

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

In re	)	
	)	
Applications for Consent to Transfer	)	WC Docket No. 06-74
Control Filed by AT&T Inc. and	)	DA 06-904
BellSouth Corporation	)	
	)	

**REPLY COMMENTS OF TELEPHONE USA INVESTMENTS, INC.**  
**ON MERGER AND REQUEST FOR CONDITIONS**

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## SUMMARY

In these Reply Comments, Telephone USA Investments, Inc. (“Telephone USA”), by its attorneys, supports the numerous commenters and petitioners in this proceeding that urged the Commission to approve the transfer of control of licenses held by BellSouth Corporation to AT&T Inc., if at all, only conditioned on the divestiture by the merging parties of certain assets. Telephone USA joins these parties in requesting that the Commission condition its approval of the applications on the divestiture by the merging parties of certain wireless and wireline assets. The telecommunications industry suffers from, and has always suffered from, a severe lack of minority-owned businesses. This proceeding presents the Commission with a unique opportunity to further its compelling public interest in diversifying ownership in the telecommunications industry and combating discrimination.

The Commission has broad authority to condition its approval of transfers of control of licensees to protect the public interest. To alleviate the harms brought about by the increasing consolidation of the telecommunications industry, the Commission should require that the merged entities divest certain assets, with a right of first negotiation to acquire those assets awarded to socially disadvantaged entrepreneurs who continue to suffer from discrimination. Telephone USA in these Reply Comments describes a program designed to help correct past

discrimination, increase diversity of ownership, protect consumers in a constitutionally permissible manner, and further the public interest.

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**ON MERGER AND REQUEST FOR CONDITIONS**

Telephone USA Investments, Inc. (“Telephone USA”), by its attorneys, hereby submits these reply comments in the above-referenced proceeding in which AT&T Inc. (“AT&T”) and BellSouth Corporation (“BellSouth”) have filed a series of applications seeking Commission consent to this major telecommunications merger by approval of the transfer of control to AT&T of licenses held directly and indirectly by BellSouth. A number of Petitions to Deny, and many Comments, were filed in this proceeding expressing significant concerns about this most unique of mergers. A number of the Petitions and Comments requested that the Commission either deny the applications, or in the alternative, approve the merger only after the imposition of meaningful conditions, including the divestiture of certain assets. Among the assets proposed for divestiture in the Petitions and Comments were:

- All interest in Cingular Wireless;

- Licenses and lease interests held by BellSouth in the 2.3 GHz and 2.5 GHz Broadband Radio Service and Educational Broadband Radio Services;
- Local exchange and exchange access facilities, particularly those held by AT&T in BellSouth regions; and
- Certain loop and transport facilities.

The Consumers Federation of America, Consumers Union, Free Press, and U.S. Public Interest Research Group jointly submitted a Petition to Deny, for example, arguing that approval of the merger would have “profound anticompetitive effects on the markets for telecommunications, internet and video services.”<sup>1</sup> This Petition requested that the Commission deny the applications, or grant them only with the imposition of a number of conditions, including divestiture of Cingular and all of its licenses and operations in the 2.3 and 2.5-2.7 GHz bands. The Center for Digital Democracy submitted a separate Petition to Deny endorsing these proposals.

Clearwire Corporation also submitted a Petition to Deny expressing its concerns that approval of the proposed merger would allow the merged company to stifle competition and development in broadband services. Clearwire urged the Commission to deny the application or condition its approval on divestiture of all of BellSouth’s 2.5 GHz Broadband Radio Service/Educational Broadband Radio

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<sup>1</sup> Petition to Deny of Consumer Federation of America, Consumers Union, Free Press, and U.S. Public Interest Research Group at 4.

Service licenses and leases.

Similarly, Access Point, Inc., in Petition to Deny in which numerous additional parties joined, requested that the Commission deny the applications or approve them only upon the divestiture of WiMax spectrum and other assets, including local exchange and exchange access facilities currently held by AT&T in BellSouth regions. Sprint Nextel Corporation also filed Comments expressing concern over the merged AT&T and BellSouth's ability to discriminate in special access services, and requesting the divestiture of certain loop and transport facilities held by AT&T and BellSouth.

