

October 4, 2006

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, WC Docket No. 06-74

Dear Ms. Dortch:

Although the record in this proceeding overwhelmingly establishes that the merger of AT&T and BellSouth will not reduce competition in *any* link in the Internet chain, a few commenters have suggested that the Commission should condition its approval of the merger on “net neutrality” commitments that would apply only to AT&T. It would neither be lawful nor in the public interest for the Commission to impose the unproven (and largely undefined) merger conditions that these commenters propose to address the unproven (and non-merger-specific) harms they hypothesize. Indeed, it would be affirmatively anticompetitive to impose such conditions here given that the Commission just months ago expressly rejected such conditions in a transaction involving the nation’s largest providers of the cable modem services over which most Americans obtain broadband access to the Internet.

First, merger approvals are conditioned “*only* to remedy harms that arise from the transaction (*i.e.*, transaction-specific harms),”¹ and this transaction will not harm Internet competition in any respect. The Internet backbone market is, by any measure, robustly competitive, and it will remain so following the merger of AT&T and BellSouth. BellSouth is not even a Tier 1 backbone provider, and the merger thus plainly could not have any adverse competitive impact on the provision of backbone services. Nor will the merger increase concentration in the provision of “last-mile” broadband Internet access services. AT&T and BellSouth serve discrete and non-overlapping local markets and each faces intense competition from a host of other existing and emerging broadband providers in the local markets it serves. For this reason alone, the Commission should reject pleas for “net neutrality” (or any other) Internet conditions as beyond the scope of this merger proceeding – as it recently did when such conditions were advocated for a transaction involving providers of the cable-based services over

¹ *SBC-AT&T Merger Order*, 20 FCC Rcd. 18290, ¶ 19 (2005) (emphasis added); *Time Warner-America Online Merger Order*, 16 FCC Rcd. 6547, ¶ 6 (2001) (“It is important to emphasize that the Commission’s review focuses on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction – *i.e.*, harms and benefits that are ‘merger-specific’”).

which the majority of consumers obtain broadband access to the Internet today.² Parties opposing the Comcast and Time Warner acquisition of Adelphia argued that, as vertically integrated providers of broadband access and Internet content, Comcast and Time Warner would have incentives to discriminate against Internet content offered by unaffiliated providers. The Commission properly rejected the imposition of *any* net neutrality requirements, noting that “vigorous competition” in the broadband market “limits the ability of providers to engage in anticompetitive conduct.”³ Competition has only become more vigorous in the few months since the Commission reached this correct conclusion, and there is no conceivable basis for imposing net neutrality requirements here, especially since neither AT&T nor BellSouth is a vertically integrated provider of Internet content and, thus, even the (non-merger-specific) discrimination concerns that were raised in the Adelphia transaction are not present here.

Second, imposing lopsided Internet regulation on AT&T alone in *any* proceeding could only harm consumers. The Commission has repeatedly recognized that it should not pick winners and losers in the marketplace through its rulings. AT&T’s broadband Internet access services face fierce competition from cable and other broadband providers, none of which are subject to the regulation that net neutrality proponents urge the Commission to impose on AT&T. Since the Commission ended one-sided economic regulation of DSL services last year, broadband prices are falling,⁴ throughput speeds are increasing, consumers are being offered more choices with each passing month, investment is mushrooming and no provider has the slightest interest in driving customers to its competitors by denying them access to the lawful content, applications or devices they demand. These marketplace developments confirm the clear benefits of eliminating asymmetric regulation of Internet services.⁵ Re-imposing one-sided Internet

² See, e.g., *Adelphia-Comcast-Time Warner Merger Order*, 21 FCC Rcd. 8203, ¶ 220 (2006) (“Commenters and petitioners do not offer evidence that Time Warner and Comcast are likely to discriminate against Internet content, services, or applications after the proposed transactions are complete; nor do they explain how the changes in ownership resulting from the transaction could increase Time Warner’s or Comcast’s incentive to do so”); see also *SBC-AT&T Merger Order* ¶ 142 (“We are generally unpersuaded that commenters’ concerns are sufficiently merger-specific and that the merged entity is likely to pursue the alleged strategies”).

