STATEMENT OF
COMMISSIONER JONATHAN S. ADELSTEIN,
CONCURRING

Re: ***AT&T Inc. and BellSouth Corporation Application for Transfer of Control, WC Docket No. 06-74, Memorandum Opinion and Order, FCC (Dec. 29, 2006)***

As a Commissioner, I am required to review the transactions that come before me – not necessarily the ones that I would have preferred. This transaction has given me serious pause, but through hard work and genuine compromise, we were able to achieve a result that delivers major, tangible benefits to consumers. A historic merger warrants historic conditions. I don't pretend that we addressed every possible issue presented here or that it is possible, or even appropriate in this context, to try to rectify years of decisions that have undercut competition. Yet, drawing on the full record, I have tried to counter-balance the effects of this transaction by asking for meaningful conditions that protect the open and neutral character of the Internet, benefit consumers by promoting affordable broadband services, and preserve competitive choices for residential and business consumers.

These are rapidly changing times in the telecommunications industry and the broader communications marketplace in general. Mergers that were unthinkable only a few years ago now seem like a regular occurrence. But for a few brave voices in the competitive community, a handful of tireless consumer rights advocates, and a few concerned leaders on Capitol Hill, most observers, both inside and outside Washington, DC, don't focus on this trend of consolidation. It seems as if the widespread view, from our supposed antitrust watchdogs at the Department of Justice to many inside this building, is to simply accept this process as inevitable.

It is against this backdrop the Commission today conditionally approves the formation of the country's largest wireline, wireless, and broadband company. This combination will directly touch residential consumers, wireless customers, small and large businesses, local governments and institutions across the United States. A merger of this breadth and scope raises serious questions for policymakers and consumers because communications services – voice, data, and video – are so integral to our daily lives and to the economic success of our communities and national economy. I share many of the concerns raised about this combination and have tried to put in place a meaningful set of conditions to address them.

The result we reach today is not perfect. Rather, it reflects true compromise. Yet, on balance, it will benefit the public interest in several significant ways. In the item, we take important steps to address concentration in the broadband market by accepting as a condition AT&T's commitment to maintain a neutral network and neutral routing in its provision of wireline broadband Internet access service. This commitment will help preserve the open nature of the Internet from the consumer to the Internet cloud. As a result of our conditions, consumers also will have access to more affordable broadband services, whether purchased as a bundled package or as a stand-alone offering that can be paired with wireless or Internet phone service. In addition, we take significant steps to promote and preserve competition by requiring that the applicants divest wireless broadband spectrum that will be critical to the development of an independent broadband option; by ensuring that competitive carriers will continue to have access

to critical wholesale inputs that they need; and by providing that these conditions last for a meaningful period of time.

At the same time, the applicants will be able to move forward with their plans to accelerate their broadband and video deployment across their entire footprint. To that end, I would have preferred a clearer and more enforceable set of commitments on the applicants' plans to bring true high-bandwidth broadband services to all consumers, including low income consumers and those in rural areas. But I am pleased that the combined company has agreed to reach 100% of their customers with at least basic broadband service by the end of 2007 and to file a report on their progress in deploying advanced video services.

This proceeding has been challenging. I would like to thank the parties and my colleagues for their willingness to consider and adopt critical consumer protections to mitigate some of the potential harms of this transaction. Without these conditions, I could not support this combination, so our ability to find common ground was critical to this decision. I would have preferred more rigorous safeguards in some areas and longer durations for certain conditions that we adopt. At the same time, I know and respect that some of my colleagues come at this proceeding from a very different starting position.

That fact was keenly driven home two months ago when the Department of Justice waived this merger through without the imposition of even a single condition to protect competition or consumers. I disagreed with that approach and continue to believe that a merger of this magnitude warrants a careful review of the public interest, something I have pressed hard for in this case. We are obligated to analyze carefully the record evidence and determine whether the public will be served better by the transaction being approved or being denied, and whether conditions may be necessary to mitigate harms to consumers. The manner in which the Commission reaches its decisions is also important, so I appreciated the willingness of my colleagues to provide additional opportunity for public input on the impact of this deal and on the need for adequate conditions.

