

October 24, 2006

Via ECFS

Marlene H. Dortch, Esq.
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:

This letter addresses the suggestion that the Commission should not rule on the license transfer application of AT&T and BellSouth until the completion of Tunney Act review of the proposed consent decree that settled antitrust litigation with the Justice Department over the SBC/AT&T merger last year. As even this general description indicates, the pendency of a separate Tunney Act proceeding on a separate merger, raising entirely distinct legal and factual issues, provides no basis for the Commission to delay its final decision on the current application. Moreover, for the Commission to engage in such a delay would harm consumers, be unfair to the parties, and set a dangerous precedent for future Commission proceedings.

A. Background on the Tunney Act Proceeding

The Tunney Act proceeding in *United States v. SBC Communications Inc. and AT&T Corp.* is focused solely on the issue of whether the divestitures in that case are adequate to remedy the Clayton Act violation alleged in the DOJ complaint. DOJ alleged in that complaint that the combination of SBC's and AT&T's local private line facilities in certain buildings would "lessen competition substantially in violation of Section 7 of the Clayton Act." The proposed decree fully addresses that harm and restores competition in all 383 buildings through divestiture of facilities necessary for competitive service.

While those opposing entry of the decree have attempted to introduce issues not addressed in the complaint, including competitive concerns in other buildings, or other metro areas and even in other telecommunications services, such an attempt to second-guess the prosecutorial decision of the executive branch as to what violation to charge is clearly improper under the Tunney Act. It not only is

inconsistent with the plain language of the statute, but also – if adopted by the Court – would violate constitutional principles of separation of powers.¹

Accordingly, the sole issue before the Court under the Tunney Act is the efficacy of the proposed divestiture remedy to restore competition in the 383 buildings where DOJ alleged competitive harm. In addressing that issue, the Justice Department has submitted extensive record evidence and explication as to the violation charged and how the proposed divestitures will remedy the competitive harm alleged. Perhaps the best objective evidence of the efficacy of the divestiture remedy is the fact that three sophisticated telecommunications companies have agreed to purchase the divested assets to tie into their existing local networks. AboveNet, Level 3 and Time Warner Telecom not only have signed acquisition agreements but have satisfied the Justice Department that they are ready, willing and able to use those assets to compete with AT&T.²

At the end of the day, the judicial role under the Tunney Act is only to accept or reject the decree as proposed.³ The district court cannot order any additional special access remedies or other conditions. Nor, of course, can the court reject the

¹ See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978) (“In our system, . . . the decision whether or not to prosecute, and what charge to file . . . generally rests entirely in [the prosecutor’s] discretion.”); *Haitian Refugee Center v. Gracey*, 809 F.2d 794, 804 (D.C. Cir. 1987) (“The refusal of courts to interfere with prosecutorial discretion is . . . an aspect of the separation of powers.”). While the Court has not issued a final ruling, Judge Sullivan’s comments at oral argument are consistent with this principle. See, e.g., Hearing Transcript at 60:6-13, *United States v. SBC Communications Inc.*, 1:05cv02102 (D.D.C. July 12, 2006) (Court: “I have no desire whatsoever to redraft the complaint or require the government to redraft the complaint to address concerns of others at this point. None whatsoever.”); *id.* at 14:12-13 & 21-24 (Court: “It’s clearly my job to scrutinize the only complaint that’s pending before the Court . . . to determine whether or not the issues raised by the complaint have been satisfactorily addressed by the consent decree”).

² See Plaintiff United States’ Submission In Response To The Court’s Minute Order of July 25, 2006, at 11, *United States v. SBC Communications Inc.*, 1:05cv02102 (D.D.C. Aug. 7, 2006).

³ See, e.g., *United States v. Columbia Artists Management, Inc.*, 662 F. Supp. 865, 870 (S.D.N.Y. 1987) (court “may not substitute its opinion or views concerning . . . the determination of appropriate injunctive relief for the settlement of [antitrust] cases”) (quoting *Mid-America Dairymen*, 1977-1 Trade Cas. (CCH) at 71,980).

merger itself or order the Justice Department to broaden the antitrust violation alleged in its complaint beyond the 383 buildings.

B. The Commission Should Not Delay Its BellSouth Decision

Against this backdrop, it is clear that the Commission need not, and should not, allow the Tunney Act proceeding to affect timely resolution of the BellSouth matter.

First and foremost, the Commission consistently has declined to postpone resolution even of current license transfer proceedings pending the resolution of litigation involving the same transaction, let alone activities related to a different transaction involving different parties. The Commission did not delay its consideration of the SBC/AT&T merger pending Tunney Act review of that merger. It would be clearly inappropriate for the Commission to delay its consideration of an entirely different merger on that basis.

