

Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)	
)	
Applications for Consent to the)	
Transfer of Control of Licenses and)	
Section 214 Authorizations from)	
)	
Tele-Communications, Inc.,)	CS Docket No. 98-178
Transferor)	
)	
To)	
)	
AT&T Corp.,)	
Transferee.)	

MEMORANDUM OPINION AND ORDER

Adopted: February 17, 1999

Released: February 18, 1999

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement; Commissioner Tristani approving in part, dissenting in part, and issuing a statement.

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I. INTRODUCTION

1. Tele-Communications, Inc. ("TCI") and AT&T Corp. ("AT&T") have applied for our consent to their proposed transfer of control to AT&T of certain licenses and authorizations controlled by TCI or its affiliates or subsidiaries.¹ Based on the record, we find that AT&T and TCI (collectively, the "Applicants" or "AT&T-TCI") have demonstrated that the proposed transfers are in the public interest. We conclude that, with the conditions imposed by this Order, the merger of AT&T and TCI is likely to result in benefits for consumers, including a local telephony alternative to many residential customers now served only by incumbent local exchange companies ("LECs"), without creating competitive harm with respect to other services. Accordingly, we grant the transfer application subject to the following conditions: (1) that prior to consummation TCI transfer ownership of its Sprint PCS tracking stock to a trust that has been approved by the Commission;² and (2) that the merged AT&T direct any economic interest arising in connection with the Sprint PCS tracking stock to the benefit of the shareholders of Liberty Media Group consistent with its proposed policy statement and with the terms of the Applicants' settlement agreement with the Department of Justice, as set forth in the proposed Final Judgment in *United States v. AT&T Corp. and Tele-Communications, Inc.*, Case No. 98-3170 (D.D.C., filed Dec. 30, 1998).

II. BACKGROUND

A. The Applicants

2. *AT&T*. Principally, AT&T is a telephone company. More specifically, AT&T is the largest domestic and international long distance telecommunications carrier in the United States.³ It

¹Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T, CS Docket No. 98-178 (filed Sept. 14, 1998) ("Application").

²The proposed trust agreement must be submitted to the Commission within 30 days after issuance of this Order or at least 10 days prior to consummation, whichever is earlier. The Applicants cannot consummate the merger until the Commission has approved the proposed trust agreement. We delegate authority to the Wireless Telecommunications Bureau to review and approve the proposed trust agreement in consultation with the Office of General Counsel. 47 C.F.R. §§ 0.131(1), 0.331.

³Federal Communications Commission, *Trends in Telephone Service* at 24, 53-54 (Common Carrier Bur., Industry Analysis Div., Feb. 1998).

provides communications services to residential, business, and government customers, and operates in more than 250 countries and territories around the world.⁴ AT&T's revenues from communications services totaled \$51.3 billion in 1997, of which \$22.2 billion were derived from business long distance services and \$23.9 billion from residential long distance services.⁵

3. AT&T provides local exchange services to a relatively small number of customers.⁶ In particular, AT&T offers resold local exchange service to less than one-half of one percent of the total residential customers.⁷ AT&T also offers service to business customers. To expand its presence in markets for local exchange and exchange access services for business customers, AT&T acquired Teleport Communications Group Inc. ("Teleport"). Teleport provided residential local telephone service to only 12,000 customers nationwide.⁸ The Commission approved the transaction on July 23, 1998.⁹ At the time of its acquisition, Teleport was the nation's largest competitive local exchange carrier and had initiated the development of local telephone networks in 83 metropolitan areas in approximately 28 states

⁴See AT&T Corp., 1997 Annual Report at 2 (Feb. 24, 1998) ("*AT&T 1997 Annual Report*"); AT&T Corp., 1996 Annual Report at 1 (Feb. 28, 1997) ("*AT&T 1996 Annual Report*"). AT&T's domestic and international communications services include wireline local and long distance voice, data, and video services, wireless services, network management services, electronic commerce services, and online and Internet access services. *AT&T 1997 Annual Report* at 25; *AT&T 1996 Annual Report* at 21.

⁵*AT&T 1997 Annual Report* at 28. As of December 1996, 100.2 million telephone lines in the United States (63.3% of the total 158.7 million presubscribed lines) were presubscribed to AT&T for long distance calls (including international). Federal Communications Commission, *Long Distance Market Shares: First Quarter 1998* at 4, 9 (Common Carrier Bur., Industry Analysis Div., June 1998). Commission staff estimate that, in 1996, AT&T's share of presubscribed residential lines was 70%, while its share of business access lines was approximately 51%. Federal Communications Commission, *Long Distance Market Shares: Fourth Quarter 1997* at 19 (Common Carrier Bur., Industry Analysis Div., Mar. 1998).

⁶*Applications of Teleport Communications Group Inc. and AT&T Corp. for Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order, 13 FCC Rcd 15236, 15238-39 ¶ 4 (1998) ("*AT&T-Teleport Order*").

⁷AT&T's percentage of residential customers for local exchange service is approximately 0.30%. This percentage is derived from dividing AT&T's total residential customers (325,000) by the total number of residential billable access lines of reporting local exchange companies (approximately 108,000,000). Application at 4; see Federal Communications Commission, *Statistics of Communications Common Carriers ("SOCC")* at 20 Table 2.3, 176 Table 2.19 (1997-1998). In 1997, AT&T's total revenues from its local services were \$68 million. AT&T claims to have spent in excess of \$3 billion in its attempt to provide local service. Application at 3.

⁸Application at 5.

⁹*AT&T-Teleport Order*, 13 FCC Rcd at 15236. Prior to its merger with Teleport, AT&T also provided or planned to deploy facilities-based local calling services directed primarily at large and medium-sized businesses. Examples of these services include "AT&T Digital Link" ("ADL") and synchronous optical equipment-based facilities ("SONET Rings"). Application at 4. See also AT&T Corp., *AT&T Midyear Report to Our Shareholders: Mergers, Venture and Highlight Busy Half*, July 26, 1998, <www.att.com/ir/midyear/1998/busyhalf.html> (visited: Jan. 28, 1999) ("*AT&T Midyear Report*").

throughout the United States.¹⁰ From these operations, through which it served the business market, Teleport had earned revenues of \$494.3 million in 1997.¹¹

4. In addition to the foregoing wireline services, AT&T provides wireless mobile telephone services through its ownership and operation of AT&T Wireless Services Inc. ("AT&T Wireless"). Operating in numerous metropolitan markets throughout the United States, AT&T Wireless serves approximately 6.6 million customers.¹² In 1997, AT&T Wireless generated revenues of approximately \$4.4 billion.¹³ AT&T also provides Internet access service to approximately 1.25 million customers through AT&T WorldNet Service and CERFNet.¹⁴ AT&T WorldNet and CERFNet offer Internet access to residential and business customers through dial-up and dedicated connections.¹⁵

5. *TCI*. Principally, TCI is a cable company. More specifically, TCI is a diversified corporation that holds a variety of interests through its subsidiaries, TCI Communications ("TCI-C"), Liberty Media Group ("Liberty Media"), and TCI Ventures Group. TCI-C is one of the largest providers of cable television service in the United States. Through its subsidiaries, TCI-C delivers a wide range of video programming, including local broadcast stations; national, regional, and local cable programming services; premium movie and pay-per-view channels; and sports programming services to homes and businesses nationwide.¹⁶ TCI-C controls a number of subsidiaries that together provide cable television service to approximately 12.7 million customers, passing approximately 20.9 million homes.¹⁷ TCI-C also holds minority interests in, or has joint ventures with, other cable television operators.¹⁸ These

¹⁰Application at 5. These states include: Alabama, Arizona, California, Colorado, Connecticut, Florida, Georgia, Illinois, Indiana, Kansas, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New York, New Jersey, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Washington, and Wisconsin. *Id.*

¹¹*Id.* at 5. At the time of the merger, Teleport served 16,500 buildings nationwide. Less than 100 of these buildings were multiple dwelling units ("MDUs"). *Id.*

¹²*Id.* at 6. In terms of customers served, AT&T Wireless' top 10 markets are: New York City, New York; Miami, Florida; Dallas, Texas; Seattle, Washington; Pittsburgh, Pennsylvania; Minneapolis, Minnesota; Portland, Oregon; Tampa, Florida; Denver, Colorado; and Sacramento, California.

¹³*Id.* at 5.

¹⁴*Id.* at 5 n.9. AT&T originally introduced AT&T WorldNet Service, while Teleport originally introduced CERFNet prior to its acquisition by AT&T.

¹⁵*Id.*

¹⁶Application at 6.

¹⁷*Id.* According to TCI, the numbers of subscribers and homes passed are based on the most conservative interpretation of the Commission's ownership attribution rules. *Id.* at n.11. See 47 C.F.R. §§ 76.501, 76.503.

¹⁸Application at 6. TCI-C has certain ownership interests and/or operational arrangements with various multiple system operators, which include, but are not limited to, the following: Adelpia Communications Corporation, (continued...)

operators collectively provide cable television service to approximately 7.5 million additional customers, and pass approximately 13.2 million additional homes.¹⁹ In 1997, revenues from TCI-C's cable services operations totaled approximately \$5.8 billion, which constituted 76% of TCI's total annual revenue.²⁰

6. TCI's Liberty Media Group subsidiary is an investor in, and manager of, entities engaged in the production, acquisition, and distribution of entertainment and informational programming and software, including multimedia products.²¹ The various business interests fall into four categories: movie services; general entertainment and information services; electronic retailing (which includes direct marketing, advertising sales relating to programming services, infomercials, and transaction processing); and sports programming services.²²

¹⁸(...continued)

Bresnan Communications, Cablevision Systems Corporation, Falcon Communications, LP, and Insight Communications. See *Tele-Communications, Inc. 1997 Stockholder Report*, TCI Group: Operations Review, <www.tci.com/tci.com/annualreports/reportsframe.html> (visited: Jan. 28, 1999) ("*TCI 1997 Stockholder Report*").

¹⁹Application at 6-7. As of December 30, 1998, TCI reports, pursuant to MM Docket No. 92-264, FCC 98-138 (rel. June 26, 1998), that it passes approximately 39 million cable homes. Letter dated Jan. 20, 1999, from Douglas G. Garrett, Sr., TCI Senior Regulatory Counsel to Magalie Roman Salas, Secretary, Federal Communications Commission at 1. TCI filed the letter reporting the number of homes passed by its systems pursuant to the Commission's June 26, 1998 order on reconsideration in the *Horizontal Limits* proceeding, which requires operators whose systems reach 20% or more of the homes passed nationwide by cable operators to report the incremental change in homes passed by their systems as a result of acquisitions of other cable systems. *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Limits*, MM Docket No. 92-264, Memorandum Opinion and Order on Reconsideration, 13 FCC Rcd 14462, 14492 ¶ 76 (1998) ("*Horizontal Limits Order on Reconsideration*"). The *Horizontal Limits Order on Reconsideration* also stayed the effective date of the Commission's horizontal ownership rules (47 C.F.R. § 76.503) pending a decision by the United States Court of Appeals for the District of Columbia Circuit ("D.C. Circuit") on challenges to the rules and their authorizing statute, section 613 of the Communications Act, 47 U.S.C. § 533. *Id.* at 14492 ¶ 75; see *Time Warner Entertainment Co., L.P. v. FCC*, 93 F.3d 957, 979-80 (D.C. Cir. 1996). The Commission's horizontal ownership rules provide that "no person or entity shall be permitted to reach more than 30% of all homes passed nationwide through cable systems owned by such person or entity or in which such person or entity holds an attributable interest." 47 C.F.R. § 76.503(a). Any entities that exceed the 30% horizontal limit must come into compliance with the horizontal ownership rules within 60 days after the D.C. Circuit upholds section 613 and the horizontal ownership rules. *Horizontal Limits Order on Reconsideration*, 13 FCC Rcd at 14492-93 ¶ 77. Our Order in this proceeding does not affect AT&T-TCI's obligations under the Commission's horizontal ownership rules.

²⁰Application at 7.

²¹The Liberty Media Group's principal assets include interests in Encore Media Group LLC, Discovery Communication, Inc., Fox/Liberty regional and national sports network, Time Warner, Inc., QVC Inc., and USA Networks, Inc. AT&T Corp., *SEC Form S-4: Proxy Prospectus* (filed Jan. 8, 1999) at 173 ("*AT&T Merger Proxy Prospectus*"). The Liberty Media Group also has interests in various other domestic and international programming networks that include, for example, BET Holdings II Inc., E! Entertainment Television, Fox Kids Worldwide, Inc., MacNeil/Lehrer Productions, and Telemundo Network. *Id.* at 174.

²²See *TCI 1997 Stockholder Report*, Liberty Media Group: Operations Review, <www.tci.com/tci.com/annualreports/reportsframe.html> (visited: Jan. 28, 1999).

7. TCI's third subsidiary is TCI Ventures Group, a wholly owned subsidiary that is composed of an array of telecommunications investments.²³ Through this business unit, TCI holds its non-cable, non-programming and international assets, including, of particular relevance to this proceeding, its investments in @Home and Sprint Corporation ("Sprint"). TCI Ventures Group holds a 39% equity interest and a 71% voting interest in @Home, which provides content-enriched, high-speed Internet services over cable television infrastructure.²⁴ @Home began its commercial operation in September of 1996. Its primary offering allows residential subscribers to connect their personal computers via cable modems to their cable operator's hybrid fiber-coaxial cable ("HFC") network and receive data at higher speeds than are available with typical dial-up access services offered over standard analog lines of local exchange carriers.²⁵ @Home transmits data between the cable plant and the public Internet using a proprietary backbone network that enhances the speed of transmission.²⁶ @Home has reached affiliate agreements with 18 cable companies worldwide to deliver its high-speed Internet services.²⁷ Considering other current and pending affiliations, @Home has potential access to more than 50 million homes, or approximately 50% of all homes passed by cable television plant in North America.²⁸ As of December 31, 1998, @Home served more than 330,000 cable modem subscribers across North America.²⁹

8. Through TCI Ventures Group, TCI currently holds approximately 23.8% of the equity and approximately 2.38% of the voting interest in a class of Sprint stock that tracks the value of Sprint's personal communications service operating group ("Sprint PCS tracking stock").³⁰ On August 31, 1998, after a public notice period, the Commission approved Sprint's unopposed application for re-organization, whereby Sprint issued shares of this newly-created Sprint PCS tracking stock to TCI in exchange for

²³*Id.*

²⁴Application at 8.

²⁵*Id.* See *infra* Section IV.C.

²⁶Application at 8; see AtHome Corp., *@Home Network: Network Architecture*, <www.home.net/corp/network.html> (visited: Jan. 28, 1999); see also AtHome Corp., *@Home Network: Company Background*, <www.home.net/corp/background.html> (visited: Jan. 28, 1999).

²⁷AT&T Corp., *@Home Network To Create Internet Backbone with Initial Capacity for 5 Million Broadband Users* (press release), Jan. 6, 1999. Some of the major companies with whom @Home has reached affiliate agreements include: Bresnan Communications, Cablevision Systems Corporation, Comcast Corporation, Cox Communications, Marcus Cable, InterMedia Partners, and Insight Communications.

