

RECEIVED

OCT 29 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Joint Application of AT&T Corporation and)
Tele-Communications, Inc. For Approval of)
Transfer of Control of Commission Licenses)
and Authorizations)

CS Docket 98-178

RECEIVED

OCT 29 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**PETITION TO DENY
OF
CONSUMERS UNION,
CONSUMER FEDERATION OF AMERICA, and
OFFICE OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST**

Cheryl A. Leanza
Andrew Jay Schwartzman
Gigi B. Sohn

MEDIA ACCESS PROJECT
1707 L Street, NW
Suite 400
Washington, D.C. 20036
(202) 232-4300

Counsel for the Petitioners

Sabrina Youdim
Law Student Intern
UCLA Law School

October 29, 1998

No. of Copies rec'd
List ABCDE

11

TABLE OF CONTENTS

	<u>Page</u>
INTRODUCTION AND SUMMARY	ii
PETITION TO DENY	1
I. The Commission has the Authority and the Responsibility to Require AT&T and TCI to Demonstrate that this Transaction Serves the Public Interest.	2
II. The Program Access Rules Should Apply Both to AT&T Consumer Co. and the Liberty Media Group.	3
IV. The Commission Must Take Steps to Ensure that AT&T and TCI Will Not Exploit Consumers In Their Asserted Efforts to Provide Competitive Local Telephone Service. .	7
V. AT&T and TCI Must Not Be Allowed to Monopolize High Speed Access to the Internet.	11
VI. AT&T and TCI Must Demonstrate that the New Entity will Provide New Services to All Americans in a Nondiscriminatory Fashion.	14
CONCLUSION	15

INTRODUCTION AND SUMMARY

While Consumers Union *et al.* (“CU *et al.*”) believe that the proposed merger of AT&T and TCI (“AT&T/TCI”) offers the *possibility* of enormous long term benefits for the American public, the merger, as proposed, *certainly* poses significant, immediate dangers that exceed its potential benefits.

Absent adequate protection, small and residential consumers will *certainly* face spiraling cable TV rates and discriminatory practices restricting customer choice and competition in telephone, video, Internet, and other advanced services.

CU *et al.* welcome the prospect that new and different telecommunications services might be in the offing. This merger may -- *or may not* -- mark the long-sought turning point towards a new era of choice, competition, and diversity in telecommunications. AT&T/TCI may -- *or may not* -- use their combined financial resources and technologies to offer facilities-based voice, data, and video services (including high speed Internet connectivity) to residential, as well as business, customers. They may -- *or may not* -- offer small and large customers content and technology options not presently available. And they may -- *or may not* -- enhance competition in the delivery of such services.

The incomplete nature of this application and its inadequate consumer safeguards give rise to fears that the reality of this deal does not match the rhetoric that accompanies it. The dangers are real and substantial that an AT&T/TCI combination will exploit its dominance in non-competitive markets at the expense of consumers and new, small competitors. TCI’s track record of rapacious anti-competitive practices gives particular cause to be wary.

Because the risks are genuine and substantial and the potential benefits are, at best, speculative,

AT&T/TCI have failed to establish their entitlement for Commission approval of their application. Despite the size and scope of this unprecedented merger, AT&T/TCI have presented stunningly sparse and conclusory documentation of their plans and intentions. They have not made commitments to promote, rather than inhibit, choice, competition, and diversity. Absent additional information and specific promises to ameliorate potentially anti-competitive aspects of the transaction, the Commission does not have adequate information to conclude that grant of the application is in the public interest.

Nor is there assurance on this record that the First Amendment goal of a diverse marketplace of commercial, political, social and artistic expression will be advanced. This proposed merger raises especially serious concerns that a merged AT&T/TCI will be able to regain the stranglehold on TV programming markets that the 1992 Cable Act was designed to abolish.

AT&T/TCI's Internet service plans threaten to stifle diversity and commerce on the Internet, and, indeed, could well change the very character of the Internet. Here, too, AT&T/TCI's filings present many more questions than answers. Because the Internet offers greater opportunity for growth and innovation than any other part of the evolving digital telecommunications future, the Commission must pay particular heed to promoting competition in this most promising of all sectors.

