

**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of	)	
	)	DA 06-2035
Application for Consent	)	WC Docket No. 06-74
To Transfer of Control Filed By	)	
AT&T Inc. and BellSouth Corporation	)	

**COMMENTS OF EARTHLINK, INC.**

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EarthLink, Inc. (“EarthLink”), pursuant to the Commission’s Public Notice, DA 06-2035 (Oct. 13, 2006) and *Erratum* (Oct. 16, 2006), hereby submits comments on the Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T, to Kevin Martin, Chairman, FCC, dated October 13, 2006, and captioned “Notice of *Ex Parte* Filing” in which AT&T set forth potential conditions on its proposed merger with BellSouth Corporation (“BellSouth,” and with AT&T, the “Applicants”) that AT&T officials discussed on October 12, 2006, with Michelle Carey, Senior Legal Advisor to Chairman Martin, and Tom Navin, Chief of the Wireline Competition Bureau (the “*Ex Parte* Proposal”).

**I. INTRODUCTION AND SUMMARY**

The record of this proceeding demonstrates that the combination of the nation’s second and third largest incumbent local telephone companies will significantly impact the competitive landscape for both new and emerging voice and data services. The evidence in the record amply demonstrates that the unprecedented creation of a coast-to-coast mega-incumbent will significantly harm competition, undermine innovation, and increase prices.

The Commission is to be commended for seeking public comment on the *Ex Parte* Proposal. Although some of the proposed conditions are identical to those adopted last year when the Commission approved the merger of SBC and the former AT&T, and certain others have been commented on in this proceeding, AT&T has introduced other conditions – including proposals regarding ADSL transmission service and broadband service accessibility – which were not part of the SBC-AT&T merger conditions, or for which there is no extensive discussion in the existing record.<sup>1</sup> In EarthLink’s view, the scope and scale of the proposed merger warrant close scrutiny and analysis of AT&T’s proposals. While some of the proposed conditions, with modification, may be appropriate for this unprecedented transaction, others clearly are not. The proposals underscore how important it is for the Commission to “get it right” before acting on the proposed merger – only by doing so will consumers be able to enjoy post-merger broadband competition and the new and innovative services that companies like EarthLink bring.

The conditions should reflect not only the size and significance of the proposed merger, but the glaring backdrop of the Applicants’ substantial history of Commission rules and merger conditions violations. Accordingly, each condition proposed by AT&T must be carefully considered and, should the Commission ultimately approve the merger, must be rejected or modified on the basis of whether it is likely to remedy specific competitive harms or achieve appropriate public benefits “against a backdrop of rapid

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<sup>1</sup> AT&T suggests that there is little new about the proposed conditions. *See Ex Parte* Proposal at 1 (“we would not object to the imposition of certain merger conditions previously proposed by certain parties.”). AT&T failed to provide the source or background of any of the previously proposed conditions. The conditions that AT&T actually discussed with Ms. Carey and Mr. Navin, however, and which are set forth in the *Ex Parte* Proposal, include carefully crafted, detailed proposals and language not previously in the record, and accordingly the Commission should compile a thorough record on the submission.

consolidation and high levels of market concentration in the telecommunications industry.”<sup>2</sup>

After review, EarthLink urges the Commission, should it approve the merger, to adopt conditions with the modifications set forth below (the “Conditions”). In addition, if the merger is approved, the Commission, consistent with previous horizontal telecommunications mergers of former Bell Operating Companies and the pattern and practices of the Applicants, must adopt rigorous enforcement mechanisms and strict and substantial penalties for AT&T/BellSouth’s non-compliance with the Conditions.

In particular, as shown below:

(1) Given the importance of UNE-based competition, for as long as the Conditions remain in effect, AT&T/BellSouth must offer and not increase UNE and collocation rates, and must not be allowed to seek forbearance from these commitments and from the requirements of Section 251.

(2) The ADSL transmission service commitment to Internet Service Providers (“ISPs”) must be modified to provide for stand-alone ADSL transmission services. Moreover, to promote competition and consumer choice, ADSL transmission services must be offered at all transmission speeds and at reasonable rates (and no less than the retail rate for functionally similar services) and on terms and conditions that do not include line of business or resale restrictions.

(3) To ensure that all consumers receive the benefit of the stand-alone ADSL service commitment, AT&T/BellSouth must not be permitted to continue to exclude ISPs and their end-users from the offer of stand-alone ADSL service at all transmission

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<sup>2</sup> Letter from Michael J. Copps, Commissioner, FCC and Jonathan S. Adelstein, Commissioner, FCC, to Kevin Martin, Chairman, FCC, WC Docket No. 06-74 (Oct. 13. 2006).

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speeds. To ensure the service offer is meaningful, AT&T/BellSouth must agree to implement stand-alone ADSL service in the BellSouth region within three months of the Merger Closing Date and to migrate without charge or delay any existing ADSL customer who requests to subscribe to the stand-alone ADSL service, including Internet Service Providers and their end-users.

(4) ASI must be subject to the special access conditions to the same extent as any other AT&T/BellSouth affiliate.

(5) Any offer intended to promote broadband service accessibility, especially at the proposed \$10 price, must not be targeted exclusively at non-AT&T and non-BellSouth subscribers, must not require retail customers also to purchase AT&T/BellSouth voice services and must, consistent with the ADSL Transmission Service Condition, be available at wholesale.

(6) AT&T's commitment to forbear from seeking regulatory changes must include a commitment not to seek relief from its merger conditions or from its collocation or other Section 251 obligations, and must include withdrawal of AT&T's and BellSouth's pending broadband forbearance petitions.

(7) The commitment to comply with the Net Neutrality Policy Statement must include specific examples of what constitutes a violation, including line-of-business restrictions, refusal to deal, undefined bandwidth restrictions and other unreasonably discriminatory conduct.

(8) The Conditions must remain in effect for sixty months from the Merger Closing Date in order to protect against the competitive harms that will result from the proposed merger.

(9) The Conditions must have a solid backstop of meaningful enforcement and compliance commitments, including no “time off for bad behavior,” that is, extension of the period of the condition equal to the length of any period of non-compliance, and additional extensions for each instance of non-compliance.

## **II. ANALYSIS OF AT&T’S EX PARTE PROPOSAL AND EARTHLINK’S PROPOSED ALTERNATIVES**

### **A. UNEs**

#### **1. AT&T Proposal**

AT&T proposes three separate UNE conditions. First, AT&T proposes leaving unchanged for 30 months after the Merger Closing Date State-approved AT&T and BellSouth rates for UNEs and collocation that are in effect as of the Merger Closing Date, but allowing AT&T/BellSouth to contract with other telecommunication carriers for different rates.<sup>3</sup> Second, AT&T proposes that AT&T/BellSouth will recalculate the thresholds for determining access to high capacity UNE loops (DS1, DS3, OC3, etc.) by excluding certain collocations, thereby making such loops available as UNEs from additional wire centers in the AT&T and BellSouth in-region territories.<sup>4</sup> Third, AT&T proposes that AT&T/BellSouth will terminate all pending EEL compliance audits, and will not initiate any new audits.<sup>5</sup>

#### **2. Analysis**

The Commission has recognized that UNE-L allows facilities-based competitors to offer a range of services to consumers, including voice, data and video, over a single

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<sup>3</sup> *Ex Parte* Proposal at 3.

<sup>4</sup> *Id.*

<sup>5</sup> *Id.*

copper loop.<sup>6</sup> AT&T itself has conceded that UNE-L provides a vital avenue for facilities-based competition, noting that Covad's UNE-L arrangements provide "nationwide, facilities-based broadband networks" for EarthLink to offer VoIP and other services.<sup>7</sup> As explained previously, EarthLink has made significant steps to bring these services to end-user consumers.

Given the importance that the Commission has placed on UNE-based competition, approval of the merger must be conditioned on a commitment by AT&T/BellSouth not to increase UNE and collocation rates after the Merger Closing Date and not to seek other regulatory changes that would alter or undermine the availability of UNEs and any current obligation under Section 251 of the Communications Act ("Act"). In addition, as noted below in EarthLink's discussion of AT&T's proposed forbearance commitment, that commitment must be consistent with the UNE Condition, and must not allow AT&T to avoid its collocation commitment or any current obligation under Section 251.

### **3. EarthLink Proposed Alternative Condition**<sup>8</sup>

#### **UNEs**

1. The AT&T and BellSouth incumbent LECs shall continue to offer and shall not seek any increase in State-approved rates for UNEs or collocation that are in effect as of the Merger Closing Date, and shall not seek forbearance from this condition. This condition

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<sup>6</sup> *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking*, 18 FCC Rcd. 16978, ¶ 258 (2003), as modified by *Errata*, 18 FCC Rcd. 19020 (2003) vacated and remanded in part, *aff'd in part*, United States Telecom Ass'n v. FCC, 359 F.3d 554 (D.C. Cir. 2004).

