ORIGINAL

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

In the Matter of	)	
	)	
Joint Applications of AT&T Corporation	)	
and Tele-Communications, Inc. for	)	CS Docket No. 98-178
Transfer of Control to AT&T of Licenses	)	
and Authorizations Held by TCI and Its	)	
Affiliates or Subsidiaries	)	
	)	

To: The Commission

REPLY OF PRODIGY COMMUNICATIONS CORPORATION

Prodigy Communications Corporation ("Prodigy") hereby submits its reply to comments and petitions filed in response to the above-captioned application of American Telephone and Telegraph Corporation ("AT&T") and Tele-Communications, Inc. ("TCI") (collectively "AT&T/TCI") for approval of the merger of those two companies.

Prodigy strongly supports those commenters who have demonstrated that the Federal Communications Commission ("FCC" or "Commission") should condition its approval of that application on AT&T/TCI's provision of nondiscriminatory, open access for non-affiliated Internet service providers ("ISPs") and online service providers ("OSPs") (collectively ISPs) to the high speed data transport services being deployed over TCI's cable systems. Such a condition, which requires AT&T/TCI to offer high speed data transport to ISPs separate from its affiliated Internet access and content services, is necessary to protect the public interest in consumer choice among ISPs and the competitive development of the Internet marketplace.

Prodigy is a leading nationwide ISP providing fast and reliable Internet access and other value added services. In particular, Prodigy targets its service offerings to Internet users who seek to optimize their own productivity by enhancing their ability to select, organize, and display their chosen Internet-related content. Prodigy Internet thus enables subscribers to obtain and communicate desired information quickly and efficiently, in an easy and personalized manner. Prodigy also offers a suite of related features and services that expands subscriber educational and delivery options.

Prodigy maintains that, unless appropriately conditioned, the AT&T/TCI merger will sacrifice consumers' ability to freely choose how to access the Internet through high speed connections. The proposed merger would thereby undermine the vibrant competition among existing ISPs, particularly with respect to the offering of high speed access. It is that competition which, to date, has led to the explosive growth of this innovative, dynamic medium.

The AT&T/TCI merger proposes to combine AT&T, the largest long-distance and international carrier in the United States as well as a major competitive local exchange carrier, and TCI, "one of the largest providers of cable television service in the United States": delivering video products to at least 12.7 million customers, with broadband infrastructure passing at least 20.9 million homes throughout the United States.[1] Among its vast telecommunications holdings, AT&T has a substantial Internet backbone that extends throughout the United States and, through its AT&T WorldNet Service and recent acquisition

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[1] AT&T/TCI Description of the Transaction at 6-7 ("Description of Transaction"). A description of the transaction was attached to *Applications of Tele-Communications, Inc., Transferor, and AT&T Corp., Transferee,* CS Docket No. 98-178 (filed Sept. 14, 1998).

of Teleport Communications Group's ("TCG") CERFNet, supplies Internet access service to about 1.25 million customers.[2]

In addition to its vast cable infrastructure and programming interests, TCI has a 39% equity interest and approximately 71% voting interest in @Home, which is the largest provider of high speed Internet access and Internet content over cable throughout the United States.[3] TCI operates @Home as a consortium with at least 16 of the nation's largest Multiple System Operators ("MSOs").[4] Through the consortium, TCI-controlled @Home has exclusive access to a staggering 58.5 million homes.[5] @Home offers customers high speed data transport, Internet access, and content service as a single offering. As a result, consumers who want simply to use @Home's high speed data transport capability to connect with Prodigy must subscribe to both @Home's bundled Internet access offering and Prodigy. To preserve its ability to force-feed consumers this bundled product, @Home has consistently refused to offer requesting ISPs nondiscriminatory, open access to its underlying high speed transport facilities to use in the provision of their own services.[6] Moreover, pursuant to its agreements with those MSOs, the MSOs must offer only the @Home service to their cable customers. No other ISP may be offered directly to the home over their systems.

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2 *Id.* at 34.

3 *Id.* at 8.

