

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of)	
)	
Applications of)	
AT&T Corporation,)	
Transferee,)	
and)	CC Docket No. 98-178
Tele-communications, Inc. (TCI),)	
Transferor,)	
)	
For FCC Consent to Transfer of)	
Control Pursuant to Section 310(d))	
of the Communications Act, as amended,)	
of Licenses and Authorizations Controlled)	
by TCI or its Affiliates or Subsidiaries)	

REPLY COMMENTS OF BELLSOUTH CORPORATION

BELLSOUTH CORPORATION

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“No company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others.”

-- Michael Armstrong, Chairman and CEO, AT&T Corp.

I. INTRODUCTION AND SUMMARY

AT&T and TCI propose a \$48 billion dollar consolidation that would give AT&T control of more high-speed local access lines than any BOC. AT&T would become the dominant provider of high-speed access to the mass market if the proposed merger is consummated. No sharing of these facilities is justified in AT&T’s mind because more investment in broadband facilities is still necessary, and, “no company will invest ... if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments.”¹ Yet, BellSouth and other ILECs must invest heavily to catch up and compete with the dominant provider of broadband services while laboring under regulations that AT&T diagnoses as fatal to investment. Without this competition, the proposed merger is not in the public interest, especially given the historical record of AT&T’s leading lock-step price increases to the mass market, and TCI and cable companies engaging in unjustified consumer price increases and anticompetitive practices.

Many commenters propose regulatory remedies for the public interest threat posed by the proposed merger. Regulatory parity is an appropriate goal, and, to the extent that regulation exists, its burdens should certainly never fall more heavily on the firms seeking to catch up than on firms with dominant positions. But, more regulation of broadband service is not the right answer. The best answer for consumers, and the answer consistent with Congress’s deregulatory

¹ David Kouts, “Armstrong Disputes Arguments Comparing AT&T-TCI With Local Phone Companies On Data,” BNA Comments on Telecommunications Issues, November 3, 1998.

goals, is for the Commission to remove regulations that handicap ILEC competition with AT&T-TCI's broadband access dominance. BellSouth has identified these regulatory obstacles to broadband investment and competition in its 706 Comments.² The Commission should ensure that these barriers to competition are removed before it allows this merger to go forward. Anything less than fully removing these obstacles before the merger is consummated would contravene the public interest.

As several commenters have pointed out, the proposed merger also creates opportunities for evasion of the program access rules and consequent harm to competition and the public interest. The Commission should condition any approval of the proposed merger on certain commitments regarding the application of the program access rules to the merged firms .

II. AT A MINIMUM, THE FCC IS REQUIRED BY LAW TO REGULATE CERTAIN AT&T-TCI INTERNET ACCESS OFFERINGS AS TITLE II TELECOMMUNICATIONS SERVICES

Many commenters have called for the Commission to impose various resale, unbundling, open access and other requirements on AT&T-TCI as conditions of approving the merger. These commenters point to a variety of sources of Commission authority for imposing these conditions, including the Commission's merger review authority and Title II. As an initial matter, BellSouth would clarify that the Commission has Title II authority over at least some high-speed services provided by cable companies.

² Comments of BellSouth Corp. *In the Matter of 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 Dkt No. 98-146 (filed October 8, 1998). BellSouth will refer to comments filed in this Commission proceeding by the name of the commenter followed by "706 Comments," e.g., BellSouth 706 Comments.