Telephone USA supports the many commenters who have expressed serious concerns over the proposed merger of AT&T and BellSouth. Telephone USA urges the Commission to grant the applications only with the imposition of conditions, as described herein, designed to protect competition and promote diversity in the telecommunications industry.

As the Commission is well aware, the telecommunications industry has historically suffered from a severe lack of minority-owned businesses, and that continues to this day. Due in part to the significant advantages in capital and experience enjoyed by incumbent licensees, businesses with substantial ownership held by minorities or members of other socially-disadvantaged groups face great and often insurmountable obstacles in entering the telecommunications business.

At the same time, the Commission has a compelling interest in furthering diversity among its licensees, and the instant proceeding presents a unique opportunity to increase diversity of telecommunications ownership. In fact, this may be the last opportunity for the Commission to take such action. Instead of simply approving a merger that further consolidates the telecommunications industry, the Commission should use this opportunity to further diversity by conditioning its consent to the requested transfer on the divestiture of certain businesses or assets, with a right of first negotiation to acquire those assets awarded to entities in which substantial ownership interests are held by minorities or members of other socially disadvantaged groups.

**I. LACK OF DIVERSITY IN TELECOMMUNICATIONS OWNERSHIP IS A SERIOUS AND RECOGNIZED PROBLEM**

Diversity in ownership in the telecommunications industry has long been a public policy goal of both the Commission and of Congress. Section 257 of the Telecommunications Act of 1996, as well as Sections 309(i) and 309(j) of the Communications Act of 1934, for example, require the Commission to take specific steps to further this goal by eliminating market entry barriers, granting preferences to applicants that would increase diversification of ownership, and by devising competitive bidding systems to “avoid[] excessive concentration of

licenses and...disseminat[e] licenses among a wide variety of applicants.”<sup>2</sup> The Commission has consistently recognized that discrimination in the capital markets has handicapped minority entrepreneurs attempting to enter the rapidly consolidating telecommunications industry.<sup>3</sup> Indeed, it is well established that minorities face widespread discrimination in the capital markets.<sup>4</sup> Due in part to this historic discrimination, and the extremely high costs of entry into the telecommunications industry, there now exists a marked lack of minority ownership in the industry at all levels.

In recognition of Congressional directives and its compelling interest in avoiding a system of racial exclusion, the Commission has taken a number of steps to attempt to increase minority ownership in the telecommunications industry and rectify discrimination in the capital markets. The Commission has awarded bidding credits for auctions of spectrum to smaller businesses qualifying as designated entities.<sup>5</sup> In 2003, the Commission established the “Advisory Committee for Diversity in the Digital Age,” charged with making

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<sup>2</sup> 47 U.S.C. § 309(j)(3)(B), *see also* 47 U.S.C. §§ 257, 309(i)(3).

<sup>3</sup> *See, e.g.*, William D. Bradford, *Discrimination in Capital Markets, Broadcast/Wireless Spectrum Service Providers and Auction Outcomes* (2000); Ivy Planning Group, LLC, *Whose Spectrum is it Anyway? Historical Study of Market Entry Barriers, Discrimination and Changes in Broadcast and Wireless Licensing 1950 to Present* (2000).

<sup>4</sup> *See, e.g.*, *Proposed Reforms to Affirmative Action in Federal Procurement*, 61 Fed. Reg. 26042, 26052 (May 23, 1996) (DOJ proposal citing studies and congressional hearings documenting that “widespread discrimination, especially in access to financial credit, has been an impediment to the ability of minority-owned business to have an equal chance at developing in our economy”).

<sup>5</sup> *See*, 47 U.S.C. § 1.2110.

recommendations to the Commission designed to enhance the ability of minorities and women to participate in telecommunications industries.<sup>6</sup> Despite these and other efforts, however, the level of minority and socially disadvantaged ownership in the telecommunications industries remains far too low.

The Commission has a compelling interest in ending such practices and expanding ownership opportunities before the era of consolidation ends. The telecommunications industry is extremely capital intensive. Only well-financed companies win FCC auctions or acquire FCC-regulated businesses. Minority-owned businesses, therefore, are at a distinct disadvantage because discrimination hinders their ability to raise capital and thus establishes a significant barrier to entry. The Commission's regulatory policies passively support this discrimination and continue to hinder socially disadvantaged entrepreneurs' ability to enter the telecommunications industry. For example, the Commission awards most of its auctionable spectrum to the highest bidder, and it approves applications to transfer licenses to other well-financed entities. Nevertheless, the Commission also has the authority, and in this case is presented with the unique opportunity, to effectively help combat such discrimination and encourage diversity of ownership in the telecommunications industry.

