

October 24, 2006

Chairman Kevin Martin
Commissioner Deborah Taylor Tate
Commissioner Michael Copps
Commissioner Robert McDowell
Commissioner Jonathan Adelstein
Federal Communications Commission
The Portals
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 06-74, Opposition to the AT&T / BellSouth merger

Comments of Raw Bandwidth Communications, Inc.

I am Michael Durkin, Founder and President of Raw Bandwidth Communications, Inc., an independent Internet Service Provider based in San Bruno and San Francisco, California. My company presently offers ADSL Internet access utilizing the wholesale DSL Transport offering of AT&T Advanced Solutions, Inc. and predecessors, in the Greater San Francisco Bay Area, combined with our own upstream Internet bandwidth and services, and has done so continuously since July 1999.

I write in opposition to approval of the merger between AT&T and Bellsouth presently being considered by the Commission in WC Docket No. 06-74, and write in response to the invitation for further public comment issued by the Commission on October 13th and 16th, 2006. While I believe there are broader issues with respect to competition being raised by other organizations submitting comments in opposition to this merger with which I also agree, I'm focusing my comments on the area I'm personally most familiar with, namely AT&T's provision of DSL Transport to independent ISPs, and how AT&T's proposed "concessions" fit in with us, as well as their offering of standalone ADSL through their affiliated retail ISP, AT&T Internet.

Introduction

This Commission should not be hoodwinked into accepting AT&T's "concessions" with respect to ADSL as being sufficient to allow this merger. In fact, they are hollow, and the proof of that can be found in the very recent history, by looking at AT&T's self-serving interpretation and implementation of the ADSL-related merger conditions they accepted in the SBC / AT&T merger, which serve as the basis for proposed conditions related to ADSL in the instantly considered merger. In particular,

- a) AT&T Interprets the SBC / AT&T merger condition as NOT requiring an offering of standalone ADSL on a wholesale basis to independent ISPs, even when AT&T is otherwise obligated to provide wholesale DSL Transport to an independent ISP, and does not offer it to independent ISPs in California where the standalone ADSL merger condition has already taken effect. We should assume they will treat standalone ADSL the same under the “concessions” offered in the instant merger to do so and to continue offering wholesale DSL Transport to independent ISPs generally. They reserve the standalone DSL service only for their own ISP, which harms independent ISPs, harms the consumers that would like to choose an independent, and harms advances independent ISPs are pioneering in the use of aggregation of multiple ADSL lines for faster speeds *today*.
- b) AT&T has done precisely what Commissioner Copps feared when approving the SBC / AT&T merger by offering standalone ADSL at retail at price points that significantly exceed the cost of line-shared ADSL Internet service plus an active POTS phone line; there is NO cost savings available for retail residential consumers from the standalone ADSL AT&T offers only through their affiliate ISP in California.

This Commission should deny the AT&T / Bellsouth merger, and not reconsider it unless and until AT&T has fully complied with the full spirit of all of the SBC / AT&T merger conditions, including making standalone ADSL available to independent ISPs on a nondiscriminatory basis, as well as ensuring that the cost differential between standalone ADSL and lineshared ADSL (excluding the separate POTS charges for lineshared service) is a reasonable amount and less than the cost of a full POTS phone line, no more than \$5-6/mo differential, on both a retail and wholesale basis.

Further, there are problems even with additional proposed DSL-related merger conditions, for instance the retail \$10/mo 768Kbps service is not accompanied by any assurance that ISP’s purchasing wholesale ADSL Transport would receive a commensurate reduction in the wholesale rate. Presently, independent ISPs pay more for a wholesale DSL Transport circuit than this rate, and must still add ATM backhaul, upstream Internet bandwidth, email and web server, support, and other costs before delivering a retail product. Additionally, AT&T’s wholesale contracts charge a downgrade fee of \$50, even though their retail customers typically don’t get charged such a fee, and independent ISPs typically have customers on at minimum an up to 1.5Mbps plan¹ for the loop (even when the end customer cannot achieve the full speed). Should AT&T ASI begin offering a wholesale 768Kbps service, it must be possible for independent ISPs to downgrade customers to this plan without charge in addition to receiving a lower wholesale loop cost. In my view, the wholesale downgrade fee is

¹ Even though some customer’s lines cannot achieve the 1.5Mbps speed, the “up to 1.5Mbps” plan is the minimum plan available for new orders, as the “up to 384Kbps” plan is grandfathered and has not been orderable for new customers for quite some time now.

fundamentally unfair particularly since AT&T does not charge it at retail and should be eliminated in all cases.