<sup>7</sup> Letter from Gary L. Phillips, General Attorney and Assistant General Counsel, AT&T, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 05-65; 06-74, at 4 (Sept. 20, 2006) ("AT&T Sept. 20 *Ex Parte*").

<sup>8</sup> For the Commission's convenience, a black-lined comparison to AT&T's proposed UNE condition is included in Attachment 1.

shall not limit the ability of AT&T and BellSouth incumbent LECs and any other telecommunications carrier to agree voluntarily to any different UNE or collocation rates.

2. AT&T/BellSouth shall recalculate its wire center calculations for the number of business lines and fiber-based collocations and, for those that no longer meet the non-impairment thresholds established in 47 C.F.R. § 51.319(a) and (e), provide appropriate loop and transport access. In identifying wire centers in which there is no impairment pursuant to 47 C.F.R. § 51.319(a) and (e), the merged entity shall exclude the following: (i) fiber-based collocation arrangements established by AT&T or its affiliates; (ii) entities that do not operate (*i.e.*, own or manage the optronics on the fiber) their own fiber into and out of their own collocation arrangement but merely cross-connect to fiber-based collocation arrangements; and (iii) special access lines obtained by AT&T from BellSouth as of the day before the Merger Closing Date.
3. AT&T/BellSouth shall terminate all pending audits of compliance with the Commission's EELs eligibility criteria and shall not initiate any new audits.

**B. ADSL TRANSMISSION SERVICE**

**1. AT&T Proposal**

AT&T proposes that, within the AT&T/BellSouth in-region territory, for 30 months following the Merger Closing Date, it will offer ISPs an ADSL transmission service that is “functionally the same as the service AT&T offered within the AT&T in-region territory as of the Merger Closing Date ... at prices comparable to those available in the overall market for wholesale broadband services.”<sup>9</sup>

**2. Analysis**

AT&T's proposal – which corresponds to no similar provision in the SBC-AT&T Merger Order conditions – is a transparent attempt to legitimize AT&T's and BellSouth's ongoing denial of stand-alone ADSL service to all customers, including ISPs, and ignores

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<sup>9</sup> *Ex Parte* Proposal at 2, 6.

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the fact that both AT&T and BellSouth already have for years separately and repeatedly promised the Commission they would offer broadband transmission services to ISPs. As EarthLink has explained in the record of this proceeding, the Applicants have not lived up to the promises made in the *Wireline Broadband* proceeding.<sup>10</sup> By introducing a new, separate “condition” for ADSL Transmission Service that ostensibly addresses offerings “to [ISPs], for their provision of broadband Internet access service to ADSL-capable retail customer premises,” AT&T conveniently ignores the sorry state of the Applicants’ broadband practices in the 11 months since release of the Wireline Broadband Order. Indeed, AT&T continues to seek to legitimize its unlawful refusal to offer ISPs ADSL service unbundled from circuit switched voice grade telephone service and ignores its failure to live up to its previous promises. The Commission should reject any such transmission “condition” that continues to tether end-users to AT&T’s legacy voice services. Accordingly, the condition must state expressly that all ADSL transmission service offerings cannot require ISPs and their end-users also to purchase circuit switched voice grade telephone service.

AT&T also offers to make the ADSL transmission service available “at prices comparable to those available in the overall market for wholesale broadband services.” Currently, as EarthLink has shown,<sup>11</sup> the pricing of AT&T’s “no voice” Internet access service is patently unreasonable and renders the offering and the SBC-AT&T Merger

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<sup>10</sup> In the Wireline Broadband Order, the Commission eliminated *Computer Inquiry* obligations subject to a one-year transition period that obligated providers to honor transmission arrangements already in place with ISPs and other customers. *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Report and Order and Notice of Proposed Rulemaking*, 20 FCC Rcd. 14853 (2005) (“Wireline Broadband Order”) at ¶ 98. Both AT&T and BellSouth have assured the FCC they would offer such transmission arrangements thereafter.

<sup>11</sup> See, e.g., EarthLink, Inc. *Ex Parte* Presentation, WC Dkt. No. 06-74 (filed Sept. 12, 2006), at 3; Letter from Donna N. Lampert, Counsel for EarthLink, to Marlene Dortch, FCC, WC Docket Nos. 05-65; 06-74, at 10-11 (Sept. 27, 2006) (“EarthLink Sept. 27 *Ex Parte*”).

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Order ADSL condition essentially meaningless, especially for consumers who may wish to use it for VoIP and other services competitive with AT&T's offerings. AT&T has sought to justify its pricing by disputing the relevance of Verizon's price offerings<sup>12</sup> and making inapt comparisons to cable modem services that have substantially faster transmission speeds and are not available on a wholesale basis.<sup>13</sup> As EarthLink explained in its Petition to Deny, the Applicants' merger would mean the loss of a key point of comparison in the "overall market," making AT&T's commitment all the more illusory. The prospective loss of BellSouth as a provider of "comparable wholesale" service makes it critical that the Commission provide guidance with respect to what should constitute reasonable wholesale broadband rates.

Given the Applicants' history regarding the offering of wholesale ADSL transmission services (or more appropriately, their failure to offer reasonable rates and terms) and in light of the significant changes in the market for wholesale broadband services that will occur as a result of the merger, specific pricing guidance is warranted. This is especially necessary given AT&T's position that it is not under any obligation to offer reasonable rates or terms for its broadband services.<sup>14</sup> AT&T/BellSouth should be required not only to offer the wholesale ADSL transmission services at prices comparable to those available in the overall market for wholesale broadband services, the offerings

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<sup>12</sup> See AT&T Sept. 20 *Ex Parte* at 5-6. Verizon's pricing provides the most accurate and useful basis for stand-alone ADSL service price comparison. Verizon imposes no additional charge on ISPs who order stand-alone ADSL service. See EarthLink Sept. 27 *Ex Parte*, at 10-11.

<sup>13</sup> See AT&T Sept. 20 *Ex Parte* at 5. Because cable and other providers do not offer wholesale broadband services, their pricing terms have no practical use as a measure of comparison to AT&T/BellSouth's price offerings.

<sup>14</sup> See, AT&T Sept. 20, 2006 *Ex Parte* at 3 ("The stand-alone ADSL commitment, however, in no way purports to regulate the price of stand-alone ADSL service. To the contrary, when the Commission adopted that commitment as a merger condition, it expressly contemplated that stand-alone ADSL service would be offered at market rates determined solely by AT&T.") (internal citations omitted).

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should in any event be less than the rates charged by AT&T/BellSouth to retail customers for functionally similar services, including any promotional rates offered for a period of six months or longer.

Moreover, to ensure there is no confusion as to the scope of the ADSL transmission service commitment, the FCC should clarify that for purposes of this ADSL Transmission Service condition, ADSL transmission services include services at the same transmission speeds as all services offered by AT&T/BellSouth. For example, this condition would not be satisfied by an offer by AT&T/BellSouth solely of a 768 Kbps service but would require AT&T/BellSouth to offer all transmission speeds. In this way, consumers will reap the promised benefits of broadband competition. Likewise, AT&T's current practices also demonstrate the need to include in the ADSL transmission condition a commitment by AT&T/BellSouth to offer stand-alone ADSL transmission services without any line of business or resale restriction. Such restrictions include but are not limited to restrictions on the types of customers that may be served (e.g., restrictions requiring service only to residential customers and not to business customers) or types of services that may not be offered (e.g., restriction against offering VoIP services).

Finally, the ADSL transmission service commitment must conform to the nondiscrimination element of the proposed special access condition. As the Commission well knows, broadband plays an increasingly important role in the competitive landscape and holds the potential to offer consumers innovative and exciting new service options. Just as AT&T has recognized that nondiscrimination is important in the delivery of

special access services, so too is it key in the context of ADSL transmission services. As such, the language must be included in the condition.

**3. EarthLink Proposed Alternative Condition**<sup>15</sup>

**ADSL Transmission Service**

AT&T/BellSouth will offer to Internet service providers, without requiring Internet service providers or their end-users also to purchase circuit switched voice grade telephone service, ADSL transmission services in the combined AT&T/BellSouth territory that are functionally the same as the services AT&T/BellSouth offers within the combined AT&T/BellSouth territory,<sup>16</sup> without any line of business or resale restrictions.<sup>17</sup> Any such wholesale offering will be at prices comparable to those available in the overall market for wholesale broadband services, and in any event less than the rate charged by AT&T/BellSouth to retail customers for functionally similar services, including any promotional rate offered for a period of six months or longer.

