

the requested transfers to go into effect before conducting a rulemaking to determine the status of cable-provided Internet access services and to require equal access for competing ISPs.<sup>249</sup>

86. As a remedy for the feared monopolization of residential broadband Internet access services, many parties ask the Commission to impose one or more of the following conditions on the proposed transfer of licenses obligating AT&T-TCI to: (1) offer broadband Internet access services unbundled from content so that subscribers may purchase one without the other (and buy a substitute for the service not purchased from AT&T-TCI);<sup>250</sup> (2) offer "equal" or "open" access to competing ISPs (so that the transmission service can be included with their content even if it is not available to subscribers as a separate service);<sup>251</sup> (3) interconnect with other ISPs pursuant to the requirements imposed on telecommunications carriers and local exchange carriers by section 251(a)-(b) of the Communications Act;<sup>252</sup> (4) provide competing ISPs with interconnection, unbundled elements, and resale pursuant to the section 251(c) obligations for incumbent LECs;<sup>253</sup> or (5) provide capacity to competing ISPs pursuant to the leased access provisions of Title VI.<sup>254</sup> Taking the opposite approach, BellSouth argues that the Commission should reverse its decision in the *Advanced Services Order and NPRM* and, instead, determine that high-speed Internet access services offered by incumbent LECs are not covered by the interconnection, unbundling, and resale requirements of section 251(a)-(c) of the Communications Act.<sup>255</sup>

87. *Technical Issues.* Commenters have proposed various modifications to the AT&T-TCI network that, they assert, would enable the firm to provide access to other ISPs. These commenters and AT&T-TCI disagree, however, on the practicality and feasibility of the proposed modifications.<sup>256</sup> In

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<sup>249</sup>GTE Comments at 48-49.

<sup>250</sup>Cable & Wireless Reply at 5-7.

<sup>251</sup>*Id.* at 9; GTE Comments at 45-48; MCI WorldCom Comments at 14 (arguing that @Home's exclusivity provision with cable systems should be waived as a condition of the merger). *See also* Mt. Hood Comments at 18-22; Comments of Oregon Cities.

<sup>252</sup>MCI WorldCom Comments at 6-7; MCI WorldCom Reply at 2-5; U S WEST Petition at 22-31.

<sup>253</sup>Ameritech Comments at 13-25; Ameritech Reply at 9-10; MCI WorldCom Comments at 13; MCI WorldCom Reply at 5-7; Qwest Comments at 16; U S WEST Petition at 22-31.

<sup>254</sup>GTE Comments at 46-48. *But see* MindSpring Reply at 9 (arguing that the leased access rules only apply to video programming). The Commission's commercial leased access rules provide unaffiliated video programmers access to a cable system's channel capacity so they may distribute their video programming. 47 U.S.C. § 532; 47 C.F.R. §§ 76.970, 76.971. Cable operators subject to this requirement are to establish reasonable prices, terms, and conditions of such use. 47 U.S.C. § 532.

<sup>255</sup>BellSouth Reply at 12-14. Based on their filings, it seems reasonable to expect that Ameritech, GTE, and U S WEST would support this position in addition to their own arguments that AT&T-TCI ought to be subjected to obligations comparable to those they face.

<sup>256</sup>In particular, the commenters and AT&T-TCI disagree on how costly the modifications would be, how quickly the modifications could be completed, and how difficult those modifications would be. Other areas of disagreement are issues such as scalability and operations support.

addition, there is disagreement on whether some of the proposed solutions would inhibit future new services and thus stifle innovation. AT&T-TCI argue that "equal access" conditions such as those advocated by opponents of the requested transfers are not technically feasible and would severely inhibit AT&T-TCI's ability to deploy broadband services. A number of parties disagree, however, and submit a variety of proposals that they claim demonstrate how equal access could be implemented. Ameritech argues that equal access is technically feasible, and that AT&T-TCI could add or modify "router/proxy servers" in the cable headends so that subscribers would be connected with the facilities of their preferred ISPs.<sup>257</sup> AOL asserts that there are no meaningful technical obstacles that would prevent the deployment of the kind of "equal access" that it is seeking, and submits an example involving reconfiguration of the cable modem termination system and routers to include tables of IP blocks and router addresses corresponding to competing ISPs.<sup>258</sup> MindSpring states that it currently has equal access arrangements with a cable overbuilder in Alabama.<sup>259</sup> MindSpring has joined AOL in arguing that AT&T-TCI should be required to provide a data routing capability on an unbundled basis to competing ISPs, and has submitted a document entitled "Using cable modems to provide multiple-carrier networks" in support of its proposal.<sup>260</sup> AOL also submits two documents that it argues "describe the technical terms mutually agreed upon by Canadian regulators and cable operators to afford multiple Internet service providers fair access to cable high-speed Internet access networks."<sup>261</sup>

88. AT&T-TCI and @Home respond to the arguments and technical solutions advocated by MindSpring and AOL. They filed an affidavit from Milo Medin, Senior Vice President and Chief Technical Officer of @Home.<sup>262</sup> Mr. Medin argues that there is only one technically feasible point of interconnection with competing ISPs, namely the Cable Modem Termination System ("CMTS"), and that interconnection at that point would not be technically feasible in practice because of capacity constraints and the shared bandwidth nature of the cable modem network. Moreover, Mr. Medin argues that an equal access solution like that advocated by AOL would likely require the abandonment of multimedia and dynamic services. Mr. Medin also argues that there are difficult issues related to capacity engineering, fault recovery, number assignment, customer provisioning, and other operational matters that are not addressed in the proposals submitted by AOL and MindSpring. In response to Mr. Medin's assertions, GTE acknowledges that the architecture and technology of the network planned by AT&T-TCI is not capable of supporting open and nondiscriminatory access without technical modification but

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<sup>257</sup>Ameritech Comments at 21.

<sup>258</sup>AOL Comments at 38-39, App. C (Declaration by Suk Soo).

<sup>259</sup>MindSpring Comments at 18-19.

<sup>260</sup>Letter dated Nov. 13, 1998, from Greg Simon, Simon Strategies, to Magalie Roman Salas, Secretary, Federal Communications Commission. A copy of this filing, which was submitted in CC Docket No. 98-146, has been placed in the record of this proceeding.

<sup>261</sup>Letter dated Dec. 9, 1998, from Peter D. Ross, Wiley, Rein & Fielding, to Magalie Roman Salas, Secretary, Federal Communications Commission, enclosing Tekton Internet Assocs., "Third Party Residential Internet Access," and Canadian Cable Television Association, "Technical Report on the Status of Implementation of Access for Internet Service Providers." A copy of this filing, which was submitted in CC Docket No. 98-146, has been placed in the record of this proceeding.

<sup>262</sup>AT&T-TCI Reply, App. D (Affidavit of Milo Medin).

suggests that the necessary modifications are feasible.<sup>263</sup> Finally, in the record leading to the *Advanced Services Report*, documents were filed in support of arguments that the open network solutions purportedly achieved in Canada are based on flawed assumptions and are unworkable.<sup>264</sup> The parties filing these documents argue that the proposals have not been tested, and that numerous operational issues have not been addressed.<sup>265</sup>

89. *Investment Incentives.* According to AT&T-TCI, any equal access conditions such as those advocated by opponents to the requested transfers will impose substantial investment costs and expenses on @Home, which will only delay and diminish its deployment of broadband services to residential customers.<sup>266</sup> AT&T-TCI argue that the only way that the equal access conditions advocated by commenters could be implemented is through investment-detering rate regulation and cost allocation rules that would ensure that @Home's content was not cross-subsidized by the common transport provided by @Home to subscribers buying content from other providers.<sup>267</sup> Moreover, argue AT&T-TCI, the advertising revenues provided by @Home's content are needed to offset the transmission costs incurred by providing cable modem service.

90. Other parties support AT&T-TCI's argument that equal access would harm the deployment of advanced telecommunications infrastructure. The National Cable Television Association ("NCTA") submitted a report by Bruce W. Owen and Gregory L. Rosston ("Owen-Rosston Report") making the same conclusion and arguing that "exclusive bundling" by @Home is needed to reduce risk and provide adequate revenue streams to support investment in broadband cable upgrades.<sup>268</sup> Several members of the financial community who cover cable system securities also submit that the unbundling proposals sought by commenters would "dampen the willingness of the financial community to finance

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<sup>263</sup>Letter dated Feb. 2, 1999, from John F. Raposa, Associate General Counsel - Federal Regulatory Matters, GTE Service Corporation to William Kennard, Chairman, Federal Communications Commission (enclosing Declaration of Justin A. Aborn).

<sup>264</sup>Letter dated Jan. 6, 1999, from Alexander V. Netchvolodoff, Vice President of Public Policy, Cox Enterprises, Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission (enclosing an analysis of "weakness and incompleteness of AOL's *ex parte* filing . . . "); Letter dated Jan. 21, 1999 from Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C. to Magalie Roman Salas, Secretary, Federal Communications Commission (enclosing "Analysis of MindSpring Enterprises, Inc.'s 'Using cable modems to provide multiple-carrier networks'" and "Analysis of 'PRIA Point of Interconnect Network Design'"). Copies of these documents, which were filed in CC Docket No. 98-146, have been placed in the record of this proceeding.

<sup>265</sup>*Id.*

<sup>266</sup>AT&T-TCI Reply at 48-51.

<sup>267</sup>*Id.* at 48-51, App. B (Ordoover & Willig Decl.) at ¶¶ 38-40.

<sup>268</sup>Letter dated Dec. 10, 1998, from Daniel L. Brenner, Vice President for Law & Regulatory Policy, National Cable Television Association, to Magalie Roman Salas, Secretary, Federal Communications Commission, enclosing Bruce M. Owen & Gregory L. Rosston, "Cable Modems, Access and Investment Incentives" (Dec. 1998). A copy of this filing has been placed in the record in this proceeding.

deployment of upgraded cable facilities, other broadband facilities and related equipment."<sup>269</sup> Finally, AT&T-TCI argue that @Home's bundling of transmission and content is no different than the practices of many of its competitors, including AOL.

91. Several commenters or opponents of the requested transfers take issue with AT&T-TCI's assertion that equal access conditions would inhibit investment in broadband facilities and deployment of high-speed Internet access services. CompTel argues that providing access to other ISPs should produce additional revenue in competitive markets beyond that which would be realized through exclusive bundling with @Home.<sup>270</sup> Moreover, argue these commenters, equal access conditions like those sought by commenters would provide for normal returns on the necessary investments, so AT&T-TCI would be opposed to them only if it anticipated making monopoly profits.<sup>271</sup> MindSpring argues that equal access by competing ISPs reflects the operation of a competitive market, as evidenced by its arrangement with a cable overbuilder in Alabama.<sup>272</sup> AOL submits a paper by Jerry Hausman in rebuttal to the Owen-Rosston Report submitted by AT&T-TCI, arguing that AT&T-TCI's tying of @Home content to its high-speed Internet access service proves that AT&T-TCI are seeking to prevent competition.<sup>273</sup> Mr. Hausman further argues that the tying of @Home content with high-speed Internet access service will reduce overall investment in broadband data facilities and harm consumers through reduced choices and higher prices.

### 3. Discussion

92. *Market Definition.* We do not need to determine at this time whether narrowband and broadband Internet access services provided to residential and small business customers are sufficiently different to support the conclusion that they are in separate markets. As we explain in the following paragraphs, even if we were to assume that they are in separate markets, we would reach the same conclusion concerning the issues raised by parties opposing and commenting on the proposed merger.

93. *Effect on Competition.* To address the specific issues raised by parties opposing the merger or seeking conditions, we must first consider whether the merger is likely to produce any adverse

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<sup>269</sup>Letter dated Dec. 22, 1998, from Michael H. Hammer, Willkie Farr & Gallagher, to Magalie Roman Salas, Secretary, Federal Communications Commission, enclosing letter dated Dec. 18, 1998 from Laura A. Martin, Credit Suisse First Boston Corporation, Dennis H. Leibowitz, Donaldson, Lufkin & Jenrette Securities, Jessica Reif Cohen, Merrill Lynch, Pierce, Fenner & Smith Inc., and Thomas Eagan, FineWebber Inc., to William E. Kennard, Chairman, Federal Communications Commission.

<sup>270</sup>CompTel Reply at 7-8.

<sup>271</sup>AOL Comments at 34-38, App. B (Declaration Regarding Investment Incentives by Jerry Hausman); GTE Reply at 17-18. *But see* Letter dated Dec. 9, 1998, from Leslie L. Vadasz, Senior Vice President, Intel Corp., John T. Chambers, President and CEO, Cisco Systems *et al.*, to William E. Kennard, Chairman, Federal Communications Commission (arguing that government regulation of broadband networks will stifle investment in the construction of new or expanded broadband networks).

<sup>272</sup>MindSpring Comments at 18-20.

<sup>273</sup>Letter dated Jan. 14, 1999, from Donna N. Lampert, Donna N. Lampert Associates, to Magalie Roman Salas, Secretary, Federal Communications Commission, enclosing Jerry A. Hausman, "Investment and Consumer Welfare in Broadband Internet Access."

competitive effects in residential markets for Internet access services. Currently, there are a large number of firms providing Internet access services in nearly all geographic markets in the United States, and these markets are quite competitive today.<sup>274</sup> Accordingly, if all Internet access services were included in the market definition, we would conclude that the merger is unlikely to adversely affect the public interest in competitive markets for Internet access services.

94. Even if we were to consider a market defined to include only high-speed Internet access services, we would still conclude that the merger is unlikely to adversely affect the public interest in a competitive market. Although AT&T-TCI together might be able more quickly to deploy high-speed Internet access services and win a significant number of residential Internet access customers, it appears that quite a few other firms are beginning to deploy or are working to deploy high-speed Internet access services using a range of other distribution technologies.<sup>275</sup> Moreover, even if broadband Internet access services were deemed to constitute a separate market from dial-up Internet access services, AT&T is not a more likely entrant than AOL or other leading ISPs (including the incumbent LECs, which have facilities of their own) that are currently providing services using narrowband transmission. Accordingly, the merger does not eliminate any scarce assets or capabilities; in fact, a partnership between AT&T and TCI is precisely the kind of arrangement by which AT&T (and other ISPs) could be expected to provide higher-speed Internet access services. Finally, while the merger is unlikely to yield anticompetitive effects, we believe it may yield public interest benefits to consumers in the form of a quicker roll-out of high-speed Internet access services.<sup>276</sup>

95. We also note that AT&T-TCI have submitted the following statement concerning the availability of unaffiliated online services to TCI subscribers:

Even if an online service provider cannot or does not want to enter into [an agreement providing TCI customers with unimpeded access to that provider], customers of TCI@Home, TCI's cable Internet service, can still access that provider through their TCI/IP connections using a "bring-your-own-access plan" like that actively marketed by AOL. TCI customers subscribing to AOL under the BYOA plan today can connect directly to AOL by "double clicking" on the AOL icon on their computer desktop. They do not have to "go through" @Home or view any @Home-provided content or screens. In fact, if they so desire, customers will be able to remove the @Home icon from their desktop completely. This will continue to be the case after the merger.

