

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

In the Matter of)	
)	
GTE Corporation, Transferor)	CC Docket 98-184
And)	
Bell Atlantic, Transferee)	
For Consent to Transfer of Control)	

**COMMENTS OF
THE PROGRESS & FREEDOM FOUNDATION**

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I. Introduction and Summary

The Progress & Freedom Foundation ("PFF" or "the Foundation") is a private, non-profit research institution established in 1993 to study the digital revolution and its implications for public policy. PFF respectfully submits these comments in response to filings in the FCC's examination of the proposed merger of Bell Atlantic and GTE. Through its research and the expertise of its Senior Fellows and Staff, the Foundation has accumulated a substantial body of information and analysis relevant to the issues addressed in this proceeding.

The Foundation's research and analysis has focused especially on issues associated with digital broadband communications, especially the impacts of regulation on investment in and deployment of digital broadband networks.¹ Accordingly, the Foundation's comments in this proceeding focus on the impact of the subject merger on the broadband marketplace and, more broadly, on the context within which the FCC should view proposed mergers which might affect that marketplace. Specifically, these comments assert: 1) rapid deployment of affordable broadband telecommunications services is essential to continued economic prosperity; 2) the instant merger, and similar mergers now underway, are motivated by efficiency considerations associated with telecommunications convergence generally and the rapidly developing market for broadband services in particular; 3) the market for broadband communications is extraordinarily competitive; and, 4) the Commission should forebear from a broad, "public interest" style review of this and similar mergers. It should instead grant swift and essentially

¹ See especially Comments of The Progress & Freedom Foundation, CC Docket 98-146, September 14, 1998; see also Jeffrey A. Eisenach, Testimony Before the Subcommittee on Communications, Committee on Commerce, Science, and Transportation, United States Senate, (April 22, 1998); Jeffrey A. Eisenach, "Into the Fray: The Computer Industry Flexes Its Muscle on Bandwidth," *Progress on Point* 5.9 (December 1998); and, Donald W. McClellan, Jr., Esq., "A Containment Policy for Protecting the Internet from Regulation: The Bandwidth Imperative," *Progress on Point* 4.5 (August 1997).

unconditional approval to mergers that promise more rapid deployment of affordable digital broadband services.

II. Rapid Deployment of Affordable Broadband Telecommunications Services is Essential to Continued Economic Prosperity

Testifying before Congress in February of this year, no lesser authority than Federal Reserve Board Chairman Alan Greenspan stated that "our economy has been experiencing a higher growth rate of productivity -- output per hour worked -- in recent years. The dramatic improvements in computing power and communication and information technology appear to have been a major force behind this beneficial trend."²

Growth in the digital economy is indeed driving American prosperity, and bandwidth -- provided by digital broadband networks -- is the *sine qua non* of continued expansion.

In April of 1998, the U.S. Department of Commerce issued the Federal government's first comprehensive assessment of the impact of the information technology sector on the economy.³ The study concluded that "Between 1992 and 1997, [information technology] industries contributed over one quarter of the real growth in the economy" -- and 41 percent of real growth in 1995, the last year for which final data were available.⁴ Furthermore, "Inflation in 1997, as

² "Monetary Policy Testimony and Report to Congress," Testimony of Alan Greenspan, Chairman, Board of Governors of the Federal Reserve System Before the Subcommittee on Domestic and International Monetary Policy of the Committee on Banking and Financial Services, U.S. House of Representatives, February 24, 1998. Available at <http://www.bog.frb.fed.us/boarddocs/hh/9802test.htm>. The full quotation is worth reading. "As I noted earlier, our nation has been experiencing a higher growth rate of productivity--output per hour worked--in recent years. The dramatic improvements in computing power and communication and information technology appear to have been a major force behind this beneficial trend. *Those innovations, together with fierce competitive pressures in our high-tech industries to make them available to as many homes, offices, stores, and shop floors as possible, have produced double-digit annual reductions in prices of capital goods embodying new technologies.* Indeed, many products considered to be at the cutting edge of technology as recently as two to three years ago have become so standardized and inexpensive that they have achieved near 'commodity' status, a development that has allowed businesses to accelerate their accumulation of more and better capital." [Emphasis added.]

³ Lynn Margherio, et al, *The Emerging Digital Economy* (Washington, DC: U.S. Department of Commerce, 1998).

⁴ Margherio, p. A1-5.

measured by prices in the overall economy, was 2.0 percent. Without IT industries keeping prices down, inflation would have been 3.1 percent."⁵ The study goes on to detail myriad ways in which the digital revolution is contributing to prosperity, from reducing barriers to entry to creating high-wage jobs.

