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The American
Antitrust Institute

**Testimony of Jonathan L. Rubin**
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**On**
**"AT&T and BellSouth Merger:**
**What Does it Mean for Consumers?"**
**Before the**
**U.S. Senate Committee on the Judiciary**
**Subcommittee on Antitrust, Competition Policy, and Consumer Rights**
**June 22, 2006**

Good afternoon, Chairman DeWine, Ranking Member Kohl, and members of the Committee:

1. Thank you for the opportunity to comment on behalf of the American Antitrust Institute (AAI) on the proposed and historic AT&T/BellSouth merger. I am Jonathan Rubin, Senior Research Fellow at the American Antitrust Institute.

2. The AAI is an educational, non-profit, research and advocacy organization devoted to the promotion of competitive markets through vigorous enforcement of the antitrust laws in the U.S. and around the world. We are generally centrist, pro-competition, and pro-consumer in orientation, and operate with the assistance of an advisory board composed of many of the leaders of the antitrust community, including academicians and practitioners in the fields of law, economics, and business. The AAI's advisory board does not vote, however, so the AAI's positions should not be attributed to any individual advisory board member. Further information may be found at www.antitrustinstitute.org, which also contains a wealth of resources related to antitrust law and policy.

## I. Introduction

3. The initial legal issue in evaluating the lawfulness of a merger or acquisition under Section 7 of the Clayton Act is whether the effect of the acquisition "may be substantially to lessen competition, or tend to create a monopoly." In pre-clearing a merger for compliance with this standard, one ordinarily begins with the current state of the market and then tries to predict, given current conditions, whether the merger as proposed is likely to harm competition. In most cases, the clearing agency and the merging parties engage in negotiations over a remedy designed to eliminate, or at least substantially attenuate, any foreseen or alleged competitive harm.

4. Currently, the merging parties compete in some markets, and where they do, it is irrefutable that this merger will directly suppress such preexisting competition. For example, in the previous round of mergers between SBC and the old-AT&T and Verizon and MCI, the Department of Justice imposed protective conditions intended to prevent the joinder of competitive operations in the retail market for "special access," which serves high capacity business customers. Similarly, to the extent there is preexisting competition for long-distance customers, a remedy may also be required.

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5. However, of over-arching concern to consumers should be that the proposed AT&T/BellSouth transaction takes us one giant step farther in the process of converting the national industry to one dominated by duopolies of multi-platform operators of legacy, broadband, and wireless networks. This prospect threatens to stifle consumer choice and create conditions that inhibit customer switching and deter competitive entry by rivals. Of particular concern in this regard is the local broadband access market.

6. To mitigate the broadband duopoly scenario, some parties have asked the FCC to impose conditions on this transaction that would free-up vital un-used wireless spectrum owned or controlled by BellSouth. This spectrum is particularly well suited to provide wireless broadband access using the WiMax standard. A prohibition on telco or cable cross-ownership of WiMax-platform deployment would ease the barrier to entry faced by new unaffiliated providers of WiMax services and promote the deployment of a third competitive alternative to the telco-cable duopoly.

7. This merger is also occurring in the midst of profound institutional, regulatory and technological changes now taking place. Such changes must be factored into the competitive assessment of the transaction.

## II. Broader Issues of Institutional, Legal, and Regulatory Policy Are Implicated

8. On the legal front, numerous statutory and regulatory policy changes have been adopted or are being contemplated that will affect the regime under which the industry will operate. For example, by reclassifying internet communications as non-common carrier services, the FCC moved broadband access services to the jurisdiction of the Federal Trade Commission, which is statutorily prohibited from exercising jurisdiction over common carriers. A bill passed by the House last week, however, appears to be designed to counter this consequence of the FCC's reclassification by placing broadband access services under the exclusive jurisdiction of the FCC. At any rate, such institutional reforms are likely to have a dramatic impact on the competitive effects one can expect from any given transaction.

9. Another area of legal upheaval is manifest by the network neutrality debate, which expressly focuses on the duopoly problem in mass-market broadband access. Many experts, including proponents of network neutrality, recognize that in the presence of sufficient competition and consumer choice a network neutrality rule would not be necessary. Consumers would simply vote with their feet and drop the access providers that violate neutrality.