AT&T/BellSouth will not provide to its wireline affiliates ADSL or functionally similar transmission services that are not available to other similarly situated customers on the same terms and conditions.

**C. STAND-ALONE ADSL SERVICE**

**1. AT&T Proposal**

AT&T proposes that, within 12 months of the Merger Closing Date, AT&T/BellSouth will deploy and offer within the BellSouth in-region territory, ADSL service to “ADSL-capable customers” on a stand-alone basis (i.e., without tying the purchase of ADSL service with the purchase of circuit switched voice grade telephone

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<sup>15</sup> For the Commission’s convenience, a black-lined comparison to AT&T’s proposed ADSL Transmission condition is included in Attachment 1.

<sup>17</sup> For purposes of this ADSL Transmission Service condition, ADSL transmission services include services at the same transmission speeds as all services offered by AT&T/BellSouth. For example, this condition shall not be satisfied by an offer by AT&T/BellSouth solely of a 768 Kbps service but shall require AT&T/BellSouth to offer all transmission speeds.

<sup>18</sup> Such restrictions include but are not limited to restrictions on the types of customers that may be served (e.g., restrictions requiring service only to residential customers and not to business customers) or types of services that may not be offered (e.g., restriction against offering VoIP services).

service).<sup>18</sup> AT&T further proposes that that this stand-alone offering will continue in each state for 30 months after the “implementation date” in that state, which it defines as the date on which AT&T/BellSouth can offer stand-alone ADSL service to 80 percent of the “ADSL-capable premises in BellSouth’s in-region territory in that state.”<sup>19</sup> AT&T also proposes to extend for 30 months beyond the Merger Closing Date its SBC-AT&T Merger Order commitment to provide stand-alone ADSL service within the AT&T in-region territory.<sup>20</sup>

## 2. Analysis

AT&T’s proposed commitment with respect to stand-alone ADSL is virtually identical to the commitment it made last year in order to obtain Commission approval for the merger of SBC and the former AT&T.<sup>21</sup> One year later, however, this Commission has ample evidence that AT&T has not yet lived up to that commitment,<sup>22</sup> despite its false certification to the contrary.<sup>23</sup> Incredibly, AT&T has taken the position that EarthLink and other ISPs are not “customers” and, consequently, that the SBC-AT&T

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<sup>18</sup> *Ex Parte* Proposal, at 5.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> See *In the Matter of SBC Communications, Inc. and AT&T Corp. Applications for Approval of Transfer of Control*, Memorandum Opinion and Order, 20 FCC Rcd. 18290, Appendix F (Conditions) (2005) (“SBC-AT&T Merger Order”).

<sup>22</sup> See, e.g., EarthLink Sept. 27 *Ex Parte* at 2-5; *Ex Parte* Presentation of EarthLink, Inc., WC Dkt. No. 06-74 (Oct. 6, 2006) (“EarthLink Oct. 6 *Ex Parte*”); *Ex Parte* Presentation of EarthLink, Inc., WC Dkt. No. 06-74, (Oct. 18, 2006).

<sup>23</sup> Letter from Jacqueline Flemming, AT&T, to Marlene Dortch, Secretary, FCC, WC Dkt. No. 05-65 (June 30, 2006) (attaching certification of Priscilla Hill-Ardoin, Senior Vice President-AT&T Services, Inc., stating that “on June 13, 2006, AT&T Inc. introduced an ADSL service offering in each of the thirteen in-region states *which does not require customers to also purchase circuit switched voice grade telephone service.*”) (emphasis added). Moreover, as EarthLink also has shown, the AT&T Yahoo! High Speed Internet service that AT&T cited as meeting its commitment is an information service, not an ADSL service. See Petition to Deny of EarthLink, Inc., WC Dkt. No. 06-74 (June 5, 2006); EarthLink Sept. 27 *Ex Parte* at 7-9; EarthLink Oct. 6 *Ex Parte* at 7.

Merger Order condition allows AT&T to refuse to offer ISPs or any other provider ADSL service on a stand-alone basis.<sup>24</sup>

AT&T has offered no factual or legal basis for its specious assertion that an ISP is not a customer.<sup>25</sup> As EarthLink has shown, Commission precedent, AT&T tariffs, statements by AT&T/SBC, the practices of other providers – and, most importantly, the very language of the commitment – all contradict AT&T’s assertion.<sup>26</sup> While AT&T now cries that it meant *consumers* not *customers*, it can hardly protest given that AT&T itself proposed the language ultimately adopted in the SBC-AT&T Merger Order,<sup>27</sup> and plainly used the word “customers” in a variety of different contexts in SBC-AT&T Merger Order conditions.<sup>28</sup> Simply put, there is no limiting language in the commitment that allows AT&T to discriminate as between ISPs and other customers.

Given AT&T’s failure to comply with its previous commitments, it is clear that the record does not justify merely copying the SBC-AT&T Merger Order ADSL service condition in this proceeding. Ultimately, the purpose of the stand-alone ADSL commitment is to benefit consumers by allowing them to “buy DSL without being forced to also purchase voice service.”<sup>29</sup> Nothing in the record of either the SBC-AT&T or the AT&T-BellSouth merger proceedings suggests that consumers should enjoy this benefit only when their ISP service is offered by AT&T. Indeed, AT&T has simply substituted

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<sup>24</sup> See, e.g., AT&T Sept. 20 *Ex Parte* at 8 (“AT&T did not commit to provide stand-alone DSL to EarthLink or any other ISP.”)

<sup>25</sup> See *id.*

<sup>26</sup> See EarthLink Sept. 27 *Ex Parte* at 2-5.

<sup>27</sup> See Letter from James C. Smith, Senior Vice President, SBC, to Kevin Martin, Chairman, FCC, WC Dkt. No. 05-65, at 3 (Oct. 31, 2005).

<sup>28</sup> See *id.*; cf. SBC-AT&T Merger Order, Appendix F (Special Access Conditions 2, 3, 4).

<sup>29</sup> SBC-AT&T Merger Order, Statement of Commissioner Michael J. Copps.

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one tied product (voice) for another (Internet access); this surely is antithetical to the stand-alone ADSL condition. Unless AT&T complies with the condition as imposed in the AT&T-SBC merger, however, only those consumers who subscribe to AT&T ISP services will reap the benefits of stand-alone ADSL not tied to the incumbent's voice service.

In order to ensure that all consumers receive the benefit of the ADSL Service commitment, consistent with its purpose, the proposed condition must be modified to include the clause "*including Internet Service Providers and their end-users,*" so that AT&T may not continue to exclude ISPs and their end users from the offer of stand-alone ADSL. The condition also must make clear that "ADSL service" includes any transmission speed so that consumers are not simply given the stand-alone option at, for example, the lowest ADSL transmission speed (e.g., 768 Kbps). EarthLink also urges the Commission to expressly state in any Order approving the merger that the inclusion of this clause is intended to clarify and affirm the nature of AT&T's ADSL obligation, including the commitments it made in the SBC-AT&T Merger Order.

These commitments also should supersede any prior contractual provisions in effect as of the Merger Closing Date that require the purchase of circuit switched voice grade telephone service as a prerequisite to obtaining ADSL service. Moreover, to avoid additional efforts by the Applicants to evade the letter and spirit of the stand-alone promise, the FCC should clarify that AT&T/BellSouth must, without charge or delay, migrate any existing ADSL customer who requests to subscribe to the stand-alone ADSL service, including Internet Service Providers and their end-users.

Finally, AT&T has offered no rationale for an entire year from the Merger Closing Date to pass before implementing its stand-alone ADSL commitment in the BellSouth region. In light of AT&T's history of non-compliance with existing stand-alone ADSL obligations, and the importance of all consumers enjoying as soon as possible what they were promised last year, there is no reason for the Commission to accept a 12-month ramp-up period within the BellSouth region. AT&T itself asserts that it already has substantial experience implementing a stand-alone offering throughout the former SBC region, pursuant to its SBC-AT&T Merger Order commitment.<sup>30</sup> Indeed, it certified that it met a similar commitment in every single state throughout the larger AT&T/SBC region in approximately seven months.<sup>31</sup> Thus, in the BellSouth region a three-month ramp up period is ample time and if there is any technical reason that this cannot be achieved, it should be made public now. A three-month implementation deadline would further the goal of promoting access to competitive broadband and new services such as competitive VoIP throughout the BellSouth region.

