primary claim that is loosely asserted in the affidavit of Professor Hausman and in some of the comments is that the existing arrangements constitute a "tie-in" of two purportedly separate products: TCI's broadband transport between customers' homes and its headends, and high-speed Internet access and enriched content provided by the @Home network. But a tie-in occurs only when a consumer is forced to obtain two products in combined form, rather than obtaining the two products separately from separate sources and combining them himself or herself.[87] There is no tie-in here because TCI@Home is a single offering, just as the provision of Home Box Office over a cable system is a single offering of video programming and not the combination of "cable transport" and a "satellite cable service."

Neither the broadband transport to the headend nor the high speed and enriched content that make up the "@Home experience" are products that are or could be offered separately to a consumer and combined by him or her to create an Internet access service. To the contrary, these are two inputs that have been designed and rolled out on a fully integrated basis. The TCI @Home cable Internet service integrates TCI's high-speed two-way infrastructure and @Home's backbone network provisioning system and local caching functionality. Each input is today useless without the other. No consumer could obtain the two purported products (i.e. the @Home and TCI inputs to the @Home service) from separate sources and combine them himself or herself to produce the equivalent of the @Home service. That establishes that there is no tie-in claim here, and that TCI's @Home is a single finished product, not a bundle of two separate tied products.

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[86] (...continued)
multicasting. None of these issues can readily be addressed in the context of this proceeding.

[87] See X P. Areeda, Antitrust, § 1748a-b, pp. 242-43 (1996).

Thus, what AOL and the other ISPs purport to want is not an end to a non-existent tie-in of products that consumers could separately obtain and then combine. Rather, they want to force the technical and other developments that would enable them to obtain access to TCI's broadband facilities at the headend so that they can offer their own on-line service. That is not a tie-in claim, and there is no antitrust basis for imposing this liability on TCI given that it has no monopoly power in a relevant market. As Professor Areeda has stated:

> The effect of imposing tie-in liability would thus be to force the defendant to sell component A to his rival, normally the plaintiff. As we concluded earlier, such duties to deal should, if imposed at all, be narrowly limited to certain unjustified refusals to deal by actual or potential monopolists. A broader duty to deal would have little potential to improve price and output, would be extremely difficult to administer, and would threaten much efficient vertical integration. Courts would, for example, have to figure out with which firms the defendant should deal, and at what price, quantity, and other terms.[88]

These points apply with special force here. For to require TCI to provide unbundled broadband access to third party ISPs would require TCI to offer a service it does not currently provide as a cable operator – broadband transport -- which would in turn require significant additional investments by both TCI (e.g., the installation, engineering, and operation and maintenance of such equipment or facilitiesas are required to provide access to multiple ISPs) and the third party seeking such access (obtaining facilities between TCI's headend and an ISPs or OSP's existing transmission facilities). In addition, there would be transaction and facility costs of establishing a point of access for multiple providers of transporting data between each of TCI's headends and the transmission facilities and computers of third party providers, and of establishing an appropriate price for "unbundled data

[88] Areeda, Volume X, at 243-44.

transport."[89] See Willig\Ordover Aff., ¶¶ 38-52. There is no basis in law or policy for the Commission to impose such a radical regulatory burden on the cable industry under any circumstances, and certainly not in the context of this merger proceeding.

There is a more basic fallacy to AOL's complaint over the fact that to date TCI has afforded subscribers access to unaffiliated content only through its @Home cable Internet offering and not through some form of unbundled access to broadband plant. The reality is that if any provider seeks to offer content that TCI's customers would find attractive, and offers reasonable commercial terms for the arrangement, it will be in TCI's or @Home's interest voluntarily to come to agreement with the provider. As AT&T's chairman has explained, "[c]ontent is essential to make money in networks. . . . And to invite as much content over that broadband set of network facilities is absolutely, Mr. Chairman, what we want to do."[90]

There is in the end no basis for commenters' overcharged rhetoric and assertions that TCI will exert "vise-like control over the previously free-form and truly democratic medium of the Internet"[91] or "exercise disproportionate power over content matters, advancing its own editorial

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[89] Professor Hausman's assumption that such a price could be readily developed rests on the false premise that @Home currently pays TCI a market determined price for the broadband facilities that are used to deliver @Home's services. As described below, this assumption is incorrect. TCI pays @Home for the service, just as it pays most other suppliers of cable services. In view of the multiple and differentiated benefits that TCI receives from its relationship with @Home, moreover, there is no basis for extracting a market based transfer price for the data transport capabilities that TCI has established.

[90] See Remarks of Michael Armstrong before the Federal Communications Commission's En Banc Hearing on Telecommunications Mergers ("FCC Mergers En Banc"), transcript at 25 (Oct. 22, 1998)

[91/] Consumers Union, p. 13.

perspectives and discriminating against unaffiliated ISPs with a different viewpoint."[92] The complete refutation to these claims is that TCI and @Home are providing open access today under what appears to be the most efficient or attractice arrangement and will have every incentive to provide other arrangements that OSPs propose if they are more efficient and also fully compensate TCI for its costs and risks. Willig\Ordover, ¶¶ 47-52 .

AOL also has a second different complaint about @Home. It complains that TCI forces @Home customers to "pay for two value-added Internet services to get to the one source of online content they want."[93] As AT&T and TCI have repeatedly explained, today any @Home customer can access AOL through his or her TCP/IP connection, and AOL itself actively markets such a connection as its "bring-your-own-access" plan ("BYOA plan").[94] Indeed, the BYOA plan offers customers substantial savings over the conventional monthly charge for AOL. For $9.95 per month, compared with standard monthly charge of $21.95, BYOA enables any customer, including @Home customers, to gain "unlimited access to thousands of unique AOL features."[95] There is little difference between customers who choose to access AOL through a separately-purchased ISP such as MSN, MindSpring, or Erols' Internet, and customers who use AOL's BYOA plan in connection with @Home. AOL's concerns about subscribers that must "pay twice" also rings hollow in light of

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92/ MindSpring, p.14.

93/ AOL, p. 14 n.29.

94/ See "Top 20 AOL Member Questions," <http://aol.com/nethelp/top20memberquestions.html>.

95/ Id. (AOL's BYOA plan is one of "5 pricing plans that provide access to AOL and the Internet. These are designed to appeal to the broadest range of consumers. Of the five offered plans, we hope that one of them will fit your individual needs."). AOL's BYOA plan presumably saves AOL money because it allows the company to provide its services to a customer without adding traffic to the backbone facilities it leases from MCI WorldCom.

the fact that its BYOA customers can often obtain portal and e-mail functions from their ISP but must purchase these functionalities again from AOL itself in order to gain access to AOL's proprietary content. AOL refuses to sell dial-up access without its front-end advertising screens and other content.

Thus, there is only one possible basis for AOL's claim that its customers who reach it through @Home are "paying twice" for something. That is the fact that the monthly charge for @Home entitles the subscriber to obtain both the proprietary content of @Home and its Internet access services, so AOL contends, customers who obtain @Home solely to obtain high speed Internet access are paying more than they should because they "pay" for content they do not want or use. This claim ignores the economic realities of the service. In particular, it ignores that the provision of content allows @Home to sell advertising and use the revenues to offset its network and transmission costs. If content were not provided and advertising revenues were not realized, that would, all other things being equal, require @Home to recover these costs from other sources (or reduce its network and transmission costs). Mulron Aff., ¶¶ 3-4. That would put <u>upward</u> pressure on TCI's charges for @Home. Thus, as Professors Willig and Ordover explain, rather than increase rates for @Home, the provision of content may <u>reduce</u> them. Willig/Ordover Aff. ¶¶ 43-44.

As AT&T's chairman explained in a recent speech, "AOL or any other OSP can actually gain revenue by our customers reaching their services via our broadband network. That means enhanced advertising, e-commerce and other advantages. It's a win-win situation."[96] AOL and other OSPs, however, are not content with a "win-win" world. They want the Commission to treat TCI like a common carrier and force TCI to provide unbundled access to its broadband cable

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[96/] Armstrong WMCC Remarks.

facilities, a solution that will greatly reduce AT&T's and TCI's economic incentives to upgrade TCI's network in the first place. The Commission cannot, and should not, choose this "lose-lose" route.

4. The Proposed Access Requirements are Infeasible and Unrealistic.

The arguments of AOL and MindSpring are fallacious for another reason. They could not be implemented in ways that protect their purported interests without requiring the Commission to engage in rate regulation that all concede would be improper and that would further jeopardize the economic basis for the AT&T-TCI merger.

In this regard, AOL's expert, Professor Hausman, states, correctly, that if an unbundling obligation were imposed on TCI, it would have to be permitted to charge a price to the ISPs that compensated it for the full value of its broadband investment and the costs incurred as a result of providing the "access" arrangement, including the opportunity costs of not being to provide the ISP or OSP itself. Otherwise, the unbundling duty would impede the incentives for investments that are profoundly beneficial to consumers.

However, Professor Hausman believes that there would be no social or other costs in imposing the unbundling duty because he believes @Home is already "paying" TCI a price for access that has been established under the foregoing standard and that all that would be required is for that same price to be charged to AOL or other OSPs. This is just wrong. The relationship between @Home and TCI is decidedly not like that an ISP has with an ILEC or other common carrier. To begin with, @Home does not "pay a fee to the local cable provider that provides last mile high speed transport."[97] In areas where it is available, cable subscribers order @Home like they

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97/ @Home also shares revenues from premium areas on the service. AOL clearly does not contemplate such a "programmer" relationship with TCI.

would any other cable service from the operator. The cable operator controls pricing, and remits to @Home 35 percent of the monthly subscription fee. The cable operator retains not only 65% of its price, but all the benefits of having the direct customer relationship. As explained above, it is the desire to capture those benefits that is at the heart of AOL's claim, not a desire to obtain "access" to cable facilities at a particular point. Indeed, this relationship is of immense value to any cable provider, for providing cable Internet services to subscribers both broadens and strengthens the bond with that customer and enhances the ability to attract that customer for the cable system's future local telephone service. In this regard, the enthusiasm of the incumbent LECs for the AOL proposal is a product of their overriding interest in weakening AT&T\TCI as prospective competitors with the LECs' monopolies.

That underscores why the appropriate model for these services is not the common carrier "transport" analogy cited by AOL, but cable programming plain and simple.[98] AOL's intentions are obviously not to replicate the @Home approach, but to pick out an entirely imaginary "underlying transport" functionality that can be commoditized and sold piecemeal. But the @Home relationship with TCI cannot serve as a model for this proposal.

At the same time, AOL does assert (p. 34) that it is not "call[ing] for price regulation of last-mile high speed date transport." AOL's affiant likewise asserts that "TCI could still charge the (unregulated) profit maximizing price for last mile high speed data transport over its network." Hausman Aff., ¶ 16. If this were literally true, imposition of the access requirements could serve no conceivable objective since commercial negotiations and arrangements would assure that the most efficient and appropriate access arrangements. AT&T and TCI can only conclude that AOL's

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[98] Hausman Declaration "B" at 9.

disavowal of rate regulation cannot be taken seriously. Indeed, the other ISP who urges the same condition -- MindSpring -- candidly states that it is seeking access to the broadband transport facilities of TCI and other cable systems at rates and terms and conditions that are cost-based and just, reasonable, and appropriate.[99]

Under any scenario, the adoption of the proposed regulations would impose burdens on the merged AT&T-TCI and threats of protracted proceedings and rate regulation that would impair their incentive and ability to undertake rapidly the investments required to upgrade TCI's cable facilities to allow them to provide high speed Internet and telecommunications services alike. The threat would be most direct and destructive in the case of MindSpring's candid call for actual "cost of service" rate regulations. The expenses that would have to be incurred to allocate fixed and other cable costs and to litigate appropriate rates would be immense, and the mere possibility that rates would be set at levels that do not fully compensate AT&T-TCI for the investments they make will operate as a major inhibition. Willig/Ordover Aff. ¶¶ 38-40. That is presumably why Congress squarely foreclosed the imposition of such conditions on cable systems. They simply serve no purpose in view of the fact that services offered over cable systems directly compete with those offered over the narrowband as well as broadband facilities of ILEC monopolies.

