Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TELE-COMMUNICATIONS, INC., Transferor to AT&T CORPORATION, Transferee	)	CS Docket No. 98-178

To: The Commission

PETITION OF U S WEST TO DENY APPLICATIONS OR TO CONDITION ANY GRANT

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SUMMARY

The Commission should deny the AT&T/TCI applications for transfer of control or should condition any grant on the imposition of competitive safeguards. Under Titles II and III of the Communications Act, the Commission may grant AT&T/TCI's applications only if it affirmatively determines that the merger of the two companies would promote the public interest in competitive telecommunications markets. In conducting this analysis, the Commission must determine the particular markets that would be affected by the merger and evaluate the potential consequences for each. If the merger poses risks of anticompetitive harms in any of those markets, the Commission has the authority and obligation either to deny the applications or to impose conditions necessary to prevent such anticompetitive harms.

The proposed merger poses grave risks to competition in a number of markets. It would create a vertically integrated behemoth with combined revenues of nearly $60 billion and with leading positions in fields spanning virtually the entire communications industry. The merger would combine the nation's largest monopoly cable television operator and leading provider of high-speed Internet access service into a company that already is the nation's largest provider of domestic and international long distance service, largest competitive local exchange carrier, largest mobile telephone operator, and a leading provider of dial-up Internet access.

The merged entity would enjoy significant market power. TCI is the monopoly provider of cable service to roughly one-third of American homes, and AT&T and TCI assert that the merger would enable them rapidly to upgrade TCI's monopoly cable facilities to carry broadband data traffic. That capability would be unique. No other carrier would have a comparable ability in the near term; incumbent LECs are working hard to deploy DSL broadband technology, but AT&T/TCI would have a substantial head start. Moreover, because of

technological and regulatory obstacles, DSL could not presently match AT&T/TCI's wide customer reach and ability to package video programming with the full range of local and long distance communications services. As a result, a merged AT&T/TCI would have a monopoly in TCI's service areas not only in cable television, but also in markets that depend on broadband transmission to the home, such as the markets for high-speed data services and "one stop shopping."

The merged entity would have the incentive and ability to leverage that market power to distort competition in downstream and adjacent markets. It could bundle its monopoly services with its other services, so that a customer wanting the monopoly services has no choice but to buy the other services as well; could discriminate against competitors seeking access to its bottleneck facilities; and could shift costs between the different services it offers, so that the monopoly services cross-subsidize the others.

To evaluate the magnitude of these risks, the Commission must first determine whether and to what extent AT&T/TCI would be subject to the competitive safeguards of section 251 of the Communications Act. Broadband services such as high-speed data transmission may be Title II telecommunications services, which would make AT&T/TCI subject to section 251(a). If the Commission also finds that AT&T/TCI's broadband transmission services are either exchange access or exchange service — as a recent Commission order suggests — then AT&T/TCI would be a local exchange carrier subject to the requirements of section 251(b). And, if AT&T/TCI would be a local exchange carrier in offering its broadband services, its dominant position in the broadband market makes it an *incumbent* local exchange carrier subject to the requirements of section 251(c). If the Commission determines that all of these safeguards would apply, then some of the competitive dangers posed by the merger would be substantially lessened.

If the Commission concludes that any part of section 251 does not apply, then the Commission should either deny the applications or impose access, nondiscrimination, and related requirements analogous to those applicable under section 251 as conditions for approval of the merger. Such conditions would be essential to constrain the combined entity's significant market power, to prevent anticompetitive conduct, and to create regulatory parity so that the head start enjoyed by AT&T/TCI's cable broadband business is not further cemented by regulatory advantages.

Specifically, the Commission should condition approval on the following requirements:

1. AT&T/TCI should be required to provide capacity on its local broadband transmission facilities to other carriers on an unbundled basis at a reasonable, cost-based price.

2. AT&T/TCI should be required to interconnect with all data transport providers at any technically feasible point and on reasonable and nondiscriminatory terms.

3. AT&T/TCI should be required to allow resale of its cable television and voice telecommunications services. As the incumbent monopolist, it should be required to provide its cable television services to resellers at a wholesale discount.

4. AT&T/TCI should be required to comply with dialing parity and equal access obligations comparable to those that apply to BOCs.

5. In any state in which it offers voice services over broadband facilities, AT&T/TCI should be required to comply with all state rules concerning public telecommunications utilities, including carrier of last resort obligations where appropriate.

6. AT&T/TCI should be required to comply with cost allocation, interaffiliate transaction, customer proprietary network information (CPNI), and structural separation rules comparable to those that apply to incumbent LECs.

7. AT&T/TCI should be required to provide competitive multichannel video programming distributors with nondiscriminatory access to all programming supplied by vendors in which AT&T/TCI has an attributable interest, regardless of whether AT&T/TCI seeks to distribute such programming over satellite or terrestrial facilities.

8. AT&T/TCI should be required to comply with the Commission's rules concerning inside wiring and navigation devices, regardless of whether the general applicability of such requirements is overturned on appeal.

9. AT&T/TCI should be required promptly to divest its interest in Sprint's PCS operations in compliance with the CMRS spectrum cap rules, and to extend roaming terms and conditions to all carriers on a nondiscriminatory basis.

U S WEST believes that the present record demonstrates that this merger cannot be approved without the foregoing conditions. If the Commission does not agree at this juncture, it should require AT&T and TCI to submit their Hart-Scott-Rodino documents to the Commission and third parties for review and further comment.

TABLE OF CONTENTS

Before the
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In the Matter of	)	
	)	
Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from	)	CS Docket No. 98-178
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To: The Commission

PETITION OF U S WEST TO DENY APPLICATIONS OR TO CONDITION ANY GRANT

Pursuant to the Public Notice issued by the Commission on September 29, 1998, U S WEST, Inc. ("U S WEST") respectfully submits this petition to deny the applications of AT&T Corporation ("AT&T") and Tele-Communications, Inc. ("TCI") for authority to transfer control of TCI's licenses and authorizations to AT&T or to condition any grant on the imposition of safeguards to minimize the anticompetitive effects of this extraordinary merger.

INTRODUCTION

The proposed merger between AT&T and TCI will vest unprecedented market power in a single entity with approximately $60 billion dollars in annual revenues,[1/] making it

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1/ *Tele-Communications, Inc., Transferor, AT&T Corp., Transferee, Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, for Transfer of Control of Authorizations to Provide International Resold Communications Services*, File No. I-T-C-98-___, Application for Authority to Transfer Control, filed by AT&T and TCI, at 4, 7 (filed Sept. 14, 1998) ("*Application*"). AT&T and TCI have filed numerous similar applications (continued...)

nearly 50 percent larger than a combined SBC/Ameritech. This merged entity would be the nation's largest provider of cable television service, long distance telephony, competitive local telephony, and wireless communications, and one of the largest providers of Internet services.

AT&T and TCI boast that the combination of AT&T's telephony expertise, established brand name, and capital resources with TCI's video services and connections into roughly one-third of American homes will allow the merged entity to provide a superior, integrated communications package to the American consumer. AT&T and TCI "plan to be the first fully integrated residential communications services provider with a national product including the ability to provide long distance, video, local, wireless, Internet and other data services on a packaged, as well as an individualized basis."[2/] Indeed, the merged entity would enjoy a monopoly in the provision of such integrated services throughout TCI's substantial service areas. Without regulatory safeguards to ensure that the merged entity's tremendous and exclusive capacities are shared with other would-be competitors — who are blocked due to technological and regulatory constraints from providing competitive services or packages of services via broadband in the near future — the merger would decisively impair competition and distort the marketplace. Accordingly, the Commission should not approve the merger absent the imposition of regulatory safeguards.

1/ (...continued)
with the Commission for the transfer of the licenses, certificates, and authorizations necessary for the merger. We will cite to the above application as representative of the many similar applications filed by AT&T and TCI.

2/ *Application* at 39. AT&T President Michael Armstrong has similarly declared that the combined AT&T/TCI "will bring to people's homes the first fully integrated package of communications, electronic commerce and video entertainment services." Press Release, June 24, 1998 (http://www.tci.com/tci.com/press/980624.html).

STANDING

U S WEST is clearly a party in interest with respect to the proposed AT&T/TCI merger and therefore has standing under section 309(d)(1). *See* 47 U.S.C. § 309(d)(1). U S WEST's current and planned business operations would make it a direct competitor with a merged AT&T/TCI in numerous product markets. For example, U S WEST already provides local voice, mobile wireless, data, and video services. U S WEST plans to provide long distance voice and data services as soon as it gains regulatory approval to do so. U S WEST's data offerings include both high-speed DSL connectivity (under the brand name MegaBit) and Internet access (under the brand name USWEST.net). U S WEST's provision of these various services — many of them in areas where TCI holds interests in cable systems — makes U S WEST a present or potential competitor with respect to the full range of services that a merged AT&T/TCI would deliver to consumers over cable broadband facilities. Moreover, U S WEST's ISP offering will be offered to many consumers who will not have access to U S WEST's DSL connectivity and therefore will need to rely on alternative sources for high-speed connection. Accordingly, U S WEST is well situated to identify some of the significant competitive threats and market distortions that the AT&T/TCI merger would create.

ARGUMENT

I. THE COMMISSION HAS A STATUTORY OBLIGATION TO IMPOSE CONDITIONS ON THE MERGER THAT ARE NECESSARY TO PREVENT ANTICOMPETITIVE HARM AND PROMOTE COMPETITION IN TELECOMMUNICATIONS MARKETS.

Under Titles II and III of the Communications Act of 1934 (the "Act"), the Commission may not grant the AT&T/TCI applications unless the proposed transfers of control serve the public interest. This review obligation of the Commission arises first under section

214(a), which prohibits common carriers from acquiring or operating any line until the Commission grants the carrier "a certificate that the present or future public convenience and necessity require or will require" the operation of that line. 47 U.S.C. § 214(a). It arises also under section 310(d), which prohibits the transfer of any Title III license unless the Commission finds that the "public interest, convenience and necessity will be served thereby." *Id.* § 310(d). Under both statutory provisions, the burden of proof in this regard is on the applicants, not on the Commission or those parties opposing the transfers.[3] In addition, the Commission has a separate responsibility under section 7 of the Clayton Act to review whether a merger would "substantially . . . lessen competition, or . . . create a monopoly."[4]

Even if the Commission does not formally initiate a Clayton Act proceeding, its public interest analysis under sections 214 and 310 is guided primarily by how a merger would

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[3] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc., Transferee*, CC Docket No. 98-25, Memorandum Opinion and Order, FCC 98-276, ¶ 13 (rel. Oct. 23, 1998); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20000 ¶ 29 (1997) ("*Bell Atlantic/NYNEX Order*"); *see also* 47 U.S.C. § 309(e).