²⁸See *TCI 1997 Stockholder Report*, TCI Ventures Group: Operations Review, <www.tci.com/tci.com/annualreports/reportsframe.html> (visited: Jan. 28, 1999).

²⁹See AtHome Corp., *@Home Network Surpasses 330,000 Subscribers*, (press release), Jan. 11, 1999, <www.home.net/corp/news/pr_990112_01.html> (visited: Jan. 28, 1999). These numbers include Internet service subscribers served by @Home affiliates that are currently being converted to the @Home service.

³⁰Application at 10.

TCI's partnership interest.³¹ This re-organization includes an initial public offering of additional shares of the Sprint PCS tracking stock.³²

B. The Merger Transaction and the Application To Transfer Licenses

9. *Proposed Transaction.* On June 24, 1998, AT&T announced its agreement to merge with TCI.³³ Under the terms of the agreement, and following a reorganization of certain of TCI's assets, AT&T will become the parent company of TCI.³⁴ Through this merger, AT&T plans to integrate its telecommunications business with TCI's cable networks and thereby build a facilities-based local residential telecommunications network.³⁵ The Applicants contend that the merger will expand and accelerate AT&T's ability to compete with incumbent local exchange carriers ("incumbent LECs") in providing local telephone service to residential customers.³⁶ After a significant investment to upgrade TCI's cable facilities to allow two-way voice and data communications, Applicants submit, the merger will allow almost one-third of American households access to the upgraded high-capacity broadband networks.³⁷ Applicants believe that the merger provides them an opportunity to give consumers an "unprecedented choice of communications, entertainment and advanced information services from one company with one easy connection."³⁸

³¹See Public Notice, *Sprint Spectrum Holding Company, LP and PhillieCo Partners I, LP Transfers of Control Action Taken*, LB-98-65 (rel. Aug. 31, 1998). Pursuant to this reorganization, which was consummated on November 23, 1998, Sprint also issued Sprint PCS tracking stock to Cox Communications, Inc., and Comcast Corporation in exchange for their respective partnership interests. Sprint Corp., *Sprint Completes Recapitalization of its Common Stock and Restructuring of Sprint PCS* (press release), Nov. 23, 1998.

³²On February 5, 1999, Sprint announced that it priced its previously announced public offering of Sprint PCS tracking stock, selling 21.22 million shares at a price to the public of \$28.75 per share. Sprint Corp., *Sprint PCS Stock Offering Is Priced* (press release), Feb. 5, 1999. This public offering of Sprint PCS tracking stock raises capital for Sprint to finance the build-out of new and existing wireless markets, and effectively dilutes TCI's percentage ownership of Sprint PCS tracking stock. See Sprint Corp., *Sprint To Proceed with \$500 Million PCS Stock Offering* (press release) Jan. 21, 1999.

³³*AT&T Midyear Report*, <www.att.com/ir/midyear/1998/busyhalf.html> (visited: Jan 28, 1999).

³⁴Application at 2. TCI will continue to exist as a wholly owned subsidiary corporation of AT&T, and all common stockholders of TCI will exchange their shares of TCI common stock for shares of AT&T common stock. *Id.*

³⁵*Id.* at 13.

³⁶*Id.* at 14.

³⁷*AT&T Midyear Report*, <www.att.com/ir/midyear/1998/busyhalf.html> (visited: Jan 28, 1999). The one-third estimate takes into account TCI's affiliate arrangements with other multiple system operators. *Id.*

³⁸*Id.*

10. Prior to the merger, and subject to shareholder approval, TCI plans to combine its Liberty Media Group with its TCI Ventures Group.³⁹ The new business unit, called "Liberty Media Group," will combine the business operations of the two groups.⁴⁰ Immediately prior to the merger, the new Liberty Media Group will transfer to TCI its investment in @Home, the National Digital Television Center, and its ownership of Western Tele-Communications, Inc.⁴¹ Subsequent to the merger, AT&T also plans to issue a separate tracking stock, called Liberty Media Group tracking stock, which is intended to reflect the performance of the assets and businesses of the new Liberty Media Group.⁴² Although AT&T will be the legal owner of the assets and the businesses of the new Liberty Media Group, the businesses of Liberty Media Group will continue to be managed by the executives of Liberty and TCI Ventures Group that were in office prior to the merger.⁴³

11. *Federal Review.* On September 14, 1998, AT&T and TCI filed joint applications under sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("Communications Act"),⁴⁴ requesting Commission approval of the transfer of control to AT&T of licenses and authorizations controlled by TCI or its affiliates or subsidiaries.⁴⁵ The transfer would take place as a result of the proposed merger between AT&T and TCI, subsequent to which TCI would become a wholly-owned subsidiary of AT&T. On December 30, 1998, the Department of Justice ("DOJ") completed its review of the proposed merger between AT&T and TCI.⁴⁶ Pursuant to a proposed consent decree, DOJ required

³⁹Application at 10 n.19. The Merger Agreement also provides, to the extent practicable and subject to the reasonable satisfaction of AT&T, that the direct or indirect subsidiaries of TCI-C will merge with TCI prior to the closing of the merger. *AT&T Merger Proxy Prospectus* at 67.

⁴⁰Application at 10 n.19. *AT&T Merger Proxy Prospectus* at 1.

⁴¹Application at 10-11 n.19. *AT&T Merger Proxy Prospectus* at 68.

⁴²*AT&T Merger Proxy Prospectus* at 7; Application at 11 n.20; see AT&T Corp., *AT&T Publicly Files TCI Merger Proxy: Expects To Begin Mailing to Shareowners Shortly* (press release), Jan. 8, 1999. Tracking stock tracks the performance of a specific business unit within a larger company. It allows investors to buy shares in the economic interests -- risks and benefits -- of just that unit while the unit remains part of a corporate family. The shareholders of the parent (in this case, AT&T-TCI) will still own all the underlying assets associated with the business unit listed under the tracking stock. The tracking stock concept separates asset ownership from economic interest in those assets. *AT&T Midyear Report: What Is a Tracking Stock and How Does It Work?* <www.att.com/ir/midyear/1998/merger_d.html> (visited: Jan. 29, 1999). In this case, the use of tracking stock will allow the public to invest selectively in, and to evaluate separately, the discrete businesses of Liberty Media Group from AT&T-TCI.

⁴³Application at 11 n.19; *AT&T Merger Proxy Prospectus* at 8.

⁴⁴7 U.S.C. §§ 214(a), 310(d).

⁴⁵Public Notice, *AT&T Corporation and Tele-Communications, Inc. Seek FCC Consent for a Proposed Transfer of Control*, DA 98-1969 (Cab. Services Bur., Sept. 29, 1998).

⁴⁶*United States v. AT&T Corp. and Tele-Communications Inc.*, Case No. 98-3170, Complaint (D.D.C. Dec. 30, 1998). See 15 U.S.C. § 18 (1994).

Liberty Media to divest its ownership of Sprint PCS tracking stock to prevent the merger from reducing competition in mobile wireless services.⁴⁷

12. *Local Franchising Authority Review.* Applicants have completed initial regulatory filings with approximately 940 local franchising authorities.⁴⁸ Pursuant to section 617 of the Communications Act, local franchising authorities with jurisdiction to review such transfers or sales of cable systems have 120 days to render a decision.⁴⁹

III. LEGAL STANDARDS

13. As we explained in our decision approving the transfer of licenses and authorizations from MCI to WorldCom, before the Commission can approve the transfer of control of authorizations and licenses in connection with a proposed merger, we must find that the proposed transfers serve the public interest, convenience, and necessity.⁵⁰ To make this finding, we must weigh the potential public interest harms and benefits. At a minimum, this requires that the merger does not interfere with the objectives of the Communications Act.⁵¹

14. This analysis must include, among other things, consideration of the possible competitive effects of the transfer.⁵² Our public interest analysis is not, however, limited by traditional antitrust

⁴⁷*United States v. AT&T Corp. and Tele-Communications Inc.*, Case No. 98-3170, Final Judgment (D.D.C. Dec. 30, 1998) ("Proposed Final Judgment"). The Proposed Final Judgment will approve the proposed consent decree.

⁴⁸A cable operator does not have to obtain local franchising authority approval for the transfer or sale of its cable system unless the franchise agreement so requires. 47 U.S.C. § 537.

⁴⁹47 U.S.C. § 537; 47 C.F.R. § 76.502.

⁵⁰*Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order, 13 FCC Rcd 18025, 18026 ¶ 1 (1998) ("*MCI-WorldCom Order*"). See generally 47 U.S.C. §§ 214(a) ("no carrier shall . . . acquire or operate any line, or extension thereof, or shall engage in transmission over or by means of such additional or extended line, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line . . .") & 310(d) ("No construction permit or station license . . . shall be transferred, assigned, or disposed of in any manner . . . except upon application to the Commission and upon a finding by the Commission that the public interest, convenience, and necessity will be served thereby").

⁵¹*Applications of Southern New England Telecommunications Corp. and SBC Communications, Inc. for Consent To Transfer of Control of Licenses and Section 214 Authorizations*, CC Docket 98-25, Memorandum Opinion and Order, 13 FCC Rcd 21292, 21298-99 ¶ 13 (1998) ("*SBC-SNET Order*"); *MCI-WorldCom Order*, 13 FCC Rcd at 18030-31 ¶ 9; *Applications of NYNEX Corp. and Bell Atlantic Corp. 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, 19988 ¶ 3 (1997) ("*Bell Atlantic-NYNEX Order*").

⁵²*MCI-WorldCom Order*, 13 FCC Rcd at 18030-33 at ¶¶ 9-12.

principles.⁵³ In the telecommunications and cable industries for which we have statutory responsibility, as in most others, competition is shaped not only by antitrust rules, but by the regulatory policies that govern the interactions of firms inside the industries. An antitrust analysis -- such as that undertaken by the Department of Justice in this case -- focuses solely on whether a proposed merger will harm competition. Our public interest analysis, however, also encompasses the broad aims of the Communications Act.⁵⁴ For example, an antitrust analysis of cable television service providers takes place against a backdrop of rules adopted by this Commission, as directed by Congress, that among other things limit the ability of cable operators to prohibit their competition from carrying certain programming.⁵⁵ To apply our public interest test, then, we must determine whether the merger violates our rules, or would otherwise frustrate our implementation or enforcement of the Communications Act and federal communications policy. That policy is, of course, shaped by Congress and deeply rooted in a preference for competitive processes and outcomes.

15. The Applicants bear the burden of proving that the transaction serves the public interest.⁵⁶ Where necessary, the Commission can attach conditions to the transfer of authorizations or licenses in order to ensure that the public interest is served by the transaction.⁵⁷ When assessing the potential public interest effects of this transaction between AT&T and TCI, we limit our analysis to those issues that have been raised by the parties to the proceeding and those additional issues that may significantly affect the

⁵³See *Satellite Business Systems*, 62 F.C.C. 2d 997, 1069, 1088 (1977), *aff'd. sub. nom. United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980) (*en banc*).

⁵⁴*MCI-WorldCom Order*, 13 FCC Rcd at 18030 ¶ 9 (citing *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19987 ¶ 2 & n.2).

⁵⁵The Commission's program access rules prohibit cable operators and programmers with which they are affiliated from engaging in certain proscribed practices. The rules are generally intended to ensure that multichannel video programming distributors ("MVPDs") that are competing with traditional cable operators are not deprived, through exclusive distribution contracts, discriminatory pricing of programming, or otherwise, of access to cable programming distributed via satellite by programmers that have corporate affiliations with cable operators. See 47 C.F.R. §§ 76.1000-76.1004; 47 U.S.C. § 548.

⁵⁶*MCI-WorldCom Order*, 13 FCC Rcd at 18031 ¶ 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant)); *American Telephone and Telegraph Co. and MCI Communications Corporation Petitions for the Waiver of the International Settlements Policy*, File No. USP-89-(N)-086, Memorandum Opinion and Order, 5 FCC Rcd 4618, 4621 ¶ 19 (1990) (applicant seeking a waiver of an existing rate bears the burden of proof to establish that the public interest would be better served by the grant rather than the denial of the waiver request); *LeFlore Broadcasting Co., Inc.*, Docket No. 20026, Initial Decision, 66 FCC 2d 734, 736-37 ¶¶ 2-3 (1975) (on the ultimate issue of whether the applicants have the requisite qualifications to be or to remain Commission licensees, and whether a grant of the applications would serve the public interest, convenience and necessity, as on all issues, the burden of proof is on the licensees).

⁵⁷*MCI-WorldCom Order*, 13 FCC Rcd at 18031-32 ¶ 10 (citing 47 U.S.C. § 214(c), 47 U.S.C. § 303(r)).

public interest.⁵⁸ Finally, we weigh any potential competitive harms and benefits to determine whether the proposed transaction would promote the public interest.⁵⁹

16. For some mergers no inquiry is necessary. Indeed, the face of some merger applications may reveal that the merger could not frustrate or undermine our policies.⁶⁰ This merger, although ultimately we judge it permissible, is not so simple. Parties have raised non-frivolous issues about whether this merger creates incentives or opportunities for the merged firm to violate or frustrate Commission rules and policies. We analyze the potential public interest harms and benefits of this merger in the next sections.

IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

17. Consistent with our precedent, we begin our analysis of the competitive effects of the proposed merger by identifying the relevant product and geographic markets.⁶¹ We then consider whether the merger is likely to result in anti-competitive effects or other potential adverse public interest effects.⁶²

18. Parties opposing the merger of AT&T and TCI have alleged that the combination may harm the public interest. These allegations concern behavior that may or will occur in one or more of four relevant types of services: (1) multichannel video programming distribution ("MVPD"); (2) local exchange and exchange access; (3) residential Internet access; and (4) mobile telephony. Based on our own review of the record, we believe that the proposed transfers of licenses and authorizations are not likely to produce any adverse public interest effects with respect to any other services. Accordingly, we limit our analysis to the four services listed above. With one exception, neither the Commission nor commenters identified issues concerning other services provided by AT&T and/or TCI. Sprint alleged that the merger could have anticompetitive effects with respect to long distance service as a result of the merged firm's control of exchange access service. We address this concern in our analysis of local exchange and exchange access services.⁶³

⁵⁸For this reason, we do not describe or analyze markets in which the merger is not likely to produce public interest harms or benefits.

⁵⁹*SBC-SNET Order*, 13 FCC Rcd at 21299-300 ¶¶ 15-17; *MCI-WorldCom Order*, 13 FCC Rcd at 18031-39 ¶¶ 10-22; *AT&T-Teleport Order*, 13 FCC Rcd at 15245 ¶¶ 15-16; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19987-88 ¶¶ 2-3, 20008 ¶ 37.

⁶⁰See, e.g., *Applications of Bourbeuse Telephone Company and Fidelity Telephone Company for Consent To Assignment of Authority Under Section 214 of the Communications Act*, CC Docket 98-210, Memorandum Opinion and Order, DA 98-2568 (Common Carrier Bur., rel. Dec. 21, 1998).

