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**FCC Delays, and Delays, AT&T/BellSouth
Merger Decision**

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The \$82 billion AT&T and BellSouth merger was on the brink of receiving Federal Communications Commission approval by the time *FHH Telecom Law* readers received this issue. But all bets are off following removal of the item from the agenda of both the October and November Open Meetings at the FCC.

Chairman Kevin Martin finds himself in very familiar situation, deadlocked 2-2, as he was so often during his first year as Chairman in the absence of a fifth Commissioner. First year Commissioner Robert McDowell recused himself from participating in the merger proceeding because, as a member of the Virginia Bar, his status as a public official prohibits him from acting on an issue he was involved with in private practice. McDowell's former employer, Comptel, has lobbied vigorously against the merger.

A dramatic stage was set for Oct. 12, one day following the Department of Justice's (DoJ) approval of the merger. The FCC was slated to announce its vote on the merger during its monthly agenda meeting, but delayed the decision one day, scheduling a special meeting expressly for the AT&T/BellSouth item. However, after keeping anxious observers and reporters waiting more than three hours, the Commission never appeared in the meeting room, canceling its vote for the second time in two days.

The vote was teed up once again for the Nov. 3 meeting, but was pulled one day earlier when it became evident that the two Democratic Commissioners would not budge on merger conditions.

AT&T officials have been working feverishly to obtain FCC approval as soon as possible, fearing what might happen if the merger is left pending too long in an election year. At one point, AT&T was adamant about securing a 4-0 FCC vote on the item, but has since indicated a willingness to settle for the requisite three votes. There is speculation that if the Commission remains stuck at 2-2 for an extended period of time, McDowell's recusal may be revisited.

The two Democratic Commissioners, Michael Copps and Jonathan Adelstein, both expressed disappointment at the DoJ's approval of the mergers absent any consent decree/modifications from the two parties. The DoJ had been urged by several members of Congress to wait until the completion of a federal court review of the SBC-AT&T merger under the Tunney Act prior to issuing its approval. Adelstein called the DoJ's decision "a reckless abandonment of DoJ's responsibility to protect competition and

consumers.”

Copps and Adelstein have reportedly demanded many of the same conditions attached to last year’s mega-mergers (AT&T-SBC and Verizon-MCI). Following the cancellation of an FCC decision on

Oct 12 and 13, AT&T offered a series of merger conditions in an *ex parte* letter addressed to the Commission. The conditions included the following:

By December 2007, the merged company “will offer broadband Internet access service . . . to 100% of the residential living units in the AT&T/BellSouth in-region territory.”

By June 1, 2007, AT&T “will make its disaster recovery capabilities available to facilitate restoration of service in BellSouth’s in-region territory in the event of an extended service outage”

The merged company will continue to offer UNEs and colocation service without seeking an increase in state-approved rates

AT&T will implement a service quality measurement plan for special access like the one in the SBC-Ameritech merger conditions

The company “shall initiate ten new trials of broadband Internet access service using 2.3 GHz or 2.5 GHz spectrum by the end of 2007” with at least five of those trials conducted in BellSouth’s territory

The company will offer ADSL service to customers “without requiring such customers to also purchase circuit switched voice grade telephone service.”

Complete details regarding Copps and Adelstein’s concerns have not been released, but information has slowly been trickling to the media as merger talks intensify. According to *Communications Daily*, one of the primary issues is the potential divestiture of 2.5 GHz and 2.3 GHz spectrum held by BellSouth in the Southeast. Clearwire is one major proponent of a divestiture, arguing that an AT&T/BellSouth merger without it would make it incredibly difficult for competitors to build a viable, nationwide network.

A significant amount of discussion has also revolved around net neutrality, which ironically was an item on the same FCC meeting slated to contain the FCC’s merger decision. AT&T stated it will agree to the same net neutrality conditions imposed by the Commission on the SBC/AT&T merger – essentially an agreement to abide by the FCC’s four net neutrality principles.

This is not sufficient for most proponents of net neutrality. “It’s Our Net,” a coalition of net neutrality supporters, is lobbying for the addition of a fifth principle concerning the nondiscriminatory treatment of applications, content and services. If the impasse between the Commissioners remains status quo, it is quite possible that many more conditions will be imposed for an agreement to be ironed out.

