

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

In the Matter of)	
)	
BellSouth Corporation,)	
Transferor,)	
)	
and)	WC Docket No. 06-74
)	(Public Notice DA 06-904)
AT&T, Inc.,)	
Transferee,)	
)	
Applications for Consent to Transfer)	
Control of a Corporation Holding)	
Section 214 Authorizations, Section)	
310 Licenses, and Submarine Cable)	
Landing Licenses)	

**COMMENTS OF JONATHAN L. RUBIN, J.D., Ph.D
IN OPPOSITION TO THE APPLICATIONS OF AT&T AND BELLSOUTH
FOR CONSENT TO TRANSFER OF CONTROL**

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June 5, 2006

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Pursuant to the *Public Notice*¹ issued by the Federal Communications Commission (FCC, or Commission) relating to the applications of AT&T Inc. (AT&T) to acquire control of Commission licenses and authorizations controlled by BellSouth Corporation (BellSouth),² Jonathan L. Rubin, J.D., Ph.D. sets forth the following comments on the competitive effect of the proposed transaction. The undersigned

¹In the Matter of AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, WC Docket No. 06-74, DA 06-904, *Commission Seeks Comment on Application for Consent to Transfer of Control Filed by AT&T, Inc. and BellSouth Corporation, Pleading Cycle Established* (rel. Apr. 19, 2006) (*Public Notice*).

²See Applications for Transfer of Control of Domestic Section 214 Authorizations, Applications for Transfers of Control of International Section 214 Applications, Applications for Transfer of Control of Station Licenses and Operating Authorizations (filed March 31, 2006) WC Docket No. 06-74.

appreciates the opportunity to comment on the transaction proposed by AT&T and BellSouth (the Applicants).

Jonathan Rubin is a Washington, D.C.-based attorney and economist with an interest in competition policy.

I. THE STANDARD OF REVIEW

A. The Authorizations

1. §214(a) Applications

Under Section 214(a) of the Communications Act of 1934, as amended,³ AT&T must obtain from the Commission a certificate of “public convenience and necessity” to acquire or operate the numerous communications wireline and other Commission authorizations, domestic and international, presently controlled and operated by BellSouth.

2. §310(d) Applications

Pursuant to Section 310(d) of the Communications Act of 1934, as amended,⁴ control of a station license for the operation of a radio service shall not be transferred to any person “except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”

Moreover, §310(d) provides that “[a]ny such application shall be disposed of as if the proposed transferee or assignee were making application under section 308 for the

³47 U.S.C. §214(a).

⁴47 U.S.C. §310(d).

permit or license in question; ...”⁵

Section 308(b) requires applications to “set forth such facts as the Commission by regulation may prescribe as to the ... character ... and other qualifications of the applicant to operate the station; ...”⁶

3. §2 Cable Landing Act Applications

Under the Cable Landing License Act, 47 U.S.C. §35, licenses may be granted only “upon such terms as shall be necessary to assure just and reasonable rates and service”

B. The Public Interest Standard Is Pro-Competitive

The “public interest, convenience, and necessity” standards of sections 214(a) and 310(d), and the “terms necessary to assure just and reasonable rates and services” of the Cable Landing License Act, therefore, require the Commission to make an *affirmative finding* that the public interest will be served by its consent to the applied for transfers.

In making such a finding the Commission engages in

a balancing process that weighs the potential public interest harms of the proposed transaction against its potential public interest benefits. The Applicant bears the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest. In applying this public interest test, the Commission considers four overriding questions:

- (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision;

⁵*Id.*

⁶47 U.S.C. §308(b).

- (2) whether the transaction would result in a violation of Commission Rules;
- (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of that and other statutes; and
- (4) whether the merger promises to yield *affirmative public interest benefits*.⁷

Accordingly, it is not sufficient that a transaction merely refrain from causing detriment to the public interest or inflicting harm to competition. Applicants must demonstrate that “the *predominant effect* of the transfer will be to advance the public interest.”⁸ In sum, the Applicants must demonstrate by a preponderance of the evidence that granting the applications affirmatively promotes the public interest.