10. The premise of network neutrality, therefore, is that existing mechanisms of domestic competition policy—antitrust law enforcement and merger review—are inadequate as currently applied to ensure competitive internet-related telecommunications markets.

11. Indeed, antitrust as an effective competition policy instrument in telecommunications has been undermined by the 2004 Supreme Court opinion in *Verizon v. Trinko*. I have heard it said that *Trinko* means that "A network's refusal to interconnect is never an antitrust violation." A contrary view, which in my view is based on just as plausible an interpretation of the case, limits any narrowing of Section 2 doctrine to the particular facts and regulatory regime at issue before the *Trinko* Court.

12. Whatever the status of the dual jurisdiction apparently contemplated by the 1996 Act, the progressive deregulation of the industry and the statutory prohibition against "unfair methods of competition" implies explicit application of the antitrust laws, by whatever agency is assigned the task. Legislative proposals that place competition enforcement responsibilities with the FCC must also provide the agency with clear procedural and substantive standards, explicit instructions to follow antitrust common law in adjudications under those standards, and allocate sufficient resources and personnel to the agency so they may competently perform the requisite competition policy analysis, investigation, and enforcement.

## III. The Technological Flux Is Migration and Convergence

13. In addition to these institutional and legal changes, a technological flux is re-writing network operators' business models. The flux consists of a migration-convergence process from legacy networks to internet protocol- (IP-) based next-generation-networks (NGNs). Both kinds of changes dramatically influence the economics of the market and thus the competitive impact of the proposed merger.

14. The overlap between institutional and technological change is not coincidental. The IP-based packet-switched services that provide the infrastructure for NGNs are now classified as non-common carrier. *Migration*, therefore, refers not just to the technological shift from circuit-switched to packet-switched network technology, but also to the redeployment of infrastructure from common carrier use to non-common carrier use. For the purposes of AT&T's fiber project, in other words, the conduits and rights-of-way for physical access to buildings that it will acquire with BellSouth are far more valuable than the twisted pairs of wire that now serve as the network infrastructure.

15. The other motion in the technological flux is *convergence*, which also serves double duty by referring both to wireline-and-wireless convergence and to the convergence of the industry on an open industrial standard, IP Multimedia Subsystem, or IMS.

16. IMS provides a unified architecture that supports a range of IP-based services across both packet-switched and circuit-switched networks. IMS promises to provide end users with a network of network resources operated by many different companies and across which users will be able to move with ease. IMS is designed to enable such network features as subscriber "follow-me presence and availability," "push-to" services (to-talk, to-view, to-video), multi-media calls, people-to-content, people-to-people, and people-to-groups.

17. By using technology developed in the cellular telephone sector, session-initiated protocol, or SIP, the network operator is able to geo-locate and track subscribers, monitor and react to their network usage, and push-and-price customized services, such as application-specific quality-of-service. End-users will be able to initiate multiple sessions at once, enabling multi-media or the transfer of on-going sessions from one device to another. IMS and its features work independently of access modality (fiber, wireline, wireless, cable, WiFi, etc.).

18. The SIP function and other network management tools involving deep-packet inspection allow network operators to obtain much more information about how their networks will be used than is presently available. This level of subscriber awareness enables transaction-level billing

and permits the network operator to micro-market and price-discriminate among its subscribers.

19. NGNs are likely to change the way we interact with the network and the way the networks interact with one another. By vesting greater control over the access mode in the hands of subscribers, value moves from the core of the network to its edges. One way to increase the chances that your network will be providing the necessary access to the subscriber is to acquire more territory, as this merger may be demonstrating.

20. Network interoperability, or "inter-working," is a central feature of IMS. Common ownership, therefore, is no longer necessary for efficient technical compatibility. Indeed, differentiated ownership may even benefit consumers by creating an audit trail and thus increasing the potential for greater transparency in the prices paid for network services as the subscriber moves across multiple access providers.

## IV. Three Specific Threats to Competition

21. There are three ways in which the likelihood of substantial merger-specific harm to competition may be high. They occur in: the consumer market for broadband access, the "special access" markets in BellSouth's region, and the markets for video content, particularly high-definition programming, and telecommunications equipment.

