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October 29, 1998

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HAND DELIVERY

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

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OCT 29 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: CS Docket No. 98-178
Petition to Deny The Applications of Tele-Communications, Inc.
and AT&T Corporation or, in the Alternative, to Impose
Conditions

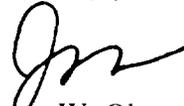
Dear Ms. Salas:

Transmitted herewith, on behalf of Seren Innovations, Inc., are an original and 12 copies of Seren Innovations, Inc.'s Petition as referenced above.

A copy of Seren's "Comments" on a 3.5" computer diskette in a "read only", IBM-compatible format using WordPerfect 5.1 for Windows is being transmitted under a separate cover letter to Royce Dickens of the Policy and Rules Division, Cable Services Bureau.

Please file-stamp the enclosed additional copy of the Petition and return it to our courier. Any correspondence regarding this filing should be directed to the undersigned.

Very truly yours,



James W. Olson

Enclosures

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Before the
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In the Matter of)
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Applications of Tele-Communications, Inc.)
and AT&T Corporation for)
Transfer of Control of)
TeleCommunications, Inc.)
to AT&T Corporation)

CS Docket No. 98-178

Petition to Deny The Applications of
Tele-Communications, Inc. and AT&T Corporation
or, in the Alternative, to Impose Conditions

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**Before the
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Applications of Tele-Communications, Inc. and AT&T Corporation for)	CS Docket No. 98-178
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TeleCommunications, Inc.)	
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**Petition to Deny The Applications of
Tele-Communications, Inc. and AT&T Corporation
or, in the Alternative, to Impose Conditions**

I. INTRODUCTION AND SUMMARY

Seren Innovations Inc. ("Seren") is a start-up company which will begin to deliver local and long distance telephone, Internet access and multichannel video services in late 1998, initially to St. Cloud, Minnesota and three surrounding communities. Seren will deliver these services via a state-of-the-art Hybrid Fiber Coaxial cable network capable of carrying voice, data and video simultaneously. Seren, a separate subsidiary of Northern States Power Co., is dedicated to providing precisely the type of competition which the Telecommunications Act of 1996 was intended to promote.

Tele-Communications, Inc. ("TCI"), through its local affiliate, Westmarc Cable Inc., is the incumbent monopoly cable provider in St. Cloud with which Seren wishes to compete.

Seren files this Petition because TCI is using its monopoly position unfairly to hamper the ability of Seren and other similarly-situated entrants to compete against it and this merger will only exacerbate the situation. Specifically, TCI has leveraged its monopoly position to obtain an

exclusive contract with the leading regional sports channel in the Upper Midwest, Midwest Sports Channel ("MSC"). Among other events, MSC televises Minnesota Twins baseball games, Minnesota Timberwolves basketball games, University of Minnesota football, hockey and basketball games, as well as certain St. Cloud State University athletic events. The exclusive contract prevents MSC from making its programming available to competitors of TCI such as Seren, thereby reinforcing TCI's monopoly.

This conduct represents an anti-competitive abuse by TCI of its dominant position in local cable markets, a dominance which will be reinforced by its merger with AT&T. It also runs contrary to the expressed policy of Congress and this Commission to promote competition in all telecommunications markets. TCI and AT&T proclaim that their merger will advance facilities-based competition in local telephone markets. They quietly glide over the fact that the transaction will reinforce TCI's dominant position in local cable markets.

It is the duty of the parties to demonstrate that a proposed transaction is in the public interest. Because they fail to carry that burden in regard to cable markets, the Commission should deny their applications or, at a minimum, impose as a condition of its approval a requirement that TCI agree to waive exclusivity provisions such as the one it has with MSC.

II. AT&T AND TCI MUST DEMONSTRATE THAT THIS MERGER IS IN THE PUBLIC INTEREST

This Commission has made it clear that Sections 214 and 310(d) of the Communications Act, 47 U.S.C. §§ 214 and 310(d), require the Commission to find that a proposed merger is in the public interest before it can approve the transfer of control of authorizations and licenses associated with the transaction. *See, e.g., Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corp. to SBC Communications, Inc.*, CC Docket No. 98-25, Memorandum Opinion and Order (released October 23, 1998), ¶ 13 (*SNET-SBC Order*); *In the Matter of Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum

Opinion and Order (September 14, 1998) (*WorldCom-MCI Order*). Specifically, Section 214(a) requires the Commission to find “that the present or future public convenience and necessity require or will require” AT&T to operate the acquired lines and that “neither the present nor future public convenience and necessity will be adversely affected thereby...” Section 310(d) states that “No ... station license ... shall be transferred ... except ... upon finding by the Commission that the public interest, convenience, and necessity will be served thereby.”