In short, the Commission cannot grant the application in the form submitted. The applicants must supply additional information and necessary commitments to permit full evaluation, and to assure that the proposed transaction will promote, not inhibit, choice, diversity, and competition. Only then might the Commission be able to determine whether this merger would be in the public interest, and whether conditions, including structural and behavioral safeguards, must be imposed upon the grant of the AT&T/TCI application.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)	
)	
Joint Application of AT&T Corporation and)	CS Docket 98-178
Tele-Communications, Inc. For Approval of)	
Transfer of Control of Commission Licenses)	
and Authorizations)	

PETITION TO DENY
OF
CONSUMERS UNION, CONSUMER FEDERATION OF AMERICA, OFFICE
OF COMMUNICATION, INC. OF THE UNITED CHURCH OF CHRIST

Consumers Union, Consumer Federation of America, and Office of Communication, Inc. of the United Church of Christ (hereinafter "CU *et al.*"), by their counsel, Media Access Project, respectfully submit this petition to deny the above-captioned applications unless certain conditions are met.

THE PETITIONERS

The petitioners are Consumers Union ("CU"),¹ Consumer Federation of America ("CFA"),² and the Office of Communication, Inc. of the United Church of Christ ("UCC").³ The petitioners

¹ Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers.

² CFA is the nation's largest consumer advocacy group, composed of over two hundred and forty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.

³ The Office of Communications, Inc. of the UCC is an instrumentality of one of the nation's largest Protestant denominations charged, *inter alia*, with conducting a ministry in the mass media. Since it won standing for viewers to participate in FCC licensing proceedings more than 30 years

appear in this proceeding on behalf of their members and others who are television viewers, cable subscribers, telephone customers, and Internet users. Each of the petitioners also appear here to facilitate their access to broadband telecommunications, and to protect and expand their and their members First Amendment rights to speak and be heard, and to receive information.

I. The Commission has the Authority and the Responsibility to Require AT&T and TCI to Demonstrate that this Transaction Serves the Public Interest.

AT&T/TCI bear the burden of demonstrating that their proposed transaction is in the public interest. *See, e.g.*, 47 U.S.C. §§ 309(e), 310(d); *Bell Atlantic/NYNEX Merger Consent Order*, 12 FCC Rcd 19985 at ¶¶ 29. (1997) (“*BA/NYNEX Order*”). Specifically, they must show that competition will be enhanced and that the merger’s significant impediments to competition will not offset its benefits. *See generally id.* at ¶¶ 2-3, 29-32. Further, the Commission is also authorized to impose such conditions as are necessary to carry out the provisions of the Act. *Id.* at ¶ 30 n.63. The Commission’s authority to review a proposed merger extends to the entire transaction, regardless of whether the proposed transaction centers on the transfer of the licenses at issue. *Athena Communications*, 47 FCC 2d 535 (1974) *cited in BA/NYNEX Order* at n.84. To determine whether a transaction fulfills the public interest, the Commission considers not only whether the transaction will promote competition, but also whether it will promote diversity, just and reasonable rates, competitive neutrality, and improved provision of news coverage and political information. *See BA/NYNEX Order* at ¶ 32, n.67 and cases cited therein.

It is of particular significance that this merger is a milestone in the convergence of

ago, Office of Communication of the United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966), it has regularly appeared before the Commission to protect viewers' First Amendment rights to receive information.

telecommunications, media, and common carrier functions that may significantly affect the marketplace of ideas, and quite literally, the civic discourse that is the essence of democratic self-governance. Thus, under the Communications Act, the Commission must scrutinize this transaction in light of its mission to promote the widest possible dissemination of social, political, esthetic, moral, and other ideas. *Red Lion v. F.C.C.*, 80 S.Ct. 1704, 1807 (1969).

II. The Program Access Rules Should Apply Both to AT&T Consumer Co. and the Liberty Media Group.

AT&T/TCI seek to divorce TCI's cable systems operations from its programming interests. Subsequent to the merger, the cable systems would be located in AT&T Consumer Co. (Consumer Co.), and the cable program networks in Liberty Media Group (LMG), a cable programming distributor spun off from TCI several years ago in which TCI currently holds an ownership interest. Transfer Application Statement ("TA Statement") at 11.

