board of directors of post-Merger AT&T, as well as in other aspects of the transaction. Mr. C. Michael Armstrong, who is AT&T's Chairman and CEO, will remain Chairman and CEO of AT&T. Mr. John Zeglis, who is currently AT&T's President, and Mr. Leo J. Hindery, Jr., who is TCI's current President, are expected to become Chairman and President, respectively, of AT&T Consumer Co. On a day-to-day basis, the Liberty Media Group will continue to be managed by its current management. Dr. John C. Malone, TCI's current Chairman and CEO, will serve as Chairman of the Liberty Media Group. Mr. Robert R. Bennett, currently President and CEO of Liberty Media Corporation, will be President and CEO of the Liberty Media Group.

Several factors will facilitate the Liberty Media Group's operational independence. First, for at least the first seven years after the Merger, directors appointed by TCI prior to the Merger will make up a majority of the Board of Directors of Liberty Media Corporation ("LMC"), through which substantially all of the Liberty Media Group's business will be managed. Second, members of the LMC Board cannot be removed by AT&T (which indirectly will be the sole stockholder of LMC following the Merger), except for cause. Third, after consummation of the Merger, AT&T's Board of Directors will increase in size by one member. AT&T has agreed that this additional director (who initially will be Dr. Malone) will be a person who, by virtue of his or her background and experience, will understand and reflect issues of concern to the Liberty Media Group and the holders of Liberty Media Group tracking stock.[21] Fourth, AT&T's Board also will establish a Capital Stock Committee, which will have three members, one of whom will be the Liberty Representative and the other two of whom will be independent directors of AT&T

[21] This director is hereafter referred to as the "Liberty Representative."

who are not affiliated with AT&T's management.[22] Fifth, 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. Sixth, certain inter-group liabilities, obligations and other inter-group relations will be limited by contract, which will act as a "firewall" between the groups. Finally, the Agreement and underlying Merger-related documents expressly provide that the Liberty Media Group and the Common Stock Group can compete with each other in their lines of business and have no obligation to provide financial support or share corporate opportunities with each other. Although the Merger therefore will allow AT&T to integrate its telecommunications business with TCI's cable networks and thereby build a facilities-based local residential telecommunications network, the structure of the transaction specifically will establish and preserve the Liberty Media Group as a separately managed business group engaged in its current video programming businesses and any other business it elects to enter.

II. THE MERGER ANALYSIS.

As detailed below, the proposed Merger will expand and accelerate AT&T's ability to compete with ILECs in providing local telephone service to residential customers. By integrating AT&T's telecommunications businesses with TCI's cable business, the Merger will

[22] The AT&T Board will delegate authority to the Capital Stock Committee to interpret, make determinations under and oversee the implementation of key policies, including a "fair dealing" standard that governs dealings among the three groups.

provide AT&T with vital access to TCI's cable facilities thereby benefitting consumers currently dependent on ILECs for local service. With a significant investment of capital to upgrade those cable facilities to allow two-way toll quality voice telephone communications, AT&T eventually will be able to compete with ILECs where TCI currently has facilities. As a result, 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.

A. Defining the Analysis and the Relevant Services.

Because the proposed transaction between AT&T and TCI does not involve a horizontal merger in any market, the Merger Parties do not believe that it is necessary for the FCC, in determining whether the Merger is in the public interest, to conduct the three-stage analysis of the potential competitive effects of the Merger that it employed in NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, 12 FCC Rcd. 19985 (1997) ("Bell Atlantic/NYNEX"). Instead, in approving the Merger, the FCC certainly would be justified in relying on the substantial public interest benefits that flow from increased competition from a new facilities-based provider of local exchange and exchange access service as envisioned by the Telecommunications Act of 1996. Nevertheless, in the interest of expediting the FCC's consideration of this series of applications seeking FCC consent to the transfer of control of TCI's licenses, the Merger Parties have provided two sections of analysis that each independently support the grant of those applications.