[4] 15 U.S.C. § 18. Section 11 of the Clayton Act gives the Commission authority to enforce section 7 of the Clayton Act with respect to acquisitions of "common carriers engaged in wire or radio communications." *Id.* § 21(a). AT&T is predominantly a common carrier, and TCI holds numerous FCC common carrier authorizations. *See, e.g., Application* at 2 n.1 ("The FCC authorizations controlled by TCI for which FCC consent is currently being sought include licenses in the . . . international common carrier service."). Given the enormous size and competitive risks of a combined AT&T/TCI, the Commission should exercise this authority under the Clayton Act. *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20005 ¶ 33 ("[W]e would not hesitate to exercise our Clayton Act authority, issue a complaint and initiate a hearing in the appropriate case.").

affect competition.[5] The analysis is "informed by antitrust principles"[6] and additionally goes beyond those principles to consider the broader question whether the merger affirmatively advances the procompetitive goals of the Act as amended in 1996.[7] Thus, under Commission precedent, the AT&T/TCI applications "must be denied" unless the Commission is "convinced" that any competitive benefits from the merger affirmatively outweigh the competitive harms, such as the creation of an entity with the ability and incentive to exploit its position in the numerous markets in which it has market power.[8]

In exercising its review power, the Commission has both the authority and the obligation to condition its approval of a merger on compliance with specific safeguards necessary to mitigate any competitive harms and thereby ensure that the merger serves the public interest. Section 214(c), for example, authorizes the Commission to attach "such terms and conditions as in [the Commission's] judgment the public convenience and necessity may require." 47 U.S.C. § 214(c). Similarly, the Commission has authority under Title III to grant radio license transfers subject to conditions necessary to ensure that such transfers serve the

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5/ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20003 ¶ 32.

6/ *Id.*

7/ *See Applications of Teleport Communications Group, Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Telecommunications*, CC Docket No. 98-24, Memorandum Opinion and Order, FCC 98-169, ¶ 12 (rel. July 23, 1998) ("*AT&T/Teleport Order*").

8/ *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19986 ¶ 2; *see also AT&T/Teleport Order*, ¶ 12 ("Mergers that increase market power . . . conflict with [the policy of the Telecommunications Act of 1996] by impeding the advent of competition and thereby maintaining, rather than decreasing, the need for continued regulation.").

public interest.[9] In short, there is "ample precedent for the imposition of conditions that would render the transaction consistent with the public interest."[10] As shown below, there is more than ample need to do so here.

In analyzing the competitive effects of the merger, the Commission must first define the relevant product and geographic markets and then consider how the merger would affect competition in those markets.[11] As discussed in part II below, the proposed AT&T/TCI merger would have significant effects on a number of interrelated markets: in the first instance, the markets for cable service and broadband transmission to the home in all of the areas served by TCI or its affiliates, and, in the second instance, the downstream and adjacent markets that will use broadband transmission as an input.[12] The latter markets include those for long distance

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9/ *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20002 ¶ 30; *see also* 47 U.S.C. § 303(r) (authorizing the Commission to "[m]ake such rules and regulations *and prescribe such restrictions and conditions*, not inconsistent with law, as may be necessary to carry out the provisions of this Act").

10/ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20007 ¶ 35. *See Applications of Craig O. McCaw, Transferor, and American Tel. and Tel. Co., Transferee, For Consent to the Transfer of Control of McCaw Cellular Communications, Inc. and its Subsidiaries*, File No. 05288-CL-TC-1-93, Memorandum Opinion and Order, 9 FCC Rcd 5836 (1994), *aff'd sub nom. SBC Communications, Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1996) (approving transfer of radio licenses subject to conditions). Such conditions also would be reasonably ancillary to the Commission's Title I, III, and VI authority over the merged entity's wire- and radio-based services. *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968); *Computer and Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 214 (D.C. Cir. 1982).

11/ *See AT&T/Teleport Order*, ¶ 15; *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20008 ¶ 37.

12/ *See Merger of MCI Communications Corporation and British Telecommunications plc*, GN Docket 96-245, Memorandum Opinion and Order, 12 FCC Rcd 15351, 15409 ¶ 154 (1997) ("Vertical effects that harm competition generally depend on the vertically integrated firm possessing market power in an upstream 'input' market and taking actions in that input market that leverage this market power in the downstream 'end-user'

(continued...)

voice, local voice, high-speed Internet access, and other data services, all of which use local broadband distribution as an input, and those for local and long distance data transport (often referred to as "backbone" services), which depend on interconnection with to-the-home broadband transmission facilities. The merger also would dramatically affect the emerging markets for bundled packages of these services. The communications industry has been moving headlong toward one-stop shopping, and the Commission has stated clearly that, as "more and more companies enter each others' markets, we believe that telecommunications services packages that bundle a combination of services may become a separate product market as well."[13/] Because a combined AT&T/TCI intends to provide bundled local voice, long distance voice, broadband distribution, high-speed Internet access, mobile wireless, and video services, the proposed merger would affect the markets for such integrated packages as well.

II. THE PROPOSED MERGER WOULD CREATE A COMMUNICATIONS BEHEMOTH POSING UNIQUE DANGERS TO COMPETITION, PARTICULARLY IN THE MARKETS FOR RESIDENTIAL BROADBAND AND RELATED SERVICES.

The Commission need look no further than AT&T and TCI's own applications to understand the magnitude of this merger and the associated dangers. In the words of the applicants, the merger would combine (1) "one of the largest providers of cable television service in the United States,"[14/] (2) "the largest provider of domestic and international long distance

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12/ (...continued)
market. These downstream effects could harm consumers through increases in prices, decreases in quality, or a reduction in alternatives in end-user markets.").

13/ *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20015 ¶ 52.

14/ *Application* at 7.

telephone service,"[15] and (3) "the nation's largest competitive local exchange carrier ('CLEC')."[16] TCI's owned and affiliated cable television operators serve approximately 20 million homes and have facilities passing over 10 million more — making it the monopoly service provider for roughly one-third of American homes.[17] AT&T boasts over 90 million total customers[18] and has communications plant valued at over $36 billion.[19] The merger also would combine one of the leading dial-up Internet access services — AT&T's WorldNet — with the leading high-speed Internet access service — TCI's @Home. And finally, the merger would bring under the same corporate umbrella the largest mobile telephone operator in the country, whose cellular and PCS operations together serve over 345 million "pops."[20] All told, AT&T's

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15/ *Id.* at 3.

16/ *Id.* at 6.

17/ According to AT&T and TCI, TCI and its affiliates now own cable systems passing over 30 million homes. *Application* at 8. These amount to approximately 32% of the 94.2 million U.S. homes passed by cable, and approximately 31% of the 97 million U.S. television households. *See Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, CS Docket No. 97-141, Fourth Annual Report, 13 FCC Rcd 1034, 1247 App. B, Table B-1 (1998) ("*Video Competition Report*"). Because the Commission lacks reporting information concerning the precise nature and extent of TCI's minority holdings, it does not now know whether TCI's investments in other cable MSOs have resulted in ownership interests exceeding the Commission's 30% threshold, even for attributable interests (as currently defined). *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket No. 92-264, Memorandum Opinion and Order on Reconsideration, FCC 98-138, ¶ 43 n.104 (rel. June 26, 1998).

18/ *See* http://www.att.com/factbook/co_business.html.

19/ Federal Communications Commission, *Preliminary Statistics of Common Carriers* at 14 (1997 ed.).

20/ *See Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993, Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services*, Third Report, FCC 98-91, at B-5, Table 4 (rel. June 11, 1998); *see also Application* at 10 & nn.15-16.

1997 communications revenues totaled $51.3 billion; TCI 's total 1997 revenues came to $7.6 billion.[21]

A. The Merger Would Create a Monopoly Provider in the Market for Broadband Transmission to the Home.

The entity resulting from the proposed merger would be a capital-rich telecommunications behemoth, with nearly $60 billion in annual revenues and direct, high-speed connection capability into roughly a third of American households. AT&T/TCI would possess the exclusive ability to provide those households with a fully integrated package of services. According to the *Application*, AT&T's knowledge of the communications business, technological expertise, established brand name, and extensive capital resources, together with TCI's existing monopoly in cable services and network of residential cable facilities, would enable the combined company to deploy broadband capability widely and on an aggressive timetable.[22] Thus, by virtue of the merger, the *Application* states that the combined company will be "the first fully-integrated residential communications services provider with a national product including the ability to provide long distance, video, local, wireless, Internet, and other

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[21] *Application* at 4, 7.

[22] *See Application* at 21 ("TCI contributes its residential wireline network and architecture that currently serves approximately 12.7 million homes through cable systems controlled by TCI. AT&T contributes its experience in providing toll-quality voice and data traffic, switching technology, a brand name that can compete with incumbent local telephone companies and capital to cover the significant costs of the upgrade of TCI's facilities.") Similarly, TCI's President observed at the Commission's October 22, 1998 Open Meeting that AT&T's "technical expertise in the areas of network design and implementation" and "strong financial base" will make it possible to upgrade TCI's cable facilities for broadband capability on an accelerated basis, and that the company will offer its broadband services "under the AT&T brand name."

data services on a packaged, as well as individualized, basis."[23] In short, the merger would create a "one-stop shopping" giant. Due to a variety of technological and regulatory factors — including regulatory restrictions that hamper incumbent LECs and the Bell Operating Companies ("BOCs") in particular — no competitors will be in a position to offer a comparable package of services any time soon.

AT&T and TCI focus principally on the effect that their proposed merger would assertedly have on the market for local, residential voice telephone service. But the merger also would have a major negative impact on a number of other markets. It would, in the first instance, enable TCI to expand its monopoly in cable service into the market for high-speed Internet access and, more generally, for broadband data transmission to the home. This in turn would distort the downstream and adjacent markets for all services that are or can be delivered over broadband facilities: long distance voice telephony, local voice telephony, other data services, backbone services, and integrated packages of these services. Because of its enormous flexibility and its potential to facilitate the "one stop shopping" that consumers covet, broadband capability is widely expected to assume an increasingly central role in the communications industry and in the economy generally.[24]

23/ *Id.* at 39.

24/ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Notice of Inquiry, FCC 98-187 (rel. Aug. 7, 1998) ("*Notice of Inquiry*") ¶¶ 1-2 (observing that the "demand for more 'broadband' or 'high-speed bandwidth' is increasing exponentially," and that "the arrival of the broadband communications services of the twenty-first century . . . can create a more productive, knowledgeable, and cohesive nation.").

The *Application* pays scant attention to the proposed merger's implications for the broadband market. This market is just emerging, and a merged AT&T/TCI would — as the parties themselves know best — quickly become the dominant player in all regions currently served by TCI. In a relatively short period of time, AT&T/TCI would have the ability to deliver broadband services directly into the one-third of American homes passed by TCI's owned and affiliated cable systems. AT&T and TCI plan to use broadband to offer these households a fully integrated package of services, including local and long distance voice, high-speed data and Internet access, and multichannel video.[25/] Moreover, TCI controls a significant equity interest in Time Warner,[26/] the nation's second largest cable operator. Following its merger agreement with TCI, AT&T has now initiated negotiations for access to Time Warner's 12 million cable subscribers — an arrangement that "would nearly double the number of consumers to which AT&T could pitch a bundle of phone services."[27/]

AT&T/TCI would be the exclusive provider of broadband transmission to these homes. It would control the *only* presently available means for delivering integrated broadband services to the enormous base of consumers in TCI's service areas. There would be no realistic prospect of competition from other cable providers, because in the vast majority of areas there is but one local cable operator, and where there is a second it generally has minimal market share. The Commission recently concluded that "[c]ompetitive overbuilding by franchised cable

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25/ *See id.* at 39.

