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February 12, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

VIA HAND DELIVERY
Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
TW-A325
Washington, D.C. 20554

Re: *In the Matter of AT&T Corporation and Tele-Communications, Inc. - CS Docket No. 98-178*
NOTICE OF EX PARTE COMMUNICATION

Dear Ms. Salas:

On February 9, 1999, undersigned counsel and Paul J. Sinderbrand, Esq., along with George Blumenthal and Christopher A. Holt, Chief Executive Officer and Assistant General Counsel of CoreComm Limited, respectively (hereinafter referred to collectively as "CoreComm") met with Anita Wallgren, Legal Assistant to Commissioner Susan Ness, to discuss issues raised in CoreComm's reply comments in the above-referenced proceeding. Specifically, CoreComm noted that the AT&T/TCI transaction would link AT&T's nationwide fiber network with the regional networks of TCI and the other cable MSOs, and that this would give the post-merger AT&T enormous financial and technical incentives to deliver video programming to cable headends via fiber rather than satellite.

In addition, CoreComm described how terrestrial distribution of video programming would prevent the company from having full and fair access to that programming, and how the resulting uncertainty over program access precludes construction of full-service, marketwide broadband networks by new competitors. CoreComm further argued that the Commission can and should exercise its public interest authority under Section 310(d) of the Communications Act of 1934, as amended, to impose program access conditions on the AT&T/TCI transaction as a safeguard against the terrestrial distribution problem. The attached memorandum summarizing CoreComm's concerns was submitted as part of CoreComm's presentation.

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Pursuant to Section 1.1206(b)(2) of the Commission's Rules, an original and one copy of this notice has been submitted for filing.

Should there be any questions concerning this matter, please contact the undersigned.

Very truly yours,

Robert D. Primosch
Counsel for CoreComm Limited

Enclosure

EX PARTE PRESENTATION OF CORECOMM LIMITED
CS DOCKET NO. 98-178
FEBRUARY 9, 1999

EXECUTIVE SUMMARY

- CoreComm Limited ("CoreComm") is a competitive local exchange carrier ("CLEC") whose operations in the United States will soon be expanded to include provision of broadband services to residential and business customers.

  - CoreComm's commonly-controlled affiliate, NTL, Inc., is already the third largest provider of broadband services in the United Kingdom, operating a fiber network that passes nearly 1,000,000 homes and serves nearly 400,000 subscribers.

- The current program access law was conceived over six years ago, when satellite transmission was the predominant method of delivering programming to cable headends. Changes in technology, however, have created financial and operating incentives (*e.g.*, lower costs and better picture quality) for programmers to move distribution of content from satellite to fiber delivery.

  - AT&T is one of the few domestic carriers with a nationwide fiber network - upon linkage with the regional networks of the largest cable MSOs, Liberty will be able to deliver its programming terrestrially to an unprecedented number of subscribers in most major markets throughout the United States.

- Regional sports programming is already being migrated to local fiber networks used ostensibly for strictly "local" programming. More of these "local" networks are in development, and will likely be used for terrestrial delivery of regional sports programming.

- Absent preemptive Commission action, over time such "incremental" migration will prevent broadband competitors from offering the complete menu of bundled products that has become the foundation of competitive local exchange service.

- To ensure that migration of programming to terrestrial delivery does not undermine the purposes of the 1992 Cable Act and the Telecommunications Act of 1996, the Commission can and should exercise its public interest authority under Section 310(d) of the Communications Act, as amended, to condition its approval of the AT&T/TCI merger on receipt of a firm and irrevocable commitment from both parties that any Liberty-affiliated programming migrated to the AT&T network will be made available to competing broadband providers at nondiscriminatory rates, terms and conditions.