If anything, the Department of Commerce's estimates may be conservative. Indeed, estimates of the impact of the digital revolution on the economy, no matter how aggressive, typically have been outpaced by actual results. In this context, a recent report by Forrester Research estimating that the overall volume of Internet commerce will reach \$1.8 to \$3.2 *trillion* in 2003, representing nearly five percent of all global sales, seems quite plausible.⁶

To achieve continued growth in the digital economy, however, and to capture the tremendous benefits that would result, requires the rapid deployment of affordable digital broadband telecommunications services to homes and businesses. This fact was recognized just last month in the report of the Administration's Working Group on Electronic Commerce:

The Administration believes that *deployment of the advanced broadband networks of the future is critical for our nation's economic prosperity*. We support open and vigorous competition as the principal means of developing the infrastructure necessary for electronic commerce utilizing all the available telecommunications technologies -- wireline, cable, wireless terrestrial and satellite.⁷

As the Department of Commerce explained in its *Emerging Digital Economy* report,

A fast/high bandwidth connection can make a vast difference in a person's willingness to access products and services electronically. An Internet user probably will not spend 46 minutes waiting for a 3.5 minute video clip (approximately the amount of video represented by a 10 megabyte file) to download, but would wait if it took only a minute or a few seconds to download the same file. *Thus, the bandwidth of a consumer's connection to the Internet is a*

⁵ Margherio, p. A1-6.

⁶ "Forrester Estimates Worldwide Internet Commerce Will Reach as High as \$3.2 Trillion in 2003," Forrester Research, November 5, 1998.

⁷ U.S. Government Working Group on Electronic Commerce, First Annual Report, November 1998, p. 25. [Emphasis added.]

*prime determinant of the products and services that can be delivered electronically.*⁸

The Commission is no stranger to the digital economy. Indeed, one of its own, Kevin Werbach, authored one of the most authoritative papers on the topic. Importantly, Werbach explained that growth of the digital economy is the result of a "virtuous cycle," in which innovations in one arena lead to advances which, in turn, permit further innovations in other areas: "Some supply factors (such as the availability of higher-capacity networks) permit an expansion of demand (for example, by allowing bandwidth-intensive services such as high-resolution video transmission). Like a digital tornado, the vortex continues, as the new level of demand creates the need for additional capacity, and so forth."⁹

Increasing the availability of affordable bandwidth is an essential link in the cycle of growth upon which all Americans depend for income, purchasing power and jobs. In considering mergers where the market for broadband communications is a factor, the Commission must recognize that actions to promote continued growth in this market are essential to fulfill its broad statutory obligation to "promote the public interest."

III. The Instant Merger, and Similar Mergers Now Underway, Are Motivated By Efficiency Considerations Associated With Telecommunications Convergence Generally and the Rapidly Developing Market For Broadband Services in Particular.

Today's market for telecommunications is characterized by extraordinarily rapid technological change. Technological convergence is an inescapable result of the digital revolution. Once information is converted into digital bits and bytes, the medium over which it is carried becomes virtually irrelevant. Phone conversations can travel over the coaxial cable

⁸ Margherio, p. A2-12. [Emphasis added.]

⁹ K. Werbach, FCC Office of Plans and Policy, OPP Working Paper No. 29, *Digital Tornado: The Internet and Telecommunications Policy* pp. 4-5 (Mar. 1997).

used for cable television as easily as over the fiber or copper wires of the phone companies.

Data, TV programs and video conferences can (and do) get to consumers through a wide variety of previously distinct telecommunications media.

Increasingly consumers are looking to purchase their communications services as a package. Through cable modems offered by the cable companies, wireless services offered by Teligent or Winstar, or ISDN/xDSL services offered by both ILECs and CLECs, they can buy a package of voice, video and data services that meets their particular needs at the lowest possible cost. As a result, the fractionated market in which there were voice companies (long distance and local), data companies, wireless companies and video companies simply will not exist in a few years. These old markets are dying and a new one, for communications services, is being born.

Not surprisingly, this technological revolution is causing telecommunications providers to fundamentally re-think and re-make their business strategies. As they do so, they find that their existing asset configurations are no longer efficient. As a result, the pace of acquisitions and divestitures has increased dramatically, as companies seek to create the mix of assets best suited to competing in this new technological environment.¹⁰

Importantly, the environment itself remains in the midst of a transformation, the duration and outcome of which cannot at this juncture be known. The technologies themselves are changing rapidly, and business decisions must be made in the context of "best-guess" predictions about future developments and cost structures. Market acceptance of the services now being

¹⁰ In 1996, telecommunications mergers topped \$100 billion in value; 1997 followed with more than \$90 billion in deals. P. Truell, Buoyant Stock Market Keeps Mergers in Pipeline, N.Y. Times, Jan. 5, 1998, at D3. While final figures are not available for 1998, it is clear that this year will exceed all previous years by a substantial margin.

offered is only now being tested, and it remains unclear which types of services, or bundles of services, will prove most attractive to consumers.¹¹

In the instant proceeding, and in the parallel proceedings regarding AT&T/TCI and SBC/Ameritech, the Commission must determine whether it will permit the telecommunications business to respond rapidly and efficiently to the demands of technological and marketplace transformation, or whether it will use its authority over mergers as a barrier to such restructuring.

As part of its determination, the Commission may ask whether the current merger wave is driven primarily by technology and marketplace changes, as opposed to efforts by the merging parties to preserve or extend their market power, as some of the parties in this proceeding contend.¹²

The question of whether market power exists in the market for broadband communications is addressed in the following section. In this section, we examine the efficiency claims made in this and other current mergers.