4 Reply Comments of At Home Corporation, CC Docket No. 98-146 at 7 (filed Oct. 9, 1998).

5 At Home Corporation, Securities and Exchange Commission Form 424B4 at 2 (filed Aug. 13, 1998).

6 Comments of America Online, Inc., CS Docket No. 98-178 at 57-58 (filed Oct. 29, 1998) (Comments of AOL).

After the merger, AT&T and TCI intend to further leverage their control over broadband data transport used for Internet access service to enhance their gatekeeper role over high speed Internet access for millions of homes throughout the United States – to the detriment of consumer choice and competition. In a Senate hearing regarding the merger, AT&T's Chairman stated that @Home customers would continue to have to pay to subscribe to @Home for both its bundled Internet access and content services.[7] He has further confirmed that AT&T/TCI will not make high speed data transport capability available on a standalone basis to competitors after the merger.[8]

The comments reveal that a virtually unprecedented broad array of ISPs, consumers, multi-channel video programming distributors ("MVPDs"), local exchange carriers ("LECs"), and interexchange carriers ("IXCs") are legitimately concerned that the proposed merger of the largest incumbent cable operator (with the most extensive installed base of broadband capacity) with the largest combined long distance provider/competitive local exchange carrier presents a serious threat to the public interest in the availability of a diversity of broadband-based Internet offerings. A number of ISPs suggest that the merger will be detrimental to both consumers and ISPs because AT&T/TCI will have control over one of the predominant mediums used to

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[7] Comments of AOL at 11 n.24 ("When asked by Sen. Leahy (D-VT) whether AT&T would offer TCI's pipeline to ISPs other than those owned by cable, Armstrong replied that customers of ISPs 'can subscribe and get there' over cable.... *He said that if here* [sic.] *were an AOL customer, he would subscribe to TCI's @Home Cable Internet service, or other [cable] service, to reach AOL.*" (citing *AT&T's Armstrong Pledges Access to Cable Systems,* Communications Daily, July 8, 1998) (emphasis added)).

[8] *See, e.g.*, Speech of C. Michael Armstrong to Washington Metropolitan Cable Club (Nov. 2, 1998). <www.att.com/speeches/98/981102.maa.html>.

deliver high speed Internet access: cable.[9] U S WEST agrees noting that while digital subscriber line ("DSL") technology is being deployed by some LECs, "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."[10]

Similarly, Echostar - an MVPD - observes that because cable broadband access will be the predominate broadband access medium for the foreseeable future: "This deal will thus take an already dominant MVPD distributor, turn it into a distributor with virtually unlimited bandwidth by virtue of resources that it will exclusively control, and pit it against bandwidth-constrained distributors that are already handicapped in their efforts to compete."[11] AOL explains that "the combined AT&T/TCI will be able to continue to draw upon the well-

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9 Comments of AOL at 52; Comments of MindSpring Enterprises, Inc., CS Docket No. 98-178 at ii-iii (filed Oct. 29, 1998) (Comments of Mindspring) ("For at least the next five to ten years (and perhaps indefinitely), the primary high speed packet connection to home and small businesses will run over the wireline plant of the ILEC or cable operator.").

10 Petition of U S WEST to Deny Applications or to Condition any Grant, CS Docket No. 98-178 at 12 (filed Oct. 29, 1998) (Comments of U S WEST). "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...." *Id.* "Moreover, current DSL technology can be deployed only to customers whose local loops satisfy certain criteria of quality and distance form the LEC's central office and who are not serviced by digital loop carrier ("DLC") technology." *Id.* at 13. "DSL also faces significant regulatory handicaps that may delay and hamper the deployment of DSL services on a widespread basis." *Id.*

11 Comments of Echostar Communications Corporation, CS Docket No. 98-178 at 6 (filed Oct. 29, 1998) ("Instead of leveling the MVPD playing field in accordance with the Commission's mandate under the 1992 Cable Act, approval of this transaction without conditions would render that field an even more uneven precipice."). U S WEST makes the salient point that: "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." Comments of U S WEST at 11.

established brand names of both companies to jointly market services with affiliated or unaffiliated ISPs, giving them the opportunity to utilize their respective brands in 'best-of-breed' offerings."[12] Moreover, "AT&T/TCI's desire to become a gatekeeper over last-mile provision of high-speed transport will prevent the emergence of robust competition in video-enabled Internet services. Certainly, AT&T/TCI's incentives to maintain exclusive control over this input also will increase accordingly."[13]