The first section provides the three-stage analysis set forth in Bell Atlantic/NYNEX, as well as in MCI Communications Corp. and British Telecommunications PLC, 12 FCC Rcd. 15351 (1997) ("MCI/BTI"), and, recently, Teleport, FCC 98-169, released July 23, 1998. This analysis involves: (a) defining the possible relevant product and geographic markets; (b) determining the most significant competitors in these markets, including actual competitors and currently precluded significant competitors; and (c) performing a competitive analysis. In performing the competitive analysis, the FCC has sought to determine whether the merger will reduce competition either by enabling the combined entity to achieve unilateral market power or by reducing the number of competitors in any relevant market to a number that facilitates the competitors' collective exercise of market power through coordinated interaction. The FCC also has sought to determine if a proposed merger will actually be procompetitive, by enabling a competitor more quickly or efficiently to compete with a dominant firm or serve as a stronger maverick in preventing coordinated interaction in furtherance of the collective exercise of market power.[23]

Prior FCC opinions and orders suggest that the FCC might consider as potentially relevant for analysis under the Commission's market analysis framework the following seven types of services: (1) local exchange and exchange access services, which have separate residential and business components and which comprise a variety of local service areas; (2) domestic long distance services; (3) United States international telephone services; (4) wireless mobile

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[23] See Bell Atlantic/NYNEX, 12 FCC Rcd. at 20008-20; MCI/BTI, 12 FCC Rcd. at 15367-76; Teleport, FCC 98-169, ¶¶ 11-19.

telephone services, which comprise a variety of local service areas; (5) multichannel video programming distribution services; (6) video programming; and (7) Internet services.

In addition to its competitive analysis, the FCC also considers other more general public interest benefits that will result from a proposed merger, including, among other things, the pro-competitive effect that the merger will have on the quality, and price of services provided to the public. The FCC weighs any potential competitive or other harms from a proposed merger against these benefits to determine whether, on balance, the proposed transaction is in the public interest.[24] In the section following its three-stage analysis, the Merger Parties therefore set forth significant public interest benefits that support the grant of their applications independent of the FCC's assessment under the Bell Atlantic/NYNEX framework.

B. Competitive Analysis.

1. Local Exchange and Exchange Access Services.

Residential Telephone Services. By enabling AT&T to provide facilities-based local telephone service to residential customers that neither AT&T nor TCI could provide as expeditiously on their own, if ever, the Merger greatly enhances, rather than impedes, competition for residential local exchange and exchange access services. As the FCC has found, "incumbent

[24] See Bell Atlantic/NYNEX, 12 FCC Rcd. at 20001, 20007; MCI/BTI, 12 FCC Rcd. at 15367; Teleport, FCC 98-169, at ¶¶ 11-12.

local exchange carriers are the sole actual providers of local exchange and exchange access services to the vast majority of residential and small business customers in most areas of the United States."[25] In 1996, ILECs earned more than 98% of all local exchange and exchange access revenues nationwide, and any competition from CLECs generally has focused on large business customers in large cities, not on residential or small business customers.[26] In fact, the FCC has found no evidence suggesting the existence of any significant actual competitors to the ILECs with respect to the provision of residential local telephone service in the geographic areas where AT&T is present.[27]

Currently, AT&T and TCI each provide an extremely limited amount of residential local exchange and exchange access services in, collectively, eight states in the United States. TCI presently is engaged in limited telephony trials in California, Connecticut, Illinois and Texas, and AT&T provides residential services in those states, as well as Alaska, Georgia, Michigan and New York. AT&T's residential service is limited almost entirely to resold local exchange service to approximately 325,000 customers, in circumstances where it is no longer actively marketing its service.[28] For its part, TCI has established only four test-bed local exchange services in Hartford, Connecticut; Arlington Heights, Illinois; San Jose, California and Dallas, Texas. TCI has

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[25] Teleport, FCC 98-169, at ¶ 24; see Bell Atlantic/NYNEX, 12 FCC Rcd. at 20032-33.

[26] See id. at ¶ 24 n.80; Trends in Telephone Service, February 1998, at 28, 32.

[27] See Teleport, FCC 98-169, at ¶ 24 n.81.

[28] See supra at 3-4. AT&T also provides very limited local service in Alaska and Teleport serves a de minimis number of multiple dwelling units.

proposed to transfer the Hartford, Connecticut operations to Cablevision Systems Corp. as part of TCI's proposed disposition of its interest in the Hartford cable television system.[29] The San Jose and Dallas trials are very limited in nature, serving a total of less than 400 customers, and are focused solely on multiple dwelling units. At the time of its decision to enter the Agreement, TCI had no plans to expand its telephony offerings beyond these very limited trials.

Given the very limited residential local exchange and exchange access offerings of AT&T and TCI, the Merger will have no adverse competitive effect. The Chicago metropolitan statistical area ("MSA") is the only area where both of the Merger Parties provide local telephone service worthy of analysis.[30] AT&T and TCI face significant competition from the ILEC in the MSA, Ameritech, and together AT&T and TCI are de minimis participants. Ameritech reported total local revenues for 1997 in Illinois of approximately $2.19 billion, a figure that is more than fifty times the Merger Parties' total local exchange revenue in Illinois, even including Teleport's business operations.[31] Ameritech reported approximately 6.25 million subscribers lines in Illinois as of the close of 1996, or approximately 85% of all local telephone lines in Illinois.[32] Almost all

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[29] See supra at 7. The overwhelming majority of TCI's local telephone customers, less than 5,000 in total, are located in Hartford.