### **3. EarthLink Proposed Alternative Condition**<sup>32</sup>

#### **ADSL Service**

1. Within three months of the Merger Closing Date, AT&T/BellSouth will deploy and offer within the BellSouth in-region territory ADSL service to all ADSL-capable customers, including Internet Service Providers and their end-users, without requiring such customers to also purchase circuit switched voice grade telephone service. AT&T/BellSouth will continue to offer this service in each state for sixty months after the "implementation

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<sup>30</sup> See Letter from Jack Zinman, General Attorney, AT&T, to Marlene Dortch, Secretary, FCC, WC Docket Nos. 05-65, 06-74, at 3 (Oct. 3, 2006).

<sup>31</sup> See Letter from Jacqueline Flemming, AT&T, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-65 (June 30, 2006).

<sup>32</sup> For the Commission's convenience, a black-lined comparison to AT&T's proposed ADSL Service condition is included in Attachment 1.

date” in that state.<sup>33</sup> For purposes of this condition, the “implementation date” for a state shall be the date on which AT&T/BellSouth can offer this service to eighty percent of the ADSL-capable premises in BellSouth’s in-region territory in that state. Within twenty days after meeting the implementation date in a state, AT&T/BellSouth will file a letter with the Commission certifying to that effect. For purposes of these ADSL Service conditions, ADSL service shall include all transmission speeds.

2. AT&T/BellSouth will extend until sixty months after the Merger Closing Date the availability within AT&T’s in-region territory of ADSL service to all ADSL-capable customers, including Internet Service Providers and their end users, as described in the ADSL Service Merger Condition, set forth in Appendix F of the *SBC/AT&T Merger Order* (FCC 05-183).
3. These ADSL Service conditions supersede any conflicting contractual arrangements in effect as of the Merger Closing Date that require the purchase of circuit switched voice grade telephone service as a prerequisite to obtaining ADSL service. AT&T/BellSouth shall without charge or delay migrate any existing ADSL customer who requests to subscribe to the stand-alone ADSL service, including Internet Service Providers and their end-users.

**D. SPECIAL ACCESS**

**1. AT&T Proposal**

AT&T proposes five conditions related to its provision of special access services.<sup>34</sup> EarthLink’s comments at this time are limited to AT&T’s exclusion of AT&T Advanced Solutions, Inc. and the Ameritech Advanced Data Services Companies (doing business collectively as “ASI”) from the entities obligated to comply with the special access conditions.

**2. Analysis**

AT&T has provided no rationale for excluding from this condition any AT&T/BellSouth affiliate that offers special access services. Consequently, ASI, and any

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<sup>33</sup> After meeting the implementation date in each state, AT&T/BellSouth 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.

<sup>34</sup> *Ex Parte* Proposal at 3-5.

other AT&T/BellSouth affiliate that now or in the future offers special access services, must be subject to the condition. It is critical, however, that all of AT&T's special access services be subject to pro-competitive merger conditions, and that AT&T not be permitted to exclude certain important special access service elements by excluding certain of its data subsidiaries.

**3. EarthLink Proposed Alternative Condition**<sup>35</sup>

The footnote contained in the first clause of the first sentence of AT&T's proposed first special access condition must be deleted.

**E. PROMOTING BROADBAND SERVICE ACCESSIBILITY**

**1. AT&T Proposal**

AT&T proposes to offer broadband Internet access service to 100% of the residential living units within AT&T/BellSouth's in-region territory by December 31, 2007, with such service provided by wireline technologies to 85% of the units (the "Wireline Buildout Area") and by alternative technologies and operating agreements to the remaining 15% of the units.<sup>36</sup> Within the Wireline Buildout Area, AT&T promises to offer, for 30 months following the Merger Closing Date, high speed Internet access service for \$10 per month to retail customers who have not previously subscribed to AT&T's or BellSouth's ADSL service, and to give away free ADSL modems during 2007 to its dial-up subscribers who enter into a contract for at least one year of ADSL service.<sup>37</sup> Finally, AT&T proposes that at least 30% of the incremental deployment

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<sup>35</sup> For the Commission's convenience, a black-lined comparison to AT&T's proposed Special Access condition is included in Attachment 1.

<sup>36</sup> *Ex Parte* Proposal at 2.

<sup>37</sup> *Id.* at 2-3. AT&T would impose unspecified "shipping and handling" charges in connection with the modems. *Id.* at 2.

necessary to achieve the 85 percent commitment will occur in rural areas or low income living units.<sup>38</sup>

## 2. Analysis

EarthLink agrees that broadband service accessibility is a worthy goal, especially as consumers can be offered an array of competitive services. Yet, AT&T's proposals to "promote broadband accessibility" lack any discussion of how the specific proposals would further the public's interest in greater broadband service options. In fact, as proposed, the condition would appear to be designed solely to assist AT&T and BellSouth in securing additional subscribers and appear likely to undermine, not further, robust broadband services competition. Modifications are necessary if the Commission wants truly to promote the worthy goal of making broadband service more accessible.

AT&T's offer of ADSL service for \$10 per month to retail consumers who are not AT&T or BellSouth subscribers, while continuing to charge competitors from whom those subscribers currently obtain ADSL transmission service wholesale prices that are substantially more than \$10 per month, is a transparent ploy to have the Commission endorse AT&T's poaching of its competitors' customers. AT&T has not explained how its proposal to offer below-cost service to only those households in the AT&T/BellSouth territory who are not AT&T or BellSouth subscribers would further its purported commitment to promoting broadband access.<sup>39</sup> Indeed, AT&T has not bothered to

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<sup>38</sup> *Id.* at 2.

<sup>39</sup> AT&T's proposal also raises concerns regarding prohibited cross-subsidization under Section 254(k) of the Act ("A telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition"), 47 U.S.C. § 254(k), and long-standing precedent. The Commission repeatedly has made clear that cross-subsidies harm consumers and the public interest in competitive markets. See *In the Matter of Separation of Costs of Regulated Telephone Services from Costs of Nonregulated Activities*, Order on Reconsideration, 2 FCC Rcd. 6283, ¶ 142 (1987) (cross-subsidies both cause "direct harm ... to ratepayers" and can harm competitors by "distort[ing] price signals"); *In the*

explain whether its proposal has any real public interest benefits or is simply an expedient ploy to gain eleventh-hour merger approval. To the extent that any offer of below-cost service is permitted, it should be available to customers who are not subscribers of any ADSL service.

Likewise, consumers should also be freed from the obligation to take AT&T/BellSouth legacy voice services. Stand-alone service should be available to all consumers so that VoIP and other competitive services have the opportunity to flourish. Finally, consistent with the ADSL transmission service obligations, AT&T/BellSouth should be required expressly to offer such a 768 Kbps service at wholesale (at a rate lower than the proposed \$10 retail rate).

**3. EarthLink Proposed Alternative Condition<sup>40</sup>**

**Promoting Accessibility of Broadband Service**

3. AT&T/BellSouth will offer to retail consumers in the Wireline Buildout Area who have not previously subscribed to any ADSL service, without requiring such customers also to purchase circuit switched voice grade telephone service, broadband Internet access service at a speed of up to 768 Kbps at a monthly rate (exclusive of any applicable taxes and regulatory fees) of \$10 per month. Consistent with the ADSL Transmission Service condition herein, AT&T/BellSouth shall offer such a 768 Kbps service at wholesale.

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*Matter of Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace, Report and Order, 12 FCC Rcd. 15756, ¶ 103 (1997) (“Our efforts . . . are directed toward providing equal opportunities for entrants to compete, as well as endeavoring to ensure that a carrier’s ratepayers do not shoulder the investment risk of nonregulated activities.”).*

<sup>40</sup> For the Commission’s convenience, a black-lined comparison to AT&T’s proposed Broadband Forbearance condition is included in Attachment 1. EarthLink does not at this time propose any modification to AT&T’s first and second broadband accessibility commitments.

**F. FORBEARANCE**

**1. AT&T Proposal**

AT&T proposes that it commit not to seek a ruling from the Commission, through “a forbearance petition ... or any other petition,” to change the status of any facility currently offered as a loop or transport UNE pursuant to its statutory unbundling obligations under section 251(c)(3) of the Act.<sup>41</sup>

**2. Analysis**

EarthLink agrees as a general matter that any order approving the merger should include a forbearance condition since it makes little sense for AT&T to agree to conditions and then seek to undermine through regulatory changes. The condition as proposed by AT&T, however, does not go far enough to alleviate concerns that AT&T/BellSouth may try to avoid obligations and conditions (including those resulting from this proceeding), by seeking relief through a separate proceeding. Indeed, as proposed, AT&T’s commitment to forbear from seeking regulatory changes could allow it effectively to cancel its proposed conditions prematurely. Recent history makes clear the self-serving lengths to which AT&T will go in order to avoid commitments that it made to secure merger approval.<sup>42</sup>

AT&T has not explained why the forbearance condition does not include a commitment not to seek relief from all of its proposed conditions. Nor has AT&T explained why its proposed commitment is limited only to Section 251(c)(3) loop and

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<sup>41</sup> *Ex Parte* Proposal at 6.