AT&T does not feel obligated by past merger conditions requiring the offering of “standalone” ADSL to offer that service to Independent ISPs even when they otherwise are obligated to sell DSL Transport to independents

In approving the SBC / AT&T merger conditions, this Commission required that AT&T offer standalone ADSL—that is ADSL on a dry copper loop without purchasing underlying POTS voice service (as opposed to “lineshared” ADSL on top of a POTS service) – beginning by November of this year, and for a period of two years thereafter. However in the state of California, in seeking approval for the same merger, SBC / AT&T accepted an earlier commitment of availability by the end of June 2006². Accordingly, by the end of June 2006, AT&T was to have offered standalone ADSL in the state of California, and by mid-June 2006, AT&T has been offering such a service, *but* only through their own affiliated retail ISP, AT&T Internet Services. They do NOT offer standalone DSL Transport to independent ISPs, despite the California PUC hearing during the SBC / AT&T merger debate from independent ISPs and the California ISP Association supporting a provision requiring standalone ADSL, and citing support from independents for such a condition when discussing the merger conditions in the CPUC’s order approving the earlier merger.

Upon hearing reports of standalone ADSL being offered by AT&T’s affiliate ISP in June, I contacted Raw Bandwidth’s account team at AT&T by email on June 20, 2006 to inquire about how we could order standalone DSL, since no information had come out through the normal announcement channels about such an offering. On July 5, 2006, a member of our account team wrote back, indicating simply that there was nothing available to independent ISPs and “If anything changes, I will definitely let you know.”

On July 13, 2006, I sent email to Elizebeth Hansen in her capacity as the “ISP Ombudsperson” at AT&T, a position that arose out of a settlement in a broad complaint case about DSL that the California ISP Association brought before the California PUC in mid-2001 (settled in early 2003), to serve as a definitive line of communication with SBC/AT&T for resolving complaints when the day-to-day channels fail. It is fair to consider everything that comes from the Ombudsperson at AT&T to be the position of the Company, and based on my experience with frequent communications and the responses I receive from her, I believe she consults with AT&T’s inside legal counsel whenever necessary to respond to a question or complaint I make to her. Ms. Hansen responded to me on July 14th, to which I followed up later that same day, and to which she responded on July 17th, unequivocally stating that AT&T’s interpretation is that they are in compliance with California PUC’s merger requirements. Because the CPUC’s merger requirements defer to the same standalone ADSL requirement of the FCC’s merger approval, but for an earlier implementation date requirement, and the June 2006 deadline in California had already passed with AT&T not offering standalone DSL to independent ISPs and expressing no imminent intent to do so, it follows that AT&T does

² Which, to my understanding, was a further concession proposed by AT&T at the state commission.

not feel that they have any obligation to provide standalone ADSL to independent ISPs under the FCC's merger conditions, even to the extent they are generally obligated to offer wholesale DSL Transport to independent ISPs by existing contracts³ or legal settlements, nor if they voluntarily sell DSL Transport to independent ISP's in the future. It sounds like even though AT&T is offering to commit to offer wholesale DSL to independent ISPs for at least thirty months from the merger closing date as a "concession" in the instant merger, that they will continue to interpret the conditions as not requiring them to provide standalone ADSL to independents ISPs. A true and correct copy of the last emailed response from the ISP Ombudsperson at AT&T is attached hereto as Attachment #1. This email contains the content of the earlier emails exchanged in the quoted material therein for context.