Likewise, @Home's recently-announced purchase of Excite will not deprive consumers of their existing choice of portals. @Home subscribers will be able to access content through @Home's interface or through Excite's portal -- or through any other interface (Yahoo, Lycos, AOL, or others) they choose. Internet users who are not

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<sup>274</sup>According to one study, over 90% of this country's population has access by a local phone call to several Internet service providers. Another five percent has access by a local call to one service provider. *Advanced Services Report* at ¶ 63.

<sup>275</sup>*Id.* at ¶¶ 51-59.

<sup>276</sup>See *infra* Section V.

@Home subscribers will still be able to access and use Excite through www.excite.com, just as they do today.<sup>277</sup>

96. We take this representation seriously, and as we have noted elsewhere, we will monitor broadband deployment closely. Based on this representation, we conclude nothing about the proposed merger would deny any customer (including AT&T-TCI customers) the ability to access the Internet content or portal of his or her choice. We further conclude that the open access issues would remain equally meritorious (or non-meritorious) if the merger were not to occur. Moreover, as we observed in the *Advanced Services Report*, multiple methods of providing high-speed Internet access appear to be emerging, and the Commission will monitor broadband deployment closely. Therefore, we find that the equal access issues raised by parties to this proceeding do not provide a basis for conditioning, denying, or designating for hearing any of the requested transfers of licenses and authorizations.

#### D. Mobile Telephone Service

97. The proposed merger also affects markets for mobile telephone services. As described earlier, 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").<sup>278</sup> Sprint is licensed to provide Commercial Mobile Radio Service ("CMRS")<sup>279</sup> in numerous areas, including New York, New York; Los Angeles, California; Dallas-Fort Worth, Texas; San Francisco-Oakland-San Jose, California; and Miami-Fort Lauderdale, Florida.<sup>280</sup> AT&T, through AT&T Wireless, also holds CMRS licenses throughout the country, including many of the same areas where Sprint provides service.<sup>281</sup>

98. To promote competition and address concerns about anticompetitive behavior in CMRS markets, the Commission has adopted a CMRS spectrum cap limiting the amount of CMRS spectrum that

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<sup>277</sup>Letter dated Jan. 21, 1999, from Betsy Brady, Vice President Federal Government Affairs, AT&T Corp. to Magalie Roman Salas, Secretary, Federal Communications Commission, enclosing letter dated Jan. 21, 1999, from Betsy J. Brady, Vice President Federal Governmental Affairs, AT&T Corp., and Dr. Robert Pepper, Chief, Office of Plans and Policy, Federal Communications Commission at 1-2. See also *see* Hindery Letter at 3-4.

<sup>278</sup>On August 31, 1998, after a public notice period, the Commission approved Sprint's unopposed application for reorganization. See Public Notice, *Wireless Telecommunications Bureau Commercial Wireless Service Information Sprint Spectrum Holding Company, L.P. And Phillieco Partners I, L.P. Transfers of Control Action Taken*, Report No. LB-98-65 (Wireless Tel. Bur., rel. Aug. 31, 1998). This reorganization, which occurred on November 23, 1998, permitted TCI and Sprint's other cable partners, Cox Communications, Inc. and Comcast Corporation, to convert their partnership interests in Sprint into shares of this newly created Sprint PCS tracking stock.

<sup>279</sup>CMRS includes, *inter alia*, cellular service and personal communications service. See 47 C.F.R. § 20.9.

<sup>280</sup>See Application at 8-10:

<sup>281</sup>See AT&T Form 704 (1997). AT&T Wireless' service areas include New York, New York; Miami-Fort Lauderdale, Florida; Dallas-Fort Worth, Texas; Seattle, Washington; Pittsburgh, Pennsylvania; Minneapolis, Minnesota; and Portland, Oregon. Application at 27 n.54.

can be licensed to a single entity within a particular geographic area.<sup>282</sup> Specifically, section 20.6 of the Commission's rules prohibits an entity from having an attributable interest in a total of more than 45 MHz of licensed cellular, broadband PCS, and Specialized Mobile Radio ("SMR") spectrum regulated as CMRS with significant overlap in any geographic area.<sup>283</sup> Ownership of 20% or more of equity or outstanding stock, among other things, is considered an attributable interest.<sup>284</sup>

99. The Applicants acknowledge that AT&T's acquisition of TCI implicates the CMRS spectrum cap.<sup>285</sup> As noted, TCI indirectly owns approximately 23.8% of the equity and approximately 2.38% of the voting interest in Sprint PCS tracking stock.<sup>286</sup> Because TCI owns 20% or more of the equity of Sprint PCS tracking stock, under section 20.6 of the Commission's rules, TCI has an attributable interest in all licenses held by Sprint's PCS operating group. Because AT&T and Sprint have significant overlap in numerous service areas, AT&T's acquisition of TCI's interest in Sprint PCS tracking stock would cause AT&T to exceed the spectrum aggregation limit established by the CMRS spectrum cap in those areas.

100. AT&T and TCI have committed that they will comply with the CMRS spectrum cap by transferring ownership of the Sprint PCS tracking stock to a trust, subject to Commission consent.<sup>287</sup> Additionally, AT&T and TCI have submitted documents related to this merger that have been filed by DOJ in the United States District Court for the District of Columbia (collectively "Proposed DOJ Settlement Agreement").<sup>288</sup> The Proposed DOJ Settlement Agreement resolves DOJ's concerns that

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<sup>282</sup>*Amendment of Parts 20 and 24 of the Commission's Rules -- Broadband PCS Competitive Bidding and the Commercial Mobile Radio Service Spectrum Cap; Amendment of the Commission's Cellular/PCS Cross-Ownership Rule*, WT Docket 96-59, GN Docket 90-314, Report and Order, 11 FCC Rcd 7824, 7875 (1996), *appeal pending sub nom. Cincinnati Bell Tel Co. v. FCC*, No. 96-3756 (6th Cir.), *order on recon.*, 12 FCC Rcd 14031 (1997), *aff'd sub nom. BellSouth Corp. v. FCC*, No. 97-1630, slip op. (D.C. Cir. Jan 8, 1999). *See also 1998 Biennial Regulatory Review -- Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket No. 98-205, Notice of Proposed Rulemaking, FCC 98-308, at ¶¶ 10-18, 32-34 (rel. Dec. 10, 1998) ("*CMRS Spectrum Cap NPRM*").

<sup>283</sup>47 C.F.R. § 20.6. A significant overlap of PCS and cellular service areas is defined as a 10% population overlap. 47 C.F.R. § 20.6(c)(1). The CMRS spectrum cap is the subject of a pending rulemaking proceeding. *See CMRS Spectrum Cap NPRM*.

<sup>284</sup>47 C.F.R. § 20.6(d)(2).

<sup>285</sup>Application at 30; AT&T-TCI Reply at 75-76.

<sup>286</sup>*See* Application at 8-10.

<sup>287</sup>In the Application, AT&T suggests that it could comply with the CMRS spectrum cap by either divesting itself of a portion of Sprint PCS tracking stock, placing the stock in a trust, or obtaining a temporary waiver. Application at 30. Subsequently, AT&T committed to placing its interest in Sprint PCS tracking stock into a trust. AT&T-TCI Reply at 76.

<sup>288</sup>*United States v. AT&T Corp. and Tele-Communications Inc.*, Case No. 98-3170 (D.D.C. Dec. 30, 1998). The Proposed DOJ Settlement Agreement includes the following documents: Complaint, Final Judgment, Stipulation, (continued...)

AT&T's acquisition of TCI's Sprint PCS tracking stock may harm competition.<sup>289</sup> According to the Proposed DOJ Settlement Agreement, AT&T and TCI will not consummate the merger until they transfer the Sprint PCS tracking stock into a trust administered by an independent trustee charged with divesting the stock according to a specific schedule.

101. Commenters addressing this issue agree that Commission consent to the transfer of TCI's licenses and authorizations should be conditioned on AT&T's and TCI's compliance with the CMRS spectrum cap and the divestiture of their interest in Sprint PCS tracking stock. SBC Communications, Inc. ("SBC") cites the extensive wireless service area overlap between Sprint and AT&T and contends that permitting this merger to go through without a fully developed and clearly defined compliance plan would "completely undermine the purpose of the CMRS spectrum cap."<sup>290</sup> U S WEST contends that a prompt divestiture is appropriate and asks that any trust agreement contain restrictions that the Commission has previously required in other trust situations.<sup>291</sup>

102. U S WEST also argues that even if AT&T-TCI comply with the CMRS spectrum cap by placing the stock into a trust administered by an independent trustee, the merged firm "will still retain a significant economic interest in favoring Sprint and disfavoring Sprint's competitors in its negotiation of wireless roaming agreements."<sup>292</sup> U S WEST requests that so long as the merged firm retains an interest in Sprint PCS tracking stock, the Commission should require it to offer competitors the same terms and conditions for roaming that it offers Sprint.<sup>293</sup>

103. Sprint also requests that approval of the Application be conditioned on a clear divestiture plan, but argues that a quick divestiture of Sprint PCS tracking stock could harm competition. According to Sprint, if AT&T-TCI quickly sell Sprint PCS tracking stock it could competitively harm Sprint by adversely affecting its ability to raise capital.<sup>294</sup> Access to capital is extremely critical at this point, Sprint argues, because it is actively engaged in building out its PCS network, an endeavor that requires

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<sup>288</sup>(...continued)

and Competitive Impact Statement. These documents will be referred to individually where appropriate. *See also* Letter dated Jan. 4, 1999, from Mark Schneider, counsel for AT&T Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission.

<sup>289</sup>Competitive Impact Statement at 7-10.

<sup>290</sup>SBC Comments at 21.

<sup>291</sup>Specifically, U S WEST requests a "review of the proposed agreement to ensure that it complies with the requirements of independence (such as a ban on communication between the independent trustee and AT&T/TCI personnel)". U S WEST Petition at 49.

<sup>292</sup>*Id.* at 50.

<sup>293</sup>*Id.* at 51.

<sup>294</sup>Sprint Comments at 4.

significant capital resources.<sup>295</sup> Additionally, Sprint contends that when it negotiated the re-organization agreement with TCI that resulted in TCI acquiring 23.8% of the Sprint PCS tracking stock, TCI was a direct and significant competitor to AT&T, and had economic incentives to maximize the value of Sprint PCS tracking stock.<sup>296</sup> These incentives, Sprint asserts, may change if AT&T, a competitor, acquires TCI.<sup>297</sup>

104. Sprint requests that the Commission impose conditions to protect against the possible adverse effects of AT&T-TCI inundating the investment market with a large quantity of Sprint PCS tracking stock. Sprint requests that AT&T-TCI be required to place the Sprint PCS tracking stock into a trust, administered by an independent trustee, who would make an "orderly" disposition of the Sprint PCS interest within 10 years.<sup>298</sup> Sprint also lists other conditions it urges us to impose on the activities of AT&T and the trustee.<sup>299</sup>

105. Notwithstanding their commitment to comply with the CMRS spectrum cap, AT&T-TCI acknowledge that "sale of [TCI's Sprint PCS] stock in a short period following the restructuring would greatly increase the amount of [Sprint PCS] stock being offered in the marketplace and could create an amount of available stock in the public market that would impair Sprint's own ability to issue new PCS stock as a source of capital."<sup>300</sup> The Proposed DOJ Settlement Agreement also recognizes the possible harm that a prompt divestiture may inflict upon Sprint's access to capital.<sup>301</sup>

106. We recognize that requiring AT&T-TCI promptly to divest the Sprint PCS tracking stock at this time could impede Sprint's ability to provide service to the public and could violate contractual

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<sup>295</sup>Sprint Comments at 6. Sprint's reorganization plan anticipated the completion of an initial public offering ("IPO") of Sprint PCS tracking shares. When this IPO is completed it will reduce TCI's percentage of ownership of the Sprint PCS tracking stock.

<sup>296</sup>*Id.*

<sup>297</sup>*Id.*

<sup>298</sup>Sprint Comments at 8. According to Sprint, an "orderly" disposition means a series of dispositions (1) designed to maximize the total value received for all of the Sprint PCS interest held by AT&T-TCI and made in a manner that does not injure Sprint and (2) not exceeding more than 10% of the public float of Sprint PCS stock in a registered offering or otherwise in any consecutive 12-month period. *Id.*

<sup>299</sup>These safeguards include: requiring that the trustee vote *pro rata* in accordance with the aggregate vote of the other holders of Sprint PCS stock; prohibiting the trustee from selling any portion of the Sprint PCS tracking stock to a "major telecommunications competitor" without the prior consent of the Commission; requiring AT&T and the trustee to become parties to a standstill agreement executed between Sprint and TCI, which protects against certain acquisitions of additional Sprint stock; and requiring that the parties comply with the terms of existing agreements between Sprint and TCI. Sprint Comments at 9 & n.5.

<sup>300</sup>Application at 11 n.17.

<sup>301</sup>Competitive Impact Statement at 11.

agreements between the parties.<sup>302</sup> However, to permit AT&T-TCI to continue owning Sprint PCS tracking stock would violate the CMRS spectrum cap and may not encourage arms-length competition between AT&T-TCI and Sprint in CMRS markets.<sup>303</sup> Therefore, balancing these considerations, we conclude that requiring AT&T-TCI to place the Sprint PCS tracking stock in a temporary divestiture trust before consummating this merger would best serve the public interest.

107. We condition our approval on AT&T-TCI transferring ownership of the Sprint PCS tracking stock to a trust prior to consummation of the merger. The trust must fully comply with Commission rules that permit grantors and beneficiaries of a trust to avoid attribution for CMRS spectrum cap purposes,<sup>304</sup> and with the additional requirements discussed below. We further require that AT&T-TCI submit the proposed trust agreement to the Commission for review within 30 days after issuance of this Order or at least 10 days prior to consummation of the merger, whichever is earlier. The Commission must approve the proposed trust agreement before the Applicants can consummate the merger. We delegate authority to the Wireless Telecommunications Bureau to review and approve the proposed trust agreement in consultation with the Office of General Counsel.<sup>305</sup>

108. There remains the question of the conditions under which the proposed trust may hold the Sprint PCS tracking stock. In the Proposed DOJ Settlement Agreement, AT&T-TCI agreed to direct the trustee to divest enough Sprint PCS tracking stock to cause the proposed trust to hold no more than 10% of the outstanding shares of Sprint PCS tracking stock on or before May 23, 2002, and to divest the remainder on or before May 23, 2004.<sup>306</sup> We concur with DOJ's conclusion that this represents a reasonable divestiture period in this situation. This term appropriately balances the concern that a rapid divestiture may harm competition by adversely affecting Sprint's ability to raise capital to build out its network against the concern that a long divestiture period would harm competition.<sup>307</sup>

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<sup>302</sup>Under the Sprint reorganization agreement, TCI has a right to register for sale its stock in Sprint PCS tracking stock on a priority basis, beginning on the later of either (i) 90 days after Sprint PCS completes an initial public offering or (ii) 180 days after the restructuring is completed. See Application at 28.

<sup>303</sup>The CMRS spectrum cap is the subject of a pending rulemaking proceeding. See *CMRS Spectrum Cap NPRM*, *supra* note 282. We note that any change to the Commission's current spectrum cap would not necessarily assuage the competitive concerns identified above.