Moreover, “an analysis of the public interest benefits and harms includes, but is not limited to, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles.”⁹ Interpreting the public interest promotion standard in *pari materia* with the pro-competitive policies of numerous federal statutes, including the Telecommunications Act of 1996 and the Sherman and Clayton Antitrust Acts, “the Commission must ‘be convinced that it will enhance competition’” in order for

⁷*In re Applications of Ameritech Corp. and SBC Communications, Inc. For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5,22,24,25,63,90,95, and 101 of the Commission's Rules*, Memorandum Opinion and Order, 14 FCC Rcd 14712, para. 48 (1999) (*SBC/Ameritech Order*)(emphasis added). The Applicants interpret the three statutory standards as having been merged. Description of Transaction, Public Interest Showing and Related Demonstration, at 4, n. 17 (*Public Interest Statement*). In the present context,

⁸*SBC/Ameritech Order*, para. 48 (emphasis added).

⁹*Id.*, at para. 49.

a proposed merger to promote the public interest.¹⁰

The present record before the Commission does not make either of the requisite demonstrations that the AT&T-BellSouth transfer of control applications will promote the public interest or will enhance competition.

One explanation for the deficiency in the Applicants' demonstration may be that the Applicants' are unaware that they are required to affirmatively prove enhancement of competition. The Applicants state:

this transaction will benefit the public interest in a number of ways without harming competition and, accordingly, should be approved by the Commission expeditiously and without conditions.¹¹

Similarly, the thrust of the Declaration of Drs. Dennis W. Carlton and Hal S. Sider, economists retained by the Applicants, is that the transaction will not harm competition in a number of markets. No demonstration is made, however, of how the transaction would in any market enhance competition.¹² The failure to demonstrate that the proposed transaction is pro-competitive renders the Applicants' submissions fatally flawed.

Even in the absence of the pro-competitive requirement, however, the applications still do not satisfy the public interest standard. As demonstrated below, the proposed

¹⁰*Id.* at para. 49, quoting *Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 19987, para. 2 (1997) (*BellAtlantic/NYNEX Order*).

¹¹*Public Interest Statement* at 5.

¹²*See* Declaration of Dennis W. Carlton and Hal S. Sider (March 29, 2006), *passim*.

merger will harm competition in several markets without yielding any countervailing, merger-specific public interest benefit to offset the harm.¹³

Before addressing these central issues, however, the present discussion of the standard of review mentions briefly certain technical matters relating to the filing and handling of the applications, presents a list of market definitions relevant to the competitive evaluation, and highlights the principal difference between the present transaction and the ILEC-IXC mergers of 2005.

C. None of the Transfers of Control of Commission Lines or Authorizations Should Be Handled As Non-Substantial or *Pro Forma* Transfers or Assignments

As the *Public Notice* points out, the Applicants assert that a majority of Cingular's licenses involve only *pro forma* applications that qualify for exemption of pre-approval by the Commission.¹⁴ In light of the size and scope of the proposed transaction, the undersigned objects to the treatment of any application for consent for transfer of control of any Commission line or authorization as a *pro forma* transaction.¹⁵

Procedural rules for applications for consent for transfers of control exist in part to inform the public and maintain transparency in the Commission's activities. Moreover, in

¹³The Commission also has concurrent jurisdiction with the Department of Justice under sections 7 and 11 of the Clayton Act to disapprove acquisitions of common carriers (such as BellSouth) where the effect of which "may be substantially to lessen competition, or tend to create a monopoly." See 15 U.S.C. §18 and §21(a). In most cases, the Commission declines to exercise its Clayton Act authority where authority under the Communications Act is sufficient to address both the competitive issues raised by the proposed transaction and its likely effect on the public interest. See *SBC/Ameritech Order*, at para. 53.

¹⁴*Public Interest Statement* at 127-32.

¹⁵See, e.g., 47 C.F.R. §1.948(c) and (d), which excuse communications carriers from filing Form 603 until after consummation for "non-substantial" transfers or assignments of Wireless Radio Service authorizations. Such procedures should not be applicable in the present transaction.

a transaction of this magnitude that affects such a substantial portion of the national economy, the Commission must have the opportunity to evaluate all related applications before the proposed transfers or assignments are consummated.