26/ *See* SEC Form 14A of Time Warner, Inc. at 14 (March 1998) (57,061,942 shares).

27/ Asian Wall St. J., October 23, 1998, at 12.

systems remains minimal."[28] Alternative technologies such as satellite have been unable to make significant inroads into cable's dominance in the delivery of multichannel video to consumers. While satellite providers hope someday to offer a broader array of advanced services, there are currently substantial legal and technical obstacles to their doing so.[29] Indeed, cable providers control 87 percent of the market for multichannel video distribution — a market share that has prompted Chairman Kennard to conclude that "broad-based, widespread competition to the cable industry has not developed and is not imminent."[30]

Consumers may eventually have the option of taking broadband services over their phone lines via digital subscriber line ("DSL") technology being deployed by U S WEST and other LECs. However, cable broadband technology has a substantial head start, and most analysts expect that such technology will be the dominant force in the market for broadband services to the home for some time. The technological upgrades needed to convert cable networks for broadband transmission are less costly than the upgrades needed for DSL and are proceeding more quickly: In contrast to AT&T/TCI's timetable, a recent *Wall Street Journal* article reports that many incumbent LEC networks may not be capable of delivering a fully

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28/ *Video Competition Report*, 13 FCC Rcd 1034, 1043 ¶ 11 (1998). The Commission noted that such head-to-head cable competition appears to be increasing, but that as of July 1997 cable franchises have been awarded to competitive operators in only 81 communities nationwide. *Id.* at 1058-59 ¶ 33.

29/ *See, e.g.,* TCI Form 10-K, at I-6 ("The primary disadvantage of DBS is its inability to provide local broadcast television stations . . . . Additional DBS disadvantages presently include a limited ability to tailor the programming package to the interests of different geographic markets; signal reception being subject to line-of-sight angles; and technology which requires a customer to rent or own one set-top box (which is significantly more expensive than a cable converter for each television [set]).").

30/ *Id.*, Separate Statement of Chairman William F. Kennard.

integrated package of broadband services for another decade.[31] In those areas in which incumbent LECs already are moving ahead with DSL, the technology generally is focused on high-speed Internet access and is not now deployed as an alternative means of delivering multichannel video programming.

Moreover, current DSL technology can be deployed only to customers whose local loops satisfy certain criteria of quality and distance from the LEC's central office and who are not served by digital loop carrier ("DLC") technology. Although U S WEST is working hard to overcome these technological difficulties, less than 50 percent of U S WEST's residential subscribers could obtain high-speed Internet access using current DSL capabilities. Thus, even if DSL were immediately deployed in every incumbent LEC central office, there still would be a substantial number of customers that DSL would not reach.[32] For these customers, cable would remain the only broadband link to the home, and U S WEST or any other entity wishing to offer any high-speed data service to such customers would need access to AT&T/TCI's cable network. The same would be true for customers in a new development or multiunit residence in which AT&T/TCI is chosen as the initial telephone service provider, and who therefore have no telephone local loop in addition to their cable.

DSL also faces significant regulatory handicaps that may delay and hamper the deployment of DSL services on a widespread basis. First, U S WEST and the BOCs deploying

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[31] Dean Takahashi, *The Cable Edge*, Wall St. J., Sept. 21, 1998, at R14. The article cites cable upgrade costs ranging from $787 to $990 per subscriber, compared to a range of $800 to $1,500 for DSL.

[32] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability,* CC Docket No. 98-147, Notice of Proposed Rulemaking, FCC 98-188, ¶ 166 (rel. Aug. 7, 1998).

DSL are prohibited from offering long distance telecommunications services until they obtain special authorization from the Commission under section 271 of the Act. *See* 47 U.S.C. § 271.[33] The Commission has ruled that this prohibition applies to long distance *information* services as well.[34] Based on that view, the principal incumbent LECs must exclude all long distance voice, data, and information services from any package of service they provide, thus disabling them from offering the same fully integrated package of services that AT&T and TCI plan to provide. Second, the Commission has ruled that incumbent LECs' DSL facilities and services are subject to section 251(c) of the 1996 Act, which requires the incumbents to make them immediately available to competitors at regulated prices.[35] Unless these requirements are lifted or applied equally to cable broadband services, they will make DSL a considerably less attractive investment than cable broadband technology. An uneven application of this significant investment disincentive would magnify the cable companies' current advantage.

The proposed merger would enable AT&T/TCI to deploy full and extensive broadband capability well in advance of all potential rivals.[36] While long-term technology

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[33] Even after obtaining section 271 authorization, BOCs may offer long distance service only through a separate affiliate subject to strict independence requirements. *See* 47 U.S.C. § 272.

[34] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905, 21932-33 ¶¶ 55-57 (1996) ("*Non-Accounting Safeguards Order*").

[35] *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. Aug. 7, 1998) ("*Advanced Services Order*").

[36] *See* AT&T News Release, *AT&T, TCI to merge, create new AT&T consumer services unit* (June 24, 1998) (available at http://www.att.com/press/0698/980624.cha.html) at 1 (continued...)

developments are impossible to predict with certainty, cable facilities will be essential for early participation in the broadband service market. One industry analyst predicts that, by the end of 1998, cable broadband subscribers will outnumber DSL subscribers by five to one;[37] another estimates that, of the 60 million households expected to have an Internet link by 2002, one-quarter will use cable facilities and only one in 30 will use DSL.[38] In short, local cable operators, with a monopoly in cable service and bottleneck control over the "last mile" of broadband distribution into customers' homes, start as the dominant force in the broadband service market. A merged AT&T/TCI, with its broad geographic reach, brand name, financial clout, and ambitious deployment plans, would be at the forefront of this development and substantially likely to eclipse all latecomers. As AT&T itself has stated, "Absent Commission rules that clearly and directly require nondiscriminatory access to the local facilities used to provide advanced services, . . . anticompetitive incumbent incentives and abilities can be expected to cripple the competitive provision of those services."[39]

36/ (...continued)
("Following the merger, the new unit intends to significantly accelerate the upgrading of cable infrastructure, enabling it to begin providing digital telephony and data services to consumers by the end of 1999, in addition to digital video services.").

37/ *See* Takahashi, *supra*.

38/ Aaron Pressman, *Cable Internet access facing regulatory battle* (Reuters, Oct. 12, 1998) (*available at* http://biz.yahoo.com/rf/981012/0q.html).

39/ *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Reply Comments of AT&T Corp., at 3 (filed Oct. 16, 1998) ("*AT&T Advanced Services NPRM Reply Comments*").

B. The Merger Would Enable AT&T/TCI To Leverage Its Market Power in Cable Service and Broadband Transmission into Related Service Markets.

A combined AT&T/TCI also would have unmatched ability to leverage its dominance into other markets. It would have both the incentive and ability to exploit its market power in cable service and broadband transmission to gain an advantage in long distance and the numerous other markets in which the company would compete. There are three main ways in which it could do so: It could bundle its monopoly services together with competitive services; it could discriminate against competitors seeking access to its bottleneck facilities; and it could shift costs between the different services it offers, so that monopoly services cross-subsidize the competitive ones.

First, AT&T/TCI could bundle its bottleneck service (broadband transmission to the home) with competitive services, so that every customer wanting a high speed data link would be required to buy other AT&T/TCI services as well. TCI already employs such a strategy with respect to Internet services: TCI bundles its broadband service with the services of its affiliated ISP, @Home. Since a customer buying the broadband service automatically pays for @Home as well, signing up with a different ISP would mean paying *twice* for Internet access service.[40] As a result, the customer has no ability to make a neutral choice among competing

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[40] At the Commission's October 22, 1998 Open Meeting, Commissioner Ness asked TCI President Leo Hindery whether an AT&T/TCI cable modem customer who wished to use an ISP other than @Home would have to pay twice for ISP service. In response, Mr. Hindery did not say (because he could not) that such a customer would not be required to pay for @Home service. Rather, he suggested only that the price the customer would pay for the *other* ISP might be reduced, because some major ISPs offer discounted service to customers who subscribe to a "bring your own access" plan. The fact remains that a customer cannot buy an Internet channel from TCI without also paying for @Home. *See* Ted Hearn, *Armstrong to FCC: We're Open to All*, Multichannel News, Oct. 26, 1998, at 1, 78 ("Hindery . . . offered an elaboration that
(continued...)

ISPs, and ISPs other than @Home lose the ability to compete effectively for that customer's business.

The proposed merger would create opportunities for additional bundling arrangements. The merged company could bundle its bottleneck broadband transmission service with any or all of the numerous residential services under its wide corporate umbrella — cable television, long distance voice, local voice, and wireless, as well as Internet services. It could require consumers to buy certain services only as a package, or it could manipulate its prices artificially to discourage buying the services individually. Such actions would reduce competition for each of the bundled services; consumers wanting *some* of those services would be dissuaded from ordering the other services from AT&T/TCI's competitors, even if they might otherwise have preferred a competitor's offering. The *Application* notes that the combined company would have "the ability" to provide a full range of residential services on a packaged *or individualized* basis;[41/] absent regulatory safeguards it may decline to do the latter and may insist on bundling those services that face vigorous competition with those for which it has market power.

A combined AT&T/TCI also would have the ability and incentive to use its control over broadband transmission to the home to discriminate against competitors in downstream markets. For example, AT&T and Teleport now compete with numerous other facilities-based rivals for the business of transporting data traffic on a long distance and local

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40/ (...continued)
suggested that a double charge was inevitable. He said the cable-modem subscriber would have to pay the monthly @Home fee and pay still more to access [an alternative ISP's] service.").

41/ *Application* at 39.

basis, respectively. Following a merger, AT&T/TCI would have the ability and incentive to steer all data traffic originating with its cable broadband customers onto transport facilities owned by AT&T or Teleport. Competing data transport providers thus would be precluded from a substantial segment of the market — up to a third of the nation's households. Moreover, such data transport providers would need to interconnect with AT&T/TCI in order to handle data traffic (such as e-mail) destined for an AT&T/TCI broadband customer. AT&T/TCI could favor its own transport provider over competitive providers by discriminating with respect to interconnection terms or quality.

The combined company would have every reason to try to use its position in the broadband market also to preclude competition in the market for long distance voice services. Even though customers of AT&T/TCI's broadband services in theory have the option of choosing another IXC over AT&T as their long distance provider, AT&T's established position in the long distance market might lead many buyers of an AT&T-branded integrated broadband package to assume that AT&T automatically will be their long distance provider. By failing to make customers fully aware of their options, AT&T/TCI could preclude long distance competition for these customers. AT&T/TCI also could use customer information collected in its capacity as a monopoly cable television or broadband provider to market its long distance service, or vice versa. This could put competing providers, who do not have access to such information, at a competitive disadvantage.

Finally, AT&T/TCI could attempt to shift costs between its services, so that some services cross-subsidize others. In particular, for all cable services until March 31, 1999 and for basic cable service offerings thereafter,[42] AT&T/TCI could attempt to shift costs of its noncable services to the cable side of its books. Since cable rate regulation is designed to take account of the service provider's costs,[43] such cost-shifting would enable AT&T/TCI to charge artificially high prices for its cable services in order to subsidize artificially low prices for other services — such as local or long distance telephony or broadband data services. The artificially low telephony prices would enable AT&T/TCI to undercut its competitors and hence gain market share at their expense.