<sup>304</sup>Commission rules provide that stock interests held in trust shall be attributed to any person who holds or shares the power to vote such stock, to any person who has the sole power to sell such stock, and to any person who has the right to revoke the trust at will or to replace the trustee at will. If the trustee has a familial, personal, or extra-trust business relationship with the grantor or beneficiary, the grantor or beneficiary, as appropriate, also will be attributed with the stock interests held in trust. 47 C.F.R. § 20.6(d)(3).

<sup>305</sup>47 C.F.R. §§ 0.131(l), 0.331.

<sup>306</sup>Proposed Final Judgment at 6. Because TCI now owns approximately 23.8% of the outstanding shares of the tracking stock, the requirement that it hold no more than 10% of the outstanding shares by May 23, 2002, will result in a divestiture by that date of approximately 58% of the shares now owned by TCI.

<sup>307</sup>For the trustee to sell the stock over five years would require, over the entire five-year period, the sale, on average, of approximately 78,000 shares per trading day. This would represent an 8% increase in trading volume.

109. We recognize that the proposed trust condition permits the trustee a significant period of time to effect a sale.<sup>308</sup> To ensure that AT&T cannot exert influence over the trustee during this period, we require that the trust agreement provide that: (1) the trustee will have the sole power to accomplish the divestiture and, consistent with the terms of the Proposed DOJ Settlement Agreement, will do so in a manner reasonably calculated to maximize the value of the Sprint PCS tracking stock to the beneficiaries of the trust; and (2) all decisions regarding the divestiture shall be made by the trustee without consultation with AT&T.<sup>309</sup> We find that these requirements, which are consistent with the terms of the Proposed DOJ Settlement Agreement, address Sprint's concerns and ensure that AT&T will not exert influence over the trustee that may harm competition.

110. We must also ensure that the economic benefits arising from the beneficial ownership of the Sprint PCS tracking stock do not flow to the merged AT&T. This could provide a disincentive for AT&T to compete vigorously with Sprint in CMRS markets. AT&T could also have an incentive to favor Sprint over other CMRS providers in some situations, such as negotiating roaming agreements. These concerns were raised by U S WEST.<sup>310</sup> U S WEST requests that the Commission require Sprint and AT&T to share the terms and conditions of their mutual roaming agreements during the period in which AT&T retains an interest in Sprint PCS.<sup>311</sup> There is no precedent for the imposition of the condition proposed by U S WEST, and we do not believe such a requirement is necessary in this case. Rather, to mitigate the possibility that AT&T will not compete fully with Sprint during the divestiture period, we concur with the DOJ conclusion that certain additional restrictions should be placed on AT&T.<sup>312</sup>

111. Accordingly, we require that AT&T implement and enforce a representation it made to the Commission in the Application. Specifically, the Applicants stated that "AT&T will adopt a policy statement that its cash dividend policy will be to distribute, subject to the limitations in the AT&T Charter, dividends and distributions received by AT&T from businesses included in the Liberty Media Group to the holders of AT&T Liberty Media Group tracking stock."<sup>313</sup> We condition our approval on

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<sup>308</sup>The Commission generally does not allow for divestiture trusts of such long duration. As noted above, however, the circumstances of this case are unusual, in part, because the objection to a rapid divestiture was raised by Sprint, a competitor, rather than by AT&T, the acquiring party. Given these unusual circumstances, we expect that this divestiture period will have little, if any, precedential significance.

<sup>309</sup>We do not object, however, to the trustee consulting with certain members of the Liberty Media Group Board of Directors as provided by the terms of the Proposed DOJ Settlement Agreement. As explained by AT&T-TCI, for at least the first seven years after this transaction, directors appointed by TCI prior to this transaction will make up the majority of the Board of Directors of Liberty Media Group, through which substantially all of the Liberty Media Group's affairs will be managed. Members of this Board cannot be removed by AT&T except for cause. Application at 11-13 & 29.

<sup>310</sup>U S WEST Petition at 49-50.

<sup>311</sup>*Id.* at 50.

<sup>312</sup>*See* Proposed Final Judgment at 9-10.

<sup>313</sup>Application at 13. AT&T has stated that it will hold the Sprint PCS tracking stock within the Liberty Media Group. *Id.* at 11-13 & 29.

AT&T's adoption of this policy statement. This will ensure that any economic interest arising in connection with Liberty Media Group's interest in Sprint PCS tracking stock, including but not limited to any interest or dividends earned or net proceeds received upon the disposition of the stock; shall be for the sole and exclusive benefit of the holders of Liberty Media Group tracking stock.<sup>314</sup> AT&T may modify this provision only upon prior Commission approval. This requirement is consistent with a requirement imposed by the Proposed DOJ Settlement Agreement.<sup>315</sup>

112. We find that the Applicants' compliance with these conditions is necessary to permit us to find that this transaction benefits the public interest. As discussed above, our approval is conditioned on AT&T-TCI transferring the Sprint PCS tracking stock into a trust prior to consummation of the merger. We require that AT&T and TCI submit the proposed trust agreement for our review within 30 days after issuance of this Order or at least 10 days prior to consummation of the merger, whichever is earlier. The Applicants cannot consummate the merger until we approve the proposed trust agreement. Additionally, our consent is conditioned on AT&T-TCI ensuring that the economic interests arising from ownership of the Sprint PCS tracking stock during the divestiture period are directed only to the shareholders of the Liberty Media Group tracking stock, consistent with the terms of the Proposed DOJ Settlement Agreement.

#### **E. Other Public Interest Issues**

113. Commenters raise other issues regarding the merger's effect on the public interest. The issues discussed here do not revolve solely around one particular telecommunications service, but rather involve the merger's impact across several telecommunications services and the merger's effects on equity, as well as efficiency, issues.

##### **1. Cross-subsidization and cost allocation**

114. Commenters express concern that AT&T-TCI will use unregulated or imperfectly regulated cable service revenues to subsidize below-market or below-cost pricing of telephone and Internet access services.<sup>316</sup> They fear that cable rates will increase unreasonably as a result and ask that the Commission impose cost allocation rules designed to prevent cross-subsidization.<sup>317</sup> AT&T-TCI assert that cost allocation rules are unnecessary, because the merged entity will have neither the incentive nor the ability to engage in illegal cross-subsidization.<sup>318</sup> Rather, AT&T-TCI submit the merged company

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<sup>314</sup>*Id.* at 13. The value of AT&T Wireless is not "tracked" by this Liberty Media Group tracking stock. *Id.* at 11.

<sup>315</sup>Proposed Final Judgment at 9-10.

<sup>316</sup>*See e.g.*, Consumers Union Petition at 8; U S WEST Petition at 18-19; CoreComm Reply at 19-20; Greater Metro Telecommunications Consortium Statement (Dec. 14, 1998 *en banc* Hearing).

<sup>317</sup>U S WEST Petition at 37; *see also* Consumers Union Petition at 9-10; MCI WorldCom Comments at 4, 14-15; GTE Reply at 11.

<sup>318</sup>Letter dated Jan. 6, 1999, from James Cicconi, Senior V.P. Government Affairs & Federal Policy, AT&T Corp. to William E. Kennard, Chairman, Federal Communications Commission at 1 ("Jan. 6 Cicconi Letter").

will have an incentive not to raise cable rates in order to retain existing subscribers and attract new ones.<sup>319</sup> AT&T-TCI also argue that predatory pricing practices would not make economic sense, because their effect would be to make the combined enterprise less profitable.<sup>320</sup> Moreover, AT&T-TCI contend that the cross-subsidy concerns raised by the commenters are more appropriately addressed in an industry-wide rulemaking proceeding, not a merger proceeding involving a single cable provider.<sup>321</sup>

115. The commenters are concerned that the merged company will use market power in the delivery of cable service to impose rates that exceed reasonable levels.<sup>322</sup> The company could then use the additional revenues generated in this manner to subsidize the cost of other services, such as long distance telephone service and local exchange service, enabling the company to price these services at below-market rates, perhaps even at rates that do not cover the costs of the service.<sup>323</sup> Such predatory pricing in competitive markets could give the company an advantage over its competitors.<sup>324</sup> Commenters urge the Commission to adopt reasonable safeguards, such as cost allocation rules, to prevent the merged entity from engaging in such practices.<sup>325</sup>

116. We address two potential forms of objectionable behavior – the exercise of market power to charge unreasonable cable rates, and the use of revenues derived from such rates to subsidize other

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<sup>319</sup>AT&T-TCI Reply at 73.

<sup>320</sup>Jan. 6 Cicconi Letter at 2. AT&T-TCI further claim that even if an operator could charge supra-competitive prices for unregulated upper-tier services, the incentive to do so would exist regardless of any local telephone entry plans. *Id.* According to AT&T-TCI, there is no incentive to use supra-competitive profits to subsidize uneconomic telephony or other offerings. *Id.*

<sup>321</sup>Jan. 6 Cicconi Letter at 3. AT&T notes that many other cable operators have already launched telephone services over their cable plant. Whatever the Commission's ultimate view on these cross-subsidy arguments, according to AT&T, there is no legitimate basis to single out AT&T-TCI for additional regulatory burdens. *Id.*

<sup>322</sup>Consumers Union Petition at 9-10; U S WEST Petition at 37, 39. Consumers Union also fears AT&T will raise rates to low-volume residential long distance customers in order to subsidize its entry into competitive markets. Consumers Union Petition at 8. The Commission has determined that most long distance subscribers are experiencing increased competition in the market for long distance since the breakup of AT&T in 1984, although that may be less true for low-volume customers. *MCI-WorldCom Order*, 13 FCC Rcd at 18050 ¶ 40. In 1995, the Commission found that AT&T lacked unilateral market power in the long distance market and, thus, reclassified AT&T as a nondominant interexchange carrier. *Motion of AT&T Corp. To Be Reclassified as a Non-Dominant Carrier*, Order, 11 FCC Rcd 3271, 3303 (1995). Recently, in the *MCI-WorldCom* proceeding, the Commission determined that these trends have continued and that AT&T lacks market power in the domestic long distance market. *MCI-WorldCom Order*, 13 FCC Rcd at 18050-51 ¶ 41.

<sup>323</sup>U S WEST Petition at 19, 39; *see* Consumers Union Petition at 10.

<sup>324</sup>*See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-23 (1993) (defining the general character of a predatory pricing claim under section 2 of the Sherman Act, 15 U.S.C. § 2). A claim of predatory pricing consists of two prongs: 1) that the alleged predator's prices are below an appropriate measure of its costs; and 2) that the predator must have a reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.

<sup>325</sup>*See* Consumers Union Petition at 10; U S WEST Petition at 19, 38.

services, such as local exchange and long-distance service, and thereby gain an anticompetitive advantage for the sale of the other services. Although the Commission would view both practices with extreme disfavor and would take allegations of such conduct very seriously, for the reasons described below we decline to condition our approval of the requested license transfers on the adoption of cost allocation rules designed to prevent cross-subsidization.

117. First, any contention that the merger would create incentives to engage in such behavior is speculative at best. As we show below, opponents may fear either of two predatory pricing strategies. Each, however, is equally available to TCI pre-merger as it is to AT&T-TCI post-merger. If the merged firm will have an ability to cross-subsidize phone service or other telecommunications services from cable revenues, then TCI already possesses that ability, and so do most cable operators. There is no need to impose a merger condition on only one cable operator among many for an alleged harm that is not traceable to the merger.

118. We also doubt that either TCI now or AT&T-TCI after the merger have rational predation strategies available. Opponents may have either of two predation strategies in mind. The first we might call "simple predation." Cable monopolists, it is suggested, will take their monopoly profits after the sunset of cable rate regulation<sup>326</sup> and use them to subsidize below-cost, below-competitive level telephone prices in order to monopolize local or long distance telephone services. There is, however, no reason to believe that sacrificing monopoly profits, should they be available, in cable to obtain monopoly profits, should they be attainable, in telephone service would be a profit-maximizing strategy. It appears unlikely that the merged firm would have any incentive to raise cable rates simply to subsidize other services and drive out competitors for those services.<sup>327</sup> Moreover, the presence of extensive sunk facilities in both the local and interexchange markets suggests that the merged firm would be unable successfully to raise prices after the competitors were driven out of the market. Should parties believe the merged company

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<sup>326</sup>Pursuant to the Communications Act, Commission regulation of the cable programming service tier (also referred to herein as the "upper tier") will end on March 31, 1999. 47 U.S.C. § 543(c)(4); 47 C.F.R. § 76.950(b). Local franchising authority jurisdiction to regulate basic service tier rates will not be affected by the sunset of upper tier regulation.

<sup>327</sup>We find that firms in dynamic industries such as telecommunications generally do not have the incentives to engage in predatory practices, because the success of such practices rests on a series of speculative assumptions. See *Brown & Williamson*, 509 U.S. at 226-243 (dismissing antitrust action against cigarette manufacturer because the market analysis of the relevant industry demonstrated that predatory pricing was not a profitable strategy); *Matsushita Elec. Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588-98 (1986); *PanAmSat Corp. v. COMSAT Corp.*, Memorandum Opinion and Order, 12 FCC Rcd 6952, 6958-59 ¶¶ 18-20 (1997). See also Robert Bork, *The Antitrust Paradox: A Policy at War with Itself* 144-55 (1978); Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 Univ. Chi. L. Rev 263 (1981). Predation only makes sense if competitors are driven out of a specific market and barriers prevent new firms from entering that market. *Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 119 n.15 (1986). Even if a competitor (in this case, local exchange carrier, long distance carrier, or ISP) is driven out of the market due to the predatory below-cost pricing, the capacity to provide such services still remains, and other firms could purchase this capacity. Furthermore, even assuming predation is profitable, the firm would not need to subsidize its below-cost rates with profits from another line of business such as cable rates -- any source of capital would support this subsidization, as it would simply represent an investment in future profits.

is engaging in such predatory practices, existing federal and state laws prohibiting anticompetitive behavior already proscribe such pricing practices.<sup>328</sup>

119. A second kind of predation strategy might be called "regulatory predation." Here a firm that enjoys market power in one product (e.g., cable), where government regulates the price of that product, could find it profitable to enter a business (e.g., telephone service) whose costs can be shifted to the regulated product's (cable's) production. This strategy works only if price regulation is based on a type of cost-of-service model that is not fully effective in policing the actual costs of the regulated service, such that the company can include improperly the costs of another service in the costs (and rates) of the regulated service. In theory, at least, this cost-shifting allows the firm to profit doubly. The price of the regulated service (cable) goes up as government observes its costs increasing. At the same time the firm, having shifted costs, can underprice rivals in the other (telephone) services.

120. We think regulatory predation is unlikely to occur for the following reasons. First, we agree with AT&T-TCI that the merged firm will have an economic interest in preserving and expanding TCI's existing cable subscriber base. This would allow the merged firm to maintain or increase TCI's current cable service revenues, as well as maximize the merged firm's direct access to customer households in order to increase its ability to market its new service offerings, such as local telephony and Internet access.<sup>329</sup> By raising cable rates, the merged firm would risk losing potential customers who could subscribe to its new services.<sup>330</sup> Second and equally important, most cable operators do not elect the cost-based rate of return form of rate regulation, but rather are subject to price-cap regulation. Under this system, an increase in a cable operator's costs does not necessarily constitute a basis for increasing permitted prices.<sup>331</sup> Hence, a cost-shift would not necessarily yield "regulatory predation" possibilities. In addition, with or without the merger, such a regulatory cross-subsidization strategy would be available

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<sup>328</sup>Predatory pricing is analyzed under the antitrust laws as illegal monopolization or attempt to monopolize under section 2 of the Sherman Anti-Trust Act, 15 U.S.C. § 2, or sometimes as a violation of section 2 of the Clayton Act, as amended by the Robinson-Patman Act. 15 U.S.C. §13(a). In addition, numerous states have enacted parallel statutes to prohibit predatory pricing. See, e.g., CA Bus & Prof. Code § 17043 (California); F.S.A. § 364.3381 (Florida); 740 ILCS § 1013 (Illinois); NY Gen. Bus. § 340 (New York); TX Bus. & Com. § 15.05 (Texas); WA St § 19.86.020 (Washington).

