

exclusive dealings as perfectly appropriate for its wireless broadband services.¹ Without strong network neutrality conditions, AT&T will leverage its combined wireless and wireline subscribers to control what these customers can hear, see, and say.

ARGUMENT

As an initial matter, CDD wishes to commend Commissioners Copps and Adelstein for their commitment to openness in government and public debate. Even if, as the Chairman maintains, no violation of the *ex parte* rules took place, it violates the spirit of the Government in the Sunshine Act and the Administrative Procedure Act to decide a merger of such importance on the basis of back-channel communications made possible by exploiting legal loopholes. CDD therefore respectfully thanks the Chairman for acceding to the request of Commissioner Copps and Commissioner Adelstein for further public notice and comment.

The proposed conditions are wholly inadequate to protect the public from the market power the combined AT&T/BellSouth will wield in the traditional telephone market, broadband market, and mobile and fixed wireless markets. The combined integration of landline and wireless voice and broadband services, free to impose charges or manipulate the network virtually without restraint, threatens to destroy the vibrant, free and open internet that exists today.

Indeed, some of AT&T's proposed conditions – free DSL modems, a \$10 introductory rate for new DSL subscribers – look more like promotional offers than conditions designed to alleviate the dangers to free speech and competition caused by the proposed transaction. Similarly, the

¹Newsfactor.com, “Debate Continues Over Internet’s Future,” August 23, 2006. Available at http://www.newsfactor.com/news/Debate-Continues-over-Internet-s-Future/story.xhtml?story_id=11300ADUIVFZ (last viewed October 24, 2006).

promise of \$1 Million for public safety organizations appears like an almost laughable attempt to buy approval of a merger valued at nearly \$80 Billion without confronting the real issues that make this merger so harmful to the public interest. The Commission should reject these transparent efforts substitute token gestures for genuine conditions.

Because other parties will extensively address the deficiencies in other conditions, CDD does not dwell on them here. Instead, CDD focuses on the failure of AT&T to offer meaningful conditions to address its post-merger dominance in spectrum.

I. THE COMMISSION SHOULD REQUIRE DIVESTITURE OF 2.3 GHZ AND 2.5 GHZ SPECTRUM.

As explained by CDD in its *Petition to Deny*, the combination of AT&T and BellSouth creates significant anticompetitive problems simply as a function of pure competition in wireless. For some time now, the Commission has pinned its hopes for a “third-pipe” to the home on wireless broadband. The Commission also relies upon competition between mobile cellular phones and landlines to keep residential telephony prices down.

In response to the concerns raised by CDD and others that AT&T will have the capacity to block rival wireless carriers and will continue to warehouse spectrum, AT&T proposes only one condition. AT&T commits to conducting ten trials of for wireless broadband service using its 2.3 GHz and 2.5 GHz spectrum by the end of 2007. This proposal does not even begin to address the problems caused by allowing AT&T to achieve a position of unquestioned spectrum supremacy as a consequence of the merger.

The combination of AT&T and BellSouth removes both the presence of a significant cellular competitor – Cingular – and eliminates the likelihood of wireless broadband deployment as a service competing with DSL or fiber. At present, AT&T and BellSouth actively compete with Cingular for

customers in their respective territory; every dollar of revenue AT&T or BellSouth loses from a Cingular customer dropping a landline translates to only 60 cents or 40 cents of revenue to the respective companies. Post merger, AT&T will have 100% of Cingular. Cingular will therefore cease to be a competitor of AT&T. While AT&T regards this as a “synergy,” the Commission should properly see this as a significant loss of competition.

Similarly, to the extent Cingular’s EVDO and fixed wireless service are considered broadband competitors to AT&T and BellSouth, this competition will also end. As with Cingular/AT&T landline competition, Cingular/DSL voice competition will become a thing of the past. Instead, AT&T will stunt the development of wireless broadband services to ensure that they do not cannibalize profitable AT&T’s landline services.

AT&T/Cingular is unlikely to face significant competition from other wireless services because of its enormous spectrum advantage in its service area. As previously described by CDD and others, AT&T and Bell South will, post-merger, dominate the airwaves in its service region. As described in CDD’s *Petition to Deny*, AT&T post-merger will also control huge swaths of spectrum in the desirable 2.3 GHz and 2.5 GHz bands. This both enhances AT&T’s spectrum advantage, and starves potential competitors of needed spectrum.

The recent AWS auction has only aggravated the situation. According to the Commission’s report on the auction, Cingular AWS was one of the most successful bidders for AWS licenses.² An examination of the winning bids demonstrates several patterns with implications for wireless competition and the likelihood of a competitive wireless broadband market.