The communications I've had with AT&T regarding the availability of standalone ADSL for independent ISPs, and my experience dealing with them in general, suggests that they have no intention of offering standalone ADSL to independent ISPs.

Lack of standalone ADSL for independent ISPs hinders competition as well as innovation of available services, and harms retail consumers

The lack of standalone ADSL hinders competition from independent ISPs, and harms retail consumers. A significant portion of our customer base, possibly a third or more, only maintain a POTS telephone line because of the requirement of lineshared ADSL service to have one as the base for their ADSL. They would drop that POTS service given the opportunity, either because they use a cell phone or VoIP for their voice telephony, using their POTS line if at all only incidentally "because it's there", but AT&T ASI will not sell us a standalone product at wholesale. In some cases, business customers use competitive voice providers, often via DS1 access, for all of their voice and fax communications, and maintain a single AT&T POTS line solely to lineshare with our ADSL service because AT&T will not provide DSL Transport lineshared with voice competitors' POTS lines. I have even been contacted by several potential customers since the June 2006 date when we expected to have had standalone ADSL available to us, where the consumer has declined ADSL service entirely unless and until they can get standalone ADSL.

One area where the lack of standalone ADSL directly hinders the advancement of available services can be seen in a service which we offer on a limited basis, but would very much like to roll out on a much wider basis. That is the aggregation of multiple ADSL circuits into much faster service levels than can be achieved with a single line with the current network today, or in order to achieve faster speeds when a location is too far to do so over a single line due to technical limitations.

³ Raw Bandwidth has a contract through June 2009, and other ISPs have entered into the same 4-year agreement with later effective dates and so will expire after ours. Our contract predates the standalone ADSL requirement from the SBC / AT&T merger and says nothing about standalone ADSL. Our efforts to negotiate wholesale DSL contracts with ASI in other areas were completely fruitless and frustrating, and got absolutely nowhere, despite AT&T/SBC's obligations to negotiate in good faith under FCC 02-340; we had no real choice but to take this contract as presented by SBC.

The fastest speed wholesale ADSL circuit that AT&T ASI offers today is 3-6Mbps download speeds with a 512-768Kbps upload, but it is possible to use multiple lines in a load-sharing configuration with the right routing equipment on each end to achieve faster speeds. My company does this today with a few business customers to achieve 12M/1.5M service, and at least four lines can easily be combined for 24M/3M service, possibly as many as 6-8 lines, and all the while doing true load sharing of public static IP addresses and able to achieve the full speed of the aggregated lines with a single TCP/IP stream⁴. I know of one other ISP that also offers this service. But we have not yet published this on our website, nor have we rolled out a residential offering... I had been planning to do so since earlier in the year, and was eagerly looking forward to standalone DSL because, for obvious reasons, it would be a great asset to this sort of aggregated line service. As it stands, our customers have to install separate active POTS voice lines with separate telephone numbers to get this service, even if they have no need whatsoever for traditional POTS voice service at their location, or no need for more than a single voice line, and they pay more than standalone service should cost.

The same goes for achieving faster speeds when distance from the Central Office limits availability of faster speeds. For instance, a customer who is 14Kft from the serving CO with no remote terminal available, and who is fortunate to achieve 1.5M/384K out of a single line, can get 3M/768K or even 6M/1.5M out of a service by using 2-4 lines combined, a vast improvement. But today, they'd have to purchase 2-4 POTS lines to do this with us. This is a service that is feasible immediately, virtually everywhere that ADSL is available, but is being hindered by the requirements to purchase the underlying POTS lines and for the independent ISPs like us to use lineshared wholesale ADSL circuits.

The lack of availability of standalone ADSL to independent ISP's by AT&T harms retail consumers by making it more difficult to choose an independent ISP's services, and hinders the ability of independent ISPs to leverage multiple lines into faster services by aggregating the lines. In my view, AT&T is willingly violating the AT&T / SBC merger requirement to offer standalone DSL by not offering it to independent ISPs.