<sup>329</sup>AT&T-TCI Reply at 73.

<sup>330</sup>*Id.*

<sup>331</sup>Operators regulated under the price cap method are permitted to increase rates to reflect actual increases in the costs of certain programming and other so-called "external costs." See 47 C.F.R. § 76.922(f) (defining external costs to include: (1) state and local taxes applicable to cable service, (2) franchise fees, (3) the costs of complying with franchise requirements, (4) "retransmission consent fees and copyright fees incurred for the carriage of broadcast signals," (5) "other programming costs," and (6) Commission regulatory fees). See also 47 C.F.R. §§ 76.922(d)(3) (rules governing the adjustment of rates under the quarterly method to include external costs), 76.922(e)(2) (rules governing the adjustment of rates under the annual method to include external costs). Operators using the price cap method may also increase rates under a streamlined cost-of-service filing to reflect the costs of infrastructure upgrades. 47 C.F.R. § 76.922(j). In addition, operators may elect to use a cost-of-service method instead of the price cap method for establishing permitted rates. 47 C.F.R. §§ 76.922(i), 76.922(l)-(m), 76.924. The Commission's existing cost allocation rules apply to streamlined cost-of-service filings to reflect upgrade costs and to full cost-of-service rate filings. See 47 C.F.R. §§ 76.922(j)(4), 76.924.

to TCI only in franchise areas where rates are now constrained by regulation. In some areas, TCI's systems are not regulated, either because they have been found to be subject to effective competition<sup>332</sup> or because their rates have not been subjected to local franchising authority regulation or cable programming service tier ("CPST") complaints. In other systems, TCI may already be charging rates that are below those permitted by our regulations.<sup>333</sup> In these systems, TCI's rates are not likely to increase when it merges with AT&T, because these rates presumably already have been established at levels that maximize TCI's profits. An increase in rates could result in a loss of subscribers and a possible decrease in profitability.<sup>334</sup> Where rates are already constrained by market forces, regardless of the number of MVPD alternatives, neither the merger nor the sunset of upper tier rate regulation will relieve that price constraint, and neither event should lead to increased rates in such systems.

121. As a result of the sunset of upper tier rate regulation, it is possible that rates in some systems will increase if higher rates would result in increased profits. This would be true in any cable system, whether owned by TCI or another operator, in which rates have been set at levels that are lower than they would be absent rate regulation. It is not a merger-related outcome. Nor is there reason to believe that TCI or AT&T would benefit from dissipating profits on cable services to underwrite below-cost prices on telephony services.<sup>335</sup> Further, the removal of upper-tier rate regulation, coupled with the predominance of price-cap regulation where price controls remain, means that a "regulatory predation" strategy will not be available to either TCI or AT&T-TCI.

122. Therefore, we decline to deny or condition the requested license transfer authorizations on the basis of speculation about cross-subsidization or the merger's effect on cable rates in some local franchise areas. We note, however, that the Commission's existing cost allocation rules will continue to apply to basic service tier rates after the sunset of upper tier regulation.<sup>336</sup> Moreover, the merged company must comply with all existing federal and state laws and Commission regulations that prohibit predatory pricing and other anticompetitive behavior.<sup>337</sup> The likelihood of cross-subsidization is not so substantial as to warrant denial or conditioning of the transfer requests.

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<sup>332</sup>See 47 C.F.R. § 76.905.

<sup>333</sup>See Letter dated Jan. 13, 1999, from Francis M. Buono, Counsel for Tele-Communications, Inc. to Magalie Roman Salas, Secretary, Federal Communications Commission.

<sup>334</sup>AT&T-TCI Reply at 73.

<sup>335</sup>Any contention that the merged firm will be unable to recover the costs of telephony services from telephony revenues and therefore will have increased incentives to use cable rates to cross-subsidize its telephony services is speculative.

<sup>336</sup>See 47 C.F.R. § 76.924.

<sup>337</sup>See *supra* note 328 (citing federal and state antitrust laws). We note that the Commission has prohibited predatory pricing of common carrier services on the grounds that such pricing is not just and reasonable and therefore violates section 201(b) of the Communications Act. 47 U.S.C. § 201(b). See *PanAmSat Corp.*, 12 FCC Rcd at 6957-66. Parties would be free to file complaints with the Commission pursuant to 47 U.S.C. § 208, alleging a violation of 47 U.S.C. § 201(b), by framing the carrier's predatory pricing practice as an "unjust or unreasonable" practice.

## 2. Tying

123. *Bundling (or tying) end user services.* Some parties have asserted that the merged firm's ability to offer a wider range of services to consumers presents not an opportunity to increase consumer welfare, but a threat of anticompetitive, monopolistic behavior. They allege that the merged entity may harmfully condition purchase of one service on the purchase of another service in a manner that injures competitors and consumers.

124. The specific claims vary with the business interests of the opponent. Thus, Sprint, a principal long distance provider, fears that after the merger AT&T-TCI will have the ability to exploit its monopoly control over cable to force the cable subscriber to subscribe to the merged firm's offerings in competitive markets, *e.g.*, long distance service.<sup>338</sup> Sprint asks that the Commission prohibit AT&T-TCI from tying its monopoly cable service with its long distance and other competitive services.<sup>339</sup> EchoStar, which offers direct broadcast satellite service but not telephone service, has the reverse perspective; the Commission should require that, post-merger, AT&T-TCI make available to consumers MVPD, advanced, and telephone services on a separate, unbundled basis, thus allowing consumers to turn to other distributors for their MVPD needs.<sup>340</sup> U S WEST's fears are more wide-ranging:

The merged company could bundle its bottleneck broadband transmission service with any or all of the numerous residential services under its wide corporate umbrella -- cable television, long distance voice, local voice, and wireless, as well as Internet services. It could require consumers to buy certain services only as a package, or it could manipulate its prices artificially to discourage buying the services individually. Such actions would reduce competition for each of the bundled services.<sup>341</sup>

GTE fears that the merged firm "would be able to exploit its advantage in the market for cable services and high-speed Internet access by forcing its customers to purchase a tied telephone service."<sup>342</sup> MCI WorldCom, while supporting the merger, also cautions that the merged entity should not be permitted to condition purchase of its cable services on consumers' agreements to purchase other telephony services from AT&T-TCI.<sup>343</sup> CoreComm similarly recommends that the Commission not approve the merger without "a commitment from the Joint Applicants that . . . they will not require any TCI subscriber to purchase AT&T's telephony or Internet access services as a precondition for purchase of TCI's multichannel video service."<sup>344</sup>

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<sup>338</sup>Sprint Comments at 22.

<sup>339</sup>*Id.*

<sup>340</sup>EchoStar Comments at 8.

<sup>341</sup>U S WEST Petition at 17.

<sup>342</sup>GTE Comments at 40..

<sup>343</sup>MCI WorldCom Comments at 11-12.

<sup>344</sup>CoreComm Reply at 21.

125. For two reasons, we decline to impose any of these recommended conditions. First, a blanket ban on the bundling of services might well prevent competitively harmless transactions. Post-merger, AT&T-TCI may well have lower costs in billing and servicing customers that subscribe to several of its products. In such a case, by offering these products as a package at a price below that of the individual prices of the package's components when sold separately, the merged firm would both lower costs and pass at least some of those cost savings on to consumers.

126. Second, the merger does not alter either firm's ability to engage in a profitable strategy of anticompetitive tying. Therefore, we should continue to rely on competition or, in its absence, antitrust laws to protect against this danger, just as we did before the merger.<sup>345</sup> AT&T-TCI could inflict competitive harm by offering a package of bundled products only if rivals could not offer a similar package -- that is, only if the merged firm enjoys a monopoly in one of the bundled services.<sup>346</sup> There is simply no support in the record or in experience for the proposition that after the merger AT&T-TCI may have a monopoly in long distance voice, local voice, wireless, or Internet services. AT&T-TCI customers in every TCI franchise area will have alternative providers of each of those services. This leaves only cable service as a service over which AT&T-TCI may well have market or monopoly power post-merger.<sup>347</sup> Yet, if the merged firm will have market power as a cable operator, TCI -- and every other cable firm that is not subject to effective competition within its franchise area -- already enjoys equivalent market power. Nevertheless, we have not been asked to impose a blanket rule prohibiting the bundling of cable services with other services in which a cable operator might have a financial interest.<sup>348</sup>

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<sup>345</sup>See, e.g., Sherman Antitrust Act, 15 U.S.C. § 1; *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-62 (1992); CA Bus. & Prof. Code § 16720 (California); C.R.S.A. § 6-4-104 (Colorado); F.S.A. § 542.18 (Florida); IL ST CH 740 § 1013 (Illinois); N.J. Stat. § 56:9-3 (New Jersey); NY Gen. Bus. § 340 (New York); TX Bus. & Com. § 15.05 (Texas).

<sup>346</sup>To illustrate with a simple non-telecommunications example, a firm that bundled flour and sugar could inflict no competitive harm on either sugar or flour sellers because each could match the offer by buying the other product in an open, competitive market. The bundling would be profitable -- i.e., a sound business strategy -- only if there were some efficiency associated with selling flour and sugar as a bundled package.

<sup>347</sup>GTE adds the argument that "AT&T-TCI will be able to leverage its advantage in providing high-speed Internet access into market power in the bundled services market." GTE Comments at 35. As previously explained below, there is no reason to assume at this time that the merged firm will be the only entity in TCI's local franchise markets that is capable of offering high-speed Internet access. See *supra* para. 74. Thus, there is no basis for assuming or finding that the merged firm will have market power in "providing high-speed Internet access."

<sup>348</sup>For example, in theory TCI might have profited from an anticompetitive bundling of its cable services and Sprint PCS services. Although the Commission's rules require operators to offer the basic service tier (generally, over-the-air and public, educational, and governmental access channels) on a stand-alone basis (47 C.F.R. § 76.901, 76.921), and operators must charge uniform rates for their service (47 C.F.R. § 76.984), neither rule prohibits the bundling of cable and other services as long as the basic service tier can be purchased separately. Further, a subscriber of a cable system must subscribe to the basic service tier in order to subscribe to any other tier of video programming or to purchase any other video programming service. 47 C.F.R. § 76.920.

We are not persuaded that the merged firm is likely to follow an anticompetitive bundling strategy.<sup>349</sup> Should the merged firm engage in anticompetitive tying of services to cable service, we will deal with that behavior forthrightly.<sup>350</sup>

127. *Discrimination against downstream competitors.* Another leveraging concern is raised by U S WEST:

A combined AT&T/TCI . . . would have the ability and incentive to use its control over broadband transmission to the home to discriminate against competitors in downstream markets. For example, AT&T and Teleport now compete with numerous other facilities-based rivals for the business of transporting data traffic on long distance and local service, respectively. Following a merger, AT&T-TCI would have the ability and incentive to steer all data traffic originating with its cable broadband customers onto transport facilities owned by AT&T or Teleport. Competing data transport providers thus would be precluded from a substantial segment of the market -- up to a third of the nation's households.<sup>351</sup>

128. The harm U S WEST asserts here depends on speculation in two respects -- first, that the merged firm will, as a result of the planned TCI plant upgrades, achieve a monopoly over broadband transmission to the home and, additionally, that "up to a third of the nation's households" (*i.e.*, every single residence in TCI's territories) will subscribe to that monopoly. On this record, we do not believe that AT&T-TCI will be successful in becoming the only firm within TCI's current territories to offer broadband transmission to the home or that, having done so, every resident in those territories will subscribe to that monopoly service.

129. In virtually every TCI franchise area, an incumbent local exchange carrier, at least two wireless providers, and the local electrical utility also have facilities that may prove to be viable platforms for residential broadband access. Should all these alternatives fail -- and AT&T thereby achieves both a monopoly and subscriptions to it from all within its service area -- both the Communications Act and the antitrust laws should be able to prevent AT&T from extending a monopoly to other competitive services. In the absence of a monopoly so successful, AT&T could not cause competitive harm by diverting data traffic onto its own transport facilities because the diversion would not be great enough to materially harm AT&T's rivals. Therefore, such diversion would be an unwise business strategy unless it were an efficient way to do business, in that it lowered the costs of transporting data.

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<sup>349</sup>For one concrete example, we cannot conclude -- and none of the parties offers us reasons beyond unsupported speculation to conclude -- that AT&T-TCI will have a greater incentive to tie, inefficiently and anticompetitively, its PCS service to its cable service than the incentive TCI had to tie its Sprint PCS service, inefficiently and anticompetitively, to that same cable service.

<sup>350</sup>When the seller of a tied product has "appreciable economic power" in the tying product market and the arrangement affects a "substantial volume of commerce" in the tied market, the arrangement may be anticompetitive, despite any purported consumer benefits or efficiency gains from the arrangement. *Eastman Kodak Co.*, 504 U.S. at 461-62; *Jefferson Parish Hosp. Dist. v. Hyde*, 466 U.S. 2, 12 (1984).

<sup>351</sup>U S WEST Petition, at 17-18.

### 3. Section 652 – Prohibition on buy outs

130. Bell Atlantic and GTE assert that the buy out restriction of section 652 of the Communications Act<sup>352</sup> prohibits AT&T from acquiring any TCI systems in areas served by Teleport, a competitive LEC acquired by AT&T in July 1998.<sup>353</sup> In relevant part, section 652(a) prohibits local exchange carriers or their affiliates from acquiring directly or indirectly more than a 10% financial interest, or a management interest, in any cable operator within the local exchange carrier's "telephone service area."<sup>354</sup> The term "telephone service area" is defined as an area where a common carrier provided telephone exchange service as of January 1, 1993.<sup>355</sup> Bell Atlantic and GTE believe that Teleport provided telephone exchange service within the meaning of section 652 in certain areas that overlap with TCI's cable franchise areas.<sup>356</sup> As a result, Bell Atlantic and GTE contend, AT&T's acquisition of TCI's systems in those areas would violate section 652.<sup>357</sup> Bell Atlantic further contends that AT&T would not qualify for either an exception or a waiver of the buy out prohibition.<sup>358</sup> Citing legislative history, Bell Atlantic points out that while there exist exceptions to the prohibition, the Conference Committee agreed "to take the most restrictive provisions of both the Senate bill and the House amendment in order to maximize competition between local exchange carriers and cable operators within local markets."<sup>359</sup>

131. In response, AT&T-TCI contend that the merger does not violate section 652(a) in any area of the country and that commenters' arguments to the contrary are both factually and legally incorrect.<sup>360</sup> As a factual matter, AT&T-TCI maintain that the buy out prohibition is inapplicable to Teleport because it "did not obtain peer status as a local exchange carrier" until June, 1994 – after the operative statutory date of January 1, 1993.<sup>361</sup> Although as of January 1, 1993, Teleport did provide "resale of NYNEX dial tone services" in New York City,<sup>362</sup> AT&T-TCI contend that section 652 is not

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<sup>352</sup>47 U.S.C. § 572.