³ *Adelphia-Comcast-Time Warner Merger Order* ¶ 217.

⁴ See, e.g., AT&T Simplifies Residential Broadband Pricing and Adds New Speed Tier, Company Offers Everyday Low Rates Without Term Commitments, AT&T Press Release (Oct. 3, 2006) (detailing new broadband Internet access offerings starting at under \$15/month, adding a new speed tier, and allowing customers to obtain AT&T’s lowest monthly rate without entering into a one-year service contract), available at <http://att.sbc.com/gen/press-room?pid=4800&cdvn=news&newsarticleid=22821>.

⁵ According to a recent Wall Street Journal editorial by the Commission’s former Chief Economist, Thomas Hazlett, “DSL packages are cheaper, performance speeds are faster, and the number of subscribers is growing more quickly than under [common carrier] rules. . . . Since DSL began to shed its [common carrier] obligations, users have flocked to the service.” Broadbandits, Thomas Hazlett, Wall Street Journal (Aug. 12, 2006) (urging regulators to preserve “this victory for freer markets” and to “reject [a] U-turn to Internet regulation via net neutrality”).

regulation that applied *only* to AT&T and limited *only* AT&T's ability to recoup its broadband investments by offering consumers and applications providers *more* choice and flexibility in the way they enjoy the Internet would necessarily reduce both AT&T's ability to compete effectively and its incentives to continue to invest and innovate in its broadband networks. Consumers would be the ultimate losers. Indeed, by impeding broadband Internet access competition, such asymmetrical regulation could only *exacerbate* the (currently non-existent) last-mile "problem" that proponents of net neutrality claim justifies such regulation.

Third, the record in this proceeding does not, in any event, provide the Commission with an informed basis on which to address any net neutrality concerns. Proposals to depart from the "hands off the Internet" and deregulatory broadband policies under which the Internet has thrived raise industry-wide issues of exceptional importance that warrant careful study. Mistakes and rash decisions in this area could cause harm of truly extraordinary proportions – putting the brakes on investment and delaying or foreclosing innovative new Internet offerings that would greatly benefit consumers.⁶ An industry-wide proceeding to develop a full record on these issues would be the only appropriate way to proceed, and it would be folly to act here before such a record is even developed, based solely upon superficial advocacy that does not even confront the complexities and potential unintended consequences that even the most ardent net neutrality proponents concede exist in this area.

For example, while net neutrality proponents speculate that some future arrangements between network owners and content and service providers designed to *improve* service quality might nonetheless prove "bad" for the Internet, their vaguely worded "solutions" for this speculative harm do not even attempt to distinguish the arrangements they (wrongly) claim should be feared from innovations that all agree will be necessary to meet consumers' evolving Internet needs.⁷ Internet backbone traffic is exploding and capacity is being exhausted at an ever-accelerating pace. Driven by the tremendous growth of VoIP, Internet video, online gaming and other multimedia applications, AT&T has been rapidly upgrading its Internet backbone to OC-768 speeds (40 Gbps) – but even that bandwidth is being consumed faster than expected.⁸ AT&T estimates that it will need to further increase its backbone capacity up to an unprecedented 100 Gbps by 2010.⁹

Given the voracious bandwidth appetite of these multimedia applications, the costly and time consuming process of adding "more bandwidth" is not an efficient solution by itself,

⁶ The Federal Trade Commission in the Online World: Promoting Competition and Protecting Consumers, Remarks by Deborah Platt Majoras, Chairman, Federal Trade Commission, The Progress and Freedom Foundation's Aspen Summit, at 14-15 (August 21, 2006) (available at <http://www.ftc.gov/speeches/majoras/060821pffaspenfinal.pdf>).