We won far more concessions to benefit the public than anyone predicted when this deal was announced. People expected us to deliver a few kilobits, and we came through with several megabits. What follows is my analysis of many of the critical elements that made this agreement possible.

Ensuring a Neutral and Open Internet

One hallmark of this Order is that it applies explicit, enforceable provisions to preserve and protect the open and interconnected nature of the Internet, including not only a commitment to abide by the four principles of the FCC Internet Policy Statement but also an historic agreement to ensure that the combined company will maintain a neutral network and neutral routing in its wireline broadband Internet access service. Together, these provisions are critical to preserving the value of the Internet as a tool for economic opportunity, innovation, and so many forms of civic, democratic, and social participation.

The Internet has been a source of remarkable innovation and has opened a new world of social and economic opportunities, precisely because of its openness and diversity. To help preserve this character, the FCC last fall adopted an Internet Policy Statement that sets out a basic set of consumer expectations for broadband providers and the Internet. With these four principles, the Commission sought to ensure that consumers are entitled to access the lawful Internet content of their choice, to run applications and use services of their choice, subject to the needs of law enforcement, and to connect their choice of legal devices that do not harm the network. This Order rightly requires the applicants to meet these basic provisions adopted unanimously by the Commission and applied as enforceable conditions to the BOC-IXC mergers, last year.

Most significantly, the Commission takes a long-awaited and momentous step in this Order by requiring the applicants to maintain neutral network and neutral routing in the provision of their wireline broadband Internet access service. This provision was critical for my support of this merger and will serve as a "5th principle," ensuring that the combined company does not privilege, degrade, or prioritize the traffic of Internet content, applications or service providers, including their own affiliates. Given the increase in concentration presented by this transaction – particularly set against the backdrop of a market in which telephone and cable operators control nearly 98 percent of the market, with many consumers lacking any meaningful choice of providers – it was critical that the Commission add a principle to address incentives for anti-competitive discrimination. Defining the exact parameters of any neutrality provision is, almost by definition, complex and difficult. The precise contours, scope, and exclusions in this provision reflect compromise and a predictive judgment about how, in the words of Prof. Tim Wu, "to preserve the most attractive features of the Internet as it now exists." The work is not done, however. It is critical that we remain vigilant and continue to explore comprehensive approaches to this issue; but I expect this significant step will inform the debate in the coming months and years. I appreciate the efforts of the many diverse groups and individuals who have contributed to this effort and, in particular, I want to thank Commissioner Copps for his leadership on this issue and for his commitment to the effort to devise a carefully-crafted condition.

Encouraging Consumer Access to Broadband

Affordable Broadband. We made substantial progress during our review in increasing consumer access to broadband services. These services are increasingly recognized as critical for the growth of small businesses, for persons with disabilities, and as a driver of opportunity in so many aspects our lives, including distance learning and telemedicine. So, the commitment to offer basic broadband service for $10 per month should help lower the cost for many consumers who are just starting to take advantage of the broadband experience. I've said often that we need more bandwidth value in this country, so I am pleased to see this commitment from the applicants. We have heard from many Members of Congress, state and local officials, and community organizations who believe that the ability of the combined company to deliver low priced broadband services was particularly appealing to them.

Broadband Build-Out. I also note that, in response to our call for conditions, AT&T has committed to provide broadband services to 100% of their territory by the end of 2007. A

ubiquitous broadband commitment is key because people all over this country want access to the opportunities that flow from this technology, no matter where they live. While I support adopting this commitment as a condition of the merger, it alone will not be a panacea. It would have been substantially improved by the inclusion of more specific, quantifiable, and enforceable commitments for rural and low income consumers, who deserve to enjoy the benefits of this transaction, too.