Lack of any sort of price controls, and other self-serving interpretations of the merger requirements for standalone ADSL by AT&T, make it a hollow concession even for the retail consumer

In response to FCC 05-183, the order approving the SBC / AT&T merger in November 2005, Commissioner Copps wrote with regard to standalone ADSL in his concurring statement:

And I hope we will have the good sense to find it anti-competitive if the price for stand-alone DSL is

⁴ This is contrasted to multi-WAN NAT routers which use different IP addresses on each line, even from different ISPs if desired, and which cannot aggregate the lines such that they achieve true packet-by-packet load balancing. Instead, each TCP/IP stream gets assigned to a different WAN connection by such a router, they cannot increase the speed of a single TCP/IP stream beyond the speed of a single line, and some lines will receive more of the traffic, even max out one line with available capacity in others going unused.

not significantly less than the price for bundled voice and DSL.

I suspected at the time this statement was made that the odds were Commissioner Capps' worry would be proved right, and that is has been. Aside from making it difficult to find information about standalone ADSL on the www.att.com website⁵, and otherwise difficult to find a representative familiar with and capable of signing up the consumer, AT&T Internet's retail pricing for standalone ADSL is actually more expensive than it costs to get a residential POTS line with lineshared ADSL in California.

In California, a measured residential POTS line from AT&T runs about \$6/mo quoted rate, and when adding in the cost of the EUCL and other unavoidable taxes and fees, clocks in at about \$11.50/mo. Adding 1.5Mbps ADSL to that phone line on a lineshared basis today costs \$19.95, every month indefinitely, for a total cost of about \$31.45/mo for 1.5Mbps ADSL through AT&T Internet with POTS voice service.

The cost of standalone ADSL from AT&T Internet at the same speed? I phoned AT&T, because the information about standalone ADSL at retail seems to have disappeared from their website. I was told that Express upto 1.5Mbps service on a standalone basis is \$44.99/mo for 6 months, then \$49.95/mo thereafter. So by paying about \$18/mo MORE⁶, consumers can have the privilege of dropping their voice telephone line. The AT&T representative I was speaking with even volunteered that "it's much cheaper" if I were to get a voice phone line to put the ADSL on top of. Heck, I could get two phone lines plus lineshared ADSL for less money than I can get a standalone ADSL service from AT&T Internet.

Additionally, AT&T has made standalone ADSL available at retail for their 1.5Mbps and 3Mbps speed plans only. They have excluded standalone DSL at the 6Mbps tier entirely, despite offering that speed on lineshared plans. When I spoke with AT&T, the representative even commented along the lines of "we don't offer 6Mbps standalone for VoIP; and that's what that [standalone ADSL] is for, VoIP". Not offering the highest speeds available for someone using VoIP seems backwards to me, unless the intent is to stifle competition and pervert the standalone ADSL merger condition.

⁵ I had found information on AT&T's website in June about standalone ADSL, but while composing this letter, I could not find any information at all on their website even after spending an hour looking, and had to call AT&T to confirm the standalone prices. I believe standalone DSL information may have been removed from their website with recent price changes to their line-shared service. When phoning AT&T Internet services, I was given the runaround by the "sales" department, told that I had to call a back at another number and that they could not transfer me. I did call the number given, and wound up back to the same department! I was then told I had to call back and ask for "support". I did that and while wading through voice response prompts that all had to do with existing ADSL service with them that I didn't have, I finally started demanding an operator into the voice response system until I was transferred to a person. That person then transferred me to another person who was able to give me information about standalone DSL. Why is "support" handling standalone ADSL sales, when it is very easy to get to the sales department to order lineshared ADSL from them?

⁶ The cost for the 3Mbps standalone service is similarly out of whack--\$54.99 at retail for 6 months, then \$59.95/month. That same plan on a lineshared basis is \$24.99/mo, plus the approximately \$11.50 for a phone line, for about \$36.50/mo. In the case of this plan, closer to \$23/mo MORE for the privilege of dropping the POTS phone line.

AT&T seems to have taken their obligation to offer standalone ADSL made in the SBC / AT&T merger, and gutted it to suit their desire to bolster their sale of POTS lines... business as usual... hardly the spirit of the obligation. As it stands now, the standalone DSL merger requirement in the SBC / AT&T merger might as well not exist.