Indeed, to advance the stated interests of the ISPs and LECs, the Commission would have to assert authority over both the price that TCI would charge for its so-called last mile

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[99] See MindSpring, p. 17. Other commenters likewise clearly reveal their regulatory aspirations. SBC suggests the Commission "adopt a national range of discount percentages to be applied to local retail rates for cable services." SBC, p. 15 n.50. AT&T would then be required to offer "high-speed data transport capabilities . . . at wholesale prices . . . .". Id., pp. 15-16. U S WEST seeks unbundled access under TELRIC pricing. U S WEST, p. 29. EchoStar calls for "reasonable" terms and conditions. EchoStar, p. 7.

"transport" as well as the rate that TCI and @Home would charge for Internet access, or AOL's stated goal could not be achieved. Willig/Ordover ¶ 38. As for TCI's rate for transport, the point should be clear: unless TCI's rate was regulated by the Commission, TCI could be claimed to have effectively denied access to unaffiliated ISPs and OSPs by setting a rate that was "too high." In addition, regulation of TCI's rate for "transport" would not be enough. In order to ensure "true parity" between AOL and @Home, the Commission would have to require @Home to impute to itself the full cost of the transport rate that TCI charged AOL and reflect it in the prices for the Internet access and on-line services that TCI provides over those facilities. In particular, parties would claim that the rates for Internet access and on-line services would exceed the imputed cost of the broadband cable transport plus some measure of costs of the other components of these information services.[100]

Thus, far from promoting the widespread availability of advanced services, subjecting new entrants such as TCI to the unbundling and other obligations that Congress imposed on the incumbent LECs would thwart the Act's competitive goals. Congress understood that cable companies today offer the best hope of providing competitive local exchange services to a broad number of residential customers over facilities that bypass the incumbent LECs' bottleneck facilities.[101] In order to do so, however, cable providers will be required to invest billions of dollars to upgrade their networks -- an economic and technological risk that cable companies will not undertake if they

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[100] AOL seeks to avoid these fundamental facts by asserting that "@Home currently pays a fee to the local cable provider that provides last mile high speed transport," and argues that the Commission should simply require TCI to "charge AOL similar prices." Hausman, Aff. B, ¶ 16. As explained above (see p. 48, supra), that is incorrect.

[101] Joint Explanatory Statement, p. 148.

would then have to provide unbundled access to those upgraded facilities to third parties whose business plans did not include the development and deployment of advanced infrastructure at regulated and potentially noncompensatory rates. In the two and a half year period since the 1996 Act was passed, there has been virtually no erosion in the monopoly power of the incumbent LECs. The last thing the Commission should do now is subject the most promising facilities-based competitive providers of Internet access to residential consumers to common carriage regulation -- much less to regulations that were designed for incumbent monopolists.

Significant risks attend AT&T and TCI's commitment to making the substantial investments that the nationwide deployment of competitive local telephone networks and broadband facilities will require. One of the potential benefits of undertaking this risk, however, is that the merged company will be able to compete for customers on the basis of the services and functionalities that the new network will make possible. Forcing AT&T and TCI to accept common carrier regulation for their broadband plant from day one will create a substantial disincentive to their making the network investments that will enable facilities-based competitive local telephone service as well as advanced cable and other services to residential customers. That, in turn, would jeopardize the economic underpinnings of the merger.

IV. THE TERMS OF THE COMMUNICATIONS ACT PROHIBIT THE IMPOSITION OF CONDITIONS THAT WOULD SUBJECT TCI'S CABLE SYSTEMS TO ANY OF THE "ADDITIONAL OBLIGATIONS" THAT APPLY TO INCUMBENT LECS UNDER SECTION 251(c).

As shown in Section III, supra, there is no legal or policy basis for subjecting TCI's cable services to Title II obligations, as AOL and MindSpring urge. However, in addition to endorsing AOL's and MindSpring's claims, the LECs and two of AT&T's interexchange competitors also claim that the Commission should declare that when AT&T-TCI begins to provide telephony, it will be an "incumbent LEC" (or at least should be subject to the same requirements that Section 251(c) of the Communications Act imposes on incumbent LECs).[102] This claim is likewise one that should be raised, if at all, only in a generic proceeding, for any issues concerning how cable systems that offer telephone service should be regulated are industry-wide questions that should be resolved on an industry-wide basis. Moreover, because the merged entity will not be able to offer telephony until it completes the necessary upgrades, there is no basis today even to consider in this proceeding whether to impose the obligations these commenters seek.

In all events, this claim is squarely foreclosed by the terms of the Communications Act and the Commission's rules alike. They provide that cable systems cannot be subject to any common carrier regulations unless those systems provide telecommunications services. Even then, their telecommunications services will be subject only to the obligations of Sections 251(a) and (b), and not those of Section 251(c).

First, the requirements of Title II, and Section 251 in particular, do not apply to firms that do not provide "telecommunications services." The Communications Act states that a provider of a telecommunications services "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services," 47 U.S.C. § 153(44), and the Communications Act defines "telecommunications services" as the "offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). "Telecommunications" is in turn defined as "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." 47 U.S.C. § 153(43).

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[102] See, e.g., GTE, pp. 6-7; MCI/WorldCom, p. 13; Qwest, pp. 15-16.

Thus, when, as here, a cable system does not provide broadband transmission services to any member of the public, but merely uses broadband cable facilities to provide information services or other advanced cable services to cable subscribers, the access requirements that have been sought are expressly not authorized by Title II and, indeed, Title VI prohibits them.[103] Accordingly, none of the common carrier obligations of Title II can be applied to any TCI cable system either today or during the period after the merger closes when these systems will continue providing only "cable services."

Further, even after TCI's cable systems are upgraded and begin providing "telephone exchange services," "exchange access" services, and other "telecommunications services," in its provision of telecommunications services, the cable systems will be only a "telecommunications carrier" within the meaning of Section 251(a) and a "local exchange carrier" within the meaning of Section 251(b).[104] To the extent that TCI's cable facilities offer telecommunications services as a local exchange carrier, they will be subject to the interconnection and other obligations imposed on all telecommunications carriers by Section 251(a), and to the resale, number portability, dialing parity,

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[103] See 47 U.S.C. § 541(c) (exempting "any cable system" from "regulation as a common carrier or utility by reason of providing any cable service"); see also In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report to Congress, FCC 98-67 at ¶¶ 45-46 (rel. April 10, 1998) (finding that "information services" remain in a separate category from "telecommunications services").

[104] See 47 U.S.C. § 153(44) ("The term 'telecommunications carrier' means any provider of telecommunications services, except that such term does not include aggregators of telecommunications services (as defined in Section 226[]). A telecommunications carrier shall be treated as a common carrier under this Act only to the extent that it is engaged in providing telecommunications services, except that the Commission shall determine whether the provision of fixed and mobile satellite service shall be treated as common carriage"); 47 U.S.C. § 153(26) ("The term 'local exchange carrier' means any person that isengaged in the provision of telephone exchange service or exchange access").

rights-of-way, and reciprocal compensation obligations imposed on all local exchange carriers by Section 251(b).[105]

By contrast, even after they are upgraded to offer competing exchange and other telecommunications services, the Communications Act and the Commission's rules prohibit the imposition on these systems of any of the requirements of Section 251(c) that are imposed only on "incumbent LECs."[106] As the commenters do not dispute, neither AT&T nor any of TCI's cable systems meet the Communications Act's definition of "incumbent local exchange carrier."[107]

Contrary to GTE's contention, it is not merely that "there is no statutory mandate directing" the Commission to impose incumbent LEC obligations on the post-merger cable systems.[108] Rather, the statute precludes the imposition of these obligations on the TCI cable systems by any regulatory body, state or federal. Indeed, that was the Commission's holding in the Local

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[105] See, e.g., GTE, pp. 13-15 (AT&T would be a "local exchange carrier"); MCI/WorldCom, pp. 4-5 (incorrectly suggesting that AT&T would advocate an improper "distinction between 'cable telephony' and telephony provided over traditional telephony infrastructure").

[106] See, e.g., GTE, pp. 6-7, 15-18; U S WEST, pp. 19-41; Ameritech, pp. 13-23; MCI/WorldCom, p. 13; Qwest, pp. 15-16.

[107] The Communications Act defines "incumbent local exchange carrier" as "with respect to an area, the local exchange carrier that --

> (A) on [the date of enactment of the Telecommunications Act of 1996,] provided telephone exchange service in such area; and
> (B) (i) on [such date of enactment], was deemed to be a member of the exchange carrier association pursuant to section 69.601(b) of the Commission's regulations (47 C.F.R. 69.601(b)); or
> (ii) is a person or entity that, on or after [such date of enactment], became a successor or assign of a member described in clause (i).

47 U.S.C. § 251(h)(1).

[108] See GTE, p. 16 (emphasis added).

Competition Order. The Commission there concluded that although States have general statutory authority to impose additional requirements on exchange carriers as long as those requirements are not precluded by the Communications Act or contrary to its purposes, States are prohibited from "impos[ing] on non-incumbent LECs obligations that the 1996 Act designates as 'Additional Obligations on Incumbent Local Exchange Carriers,' distinct from obligations on all LECs.[109] The Commission correctly held that the imposition of the incumbent LECs' obligations on competitive LECs "would be inconsistent with the statute" and with "the language and purposes" of the Communications Act.[110] That substantive prohibition -- and the express congressional intent it embodies -- applies here with equal force.

The Commission further held in that Order that the Communications Act provides only one mechanism through which a LEC that does not satisfy the statutory definition of "incumbent local exchange carrier" can be required to comply with the obligations imposed by Section 251(c): the Commission may declare the LEC a "comparable" carrier pursuant to Section 251(h)(2).[111] However, the Commission may classify a non-incumbent LEC a "comparable" carrier only where:

> (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 carrier described in paragraph (1) [an incumbent LEC];
>
> (B) such carrier has substantially replaced an incumbent local exchange carrier described in paragraph (1); and

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[109] See First Report and Order, Impementation of the Local Competition Provisions of the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 1247 ("Local Competition Order")..

[110] See id..

[111] See Local Competition Order, 11 FCC Rcd. ¶ 1249; accord Memorandum Opinion and Order and Notice of Proposed Rulemaking, Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket 98-147 (August 7, 1998), ¶ 91.

(C) such treatment is consistent with the public interest, convenience, and necessity and the purposes of this section

47 U.S.C. Section 251(h)(2). The Commission has held that a LEC will not be declared a "comparable carrier" absent "a clear and convincing showing" that these statutory prerequisites are met.[112]

Here, contrary to the claims of two commenters,[113] no showing supporting such a claim could conceivably be made. First, neither AT&T nor TCI occupies a place in the local exchange market remotely comparable to that of an incumbent local exchange provider, given the extremely limited local exchange service they provide today.[114] Second, AT&T and TCI obviously have not "substantially replaced" the incumbent monopolies that continue to control the provision of local telephone service to virtually all customers in every region AT&T or TCI serve.[115] Third, it

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[112] See Local Competition Order, 11 FCC Rcd. at 16110 (¶ 1248).