The Commission has also explicitly held that the burden is on the parties to prove that a transaction serves the public interest. *SNET-SBC Order* at ¶ 13; *WorldCom-MCI Order* at ¶ 10. Part of that burden is to show that the transaction serves the interest of competition. The public interest standard has long been held to include an assessment of the effect of a transfer on competition: “[T]here can be no doubt that competition is a relevant factor in weighing the public interest.” *FCC v. RCA Communications, Inc.*, 346 U.S. 86, 94 (1953); *SNET-SBC Order* at ¶ 13; *WorldCom-MCI Order* at ¶ 10. More recently, this Commission has held that the public interest standard includes implementation of Congress’ “pro-competitive, de-regulatory national policy framework designed to open all telecommunications markets to competition,” as expressed in the Telecommunications Act of 1996. *WorldCom-MCI Order* at ¶ 9.¹

Thus, before this merger is approved, it is the responsibility of the parties to carry the burden of proving by a preponderance of the evidence that the merger will advance the pro-competitive goals of the Telecommunications Act of 1996.

III. LACK OF COMPETITION IN THE MVPD MARKET

Congress’ intent, as expressed in the Telecommunications Act of 1996, that competition be brought to formerly monopoly telecommunications markets, unhappily has failed to bear fruit in the market for multichannel video programming distribution (“MVPD”). In fact, the persistent monopoly power of entrenched incumbent cable companies has scarcely eroded at all in the

¹ Citing H.R. Rep. No. 104-458 at 1; Preamble to Pub. L. No. 104-104, 110 Stat. 56 (1996).

MVPD market in the six-year period since Congress first attempted to deal with the cable industry's monopoly power in the 1992 Cable Act.²

The unfortunate and stark facts are available in the annual reports to Congress on video competition submitted by the Commission as required by the Cable Act. In its most recent report, the Commission indicates that cable's share of the multichannel video programming distribution market had been 94.9 percent in 1993 and that it had declined only to 87.1 percent in 1997. *Fourth Annual Competition Report*, 13 FCC Rcd. 1034, 1199 (1998) (Appendix E) (Table E-1). Nearly all of even that small decline was due to the advent of DBS service, which as Chairman Kennard noted in his separate statement on the *Fourth Annual Competition Report*, "remains primarily a high-end product or a way to receive multichannel video services in areas cable does not reach." Thus, nearly everywhere in the United States, cable continues to have virtually unchecked monopoly power. At the same time, TCI's share of cable industry subscribers nationally has increased from 24.3 percent in 1993 to 29.32 percent as calculated in the *Fourth Annual Competition Report*, and the concentration level of the industry has risen from an HHI of 880 to 1379.³ 13 FCC Rcd 1034, 1203 (Appendix E) (Table E-3).

Not surprisingly, given this lack of competition, cable rates have been increasing dramatically. In calendar year 1996, Consumer Price Index figures showed that cable rates rose 10 percent, and in calendar year 1997, 7.5 percent.⁴ The *Fourth Annual Competition Report* indicates that the average cable price rose 8.5 percent in the 12 months ending in July 1997, several times the rate of inflation. 13 FCC Rcd 1034 at 1038. In the 12 month period ending in June, 1998, cable rates rose 7.3 percent versus a 1.7 percent Consumer Price Index overall

² Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

³ The HHI, or Herfindahl-Hirschman Index, is a measure of industry concentration used in the Department of Justice and Federal Trade Commission *Horizontal Merger Guidelines*. An HHI of less than 1000 denotes a relatively unconcentrated market and one of 1000-1800 a moderately concentrated market.

