

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
AT&T Inc. and BellSouth Corporation)	WC Docket No. 06-74
Applications for Approval of)	
Transfer of Control)	
)	

COMMENTS OF IT'S OUR NET COALITION

It's Our Net Coalition ("It's Our Net" or "Coalition"), by its attorneys, and pursuant to the Federal Communications Commission ("FCC" or "Commission") Public Notice,¹ files these comments in the above-referenced proceeding. It's Our Net believes that the proposed conditions submitted by AT&T Inc. ("AT&T") and BellSouth Corporation must include meaningful and effective network neutrality safeguards. Simply complying with the Commission's Policy Statement on net neutrality, as AT&T has proposed, will fail to shield consumers from discriminatory conduct. Consequently, we urge the Commission to revise the submitted conditions so that the merged company is required to abide by tailored nondiscrimination requirements guaranteeing even-handed treatment of all Internet-based applications, content, and services traffic traversing its broadband facilities, regardless of its source, destination, or ownership.

I. BACKGROUND

It's Our Net is a broad-based coalition of Internet companies, consumers, grassroots groups, and small businesses working together to preserve the Internet and net neutrality.² This unique alliance spans an impressive range of communities of interest,

¹ *Commission Seeks Comment on Application for Consent to Transfer of Control Filed By AT&T Inc. and BellSouth Corp.*, Public Notice, WC Docket No. 06-74, DA 06-2035 (rel. Oct. 13, 2006) (Public Notice).

² A complete list of It's Our Net Coalition members, supporters, and financial backers can be found at www.itsournet.org.

including hundreds of commercial, political, educational, religious, and non-profit voices from all over the United States. These disparate entities have joined together to unite around a single cause: ensuring that Congress reinstates effective and enforceable network neutrality safeguards, so that users of our nation's non-competitive broadband networks retain the ability to control their own access to the Internet.

It's Our Net submits these comments in response to the FCC's request for public comment on AT&T's merger conditions proposal. On March 31, 2006, AT&T and BellSouth filed with the FCC their joint application for consent to consummate their proposed merger.³ On October 13, AT&T submitted a letter to the Commission, indicating for the first time that the company "would not object to the imposition of certain merger conditions...in order to obtain expeditious unanimous approval of the merger."⁴ Among those "potential conditions" is adherence to the Commission's Policy Statement on network neutrality for thirty months after the merger closes.⁵ AT&T also indicated that it had discussed with certain FCC officials "the possibility of further conditions related to...network neutrality non-discrimination..."⁶ The FCC subsequently issued its Public Notice inviting comments on AT&T's proposals.

II. THE FCC SHOULD ADOPT TAILORED, MEANINGFUL, AND EFFECTIVE NONDISCRIMINATION SAFEGUARDS TO GOVERN AT&T'S BROADBAND SERVICES

A. There Is A Compelling Need for Effective Net Neutrality Safeguards

Over the past decade, the Internet has become an engine of tremendous economic growth, and an essential medium for innovation, competition, and the free flow of information. Much of this success can be attributed to the Internet's layered, end-to-end

³ AT&T Inc. and BellSouth Corporation Applications for Approval of Transfer of Control, WC Docket No. 06-74, filed March 31, 2006.

⁴ Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T Inc., to The Honorable Kevin Martin, Chairman, Federal Communications Commission, WC Docket No. 06-74, at 1 (AT&T Conditions Letter).

⁵ AT&T Conditions Letter at 6.

⁶ *Id.*

design, built into its open, decentralized, and modular architecture. As Internet pioneer Vint Cerf recently put it, the result has been a platform for “innovation without permission,”⁷ where anyone seeking to exchange personal, business, religious, or political information -- from the largest companies, to individual innovators, to private citizens -- is free to create, offer, and share new content, applications, and services. In turn, this open architecture was enabled by a longstanding regulatory framework of nondiscrimination requirements that prohibited the operators of our nation’s underlying telecommunications networks from limiting consumer choice. Until recently, America’s telecom regulations prevented the rise of unwanted gatekeepers over access to Internet content and services.

Unfortunately, the Net’s platform of “innovation without permission” now is at risk. As a result, meaningful and enforceable network neutrality provisions must be reinstated, to counter (1) enduring – and worsening – concentration in the consumer broadband market, which will be exacerbated by the proposed merger, (2) the FCC’s elimination of prior regulatory safeguards for broadband connections, and (3) the present threat of broadband providers discriminating against unaffiliated Internet content, applications, and services. Together, these realities demand a return to the fundamental nondiscrimination requirements that governed our telecom networks for decades.