[113] See U S WEST, pp. 25-27; Qwest, pp. 15-16. While Ameritech, GTE, and MCI likewise seek to impose incumbent LEC obligations on AT&T, none of them even cites Section 251(h)(2) or otherwise identifies a source of statutory authority for such obligations.

[114] By contrast, in the one instance in which the Commission has declared a LEC (the Guam Telephone Authority) a "comparable carrier" under Section 251(h)(2), it found that the LEC "occup[ied] a dominant position" in its market by being "the sole provider of local exchange and exchange access services." See Declaratory Ruling and Notice of Proposed Rulemaking, Guam Public Utilities Commission Petition for Declaratory Ruling Concerning Sections 153(37) and 251(h) of the Communications Act, 12 FCC Rcd. 6925, ¶¶ 26-27 (1997); Report and Order, In the Matter of Treatment of the Guam Telephone Authority and Similarly Situated Carriers as Incumbent Local Exchange Carriers under Section 251(h)(2) of the Communications Act, CC Docket No. 97-134 (rel. July 20, 1998).

[115] The assertions that AT&T/TCI would control "bottleneck" facilities (GTE, p. 15; Qwest, pp. 1, 12, 15), be an "RBOC-type company" (Qwest, p. 12), or "exercise monopolistic ILEC-type power in the local markets" (Qwest, p. 15), thus make absolutely no sense. To the contrary, there will be an ILEC everywhere AT&T/TCI will provide service with which the merged entity will be competing, each of which has monopoly power.

would affirmatively disserve the public interest, and frustrate the purpose of Section 251 to bring competition to the incumbent LECs' markets, for the Commission to delay, diminish, and increase the costs of facilities-based entry by subjecting such entrants to the "additional obligations" that Congress expressly reserved to incumbent LECs.

The incumbent LECs' repeated claims that AT&T and TCI should be regulated "in the same manner as ILECs" in order to achieve "regulatory parity," and that it would be "arbitrary" and "[ir]rational" to regulate them differently,[116] thus constitute an improper collateral attack on Congress' carefully considered decision, consistent with decades of regulatory practice in analogous contexts (such as long-distance services), to regulate the incumbent monopolists differently than the new entrants seeking to compete with them. That decision assuredly applies to entry by cable companies into local telephony, for such entry is precisely "the sort of local residential competition that [Congress] consistently . . . contemplated."[117] As Congress recognized, it is in no way "rational" to require "parity" of treatment with respect to disparate classes of carriers. The incumbent LECs simply refuse to acknowledge this fundamental principle.[118]

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[116] See, e.g., GTE, pp. 2, 7, 15-16.

[117] See Conference Report, p. 148.

[118] See, e.g., GTE, pp. 15-18; US WEST, pp. 30-41. For example, U S WEST claims (pp. 34-35) that equal access obligations should be extended to AT&T/TCI -- ignoring that (1) some equal access obligations will already apply by virtue of the dialing parity requirements of Section 251(b)(3) once AT&T/TCI begins providing telephony, (2) Congress limited the applicability of the other equal access obligations, at least on an interim basis, to the BOCs and GTE (see Section 251(g)), and (3) any revision in the existing equal access rules should be accomplished in an industry-wide rulemaking, not a merger proceeding. See AT&T, et al. v. U S WEST, et al., No. E-98-41, ¶ 53 (suggesting a future rulemaking proceeding on equal access). Similarly, U S WEST's claim (p. 41) that if the Commission determines in its pending Advanced Telecommunications Services proceeding to define the terms under which an affiliate of an ILEC will be sufficiently separate from the ILEC that it will (continued...)

In sum, there is no basis for conditioning the approval of the proposed license transfers on AT&T's or TCI's compliance with any of the requirements of Section 251. To the extent commenters seek to impose the requirements that the merged entity offer its local exchange services for resale,[119] provide dialing parity,[120] or comply with Section 224's requirements relating to access to poles, ducts, conduits, and rights of way,[121] the proposals are unnecessary, for Sections 251(a) and (b) independently impose these same obligations. To the extent that commenters seek to impose the "additional obligations" that Section 251(c) imposes only on "incumbent LECs," the proposal is foreclosed by the Communications Act's terms and purposes, the Commission's rules, and the public's interest in facilitating, not impeding, new local entry.

V. THERE IS NO BASIS FOR IMPOSING ANY OF THE PROPOSED CONDITIONS RELATING TO THE CABLE ACT.

The laundry list of Cable Act-related objections and conditions to the proposed merger consists exclusively of issues that the Commission has already considered or is currently addressing in other industry-wide proceedings. As noted above, because these issues are more properly

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[118] (...continued)
not itself be an "incumbent LEC" subject to the obligations of Section 251(c), the Commission should apply similar requirements to AT&T/TCI, betrays a fundamental misunderstanding. Since neither AT&T nor TCI is an incumbent LEC, no specific terms of separation are necessary to render an affiliate of theirs also a non-incumbent LEC. And U S WEST's claim (pp. 36-37) that this Commission should require AT&T and TCI to comply with State laws and regulations applicable to public telecommunications utilities even when the States that adopted and enforce those laws and regulations affirmatively do not wish them to be so applied is so bizarre that stating the proposition is sufficient to refute it.

[119] See U S WEST, p. 33.

[120] See id., p. 34.

[121] See Ameritech, pp. 24-25.

addressed in these open proceedings, and because they are entirely unrelated to consideration of whether the proposed merger serves the public interest, the Commission can and should summarily dispose of them on those grounds. In all events, even if the Commission chooses to consider the underlying merits of these unrelated issues, as demonstrated more fully below, it should decline the invitations to impose any of the conditions sought by various commenters.

A. Program Access Issues

1. Liberty Will Continue to be Subject to the Program Access Rules Post-Merger.

Several commenters express concerns that after the merger Liberty Media Group ("Liberty") will arguably no longer be vertically integrated with a cable operator and therefore could be deemed exempt from the program access rules.[122] AT&T/TCI assure the Commission that there is simply no issue here: under the current program access rules, AT&T/TCI acknowledge that following the merger as presently proposed, Liberty will remain vertically integrated and subject to the program access rules. Thus, the Commission need not be concerned about, nor impose any conditions regarding, this issue in its analysis of the proposed merger.

2. The Commission Cannot and Should Not Impose Additional Program Access Restrictions on AT&T/TCI as a Condition of the Merger.

Ameritech suggests that the Commission apply the following three conditions as part of its approval of the AT&T/TCI merger:

(1) extend the program access restrictions to any programming delivered by Liberty or any other AT&T subsidiary, even if such programming is

[122] See, e.g., Consumers Union, pp. 3-6; DIRECTV, pp. 1-2; Echostar, pp. 8-9; US WEST, pp. 42-47; Wireless Communications Association, pp. 10-13.

distributed terrestrially, rather than via satellite (the "Terrestrial Condition");[123]

(2) require AT&T/TCI to waive any existing exclusive program access arrangements and forego any new exclusive arrangements for at least five years (the "Exclusivity Condition");[124] and

(3) require AT&T to commit to submit any proposed restructuring of Liberty to the Commission for public comment and approval to ensure that any such restructuring is not an attempt to evade the program access rules (the "Restructuring Condition").[125]

Moreover, Seren Innovations, Inc. asks the Commission to condition approval of the merger on TCI's waiver of all its popular sports programming exclusivity, including the Midwest Sports Channel.[126] For the reasons discussed below, the Commission cannot and should not impose, or make its approval of the merger subject to, any of these conditions.

a. The Commission should not impose Ameritech's terrestrial condition.

On two occasions in just the past four months, the Commission has expressly addressed -- and rejected -- requests by Ameritech and others to extend the program access rules to terrestrially-delivered programming. In its August 1998 order expanding the program access rules in certain respects, the Commission concluded that reasonable questions had been raised regarding its authority to extend the rules to terrestrially-distributed programming, and that even assuming it had such authority, there is no basis at this time to extend the rules in this way:

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[123] Ameritech, p. 37; see also US WEST, pp. 45-47; Wireless Communications Association, pp. 13-19.

[124] Ameritech, pp. 37-38.

[125] Id. at 38.

[126] Seren Innovations, p. 8.

> The record developed in this proceeding fails to establish that the conduct complained of, i.e., moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules, is significant and causing demonstrative competitive harm at this time. The Commission has received only two complaints against the same vertically-integrated programmer related to moving the transmission of programming from satellite to terrestrial delivery to avoid the program access rules. Where the record fails to indicate a significant competitive problem, we are reluctant to promulgate general rules prohibiting activity particularly where reasonable issues are raised regarding the scope of the statutory language. In circumstances where anti-competitive harm has not been demonstrated, we perceive no reason to impose detailed rules on the movement of programming from satellite delivery to terrestrial delivery that would unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers.[127]

Even more recently, the Cable Services Bureau held that the program access provisions apply only to "satellite cable programming," and not to programming that was "previously" satellite-delivered or the "equivalent" of satellite cable programming.[128] In so ruling, the Cable Bureau reached several conclusions that dispose of the various contentions raised here:

- "In enacting Section 628, Congress determined that while cable operators generally must make available to competing MVPDs vertically integrated programming that is satellite-delivered, they do not have a similar obligation with respect to programming that is terrestrially-delivered. DIRECTV's argument would have us find that it is somehow unfair for a cable operator to move a programming service from satellite delivery to terrestrial delivery if it means that a competing MVPD may no longer be afforded access to the service. We find no evidence in Section 628 that Congress intended such a result."[129]

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[127] In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage, 12 Comm. Reg. (P&F) 1296, at ¶ 71 (1998) (emphasis added) (citations omitted) ("Ameritech Program Access Order").

[128] See In the Matter of DIRECTV, Inc. v. Comcast Corporation, et al., DA 98-2151 (released Oct. 27, 1998), at ¶ 25.

[129] Id. at ¶ 32.

- "Congress did not prohibit cable operators from delivering any particular type of service terrestrially, did not prohibit cable operators from moving any particular service from satellite to terrestrial delivery, and did not provide that program access obligations remain with a programming service that has been so moved."[130]

- "[While Section 628 (b)] remains . . . a clear repository of Commission jurisdiction to adopt additional rules or to take additional action to accomplish statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast programming[,] [i]t cannot . . . be converted into a tool that, on a per se basis, precludes cable operators from exercising competitive choices that Congress deemed legitimate."[131]

As both these recent decisions make clear, the Commission has already concluded that there is no public policy basis to impose program access restrictions on terrestrially-distributed programming at this time given the absence of evidence demonstrating a competitive problem. Moreover, it is at best questionable whether the Commission even has the authority to impose such a requirement even if it were otherwise inclined to do so.

Nothing about the proposed merger casts any doubt on the continued validity of these conclusions. Indeed, in their unsuccessful effort to convince the Commission to extend the program access rule to terrestrially-distributed programming, Ameritech and others made virtually identical arguments based on the capacity of recently clustered and upgraded digital cable systems.[132] The Commission properly rejected these claims because "anti-competitive harm has not been

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[130] Id.

[131] Id. at ¶ 33.