D. The Applicants' Request for a Waiver of 47 C.F.R. §1.913(b) of the Commission's Rules Pertaining to Mandatory Use of Universal Licensing System for Applications Related to Wireless Radio Services Is Without Merit and Should Be Denied

Similarly, the Applicants' request for a waiver of 47 C.F.R. §1.913(b) of the Commission's Rules should be denied. Under 47 C.F.R. §1.913(b), all Forms 603 and other applications related to any Wireless Radio Service must be filed with the Universal Licensing System (ULS). The ULS is defined in 47 C.F.R. §1.907 of the Commission's Rules as "the consolidated database, application filing system, and processing system for all Wireless Radio Services," part of the purpose of which is to provide "public access to licensing information."

The undersigned is concerned that unless the Applicants are required to upload all applications, attachments to applications, and any associated documents (as required by 47 C.F.R. §1.913(b) of the Commission's Rules) the information necessary for the evaluation of the competitive significance of Applicants' joint holdings of Wireless Radio Services will remain unavailable to public inspection.

Applicants submit no rational argument for avoiding the use of ULS. The fact that the number of applications, radio services, and spectrum bands are so numerous augurs favorably for the automated handling of the applications and provides no rational

argument that they should be filed only manually.

E. Market Definitions

Meaningful discussion of market competition requires a meaningful definition of the markets being evaluated.¹⁶ For purposes of analysis we identify the following categories of product markets: Mass-market access services, which includes switched line access and internet protocol (IP) connectivity, enterprise access services, transit and networking services, and converged, multimedia broadband services.¹⁷

This categorization is motivated in part by the clear difference in the competitive conditions between the access service markets on the one hand and the transit and networking service markets on the other. The former, which is the familiar “last mile bottleneck,” lacks opportunities for entry and, consequently, also lacks competition. Such markets are subject to manipulation by strategic behavior. More competitive markets, such as the wholesale market for global networking services, are manifestly more competitive.

The access markets are categorized further according to whether they are principally driven by the demands of consumers for mass market access or by enterprises for private line or special access.

¹⁶See *Horizontal Merger Guidelines*, U.S. Department of Justice and the Federal Trade Commission, (April 2, 1992, as revised April 8, 1997) (hereinafter, “*Merger Guidelines*”).

¹⁷A recurring difficulty with mergers of firms as large as the Applicants is that their activities span so many different markets, products, and customer types that it is easy to get ensnared in minutia that is not competitively significant. No attempt is made here to follow a rigorous market definition methodology that might be appropriate in a less conglomerated industry. Instead, groups of products that are likely to be seen by end-users as reasonable substitutes given the current real-world trends are identified based on informal evidence.

1. Mass Market Access

a. Domestic Switched Line Access

Use of switched access lines as a dedicated voice network to connect to a publicly switched telephone network is in steep decline in the number of subscriptions for switched access line services are dropping. The domestic switched access lines that remain are migrating in use from a dedicated analog voice application to being used for digital subscriber line (DSL) IP access. All the former Bell Local Exchange Carriers (LECs) report dramatic monthly losses in the numbers of switched access lines subscribed to. More voice calls in a recent period were initiated by subscribers to wireless networks than were initiated on switched access lines. Similarly, as long as any form of IP connectivity subsumes access to voice over IP (VoIP), any form of IP connectivity is a potential substitute for a switched access line.

Switched access dedicated to voice communication is no longer a competitively significant product market, even while twisted-pair local exchange networks continue to serve an important function as basic national infrastructure.

Therefore, “domestic switched access line market,” the “voice market,” or the “local exchange market,” each exclude so many product substitutes that they fail to define a relevant market for the evaluation of the competitive effects of the proposed merger.

b. Internet Access (T-1 Range)

By contrast, the market for internet access in the T-1 range (i.e., between about 1.5–3.0-Mbps) provided on a best efforts basis is expanding and has become the *de facto* standard for mass market IP connectivity (in essence, “plain old internet service”). The mass market for internet access is the most critical market definition for consumers and for the evaluation of the proposed transaction.