A. Efficiency Effects of the Bell Atlantic/GTE Merger: The merger of Bell Atlantic and GTE appears on its face to create substantial potential efficiencies, in four ways.

First, the merger will reduce the costs of entering new markets. Bell Atlantic and GTE serve complementary markets.¹³ Bell Atlantic serves a highly urban, business-intensive market in the Northeastern United States, while GTE serves a widely dispersed national market focused on suburban and rural customers. Each company has announced its intention to compete in new service areas. By providing facilities, personnel, familiarity with the regulatory process and

¹¹ For a detailed analysis of the emerging marketplace for broadband communications, see Comments of The Progress & Freedom Foundation, CC-Docket 98-146, especially Sections III and IV, pp. 11-34.

¹² See, for example, Comments of RCN Telecom Services, Inc., p. 1. "After the proposed merger, such anti-competitive behavior likely will intensify. Furthermore, allowing Bell Atlantic and GTE to merge would ensure that the latter never competes against the former, which it could do now." See also Comments of Level Three Communications.

¹³ See Application for Transfer of Control, pp. 6-8.

other local assets in or near new markets Bell Atlantic desires to enter, GTE will substantially reduce the cost to Bell Atlantic of entering such new markets. Conversely, Bell Atlantic's strong relationships with national/global businesses located in its current service area offer GTE the opportunity to market services to the branch offices of such companies which are in or near its current service areas. By effectively lowering barriers to entry, for traditional telecommunications services as well as for broadband offerings, the merger would benefit consumers and advance the Commission's objectives of promoting competition in the local loop.

Second, the merger will lower the costs of entry into the market for Internet backbone services. While Bell Atlantic has been effectively precluded from offering backbone services due to its failure to win Sec. 271 approval from the Commission, it has expressed strong interest in doing so. Indeed, it was the first of the ILECs to petition the FCC for relief under Sec. 706 of the Telecommunications Act, doing so in January 1998.¹⁴

GTE, of course, was not restrained by Sec. 271 and, accordingly, moved into the backbone market early through its purchase of BBN (now GTE Internetworking). As a result, GTE has extensive experience in the provision of Internet backbone services. When the Commission eventually approves the combined company's entry into the inter-LATA marketplace, either in whole or -- as it has suggested in its NPRM on advanced telecommunications services, through targeted inter-LATA relief¹⁵ -- the combined company will be in a much stronger position to offer backbone services in Bell Atlantic's current region than Bell Atlantic alone.¹⁶ By effectively lowering the barriers to entry in this segment of the

¹⁴ Petition of Bell Atlantic Corporation for Relief from Barriers To Deployment of Advanced Telecommunications Services, January 26, 1998.

¹⁵ Memorandum, Opinion and Order, and Notice of Proposed Rulemaking, In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket 98-188, August 6, 1998.

¹⁶ "GTE Internetworking (formerly BBN) is currently a distant fourth to the most significant providers of Internet backbone services. . . . Combining with Bell Atlantic's concentrated urban customer base will allow GTE to become a much more potent competitor to the larger backbones. . . ." See Application for Transfer of Control, pp. 6-8.

broadband market, the merger would benefit consumers and advance the Commission's interest in promoting competition in the market for broadband services.

Third, the merger would create synergies by allowing Bell Atlantic to benefit from GTE's experience in deploying, marketing and managing broadband services to homes and businesses.

Again, while Bell Atlantic has begun "rolling out" its InfoSpeed DSL services, the roll out is in its early phases, and Bell Atlantic has, to date, relatively little experience in deploying, marketing and managing such services. GTE, on the other hand, is among the nation's leaders in precisely this marketplace:

Bell Atlantic currently has limited experience and presence in Internet and data-services markets. GTE, through GTE Internetworking (formerly BBN), is one of the leaders in developing and selling such services, but it lacks critical high-density customer bases to deploy many such services as soon as they are technologically available.¹⁷ [BA at 16.]

By providing Bell Atlantic with expertise it does not now have, the merger will reduce its costs of deploying DSL and related services. Conversely, by providing GTE with access to markets in which it currently does not have a presence, it will reduce GTE's costs of marketing its services in new areas. Both effects represent economic efficiencies, reducing the costs of producing broadband telecommunications services and permitting them to be offered sooner, cheaper to more consumers.¹⁸

Fourth, and in part as a result of the first three factors, the merger will create potential cost savings and other efficiencies through the ability of the combined firm to present consumers

¹⁷ Application for Transfer of Control, p. 16.

¹⁸ On this point, see Comments of the Alliance for Public Technology. "Given the geographic dispersion of Bell Atlantic and GTE's combined service areas, the strength of GTE's data networks and the rate at which both companies have deployed high capacity network technologies, this merger has the potential to advance the ubiquity goals of Section 706." Comments of the Alliance for Public Technology, p. 2.

with a "bundled" package of services.¹⁹ It appears that consumers strongly desire such services, if properly marketed,²⁰ and all of the major players in this marketplace are moving rapidly ahead to provide such services, a development upon which the Commission has smiled in the past.²¹ To the extent the proposed merger reduces the cost of offering or managing bundled packages of services, once again, it enhances economic efficiency and offers benefits to consumers. And, to the extent consumers wish to purchase broadband services as part of a bundled package, these benefits extend to the market for broadband services.