I. INTRODUCTION AND STATEMENT OF INTEREST.

CoreComm Limited ("CoreComm") is a competitive local exchange carrier ("CLEC") whose operations will soon be expanded to include provision of broadband services to residential and business customers. The company already has substantial experience with the legal, economic and technical issues associated with broadband services: its commonly-controlled affiliate, NTL, Inc., is the third largest operator of local broadband communications systems in the United Kingdom, operating a fiber network that passes nearly 1,000,000 homes and has nearly 400,000 customers, 91% of which subscribe to NTL's packages of telephony and multichannel video services.[1/] As in the UK, CoreComm's ultimate business objective is to offer subscribers the widest possible array of video, voice and high-speed Internet access services, with an emphasis on providing packages of integrated services specifically tailored to each subscriber's needs.[2/] CoreComm thus has a direct and immediate interest in the program access implications of the proposed AT&T/TCI merger.

For the reasons set forth below, CoreComm believes that the merger will create unprecedented opportunities for TCI's cable programming subsidiary, Liberty Media, to migrate programming from satellite delivery to the AT&T landline network. As a result, CoreComm and other alternative broadband providers will be at risk of losing access to popular cable

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[1/] Following its recent acquisition of certain Comcast and Comtel cable systems and its pending acquisitions of systems operated by Diamond Cable, NTL's network will pass approximately 3,500,000 homes throughout the UK and Ireland.

[2/] In addition to its present operations in Ohio, CoreComm is authorized to provide CLEC service in California and New York, and has applications pending to receive similar authorization in 18 other states. CoreComm also has been certificated to provide franchised cable service in California and New York, and holds 15 LMDS licenses in Ohio under the name CortelyouComm.

programming that is essential to their survival, particularly national and local sports programming. CoreComm is *not* suggesting that the Commission should address this problem by extending the program access law or by otherwise regulating beyond its authority under Section 628 of the Cable Consumer Protection and Competition Act of 1992 (the "1992 Cable Act"). Instead, the Commission can and should exercise its public interest authority under *Section 310(d)* of the Communications Act, as amended, to condition its approval of the AT&T/TCI merger on receipt of a firm and irrevocable commitment from both parties that any Liberty-affiliated programming migrated from satellite delivery to the AT&T network will be made available to competing broadband providers at nondiscriminatory rates, terms and conditions.

II. THE LINKAGE OF AT&T'S NATIONWIDE FIBER NETWORK WITH THE REGIONAL NETWORKS OF THE CABLE MSOs RAISES A SIGNIFICANT THREAT THAT LIBERTY PROGRAMMING WILL BE MIGRATED TO TERRESTRIAL DELIVERY.

At the outset, CoreComm recognizes that consumers benefit from vigorous competition in the market for local exchange service, and thus CoreComm does not unconditionally oppose transactions that facilitate competitive entry by new providers of local exchange services. By the same token, NTL's experience in the UK reflects that new entrants into the local loop cannot compete effectively unless they are able to offer bundled packages of voice, video and/or Internet services to the consumer; indeed, the "bundling" concept is the cornerstone of the entire AT&T/TCI merger. Thus, what is at stake here is not merely the ability of alternative MVPDs to offer programming packages competitive with those offered by incumbent cable operators.

Rather, the issue here is whether broadband service providers will have a full and fair opportunity to offer the complete menu of bundled service offerings that has become the foundation of competitive local exchange service.

The record before the Commission reflects that Liberty is probably the most powerful vertically-integrated cable programmer in the marketplace today. Liberty holds ownership interests in nearly 100 cable programming services, a number of which have substantial brand name recognition and thus are essential to the success of any broadband provider that seeks to offer multichannel video service.[3] More significantly, however, Liberty holds a substantial ownership stake in Fox/Liberty Networks, which is the largest domestic regional sports network ("RSN") programmer in the United States. Fox/Liberty currently holds interests in 21 RSNs and Fox Sports Net, a 24-hour national sports programming service.[4] The Fox Sports RSNs, together with five additional Fox SportsNet-affiliated RSNs, have rights to telecast games of 72 professional sports teams to over 62 million U.S. cable and DBS households.[5] Fox/Liberty's market power has been described as follows:

> The meaning [of the Fox/Liberty RSNs] was simple, Murdoch would own the home-team sports fan almost everywhere. If you wanted to watch teams from other parts of the country, you could turn on ESPN or the Big Three networks. If you wanted to watch teams from your own city or

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[3] These services include The Discovery Channel, The Learning Channel, fX, QVC, Black Entertainment Television, E! Entertainment, and the various Encore premium movie services.