[30] Although TCI provides very limited telephone service to customers in California and Texas and Teleport serves isolated multiple dwelling units in certain states, the amount of service is de minimis, and does not warrant analysis.

[31] AT&T earned less than $40 million from its sale of local telephone service in Illinois in 1997. AT&T earned $8.7 million from its local resale operations in Illinois in 1997, and Teleport earned less than $30 million from its local exchange services directed to business customers in Illinois.

[32] See Trends in Telephone Service, July 1998, at 98.

of the remaining 15% of local telephone lines were held by independent local telephone companies.[33] Ameritech thus currently has over 100 times the number of subscriber lines as AT&T and TCI have residential customers in Illinois,[34] and AT&T's share of the local residential revenues and traffic in the Chicago MSA is no greater than one percent. Thus, even where both AT&T and TCI have initiated some residential local exchange service, they remain very small, and face a dominant competitor.[35]

The Merger unquestionably will promote competition in the provision of local residential telephone service in areas where TCI has existing cable infrastructure. As a result of the Merger, AT&T and TCI together will be able to provide a competitive facilities-based local telephone service to consumers on a schedule that greatly exceeds the pace AT&T or TCI independently could provide such service. AT&T and TCI anticipate combining their assets to invest in and develop advanced wireline facilities that will compete directly with ILECs to provide toll-quality voice and high-speed data communications to America's homes. TCI contributes its residential wireline network and architecture that currently serves approximately 12.7 million homes through cable systems controlled by TCI. AT&T contributes its experience in providing

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[33] Id. Fifty-five other independent local telephone companies reported approximately 1.15 million additional lines in Illinois. Id.

[34] Together, the Merger Parties currently serve less than 62,000 residential customers in Illinois. See supra at 3,7.

[35] AT&T and TCI also face potential competition in the residential local exchange market from other previously precluded carriers, including other ILECs in Illinois, adjacent ILECs such as Bell Atlantic, MCI Communications Corp. ("MCI") and Sprint. See Bell Atlantic/NYNEX, 12 FCC Rcd. at 20029-33; Teleport, FCC 98-169, at ¶ 25.

toll-quality voice and data traffic, switching technology, a brand name that can compete with incumbent local telephone companies and capital to cover the significant costs of the upgrade of TCI's facilities to provide for two-way voice telephony. Together, AT&T and TCI plan to use TCI's local network, enabling AT&T to provide facilities-based residential service without designing and constructing such a local network from ground zero. AT&T's telephony resources and capital thus can be used to bring a new facilities-based competitor to local exchange and exchange access services where TCI has cable television facilities, and enable AT&T to emerge as a new competitor for the local residential telephone services at a pace and scope that could not be achieved otherwise.[36]

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[36] AT&T's attempts in recent years to develop the capacity to provide local telephone services have met with limited success. Until January 1998, AT&T tried to initiate competition in the provision of local telephone service through the provision of Total Service Resale ("TSR"), under which AT&T purchased services from an ILEC, and then resold those services to customers in competition with the ILEC. AT&T never considered TSR a long-term solution, however, because it required paying access charges to the ILECs for the origination and termination of long-distance telephone calls. Moreover, AT&T discovered through experience that TSR was impractical, given the difficulties associated with working with their ILEC competitors. After spending over $3 billion on the initiation of local telephone service as of 1997 to achieve less than $70 million in total revenues, AT&T abandoned further efforts to develop TSR in early 1998. AT&T's efforts to use unbundled network elements ("UNEs") to serve these and other customers also have been hampered by the difficulty in obtaining compliance by the ILECs with the FCC's implementing regulations and the Eighth Circuit's invalidation of the rule requiring ILECs to provide CLECs with UNEs and UNE combinations. See Iowa Utilities Board v. FCC, 120 F.2d 752 (Th Cir. 1997), *cert. granted,* 118 S.C. 879 (1998). As noted above, AT&T's plans to create a facilities-based network through its ADL service and SONET Rings technology were directed primarily to larger business customers, and, given the tremendous expense and time necessary to develop a local network, unlikely to result in local residential telephone service competition at any time in the near future. Finally, while AT&T's acquisition of Teleport will assist it in reaching urban businesses and a limited number of multiple dwelling units, it was never intended to enable AT&T to compete on a wide scale in the provision of local residential exchange services.