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<sup>6</sup> See, *Chairman Powell Announces Intention to Form a Federal Advisory Committee to Assist the Federal Communications Commission in Addressing Diversity Issues*, Public Notice (rel. May 19, 2003); see also Diversity Committee webpage at <http://www.fcc.gov/diversityFAC/>.

## **II. THE COMMISSION HAS THE AUTHORITY TO CONDITION ITS APPROVAL OF THE APPLICATIONS ON THE DIVESTITURE OF CERTAIN BUSINESSES BY THE MERGED COMPANIES**

Section 310(d) of the Communications Act prohibits the transfer of control of any corporation holding a Commission license except upon a finding by the Commission that the transfer would serve the public interest, convenience and necessity.<sup>7</sup> As part of its mandate to grant transfer applications only where they would serve the public interest, the Commission has broad authority to grant such applications only where the parties thereto agree to certain conditions. In past cases, the Commission has conditioned its approval of license transfers related to mergers on the divestiture of various assets held by one of the parties to the application.<sup>8</sup>

The Commission is, in its review of proposed transactions, “empowered to impose conditions on the transfer of control of Commission licenses to mitigate the harms the transaction would likely create.”<sup>9</sup> In the instant case, approval of the merger would result in the continued rapid consolidation of the telephone industry. With each such step towards consolidation, it becomes more and more difficult for small business, and particularly those owned by

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<sup>7</sup> 47 U.S.C. § 310(d).

<sup>8</sup> See, e.g. Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, Memorandum Opinion & Order, 17 FCC Rcd 23246, ¶4 (2002).

minorities and other socially disadvantaged individuals, to gain entry into the telecommunications industry. Increasing consolidation also harms consumers generally. Recent news reports suggest, for example, that government agencies have requested, and in some cases may have received, phone records from telephone companies in potential violation of the Communications Act's privacy protections.<sup>10</sup> Regardless of whether any violation of the Communications Act, other laws, or consumers' expectations of privacy occurred in this specific instance, increased consolidation serves only to make easier any such violations, and undermines the confidence of consumers that any violations will be disclosed. In a market with only a very small number of competitors, those competitors may be less likely to resist overintrusive government requests for information for fear of retribution. In a market with vibrant competition, including many diverse participants, those participants will be better able to police the actions of their competitors. In addition, the increased likelihood that at least one competitor would resist any overintrusive request for information could help to prevent any such attempts. The simple fact of increased competition in the marketplace may help to assuage

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<sup>9</sup> See Applications of Western Wireless Corporation and ALLTEL Corporation For Consent to Transfer Control of Licenses and Authorizations, File Nos. 0002016468, et al., Memorandum Opinion & Order, FCC 05-138, ¶ 160 (2005).

<sup>10</sup> See John Eggerton, *Adelstein Calls for Telco Inquiry*, Broadcasting & Cable (May 16, 2006); 47 U.S.C. § 222.

consumers' fears that privacy violations would go unreported by their communications providers.

**III. THE COMMISSION SHOULD REQUIRE THE DIVESTITURE OF WIRELINE AND WIRELESS ASSETS AS A CONDITION OF ITS APPROVAL OF THE APPLICATIONS**

Telephone USA submits that the merger of AT&T and BellSouth should only be approved by the Commission after analyzing the public interest harms and benefits presented by the merger, recognizing this unique opportunity to combat discrimination and improve minority ownership in the telecommunications industry and conditioning its approval upon appropriate divestitures. Telephone USA proposes that the Commission implement a program that will help protect consumers from any competitive harms presented by the merger, and will also benefit socially disadvantaged entrepreneurs who continue to suffer from discrimination. As a condition of the merger approval, the Commission should require that:

- (1) The merged entities of AT&T and BellSouth divest at least one billion dollars worth of certain wireline and/or wireless businesses in both larger markets and in rural areas where greater telecommunications ownership would help foster competition, and
- (2) To encourage minority investment and participation in the telecommunications industry, the Commission should grant a right of

first negotiation for the acquisition of these businesses or assets to companies owned or controlled by members of minority or socially disadvantaged groups.

