

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

In the Matter of )  
 )  
Application for Consent to Transfer of Control ) WC Docket No. 06-74  
Filed by AT&T Inc. and BellSouth Corporation )  
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COMMENTS OF THE NEW JERSEY DIVISION OF RATE COUNSEL

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On the Comments:

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Date: October 23, 2006

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**INTRODUCTION**

The New Jersey Division of Rate Counsel (“New Jersey Rate Counsel”)<sup>1</sup> files these comments in response to the Public Notice issued by the Federal Communications

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<sup>1</sup> / Effective July 1, 2006, the New Jersey Division of Ratepayer Advocate is now the New Jersey Division of Rate Counsel. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is a Division within the Department of the Public Advocate. The Department of the Public Advocate is a government agency that gives a voice to New Jerseyans who often lack adequate representation in our political system. The Department of the Public Advocate was originally established in 1974, but it was abolished by the New Jersey State Legislature and New Jersey Governor Whitman in 1994. The Division of the Ratepayer Advocate was established in 1994 through enactment of Governor Christine Todd Whitman’s Reorganization Plan. The mission of the Ratepayer Advocate is to make sure that all classes of utility consumers receive safe, adequate and proper utility service at affordable rates that are just and nondiscriminatory. In addition, the Ratepayer Advocate works to insure that all consumers are knowledgeable about the choices they have in the emerging age of utility competition. The Department of the Public Advocate was reconstituted as a principal executive department of the State on January 17, 2006, pursuant to the Public Advocate Restoration Act of 2005, P.L. 2005, c. 155 (*N.J.S.A. §§ 52:27EE-1 et seq.*). The Department is authorized by statute to “represent the public interest in such administrative and court proceedings . . . as the Public Advocate deems shall best serve the public interest,” *N.J.S.A. § 52:27EE-57, i.e.*, an “interest or right arising from the Constitution, decisions of court, common law or other laws of the United States or of this State inhering in the citizens of this State or in a broad class of such citizens.” *N.J.S.A. § 52:27EE-12*, and the office of the Rate Counsel, formerly known as the Ratepayer Advocate, became a division therein to continue its mission of protecting New Jersey ratepayers.

Commission (“Commission” or “FCC) on October 13, 2006.<sup>2</sup> The New Jersey Rate Counsel is encouraged that Commissioners Copps and Adelstein raised concerns about the proposed merger of AT&T Inc. (“AT&T”) and BellSouth Corporation (“BellSouth”) (collectively, “Applicants”), and recommended that the Commission seek proposals from the Applicants as well as additional public comment.<sup>3</sup> These legitimate concerns subsequently led to the supplemental filing by AT&T on October 13, 2006, in which the Applicants propose various merger conditions.<sup>4</sup> Meanwhile, the Rate Counsel acknowledges but is dismayed by the failure of the Department of Justice to seek any remedy to offset the anticompetitive consequences of the proposed merger.<sup>5</sup>

Based on the Rate Counsel’s detailed analysis of the Applicants’ original filing and of the Applicants’ voluminous responses to the Commission’s information and document request, the Rate Counsel recommends that the Commission deny the merger because the recently proposed conditions fail to remedy adequately the fundamental and significant flaws in the proposed transaction.

The Rate Counsel has submitted several detailed filings that analyze the implications of the proposed merger for consumers, including, most recently, a detailed

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<sup>2</sup> / “Commission Seeks Comment on Proposals Submitted by AT&T Inc. and BellSouth Corporation,” WC Docket No. 06-74, DA 06-2035, October 13, 2006; Erratum dated October 16, 2006.

<sup>3</sup> / Letter from Commissioners Michael J. Copps and Jonathan S. Adelstein to Chairman Kevin J. Martin, October 13, 2006.

<sup>4</sup> / Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T Services, Inc. to Chairman Kevin Martin, Re: Notice of *ex parte* filing, October 13, 2006 (“Applicants’ Merger Conditions Letter”).

<sup>5</sup> / U.S. Department of Justice Press Release, “Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T’s Acquisition of BellSouth,” October 11, 2006, available at [http://www.usdoj.gov/atr/public/press\\_releases/2006/218904.htm](http://www.usdoj.gov/atr/public/press_releases/2006/218904.htm).

