

The proposed AT&T/BellSouth merger: the need for meaningful FCC conditions.

- The creation of a coast-to-coast incumbent local exchange carrier will significantly harm competition, undermine innovation, and increase prices.
- BellSouth and AT&T have a history of FCC rule violations.
- BellSouth and AT&T are engaging in anticompetitive practices.
 - BellSouth requires “no competition” clauses as a condition of its broadband contracts.
 - BellSouth’s broadband contracts violate Net Neutrality.
 - AT&T is violating existing SBC-AT&T merger condition requiring stand-alone ADSL.
 - AT&T has failed to negotiate in good faith for broadband services for post-Wireline Broadband transition.
- The FCC should expressly bar these practices and condition merger approval on:
 - The provision of stand-alone ADSL service to all customers, including ISPs.
 - The duty to abide by Net Neutrality obligations and to cease current violating practices.
 - Freeze of UNE rates and availability to continue facilities-based competition.

BellSouth will not provide broadband services unless customers agree not to compete.

- BellSouth expressly promised to the FCC that “ILECs will continue to provide wholesale transmission services to customers...” but instead, it has mandated competitive service restrictions for broadband services.
(Reply Comments of BellSouth Corp., CC Dkt. 02-33, at p. 3 (Jul. 1, 2002)).
- BellSouth’s broadband contracts preempt stand-alone broadband service.
 - Service will not be available “to a particular end user when BellSouth is not the voice telecommunications provider to the end-user.” (BellSouth Broadband IP Services Agreement, Fifth Amendment, Section 1 (dated Jan. 1, 2006).)
- BellSouth’s contracts ban any service to businesses.
 - Service is not available when “the end user is not served by residential voice service.” (BellSouth Broadband IP Services Agreement, Fifth Amendment, Section 1 (dated Jan. 1, 2006).)
- BellSouth’s contracts forbid resale of its services.
 - Service may not be resold “on a wholesale basis to a third party” including “Interexchange Carriers (IXCs), Competitive Local Exchange Carriers (CLECs), and Data Local Exchange Carriers (DLECs).” (BellSouth Broadband IP Services Agreement, Fifth Amendment, Section 1 (dated Jan. 1, 2006).)
 - “The Service is not subject to resale.” (Draft BellSouth Wholesale Only Business DSL Agreement (dated Jan. 19, 2006).)
- BellSouth has stated that unless NEN agrees not to offer VoIP and removes all collocated facilities in-region, it will not negotiate with EarthLink’s New Edge Networks (NEN) affiliate.

BellSouth's broadband contracts create Net Neutrality loophole.

- BellSouth contract language permits BellSouth to violate the rights of consumers to access lawful Internet content and run services of their choice.
- service restrictions give BellSouth complete discretion to bar otherwise legal "file sharing, peer to peer traffic, and video streaming" if BellSouth decides they constitute "excessive use of bandwidth."
 - These restrictions afford BellSouth the unilateral "right to immediately disconnect Service." (Draft BellSouth Wholesale Only Business DSL Agreement (dated Jan. 19, 2006).)
 - BellSouth does not define what constitutes "excessive bandwidth" use nor the circumstances under which BellSouth would disconnect service, it broadly reserves the right to terminate services and bar applications.

BellSouth's broadband contracts violate Net Neutrality, con't...

- BellSouth restricts legitimate end user activity: “End user products that use or incorporate the Service must be sold, supported, and billed by New Edge Networks.” (Draft BellSouth Wholesale Only Business DSL Agreement (dated Jan. 19, 2006).)
 - BellSouth's contract language restricts end-users from downloading a song from a music subscription site or using another online application, *e.g.*, TurboTax, that incorporates broadband, undermining the rights of consumers to “access the lawful Internet content of their choice” and “run applications and use services of their choice.”
- BellSouth's also sought a requirement that NEN not offer VoIP services as a prerequisite for wholesale broadband negotiations undermines consumer's rights to “access the lawful Internet content of their choice” and “run applications and use services of their choice.”

AT&T is violating existing SBC-AT&T merger condition requiring stand-alone ADSL.

