

John F. Raposa  
Associate General Counsel -  
Federal Regulatory Matters



**GTE Service Corporation**  
600 Hidden Ridge, HQE03J27  
P.O. 152092  
Irving, TX 75015-2092  
972/718-6969  
FAX: 972/718-1250  
john.raposa@telops.gte.com

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**By Hand Delivery**

The Honorable William E. Kennard  
Chairman, Federal Communications Commission  
The Portals  
455 Twelfth Street, S.W.  
Room 8-B201  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**Subject: Written Ex Parte Communication of GTE Service Corporation,  
Joint Application of AT&T Corporation and Tele-Communications, Inc.  
for Transfer of Control, CS Docket No. 98-178**

Dear Chairman Kennard:

As the Commission nears a decision on the merger of AT&T and TCI, it must consider the marketplace impact of that transaction in light of recent industry and legal developments – specifically, the announcement that AT&T and Time Warner will establish a joint venture to sell local telephone service and high-speed Internet access to Time Warner's 12 million cable subscribers, and the Supreme Court's decision in *AT&T v. Iowa Utilities Board*.<sup>1</sup> The first development reinforces the need to impose an open access condition as a prerequisite to approval of the AT&T/TCI merger. The second makes it clear that the Commission cannot use its refusal to impose such a condition as a means of justifying a requirement for continued expansive unbundling of incumbent local telephone company ("ILEC") networks.

Following consummation of the TCI and Time Warner deals (assuming they are approved), AT&T will be able to offer local dial tone and broadband Internet access – as well as content through @Home and Excite and long distance service over its own network – on a facilities basis to roughly half of the nation's homes.<sup>2</sup> According to press reports, AT&T is continuing to negotiate with other large cable MSOs, with the goal of being "able to offer local service to as many as 65 percent of United States homes."<sup>3</sup> Notwithstanding the ubiquity of these offerings and AT&T's dominance across virtually all communications industry segments, it has taken the position that it need not and will not offer competitors nondiscriminatory

<sup>1</sup> No. 97-826 (U.S. Jan. 25, 1999).

<sup>2</sup> Leslie Cauley, "AT&T Moves Closer to Local Service," *Wall Street J.*, Feb. 2, 1999, at A3 ("Cauley"). It is also apparent that there will be consolidation of TCI's @Home and Time Warner's Roadrunner cable modem services, with the result that AT&T will control the surviving high-speed Internet provider. Cory Grice and Ben Heskett, "@Home Considers Road Runner Pairing," CNET News.com, Feb. 4, 1999, 11:30 a.m. PT.

<sup>3</sup> Seth Schiesel, "Time Warner Joins Forces with AT&T," *New York Times*, Feb. 2, 1999, at C4.

access to the network facilities used to provide these services. Indeed, the Time Warner deal apparently gives AT&T exclusive access to Time Warner's cable systems for 20 years.<sup>4</sup>

Even prior to the @Home, Excite, and Time Warner announcements, an open access condition was necessary to prevent AT&T/TCI from impeding competition in the emerging market for bundled services.<sup>5</sup> If and when those transactions are implemented, AT&T's vertical and horizontal reach will be unmatched and, indeed, unmatchable. Solely because of its refusal to afford nondiscriminatory access to its network, AT&T, and AT&T alone, will be able to offer bundled local telephony, dial-up and high-speed Internet access, content, and long distance telephony to some 60 million households. No competing information service provider will be able to use TCI's and/or Time Warner's cable networks to provide broadband access to consumers. And no local phone company currently may even hope to assemble a competing array of services, given the multitude of separate affiliate, unbundling, and discounted resale obligations under which the ILECs are forced to operate.

If the Commission truly wants to preserve an open, unregulated Internet – as it is directed to do by Section 230 of the Act – it must treat AT&T/TCI/Time Warner no more favorably than it treats incumbent LECs offering the same services. Disparate regulation will distort investment, restrain competition, and irrationally discriminate against one class of service providers simply because they use *narrow-band* copper wire rather than *broad-band* coaxial cable as a transmission medium. Through its failure to ensure regulatory parity, the Commission indeed would be picking winners and losers, and the technology to serve consumers, *i.e.*, AT&T /TCI/Time Warner and their coaxial cables win and ILECs and their copper wires -- and, more importantly, *consumers* -- lose.

As GTE has repeatedly made clear, if AT&T/TCI provides telecommunications services over cable facilities as they clearly intend to do, they must be regulated in the same manner as the ILECs in order to assure regulatory parity and permit fair competition. Specifically stated, it would be an abuse of discretion for the Commission to approve the instant merger to the extent that it would countenance asymmetric regulation of the giant, merged AT&T/TCI (cable and telecommunications) entity vis-à-vis incumbent local exchange carriers.