[4] *See* Prospectus of Fox Entertainment Group, Inc., at 4 (filed with SEC Nov. 10, 1998)["FEG SEC Filing"].

[5] *Id.*

region, you'd probably have to tune in to Fox SportsNet.[6]

At the same time, there is every indication that the AT&T/TCI merger will provide the new AT&T with both the ability and the incentive to migrate Liberty programming to terrestrial delivery. The Commission has recognized that AT&T is one of only four domestic long-distance carriers that currently possesses a coast-to-coast fiber optic network.[7] As described in the various AT&T/TCI license transfer applications, AT&T's entry into the market for local residential telephone service will be achieved by integrating AT&T's network facilities with those of TCI's cable systems.[8] To achieve the nationwide "footprint" necessary for AT&T to provide "all distance service" to all areas of the United States, AT&T has embarked on a strategy of securing affiliation agreements with other large MSOs, as evidenced by the recent announcement of

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[6] Deutschman, "Sly as a Fox," *The New York Times Magazine*, pp. 69, 70 (Oct. 18, 1998) (also noting that "[b]y televising up to nine baseball games in scattered regions on a single night, for example, Fox [SportsNet] attracts more than twice as many viewers as ESPN does for its one-size-fits all national broadcast"). *See also* "New Teammates: Fox/Liberty Nets, Sports Channel," *Media Daily* (July 1, 1997) (quoting Fox SportsNet executive as referring to the network as "quite a behemoth."). Fox/Liberty Networks also owns and operates the FX cable network, which reaches approximately 37 million cable and DBS households. Prospectus at 4. FX's sports programming includes Major League Baseball and NCAA college football. *See, e.g.*, Grover, "Playing for Keeps," *Business Week*, at 33 (Sept. 22, 1997); Breznick, "ESPN, Classic Sports Play Ball," *Cable World*, at 1 (Sept. 8, 1997).

[7] *Teleport Communications Group, Inc.*, CC Docket No. 98-24, FCC 98-169, at ¶ 28 (rel. July 23, 1998).

[8] *See, e.g.*, AT&T/TCI Section 214 Applications, Narrative Statement at 21. AT&T's ultimate plan calls for the development of an "end-to-end packet network" that will provide "long distance, video, local, wireless, Internet and other data services on a packaged, as well as individualized, basis." *Id.* at 39, 42.

AT&T's joint venture with Time Warner.[9] These agreements currently give AT&T access to 43% of the nation's cable households, and it is only a question of time before AT&T achieves 100% coverage through additional agreements with the remaining cable MSOs.[10]

Moreover, AT&T's agreements with the cable industry come at a time when the cable MSOs themselves are developing their own regional networks via "clustering" of adjacent cable systems in local markets. As indicated in the Commission's *Fifth Annual Report* on the status of competition in markets for the delivery of video programming, system clusters serve more than half the total number of cable subscribers in the United States, and it is expected that TCI, Time Warner and other cable MSOs will continue to pursue system clustering aggressively as they expand their networks to facilitate delivery of local exchange service.[11]

Prior history suggests that Liberty and other programmers will take full advantage of the unprecedented terrestrial delivery opportunities created by linkage of AT&T's nationwide network with the regional networks of the cable MSOs. It is well known that terrestrial delivery offers significant cost benefits and better picture qualify, and thus it is not surprising that a number of MSOs are already deploying fiber to deliver local sports and other programming on

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[9] *See, e.g.*, Dawson, "AT&T, Time Warner Finally Dance," *Multichannel News*, at 1 (Feb. 8, 1999).