<sup>353</sup>See *AT&T-Teleport Order*, 13 FCC Rcd 15236.

<sup>354</sup>47 U.S.C. § 572(a).

<sup>355</sup>47 U.S.C. § 572(e).

<sup>356</sup>Bell Atlantic Reply at 1; GTE Comments at 12.

<sup>357</sup>Bell Atlantic Reply at 1; GTE Comments at 50.

<sup>358</sup>Bell Atlantic Reply at n.2 (citing 47 U.S.C. §§ 572(d), 572(d)(6)).

<sup>359</sup>Bell Atlantic Reply at n.2 (citing H.R. Rep. No. 458, 104th Cong., 2d Sess. at 389 (1996)); see also GTE Comments at 49.

<sup>360</sup>AT&T-TCI Reply at 85-87.

<sup>361</sup>*Id.* at 85.

<sup>362</sup>According to AT&T-TCI, the "only local switched services [Teleport] provided as of January 1, 1993 were through the resale of NYNEX dial tone services in New York City." *Id.*

implicated since New York City is not within the service area of any TCI cable systems.<sup>363</sup> In a subsequent *ex parte* filing dated January 21, 1999, AT&T provided more detailed information regarding the types of services Teleport provided in the New York metropolitan area as of January 1, 1993:<sup>364</sup> (1) in Manhattan, Teleport used "two 5ESS central office-type switches" to provide private branch exchange ("PBX") services to Merrill Lynch and "about one dozen other customers in Manhattan;"<sup>365</sup> (2) Teleport provided shared tenant service and earth station service in Staten Island;<sup>366</sup> and (3) Teleport provided inter- and intra-LATA toll services in New York City.<sup>367</sup> In an *ex parte* filing dated January 7, 1999, AT&T-TCI identified areas where Teleport provided service as of January 1, 1993, that overlap with TCI's or an affiliate's cable franchise areas.<sup>368</sup> Specifically, Teleport provided private line and special access services in Boston, San Francisco, Los Angeles, Chicago, Dallas, Houston, and metropolitan New York (which AT&T-TCI identified as including Newark, Jersey City, and Princeton, New Jersey; Nassau County, New York; and all boroughs of New York City except the Bronx).<sup>369</sup> According to information provided by AT&T-TCI, TCI operates cable systems in San Francisco, Los Angeles, Chicago and Dallas.<sup>370</sup> Together with Time Warner, TCI has an attributable interest in a cable system in Houston.<sup>371</sup> Through its ownership interest in Cablevision Systems Corp., TCI has an attributable interest in cable systems serving Boston, Newark, Brooklyn, and Nassau County.<sup>372</sup>

132. AT&T-TCI maintain that even assuming there exist overlapping service areas that could provide a factual predicate for commenters' claims, the commenters' legal interpretation of section 652 is erroneous. AT&T-TCI submit that the buy out prohibition of section 652 is "concerned solely with preventing mergers between *incumbent* LECs and the existing in-region cable operator."<sup>373</sup> According to AT&T-TCI, mergers between a cable operator and a competitive LEC "are permissible because such

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<sup>363</sup>*Id.*

<sup>364</sup>See Letter dated Jan. 21, 1999, from Robert Quinn, Director Federal Government Affairs, AT&T Corp. to Magalie Roman Salas, Secretary, Federal Communications Commission at 1-2 ("Jan. 21 Quinn Letter").

<sup>365</sup>*Id.*

<sup>366</sup>*Id.* at . . . see also Letter dated Jan. 25, 1999, from Robert Quinn, Director Federal Government Affairs, AT&T Corp. to Magalie Roman Salas, Secretary, Federal Communications Commission ("Jan. 25 Quinn Letter").

<sup>367</sup>See Jan. 21 Quinn Letter at 1.

<sup>368</sup>See Letter dated Jan. 7, 1999, from Howard J. Symons, Esq., Counsel for TCI to Magalie Roman Salas, Secretary, Federal Communications Commission ("Jan. 7 Symons Letter"), Attachment at 1.

<sup>369</sup>*Id.*

<sup>370</sup>*Id.*

<sup>371</sup>*Id.*

<sup>372</sup>*Id.*

<sup>373</sup>AT&T-TCI Reply at 86 (emphasis in original).

arrangements would not undermine the statutory goal of two-wire competition.<sup>374</sup> AT&T-TCI additionally contend that limiting section 652(a) to incumbent LECs is consistent with Commission precedent interpreting the now repealed cable-telephone company cross-ownership ban set forth in section 613(b)(1).<sup>375</sup>

133. We find that section 652 does not apply to the transfers requested in this proceeding for two reasons. First, in Manhattan and Staten Island, where Teleport provided PBX, earth station, and shared tenant services, neither TCI nor any TCI affiliate provide cable services in those areas.<sup>376</sup> The buy out prohibition of section 652(a) is triggered only where the LEC's telephone service area overlaps with the area in which the cable operator is providing cable service.<sup>377</sup> Since the New York City boroughs Manhattan and Staten Island are not within the service area of any TCI cable system, or any cable system in which TCI holds an attributable interest, section 652 is not implicated by Teleport's provision of services in Manhattan and Staten Island.<sup>378</sup>

134. Second, although as of January 1, 1993, Teleport provided service in areas which overlap with TCI's, or a TCI affiliate's, cable franchise area (*i.e.*, Boston, San Francisco, Los Angeles, Chicago, Dallas, Houston, Brooklyn, Nassau County, and Newark), Teleport was not providing the type of service – *i.e.*, telephone exchange service – in those areas that would trigger the buy out restriction set forth in section 652. Section 652(a) prohibits local exchange carriers from acquiring more than a 10% financial interest in any cable operator within the local exchange carrier's "telephone service area."<sup>379</sup> The term "telephone service area" is defined as the area within which a common carrier provided "telephone exchange service" as of January 1, 1993.<sup>380</sup> The Communications Act defines the term "telephone exchange service" as:

(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,

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<sup>374</sup>*Id.*

<sup>375</sup>*Id.* (citing 47 U.S.C. § 533(b)(1) (1994), *repealed by* Telecommunications Act of 1996 § 302, 110 Stat. 56, 124).

<sup>376</sup>See Jan. 21 Quinn Letter at 2 & n.1. As noted by AT&T, the Commission previously held that TCI's ownership of Time Warner stock is not attributable for purposes of the cable ownership rules. See *Applications of Turner Broadcasting System and Time Warner, Inc. for Consent To Transfer of Control of License of Television Station WTBS(TV), Atlanta, GA*, Memorandum Opinion and Order, 11 FCC Rcd 19595, 19602-04 ¶¶ 17-19 (1995). Thus, Time Warner's Manhattan cable system is not part of TCI's cable service area for purposes of section 652(a). According to AT&T, "TCI and Time Warner are affiliated in Houston through a separate joint venture." See Jan. 21 Quinn Letter at 3.

<sup>377</sup>47 U.S.C. § 572(a).

<sup>378</sup>See AT&T-TCI Reply at 85.

<sup>379</sup>47 U.S.C. § 572(a).

<sup>380</sup>47 U.S.C. § 572(e).

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.<sup>381</sup>

135. The services offered by Teleport in the overlap areas of Boston, San Francisco, Los Angeles, Chicago, Dallas, Houston, Brooklyn, Nassau County, and Newark -- namely private line, special access, and inter- and intra-LATA toll services -- do not fall within the statutory definition of "telephone exchange service." By definition, "telephone exchange service" involves "furnish[ing] to subscribers intercommunicating service of the character ordinarily furnished by a single exchange."<sup>382</sup> By contrast, private line service is a "service whereby facilities for communication between two or more designated points are set aside for the exclusive use or availability for use of a particular customer and authorized users during stated periods of time."<sup>383</sup> Special access service generally provides a dedicated path between an end user and an interexchange carrier's point of presence.<sup>384</sup> Telephone toll service involves telephone service between stations in different exchange areas for which there is made a separate charge not included in contracts with subscribers for exchange service.<sup>385</sup> Thus, the services Teleport was providing in the overlap areas fall outside the definition of "telephone exchange service."

136. Because we find that Teleport was not providing "telephone exchange service" as of January 1, 1993 in the overlap areas, Teleport, by definition, did not have a "telephone service area" within the meaning of the statute.<sup>386</sup> Accordingly, since Teleport does not have a "telephone service area" for purposes of the section 652(a) buy out prohibition, the statutory restriction does not apply to the instant proceeding.

#### 4. Universal Service/deployment

137. A number of parties representing consumer interests have raised issues concerning AT&T-TCI's commitment to providing telecommunications services to all Americans on a non-discriminatory basis.<sup>387</sup> The Rural Utilities Service and the Greenlining Institute/Latino Issues Forum

<sup>381</sup>47 U.S.C. § 153(47).

<sup>382</sup>*Id.*

<sup>383</sup>47 C.F.R. § 21.2.

<sup>384</sup>*GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148, CC Docket No. 98-79, Memorandum Opinion and Order, FCC 98-292, ¶ 24 (rel. Oct. 30, 1998).*

<sup>385</sup>47 U.S.C. § 153(48).

<sup>386</sup>47 U.S.C. § 652(e).

<sup>387</sup>*See generally* Consumers Union Petition; Letter dated Oct. 21, 1998, from Christopher A. McLean, Deputy Administrator, U.S. Dep't of Agriculture, Rural Utilities Service, to William E. Kennard, Chairman, Federal Communications Commission ("Rural Utilities Service Letter"); Letter dated Oct. 27, 1998 from John C. Gamboa, Executive Director, Greenlining Institute, Luis Arteaga, Executive Director, Latino Issues Forum *et al.*, to William

(continued...)

("Greenlining Institute") urge us to examine the effects of the proposed transaction on the preservation and advancement of the Commission's universal service goals.<sup>388</sup> Similarly, the Rainbow PUSH Coalition seeks assurances that AT&T-TCI will deploy telecommunications services to rural and inner-city communities.<sup>389</sup> The Campaign for Telecommunications Access asks us to condition our approval of the merger on a guarantee by AT&T-TCI to provide service to the elderly and disabled, and on a guarantee to provide advanced services to poor urban centers, scattered rural areas, and the homes of persons with disabilities.<sup>390</sup> The Consumers Union believes that the Commission should require AT&T-TCI to submit additional information regarding plans to upgrade TCI's cable plant to ensure that all Americans receive the touted benefits of this merger.<sup>391</sup>

138. In the 1996 Act, Congress directed the Commission and the States to devise methods to ensure that "[c]onsumers in all regions of the nation, including low-income consumers and those in rural, insular, and high cost areas . . . have access to telecommunications and information services" at reasonable rates.<sup>392</sup> This congressional mandate reflects the national goal of delivering the potential of the information revolution to all Americans, whether they live in affluent or low-income areas.

139. Pursuant to our request for further information pertaining to AT&T's planned deployment of cable telephony, AT&T has submitted to the Commission detailed confidential business data and strategies concerning its planned upgrades of TCI's cable systems to expand system capacity using HFC plant and its planned deployment of two-way digital capability and telephony over many of TCI's facilities.<sup>393</sup> After carefully reviewing this information, the testimony of AT&T's Senior Vice President

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<sup>387</sup>(...continued)

E. Kennard, Chairman, Federal Communications Commission ("Greenlining Institute Letter"); Prepared Testimony of Rev. Jesse Jackson, Sr., Founder Rainbow PUSH Coalition, delivered on Dec. 14, 1998 at FCC *en banc* Hearing on Mergers; Letter dated Dec. 13, 1998 from David Newburger, Director, Campaign for Telecommunications Access, to William E. Kennard, Chairman, Federal Communications Commission ("CTA Letter").

<sup>388</sup>Rural Utilities Service Letter at 1; Greenlining Institute Letter at 1-2. The Greenlining Institute also notes that local telephone penetration rates decreased in California following the merger of Pacific Bell and SBC. Transcript of Dec. 14, 1998 *en banc* Hearing at 163-64.

<sup>389</sup>Prepared Testimony of Rev. Jesse Jackson, Sr., at 2.

<sup>390</sup>CTA Letter at 3-4.

<sup>391</sup>Consumers Union Petition at 14-15. The Consumers Union believes that the merger might give AT&T-TCI the opportunity to expand the market for exclusive high-end service to the detriment of basic local telephone service. Transcript of Dec. 14, 1998 *en banc* Hearing at 181, ll. 17-23 (testimony of Consumers Union Co-Director Gene Kimmelman).

<sup>392</sup>47 U.S.C. § 254(b)(3).

<sup>393</sup>Letter dated Jan. 27, 1999, from Betsy J. Brady, Vice President Federal Government Affairs, AT&T Corp. to Magalie Roman Salas, Secretary, Federal Communications Commission ("Jan. 27 Brady Letter"); Letter dated Jan. 12, 1999, from Betsy J. Brady, Vice President Federal Government Affairs, AT&T Corp., to Magalie Roman Salas, Secretary, Federal Communications Commission ("Jan. 12 Brady Letter").

for Government Affairs and Public Policy,<sup>394</sup> and the representations of AT&T's Chairman,<sup>395</sup> we are satisfied that AT&T's current deployment plan does not retard, but in fact furthers, our goal of providing equal and expanded access to advanced telecommunications technologies.<sup>396</sup> All TCI systems will receive at least an upgrade to HFC. Moreover, AT&T currently has concrete plans that appear credible on their face to deploy local exchange and exchange access service in the near term to all areas where TCI currently provides service and where subscribers are sufficiently numerous to justify the expense of the necessary additional upgrades. Further, the progressive roll out of these services within these local areas appears to be based on engineering and franchising concerns. We are not persuaded that the merger threatens our universal service goals, and thus decline to condition our approval of the merger on any further assurances from AT&T concerning its deployment plans.<sup>397</sup>

## 5. Labor issues

140. Communication Workers of America ("CWA") argue that the Commission's review of the proposed merger should include an examination of the Applicants' employment and labor practices, as well as their quality of service.<sup>398</sup> According to CWA, there is substantial evidence to support a direct link between quality of workforce and quality of service.<sup>399</sup> CWA believes that TCI's inadequate employment practices have caused it to sustain a poor reputation for service in the majority of its cable franchise communities.<sup>400</sup> On the other hand, CWA believes AT&T's long-standing reputation for quality customer service is attributable to its employment practices, which CWA finds preferable to TCI's practices.<sup>401</sup> CWA states that AT&T makes substantial investments in human capital, including "high

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<sup>394</sup>See, e.g., Transcript of Dec. 14, 1998 *en banc* Hearing at 190 ("When we go into a city and build out this system the build out will be for the entire city. It would be extremely foolish of us to leave out any customer, just from an economic standpoint").

<sup>395</sup>Letter dated Feb. 8, 1999, from C. Michael Armstrong, Chairman, AT&T Corp. to William E. Kennard, Chairman, Federal Communications Commission.

<sup>396</sup>Further, the merged entity would be required to make universal service contributions based on the same contribution percentages as are applied to incumbent LECs. *MCI-WorldCom Order*, 13 FCC Rcd at 18150 ¶ 218.

