

**STATEMENT OF
COMMISSIONER MICHAEL J. COPPS,
CONCURRING**

Re: SBC Communications Inc. and AT&T Corp. Applications for Approval of Transfer of Control, Memorandum Opinion and Order, WC Docket No. 05-65 (Concurring)

The mergers before us are about more than the union of this country's largest telecommunications carriers. They are about consumers' phone bills, the availability of competitive broadband options and the future of the Internet. But in a sense, these mergers can also be seen as an epitaph for the competition that many of us thought we would enjoy as a result of the Telecommunications Act of 1996. That legislation, I am convinced, envisioned a vastly different communications landscape than the one we find ourselves living in today.

If you seek the reason why we haven't arrived at that happy valley of competition rife with consumer benefits, you can start with the misdirected policies of the FCC over the last several years. On too many fronts, the Commission put the spear to the pro-competitive policies of the Telecommunications Act of 1996. It put intra-modal competition for the residential market pretty much beyond reach for new entrant carriers and then proceeded to inhibit enterprise competition, too. We turned our eyes away when enforcement was needed to keep bottleneck facilities open. And all the while we kept singing confidently "Don't Worry, Be Happy"—*inter-modal* competition is going to save us with all its new options. Maybe, but then again maybe not—we're still waiting. I think we ought to be concerned. Thanks in part to our actions, the wireline market became increasingly the province of the few. More than half of the wireless market came under the control of incumbent wireline providers. New services like VoIP have been held back by the high cost of broadband in this country. And now the Internet backbone seems headed in the same direction of control by a favored few.

This state of affairs is not of my making or choosing. The record shows that I objected vociferously to many of these changes. I would have chosen a very different path than the one we travel today. But in the end, we are charged with considering these mergers in the context of the world that is, not the one that might have been.

In this environment, I believe my responsibility is to identify and fight for what we can preserve, so that American consumers can still enjoy some competition in telecom services; that business customers, too, can benefit from competitive rates and innovative service choices and lower prices; and that, when it comes to the Internet, we can all go where we want to go and do what we want to do with this dynamic tool that is so critical to our nation's future. These things are all clearly in the public interest.

The Order the Commission adopts today falls far short of ideal. Maybe a better way to put it on this Halloween Day is to say: It's not a trick or much of a treat, but it's all you get if you come knocking at the Commission's door today. Yet, clearly, this is better than approving these mergers without any conditions. There have been difficult discussions here in recent days, but they have been substantive, productive and fair. And while I wish I could have been more persuasive on a number of issues, we should keep in mind that this outcome is far from a rubber stamp approval of the item we received. I would not—could not—support an unconditioned approach. Would I have preferred to do more? Yes. Am I entirely satisfied? No. But this Order is now conditioned on provisions designed to address numerous possible harms to competition and to consumers, as well as to protect the openness and innovation that must always characterize the Internet.

- *Stand-Alone DSL:* We require the Applicants to make available stand-alone, or "naked" DSL. This means consumers can buy DSL without being forced to also purchase voice service. This is good news. If savvy consumers have cut the cord and use only a wireless phone, why should they have to pay for wireline voice service they don't even want? Looking forward, this condition is important for the development of VoIP. I also am pleased that the Commission has committed to enforce this condition and issue an annual report addressing anti-competitive conduct in this market. And I hope we will have the good sense to find it anti-competitive if the price for stand-alone DSL is not significantly less than the price for bundled voice and DSL.
- *Net Neutrality:* Two years ago I urged the Commission to ensure that its policies protect the openness that makes the Internet such a vibrant place. Two months ago, I pushed for this Commission to approve an Internet Policy Statement outlining the freedoms consumers have a right to expect in the digital age. Today, we make these principles enforceable. As a result, consumers will have an enforceable right to use their bandwidth as they see fit, going where they choose and running the applications they want on the Internet.
- *Internet Backbone:* The Internet's network of networks relies on providers handing traffic off to one another. This free exchange of traffic—known as peering—has been a hallmark of the Internet backbone. We require the Applicants to continue peering with as many providers as they do today. This will help prevent the network outages that come from de-peering. It will also help ensure that the free flow of traffic continues—and that new costs are not passed on to end-users.
- *Special Access:* We provide a measure of stability for businesses and carriers that use special access services—the high capacity facilities that so much of our communications rely on. We freeze rates and provide some protection against discriminatory practices. Let me note, however, that the Commission still has a long-standing and more comprehensive proceeding on special access to complete. It is vitally important that we do so without further delay.
- *UNEs:* To keep competition growing from competitive carriers, we require the Applicants to update the wire center test from the *Triennial Review Remand*. We also provide stability by capping UNE input rates for two years.