Assurance of offering of wholesale ADSL Transmission Service is virtually meaningless and may be used against independent ISPs

In their proposed “concessions”, AT&T offers to make available to independent Internet service providers ADSL transmission service (aka wholesale DSL Transport) “that is functionally the same as the service AT&T offered within the AT&T in-region territory as of the Merger Closing Date.” However, as I previously discussed, AT&T does not offer standalone ADSL to independent ISPs, which I argue is a self-serving creative interpretation of the SBC / AT&T merger conditions that goes against the clear spirit of the provision. Should this Commission approve the instant merger with the condition AT&T has suggested here, AT&T may later argue that this “concession” presented in the AT&T / Bellsouth merger should be interpreted as approval of the current state of affairs where standalone DSL to is not made available on a wholesale basis to independent ISPs.

As part of the same “concession”, AT&T offers that “Such wholesale offering [to independent ISPs] will be at prices comparable to those available in the overall market for wholesale broadband services.” Why are they not offering to make DSL Transport available to independent ISPs a price points that are just and reasonable, as well as competitive, when compared to what they offer at retail through their own ISP, especially considering the additional costs that must be added by the independent ISP before completing a retail offering? Are independent ISPs supposed to thank AT&T when they take our remaining dialup customers with a \$10/mo retail price point for 768Kbps service that is impossible for us to compete with due to wholesale costs? And why will they not ensure independent ISPs that we will not see price increases from the wholesale rates we have today?

The Commission should impose meaningful upward wholesale price controls, and at least with respect to provisions related to ADSL and broadband, the provisions should not sunset in order to give independent ISPs longer term certainty with which to grow their businesses.

Conclusion

The Commission should deny the merger between AT&T and Bellsouth. AT&T has already demonstrated with its self-serving interpretation of the merger conditions of the SBC / AT&T merger that was approved just a year ago that any “concessions” they offer will be interpreted by AT&T in the manner most offensive to competition, fair play, and the spirit of the deal. They have demonstrated a clear refusal to offer standalone ADSL to independent ISPs even when otherwise obligated to sell DSL Transport, and

they have priced their affiliated ISP's retail standalone DSL service at a price point that exceeds the cost of a residential POTS phone line and lineshared ADSL service at the same speed as the standalone offering. They also have not made the fastest ADSL speeds available on a standalone basis.

To the extent this Commission continues to consider this merger, it should first ensure that independent ISPs receive access to standalone DSL on all service plans immediately, and that independent ISPs have long-term and strong guarantees of continued availability of wholesale ADSL service from AT&T, wholesale access to technologies deployed that serve to replace ADSL in the future, and wholesale access at price points that reflect a meaningful discount off their retail broadband service offerings of equivalent speeds, particularly deserving because wholesale DSL Transport is a subset of the components AT&T requires for their retail service offering. The Commission must also ensure that standalone ADSL is offered both at wholesale and retail price points that represent a significant discount off lineshared ADSL plus a telephone line, at a price not more than \$5-6/mo more than lineshared ADSL before the cost of the underlying full POTS service is added. Additionally, I suggest that the conditions specific to ADSL and broadband should not sunset, but should be imposed indefinitely.

Thank you for your consideration.

Respectfully submitted,

_____/s/_____
Michael S. Durkin
President

Raw Bandwidth Communications, Inc.
P.O. Box 1305
San Bruno, CA 94066

Phone (650) 802-8006
Fax (650) 475-8429
mdurkin@rawbandwidth.com

October 24, 2006

Attachment #1

Main Identity

From: "SBCISP" <sbcisip@att.com>
To: "Mike Durkin" <mdurkin@rawbw.com>; "SBCISP" <sbcisip@att.com>
Cc: "VAWTER, LARRY W (PB)" <lv2571@att.com>
Sent: Monday, July 17, 2006 4:57 PM
Subject: RE: standalone/dry-line ADSL

AT&T has complied with the California PUC's merger condition related to standalone DSL.