⁷ OPP Working Paper No. 31, *The FCC and the Unregulation of the Internet*, 1999 FCC LEXIS 3370, at *64 ("The Commission should, of course, avoid regulation based solely on speculation of a potential future problem").

⁸ AT&T's New Backbone Quickly Filling Up, Broadband Reports.com (Sept. 21, 2006); AT&T VP: 100-Gig by 2010, Light Reading (Sept. 19, 2006).

⁹ *Id.*

particularly in “last mile” networks. Rather, in addition to building faster networks, *managing* available bandwidth to improve efficiency is critically important to ensuring that the greatest number of consumers receive innovative, high-quality broadband services and applications. As an analyst from the Yankee Group recently explained, if service providers are going to deliver IP-based video, voice and other multimedia applications that satisfy consumers’ quality of service expectations, “[p]rioritizing traffic is going to have to happen.”¹⁰ Indeed, a recent study by Brix Networks showed that Internet-based VoIP call quality had decreased over the last 18 months because VoIP services are “increasingly competing for resources on the same IP network that is also delivering Internet access and in some case IP-based video.”¹¹ While the “speed of broadband networks has increased, consumers are doing more on the Net, which affects call quality.”¹² According to the chief technology officer of Brix, because there are “more services running over the same pipe, carriers need to differentiate packets and prioritize service.”¹³

Imposing net neutrality regulations that would prevent broadband network owners from efficiently managing the available bandwidth in their networks would be seriously detrimental to the public interest. Not only would such regulation interfere with network owners’ ability to address the inherent quality of service concerns discussed above for IP-based voice, video, gaming and other applications, it could also deter – or possibly prohibit – them from continuing to offer certain managed IP-based services that are critically important to many business customers today. For example, business customers rely upon a variety of virtual private network (“VPN”) services that enable them to communicate reliably and securely over the Internet by prioritizing traffic to achieve the service quality and security their businesses require. A multitude of different businesses across the United States – from hospitals to hotels and insurance companies to appliance manufacturers – rely on VPN services from AT&T to meet their business needs every day.¹⁴ But if net neutrality proponents have their way, the traffic prioritization capabilities inherent in these VPN services would be outlawed, depriving customers of services upon which they rely for their most critical communications needs.

Worse still, net neutrality regulation could inhibit the development of new technologies and services that enable the prioritization of specific types of traffic to achieve compelling public policy goals. For example, prioritizing VoIP 911 traffic over other Internet traffic could help ensure that emergency calls are delivered to first responders in a reliable and timely manner. Prioritizing telemedicine applications, such as real-time remote diagnostics – which can greatly benefit rural residents, senior citizens, and others without local access to specialized medical care – may be necessary for these applications to function reliably, as the Commission recently noted

¹⁰ Study: Net telephony quality worsening, CNET News (July 25, 2006); Internet Phone Quality Drops Significantly and Steadily Over Last 18 Months, Brix Networks Press Release (July 24, 2006).

¹¹ *Id.*

¹² *Id.*

¹³ *Id.*

¹⁴ See IP and IP VPN Case Studies, available at http://www.business.att.com/resource.jsp?reporid=ProductCategory&reporitem=eb_vpn&rtype=CustomerTestimonial&segment=ent_biz.

in its order establishing a pilot program to speed development of rural telehealth offerings.¹⁵ Prioritizing packets on the video link in a Video Relay Service (“VRS”) application can help ensure that the hearing-impaired or speech-impaired receive high-quality VRS. And the Internet regulation proposed by net neutrality proponents could prevent many other innovative applications and services that have not yet been deployed from ever coming into existence.