Business Services. The Merger will not impede competition for the provision of local exchange and exchange access services to businesses. As with residential service, the FCC has found that "[i]ncumbent LECs also continue to dominate the larger business market for local exchange and exchange access services."[37] As with residential service, AT&T and TCI presently provide a very limited amount of local exchange and exchange access services to larger businesses in the United States, especially when their operations are compared to the ILECs. The ILECs still earn in excess of 96% of the business revenues from the provision of local exchange services, and still control approximately 10 times the number of fiber miles controlled by the CLECs.[38] For its part, the FCC has never recognized TCI as a significant provider of telephony services to businesses, and the Merger thus does not eliminate a competitor in this service.

The Merger Parties, however, do face potential competition from other carriers besides the ILECS that previously were not significant competitors in providing this service. The FCC has stated that "numerous new entrants are rapidly entering this market, especially in central business districts in urban areas, and that any number of these other new entrants have both the capabilities and the incentive to compete effectively."[39] In the context of competition for larger businesses, AT&T and TCI face competition from a number of other CLECs in addition to that of its predominant ILEC competitor. For example, as recognized by the Commission in Teleport, in

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[37] Teleport, FCC 98-169, at ¶ 26.

[38] See Trends in Telephone Service, February 1998, Table 9.1, Chart 9.1; Teleport, FCC 98-169, at ¶ 27.

[39] Teleport, FCC 98-169, at ¶ 27.

AT&T's top ten service areas, there are currently between 5 and 12 operational CLECs, including Focal Communications Corp.; MCI Local Service; Metromedia Fiber Networks; MelTel; RCN Corporation; USN Communications, Inc.; WinStar Communications, Inc. and WorldCom, Inc.[40] In Chicago, the Merger Parties will face competition from more than 10 CLECs, including Allegiance Telecom Inc.; Focal Communications Corp.; Jones Lightwave; Metromedia Fiber Network Inc.; MGC Communications; Teligent; USN Communications; Winstar; MCI Metro and WorldCom. With the Merger, AT&T is not eliminating any of these potential CLEC competitors and these other new entrants will be "at least as significant a competitive force as either of the merging parties."[41]

This is especially accurate in this case, where TCI's facilities and local network will be useful primarily for providing residential local telephone service, and AT&T's business local exchange service will be provided predominantly through Teleport's facilities and through AT&T's ADL service. AT&T's share of 1997 local revenue in business local exchange services was less than 1%,[42] a figure that is constant in both New York state and Chicago. TCI's business service is even more limited. Even in the service areas where AT&T and TCI have their greatest local large business activity, their combined current presence is practically insignificant. In the New York City metropolitan area, AT&T's business revenues, including the revenues of Teleport, do

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[40] Teleport, FCC 98-169, at ¶ 27.

[41] Bell Atlantic/NYNEX, 12 FCC Rcd. at 20019; Teleport, FCC 98-169, at ¶ 27.

[42] Teleport, FCC 98-169, at ¶ 36.

not exceed 4% of local telephony service, and TCI-controlled cable systems do not provide local exchange service in the New York City metropolitan area.

As the FCC concluded in Teleport, rather than impede competition, the merger of companies with complimentary assets is likely to enable the merged entity to more quickly mount a challenge to the dominant position currently held by the ILEC service provider.[43] The current efforts of AT&T and TCI in the business local exchange service are nominal, but with TCI's network and architecture, and AT&T's brand name and other assets, the merged entity will be more likely to establish itself as a viable competitor in the provision of both residential and business local exchange services.

2. **Domestic Long Distance Services.**

Although AT&T is the largest provider of long distance services in the United States, the Merger does not pose any threat to competition for long distance services because TCI is not, and had no plans at the time it entered the Agreement to be, a competitor in the provision of long distance services.[44] Second, the FCC has recognized that AT&T's share of long distance services has declined steadily over the past 15 years, so much so that in 1995, the FCC reclassified

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[43] Teleport, FCC 98-169, at ¶ 39.

[44] In its merger analysis to date, including its decisions in NYNEX/Bell Atlantic and Teleport, the FCC has not even recognized TCI as a precluded competitor likely to provide competition for national long distance communications. See supra, at 7 & n.12 (WTCI provides very limited long distance service in Wyoming).

AT&T as a non-dominant carrier.[45] AT&T's share of long distance operating revenues eroded from 90.1% in 1984 to 44.5% in 1997, and was 51.8% in 1995 when AT&T was declared non-dominant.[46] AT&T's share of switched access minutes eroded from 80.2% in 1984 to 51.4% in 1997, and was approximately 55% in 1995 when AT&T was declared non-dominant.[47] Because the Merger will have no effect on AT&T's ability to supply long distance services, there is no reason to revisit the conclusions in the AT&T Domestic Non-Dominance Order in considering the instant transfer of control applications.