This commitment also relies on a definition of broadband that does not nearly put our country on par with our global competitors and is not at a sufficient level of bandwidth to support the provision of video services. I would have supported adoption of a condition requiring the applicants to meet agreed-upon levels of fiber deployment, which is critical for the deployment of competitive video services, one of the chief benefits touted for this combination. I do appreciate the applicants' willingness to respond to my concerns by outlining some of their fiber and video deployment plans and agreeing to provide a report one year from now on their progress, but I wish that we could have done more to ensure that consumers truly reap the purported benefits of providing real video competition in the BellSouth region. I am hopeful this will occur even in the absence of enforceable conditions.

I am particularly pleased that AT&T also has committed to increase its build-out of wireless broadband services. As a condition of this merger, AT&T will jumpstart service in the under-used 2.3 GHz band by agreeing to a specific construction commitment over the next three and a half years. AT&T already has conducted a number of successful trials on the spectrum and is running a commercial WiMAX network in Pahrump, Nevada. I want to see more deployment in the 2.3 GHz band. In addition to divesting its 2.5 GHz wireless broadband holdings, AT&T has met my challenge by committing today to a specific level of buildout by July 2010. Much like the Sprint-Nextel merger, I am hopeful that this build-out commitment will prove a catalyst to the entire Wireless Communications Service. Like a rising tide that lifts all boats, AT&T's work in this band will be a boon for other wireless broadband providers looking to provide service in the 2.3 GHz band.

Stand-Alone DSL. Another major victory for consumers is the ability to purchase broadband services without having to buy a whole bundle of traditional telephone service. So, I fully support the applicants' commitment to provide a meaningful stand-alone DSL option for consumers who want access to broadband services but who want to "cut the cord." Consumer advocates have strongly supported this condition, which should expand the options available for residential and small business consumers who are interested in relying on wireless or Internet phone service for their voice connections.

We have shown greater attention in this Order to the stand-alone DSL condition because it must be implemented fairly in order to be a meaningful option for consumers. In the previous merger of then SBC with AT&T, we conditioned our support on the offer of a similar naked DSL service. I was disappointed when that offer was made to consumers at a price point that seemed designed to make it unattractive for consumers, virtually at the same level as the entire bundled offering. In California, for example, consumers who were actually able to learn of the availability of stand-alone DSL, which had not been advertised, were quoted a rate of $44.99 per month, a mere one dollar less than the least expensive regular bundle of DSL and phone service.

So, it is especially meaningful here that we were able to reach agreement for AT&T to offer the service at $19.95. Particularly in combination with the Internet neutrality conditions adopted today, this stand-alone DSL offering should create an opportunity for the development of competitive Voice over Internet Protocol (VoIP) services. This condition has the potential both to give consumers more options and flexibility in their broadband and voice services, and to spur the development of competition and choice.

Promoting Competitive Alternatives

Some have argued that this combination is a mere afterthought in the world of converged communications. But this analysis falls short. Even the Order as drafted recognizes that the markets for business and residential services are highly concentrated in the applicants' in-region territories. Moreover, AT&T is already a substantial competitive force and has the potential to be a greater competitive force in the BellSouth region. In fact, just last year AT&T justified the SBC-AT&T merger on grounds that it would compete nationwide, not merge nationwide. So, in the absence of meaningful conditions from the Department of Justice, it is critical that we adopt the safeguards we do today to protect against the loss of competition.

UNEs. To address concerns about the loss of competitive alternatives, the applicants have agreed to freeze the wholesale rates for critical unbundled network elements and to recalculate the impairment triggers for determining the availability of the elements. As a result, competitors will have access to critical elements in some additional markets where AT&T is lost as a competitor, and they will not be faced with draconian price increases. The applicants have also offered an important new commitment – a commitment not to seek forbearance from section 251 unbundled network elements – that should provide competitors another critical measure of stability.