III. IN LIGHT OF THE COMPETITIVE DANGERS POSED BY THE MERGER, THE COMMISSION SHOULD ENSURE THAT EITHER STATUTORY OR OTHER SAFEGUARDS ARE IN PLACE TO PROTECT COMPETITION AND CONSUMERS.

As discussed in part II above, the proposed merger would pose serious competitive dangers. Indeed, the Commission has already begun to focus on the formidable control that an unregulated AT&T/TCI would have in the market for broadband transmission to the home. At the Commission's October 22 Open Meeting, Chairman Kennard asked "how competitors who want access to [the merged AT&T's] networks will be able to get access," and Commissioner Ness asked whether an AT&T subscriber wanting to use an ISP other than @Home would nonetheless have to pay for @Home service. AT&T and TCI officials stated in

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42/ The 1996 Act requires deregulation of rates for "cable programming services," which are those services offered on tiers that do not carry broadcast stations, by March 31, 1999. 47 U.S.C. § 543(c)(4). Rates for basic cable service, and for cable equipment and installation, are not scheduled to be deregulated.

43/ The Commission's cable rate regulations permit a cable operator to increase its tier charges to reflect increases in its "external costs." These include, for example, all programming costs. 47 C.F.R. § 76.922(d)(3), (f). The Commission's rate regulations for cable equipment and installation are also cost-based. 47 U.S.C. § 543(b)(3); 47 C.F.R. § 76.923.

response that they would pursue "an open broadband strategy" premised on "complete neutrality."

The Commission should not be satisfied by such vague (and in some cases evasive[44]) assurances. Rather, as the Commission evaluates the proposed merger under sections 214 and 310(d) of the Communications Act and section 7 of the Clayton Act, it must have a clear understanding of the *regulatory* framework in which AT&T/TCI would operate if the merger were approved. The Commission cannot make a reasoned decision about the balance of competitive benefits and harms unless it first identifies what specific regulatory safeguards will be in place to constrain AT&T/TCI's behavior, and how those compare to the regulatory restrictions that constrain the merged entity's current and likely competitors. Only once this analysis has been performed can the Commission reliably analyze the extent to which AT&T/TCI will dominate relevant markets or leverage market power.

Thus, the first issue the Commission must determine is whether the obligations of sections 251(a), (b), and (c) would apply to the provision of broadband local transmission services by AT&T/TCI. As set forth in part III.A below, broadband services may be Title II telecommunications services, which would make AT&T/TCI subject to section 251(a). If the Commission also finds that AT&T/TCI's broadband services are either exchange access or exchange service — as its *Advanced Services Order* suggests[45] — then AT&T/TCI would be a local exchange carrier subject to the requirements of section 251(b). And, given the merged entity's status as a dominant incumbent provider of high-speed data services in TCI's regions,

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44/ *See supra* note 40 (discussing the response of TCI's President to Commissioner Ness).

45/ *See infra* note 52.

the company also would qualify as an incumbent local exchange carrier in the broadband market in those areas, making it subject to section 251(c) as well. The imposition of these safeguards would ameliorate some of the harms posed by the AT&T/TCI merger and would be consistent with the "complete neutrality" and "open broadband" principles embraced by AT&T and TCI before the Commission.[46/]

If, however, the Commission finds that sections 251(a), (b), and (c) would *not* apply to AT&T/TCI's broadband local transmission services, then sections 214 and 310 of the Communications Act and section 7 of the Clayton Act require the Commission to impose similar safeguards as conditions of the merger. Chairman Kennard has declared that a key responsibility of the Commission as the nation moves toward a competitive telecommunications environment is to "remove bottlenecks where the exercise of market power permits them to appear" and to "establish[] the obligations, where necessary, of firms to extend services to others."[47/] As set forth below in part III.B, the merged AT&T/TCI's bottleneck control in the broadband market will, in the absence of section 251 requirements, require that safeguards analogous to those requirements be imposed to protect competition and consumers. Such safeguards and obligations are necessary to protect competition because they "will make it more likely that other market

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46/ *See* Remarks of Vice-President Al Gore, Superhighway Summit, Los Angeles, CA, Jan. 11, 1994 (arguing for access requirements on cable companies and stating that "[a]s cable and telephone service become harder and harder to distinguish . . . labels derived from the past regulatory structures [should not be] translated into inadvertent and unfair competitive advantages").

47/ Remarks of William E. Kennard, Georgetown University Law Center Continuing Legal Education Seminar "The New FCC," Washington, D.C., Oct. 1, 1998.

participants can enter, expand or become more significant market participants that are capable of mitigating in the relevant market, the competitive harms" posed by the merger.[48]

A. If the Commission Finds That the Safeguards of Sections 251(a), (b), and (c) Apply to AT&T's Provision of Broadband Transmission Services, Some of the Competitive Dangers Posed by the Merger Would Be Substantially Lessened.

If the Commission determines that a combined AT&T/TCI would be subject to the requirements of sections 251(a), (b), and (c), the merger would present fewer dangers to competition and the public interest. Those sections were designed precisely to cope with facilities bottlenecks, and the application of those requirements to AT&T/TCI would temper that entity's bottleneck control over local broadband facilities. Moreover, to the extent that the Commission interprets section 251 to apply to advanced services provided by traditional LECs, the same result must follow *a fortiori* with respect to the provision of the same services by AT&T/TCI.

The first question the Commission must determine, therefore, is whether Title II of the Act — including the safeguards in section 251(a) — would apply to AT&T/TCI's provision of broadband transmission services. "Telecommunications," as defined by the Act, involves "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). If high-speed local data transmission services satisfy this definition, then AT&T/TCI clearly would provide "telecommunications services" within the meaning of the

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[48] *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 19993 ¶ 14.

Act.[49] Nothing about the technology used warrants a different conclusion. *See* 47 U.S.C. § 153(46) ("The term 'telecommunications service' means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of the facilities used*.") (emphasis added).[50] Because the combined AT&T/TCI would, under this analysis, be a "provider of telecommunications services" when it offers broadband services over TCI's cable plant, it would be a "telecommunications carrier" with respect to those services, *id.* § 153(44), and it would be subject to the interconnection, accessibility, and compatibility obligations that apply to all telecommunications carriers. *See id.* § 251(a).

If the Commission finds section 251(a) to be applicable, then it next must determine whether AT&T/TCI would be a local exchange carrier and therefore subject to the requirements of section 251(b). Indeed, if AT&T/TCI's broadband service is found to be a telecommunications service and if the Commission continues to hold that advanced broadband services constitute local exchange services, it logically follows that AT&T/TCI would have to comply with the obligations of "*all* local exchange carriers" contained in section 251(b),

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49/ The Commission has not yet addressed whether TCI's current insistence on selling its high-speed data transmission service in a bundle with its @Home content and Internet access services changes the nature of the transmission service. It is possible, however, that TCI's bundling of other services with transmission would not change the classification of the transmission: U S WEST, for example, has not contended that its MegaBit xDSL services cease to be telecommunications services simply because some subscribers use them to access USWEST.net, U S WEST's information-service Internet access offering. U S WEST expresses no opinion here on whether the services that TCI bundles with transmission are "information services," Title VI "other programming services," or something else.

50/ *See also Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501, ¶ 98 (rel. April 10, 1998) ("*Report to Congress*") ("Congress did not limit 'telecommunications' to circuit-switched wireline transmission, but instead defined that term on the basis of the essential functionality provided to users.").

including resale, dialing parity, and access to rights of way. *See* 47 U.S.C. §§ 251(b)(1)-(5) (emphasis added). Cable broadband services belong to the class of "advanced services,"[51] and the Commission has held that advanced services are either "exchange access" or "telephone exchange service" for purposes of the Act.[52] Because the Act defines a "local exchange carrier" as "any person" (other than a CMRS provider) "that is engaged in the provision of telephone exchange service or exchange access," 47 U.S.C. § 153(26), AT&T/TCI would, under this analysis, be a LEC subject to section 251(b). U S WEST has challenged the Commission's conclusion that advanced services are exchange access or exchange service;[53] and, to the extent that challenge is successful, AT&T/TCI's advanced services (like U S WEST's) might not be subject to section 251(b). However, to the extent that the Commission's determination stands, its conclusions must — by logical necessity and as a matter of regulatory parity and equal protection of the laws — apply to AT&T/TCI as well.

Finally, if the Commission finds that AT&T/TCI would be a local exchange carrier, then the Commission also should determine that the merged entity's dominant position in

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[51] The Commission has defined "advanced services" as "wireline, broadband telecommunications services," including services that rely on "packet-switched technology." *Advanced Services Order* at ¶ 3. Although the *Advanced Services Order* primarily focused on LEC-provided xDSL line services, the Commission made a point of noting that "services that rely on digital subscriber line technology are but one of the advanced services currently in existence, and we in no way mean to suggest digital subscriber line is the preferred technology." *Id.* at n.6.

[52] *See Advanced Services Order* at ¶¶ 40-44. Although the Commission was discussing the "advanced services offered by incumbent LECs," *id.* at ¶ 40, that is not a limiting characteristic. As noted above, it is the type of service offered that determines whether a provider is a LEC in the first place; and section 251(b) applies to all LECs, not only incumbent LECs.

[53] *See U S WEST Communications, Inc. v. FCC*, No. 98-1410 (D.C. Cir.) (filed Sept. 2, 1998).

the broadband market would make it an *incumbent* local exchange carrier and therefore subject to the requirements of section 251(c). AT&T and TCI may be relatively new entrants in the local exchange marketplace, but the Commission has recognized that "the 1996 Act contemplates that new entrants will be subject to the same obligations imposed on incumbents" when their dominance in a particular market makes those obligations necessary to protect competition.[54] In particular, section 251(h)(2) of the Act provides:

> TREATMENT OF COMPARABLE CARRIERS AS INCUMBENTS.—The Commission may, by rule, provide for the treatment of a local exchange carrier (or class or category thereof) as an incumbent local exchange carrier for purposes of this section if—
>
> (A) such carrier occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by [a traditional incumbent];
>
> (B) such carrier has substantially replaced an incumbent local exchange carrier . . . ; and
>
> (C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section.

47 U.S.C. § 251(h)(2).

The merged AT&T/TCI would meet these criteria based on its provision of advanced data services, and it therefore would — at least with respect to those services — be an incumbent LEC.[55] First, the combined entity would have a "seemingly dominant market presence" in the broadband market comparable to that of an incumbent LEC in the market for circuit-switched voice services, as well as "substantial financial resources, significant economies

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[54] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16110 ¶ 1248 (1996) ("*Local Competition Order*").