<sup>397</sup>We also take notice of AT&T's recent \$1 billion purchase of equipment necessary to deliver cable telephone calls. This type of investment evinces a firm business commitment to deploy cable telephony on a mass scale. Rebecca Blumstein and Leslie Cauley, *AT&T Set To Purchase Equipment To Deliver Service on TCI's Lines*, Wall St. J. at B2 (Oct. 29, 1998).

<sup>398</sup>CWA Comments at 3.

<sup>399</sup>*Id.* at 5. CWA believes that the key to attaining quality of service is the training and experience of the employees that service the customers and maintain the network. *Id.* at 4

<sup>400</sup>*Id.* at 2. CWA states that TCI has failed to invest in its workforce through adequate training, wages, benefits, and union representation. CWA believes such policies produce a poorly trained, high-turnover, and low-wage workforce that lacks the requisite skills, resources, and support to provide quality service. *Id.*; see Prepared Testimony of Rev. Jesse Jackson, Sr., at 7.

<sup>401</sup>CWA Comments at 1-2, 9.

levels of training, wages, benefits, union representation, and a globally recognized employee/union involvement program known as Workplace of the Future."<sup>402</sup> CWA argues that the Commission's merger review provides an opportunity to ensure that AT&T's employment practices and high quality of service are applied to current TCI operations.<sup>403</sup> To attain these benefits post-merger, which CWA states is clearly in the public interest, CWA recommends that the Commission require the Applicants to provide benchmark data to assist the Commission in monitoring work-force related service quality improvements.<sup>404</sup> AT&T-TCI argue that the Commission should deny CWA's request as outside the scope of this proceeding.<sup>405</sup>

141. The record in this case does not support CWA's concern that the merged entity will implement poor employment practices or labor relations, resulting in a deterioration in service quality. Even CWA notes that AT&T has a good reputation in these areas, and we have no reason to believe that the merged entity would compromise AT&T's record for quality customer service. Therefore, we decline CWA's request.<sup>406</sup>

## 6. Corporate responsibility

142. *Corporate Responsibility.* The Rainbow PUSH Coalition, the Greenlining Institute, and the Hispanic Association on Corporate Responsibility have requested that the Commission scrutinize this transaction to ensure that the merged company will be a responsible corporate citizen.<sup>407</sup> According to these commenters, mergers threaten ills such as layoffs<sup>408</sup> and harm to minority ownership and employment initiatives.<sup>409</sup>

143. The record in this case does not give the Commission concern that the merged company will be a poor corporate citizen. The record sufficiently demonstrates that AT&T has a good record of

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<sup>402</sup>*Id.* at 2.

<sup>403</sup>*Id.* at 2, 7. See Prepared Testimony of Rev. Jesse Jackson, Sr., at 6.

<sup>404</sup>CWA Comments at 7.

<sup>405</sup>AT&T-TCI Reply at 10. Moreover, AT&T-TCI state that they are confident that AT&T's employment and labor-relation practices will continue after the merger. *Id.* at n.11.

<sup>406</sup>CWA cites to the *MCI-WorldCom Order* for the proposition that the Commission considers employment impact in its merger review. CWA Comments at 9 (citing *MCI-WorldCom Order*, 13 FCC Rcd at 18146-48 ¶ 213). In that case, we concluded that CWA's concerns and purported allegations were speculative and not substantially supported by the record.

<sup>407</sup>Prepared Testimony of Rev. Jesse Jackson, Sr.; Greenlining Institute Letter; Letter dated Dec. 2, 1998 from Richard Bela, Hispanic Ass'n on Corporate Responsibility, to John Norton, Cable Services Bureau, Federal Communications Commission ("HACR Letter").

<sup>408</sup>Prepared Testimony of Rev. Jesse Jackson, Sr., at 3.

<sup>409</sup>*Id.* at 3; Greenlining Institute Letter at 2-3; HACR Letter at 1; Transcript of Dec. 14, 1998 *en banc* Hearing at 166, ll. 5-15 (testimony of Executive Director John C. Gamboa).

corporate responsibility and service,<sup>410</sup> and we have no reason to believe that the merged company will reverse this record.

144. We made clear in our *MCI-WorldCom Order* that parties advancing such claims must substantiate them with credible evidence.<sup>411</sup> Although the record includes allegations regarding TCI's service record,<sup>412</sup> we are not convinced that these alleged acts may be imputed to AT&T as the acquiring company in this transaction. Given the lack of specific evidence adduced by the parties in this case, as well as AT&T's favorable record, we decline to pursue these matters further in this proceeding. The conclusory allegations regarding the merged company do not serve as a sufficient basis to deny the merger as contrary to the public interest, nor would the public interest be served by withholding action on the proposed merger.<sup>413</sup> We also decline to condition our approval of the merger, as requested by the Greenlining Institute, on certain levels of philanthropic contributions or diversity goals,<sup>414</sup> in the absence of evidence that the combined entity will disserve the public interest in these areas.

## V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

145. In addition to examining the potential competitive harms of this merger, we also must consider the pro-competitive benefits.<sup>415</sup> The Applicants contend that the primary benefits of the merger will be AT&T's expanded and accelerated incentives and abilities (a) to compete with incumbent LECs in providing local telephone service to residential customers, and (b) to develop and offer the next generation of IP telephony, broadband data, and cable services.<sup>416</sup> The Applicants submit that neither entity acting alone could or would create competition for residential local exchange and exchange access

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<sup>410</sup>See, e.g., Prepared Testimony of Rev. Jesse Jackson, Sr., at 5-7; Transcript of Dec. 14, 1998 *en banc* Hearing at 165, ll. 10-19 (noting that AT&T has a "positive record and a social commitment" to the communities in which it serves). See also *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20020-31 ¶¶ 82-84 (finding that AT&T has a strong brand name and reputation in the provision of telephone service to the public).

<sup>411</sup>*MCI-WorldCom Order*, 13 FCC Rcd at 18139-151 ¶¶ 200-219.

<sup>412</sup>The Civil Rights Forum on Communications Policy, for example, has demanded that the Commission withhold approval of the merger based on several allegations concerning TCI, including: (1) a poor history of cable rate compliance; (2) selective deployment of advanced services to affluent areas only; and (3) a history of non-compliance with equal opportunity regulations. Civil Rights Forum: TCI/AT&T Merger Release (Oct. 22, 1998) <<http://www.civilrightsforum.org/text/TCIRelease.html>>. A complete list of these allegations can be found at <<http://www.civilrightsforum.org/TCI.htm>>.

<sup>413</sup>*AT&T-Teleport Order*, 13 FCC Rcd at 1526-65 at ¶ 55.

<sup>414</sup>Transcript of Dec. 14, 1998 *en banc* Hearing at 166, ll. 5-15 (transcript of Greenlining Institute Executive Director John Gamboa urging the Commission to condition the merger on a "philanthropic contribution that at least matches the pre-tax earnings of the five top executive's [sic] compensation packages . . . and a diversity goal at all levels of management").

<sup>415</sup>*MCI-WorldCom Order*, 13 FCC Rcd at 18134-35 ¶ 194.

<sup>416</sup>Application at 37; AT&T-TCI Reply at 11-15.

services in the near future, if at all.<sup>417</sup> By integrating AT&T's telecommunications businesses with TCI's cable business, the Applicants believe that the merger will provide AT&T with vital access to TCI's cable facilities, thereby benefitting consumers currently dependent on incumbent LECs for local service.<sup>418</sup> With billions of dollars of investment capital being deployed to upgrade TCI's cable facilities to allow two-way cable telephony, AT&T hopes to bring competition to the local telephone exchange markets in areas where TCI has many customers "within a foreseeable time period."<sup>419</sup> Further, the Applicants contend that the merger will increase the availability to consumers of a wide array of packaged and *a la carte* services – including local, long distance, and wireless telecommunications service, as well as video and content-enriched high-speed Internet services.<sup>420</sup>

146. There does not appear to be any disagreement over the public interest benefit of bringing vigorous competition to the local exchange and exchange access markets. Indeed, many commenters explicitly acknowledge the public interest benefits of AT&T's plan to create an alternative loop to provide local exchange and access services that compete directly with the incumbent providers.<sup>421</sup> There are, however, some points of departure among the commenters. The Consumers Union expresses doubt that the merged entity will be able to offer sound and affordable local exchange service because of the technical complexity and cost of upgrading TCI's cable plant to deliver cable telephony.<sup>422</sup> Qwest Communications Corporation ("Qwest") and U S WEST have similar doubts about the merged entity's ability and commitment to provide residential local exchange service.<sup>423</sup> Both Qwest and U S WEST urge the Commission to require the Applicants to submit detailed information concerning their plans to offer local exchange service and exchange access service.

147. Applicants have demonstrated that the merger is likely to produce tangible public interest benefits in the near term. We find that the merger will create an entity that has incentives to expand its

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<sup>417</sup>Application at 19, 22-23; AT&T-TCI Reply at 12-13.

<sup>418</sup>Application at 37-38.

<sup>419</sup>*Id.* at 37.

<sup>420</sup>*Id.* at 14; AT&T-TCI Reply at 13 ("As a result of the alternative local exchange facilities that will be established after the merger, however, consumers will have an additional residential telephony option, and the ability to mix and match it with other services from other providers").

<sup>421</sup>*See, e.g.*, Consumers Union Petition at 7 ("[we] would like nothing better than to see AT&T/TCI succeed in competing with incumbent LECs in the provision of residential local exchange service"); Cable & Wireless Comments at 2 ("indeed, to the extent that . . . AT&T's acquisition of and investment in TCI's cable network results in a merged entity that will be in a position to provide local exchange and access services comparable to *and* more technologically advanced than those of the ILECs, C&W USA supports the merger"); MCI WorldCom Reply at 1 ("MCI WorldCom generally supports the proposed merger because it would increase facilities-based competition in the local market"); CompTel Reply at 2 ("CompTel does not oppose the proposed merger to the extent that it will promote competition in the local exchange and exchange access markets, as Applicants promise").

<sup>422</sup>Consumers Union Petition at 8; Transcript of Dec. 14, 1998 *en banc* Hearing at 180-82 (testimony of Consumers Union Co-Director Gene Kimmelman).

<sup>423</sup>Qwest Comments at 16-18; U S WEST Petition at 51-52.

operations and provide facilities-based competition in the local exchange and exchange access markets, and will be able to do so more quickly than either party alone could.<sup>424</sup> The merged firm will have strong incentives to encourage maximum utilization of its network facilities in order to have as large a market share as possible from which to recover its operating costs.<sup>425</sup> We also find that the merger offers the potential, at least in those areas where TCI has enough subscribers to warrant the expense of two-way up-grades, to create greater customer choice among video- and content-enriched high-speed Internet access services. The fact that TCI will gain access to AT&T's capital is not, in itself, a reason to approve the merger. We recognize that TCI might have sought external funding elsewhere to expand and upgrade its plant to provide new product offerings. Through this merger, however, in addition to gaining access to AT&T's capital resources, TCI also will have instant access to AT&T's expertise and established telephony brand to support the combined entity's new product offerings, both on a packaged and individualized basis, and to support its marketing efforts.<sup>426</sup> In addition, in light of our conclusion that this merger, as conditioned, will not produce significant anti-competitive effects, we recognize that the operation of market forces is likely to yield efficiencies and consumer benefits in addition to those we anticipate here.

148. Moreover, we are satisfied that the Applicants have demonstrated their intention to actually provide residential local exchange service. Perhaps most importantly, the merger will give AT&T-TCI an obvious incentive to follow through on their announced plans. Based on our analysis of the assets and capabilities of the merging firms, this combination is likely to be profitable only if AT&T-TCI's plans for upgrading the cable systems and, where economical, introducing telephony and broadband Internet access, are carried out.<sup>427</sup> Further, the complementary skills and assets of AT&T and TCI suggest that their investment may yield synergies in the execution of their plan. AT&T will be contributing its experience in providing toll-quality voice and data traffic, switching technology, and a brand name that can compete with incumbent LECs.<sup>428</sup> TCI will be contributing a residential wireline network and architecture that currently serves millions of homes.<sup>429</sup> Finally, AT&T has repeatedly assured the Commission that it intends to provide residential local exchange service in the foreseeable future.<sup>430</sup> We have no reason to believe that these representations were not made in accordance with the

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<sup>424</sup>Application at 19-20, 37-38; AT&T-TCI Reply at 832-83. *Accord MCI-WorldCom Order*, 13 FCC Rcd at 18138 ¶ 199.

<sup>425</sup>AT&T-TCI Reply at 83.

<sup>426</sup>Application at 37-38. *See supra* Sections II.A. & B, IV.E.4.

<sup>427</sup>*See also* Transcript of Dec. 14, 1998 *en banc* Hearing at 190-91 (AT&T Sr. Vice President for Government Affairs and Federal Policy testifying that the economics of the transaction depends on AT&T serving the highest possible number of residential customers).

<sup>428</sup>Application at 19-20, 37-38.

<sup>429</sup>*Id.* at 19.

<sup>430</sup>*See, e.g., Id.* at 16, 19-23, 37, 44-51; Transcript of Dec. 14, 1998 *en banc* Hearing at 183, ll. 2-5 (AT&T Sr. Vice President for Government Affairs and Federal Policy stating: "Simply put, this merger represents AT&T's tremendous commitment to residential customers, and I would emphasize the 'residential,' in its leadership in  
(continued...)

Commission's candor and truthfulness requirements.<sup>431</sup> In addition to these assurances, AT&T has submitted detailed deployment schedules to the Commission outlining its plans to deliver local exchange and exchange access services following the consummation of the merger.<sup>432</sup> Given the absence of proof to the contrary, we award substantial weight to AT&T's assurances and to the supporting documentation submitted by the Applicants.<sup>433</sup> We find that the merger will yield pro-competitive benefits for consumers. Although AT&T and TCI each have dominant positions in their primary markets, we believe the merger is clearly in the public interest.

## VI. ADDITIONAL PROCEDURAL MATTERS

149. Certain commenters have raised questions about access to documents filed by the Applicants. SBC filed a motion<sup>434</sup> for an order compelling the Applicants to submit for Commission review all documents and information (collectively "HSR documents") they have filed with DOJ as part of the pre-merger review process under the Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR Act")<sup>435</sup> and to permit interested third parties to review all documents submitted to the Commission by the merger parties in the course of this proceeding, including any HSR documents.<sup>436</sup> SBC contends that Commission review of all HSR documents is necessary to allow the Commission to evaluate adequately the purported benefits of the merger, and that review of the HSR documents would aid the Commission's understanding of other mergers that presently are pending before it.<sup>437</sup> Further, SBC asserts, granting third-party access to the HSR documents under a protective order will allow more thorough scrutiny of the Applicants' submissions and provide the Commission with the "best analyses possible."<sup>438</sup>

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<sup>430</sup>(...continued)

bringing local phone competition and its benefits to them"); Transcript of Oct. 22, 1998 *en banc* Hearing at 17 (AT&T's Chairman stating, "This merger means most importantly local phone competition for residential customers"); AT&T-TCI Reply at 11-13.