First, the U.S. consumer broadband market is highly concentrated. According to the FCC’s own most recent figures, an astonishing 99.6 percent of all American consumers receive their high-speed broadband connection from either an incumbent telephone company or an incumbent cable company.⁸ More critically, the share of alternative broadband platforms actually has been decreasing over time, from a less-than-impressive 2.9 percent in 1999 to an anemic 0.4 percent today.⁹ Further, under the

⁷ *See, e.g.*, Prepared Statement of Vinton G. Cerf, Vice President and Chief Internet Evangelist, Google Inc., US Senate Judiciary Committee, Hearing on Reconsidering our Communications Laws, June 14, 2006, at 2.

⁸ High-Speed Services for Internet Access: Status as of December 31, 2005, Industry Analysis and Technology Division, Wireline Competition Bureau, FCC (July 2006), at Page 9, Table 6 (FCC High-Speed Services 2006 Report).

⁹ *Id.*; *see also* Broadband Reality Check II: The Truth Behind America’s Digital Decline, S. Derek Turner, Research Director, Free Press (August 2006), at 24-25.

Commission's over-inclusive methodology of zip codes, broadband subscribers in only 52.7 percent of zip codes have two choices, while 33.8 percent have only one choice, and 13.5 percent have no choices at all.¹⁰ The U.S. General Accountability Office reached an even more pessimistic conclusion, showing that only about 28 percent of all US households subscribed to broadband service in 2005, and DSL and cable modem service together constitute the only broadband technologies actually available to consumers.¹¹ At best, then, the consumer broadband market in this country can only be characterized as an entrenched duopoly.

The proposed merger of AT&T and BellSouth will serve only to solidify that duopoly. The merged entity will house under one roof an impressive array of broadband assets, including an extensive wireline and wireless infrastructure, radio spectrum, and a legacy customer base. Such assets will serve to discourage market entry from would-be competitors, which must negotiate with the dominant broadband provider in nearly half the country. Indeed, to the extent the Commission relies upon existing competition to find that the proposed merger is in the public interest, it cannot have it both ways: simultaneously crediting Internet-based competition that has thrived due to the presence of nondiscrimination requirements, and then refusing to ensure that such competition is durable through meaningful net neutrality conditions. If a few large corporations such as AT&T are allowed to dominate the market for broadband Internet access, their gatekeeper role must be subject to appropriate regulatory oversight and enforcement. Because the proposed merger cements the existing broadband duopoly, it is entirely reasonable for the Commission to revise AT&T's proffered merger conditions to include tailored yet effective net neutrality requirements.

Second, last September the FCC adopted its wireline broadband order, which eliminated the Computer Inquiry rules and other common carriage requirements.¹² In the

¹⁰ FCC High-Speed Services 2006 Report, at Page 4.

¹¹ U.S. General Accountability Office, Broadband Deployment is Extensive throughout the United States but It Is Difficult to Assess the Extent of Deployment Gaps in Rural Areas, GAO-06-426, May 2006, at 10-12.

¹² *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *et al.*, Report and Order and Notice of Proposed Rulemaking, issued Sept. 23, 2005 (Wireline Broadband Order).

process, the Commission did away with those safeguards that long had protected the ability of consumers and producers alike to use the nation's broadband networks without fear of carrier discrimination. At that same time, the Commission adopted a Policy Statement indicating that consumers are entitled to (1) access lawful Internet content, (2) run applications and use services of their choice, (3) connect legal devices, and (4) benefit from competition among network providers, application and service providers, and content providers.¹³ However, as the Commission pointed out, its Policy Statement does not include any implementing rules, is not enforceable by the agency, and is subject to undefined "reasonable network management."¹⁴

More importantly, the FCC's Policy Statement fails to address a critical issue: discrimination by broadband providers against unaffiliated Internet content, services, and applications. For decades, the concept of nondiscrimination has been at the very heart of Section 201 of the Communications Act. The Commission's own Computer Inquiry decisions, spanning some 25 years, was premised on the need for nondiscrimination requirements to protect all users of the communications networks. The Policy Statement's omission of this fundamental precept of communications law meant that the Commission replaced actual, effective, and enforceable regulations with incomplete and unenforceable suggestions.