²<https://auctionbidding.fcc.gov/auction/index.htm?CFID=1465&CFTOKEN=32160238&jsessionid=F2yyPGvDy8zDQ42jvGBGJsp2WJsB39Gkgc22FbLh2RDpGGrQyQ78!720484096!NONE!1161720434795>

- AT&T/Cingular's AWS licenses significantly overlap its wireline service area and existing spectrum holdings, further maximizing Cingular's spectrum advantage.
- For a large number of these licenses, the winner of the paired competing license was Spectrum Co., a consortium controlled by Comcast and Time Warner.³ Taken by itself, this should presage a possible powerful new competitor (albeit one that would reenforce the dominance of the incumbent cable operators). But Comcast and Time Warner have said repeatedly that they do not intend to use their AWS spectrum to build a rival mobile telephone network or what services they ultimately intend to offer through their spectrum.⁴ AT&T can therefore trust that its wireless dominance will remain unchallenged.
- Even where potential rivals such as Cricket won competing licenses, it will take years for the current federal incumbents to clear the AWS band and permit commercial deployment in the most significant markets.

In other words, rather than provide potential competition, the AWS auction has further bolstered AT&T's spectrum supremacy. Unless the Commission orders divestiture of sufficient spectrum for a genuine national competitor in spectrum fit for use either now or in the near future, AT&T will enjoy unchallengable dominance in wireless broadband as a consequence of its superior spectrum holdings as compared to potential rivals.

II. THE COMMISSION MUST IMPOSE WIRELESS NETWORK NEUTRALITY CONDITIONS.

The Chairman and Commissioner Tate have repeatedly maintained that they see no evidence that broadband providers will seek to block content or lock subscribers into exclusive deals. Wireless providers, however, have shown every indication that they intend to do just that. In addition to imposing limitations on users through contractual limitations, Cingular has taken steps

³Sprint/Nextel has a 5% interest in Spectrum Co. Other interest holders are other cable operators, not competing wireless providers.

⁴*See, e.g.*, Jonathon Make, Howard Buskirk, "Cable Firms Seen Selling Video, Broadband on AWS Spectrum," *Communications Daily* (September 18, 2006) (quoting Comcast COO John Alchin as saying "we have no interest in being the 5th cellular operator" and that acquired spectrum was about "long term flexibility").

to limit users to its exclusive on-line pay service.

At a Progress and Freedom Foundation conference last August, Deputy Counsel for EBay Todd Cohen complained that Cingular customers cannot use text messages to make a payment through eBay's online subsidiary, PayPal, because Cingular won't agree to give PayPal access to necessary wireless codes on its network. PayPal is available to customers of other wireless services. Instead, Cingular requires its customers to use an exclusive provider.⁵ A representative of the wireless industry replied that Cingular should have the right to strike exclusive deals, and that its refusal to allow users to access PayPal via text-messaging was not "market failure" but capitalism at its best.⁶

Furthermore, based on comments of Ed Whitacre at the NARUC conference August 1st, AT&T intends to apply similar "market practices" to all of AT&T's broadband pipes. While denying that AT&T would ever outright block content, Mr. Whitacre insisted that "nobody gets a free ride."⁷ In comments that echoed his previous (and subsequently disavowed) remarks about charging Google and others to reach "his" customers, Mr. Whitacre asserted that AT&T would not provide a "dumb pipe" or allow internet companies to use AT&T's networks without compensation.

As others have explained, AT&T's commitment to abide by the FCC's "four principles" for another 30 months does not alleviate the danger to free speech and competition on the internet

⁵Newsfactor.com, "Debate Continues Over Internet's Future," August 23, 2006. Available at http://www.newsfactor.com/news/Debate-Continues-over-Internet-s-Future/story.xhtml?story_id=11300ADUIVFZ (last viewed October 24, 2006).

⁶*Id.*

⁷Light Reading, "AT&T: Nobody Gets a Free Ride," August 1, 2006. Available at http://www.lightreading.com/document.asp?doc_id=100380 (Last visited October 24, 2006).

caused by the merger. More significantly, however, the proposed condition does not extend to AT&T's current and future wireless internet access offerings.

Cingular has made it clear by its conduct that it has no intention of operating in accordance with the Commission's four principles. Given the dominant position AT&T will have in deployment of wireless broadband networks, and the ability to integrate its wireless and wireline broadband networks, the Commission must impose a strict network neutrality condition on AT&T's wireless offerings. Otherwise, the wireless broadband world will continue to evolve away from the open internet of today into a "walled garden" in which AT&T carefully manages the user experience and keeps out competitors.

CONCLUSION

Since CDD filed its *Petition to Deny* in May, the anticompetitive consequences of the merger have only worsened. But the proposed conditions do not address any of the dangers identified by CDD as flowing from the merger, given the spectrum supremacy it would confer to AT&T.

WHEREFORE, the Commission should deny the merger, or impose the requested divestiture and network neutrality conditions and all other relief as may be just and proper.

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