The attributes of the U.S. mass market for IP connectivity, in metrics related to penetration, bandwidth, latency, and jitter are inferior to many other industrialized countries. Four classes of technology are poised to supply the increasing mass market demand for access to IP connectivity:

i. DSL and Cable

Most geographic markets are already served by either DSL or Cable. Some areas have a DSL-Cable duopoly, while some localities have no mass market internet connectivity at all.

ii. Cellular and Advanced Wireless Services

The spectrum assigned to mobile telephony is too valuable for dedicated voice-only implementation. Usage of the cellular telephony spectrum is already changing dramatically and is beginning to substitute for some functions such as e-mail that had required dial-up, DSL, or Cable modem IP connectivity.

The Commission is engaged in several initiatives to promote more advanced wireless services. These include cellular telephony providers, such as Cingular, which are

already on an expansion path toward third generation (3G) services based on proprietary standards and technology. In many localities, mobile telephony providers are already offering IP connectivity, although at speeds substantially slower than a T-1 line.

iii. Fiber to the Curb/Home

Fiber infrastructure, where it is available to mass market customers, provides a T-1-style IP connection, but fiber has not yet been deployed widely enough to supply a significant proportion of the market. Of course, once implemented, fiber will be able to substitute for much more than T-1 style IP connectivity, including broadband applications such as HD video distribution or real-time interactive video gaming.

iv. Wi-MAX and Wi-Fi

Finally, IP connectivity is available through wireless technologies known as Wi-Max and Wi-Fi. Wi-Max refers to Worldwide Interoperability for Microwave Access and is based on the IEEE 802.16 series of standards for broadband wireless packet transmission. The technology is frequency agile between 2-Ghz and 66-Ghz.

Importantly, Wi-Max is an open standard, in contrast to the proprietary standards of cellular telephony. The range for Wi-Max transmission varies depending on conditions and terrain, but the average coverage is several miles of non-line-of-sight. On December 7, 2005, the IEEE approved the 802.16-2005 standard that will serve as the basis for mobile Wi-Max.¹⁸ Devices will be certified by the Wi-Max Forum (tm) as compliant in

¹⁸See *Standard: 802.16E-2005 IEEE Standard for Local and metropolitan area networks Part 16: Air Interface for Fixed and Mobile Broadband Wireless Access Systems Amendment for Physical and Medium Access Control Layers for Combined Fixed and Mobile Operation in Licensed Bands*, available at

the year 2006.¹⁹

Wi-Fi, or Wireless Fidelity, is typically deployed by consumers as a means of distributing wireless IP connections in their homes, by businesses to create “hot spots” for customers, or by airports, shopping malls, or even municipalities, using local Wi-Fi transmitters to create a “mesh” configuration. Wi-Fi relies on the IEEE 802.11 series of standards and uses unlicensed microwave spectrum.

Even before its approval as an IEEE standard, Wi-Max was being deployed as a means of inexpensive IP connectivity with features that rival other means of IP access.

In the U.S., spectrum in the Wireless Communications Service (WCS) 2.3-GHz band and the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) 2.5-GHz band are being actively considered for use for Wi-Max IP access. The Commission has recently concluded a lengthy proceeding amending its rules to make possible widespread deployment of wireless broadband services in the 2.5 Ghz spectrum band.²⁰

Wi-Max and Wi-Fi are compatible and complimentary technologies. A Wi-Max link could be used to feed a series of Wi-Fi hot spots or a Wi-Fi mesh, for example.

<http://shop.ieee.org/ieeestore/Product.aspx?product_no=SE95394>.

¹⁹See <www.wimaxforum.org>.

²⁰See *Amendment of Parts 1, 21, 73, 74 and 101 of the Commission's Rules to Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*; Order on Reconsideration and Fourth Memorandum Opinion and Order, and Third Memorandum Opinion and Order and Second Report and Order, WT Docket No. 03-66 *et al.* (rel. April 27, 2006).