⁴ *Communications Daily*, July 29, 1998, at p. 3.

inflation rate. In June itself, cable rates rose at seven times the rate of inflation (.7 percent versus .1 percent).⁵ These persistent and outsized price increases led to the introduction in Congress of bi-partisan legislation by the Chairman and ranking minority member of the House Subcommittee on Telecommunications, Trade and Consumer Protection, who indicated that the bill was an admission that the Telecommunications Act was wrong in its assumptions about the development of competition for the cable industry and that consumers were being forced to pay higher prices than they should be (or as it was colorfully put, the cable companies were “tipping ... [them] upside down and shaking money out of their pockets.”)⁶

This Congressional concern is well-placed. In the absence of a competitive market one can expect cable prices to skyrocket once prices are unregulated at the end of March, 1999. Having recognized the highly concentrated state of the MVPD market and lack of price constraints on cable monopolists, this Commission should take advantage of every opportunity that arises to help remedy the situation by opening the doors to competition.

IV. ACCESS TO PROGRAMMING IS KEY TO COMPETITION

A. Program Access

Congress’ intent in the 1992 Cable Act was to use rate regulation as a stop-gap measure until competition was in place to restrain rates. In the 1992 Cable Act Congress also affirmatively promoted competition, particularly by attempting to ensure that cable’s rivals would have access to popular programming, through the program access provisions of the legislation, 47 U.S.C. § 548.

The program access provisions were a response to extensive Congressional testimony and litigation brought by frustrated entrants, attesting to the fact that large cable MSOs were using their market power to deny programming to rivals. *See, e.g., Senate Comm. on Commerce, Science and Transportation, S. Rep. No. 92, 102d Cong., 1st Sess. 8-11, 24 (1991); Storer Cable*

⁵ *Communications Daily*, July 15, 1998 at p. 2.

⁶ *Communications Daily*, July 30, 1998 at p. 3.

Communications, Inc. v. City of Montgomery Alabama, 826 F. Supp. 1338 (M.D. Ala.), *vacated*, 866 F. Supp. 1376 (M.D. Ala. 1993). However, at the time, in an attempt to cure the worst abuses, Congress limited program access coverage to vertically-integrated programming. It has now become apparent that cable MSOs can exert their market power to obtain exclusive contracts from non-vertically integrated programmers. Such action is particularly damaging when it is used to obtain exclusivity for popular local sports programming and thus helps perpetuate the very market power which makes it possible to extract such commitments in the first place.

B. Seren's Experience

Seren faces precisely the situation of a denial of popular sports programming as it attempts to enter the St. Cloud, Minnesota market. As the attached Statement of Glynis Hirschberger, Seren's President and CEO indicates, Seren is a start-up company which will enter the market to deliver voice, data and video services in St. Cloud, Minnesota and three surrounding communities later this year. On October 26, 1998, Seren was granted a cable franchise by St. Cloud. (Hirschberger Statement, ¶¶ 2, 3.)

Seren has the capability to deliver more than 70 channels of cable programming to its video customers and is now in the process of selecting the channels it will offer (Hirschberger Statement, ¶ 4). One of the channels Seren would like to offer is the Midwest Sports Channel because MSC controls the television rights to the largest share of the most popular local sporting events. Among the games televised by MSC are those of the Minnesota Twins, Minnesota Timberwolves, University of Minnesota football, basketball and hockey teams, as well as various St. Cloud University contests. According to its website, MSC is a 24-hour satellite-delivered regional sports network owned by CBS, Inc., with over 1.4 million cable customers on more than 400 cable systems throughout the Upper Midwest.⁷

⁷ <http://www.getworks.com/sports>

However, when Seren's President, Glynis Hirschberger, contacted MSC on June 16, 1998, she was told by MSC's Director of Marketing that MSC's contract with TCI prohibited MSC from making its programming available to Seren. (Hirschberger Statement, ¶ 6.) Seren has asked TCI to waive the exclusivity provision, but has yet to receive a response. (*Id.*) Because MSC is not vertically-integrated, it is not covered by the existing program access statutes.

Thus, TCI has been able to exploit its dominant position to handicap Seren and other similarly situated entrants while they are still in the starting blocks. First, TCI used its monopoly position to extract an exclusive contract from MSC, which obviously had little choice given the lack of competition to cable. Second, TCI uses that exclusive contract to discourage entry by or harm any rival bold enough to challenge its monopoly.