Reducing Costs of Interconnection Agreements. I was also pleased that we require the applicants to take a number of steps – including providing interconnection agreement portability and allowing parties to extend their existing agreements – to reduce the costs of negotiating interconnection agreements. This condition also responds to concerns about incentives for discrimination – whether through the terms of access offered to competitors or through raising competitors' costs – long-recognized by Commission precedent. This condition also addresses the purported purpose of this merger, which is to respond to intermodal competition.

Special Access Services. It is clear that many business customers and wholesale carriers rely heavily on the applicants' special access services for their voice and high-speed connections. Independent wireless companies, satellite providers, and long distance providers also depend on access to the applicants' nearly ubiquitous network and services to connect their networks to other carriers. In addition, many small rural providers depend on these services to connect to the Internet backbone. So, if the applicants were to raise prices as a result of diminished competition, such action would directly impact the cost and availability of services for large and small businesses, schools, hospitals, government offices, and independent wireless providers. Particularly in light of DOJ's inaction, I believe it is imperative to adopt measures to protect against the loss of competition. The Order includes modest provisions to reduce the applicants' prices for special access services in areas where the Government Accountability Office (GAO),

in its recent report on special access services, raised the most significant concern, and the Order includes a price freeze for the remainder of the applicant's special access services across the entire 22 state territory of the new company.

The Order also addresses some of the terms and conditions that have been called into question by GAO. For example, it eliminates on a going forward basis at least one condition that restricts the ability of wholesale providers to buy from other channels. While I would have supported, and many commenters have strongly urged the Commission to adopt, more stringent safeguards in this area, we have attempted to provide a modest level of stability for 48 months for these many consumers of special access services. I do note that the Commission has a long-pending proceeding on special access services and, with fresh motivation from GAO's report, it will be even more critical that the Commission tackle these issues as comprehensively and expeditiously as possible. I will continue to push for action on this long-overdue proceeding.

Wireless Broadband. I am particularly pleased with the conditions related to wireless broadband because these services offer one of the most significant opportunities for much-needed broadband competition. And while many simply talk about broadband deployment, I have been passionate about taking specific steps to drive actual wireless broadband build-out. I want to promote flexibility and innovation in this wireless space, but since the spectrum is a finite public resource, I want to see results as well – particularly in the area of wireless broadband.

Consistent with my efforts to promote wireless broadband deployment in other mergers and proceedings, I worked closely with the applicants to come up with conditions for the merged company's holdings that will serve the public interest. Most significantly, AT&T will divest the licenses and leases it acquires in the 2.5 GHz band from BellSouth within one year of the merger's closing date. This significant commitment will ensure that independent broadband access providers interested in developing services in the 2.5 GHz band will now have access to spectrum in an important part of the country that may otherwise have been unavailable to them. Increased 2.5 GHz availability in the southeast will lead to the deployment of wireless broadband services in this market in direct competition to the new AT&T – a real boon for consumers. And consumers in other markets will benefit as increased deployment in the southeast will continue to improve efficiencies for the entire 2.5 GHz industry as broadband services are rolled out in the band across the country over the next several years.

Taken together, the two spectrum conditions – a build-out condition for the 2.3 GHz band and divestiture of the 2.5 GHz band – will significantly advance the deployment of wireless broadband services in the southeast and throughout the rest of the country. With the belief that actions speak louder than words, I truly am pleased to have been an advocate for that outcome.