⁶¹*Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20008 ¶ 37; *AT&T-Teleport Order*, 13 FCC Rcd at 15245 ¶ 15; *SBC-SNET Order*, 13 FCC Rcd at 21299-300 ¶ 15.

⁶²*SBC-SNET Order*, 13 FCC Rcd at 21298 ¶ 13, 21299-30 ¶ 15.

⁶³ See *infra* Section IV.B. The other services offered by the Applicants, which we do not address in this Order, are video programming production, which is Liberty Media's primary business, and U.S. international service (*i.e.*, international long distance telephone service), which is one of AT&T's businesses. These services are not analyzed
(continued...)

19. We treat multichannel video programming distribution services, local exchange and exchange access services, Internet access service, and mobile telephony services as separate offerings, although we expect that some of these services may be offered on a bundled basis in the future. At present, such a bundled service offering is a new offering in some markets and nonexistent in many others. Accordingly, we do not conduct a separate analysis of bundled services as a discrete product. Rather, our competitive analyses of how the merger will affect each component of a bundled offering will analyze the competitive effects of the bundle as well.⁶⁴

A. Multichannel Video Programming Distribution Service

20. No party alleges that the merger will eliminate an actual or potential significant competitor in markets for multichannel video programming distribution. However, some commenters are concerned that the merged company will have a competitive advantage over other multichannel video programming distributors ("MVPDs") because of its ability to deliver a comprehensive package of services in addition to cable service -- specifically, local and long distance service, mobile telephone service, and high-speed Internet access service. In light of the exorbitant, and arguably prohibitive, investment that would be needed to deploy competing facilities on the same scale, these commenters argue that we should approve the merger subject to the condition that competitors have a right of access to the merged entity's facilities, on reasonable terms, for the purpose of providing competing services. Other commenters are concerned that the merged company will attempt to evade the Commission's existing program access and pole attachment rules.⁶⁵ In some cases, commenters believe the merged company should be subject to expanded regulatory restrictions, particularly with respect to program access.

⁶³(...continued)

separately in the Order because the merger does not raise a competitive concern in either of these services. AT&T does not provide video programming production and has no special advantage over numerous other possible providers of video programming. TCI does not provide U.S. international telephone service and has no special advantage over numerous other possible providers of this service. See Application at 25; Letter dated Feb. 11, 1999, from Michael H. Hammer, Willkie Farr & Gallagher, to Magalie Roman Salas, Secretary, Federal Communications Commission; 1997 Section 43.61 International Telecommunications Data (filed as of Oct. 31, 1998; (Common Carrier Bur., rel. Dec., 1998) at 22 Figure 7. Issues raised by commenters concerning video programming services are considered in our analysis of MVPD services, and, in particular, our discussion of the Commission's program access rules. See *infra* Section IV.A.2. No commenters raised any concerns relating to the provision of U.S. international service. Thus, we are approving the transfer of TCI's international section 214 authorizations without further discussion. See *infra* paras. 155-156.

⁶⁴See, e.g., *MCI-WorldCom Order*, 13 FCC Rcd at 18038-39 ¶ 22 n.60; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20024 ¶ 70 n.159.

⁶⁵See 47 U.S.C. § 224. A pole attachment is the means by which a cable operator or telecommunications provider secures its wire to a utility pole, duct, conduit, or right-of-way. The rate charged by the pole owner is generally per attachment, per year. Section 224 of the Communications Act requires the Commission to "regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable." The Act also requires the Commission to adopt procedures to hear and resolve complaints with regard to rates, terms, and conditions. The program access rules are described *supra* note 55.

21. The product we consider in this section is the services provided by MVPDs. This conforms with the Communications Act's definition of "multichannel video programming distributor."⁶⁶ MVPDs include cable, direct broadcast satellite ("DBS"), multichannel multipoint distribution services ("MMDS"), and satellite master antenna television ("SMATV") providers.⁶⁷ Although the relevant services are offered by MVPDs using different distribution technologies and may not be perfect substitutes for each other (*e.g.*, DBS providers generally do not offer local broadcast channels, which cable, MMDS, and SMATV systems can provide), subscribers can often combine services (*e.g.*, use an antenna to receive broadcast programming over the air when subscribing to DBS services) to obtain most of the functionality provided by other MVPDs. Consumers in a local cable franchise area cannot switch to alternative MVPD services that are not offered in the same local service area.⁶⁸ For purposes of our public interest analysis, however, it is reasonable to treat all households facing similar competitive choices as being in the same market.⁶⁹ TCI is the dominant provider of multichannel video programming services in those local areas in which it operates a franchised cable system.⁷⁰ Consequently, to analyze the effects of this merger on competition between MVPDs, we focus on TCI's individual local franchise areas.⁷¹

22. We conclude that the proposed merger is unlikely to produce adverse competitive effects in the provision of services from MVPDs. Although AT&T has operated as a retail provider of such

⁶⁶47 U.S.C. § 522(13).

⁶⁷See *Fifth Annual Report on Competition In Video Markets*, CS Docket No. 98-102, Report No. CS 98-18, Sections II.A. - II.F. (Dec. 17, 1998) ("*1998 Competition Report*") (generally describing the various types of MVPDs). DBS operators provide programming via satellite to subscribers that own or lease small-diameter receiving dishes. MMDS providers offer programming via microwave facilities (the service is often referred to as "wireless cable service"). SMATV operators, also known as "private cable operators," also frequently use microwave facilities to transmit programming to subscribers. SMATV subscribers usually reside in MDUs.

⁶⁸We note that a customer could obtain alternative cable service in those limited situations in which a second cable operator (*i.e.*, a cable overbuilder) had entered the neighborhood, or if the customer has access to multichannel video service through a DBS operator or a provider of wireless cable service.

⁶⁹*Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20016-17 ¶ 54; *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, CC Docket No. 96-149, and Third Report and Order, CC Docket No. 96-61, 12 FCC Rcd 15756, 15794 ¶ 66 (1997); *The Merger of MCI Communications Corporation and British Telecommunications PLC*, GN Docket No. 96-245, 12 FCC Rcd 15351, 15375-76 ¶ 51 (1997).

⁷⁰The *1998 Competition Report* suggests that cable MVPDs account for about 85% of the local MVPD market. Since most MVPD markets are served by one cable operator, the market share of the leading cable operator is generally quite high. See *Fifth Annual Report on Competition In Video Markets*, CS Docket No. 98-102, Report No. CS 98-18 (Dec. 17, 1998) ("*1998 Competition Report*") at ¶ 128.

⁷¹Even when aggregating households to form relevant geographic markets, there may be more than one relevant product market within any given TCI franchise area if alternative MVPDs offer service to only some customers or localities within the TCI area.

services on a limited scale in the past, it is not doing so now.⁷² Even if it had plans to begin offering video programming services on a retail basis in the future, many other companies have comparable incentives and capabilities. AT&T is unlikely to quickly become a significant competitor in the distribution of multichannel video programming absent the merger.⁷³ AT&T's current assets and capabilities do not provide it with an advantage compared to other firms that might be interested in deploying the necessary facilities; indeed, we have previously reported that DBS providers, wireless cable operators, SMATV systems, incumbent LECs, and electric utility providers are more likely sources for the development of competitive facilities.⁷⁴ Accordingly, the proposed merger is unlikely to result in the loss of a significant source of current or future competition in MVPD services.

23. Nevertheless, commenters assert that the merger will further entrench whatever market power TCI currently enjoys in its franchise areas. To avoid or mitigate this enhanced market power, commenters ask us to adopt, for this merger, new rules regarding access to TCI's facilities, program access, and local station signal carriage. For the reasons discussed below, we decline each of these invitations to fashion new rules to confine a hypothetical increase in market power.

1. Open access to broadband facilities by MVPD competitors

24. EchoStar Communications Corporation ("EchoStar") asserts that the Commission should require AT&T-TCI to allow competing MVPDs to have access to TCI's broadband facilities, including inside wiring.⁷⁵ It appears that EchoStar seeks access to TCI's facilities to sell video services and possibly other services.⁷⁶ EchoStar proposes that the Commission condition its approval on a requirement that the merged company make its facilities, including inside wiring in multiple dwelling units, available to

⁷²In 1996, AT&T began to offer video services to the home through its equity interest in DIRECTV, Inc. *AT&T 1996 Annual Report* at 8. In 1997, AT&T sold its investment in DIRECTV, stating that in an effort to stabilize earnings, it continued to divest assets and businesses not critical to the company's long-term strategy. *AT&T 1997 Annual Report* at 27.

⁷³See Application at 33.

⁷⁴See *1998 Competition Report* at ¶¶ 11-12. With the exception of electric utilities, each of these types of alternative MVPDs are currently providing video programming services. *Id.* Certain electric utilities have entered the MVPD business through corporate affiliations with competitive LECs. For example, Boston Energy Technology Group, Inc. ("BETG") and Residential Communications Network, Inc. ("RCN") are providing open video system and Title VI cable services in the Boston metropolitan area through their affiliate, RCN-BETG, Inc. RCN-BETG, LLC, *Certification to Operate an Open Video System*, Memorandum Opinion and Order, 12 FCC Rcd 2480 (1997). Potomac Electric Power Co. and RCN have announced plans and have obtained Commission approval to operate an open video system in the Washington, D.C. metropolitan area through their affiliate Starpower. Starpower Communications, LLC, *Certification to Operate an Open Video System*, Memorandum Opinion and Order, 13 FCC Rcd 2169 (1998).

⁷⁵EchoStar Comments at ii, 7.

⁷⁶*Id.* at ii, 2-8; U S WEST Petition at 47-49. The term "inside wiring" generally describes the wire, equipment and infrastructure within a home, business or MDU as well as the physical location of the wiring such as conduits and ducts.

competing MVPDs.⁷⁷ U S WEST, Inc. ("U S WEST") argues that the anticompetitive potential of the merger would be so severe as to warrant requiring that AT&T-TCI comply with the Commission's rules on inside wiring and navigational devices even if they are overturned on appeal.⁷⁸ According to U S WEST, these requirements were originally adopted, at least in part, because of the market power that cable operators currently possess.⁷⁹ U S WEST asserts that the merger of AT&T and TCI threatens to

⁷⁷EchoStar Comments at ii, 7. EchoStar appears to be primarily interested in using AT&T-TCI's infrastructure to provide packages of services rather than pure video service. EchoStar argues that the competitive disadvantage facing TCI's MVPD competitors is similar to, though potentially even more acute than, that facing online service providers because TCI already distributes its own highly developed content (its cable television programming packages) to an enormous subscriber base of millions (compared to the more limited penetration of AT&T and TCI in the area of Internet content). Thus, just as the online service providers are concerned that AT&T-TCI will combine its broadband capabilities with its own Internet content, to the exclusion of alternative content sources, EchoStar argues that MVPDs are justly concerned that the merged company will use its upgraded networks to create combined packages of products (video products combined with telephony and Internet access), making competition much more difficult for alternative MVPDs, such as EchoStar, that are unable to offer a similar package of products. *Id.* at 6. See also *infra* Section IV.C.

⁷⁸U S WEST Petition at 47-48. The Commission recently adopted a Report and Order and Second Further Notice of Proposed Rulemaking that amended its cable inside wiring rules to enhance competition in the video distribution marketplace. *Telecommunications Services Inside Wiring: Customer Premises Equipment, and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, CS Docket No. 95-184, MM Docket No. 92-260, Report and Order and Second Notice of Proposed Rulemaking, 13 FCC Rcd 3659 (1997) ("*Inside Wiring Report & Order and NPRM*"). The rules became effective on March 13, 1998. Public Notice, *Commission's New Rules Regarding Cable Home Wiring and MVPD Home Run Wiring Effective March 13, 1998*, Report No. CS 98-3 (Mar. 19, 1998). The Commission's Second Further Notice seeks comment on benefits or disadvantages of exclusive contracts in promoting a competitive environment, and whether there are circumstances where the Commission should adopt restrictions on exclusive contracts between cable operators and MDU owners in order to further promote competition in the MDU marketplace. A petition for review was filed in the United States Court of Appeals for the Eighth Circuit on November 24, 1997. The Commission received petitions for reconsideration and requested the Eighth Circuit to hold the pending court case in abeyance until the Commission takes action on the pending petitions. The court granted the Commission request. *Inside Wiring Report & Order and NPRM, petition for review pending sub nom. Charter v. FCC*, No. 97-4120 (8th Cir. Nov. 26, 1997). The Commission also adopted rules to address the mandate expressed in section 629 of the Communications Act to ensure the commercial availability of "navigational devices." 47 U.S.C. § 549. Navigational devices are defined as customer premises equipment (e.g., converter boxes, interactive equipment) used to receive multichannel video programming and other services offered over multichannel video programming systems. *Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order, 13 FCC Rcd 14775 (1998) ("*Navigational Devices Order*"), *petitions for review pending sub nom. General Instruments Corp. v. FCC*, No. 98-1420 (D.C. Cir. Sept. 11, 1998). The purpose of section 629 and the Commission's rules is to expand opportunities to purchase such equipment from sources other than the service provider and thereby bring more choice to a broader range of consumers at better prices. *Navigational Devices Order*, 13 FCC Rcd at 144776 ¶¶ 1-2. Further, the Commission received several petitions for reconsideration challenging our rules that require the separation of security and non-security functions for analog equipment. These petitions are currently under consideration by the Commission.

⁷⁹U S WEST Petition at 48.

solidify and increase TCI's existing market power and justifies such an obligation even if the general application of these requirements is overturned on appeal.⁸⁰

25. Ameritech asks the Commission to condition the merger on AT&T-TCI's commitment to provide non-discriminatory access to the merged company's utility poles, conduits, ducts, and rights-of-way in accordance with section 224 of the Communications Act.⁸¹ Ameritech believes the combination of AT&T's telecommunications conduits and TCI's "last mile" facilities would cause the merged entity to fall within the spirit, if not the letter, of the definition of "utility" contained in section 224(f) of the Communications Act, which governs the rates, terms, and conditions under which utilities must allow other service providers to attach plant to the poles and other infrastructure of the utility.⁸² Ameritech anticipates that AT&T-TCI might claim to be free of any obligations under section 224 due to the planned use of cable (*i.e.*, non-utility) infrastructure, rather than traditional telephone facilities, for the provision of local exchange and other services.⁸³

26. AT&T-TCI respond that under Title VI of the Communications Act, the Commission cannot require TCI to open its cable systems to competing MVPDs.⁸⁴ Moreover, they assert, such a condition would erode the merged company's incentive to upgrade TCI's existing cable plant to provide broadband services and telephony.⁸⁵

27. AT&T-TCI also contend that the merged company will comply with the Commission's rules, including inside wiring rules and navigational devices rules.⁸⁶ They caution, however, that there is no public interest reason to force these rules on AT&T-TCI if they are overturned by the courts.⁸⁷ AT&T-TCI argue that the condition proposed by Ameritech to require that the merged company provide non-discriminatory access to its utility poles, conduits, ducts, and rights-of-way in accordance with section 224 is unnecessary because sections 251(a) and (b) embody the same obligations and adequately address Ameritech's concerns.⁸⁸

⁸⁰*Id.*

⁸¹Ameritech Comments at 24-25.