[55] Nothing in the Act precludes the Commission from classifying incumbents on a market-by-market basis. Such classification might be the most effective means of opening up bottlenecks wherever they appear, particularly in light of the new risks to competition posed by the creation of entities such as AT&T/TCI.

of density, connectivity, and scale, and, most importantly, control of the bottleneck" ubiquitous cable broadband network.[56] Second, as noted above, cable providers are "substantially replac[ing]" incumbent telephone carriers as the preferred means for accessing online services and the Internet.[57]

Third, treating the merged AT&T-TCI's cable broadband services comparably to the advanced services of an incumbent LEC is consistent with the public interest, convenience, and necessity and the purposes of section 251. AT&T consistently has argued in the circuit-switched voice context that "[s]pecific and strictly enforced . . . unbundling regulations (coupled with efficient pricing rules) are essential if CLECs are to receive the nondiscriminatory access to unbundled loop facilities that the Commission has recognized is 'critical to encouraging entry.'"[58] By the same logic, application of the unbundling, discounted resale, and other obligations of section 251(c) to AT&T/TCI's broadband transmission services will increase competition in the broadband marketplace by giving all providers access to the only network in the community that can support the provision of advanced services to all subscribers, regardless

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56/ *Guam Public Utilities Commission, Petition for Declaratory Ruling Concerning Sections 3(37) and 251(h) of the Communications Act*, CCB Pol. 96-18, Declaratory Ruling, 12 FCC Rcd 6925, 6944 ¶ 33 (1997). Moreover, in any newly constructed housing development or multiple dwelling unit ("MDU") where AT&T/TCI were the primary or exclusive provider of *all* communications service, that fact alone would make AT&T/TCI the incumbent telephone provider under section 251(h)(2).

57/ The Commission has properly refused to give subsection 251(h)(2)(B) an "unduly literal" reading by requiring that the carrier actually succeed an incumbent LEC in providing a specific service in order to be deemed "comparable." *Id.*

58/ *See Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of AT&T Corp., at 39 (filed Sept. 25, 1998) ("*AT&T Advanced Services NPRM Comments*") (quoting *Local Competition Order*, 11 FCC Rcd at 15689 ¶ 377).

of subscribers' distance from a central office or the presence of a digital loop carrier. Thus, the Commission could not reasonably decline to apply the safeguards of section 251(c) to AT&T/TCI's dominant local broadband services if it holds them applicable to other "incumbents'" subsequent introduction of comparable services.

B. If AT&T/TCI's Broadband Services Are Not Subject to the Safeguards of Sections 251(a), (b), and (c), then the Commission Should Impose Analogous Safeguards as a Condition of Approving the Merger.

As discussed in the previous section, to evaluate the competitive effect of the proposed merger, the Commission must first determine whether and to what extent the broadband services AT&T/TCI plans to offer are subject to the regulatory requirements of section 251 of the Act. If the Commission concludes that any part of section 251 does not apply — either because the services fall outside the scope of Title II entirely or because they fall outside of specific subsections of section 251 — then the Commission should, in order to protect competition, impose analogous access, nondiscrimination, and related requirements as conditions of approval of the merger. Such conditions would be essential to constrain the combined entity's significant market power and to prevent anticompetitive conduct.[59] In this circumstance, the

[59] Such conditions would be especially necessary in light of the artificial regulatory advantage that AT&T/TCI otherwise would enjoy vis-a-vis its closest competitors, namely, incumbent LECs. As Chairman Kennard stated last June, the proposed AT&T/TCI merger "highlight[s] the conflict in the way the Telecom Act treats common carriers and cable operators, especially on how open and accessible their networks are to users and competitors." *See* "A Broad(band) Vision for America," Remarks by William E. Kennard to the Federal Communications Bar Association, June 24, 1998.

Commission has the authority and indeed the obligation to impose competitive safeguards until such a time as there is sufficient competition to eliminate the threat of anticompetitive action.[60]

1. AT&T/TCI Should Be Required To Provide Other Carriers with Unbundled Access to Capacity on Its Local Broadband Transmission Facilities.

As discussed above, a combined AT&T/TCI would have bottleneck control over broadband transmission capability and a virtual monopoly in the provision of cable television and integrated service packages to the millions of homes served by TCI and its affiliates. The merger also would give the company the ability and incentive to exploit this bottleneck control in related markets. To prevent such anticompetitive leveraging, and to preserve the opportunity for competition in the broadband market, AT&T/TCI should be required to provide capacity on its local broadband transmission facilities to other carriers on an unbundled basis at a reasonable, cost-based price. AT&T has argued in the DSL context that "advanced services are most likely to reach all Americans if incumbents are subject to unbundling obligations to permit additional competitors to provide service."[61] If unbundled access to incumbent LEC DSL facilities is needed to permit additional competitors to provide broadband services, such access is all the more necessary in the case of AT&T/TCI's cable broadband facilities, which in the near term are the only means of delivering fully integrated service packages and which reach many customers that DSL does not.

60/ U S WEST has consistently advocated making regulatory restrictions subject to appropriate sunset provisions. Where competition is adequately developed, regulatory safeguards are unnecessary.

61/ *See AT&T Advanced Services NPRM Reply Comments* at 17 (citing *Deployment of Wireline Service Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of CTSI, at 12 (filed Sept. 25, 1998)).

The price AT&T/TCI may charge for unbundled access to its broadband transmission capacity should be calculated using the same methodology AT&T has advocated in seeking to *buy* unbundled access and interconnection from incumbent LECs under section 251(c) of the Act.[62] AT&T/TCI also should be required to provide any access and support systems necessary to enable competing carriers to make appropriate use of the capacity they purchase. These support systems must be sufficient to support large-scale competitors with high order volumes, as AT&T has argued in analogous contexts.[63]

Permitting unbundled access to AT&T/TCI's broadband transmission facilities would enable other carriers to offer individual or integrated services directly to the large number of AT&T/TCI cable customers, thus increasing customer choice and reducing AT&T/TCI's ability to preclude competition in markets that depend on broadband transmission. For example, an ISP wishing to compete with @Home could market its service directly to consumers, offering complete end-to-end Internet connectivity together with specialized content. Upon winning a customer, the ISP would purchase broadband transmission capacity from AT&T/TCI, unbundled from other facilities or services. The ISP would then provide service to the customer over that

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62/ AT&T has consistently advocated the use of TELRIC pricing based on the so-called Hatfield Model. *See, e.g., Pricing Proceeding for Interconnection, Unbundled Elements, Transport and Termination, and Resale*, Wash. Pub. Util. and Transp. Comm'n Docket No. UT-960369, Post-Hearing Brief of AT&T Communications and MCI Telecommunications, at 10 (filed Sept. 12, 1997) ("*AT&T Post-Hearing Brief*"); *Investigation and Suspension of Tariff Sheets Filed by U S WEST Communications, Inc.*, Colo. Pub. Util. Comm'n Docket No. 96S-331T, AT&T's Statement of Position, at 3, 15 (filed May 19, 1997) ("*AT&T Colorado Statement*").

63/ *See, e.g., Application by Ameritech Michigan For Authorization Under Section 271 of the Communications Act to Provide In-Region InterLATA Service in the State of Michigan*, CC Docket No. 97-137, Comments of AT&T Corp. in Opposition to Ameritech's Section 271 Application for Michigan, CC Docket No. 97-137, at 24 (filed June 10, 1997).

purchased broadband capacity, together with transport and content that the ISP arranges for itself. The end result would be a full-fledged competitor to @Home, able to compete with it on a nondiscriminatory basis regardless of @Home's ties to AT&T/TCI. Companies seeking to offer other types of services delivered over broadband facilities could take an identical approach.

Requiring AT&T/TCI as the incumbent to provide unbundled access also would ensure that the head start enjoyed by the company's cable broadband business will not be further cemented by regulatory advantages. Permitting AT&T/TCI to deploy bottleneck broadband transmission facilities free of unbundling obligations, while at the same time imposing unbundling requirements on incumbent LECs' deployment of DSL under section 251(c)(3), would artificially increase AT&T/TCI's broadband market power by decreasing DSL's relative attractiveness as an investment vis-a-vis cable broadband technology, ultimately reducing consumer choice.

2. AT&T/TCI Should Be Required To Permit Unaffiliated Data Transport Providers To Interconnect with Its Broadband Transmission Facilities at Any Technically Feasible Point and at Nondiscriminatory, Cost-Based Rates.

As the FCC has recognized in more traditional telecommunications contexts,[64] a carrier's bottleneck control over access to customers necessitates giving other carriers the right to interconnect with that carrier's network. Likewise, AT&T/TCI's bottleneck control and monopoly over broadband access to a significant portion of the nation's homes, together with the combined company's size and broad scope, make it imperative that unaffiliated data carriers be guaranteed the ability to interconnect with its network. To use the simplest example, any time a data transport provider carries an e-mail message destined for an AT&T/TCI broadband

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[64] *Local Competition Order*, 11 FCC Rcd at 15509 ¶ 13; *id.* at 15588 ¶ 172.

customer, the data transport provider must interconnect with the AT&T/TCI broadband network in order for the message to be successfully delivered. To ensure that AT&T/TCI cannot discriminate in favor of its affiliates and against its competitors, the company should be required to interconnect with *all* data transport providers at any technically feasible point. Such interconnection should be made available at terms and prices that are nondiscriminatory and cost-based, and the quality should be no less than that of the interconnection that AT&T/TCI provides between its cable broadband network and its own long distance backbone facilities. As in the case of unbundled access, AT&T/TCI should commit to calculate prices based on the same type of methodology that AT&T has advocated when purchasing unbundled access and interconnection from incumbent LECs, and to make available efficient support systems capable of handling even large scale interconnection requests.

Reasonable interconnection with AT&T/TCI's facilities also is essential for carriers seeking to provide service over unbundled broadband transmission capacity purchased from AT&T/TCI, as discussed above. Without a guarantee of such interconnection, AT&T/TCI would be able to hinder competitors' abilities to connect their transport and other facilities to AT&T/TCI cable systems, and thereby frustrate competitors' efforts to make effective and economical use of the unbundled broadband capacity.

3. AT&T/TCI Should Be Required To Permit Competitors To Resell the Cable Television and Voice Services It Offers to Residential Consumers over Its Broadband Transmission Links.

Resale is another important tool for neutralizing the competitive threats of the proposed merger. The Commission has found in other contexts that "resale confers important public benefits in less competitive markets, including encouraging competitive pricing;

discouraging unjust, unreasonable, and unreasonably discriminatory practices; [and] reducing the need for regulatory intervention and concomitant market distortions."[65/] At present, the market for multichannel video is decidedly noncompetitive, with incumbent cable operators retaining an entrenched monopoly. This merger would create new opportunities for AT&T/TCI to exploit that monopoly through such means as bundling and cross-subsidization. Moreover, AT&T/TCI's monopoly over cable in its service region would in turn give the company a monopoly over fully integrated packages of broadband services, because no other provider would be able to offer a competing package including multichannel video.

Requiring AT&T/TCI as the incumbent to allow resale of its cable television services would help alleviate the competitive threat. Specifically, competitors should be permitted to resell those services separately or as part of an integrated package of services. And to ensure that such resale will have real potential as a viable competitive option, AT&T/TCI should be required to provide its cable television service to resellers at a wholesale price that reasonably reflects the costs it saves by having the reseller handle such functions as marketing and billing.[66/] Such resale would help to counterbalance the present dearth of competition in the cable market and, at the same time, assist competitors who are working to develop alternative video technologies to gain a foothold in the marketplace.

65/ *Personal Communications Industry Association's Broadband Personal Communications Services Alliance's Petition for Forbearance for Broadband Personal Communications Services*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-134, ¶ 32 (rel. July 2, 1998).