Third, the FCC has recognized that hundreds of other firms actually provide long distance service, and expects that previously precluded firms will be strong competitors when they are permitted to provide domestic long distance service. As the FCC has acknowledged, at least three other major service providers have competitive national, coast-to-coast fiber-optic networks (Sprint, MCI and WorldCom) and at least four other current service providers are currently constructing national coast-to-coast fiber-optic networks (Qwest Communications International, Inc., IXC Communications, Inc., Williams Communications Group, Inc., and Level 3 Communications, Inc.).[48] Further, as the FCC has noted, numerous other competitors provide

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[45] AT&T Domestic Non-Dominance Order, 11 FCC Rcd. 3271, 3273 (1995). Other factors such as customer "churn" would further demonstrate the competitiveness of the long distance market.

[46] Long Distance Market Shares, June 1998, at 16, Table 3.2.

[47] Id. at 2-3, Table 1.1.

[48] Teleport, FCC 98-169, at ¶ 28. In 1997, MCI's share of operating revenues for the long distance service was 19.4%, Sprint's share was 9.7% and WorldCom's share was 6.7%. See Long Distance Market Shares, June 1998, at 16, Table 3.2.

long distance service in large regional areas, including Excel Telecommunications, Inc.; Frontier Corp.; Cable & Wireless, Inc.; GTE and other non-Regional Bell Operating Companies.[49] Finally, the Regional Bell Operating Companies ("RBOCs"), competitors that have previously been precluded from entering certain service areas, are expected to be strong competitors at the time that they are permitted to enter the long distance market upon compliance with the requirements of the Telecommunications Act of 1996. Accordingly, the proposed Merger will not affect competition for domestic long distance telephone services. In particular, the Merger will neither give AT&T unilateral market power nor increase the likelihood of coordinated action among competitors.

3. United States International Telephone Services.

Although AT&T is the largest provider of international telephone service in the United States, the Merger similarly will not reduce competition for the provision of international telephone services. First, as with domestic long distance service, TCI is not a significant competitor in the provision of international telephone service and had no plans to become a meaningful provider of international telephone service prior to the effective time of the Merger. Indeed, in its merger analyses to date, including <u>MCI/BTI</u> and <u>Teleport</u>, the FCC has not recognized TCI as a precluded competitor likely to provide competition for international telephone services. Second, the FCC has recognized that AT&T's share of international telephone

[49] From 1984 to 1997, the market share of the more than 600 companies providing long distance service other than the four largest carriers had increased from 2.6% to 19.8%. <u>Long Distance Market Shares</u>, June 1998, at 16, Table 3.2.

traffic from the United States has decreased from 100% in 1984 to less than 50% in 1996, after it was declared a non-dominant international carrier.[50]

Finally, as the FCC has noted, "there are hundreds of carriers that" compete in providing international telecommunications services.[51] As of 1996, 47 carriers offered international services using their own facilities or leased lines and more than 300 additional firms offered international service on a resale basis.[52] GTE and other non-Regional Bell Operating Companies are currently competitors, and the RBOCs are likely to provide strong competition at some time in the future, certainly within each of their LEC regions.[53] The proposed Merger thus will not diminish competition for international telephone services.

4. Wireless Mobile Telephony.

AT&T, through its ownership and control of AT&T Wireless, holds numerous licenses to provide commercial mobile radio service ("CMRS") in service areas throughout the

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[50] Teleport, FCC 98-169, at ¶ 31 & n.107; Trends in Telephone Service, February 1998, at 24; AT&T International Non-Dominance Order, 1 FCC Rcd. 17963, 17964 (1996). As indicated with respect to long distance service, other factors such as customer "churn" would demonstrate further the competitive nature of this service.

[51] Teleport, FCC 98-169, at ¶ 30.

[52] Id. In 1996, MCI had a market share of 20.3%, Sprint a market share of 8.9% and WorldCom a market share of 4.4%. Trends in Telephone Service, February 1998, at 26. Carriers other than the largest four international telephone service providers earned 18.1% of the revenues in this market. Id.

[53] Teleport, FCC 98-169, at ¶ 30.