⁸²*Id.* (citing 47 U.S.C. § 224(f)). Section 224(f) requires that any utility must provide telecommunications carriers (other than incumbent LECs) and cable system operators nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by the utility. We refer to these collectively as "utility poles."

⁸³Ameritech Comments at 25.

⁸⁴AT&T-TCI Reply at 51-58.

⁸⁵*Id.* at 50-51.

⁸⁶*Id.* at 73-74.

⁸⁷*Id.* at 73-74.

⁸⁸*Id.* at 58. *But see* AT&T-TCI Reply at 51-58. While AT&T-TCI concede that section 251(a) and (b) will apply to their cable systems when they are upgraded and begin to provide switched telephony, they do not specifically address whether the rules will apply to these systems if they begin to provide IP telephony.

28. *Discussion.* The merged entity will be subject to the inside wiring rules and navigational devices rules to the same extent as all other cable operators. We decline to condition our approval of the requested transfers on the stipulation that the merged entity will be subject to those requirements even if they are subsequently struck down by the courts. Nothing in the record warrants such a condition based solely on speculation that the inside wiring rules and navigational devices rules might be found to be invalid. Moreover, we cannot conclude that the evidence in the record would support the continued application of these rules to the merged firm, but not other cable operators, as a remedy for possible future harms associated with the merger.

29. Beyond affirming the general applicability of our rules to the merged entity, we will not require AT&T-TCI to grant other MVPDs access to TCI's broadband facilities for the purpose of providing multichannel video programming services.⁸⁹ Commenters advocating such a condition rely on the open access rules applicable to common carriers and seek to expand those requirements beyond traditional common carrier functions. We continue to recognize and adhere to the distinctions Congress drew between cable and common carrier regulation. Under present law, neither cable operators nor common carriers providing cable service, other than on a common carrier basis, are subject to common carrier regulations under Title II of the Communications Act.⁹⁰

30. We further conclude that Ameritech's proposed condition regarding the applicability of section 224 of the Communications Act to AT&T-TCI is unnecessary. Section 224 provides that "a utility shall provide a cable system or any telecommunications carrier with nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."⁹¹ The term "utility" includes local exchange carriers that own or control such facilities or rights-of-way and use them to any extent for wire communications.⁹² AT&T-TCI will be required to comply with section 224 wherever the company acts as a local exchange carrier⁹³ and, therefore, a "utility" within the statutory definition.⁹⁴ The fact that the company may use cable facilities to provide telephone exchange service does not alter this result. There is nothing in the plain language of the statute or the legislative history to suggest that the use of cable facilities to provide telephone exchange service would exempt a local exchange carrier from the requirements of section 224. Rather, the statutory provision applies to any "utility" that owns or controls poles, ducts, conduits or rights-of-way⁹⁵ to ensure that its rates, terms, and conditions for pole

⁸⁹We address the issue of open access by competing Internet access and content providers in Section IV.C. We address the issue of access by other telecommunications providers in Section IV.B..

⁹⁰See, e.g., 47 U.S.C. §§ 571(a)-(b). See also 47 U.S.C. § 522(7) (defining the term "cable system").

⁹¹47 U.S.C. § 224(f).

⁹²47 U.S.C. § 224(a)(1).

⁹³A "local exchange carrier" is defined as any person that is engaged in the provision of telephone exchange service or exchange access. 47 U.S.C. § 153(26).

⁹⁴47 U.S.C. § 224(a)(1).

⁹⁵See 47 U.S.C. § 224(a)(1) & (f)(1).

attachments are just and reasonable.⁹⁶ To the extent Ameritech seeks imposition of section 224 obligations on AT&T-TCI in areas where the company only provides cable service, we decline to impose section 224 obligations because we conclude the company is not acting as a "utility" within the meaning of section 224 when it provides only cable service. The Commission has never regulated cable companies that provide solely cable services as "utilities" under section 224 and sees no reason to do so in the context of this merger.

2. Program access

31. Various commenters urge the Commission to rule that AT&T-TCI will be subject to the Commission's program access rules with respect to TCI's provision of cable service and Liberty Media's investments in cable-affiliated programming vendors.⁹⁷ The program access rules apply to programming vendors that are affiliated with cable operators, such as through common ownership, and to sales of cable programming that is delivered via satellite from a programming vendor to a cable operator.⁹⁸ The Commission adopted its rules pursuant to section 628 of the Communications Act,⁹⁹ through which Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other MVPDs in the sale of satellite cable and satellite broadcast programming.¹⁰⁰ Among other restrictions, the rules prohibit any cable operator that has an attributable interest¹⁰¹ in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including prices, terms, and conditions of sale or delivery, of satellite cable programming or satellite broadcast programming to any unaffiliated MVPD.¹⁰² The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices or terms and conditions of sale of satellite-delivered programming to cable operators and other MVPDs.¹⁰³ In addition, cable operators generally are prohibited from entering

⁹⁶See 47 U.S.C. § 224(b)(1).

⁹⁷See Ameritech Comments at 27; DIRECTV Comments at 2; EchoStar Comments at 8; U S WEST Petition at 42; WCA/ICTA Comments at 3,10; BellSouth Reply at 15; CoreComm Reply at 5. A partial list of the video programmers in which Liberty Media Group owns interests includes: Discovery Communications, Inc.; USA Networks; BET Holdings, Inc.; Fox/Liberty Networks, LLC; QVC Inc.; MacNeil/Lehrer Productions, and Encore Media Group. Application at 7-8.

⁹⁸47 C.F.R. §§ 76.1000-76.1004.

⁹⁹47 U.S.C. § 548.

¹⁰⁰Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"), Pub. L. No. 102-385, 106 Stat. 1460-1, § 2(a)(5) (1992).

¹⁰¹The attribution of corporate interests for purposes of the program access rules is determined under sections 76.501 and 76.1000(b) of the Commission's rules. 47 C.F.R. §§ 76.501 note, 76.1000(b). Under those provisions, AT&T's 100% ownership interest in TCI will be attributable to AT&T.

¹⁰²47 C.F.R. § 76.1002(a).

¹⁰³47 C.F.R. § 76.1002(b). This restriction is subject to certain limited exceptions. *Id.*

into exclusive distribution arrangements with affiliated programming vendors.¹⁰⁴ Those provisions of the program access rules that apply to "cable operators" apply equally to any common carrier or its affiliate that provides video programming directly to subscribers.¹⁰⁵

32. TCI and Liberty Media are subject to the Commission's program access rules because they are vertically integrated. Some commenters are concerned that AT&T-TCI might argue in the future that the program access rules should not apply to the merged company because of the post-merger operational separation between Liberty Media, which will continue to own interests in programming vendors, and AT&T Consumer Services, which will provide cable service.¹⁰⁶ Ameritech is concerned not only about the proposed corporate structure but also about any future restructuring that might affect the merged company's ownership of Liberty Media. Ameritech recommends that the Commission reserve the right to review and approve any such restructuring.¹⁰⁷

33. To the extent that our program access rules apply only to programming delivered by satellite, some commenters ask the Commission to condition its approval of the merger by applying the current program access rules (or equivalent restrictions) to any programming that may be delivered terrestrially from Liberty Media programmers to AT&T-TCI cable systems.¹⁰⁸ These commenters believe terrestrial delivery might be feasible once AT&T's existing facilities are combined with TCI's facilities. Certain commenters also argue that the Commission should require the merged entity to waive TCI's existing exclusivity agreements with programmers.¹⁰⁹ Ameritech adds that AT&T-TCI should be required to forego any new exclusivity agreements for at least five years, regardless of whether the Commission's

¹⁰⁴47 C.F.R. § 76.1002(c). Relief may be granted pursuant to a Commission determination that specific exclusive arrangements are in the public interest. 47 C.F.R. § 76.1002(c)(4). In addition, exclusive arrangements entered into prior to June 1, 1990, are "grandfathered," or exempt from the exclusivity prohibition, provided they were not extended or renewed after October 5, 1992. 47 C.F.R. § 76.1002(e).

¹⁰⁵47 C.F.R. § 76.1004.

¹⁰⁶See, e.g., Ameritech Comments at 33-34; DIRECTV Comments at 3-4; EchoStar Comments at 9; Consumers Union Petition at 3-4; U S WEST Petition at 45; WCA/ICTA Comments at 2, 9; CoreComm Reply at 11.

¹⁰⁷Ameritech Comments at 28.

¹⁰⁸See, e.g., Ameritech Comments at 32-33; U S WEST Petition at 42, 47; WCA/ICTA Comments at 3-4, 9; BellSouth Reply at 15; CoreComm Reply at 12.

¹⁰⁹Ameritech Comments at 28; Seren Comments at 8. In essence, Ameritech and Seren Innovations, Inc. ("Seren") ask the Commission to declare unlawful any grandfathered exclusivity agreements between TCI and Liberty and any exclusivity agreements between TCI and unaffiliated programmers. Seren, a start-up cable overbuilder, states that its ability to compete with TCI in St. Cloud, Minnesota, will be hampered by TCI's existing exclusive distribution agreement with Midwest Sports Channel, a regional programmer that is not affiliated with TCI. Seren Petition at 6-7. A similarly situated commenter, Hiawatha Broadband Communications, Inc. ("Hiawatha"), raises the same argument. Hiawatha Petition at 2, 9-11. Hiawatha filed its petition to deny on December 30, 1998, well after the close of the pleading cycle. Thus, we do not accept the pleading as late-filed. Instead, we will treat the pleading as a written *ex parte* communication pursuant to the Commission's *ex parte* rules. See 47 C.F.R. § 1.1206.

rules otherwise would permit such agreements.¹¹⁰ Consumers Union, Consumer Federation of America, and the Office of Communications, Inc., of the United Church of Christ ("Consumers Union") state that the Commission should require Liberty Media to charge market prices for its programming, regardless of whether it is engaging in unlawful price discrimination.¹¹¹ Consumers Union claims that offering programming only at above-market prices would constitute an unfair method of competition, which is prohibited by the program access rules.¹¹² CoreComm Limited ("CoreComm") asks the Commission to investigate the reported "preferred vendor" arrangements between Liberty Media and AT&T-TCI.¹¹³

34. In response, AT&T-TCI state that nothing in the merger transaction would shield the merged company from the program access rules.¹¹⁴ They conclude that a condition therefore is unnecessary. AT&T-TCI object to any proposed conditions that would go beyond the Commission's current program access rules, arguing that there is nothing about the merger that would justify imposing a unique restriction on AT&T-TCI's entering into exclusive arrangements with programming vendors that are not vertically integrated and not covered by the rules.¹¹⁵

35. *Discussion.* We affirm that the merger, as proposed, will not shield AT&T-TCI from the program access rules. Liberty Media will be a wholly owned subsidiary of AT&T,¹¹⁶ and transactions between the merged company and Liberty Media programmers therefore will fall within the scope of the Commission's program access rules.¹¹⁷

36. We decline to prohibit, as a condition on this merger, Liberty Media's reported post-merger 'preferred vendor' status with AT&T-TCI, as AT&T-TCI have explained such status. AT&T-TCI state that the arrangement will ensure that the terms and conditions offered by AT&T-TCI

¹¹⁰Ameritech Comments at 28.

¹¹¹Consumers Union Petition at 6 n.7. Consumers Union does not explain how "market prices" would be defined, but states that for Liberty Media to not charge "market prices" would constitute an "unfair act [] or practice" under 47 U.S.C. § 548(a).

¹¹²*Id.* (citing 47 U.S.C. § 548(a)).

¹¹³CoreComm Reply at 6, 13 (citing TCI Communications, Inc. Form 10-Q for quarter ending June 30, 1998 at 10 (Aug. 14, 1998)).

¹¹⁴AT&T-TCI Reply at 59.

¹¹⁵*Id.* at 58-60; see Opposition to Motion To Accept Late-Filed Petition To Deny and Joint Response of Telecommunications, Inc. and AT&T Corp. (filed Jan. 11, 1999) at 4.

¹¹⁶Application at 10-13; AT&T-TCI Reply at 59.

¹¹⁷It is expected that, after the merger, Liberty Media will become one of two groups under AT&T Corp. Liberty Media is expected to merge with TCI Ventures (TCI's non-cable holdings) to form the New Liberty Media Group with its own tracking stock, while AT&T will also offer an AT&T Common Stock Group. Application at 10, Merger Proxy Statement at 6-7. Liberty Media will continue to hold, among other assets, its existing ownership interests in video programmers. *Id.* AT&T-TCI acknowledge that the merged firm will be subject to the Commission's program access rules. AT&T-TCI Reply at 59.

to Liberty Media for its programming are no less favorable than the terms offered by AT&T-TCI to other programming vendors.¹¹⁸ If an entity believes that this "preferred vendor" arrangement violates the program carriage or program access rules, or any other Commission rule, they are free to file a complaint detailing the alleged infraction.

37. The parties have not demonstrated that the merger provides a basis for imposing restrictions that are beyond the scope of the Commission's program access rules. We decline to apply the program access rules or equivalent restrictions to terrestrially delivered programming distributed by the merged company, in conformance with our recent decision in the *Program Access Order*.¹¹⁹ We recognize, however, that the integration of TCI's content with AT&T's coast-to-coast fiber optic network may provide the merged entity with the ability and the cost and quality incentives to migrate video programming from satellite to terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace. As we indicated in the *Program Access Order*, we remain aware of the potential for this type of migration and the possible need to address it in the future.¹²⁰ If it appears that the movement of programming from satellite to terrestrial delivery is frustrating the pro-competitive purposes of section 628, we will so notify Congress.

38. We further decline to condition the merger on the imposition of anti-exclusivity restrictions that are not required by the program access rules. If parties believe any existing exclusivity agreements violate the program access rules, the program access complaint process is the appropriate forum in which to resolve any such grievance.¹²¹ Commenters have not alleged that existing exclusivity arrangements are unlawful, and we do not find that this merger provides a basis for the Commission to declare unlawful TCI's future exclusivity agreements to the extent they conform with current rules.

¹¹⁸Letter dated Jan. 8, 1999, from Mark D. Schneider, Counsel for AT&T Corp. to Magalie Roman Salas, Secretary, Federal Communications Commission at 1 ("Jan. 8 Schneider Letter"). AT&T states that the preferred vendor provision in the Merger Agreement provides that "post-merger, AT&T will use 'reasonable efforts' to provide digital distribution for new services created by Liberty and its affiliates on a mutual most-favored nations basis that is otherwise 'consistent with industry practices,' an arrangement that merely ensures access and services on terms no less favorable than those provided to other programmers or services." *Id.* at 1. AT&T adds that "[t]he Merger Agreement also contains provisions related to the renewal of existing affiliation agreements of Liberty and its affiliates and arrangements for the distribution of interactive video services." *Id.* AT&T asserts that these provisions "are all common in the industry and in no way constitute the discrimination prohibited by the program access or program carriage rules." *Id.*

¹¹⁹*Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 22840, 22861 ¶ 50 (1997) ("*Program Access Order*"). As we stated in the *Program Access Order*, there are no indications at this time that terrestrial delivery of programming formerly delivered by satellite is a significant competitive problem. However, we acknowledge that if, as a trend, vertically integrated programmers began to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules, we would "consider an appropriate response to ensure continued access to programming." *Id.*

¹²⁰*Program Access Order*, 12 FCC Rcd at 22861-62 ¶¶ 50-51.