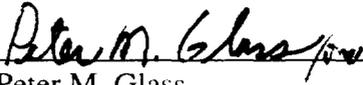
Through this course of conduct TCI is attempting to frustrate the efforts of Congress and this Commission to open the multichannel video programming market to competition. It should not be allowed to do so.

V. CONCLUSION

In their Application for Authority to Transfer Control, TCI and AT&T correctly cite the *Bell Atlantic/Nynex Order*,⁸ and other Commission decisions as indicating that the Commission seeks "to determine if a proposed merger will actually be pro-competitive, by enabling a competitor more quickly or efficiently to compete with a dominant firm..." Application at 16. However, they do not advance any reasons why the merger will be pro-competitive in the MVPD markets TCI monopolizes, and where the transaction will further entrench TCI's position.

⁸ *Application of NYNEX Corporation, Transferor and Bell Atlantic Corporation, Transferee, For Consent To Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20008-20 (1997).

Instead, they claim that their merger will benefit the public interest by promoting facilities-based competition in local telephone markets. This Commission should hold them to their word by denying the requested authorizations and license transfers or, in the alternative, by requiring TCI to waive its exclusivity for popular local sports programming such as Midwest Sports Channel as a condition for approval of the merger. Such action by this Commission would truly promote facilities-based competition "by enabling a competitor more quickly . . . to compete with a dominant firm" --- TCI.


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STATEMENT OF GLYNIS HINSCHBERGER

1. I am Glynis Hirschberger, President and CEO of Seren Innovations, Inc. I have held this position since 1996. Previously, I held various positions with Northern States Power Co., of which Seren is a separate subsidiary, for 19 years.

2. Seren is a start-up company which will provide local and long distance telephone, Internet and multichannel video services beginning in late 1998, initially to St. Cloud, Minnesota and three surrounding communities. Seren will deliver these services through a state-of-the-art Hybrid Fiber Coaxial Cable network capable of carrying voice, video and data simultaneously.

3. Seren has applied for a cable franchise in St. Cloud which was granted on October 26, 1998. The incumbent cable provider in St. Cloud is Westmarc Cable Inc., an affiliate of Tele-Communications, Inc.

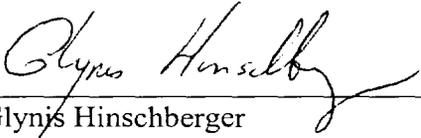
4. Seren will deliver to its video customers more than 70 channels of cable programming. We are now in the process of selecting the channels we will offer.

5. Seren would very much like to offer the Midwest Sports Channel to its customers. The Midwest Sports Channel is a 24-hour regional sports network which offers a wide range of sports programming. Most importantly, it televises Minnesota Twins baseball games, Minnesota Timberwolves basketball games, University of Minnesota football, hockey and basketball games, and certain St. Cloud State University athletic events. Midwest Sports Channel's ability to televise the games of these popular teams makes its programming highly desirable.

6. On June 16, 1998, I contacted Midwest Sports Channel to negotiate a contract whereby Seren could offer the Midwest Sports Channel on its system in St. Cloud and the surrounding area. I was told by Kate Kingsley, Midwest Sports Channel's Director of Marketing, that Midwest Sports Channel could not make its programming available to Seren because of an exclusive contract it had with TCI covering the St. Cloud area. On October 26, 1998, Seren's General Counsel, Peter Glass, contacted TCI's General manager, Elizabeth Engel, asking for waiver of the exclusivity provision of TCI's contract with Midwest Sports Channel. To date, there has been no response.

7. Seren's inability to offer coverage of the popular local sports teams shown on Midwest Sports Channel will adversely affect our ability to compete with TCI. Seren believes it should have the opportunity to compete with TCI on a level playing field, but TCI's exclusive contract with Midwest Sports Channel means we are entering the contest with the field tilted against us.

I hereby declare the foregoing is true and correct to the best of my knowledge and belief.


Glynis Hirschberger

October 29, 1998

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 1998, a copy of the "Petition to Deny The Application of Tele-Communications, Inc. and AT&T Corporation or, in the Alternative, to Impose Conditions" was sent by first-class mail, postage-prepaid, to the parties on the attached list.

Teri Price

Teri Price

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