- “After meeting the implementation date in each state, SBC/AT&T will continue deployment so that it can offer the service to all ADSL-capable premises in its in-region territory within twelve months of the Merger Closing Date.” (*SBC-AT&T Merger Order*, 20 FCC Rcd 18290, fn 576.)
 - Yet, AT&T’s web-posted terms continue to state that it will only provide ADSL service “over an AT&T ILEC-provided (non-resold, non-UNE Platform) retail POTS line.” (Section 6.2.2 of SBC ASI Terms and Conditions, www.sbc.com/public_affairs/regulatory_documents.)
- Even though Internet Service Providers (ISPs) are eligible stand-alone ADSL-capable customers AT&T now refuses to sell stand-alone ADSL to ISPs.
 - AT&T for years has treated EarthLink (and other ISPs) as ADSL “customers.”
 - AT&T’s tariff and web-postings state: **CUSTOMER** – Any person, firm, partnership, corporation or other entity who subscribes to Service under an arrangement which incorporates, in whole or in part, these Terms and Conditions. (SBC Advanced Solutions, Inc. d/b/a/ AT&T Advanced Solutions, General Terms and Conditions, at § 1.6 (Version 27.0, effective Aug. 26, 2006))
 - AT&T urged in the *Wireline Broadband* proceeding: “We have consistently demonstrated a *commitment to independent ISPs as customers* and implemented services and process improvements on their behalf...” (Letter from Jeffry Brueggeman, General Attorney, SBC Communications, Inc. to Marlene Dortch, FCC, CC Docket Nos. 02-33 et al., at 8 (July 31, 2003) (emphasis added).
 - FCC precedent recognizes that, in the context of DSL transmission sales, the ISP is routinely the “customer” of the BOC, consistent with FCC precedent treating ISPs as “customers” and “end users” for a variety of purposes, such as access charges and FUSF.
- There is no such ISP exclusion or limitation in the language of the merger condition.
 - Verizon, which is subject to the exact same merger condition language, does not exclude ISPs from purchasing stand-alone DSL.

AT&T is violating existing SBC-AT&T merger condition requiring stand-alone ADSL – continued.

- The *Wireline Broadband Order* relieved AT&T of *Computer Inquiry* obligations. It did not exonerate AT&T from complying with its subsequent voluntary commitments.
- Enforcement of the ADSL stand-alone DSL commitment does not violate the *Wireline Broadband Order*. They are completely consistent.
 - The *Wireline Broadband Order* removed the *Computer Inquiry* regulations; it did not affect subsequent voluntary merger commitments of AT&T. FCC merger precedent establishes that a merger condition is not regulation, but a voluntary commitment on the part of the merger applicant.
 - The *Wireline Broadband Order* relieved AT&T of the extant *Computer Inquiry* obligation to operate as a common carrier, and provided AT&T with *the choice* of offering ADSL service on a common carrier or a private carrier basis. AT&T's merger commitment reflects the choice to offer stand-alone ADSL transmission service to all, not to offer private carriage or an information service.
- When AT&T closed the merger of SBC and AT&T, it accepted *a new legal obligation* (different from the *Computer Inquiry* obligations) to offer all ADSL service on a stand-alone basis.

AT&T is violating existing SBC-AT&T merger condition requiring stand-alone ADSL – continued.

- AT&T's asserts that its Internet access "AT&T Yahoo! High Speed Internet Service" meets the merger commitment even though it has not offered a stand-alone ADSL service
- The *Wireline Broadband Order*, the *Cable Modem Declaratory Ruling*, and *Brand X* established a bright-line distinction between the offering of a transmission service, (ADSL transmission) and an information service (Internet access) service.
 - The stand-alone ADSL Service is a transmission service, not an information service.
 - Under the *Wireline Broadband Order*, AT&T is offering a "telecommunications service" pursuant to *NARUC I* because AT&T is obligated by the terms of the merger order to offer stand-alone ADSL transmission to all customers indiscriminately, not to offer (or not) a "collection of individualized arrangements."
- AT&T's Internet access service is not a telecommunications service.
- AT&T's stand-alone ADSL service is "telecommunications service" under the Communications Act because it is
 - A transmission service;
 - For a fee; and
 - To the public, or to such classes of users as to be effectively available.

AT&T is violating existing SBC-AT&T merger condition requiring stand-alone ADSL – continued.

- Even AT&T's "no voice" Internet access service is priced to violate the spirit of the SBC AT&T stand-alone condition.
- AT&T seeks to justify its pricing by making inapt comparisons, including to cable modem services which are at least 4 times faster and different in kind.
- As Commissioner Copps urged: "if the price for stand-alone DSL is not significantly less than the price for bundled voice and DSL" the commission should find such pricing "anti-competitive." (SBC-AT&T Merger Order, Statement of Commissioner Michael J. Copps)
- Commissioner Adelstein also stressed the importance of ensuring the stand-alone ADSL services are "being made available to consumers at reasonable prices and under fair terms." (*Id.*, Statement of Commissioner Adelstein.)
- If AT&T were to offer a stand-alone ADSL service, Verizon's stand-alone ADSL service would be the proper price comparison for AT&T's service offering.
 - Verizon charges ISPs no additional charge for ordering Stand-Alone ADSL.

AT&T has stalled negotiations for broadband services for post-Wireline Broadband transition.