*ex parte* filing submitted on October 3, 2006.<sup>6</sup> The Rate Counsel comprehensively reviewed the Applicants' voluminous responses to the Commission's data and information request, particularly as the information concerns mass market, mid-sized, and enterprise business consumers. The Rate Counsel has also participated extensively in the Commission's other recent merger proceedings, concerning Verizon's acquisition of MCI and SBC's acquisition of AT&T. The Rate Counsel will not reiterate its comprehensive analyses and discussions in this filing, but urges the Commission to review the Rate Counsel's three prior submissions in this proceeding as it deliberates on the impact of AT&T's proposed acquisition of BellSouth on consumers and on competition, and on the merits of the Applicants' proposed conditions.

## **ANALYSIS OF PROPOSED CONDITIONS**

**The Commission should not consider the proposed conditions within a vacuum, but rather should assess their merits within the context of related Commission proceedings and the status of today's telecommunications markets.**

The Commission should not consider the merger, and the proposed conditions within a vacuum. Other pending Commission proceedings bear directly on the merits and sufficiency of the conditions, including, in particular the Commission's investigation of interstate special access (in Docket 05-25) and separations (in Docket 80-286).

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<sup>6</sup> / The New Jersey Rate Counsel submitted initial comments, including a detailed declaration by Susan M. Baldwin and Sarah M. Bosley ("Baldwin/Bosley Declaration"), on June 5, 2006 and submitted reply comments on June 20, 2006. On October 3, 2006, the New Jersey Rate Counsel submitted an *ex parte* filing, based on its detailed review of the Applicants' voluminous, highly confidential responses to the Commission's information and document request, and including a detailed declaration by Susan M. Baldwin, Sarah M. Bosley, and Timothy E. Howington ("Baldwin/Bosley/Howington Declaration"). The vast majority of the documents that the Applicants submitted were designated as highly confidential. The Rate Counsel submitted redacted and highly confidential versions of its detailed analyses of these documents.

**The Applicants have not yet set forth the minimum conditions necessary to render the proposed transaction in the public interest.**

The Applicants' proposal represents a small first step toward redressing the harm to consumers and to competition that the contemplated industry consolidation would create. However, for the most part, the proposed conditions are little more than promises to follow through on the Applicant's own business plans and would simply further AT&T's own strategic interests. Also, the Applicants' proposed conditions lack adequate information because they fail to divulge the difference between their "business as usual" plans (*i.e.*, plans assuming that they each continued to operate on a stand-alone basis) and their post-merger business plans (as modified by the conditions). Therefore, the Commission lacks the information necessary to assess the degree to which the Applicants are making *additional* commitments relative to what they would do anyway.

The Commission should direct the Applicants to specify the additional investment and/or reduction in revenues associated with the proposed conditions, *relative to their business as usual, i.e., as if the two companies were to continue to operate on a stand-alone basis.*<sup>7</sup> Furthermore, the Applicants should specify separately the incremental investment and/or reduction in revenue charges associated with each of the proposed conditions.

**Discussion of Applicants' Proposed Conditions**

First, with respect to Broadband Condition No. 1, the RBOCs have been making promises to federal and state regulators for years regarding broadband deployment as part

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<sup>7</sup> / The Commission appropriately issued a detailed information and document request relative to the Applicants' original filing. It is equally relevant and important for the Commission to seek specific information now relevant to the Applicants' recently proposed conditions so that the Commission can deliberate on whether the conditions (or a modified version of the conditions) render the proposed transaction in the public interest). By providing responsive information, without delay, the Applicants can ensure that the Commission's review of the proposed transaction continues in a timely manner.

of a *quid pro quo* for deregulation and yet the digital divide continues to exist. The Commission should require the Applicants to indicate:

- The percentage of residential living units in the AT&T/BellSouth in-region territory that presently have access to broadband Internet access through (a) wireline technologies and (b) alternative technologies;
- The percentage of residential living units in the AT&T/BellSouth in-region territory, based on the Applicants' individual business plans absent a merger, that are estimated to have access to broadband Internet access through (a) wireline technologies and (b) alternative technologies as of December 31, 2007.