<sup>431</sup>47 C.F.R. § 1.17. Although AT&T has acknowledged in a recent proxy statement that there is a "risk" that it will not deploy local telephone service, the company did state affirmatively its intention to deploy local telephone service. Merger Proxy Statement at 21. In light of information directly supplied to the Commission by AT&T, as well as the level of investment the company is making in this area, this acknowledgement in the context of a proxy statement does not impugn the representations provided by the company.

<sup>432</sup>See Jan. 27 Brady Letter; Jan. 12 Brady Letter.

<sup>433</sup>*MCI-WorldCom Order*, 13 FCC Rcd at 18134 ¶ 193.

<sup>434</sup>Motion of SBC Communications Inc. To Require Review of Hart-Scott-Rodino and Other Documents (Oct. 14, 1998) ("SBC Motion").

<sup>435</sup>Pub. L. No. 94-435, 90 Stat. 1383 (July 30, 1976), codified at 15 U.S.C. § 18a.

<sup>436</sup>SBC Motion at 2, 8.

<sup>437</sup>*Id.* at 2-6.

<sup>438</sup>*Id.* at 6.

150. U S WEST filed a motion seeking an expedited ruling on the SBC Motion to permit interested parties to review the HSR documents.<sup>439</sup> U S WEST requests that the Commission provide interested third parties access to the documents prior to the Commission reaching a decision on whether to approve the transfer of licenses.<sup>440</sup> Qwest also has expressed support for the SBC Motion and the U S WEST Motion To Expedite.<sup>441</sup>

151. In merger review proceedings, the Commission normally obtains supplemental information through one of two means. First, pursuant to section 1.1204(a)(6) of the Commission's *ex parte* rules,<sup>442</sup> the Commission in consultation with DOJ, may review HSR documents if the Applicants grant the Commission a waiver of their confidentiality rights.<sup>443</sup> Typically, Commission staff review some but not all HSR documents, limiting their review to documents deemed potentially relevant to review of the merger application. Documents of decisional significance are placed in the Commission's record, where they are available for other parties to review. Second, the Commission may seek further information from the Applicants or parties themselves. The Applicants or parties are directed to submit the information to the Commission for inclusion in the record. Any confidential information obtained by either means is generally subject to a protective order, under which third-party review is permissible under conditions specified in the order.<sup>444</sup>

152. On December 31, 1998, the Cable Services Bureau released an order approving a protective order setting forth the conditions under which confidential documents and information obtained in this proceeding may be reviewed by interested parties.<sup>445</sup> The protective order grants interested parties access to confidential and proprietary information submitted by the Applicants under conditions that limit review of such documents to certain classes of persons (*e.g.*, outside counsel) and require that confidentiality be maintained by reviewing parties to the extent specified in the order.<sup>446</sup> All confidential information submitted by the Applicants has been made available for review by third parties under the

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<sup>439</sup>Motion of U S WEST To Expedite Ruling on Motion To Require Applicants To Provide Interested Parties with Access to Hart-Scott-Rodino Documents (Dec. 7, 1998) ("U S WEST Motion To Expedite").

<sup>440</sup>U S WEST Motion To Expedite at 2-4.

<sup>441</sup>Qwest Supplemental Comments at 1-3.

<sup>442</sup>47 C.F.R. § 1.1204(a)(6).

<sup>443</sup>In this proceeding, the Applicants granted a waiver permitting Commission staff to review and discuss with DOJ the HSR documents. Letter dated Oct. 27, 1998, from Betsy Brady to Magalie Roman Salas, Secretary, Federal Communications Commission, enclosing a Letter dated Oct. 27, 1998, from Francis M. Buono, Willkie, Farr & Gallagher, attorney for Tele-Communications, Inc., and Mark C. Rosenblum, Vice President - Law, AT&T Corp., to Royce L. Dickens, Staff Attorney, Federal Communications Commission.

<sup>444</sup>See 47 C.F.R. §§ 0.457, 0.459.

<sup>445</sup>*Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, CS Docket No. 98-178, Order Adopting Protective Order, DA 98-2653 (Cable Services Bur., rel. Dec. 31, 1998).

<sup>446</sup>*Id.* at ¶ 3.

terms of the protective order. All non-confidential information submitted by the Applicants has been made available for unrestricted review by third parties under the Commission's normal procedures for review of the public record.

153. Thus, the only remaining issue for the Commission to resolve is whether all HSR documents submitted to DOJ must be reviewed by and submitted to us. The Commission is under no obligation to obtain and review all documents submitted to DOJ as part of its separate pre-merger review process, and we decline to do so here. Contrary to the suggestions of the moving parties, the Commission has not established a policy of reviewing all HSR documents filed in merger cases.<sup>447</sup> Instead, our decision whether to review HSR documents is made on a case-by-case basis, and "calls for balancing the relevance of the information that may reside only in the documents, the importance of the issues to which any such information would be material, the closeness of those issues in light of the other available evidence, and the danger of unintentionally giving the opponents of the proposed transfer 'a potent instrument for delay.'"<sup>448</sup> Thus, the Commission has discretion to review or not review HSR documents based on the requirements of a particular case. If the Commission chooses to review HSR documents, it is under no obligation to disclose such documents unless we rely on them in the decision-making process.<sup>449</sup> None of the HSR documents we reviewed in this proceeding were relied on in rendering our decision.<sup>450</sup> Further, it is not necessary for the Commission to review all HSR documents, as urged by SBC, in order to create a useful context for separate, pending mergers.<sup>451</sup> Under the facts of the case that is before us, SBC and U S WEST have failed to demonstrate that our review of all or particular HSR documents is indispensable to a reasoned analysis of this merger. In conducting our public interest analysis, the Commission need only obtain "sufficient information to make an informed

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<sup>447</sup>For example, although we did review various HSR documents in the MCI-WorldCom merger, we did not request such documents in the SBC-SNET, AT&T-Teleport, or SBC-PacTel merger proceedings. See *SBC-SNET Order*, 13 FCC Rcd at 21292; *AT&T-Teleport Order*, 13 FCC Rcd at 15236; *SBC-PacTel Order*, 12 FCC Rcd at 2624.

<sup>448</sup>*SBC-PacTel Order*, 12 FCC Rcd at 2662 ¶ 86 (citing *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1497 (D.C. Cir. 1995) (quoting *United States v. FCC*, 652 F.2d 72, 91 (D.C. Cir. 1980))).

<sup>449</sup>47 C.F.R. § 1.1204(a)(6)

<sup>450</sup>We reject U S WEST's assertion that the protective order approved in this case is inadequate to the extent that it is restricted to the production of documents "that AT&T plans to submit *voluntarily* to the Commission" and those that relate only to the deployment of cable telephony. Supplement to Motion of U S WEST Regarding Hart-Scott-Rodino Documents at 2 (Jan. 19, 1999) (emphasis in original). The Commission is free to limit its review of any documents to those it deems relevant to conduct a reasoned public interest analysis. Moreover, U S WEST overlooks the fact that Commission staff have requested and AT&T-TCI have produced supplemental information that relates to issues other than the deployment of telephony. See, e.g., Jan. 8 Schneider Letter; Jan. 6 Cicconi Letter; Jan. 7 Symons Letter; Jan. 21 Quinn Letter; Jan. 25 Quinn Letter. Finally, the Protective Order adopted in this proceeding is identical to the Order entered in the *SBC-Ameritech* case, and is not restricted in its scope to documents "that AT&T plans to submit voluntarily to the Commission" or to documents relating only to the deployment of telephony, as U S WEST implies. Interested third parties are free to avail themselves of the Protective Order if they so choose.

<sup>451</sup>SBC Motion at 5-6.

decision."<sup>452</sup> We are satisfied that the materials submitted to the Commission, as subsequently supplemented, constitute a sufficient record upon which to conduct our public interest analysis. Further, all information made available by Applicants for our review that we relied on in our decision-making has been included in the record. We reject the moving parties' suggestion that full disclosure of the HSR documents not filed with the Commission is necessary so that the parties can assist the Commission in its merger analysis. The Commission is well situated to determine what HSR documents are pertinent to its public interest analysis. The SBC and U S WEST Motions are denied.

## VII. CONCLUSION

154. For all of the foregoing reasons, we conclude that the Applicants have carried their burden of showing that the proposed merger will serve the public interest, convenience, and necessity, subject to the divestiture of certain wireless assets and the adoption of AT&T's proposed Policy Statement in accordance with the Proposed DOJ Settlement Agreement. Accordingly, we hereby grant the Applications subject to the conditions specified herein. The Commission will issue a public notice listing the specific license and authorization transfers granted by this Order.

## VIII. ORDERING CLAUSES

155. Accordingly, having reviewed the Application and the record in this matter, IT IS ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309 and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Application filed by AT&T Corp. ("AT&T") and Tele-Communications, Inc. ("TCI") IS GRANTED subject to the conditions stated below.<sup>453</sup>

156. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for AT&T to acquire control of:

- a) any authorization issued to TCI, its subsidiaries, or its affiliates during the Commission's consideration of the Application and the period required for consummation of the merger transaction following approval;
- b) construction permits held by licensees involved in this transfer that mature into licenses after closing of the merger transaction and that may have been omitted from the transfer of control Application; and

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<sup>452</sup>*SBC-PacTel Order*, 12 FCC Rcd at 2663 ¶ 89 (citing *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 630-31 (D.C. Cir. 1978)).

<sup>453</sup>Our review of this transaction reveals that AT&T ultimately controls WOOD-TV, a television broadcast station licensed to Grand Rapids, Michigan. Because TCI ultimately controls a cable television system in Grand Rapids, AT&T's acquisition of TCI would violate the cable television/broadcast television cross-ownership rule. 47 C.F.R. § 76.501(a). In order to accommodate the proposed merger transaction, and noting that an application to divest WOOD-TV has been filed, we hereby grant AT&T a temporary, six-month waiver of that rule in order to come into compliance with its requirements.

- c) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.<sup>454</sup>

157. IT IS FURTHER ORDERED that this grant IS CONDITIONED on AT&T and TCI transferring ownership of TCI's Sprint PCS tracking stock, prior to consummation of the merger, to a trust that has been approved by the Commission. The proposed trust agreement must be submitted to the Commission for review within 30 days after issuance of this Order or at least 10 days prior to consummation of the merger, whichever is earlier. The Applicants may not consummate the merger until we approve the 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.<sup>455</sup>

158. IT IS FURTHER ORDERED, that this grant IS CONDITIONED on AT&T-TCI directing any economic interest arising in connection with the Sprint PCS tracking stock to the benefit of the shareholders of Liberty Media Group consistent with AT&T's proposed policy statement and with the proposed 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).

159. IT IS FURTHER ORDERED that all references to AT&T and TCI in this order shall also refer to their respective officers, directors, and employees, as well as to any affiliated companies, and their officers, directors, and employees.

160. IT IS FURTHER ORDERED, pursuant to sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petition To Deny of the Consumers Union, Consumer Federation of America, and Office of Communication, Inc. of the United Church of Christ; the Petition To Deny the Applications of Tele-Communications, Inc. and AT&T Corporation or, in the Alternative, to Impose Conditions of Seren Innovations, Inc.; the Petition of U S WEST To Deny Applications or To Condition Any Grant; the Joint Comments and Request for Imposition of Conditions of the Wireless Communications Association International, Inc., and Independent Cable and Telecommunications Association; and the requests of any party requesting similar relief, ARE DENIED.

161. IT IS FURTHER ORDERED that the Motion To Accept Late Filed Petition To Deny of Hiawatha Broadband Communications, Inc., IS DENIED. The petition instead will be treated as a written *ex parte* communication pursuant to Section 1.1206 of the Commission's rules, 47 C.F.R. § 1.1206.

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<sup>454</sup>See *MCI-WorldCom Order*, 13 FCC Rcd at 18153 ¶ 226(c).

<sup>455</sup>47 C.F.R. §§ 0.131(1), 0.331.

162. IT IS FURTHER ORDERED that the Motion of SBC Communications Inc. To Require Review of Hart-Scott-Rodino and Other Documents, the Motion of U S WEST To Expedite Ruling on Motion To Require Applicants To Provide Interested Parties with Access to Hart-Scott-Rodino Documents, and the Supplement of the Motion of U S WEST ARE DENIED.

163. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release, in accordance with section 1.103 of the Commission's rules.<sup>456</sup>

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas  
Secretary

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<sup>456</sup>47 C.F.R. § 1.103.



## APPENDIX

## List of Commenters and Petitioners\*

America Online, Inc. ("AOL")  
Ameritech  
AT&T Corp. and Tele-Communications, Inc. ("AT&T-TCI")  
Bell Atlantic  
BellSouth Corporation ("BellSouth")  
Cable & Wireless USA, Inc. ("Cable & Wireless")  
Communications Workers of America ("CWA")  
Competitive Telecommunications Association ("CompTel")  
Consumer Electronics Manufacturers Association ("CEMA")  
Consumers Union, Consumer Federation of America, and Office of Communication, Inc. of the  
United Church of Christ ("Consumers Union")  
CoreComm Limited ("CoreComm")  
DIRECTV, Inc. ("DIRECTV")  
EchoStar Communications Corporation ("EchoStar")  
GTE Service Corporation ("GTE")  
Hiawatha Broadband Communications, Inc. ("Hiawatha") (*late-filed*)  
MCI WorldCom, Inc. ("MCI WorldCom")  
MindSpring Enterprises, Inc. ("MindSpring")  
Mt. Hood Cable Regulatory Commission ("Mt. Hood") (*late-filed*)  
National Association of Broadcasters ("NAB")  
Qwest Communications Corporation ("Qwest") (*timely initial comments; late-filed supplemental  
comments*)  
Prodigy Communications Corporation ("Prodigy")  
SBC Communications Inc. ("SBC")  
Seren Innovations, Inc. ("Seren")  
Sprint Corporation ("Sprint")  
U S WEST, Inc. ("U S WEST") (*timely initial comments; late-filed reply comments*)  
The Wireless Communications Association International, Inc. & Independent Cable and  
Telecommunications Association ("WCAI")

\*Unless otherwise noted, pleadings were timely filed.



**CONCURRING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH**

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

I concur wholeheartedly in the result of this Memorandum Opinion & Order: namely, that the Commission approves TCI's application to transfer station licenses and authorizations to provide international resold communications services to AT&T, subject to compliance with existing FCC wireless spectrum cap rules. In particular, I commend the Commission staff for their prompt action on these applications, and I hope we can process other transfer applications with like timeliness.

While I support the bottom line in the Order, I cannot sign on to the general reasoning that underlies it. The Order focuses its review -- erroneously, to my mind -- on the larger business transaction of the merger as opposed to the simple transfer of radio licenses and international resale authorizations.

*Merger Review Authority*

I do not believe that the Federal Communications Commission possesses statutory authority under the Communications Act to review, writ large, the merger of AT&T and TCI.<sup>1</sup> Rather, that Act charges the Commission with a much narrower task: review of the proposed transfer of radio station licenses from TCI to AT&T, and consideration of the extension of common carrier lines by the merged entity. Nothing in either of these provisions speaks of jurisdiction to approve or disapprove *the merger* that has occasioned TCI's desire to transfer licenses and international resale authorizations.<sup>2</sup> We are required to determine whether *the transfer of station licenses* serves the public interest, convenience and necessity and whether *the transfer of authorizations for international resale* serves the public convenience and necessity.<sup>3</sup>

To be sure, the transfer of the licenses and authorizations is an important part of the merger. But it is simply not the same thing. The merger is a much larger and more complicated set of events than the transfer of FCC permits. It includes, to name but a few things, the passage of legal title for many

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<sup>1</sup>Section 310(d) provides: "No . . . station license . . . shall be transferred . . . to any person except upon application to Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby," *i.e., by the license transfer*. Section 214(a) states: "No carrier shall undertake the construction of a new line or of an extension of any line, or shall acquire or operate any lines, or extension thereof, or shall engage in transmission over or by means of such additional or extended lines, 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."