Third, over the past year, senior executives from the merging entities have declared, publicly and repeatedly, their intention to use their market power to discriminate in favor of affiliated or preferred Internet traffic, and against unaffiliated Internet traffic. In particular, AT&T CEO Ed Whitacre has described creating premium lanes on the Internet in exchange for higher fees, and charging Net companies additional

¹³ *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket No. 02-33, *et al.*, Policy Statement, issued Sept. 23, 2005 (Policy Statement). Then-SBC and Verizon subsequently agreed to include these policy principles as part of their voluntary commitments in support of their pending mergers with AT&T and MCI, respectively. Of course, AT&T's offer in this proceeding to abide by those same principles, although inadequate, demonstrates that the merging companies recognize the importance of including some type of network neutrality requirements as merger conditions.

¹⁴ *Id.* at 3 n.15. Nonetheless, the It's Our Net Coalition supports the thrust of the principles as they apply to end users and their content, applications, and devices.

arbitrary surcharges for the use of “my pipes.”¹⁵ William Smith, chief technology officer for BellSouth, also has indicated that his company seeks to strike deals with companies to charge fees for higher quality service in reaching consumers, creating what he called a “pay-for-performance” tier in the marketplace that develops on top of the baseline Internet.¹⁶

Without effective net neutrality safeguards, AT&T will be free to manipulate what consumers can see and do online, and the merged entity’s ability to harm consumers will expand substantially. Failing to adopt meaningful and enforceable safeguards will put at risk consumer choice, American innovation, and global competitiveness. In such an environment, consumers will suffer because investors will have little reason to support new Internet-based applications, content, and services if there is no legal guarantee they can even appear on the Net, or broadband customers can even select their products.

B. AT&T’s Merger-Related Commitments Should Include A Tailored and Enforceable Nondiscrimination Requirement to Protect Net Neutrality

We applaud AT&T for openly acknowledging that its proposed merger with BellSouth raises profound issues related to network neutrality. Unfortunately AT&T’s proposal merely to abide by its prior merger commitment is incomplete and insufficient. In particular, the FCC’s Policy Statement fails to address the critical issue of discrimination against unaffiliated Internet content, applications, and services. Moreover, the Policy Statement is not a set of rules, and includes no mechanism for filing complaints or seeking enforcement. AT&T also proposes to adhere to the Policy Statement for a period of only thirty months, despite the fact that there is no evidence that the duopoly position that holds today will change appreciably in that time frame.

Thus, in order to preserve an open and innovative Internet, the Commission should revise AT&T’s submitted merger conditions to include a tailored, meaningful, and

¹⁵ O’Connell, Patricia (ed), “At SBC, It’s All About ‘Scale and Scope,’” Business Week Online, 7 November 2005.

¹⁶ “Executive Wants to Charge More for Web Speed,” Jonathan Krim, Washington Post, December 1, 2005, at D-5.

enforceable net neutrality requirement. That requirement should contain two interrelated components.

First, in addition to explicitly applying the four net neutrality-related principles to the merged entity and each of its affiliates, the Commission should establish a fifth principle requiring AT&T to commit to treating in a nondiscriminatory manner all Internet traffic traversing its broadband facilities in either direction. It's Our Net suggests the formulation put forth this past summer by Senators Olympia Snowe (R-ME) and Byron Dorgan (D-ND) in their proposed joint amendment to video franchise legislation in the Senate. In the context of this merger proceeding, such language would state that end users are entitled to broadband services from AT&T "that shall not discriminate in their carriage and treatment of Internet traffic based on the source, destination or ownership of such traffic."¹⁷ This language would, for example, prohibit tiering schemes that impose additional surcharges on Web companies to "deliver" Internet content, on top of the considerable fees that those companies and consumers already pay to connect to the Internet.¹⁸

Second, AT&T's net neutrality-related merger commitments should be subject to swift, sure, and effective enforcement. In particular, AT&T should agree to the adoption of explicit dispute resolution procedures, including an expedited FCC complaint process. Users also should be entitled to request as an alternative a third party binding arbitration process. Any violations of the net neutrality-related merger commitments should be subject to significant financial penalties.

¹⁷ Amendment by Senators Olympia Snowe and Byron Dorgan to Committee Amendment to H.R. 5252, dated June 28, 2006, at sec. 903.

¹⁸ Importantly, such language still would allow broadband providers to (1) put in place tiered consumer pricing, (2) establish network prioritization based on the type of traffic (such as video, voice, and data), (3) conduct nondiscriminatory network management, and (4) create and sell a full range of competitive applications, services, and content.