Sprint further explains that this combination of power will mean that "AT&T's acquisition of TCI will enable it to re-establish itself – less than fifteen years after divestiture – as a vertically-integrated entity capable of providing, over its own facilities, not only long distance service but also, uniquely, the origination and termination of such service to mass market customers."[14] It is, therefore, not surprising that MCI WorldCom, along with all of these other commenters, contends that an open access condition is the only way to alleviate the serious problems raised by the merger: "[t]he condition . . . would prevent AT&T/TCI from using its market power over cable service to require consumers to purchase two or more of these services as a package for one price, whether or not they wanted to purchase all of them or preferred to purchase some from another supplier."[15] Moreover, AOL similarly concurs

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[12] Comments of AOL at 36.

[13] *Id.* at 15.

[14] Comments of Sprint Corporation, CS Docket No. 98-178 at 12 (filed Oct. 29, 1998) (Comments of Sprint). "The Commission cannot remain passive in the face of the incentives and the ability which AT&T has as a result of its cable acquisitions to discriminate against competitors and thereby raise its rivals' costs." *Id.* at 20.

[15] Comments of MCI WorldCom, Inc. CS Docket No. 98-178 at 12 (filed Oct. 29, 1998) (Comments of MCI WorldCom). Ameritech adds that requiring that AT&T/TCI provide open access on a non-discriminatory basis to AT&T/TCI's underlying high speed data transport

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that: "The Commission should take early, effective steps to safeguard consumer choice and competition in Internet services and to promote the development of full and effective facilities-based competition in the 'last-mile' broadband data transport services."[16]

Aside from identifying the myriad of problems that will stem from the merger, commenters have also catalogued the history of FCC and Congressional efforts to intervene in the cable marketplace to remedy the precise types of problems – self-dealing, exclusionary practices, and price gouging – that AT&T/TCI now threatens in connection with the provision of high speed cable-based transport for Internet access.[17] In addition, as SBC highlights, the Commission has historically imposed resale requirements on carriers such as AT&T to "curb price discrimination, facilitate competitive entry, spur the introduction of new and specialized services, promote innovation by equipment manufacturers, and increase demand for new services."[18]

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facilities "would not require costly reconfiguration of the TCI-controlled cable system." Comments of Ameritech, CS Docket No. 98-178 at 21 (filed Oct. 29, 1998) (Comments of Ameritech). "Requiring such competitive access to the AT&T/TCI controlled 'last mile' facilities, as advocated by Ameritech, would guarantee that consumers will not be forced to purchase the services of AT&T's affiliated ISP as the price of admission to their preferred ISP. Absent such a condition, the proposed merger creates significant incentives for AT&T to favor its affiliated ISP and thus erect toll booths to consumer access to the Internet." *Id.* at 22-23.

16 Comments of AOL at 2.

17 *See id.* at 25-30.

18 Comments of SBC Communications, Inc., CS Docket No. 98-178 at 12, *citing Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Report and Order, 60 F.C.C. 2d 261 (1976), *recon. granted in part*, Memorandum Opinion and Order, 62 FCC 2d 588 (1977), *aff'd sub nom. AT&T v. FCC*, 572 F.2d 17 (2d Cir.), *cert. denied*, 439 U.S. 875 (1978) (filed Oct. 29, 1998). SBC argues that the Commission should maintain a "consistent approach" and "must therefore condition this
(Continued...)

In contrast to the cable experience, the Internet marketplace has developed in a vibrantly competitive and open environment. As MindSpring correctly explains, it is "competition and innovation that have driven Internet and other advances to date" and, without this competition, "consumers would pay higher prices and receive inferior service."[19] The Internet has evolved through the use of comparatively open telephone network services for the provision of Internet access and the lack of any government franchise requirement or protection for the incumbents or the first entrants in the Internet marketplace.[20]

Unfortunately, the full competitive development of and public benefits available from this marketplace are placed at risk by the discriminatory practices endorsed by AT&T/TCI. Consumers are now beginning to demand low cost, high speed access from companies with which they are familiar, and the Commission's charter mandates that this demand be met in a fair, open environment. Indeed, not only is consumer choice to providers and competition threatened, as the Consumers Union, *et. al.* submit, the merger undermines First Amendment principles by limiting consumer access to information. "[T]here is no assurance on this record that the First Amendment goal of a diverse marketplace of commercial, political, social and artistic expression will be advanced."[21]

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merger upon a requirement that TCI make its monopoly cable services available for resale on a nondiscriminatory and competitively neutral basis." *Id.* at 14.