United States.[54] Although AT&T is one of the largest providers of wireless mobile telephone services, and TCI currently holds indirectly a minority interest in Sprint's PCS ventures, the Merger will not pose any threat to competition or result in a violation of the FCC's rules.[55]

TCI, through certain subsidiaries, currently holds a minority interest in partnerships that operate Sprint's PCS business, including Sprint's domestic PCS wireless mobile telephone service.[56] TCI originally obtained this interest as part of a plan by Sprint and several cable television companies to build a national wireless and cable telephone network that would have combined Sprint's wireless technology with the cable companies' local networks. The plan to associate Sprint's wireless facilities and the cable networks has been abandoned, however, and, independent of its decision to merge with AT&T, TCI and other cable partners entered into a series of agreements with Sprint providing for a restructuring of their interests in Sprint's PCS operations. The restructuring will reduce significantly TCI's voting and equity interests in the Sprint Ventures, provide TCI with liquidity for its interest in Sprint's PCS ventures, and eliminate any active management or day-to-day operational role for TCI in those PCS ventures.

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[54] The licenses held by AT&T Wireless are a matter of record in its FCC Forms 430 filed at the FCC, and have been identified in an attachment to the FCC Form 704 applications seeking FCC consent to the instant Merger. AT&T Wireless' largest CMRS areas include New York City, Miami, Dallas, Seattle, Pittsburgh, Minneapolis, Portland, Tampa, Denver and Sacramento.

[55] Section 20.6 of the FCC's rules generally limits to 45 MHz the amount of broadband CMRS spectrum that a may be "attributable" to any licensee with significant overlap in any geographic area. 47 C.F.R. § 20.6(a). Any stock interest amounting to 20 percent or more of the equity, or outstanding stock, or outstanding voting stock of a broadband PCS, cellular or Specialized Mobile Radio ("SMR") licensee is "attributable." Id. § 20.6(d)(2).

[56] See supra at 8-10 & n.15.

Specifically, as part of Sprint's PCS restructuring, TCI will exchange its current partnership interests for Sprint PCS Tracking Stock amounting to a 2.38% voting interest and a 23.8% equity ownership interest in Sprint's PCS business.[57] TCI's Sprint PCS Tracking Stock will constitute less than a 1% voting interest in Sprint's outstanding capital stock. As a condition of restructuring, Sprint will conduct a public offering to raise between $500 and $525 million, to be invested in its PCS business. This offering will dilute TCI's interest even further, probably to a voting interest of less than 1% of the Sprint PCS Tracking Stock.[58] Moreover, under the terms of the restructuring agreement, TCI will receive rights to register for sale its stock in Sprint's PCS venture on a priority basis, beginning on the later of either (i) 90 days after Sprint PCS completes its initial public offering or (ii) 180 days after the restructuring is completed. Thus, when the restructuring takes place as anticipated, TCI will have the ability after the Merger to sell part or all of its interest in Sprint's PCS business in a timely and economically reasonable manner.[59]

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[57] The FCC already has approved the transactions that are proposed for Sprint's restructuring of its PCS ventures. See Public Notice, Report No. LB-98-65, released August 31, 1998.

[58] The initial public offering is a condition of the restructuring, and depending on the specific terms of the offering, will reduce TCI's equity interest in the Sprint PCS Tracking Stock to near 20%.

[59] TCI's sale of its investment immediately, however, would be ill-advised and actually hurt competition in the provision of wireless mobile telephone services. As indicated above, as part of its restructuring, Sprint is seeking to obtain large amounts of new capital to complete its nationwide PCS network, which will help to improve its ability to compete with, among others, AT&T. Requiring TCI to sell its interest likely would dilute significantly the value of new Sprint stock in the market, thereby impairing Sprint's ability to raise capital by issuing new stock. Under the restructuring agreement, TCI therefore has agreed, among other things, to remain a passive investor in Sprint's PCS ventures until the restructuring is completed. Any attempt by TCI to force a sale before Sprint's PCS restructuring is completed would harm competition in CMRS, and could result in a suit for specific performance for a breach of TCI's contractual obligations.

Additionally, for any time after the Merger that the Liberty Media Group retains its interest in Sprint PCS, AT&T Consumer Co will operate its CMRS business independently from Liberty Media Group's minority financial investment interest in Sprint PCS. As described above, following the Merger, the Sprint investment will be held by the Liberty Media Group, and therefore will be insulated from AT&T Wireless' CMRS business.[60] The Agreement thus eliminates any operational or financial link between AT&T Wireless and the Liberty Media Group's potential interest in Sprint PCS, making inapplicable the concerns underlying the FCC's spectrum aggregation limits in Section 20.6 of its rules.[61]

Nevertheless, and regardless of whether the FCC determines that TCI's interest in Sprint and AT&T's interest in AT&T Wireless should be aggregated subsequent to the Merger, AT&T will come into compliance with Section 20.6 in either of two ways, depending upon the

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[60] See supra at 10-13. As noted above, Liberty Media Group will be separately managed from the Common Stock Group and AT&T Consumer Co. Among other things, for at least the first seven years after the Merger, designees of TCI appointed prior to the Merger will make up a majority of the Board of Directors of LMC, and cannot be removed by AT&T except for cause. Additionally, the separate groups can compete with each other in their lines of business and have no obligation to provide financial support or share corporate opportunities.

