Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
BellSouth Corporation,	)	
Transferor,	)	
	)	
and	)	WC Docket No. 06-74
	)	(Public Notice DA 06-2035)
AT&T, Inc.,	)	
Transferee,	)	
	)	
Applications for Consent to Transfer	)	
Control of a Corporation Holding	)	
Section 214 Authorizations, Section	)	
310 Licenses, and Submarine Cable	)	
Landing Licenses	)	

COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE, INC.
ON "POTENTIAL MERGER CONDITIONS" SUBMITTED BY AT&T

I. Introduction

The American Antitrust Institute, Inc. (AAI) appreciates the opportunity to submit the following response to the Commission's *Public Notice* released October 13, 2006[1] seeking public comment on "potential merger conditions" recited in an *ex parte* letter from the Applicants in the above-captioned docket.[2]

The AAI is a non-profit educational, research and advocacy organization committed

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[1]*AT&T Inc. and BellSouth Corporation Applications for Transfer of Control*, WC Docket No. 06-74, Public Notice, DA 06-2035, (rel. Oct. 13, 2006).

[2]Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T, to Kevin Martin, Chairman, FCC, WC Docket No. 06-74 (filed Oct. 13, 2006) (appended to the *Public Notice*)(hereinafter Quinn Letter).

to vigorous enforcement of the antitrust laws and to regulatory policies that promote competition and competitive markets. Although telecommunications deregulation primarily "shifts to the antitrust laws responsibility for protecting consumers," the institutional mechanism by which this shift occurs has yet to be determined.[3] Through its review of the proposed combination of the vertically integrated AT&T and BellSouth the Commission will play a pivotal role in determining the future course of the marketplaces for telecommunications services. Moreover, future deregulated markets are likely to be sensitive to initial conditions so that errors made today will require larger and more difficult course corrections later.

Although this transaction implicates a multitude of markets and market participants, the conditions on the AT&T-BellSouth merger that are most urgently needed are those that will prevent recurring instances of undesirable and anticompetitive duopoly in market after market across the nation.

II. Conditions on the AT&T-BellSouth Merger Are Required to Counter a Structural Threat to Competition

It is important for regulators to know when markets are sufficiently competitive to warrant regulatory forbearance. When the Canadian authorities recently considered a bright-

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[3] *See* Alfred E. Kahn, "Telecommunications, the Transition from Regulation to Antitrust," 5 J.Telecom.&H.Tech.L. 159, 165 (2006)(hereinafter Kahn)("It is a truism ... that the abandonment of direct economic regulation shifts to the antitrust laws responsibility for protecting consumers. That truism leaves indeterminate the locus of responsibility for administering those injunctions: should it be state or federal regulatory agencies, or the antitrust enforcement agencies, and if both, with what division of responsibilities and subject to what substantive interpretations of the laws?").

line test for the point at which telecommunications markets become "competitive,"[4] Professor Alfred E. Kahn stressed the importance of a third, competitive platform independent of the incumbent local exchange carriers (ILECs).[5] This creates the need for careful scrutiny of the competitive effect of this merger:

> In supporting testimony, I recommended adding the requirement of a third, competitive platform independent of the ILECs, presumably *wireless*, ... This calls attention once more to the need for a careful assessment of widespread mergers in recent years, both among wireless companies and between them and local telephone companies. In these circumstances, it seems to me important to assess the competition of non-affiliated providers of wireless services ... freeing up the spectrum for others, service providers and users.[6]

The competitive threat generated by un-cabined merger activity is easy to understand because it is structural. In fact, the consumer welfare harm that almost always flows from duopoly is so widely understood as to require no separate support.[7]

The requirement that the third platform be independent from the ILECs is essential because, as Professor Kahn points out, competition that takes place only *within* the firm "is merely metaphorical; it is not a sufficient substitute for competition between or among

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[4]*See Forbearance from Regulation of Local Exchange Services,* Telecom Decision CRTC 2005-15, 6 April 2006 (Telecom Decision 2005-15).

[5]Kahn, *supra* note 3.

[6]*Id*. 162-3 (emphasis added, footnotes omitted).

[7]*See, e.g.*, *Federal Trade Commission v. H.J. Heinz Co*., 246 F.3d 708 (D.C. Cir. 2001) (discussing the improbability that a merger to duopoly could satisfy the standards of the antitrust laws).

firms...."[8]

The specter of a Cable-ILEC duopoly as the sole supply of broadband access services repeating itself across the nation should alarm the Commission. It clearly concerns the bipartisan leadership of the Subcommittee on Antitrust, Competition Policy & Consumer Rights of the Senate Judiciary Committee, who declared that

> The issue most deserving of close scrutiny is the [AT&T/BellSouth] merger's potential effect on the availability of wireless spectrum to be used for broadband service. Many industry analysts believe that the most promising option for intermodal competition with the established phone and cable companies will be provided by the broadband wireless technologies that employ the standards known as "WiMAX." However, WiMAX will not be able to develop into a truly effective competitive alternative without sufficient wireless spectrum for competitors to utilize.[9]

Clearly, "the exclusion of other service providers from the opportunity to compete on the basis of the relative attractiveness of their offerings," as Professor Kahn put it, is an unfair method of competition.[10] Therefore, a merger that by virtue of consolidating control of

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[8]Kahn, *supra* note 3, at 159-60.