Second, regarding Broadband Condition No. 2, the offer of a free modem to the Applicants' own wireline consumers who migrate from an additional line to a broadband connection is self-serving – the Applicants seek to lock in customers (customers need to elect a term plan with AT&T for at least twelve months). The offer of a free modem should be extended to and apply to any user of dial-up Internet access who switches to DSL. Furthermore, the Applicants stand to gain a high-value triple play customer. The Applicants should quantify the estimated number of customers affected by the condition, and the associated cost.

Finally, Broadband Condition No. 3 is anticompetitive unless AT&T commits to offer wholesale unbundled digital subscriber line (“DSL”) at a lower rate. Furthermore, AT&T should offer combined voice/data at the POTS price, for all consumers, including new and existing customers.<sup>8</sup> AT&T and BellSouth have already recovered the vast

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<sup>8</sup> / AT&T proposes to offer DSL at \$10.00 *only* to those consumers who have not previously subscribed to AT&T's or BellSouth's DSL service. AT&T does not justify this unwarranted price discrimination.

majority of the cost of providing DSL (which they offer over the existing POTS line) through regulated rates.<sup>9</sup>

The Public Safety and Disaster Recovery Conditions Nos. 1 and 2 are simply window-dressing. The Applicants' plan to initiate ten new trials of wireless broadband Internet access furthers AT&T's business objectives and market dominance.

Relative to UNE Condition No. 2, AT&T should suspend the non-impairment test for all wire centers under Sections 51.319(a) and (e).

The five Special Access Conditions that the Applicants propose fail to address adequately the Applicants' substantial overearnings, nor do they fail to offset the adverse effect of the loss of an actual and potential competitor in BellSouth's regions. The Rate Counsel's submission on October 3, 2006 provides further analysis of this market.<sup>10</sup>

The Applicants should explain why Special Access Condition No. 1 excludes AT&T Advanced Services, Inc. and Ameritech Advanced Data Services Company ("ASI"). Furthermore, relative to Special Access Condition No. 4, the Commission should direct the Applicants to (1) explain why Verizon Communications Inc. is carved out relative to the requirement; (2) describe fully the rates that now apply to Verizon Communications Inc. or its affiliates; and (3) compare the rates offered to Verizon Communications Inc. with the rates offered to the Applicants' affiliates. Generally, the Applicants should specify the most-favored price for any special access customers, and

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<sup>9</sup> / See, *In the Matter of Jurisdictional Separations and Referral to the Federal-State Joint*, CC Docket No. 80-286, Affidavit of Susan M. Baldwin, on behalf of the New Jersey Division of Rate Counsel and the National Association of State Utility Consumer Advocates, August 22, 2006 ("Baldwin Separations Affidavit").

<sup>10</sup> / Baldwin/Bosley Declaration, at paras. 190-195; Baldwin/Bosley/Howington Declaration, at paras. 25-27, 110. See, also, discussion of actual and potential competition, Baldwin/Bosley Declaration, at paras. 148-153; Baldwin/Bosley/Howington Declaration, at paras. 59-66.

make that pricing available to all special access customers. The Rate Counsel also recommends that the Commission consider carefully the detailed recommendations set forth in the *ex parte* submission of various competitive local exchange carriers (“CLECs”) and users on September 22, 2006.<sup>11</sup>

AT&T’s commitment to offer stand-alone DSL should not have a sunset date, but rather should continue until such time that the Commission affirmatively determines such a requirement is no longer necessary. Also the condition should apply throughout AT&T’s home region. Furthermore, the price for the stand-alone DSL should not be anticompetitive. In its filing submitted earlier this month, the Rate Counsel raised concerns about AT&T’s deployment of its own DSL and its compliance with the stand-alone DSL conditions set forth in the Commission’s order approving SBC’s acquisition of AT&T.<sup>12</sup> Moreover, the reference in the ADSL Condition No. 2 should clarify that “after the Merger Closing Date” refers to the AT&T/BellSouth Closing Date.<sup>13</sup>

AT&T commits to offer ADSL transmission service in the combined AT&T/BellSouth region “that is functionally the same as the service AT&T offered within the AT&T in-region territory as of the Merger Closing Date.”<sup>14</sup> If AT&T improves the functionality of its ADSL transmission service *after* the Merger Closing Date, it should also offer the improved ADSL transmission service so that competitors

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<sup>11</sup> / *Ex parte* filing, Comptel, *et al*, September 22, 2006.