[132] Various parties argued that the increased clustering of cable systems has made it technically feasible for cable operators to distribute national and regional programming services on a terrestrial basis over their upgraded systems and that cable operators intend to use such terrestrial distribution to evade the program access rules. See Ameritech Program Access Order at ¶ 64 & nn.192-194 (citing comments of Ameritech, DIRECTV, Consumer Union, Bell Atlantic, and Wireless Communications Association).

demonstrated."[133] The fact that Ameritech here cites AT&T's and TCG's fiber optic transmission facilities, as opposed to the fiber optic transmission facilities of clustered cable systems, does not change anything. Thus, even if the Commission should choose substantively to address Ameritech's requested condition in this proceeding (as it need not and should not), it should reject that proposal for the same reasons it has twice rejected it in the past several months.[134]

b. The Commission should not impose Ameritech's exclusivity condition or Seren's condition that TCI waive its exclusivity for sports programming.

Having recently failed to convince the Commission to impose any significant additional limits on programming exclusivity throughout the industry, Ameritech attempts to resuscitate its efforts here. It urges the Commission to restrict unilaterally AT&T/TCI's ability to compete by requiring AT&T/TCI to waive any existing exclusive program arrangement and to forego all program exclusivity for at least five years, regardless of whether the program access rules would otherwise allow such arrangements. As noted above, because this Commission has just declined to expand the reach of its program access rules, it should summarily reject Ameritech's proposed condition here.

Ameritech provides no new legal or policy basis for its proposed outright ban on all AT&T/TCI exclusivity arrangements, an outcome that is directly at odds with the approach taken by

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[133] Ameritech Program Access Order at ¶ 71 (emphasis added).

[134] Rejection of Ameritech's Terrestrial Condition would be especially warranted given that the Cable Services Bureau has found that there may be legitimate business reasons why a cable operator decides to distribute a program service on a terrestrial basis. See DIRECTV Program Access Order at ¶¶ 28, 32. In addition, extension of program access to non-satellite services could substantially reduce the incentive of cable operators to produce local programming, contrary to well-established congressional and Commission efforts to promote the development of such programming. See Comments of Liberty Media Corp., filed in CS Docket No. 97-248, RM No. 9097 on Feb. 2, 1998, at 28-29.

Congress in the Cable Act.[135] Ameritech's preoccupation with an all-out ban of programming exclusivity fails to recognize that exclusive arrangements promote efficiencies including, among other things, reduced transaction costs (e.g., dealing with only one distributor for a market) and the elimination of promotional free-riding (creating incentives to promote programming more zealously because the promotion benefits run to the distributor and not its competitors) -- efficiencies that the Commission has itself recognized.[136]

Not only have the Commission and Congress recognized the efficiencies created by programming exclusivity, numerous well-established, alternative MVPDs have done so as well, and are increasingly using program exclusivity as a competitive weapon against cable. DIRECTV, for example, recently signed a 3-year renewal of its exclusive "NFL Sunday Ticket," which gives it

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[135] See Ameritech, pp. 37-38. Ameritech misstates Congress' intent by claiming that such an exclusivity ban will "secure the benefits of robust competition in TCI's franchise areas, as Congress intended, by providing new entrants access to essential video programming." See id. at 38 (emphasis added). Contrary to Ameritech's assertion, an outright ban on all exclusive programming is not at all what Congress intended. See, e.g., 47 U.S.C. § 548(c)(2)(C),(D) (permitting exclusivity under all circumstances when there is no vertical integration; and permitting exclusivity for vertically integrated programmers in served areas if found to be in the public interest).

[136] See Amendment of Parts 73 and 76 of the Commission's Rules Relating to Program Exclusivity in the Cable and Broadcast Industries, 3 FCC Rcd 5299, at ¶ 66 (1988) ("exclusivity is a normal competitive tool, useful and appropriate for all sectors of the industry, including cable as well as broadcasting. Exclusivity enhances the ability of the market to meet consumer demands in the most efficient way; this is a sufficient reason for allowing all media the same rights to enter into and enforce exclusive contracts"); Program Access Order, 8 FCC Rcd 3359, at ¶ 65 (1993) ("we recognize that there may well be circumstances in which exclusivity could be shown to meet the public interest test, especially when the launch of local origination programming is involved that may rely heavily on exclusivity to generate financial support due to its more limited appeal to a specific regional market"); id. ("it is possible that local or regional news channels could be economically unfeasible absent an exclusivity agreement"); New England Cable News, CSR-4190-P, Memorandum Opinion and Order, 9 FCC Rcd 3231, at ¶1 37 (1994) (exclusive carriage of a start-up regional venture held appropriate for a vertically integrated MSO "due to the regional nature and limited distribution potential of" the programming at issue)

exclusive rights to a package of Sunday NFL programming.[137] In addition, DIRECTV has recently obtained the exclusive rights to (i) an NCAA college basketball package, (ii) a weekly half-hour music magazine series, and (iii) original television movies and television series in association with Action Adventure Network -- none of which is available to cable operators.[138]

These competitors aggressively promote their exclusive arrangements, and the cable industry's lack of access to such programming, in their marketing. DIRECTV, for example, has touted its offer of sports programming "not available on cable" from every major professional league, such as "NFL Sunday Ticket," "MLB Extra Innings," "NHL Center Ice," and "NBA League Pass." Of its "NFL Sunday Ticket" package, DIRECTV declares, "You won't find this subscription, or this many regular season NFL games, on cable or any other mini-dish service -- no matter what the competition says."[139]

Given this competitive backdrop, the Commission should reject Ameritech's proposal to single AT&T/TCI out and inhibit its ability to compete by eliminating its right to maintain

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[137] E. Wallison, "TCI's Hindery Lashes Out at Fledgling Cable Rivals," The Hollywood Reporter (Oct. 9, 1997).

[138] See J. Dempsey, "WB Pay TV Plays Music," Daily Variety, at 39 (Dec. 11, 1997); "DIRECTV Agreement with Action Adventure Network Marks Entry into Original First-Run Entertainment," Business Wire (Nov. 12, 1997); K. Amos, "Channeling a Continuing Look at the Best and Worst of Sports Viewing," The Sporting News, at 4 (Nov. 10, 1997); "Channel Earth is on the Air with Sony's Digital Solutions," Business Wire (Nov. 6, 1997). See also T. Ulmstead, "DIRECTV, NFL Extend Carriage Deal," Multichannel News, at 28 (Oct. 20, 1998). Similarly, USSB late last year announced that it entering into an exclusive arrangement with Don King Productions to air major boxing events. See "Overset: Television and Radio," Media Daily, September 12, 1997.

[139] See http://www.directv.com/programming/index.html. Of its "ESPN Full Court" package, DIRECTV says, "Watch hundreds of out-of-market NCAA Division I college basketball games. See games not available on cable or local TV from the BIG TEN, Big XII, Big East, SEC, ACC, WAC, Atlantic 10, Conference USA, Missouri Valley, Ohio Valley, Sun Belt, and others. See http://www.directv.com/sports/index.html.

exclusivity with program services not covered by the rules. AT&T/TCI reiterate that after the merger, Liberty will continue to be subject to the program access rules, including the significant restrictions on exclusivity.[140] Ameritech has simply failed to support limiting AT&T/TCI's program exclusivity beyond the program access rules that apply throughout the industry.

The Commission should similarly reject the request by Seren Innovations, Inc. that approval of the merger be conditioned upon TCI's waiver of its exclusivity with all popular sports programming, such as Midwest Sports Channel.[141] Midwest Sports Channel is clearly not covered by the program access rules because it is not vertically integrated with any cable operator.[142] Given the increasingly aggressive use of exclusivity by TCI's largely non-regulated competitors, especially in securing exclusive sports programming and using these exclusive arrangements to compete for subscribers, AT&T/TCI respectfully submit that there is no sound public policy basis to justify Seren's proposal to interfere in the programming market and require TCI to waive, across-the board, all of its bargained-for sports programming exclusivity arrangements.[143]

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[140] TCI has only a limited number of exclusivity agreements for services not covered by the program access rules. Out of the over 170 national satellite cable programming services that currently exist, TCI has established exclusive arrangements with only two -- Fox News and The Game Channel.

[141] See Seren Innovations, Inc. Petition to Deny at 8.

[142] See id. at 7 ("Because [Midwest Sports Channel] is not vertically-integrated, it is not covered by the existing program access statutes.").

[143] Moreover, TCI has been entirely reasonable with its competitors in voluntarily relinquishing exclusivity in certain cases, even though it was under no obligation to do so under the program access rules. For example, TCI voluntarily waived its exclusive rights to the Chicago Cubs baseball games carried on CLTV, a local service in the Chicago area, which was a matter of particular interest to Ameritech. AT&T/TCI will continue to review requests to relinquish exclusivity for services not covered by the program access rules on a case-by-case basis and to act reasonably and responsibly in this area.

c. The Commission should not impose Ameritech's restructuring condition.

Ameritech's proposal to have AT&T submit any proposed restructuring of Liberty to the Commission for public comment and approval is as absurd as it is groundless. As an initial matter, unless such restructurings implicated a transfer or assignment of an FCC license, the Commission has neither a need nor the authority to conduct such a pre-approval process.

Equally important, such a process would impose significant administrative burdens both on AT&T/Liberty and on the Commission's limited staff with no corresponding public interest benefit. There is nothing about this merger which makes such a process justified or sensible. If Liberty were restructured in the future and an MVPD felt that the restructured company was discriminating against it, the proper and more efficient forum for addressing this issue would be a program access complaint. The Commission staff has addressed these issues in the past and in such a context, the staff could make a more accurate determination based on established facts rather than on proposed corporate transactions.[144] Ameritech has offered no basis to justify a departure from this established procedure. In short, the Commission should conclude here as it has elsewhere that "[i]n circumstances where anticompetitive harm has not been demonstrated, we perceive no reason to . . .

[144] See, e.g., Echostar Communications Corp. v. Fox/Liberty Networks, et al., DA 98-730 (rel. Apr. 17, 1998), at ¶¶ 17-18 (finding that corporate restructuring of FX which caused FX to become a vertically integrated satellite cable programmer subjected all of FX's exclusive contracts to the program access rules); Consumer Satellite Systems, Inc. v. Lifetime Television, DA 94-705 (rel. June 27, 1994) (dismissing program access complaint and noting that Lifetime had restructured its ownership and was no longer a vertically integrated programmer).

unnecessarily inject the Commission into the day-to-day business decisions of vertically-integrated programmers."[145]

B. Digital Broadcast Carriage Issues

1. The Commission Should Reject NAB's Proposed Condition Regarding the Mandatory Carriage of Digital Broadcast Signals.

NAB asks the Commission to require AT&T/TCI, as a condition of merger approval, to carry all digital signals of local broadcasters in the markets in which they operate upgraded cable systems. The Commission should summarily reject NAB's proposed condition.

This is clearly not an appropriate proceeding in which to consider the broad public policy issues raised in its comments on the proposed merger. The Commission currently has an open rulemaking proceeding directly addressing this issue,[146] and has consistently declined to consider in merger proceedings matters "that are the subject of other proceedings before the Commission because the public interest would be better served by addressing the matter in the broader proceeding of general applicability."[147]

Moreover, even if the merits of NAB's request were properly at issue, the Commission should reject the proposed condition. As noted above and in other Commission filings, TCI is committed to providing a competitive service in the market with programming that its customers

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[145] Ameritech Program Access Order at ¶ 71.