The transfer application is silent as to whether AT&T/TCI intend to take the position that the new structure removes LMG from the Commission's jurisdiction under the program access law and the Commission's implementing regulations. 47 USC §548; 47 CFR §76.1000, *et seq.* Under this law, it is:

unlawful for a cable operator, a satellite cable programming vendor in which a cable operator has an attributable interest, . . . to engage in unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any multichannel video programming distributor from providing satellite cable programming . . . to subscribers or consumers.

47 USC §548(a).

While there may be valid tax, securities, and other reasons for this "spin-off," the alleged "separation" of Consumer Co. and LMG does not change the reality that they will continue to

operate as a vertically-integrated entity for the purposes of the program access provisions. Thus, to the extent that AT&T/TCI intend to avoid application of the program access rules by this "spin-off," the Commission should condition its approval on a decision that the program access rules apply both to Consumer Co. and LMG.⁴

The application states that "the structure of the transaction specifically will establish and preserve the Liberty Media Group as a separately managed business group" TA Statement at 13. The word "preserve" is instructive here. Nothing in the transfer application demonstrates that shuffling the boxes on the corporate organizational chart will alter the fundamental relationship between the cable systems and the cable programming ventures. While Dr. Malone and Mr. Hindery may use different letterhead, will still be engaged in a common enterprise. For purposes of the program access rules, the two companies must be treated as one.⁵

The transfer application demonstrates that AT&T/TCI's assertion of independence is a mere illusion. Regardless of the factors that AT&T/TCI claim will insulate Consumer Co. from LMG, the fact remains that both entities will be owned by the combined AT&T/TCI entity. The management of Consumer Co. and LMG will largely come from the same source -- the now vertically-integrated TCI. Leo J. Hindery, currently TCI's President, would become President of Consumer

⁴ Under the plain language of the program access law, "a cable operator" is prohibited from discriminating in the provision of cable programming. 47 USC §548(a). Thus, there is no question that the law and regulations apply to Consumer Co. as a cable operator.

⁵ The transfer application does not even attempt to provide information sufficient to determine whether any of the stockholders or key management of AT&T or Consumer Co. have "attributable" interests in LMG that would make LMG a "satellite programming vendor in which a cable operator has an attributable interest" and therefore subject to the program access rules. 47 USC §548(a). See 47 CFR §§76.1000, *et seq.*; 47 CFR §76.501 notes.

Co. John Malone, TCI's current Chairman and CEO, will serve as Chairman of the Liberty Media Group. TA Statement at 12. Dr. Malone will also serve on AT&T's Board of Directors specifically to protect his Liberty interests, or as stated in the application, as "a person, who by virtue of his or her background and experience, will understand and reflect issues of concern to the Liberty Media Group and the holders of Liberty Media Group tracking stock." *Id.* In addition, for at least the first seven years after the Merger, directors appointed by TCI prior to the Merger will make up a majority of the Board of Directors of Liberty Media Corporation, which will manage nearly all of LMG's businesses. *Id.*

To assert that the two entities will not act in concert is to ignore the history of TCI and the relationship of its two principals, Mr. Hindery and Dr. Malone. The two have worked hand-in-hand to build perhaps the most powerful vertically-integrated cable company in the world. In doing so, they have vigorously fought attempts to require that TCI's programming be made available to competitors, while making exclusive deals with independent programmers. While Mr. Hindery may have no formal or other affiliation with LMG under the terms of the merger, he understands the nature of program distribution, and how valuable exclusive access to programming is to the cable systems he will be overseeing. Indeed, as part of the terms of the sale of TCI to AT&T, Dr. Malone arranged to have LMG's programs get preferential status on TCI cable systems. "Malone: TV's New Uncrowned King?" abstracted from *Business Week* (Oct. 5, 1998) found at <http://excite.transium.com/partner.html>.