<sup>42</sup> For example, AT&T has asserted that it is not required to comply with its SBC-AT&T Merger Order commitment to offer stand-alone ADSL service as a telecommunications service because, according to AT&T, that commitment conflicts with the Wireline Broadband Order. See AT&T Sept. 20 *Ex Parte*, at 9, 10. This assertion is incorrect. See EarthLink Sept. 27 *Ex Parte* at 6-7.

transport facilities. The proposed condition must be modified accordingly, and include a specific commitment not to seek relief from collocation and other Section 251 obligations. AT&T and BellSouth also should withdraw their pending broadband forbearance petitions.<sup>43</sup>

### **3. EarthLink Proposed Alternative Condition**<sup>44</sup>

#### **Forbearance**

For sixty months from the Merger Closing Date, AT&T/BellSouth will not seek a ruling, including through a forbearance petition under section 10 of the Communications Act (the “Act”), 47 U.S.C. § 160, or any other petition, altering the status of any facility being currently offered as a loop or transport UNE including any collocation arrangement, or of any current obligation under section 251 of the Act, or that would have the effect of altering any condition herein or in the *SBC-AT&T Merger Order*. On the Merger Closing Date, AT&T/BellSouth shall request the dismissal of the petitions for forbearance filed by AT&T Inc. and by BellSouth Corporation on July 13, 2006 and July 20, 2006, respectively, in WC Docket No. 06-125.

#### **G. NET NEUTRALITY**

##### **1. AT&T Proposal**

AT&T proposes that for 30 months following the Merger Closing Date, AT&T/BellSouth “will conduct business in a manner that comports with the principles set forth in” the Commission’s Net Neutrality Policy Statement.<sup>45</sup>

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<sup>43</sup> See Petition of AT&T Inc. for Forbearance under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services, WC Dkt. No. 06-125 (filed Jul. 13, 2006); Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. 160(c) From Title II and *Computer Inquiry* Rules with Respect to Its Broadband Services, WC Dkt. No. 06-125 (filed Jul. 20, 2006).

<sup>44</sup> For the Commission’s convenience, a black-lined comparison to AT&T’s proposed Forbearance condition is included in Attachment 1.

<sup>45</sup> *Ex Parte* Proposal at 6 (citing *Appropriate Framework for Broadband Access to the Internet Over Broadband Facilities*, CC Docket No. 02-33, Policy Statement, FCC 05-151 (released Sept. 23, 2005) (“Net Neutrality Policy Statement”).

## 2. Analysis

AT&T already has committed, in the SBC-AT&T Merger Order, to comply with the Net Neutrality Policy Statement.<sup>46</sup> The condition is intended to create an enforceable right to redress practices of blocking, service degradation and other anticompetitive conduct; however, it does not go far enough to accomplish these objectives because no established guidelines explain what constitutes a violation of the Net Neutrality Policy Statement. In order to make the proffered condition meaningful, the Commission must take this opportunity to clarify what constitutes a violation of its Net Neutrality Policy Statement, and provide concrete examples.<sup>47</sup>

EarthLink has provided the Commission with specific, glaring examples of proposed and effective conduct by the Applicants, including proffered contract language, that violates Net Neutrality principles.<sup>48</sup> Those provisions would give BellSouth complete discretion to bar otherwise legal “file sharing, peer to peer traffic, and video streaming” if BellSouth unilaterally decides that such activities constitute “excessive use of bandwidth.”<sup>49</sup> Likewise, BellSouth would restrict legitimate end user activity by stating that “End user products that use or incorporate the Service must be sold, supported, and billed by New Edge Networks.”<sup>50</sup>

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<sup>46</sup> SBC-AT&T Merger Order, Appendix F (“Effective on the Merger Closing Date, and continuing for two years thereafter, SBC/AT&T will conduct business in a manner that comports with the principles set forth in the FCC’s Policy Statement, issued September 23, 2005 (FCC 05-151).”).

<sup>47</sup> Although the Commission has indicated that it intends to address net neutrality in a separate Notice of Inquiry, it is imperative that the Commission provide clarification regarding net neutrality violations in any order approving the proposed AT&T/BellSouth merger. The condition otherwise carries no weight.

<sup>48</sup> See EarthLink Oct. 6 *Ex Parte* at 3-4; *Ex Parte* Presentation of EarthLink, Inc., WC Dkt. No. 06-74 (Oct. 5, 2006), at 3-4; *Ex Parte* Presentation of EarthLink, Inc., WC Dkt. No. 06-74 (Oct. 4, 2006), at 3-4; *Ex Parte* Presentation of EarthLink, Inc., WC Dkt. No. 06-74 (Sept. 29, 2006).

<sup>49</sup> See, e.g., EarthLink Oct. 6 *Ex Parte* at 3 (citing Draft BellSouth Wholesale Only Business DSL Agreement dated Jan. 19, 2006).

<sup>50</sup> *Id.* at 4 (citing Draft BellSouth Wholesale Only Business DSL Agreement dated Jan. 19, 2006).

To provide the necessary guidance, the Commission should find that the following practices constitute violations of the Net Neutrality Policy Statement.

- (1) Restrictions that have the effect of barring services to businesses or any class of customers (line of business restrictions).
- (2) Restrictions that have the effect of limiting resale.
- (3) Restrictions that have the effect of barring the use of broadband service to provide competitive services such as VoIP.
- (4) Failure to negotiate in good faith for broadband service contracts.
- (5) Restrictions on “excessive bandwidth,” unless stated in clear and objective terms, and is not more restrictive than necessary to support the carrier’s reasonable capacity constraints for service.
- (6) Requiring that end-users use and incorporate broadband if they are sold, supported and billed by a certain entity.

To the extent that any currently effective contract embodies these practices, it should be modified and superseded to reflect the Commission’s guidance.

By simply clarifying what constitutes a net neutrality violation and providing concrete examples of specific violations, the Commission will make it possible for the net neutrality condition to achieve its stated goals. Clarification of net neutrality principles also will help all sides of the industry by settling disputes likely to result in expensive litigation, and will reduce the Commission’s administrative burden of settling enforcement disputes that are likely to result from unresolved conflicts between carriers.

**H. DURATION OF CONDITIONS**

**1. AT&T Proposal**

AT&T proposes that all of its proposed conditions and commitments would apply for 30 months from the Merger Closing Date (except where a different period of time is expressly stated), and would sunset automatically thereafter.<sup>51</sup>

**2. Analysis**

Thirty months is not a sufficient period of time to protect against the competitive harms that will result from the proposed merger. Consistent with recent precedent,<sup>52</sup> the Conditions should remain in effect until sixty months after the Merger Closing Date, unless extended due to a violation by AT&T/BellSouth as stated herein regarding enforcement.

**3. EarthLink Proposed Alternative Condition**

For the avoidance of doubt, unless otherwise expressly stated to the contrary or extended due to a violation of these conditions, all conditions and commitments set forth below shall apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of sixty months from the Merger Closing Date.

**I. COMPLIANCE AND ENFORCEMENT**

**1. AT&T Proposal**

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<sup>51</sup> *Ex Parte* Proposal at 2.

<sup>52</sup> *Cf. Application for Consent to the Assignment and/or Transfer of Control of Licenses of Adelphia Commc'ns. Corp. to Time Warner Cable, Inc.; Adelphia Commc'ns Corp. to Comcast Corp; Comcast Corp to Time Warner Inc.; Time Warner Inc. to Comcast Corp.*, 21 FCC Rcd. 8203, Appendix B (2006) (imposing conditions for a period of six years from the Merger Closing Date); *see also, In the Matter of General Motors Corp. and Hughes Electronics Corp., And The News Corp. Ltd., For Authority to Transfer Control*, 19 FCC Rcd 473, Appendix F (2003) (imposing conditions for a period of six years from the Merger Closing Date).

AT&T proposes that it file an annual declaration of an officer of the corporation attesting to AT&T/BellSouth's material compliance with its proposed conditions.<sup>53</sup>

## **2. Analysis**

A glaring omission from the *Ex Parte* Proposal is any commitment, save for an annual declaration, to accept either oversight of AT&T's compliance with the conditions or the Commission's authority to enforce them. AT&T is silent about what records or information would support its declaration, or what penalties it might incur in the event it is unable to make such a declaration.