- Prior to deregulation, AT&T urged that “Market-driven commercial contracts will facilitate the most efficient, productive, creative and technology-neutral provisioning of broadband services.” (*Memorandum of Understanding SBC and USIIA*, CC Dkt. 02-33, 95-20 and 98-10 (May 2, 2002)).
- AT&T reassured the Commission that “there is no basis for concern that BOCs will not continue to offer broadband facilities to many ISPs.” (Reply Comments of SBC Communications, Inc., CC Dkt. 02-33, at p. 6 (Jul. 1, 2002)).
- Since the FCC’s August 2005 Wireline Broadband Order, AT&T has delayed, failing even to offer a term sheet or any written proposal despite numerous efforts by EarthLink.
 - *Rather than negotiate in good faith, AT&T has publicly stated that it is using the FCC’s Wireline Broadband Order one-year transition period “to review its wireline broadband product portfolio” (Reply Comments of AT&T Inc., WC Dkt. 06-125 and 06-147, at p. 34).*
 - *AT&T defends its tactical decision not to negotiate by stating that “during that one-year transition period, the status quo is effectively frozen” (Id.).*

BellSouth has stalled negotiations for broadband services for post-Wireline Broadband transition

- Prior to broadband deregulation, BellSouth stated that “Without doubt, BellSouth will continue to offer wholesale services,” but its practices demonstrate the opposite.
(Reply Comments of BellSouth Corp., CC Dkt. 02-33, at p. 20 (Jul. 1, 2002))
- BellSouth eliminated Layer 2 broadband service to EarthLink’s New Edge Networks (NEN) affiliate, ending its ability to serve businesses with competitive ATM-over-DSL, and offered no feasible alternative service.
 - Frame Relay is not a feasible technical alternative and, in any case, costs approximately 700% more than the discontinued Layer 2 broadband service.

The FCC should not grant the proposed merger without express conditions that promote robust competition.

- The FCC should require the merged company to:
 - Abide by the FCC's Net Neutrality Policy Statement;
 - Provide stand-alone ADSL on reasonable terms to all customers without exception; and
 - Freeze UNE rates and availability to support facilities-based competition.

The FCC should require the merged company to abide by the FCC's Net Neutrality Policy Statement.

- The FCC should find that an undefined restriction on “excessive bandwidth” violates net neutrality.
- The FCC should find that a requirement that end-users may only use Internet products that use and incorporate broadband if they are sold, supported and billed by a certain entity violates net neutrality.
- The FCC should find that restrictions barring service to businesses, as well as resale restrictions, violate net neutrality.

The FCC should require the merged company to abide by the FCC's Net Neutrality Policy Statement – continued.

- The FCC should find that a restriction barring the use of broadband service to provide competitive VoIP services violates net neutrality.
- AT&T's and BellSouth's failure to negotiate in good faith for broadband service contracts violates net neutrality.

The FCC should require the merged company to provide stand-alone ADSL on reasonable terms to all customers without exception.

- To prevent any contrary interpretation by AT&T, the FCC should expressly specify that stand-alone ADSL be offered to all customers, including ISPs, on just and reasonable terms and conditions without restrictions.
 - The condition should require elimination of all restrictions that would tie ADSL service to a requirement that consumers take AT&T local voice service.
 - The stand-alone ADSL service condition must make clear that it supplants any prior contractual limitations.
- The FCC should also make clear that ISPs can migrate one or more of its subscribers from an existing AT&T/BellSouth ADSL service, including any ADSL-based Layer 3 service without charge.
 - Customers should not have to pay a termination charge or experience delays in order to use the stand-alone ADSL service.
- Since the words of the AT&T/SBC merger order were insufficient to ensure AT&T's compliance, specificity is key.

The FCC should freeze UNE rates and availability.

- The FCC has recognized that UNE-L allows for facilities-based competitors to offer a range of services to consumers, including voice, data, and video, via a single copper pair.
 - “Thus, in the instant case, we take into the account the fact that there are a number of services that can be provided over the stand-alone loop, including voice, voice over xDSL (i.e., VoDSL), data, and video services. In so doing, we conclude that the increased operational and economic costs of a stand-alone loop (including costs associated with the development of marketing, billing, and customer care infrastructure) are offset by the increased revenue opportunities afforded by the whole loop.” (*Triennial Review Order*, 18 FCC Rcd 16978, ¶ 258 (Feb. 20, 2003)).
 - AT&T itself agrees that UNE-L services is a vital avenue for facilities-based competition, stressing that Covad’s UNE-L arrangements provide “nationwide, facilities-based broadband networks” for EarthLink to offer VoIP and other services. (AT&T Ex Parte, FCC Dkt. No. 06-74, Sept. 20, 2006 at p. 4).
- The FCC should require AT&T not to increase UNE-L rates for a minimum of four years after the merger closing date.
- The FCC should require that AT&T make available all current UNE-L facilities for a minimum of four years after the merger closing date.
- The FCC should make clear that during such period, AT&T shall not seek forbearance or other regulatory changes that would preempt a merger condition or foreclose the continued availability of UNE-L.