Moreover, the Commission's willful countenance of disparate regulation raises another threat: that such lack of parity would be used to bootstrap continued onerous regulation of the ILECs. This threat is particularly grave in light of the Supreme Court's decision, which directs the Commission, in determining which network elements must be unbundled under Section 251(d)(2) of the Act, to consider the "availability of elements outside the incumbent's network." Under any rational analysis, AT&T's cable networks are "available" alternative sources of reaching subscribers. It would be a profound legal error to attempt to justify continued unbundling obligations for ILEC loops on the Commission's own refusal to require AT&T to permit competitors to use its network facilities. Simply put, the Commission cannot decline to take steps to make AT&T's facilities available, and then demand that ILECs unbundle their loops because no alternative exists. Turning such a blind eye to the second wire into the home -- one controlled by the nation's largest telecommunications carrier as it

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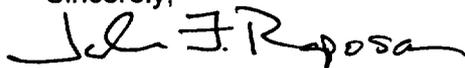
<sup>4</sup> Cauley, at A3.

<sup>5</sup> See GTE Comments in Opposition, CS Docket No. 98-178, filed October 25, 1998.

reassembles its pre-divestiture monopoly -- is neither rational nor consistent with the Act.

GTE respectfully submits that the Commission has no alternative but to condition the merger in two critical respects to overcome its inherent anti-competitive effects. First, the case for imposing an open access condition on approval of the AT&T/TCI merger is now more compelling than ever. Thus, AT&T/TCI must be required as a condition of the merger to unbundle its broadband cable Internet access services for competing information service providers. Second, to the extent that cable facilities are used to provide local or long distance telecommunications service -- as AT&T/TCI have made clear they intend to do -- AT&T/TCI must be subject to the same Title II obligations imposed upon competitors such as GTE and other ILECs. In contrast, if the Commission continues to countenance disparate regulatory treatment of AT&T/TCI *vis-à-vis* these other telecommunications carriers, thereby giving AT&T exclusive use of the second wire into over half of the nation's homes, it cannot then base a determination that access to unbundled ILEC loops is required under Section 251(d)(2) upon that refusal to ensure a level playing field.

Sincerely,



John F. Raposa  
Associate General Counsel -  
Federal Regulatory Matters

cc: Commissioner Harold Furchtgott-Roth  
Commissioner Susan Ness  
Commissioner Michael Powell  
Commissioner Gloria Trisani  
Secretary, Federal Communications Commission (two copies)

## CERTIFICATE OF SERVICE

I, Robin Walker, hereby certify that on this 9<sup>th</sup> day of February, 1999, I caused copies of the foregoing attached ex parte to be sent via hand-delivery or via first-class mail, postage pre-paid to the following:

\*International Transcription Service, Inc.  
1231 20<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

\*Royce Dickens  
Policy and Rules Division  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W.  
Room 406  
Washington, D.C. 20554

\*Evette Keene  
Video Services Division  
Mass Media Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Room 712  
Washington, D.C. 20554

\*Sherille Ismail  
Telecommunications Division  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W.  
Room 800  
Washington, D.C. 20554

\*Deborah Lathen, Chief  
Cable Services Bureau  
Federal Communications Commission  
2033 M Street, N.W.  
Room 918  
Washington, D.C. 20554

\*Quyen Truong  
Policy and Program Planning Division  
Common Carrier Bureau  
Federal Communications Commission  
1919 M Street, N.W.  
Room 544  
Washington, D.C. 20554

\*Karl Kensinger  
Satellite & Radio Communication Division  
International Bureau  
Federal Communications Commission  
2000 M Street, N.W.  
Room 800  
Washington, D.C. 20554

\*Walter Strack  
Wireless Telecommunications Bureau  
Federal Communications Commission  
2025 M Street, N.W.  
Room 5002  
Washington, D.C. 20554

Stephen J. Flessner  
Director of FCC Compliance  
Cable Regulatory Compliance Dept.  
Terrace Tower II  
5618 DTC Parkway  
Englewood, CO 8011-3000

Mark C. Rosenblum  
AT&T Corporation  
295 North Maple Avenue  
Baskin Ridge, NJ 07920

George Vradenburg, III  
William W. Burrington  
Jill A. Lesser  
Steven N. Teplitz  
America Online  
1101 Connecticut Ave., N.W.  
Suite 400  
Washington D.C. 20036

Kelly R. Welsh, Esq.  
John T. Lenahan, Esq.  
30 S. Wacker Drive  
39<sup>th</sup> Floor  
Chicago, IL 60606  
(Counsel for Ameritech)

Christopher M. Heimann, Esq.  
1401 H Street, N.W., Suite 1020  
Washington, D.C. 20005  
(Counsel for Ameritech)

Mark D. Schneider  
Sidley & Austin  
1722 Eye Street, N.W.  
Washington, D.C. 20006  
(Counsel for AT&T)