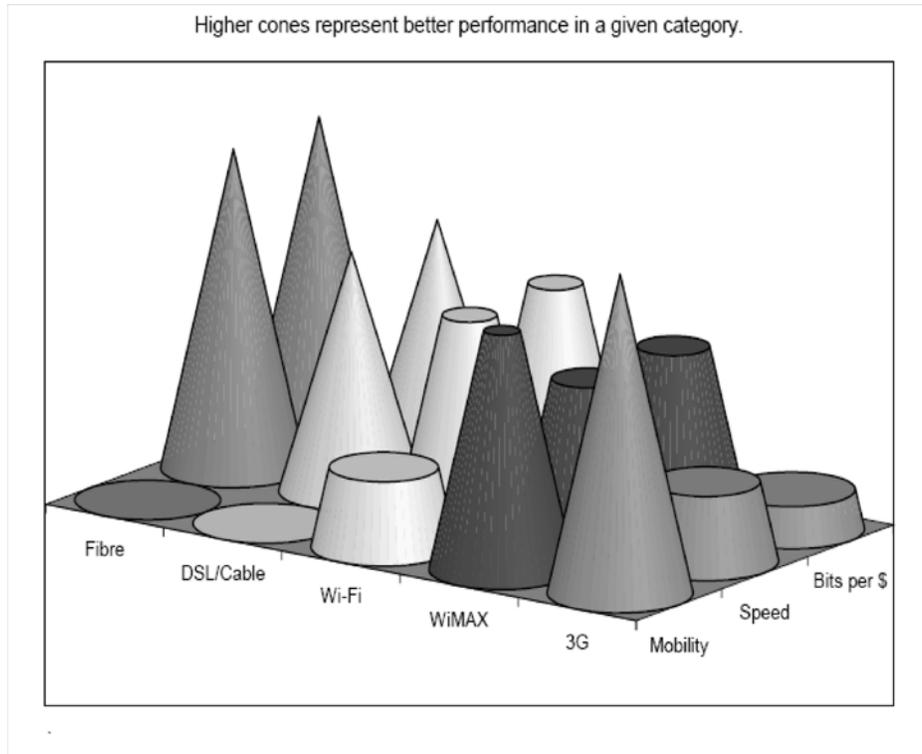


Figure 1.: Comparative Attributes of Mass Market IP Access Technologies
 Source: OECD: "The Implications of WiMax for Competition and Regulation,"
 DSTI/ICCP/TISP(2005)4/FINAL (March 2, 2006), Page 28, Fig. 6

∴

2. Enterprise Private Line “Special Access”

Enterprises demand greater bandwidth and a higher quality of service, and the ILECs have traditionally been the dominant supplier of special access. The rules governing special access have been the subject of a Commission proceeding that is awaiting decision. Because of bottlenecks in access to buildings, this market is not competitive.

3. Transit and Networking Services

According to Renesys,²¹ an internet research firm, the market for wholesale IP transit and networking services is competitive. A recent report indicates that the top five competitors in three global regions are: North America: 1) Level 3 Communications, 2) UUNET Technologies, 3) AT&T Worldnet Services, 4) Sprint, 5) Qwest; Europe: 1) Level 3 Communications, 2) Sprint, 3) TeliaNet Global Network, 4) Global Crossing, 5) Cable & Wireless; Asia/Pacific: 1) Sprint, 2) NTT America, 3) China Telecom, 4) KDDI, 5) Savvis.

4. Converged Multimedia Broadband Services

Another open standard, IP Multimedia Subsystem (IMS), now in a pre-implementation phase, provides an architecture for movement of value away from the source of connectivity and outward toward the device interoperating with the network by providing a system of gateways and interfaces that converge wireless and wireline

²¹See <www.renesys.com> “Report: Level 3 Tops IP Transit” *Light Reading*, <www.lightreading.com> (accessed May 28, 2006).

networks and networks of competing providers. The implementation of IMS and the introduction of next generation networks (NGNs) will alter the manner in which both consumer and enterprise users interact with the network.