Because both Applicants have a long history of violating merger conditions<sup>54</sup> – suggesting that that they view the proposed conditions as an expedient route to Commission approval, and consider penalties a cost of doing business rather than as an incentive to comply – it is vital that the Commission follow its past practices when approving mergers between former Bell Operating Companies.<sup>55</sup> In order to ensure compliance and redress in the event of violation, the Commission must adopt comprehensive compliance and enforcement

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<sup>53</sup> *Ex Parte* Proposal at 6.

<sup>54</sup> See, e.g., *In the Matter of SBC Communications, Inc. Apparent Liability for Forfeiture, Forfeiture Order*, 17 FCC Rcd. 19923 (2002) (finding that SBC willfully and repeatedly violated a condition of the SBC-Ameritech Merger Order); *In the Matter of SBC Communications Inc. Apparent Liability for Forfeiture, Order on Review*, 17 FCC Rcd. 4043 (2002) (finding that SBC willfully and repeatedly violated the Commission's collocation rules and the terms of the SBC-Ameritech Merger Order).

<sup>55</sup> See *In re Application of GTE Corporation, and Bell Atlantic for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License, Memorandum Opinion and Order*, 15 FCC Rcd. 14032 (2000) ("GTE-Bell Atlantic Order"); *Application of Ameritech Corp., and SBC Communications Inc. for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules, Memorandum Opinion and Order*, 14 FCC Rcd. 14712 (1999) ("SBC-Ameritech Order"); *Application of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries, Memorandum Opinion and Order*, 12 FCC Rcd. 19985 (1997).

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mechanisms that will impair significantly AT&T/BellSouth's incentive to violate the Conditions.

Most critically, the Commission should underscore that it takes enforcement seriously and, as such, sanctions for violations will be clear, swift and designed to have a deterrent effect. Here, the Commission should extend the period of any Condition with which AT&T/BellSouth fails to comply during the term of the Condition. The period of the extension should be equal to the period of time during which AT&T/BellSouth failed to comply with the Condition. In addition, in order for these conditions to have a meaningful deterrent effect, the period should be extended for an additional six months for the first instance of AT&T/BellSouth's failure to comply, and for one year for each additional instance of AT&T/BellSouth's failure to comply. Similarly, if a failure to comply with one Condition has the effect of denying a benefit under another Condition, the other Condition should be extended for a comparable period. Any extension of the period of a Condition should be in addition to other penalties.

The enforcement process also must be swift. Although the Commission has accelerated docket procedures, given the unprecedented nature of the proposed merger, the likelihood that the communications arena will undergo fundamental and permanent changes as a result of their consummation, and the Applicants' past history of rule and merger condition violations, the Commission should adopt a process specifically for redress of merger violation complaints. Such a process should provide an expedited decision making process and also afford injunctive-type relief so that the harm to aggrieved parties is not exacerbated during the enforcement process. By affording immediate redress (subject to a "true-up" according to the outcome of the alleged

complaint), the Commission would take a much needed step to redressing the public interest harms caused by the merger condition violations.

The Commission also should require AT&T/BellSouth to establish a Compliance Program that requires AT&T/BellSouth, among other things, to appoint a senior corporate officer to oversee the implementation of, and compliance with, the Conditions, with additional oversight by AT&T/BellSouth's Board and Directors and Audit Committee; to require the compliance officer to provide periodic, detailed reports regarding AT&T/BellSouth's compliance and consult with Commission Staff and other appropriate individuals;<sup>56</sup> and to retain, at their own expense, an independent auditor to conduct an examination engagement regarding compliance and the sufficiency of internal controls designed to ensure compliance.<sup>57</sup> The independent auditor must have unfettered access to books, records, and operations as necessary to fulfill the audit requirements.<sup>58</sup> The report of the independent auditor, as well as the compliance reports of the merged companies, should be available and accessible to interested parties in order to help detect and redress violations.

The Commission also should expressly require AT&T/BellSouth to implement the conditions in good faith and in a reasonable and timely manner so that affected parties are able to obtain the full benefits of the conditions.

### **3. EarthLink Proposed Alternative Condition**

Complete text of EarthLink's proposed enforcement and compliance provisions is set forth in Attachment 1.

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<sup>56</sup> Cf. GTE-Bell Atlantic Order, ¶ 334; SBC-Ameritech Order, Appendix C.

<sup>57</sup> Cf. SBC-Ameritech Order, Appendix C, ¶ 66; Bell Atlantic-GTE Order, ¶ 336.

<sup>58</sup> Cf. Bell-Atlantic-GTE Order, ¶ 338.

**III. CONCLUSION**

For the foregoing reasons, EarthLink urges the Commission not to approve the application for the proposed merger of AT&T and BellSouth unless it is subject to the revised proposed Conditions set forth herein.

Respectfully submitted,



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October 24, 2006

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**ATTACHMENT 1**

**BLACK-LINE COMPARISON OF AT&T PROPOSED CONDITIONS AND  
EARTHLINK PROPOSED ALTERNATIVE CONDITIONS**

For the avoidance of doubt, unless otherwise expressly stated to the contrary or extended due to a violation of these conditions, all conditions and commitments set forth below shall ~~proposed in this letter would~~ apply in the AT&T/BellSouth in-region territory, as defined herein, for a period of sixty ~~thirty~~ months from the Merger Closing Date ~~and would automatically sunset thereafter.~~

**Promoting Accessibility of Broadband Service**

1. By December 31, 2007, AT&T/BellSouth<sup>1</sup> will offer broadband Internet access service (*i.e.*, Internet access service at speeds of 200 kbps in at least one direction) to 100 percent of the residential living units in the AT&T/BellSouth in-region territory.<sup>2</sup> To meet this commitment, AT&T/BellSouth will offer broadband Internet access services to at least 85 percent of such living units using wireline technologies (the “Wireline Buildout Area”). The merged entity will make available broadband Internet access service to the remaining living units using alternative technologies and operating arrangements, including but not limited to satellite and Wi-Max fixed wireless technologies. AT&T/BellSouth further commits that at least 30 percent of the incremental deployment after the Merger Closing Date necessary to achieve the Wireline Buildout Area commitment will be to rural areas or low income living units.<sup>3</sup>
2. AT&T/BellSouth will provide an ADSL modem without charge (except for shipping and handling) to residential subscribers within the Wireline Buildout Area who, during calendar year 2007, replace their AT&T/BellSouth dial-up Internet access service with AT&T/BellSouth’s ADSL service and elect a term plan for their ADSL service of twelve months or greater.
3. AT&T/BellSouth will offer to retail consumers in the Wireline Buildout Area who have not previously subscribed to any AT&T’s or BellSouth’s ADSL service, without requiring such customers also to purchase circuit switched voice grade telephone service, broadband Internet access service at a speed of up to 768 Kbps at a monthly rate (exclusive of any applicable taxes and regulatory fees) of \$10 per month. Consistent with the ADSL Transmission Service condition herein, AT&T/BellSouth shall offer such a 768 Kbps service at wholesale.

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<sup>1</sup> AT&T/BellSouth refers to AT&T Inc., BellSouth Corporation, and their affiliates that provide domestic wireline services, and their successors and assigns.

<sup>2</sup> As used herein, the AT&T/BellSouth “in-region territory” means the areas in which an AT&T or BellSouth operating company is the incumbent local exchange carrier, as defined in 47 U.S.C. § 251(h)(1)(A) and (B)(i).

<sup>3</sup> For purposes of this commitment, a low income living unit shall mean a living unit in AT&T/BellSouth’s in-region territory with an average annual income of less than ~~the~~ \$35,000, determined consistent with Census Bureau data, *see* California Public Utilities Code section 5890(j)(2) (as added by AB 2987) (defining low income households as those with annual incomes below \$35,000), and a rural area shall consist of the zones in AT&T/BellSouth’s in-region territory with the highest deaveraged UNE loop rates as established by the state commission consistent with the procedures set forth in section 51.507 of the Commission’s rules. 47 C.F.R. § 51.507

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**Public Safety and Disaster Recovery**

1. By June 1, 2007, AT&T will complete the steps necessary to allow it to make its disaster recovery capabilities available to facilitate restoration of service in BellSouth's in-region territory in the event of an extended service outage caused by a hurricane or other disaster.
2. In order to further promote public safety, within thirty days of the Merger Closing Date, AT&T/BLS will donate \$1 million to a section 501(c)(3) foundation or public entities for the purpose of promoting public safety.