The incentives for the two companies to act in concert to discriminate are enormous. LMG's programming includes some of the most popular found on cable systems. They include the Discovery Channel, The Learning Channel, Fox Sports Net, Court TV, E! Entertainment

Television, Home Team Sports, MSG Network, and Encore. To the extent that TCI's exclusive carriage agreements with LMG will financially benefit Consumer Co. and by extension, AT&T, both Dr. Malone and Mr. Hindery (and perhaps other officers or stockholders of the two entities) have this incentive. Under the proposed merger, Dr. Malone will be the largest single shareholder of AT&T. He also currently controls the majority of voting stock in LMG and will likely retain that control after the merger is consummated. *See* Form 8-K filed by AT&T with the Securities and Exchange Commission, Exhibit 2.1 at 15 (July 6, 1998). As President of Consumer Co., Mr. Hindery will seek to maximize his company's profits at the expense of competing multi-channel video programming distributors ("MVPDs") -- and denying programming to those competitors is one method by which he can do so.⁶

At a time when cable rates are skyrocketing and competitive MVPDs are struggling to gain market share, the Commission can ill afford to permit the merger of behemoths to limit competitors' access to popular cable programming. Therefore, it should first request AT&T/TCI to submit additional information that will permit the Commission to determine whether the separation of Consumer Co. and LMG will lead to evasion of the program access rules, and if so, condition the merger on those entities' compliance with those rules.⁷

⁶ The application does not detail the extent of Mr. Hindery's financial interest in AT&T, Consumer Co. or LMG. Such a financial interest would also provide an incentive for Mr. Hindery to seek exclusive programming contracts with LMG.

⁷ The Commission should also clarify that LMG must make its programming available to competitors at market prices. LMG might charge Consumer Co. and competitive MVPDs the same, above-market prices for programming, which would result in a mere transfer of funds from one arm of the merged company to the other in the former case, but would result in a severe hardship to competitors in the latter. Under the program access rules, such action may not constitute prohibited "discrimination...in prices, terms and conditions of sale of" cable program-

IV. The Commission Must Take Steps to Ensure that AT&T and TCI Will Not Exploit Consumers In Their Asserted Efforts to Provide Competitive Local Telephone Service.

CU *et al.* would like nothing better than to see AT&T/TCI succeed in competing with incumbent LECs in the provision of residential local exchange service. Unfortunately, CU *et al.* know that AT&T's strategy is a risky one that may never come to fruition. Because of that risk, CU *et al.* call upon the Commission to ensure that consumers will not be harmed in the event that AT&T maximizes profits by inflating cable prices as it attempts to provide competitive residential local exchange service over TCI's cable infrastructure.

No one, and certainly not AT&T/TCI, expect that the company will be profitable in the provision of competitive residential local exchange services for many years. AT&T/TCI may never make a profit providing residential local telephone service over TCI's plant. Even if the merged company successfully surmounts the technological and market-based hurdles before it, the costs will be extremely high. For example, although TCI has committed to spend \$1.8 billion to upgrade its plant to provide interactive services, experts estimate that it may cost AT&T up to \$10 billion to upgrade the plant to provide voice telephony in addition to Internet access. John Markoff, "In AT&T Deal, Cost and Logistical Problems," *New York Times* at D18 (Jul. 2, 1998). AT&T itself estimates it will cost \$5 billion to upgrade the network completely. Mike Mills, "AT&T's Headache: Upgrading TCI Cable Systems," *Washington Post* at D1 (July 13, 1998). This barrier seemed insurmountable to some. Bell Atlantic cited the huge costs associated with upgrading TCI's network as one of the reasons it decided to back out of its proposed merger with TCI in 1994. Mills at D1.

Wall Street is certainly skeptical of AT&T's ability to succeed with its current business plan.

ming, 47 USC §548(c)(2)(B), but it certainly constitutes an unfair method of competition or "unfair act[] or practice" under Section (a) of that law.

The value of AT&T's stock fell \$10 in the first few weeks after it announced the merger. Mills at D1. Technological and competitive problems will likely delay the provision of service. Some analysts question the speed with which the cable-telephony technology can be developed and deployed, and its reliability once it is deployed. Markoff at D18. It may be up to two years before AT&T will be able to offer local telephone service via cable infrastructure. Stephanie N. Mehta, "AT&T Faces Hurdles in Plan to Use TCI As Platform for Communications Network," *Wall Street Journal* at A16 (June 25, 1998). Not only is the upgrade of TCI's plant a costly and risky proposition, but AT&T will still be reliant on incumbent LECs' networks to serve areas outside of TCI's service territory. Mehta at A16. The risk is great that, despite its best intentions, AT&T will fail to find a cost-effective method of providing local telephone service.