¹²¹47 C.F.R. § 76.1003.

39. We reject Consumers Union's proposal that the Commission mandate the sale of programming at "market" prices. Neither the merger nor the Commission's rules provide any basis for the imposition of a mandate that Liberty Media price its programming at any particular level, provided the pricing is not unlawfully discriminatory.

40. Finally, we will not condition the merger on any restriction on the merged company's right to restructure the ownership of Liberty Media beyond the Commission's usual requirement that companies seeking to transfer Commission licenses first obtain the Commission's approval.¹²² Assuming all license transfer requests are approved, our rules do not explicitly prohibit vertically integrated companies from restructuring their corporate relationships. If parties believe any future corporate restructuring is motivated by an unlawful or otherwise improper purpose, they may pursue such claims in a complaint detailing the alleged improprieties.¹²³

3. Digital broadcast signal carriage

41. The National Association of Broadcasters ("NAB") and the Consumer Electronic Manufacturers Association ("CEMA") are concerned about the impact of the proposed merger on the future of advanced digital television technologies ("DTV").¹²⁴ Considering that over two-thirds of the American public receive broadcast signals via cable,¹²⁵ NAB and CEMA submit that the cable industry's commitment, in particular TCI's, to carry digital broadcast signals is essential to ensure the timely completion of digital broadcast deployment as mandated by both Congress and the Commission.¹²⁶ To this end, NAB asks the Commission to condition approval of the merger on the requirement that the merged entity carry all local digital television broadcast signals to consumers' television sets without

¹²²See, e.g., 47 C.F.R. § 78.35 (transfer of CARS microwave licenses).

¹²³See 47 C.F.R. § 76.1003.

¹²⁴NAB Comments at 4; CEMA Comments at 3-4. The Commission recently adopted rules establishing procedures for the conversion from analog television broadcasting to digital television broadcasting. 47 C.F.R. §§ 73.622-73.624. With respect to a broadcaster's analog transmissions, cable operators today are subject to "must carry" requirements for commercial and noncommercial television stations. 47 U.S.C. §§ 534, 535. During the transition period, however, broadcasters will transmit simultaneously their signals in both analog and digital form. One of the most difficult issues still left unresolved is whether and to what extent the Commission's "must carry" rules will apply to cable operators during and after this transitional period. This issue is the subject of a pending rulemaking proceeding. *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092 (1998) ("*Digital Broadcast NPRM*").

¹²⁵CEMA Comments at 6. CEMA argues that because TCI is substantially larger than any other cable operator in the United States, its treatment of digital broadcast signals will be a bellwether for the cable industry as a whole and will directly affect the timing of the digital transition. CEMA Comments at 3-4 (citing *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, CS Docket No. 97-141, 13 FCC Rcd 1304 (1998) at Table E-3).

¹²⁶NAB Comments at 6; CEMA Comments at 6.

degradation.¹²⁷ NAB argues that the imposition of must-carry obligations on the merged entity would advance the public interest by promoting competition among MVPDs through diversity of programming.¹²⁸ CEMA asks the Commission to require the merged entity to respect TCI's commitments to Congress that its upgraded cable systems will carry digital broadcast signals irrespective of the formats in which they are broadcast and that TCI's digital set-top boxes will be able to convert television signals from any digital format to the current National Television System Committee ("NTSC") television standard so that they may be displayed on conventional, existing television sets.¹²⁹

42. AT&T-TCI argue that the Commission should reject NAB's proposed condition to mandate the carriage of digital broadcast signals.¹³⁰ Asserting that the condition is beyond the scope of this merger proceeding,¹³¹ AT&T-TCI add that in response to expected consumer demand, TCI is currently negotiating digital carriage matters with several broadcasters.¹³² Given that the majority of broadcasters are not expected to commence DTV broadcasts until May 1, 2002, AT&T-TCI assert that there is no reason for the Commission to act in this proceeding.¹³³ Furthermore, AT&T-TCI contend that expanded channel capacity achieved through system upgrades provides no basis for conferring a preferred status on broadcasters' digital feeds during the DTV transition period.¹³⁴ They state that if broadcasters offer DTV programming that consumers want, the marketplace will ensure that the cable industry will respond.¹³⁵ Similarly, AT&T-TCI assert that CEMA's proposal to condition the merger on commitments related to pass-through and conversion of all digital broadcast signals should be rejected.¹³⁶ AT&T-TCI

¹²⁷NAB Comments at 2, 6. According to NAB, the upgraded cable systems contemplated by AT&T-TCI will have expanded bandwidth capacity "that should easily accommodate full digital television must-carry" *Id.* at 3 (citing Strategic Policy Research Report, attached as Exhibit to NAB Comments).

¹²⁸NAB Comments at 5. Through Commission imposition of must-carry obligations, NAB contends, broadcasters would have a platform to distribute their digital programming. Without must-carry obligations, NAB states, AT&T-TCI would reserve increased channel capacity for affiliated programming and related services. *Id.* at 5.

¹²⁹CEMA Comments at 2. Specifically, CEMA requests that the Commission ensure that AT&T-TCI will convert all digital formats used by broadcasters, including the 720 progressive and 1080 interlaced formats, to the analog NTSC format. *Id.* at 4. In addition, CEMA asks the Commission to ensure that the merged entity will abide by TCI's commitment to pass through its digital set-top boxes all digital formats used by broadcasters. *Id.* at 5.

¹³⁰AT&T-TCI Reply at 68-69.

¹³¹*Id.* (citing *Digital Broadcast NPRM*, 13 FCC Rcd 15092).

¹³²*Id.* NAB did not reference such negotiations in their comments.

¹³³*Id.* at 69.

¹³⁴*Id.*

¹³⁵*Id.*

¹³⁶*Id.* at 69-72.

argue that given the complex and highly technical trade-offs involving technology, cost, quality, and spectrum efficiency, the transition to DTV is best handled by the marketplace.¹³⁷

43. *Discussion.* We find that digital broadcast signal carriage requirements should be addressed in the Commission's pending rulemaking proceeding and not here.¹³⁸ The evidence in the record does not demonstrate that the proposed merger will adversely affect the development of digital broadcast signal carriage. Accordingly, this is like other cases where the Commission has declined to consider, in merger proceedings, matters that are the subject of rulemaking proceedings before the Commission because the public interest would be better served by addressing the matter in a broader proceeding of general applicability.¹³⁹ We find no reason to depart from Commission precedent in this case and, therefore, impose no digital broadcast signal carriage requirements as a pre-condition to this merger. We note, however, that the merged entity, like other cable operators, will be subject to the rules eventually adopted in the pending rulemaking proceeding.

B. Local Exchange Service and Exchange Access Service

44. The Communications Act defines "local exchange carrier" as any person that is engaged in the provision of telephone exchange service or exchange access.¹⁴⁰ The term "telephone exchange service" means "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service."¹⁴¹ The term "exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services."¹⁴²

45. In prior merger proceedings, we have concluded that local exchange and exchange access services both include at least two separate relevant product markets: a market for residential and small business customers (the "mass market") and another for medium-sized and large business customers (the

¹³⁷*Id.* at 70-72. With regard to the passthrough of digital broadcast formats, TCI President Leo Hindery has testified before Congress that TCI's advanced digital customer terminals will be able to pass through all digital formats for customers with digital TV receivers, including the 720 progressive and 1080 interlaced formats. *Id.* at 70. Mr. Hindery further testified that with regard to the conversion of digital broadcast signals to analog format, TCI has stated that its advanced digital customer terminals will have enough memory and processing power to convert a 480 progressive signal at 24 or 30 frames per second (NTSC frame rate) and a 720 progressive signal at 24 frames per second (film rate) for display on today's analog TVs. *Id.*

¹³⁸*Digital Broadcast NPRM*, 13 FCC Rcd 15092.

¹³⁹*See SBC-SNET Order*, 13 FCC Rcd 21292 at 21306 ¶ 29 (citing *AT&T-McCaw Order*, 9 FCC Rcd at 5877 ¶ 70, 5887 ¶ 86; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd 19985 at 20075 ¶ 210).

¹⁴⁰47 U.S.C. § 153(26).

¹⁴¹47 U.S.C. § 153(47).

¹⁴²47 U.S.C. § 153(16).

"larger business market").¹⁴³ We see no reason not to follow the same reasoning in this proceeding. Consequently, we consider the possibility of adverse public interest effects in these two markets. In both cases, the relevant geographic market for local exchange and exchange access services is the local area, since a customer cannot substitute services provided to homes or businesses outside of the customer's local area for those available within the customer's local area. As we have discussed in the past, however, it is appropriate to aggregate in one geographic market those customers that have comparable choices among local exchange and exchange access service providers.¹⁴⁴ The merger will permit AT&T to use TCI's cable system facilities to provide local exchange and exchange access service. Although TCI might be a potential entrant in markets outside of the areas served by its cable systems, for the purposes of this merger review, we see no special incentives, assets, or capabilities for AT&T-TCI outside of those service areas that warrant our attention. Accordingly, we will focus our analysis on the areas served by TCI's cable systems.

46. *Mass Market Customers.* TCI offers local exchange and exchange access services in four cities on a trial basis: San Jose, California; Hartford, Connecticut; Arlington Heights, Illinois; and Dallas, Texas. In January 1998, TCI announced plans to sell its Connecticut cable systems, including the local telephony business in Hartford.¹⁴⁵ TCI currently has fewer than 5,000 customers in all four cities combined.¹⁴⁶ The Applicants state that the overwhelming majority of TCI's local telephone subscribers are facilities based residential customers located in Hartford.¹⁴⁷ Thus, the sale of TCI's Connecticut cable systems to Cablevision includes the bulk of its local residential telephone business. AT&T offers resold local exchange service to 325,000 customers in the same four states where TCI is conducting market trials, and also serves localities in Alaska, Georgia, Michigan, New York, and Texas.¹⁴⁸ All of the relevant geographic markets, *i.e.*, those where TCI is a franchised cable system

¹⁴³See, *e.g.*, *SBC-SNET Order*, 13 FCC Rcd at 21300 ¶ 16; *AT&T-Teleport Order*, 13 FCC Rcd at 15247 ¶ 20. We note, however, that in other merger proceedings it may be appropriate to analyze the competitive effects of the merger on customer segments in other product markets.

¹⁴⁴*Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area*, CC Docket No. 96-61, 12 FCC Rcd 15756, 15792-95 ¶¶ 64-69 (1997) ("*LEC In-Region Interexchange Order*"); *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20016-17 ¶ 54.

¹⁴⁵In return, TCI will receive an additional 3% stake in Cablevision. *Cablevision and TCIC Transaction To Transfer Ownership of Connecticut Systems Serving 250,000 Customers*, Cablevision-TCI Communications Press Release (Jan. 27, 1998); *Cablevision Systems Gets 250,000 Conn. Subscribers and the Wiz*, Communications Daily, vol. 18, no. 10 (Jan. 29, 1998) at 6. See also Application at 7 and n. 13 (stating that TCI has entered into a letter of intent to dispose of its cable and telephone operations in Hartford).

¹⁴⁶Application at 7, 18-19.

¹⁴⁷*Id.* at 7, 18 & n.29.

¹⁴⁸*Id.* at 17.

operator, are dominated by the incumbent LEC, which has considerably more than 90% of the customers and revenue.¹⁴⁹

47. Although both TCI and AT&T may serve some of the same markets,¹⁵⁰ it does not appear that the proposed merger will adversely affect the public interest by inhibiting the development of competition in local exchange and exchange access service to residential and small business customers. Before the AT&T-TCI merger was announced, TCI Chairman John Malone stated that TCI had backed away from its 1996 business plan to add local telephony to its residential service offerings.¹⁵¹ With the proposed sale of its largest telephony trial in Hartford, TCI has only a minimal presence in three local markets, two of which serve only multiple dwelling units ("MDUs").¹⁵² The Commission has recognized previously that AT&T is one of only a few firms that currently possesses the experience, brand name assets, and financial resources that are essential for quick and substantial entry into the retail residential local exchange and exchange access markets.¹⁵³ The Commission also concluded previously that cable systems do not have the same kind of brand-name reputation and expertise with respect to telecommunications services.¹⁵⁴ Although some cable operators are successfully entering local exchange markets today, we do not believe TCI presently should be considered a "most significant market participant" for purposes of our competitive analysis.¹⁵⁵

¹⁴⁹According to their Application, both AT&T and TCI now provide a limited amount of residential local exchange and exchange access service through reselling incumbent LECs' services. AT&T abandoned plans to expand these services prior to its plan to merge with TCI. *Id.* at 17, 20 n.36.

¹⁵⁰The merging companies offer local phone services in the same four states, but it appears that they may not serve the same four cities where TCI is conducting its market trials on local residential phone services. Application at 4, 18-19.

¹⁵¹"The company got overly ambitious about the things it could do simultaneously," Malone reportedly said. "If you read our annual report last year, you'd think we're one-third data, one-third telephone and one-third video entertainment, instead of 100% video entertainment and two experiments," he added. Mark Robicheaux, *Malone Says TCI Push into Phones, Internet Isn't Working for Now*, Wall St. J. (Jan. 2, 1997) at 1. As of January 1997, Malone reportedly stated that TCI had zero revenues in residential telephone services. *Id.* By year-end 1997, revenues were less than \$1 million. Application at 7. The AT&T-TCI merger was not announced until June 1998. See *AT&T Midyear Report*, <www.att.com/ir/midyear/1998/busyhalf.html> (visited: Jan 28, 1999). AT&T-TCI state in their Application that TCI "had no current plans to expand its telephony operations prior to the proposed Merger." Application at 7.

¹⁵²The San Jose and Dallas trials are limited solely to MDU offerings and serve less than 400 customers. Application at 17.

¹⁵³*Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20025 ¶ 70, 20029-30 ¶¶ 82-83. Other significant market participants include Bell Atlantic, MCI WorldCom, and Sprint.

¹⁵⁴*Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20031-32 ¶¶ 85- 86.

¹⁵⁵A number of cable systems are providing local exchange service on a limited basis. For example, Cox is offering digital telephone service in parts of its six major markets: Orange County and San Diego, California; Hartford, Connecticut; Phoenix, Arizona; Omaha, Nebraska; and Hampton Roads, Virginia. MediaOne offers telephony in parts of Atlanta, Georgia; Boston, Massachusetts; Jacksonville and Pompano, Florida; and Richmond,

(continued...)

48. We recognize that cable systems possess an important asset -- a "second wire" into most homes -- that may have permitted TCI in the long term to become a sustained and effective competitor for residential telecommunications customers.¹⁵⁶ Here, however, the complementary nature of the merging firms' assets means that the combined firm will be able to provide an alternative to the incumbent LECs' services for residential customers far more quickly and effectively than either could separately. TCI possesses the "last mile" assets, while AT&T possesses a brand name, experience, and financial resources that improve TCI's ability to capitalize on its network assets. We are committed to ensuring that residential local exchange competition becomes a reality sooner rather than later. One way this may occur more quickly is through combinations of complementary assets by emerging entrants such as AT&T and TCI.