AT&T and TCI will no doubt continue here arguments that the Commission has no Title II authority even over high-speed access or transport provided by cable operators. Essentially, the cable operator argument is that the Act's current definition of "cable service" includes access to the Internet and high-speed transport of information services, and thus the provision of those services by cable operators is "cable service" that falls under Title VI of the Act rather than Title II.³

This broad argument that the Commission has no Title II authority over any advanced telecommunications services provided by cable operators is wrong, as a complete examination of the definition of "cable service" coupled with cable operators' practice of selling high-speed access and services to non-cable subscribers makes clear. Section 602 defines "cable service" as the "transmission to subscribers" of video or other programming services. The Commission has long defined "subscribers" in this context to mean "a member of the general public who receives broadcast programming distributed by a cable television system."⁴ Thus, cable operators provide "cable services" to subscribers who receive broadcast programming from the cable operator. This "cable service" may well include high-speed Internet access or other information service offerings. However, customers who do not receive basic broadcast programming ("basic cable service") from the cable operator cannot, by definition, be subscribers to "cable service." Because these customers are not "subscribers" within the meaning of the Act, high-speed services offered to them cannot be cable services.

The overall statutory structure of the Cable Act reinforces the legal conclusion that a service can only be a "cable service" under the Act only if it is sold in association with a basic

³ See, e.g., National Cable Television Association 706 Comments at 22; Tele-Communications, Inc. 706 Comments at p. 14.

⁴ 47 C.F.R. § 76.5(ee).

tier of local broadcast programming that is provided to all subscribers. First, the Cable Act, 47 U.S.C. § 534, and the Commission's rules, 47 C.F.R. § 76.56, require cable service to include a basic tier of service that includes all local broadcast signals entitled to carriage under the Cable Act's must carry rules. Furthermore, the Cable Act, 47 U.S.C. § 534(b)(7), and the Commission's rules, 47 C.F.R. §76.56(d)(1), specifically require that all local broadcast signals electing must carry status "shall be provided to every subscriber of cable systems." Also, the Cable Act, 47 U.S.C. §543(B)(7), and the Commission's rules, 47 C.F.R. §76.920, require that subscribers shall be provided a separately available basic tier of local television broadcast programming to which subscription is required for access to any other tier of service or video programming.

Cable companies, like TCI/@Home, offer and provide high-speed access and services to customers who do not subscribe to their basic cable programming service. For example, @Home's marketing literature offers @Home services to non-subscribers, and states "you are not obligated to subscribe to the cable television service to receive the @Home service."⁵

High-speed access and information services offered to non-subscribers are not *cable* services. These services include advanced telecommunications services that fall under the same Title II regulation as similar services provided over ILEC networks. Thus, to the extent cable operators generally offer high-speed services to non-subscribers the Commission must regulate them as common carriers.⁶ This accords with Congress's explicit intent that telecommunications

⁵ @Home Questions and Answers at 3, available at <www.home.net/home/qa.html> downloaded Nov. 10, 1998.

⁶ See, e.g., *National Ass'n of Regulatory Utilities Commissioners v. FCC*, 533 F.2d 601, 608 (D.C. Cir. 1976)("one can be a common carrier with regard to some activities but not others").

services be treated as such “regardless of the facilities used” to deliver the service.⁷ The same would be true if the services being offered over these cable systems were traditional voice or other telecommunications services.

III. AT&T-TCI MUST DEMONSTRATE THAT THEIR PROPOSED MERGER IS IN THE PUBLIC INTEREST

The burden of proof is squarely on the merging parties to demonstrate that their merger will benefit the public interest.⁸ One particularly important component of the Commission’s merger analysis concerns whether merging parties can claim that merger efficiencies or other private benefits of a merger will translate into public benefits.⁹ Parties seeking to justify an acquisition because it creates efficiencies or public benefits must demonstrate that the benefits will actually be passed on to consumers.¹⁰ The best guarantee that the private benefits of this merger will benefit the public is vigorous competition.¹¹

However, vigorous competition to provide consumers high-speed access is threatened by this proposed merger and the Commission’s regulatory policies. TCI and other cable companies hold a wide lead in the race to provide high-speed access offerings to residential customers. TCI’s broadband access lead, coupled with the huge lead AT&T holds over other competitors in

⁷ 47 U.S.C. § 3(a)(2)(51) (definition of telecommunications service).