Unless the Commission takes specific action, TCI's current cable customers could be the victims if AT&T's plans do not materialize, or if AT&T uses its monopoly cable services to cross-subsidize its entry into telephony. As one industry analyst said, "[o]ne of the secrets of this whole deal is that AT&T is going to make a bunch of money offering traditional cable television." Markoff at D19. AT&T is now engaged in a risky, capital intensive venture. One easy source of revenue is TCI's captive cable customers, who have already been suffering serious rate increases. As cable rates become deregulated next year, the danger that cable subscribers will be forced to subsidize AT&T's adventures only increases.

Other potential victims are AT&T's low-volume long distance customers who do not make enough calls to benefit from long distance volume discount plans. These customers are another ready source of revenue for AT&T. These customers have previously been of special concern to the Commission. For example, as part of its reclassification as a non-dominant carrier, AT&T made

explicit promises to ensure that these customers would benefit, at least to some extent, from the competitive long distance market. *See AT&T Non-Dominant Classification Order*, 11 FCC Rcd 3271 at 3284-85, 3315-18 (1995) (describing commitments made by AT&T to protect basic residential customers). The vulnerability of this group is further demonstrated by AT&T's recent decision to impose a \$3.00 flat fee on its low-volume customers, and its decision to pass through PICCs and universal service charges without making a concomitant reduction in per-minute rates.

AT&T may also choose to raise cable rates even if it chooses to forgo an expensive entrance into the residential local exchange market. AT&T has paid significant sums for TCI. *See Mehta* at A16. If AT&T cannot earn revenue from the sale of local telephone service sufficient to justify the high purchase price of TCI, it may need to increase cable revenue to compensate its shareholders.

For these reasons, as a condition of their merger, the Commission should impose limitations on AT&T/TCI's ability to cross-subsidize its risky, capital-intensive businesses with the revenue from businesses that are subject to little, if any, competition. This type of condition would be consistent with the requirements of the Communications Act and, in particular, the 1992 Cable Act. When considering the cable industry, the Commission must start from the factual premise that Congress found that cable operators have "undue market power . . . as compared to that of consumers." 1992 Cable Act, Pub. L. No. 102-385, Sec. 2. Further, although upper tier rate regulation will expire in March 1999, 47 USC § 543(c)(4), the Commission retains its authority to "prevent evasions" of cable rate regulation in Section 623(h) of the Act. 47 USC § 543(h). Section 623 requires the Commission to "periodically review and revise" its rules to ensure that no evasions result from retiering of cable services. *Id.* The Commission cannot ignore the goals of the Act embodied in these provisions when it reviews AT&T/TCI's proposed transaction. Most important for consumers, an economically

efficient market will not result if AT&T/TCI are allowed to abuse its captive customers to attempt to gain new customers using costly, unproven technology designed to upgrade cable plant.

A merged AT&T/TCI will be an overwhelming force in markets that are not fully competitive, such as low-volume residential service, and in other monopoly markets, as in the case of most cable service franchise areas. The Commission must, therefore, adopt safeguards to provide the companies incentives that will induce them to compete in an economically efficient manner. Although in many instances, companies use revenue from one part of their businesses to finance a new venture, the position of AT&T/TCI will be different from that of a firm in a fully competitive market. Cable customers rarely have an alternative provider to turn to in the event that cable rates increase or service is poor. Because of its historic position as the monopoly long distance provider, AT&T benefits from a huge base of ill-informed legacy customers who have never selected a new interexchange carrier and low-volume long distance users who cannot benefit from most discount plans.

To assure fair competition, AT&T should finance its new venture using the same means that would be available to a company not in AT&T's position to exploit a captive customer base: the financial markets. AT&T is fully capable of raising capital. If AT&T cannot obtain market-based financing without relying on cross-subsidies from non-competitive services, then Wall Street does not believe the provision of local telephony over cable infrastructure is financially viable. AT&T's and TCI's subscribers who have nowhere else to obtain service should not be required to become venture capitalists to support this new business model.