[146] See Notice of Proposed Rulemaking, Carriage ofthe Transmssions of Digital Television Broadcast, CS Docket No. 98-120, (released July 10, 1998)

[147] Memorandum Opinion and Order, In re 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, at ¶ 29 (rel. Oct. 23, 1998).

value. To that end, TCI is currently engaged in digital carriage discussions with several broadcast groups and expects to finalize DTV carriage agreements in the not too distant future.[148] Given that the overwhelming majority of broadcasters are not expected to commence DTV broadcasts until May 1, 2002, there is no reason for the Commission to act now and intervene in the marketplace, especially given the grave questions raised by TCI and others regarding the Commission's statutory and constitutional authority to require digital must carry during the transition to DTV.[149]

Finally, contrary to NAB's assertion, expanded channel capacity achieved through system upgrades provides no basis for affording preferred status to broadcasters' digital feeds during the DTV transition period. Even in upgraded systems, an across-the-board obligation could deprive consumers of innovative and diverse video and non-video services they would otherwise receive in a competitive market.[150] If broadcasters offer DTV programming that consumers want to see, the cable industry will respond to that demand and make the arrangements to carry that programming.

2. CEMA's Proposal to Condition the Merger on Commitments Related to the Pass Through and Conversion of all Digital Broadcast Signals Should also be Rejected.

For the same reasons, the Commission should also reject the conditions proposed by the Consumer Electronics Manufacturers Association ("CEMA"), which, like NAB, seeks to have various extraneous DTV carriage obligations (including digital pass through and analog conversion)

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148 See "Hindery Sees DTV Deals Before Fall," Broadcasting & Cable, July 27, 1998, at 36.

149 See, e.g., Comments of TCI, filed in CS Docket No. 98-120 (Oct. 23. 1998); Comments of Time Warner Cable, filed in CS Docket No. 98-120 (Oct. 23, 1998), at 8-53; Comments of MediaOne Group, Inc., filed in CS Docket No. 98-120 (Oct, 23, 1998), at 26-46.

150 See Comments of MediaOne Group, Inc. filed in CS Docket No. 98-120 (Oct, 23, 1998), at 23-26.

imposed on AT&T/TCI. CEMA's equally transparent attempt to circumvent the Commission's separate proceeding addressing cable carriage of digital broadcast signals should also be summarily rejected.[151]

CEMA proposes that the Commission place two conditions on the merger, namely that the digital customer terminal have the capability to: 1) pass through all digital formats used by broadcasters; and 2) convert all such formats to analog. TCI already has made its position on both issues clear. The combined AT&T/TCI will have the same position.[152]

With regard to the pass through of digital broadcast formats, TCI has stated that its advanced digital customer terminals will be able to pass through all digital formats for customers with digital TV receivers, including the 720p and 1080i formats.[153] With regard to the conversion of digital broadcast signals to analog format, TCI has stated that its advanced digital customer terminals will have enough memory and processing power to convert a 480p signal at 24 or 30 frames per second

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[151] CEMA's justification for addressing this proposal in this proceeding is frivolous. After asserting that TCI's leadership in the cable industry makes TCI influential on the issue of carriage of digital broadcast signals, CEMA simply asserts that TCI "will exercise even more influence when and if it is merged with AT&T, which is the nation's largest domestic and international long distance carrier." CEMA, p.3 CEMA offers no explanation of how AT&T's long distance telephony business will increase TCI's influence on the carriage of digital broadcast signals. In fact, the merger will not affect such carriage at all because AT&T does not compete in the distribution of video programming. As a result, the merger will not increase TCI's ownership of cable systems or its influence over the development of digital broadcasting.

[152] In its comments, CEMA mischaracterizes a sentence from the question and answer period in a congressional hearing in an attempt to enlarge TCI's position on the conversion of digital broadcast formats to analog. CEMA improperly states that TCI has said that it would "convert to [analog] <u>all</u> formats used by broadcasters." CEMA, p. 1; <u>see</u> <u>also</u> <u>id.</u>, pp. 4, 6.

[153] <u>See</u> Testimony of Leo J. Hindery, Jr. before the House Subcommittee on Telecommunications, Trade and Consumer Protection (April 23, 1998), at 6.

(NTSC frame rate) and a 720p signal at 24 frames per second (film rate) for display on today's analog TVs.[154]

In testimony before the House Telecommunications Subcommittee, TCI also clearly stated that "[b]ased on the demands of the marketplace, the conversion of other HDTV formats for display on analog TVs remains possible with the addition of more processing power and memory to our digital customer terminals."[155] Thus, while TCI's advanced digital customer terminals could be made to convert 1080i to analog as well, to do so would require that additional memory and processing power be added, additions that would increase the cost of the terminals.[156]

TCI has not committed to include the ability to convert 1080i to analog in its digital customer terminals because the broadcast industry has not yet determined the format which it will use to broadcast digital signals. Naturally, TCI does not want to incur the additional costs for conversion of 1080i to analog, costs that ultimately would be borne by consumers, unless and until 1080i becomes the broadcast standard. TCI has said, however, that if 1080i does become the de facto broadcast standard, it is prepared to build into its advanced digital customer terminals the ability to convert that format to analog.

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[154] Id. at 7.

[155] Id. This statement is consistent with TCI's overall approach to the conversion from analog to digital broadcasting.

[156] TCI has consistently sought to provide digital customer terminals to its customers without excessive costs. In the hearing that CEMA references in its comments, Subcommittee Chairman Tauzin similarly expressed serious concern about the cost of the terminals. See Statement of Rep. Tauzin in Hearing of the Telecommunications, Trade and Consumer Protection Subcommittee of the House Commerce Committee on High Definition Television, April 23, 1998, Reported in Federal News Service, April 23, 1998, at 35 ("[I]t's a great concern that the cost of these boxes come down . . . .").

Rather than trying to force a regulatory solution -- particularly one that will increase costs for consumers -- the Commission should allow the marketplace to settle this complicated question. Given the complex and highly technical trade-offs involving technology, cost, quality, and spectrum efficiency, the transition to digital TV is quintessentially a situation for marketplace resolution. It is both inappropriate and unnecessary for the Commission to adopt the conditions proposed by CEMA, especially at this very early stage of the transition to DTV.

C. Cable Prices

Two commenters suggest that the Commission impose cost allocation rules on AT&T/TCI to prevent cable customers from subsidizing AT&T/TCI's entry into local telephony.[157] The Commission should also reject this proposed condition.

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[157] See Consumers Union, pp. 7-10; U S WEST, pp. 37-41. Even assuming the Commission had the authority to impose such cross-subsidy rules, it is unclear on what basis it could justify doing so solely to AT&T/TCI in the context of this merger proceeding given that the very same issue is presented every time any cable system is upgraded to deliver video and non-video services.

On this score, TCI's rate increases have been quite reasonable. This year, for example, TCI's average price increase was only 3.9%. In addition, TCI has implemented prices for regulated cable services and equipment below the "maximum permitted" level established under Commission regulations. TCI's limited price increases are attributable in large part to competition from DBS, telco overbuilders, SMATVs, MMDS, and other MVPDs. In the last five years, DBS subscribership has grown at an average annual rate of over 100%. In the last 12 months alone, DBS subscribership grew 43% -- nearly 31 times as great as cable's growth rate in the last year. The DBS industry now serves over 7.6 million subscribers, or over 10% of all MVPD subscribers nationwide. Provision of video service by telcos is also growing steadily. For example, Ameritech has been authorized to serve more than 2.5 million homes; BellSouth has received cable franchises to serve over 1.2 million homes; the Southern New England Telephone Company, which has been acquired by SBC, has begun cable service and has plans to serve the entire state of Connecticut.

This growing and irreversible competition is both the basis for Congress' decision to sunset upper-tier rate regulation as of March 31, 1999 and a further independent reason why AT&T/TCI will be constrained from engaging in the type of inappropriate cross-subsidization suggested by Consumers Union and others.

Contrary to these commenters' assertions, AT&T has a compelling economic interest in restraining cable prices. AT&T's primary objective of the merger is to maximize its direct access to customer households in order to increase its ability to market competing local telephony and other services to those households. Embarking on an aggressive strategy to raise cable prices would clearly reduce the probability that a consumer would subscribe to (or maintain a subscription to) AT&T/TCI's cable service, thereby reducing AT&T's access to the home for the sale of telephony and other non-video services. Thus, the merger will actually increase, rather than decrease, AT&T/TCI's sensitivity to cable prices.[158]

D. Cable Inside Wiring And Navigation Device Rules

U S WEST asks the Commission to condition its approval of the merger on AT&T/TCI's willingness to be subject to the cable inside wiring and navigation device rules, even if these rules are overturned by the courts on appeal.[159] The Commission should waste no time rejecting this proposed condition. After the merger, AT&T/TCI, like all other cable operators, will comply with the Commission's rules on cable inside wiring and navigation devices. However, it is absurd to suggest that once a court determines that, for whatever reason, a set of Commission rules are impermissible, a single entity in the industry should continue to have to comply with such nullified requirements. This is particularly true in this case given that U S WEST does not even suggest, let

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[158] Consumers Union suggests that even though Congress has required that upper-tier rate regulation cease as of March 31, 1999, the Commission may implement such cross-subsidy rate rules based on its enduring evasion authority under Section 623(h). See Consumers Union, p. 9. But this is clearly incorrect. Section 623(h) provides the Commission with authority to adopt rules to prevent evasions "of the requirements of [cable rate regulation]." Once upper-tier rate regulation sunsets, there is nothing for the cable operator to "evade," and thus also no enduring evasion authority under Section 623(h) with respect to upper-tier rates.

[159] See U S WEST, pp. 47-48.

alone offer any evidence, that AT&T/TCI have acted improperly with respect to either of these sets of rules, such that their continued application to AT&T/TCI could somehow be viewed as uniquely warranted.

VI. THE MERGER WILL HAVE NO ADVERSE EFFECTS IN TELECOMMUNICATIONS MARKETS AT ALL, MUCH LESS ADVERSE EFFECTS THAT COULD OUTWEIGH THE ENORMOUS PUBLIC INTEREST BENEFITS THE MERGER WILL BRING TO THOSE SAME MARKETS.

Although the public interest benefits in bringing substantially increased competition to telecommunications markets are both powerful and undisputed (see supra Section II), a few commenters claim that the merger also will have other, adverse effects in telecommunications markets. These claims fall into three categories. First, some commenters express concerns about the potential violation of Section 20.6 of the FCC's rules, 47 C.F.R. § 20.6, caused by the aggregation of spectrum caused by AT&T's ownership of AT&T Wireless, Inc., and TCI's ownership interest in Sprint's PCS ventures. Second, some commenters contend that AT&T-TCI will be able to engage in unlawful tying arrangements, or otherwise obtain unfair competitive advantages by providing consumers with combined packages of services. Third, Sprint contends that the merger may disadvantage interexchange competition because it could have an adverse effect on the availability of alternative sources of exchange access.

None of these claims provide any basis for disapproving the merger. With respect to wireless service, as the Applicants have indicated, AT&T and TCI are willing to place TCI's ownership interest in Sprint's PCS ventures in a trust arrangement pending an orderly disposition of some or all of that interest that takes into account the need for TCI to honor its agreements with Sprint and for Sprint to raise capital from the public markets as necessary to build out its network and compete with AT&T in the provision of wireless services. The remaining claims of adverse effects are entirely groundless. AT&T and TCI have no intention to engage in unlawful tying arrangements, but do hope to be able to provide consumers with packages of services as well as individual services -- options whose availability will manifestly benefit consumers. And contrary to Sprint's claims, the merger plainly will help spur exchange access competition, not inhibit it.