[61] There are a number of reasons why TCI's interest after Sprint's restructuring would not be attributable to AT&T, or, if attributable, why the FCC could waive any prohibited cross-interest. See 47 C.F.R. § 20.6(d) & note 3. First, TCI's *voting* interest in Sprint PCS Tracking Stock is far less than the 20% voting interest that triggers attribution of TCI's interest in Sprint to AT&T. 47 C.F.R. § 20.6(d)(ii). Second, TCI's 23.8% passive *equity* interest in Sprint's PCS Tracking Stock need not trigger attribution to AT&T, because the Liberty Media Group which will hold stock in Sprint will be operated and tracked separate from the Common Stock Group and AT&T Consumer Co, which will hold AT&T Wireless' CMRS business. Third, Liberty Media group will not be involved in the operations of the Sprint PCS ventures and will not be in a position to influence Sprint PCS on a regular basis. Finally, any restrictions on the sale of TCI's interest in Sprint PCS were imposed to provide Sprint with the better opportunity to raise capital for its PCS operations, and thus increase its ability to provide service.

timing of the consummation of the Merger and the planned Sprint restructuring. First, after the Merger and the restructuring, pursuant to its registration rights with respect to the Sprint PCS stock, the Liberty Media Group could sell a part of its interest in Sprint PCS and bring its equity interest below 20%.[62] See 47 C.F.R. § 20.6(e). Second, the Liberty Media Group could place the Sprint PCS stock into a qualifying voting trust pending such a sale. Id. § 20.6(d)(ii). In either event, given the proposed Sprint restructuring, regardless of the FCC's interpretation of the application of Section 20.6 to post-Merger AT&T, AT&T would come into compliance with the FCC's spectrum aggregation limits. Alternatively, if the Sprint restructuring does not occur as planned, in order to facilitate Sprint's raising of capital for its PCS business, the FCC could grant an appropriate temporary waiver until such time as the Liberty Media Group could sell its Sprint PCS stock on commercially reasonable terms that would not adversely impact Sprint's ability to raise capital.[63]

TCI has no other presence in wireless mobile telephony, and, given the restructuring of its interest in Sprint's PCS ventures, is not currently a potential provider of

[62] As an initial matter, Sprint's restructuring will reduce TCI's voting interest in Sprint PCS Tracking Stock below 3%, and any subsequent public offerings will reduce TCI's equity interest in that stock below 23.8%.

[63] The Sprint restructuring and its timing are subject to other conditions, including Sprint stockholder approval and completion of an initial public offering, that are beyond the control of AT&T. Any temporary waiver that would be necessary as a result of changes or delays in Sprint's restructuring would enhance competition for wireless mobile telephone services by preserving Sprint's ability to raise capital needed to make it a more effective competitor. The duration of any such waiver would be governed by the timing of Sprint PCS's restructuring and its public offering.

wireless mobile telephone services absent the Merger.[64] For this reason, the Merger will not harm competition for wireless mobile telephone services. Moreover, wireless mobile telephone service is an intensely competitive business. In each local service area, there are at least five, and possibly more, CMRS competitors. Two cellular service providers with at least 25 MHz are licensed in each service area, and three PCS service providers with at least 30 MHz are licensed in each service area. Other CMRS providers are viable entrants and providers of competitive service, including national SMR service operators such as Nextel Communications, and other licensees of D, E and F Block PCS Spectrum. At least one of these competitors is an incumbent LEC cellular service provider. Accordingly, the Merger should not increase the likelihood of either unilateral action by a dominant player or concerted action among competitors.

5. Multichannel Video Programming Distribution Services.

Although TCI-C is one of the largest providers of cable television service in the United States, AT&T does not compete in the distribution of multichannel video programming and had no plans to enter this business prior to its Agreement to merge with TCI. In 1996, AT&T had entered into an agreement with DirecTV, then a nascent DBS system owned primarily by Hughes Electronics Corporation. In return for its investment of $140 million, AT&T received a 2.5% equity interest and the exclusive right to market DirecTV to AT&T's customers. In

[64] TCI and the other cable companies that initially invested in the Sprint Ventures have entered into "standstill" agreements with Sprint, dated May 26, 1998, under which TCI and its affiliates may not either acquire voting securities in Sprint before the restructuring closes, or for 10 years after the restructuring closes, if such acquisition would lead to TCI holding more than 1.5% of the then outstanding voting securities of Sprint.

