

December 27, 2006

**VIA ECFS**

Ms. Marlene H. Dortch  
 Secretary  
 Federal Communications Commission  
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 Washington, D.C. 20554

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**Re: *Ex Parte* - WC Docket No. 06-74  
 In the Matter of AT&T Inc. and BellSouth Corporation Applications for  
 Transfer of Control**

Dear Ms. Dortch:

NetZero, Inc. (“NetZero”), a subsidiary of United Online, Inc. (“United Online”), through its undersigned counsel, files this *ex parte* letter concerning the proposed merger of AT&T Inc. (“AT&T”) and BellSouth Corporation (“BellSouth”) (together, “Applicants”). NetZero previously filed comments highlighting the deficiencies associated with the Applicants’ merger proposed conditions.<sup>1</sup> Specifically, NetZero recommended: (1) that the Commission modify or clarify that the Applicant’s proposed merger conditions ensure that Internet Service Providers (“ISPs”) have fair and reasonable access to ADSL services (not “functionally equivalent” services) at wholesale; (2) such wholesale offerings should not be limited to 2006 technology but should include any improved DSL services provided by the merged companies throughout the life of the merger conditions; and (3) the Commission should ensure that AT&T’s retail ADSL pricing plan does not undercut the competitive market for those services and the merged companies should be required to offer ADSL services at wholesale rates to ISPs below the retail level proposed in its merger condition with a wholesale discount sufficient to enable such providers to earn a reasonable market return on those services in order to ensure that the Applicants do not engage in predatory pricing.<sup>2</sup>

NetZero files this *ex parte* letter to emphasize the importance of adopting a merger condition that allows ISPs to obtain wholesale access to ADSL service. NetZero fully supports the Commission’s policy objective of ubiquitous broadband deployment, and also shares the goal of making broadband Internet access services, such as ADSL service, as affordable as possible to as many consumers as possible.<sup>3</sup> But by focusing

<sup>1</sup> See generally *NetZero Comments*, WC Docket No. 06-74 (filed Oct. 24, 2006).

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

<sup>3</sup> For example, several commenters in this proceeding have endorsed the Applicants’ proposed \$10 DSL service offering condition as a means to drive ADSL service penetration. See, e.g., Letter from Jim Lloyd, Chairman, Elbert County Chamber of Commerce, to FCC Commissioners, WC Docket No. 06-74 (Oct. 20, 2006); Letter from Winston Heard, CEO, (continued...)

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merely on the retail price of ADSL services, the merger conditions proposed by the Applicants would hinder, not further, the attainment of these goals. As a condition of the merger, the Applicants have proposed to offer 768 Kbps ADSL service for \$10 to retail consumers who have not previously subscribed to AT&T's or BellSouth's ADSL service.<sup>4</sup> If adopted as currently written, however, this merger condition would squeeze ISPs out of the ADSL service market by setting the retail rate for ADSL service below the wholesale rate.<sup>5</sup>

Although NetZero supports affordable broadband Internet access service for consumers, the proposed \$10 per month retail price is far below the price for 768 Kbps ADSL-capable loops in most AT&T and BellSouth service areas. By selling ADSL service to end users at retail prices that are substantially below wholesale rates offered to ISPs, AT&T would effectively be cross-subsidizing its service offering. Without corresponding wholesale ADSL service discounts, the proposed price would quickly squeeze ISPs, such as NetZero, out of the ADSL market and reduce competition in the marketplace. Once the merger conditions expire, the Applicants will be free to exercise market power to the detriment of consumers. Prior to the expiration of the merger conditions, the predatory and anticompetitive pricing will serve to bolster the merged companies' market share in ADSL access services, but will do so at the expense of all other competitors and ultimately to the detriment of consumers as competition in these markets wilts away.

To address the anticompetitive effects of the Applicants' proposal, NetZero urges the Commission to require the Applicants to offer an unbundled network element ("UNE") price for DSL-capable loops that will permit competitive service providers to compete in all areas with the proposed \$10 retail price. This could take the form of either a set price,<sup>6</sup> or through a discount off current prices for 768 Kbps ADSL capable UNE loops. In either case, the price should be set at a level which will allow ISPs and other competitors to realize a reasonable rate of return on the resale of these services. Such a condition would continue to afford consumers a \$10 retail price, or better, but by

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East Athens Development Corporation, to FCC Commissioners, WC Docket No. 06-74 (Oct. 20, 2006); Letter from Nancy Arnold Wood, President, Monticello-Jasper County Chamber of Commerce, to FCC Commissioners, WC Docket No. 06-74 (Oct. 20, 2006).

<sup>4</sup> See Erratum, *Commission Seeks Comment on Proposals Submitted by AT&T, Inc. and BellSouth Corporation*, Public Notice, WC Docket No. 06-74, *AT&T Merger Conditions Letter*, at 3 (Oct. 16, 2006).

<sup>5</sup> The danger associated with approving the merger without addressing this important issue has been raised by other parties as well. For example, a recent filing called the Commission's attention to problems associated with the retail pricing of ADSL service as proposed by the Applicants. See Letter from Darell Maynard, President, SouthEast Telephone, to FCC Commissioners, WC Docket No. 06-74 (Dec. 22, 2006).

<sup>6</sup> See *id.* at 2.

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numerous providers. The condition should require that the offering be available as a wholesale product available for purchase by ISPs, in addition to being offered as a UNE.

As currently written, the proposed merger condition is self-serving in that it will allow the Applicants to cross-subsidize ADSL service through a predatory pricing scheme which will ultimately drive competitive offerings from the market. Although the Applicants' proposed \$10 768 Kbps ADSL retail service offering may benefit some consumers in the short term, although this is entirely unclear, once the condition has expired, consumers in these areas will be left with a single ADSL carrier and no competition to ensure long-term, market-based, pricing of ADSL service. In determining whether, and under what conditions, to approve the Application, the Commission must ensure that proposed merger does not harm the public interest by damaging competition in the wholesale market. As such, NetZero requests that the Commission adopt clear and enforceable merger conditions consistent with NetZero's previously filed comments and this letter in order to protect consumers.

Pursuant to the Commission's Rules, this letter is being filed in the above-captioned proceedings for inclusion in the public record. Should you have any questions, please do not hesitate to contact the undersigned.

Respectfully submitted,

/s/

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