B. Efficiency Effects of Other Current Mergers: As it considers the potential efficiency impact of the instant merger, and especially the impact in the broadband marketplace, the Commission should look also at other mergers now before it, where it has been provided a wealth of evidence concerning potential efficiency effects in the context of the current marketplace and technological environment.

Two such mergers are the proposed mergers between AT&T and TCI and between SBC and Ameritech. The potential efficiency gains relative to broadband communications in these proposed mergers are substantial. And, not surprisingly, they are similar, in many ways, to those present in the Bell Atlantic/GTE merger.

¹⁹ "[T]he merger will add an important new competitor to the top tier of national providers that can offer consumers a full bundle of advanced telecommunications services in all major markets." Application for Transfer of Control, p. 2.

²⁰ See "Forrester's Technographics Sees Market Opportunity for Bundled Voice, Internet and TV Services," Press Release, Forrester Research, September 18, 1998, reporting on "Do Consumers Want Bundling." Available at www.forrester.com/press/pressrel/980918.htm.

²¹ "At present, the product dimension of [the bundled services] market consists of a combination of voice, data, video and other telecommunications services that are offered by a single source over an integrated international network of owned or leased facilities, and that have the same quality, characteristics, features and capabilities wherever they are provided. This end-to-end service offers the advantage to customers of 'one-stop shopping' and single-source billing." Sprint Corp., 11 F.C.C.R. 1850, Paragraph 84 (1996). [Cited in Application for Transfer of Control, p. 10]

Just as in the Bell Atlantic/GTE merger, the merger of SBC and Ameritech will produce efficiencies by allowing Ameritech to benefit from SBC's greater experience in the broadband marketplace. As the parties to the merger state,

SBC has advanced further in its deployment of ADSL services than any other incumbent local telephone company, in large part because the SBC/Telesis merger combined TRI's expertise in 'telecommuting' and other ADSL technical applications with Telesis' expertise in working with ISPs and DSL management system technology. . . . Ameritech has developed its own ADSL service too, but has had only a limited roll-out.²²

Similarly, the merger of SBC and Ameritech will create efficiencies by lower the costs of entry into new markets, and by allowing them to offer a bundled package of services to their customers.

AT&T's proposed acquisition of TCI may, on the surface, seem quite different from the subject merger of Bell Atlantic and GTE or the merger of SBC and Ameritech. And, certainly, there are differences between the merger of two ILECs and a proposed merger between an integrated company focused on long-distance and a video company focused on providing cable television.

Yet, technological and marketplace convergence are just as much a motivation for the AT&T/TCI merger as for the other two; and the efficiency gains in the market for broadband services are at least as great. Like Bell Atlantic/GTE, the AT&T/TCI merger has obvious potential to reduce the costs of entering new markets -- in this case, reducing AT&T's cost of entering the market for local (i.e. "last mile") broadband services (and local voice telephony services), while reducing TCI's costs of entering the telephone business.

²² Joint Opposition of SBC Communications Inc. and Ameritech Corporation to Petitions to Deny and Reply to Comments, CC Docket 98-141, pp. 39-40. [Hereafter cited as SBC Reply.]

Beyond reducing the costs of expansion into new markets, the AT&T/TCI merger also creates synergies for both firms, as TCI can expect to experience efficiency gains in its marketing as a result of AT&T's national advertising and brand name and AT&T's expertise with provision of broadband services through its "Worldnet" division, while AT&T will benefit from TCI's expertise (through its Cablelabs affiliation) in providing broadband services via cable and its expertise in creating and marketing broadband content (through its affiliation with @Home). Further, and importantly, the combined firm will benefit from its ability to manage broadband networks "end to end," providing customers with a single provider which they can hold responsible for any and all network problems.²³

Perhaps most importantly, in the case of AT&T/TCI, the merger will create substantial efficiencies in the combined firm's ability to offer bundled packages of services, capturing to the greatest extent of any of the three mergers the potential gains from one-stop-shopping, unified billing, etc. If the AT&T/TCI merger is allowed to proceed, it can reasonably be predicted that consumers will, for the first time, be offered the opportunity to purchase their video, data, local and long-distance telephone and wireless services from a single provider.

As one examines the efficiency impacts of the three mergers now before the Commission, the pattern becomes clear. As suggested above, companies are scrambling to reconfigure assets, identify sources of needed expertise, acquire marketing skills and otherwise react to the impact of technological and marketplace convergence in the

²³ See AT&T's and TCI's Joint Reply to Comments and Joint Opposition to Petitions To Deny or To Impose Conditions, CC Docket 98-178 (November 13, 1998), p. 40. [Hereafter cited as "AT&T Reply."] End to end management is essential for effective management of broadband networks. See Presentation of Gita Gopal, Hewlett-Packard Laboratories, "End to end application/service management is the achilles heel" of reliable

telecommunications market generally and the broadband market in particular. Given the importance of the broadband marketplace to the national economy, the Commission should pay special attention in its analysis to the efficiency gains these mergers bring to that marketplace.