49. *Larger Business Customers.* Just as incumbent LECs dominate markets for local exchange and exchange access services sold to residential and smaller business customers, they also clearly dominate markets for providing service to larger business customers. AT&T and TCI, however, are entrants or potential entrants in these markets. AT&T is a more significant competitor in markets where Teleport was operating prior to its merger with AT&T.¹⁵⁷ TCI may be a potential entrant in areas near its cable systems, but even in those cases, its base of operations is not primarily located in central business districts, where many of the largest customers are located.¹⁵⁸ Moreover, there is no evidence in the record that TCI planned to offer local exchange and exchange access services to larger business customers.

50. As we explained in the *AT&T-Teleport Order* and *SBC-SNET Order*, incumbent LECs are facing increasing competition in markets for local exchange and exchange access services provided to business customers, and "numerous new entrants are rapidly entering this market, especially in central business districts in urban areas"¹⁵⁹ Based on the record before us, we cannot conclude that both AT&T and TCI are uniquely situated potential entrants in that either possesses scarce assets or capabilities with respect to business markets for local exchange and exchange access services. Therefore, the

¹⁵⁵(...continued)

Virginia. Cablevision offers telephone service to parts of its Long Island, New York and Connecticut Systems Jones Intercable offers telephony in Alexandria, Virginia, and Prince George's County, Maryland. See NCTA, *Delivering New Products and Services: Cable Telephony*, at <http://www.ncta.com/yearend98_3.html>; *1998 Competition Report*, FCC 98-335 ¶ 18.

¹⁵⁶This does not change our general approach in merger cases that certain carriers may be categorized as most significant market participants even if they do not have a "second wire" to the home. See, e.g., *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20035 ¶ 94.

¹⁵⁷AT&T's Teleport operations serve 83 Metropolitan Statistical Areas ("MSAs"), including 29 of the top 30 MSAs, but account for relatively small shares of the sales of most local exchange and exchange access services in most of those MSAs. Application at 5; *AT&T-Teleport Order*, 13 FCC Rcd at 15239 ¶ 5.

¹⁵⁸*SBC-SNET Order*, 13 FCC Rcd at 21301-02 ¶ 20.

¹⁵⁹See *SBC-SNET Order*, 13 FCC Rcd at 21301-02 ¶ 20; *AT&T-Teleport Order*, 13 FCC Rcd at 15250-01 ¶ 27.

combination of the two firms will not eliminate any such scarce assets or capabilities.¹⁶⁰ Moreover, it appears that a number of other firms probably possess comparable assets and capabilities for providing business local exchange and exchange access services all over the country. For example, MCI WorldCom, Sprint, and Hyperion provide these services. Accordingly, we conclude that the proposed merger is unlikely to adversely affect the development of this competition.

1. Treatment of the merged entity as a LEC and/or incumbent LEC

51. Several commenters argue that the merged company should be subject to the most stringent non-discrimination, interconnection, and other requirements applicable to incumbent LECs. Various commenters express concern that the merger will allow AT&T-TCI to bring together sufficient market power, name recognition, and infrastructure to make it the functional equivalent of an incumbent LEC.¹⁶¹ Some commenters argue that AT&T-TCI and the incumbent LECs will control the only wires available to deliver local service, resulting in a duopoly and a bottleneck in the "last mile" of telecommunications wires to the homes and offices of end users.¹⁶² These commenters insist that the Telecommunications Act of 1996 ("1996 Act"),¹⁶³ regulatory parity, or both require the Commission to regulate the merged company as an incumbent LEC under section 251(c) of the Communications Act.¹⁶⁴ Section 251(c) applies only to incumbent LECs and imposes interconnection, unbundled access, and resale obligations that do not apply to non-incumbent LECs.¹⁶⁵ Several of these commenters argue that section 251(h) provides the Commission with the authority to classify any LEC as a "comparable" carrier and thereby bring it within the scope of section 251(c).¹⁶⁶ Alternatively, other commenters suggest that the Commission should condition the merger on compliance with requirements that are equivalent to those

¹⁶⁰A merger generally produces adverse competitive effects only where assets or capabilities (including customer bases) that would have been used competitively are combined, thereby eliminating an important source of actual or potential competition. *See, e.g., Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19990 ¶ 7, 19991-92 ¶¶ 10-11. If only one of the two firms in a merger possesses a particular scarce asset or capability, that asset or capability will still be deployed independently of any other scarce assets or capabilities owned by either of the merging companies. In such a case, therefore, it is unlikely that the merger would harm competition.

¹⁶¹*See, e.g.,* GTE Comments at 15-16; GTE Reply at 8-9; MindSpring Reply at 11-13; U S WEST Reply at 29.

¹⁶²*See, e.g.,* U S WEST Petition at 21-22 (arguing that the merged AT&T-TCI's bottleneck control in the broadband market will, in the absence of Communications Act section 251 requirements, require that safeguards analogous to those requirements be imposed to protect competition and consumers); Qwest Comments at 12 (characterizing the infrastructure being acquired as part of the merger as "the only alternative local loop facility").

¹⁶³Pub. L. No. 104-104, 110 Stat. 56 (1996) ("1996 Act").

¹⁶⁴*See, e.g.,* GTE Comments at 15-18; GTE Reply at 6-8 (arguing that the Commission should determine that AT&T-TCI is a "comparable carrier" pursuant to section 251(h) subject to the provisions of section 251(c)); MindSpring Reply at 7; Cable & Wireless Reply at 8; Ameritech Comments at 11; Qwest Comments at 13-14; U S WEST Petition at 19-22; U S WEST Reply at 8, 29.

¹⁶⁵47 U.S.C. § 251(c).

¹⁶⁶*See, e.g.,* GTE Comments at 15-18; Qwest Comments at 15-16.

set forth in section 251(c), even if section 251(c) otherwise would not apply, and that such a condition could be imposed pursuant to the Commission's authority under section 310(d).¹⁶⁷

52. Various commenters argue that the Commission should require that AT&T-TCI be subject to sections 251(a) and (b) of the 1996 Act.¹⁶⁸ Section 251(a) applies to all telecommunications carriers.¹⁶⁹ It requires interconnection with the facilities and equipment of other telecommunications carriers and prohibits the installation of network features that are not compliant with the guidelines and standards established pursuant to sections 255 and 256.¹⁷⁰ Section 251(b) applies to LECs and impose interconnection, resale, number portability, dialing parity, right-of-way access, and reciprocal compensation requirements.¹⁷¹

53. Some commenters argue more generally that the Commission should require open access to the broadband infrastructure¹⁷² or impose other specific obligations. Sprint argues that AT&T-TCI will be able to disadvantage long distance competitors through the merged company's imposition of unreasonable or discriminatory exchange access fees where service is rendered to an AT&T-TCI local exchange customer.¹⁷³ U S WEST suggests that where the merged firm elects to offer voice services over its broadband facilities, the Commission should require AT&T-TCI to commit that it will comply with any state rules concerning public telecommunications utilities -- whether or not the state decides to

¹⁶⁷Cable & Wireless Reply at 8; Ameritech Comments at 11; U S WEST Petition at 27-28.

¹⁶⁸See, e.g., GTE Comments at 12-15; GTE Reply at 6-8; MindSpring Reply at 11-13; Cable & Wireless Reply at 8; MCI WorldCom Comments at 4-7; MCI WorldCom Reply at 1-4.

¹⁶⁹47 U.S.C. § 251(a).

¹⁷⁰47 U.S.C. §§ 255-256. Section 255 governs access by persons with disabilities to equipment and services. Section 256 is intended to promote coordinated public telecommunications network planning and design and public telecommunications network interconnectivity, including interconnectivity of devices used to provide telecommunications service.

¹⁷¹47 U.S.C. § 251(b).

¹⁷²See, e.g., MindSpring Reply at 11-13; Qwest Comments at 13-14.

¹⁷³Sprint Comments at 2-10. Sprint raises concerns that AT&T will discriminate against competing long distance carriers by charging unreasonably high rates for exchange access, thus allowing AT&T-TCI to compete unfairly for long distance customers subscribing to its cable-telephony services. The logic of Sprint's argument seems to be that even if the merged firm charges itself the same rate for exchange access that it charges competing long distance carriers, it will be able to charge competitive long distance rates despite the high exchange access fees because it will be paying the exchange access fees to itself. If the fees the merged firm pays itself are high enough to cover the company's other costs of providing long distance service, the company can partially or wholly avoid including those other costs in rates. In contrast, AT&T-TCI's competitors are placed at a disadvantage by high exchange access charges because they must recover in rates the exchange access charges paid to AT&T-TCI, as well as all of their other costs of providing long distance service.

enforce those rules with respect to voice services delivered via cable broadband facilities.¹⁷⁴ U S WEST argues that such a requirement is necessary to ensure regulatory parity and that such consistency should depend on the service offered rather than the technology used.¹⁷⁵ In addition, U S WEST recommends that the merged entity be required to take affirmative steps to ensure that its customers understand that they are free to choose among long distance providers. Specifically, U S WEST suggests that AT&T-TCI should be required to comply with equal access obligations comparable to those applied to the Bell Operating Companies pursuant to section 251(g) of the 1996 Act.¹⁷⁶

54. AT&T-TCI counter that the Communications Act prohibits subjecting cable systems to any common carrier regulations unless those systems provide telecommunications service.¹⁷⁷ AT&T-TCI concede that the merged entity will be subject to sections 251(a) and (b) with respect to telecommunications services delivered over a cable infrastructure, but they do not agree that Internet access service or any other services delivered over cable lines should be regulated pursuant to these provisions.¹⁷⁸ AT&T-TCI note that the term "telecommunications" is defined as the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information.¹⁷⁹ Even when the acquired cable systems begin to provide telecommunications services, AT&T-TCI object to the notion that the merged firm should be treated as an incumbent LEC subject to the more stringent requirements of section 251(c).¹⁸⁰

55. AT&T-TCI also object to proposals by commenters seeking the imposition of specific obligations on the merged entity's future provision of local exchange service and exchange access service. For example, AT&T-TCI reject Sprint's argument concerning unreasonable or discriminatory access charges, asserting that as a new entrant and alternative to the incumbent LECs, AT&T-TCI will not have the market power to charge discriminatory rates.¹⁸¹ Moreover, Applicants state that the merged company will be subject to the section 201 and section 202 prohibitions against unreasonable pricing and

¹⁷⁴U S WEST Petition at 37-38. U S WEST also recommends that where AT&T-TCI is the original service provider in a new subdivision or MDU, AT&T-TCI, in lieu of any adjacent incumbent LEC, should agree to accept all of the state's carrier of last resort obligations for that area. The carrier of last resort typically is required to provide service in any given area even if service requires expansion within or into that area and might not be economically feasible. Such an obligation would reflect, according to U S WEST, that AT&T-TCI is, in fact, the incumbent telephone carrier in that area. *Id.* at 38.

¹⁷⁵*Id.* at 37-38.

¹⁷⁶*Id.* at 33-36.

¹⁷⁷AT&T-TCI Reply at 52.

¹⁷⁸*Id.* at 52-53.

¹⁷⁹47 U.S.C. § 153(43).

¹⁸⁰AT&T-TCI Reply at 55-58.

¹⁸¹*Id.* at 81-84.

unreasonable discrimination,¹⁸² as well as the interconnection and dialing parity requirements of section 251(a) and (b).¹⁸³ AT&T-TCI state that if, at some point in the future, Sprint believes that the merged company imposes discriminatory access pricing, Sprint can ask the Commission to investigate its claim in the context of a section 208 complaint.¹⁸⁴ AT&T-TCI also dismiss U S WEST's argument that the merged company should be required to comply with state regulations even if the state exempts voice services provided over cable facilities.¹⁸⁵

56. *Discussion.* The Communications Act requires that a provider of telecommunications services "shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services."¹⁸⁶ As the various systems of the merged entity begin to provide telecommunications services, they will become subject to the provisions of section 251(a). Section 251(b) will apply to the extent the merged entity acts as a local exchange carrier.¹⁸⁷

57. We find no basis for conditioning the merger on the merged firm's compliance with section 251(c). In order to classify AT&T-TCI as a "comparable carrier" under section 251(h), we would have to determine:

- (1) that the merged firm "occupies a position in the market for telephone exchange service within an area that is comparable to the position occupied by" an incumbent LEC, as the term "incumbent LEC" is defined in Section 251(h)(1);
- (2) that the merged firm "has substantially replaced" an incumbent LEC; and

¹⁸²47 U.S.C. §§ 201-202.

¹⁸³AT&T-TCI Reply at 82.

¹⁸⁴*Id.* at 83.

¹⁸⁵AT&T-TCI Reply at 57 n.118. The Applicants did not respond to U S WEST's argument that the Commission should impose the requirements set forth in section 251(g) of the Act.

¹⁸⁶47 U.S.C. § 153(44). The term "telecommunications services" is defined as the "offering of telecommunications for a fee directly to the public." 47 U.S.C. § 153(46). The term "telecommunications" is defined as "the transmission, between or among points specified by the user, of information of the user's choosing without change in the form or content of the information." 47 U.S.C. § 153(43).

¹⁸⁷In their reply comments, AT&T-TCI do not explicitly address the issue of whether IP telephony (voice service delivered using digital packet switching technology known as Internet protocol or "IP") is subject to section 251(a) or (b). Since the merged entity will not provide IP telephony initially, we need not decide that issue now. However, we note that in the *Advanced Services Order*, we determined that packet switched services provided by incumbent LECs should be subject to the provisions of section 251. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188, ¶ 11 (rel. Aug. 7, 1998) ("*Advanced Services Order and NPRM*").

(3) that treatment of the merged firm as an incumbent LEC "is consistent with the public interest, convenience, and necessity and the purposes of [section 251]." ¹⁸⁸

There is no basis in the record to support a finding that the merged firm will satisfy the foregoing criteria. We therefore decline to treat the merged firm as a "comparable carrier" under section 251(h). If the Commission believes in the future that such treatment is warranted, the Commission may institute a proceeding for that purpose. Likewise, we conclude that there is no basis in the record for the imposition of the equal access obligations of section 251(g), as U S WEST requests.

58. Similarly, we will not condition the merger on a requirement that where the merged company elects to provide voice service, it must comply with state public telecommunications utility requirements regardless of whether the state applies such regulations to the delivery of voice services via cable broadband facilities. U S WEST does not adequately explain how such a requirement would remedy a merger-related issue. Furthermore, the interpretation and enforcement of state regulations are best carried out at the state level.

59. We find that Sprint's concerns regarding access fees do not warrant action in this proceeding. As we explained in the *AT&T-Teleport Order*, where Sprint made a similar argument, if AT&T-TCI attempted to charge unreasonably high access fees, "customers could switch to other access providers." ¹⁸⁹

C. Residential Internet Access Service

60. Many parties either oppose the proposed merger or filed comments in support of conditions they believe will address alleged public interest harms resulting from the merger. Since both AT&T and TCI, through its @Home affiliate, are Internet access providers (typically called Internet service providers, or ISPs) offering services to residential subscribers, this is an area where the proposed merger conceivably could threaten to diminish competition. Internet access services are provided to residential customers over a variety of media using a variety of technologies. The extent to which different types of Internet access services compete with one another and, therefore, constitute one or several distinct product markets, does not need to be resolved in this proceeding in order to address the potential public interest effects of the proposed merger on the provision of Internet access services to residential customers.