[9]Letter from Mike DeWine, Chairman, and Herb Kohl, Ranking Member, of the Subcommittee on Antitrust Competition Policy & Consumer Rights, U.S. Senate Committee on the Judiciary, to Thomas Barnett, Assistant Attorney General, Antitrust Division, U.S. Department of Justice and Kevin J. Martin, Chairman, FCC, Sep. 28, 2006, attached to Letter from Brad E. Mutschelknaus to Marlene H. Dortch, Secretary, FCC, Notice of *Ex Parte* Communication of XO Communications Inc., WC Docket No. 06-74 (filed Sep. 29, 2006)(hereinafter DeWine/Kohl Letter). "WiMAX" refers to Worldwide Interoperability for Microwave Access; See the WiMAX Forum website at: <www.wimaxforum.org>. The Forum describes WiMAX as "a standards-based technology enabling the delivery of last mile wireless broadband access as an alternative to cable and DSL."

[10]Kahn, *supra* note 3, at 167.

spectrum relegates communities to no more than two providers of broadband access does not meet the public interest standard under which the Commission is obliged to review the present applications.[11] Accordingly, Senators DeWine and Kohl have urged the Commission to "take whatever steps are appropriate to assure that competitive WiMAX services have the opportunity to develop freely in the marketplace, including divestiture of spectrum if such divestiture is found necessary."[12]

The need to condition the merger on the divestiture of vitally important spectrum presently owned or controlled by BellSouth was brought to the Commission's attention by several parties during the regular comment cycle in this proceeding.[13] Nonetheless, the Applicants have chosen to all but ignore the anti-competitive significance of the spectrum consolidation—and the exclusionary effect of such consolidation—occasioned by the merger.

III. The Commission Should Not Permit BRS/EBS Spectrum to be Used by the Merged Entity to Avoid Building-Out Wireline-Based Broadband Access Facilities

Throughout this proceeding the Applicants have given short shrift to the anti-competitive consequences of excluding an efficient unaffiliated Wi-MAX-platform

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[11] *See* Sections 214(a) and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. 214(a), 47 U.S.C. 310(d).

[12] DeWine/Kohl Letter, *supra* note 9, at 2.

[13] *See, e.g.,* Comments of Jonathan L. Rubin, J.D., Ph.D., WC Docket No. 06-74 (filed June 5, 2006); Petition to Deny of Clearwire Corporation, WC Docket No. 06-74 (filed June 5, 2006); Petition to Deny of the Center Digital Democracy, WC Docket No. 06-74 (filed June 5, 2006); Petition to Deny of Consumer Federation of America, Consumers Union, Free Press and U.S. Public Interest Research Group, WC Docket No. 06-74 (filed June 5, 2006).

broadband access provider. AT&T's submission of potential merger conditions all but ignores these concerns. Not only do they fail to recognize the "potential" condition in which control of this vitally important broadband-capable spectrum is relinquished, but, to the contrary, the Applicants apparently consider BRS/EBS-WiMAX as among "alternative technologies and operating arrangements" that excuse the merged entity from making fully available wireline-based broadband access services to the residential customers located in its service area.[14]

AT&T's proposal to deploy broadband spectrum for gap-filling, build-out reductions, and circuit back-up makes perfect sense from the perspective of a wireline broadband access provider that is also the putative owner of Cingular wireless. However, such underutilization is at best hostile to the competitive process and at worst a prescription for the further erosion of the nation's standing in broadband penetration and connection speeds among other developed economies.

Clearly, the merged entity would prefer not to face competition from an independent provider of Wi-MAX-based broadband access. However, because of the path dependency of technology, the Applicants are doubly reluctant to see the arrival of *any* widely available Wi-

[14]Quinn Letter, *supra* note 2 ("The merged entity will make available broadband Internet access service to the remaining living units [*i.e.*, the 15% of its customers outside the'Wireline Buildout Area'] using alternative technologies and operating arrangements, including but not limited to satellite and Wi-Max fixed wireless technologies." At 2; "Wireless: AT&T/BellSouth shall initiate ten new trials of broadband Internet access service using 2.3 Ghz or 2.5 Ghz spectrum by the end of 2007. At least five of those trials will be conducted in BellSouth's in-region territory." At 5).

MAX-based broadband access regime. First, as has been pointed out elsewhere,[15] the merged entity will not deploy Wi-MAX as a stand-alone service because of its tendency to cannibalize the wireline broadband customer base. Second, the advent of mobility standards for Wi-MAX suggests the emergence of VoIP-based Wi-MAX mobile telephony.[16] Such a service would also cannibalize Cingular's wireless customer base.

Competition from an independently controlled broadband access provider based on BRS/EBS-Wi-MAX would reward consumers, stimulate innovation, and have absolutely no impact on the Applicant's merger plans because the spectrum in question lies largely fallow. On the other hand, durable duopolies are much more likely if the post-merger AT&T is permitted to retain control of BRS/EBS blocking positions in the Southeast and Kentucky.

As Professor Kahn stated, recent experience justifies a

> firm belief in the importance of ensuring the availability of at least a third, independent broadband access option—presumably wireless—whether by application of the antitrust laws to intermodal mergers, opening up additional spectrum, subsidization or direct governmental provision—as a necessary protector of both subscribers and providers of content.[17]

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[15]*See, e.g.,* DeWine/Kohl Letter, *supra* note 9, at 2 ("Some argue that the combined company will have little incentive to allocate [BRS/EBS] to WiMAX services because development of WiMAX will likely cannibalize their current customer base.")

[16]Curiously, the Applicants persist in referring to BRS/EBS-Wi-MAX as "fixed," despite the fact that the table of radio allotments permits "fixed or mobile" implementations and the imminent emergence of a Wi-MAX mobility standard and compliant equipment. In any event, it seems evident that it is only a matter of time before true mobility becomes a standard feature of Wi-MAX broadband access systems.

[17]Kahn, *supra* note 3 at 186.

IV. Conclusion

Based on the foregoing, the AAI respectfully suggests that the "potential conditions" recited by AT&T are wholly inadequate to ensure the emergence of a third, independent broadband access provider, an economic prerequisite to a pro-competitive telecommunications policy.

Respectfully submitted,

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