IV. The Market For Broadband Communications Is Extraordinarily Competitive.

The market for broadband services is highly competitive, extraordinarily fluid, characterized by rapid changes in technology -- and growing at an extraordinary pace. In its reply comments, AT&T and TCI make the point concisely:

Even if the relevant market were somehow deemed to be restricted to "broadband services," . . . TCI is facing competition from RBOCs, CLECs, ISPs, wireless providers, satellite companies and others, who are all investing billions to deploy broadband facilities and compete for customers. Many of these entities are aggressively building facilities on timetables similar to TCI's. Local exchange carriers in particular are aggressively deploying xDSL service to compete with cable's broadband service, and each industry will provide the other with a constant incentive to improve the quality, price and availability of their respective services.²⁴

Below, we examine and find merit in claims by some of the ILECs that regulatory limitations constrain their ability to compete effectively with cable modem and other broadband offerings. Nevertheless, the thrust of the argument above is correct: Competition is breaking out in the market for bandwidth.

Before proceeding to discuss the nature of competition in this marketplace, it is instructive to note that the first debate one must engage in before conducting a competitive analysis of this market is over the nature of the marketplace itself. What constitutes the relevant market for any of the mergers currently being considered by the

broadband connectivity. Presentation to the Digital Broadband Working Group, Palo Alto, California, December 2, 1997.

²⁴ AT&T Reply, p

FCC? Is it the market for data services? For broadband transport? For local telephony, video programming, ISP Internet access services, long distance telephony, wireless? All of the above -- or none of the above, but rather a "bundled" market that combines some aspects of all of these services?

In fact, neither market analysts nor economists agree on these questions, nor are they likely to.²⁵ The market is in the midst of a transformation that is affecting both the demand and supply sides of the equation. Borrowing from Mr. Werbach's metaphor, trying to define markets in the current telecommunications marketplace is like trying to gauge wind direction as a tornado passes over.

Most of what we do about the market for broadband communications suggests that this market is not now conducive to the development of market power, nor likely to be so in the foreseeable future. We know that demand in this marketplace is growing very rapidly. We know that this increasing demand is prompting rapid, sustained and apparently successful entry. We know that the new entrants are numerous and diverse, varying widely in size, reach and scope. Further, we know that these new entrants are utilizing different technologies, applying different business strategies, marketing their products in different ways and bundling their broadband offerings with diverse packages of other services. Finally, we know that the product is itself quite heterogenous, with each technology offering its own advantages and disadvantages in terms of cost, speed, mobility and other characteristics.

²⁵ See, for example, the debate between Dr. Hausman, for AOL, and Drs. Willig and Ordoover, for AT&T, on whether broadband is a separate market from narrow band with respect to Internet access. While Willig and Ordoover clearly get the better of this debate, the larger point is that some of the world's most respected economists cannot even agree over the most basic and first necessary step in any analysis of market power, that being definition of the market.

Some of the new entrants in this marketplace are represented in this proceeding and in the other merger proceedings now before the Commission. Indeed, the Bell Companies and the large cable companies (as represented here by TCI) are perhaps the most significant new entrants into this market, and they are likely to play substantial roles in the future. To focus only on these types of firms, however, is to miss a much richer, more diverse and more competitive picture.

There is growing evidence, for example, that wireless data providers are succeeding in the marketplace. According to the Yankee Group, there already are 2.9 million wireless data service users in the United States, and this figure is expected to more than quadruple in the next three years, to 12.6 million.²⁶ Companies like Teligent and Winstar, which offer bundled broadband and voice packages, are expanding rapidly, with Teligent now in 10 major cities (with more announced)²⁷ and Winstar in 27 (with more to come).²⁸ Wireless, as the Commission knows, is an especially important part of the competitive picture, due to its relatively low fixed costs relative to wireline installations.

CLECs are another substantial source of competition in the xDSL marketplace, and again the evidence suggests that broadband focused CLECs ("DataLECs" or "DLECS") are prospering. Covad, the best known of the DLECs, has until recently confined its service offerings to the San

²⁶ "The Yankee Group, a well-respected research organization, recently estimated that "there are currently 2.9 million wireless data service users in the U.S. This figure is projected to increase to 12.6 million users by 2002. . . . Western Wireless is also expanding its distribution of VoiceStream personal communication services (PCS) that allows phone customers not only e-mail and fax capability, but also access to corporate databases and the Internet." ["Wireless Technology: Explosive Growth Expected," Individual Investor On-line, November 27, 1998.]

²⁷ SBC Reply at 5.