61. Although both AT&T and TCI also provide services as backbone providers (which we describe below), no party has suggested that the proposed merger will harm the public interest with respect to backbone services, and we see no reason to conclude that such harm will occur. Similarly, although both firms provide service to business customers, the parties have largely focused on the anticipated effects on residential customers, and we believe that the merger is unlikely to significantly affect business customers of Internet access services since there appear to be a number of equally capable providers of those services.

¹⁸⁸47 U.S.C. § 251(h)(2).

¹⁸⁹*AT&T-Teleport Order*, 13 FCC Rcd at 15260 ¶ 44.

62. In this section of the order, we briefly explain what Internet access services are and how they are provided. Then we describe the parties' positions and the arguments they make. Finally, we conclude that the issues raised do not provide a basis for finding that the public interest would be better served by denying or conditioning the requested transfers. In addition, given that AT&T-TCI have stated that they will be maintaining their current arrangements with other ISPs, the proposed merger does not actually cause public interest harm that warrants conditioning or denying the requested transfers. Finally, as we concluded in our recent report to Congress on the Deployment of Advanced Telecommunications Capability ("*Advanced Services Report*"):

We observe further that the record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers. On this basis, we see no reason to take action on this issue at this time. We will, however, continue to monitor broadband deployment closely to see whether there are developments that could affect our goal of encouraging deployment of broadband capabilities pursuant to the requirements of section 706.¹⁹⁰

1. Background

63. In April, 1998, we considered in detail several issues concerning the provision of Internet access services.¹⁹¹ We began by describing the Internet as "a loose interconnection of . . . tens of thousands of networks that communicate using the Internet protocol (IP)."¹⁹² The Internet supports the delivery of a range of services, such as the World Wide Web, e-mail, and file transfer protocol ("FTP"). With these services, customers can use their computers to communicate with other people who are using their computers, and these communications can support sophisticated interaction, including on-line banking, electronic commerce, video and audio file distribution, and the distant delivery of radio broadcasts virtually anywhere in the world.¹⁹³

64. In the *April 10 Report*, we identified and described five types of entities involved in Internet services: (1) end users; (2) access providers; (3) application providers; (4) content providers; and (5) backbone providers.¹⁹⁴ The issues raised in this proceeding focus primarily on access providers (ISPs), which we said combine computer processing, information storage, protocol conversion, and

¹⁹⁰*Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, Report, FCC 99-5, ¶ 101 (Common Carrier Bur., rel. Feb. 3, 1999) ("*Advanced Services Report*").

¹⁹¹*Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress, 13 FCC Rcd 11501 (Apr. 10, 1998) ("*April 10 Report*").

¹⁹²*April 10 Report*, 13 FCC Rcd at 11531 ¶ 62. IP defines the structure of data, or "packets," transmitted over the Internet, and it was created for the purpose of permitting communications among a wide variety of networks.

¹⁹³*Id.* See also Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* at 10 (OPP Working Paper Series No. 29, 1997) ("*Digital Tornado*"); Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past* at 17-18 (OPP Working Paper Series No. 30, 1998) ("*Internet Over Cable*").

¹⁹⁴*April 10 Report*, 13 FCC Rcd at 11531 ¶ 62.

routing with transmission to enable users to access Internet content and services.¹⁹⁵ In doing this, ISPs receive communications from their customers' computers and route the communications to other computers connected either to their networks or other networks.

65. ISPs often combine their services with content that they provide themselves from their own servers, which may be content in which they have a proprietary interest.¹⁹⁶ In other words, they often compete as content providers as well as ISPs. Those ISPs that combine proprietary content with Internet access are sometimes referred to as online service providers. America Online ("AOL"), Microsoft Network ("MSN"), and Prodigy Communications Corporation ("Prodigy") all provide content as online service providers; AOL is the largest ISP.¹⁹⁷ AOL also provides its content independently from its Internet access service, but not *vice versa* (if a customer would like to purchase Internet access from AOL, he or she must also purchase the content). Some other content providers that are not ISPs but have large audiences include Yahoo!, Netscape (which AOL is purchasing), CNN Interactive, ESPN Sportszone, and Amazon.com.

66. Many ISPs, including AT&T and TCI, are also Internet backbone providers, which route traffic between Internet access providers and interconnect with other Internet backbone providers (who are serving other Internet access providers).¹⁹⁸ Internet backbone providers typically lease capacity from nationwide and international long distance telecommunications providers. Although they compete with one another for ISP customers, Internet backbone providers have typically cooperated with one another by interconnecting their networks to offer their customers access to other end users and content providers that are connected to the Internet.

¹⁹⁵*Id.*

¹⁹⁶See, e.g., *Internet Over Cable* at 17-18.

¹⁹⁷*Id.* (citing *April 10 Report*, 13 FCC Rcd at 11531 ¶ 63). See also Hoover's Online, *Hoover's Company Capsule: America Online, Inc.*, at <<http://www.hoovers.com/capsules/15558.html>> (visited: Jan. 25, 1999). Its 15 million subscribers make AOL the world's largest provider of online services.

¹⁹⁸In the *MCI-WorldCom Order*, we described Internet backbone services:

An Internet backbone consists of routers connected together by high-speed data lines. Routers are switching devices that direct packet traffic by examining the address contained in each packet and forwarding it according to directions stored in routing tables. Routers are connected by high-speed data lines that typically consist of fiber optic cables running at DS-3 speeds or higher. (The Digital Service or Digital Signal hierarchy refers to the transmission speed or capacity of a network; DS-3 runs at a speed of 44.736 million bits per second (Mbps), which is the equivalent of 672 standard voice channels. Newton's at 241.) IBPs sell backbone transit services to independent ISPs. The IBP may also provide Internet Protocol (IP) addresses to the ISP. (The Internet Protocol governs addressing of the packets that are transmitted over the Internet. This protocol, together with the Transmission Control Protocol (TCP) that governs the routing and transmission of packets, forms the TCP/IP standard that characterizes the Internet. (See *Digital Tornado* at 10, n.11.)

MCI-WorldCom Order, 13 FCC Rcd at 18104-05 ¶ 143 n.383.

67. *Dial-Up Internet Access Services.* Most residential and small business consumers receive Internet access from ISPs offering relatively slow-speed access (typically 28-56 kilobits per second ("kbps")) via traditional "dial-up" telephone services provided by LECs. Customers purchase the telephone services from LECs at standard tariffed prices and can use them for regular telephony applications as well as Internet access. Many customers purchase additional local telephone lines to provide the transport service for their Internet access services -- the local telephone service in this case is one part of the "telecommunications" by which "information services" are provided.¹⁹⁹ This "last mile" transport capability is available independent of the choice of ISP -- it is an "open platform"²⁰⁰ -- and it typically costs between \$13 and \$29, with an average of nearly \$20 per month.²⁰¹

68. With respect to dial-up Internet access services, as opposed to the underlying telecommunications service used for transmission, customers typically pay ISPs prices of \$20 or less per month for relatively unlimited usage.²⁰² In dial-up access arrangements, customers use modems located in their computers that are connected to twisted-pair copper telephone lines. The customer's computer communicates with the ISP's computer using voice-grade analog signals transmitted via standard telephone services (typically local exchange services), much as fax machines communicate using telephone lines. A number of customers obtain a higher-quality connection at speeds up to 128 kbps using Integrated Services Digital Network ("ISDN") services sold by LECs. ISDN services can be used to connect with a wide variety of ISPs, not just the ISP affiliated with the LEC providing the ISDN service.

69. AT&T is the largest provider of residential Internet access service that does not bundle content with its Internet access, and it is among the largest providers of dial-up Internet access service.²⁰³ TCI does not provide dial-up Internet access service. MCI-WorldCom is the leading provider of the facilities and transport services used to support dial-up services. Among other things, it owns the

¹⁹⁹47 U.S.C. 153(20). See *April 10 Report*, 13 FCC Rcd at 11516-26 ¶¶ 33-48.

²⁰⁰The term "open platform" as used here with reference to the last mile transport capability is intended to indicate that the transport capability is interoperable and employs nonproprietary, or at least publicly disclosed and available, interfaces.

²⁰¹Tracy Waldon, Federal Communications Commission, *The Industry Analysis Division's Reference Book of Rates, Price Indices, and Expenditures for Telephone Service* (July 1998) at 4-6 (Table 1.2-Table 1.4). The prices given are for flat-rate local service, touchtone dialtone service, and include federally-authorized subscriber line charges and federal, state, and local taxes (where applicable).

²⁰²1998 *Competition Report* at n.197. "Dial-up Internet access" refers to the type of Internet access service for which the customer's computer must place a dial call to the ISP. The customer's local exchange carrier transmits the call to the ISP under the customer's normal local exchange service plan (which could include a separate line used by the customer solely for this purpose). The ISP purchases terminating access service from either an incumbent LEC or a competitive LEC. Once the dial-up connection is established, the ISP provides access to the Internet.

²⁰³Reuters, *AT&T May Sell WorldNet* (press release), Jan. 22, 1999. AT&T's WorldNet dial-up service is the number two online service, with 1.3 million residential customers as compared with America Online's 15 million total customers. AT&T is considering selling WorldNet to @Home Corp. in exchange for \$1 billion in @Home stock.

networks that are used to provide Internet access to customers purchasing dial-up services from AOL.²⁰⁴ Other, somewhat smaller dial-up Internet access providers include Erol's, MindSpring Enterprises, Inc. ("MindSpring"), and many LECs operating within their service territories. Finally, there are literally thousands of independent, often quite small, ISPs providing service in local communities throughout the entire nation.

70. *Cable Modem Services.* A number of cable systems have started offering Internet access services over their cable system facilities. These services provide Internet access with much higher transmission speeds than dial-up services. It appears that consumers can generally purchase high-speed cable modem services for \$40-\$60 per month.²⁰⁵ Included in this service are: (1) the underlying transport service over the cable network platform; (2) the Internet access service; and (3) proprietary content, much like that offered by AOL and other online service providers. As is explained in the Technical Issues section below, it appears that the cable ISP (such as @Home) typically supplies some of the critical equipment used to provide the data transport services over the cable system platform, and that this transport functionality may be intertwined with the Internet access functionality under current arrangements. Accordingly, it may not be accurate to think of the cable system operator as the provider of the transport functionality.

71. Cable modem service is offered to residential and some business customers using cable systems' shared media HFC networks.²⁰⁶ Inside subscribers' households, "splitters" are used to send separate signals to different coaxial cables going to televisions and computers. The coaxial cable that goes toward the customer's computer is connected to a cable modem, which, in turn, is connected to the computer through the use of an Ethernet connection like that typically used in corporate computer networks. Some cable modem services require the customers' computers to send signals (called the "return path") over traditional dial-up connections using modems. In these cases, the subscriber typically can receive signals at approximately 500 kbps, and send signals at 28-56 kbps. In more advanced cable modem networks, both directions of traffic are transmitted via the coaxial cable, which permits the connection to be open at all times. The more advanced cable modem services offer higher transmission speeds as well, often as high as 3000 kbps during off-peak use, although the return path typically remains constrained to less than 384 kbps. In some areas, the upstream bandwidth has been limited to 128 kbps

²⁰⁴The facilities used by dial-up Internet access providers include the servers and connections to local exchange and Internet backbone networks. They do not include the local exchange facilities that are used to provide the connections to the dial-up Internet access provider; nor do they include the backbone facilities that are used to connect Internet access providers.

²⁰⁵1998 *Competition Report*, App. B, Tbl. B-9. Most cable operators charge between \$39.95 and \$59.95 per month for high-speed cable modem services. *Id.* See also AOL Comments, App. A, at 2-3.

²⁰⁶The description in this paragraph is based on the discussions in the following sources: Albert A. Azzam, *High-Speed Cable Modems: Including IEEE 802.14 Standards* (1997); At Home Corporation, *@Home Network Architecture*, <http://www.home.net/corp/advantage/network.html> (accessed Feb. 1, 1999); Jim Connors, SunSoft, *The Evolution of Cable Television to Interactive Communications Service Provider*, <http://www.catv.org/modem/cablemodem/sun.html> (accessed Feb. 1, 1999); Rolf V. Østergaard, *What is a Cable Modem?* <http://www.godset.dk/cablemodem> (accessed Feb. 1, 1999).

due to high levels of demand.²⁰⁷ In sum, customers can receive over the HFC network both cable television programming and the cable modem service (content provided by the cable modem service provider, access to content provided by others, e-mail, and other Internet functionality).²⁰⁸ Moreover, many cable systems are also planning to offer telephone service in the future using the same network technology.

72. TCI's @Home affiliate²⁰⁹ provides cable modem services over both TCI networks and cable networks owned by other cable system operators; @Home is the ISP for these cable modem services.²¹⁰ In a typical arrangement, @Home is the exclusive provider of Internet access and its proprietary content to the cable system, whether or not TCI-owned. @Home provides the servers, routers, and other Internet access support facilities and manages the use of the cable network for data delivery services. According to TCI, subscribers are provided with browsing and e-mail functionalities similar in nature to those offered by other ISPs, which permit those subscribers to send and receive e-mail and reach any available content on the World Wide Web, including proprietary content and services offered by AOL, Yahoo!, and others.²¹¹ In addition, @Home directly and through partnerships also offers unique content, including audio, video, and interactive functionalities. On January 19, 1999, @Home announced a merger with Excite, Inc.²¹² Asserting that it "remains committed to full and open access to the entire Web," @Home stated that the companies hope to accelerate broadband deployment and adoption by combining @Home's broadband platform with Excite's portal and narrowband reach.²¹³

73. In the *Advanced Services Report*, we concluded that most estimates indicate that cable television facilities are now being used to serve at least 350,000 residential customers for high-speed Internet access services, and that other estimates are as high as 425,000 to 700,000.²¹⁴ It appears that

²⁰⁷Whether or not the return path is transmitted via coaxial cable, speeds in both directions can vary depending on the number of subscribers that are using the system simultaneously at any given time. In determining maximum speeds available to users, the network operator must consider the number of possible simultaneous users.

²⁰⁸It appears that customers are not required to subscribe to basic cable service in order to receive @Home's services.

²⁰⁹TCI, through TCI Ventures Group, holds approximately a 39% equity interest and a 71% voting interest in @Home. See Application at 8. As of September 30, 1998, @Home has 2,000 cable modem subscribers. See At Home Corporation, *@Home Network Reports Subscriber Base Grows to 2,000 Upgraded Homes Passed Increased to 10M* (press release), Oct. 13, 1998. @Home has also entered into distribution agreements with 14 cable companies that serve approximately 58.5 million homes in the U.S. See Application at 8, n.14.

²¹⁰See *supra* para. 7.