V. AT&T and TCI Must Not Be Allowed to Monopolize High Speed Access to the Internet.

The AT&T/TCI business plan for offering high-speed Internet services on TCI's cable plant is contrary to the public interest. It is, in fact, the same anti-competitive model that the cable industry used to acquire monopoly power and restrict program diversity in cable television.

Offering Internet service under the closed cable TV system model will, quite literally, change the character of the Internet as an engine of creative technological and marketplace innovation, open entry, economic growth, and free expression.

The Commission must examine the anti-competitive model TCI has implemented in light of the extraordinary financial and marketing muscle AT&T will add. Thereafter, it must fashion conditions on any approval of the AT&T/TCI application to assure that the Internet fulfills its promise.

AT&T/TCI tout their commitment to deploy high speed cable Internet service as one of the pro-competitive public interest benefits of their merger. TA Statement at 14. This benefit is marginal, however, if it produces monopolistic, content-controlled Internet access. The Commission must carefully question AT&T/TCI's assertions with respect to the public interest benefits.⁸

For many, perhaps most, American citizens, their first opportunity to obtain high bandwidth Internet access will be through cable systems. It is true that, some day, numerous high speed broadband Internet technologies and vendors will compete in the marketplace. The telephone network and new wireless technologies may well offer a range of offerings and choices. But, in the near term, this will not be so. If and when competitive broadband offerings become available, they will not be

⁸ Many of these issues have been debated in the Commission's proceeding implementing Section 706 of the 1996 Telecommunications Act. See *CME et al.* comments (filed in CC Docket 98-146 on Sept. 17, 1998). Although the generalized concerns raised in that docket address similar issues about pro-competitive, nondiscriminatory access to the cable infrastructure, the AT&T/TCI merger presents a significant example because of the parties involved.

immediately deployed and available to millions of residential customers.

History need not, and should not, repeat itself. In the 1980s, TCI and other cable MSOs aggressively established their cable TV systems' monopoly before potential competitors could reach the market. They acquired effective or direct ownership of essential programming services, and used their vertically integrated monopoly to extract excess revenues. For example, they required customers to buy tiers of less-desired program channels as a condition of being able to purchase highly-sought-after channels, such as the Disney Channel. Congress finally intervened by enacting the 1992 Cable Act. Among other things, it forced the cable industry to share its programming services with satellite, wireless, and cable competitors; to increase access to wiring in apartments and community associations; and to prohibit "buy through" bundling of cable programming. Before the Commission allows a merger that will give TCI access to significant additional capital that will allow it to expand application of these anti-competitive practices, the Commission must consider its past and current behavior in a non-competitive market.

Although the transfer application says little about AT&T/TCI's Internet offerings, TCI has embarked upon the same course in its provision of Internet access. TCI's Chairman says that he expects that all ISPs seeking to offer high speed service will "have to go through us." Ken Auletta, "How the AT&T Deal Will Help John Malone Get Into Your House," *The New Yorker* at 25 (July 13, 1998).⁹ TCI makes Internet access available only as a bundled offering which forces all customers also to purchase @Home's proprietary content, whether or not they would want to do so. Placement

⁹ TCI has refused to sell access over its conduit to competing Internet access providers such as MindSpring. *See, e.g.*, MindSpring comments at 21 (filed in CC Docket 98-146 on Sept. 17, 1998). This refusal demonstrates that TCI is not operating in a competitive environment for high speed Internet access

of news, entertainment, information, hyperlinks, and commerce on @Home's mandatory portal will be entirely within TCI's exclusive editorial and commercial control. @Home can and does discriminate in selling access to its portal, *see, e.g., Communications Daily* at 12 (Sept. 24, 1998) (noting @Home's selection of AutoConnect as exclusive multi-year provider of automobile content and online products and services), giving it the opportunity to favor commercial and political favorites.

Placement deals, content restriction or filtering by an ISP on the basis of technical, social, political, aesthetic and commercial factors would be unobjectionable -- were there a choice in ISPs for access via the cable infrastructure. Allowing what will be in many cases the **only** broadband supplier to impose censorship of this kind is profoundly anti-competitive and ominously restrictive of speech diversity and First Amendment values.