⁸ Memorandum Opinion and Order, *Applications of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, File No. NSD-L-96-10 (rel. Aug. 14, 1997) (*Bell Atlantic/NYNEX Order*) at ¶ 36.

⁹ *Bell Atlantic/NYNEX Order* at ¶ 36.

¹⁰ *Bell Atlantic/NYNEX Order* at ¶ 158.

¹¹ Thus, antitrust “enforcement agencies remain fairly skeptical of a claim that an otherwise anticompetitive merger should be allowed on efficiency grounds, especially absent compelling evidence that the claimed efficiencies will be passed on to consumers.” ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* (4TH ED. 1997), Vol. 1 at 337 (footnote omitted).

many telecommunications markets suggests that today's competition will be insufficient to force the merged company to pass on any benefits to consumers seeking high-speed offerings.

III. AT&T-TCI WILL BE THE MOST DOMINANT PROVIDER OF HIGH-SPEED ACCESS; HOWEVER, THE COMMISSION'S REGULATORY BURDENS ARE FALLING ON NEW COMPETITORS SEEKING TO CHALLENGE THE DOMINANT FIRM

AT&T-TCI will be the leading provider of high-speed access offerings in the residential market.¹² A wide range of commenters have made compelling arguments that AT&T-TCI's broadband facilities should be subject to open access conditions such as mandatory resale and unbundling given AT&T-TCI's lead in the market and the regulatory playing field for broadband competition favoring the dominant firm that the Commission is creating.¹³ In fact, under Commission merger precedents, the Commission cannot conclude that the merger could be in the public interest given the regulatory and other advantages the merged company would enjoy. These advantages will insulate the merged entity from developing competitive forces. By

¹² AT&T and TCI acknowledge Commission precedent treating residential and business markets separately. Application at 18. The Application runs directly counter to Commission market definition precedent, however, when it lumps all Internet services into a single product market. Application at 36-37. This is counter to the Commission's conclusions in its order on the MCI WorldCom merger. That order rejected arguments that a broad Internet services market exists. Memorandum Opinion and Order, *In the Matter of Applications of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Dkt No. 97-211 (rel. September 14, 1998) at ¶148. In fact, directly counter to its position here that the market is a broad amalgamation of "Internet Services," Application at 36-37, AT&T argued in the MCI WorldCom proceeding that the "Internet Services" market definition was too broad. *See, e.g.*, Comments of AT&T Corp. on MCI's June 3, 1998 Ex Parte, *In the Matter of Applications of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Dkt No. 97-211 (filed June 11, 1998).

¹³ Comments of AMERICA ONLINE; Comments of Mindspring Enterprises, Inc; Comments of MCI WorldCom, Inc; Comments of QWEST Communications Corp; Petition of US West To Deny Applications Or To Condition Any Grant.

handicapping competitors attempting to challenge the leading firm, the Commission is virtually guaranteeing that consumers will lose out if this merger is approved.

A. AT&T-TCI Will Have A Dominant Position In Providing High-Speed Offerings To Residential Markets

BellSouth has described in detail the current market for broadband offerings in its Comments and Reply Comments filed in the Commission's 706 proceedings.¹⁴ Cable modems currently enjoy a substantial lead over local exchange carrier ADSL offerings in capturing residential consumer business.¹⁵ Analysts predict that the total number of cable modem subscribers will reach anywhere from 425,000 to 700,000 by the end of this year. In stark contrast, ADSL customers are expected to come in at about 25,000.¹⁶ And, many industry observers expect this advantage to carry over in the longer term – “even though the game has barely begun, analysts and industry executives alike say cable has a big early lead that will be difficult for its phone industry adversaries to overcome.”¹⁷ One set of industry analysts predicts that cable modems will turn this advantage into a dominating 80% share of consumer broadband

¹⁴ BellSouth 706 Comments at 18-22, 32-33; BellSouth 706 Reply at 4-8.