<sup>12</sup> / *See, e.g.* Baldwin/Bosley/Howington Declaration at paras. 97-107.

<sup>13</sup> / As stated elsewhere in these comments, the Rate Counsel recommends that the Commission deny a specific sunset date for any condition. Instead, the Commission should not allow any of the conditions to expire until and unless the Applicants demonstrate that circumstances in the market place have evolved sufficiently to allow them to expire.

<sup>14</sup> / *Applicants’ Merger Conditions Letter*, at 6.



obtain at least the same quality service as that offered to AT&T's affiliates. Furthermore the language of the condition should be modified to read that:

...AT&T/BellSouth offered within their in-region territory as of the Merger Closing Date. Such wholesale offering will be at the most favored pricing that is available in either the AT&T territory or in the BellSouth territory, whichever is less.

As is discussed in detail below, the net neutrality provision lacks accountability, and is insufficient to deter discriminatory treatment by AT&T.

### **Rate Counsel proposed conditions**

As is discussed above, the Applicants' proposed conditions are insufficient. The Commission should give careful consideration to the proposed conditions of intervenors in this proceeding. The Rate Counsel supports the following additional commitments:

- *Structural separations:* AT&T's control of the information pipe *and* the information that travels over that pipe is troubling and jeopardizes diversity in consumer choice not only of the supply of telecommunications, but in diversity of content and viewpoint.<sup>15</sup> Structural separations should apply to all of AT&T's lines of business, including its wireless and its video enterprises. Without structural separations, AT&T has a compelling economic incentive to favor its own content and affiliates, and to discriminate against other suppliers of information and rivals.
- *Net neutrality:* The Rate Counsel reiterates its previous concern: "Market concentration among relatively few carriers means that net neutrality conditions are essential to protect consumers and competitors from undue control of access

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<sup>15</sup> / See, e.g., Bill Moyers public television segment on net neutrality and media concentration, aired October 18, 2006. See also, resources from Moyer on America website with list of net neutrality pieces: <http://www.pbs.org/moyers/moyersonamerica/net/documents.html>

to the Internet.”<sup>16</sup> The disturbing monopoly over transmission *and* potentially content would jeopardize the free market evolution of the Internet and the diverse and innovative applications that have developed.<sup>17</sup> AT&T proposes to comply with the principles set forth in the Commission’s Policy Statement, issued September 23, 2005, for thirty months after the merger closing date.<sup>18</sup> As the Rate Counsel stated in its initial comments in this proceeding, at a minimum, AT&T should extend this abbreviated time frame indefinitely so that it does not sunset unless and until the Commission considers it in the public interest to do so. Furthermore, as is applicable for all of the conditions, enforceable sanctions are critically important to create incentives for compliance. The Applicants should also commit to fund an independent biennial audit of AT&T’s compliance with net neutrality conditions to ensure that AT&T is not discriminating against its competitors and favoring its own information and video programming affiliates.

- *À la carte option for any video services that AT&T offers.*
- *Broadband at POTS prices:* Consumers have already financed AT&T’s and BellSouth’s ubiquitous deployment of a public telecommunications network, which encompasses virtually all that is required for the Applicants to offer DSL. Therefore, the Applicants’ incremental cost of supplying DSL is negligible.

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<sup>16</sup> / *Ex parte* letter from New Jersey Public Advocate, Division of Rate Counsel, October 3, 2006, at 2; Baldwin/Bosley/Howington Declaration, at para. 128.

<sup>17</sup> / Baldwin/Bosley Declaration, at para. 215; *see generally, id.*, at paras 214 through 234.