[10] *Id.* at 50.

[11] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, FCC 98-335, at ¶ 148, Appendix C, Table C-2. The Commission has previously recognized that "clustering" facilitates linkage of cable systems via fiber optic connections. *See* Letter from William E. Kennard, Chairman, to Rep. W.J. (Billy) Tauzin, Chairman, Subcommittee on Telecommunications, Trade and Consumer Protection, Responses to Questions at 6 (Jan 23, 1998).

an exclusive basis to their subscribers. For example, New England Cable News, a regional news network in which MediaOne has an attributable interest, recently moved from satellite to fiber delivery for this very reason, citing cost efficiencies.[12] Indeed, fiber-based networks now deliver local cable programming to substantial number of subscribers in major markets, including New York City, Chicago, Philadelphia, Boston, Minneapolis, Orlando, Columbus, Kansas City and southern New Jersey.[13]

Most alarming, however, is the fact that regional sports programming is now being migrated to these ostensibly "local" fiber networks. For example, cable MSO Cablevision Systems Corp., which through Fox SportsNet controls virtually all professional sports programming in the New York market, recently announced that it will be carrying "overflow" games from Fox Sports Net - New York on Cablevision's fiber-delivered local networks.[14] In a similar vein, the Tribune company recently migrated nearly 50 Chicago Cubs games from WGN to the fiber-based ChicagoLand Television Network.[15] And, as the Commission is aware,

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[12] *See* Testimony of Decker Anstrom, President and CEO, National Cable Television Association, before the Senate Antitrust, Business Rights and Competition Subcommittee (Oct. 8, 1997) ("Cable companies are deploying advanced network architectures to interconnect system headends using high capacity fiber optic rings. These architectures allow systems in the same geographical area to share the same headend and production facilities . . . . These shared facilities also enable cable operators to maximize economies of scale in marketing, promotion, administration and production of programming.").

[13] *Id. See also* Umstead, "Ops Eye Low-Cost Local Heroes," *Multichannel News*, at 74 (May 4, 1998).

[14] *Id.*

[15] "Ameritech Pressing FCC and Congress for Program Access Rule Changes," *Communications Daily* (Feb. 3, 1998).

the regional sports network for the Philadelphia market, Comcast SportsNet, is a fiber-based service.[16] It has been reported that more of these allegedly "local" networks are on the drawing board for additional markets, and that these networks could carry "overflow" regional sports network programming or perhaps even bid on professional sports product themselves.[17]

In sum, contrary to what the Commission appears to have assumed in prior cases, it is very clear that vertically-integrated cable programmers, and particularly regional sports networks, are taking advantage of the economic and technical benefits of terrestrial delivery. They are doing so incrementally, in order to avoid the political backlash that inevitably would accompany any wholesale migration of popular cable programming to fiber. Over time, however, regardless of whether the migration is accomplished incrementaly or all at once, the effect on competition will be the same: broadband competitors will be denied access to critical programming, and thus will not be able to offer "bundled" services comparable to those offered by the merged AT&T/TCI entity or other incumbent cable MSOs. Customer choice, in turn, will suffer in the process, which is precisely the opposite of what Congress intended to achieve in adopting the pro-competitive policies set forth in the 1992 Cable Act and the Telecommunications Act of 1996. CoreComm submits that there is no public interest rationale for the Commission to promote that result.

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[16] *See DirecTV, Inc. v. Comcast Corporation, et al.*, DA 98-2151 (CSB, rel. Oct. 27, 1998).

[17] *See* Umstead, "Ops Eye Low-Cost Local Heroes," *Multichannel News*, at 74 (May 4, 1998) ("[Time Warner/Columbus] hopes to turn the tables on the regional sports networks. [It] hopes that the success of [its] local sports network will allow [it] to actually compete with Fox Sports Ohio for the rights to such marquee programming as Cincinnati Reds Major League Baseball and Cleveland Cavaliers NBA games.").