Telephone USA believes that such groups could be identified through a program similar to one it proposed to the Commission less than two years ago in a separate proceeding.

In the Commission's 2004 proceeding on furthering the mandate of Section 257 of the Communications Act, Telephone USA submitted comments encouraging the Commission to create a program to help "socially disadvantaged businesses" gain a foothold in the telecommunications industry.<sup>11</sup> In particular, Telephone USA modeled its proposal on Sections 8(a) and 8(d) of the Small Business Act of 1958<sup>12</sup> and the Small Business Administration's ("SBA") implementing regulations.<sup>13</sup> Telephone USA proposed that the Commission permit businesses to apply for certification as socially disadvantaged businesses ("SDBs") if they are owned by socially disadvantaged individuals in a manner that complies with one of the three tests that had been included in the Telecommunications Ownership Diversification Act of 2003, a bill introduced by Senator McCain. Under this proposal, an entity could qualify as an SDB in three different ways:

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<sup>11</sup> See Comments in MB Docket No. 04-228, filed Oct. 12, 2004.

<sup>12</sup> See Pub. L. No. 85-536, 72 Stat. 384 (codified at 15 U.S.C. §§ 631 *et. seq.*).

<sup>13</sup> See 13 C.F.R. Part 124.

1) **30-Percent Test:** If socially disadvantaged individuals collectively own at least thirty percent of the equity of the entity and control more than fifty percent of the voting interests; or

2) **15-Percent Test:** If socially disadvantaged individuals collectively own at least fifteen percent of the equity and control more than fifty percent of voting interests, and no other person owns more than a twenty-five percent equity interest; or

3) **Publicly-Traded Corporation Test:** If the entity is a publicly traded corporation and socially disadvantaged individuals control more than fifty percent of the voting stock in the corporation.<sup>14</sup>

Telephone USA proposed that the Commission define socially disadvantaged individuals as follows:

Socially disadvantaged individuals are those who, as individuals or because of their membership in a class, have been subjected to racial or ethnic prejudice or cultural bias within the telecommunications industry or the funding capital markets because of their identity as members of groups and without regard to their individual qualities. The social disadvantage must stem from circumstances beyond the individual's control.<sup>15</sup>

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<sup>14</sup> See Telecommunications Diversification Act of 2003, S. 267, 108th Cong. § 3(f)(6) (2003).

<sup>15</sup> Telephone USA developed this definition by slightly modifying the SBA's definition of socially disadvantaged individuals at 13 C.F.R. § 124.103(a) (2004). The Tenth Circuit upheld this definition. *Adarand Constructors, Inc. v. Slater*, 228 F.3d 1147, 1155 (10th Cir. 2000), *cert. dismissed*, 534 U.S. 103 (2001).

Telephone USA also suggested that this definition include a rebuttable presumption that the following individuals are socially disadvantaged: African Americans, Hispanic Americans, Native Americans, Asian or Pacific Americans, and any other group of individuals that the Commission may from time to time designate as similarly disadvantaged.<sup>16</sup>

Telephone USA anticipated that once the Commission created a general framework for certifying SDBs based on the criteria detailed above, it could then develop specific programs to further the compelling goals of increasing minority ownership in the communications industry. The instant proceeding presents an incredible opportunity to actually implement such a program. By granting a right of first negotiation to acquire the businesses or assets divested by AT&T and BellSouth to those companies that qualify as SDBs, the Commission could combat discrimination and encourage minority participation in the communications industry in a constitutionally permissible fashion.