In NGNs, subscribers will have a follow-me “presence” (such as appearing on an AOL buddy-list, independent of the nature of the network providing access). NGNs will connect people-to-content, people-to-people and to groups (as in video-conferencing or remote video gaming), provide push-to-talk-over-cellular, and importantly for network operators, track personal profile and billing information. While such a product market is nascent it is also imminent.

F. The Commission’s Approvals of the ILEC-IXC Mergers (VZ/MCI, SBC/AT&T) Have No Precedential Value Because Those Transactions Were Purely Vertical Consolidations Involving “Failing Firms”

The conditional consent given by the Commission in 2005 to the applications of SBC/AT&T and Verizon/MCI for transfer of control²² has no precedential value for the evaluation of the present transaction. Both of those transactions involved “failing” firms apparently unable to survive as stand-alone firms. No such allegation is made in the present instance.

Moreover, the 2005 transactions involved highly complimentary assets, combining a predominantly long-haul transit firm with a local exchange carrier with little

²²See *In the Matter of Verizon Communications Inc. and MCI, Inc. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, WC Docket No. 05-75 (rel. Nov. 17, 2005) and *In the Matter of SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order (rel. Nov. 17, 2005).

or no transit infrastructure. No plausible argument is present as to why, in the case of BellSouth, which clearly is not failing as a business, the merger is either necessary for survival or provides a necessary input that it cannot purchase on the open (and fairly competitive) transit and networking market.

II. THE MERGER WILL CAUSE PUBLIC INTEREST HARM BY CONSOLIDATING INTERMODAL COMPETITION

A. The FCC's Consent to the Transfer of Control of Certain Spectrum Licenses Will Block Market Entry by Wi-Max-Powered Internet Access Providers

Another difference between the ILEC-IXC mergers of 2005 and the currently proposed merger is that the present transaction harms competition in the mass IP access market. BellSouth is the licensee of spectrum in the BRS and WCS bands, some of which it has controlled for a decade or more.²³ AT&T acquisition of control of this spectrum will prevent any other operator from use of the 2.5-Ghz band for Wi-Max IP access distribution in the southeast US, and thus frustrate a national footprint.

The Applicants argue that no additional spectrum overlaps are created by the transaction because of Cingular's pre-existing CMRS holdings, both because of attribution rules and because BellSouth's spectrum is not allocated for mobile wireless

²³See, e.g., Letter from Donald R. Granger, President, BellSouth Wireless Cable, Inc. to Federal Communications Commission, MDS/ITFS Database Corrections (January 27, 2003) correcting license information for call sign B024, granted September 17, 1996. This call sign with pending File No. 000254782 is the application for most of the BRS and WCS spectrum being transferred by BellSouth. Other relevant spectrum is in File No. 0002545755, call sign WHJ893. The remainder of the spectrum appears to be leased by BellSouth; The undersigned has been unable to locate the form "603-T" referred to in the *Public Interest Statement*, p. 133, n. 437.

use.²⁴ As a result they have either failed to answer the competition-related questions on Forms 603 or answered incorrectly.²⁵ The Applicants are not correct, for at least two reasons.

First, the BellSouth spectrum in the BRS/EBS and WCS bands was never attributed to or available for use by Cingular. If these applications are approved undisturbed they will be.

Second, WCS, BRS, and EBS *are* allocated for mobile use under the table of allocations in 47 C.F.R. §2.106 of the Commission's Rules. 47 C.F.R. §27.2 of the Commission's Rules states that any services governed by Part 27 "may provide any services for which its frequency bands are allocated, as set forth in the non-Federal Government column of the Table of Allocations in §2.106 of this chapter (column 5)." That column includes "mobile" as well as "fixed."

It is also noteworthy that the new IEEE 802.16E-2005 standard is a *mobility* standard.

The proposed merger will injure competition by blocking entry by alternative firms wishing to provide mass market IP connectivity using Wi-Max deployed on licensed, 2.5-Ghz band spectrum and requiring a national footprint to achieve minimal efficient scale for mobility or nomadicity. In communities with no mass market IP access, such a result will indefinitely delay access that could have been deployed sooner. In

²⁴Public Interest Statement at 132.