²⁸ "WinStar now provides switched voice, data and Frame Relay services in 27 markets, including Atlanta, Baltimore, Boston, Chicago, Columbus, Dallas, Denver, Detroit, Fort Worth, Houston, Kansas City, Los Angeles, Milwaukee, Minneapolis, New York, Newark, Oakbrook, IL, Oakland, Orange County, CA, Philadelphia, Phoenix, San Diego, San Francisco, Seattle, Stamford, CT, Tampa and Washington, D.C. The company will deploy its telecommunications network in Miami, St. Louis and Cleveland by the end of the year." Press Release: "Winstar Completes Integration of Voice and Data Networks in Key Markets," September 23, 1998 (<http://www.winstar.com/indexNews.htm>)

Francisco Bay Area, which might be seen by some as a special case. Recently, however, it has expanded its service area to include Los Angeles, Boston, New York and Washington, DC, and has announced its entry into 17 additional markets, including Atlanta, Baltimore, Chicago, Dallas, Detroit, Houston, Philadelphia, Phoenix and San Diego.²⁹

Beyond wireless and the CLEC's, however, a still closer examination of the marketplace shows a diverse group of entrepreneurs pursuing unique and promising strategies. One of the participants in the AT&T/TCI proceeding, for example, is Mindspring, which refers obliquely in its filing to an arrangement it has "achieved" with a "competitive cable operator" in "selected southern cities."³⁰ A more detailed examination reveals a richer story: According to Mindspring's press release announcing this service, the competitive cable provider, KNOLOGY, is, like Mindspring, a "subsidiary of the ITC group of companies, which include PowerTEL, ITC, DeltaCom, Mindspring Enterprises, Inc., and Interstate/Valley Telephone."³¹ In short, Mindspring is a part of an integrated cable, local service, long distance, data, wireless and Internet access conglomerate, not altogether different from, if more localized than, the conglomerates that would result from the mergers now under review by the Commission.

One final example involves none other than Microsoft. Microsoft's investments in the broadband/telecommunications marketplace, through companies like Comcast and Qwest, are well known. Last month, it expanded its presence in the wireless data arena by forming WirelessKnowledge, LLC, a 50/50 partnership between Microsoft and Qualcomm, "Wireless data is a logical extension of the Microsoft digital nervous system, enabling users to always be

²⁹ Covad Home Page, www.covad.com/partners/ISP_partners.html, accessed December 18, 1998.

³⁰ Comments of Mindspring Enterprises, Inc., CS Docket 98-178, pp. 18-19.

³¹ Press Release: "Mindspring to Offer Two-Way Cable Modem Service Via KNOLOGY's Broadband Network," August 31, 1998 (www.mindspring.net/aboutms/press-releases/1998/0901.html).

connected to their corporate and personal information," Microsoft President Steve Ballmer was quoted as saying in announcing the new company.³²

From Microsoft to Covad, from Winstar to KNOLOGY, the broadband marketplace would appear to be a roiling sea of competition and competitors. While concerns about "bottleneck facilities" cannot be ignored, they must be seen in the context of the competition which already exists and which appears to be growing.

V. The Commission Should Forebear From a Broad, "Public Interest" Style Review of This and Similar Mergers.

The instant merger, the other mergers now under review at the Commission, and dozens of similar mergers certain to take place in the future are motivated primarily by economic efficiency. They are taking place in a market which is being rapidly transformed from its monopolistic past to a competitive present and future. By lowering the costs of deploying, marketing and managing broadband services, they are helping to alleviate the scarcity of bandwidth and thus contributing to America's economic prosperity. Accordingly, the FCC should forbear from lengthy and complex reviews of such mergers under its "public interest" standard. Instead, the Commission should approve these and like mergers expeditiously, imposing only those conditions absolutely required by law.

The Commission must also recognize, however, that its decisions concerning the current mergers will have profound and long-run effects on the ability of the telecommunications industry to complete a transformation all agree is much needed. The mergers now before the

³² Press Release: "Microsoft and QUALCOMM Form Broad Strategic Alliance and Joint Venture," November 10, 1998 (<http://www.Qualcomm.com/news/pr981110c.html>).

Commission thus create an opportunity to establish precedents and policy reaching well beyond these three transactions.

By adhering to its historical approach to merger enforcement, the Commission places itself in a position to do substantial harm in the market for broadband services. This is true for three specific reasons: A) The historical merger review process in general, and the public interest standard in particular, create unnecessary "regulatory risk;" B) The historical merger review process is ripe with opportunities to pursue unwise (if sometimes popular) "social/political" goals, even where there is no specific statutory mandate to do so; and, C) The historical merger review process tempts competing firms to engage in "regulatory predation."

A. The Historical Merger Review Process in General, and the Public Interest Standard in Particular, Create Unnecessary "Regulatory Risk." As the Commission is well aware,³³ the authority it exercises over mergers³³ in the telecommunications field is quite different from that exercised by the Department of Justice over most other industries. Unlike most other firms in the American economy, which are free to merge absent a showing by the Justice Department that the merger would harm competition, firms that come before the Commission have an affirmative burden of proof to show why a merger should go forward. Unlike the Department of Justice, the FCC is subject to no time practical time constraints,³⁴ and can effectively terminate a merger through inaction. And, the Commission is unhindered by the rules of evidence that apply to the Department of Justice in a court of law.

³³ See Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control, Memorandum, Opinion and Order, CC Docket 97-211 (September 14, 1997), ¶¶ 11-14.

³⁴ See, for example, Harold Furchtgott-Roth, "FCC Regulations Aren't in the Public Interest," *The Wall Street Journal* (December 14, 1998), p. A-18.