A. AT&T Will Come Into Compliance With The Requirements Of Section 20.6 At The Time Of The Consummation Of The Merger Through The Use Of A Trust Arrangement Acceptable To The Commission.

As AT&T and TCI acknowledged in the Application, TCI currently holds interests in Sprint's personal communications service ("PCS") ventures that, when combined with the PCS and cellular interests held by AT&T Wireless, Inc., would result in a violation of Section 20.6 of the FCC's rules, 47 C.F.R. § 20.6 (the "Spectrum Cap").[160] AT&T and TCI indicated, however, that Sprint has commenced implementation of a restructuring. Following such restructuring, TCI's interest in the Sprint PCS ventures will be represented by shares of Sprint PCS "tracking stock." When completed, the Sprint restructuring will reduce TCI's interest in the Sprint PCS ventures to a 23.8 percent equity interest representing approximately 2 percent of the voting power of the outstanding Sprint PCS stock.[161] In the Application, AT&T and TCI indicated that they would bring themselves into compliance with the Spectrum Cap, depending on the timing of Sprint's restructuring and the consummation of the merger of AT&T and TCI, either by having TCI's ownership interest in the Sprint PCS ventures, which will be held by Liberty Media Group, diluted below the 20 percent ownership equity limit, or by placing the Sprint PCS stock in a trust acceptable to the FCC.

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[160] Application at 27-30.

[161] Under the terms and conditions of the restructuring and a proposed subsequent public offering, TCI's Sprint PCS equity interest would be further reduced to approximately 21 percent.

Three commenters have addressed the potential violation of the FCC's Spectrum Cap and the proposal by AT&T and TCI to come into compliance with the Spectrum Cap, requesting that AT&T and TCI make their plan more definite by clarifying the method they will use to come into compliance with the Spectrum Cap.[162] US WEST also seeks the imposition of certain conditions on the roaming policies of AT&T Wireless, Inc.[163]

Consistent with the Application, AT&T and TCI plan to place Liberty Media Group's interest in the Sprint PCS ventures into a trust arrangement that will have been submitted to, and approved by, the FCC and the Department of Justice ("DOJ"). The implementation of the trust arrangement approved by the FCC concurrent with the consummation of the merger will prevent a violation of the Spectrum Cap. The use of the trust arrangement will be particularly effective given the independent management and separate stockholder groups of Liberty Media Group and the AT&T Common Stock Group.[164]

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[162] See SBC, pp. 16-22; Sprint, pp. 4-9; US WEST, pp. 50-51.

[163] See US WEST, pp. 50-51. US WEST requests that AT&T Wireless be required to provide roaming on nondiscriminatory terms and conditions and provide roaming resale at the same rate AT&T offers to its own end-user customers.

[164] As described in the Application at 11-13 and 29, the Liberty Media Group will hold the financial interest in Sprint's PCS venture, while AT&T's Common Stock Group (or AT&T Consumer Services Company) will hold and manage AT&T's interest in AT&T Wireless. Regardless of whether the separate tracking stocks and separate management of these Groups do not require common attribution under the Spectrum Cap, given the use of the trust arrangement, the separation provides an added measure of protection against collusion with Sprint or any desire to benefit AT&T Wireless with a sale of a large block of Sprint PCS stock. First, the management of AT&T Wireless will not communicate with the management of Liberty Media Group regarding any remaining investment by Liberty Media Group in the Sprint PCS venture except as required to complete necessary regulatory filings. Second, the management of Liberty Media Group would not be serving the interests of the holders of its separate tracking stock if they deflated the price of the Sprint PCS stock in order to benefit AT&T Wireless, when the financial performance of AT&T Wireless did not directly benefit

(continued...)

AT&T and TCI, however, oppose the conditions that US WEST seeks to impose on roaming arrangements in connection with the adoption of the trust arrangement.[165] US WEST cites no authority for the proposition that it is appropriate to condition an application seeking Commission consent to the transfer of control of TCI's FCC licenses on offering nondiscriminatory terms and conditions for roaming on AT&T's CMRS systems, and no such precedent exists. The Commission has not imposed any such obligations in the notes accompanying its Spectrum Cap providing for nonattributable interests, 47 C.F.R. § 20.6,[166] nor has it imposed any such condition in any order approving a transfer of control or assignment of a license. The use of the trust arrangement proposed here, and any necessary orderly disposition of TCI's interest in the Sprint PCS stock, sufficiently eliminate the ability and incentive of the management of both wireless companies to use roaming agreements in an anticompetitive manner.[167]

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[164] (...continued)
Liberty Media Group tracking stock shareholders.

[165] See US WEST, p. 51.

[166] Any general action on the rules governing roaming agreements, urged by US WEST, AT&T, or any other carrier are better accomplished in a rulemaking of general inquiry that is applicable to all carriers and the subject of comment by all interested parties. See supra Section I. Here, for example, any condition affecting Sprint's PCS authorizations and systems would be inappropriate because Sprint's PCS authorizations are not the subject of the pending application.

[167] Finally, US WEST's request that the FCC mandate that AT&T Wireless, Inc., provide for roaming resale to third parties at the same rate that AT&T offers to its own end-user customers is unjustified. US WEST has not stated, much less shown, how the requested condition is required to alleviate any alleged problem posed by the merger. US WEST's request is devoid of any precedent supporting the such a condition, and its request for such a condition therefore should be denied.

B. Commenters' Claims Regarding The Provision Of Service Packages Are Meritless.

Some of the commenters contend that the merger would enable AT&T-TCI "to engage in the unlawful tying of services" by forcing its customers to purchase "tied" telephone and cable service.[168] This claim can be easily dismissed. Insofar as the commenters are concerned, as they assert, that the merged entity might in the future engage in conduct that violates the antitrust laws, not only is there no basis for such speculation, but any merger condition that requires AT&T and TCI to commit to comply with those laws would simply (and needlessly) duplicate legal obligations by which the parties are already bound. In all events, AT&T and TCI commit to having all their telephony services available on a stand-alone basis. The focus of this merger is on making more choices available to customers, not less.

Towards that end, AT&T and TCI do hope in the future to make packages of cable and telecommunications services available to their customers in addition to individualized services -- as at least one of these commenters concedes is and should be permitted.[169] GTE, however, appears to contend that the offering of such consumer-oriented services itself somehow represents a public interest detriment rather than a benefit of the merger. It argues (GTE, pp. 18-32) that AT&T-TCI will thereby be able to dominate an "emerging bundled services market" by providing

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[168] See GTE, pp. 40-41; see also Sprint, pp. 21-22; U S WEST, p. ii; MCI/WorldCom, p. 10.

[169] See MCI/WorldCom, p. 12 ("MCI/WorldCom does not contend that AT&T/TCI should be prohibiting [sic] from selling a package of all or some of these services to consumers who voluntarily choose to purchase each of them from AT&T/TCI. Nor does MCI/WorldCom take the position that AT&T/TCI should be prohibited from providing cost-based discounts to consumers who voluntarily choose to purchase more than one of its services").

packages of cable services, local telephony, and long distance services and by offering consumers forms of "one-stop shopping" that GTE says it cannot.

GTE's argument is particularly ironic. GTE has obtained enormous and improper advantages since the enactment of the 1996 Telecommunications Act by resisting opening its local markets to competition and taking advantage of its resulting position as the only carrier in its regions able to offer customers a combined package of local and long-distance telephony. In light of its continued bottleneck control over local telephony, its assertions (p. 32) that "[t]he emerging bundled services market is competitive; no service provider or class of providers can exercise market power" -- and that this merger will "impede" the competition that purportedly exists in that "market" (p. 18) -- has it exactly backwards. To the contrary, this merger provides the best prospects of opening to competition the local exchange markets, and any "bundled services markets" that include local telephony, which GTE and other incumbent LECs have kept so tightly closed.

In all events, GTE's argument here is baseless. To begin with, the Commission does not currently analyze mergers by reference to a "bundled services market." As the Commission reaffirmed two months ago, while such a market may emerge in the future, it does not exist today.[170] And that fact underscores one of the most obvious reasons why GTE's concern that AT&T-TCI will be able to provide a unique package of cable and telephony services is groundless.

The reality is that AT&T and TCI cannot offer a package of cable and telephony services today, and will not be able to offer such a package over cable facilities the day after this

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[170] See MCI/WorldCom Order, ¶ 22 n.60 ("Although we have determined that these four services [domestic long distance, international long distance, Internet backbone, and local exchange and exchange access services] are the only services relevant to the instant proceeding, we expect that bundled service may, in the future, become a distinct and relevant product market").

merger is consummated. To the contrary, it will take time and resources before the upgrades to TCI's facilities will be completed and AT&T-TCI will be able to offer the local telephony component of such a package. In that same time period, GTE, if it wishes to offer comparable packages, can likewise invest resources in developing video programming services. Indeed, Ameritech, for one, has chosen to invest in such ventures; "[i]t appears that LECs will adopt different approaches depending on their varying business strategies";[171] and the statute includes provisions affirmatively designed to encourage such investments.[172] If, as GTE contends (pp. 23-25), packaged offerings would be popular with customers, then a merger that creates competition in the provision of such packages by enabling AT&T and TCI to offer them, and by spurring GTE and other carriers to create comparable packages themselves, will powerfully serve the public interest. See MCI/WorldCom Order, ¶ 9 (public interest analysis includes assessment of whether the merger will "result in the provision of new or additional services to consumers").[173]

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[171] See Fourth Annual Report, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, 13 FCC Rcd. 1034, ¶ 119 (1998).

[172] See, e.g., 47 U.S.C. § 573 (open video systems); 47 U.S.C. § 541(a)(1) ("a franchising authority may not grant an exclusive franchise and may not unreasonably refuse to award an additional competitive franchise"). At the same time, although it has extensively amended the cable laws in recent years, Congress has not, in contrast to its treatment of cable telephony, adopted any "cable resale" requirement. If the Commission were ever to consider the far-reaching suggestions of two commenters that it adopt such a requirement as a regulatory matter, it could properly do so only in a rulemaking proceeding in which the entire industry could participate, in which a complete record could be compiled, in which the important issues of law, policy, and statutory authority could be fully explored on a complete record, and in which any resulting rules could be applied to all market participants. See SBC, p. 14; US WEST, pp. 31-32.

[173] U S WEST's comparable complaint (p. 14) that it cannot offer a full package of services because Section 271 presently bars it from providing in-region long distance services likewise describes a situation that is wholly of U S WEST's own making and that is within U S WEST's power to change. See Memorandum Opinion and Order, Application of BellSouth Corporation, BellSouth

(continued...)

C. The Merger Will Promote, Not Impede, Exchange Access Competition.

Sprint claims that the merger between AT&T and TCI will create a vertically integrated entity with "ability to adversely affect competition in the downstream residential mass market,"and that the merger therefore "may have serious anticompetitive effects."[174] It is surprising that Sprint -- which itself already enjoys the vertical integration that it challenges here -- would make this claim. At any rate, its claim is baseless.

As the Commission has long recognized, "[v]ertical effects that harm competition generally depend on the vertically integrated firm possessing market power in an upstream 'input' market."[175] That is because it is such market power that would allow the combined firm to "harm consumers through increases in prices, decreases in quality, or a reduction in alternatives in end-user markets." Id. TCI, however, is a new entrant that is seeking to provide local exchange and exchange access services in competition with the existing LEC monopolists. There can be no serious claim therefore that TCI's future alternative access facilities will give it market power in "upstream" local exchange or exchange access markets. Rather, it is only the incumbent LECs that possess such

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[173] (...continued)
Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 98-121, p. 9 (October 13, 1998) ("BOCs hold the keys of their success with respect to section 271 approval in their own hands"). If this merger provides U S WEST and other BOCs with further incentives to satisfy the market-opening requirements of the Communications Act in order to obtain interLATA authority, that will provide yet another public interest benefit of the transaction.