66/ AT&T has argued in other contexts that such a wholesale discount should be 30 percent or higher, which provides a starting point for analysis here. *See AT&T Washington Post-Hearing Brief*, at 77 (arguing for 38 percent resale discount); *AT&T Colorado Statement*, at 30 (arguing for resale discount between 30 and 36 percent).

AT&T/TCI similarly should be required to permit resale of any local voice telecommunications services that it offers. The 1996 Act requires all local exchange carriers "not to prohibit, and not to impose unreasonable or discriminatory conditions or limitations on, the resale of its telecommunications services." 47 U.S.C. § 251(b)(1). The procompetitive objectives of this provision apply *a fortiori* to AT&T/TCI, an incumbent monopolist in cable television service with the ability to bundle that service with voice and other services and to engage in cross-subsidization. Moreover, in newly developed subdivisions or multiple dwelling units ("MDUs"), AT&T/TCI may be the initial voice service provider. Where this is the case, it should be required to make its voice services available for resale at a wholesale discount similar to that defined in section 252(d)(3). In addition to protecting against anticompetitive practices and facilitating competition, such resale requirements would ensure regulatory parity between the voice services of AT&T/TCI and those of the other voice carriers with which it would compete.

4. AT&T/TCI Should Be Required, in the Same Manner as the BOCs, To Facilitate the Ability of Its Local Exchange Customers To Make a Neutral Choice Among Toll Service Providers.

As AT&T/TCI begins to offer an integrated package of services over its network of residential broadband facilities, it will have a strong incentive to steer its cable customers' toll traffic to its affiliated toll service operations in an effort to regain or enhance market share. TCI cable customers who have chosen interexchange carriers other than AT&T will be attractive candidates for targeted marketing or cross-subsidies. In particular, the combined company may induce these customers to choose AT&T or Teleport as their interLATA or intraLATA toll carriers.

AT&T/TCI could promote its toll services also by making the toll services of unaffiliated carriers less convenient to use — for example, by requiring customers to dial extra digits to reach such carriers, by causing delays in the completion of calls, or by making it more difficult for customers of competing toll carriers to access long distance directory assistance or operator services. The 1996 Act establishes a clear policy that local voice carriers may not attempt to influence their customers' choice of toll carriers in this fashion. The Act imposes on local exchange carriers "[t]he duty to provide dialing parity to competing providers of . . . telephone toll service, and the duty to permit all such providers to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing, with no unreasonable dialing delays." 47 U.S.C. § 251(b)(3). AT&T/TCI should be required to comply with no less stringent requirements.

Moreover, because of the market power AT&T/TCI will enjoy with respect to residential broadband customers, and because of AT&T's status as the nation's largest provider of long distance telephone services, AT&T/TCI should be required to take affirmative steps to ensure that its customers understand that they are free to choose among long distance providers without any type of pressure, direction, or suggestion from AT&T/TCI to choose a specific carrier. Specifically, AT&T/TCI should be required at the outset to comply with equal access obligations comparable to those that apply to BOCs. The Commission has taken the position that those obligations, established under the MFJ and expressly preserved under section 251(g) of the 1996 Act, establish a principle that "BOCs may not favor an interexchange carrier by endorsing or promoting the services of one interexchange carrier or another."[67] The Commission explained the rationale for that principle as follows:

> BOCs maintain both a ubiquitous brand name awareness and unparalleled access to customers that, without constraints, easily could be used to steer customers' decisions and, as a result, influence competition in the long distance market. Accordingly, to make sure that customers make their long distance choices based solely on the merits of a long distance offering, the MFJ Court determined that the BOCs must facilitate the ability of customers to choose, but remain neutral as a participant in that decision.[68]

AT&T likewise has "ubiquitous brand name awareness," and the postmerger company will be an incumbent with unique access to customers that could be used to influence their choice of long distance carrier. The public policy interest in ensuring that customers make their long distance choice solely on the merits of the long distance offerings would be identical for the captive customers of the merged company. Thus, whatever the scope of the BOCs' equal access obligation in connection with marketing the services of unaffiliated providers, the same obligation clearly should apply to AT&T/TCI's marketing of its affiliates' toll services.

Indeed, this would not be the first time AT&T was required to make equal access commitments as a condition to a merger: When AT&T acquired McCaw Cellular Communications, Inc., it was required to "offer all interexchange carriers equal access to its cellular systems" through compliance with "equal access arrangements . . . modeled on the

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67/ *AT&T Corporation v. Ameritech Corporation,* File No. E-98-41, Memorandum Opinion and Order, FCC 98-242 (rel. Oct. 7, 1998) ¶ 57, *petitions for review pending sub nom. U S WEST Communications, Inc. v. FCC,* Nos. 98-1468 et al. (D.C. Cir.) (filed Oct. 7, 1998).

68/ *Id.*

analogous provisions of the [MFJ]."[69] The same condition should be imposed here. Moreover, the Commission recently stated that it plans to initiate a rulemaking to consider whether BOCs should continue to be subject to the equal access obligations originally established under the MFJ, or whether a new set of obligations is now appropriate.[70] In providing voice services to customers over broadband facilities, AT&T/TCI should ultimately be required to comply with whatever equal access obligations the Commission adopts in that proceeding.

5. AT&T/TCI Should Be Required To Commit That, Where It Elects To Offer Voice Services over Its Broadband Facilities, It Will Comply with Any State Rules Applicable to Telecommunications Utilities.

In any state in which it offers voice services over its broadband facilities, AT&T/TCI should agree to comply with all state rules concerning public telecommunications utilities — whether or not the state decides to enforce those rules itself with respect to voice services delivered via cable broadband facilities. Such a commitment would preserve regulatory parity between the voice services of AT&T/TCI and those of other carriers, and is consistent with

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69/ 59 Fed. Reg. 44158, 44169 (1994) (Proposed Final Judgment and Competitive Impact Statement in *United States v. AT&T Corp. and McCaw Cellular Communications, Inc.*). The Department of Justice explained that "the noncompetitive structure of current cellular service markets and the market power currently possessed by McCaw" would, absent equal access requirements, enable the combined company to use its control over cellular customers to favor AT&T over potential competitors in the provision of long distance service to those customers. *Id.* AT&T and McCaw agreed to be bound by the restrictions contained in the proposed final judgment so that the merger would be allowed to proceed. *See United States v. Western Electric Company,* 46 F.3d 1198, 1201 n.2 (D.C. Cir. 1995).

70/ *Id.* ¶ 53.

the general principle that regulatory treatment should depend on the type of service offered rather than the particular technology used.[71]

In addition, where AT&T/TCI is the original voice service provider in a new subdivision or MDU, AT&T should agree to accept all of the state's carrier of last resort ("COLR") obligations for that area, in lieu of any adjacent incumbent LEC. This commitment would reflect the fact that, in such an area, AT&T/TCI will in fact be the incumbent telephone carrier.[72] Indeed, any adjacent incumbent LEC may not have facilities installed in the area. Thus, it would be wholly irrational and economically inefficient to impose COLR obligations on the incumbent LEC in these circumstances given the ability of AT&T/TCI to provide service there.

6. The Commission Should Impose Additional Safeguards To Prevent AT&T/TCI from Engaging in Anticompetitive Cross-Subsidization or Discrimination.

The Commission should require AT&T/TCI to comply with additional measures to ensure that the company does not use its price-regulated monopoly cable service and bottleneck broadband transmission facilities to cross-subsidize or discriminate in favor of its long distance, data transport, or other competitive businesses. In particular, the Commission should require commitments regarding cost allocation, interaffiliate transactions, and customer proprietary network information ("CPNI") comparable to the rules that apply to incumbent

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[71] *See Report to Congress*, 13 FCC Rcd at 11574 ¶ 98 ("We are mindful that, in order to promote equity and efficiency, we should avoid creating regulatory distinctions based purely on technology."); *see also* Statement by William E. Kennard, *FCC News*, February 27, 1998 (emphasizing "[t]echnological neutrality" as a guiding principle and stating that "[we] should let the market decide which technologies best meet user needs in each locale").

[72] *See supra* note 56.

LECs. Absent such safeguards, AT&T's acquisition of TCI's bottleneck monopoly facilities would give the combined company the potential to subsidize any of its competitive offerings. As the Commission has recognized, cost shifting from an unregulated business to a regulated monopoly business can improperly subsidize the unregulated service, giving it a substantial advantage over competitors' offerings and at the same time raising "the costs borne by captive . . . ratepayers."[73/] As noted above, the postmerger company also would have the ability and incentive to abuse its monopoly control over bottleneck broadband facilities to discriminate against its competitors in unregulated adjacent markets.

To safeguard against improper cross-subsidies, the Commission should impose reasonable cost allocation safeguards. As an initial matter, AT&T/TCI should be required to prepare and file a cost allocation manual. AT&T/TCI's manual, like those of incumbent LECs, should "provide detail on the nature of the nonregulated activities and the cost accounts they affect, as well as cost allocation formulas and procedures."[74/] The merged company's original manual should be subject to public comment and Commission review.[75/] The Commission also should require AT&T/TCI to consent to annual audits by the Commission or an independent auditor. "The independent audit requirement has proven to be a very useful and cost effective

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73/ *Amendment of the Commission's Rules To Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services*, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15668, 15689 ¶ 28 (1997). Cable rates are scheduled for partial deregulation on March 31, 1999, but rate regulation will continue to apply to basic cable service and cable equipment and installation charges. *See supra* note 42.

74/ *See Computer III Remand Proceedings: Bell Operating Company Safeguards and Tier I Local Exchange Carrier Safeguards*, CC Docket No. 90-623, Report and Order, 6 FCC Rcd 7571, 7593 ¶ 49 (1991) ("*Computer III Remand Order*").

75/ *See Computer III Remand Order* ¶ 49.

tool in reviewing implementation of [bottleneck providers'] cost allocation manuals and the results of cost allocations under the manuals."[76] In addition, the Commission should impose "detailed reporting requirements" similar to those imposed on incumbent LECs.[77]

To help prevent discrimination and abuse of market power against competitors in unregulated markets, the Commission should also impose on AT&T/TCI measures analogous to the open network architecture and network disclosure rules that the Commission has adopted for incumbent LECs in the enhanced services context.[78] Because interaction among elements of the AT&T/TCI corporate family presents a particular threat of anticompetitive behavior, the Commission should further require the postmerger entity to comply with the affiliate transaction rules it has fashioned in the incumbent LEC context. Specifically, the regulated cable portion of the company must do business with the remainder of the company on an arm's length basis, and agreements must be reduced to writing and available for public inspection.[79]

To guard against discriminatory interconnection pricing, the Commission should require AT&T to impute the prices it charges competitors for access to bottleneck broadband facilities into the prices it charges for retail services that utilize those facilities, such as local telephone, long distance, and high-speed data and Internet access services. *Cf.* 47 C.F.R. § 64.901(b)(1). Otherwise, AT&T could permit one of its unregulated services to obtain access to

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76/ *Id.* ¶ 50.

77/ *Id.* ¶ 51.

78/ *Id.* ¶¶ 57-59.