¹⁵ Analysis under Commission market definition precedent suggests that consumer broadband access is a separate market from dial-up access. That analysis depends on demand side perspectives. *Bell Atlantic/NYNEX Order* at ¶50. Consumers view broadband access as a different product from dial-up access. BellSouth 706 Comments at 8-10; *see, e.g.* Christopher Mines, *et. al*, “Broadband Hits Home,” THE FORRESTER REPORT, Vol.5 No. 4 (Aug. 1998).

¹⁶ Christopher Mines, *et. al*, “Broadband Hits Home,” THE FORRESTER REPORT, Vol.5 No. 4 (Aug. 1998).

¹⁷ David Bowermaster, “Cable Modems Outpace ADSL,” July 31, 1998, available at <www.2dnet.com>. *See also* Dean Takahshi, “The Cable Edge,” THE WALL STREET JOURNAL (Sept. 21, 1998), at R14;

access.¹⁸ Incumbent local exchange carriers are anything but the incumbents or dominant in the high-speed access business.

AT&T's proposed \$48 billion merger with TCI will give it direct control of cable facilities, and a dominant broadband position, to 20.9 million homes. TCI affiliates add another 13.2 million to this total.¹⁹ Post-merger, AT&T will have direct control of more residential access lines than US West or Ameritech, and just slightly fewer than BellSouth.²⁰ Eleven million TCI customers in 90 markets already have access to two-way upgraded facilities.²¹

A second key aspect to the proposed merger is the fact that TCI brings with it control of @Home, the nation's largest provider of high-speed access service.²² @Home provides high-speed consumer access to over 147,000 subscribers through cable modems.²³ Its share of particular markets depends on various factors, but where @Home service is offered by TCI, it is likely to enjoy an even greater lead than the national figures and 80% share numbers set out above. AT&T-TCI's unprecedented ability to use its leading positions in providing long distance, video programming, wireless and international service to consumers will serve to protect its broadband access dominance.²⁴

¹⁸ Kate Delhagen, *et. al*, "Cable Modems Outpace ADSL," THE FORRESTER REPORT, Vol.4 No. 9 (Jan. 1998).

¹⁹ Application at 8.

²⁰ QWEST Comments at 13 (chart ranking companies by customer lines served).

²¹ TCI's 1997 Annual Report, President's Letter.

²² TCI has voting control of @Home. Application at 9; Reply Comments of @Home, CC Docket No. 98-146 at 2 (filed October 8, 1998). Fifteen cable companies have entered into agreements to distribute @Home's service, including several of the nation's largest cable MSOs.

²³ Application at 9.

²⁴ Ameritech Comments at 13.

The public and the Commission can take no solace from the past performance of TCI and AT&T. The Commission has concluded that “local markets for the delivery of video programming generally remain highly concentrated and are still characterized by some barriers to both entry and expansion by competing distributors.”²⁵ AOL has provided a useful summary of the cable industry’s predilection to use its bottleneck control to the harm of consumers and potential competitors.²⁶ AT&T has used its majority share of residential long distance customers to lead a pattern of lock-step pricing increases to residential customers.²⁷

B. Given AT&T-TCI’s Commanding Position In The High-Speed Access Market, It Makes No Sense For The Commission To Create Or Perpetuate Regulatory Handicaps On The Ability Of ILECs To Bring Competitive Broadband Offerings To The Market

To-date, Commission regulatory policy in the broadband arena is protecting the dominant firm and handicapping the insurgents. SBC has pointed out that in markets that raise the issues posed by AT&T-TCI’s position, the Commission has chosen to impose resale, unbundling or other obligations on the *dominant* firm, never on the firms striving to catch up.²⁸ In the case of high-speed access services, the Commission has its regulatory policy backwards. Although “incumbent” LECs like BellSouth trail in the race to meet the mass market demand for broadband services, they labor under an unnecessary regulatory burden that is foreign to AT&T-TCI. As BellSouth set out in its 706 Comments, this burden consists of a number of

²⁵ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, ¶¶11, 126-128 (1998).