Gary Klein, Esq.  
Vice President  
Government and Legal Affairs  
Consumer Electronics  
Manufacturers Association  
2500 Wilson Boulevard  
Arlington, VA 22201

David R. Siddall, Esq.  
Verner, Lipfert, Bernhard, McPherson  
& Hand, Chartered  
901 15<sup>th</sup> Street, N.W., Suite 700  
Washington, D.C. 20005  
(Counsel for Consumer Electronics  
Manufacturers Association)

Cheryl A. Leanza  
Andrew Jay Schwartzman  
Gigi B. Sohn  
Media Access Project  
1707 L Street, N.W., Suite 400  
Washington, D.C. 20036

David K. Moskowitz  
EchoStar Communications Corporation  
5701 South Santa Fe  
Littleton, CO

Gary M. Epstein  
James J. Barker  
Kimberly S. Reindl  
Latham & Watkins  
1001 Pennsylvania Ave, N.W.  
Suite 1300  
Washington, D.C. 20004  
(Counsel for DIRECTV, INC.)

Henry L. Baumann  
Jack N. Goodman  
Valerie Schulte  
National Association of Broadcasters  
1771 N Street, N.W.  
Washington, D.C. 20036

Philip L. Malet  
Pantelis Michalopoulos  
Colleen Sechrest  
Steptoe & Johnson LLP  
1330 Connecticut Avenue, N.W.  
Washington, D.C. 20036  
(Counsel for EchoStar  
Communications Corporation)

Drake Tempest  
Joseph T. Garrity  
QWEST COMMUNICATIONS  
CORPORATION  
555 17<sup>TH</sup> Street  
Denver, CO 80202

Kecia Boney  
Larry Fenster  
Lisa B. Smith  
MCI WORLDCOM, Inc.  
1801 Pennsylvania Avenue, N.W.  
Washington, D.C. 20554

Danny E. Adams  
Rebekah J. Kinnett  
KELLEY DRYE & WARREN LLP  
1200 19<sup>th</sup> Street, N.W., Suite 500  
Washington, D.C. 20036  
(Counsel for Qwest Communications  
Corporation)

Charles M. Brewer  
Chairman and Chief Executive Office  
MindSpring Enterprises, Inc.  
1430 West Peachtree Street  
Suite 400  
Atlanta, GA 30309

James D. Ellis  
Liam S. Coonan  
Wayne Watts  
SBC COMMUNICATIONS INC.  
175 East Houston Street  
San Antonio, TX 78205

Michael K. Kellogg  
Evan T. Leo  
Kellogg, Huber, Hansen, Todd &  
Evans, P.L.L.C.  
1301 K Street, N.W., Suite 1000 West  
Washington, D.C. 20005  
(Counsel for SBC Communications  
Inc.)

Norman M. Sinel  
Stephanie M. Phillippis  
Arnold & Porter  
555 Twelfth Street, N.W.  
Washington, D.C. 20004  
(Counsel - SBC Communications, Inc.)

Peter M. Glass  
Seren Innovations, Inc.  
10 South 5<sup>th</sup> Street, Suite 840  
Minneapolis, MN 55402

William T. Lake  
William R. Richardson, Jr.  
Lynn R. Charytan  
David Sohn  
Todd Zubler  
Wilmer, Cutler & Pickering  
2445 M Street, N.W.  
Washington, D.C. 20037-1420  
(Counsel for U S WEST, INC.)

James W. Olson  
Gregory F. Intoccia  
Howrey & Simon  
1299 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004  
(Counsel for Seren Innovations, Inc.)

Mark Roellig  
Dan L. Poole  
Sharon J. Devine  
U S WEST, INC.  
1020 19<sup>th</sup> Street, N.W.  
Washington, D.C. 20036

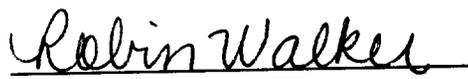
Leon M. Kestenbaum  
Jay C. Keithley  
Michael B. Fingerhut  
1850 M Street, N.W., 11<sup>th</sup> Fl.  
Washington, D.C. 20036  
(Counsel for Sprint Corporation)

Paul J. Sinderbrand  
Robert D. Primosch  
Wilkinson, Barker, Knauer, & Quinn, LLP  
2300 N Street, N.W., Suite 700  
Washington, D.C. 20037-1128  
(Counsel for The Wireless  
Communications Association  
International, Inc.)

Sandra K. Williams  
4220 Shawnee Mission Parkway  
Westwood, KS 66205  
(Counsel for Sprint Corporation)

Anthony C. Epstein  
Jenner & Block  
601 Thirteenth Street, N.W.  
Washington, D.C. 20005  
(Counsel for MCI WORLDCOM, INC.)

William E. Burhop  
Executive Director  
Independent Cable &  
Telecommunications Association  
5335 Wisconsin Avenue, N.W.  
Suite 750  
Washington, D.C. 20015

  
Robin Walker  
Robin Walker