In the absence of *any* demonstrated harm from any such services or arrangements that offer consumers and applications providers *more* choices, it is premature to conclude that there is any problem at all, much less a systemic problem that requires an immediate one-size-fits-all regulatory solution. And doing so now before the issues have even been seriously studied is truly a recipe for disaster that would almost certainly bring unintended consequences that could run the gamut from inflating costs to Internet consumers, reducing service quality, retarding innovation and investment, interfering with reasonable network management, preventing valuable new services from being developed or successfully deployed, producing endless regulatory disputes, and opening the door to a great deal of mischief by companies that seek to game the regulatory system to their own advantage.

Although AT&T and BellSouth are confident that the record that is developed in the Commission’s industry-wide proceeding will demonstrate that the Commission’s deregulatory Internet and broadband policies are as appropriate for the future as they have proven to be in the past, one thing should be clear: proposals for new regulation can only responsibly be considered in an industry-wide fashion that will ensure that should the need for such regulation ever arise, any such rules are as minimally intrusive as possible, apply equally to all competing providers, and do not have unintended consequences that harm consumers. The public interest plainly would *not* be served by singling out AT&T alone for new and poorly understood Internet regulation based on the scant record in this proceeding, particularly given the lack of any evidence that there is an existing problem or that the merger will change AT&T’s incentives or ability to engage in any of the hypothetical behaviors that the proponents of increased regulation of the Internet claim to fear. Under these circumstances, it would be reckless for the Commission to begin regulating the Internet before it has even asked all of the questions that would need to be answered before any such regulation could be responsibly considered.

While it would thus be particularly inappropriate for the Commission to impose net neutrality merger conditions, there is no need for any conditions on approval of this merger. The merger will not harm competition in any relevant market, and it promises enormous consumer benefits that the merger’s opponents simply ignore. The merger will enable AT&T to speed the deployment of IPTV services to BellSouth’s customers and increase the efficiency with which AT&T can deploy those services to all of its customers – thereby providing much needed competition in video markets long frustrated by the stranglehold of cable incumbents. It will unify ownership over Cingular Wireless, and thereby increase efficiency and facilitate the development of new converged services that customers want. It will improve services to government customers, especially in the increasingly important areas of national security and

¹⁵ Order, *Rural Health Care Support Mechanism*, WC Docket No. 02-60, ¶ 8 (rel. September 29, 2006) (“many of these real-time telehealth applications require a dedicated broadband network that is more reliable and secure than the public Internet”).

disaster preparedness and response. It will produce a company with the scale and reach needed to be a more effective competitor, both at home and abroad, thereby spurring competition, stimulating demand and creating a more globally competitive American telecommunications sector. And it will benefit all customers – from single-line mass market customers to international enterprises – through increased research and development and network integration.

AT&T and BellSouth also look forward to building upon their common traditions of strong commitments to the communities they serve and the world class employees that make it possible for them to provide best in class service to the consumers and businesses in those communities. As AT&T Chairman, Edward E. Whitacre Jr., made clear in his letter to BellSouth Chairman, F. Duane Ackerman, shortly after the successful conclusion of the companies' merger negotiations, AT&T "is committed to providing an advanced telecommunications network offering high quality services, continued high quality employment opportunities and to retaining BellSouth's historic position as a prominent corporate citizen, contributing to the residents and overall economy of the states served by BellSouth."¹⁶ Among other things, AT&T Inc. will "maintain Atlanta as AT&T Inc.'s regional telco headquarters and maintain state headquarters in each of BellSouth's traditional nine-state area," "continue BellSouth's historic levels of charitable contributions and community activities," "continue to support economic development and education in BellSouth's traditional nine-state area," "support BellSouth's traditional nine-state area with access to R&D, new technology, products and services developed by AT&T Inc.'s Labs," and "broadly utilize the services of the management and employees of BellSouth following the closing of the merger."¹⁷

Sincerely,

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¹⁶ Letter from Edward E. Whitacre Jr. (AT&T Inc.) to F. Duane Ackerman (BellSouth Corporation), at 1 (March 4, 2006) (attached hereto).

¹⁷ *Id.*