²⁶ AOL Comments at 20-30.

²⁷ Brief in Support of Second Application by BellSouth for Provision of In-Region, InterLATA Services in Louisiana, *In the Matter of Application by BellSouth Corp., et al. for Provision of In-Region, InterLATA Services in Louisiana*, CC Dkt No. 98-121.

²⁸ SBC Comments at 11-16.

requirements and prohibitions affecting entry into broadband competition – “dominant” carrier pricing, tariffing and section 214 requirements for broadband offerings even though cable operators are the dominant providers; the refusal to lift the ban on Bell company provision of broadband interLATA services to create the potential for full scale broadband service competition and the extension of section 251 unbundling and resale requirements to broadband facilities and services.²⁹

IV. IN ORDER FOR THE COMMISSION TO APPROVE THIS MERGER AS BEING IN THE PUBLIC INTEREST, IT MUST FREE ILECs FROM REGULATORY HANDICAPS THAT SERVE TO PROTECT THE POSITION OF THE DOMINANT FIRM

The Commission should follow through on its recognition that:

the role of the Commission is not to pick winners or losers, or select the ‘best’ technology to meet consumer demand, but rather to ensure that the marketplace is conducive to investment, innovation, and meeting the demands of consumers.³⁰

A regulatory playing field slanted against ILECs like BellSouth seeking to catch up to and compete with a dominant AT&T-TCI may very well cement the merged firm’s dominant position. Without that competition, the merged firm is likely to continue a tradition of anti-consumer rate increases and anticompetitive conduct. In order to achieve a competitive broadband access market, the Commission could impose the same regulatory burden on AT&T-TCI that ILECs carry in the broadband arena. However, the right course would be to achieve regulatory parity by minimizing the regulatory burden on all parties. The best course for the Commission to follow would be to remove regulatory disincentives to the *new*

²⁹ BellSouth 706 Comments at 42-56.

investment ILECs must make to catch up and compete before merger of AT&T and TCI can be consummated.

BellSouth, like other ILECs, must invest heavily in new facilities to provide a consumer broadband alternative to AT&T-TCI's, something that makes sense only if there is reasonable prospect of making a return on investment. Regulatory requirements negate much of the opportunity to make that return. BellSouth has pointed this out to the Commission before, over the objections of AT&T. Now that AT&T seeks to become a facilities-based provider (and a dominant one at that), it has changed its tune. Echoing BellSouth's 706 Comments, AT&T's Chairman observes that:

no company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others.³¹

Cable companies generally echo this point:

“requiring a particular provider of Internet access to make its facilities available to other Internet service providers would only stifle innovation, the development of facilities-based alternatives and the growth of the Internet....Mandating access to an Internet service provider's facilities, however, would not encourage competition because it would reduce substantially the incentives for competitors to develop additional facilities-based alternatives.” Cox Communications, Inc. 706 Comments at 3-4.

“It does not make economic or business sense for TCI to risk billions of dollars upgrading its networks if the government requires the company to provide the benefits of its network investment to competitors who are unwilling or unable to make similar investments.” Tele-Communications, Inc., 706 Comments at 13.

³⁰ *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Dkt No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, ¶ 2 (rel. Aug. 7, 1998).

³¹ David Kouts, “Armstrong Disputes Arguments Comparing AT&T-TCI With Local Phone Companies On Data,” BNA Comments on Telecommunications Issues, November 3, 1998.

“Firms are much more likely to invest in ‘infrastructure’ (i.e. their own facilities) if they are relieved of undue regulatory burdens. Time Warner Cable 706 Comments at 8.

“Imposing unbundling and resale obligations on cable operators for the benefit of entities that chose not to construct their own networks would turn section 706 on its head by suppressing cable’s incentives to invest in new broadband capability.” National Cable Television Association Comments at 25.