Second, the eventual ruling on DOJ's remedy in the SBC/AT&T merger has no bearing on the issues before the Commission in this proceeding. The FCC's public interest standard is not at issue under the Tunney Act. Indeed, it is significant that the parties protesting the DOJ decree under antitrust principles did not even appeal the Commission's findings under the Communications Act. All the Court will decide in the Tunney Act proceeding is whether it was reasonable for DOJ to conclude that a specific remedy (divestiture) is sufficient to address a specific competitive harm in 383 identified buildings. That issue has nothing to do with any question presented to this Commission in the AT&T/BellSouth proceeding.

Third, the AT&T/BellSouth merger not only is an entirely different transaction involving different facts but, despite all the public rhetoric to the contrary, it raises far fewer competitive issues. Obvious differences include the facts that BellSouth is a much smaller, more regional ILEC than SBC was, and has "special access" overlaps with AT&T in far fewer MSAs and less than one quarter of the number of buildings as in SBC/AT&T. The evidence on this record amply supports the conclusion that AT&T and BellSouth are even more complementary than SBC and AT&T were and that competition will not be harmed.

Although the legal standard applied by DOJ in its merger review is somewhat different from the FCC's public interest standard, it is nevertheless important to note that DOJ concluded, after a thorough, eight-month investigation, that the proposed AT&T/BellSouth merger would not lessen competition substantially in any relevant market and, in fact, is likely to generate substantial

cost savings and other efficiencies that would benefit consumers.⁴ These findings support the conclusion there is no need to await final review of the SBC/AT&T matter where, in contrast, DOJ found that remedies were required to address alleged antitrust violations.

Finally, a delay here pending resolution of the Tunney Act proceeding would be inconsistent with Commission precedent and would invite untold mischief in this and future proceedings as adverse parties seek to use collateral litigation to gain commercial advantage. The Commission has properly observed that “[a]ny such delay would unnecessarily defer realization of the public interest benefits.”⁵ It would also create a tailor-made opportunity for opposing parties in future Commission proceedings to file collateral litigation solely for purposes of delay and negotiating leverage. While delay here would delight those CLECs that wish to be protected from increased competition in the marketplace, it would harm consumers, be unfair to the parties’ customers, employees and shareholders, and set a dangerous precedent. As the Commission has held, and the Justice Department recently recognized, once the record in any proceeding is complete and a

⁴ Statement by Assistant Attorney General Thomas O. Barnett Regarding the Closing of the Investigation of AT&T’s Acquisition of BellSouth: Investigation Concludes That Combination Would Not Reduce Competition (Oct. 11, 2006), available at http://www.usdoj.gov/atr/public/press_releases/2006/218904.htm.

⁵ *Bell Atl. Tel. Cos.; Sw. Bell Tel. Co., Petitions for Waiver of Section 69.4(b) of the Commission’s Rules*, Memorandum Opinion and Order, 9 FCC Rcd. 7868, 7870 ¶ 17 (CCB 1994); see also *KCAL-TV*, Letter, 11 FCC Rcd. 11647, 11648 (Video Servs. Div., MMB 1996) (“[I]t is well-settled that once the Commission has found a licensee qualified for license renewal, an appeal for judicial review will not justify deferring consideration of an application to assign or transfer the license. . . . NHMC’s pending judicial appeal of KCAL’s license renewal does not impede consideration of this transfer application.”); *Application of Walter O Cheskey & Triad Cellular L.P.*, Memorandum Opinion and Order, 9 FCC Rcd. 986, 986 ¶ 5 (Mobile Servs. Div., CCB 1994) (“[I]t is well settled that the Commission will not defer action on transfer and assignment applications simply because proceedings are pending before the courts regarding a proposed transaction.”) (citing *Application of Pinelands, Inc. & BHC Communications, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd. 6058, 6060-61 ¶ 12 & n.9 (1992)); *Application of Bell Atl. Mobile Sys. of Philadelphia*, Memorandum Opinion and Order, 2 FCC Rcd. 7531, 7531 ¶ 7 (Mobile Servs. Div., CCB 1987) (rejecting request to defer action pending resolution of consent decree proceeding, finding that FCC’s proper “concern is not with enforcement of the MFJ but rather with public interest considerations. Enforcement of the MFJ is left to the Department of Justice and the District Court.”).

determination can be made, it is only proper for a government agency to discharge its statutory duty forthwith.⁶

For the foregoing reasons, the Commission should proceed with its final decision on the AT&T/BellSouth applications without further delay.

Sincerely,

/s/ _____
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⁶ The DOJ explained that once the statutory period provided for its investigation expired, and it concluded it had “no basis to challenge the merger in court, it was only proper for it to inform the parties that it did not intend to file such a challenge.” United States’ Opposition to ACTel’s Motion for Leave to Supplement Record at 2 n.3, *United States v. SBC Communications Inc.*, 1:05cv02102 (D.D.C. Oct. 16, 2006).