79/ *Cf. Non-Accounting Safeguards Order*, 11 FCC Rcd at 21992 ¶ 181.

bottleneck broadband facilities at rates below those that others must pay, putting the competitors in an unlawful "price squeeze."[80]

Moreover, the Commission should condition its approval of the merger on AT&T's willingness to submit to CPNI rules applicable to telecommunications carriers. The postmerger AT&T should be restricted from using CPNI from its monopoly cable service to market its other services (including telephony and data), or vice versa. Telecommunications carriers and other potential competitors of the AT&T/TCI monolith would face significant disadvantages if they alone were restricted in the use of CPNI to market services beyond existing customer relationships.[81]

One way for the Commission to facilitate implementation of these safeguards would be to require AT&T to provide bottleneck broadband services on a structurally separate basis from its other services. AT&T was required to comply with precisely such separation requirements as a condition of its acquisition of McCaw Cellular.[82] Although U S WEST recently has described its opposition to structural separation on the ground that the practice is

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80/ *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20054-55 ¶ 116-17 (discussing "price squeeze" danger and rejecting AT&T's argument that Bell Atlantic/NYNEX merger would pose such a danger because of the availability of interconnection and unbundled access at cost-based rates).

81/ *See Implementation of the Telecommunications Act of 1996*, CC Docket 96-115, Second Report and Order, 13 FCC Rcd 8061, 8066-67 ¶ 4 (1998) (summarizing CPNI restrictions applicable to telecommunications carriers).

82/ *See* 59 Fed. Reg. 44158, 44174 (1994) (Proposed Final Judgment and Competitive Impact Statement in *United States v. AT&T Corp. and McCaw Cellular Communications, Inc.*) ("McCaw and McCaw affiliates that are involved in the operation of wireless systems and the provisions [sic] of local wireless services shall be maintained as corporations or partnerships separate from AT&T as specified in . . . the Structural Separation plan.").

needlessly inefficient,[83] AT&T favors "strengthened" separation requirements for incumbent LECs' provision of advanced data services — going so far as to urge a requirement of "some meaningful quantum of outside ownership."[84] Indeed, several commenters in the *Advanced Services* proceeding argued that structural separation is necessary to prevent incumbent LECs from discriminating in favor of their own advanced service operations.[85] If the Commission adopts these suggestions, they should apply with far greater force to the postmerger AT&T/TCI, which alone would hold an incumbent bottleneck facility for broadband distribution to the home. Indeed, it would be arbitrary and unlawful in these circumstances to impose structural separation on incumbent LECs' provision of advanced data services without doing the same for AT&T/TCI.[86]

83/ *See Deployment of Advanced Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of U S WEST Communications, Inc. at 16-25 (filed Sept. 25, 1998).

84/ *AT&T Advanced Services NPRM Comments* at 20-21.

85/ *See, e.g., Deployment of Advanced Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of Covad, at 59-60 (filed Sept. 25, 1998); *Deployment of Advanced Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of Network Access Solutions, at 6-9 (filed Sept. 25, 1998); *Deployment of Advanced Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Comments of Transwire, at 8 (filed Sept. 25, 1998).

86/ *See, e.g., Amendment of Part 90 of the Commission's Rules To Provide for the Use of the 220-222 MHz Band by the Private Land Mobile Radio Service*, PR Docket No. 89-552, Fifth Report and Order, FCC 98-186 (released Aug. 6, 1998), at ¶ 8 n.40 (CMRS policy of "regulatory symmetry") (citing *Melody Music, Inc. v. FCC*, 345 F.2d 730 (D.C. Cir. 1965)). *See also McElroy Elec. Corp. v. FCC*, 990 F.2d 1351, 1365 (D.C. Cir. 1993).

7. The Commission Should Condition Approval of the Merger on AT&T's Commitment to Providing Nondiscriminatory Access to Video Programming for Competitive MVPDs.

As the owner of attributable interests in a number of satellite cable or satellite broadcast programming vendors, TCI is subject to the Commission's program access rules, which guarantee the ability of competitive multichannel video programming distributors ("MVPDs") to obtain access to the programming of such "vertically integrated" vendors.[87] The Commission should ensure that the proposed merger does not undermine this safeguard, which will be critical to U S WEST's ability to launch competitive VDSL-based video services.

AT&T and TCI indicate in the *Application* that the combined entity's video programming interests will be managed separately from its other businesses (including broadband services).[88] But the public interest still requires that the Commission make clear that the proposed post-merger managerial structure will not excuse AT&T/TCI from its obligation to continue providing competitive MVPDs with nondiscriminatory access to all programming supplied by vendors in which the company owns an attributable interest. This assurance of access to programming also should apply regardless of whether AT&T/TCI decides to divert the delivery of video programming from satellites to AT&T's extensive terrestrial facilities; a contrary result would eviscerate the effectiveness of the program access rules.

As described below, Congress recognized in the 1992 Cable Act the need to impose nondiscrimination requirements on entities that own both bottleneck cable facilities and

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87/ In this context, the Commission's rules define an "attributable" interest as ownership of 5% or more of a satellite cable or satellite broadcast programming vendor, whether in the form of a direct ownership interest, limited partnership equity interest, or ownership of voting or nonvoting stock. *See id.* §§ 76.1000(b); 76.501 note 2(a).

88/ *See Application* at 12 nn.19 & 20, 13-14.

cable programming. These safeguards in the market for delivery of video services are analogous to the obligations of competitive access in other markets described above.[89] Just as such protections should apply to AT&T/TCI's bottleneck monopoly facilities in the emerging market for integrated broadband services, they are essential with respect to AT&T's acquisition of TCI's vertically integrated monopoly cable operations.

Congress found in the 1992 Cable Act that "[v]ertically integrated program suppliers . . . have the incentive and ability to favor their affiliated cable operators over nonaffiliated cable operators and programming distributors using other technologies."[90] Congress accordingly instructed the Commission to promulgate regulations that prohibit practices and arrangements, including exclusive contracts, between cable operators and vertically integrated satellite cable and broadcast programming vendors ("vertically integrated programming vendors") that would prevent unaffiliated MVPDs from obtaining access to these vendors' programming. 47 U.S.C. § 548(c).

The Commission's rules prohibit cable operators that have an attributable interest in a programming vendor from unduly or improperly influencing either the vendor's decision to sell programming to any unaffiliated MVPD or the terms, conditions, or prices relating to such sales. 47 C.F.R. § 76.1002(a). The rules also apply to the vertically integrated programming vendors themselves: Such vendors are barred from discriminating among or between competing

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89/ *See Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Reply Comments of America Online, at 8 & n.27 (filed Oct. 8, 1998).

90/ Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, § 2(a)(5), 106 Stat. 1460, 1460-61 (1992). The program access provisions of the Cable Act were codified in the Communications Act as section 628. *See* 47 U.S.C. § 548.

cable systems, cable operators, or other MVPDs. *Id.* § 76.1002(b). Finally, cable operators must obtain prior Commission approval before entering into or enforcing an exclusive distribution arrangement with a vertically integrated programming vendor;[91] in areas that were not served by a cable operator as of the effective date of the 1992 Cable Act, the ban on exclusivity applies so long as an exclusive arrangement between a cable operator and a vertically integrated programming vendor would prevent a competitive MVPD from obtaining that vendor's programming. *Id.* § 76.1002(c)(1).

The program access rules indisputably govern TCI's existing relationship with satellite cable programming vendors in which TCI owns an attributable interest through its wholly owned subsidiary Liberty Media Corp. Such programming vendors include Fox/Liberty Networks, LLC, Discovery Communications, Inc., BET Holdings, Inc., QVC, Inc., and Encore Media Group.[92] These entities are "satellite cable programming vendor[s] in which a cable operator has an attributable interest"[93] because TCI, "one of the largest providers of cable television service in the United States,"[94] owns at least 5% of each through Liberty Media.[95]

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[91] *Id.* §§ 76.1002(c)(2), (c)(5). Commission approval of exclusive arrangements hinges on a public interest analysis that considers the effect of exclusivity on the development of competition, the incumbent cable operator's ability to attract capital, and the diversity of programming available to consumers. *See id.* § 76.1002(c)(4).

[92] *Application* at 35; *Annual Report of Tele-Communications, Inc. Pursuant to Section 13 or 15(d) of the Securities Exchange Act of 1934 for the Fiscal Year Ended December 31, 1997*, at I-19 to I-24 ("TCI SEC Form 10-K").

[93] 47 C.F.R. § 76.1002(c)(2).

[94] *Application* at 33; 47 C.F.R. § 76.5(cc) (defining "cable system operator").

[95] TCI SEC Form 10-K at I-19 to I-24.

The Commission should ensure that AT&T's manipulation of its managerial structure does not defeat the applicability of the safeguards that protect competitive MVPDs. While AT&T has not expressly argued that it will be exempt from those rules, it has stressed that "the businesses of the Liberty Media Group will continue to be managed by the managements of Liberty and [TCI] Ventures that are in office prior to the merger" and that it intends to issue a separate "tracking stock" that will reflect the particular performance of the Liberty Media Group.[96] The Commission should make clear if it approves the merger that the asserted autonomy of Liberty Media within the AT&T/TCI corporate structure has no bearing whatever on whether AT&T/TCI is a cable operator with an attributable interest in programming vendors. That question depends solely on whether AT&T/TCI *owns* 5% or more of a programming vendor, not whether it *manages* the vendor itself. *See* 47 C.F.R. §§ 76.1000(b), 76.501 note 2(a). AT&T and TCI dispositively concede that "AT&T will be the legal owner of the assets and the businesses of the Liberty Media Group."[97] Similarly, AT&T and TCI admit that the tracking stock associated with Liberty Media will be nothing less than "common stock of the parent issuer"[98] — AT&T Corporation — further confirming that it is AT&T itself that will have an attributable interest in many video programming businesses. 47 C.F.R. § 76.501 note 2(a).

Moreover, the Commission should ensure that the proposed transaction does not enable AT&T/TCI to evade this nondiscrimination requirement by changing the delivery mechanism for the Liberty Media program services (or any other programming services in which

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96/ *Application* at 12 n.19 & 12 n.20; *see also id.* at 13-14.

97/ *Id.* at 12 n.19.

98/ *Id.* at 12 n.20.

AT&T/TCI may have or acquire an attributable interest). Whether AT&T/TCI chooses to continue delivering what is now TCI's video programming via satellite or instead to migrate that programming to its extensive terrestrial facilities, it will be delivering "the very same programming that Congress in the 1992 Cable Act sought to make accessible to cable's competitors on a non-discriminatory basis."[99] The Commission has recognized that "the issue of terrestrial distribution of programming could eventually have substantial impact on the ability of alternative MVPDs to compete in the video marketplace."[100]

Because, to date, there have been few reported attempts to evade the program access rules through such migration to terrestrial facilities, the Commission declined to apply section 628 of the Telecommunications Act to *all* terrestrially delivered programming in its recent Report and Order concerning the program access rules.[101] But the access-related concerns identified by commenters in that proceeding and by the Commission itself will become far more pressing if the nation's largest cable operator migrates its programming to AT&T's extensive terrestrial delivery facilities. As noted above, TCI and its affiliates provide cable service to approximately 20.2 million customers and their facilities pass approximately 34.1 million homes.[102] If the postmerger AT&T/TCI were allowed to evade the program access rules by shifting all vertically integrated programming to its extensive terrestrial facilities, it could, given

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[99] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, CS Docket No. 97-248, RM No. 9097, Report and Order, FCC 98-189, ¶ 70 (rel. Aug. 10, 1998) ("*Program Access R&O*").