UNEs

1. The AT&T and BellSouth incumbent LECs shall continue to offer and shall not seek any increase in State-approved rates for UNEs or collocation that are in effect as of the Merger Closing Date, and shall not seek forbearance from this condition. This condition shall not limit the ability of AT&T and BellSouth incumbent LECs and any other telecommunications carrier to agree voluntarily to any different UNE or collocation rates.
2. AT&T/BellSouth shall recalculate its wire center calculations for the number of business lines and fiber-based collocations and, for those that no longer meet the non-impairment thresholds established in 47 C.F.R. § 51.319(a) and (e), provide appropriate loop and transport access. In identifying wire centers in which there is no impairment pursuant to 47 C.F.R. § 51.319(a) and (e), the merged entity shall exclude the following: (i) fiber-based collocation arrangements established by AT&T or its affiliates; (ii) entities that do not operate (*i.e.*, own or manage the optronics on the fiber) their own fiber into and out of their own collocation arrangement but merely cross-connect to fiber-based collocation arrangements; and (iii) special access lines obtained by AT&T from BellSouth as of the day before the Merger Closing Date.
3. AT&T/BellSouth shall terminate all pending audits of compliance with the Commission's EELs eligibility criteria and shall not initiate any new audits.

\* AT&T and BellSouth's commitments herein, including its commitments to offer and not seek any rate increases for both UNEs and collocation, shall not be subject to change through a subsequent forbearance proceeding instituted by AT&T/BellSouth. See Forbearance Condition herein.

**Special Access**

1. AT&T/BellSouth affiliates that meet the definition of a Bell operating company in section 3(4)(A) of the Act (“AT&T/BellSouth BOCs”)<sup>4</sup> will implement, in the AT&T and BellSouth Service Areas,<sup>5</sup> the Service Quality Management Plan for Interstate Special Access Services (“the Plan”), similar to that set forth in the SBC/AT&T Merger Conditions. The AT&T/BellSouth BOCs shall provide the Commission with performance measurement results on a quarterly basis, which shall consist of data collected according to the performance measurements listed therein. Such reports shall be provided in an Excel spreadsheet format and shall be designed to demonstrate the AT&T/BellSouth BOCs’ monthly performance in delivering interstate special access services within each of the states in the AT&T and BellSouth Service Areas. These data shall be reported on an aggregated basis for interstate special access services delivered to (i) AT&T and BellSouth section 272(a) affiliates, (ii) their BOC and other affiliates, and (iii) non-affiliates.<sup>6</sup> The AT&T/BellSouth BOCs shall provide performance measurement results (broken down on a monthly basis) for each quarter to the Commission by the 45<sup>th</sup> day after the end of the quarter. The AT&T/BellSouth BOCs shall implement the Plan for the first full quarter following the Merger Closing Date. ~~This condition shall terminate on the earlier of (i) thirty months and 45 days after the beginning of the first full quarter following the Merger Closing Date (that is, when AT&T/BellSouth files its 10<sup>th</sup> quarterly report); or (ii) the effective date of a Commission order adopting performance measurement requirements for interstate special access services.~~
2. AT&T/BellSouth shall not increase the rates paid by existing customers (as of the Merger Closing Date) of DS1 and DS3 local private line services that it provides in the AT&T/BellSouth in-region territory pursuant to, or referenced in, TCG FCC Tariff No. 2 above their level as of the Merger Closing Date.
3. AT&T/BellSouth will not provide special access offerings to its wireline affiliates that are not available to other similarly situated special access customers on the same terms and conditions.
4. To ensure that AT&T/BellSouth may not provide special access offerings to its affiliates that are not available to other special access customers, before

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<sup>4</sup> ~~For purposes of these conditions, AT&T Advanced Solutions, Inc. and the Ameritech Advanced Data Services Companies, doing business collectively as “ASI,” shall not be considered a BOC.~~

<sup>5</sup> For purposes of this condition, “AT&T and BellSouth Service Areas” means the areas in which the AT&T and BellSouth operating company subsidiaries, as defined in 47 U.S.C. § 153(4)(A), are incumbent local exchange carriers.

<sup>6</sup> BOC data shall not include retail data.

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- AT&T/BellSouth provides a new or modified contract tariffed service under section 69.727(a) of the Commission's rules to its own section 272(a) affiliate(s), it will certify to the Commission that it provides service pursuant to that contract tariff to an unaffiliated customer other than Verizon Communications Inc., or its wireline affiliates. AT&T/BellSouth also will not unreasonably discriminate in favor of its affiliates in establishing the terms and conditions for grooming special access facilities.
5. AT&T/BellSouth shall not increase the rates in its interstate tariffs, including contract tariffs, for special access services that it provides in the AT&T/BellSouth in-region territory and that are set forth in tariffs on file at the Commission on the Merger Closing Date.

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**Wireless**

AT&T/BellSouth shall initiate ten new trials of broadband Internet access service using 2.3 GHz or 2.5 GHz by the end of 2007. At least five of those trials will be conducted in BellSouth's in-region territory.

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**Transit Service**

The AT&T and BellSouth incumbent LECs will not increase the rates paid by existing customers for their existing tandem transit service arrangements that the AT&T and BellSouth incumbent LECs provide in the AT&T/BellSouth in-region territory.<sup>7</sup>

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<sup>7</sup> Tandem transit service means tandem-switched transport service provided to an originating carrier in order to indirectly send intraLATA traffic subject to § 251(b)(5) of the Communications Act of 1934, as amended, to a terminating carrier, and includes tandem switching functionality and tandem switched transport functionality between an AT&T/BellSouth tandem switch location and the terminating carrier.

**ADSL Service**

1. Within ~~three twelve~~ months of the Merger Closing Date, AT&T/BellSouth will deploy and offer within the BellSouth in-region territory ADSL service to all ADSL-capable customers, including Internet Service Providers and their end-users, without requiring such customers to also purchase circuit switched voice grade telephone service. AT&T/BellSouth will continue to offer this service in each state for ~~sixty thirty~~ months after the “implementation date” in that state.<sup>8</sup> For purposes of this condition, the “implementation date” for a state shall be the date on which AT&T/BellSouth can offer this service to eighty percent of the ADSL-capable premises in BellSouth’s in-region territory in that state. Within twenty days after meeting the implementation date in a state, AT&T/BellSouth will file a letter with the Commission certifying to that effect. ~~In all events, this commitment will terminate no later than forty two months after the Merger Closing Date.~~ For purposes of these ADSL Service conditions, ADSL service shall include all transmission speeds.
2. AT&T/BellSouth will extend until sixty ~~thirty~~ months after the Merger Closing Date the availability within AT&T’s in-region territory of ADSL service to all ADSL-capable customers, including Internet Service Providers and their end users, as described in the ADSL Service Merger Condition, set forth in Appendix F of the *SBC/AT&T Merger Order* (FCC 05-183).
3. These ADSL Service conditions supersede any conflicting contractual arrangements in effect as of the Merger Closing Date that require the purchase of circuit switched voice grade telephone service as a prerequisite to obtaining ADSL service. AT&T/BellSouth shall without charge or delay migrate any existing ADSL customer who requests to subscribe to the stand-alone ADSL service, including Internet Service Providers and their end-users.

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<sup>8</sup> After meeting the implementation date in each state, AT&T/BellSouth 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.

**ADSL Transmission Service**

AT&T/BellSouth will offer to Internet service providers, without requiring Internet service providers or their end users also to purchase circuit switched voice grade telephone service, for their provision of broadband Internet access service to ADSL-capable retail customer premises, ADSL transmission services in the combined AT&T/BellSouth territory that are is functionally the same as the services AT&T/BellSouth offers within the combined AT&T/Bellsouth in-region territory,<sup>9</sup> as of the Merger Closing Date, without any line of business or resale restrictions.<sup>10</sup> Any such wholesale offering will be at prices comparable to those available in the overall market for wholesale broadband services, and in any event less than the rate charged by AT&T/BellSouth to retail customers for functionally similar services, including any promotional rate offered for a period of six months or longer.

Conform ADSL Transmission Service with Nondiscrimination Element of AT&T Proposed Special Access Condition

AT&T/BellSouth will not provide to its wireline affiliates ADSL or functionally similar transmission services that are not available to other similarly situated customers on the same terms and conditions.

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<sup>9</sup> For purposes of this ADSL Transmission Service condition, ADSL transmission services include services at the same transmission speeds as all services offered by AT&T/BellSouth. For example, this condition shall not be satisfied by an offer by AT&T/BellSouth solely of a 768 Kbps service but shall require AT&T/BellSouth to offer all transmission speeds.

<sup>10</sup> Such restrictions include but are not limited to restrictions on the types of customers that may be served (e.g., restrictions requiring service only to residential customers and not to business customers) or types of services that may not be offered (e.g., restriction against offering VoIP services).