III. SECTION 310(d) OF THE COMMUNICATIONS ACT GIVES THE COMMISSION THE AUTHORITY TO IMPOSE TERRESTRIAL MIGRATION CONDITIONS ON THE AT&T/TCI MERGER.

Historically, vertically-integrated cable programmers have argued that since Section 628 of the 1992 Cable Act does not explicitly apply to programming delivered via terrestrial means, the Commission has no authority to require that terrestrially-delivered programming be made available to cable's competitors. CoreComm respectfully submits that this argument is incorrect, and that there is an alternative statutory basis for the Commission to take such action in the context of the AT&T/TCI merger.

Under Title III of the Communications Act of 1934 (the "Act"), the Commission may not grant the AT&T/TCI license transfer applications unless the underlying transaction serves the public interest. This review obligation of the Commission arises under Section 310(d) of the Act, which prohibits the transfer of any Title III license unless the Commission finds that the "public interest, convenience and necessity will be served thereby."[18] The burden of proof in this regard is on the applicants, not on the Commission or those parties opposing the transfer.[19] In addition, the Commission has a separate responsibility under section 7 of the Clayton Act to

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[18] 47 U.S.C. § 310(d). Section 214(a) give the Commission similar authority with respect to a transfer of common carrier licenses.

[19] *See 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, Memorandum Opinion and Order FCC 98-276, ¶ 13 (rel. Oct. 23, 1998); *Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries,* File No. NSD-L-96-10, Memorandum Opinion and Order, 12 FCC Rcd 19985, 20000 (1997) *("Bell Atlantic/NYNEX Order"); see also* 47 U.S.C. § 309(e).

review whether a merger would "substantially. . . lessen competition, or . . . create a monopoly."[20]

The Commission's public interest analysis under Section 310(d) is guided primarily by how the proposed merger would affect competition.[21] The analysis is "informed by antitrust principles,"[22] but goes beyond those principles to consider the broader question of whether the merger affirmatively advances the procompetitive goals of the Communications Act, particularly as amended in 1992 and in 1996.[23] Thus, under the Commission's precedent, the AT&T/TCI applications "must be denied" unless the Commission is "convinced" that any competitive benefits from the merger affirmatively outweigh the competitive harms, such as the creation of an entity with the ability and incentive to exploit its market power.[24]

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[20] 15 U.S.C. § 18. Section 11 of the Clayton Act gives the Commission authority to enforce section 7 of the Clayton Act with respect to acquisitions of "common carriers engaged in wire or radio communications." *Id.* § 21(a). *See also Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20005 ("[W]e would not hesitate to exercise our Clayton Act authority, issue a complaint and initiate a hearing in the appropriate case.").

[21] *Bell Atlantic/NYNEX Order,* 12 FCC Rcd 20003.

[22] *Id.*

[23] *See Applications of Teleport Communications Group, Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer Control of Corporation Holding Point-to-Point Microwave Licences and Authorizations to Provide International Facilities-Based and Resold Telecommunications,* CC Docket No. 98-24, Memorandum Opinion and Order, FCC 98-169, ¶ 12 (rel. July 23, 1998) (*"AT&T/Teleport Order"*).

[24] *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 19986; *see also AT&T/Teleport Order,* ¶ 12 ("Mergers that increase market power . . . conflict with [the policy of the Telecommunications Act of 1996] by impeding the advent of competition and thereby maintaining, rather than decreasing, the need for continued regulation").