<sup>18</sup> / In the Policy Statement, the Commission adopts the following consumer protection principles: “Consumers are entitled to access the lawful Internet content of their choice; to run applications and use services of their choice, subject to the needs of law enforcement; to connect their choice of legal devices that do not harm the network; and to competition among network providers, application and service providers, and content providers.” See *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, FCC No. 05-151 (rel. Sept. 23, 2005), at 3.

Excessive DSL rates discourage efficient purchasing decisions. All residential customers should have access to broadband as part of their basic local service (*i.e.*, AT&T should offer combined voice and data at current POTS prices), rather than being forced to pay *twice* for the capabilities of the public telecommunications network.<sup>19</sup>

- *Re-initialization of rates for regulated services within 18 months of Commission issuing an order in separations proceeding.*
- *Relinquish attempt to recover monies associated with purported under-recovery of Local Number Portability (“LNP”) costs (over \$200 million).*
- *The Applicants should not receive any high cost universal service support in the newly enlarged AT&T territory.*
- *Divestiture of duplicative assets.* Although the Department of Justice failed to require divestiture, the Commission, independently, based on information provided in response to its information and document request, should determine the need for divestiture of assets in order to fulfill the Commission’s competition goals.
- *Divestiture of AT&T’s CLEC lines in BellSouth region:* The merger would eliminate AT&T as an actual and potential local competitor in BellSouth’s region. Therefore, the Commission should establish as a condition of its approval of the merger that AT&T divest its CLECs lines that presently serve small business and residential customers in BellSouth’s region.

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<sup>19</sup> / Alternatively, the Applicants should demonstrate that they have assigned and allocated a fair share of the common network away from intrastate regulated services to DSL *and* re-initialized interstate and intrastate rates accordingly.

- *Conditions should not sunset:* The telecommunications and Internet industries are evolving rapidly and in unpredictable ways.<sup>20</sup> Thirty months is too short for the duration of conditions. There should not be *any* expiration date, but rather, no sooner than five years, the Applicants should be permitted to submit a filing in which they affirmatively demonstrate to the Commission, allowing time for public comment, that any particular condition(s) are no longer necessary. The conditions should not expire, however, unless and until the Commission determines that they are no longer necessary to protect the public interest.
- *Enforcement and accountability for any conditions.* The Applicants propose to file annual declarations attesting to their compliance with the conditions. This is inadequate protection for consumers and the public interest. The Applicants have failed to propose any financial sanctions should they fail to comply with the conditions. Consumers, competitors, and regulators should not be expected to rely on the promises of the applicants. Financial incentives should be established to enhance accountability.

The Rate Counsel recommended other conditions in its filing submitted earlier this month.<sup>21</sup> The Rate Counsel continues to support these conditions, but in this filing, the Rate Counsel reiterates those of greatest significance to consumers.

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<sup>20</sup> / By way of analogy, federal and state regulators, anticipating that competition would yield lower prices, eliminated many forms of rate protection for consumers of electricity. A decade later, consumers are seeing rate increases, and the anticipated competition has failed to materialize. “Competitive Era Fails to Shrink Electric Bills: More Increases Are Seen – Some States Are Seeking to Return to a System of Regulated Prices,” *The New York Times*, October 15, 2006, at 1. Although long distance rates have declined in the telecommunications market, the local competition that Congress envisioned has yet to materialize. Furthermore, the Bells’ mergers and increasing dominance of “bundled” markets is jeopardizing even that erstwhile long distance competition.

<sup>21</sup> / Rate Counsel *ex parte*, at 2-3; Baldwin/Bosley/Howington Declaration at paras. 126-128.

## CONCLUSION

The reassembly of Ma Bell poses significant risks to consumers and yields substantial profits for the Applicants' executives and shareholders. Although the Applicants' recently proposed conditions represent movement in the correct direction, they are insufficient. Therefore, absent a preponderance of evidence that sufficient conditions and adequate enforcement measures would render the proposed transaction in the public interest, the Commission should reject the proposed transaction. Although the Applicants are in a hurry to consummate the merger, it would be imprudent for the Commission to rush deliberation on a market structure change of such magnitude and irrevocable nature. If the Commission nonetheless intends to approve the transaction, it should enhance the Applicants' proposed conditions, increase the measures for accountability, and ensure compliance by the Applicants.

Respectfully submitted,

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