Most importantly, however, the FCC judges mergers according to a "public interest" standard³⁵ that is inherently vague, difficult to predict and -- as discussed below -- subject to manipulation for purposes that have little if anything to do with economic efficiency. As a result, the Commission finds itself tossed about like a row boat in a turbulent sea of competing arguments and interests. If it were only the Commission suffering this fate, the damage would be limited. Unhappily, every time a merger arises, a small part of the telecommunications marketplace becomes an unwilling passenger, and every part of the telecommunications marketplace knows it is likely to end up in the same boat sooner or later. The result is that a marketplace already fraught with high levels of technological and market risk is further burdened by unnecessary regulatory risk.

This risk factor is exacerbated by the Commission's historical practice of affixing any and all manner of conditions to telecommunications mergers. Thus, potential merger partners must figure into their calculations the risk that the FCC will use the merger as an opportunity, in effect, to draft them and their resources into what amounts to public service. The effect is to raise the risks and costs of all mergers, and so to deter mergers that would otherwise contribute to economic efficiency. As discussed below, several of the participants in the current mergers urge the Commission to impose precisely these sorts of conditions.

Finally, the Commission's application of its public interest authority to impose conditions on mergers increases the risk of being placed at a competitive disadvantage. Unlike its broader proceedings, merger proceedings and the conditions that result from them apply only to the merging firms. Thus, applicants must take into account not only the risk that the Commission will impose costs on them through its merger conditions, but that it will impose costs not shared by their competitors.

³⁵ See 47 U.S.C. Sec. 214(a) (1997) and 47 U.S.C. Sec. 301(d) (1997).

B. The historical merger review process is rife with opportunities to pursue unwise (if sometimes popular) "social/political" goals, even where there is no specific statutory mandate to do so. The instant merger is no exception to this rule. As noted above, for example, the Alliance for Public Technology (APT) recognizes that the Bell Atlantic/GTE merger "has the potential to advance the ubiquity goals of Section 706." One would think that, having reached this finding, APT would hope for the merger to proceed. But one is quickly disabused of this notion when, in the very next sentence, the filing demands that the FCC "ensure that the merged companies use some of the increased investment capacity to deploy infrastructure upgrades in underserved communities."³⁶ APT offers no argument for why Bell Atlantic/GTE should be singled out for this unique opportunity to serve the public -- except, implicitly, that they have had the temerity to appear before the Commission seeking approval for an otherwise desirable merger.

In fairness, it must be admitted that there is at least some plausible statutory basis for APT's stated goal (ubiquity), even if the instant proceeding is not the right venue for pursuing it. The same cannot be said for the arguments of Mindspring Enterprises, in comments filed in the AT&T/TCI proceeding. Holding itself out as representative of "independent ISPs,"³⁷ Mindspring alleges that "the Commission's challenge is to ensure that consumers will continue to enjoy a broad diversity of competitive choice and information supply as the Internet and other packet-switched applications mature."³⁸ Stating that it "would expect most parties to share a common vision of how the world should look in the future," it seeks to enlist the Commission in mandating such a world, in which "Customers could choose among dozens of companies who

³⁶ Comments of the Alliance for Public Technology, p. 2.

³⁷ See Comments of Mindspring, p. 2, especially note 2. Contrast discussion, above, p. 16, *infra*.

³⁸ Comments of Mindspring, p. ii.

compete"³⁹ Speaking now not only for independent ISPs but for all of us, it asserts that "the nation should not care how consumers interface with the Internet if they can choose among competing ISPs. . . .[rather than] even a small handful of firms."⁴⁰ Not satisfied with representing just the "nation," it speaks next in the voice of *all society*: "*We as a society* effectively face a choice. Either we rip up the neighborhoods to install a new set of wires every time we want to add a new competitor to the market, or we find an efficient way to share the wires that are in place. *Just to state the point is to answer it.*"⁴¹

To the contrary, to state the point is not to answer it. Perhaps society wishes to preserve a world in which there are "dozens" of competitors -- even, say, 4,000 or more ISPs. Perhaps, on the other hand, it does not, but rather wishes to see the development of the market based on the preferences of consumers for the best service at the lowest price, regardless of whether that market has four firms or four thousand. Certainly, it is not Mindspring's place to say. Nor, and this is the point, is it the Commission's. Indeed, if the Commission were to accept Mindspring's argument and pursue the social agenda Mindspring proposes, it would be doing so without any express statutory authority of any kind.⁴² Furthermore, it would be returning to discredited theories underlying the Robinson-Patman Act, in which efficient firms like A&P were persecuted to preserve "mom and pop" grocery stores, and consumers were denied the benefits of

³⁹ Comments of Mindspring, p. 5.

⁴⁰ Comments of Mindspring, p. 6.

⁴¹ Comments of Mindspring, p. 8. [Emphasis added.]