Thank you,
 Elizebeth Hansen
 ISP West Ombudsperson
 AT&T California

-----Original Message-----

From: Mike Durkin [mailto:mdurkin@rawbw.com]
 Sent: Friday, July 14, 2006 6:17 PM
 To: mdurkin@rawbw.com; SBCISP
 Cc: VAWTER, LARRY W (PB)
 Subject: RE: standalone/dry-line ADSL

Elizebeth,

> My response is the same as Larry's. AT&T Advanced Solutions does not
 > have a generally available standalone DSL transport product for
 > unaffiliated ISPs. If anything changes, I too will definitely let you
 > know.

I'd really like specifically clarification as to whether AT&T thinks it's in compliance with the merger decisions without offering standalone DSL to independent ISPs. The deadline for California was 6/30/06, and that's past already. AT&T has something available only through its own affiliate ISP, and I don't think ASI has any real intention of making standalone DSL available to independents.

thanks, Mike

>
 > Thank you,
 > Elizebeth Hansen
 > ISP West Ombudsperson
 > AT&T California
 >
 > -----Original Message-----

> From: Mike Durkin [mailto:mdurkin@rawbw.com]
 > Sent: Thursday, July 13, 2006 3:00 PM
 > To: SBCISP
 > Subject: standalone/dry-line ADSL
 >
 >
 > Elizebeth,
 >
 > I received the email below in response to my questions to my
 > account team about dry-line/standalone DSL (see my original
 > email quoted in Larry's reply below).
 >
 > Now I'm escalating to you, since I think AT&T et al. has no intention
 > of providing dryline/standalone ADSL to independents, and I believe
 > refusing to do so violates the merger agreements. Please let me
 > know AT&T/SBC's and ASI's official response and position with respect
 > to providing dry-line/standalone DSL to independent ISPs.
 >
 > thanks, Mike

>
 >
 >> From lv2571@att.com Wed Jul 5 12:48:39 2006
 >> Subject: RE: dry-line ADSL
 >> Date: Wed, 5 Jul 2006 10:51:15 -0700
 >> In-Reply-To: <200606210102.k5L12avi073524@shell.rawbw.com>
 >> Thread-Topic: dry-line ADSL
 >> Thread-Index: AcaUznSBpOszdrUiQi2mWTTYgsM7BALjN2SQ
 >> From: "VAWTER, LARRY W \ (PB\)" <lv2571@att.com>
 >> To: "Mike Durkin" <mdurkin@rawbw.com>
 >>
 >>
 >> Mike,
 >>
 >> After checking internally, AT&T Advanced Solutions does not have a
 >> generally available standalone DSL transport product for
 >> unaffiliated
 >> ISPs. If anything changes, I will definitely let you know.
 >>
 >> Larry Vawter
 >> Technical Sales Executive II
 >> AT&T Global Wholesale Markets
 >> Office: 415-774-1217
 >> Fax: 415-765-9984
 >> E Mail: lv2571@att.com
 >>
 >>
 >> -----Original Message-----
 >> From: Mike Durkin [mailto:mdurkin@rawbw.com]
 >> Sent: Tuesday, June 20, 2006 6:03 PM
 >> To: VAWTER, LARRY W (PB); BAXTER, TEG R (ASI-AIT)
 >> Subject: dry-line ADSL

>>
>>
>> Teg and Larry,
>>
>> As best as I can see, no announcement has been made for wholesale
>> dry-line ADSL, yet SBC Internet is already offering this service
>> at retail. When are we going to get information on and the ability
>> to offer this?
>>
>> I get the feeling that AT&T may intend to withhold this from
> independent
>> ISPs. I just reviewed both the FCC and CPUC merger orders, and the
>> letter AT&T/SBC sent to the FCC as the conclusion of the FCC merger
> case
>> was nearing summarizing the conditions it was agreeing to, and I
don't
>> see
>> any basis for ASI not offering dry-line ADSL to all of its
customers.
>>
>> thanks, Mike
>>
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>