Tunney Act Review. It is worth noting that, even as we move forward with this proposed merger, a federal court is still reviewing the historic Bell-IXC mergers approved by DOJ and the Commission last year, and the adequacy of the conditions imposed on those mergers. With that review pending, leading members of Congress on a bi-partisan basis have raised questions about whether it is appropriate to move forward with review of this transaction. Both this Order and the Commission's orders in last year's mergers take note of DOJ's review and conclusions, so I

am pleased that the applicants have committed to apply the result of any changes in the consent decree regarding the divested buildings in the SBC-AT&T merger in the BellSouth territory, as well. I have serious reservations about whether the divestiture analysis applied by DOJ adequately reflects the competitive harms, so I was also pleased that AT&T has agreed to consult with the FCC on the need for further conditions, should the Tunney Act review process lead to the imposition of greater conditions for last year's mergers.

Ensuring Access for All Americans

Persons with Disabilities. It is significant that we have heard in this proceeding from many groups representing persons with disabilities. Many of these commenters have noted that the applicants have a good history of working with consumers with disabilities and have encouraged the Commission to look carefully at the how the merged company will provide accessible services in the future. To that end, I want to commend the applicants for agreeing to provide a report describing the efforts of the combined company to provide high quality service to consumers with disabilities on a going-forward basis.

Rural Carrier Concerns. I also note that a number of commenters have raised concern about the impact of this transaction on small, rural carriers and their ability to deliver high quality, advanced services to customers in Rural America. This Order does adopt a number of measures – including the freeze on special access rates, a freeze on certain transiting rates, and a condition to address Internet backbone peering issues – that should help ameliorate these concerns. Still, it will require an on-going effort to ensure that Rural Americans benefit from the evolution of technology and this changing marketplace.

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I support the conditions that we adopt in this Order and find that they strike a reasonable balance. Particularly given where we started, and the paltry baseline afforded by DOJ's review, I believe that we have advanced the public interest significantly. Were the pen solely in my hand, I likely would have crafted different conditions, but each of my colleagues would likely say the same thing.

I rely specifically on the companies' assurances that they will faithfully and fairly implement the commitments they have made both in their applications and in their more recent filings. I fully expect they will live up to the letter and spirit of this agreement. It will also be important that this Commission commit to monitor and vigorously enforce the terms of this Order.

While I support this transaction as conditioned, it is important to note that there is much analysis in this Order that I find lacking or downright troubling. It is important to consider this combination in light of larger industry trends and developing intermodal competition, but I still find that the Order's sweeping conclusions about the lack of impact requires us to take too much on faith. It also rejects long-standing Commission precedent on the harms of horizontal consolidation in the industry, in what some might describe as an effort to walk away from "phone-to-phone" competition solely in favor of intermodal competition. While I can agree to

support the package of conditions agreed to by the applicants and my colleagues, I choose to concur to the Order given my concern with the overall analysis.

I would also like to thank the many Members of Congress, outside parties, and consumers for their comments, and AT&T and BellSouth for their efforts to address concerns that have been raised in this proceeding. I'd especially like to thank my colleague and friend Commissioner Copps for his tenacity and dedication to the public interest. He and his staff have worked tireless to make this agreement possible. It has taken effort on all sides, but we have worked quickly to achieve a result that strikes a balance. At times, this has been a difficult and unnecessarily protracted process but I am pleased that we moved quickly to conclude this proceeding once the Commission moved past its own internal drama. It turns out there wasn't an impasse, after all.

Finally, the fact that I was able to reach a successful conclusion in the waning days of the year is a tribute to the monumental efforts of my staff, especially Scott Bergmann and Barry Ohlson. They sacrificed their holidays, holding marathon sessions and working countless long hours. My heartfelt thanks are due to their families, as well, for the considerable sacrifices they made in allowing them to carry on. These are two of the finest public servants I have known, and two of the finest telecom lawyers in this city. They rose to this occasion as they have so often in the past. Appreciation is due not only from me, but from so many Americans who will benefit from their work, even if they never know any of our names.

As I have oft stated, the opportunities arising from today's technologies are greater than ever, but so is the penalty for those left without options. With that in mind, I have made every effort to ensure that consumers reap the benefits of this rapidly changing marketplace and this transaction.

For all these reasons, I concur in this Order.