[174] Sprint, pp. 10, 14.

[175] See Memorandum Opinion and Order, Merger of MCI Communications Corp. and British Telecommunications PLC, 12 FCC cd. 15351 (1997), ¶ 154 (emphasis added).

market power. That should be the end of the matter with respect to the potential adverse vertical effects analysis.

Sprint's analysis likewise ignores that once AT&T/TCI begin providing telecommunications services, it will be fully subject to the Section 201 and Section 202 prohibitions against unreasonable practices and unreasonable discrimination, as well as the Section 251(a) and Section 251(b) interconnection and dialing parity requirements. More fundamentally, following the merger, AT&T will remain predominantly a long distance carrier. It will continue to desire access to local networks and exchange access facilities around the country on favorable terms and it will continue to have every incentive to increase pressure on access charges, AT&T's single highest long distance input cost. With $45 billion in long distance revenue compared to only $500 million in local revenues, it will remain in AT&T's best interest for the foreseeable future to continue applying downward pressure on access rates.

Moreover, it is difficult to imagine how the merged companies could profitably employ the strategy posited by Sprint. Sprint ignores that TCI does not control any bottleneck exchange access facilities. <u>All</u> of TCI's local facilities are subject to direct competition from one or more incumbent local exchange carriers, competitive access providers, and competitive local exchange carriers. If TCI attempted to limit its customers' long distance choices, it would not only forego access revenues, but also lose end-user customers to competing access providers that did not limit customer choice in that manner. AT&T could not hope to make up these losses in the long distance market, because in every case its long distance competitors could make alternative access arrangements.[176]

In short, Applicants will have strong economic incentives to encourage maximum utilization of their network facilities, in order to have as large a market as possible from which to recover their operating costs. Indeed, because AT&T's and Sprint's incentives with respect to access are largely aligned, the proposed merger should, if anything, enhance Sprint's access to competitive access facilities by increasing TCI's financial resources and allowing it to build more such facilities.

In all events, if at some point in the future AT&T engages in any telecommunications service practice that Sprint believes is unreasonably discriminatory (or otherwise unlawful), it can ask the Commission to investigate that practice and, if appropriate, devise a remedy, in the context of a section 208 complaint. It is precisely that authority that has led the Commission recently to reject similar across-the-board restrictions on competitive access providers. See Access Charge Reform Order ¶ 363 ("if an access provider's service offerings violate section 201 or section 202 of the Communications Act, we can address the issue . . . through the exercise of our authority to investigate and adjudicate complaints under section 208").

In this regard, Sprint further complains that "AT&T's provision of local service can be expected to increase over time and [] AT&T . . . will have monopoly control over the provision of access to its own local subscribers."[177] Sprint itself concedes, however, that that form of "control" is possessed by every "other local carrier" as well -- including Sprint. To the extent therefore that

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[176] The same cannot be said of most customers served by incumbents such as Sprint, which continue to be the sole access providers to many locations.

[177] See Sprint, p. 16.

Sprint is concerned about the ability of LECs to charge excessive access prices and to seek to impose those charges on IXCs,[178] that concern can, and should, be addressed in an industry-wide proceeding.[179] Sprint's concerns, however, provide no basis whatsoever for denying or conditioning the requested license transfer.

Indeed, the AT&T-TCI merger presents , if anything, even lower risk of vertical integration dangers than the AT&T-TCG merger that the Commission recently approved, and in which it rejected precisely this very claim. See Memorandum Opinion and Order, ¶ 42, AT&T/Teleport Merger, FCC 98-169 (released July 23, 1998). At the time AT&T acquired TCG, TCG was already actively providing exchange access services. Sprint there argued that the merger involved the acquisition of an existing competitive access provider. By contrast, TCI is at most a potential future entrant into the market for exchange and exchange access service. That is why the most Sprint will say is that "if properly configured, cable facilities provide a possible alternative . . . for the provision of local and exchange access services."[180] Sprint ignores, however, that TCI would be unlikely to enter the local exchange market on any nontrivial basis unless its merger with AT&T is approved. The net effect of this merger, therefore, will be to increase, not decrease, the competitiveness of the exchange access market.

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[178] See Sprint p. 17.

[179] See, e.g., AT&T's Petition for Declaratory Ruling, Interexchange Carrier Purchases of Switched Access Service Offered by Competitive Local Exchange Carriers.

[180] See Sprint, p. 11 (emphasis added).

VI. THE MERGER DOES NOT VIOLATE SECTION 652(a) IN ANY AREA OF THE COUNTRY.

GTE briefly asserts that the AT&T/TCI merger would violate Section 652(a) of the Communications Act in certain unspecified areas of the country. Section 652(a) prohibits certain acquisitions by local exchange carriers of cable operators that are "providing cable service within the local exchange carrier's telephone service area."[181] The Act defines "telephone service area" as "the area within which such carrier provided telephone exchange service as of January 1, 1993."[182] GTE states that this merger would violate Section 652(a) because GTE "believes that TCG, which AT&T recently acquired, provided telephone exchange service in certain TCI markets [as of January 1, 1993]."[183]

GTE's belief is mistaken, and it has also misconstrued the statute. Each of these errors independently establishes that its Section 652(a) claim is invalid.

First, notwithstanding GTE's unsupported contrary belief, TCG's first reciprocal compensation agreement (with New York Telephone) was not signed until June 1994, and thus TCG did not obtain peer status as a local exchange carrier until that date. The only local switched services TCG provided as of January 1, 1993 were through the resale of NYNEX dial tone services in New York City, but since New York City is not within the service area of any TCI cable system the statute is not implicated at all. Thus even under GTE's view of the law, that disposes of GTE's claim.

Second, and in any event, GTE's view of the law is erroneous. The statute's focus on

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[181] See 47 U.S.C. § 572(a).

[182] See 47 U.S.C. § 572(e).

[183] See GTE, p. 12.

local exchange carriers that provided service on January 1, 1993, indicates that Congress was concerned solely with preventing mergers between incumbent LECs and the existing in-region cable operator. By contrast, mergers between a cable operator and a CLEC, for example, are permissible because such arrangements would not undermine the statutory goal of two-wire competition.

This interpretation of the statute is consistent with the prior Commission practice of permitting non-incumbent LECs to merge with cable operators notwithstanding the broad language of the now-defunct cable-telco cross-ownership ban. Section 652 was adopted to replace the cable-telco cross-ownership ban imposed by prior Section 633(b)(1).[184] Section 633(b)(1) prohibited common carriers from providing video programming within their "telephone service area."[185] Despite the facial applicability of the ban to any "common carrier," the Commission limited the ban only to traditional landline local exchange telephone companies that possessed monopoly control over local bottleneck facilities.[186] It further held that common carriers that "do not provide service by means of such facilities ... do not have 'telephone service areas' within the meaning of the ban and, therefore, are not subject to it."[187]

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[184] See S. Rep. No. 104-230, at 171-74.

[185] See 47 U.S.C. § 533(b) (1) (1994) (repealed by Telecommunications Act of 1996, § 302, 110 Stat. 56, 124).

[186] See Memorandum Opinion & Order, In re Application of Teleport Communications -- New York for Transfer of Control of Stations WLU372, WLW316 and WLW317 From Merrill Lynch Group, Inc. to Cox Teleport, Inc., 7 FCC Rcd 5986, at ¶ 15 (1992) ("Teleport MO&O"); In re Telephone Company-Cable Television Cross—Ownership Rules, Sections 63.54 - 63.58, Further Notice of Proposed Rulemaking, First Report & Order, and Second Further Notice of Inquiry, 7 FCC Rcd 300, at ¶ 46(1991) ("Video Dialtone Order"); Letter Ruling on a Petition for Declaratory Ruling Filed by Twixtel Technologies, Inc., 5 FCC Rcd 4547, at 4548 (1990) ("Letter Ruling").

[187] Letter Ruling, 5 FCC Rcd at 4548; see also Video Dialtone Order, 7 FCC Rcd at ¶ 46 ("[W]e
(continued...)

The policy behind Section 652 reflects Congress's continuing concern about monopoly control over bottleneck facilities. By preventing two incumbent networks from buying each other out, Congress envisioned each of the established networks competing in both the local exchange and video programming businesses. Section 652(a)'s policy rationale does not apply in the case of a CLEC's acquisition of an in-region cable operator because CLECs do not possess monopoly control over such bottleneck facilities. Thus, even if TCG had offered telephone exchange service as of January 1, 1993, in a TCI area (as it did not), Section 652(a) would not be implicated.

CONCLUSION

The applications seeking approval of the transfer of control of FCC authorizations held by subsidiaries of TCI and entities controlled by TCI to AT&T should be granted.

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[187] (...continued)
have consistently held that when telephone common carriers . . . do not control essential exchange facilities such as poles and conduit, the concerns about exclusionary conduct which underlie the [cross—ownership] rules are not implicated."); Teleport MO&O, 7 FCC Rcd, at ¶¶ 15-16 (The cross-ownership ban of Section 633(b)(1) was enacted based "on the judgment that cable television companies could be prevented from fair access to poles and conduits they needed to bring service to consumers by telephone companies which had monopoly control of these bottleneck facilities . . . . The Commission has limited the [telephone/cable cross-ownership] ban to traditional landline local exchange telephone companies with monopoly control of bottleneck facilities" (emphasis added)).

Congress has long been aware of the Commission's interpretation of the cable-telco cross-ownership ban. See Saxbe v. Bustos, 419 U.S. 65, 74 (1974). Moreover, the fact that Section 652(e) of the 1996 Act used the term "telephone service area" in connection with Section 652(a)'s prohibition suggests that Congress meant to incorporate the foregoing Commission precedent which construed the term as being limited to ILECs, and not CLECs.