This problem is real, not theoretical: @Home employs contracts giving TCI and other cable partners the right to exercise content limits and TCI's CEO freely acknowledged that TCI imposes a 10 minute limit on video streaming files on its systems, a practice antithetical with the very ideal of the Internet as an free and open environment. Federal Communications Commission, *En Banc* Hearing on Telecom Mergers (Oct. 22, 1998).

TCI, through its control of @Home, has begun to exert its legendary, vise-like control over the previously free-form and truly democratic medium of the Internet. AT&T stands to benefit from becoming the owner of what may potentially be the only realistic high-speed access point to the Internet available to most Americans.

Internet users are not only subscribers, but also *citizens*, using the Internet to receive information about political issues, government-distributed information, and local matters. The Commission must preserve the current status of the Internet as an environment for free expression

and civic discourse, as well as other means of communication. If the Commission wishes to ensure that this medium, which the Supreme Court has determined is worthy of the highest First Amendment protection, *Reno v. ACLU*, 117 S.Ct. 2329, 2344 (1997), remains free and democratic, the Commission must ensure that cable operators are not allowed to monopolize the content subscribers may view over their cable-provided Internet access.

If cable operators are successful in stifling competition, the victim will be the public that will lose choice and diversity. More fundamentally, the cable model of Internet access will compromise the very character of the Internet by substituting controlled access from a single provider for the unlimited and freewheeling competition to provide access to the Internet that exists today. The model for cable operators' provision of Internet access requires a consumer to take the cable operators' portal or gateway as part of Internet access. The equal opportunity of ISPs to compete for being the default provider of information and searching applications is removed, and the pro-competitive benefits of the current system are lost.

VI. AT&T and TCI Must Demonstrate that the New Entity will Provide New Services to All Americans in a Nondiscriminatory Fashion.

The Commission is under a statutory obligation to ensure that all Americans receive timely access to advanced telecommunications capability. Pub. L. No. 104-104, Sec. 706 (1996). One public interest benefit that may arise from AT&T/TCI merger will be nondiscriminatory deployment of infrastructure able to provide such capabilities. This merger could, therefore, benefit citizens who might not otherwise obtain access to such capabilities. The Commission must seek further information regarding AT&T/TCI's plans to upgrade its plant to ensure that all members of the public fully benefit from the proposed transaction.

CONCLUSION

AT&T/TCI have submitted an application that is inadequate for the Commission to complete its task. Moreover, AT&T/TCI have not, and likely cannot, demonstrate the benefits of their merger will outweigh the harms to competition and to consumers without certain enforceable safeguards. Thus, to protect the public interest -- particularly in light of AT&T/TCI's spartan and conjectural application -- the Commission must impose conditions that will ensure that, while AT&T/TCI strive to provide additional benefits to consumers through their merger, consumers will not be harmed if those aggressive plans and strategies do not become reality.

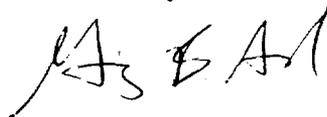
Respectfully submitted,



Cheryl A. Leanza



Andrew Jay Schwartzman



Gigi B. Sohn

MEDIA ACCESS PROJECT
1707 L St., NW
Suite 400
Washington, DC 20036

Sabrina Youdim
Law Student Intern
UCLA Law School

October 29, 1998

DECLARATION

Gene Kimmelman declares as follows:

1. I am co-director of the Washington, D.C. Office of Consumers Union.
2. This declaration is submitted in support of the Petition to Deny the Joint Application of AT&T and TCI for transfer of control of Federal Communications Commission licenses and authorizations in CS Docket 98-178 filed on behalf of Consumers Union *et al.*
3. I have reviewed the factual assertions contained in the Petition to Deny and I declare that they are true to the best of my knowledge.

I hereby state under penalty of perjury
that the foregoing is true and correct.

Executed on October 29, 1998



Gene Kimmelman

CERTIFICATE OF SERVICE

In addition, on October 29, 1998, the foregoing *PETITION TO DENY* was served by United States Mail, postage prepaid, to the following:

Mark D. Schneider
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Stephen M. Brett
Tele-Communications, Inc.
P.O. Box 5630
Denver, CO 80217



Cheryl A. Leanza