[100] *Id.* ¶ 71.

[101] *See id.* (pledging to "continue to monitor this issue and its impact on competition in the video marketplace").

[102] *Application* at 8.

its size, single-handedly undermine the goal of "increas[ing] competition and diversity in the multichannel video programming market [and] foster[ing] the development of competition to traditional cable systems."[103] Accordingly, regardless of whether the Commission chooses in the future to amend the program access rules to address the important problem of terrestrial delivery of video programming, it should require as a condition of approving the AT&T/TCI merger that the merged entity commit to providing competitive MVPDs with nondiscriminatory access to all vertically integrated programming regardless of whether that programming is delivered via satellite or terrestrial facilities.

8. The Commission Should Condition Approval of the Merger on AT&T's Commitment To Be Subject to the Commission's Regulations Regarding Inside Wiring and Navigation Devices, Even If Those Rules Are Overturned on Appeal.

In the past year, the Commission has adopted two key sets of regulations designed to encourage competition in the cable industry, both of which are analogous to existing regulations governing the local exchange telephone market. In October 1997, the Commission adopted new inside wiring rules that are intended to increase the ability of cable subscribers to choose among competing service providers.[104] In June 1998, the Commission adopted rules

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[103] *Program Access R&O* ¶ 2. Indeed, if the program access rules were deemed *not* to apply in the event that AT&T/TCI's programming were delivered terrestrially, then effect of the merger would reach far beyond TCI's service areas — any MVPD seeking to purchase Liberty programming anywhere in the country would suddenly be stripped of its access rights. *See* 47 C.F.R. § 76.1002(b) (current program access rules apply to vertically integrated programming vendors wherever they do business).

[104] *Telecommunications Services Inside Wiring; Customer Premises Equipment*, CS Docket No. 95-184; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, MM Docket No. 92-260, Report and Order, 13 FCC Rcd 3659 (1997) ("*Inside Wiring Order*"), *petition for review pending sub nom. Charter v. FCC*, No. 98-4120 (8th Cir.) (filed Nov. 26, 1997).

designed to open the market for navigation devices in order to promote consumer choice and encourage product and service innovation.[105] These rules were based upon principles first established by the Commission in the context of telephone CPE.[106]

Both of these orders were adopted, at least in part, because of the market power that cable operators currently possess. The inside wiring rules were an effort to reduce that power, and the navigation devices rules were intended to prevent cable operators from leveraging that power into the market for CPE. As discussed above, the merger of AT&T and TCI threatens to solidify and increase TCI's existing market power in cable services, as AT&T/TCI would have the unique ability to offer integrated packages of voice, data, and video services. To mitigate this anticompetitive risk, the Commission should condition approval of the merger on AT&T/TCI's willingness to be subject to the requirements adopted in these two orders, even if the general application of such requirement is overturned on appeal. The Commission has already determined that these requirements would promote competition in the cable industry;[107] requiring a market leader such as AT&T/TCI to submit to the requirements as a condition to this merger is well within the Commission's authority and fully consistent with Commission precedent.[108]

105/ *Implementation of Section 304 of the Telecommunications Act of 1996*, CS Docket No. 97-80, Report and Order, FCC 98-116 (rel. June 24, 1998) ("*Navigation Devices Order*"), *petitions for review pending sub nom. General Instrument Corp. v. FCC*, No. 98-1420 (D.C. Cir.) (Sept. 11, 1998). For a summary of inside wiring restrictions applicable to LECs, see *id.* at ¶¶ 4-9.

106/ *See id.* at ¶¶ 8, 26, 28.

107/ *Inside Wiring Order*, 13 FCC Rcd at 3678 ¶ 35 (stating that Commission's order is intended "to foster the ability of subscribers . . . to choose among competing service providers").

108/ *See Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20007 ¶ 35 & n.85.

9. Approval of the Merger Should Be Conditioned on Prompt Divestiture To Comply with the CMRS Spectrum Cap Rules and a Requirement of Nondiscriminatory Roaming Arrangements.

AT&T and Sprint are the two largest mobile telephone operators in the country. In their *Application*, AT&T/TCI note that TCI currently holds interests of at least 30% in Sprint's PCS operations, a financial stake that may (or may not) be reduced to 23.8% or (in the event of a public offering) possibly to "near 20%."[109]

Although AT&T and TCI provide no proposed timetable for any divestiture to cure this admitted violation of the spectrum cap rules, they do commit to do one of three things to deal with the obvious competitive problem it poses. The combined company may sell off some unspecified portion (though apparently not all) of its interest in Sprint so that AT&T's interest in its largest competitor will be something less than the 20% benchmark established by the spectrum cap rules. Or it may put the Sprint interest in the hands of an independent trustee. Or it may seek "an appropriate temporary waiver" to permit a later sale of the interest.[110]

As a threshold matter, the Commission should insist that AT&T/TCI comply fully with the spectrum cap rules. This means a *prompt* divestiture of the overlapping interest in Sprint, particularly since the merger applicants are the two largest competitors in the mobile telephone industry.[111] Under the Commission's rules, temporary waivers are available only for

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[109] *Application* at 10-11 & n.15, 29-30 & n.58.

[110] *Id.* at 32.

[111] Any sale to a trustee also should be conditioned on the kind of trust agreement that the Commission has required under similar circumstances, including a review of the proposed agreement to ensure that it complies with the requirements of independence (such as a ban on communication between the independent trustee and AT&T/TCI personnel). *See, e.g.*, (continued...)

overlapping interests that (1) involve 20% or less of the applicant's service area population, (2) arise solely due to management or joint marketing agreements, or (3) involve interests in licensees controlled by an unaffiliated single majority voting shareholder. 47 C.F.R. § 20.6(e). AT&T and TCI make no claim that any of these situations applies to their respective wireless interests. In any event, the rules require divestiture (the filing of a disposing application) within 90 days of the final order approving the merger. *Id.*

Moreover, as noted above, AT&T and TCI leave open that they may seek to retain a significant (albeit nonattributable) financial stake in one of AT&T/TCI's leading wireless competitors following the merger. If AT&T/TCI elects to place its 30% (or 23.8%, or 20%) interest in the hands of a duly qualified independent trustee, it will still retain a significant economic interest in favoring Sprint and disfavoring Sprint's competitors in its negotiation of wireless roaming agreements. The same will be true of any divestiture that marginally complies with the 20% benchmark (such as a divestiture to 19.9%). As the Commission has recognized, "[T]he availability of roaming on broadband wireless networks is important to the development of nationwide, ubiquitous, and competitive wireless voice telecommunications."[112/] AT&T itself has recognized the need for Commission intervention to address anticompetitive incentives to deny roaming services to new entrants and in order to forestall the need for an "often lengthy litigation process."[113/] Here, the Commission should condition any approval of the merger on a

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111/ (...continued)
Stockholders of Infinity Broadcasting Corp., 12 FCC Rcd 5012, 5041 (1996).

112/ *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, 11 FCC Rcd 9462, 9464 ¶ 2 (1996).

113/ *See Interconnection and Resale Obligations Pertaining to Local Exchange*
(continued...)

requirement that, as long as AT&T/TCI holds any financial stake in Sprint's PCS operations, it must extend terms and conditions for roaming agreements to U S WEST and all other Sprint competitors that are no less favorable than those contained in any of AT&T's present or future agreements and must provide roaming for resale at the same rate AT&T offers it to its own end-user customers.

IV. THE COMMISSION CANNOT APPROVE THE MERGER WITHOUT REQUIRING AT&T AND TCI TO SUBMIT THEIR HART-SCOTT-RODINO DOCUMENTS TO THE COMMISSION AND TO THIRD PARTIES FOR REVIEW.

U S WEST believes that the present record demonstrates that, under the competition goals embodied in Sections 214 and 310(d) of the Communications Act and in Section 7 of the Clayton Act, this merger cannot be approved without the foregoing conditions. If the Commission does not agree at this juncture, it should reserve judgment until AT&T and TCI have submitted their Hart-Scott-Rodino documents to the Commission and to third parties for review (subject to the standard confidentiality order) and opportunity for further comment.[114/] It is difficult for outside parties such as U S WEST to document the full range of competitive risks of the AT&T/TCI merger without information about the parties' business plans beyond that contained in their abbreviated transfer applications. Only with a complete administrative record containing the Hart-Scott-Rodino documents and after a full airing of the relevant issues can the

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113/ (...continued)
Carrier Provision of Commercial Mobile Radio Services, CC Docket No. 94-54, Additional Reply Comments of AT&T Wireless Services, Inc., at 1-2 & n.3 (filed Jan. 20, 1998).

114/ *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Motion of SBC Communications To Require Review of Hart-Scott-Rodino and Other Documents (filed Oct. 14, 1998).

Commission faithfully execute its analysis of the proposed merger's competitive effects. Such a review is now a matter of standard Commission procedure, having been used (initially at AT&T's insistence) in all of the most recent telecom mergers, including the SBC/Ameritech, Bell Atlantic/NYNEX, and MCI/WorldCom mergers.[115/] U S WEST therefore supports the motion of SBC Communications to require AT&T and TCI to submit for review by the Commission and third parties the documents they file with the Department of Justice and the Federal Trade Commission as part of those agencies' review under the antitrust laws. Moreover, the Commission should permit parties to submit comments on those materials after their review. AT&T' opposition here to such a procedure endorsed by it in the case of BOC mergers is, to say the least, an ironic view of the public interest standard.[116/]

[115/] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corp., Transferor, to SBC Communications Inc., Transferee*, CC Docket No. 98-141, Order Adopting Protective Order, DA 98-1952 (rel. Oct. 2, 1998); *Applications of World Com, Inc. and MCI Communications Corp.*, 13 FCC Rcd 11, 166 (1998); *Bell Atlantic/NYNEX Order*, 12 FCC Rcd at 20000 ¶ 28.

[116/] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, Opposition of AT&T and TCI to SBC's Motion To Require Review of Hart-Scott-Rodino and Other Documents (filed Oct. 26, 1998).

CONCLUSION

For the foregoing reasons, the Commission should deny the AT&T/TCI applications or should condition any grant in the manner described above.

Respectfully submitted,

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October 29, 1998

U S WEST, INC.

DECLARATION OF FRANK H. HATZENBUEHLER

1. I am Vice President, Pricing and Strategy at U S WEST Communications, Inc. In this capacity, I have personal knowledge of the operations of U S WEST, Inc. ("U S WEST") described in the foregoing Petition of U S WEST To Deny Applications or To Condition Any Grant ("Petition"), and of the high speed data technologies employed by U S WEST and its cable competitors as described therein.

2. The facts set forth in the Petition are true and correct to the best of my knowledge.

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

Frank H Hatz

Frank H. Hatzenbuehler

Executed on October 29, 1998

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CERTIFICATE OF SERVICE

I certify that on this 29 th day of October 1998, a copy of the foregoing Petition of U S WEST to Deny Applications or to Condition Any Grant was served either by hand delivery or by first class U.S. mail, postage prepaid on the parties listed on the attached Service List.

Todd C. Zubler

Todd C. Zubler

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