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**Net Neutrality**

Effective on the Merger Closing Date, and continuing for sixty ~~thirty~~ months thereafter, AT&T/BellSouth will conduct business in a manner that comports with the principles set forth in the FCC's Policy Statement, issued September 23, 2005 (FCC 05-151).

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**Forbearance**

For ~~sixty~~ thirty months from the Merger Closing Date, AT&T/BellSouth will not seek a ruling, including through a forbearance petition under section 10 of the Communications Act (the "Act"), 47 U.S.C. § 160, or any other petition, altering the status of any facility being currently offered as a loop or transport UNE including any collocation arrangement, or of any current obligation under section 251-~~(e)(3)~~ of the Act, or that would have the effect of altering any condition herein or in the *SBC-AT&T Merger Order*. On the Merger Closing Date, AT&T/BellSouth shall request the dismissal of the petitions for forbearance filed by AT&T Inc. and by BellSouth Corporation on July 13, 2006 and July 20, 2006, respectively, in WC Docket No. 06-125.

**Enforcement**

(a) If the Chief of the Enforcement Bureau (Bureau) makes a determination that AT&T/BellSouth has, during the effective period of a Condition, failed to comply with that Condition, the effective period of that Condition shall be extended for a period equal to the period of time of non-compliance. In addition, the effective period of the condition shall be extended for an additional period of six months for the first instance of a failure to comply, and for an additional one year for each additional instance of a failure to comply, all such periods to run non-concurrently. If the failure to comply that causes the Chief of the Bureau to extend a Condition also has had the effect of denying a person or entity access to a facility or service or the intended benefit required to be provided under another of these Conditions, the Chief of the Bureau may, in his or her discretion, extend the period during which AT&T/BellSouth is required to comply with the other Condition for a comparable period. The extension of the period of any Condition shall be in addition to any fine, forfeiture, or other penalty or action taken in connection therewith. AT&T/BellSouth may appeal the Chief of the Bureau's decisions made pursuant to this paragraph to the Commission.

(b) The foregoing shall not abrogate, supersede, limit, or otherwise replace the Commission's powers under the Communications Act, or any rights of third parties.

**Annual Certification Compliance**

~~For three years following the Merger Closing Date, AT&T/BellSouth shall file annually a declaration by an officer of the corporation attesting that AT&T/BellSouth has substantially complied with the terms of these conditions in all material respects. The first declaration shall be filed 45 days following the one year anniversary of the Merger Closing Date, the second and third declaration shall be filed one and two years thereafter.~~

AT&T/BellSouth shall establish and maintain in effect a program of compliance (Compliance Program) as follows:

(a) AT&T/BellSouth shall appoint a senior corporate officer (Compliance Officer) to oversee AT&T/BellSouth's implementation of, and compliance with, these Conditions; to monitor AT&T/BellSouth's Compliance Program and progress toward meeting the deadlines specified herein; to provide periodic reports regarding AT&T/BellSouth's compliance as required by these Conditions; and to consult with the Chief of the Bureau and other appropriate individuals as the Chief of the Bureau deems necessary on an ongoing basis regarding AT&T/BellSouth's compliance with these Conditions. The Compliance Officer shall provide copies of all notices AT&T/BellSouth provides to the Commission or a state commission to the independent auditor required under paragraph (d) below and shall consult with the independent auditor regarding AT&T/BellSouth's progress in meeting these Conditions. The audit committee of AT&T/BellSouth's Board of Directors shall oversee the Compliance Officer's fulfillment of these responsibilities. The requirements of this paragraph shall remain in effect until all other Conditions have expired.

(b) Not later than 60 days after the Merger Closing Date, AT&T/BellSouth shall submit to the Bureau for review and comment a plan for compliance with these Conditions. The compliance plan shall be afforded confidential treatment in accordance with the Commission's normal processes and procedures. A letter providing notice of the filing shall be filed the same day with the Secretary of the Commission for the public record.

(c) On each anniversary of the Merger Closing Date, for so long as any Condition shall remain in effect and for one year thereafter, AT&T/BellSouth shall submit to the Chief of the Bureau and file for the public record (except for materials for which confidential treatment is requested) an annual compliance report detailing AT&T/BellSouth's compliance with these Conditions during the preceding twelve months. The annual compliance report shall address AT&T/BellSouth's compliance with these Conditions and the sufficiency of AT&T/BellSouth's internal controls for complying, shall include a discussion of the efficiencies realized as a result of the merger, and shall be prepared in a format substantially similar, in relevant respects, to the format of the independent auditor's section of the audit report described in paragraph (d), below.

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(d) AT&T/BellSouth shall, at its own expense, annually engage an independent auditor (Auditor) to conduct an examination engagement resulting in a positive opinion (with exceptions noted) regarding AT&T/BellSouth's compliance with all these Conditions and the sufficiency of AT&T/BellSouth's internal controls designed to ensure compliance with such Conditions. AT&T and BellSouth shall jointly engage an Auditor for this purpose prior to the Merger Closing Date. The engagement shall be supervised by persons licensed to provide public accounting services and shall be conducted in accordance with the relevant standards of the AICPA. The Auditor shall be acceptable to the Chief of the Bureau and shall not have been instrumental during the prior 24 months in designing all or substantially all of the systems and processes under review in the audit, viewed as a whole. An Auditor's report shall be filed for each calendar year in which AT&T/BellSouth is subject to obligations under this Order, provided that no report shall be due if that report would cover a portion of a calendar year that is less than 60 days. In that event, the period of less than 60 days shall be audited in the report covering the subsequent calendar year, if any. The Auditor's report (which may consist of multiple reports) shall be prepared and submitted as follows.

(i) Not later than 45 days after the Merger Closing Date, the Auditor shall submit a preliminary audit program, including the proposed scope of the audit and the extent of compliance and substantive testing, to the Bureau. The preliminary audit program shall be afforded confidential treatment in accordance with the Commission's regular processes and procedures. The Auditor shall consult with the Chief of the Bureau and AT&T/BellSouth regarding changes to the preliminary audit program, but approval by the Bureau shall not be required.

(ii) During the course of the audit, the Auditor shall inform the Bureau of any revisions to the audit program; notify the Bureau of any meetings with AT&T/BellSouth in which audit findings are discussed; and consult with the Bureau regarding any accounting or rule interpretations necessary to complete the audit. The Auditor shall notify AT&T/BellSouth of any consultation with the Bureau regarding accounting or rule interpretations.

(iii) The Auditor shall have access to books, records, and operations of AT&T/BellSouth and its affiliates that are under the control of AT&T/BellSouth and are necessary to fulfill the audit requirements of this Condition. The Auditor shall notify the Compliance Officer of any inability to obtain such access. The Auditor may notify the Bureau if access is not timely provided after notification to the Compliance Officer.

(iv) The Auditor may verify AT&T/BellSouth's compliance with these Conditions through contacts with the Commission, state commissions, or AT&T/BellSouth's wholesale customers, as appropriate.

(v) The Auditor may consult with AT&T/BellSouth's Compliance Officer concerning matters that arise during the course of the year regarding these Conditions. If

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necessary after such consultation, the Auditor may notify the Bureau of these matters. No later than September 1 (or the first business day thereafter) of the year following the calendar year covered by the audit, the Auditor shall submit its final audit report for the preceding year to the Bureau. The Auditor's report shall be made publicly available.

(vi) Each Auditor's report shall include a discussion of the scope of the work conducted; a statement regarding AT&T/BellSouth's compliance or non-compliance with these Conditions; a statement regarding the sufficiency of AT&T/BellSouth's internal controls for complying with these Conditions; a statement regarding the accuracy of AT&T/BellSouth's annual compliance report for the year covered by the audit; and a description of any limitations imposed on the Auditor in the course of its review by AT&T/BellSouth or other circumstances that might affect the Auditor's opinion.

(vii) For 24 months following submission of the final audit report, the Commission and state commissions in the AT&T/BellSouth States shall have access to the working papers and supporting materials of the Auditor at a location in Washington, D.C. that is selected by AT&T/BellSouth and the Auditor. Copying of the working papers and supporting materials by the Bureau shall be allowed but shall be limited to copies required to verify compliance with and enforce these Conditions. Any copies made by the Bureau shall be returned to AT&T/BellSouth by the Bureau. The Bureau's review of the working papers and supporting materials shall be kept confidential pursuant to the Commission's rules and procedures. Prior to obtaining access to the working papers and supporting materials, state commissions shall enter into a protective agreement with the Chief of the Bureau and AT&T/BellSouth under which the state commission's review, including any notes, shall be kept confidential.

(viii) Not later than 60 days following submission of the final audit report, AT&T/BellSouth and the Bureau shall meet and confer regarding changes to the detailed audit program for the subsequent year's audit.