²¹¹Letter dated Dec. 1, 1998, from Leo J. Hindery, Jr., President, Tele-Communications, Inc., to Susan Ness, Commissioner, Federal Communications Commission. at 1-2 ("Dec. 1 Hindery Letter").

²¹²@Home Network, *@Home Network and Excite To Merge* (press release), Jan. 19, 1999, <http://www.home.net/corp/news/pr_990119_01.html>.

²¹³*Id.*

²¹⁴*Advanced Services Report* at ¶ 48.

@Home is the largest, but not the only, cable modem service provider. It also appears that cable modem service providers are generally not competing to offer services to many of the same customers. Instead, it appears that cable systems typically contract with only one cable modem service provider, and that provider actually manages data delivery over the cable facilities. Therefore, it does not appear that other cable modem service providers such as Road Runner, formed by Time Warner,²¹⁵ are likely to be participants in markets served by @Home; that is, from a customer's perspective they are not competitors. Competition, where it takes place, is for the contract to supply the customer's cable system.

74. *Deployment of High-Speed Internet Access Services Using Non-Cable Facilities.* In the *Advanced Services Report*, we found that many other firms already are deploying or seeking to deploy high-speed Internet access services to residential customers using other distribution technologies, and that some of these firms may emerge as competitors in markets served by @Home. Incumbent LECs have been developing the capability through xDSL technology to deliver high-speed Internet access services over their twisted-pair wires connecting most homes to their networks. A number of LECs have begun offering high-speed Internet access in a large number of areas and currently serve approximately 25,000 residential consumers, according to one estimate.²¹⁶ Similarly, competitive LECs are providing Internet access services to ISPs using their own facilities and facilities leased from incumbent LECs. In addition, there is now one satellite-based offering of high-speed Internet service that is targeted at residential customers, Hughes' DirecPC, which is providing Internet access at speeds of up to 400 kbps to customers in the forty-eight continental states who can put up an antenna with unobstructed reception to the south. In several cities, electric utilities or "wireless cable" companies are also providing high-speed Internet access services to the consumer market. Finally, a number of other companies, such as interexchange companies ("IXCs") and fixed mobile wireless telephony providers, and recent spectrum licensees are actively exploring entering residential markets for high-speed Internet access services.

2. Summary of issues

75. *Opposition to the Proposed Merger and Requests for Equal Access Conditions.* A number of parties, including LECs, IXCs, and ISPs, raise concerns focusing on the bundling of @Home content with the cable modem transmission services offered to residential customers.²¹⁷ These parties argue that there is a significant risk that AT&T-TCI (through @Home) will have a substantial head start in the provision of high-speed Internet access and could develop an insurmountable position as a monopoly provider (or duopoly provider together with incumbent LECs) of broadband Internet access services to residential customers. Several parties argue that the proposed merger will increase the potential for monopolization because it will combine AT&T's size and financial strength with TCI's bottleneck cable

²¹⁵In December 1997, Road Runner agreed to merge with MediaOne's Internet service, Media One Express. By June 1998, it had a subscribership of 70,000. See Alan Breznick, *Modem Count*, Cable World (April 20, 1998) at 28. Road Runner provides service to Time Warner and several multiple system operator affiliates.

²¹⁶*Advanced Services Report* at ¶ 53 (citing Comments of BellSouth at 32-33 & Exhibit A at 35). These LECs offer high-speed Internet access either through their own ISPs or by selling transmission services to unaffiliated ISPs who, in turn, sell the high-speed access service to their end-user customers.

²¹⁷AOL Comments at 8-17; Bell Atlantic Reply at 2; Cable & Wireless Reply at 5-7; CompTel Reply at 5-6; GTE Comments at 28-33, 42-43; GTE Reply at 13-14; MCI WorldCom Reply at 3-5; MindSpring Comments at 3-9; Prodigy Reply at 3.

facilities and @Home's exclusive arrangements with other cable system operators having bottleneck cable facilities.²¹⁸ Other parties argue that the public interest will not be served by the nationwide facilities-based local residential telecommunications network that AT&T-TCI plan to build unless that network is subject to an "open and equal access requirement."²¹⁹ Finally, some parties argue that as a matter of regulatory parity and technological neutrality, AT&T-TCI should be subject to the same interconnection, unbundling, and resale requirements as those imposed on incumbent LECs.²²⁰ As a result of the problems they foresee, all of these parties argue that the Commission should condition its approval of the requested transfers of licenses and authorizations on AT&T-TCI's providing: (a) "equal" or "open" access to competing ISPs; and (b) high-speed Internet access services unbundled from @Home's proprietary content.

76. AT&T-TCI's counter-arguments can be summarized as follows: (1) broadband Internet access services do not constitute a market separate from Internet access services generally; (2) the issues raised by parties opposing the requested transfers are outside the scope of this proceeding since the merger does not change the way in which @Home will operate; (3) the requested conditions cannot be imposed because the Commission lacks the necessary legal authority; (4) the requested conditions cannot be implemented in a technically feasible manner; and (5) economic analysis demonstrates that the requested conditions are likely to harm the public interest by delaying the deployment of broadband services.

77. *Market for Broadband Services.* AT&T-TCI contend that broadband services do not constitute a separate market, arguing that broadband and narrowband services must be included in any public interest analysis as reasonably substitutable services.²²¹ AT&T-TCI argue that the fact that AOL has a lower growth rate in areas where @Home is providing service demonstrates that narrowband and broadband Internet access and content are substitutes and, accordingly, in the same market.²²² They argue that the differences in speed between @Home's services and dial-up Internet access services are accompanied by higher prices and other disadvantages, making the two services relatively close substitutes. Moreover, AT&T-TCI provide evidence demonstrating that broadband services, such as the cable modem services offered by @Home, have very low penetration rates even among households where

²¹⁸Ameritech Comments at 5-13; GTE Reply at 14; MCI WorldCom Comments at 9-12; U S WEST Petition at 11-15.

²¹⁹CompTel Reply at 7. *See also* Consumers Union Petition at 11; Mt. Hood Cable Regulatory Commission ("Mt. Hood") Comments at 18-22 (filed Jan. 29, 1999). A number of cities in Oregon sent *ex parte* letters urging the Commission to impose an equal access requirement on AT&T-TCI as a condition of Commission approval of the merger. *See* Letters dated Jan. 28-29 and Feb. 1, 1999, from the cities of Ashland, Athena, Beaverton, Burns, Florence, Gladstone, Gold Beach, Hermiston, McMinnville, Roseburg, Sutherlin, Toledo, Wilsonville, and Veneta, to the Federal Communications Commission ("Comments of Oregon Cities").

²²⁰Ameritech Comments at 13-25; BellSouth Reply at 4-7; GTE Comments at 15-18; SBC Comments at 11-16; U S WEST Petition at 22-31.

²²¹AT&T-TCI Reply at 28-34.

²²²*Id.* at 29-32.

the service is available.²²³ Accordingly, AT&T-TCI argue for a market definition that includes, at a minimum, all ISPs. AT&T-TCI also contend that an econometric model showing that broadband services are offered at higher prices does not provide sufficient evidence, standing alone, to support AOL's allegation that there are separate narrowband and broadband markets for residential consumers.²²⁴

78. A number of parties contend, however, that Internet access services constitute too broad a market definition; they argue that narrowband services are not reasonable substitutes for broadband services at current (and anticipated) levels of quality and price and, therefore, that broadband services are a separate market.²²⁵ They contend that residential broadband services appear to offer substantially higher quality to consumers than do narrowband services since they provide significantly faster data transmission rates, which have the potential to facilitate a wide range of new and improved services. AOL supports its argument with an econometric model and testimony from its economic expert concluding that broadband services constitute a separate market, based in part on the fact that such services are generally offered at significantly higher prices than narrowband services.²²⁶

79. *Effect of the Merger on Customers of Cable-Provided Internet Access Services.* AT&T-TCI argue that the Commission has ruled that "concerns that, even if valid, would be present regardless of whether the transaction is consummated, . . . properly play no part in the Commission analysis."²²⁷ According to AT&T-TCI, the "equal access" arguments raised by commenters and opponents of the requested transfers would carry just as much force if the merger did not occur and, accordingly, that these issues are outside the scope of this proceeding.²²⁸ AT&T-TCI assert that "AOL's and MindSpring's claims relate to a cable Internet service that is offered by TCI today, entirely independently of the merger," and seek to bolster their argument by pointing out that the same issues were raised in the proceeding leading to the *Advanced Services Report*.²²⁹

80. AT&T-TCI also argue that equal access conditions are completely unnecessary with respect to @Home's broadband services. They argue that @Home has no market power because these services are "in their infancy."²³⁰ Moreover, AT&T-TCI argue that there are many emerging substitutes for broadband services like those provided by @Home.²³¹ AT&T-TCI conclude that @Home has very

²²³*Id.* at 30-32, App. B (Ordoover & Willig Decl.) at ¶¶ 10-11.

²²⁴*Id.* at 33-34, App. B (Ordoover & Willig Decl.) at ¶¶ 13-22.

²²⁵AOL Comments at 8-17; Bell Atlantic Reply at 2; Cable & Wireless Comments at 5-7; CompTel Reply at 5-6; GTE Comments at 28-33, 42-43; GTE Reply at 13-14; MCI WorldCom Reply at 3-5.

²²⁶AOL Comments, App. A (Declaration Regarding Market Definition by Jerry Hausman).

²²⁷AT&T-TCI Reply at 8.

²²⁸*Id.* at 10.

²²⁹*Id.* at 19.

²³⁰*Id.* at 20.

²³¹*Id.* at 20, App. B (Ordoover & Willig Decl.) at ¶¶ 23-27.

strong incentives to keep its prices low and its quality high and to ensure that its customers can easily and affordably access all of the content available on the Internet, including that offered by providers such as AOL, CNN, and Yahoo!²³²

81. In response, opponents of the requested transfers argue that AT&T-TCI will have strong incentives to discriminate against competing ISPs and, ultimately, to deny interconnection in a bid to monopolize broadband services.²³³ A number of parties argue that the incentive and ability to discriminate against competing ISPs is heightened by the merger because it will permit more rapid deployment of broadband services, and AT&T's complementary services will make bundled offerings more attractive.²³⁴ Several parties argue that @Home and TCI already discriminate in manner that can only be explained as an effort to seek monopoly profits.²³⁵ Moreover, argue these parties, @Home has sufficiently strong first-mover advantages and favorable regulatory treatment such that it is possible that @Home will succeed at monopolizing residential markets for broadband services.²³⁶

82. *Legal Status of Internet Access Provided Via Cable System Facilities.* AT&T-TCI argue that @Home's services are "cable services" as defined by the Communications Act because they are encompassed with the revised definition of such services that was included in the 1996 Act.²³⁷ They base their argument on the addition of the words "or use" to the definition of cable service so that cable service now means: "the one-way transmission to subscribers of (i) video programming, or (ii) other programming service [defined as information that a cable operator makes available to all subscribers generally²³⁸], and . . . subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service."²³⁹ Citing to legislative history, AT&T-TCI argue that, by adding the words "or use," Congress intended to include interactive services within the scope of the cable service definition.²⁴⁰ In their opinion, Internet access services (including associated services such as e-mail and World Wide Web browsing) are the kind of interactive services that are covered by the amended definition of cable service. According to AT&T-TCI, this conclusion means that the Commission may not impose any additional obligations beyond those specifically enumerated in Title VI of the Communications Act.

²³²*Id.* at 27-28, App. B (Ordoover & Willig Decl.) at ¶¶ 47-52.

²³³Ameritech Comments at 5-13; GTE Comments at 34-35; MCI WorldCom Comments at 9-12; U S WEST Petition at 11-15.

²³⁴Ameritech Comments at 5-13; GTE Reply at 14; MCI WorldCom Comments at 9-12; U S WEST Petition at 11-15.

²³⁵Ameritech Reply at 8-10; GTE Reply at 16-17; U S WEST Reply at 9-15.

²³⁶GTE Comments at 7-11, 32-44, Att. 1 (Declaration of Daniel F. Spulber).

²³⁷AT&T-TCI Reply at 21-22.

²³⁸47 U.S.C. § 522(14).

²³⁹47 U.S.C. § 522(6).

²⁴⁰AT&T-TCI Reply at 21-22

83. Many parties disagree with AT&T-TCI's contention that @Home's services are cable services. They argue that Internet access services do not meet the statutory definition of cable service under Title VI, but rather are information services or telecommunications services covered by Title II.²⁴¹ BellSouth Corporation ("BellSouth") contends that @Home's services cannot meet the statutory definition of cable service because they are not offered in connection with basic cable services and sometimes are provided to customers that are not subscribing to basic cable service as required by Title VI.²⁴² MindSpring argues that AT&T-TCI's interpretation of the Communications Act is contrary to the intent of Congress, as demonstrated by the fact that their interpretation would permit incumbent LECs to evade all of the market-opening provisions that were included in the 1996 Act by converting their services to packet-switched telephony offered over cable system facilities.²⁴³

84. AT&T-TCI also argue that the interconnection, resale, and unbundling requirements of section 251(a)-(c) of the Communications Act cannot be applied to @Home's high-speed Internet access services even if those services do not fall within the definition of cable service under Title VI. Many other parties argue that @Home's services are local exchange services covered by section 251(a)-(b), and that the merged entity will qualify as an incumbent LEC for the purposes of section 251(c).²⁴⁴ U S WEST and MCI WorldCom argue that the Commission's determination that advanced services offered by LECs are telephone exchange or exchange access services means that AT&T-TCI will be providing services subject to Title II because those definitions apply without regard to the facilities used.²⁴⁵ Ameritech adds that the Commission's determination that the xDSL services offered by GTE Service Corporation ("GTE") in a recent tariff are interstate access services confirms that AT&T-TCI's high-speed data offerings will be telecommunications services even though they will be offered via cable system facilities.²⁴⁶

85. A number of parties argue that the Communications Act's requirement that transfers of licenses and authorizations must be in the public interest provides the Commission with ample jurisdiction and authority to impose "equal access" conditions.²⁴⁷ U S WEST argues that a grant of the requested transfers would convey a "right not previously enjoyed," which the Commission may condition as required by the public interest.²⁴⁸ GTE argues that the public interest would not be served by permitting

²⁴¹Cable & Wireless Reply at 7-9; BellSouth Reply at 4-7; MCI WorldCom Comments at 3-4.

²⁴²BellSouth Reply at 4-8. Title VI requires that subscribers must purchase basic service in order to purchase any other cable service. 47 U.S.C. § 543(b)(7).

²⁴³MindSpring Reply at 10-11.

²⁴⁴See *supra* Section IV.B.1.

²⁴⁵MCI WorldCom Comments at 5-6; U S WEST Petition at 25-27 (citing *Advanced Services Order and NPRM*, FCC 98-188 (rel. Aug. 7, 1998)).

²⁴⁶Ameritech Reply at 5-6.

²⁴⁷AOL Comments at 39-46; Cable & Wireless Reply at 3-4; CompTel Reply at 2-3; GTE Comments at 11-12. See also CoreComm Reply at 19-22; SBC Comments at 7-11.

²⁴⁸U S WEST Petition at 3-7.