19 Comments of MindSpring at 6.

20 *See* Comments of AOL at 17.

21 Petition to Deny of the Consumers Union, Consumer Federation of America, and Office of Communication, Inc. of the United Church of Christ, CS Docket No. 98-178 at iii (filed Oct. 29, 1998).

Prodigy is especially concerned about the merger's effects on consumers' ability to access content in as efficient a manner as possible. Prodigy's services are designed to maximize its subscribers' ability to select and organize their own preferred content, without having to wade through someone else's content first. Consequently, the merged entity's tying practices strike directly at the heart of Prodigy's business plan. Further, the inability to allow Prodigy's existing subscribers to economically upgrade their service to cable broadband service presents an obstacle to continued growth. The public interest demands that the FCC not permit these problematic scenarios to materialize. The traditional remedy in circumstances involving bottleneck control of critical facilities is to require that they be made available to others on an open and nondiscriminatory basis. Numerous examples of such remedies include:

- **FCC Leased Access Rules**: The FCC's leased access rules provide non-affiliated programmers a right to carriage on cable systems under rates, terms, and conditions that meet the FCC's standard for reasonableness.[22]
- **Section 706 Requirements**: Even the FCC's proposals under Section 706 of the Telecommunications Act of 1996 would require incumbent local exchange carriers ("ILECs") to offer unbundled local loops, services for resale, and interconnection.[23]
- **Antitrust Law Prohibition Against Tying Arrangements**: The antitrust laws consistently prohibit companies from tying the purchase of one product over which they exercise market power to the purchase of any other product.[24]

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[22] Comments of AOL at 28 (citing 47 U.S.C. §§ 532(c)(1), (c)(4), 47 C.F.R. § 76.1504). AOL reminds the Commission that "[a]ccess safeguards have served as a cornerstone of communications policy wherever cable operators have been found to threaten competition and consumer choice." *Id.* at 25.

[23] Ameritech notes that the interconnection and unbundling obligation imposed on ILECs under Section 706 of the Act should also apply to AT&T/TCI. Comments of Ameritech at 17-20.

[24] *See* Comments of MCI WorldCom at 9-11 ("it would therefore be contrary to the public interest to permit AT&T/TCI to tie together the sale of cable, services, local services, long distance services, and Internet services. Consumers should have the freedom to purchase from AT&T/TCI any one of these services by itself."); Comments in Opposition of GTE, CS (Continued...)

Prodigy recognizes that alternatives to cable broadband high speed data capabilities are or will become available at least in some areas. As discussed above, however, the timing, areas of deployment, and pricing of services such as ADSL are uncertain at this time. Industry analysts do not anticipate deep penetration or wide acceptance of these high speed telephony-based services in the near term. Moreover, @Home's CEO believes that "cable has about a two year lead that I believe we'll be able to sustain even as the competing technologies mature."[25] Thus, it is during this early deployment period that the Internet marketplace is most vulnerable. Accordingly, the time for FCC action is now.

For the foregoing reasons, Prodigy urges the Commission to condition the AT&T/TCI merger on AT&T/TCI providing nondiscriminatory, open access to high speed data transport being offered over TCI's systems to unaffiliated ISPs.

Respectfully submitted,

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Docket No. 98-178 at 20 (filed Oct. 29, 1998) ("AT&T/TCI would be able to exploit its advantage in the market for cable services and high-speed Internet access by forcing its customers to purchase a tied telephone service"); Comments of Sprint at 22 ("AT&T will have the ability to exploit its monopoly control over cable to force the cable subscriber to subscribe to AT&T's offerings in competitive markets, *e.g.*, long distance service.").

[25] Comments of AOL at 53 n.126 (citing Tom Jermoluk, @Home Network Chairman and CEO Tom Jermoluk's Remarks to the National Press Club (June 9, 1998) <http://www.athome.net/corp/.news/tj_press_speech.html>).

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of November, 1998, I caused copies of the foregoing Reply of Prodigy Communications Corporation to be hand-delivered or mailed via first-class postage prepaid mail to the following:

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