⁴² Indeed, the passage from the Telecommunications Act cited by Mindspring says nothing about "dozens" of competitors, but rather argues for a "vibrant and competitive free market . . . unfettered by Federal or State regulation." 47 U.S.C. Sec. 230(b). By contrast, the December 17, 1998 action by Portland, Oregon officials to impose conditions on the merger similar to those demanded by Mindspring -- no matter how unjustified by law or policy -- is at least an act of *elected* officials who might plausibly claim to be in a position to make such social policy judgments.

lower prices and higher quality in a misguided effort to protect not competition, but competitors.⁴³

By allowing itself to be drawn into such far-flung inquiries into social and political issues, the Commission would do the market for broadband services and the telecommunications market a grave disservice. Yet, a broad reading of the "public interest" standard would hardly preclude such a result.

C. The historical merger review process tempts competing firms to engage in "regulatory predation." As a general matter, Commission's proceedings offer an opportunity for firms to seek advantages over their competitors. Such efforts are a natural by-product of the regulatory process, and while a vigilant regulator can minimize such opportunities, it can never eliminate them altogether.⁴⁴

The danger of such activity is especially high, however, in proceedings -- like the instant ones -- in which the results apply only to some firms, but not to others. In such a context, competitors may well hope to be able to impose costs or other regulatory restraints on their competitors without risking those same costs or restraints being imposed on them.

One obvious effect of this phenomenon, discussed above, is to deter potentially efficient combinations. A more insidious effect, however, is the potential it poses for a downward spiral towards a sort of lowest common denominator. In its filing in the FCC's Section 706 Notice of Inquiry, the Foundation warned of precisely this phenomenon.

Having made such a definition, the Commission would seem to have no choice but to examine each and every advanced telecommunication service to determine how best to regulate that offering. Even if incumbent LECs adopt the option of creating separate subsidiaries, the role of the Commission in the

⁴³ See, for example, *Utah Pie. v. Continental Baking Co.*, 386 U.S. 965 (1967). See also Ward Bowman, "Restraint of Trade by the Supreme Court: The Utah Pie Case," 77 *Yale Law Journal* 70 (1967).

⁴⁴ See generally Robert H. Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: The Free Press, 1978, 1993), Chapter 18.

regulation of advanced telecommunication services is bound to increase rather than decrease. Many will now ask, for example, why Title VI cable operators are not required to establish separate subsidiaries for their data services, or be forced to comply with interconnection, unbundling and resale requirements. Others will insist – and, indeed, the NPRM implies – that the rules for separate subsidiaries should eliminate *any* competitive advantages incumbent LECs have in the offering of advanced telecommunications services (including advantages associated with economic efficiencies).⁴⁵

Filings in all three of the current mergers evidence the potential for the current process to degenerate into a "race for the bottom," in which the Commission concludes that it is in the public interest for all firms to be equally disadvantaged in their efforts to build out broadband networks.

As suggested above, and in our earlier Section 706 Filing, we find substantial merit in the positions taken, for example, by U S West in its filing in the AT&T/TCI proceeding, especially when it states that, "[B]ecause of technological *and regulatory* obstacles, DSL could not presently match AT&T/TCI's wide customer reach and ability to package video programming with the full range of local and long distance communications services."⁴⁶ However, the Commission has it fully within its power to lessen or eliminate the very regulatory obstacles to which U S West refers, and it continues to be our hope that it will use its current Sec. 706 rulemaking proceeding to do just that. In any case, the appropriate course is not to proceed down the slippery slope of "fairness," as defined as "what's worst for everyone."

If the pleas for regulatory parity made by U S West and the other ILEC's in the AT&T/TCI proceeding would not lead to a "first-best" public policy outcome, they can at least be defended on equity grounds. The same cannot be said for many of the comments filed in the Bell Atlantic/GTE proceeding. Comments of firms like Level3 Communications, which

⁴⁵ Comments of The Progress & Freedom Foundation, CC Docket 98-146, September 14, 1998, p. 4.

inexplicably seeks to use this merger proceeding to resurrect the appropriately named "Loopco" proposal,⁴⁷ or of RCN, which urges the Commission to impose 13 separate new and often quite creative conditions on the merged entity,⁴⁸ would appear to have no basis whatsoever except to enlist the Commission in these firms' competitive battles against the merging parties.

VI. Conclusion

The Commission traditionally has used its authority over license transfers as one of many levers in its efforts to manage a monopolized telecommunications industry for the public good. In that role, it appropriately interposed its judgment about what would best serve the public interest over that of the individual firms operating in this market. Old habits die hard, but the Commission should recognize that, by continuing to judge mergers according to a broad public interest standard, it would now be interposing its judgment over that of a competitive marketplace -- which is to say, the judgment of consumers. In so doing, it would be deterring, delaying and making more costly a transformation in the telecommunications marketplace that is absolutely necessary for the provision of desperately needed broadband services and the continuation of America's prosperity and leadership in the world economy.

⁴⁶ Petition of U S West to Deny Applications or to Condition Any Grant, CC Docket 98-178, October 29, 1998, pp i-ii. [Emphasis added.]

⁴⁷ Comments of Level 3 Communications, Inc. In Opposition to Application for Transfer of Control, CC Docket 98-184, November 23, 1998, pp. 12-16.

⁴⁸ Comments of RCN Telecom Services, Inc., CC Docket 98-184, November 23, 1998, pp. 21-28.