Respectfully submitted,

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A

APPENDIX A

COMMENTS AND PETITIONS

1. Comments of America Online, Inc. ("AOL")

2. Comments of Ameritech

3. Communications Workers of America ("CWA")

4. Comments Of The Consumer Electronics Manufacturers Association ("CEMA")

5. Petition To Deny Of Consumers Union, Consumer Federation of America, and Office of Communication, Inc. of the United Church of Christ ("CU/CFA")

6. Comments of DIRECTV, Inc. ("DIRECTV")

7. Comments of Echostar Communications Corporation ("Echostar")

8. Comments In Opposition of GTE ("GTE")

9. Comments of MCI WorldCom, Inc. ("MCI WorldCom")

10. Comments of MindSpring Enterprises, Inc. ("MindSpring")

11. Comments of the National Association of Broadcasters ("NAB")

12. Comments of Qwest Communications Corporation ("Qwest")

13. Comments of SBC Communications Inc. ("SBC")

14. Petition to Deny of Seren Innovations, Inc. ("Seren")

15. Comments of Sprint Corporation ("Sprint")

16. Petition Of US West To Deny Applications Or To Condition Any Grant ("US WEST")

17. Joint Comments And Request For Imposition Of Conditions of The Wireless Communications Association International, Inc., and Independent Cable And Telecommunications Association ("WCAI/ICTA")

Declaration of Professors Janusz A. Ordover and Robert D. Willig

1. I (Janusz A. Ordover) am a Professor of Economics and Director of the MA Program at New York University, New York City, NY 10003.
2. I received my Ph.D. in Economics with the Highest Distinction from Columbia University in 1973. Since that time, I have engaged in extensive research in industrial organization economics and regulatory and antitrust economics. My writings on this subject have been published in numerous journals and books. In recognition of my work in this area, I was asked to serve as the Deputy Assistant Attorney General for Economics in the Department of Justice (1991-92). In that position, I led many merger reviews that employed and developed methodologies to define relevant markets in merger and other cases. I also have extensive experience in the analysis of competitive effects of business strategies, including tying and bundling.
3. I have been actively involved in the formulation of public policy in the telecommunications sector. In particular, on behalf of AT&T, I have submitted written and oral testimony to the Federal Communications Commission and to the state regulatory commissions in the mid-West, New England, and New York, on a number of issues, including the pricing of unbundled network elements and access to ILEC bottleneck facilities. My complete *curriculum vita* is attached as exhibit JAO-1.
4. I (Robert D. Willig) hold the position of Professor of Economics and Public Affairs at Princeton University, where I teach in the Economics Department and in the Woodrow Wilson School of Public and International Affairs. I served as Deputy Assistant Attorney General in the U.S. Department of Justice, Antitrust Division, from 1989 to 1991. Before joining the Princeton faculty in 1978, I was Supervisor in the Economics Research Department of Bell Laboratories. I received my Ph.D. in Economics from Stanford University in 1973, an M.S. in Operations Research from Stanford in 1968, and an A.B. from Harvard in 1967.
5. I have written, lectured and consulted widely on the subjects of industrial organization, the relationships between government and business, and domestic and international microeconomic policy. I was formerly a member of the Research Advisory Council of the American Enterprise Institute, a Member of the New Jersey Governor's Task Force on the

Market Pricing of Electricity, a Member of the Department of Defense Task Force on Defense Industry Consolidation, and a member of the editorial boards of the American Economic Review, the Journal of Industrial Economics, and the MIT Press Series on Regulation. I am an Associate of the Center for International Studies, and an elected Fellow of the Econometric Society.

6. I have been especially active in both theoretical and applied analysis of telecommunications issues. Since leaving Bell Laboratories, I have been a consultant to AT&T, Bell Atlantic, Telstra and New Zealand Telecom, and have testified before the U.S. Congress, the Federal Communications Commission, and the Public Utility Commissions of about a dozen states. I have been on governmental and privately supported missions involving telecommunications throughout South America, Canada, Europe, and Asia. I have written and testified on such subjects within telecommunications as the scope of competition, end-user service pricing and costing, unbundled access arrangements and pricing, the design of regulation and methodologies for assessing what activities should be subject to regulation, directory services, bypass arrangements, and network externalities and universal service. I have testified many times before the Federal Communications Commission in its process of promulgating rules to implement the Telecommunications Policy Act of 1996.

I. Summary of Main Conclusions.

7. We were asked by AT&T to respond to the main economic conclusions in the two Declarations filed by Professor Jerry A. Hausman on behalf of America On Line ("AOL"). We were also asked by AT&T to examine whether it would be in the public interest at this time to subject TCI's broadband "last mile" data transport to regulation that would force TCI/AT&T to offer access to its broadband last mile transport facilities on non-discriminatory and regulated terms to all potential customers, including competitors. (We shall use the term "common carrier" regulation for this sort of regulation here, although we recognize that this term has other meanings in other contexts.)

8. Our main conclusions are as follows:

   - It would be against the public interest to subject the parties' last mile broadband data transport facilities to any form of regulation at this time. It is against the public interest to impose "common carrier" obligations on TCI's broadband transport as a condition for approving the transaction because there is no reason to believe that TCI will have long-run monopoly power in the provision of the relevant services and there is no reason to believe that TCI would have incentives and ability to abuse any such monopoly power.

- Broadband last mile data transport over cable networks is a nascent technology whose success in the market place is far from assured. Consequently, imposing heavy-handed common carrier regulation on TCI could stymie the development of the technology.
- In the absence of regulatory oversight, AT&T/TCI may well have appropriate private incentives to enter into commercial negotiations with ISPs and OSPs to implement efficient access to its fast data transport facilities. Moreover, antitrust laws can provide an effective check on TCI's pricing to the ISPs and OSPs, to the extent that such a check may be required to advert monopolization.
- "Common carrier" obligations are not necessary because AT&T/TCI does not have monopoly power in providing access to the Internet. Contrary to Professor Hausman, there is no evidence that broadband last mile data transport and narrowband last mile transport are in separate "antitrust" markets. Statistical analyses performed by Professor Hausman that purport to prove that broadband transport constitutes a separate antitrust market are poorly specified, inadequately described, and seemingly inapposite. It appears that these analyses may in fact contradict Hausman's key conclusion regarding the relevant market. Other available facts indicate that narrowband last mile transport competes directly with broadband last mile data transport.
- TCI is likely to be constrained by competition even within the unrealistically confined domain of broadband last mile data transport services. The future structure of broadband supply has not yet been determined. There are many likely competitors, including the ILECs, that are actively developing broadband transport services. It is wrong to base regulatory policy formulation on the unsubstantiated assumption that TCI will enjoy long-run monopoly power in the provision of broadband transport, and that it will have the ability and the incentives to abuse whatever power it may have.
- It is impossible to predict today what will prove to be, even in the next few years, the most effective, popular and profitable format and architecture for broadband service offerings. If it turns out that the most commercially desirable offering for TCI/ATT entails ISPs and OSPs having to "go through" @Home in order to provide their services,

it does not follow that such a policy would harm competition in the provision of Internet content or other Internet services.

- The assertion that such a policy would force subscribers to "pay twice" for content -- to @Home and also to AOL, for example -- is not grounded in sound economic analysis. Such an assertion is meaningless rhetoric without a standard of comparison, which includes a view of the hypothetical price that TCI would set for broadband transport alone, without content. Professor Hausman suggests that TCI should be allowed to charge any price it wants for transport. If so, then TCI would likely only choose to bundle @Home if it would be beneficial to subscribers, and thereby profitable for TCI. In this case, subscribers would find it less expensive and more desirable to access AOL through @Home than through any alternative unbundled arrangements. If, instead, TCI would choose not to bundle @Home, it would be the result of an assessment that TCI could earn greater returns on its investment in broadband from access fees alone, to be paid by subscribers to AOL, among others. The fact of the matter is that while Professor Hausman is (correctly) espousing the principles of efficient component pricing, AOL is advocating regulated prices for TCI's broadband offerings, at below-compensatory levels.

We develop those points more fully in the rest of our Declaration.

II. Broadband and Narrowband Last Mile Data Transport are Competing Products.

9. There are several undisputed advantages that broadband data transport over cable has in comparison with the traditional narrowband service. The first advantage is speed and bandwidth of transmission. The second advantage is that the connection to the Internet is "always on." However, the facts suggest that many consumers would find the combination of purchasing a LEC phone line in conjunction with dial-up internet access service more attractive than the integrated internet service provided by TCI (or any other cable company that upgraded its cable distribution system). Traditional dial up modem service is generally less expensive than TCI's @Home service, and uses customers' existing premises equipment (CPE).[1] Moreover, as AOL notes, (AOL comments, p. 32), purchasers of TCI's @Home service cannot use that service to access the internet or use e-mail from remote locations.

[1] Customers who have already purchased a modem may not wish to discard that modem and purchase or lease a cable modem instead.

Finally, when customers choose to purchase a second phone line to use with a dial-up modem service, those customers can obviously use that second line for regular voice communication, as well as for a fax. By contrast, consumers who purchase TCI's internet service instead cannot use that capability to make phone calls, hook up a fax machine, or dial up to an employer's server.

10. Indeed, actual marketplace evidence appears to support the conclusion that narrowband service is an attractive substitute to broadband services for many consumers. We understand that although the "base of homes with access to two-way upgraded plant" who can therefore order @Home's programming today now stands at 10 million homes, @Home itself reports an overall penetration rate of only 2.1% as of September 30, 1998. (Mullion Aft., Page 2.) That is, only 210,000 homes out of 10 million have subscribed to cable modem service today. Id. By contrast, approximately 29 percent of all homes nationwide subscribe to some form of internet access service.[2] Thus, we can presume that approximately 2.9 million households in @Home's upgraded distribution area subscribe to internet service, as compared with 210,000 using internet cable service. This is solidly consistent with the surmise that, at the present time, narrowband is a successfully close demand substitute for broadband service.

11. Public statements by AOL reveal judgments about consumer demand that are indicative of the same conclusion. We understand that AOL's chief executive officer has predicted that in “five years” "seventy-five percent of the market will be narrowband because people want it to be as easy and inexpensive as possible."3 We are likewise aware that AOL's Vice President and General Counsel, George Vradenburg, has publicly stated that the vast majority of AOL's customers have no need for access at speeds that are any greater than 28.8 kbps, and that AOL can take other steps (such as caching) to satisfy those customers who desire higher speed. Vradenburg likewise opined that in contrast to available narrowband offerings, broadband involves "pretty high" installation costs, are "pretty difficult" to install, and that customer demand for these high-priced alternatives is price sensitive.[4]

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[2] The Forrester Report Volume 4, Number 9, January, 1998, page 6, Figure 3.

3 Power Lunch, Television Interview with Stave Case (CNBC Broadcast, September 28, 1998).

[4] See Transcript of panel discussion between Peter Huber, moderator, and George Vradenburg, AOL, at Aspin Summit '98 (Cyberspace and the American Dream), August 25, 1998.

12. These judgments about demand add up to the conclusion that there is and will continue to be a great deal of demand cross-elasticity and opportunities for substitution between the two modes of transport, specifically for users of AOL, as well as for other consumers, for the foreseeable future. These are exactly the principal indicators that broadband access does not constitute a relevant market by itself, and that narrowband access must be included in the same relevant market for the assessment of whether TCI/AT&T would possess monopoly power and have the opportunity and incentive to monopolize by means of anticompetitive practices.

Peter Huber, Moderator:

How does the bandwidth situation look from AOL's perspective?

George Vradenburg, Senior Vice President and General Counsel of AOL:

Well the market is about 25 million households. It is growing about 5 to 7 million a year. Consumers are continuing to sign on in somewhat of an excess of an average 28.8 kilobits; we are seeing that most of that, virtually 99% of that, is narrowband services and so customers are continuing to sign up and they are using the service. It went from about 12 minutes a day a few years ago to 45 minutes today. So their average usage, even as the growth in the number of consumers is going up, their average use is going up. Most of the applications are E-mail or chat or access to information, and only to a limited extent do they go to the web, and to the extent that we have a little problem in performance on the web, we do a lot of caching to compensate for that . So basically in terms of the growth of our business, there's sort of not a wall that we are seeing in terms of access.

Peter Huber, Moderator:

No bandwidth crisis at all! This is going to be a short panel. You foresee a crisis coming or are we in good shape?

George Vradenburg:

I think we have an opportunity coming down the pike, but for all the reasons that were described by Mr. Trujillo, there are a lot of new applications that are potentially available on high-speed connections, and I think the question is whether or not those high-speed bandwidth services are going to get rolled out. We're not seeing them rolled out very quickly now. They're going very, very slowly. There's a price sensitivity. There's still a technology uncertainty. There are still penetration doubts. As I say, the cost to install is still pretty high; pretty difficult. So we're seeing a fairly slow roll out on the high-speed pipes so far.