Telephone USA's proposal for identifying and certifying SDBs would satisfy the Supreme Court's requirement that race-conscious solutions must be narrowly tailored. The Supreme Court has announced that any race-conscious measure must meet several standards to be narrowly tailored. First, the Commission must

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<sup>16</sup> SBA regulations include a similar rebuttable presumption at 13 C.F.R. § 124.103(b). The United States Court of Appeals for the Eighth Circuit has concluded that a rebuttable presumption that certain individuals are economically or socially disadvantaged complies with

individually review each request for race-based benefits,<sup>17</sup> and as the FCC reviews each application, race may not be a singly decisive factor.<sup>18</sup> Second, the program may not unduly burden members of a nonfavored racial or ethnic group, and, third, the race conscious measures may only last as long as they are necessary.<sup>19</sup>

The proposal set forth in these Reply Comments provides significant flexibility. It does not automatically aggregate all individuals into one group or another. Rather, every individual or entity with an interest in acquiring the divested assets, regardless of racial or ethnic background, has the opportunity to participate and demonstrate qualification as an SDB. The Commission's individual review of each entity's request to qualify as an SDB ensures that all decisions will be made on a case-by-case basis and that no potential acquirer of the divested assets will be insulated from Commission scrutiny.

Under this proposal, although the Commission would presume that members of certain racial and ethnic groups are socially disadvantaged, race will not be a determinative factor. If, in light of all the circumstances, the Commission determines that the applicant has overcome its social disadvantage or never was the

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the Constitution. *See Sherbrooke Turf, Inc. v. Minn. Dept. of Transp.*, 345 F.3d 964 (8th Cir. 2003), *cert. denied*, 541 U.S. 1041 (2004).

<sup>17</sup> *See Grutter v. Bollinger*, 539 U.S. 306, 336-337 (2003); *Gratz v. Bollinger*, 539 U.S. 244, 271 (2003); *Gratz*, 539 U.S. at 276 (O'Connor, J., concurring) (discussing the importance of individualized review).

<sup>18</sup> *See Gratz*, 539 U.S. at 272.

<sup>19</sup> *See Grutter*, 539 U.S. at 339, 342.

victim of discrimination, the Commission would deny the request for classification as an SDB. Furthermore, members of groups who are not presumed socially disadvantaged may still qualify as an SDB.<sup>20</sup> Individualized review prevents Telephone USA's proposal from burdening any particular racial or ethnic group. Any individual, regardless of race or ethnicity, who has suffered from discrimination can seek classification as an SDB, and thereby become eligible to receive the benefit of the right of first negotiation to acquire the divested assets. No group is disfavored or burdened because the program treats each applicant as an individual and not as member of a racial or ethnic group.<sup>21</sup> Finally, Telephone USA's proposal as set forth herein, because it relates only to the proposed merger of AT&T and BellSouth, is necessarily limited in duration.

## **CONCLUSION**

Review of the applications for transfer of control to AT&T of certain licenses held directly and indirectly by BellSouth presents the Commission with a unique opportunity to further its compelling interest in combating discrimination and diversifying ownership in the telecommunications industry. As demonstrated by

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<sup>20</sup> Both the United States Courts of Appeals for the Eighth and Tenth Circuits have determined that a similar presumption that the SBA employs is consistent with the Fifth Amendment because a meaningful individualized review is provided. *See Sherbrooke*, 345 F.3d at 973; *Adarand*, 228 F.3d at 1183.

<sup>21</sup> *Cf. Grutter*, 539 U.S. at 341 (declaring that the University of Michigan Law School's admissions policy does not unduly harm nonminority applicants because the school evaluates each application individually).

the numerous Comments and Petitions to Deny filed in this proceeding, many parties have significant concerns about this most unique merger, concerns which Telephone USA shares. By conditioning its approval of the transfers on divestiture of certain wireless and/or wireline businesses, and facilitating that divestiture to Socially Disadvantaged Businesses, as defined herein, the Commission can help correct past discrimination in the telecommunications field and encourage increased diversity of ownership, while helping to protect consumers from the harms of increasing consolidation. The proposal put forth above does so in a constitutionally permissible manner. Accordingly, Telephone USA respectfully urges the FCC to act promptly to take the steps outlined in these Reply Comments and condition its approval of the applications in this proceeding on implementation of the proposal.

Respectfully submitted,

**TELEPHONE USA INVESTMENTS, INC.**

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **REPLY COMMENTS OF TELEPHONE USA INVESTMENTS, INC. ON MERGER AND REQUEST FOR CONDITIONS** was sent via U.S. mail, first class, postage prepaid (or via e-mail where indicated), on this 20th day of June, 2006 to the following:

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