These conditions provide only a bare minimum. I can't say we made lemonade out of lemons, but we did the best we could. More would clearly have been better. Surely our statutory obligation to ensure that these mergers are in the public interest provides ample authority for the Commission to go further than it did. In addition to the areas I just discussed, a merger of this magnitude would seem to call for more significant divestiture of overlapping facilities and routes, going beyond the minimalist consent decrees that were announced last week by the Department of Justice. But in the good faith back and forth between my colleagues and me, these are the results we were able to achieve. Similarly, some will argue that several of the commitments outlined above are not in perpetuity and are not long enough. I agree. Commissioner Adelstein and I fought long and hard for lengthier commitments. But at least for the time periods enumerated, this becomes official policy. Once instituted, consumer expectations may compel their extension, and perhaps the Commission itself will come to see the wisdom of extending them. More to the point, Congress will have the opportunity to work its will as it revisits the telecommunications statute.

Going forward, our priority must be on vigilance, expert monitoring, and enforcement as needed. This new era of telecommunication is rife with all sorts of exciting opportunities for both consumers and entrepreneurs. But there are also new perils. No less a source than the *Wall Street Journal* pointed out less than two weeks ago that large carriers "are starting to make it harder for consumers to use the Internet

for phone calls or swapping video files.” The more powerful and concentrated our facilities providers grow, the more they have the ability, and perhaps even the incentive, to close off Internet lanes and block IP byways. I’m not saying this is part of their business plans today; I am saying we create the power to inflict such harms only at great risk to consumers, innovation and our nation’s competitive posture. Because, in practice, such stratagems can mean filtering technologies that restrict use of Internet-calling services or that make it difficult to watch videos or listen to music over the web. The conditions we adopt today speak directly to this issue—*before* increased concentration of last mile facilities and the Internet backbone make it intractable. This is why stand-alone DSL, enforceable net neutrality principles, and peering in the Internet backbone are so vital.

I also am pleased that these conditions now express a measure of concern for the effects of these mergers on competitive wireline providers. Competitive carriers will benefit from the reforms we put in place for special access and UNEs. This will provide at least some latitude for competitive players trying to crack open an increasingly concentrated marketplace. We need active and engaged competitive carriers to keep rates low. This is especially important for small business customers.

In addition, this Order takes a cautious view of the impact of these mergers on rural America. We share a concern that the mergers not be allowed to jeopardize interconnection for small and rural providers. To this end, the Commission commits to monitoring the situation on an ongoing basis. This is important because the wrong policies here could actually put rural America at further disadvantage compared to the rest of the country. I, for one, will be vigilant in making sure this never happens.

Looking beyond the transaction before us, it is obvious that the whole telecommunications landscape continues to change dramatically. But despite all of the advances in technology and efficiency over the last decade, local phone rates have failed to decline. Household phone penetration is at the lowest rate in 17 years. Surely being 16th in the world in broadband penetration is nothing to crow to about. And, yes, we still have enormous digital gaps from the inner city to the rural village, and there is a real threat that current policies may widen rather than close those gaps. So there are already ample warning signs something is not right. And it is long past time for the Commission to pay heed.

It may be that we can address all these concerns in a big carrier environment. Conversely, it may be that we are tacking back in time toward an era when concentrated power dictated what limited services we could and could not have and we had no recourse but to accept what was offered. In any case, I am mindful that there are large and portentous questions here—and that their ultimate resolutions often range beyond the boundaries of FCC jurisdiction. The Commission—important as its work is—does not design the legal landscape for telecommunications. Congress is looking at these issues and will hopefully be updating our telecommunications statute in the months or year ahead—and there is no substitute for that kind of guidance. I also believe we need some real national dialogue on these issues regarding consumer rights, Internet openness, broadband deployment and many more. I think we will find the American people more than happy to engage such a discussion. They understand that how these issues are decided is important to them. The bottom line here is that these issues are vitally important to the future of our country. Telecommunications are going to be a major driver of our economy in this new century. We just have to get the legal and regulatory landscape right. If we get it wrong, American consumers will pay and so will American technology, innovation and entrepreneurship. No less than our global competitiveness in the new information age is at stake.

Above all, we must have some humility about what we do. There are honest disagreements over these issues and I don’t believe that any one of us has it all figured out. So we have to be always open to new facts and always follow up on the real-world consequences of our actions. If rates go up for residential and business users as a result of our decision today, if our broadband penetration rates fall

further in comparison with what other countries with different policies are experiencing, and if consumers find that their Internet freedom is being shackled by monopoly or duopoly control, then we have a clear and pressing duty to revisit what we have done. So we need to put as much or more effort and resources into monitoring the consequences of our actions as we do in bringing them forward for a vote. I have worked in this proceeding to protect against injurious consequences, as best I can under the circumstances, and while I would have liked more, I will concur in these Orders and pledge my close attention to their unfolding consequences.

We at this table are all indebted to the work of the Bureau and to the tireless dedication of our personal staffs as these items matured and particularly their often heroic efforts over the past week. For my part I want to extend my appreciation and admiration to Jessica Rosenworcel. Her tenacity and creativity through all of this have been an inspiration.