<sup>2</sup>The Commission does possess authority under the Clayton Act, which prohibits combinations in restraint of trade, to review mergers *per se*. See 15 U.S.C. section 21 (granting FCC authority to enforce Clayton Act where applicable to common carriers engaged in wire or radio communication or radio transmission of energy). That power is not invoked here, however. If the Commission intends to exercise authority over mergers and acquisitions as such, it ought to do so pursuant to the Clayton Act, not the licensing provisions of the Communications Act.

<sup>3</sup>Section 214(d) contains no "public interest" language. See *supra* n. 1.

assets other than radio licenses, corporate restructuring, stock swaps or purchases, and the consolidation of corporate headquarters and personnel.

Clearly, then, asking whether the particularized transactions of license transfers and section 214 transfers would serve the public interest, convenience, and necessity entails a significantly more limited focus than contemplating the industry-wide effects of a merger between the transferee and transferor. For instance, in considering the transfer of licenses, one might ask whether there is any reason to think that the proposed transferee would not put the relevant spectrum to efficient use or comply with applicable Commission regulations; one would not, by contrast, consider how the combination of the two companies might affect other competitors in the industry. One might also consider the benefits of the transfer, but not of the merger generally. And one might consider the transferee's proposed use and disposition of the actual radio licenses, but one would not venture into an examination of services provided by the transferee that do not even involve the use of those licenses.

By using sections 214 and 310 to assert jurisdiction over the entire merger of two companies that happen to be the transferee and transferor of radio licenses and international resale authorizations, the Commission greatly expands its regulatory authority under the Act. As the Order acknowledges, the transfers at issue will occur "as a result of," *supra* at para. 11, the merger, but this causative fact should not be used to bootstrap the Commission into jurisdiction over the merger itself. If the control of licenses were to be transferred "as a result of" a licensee's bankruptcy, would the Commission assert jurisdiction to review the legal propriety of the declaration of bankruptcy? That would be preposterous, as that is a job for a bankruptcy court. Here, review of the merger between AT&T and TCI, which, just like the bankruptcy in my hypothetical, is an underlying cause of the transfer, is a job for the Department of Justice. Expanding our review of license transfers to a review of the event that precipitates the transfers - whether that event is a merger, a bankruptcy, or any other event that might lead a licensee to cede control of a license - is off the statutory mark.

Despite the Commission's effort to exercise power over "mergers" under sections 214 and 310, it must be remembered that, in the end, the Commission can only refuse to permit the transfer of the licenses or to authorize international resale. While such action would no doubt threaten consummation of the merger, the Commission cannot directly forbid the stockholders of one company from selling their shares to the other. *But see supra* at para. 112 (purporting to prohibit the applicants from "consummat[ing] the merger until we approve the proposed trust agreement"). The scope of our review ought to accord with the scope of our remedies: in this case, then, it ought to be limited to considering (i) whether the public would suffer harm if radio licenses are transferred from Party A to Party B, and (ii) whether the public convenience and necessity would be served by allowing Party A to convey authorizations to operate as an international reseller of phone services to Party B. The fact that today's Order does not even identify the radio licenses or international authorizations that are the subject of AT&T and TCI's applications or discuss their conveyance, but instead moves directly to a discussion of the merger, reflects how far the Commission has strayed from the provisions of the Act that it relies upon today.

As I have previously explained, I believe that a finding that the transferee and transferor have a record of compliance with existing Commission rules, and that no extraordinary reason to oppose the transfer of licenses is asserted by the public, meets our statutory obligation to make a public interest determination under section 310. *See Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18025 (1998)

(concurring statement of Commissioner Furchtgott-Roth). As for the international resale authorizations under section 214(a), we must at a minimum evaluate that transfer application under 47 C.F.R. section 63.18, the actual regulation pursuant to which TCI filed its application to transfer those permits. I have reviewed that application, which sets out the information required by subsection 63.18(e)(5), and do not see any conflicts with the terms and conditions of that regulation.<sup>4</sup> I am unaware of any allegation that the transfer of these 214 authorizations would result in a violation of the Communications Act or any other extant FCC regulations. I therefore find that the transfer serves the public convenience and necessity, as section 214(a) requires. For these reasons, I would grant the applications filed pursuant to sections 310 and 214, and I thus agree with the result of today's Commission action.

*Potentially Arbitrary Review: Choice of Transfers for Full-Scale Review & Substantive Standards To Be Applied*

Beyond the threshold question of statutory authority to regulate mergers, I have concerns about the process employed in FCC merger reviews. The vast majority of license transfers under section 310 - even those that involve merging entities - are *not* subject to the stringent review today imposed upon AT&T and TCI. For example, as I have observed, mergers of companies like Mobil and Exxon involve the transfer of a substantial number of radio licenses, many of the same kind of licenses as those at issue here, and yet we take no Commission level action on those transfer applications. I do not advocate extensive review of all license transfer applications, but mean only to illustrate that we apply highly disparate levels of review to applications that arise under the identical statutory provision.

Unfortunately, there is no established Commission standard for distinguishing between the license transfers that trigger extensive analysis by the full Commission and those that do not. Nor does today's Order elucidate the standard. The Order conclusorily asserts that some mergers warrant heavy review and others do not, stating that "the face of some merger applications may reveal that the merger could not frustrate or undermine our policies." *See supra* at para. 16. The Order then cryptically cites a bureau level decision, without explaining what sort of facts in an application make it clear that a merger need not be fully processed. Is the question whether the merging firms are large, successful corporations? That is one of the differences one might observe between this merger and the one cited in the footnote. Or is it whether "parties have raised non-frivolous issues" about the merger? *Id.* What about frivolous contentions, or the absence of any objections at all? Does the level of review depend on the type of services offered by the merging companies, *i.e.* a telephone/cable merger (such as this one) gets one sort of review, while a telephone/telephone merger (such as the cited case) gets another? In short, merging parties have no clear notice as to the threshold showing for determining the scale of FCC license transfer review when mergers are involved. Apparently, only the Commission knows a facially clear case for review when it sees one, and it is unwilling to say what such a case looks like.

If the answer is, as some have suggested, that the Commission reviews extensively only a subclass of license transfer applications -- those occasioned by mergers with the potential to affect the telecommunications industry -- that response is incomplete. Whatever the soundness of this theory for distinguishing among transfer applications, it is not written anywhere, whether in agency rules, regulations, policy statements, or even internal agency guidelines. While the Communications Act does

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<sup>4</sup>In another indication of how far off track we are in our transfer approval process, today's Order does not mention this directly applicable regulation or the transferor's compliance with it, or even the provision of international resale services generally.

allow the Commission to make reasonable classifications of applications, *see* 47 U.S.C. section 309(g), the Commission has in no way done so, much less in a way that puts the public on notice as to what those classifications are. Agency decisions regarding which license transfers to review under 310, even as among license transfers occasioned by mergers, are entirely *ad hoc* and thus run a high risk of being made arbitrarily.

Finally, if the Commission did establish a threshold test for determining which license transfer applications should receive strict scrutiny, the Commission would still need to set out the substantive tests for those differing scrutiny levels. As a general matter, our decisional precedents provide little concrete guidance on the substantive standard for approval of title III transfers: the proposition that a merger is in the "public interest" if it is not anti-competitive (or if it is also pro-competitive) is too generalized to be helpful. Moreover, there is clearly a different "public interest" test being applied, *sub silentio*, in different cases under section 310. The cases that undergo extensive inquiry, as here, exhaustively discuss all kinds of service areas and issues ancillary to the use of the actual radio licenses, and the decisions that are granted at the Bureau level are relatively perfunctory in their public interest analysis. We should, after identifying the threshold test for license transfers that warrant thorough inquiry, articulate clearer substantive criteria to guide the Commission's inquiry.

#### *Duplication of Department of Justice Efforts*

The focus on mergers rather than on license and authorization transfers creates another problem: our work often duplicates that of the Department of Justice's Antitrust Division. As I have previously explained, this agency in its merger review undertakes a wide-ranging analysis that exceeds even DOJ's rubric and examines broad social issues beyond our expertise or authority. *See MCI/World Com Order, supra*. Merging companies should have to jump through at most one, not two, federal antitrust hoops, and that hoop should be held out by the agency with the express statutory authority and expertise to do so. That agency is the Department of Justice. If the Commission limited its review to the actual subject matter of 310 -- the transfer of radio licenses, as opposed to the proposed merger that triggered the transfer -- this problem of duplicated efforts would be avoided.

#### *Conditional Approval of License Transfer and Line Extension Applications*

Finally, I express some general apprehension about the "conditioning" of grants for license transfer applications and section 214 authorizations. I think it is entirely appropriate, even necessary, for the Commission to condition license transfer and line extension applications on compliance with existing FCC rules. *See* 47 U.S.C. section 303(r) ("Commission shall . . . prescribe such . . . conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act"); *id.* section 214(c) (Commission "may attach to the issuance of [214] certificate such terms and conditions as in its judgment the public convenience and necessity may require").<sup>5</sup> As discussed above, in order to meet the public interest standard, an applicant should demonstrate compliance with extant FCC

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<sup>5</sup>Only existing FCC rules should be applied to the merged entity in the context of conditions for license and 214 authorization transfers. *Cf. supra* at para. 75 (summarizing requests for new "open access" conditions on the merged entity). If additional regulations are alleged to be necessary, that contention is most properly addressed in the context of rulemaking, not a company-specific order. The selective application of regulatory burdens to some entities but not others is not only difficult to justify as a legal matter, but creates competitive disadvantages in the marketplace.

regulations. For that reason, I agree that we should take necessary steps to ensure that the transferor, after the license transfer, is not in violation of the wireless spectrum cap rules.

I am concerned, however, about situations in which this agency becomes an enforcer of the rules and regulations of *other* governmental agencies. We have no jurisdiction to enforce rules not promulgated under the Communications Act, *see id.* section 303(r) (referring to conditions needed to "carry out *the provisions of this Act*"), and we cannot and should not do the enforcement work of others. This is not to say that we should not take official notice, in the course of making licensing decisions, of findings by another agency that an applicant has violated a regulation in its bailiwick. We should certainly consider such findings in determining whether to grant or deny a license application.<sup>6</sup> But we should not condition such a decision on compliance with another agency's regulation, thus putting ourselves in the position of potential enforcer of non-FCC rules should the transferee fail to conform to that regulation.

I am doubly concerned about conditional FCC approval when the rule at issue is not just that of another agency, but when that agency has made no formal, final, and material findings of a violation. That is, I do not think we should take official notice of alleged violations, including matters under investigation or in litigation, or of informal concerns that an agency is not yet ready or willing to pursue through their own established procedures. When we give formal weight to anything short of formal, final findings by other agencies, we create a situation that is rife with incentives for inter-agency gaming of the system, *e.g.*, registering an objection with an agency about a matter that the complaining agency is not prepared to pursue itself, and requires the Commission to do extensive reviews in areas where it simply has no experience or authority.

In sum, at the intersection of two areas -- non-FCC rules and no final determination of a violation by a responsible entity -- our authority to impose conditions on a license or 214 authorization transfer is at its weakest. Where non-FCC rules are at issue but there is a final, record finding of a material infraction thereof, there is a middle ground: we should take notice of that fact in deciding upon the application but not condition approval upon compliance. Finally, where, as here, extant FCC rules are involved, our power to condition a proposed transfer upon compliance with those rules and to enforce compliance, if necessary, is at its apex. I therefore concur in the conditions of the transfers based on compliance with, and enforcement of, the wireless spectrum cap rules.

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For the foregoing reasons, I am pleased to concur in the Commission's decision to approve TCI's transfer of radio licenses and authorizations for international resale pursuant to sections 310 and 214 of

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<sup>6</sup>For example, as I have suggested in the broadcast context of applications for license renewal, the Commission should take due notice of a finding by the Equal Employment Opportunity Commission, or a court, that a licensee has violated the Civil Rights Act. *See In re Applications of Radio Sun Group of Texas, Inc., For Renewal of Licenses* (released July 23, 1998) (dissenting statement of Commissioner Furchtgott-Roth), at n. 5 (suggesting that the Commission take account of whether a renewal applicant has broken either state or federal anti-discrimination laws by asking applicants to certify whether they had been found liable for employment discrimination during the renewal period, and arguing that such a scheme leaves the actual determination of discrimination to the institutions best-equipped to make it, courts and employment discrimination agencies).



**SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI,  
DISSENTING IN PART**

*Re: Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*

While I support the bulk of today's Order, I respectfully dissent on one issue: the majority's refusal to impose a reporting requirement to monitor the upgrade of TCI's cable facilities to provide local telephony, high-speed data and other advanced services.

Under the Commission's merger framework, we must weigh the costs and benefits of a proposed transaction to determine whether it would serve the public interest. I believe that the merger of AT&T and TCI has the potential to benefit millions of American consumers by bringing together the complementary assets of these two companies. In the area of telecommunications, AT&T has considerable expertise and an unmatched brand name. TCI possesses a broadband pipe that covers the crucial "last mile" to consumers' homes. This should allow the merged company to furnish local telephone service and high speed Internet access more rapidly and effectively than either company could separately.

At this point, however, the plans for this to happen are just plans. That is why I place great emphasis on the parties' express commitment (reiterated most recently in a February 8, 1999 letter from AT&T's Chairman) to upgrade its facilities on a fair and non-discriminatory basis. I believe that in order for this merger to serve the public interest, it is vital that all regions and all neighborhoods share in the merger's promised benefits. Based on my examination of the maps and deployment schedules submitted by AT&T-TCI, I am satisfied that the merged entity is planning to upgrade its facilities in a manner consistent with that important goal.

My disagreement with the majority lies not in its assessment of the merged entity's current deployment plans, but in its unwillingness to monitor whether those plans are carried out. As I've said in the context of the MCI-WorldCom merger, a minimal reporting requirement seems to me an eminently reasonable way of determining whether a company follows through on the commitments it makes in obtaining merger approval. If AT&T-TCI intends to honor its deployment commitments, as I assume it does, I can see no harm in keeping the Commission apprised of its progress. A short status report every six months can hardly be characterized as burdensome given the size and nature of the merger and the importance of the issue involved.

I recognize that business plans change and that unforeseen events can upset even the best-laid plans. If that happens, a reporting requirement would not mandate that the proposed deployment schedule be adhered to, but simply that the merged entity explain how and why the schedule could not be kept. The difference I have with the majority is that if the deployment plans change I would prefer to know about it. The majority, apparently, would not. Given the stakes involved, especially for rural and low-income Americans, and our continuing obligation to monitor the deployment of advanced telecommunications capability under Section 706 of the Telecommunications Act of 1996, I believe we should err on the side of having more information rather than less.