In exercising its review power, the Commission has both the authority and the obligation to condition its approval of a merger on compliance with specific safeguards necessary to mitigate any competitive harms and thereby ensure that the merger serves the public interest.[25] There is, in other words, "ample precedent for the imposition of conditions that would render the [subject] transaction consistent with the public interest."[26] As noted by the Cable Services Bureau:

> [E]ffective review at the initial stage of the transaction (*i.e.*, the license transfer) provides a prophylactic mechanism by which the Commission can anticipate and address the potential anticompetitive effects resulting from a proposed merger beforehand, rather than await the filing of individual complaints. In addition, early identification of potential anticompetitive harm will also serve to mitigate the proliferation of complaints under the Commission's rules. Finally, there may be anticompetitive effects flowing from a merger which may not be addressed or remedied by the Commission's rules.[27]

CoreComm submits that, at least with respect to the terrestrial migration problem, the

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[25] *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20002; *see also* 47 U.S.C. § 303(r) (authorizing the Commission to "[m]ake such rules and regulations *and prescribe such restrictions and conditions,* not inconsistent with law, as may be necessary to carry out the provisions of this Act").

[26] *See Bell Atlantic/NYNEX Order,* 12 FCC Rcd at 20007. *Applications of Craig O. McCaw, Transferor, and American Tel. and Tel Co., Transferee For Consent to the Transfer of Control of McCaw Cellular Communications, Inc., and its Subsidiaries,* File No. 05288-CL-TC-1-93, Memorandum Opinion and Order, 9 FCC Rcd 5836 (1994), *aff'd sub nom. SBC Communications, Inc. v. FCC.* 56 F.3d 1484 (D.C. Cir. 1996) (approving transfer of radio licenses subject to conditions). Such conditions also would be reasonably ancillary to the Commission's Title I, III and VI authority over the merged entity's wire-and radio-based services. *See United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968); *Computer and Communications Indus. Ass'n v. FCC,* 693 F.2d 198, 214 (D.C. Cir. 1982).

[27] *Tele-communications, Inc. And Liberty Media Corporation,* 9 FCC Rcd 4783, 4786-7 (CSB, 1994.

AT&T/TCI merger satisfies all of the above-quoted criteria. The well-documented willingness of vertically-integrated programmers to take advantage of terrestrial delivery opportunities, particularly when viewed in the context of AT&T/TCI's ongoing unwillingness to make any commitments whatsoever to the Commission on the terrestrial delivery issue, presents a substantial risk that full and fair access to Liberty-affiliated programming will lost unless the Commission attaches appropriate terrestrial delivery conditions to its approval of the AT&T/TCI merger. Furthermore, as demonstrated by NTL's experience in the UK, a piecemeal, complaint-by-complaint approach to the terrestrial delivery problem in this case will only increase the already substantial burden on the Commission's administrative resources, and is unlikely to provide a sufficient remedy for the economic losses of competitors who have been denied access to programming for extended periods of time. By contrast, the imposition of terrestrial delivery conditions on the transaction prior to any Commission approval thereof will "[p]rovide a prophylactic mechanism by which the Commission can anticipate and address the potential anticompetitive effects" of the merger, and thus "mitigate the proliferation of complaints under the Commission's rules."

IV. CONCLUSION.

Again, CoreComm wishes to emphasize that it is not unconditionally opposed to Commission approval of the AT&T/TCI merger. The inescapable fact, however, is that the purported consumer benefits of the merger will be illusory if AT&T's entry into the local loop is achieved at the expense of full and fair competition among broadband service providers. The record before the Commission reflects that the transaction poses a substantial risk that Liberty-

affiliated programming will be migrated to the AT&T terrestrial network, and that any resulting loss of access to that programming by cable's competitors will weaken broadband competition significantly, to the ultimate detriment of consumers. CoreComm is *not* asking that the Commission preclude AT&T/TCI from migrating Liberty programming to the AT&T network if they believe it is more efficient to do so. All CoreComm is asking is that the Commission exercise its public interest authority under Section 310(d) and condition its approval of the transaction on a commitment from both parties that where such migration occurs, the program access *status quo* will be maintained, *i.e.*, any migrated programming will be made available to broadband competitors at nondiscriminatory rates, terms and conditions.