This chorus pointing to the harmful effects of regulating access to new investment in broadband facilities applies all the more forcefully to ILEC investment in broadband facilities. BellSouth for one, must invest millions in new broadband facilities to catch up and compete. “One of the most durable barriers to new entry into telecommunications markets is the prospect that new entrants will be subject to burdensome regulation.”³² The Commission is erecting and maintaining just such a barrier. The Commission must remove regulatory obstacles to new entrants seeking to compete with AT&T-TCI’s broadband offerings and put both ILECs and a dominant AT&T-TCI on the same regulatory playing field before it can find the proposed merger to be in the public interest.

V. FEDERAL PROGRAM ACCESS SAFEGUARDS MUST CONTINUE TO APPLY TO TCI’S CABLE PROGRAMMING NETWORKS

Several commenters raised program access issues concerning the proposed merger.³³ BellSouth believes those commenters have raised legitimate arguments concerning AT&T’s structure of the programming aspects of the proposed merger. BellSouth particularly endorses the joint comments filed by the Wireless Communications Association, Inc. and the Independent Cable and Telecommunications Association (“*Joint Comments*”) and urges the Commission to act to protect competition as the *Joint Comments* suggest.

³² Comcast Corporation 706 Comments at 12.

Commenters point to two troubling aspects of the proposed merger. First, AT&T and TCI appear to be laying the groundwork for an argument that Liberty Media Corp. (“Liberty”), which directly owns TCI’s very substantial cable programming assets, will fall outside the scope of the program access rules once the merger is consummated. AT&T’s plans to adopt particular corporate structures to hold Liberty and other assets, and to create tracking stocks that will separately measure the performance of Liberty, do not affect the simple fact that AT&T will continue to own Liberty and be a cable operator.³⁴ As the *Joint Comments* conclude, the program access rules will continue to apply. However, the Commission should clarify the continued application of the program access rules. This prophylactic approach is in accord with Commission practice, and would serve to preempt potential harms from anticompetitive uses of Liberty programming assets. The Commission has taken the position that it should “anticipate and address the potential anticompetitive effects resulting from a proposed merger beforehand, rather than await the filing of individual complaints.”³⁵ Now is the time to do so.

Commenters also point out that the proposed merger opens the door to attempts to avoid the program access rules by shifting TCI’s satellite-delivered programming to AT&T’s terrestrial network. The Commission has acknowledged that program access claims may arise from “conduct that involves moving satellite delivered programming to terrestrial distribution in order to evade application of the program access rules.”³⁶ Again, the Commission should properly preempt opportunities to evade program access requirements created by combining AT&T’s

³³ See, e.g. Comments of Ameritech at 25-38; Comments of EchoStar Communications Corp. at 8-10; Comments of DirectTV, Inc. at 1-4.

³⁴ *Joint Comments* at 10-13.

³⁵ *Telecommunications, Inc. and Liberty Media Corp.*, 9 FCC Rcd 4783, 4786-7 (CSB, 1994).

terrestrial fiber network and TCI's programming. As WCA has called for, the Commission should condition any approval of an AT&T-TCI combination on an explicit and enforceable commitment from both entities that any current or future Liberty programming migrated from satellite to terrestrial delivery will continue to be subject to program access requirements.

³⁶ *Implementation of Section 302 of the Telecommunications Act of 1996 – Open Video Systems, Second Report and Order*, 11 FCC Rcd 18223, 18325 n.451 (1996).

VI. CONCLUSION

For the reasons set out above, the proposed merger can be in the public interest only if the Commission puts broadband competitors on the same regulatory plane. Removing the regulatory obstacles to ILEC competition in the broadband arena as a pre-condition to approval of this merger would be the best and most efficient way to guarantee that the proposed merger will actually benefit the public. The Commission should also affirmatively condition any approval of the proposed merger on the program access commitments set out above.

Respectfully submitted,

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