²⁵The Applicants answer "N" to Question 13 of Form 603, File Number 0002545782, and leave questions 14a) and 14b) blank, and do the same on Form 603, File Number 0002545755.

localities with only one provider of IP connectivity—DSL or Cable—delay prolongs a monopoly. Where a community has a choice of either DSL and Cable, the barrier to entry perpetuates the duopoly. Accordingly, there are no communities in which a new entrant offering IP access through the deployment of Wi-Max would not enhance competition.

Intermodal competition is not possible if the same firm is permitted to own multiple modes. BRS and EBS spectrum licenses represent a competing mode to fiber, DSL, cable, and 3G technologies. The Commission recognizes that “competition issues might arise if there [is] a significant intermodal consolidation of services.”²⁶ Permitting AT&T to acquire controlling interest in both Cingular’s and BellSouth’s wireless authorizations constitutes a significant intermodal consolidation of services, and therefore cannot enhance competition or be in the public interest.

B. The Intermodal Consolidation and the Barrier to Entry Can Be Remedied by Requiring BellSouth to Divest its Authorizations in the 2.5-GHz Frequency Band

By making BellSouth’s wireless spectrum available to an unaffiliated entrant through a neutral procedure, much of the harm caused by the intermodal consolidation of BellSouth’s Wi-Max-suitable spectrum would be mitigated. Such a divestiture involves a one-off remedy for which the Commission has long-standing and well-functioning procedures.

²⁶*In the Matter of Promoting Efficient Use of Spectrum Through Elimination of Barriers to the Development of Secondary Markets*, Second Report and Order, Order on Reconsideration and Second Further Notice of Proposed Rulemaking, WT Docket No. 00-230 (rel. Sept. 2, 2004), at para. 27.

III. THE MERGER PROPOSAL DOES NOT PRODUCE THE PUBLIC INTEREST BENEFITS CLAIMED BY THE APPLICANTS

A. Wireless-Wireline Convergence and Next-Generation- Network Features Do Not Depend on the Proposed Merger

The Applicants claim several “efficiencies” from the proposed transactions that depend on the emergence of a multimedia industry standard logical architecture (IMS) and not on the proposed merger transaction. IMS “interworking” between networks obviates the need to combine the three companies, since it provides the gateways between networks of all kinds. To claim an efficiency by having to build only “one IMS” network rather than three,²⁷ fails to take advantage of the reason for building the IMS network in the first place.

IMS certainly promises fantastic technological innovation, and the open architecture is being promoted actively by firms such as Lucent, Nortel, Motorola, Cisco, and others for marketing to all types of communications operators. Given the additional convergence and flexibility of IMS it is not sensible to claim “unification” of an IMS system as a reason to combine separate companies or their networks.

B. The Merger is Not Required to Achieve Unification of Cingular’s Management

The Applicants also claim that the merger is necessary to unify the management of

²⁷Public Interest Statement at 16.

Cingular. It is not explained why one or the other of the Applicants cannot acquire the other's interest in Cingular, or why Cingular cannot be spun-off as an independent entity.

IV. Conclusion

AT&T has a history of anticompetitive conduct.²⁸ Moreover, three dominant, geographically separated, vertically integrated telecommunications conglomerates is not an optimal industrial structure for the U.S. market. To the extent that the proposed transaction does not involve the loss of a competitor in any local exchange market, the applicants will be rewarded for failing to meaningfully compete during the ten years since the enactment of the pro-competitive Telecommunications Act of 1996.

On the current record, the Commission cannot reasonably conclude that the proposed transfer will enhance competition, and certainly not be convinced that it will do so. Because the Applicants have not met their burden of establishing that the proposed transfer of licences serves the public, interest, convenience, and necessity, the applications must be denied.

²⁸*See, e.g.*, *SBC Communications, Inc. v. Federal Communications Commission*, 373 F.3d 140 (D.C.Cir, 2004) (upholding fine against SBC (now AT&T) for failing to abide by competition terms of an approved merger agreement).

Respectfully submitted,

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