### A. Consumer Market for Broadband Access

22. As Vint Cerf testified recently, incumbent cable and telephone companies provide 99.5% of all consumer broadband access lines. However, a duopoly presently exists for only 53% of consumers. Another 28% of consumers were served by a monopolist and the remaining 19% had no broadband access at all. Thus, nearly half of all consumers are consigned to monopoly conditions or the absence of any broadband offering at all.

23. As discussed above (¶ 9), the need for a network neutrality provision is premised on a lack of sufficient competition in the consumer market for broadband access. Moreover, even in the best case of a cable-DSL duopoly, it may be costly for the consumer to switch. Switching-deterring strategies are anticompetitive because they interfere with the competitive process and deny the consumer the full benefits of competition.

24. At least one party has petitioned the FCC to deny AT&T/BellSouth's joint application for transfer of control on the specific grounds that it would not be in the public interest because it would inhibit network neutrality by concentrating control over too much of the national market for consumer broadband access. More generally, several consumer groups and parties are asking the FCC to require that BellSouth divest itself of the 2.5 GHz spectrum it owns or controls on the basis of the Commission's inter-modal competition policy alone.

25. WiMax technology allows rivals to economically enter as a third supplier of broadband access, either by itself or in conjunction with a super-local WiFi systems or LANs. Standards bodies are about to certify WiMax equipment for deployment on licensed 2.5 GHz spectrum. AT&T should not be permitted to own or control this alternative mode of broadband access.

26. Divestiture of specific spectrum would be an effective, one-off, clean remedy with a targeted and tangible effect on the market.

B. In-Region Special Access

27. In the recent mergers of Verizon/MCI and SBC/old-AT&T, the Department of Justice found a likely violation of Section 7 in the special access markets for high-capacity business lines. The unusual remedy employed there, the use of "indefeasible rights of use," (IRUs), was designed to separate the access lines from the customers using them. As a result, the IRUs may constitute a less than appealing opportunity for an outside competitor, and the remedy may not be restoring pre-merger competition as intended.

28. There is likely to be a temptation in the present case to apply a similar remedy where overlaps and merger to monopoly occur in the special access markets in the BellSouth region. This temptation should be resisted until there is satisfactory evidence that such a remedy actually restores pre-merger competition.

29. In the special access markets, one would expect to see a first-and-only mover advantage if commercial landlords do not want alternative facilities-based carriers on the premises. In any event, the appropriate policy for this segment of the market may be to return to common carrier regulation. A regulatory proposal pending before the FCC is moving slowly.

C. Buyer Power in Media and Equipment Markets

30. Finally, the loss of a new entrant into the multi-channel video program delivery business, (*i.e.*, BellSouth), may not be competitively neutral in adjacent product or service markets. One such market is the wholesale market for video entertainment content, particularly high-definition programming. Similarly, the merger removes a purchaser from the telecommunications equipment markets.

31. Losing BellSouth as a bidder and consolidating it with AT&T risks creating substantial buyer power in the hands of AT&T. It is worth asking whether any benefits of the merger outweigh the pro-competitive benefits of having both BellSouth and AT&T as separate concerns bidding against one another for programming and equipment in competitively supplied markets.

## V. Conclusion

32. The proposed AT&T/BellSouth merger is not an ordinary merger. It is taking place at what seems to be the end of an extraordinary string of consolidations and it is occurring at a time of enormous change in the legal framework and technology in the sector.

33. Nonetheless, the same perceived lack of competition in the consumer broadband access market that animates proponents of network neutrality counsels caution against permitting the accretion of too much market power in that market. It would be anti-competitive for the post-merger AT&T, for example, to be permitted to be able to block through rights to licensed spectrum the roll-out of an independently-owned, competing broadband access platform.

34. Given how far the consolidation of this industry has already been allowed to go, it is

likely that the best outcome that consumers can hope for would be the divestiture of BellSouth's 2.5 GHz spectrum followed by the entry of an independent provider of WiMax-powered consumer broadband access.

I thank the Committee for this opportunity, and I ask that my written remarks be made part of the record. I am happy to answer any questions you may have.

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