December of 1997, however, prior to these merger discussions with TCI and for business reasons that were unrelated to the Merger, AT&T sold its entire interest in DirecTV back to one of Hughes' subsidiaries.[65]

Second, there are numerous actual and potential competitors in the business of multichannel video programming distribution ("MVPD") that currently would be "at least as significant a force" as AT&T in the MVPD service. More than 12 million television homes currently receive service from alternative MVPD providers, including DBS providers such as DirecTV, which is now the nation's largest DBS service provider. That figure is expected to increase by at least 50%, and perhaps double, by the year 2000.[66] Moreover, ILECs are previously precluded competitors that can be expected to compete for MVPD customers. Ameritech, for example, has constructed and commenced the provision of cable television service in parts of Michigan, Ohio and Illinois.

Indeed, the Merger is likely to encourage competition by accelerating the ILEC's plans for the distribution of their multichannel video programming services. As a result of the Merger, within the next several years, AT&T likely will be able to provide packaged (and separate) voice and video services to residential consumers. Although ILECS such as Ameritech

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[65] Among other things, experience proved that the costs of marketing DirecTV were much higher, and the subscription rates through AT&T were much lower, than had been initially projected, rendering the venture unprofitable for AT&T.

[66] See NCTA Comments, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, Notice of Inquiry, CS Docket No. 98-102, filed July 31, 1998, at 6; Cablevision: The Handbook for the Competitive Market, Vol. III, 1998, at 10.

have begun the process of delivering video programming to the home, the Merger should provide additional motivation for the ILECs to expedite the provision of their own video service. The Merger thus should stimulate MVPD competition rather than restrain it.[67]

6. Video Programming.

The Merger will not adversely affect competition in the provision of video content and programming. As noted above, TCI, primarily through Liberty Media Corporation and also through indirect interests, has affiliates that provide video content and programming, including Discovery Communications, Inc.; BET Holdings, Inc.; Fox/Liberty Networks, LLC; QVC, Inc.; Encore Media Group and other programming sources. AT&T, however, does not produce video programming or content, and is not a likely new video programming provider absent the Merger. The Merger therefore will not in any way reduce the number of providers of video programming services.

Nor does the Merger pose the threat of creating a dominant player capable of exercising unilateral market action. First, Liberty Media Corporation does not possess majority voting control of any programmers, except Encore Media Group and TCI Music, Inc. Second,

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[67] Furthermore, more than 95% of all television markets are served by at least 5 local broadcast television stations that provide free over-the-air video programs, and most television markets in the United States are served by at least 10 free over-the-air television stations. Moreover, the over-the-air broadcast stations will launch digital service beginning in a few months, which will increase still further their competitive presence in the MVPD marketplace, as the transition to digital broadcasting is phased in for different broadcaster in different markets over the next several years.

numerous other actual competitors exist, including seven television networks (Disney/ABC, CBS, NBC, Fox, WB, UPN, and PaxNet), various independent television production companies, and many other cable programmers. AT&T currently has no ownership interest in these or any other programmers, and thus the Merger does not increase the likelihood that any group of programmers will be able to adversely affect competition for video programming through the exercise of concerted action.[68]

7. Internet Services.

Through its AT&T WorldNet service and the CERFNet service that it acquired with Teleport, AT&T provides Internet access to approximately 1.25 million customers, out of an estimated 40 to 50 million Internet service subscribers and 90 to 100 million Internet service users. As discussed above, TCI indirectly holds an interest in @Home, which provides content enriched, high-speed Internet cable services over a cable television network to less than 150,000 subscribers. In light of the relatively small size of the new AT&T and TCI Internet businesses and the highly competitive nature of this dynamic industry, the Merger will not have an adverse effect on competition for the provision of Internet access and content services.

As an initial matter, AT&T and @Home combined represent less than 3% of the estimated Internet customers in the United States, a figure dwarfed by numerous other actual and

[68] As discussed above, after the Merger, the video programming business of TCI will be held through the Liberty Media Group, which will be operated separately from the cable television operations of AT&T Consumer Co.

potential providers of Internet services. The nation's largest Internet service provider is WorldCom's UUNet, which provides Internet access and services to, among others, America OnLine ("AOL"), CompuServe and the Microsoft Network ("MSN"). AOL itself has 12 million customers, nearly ten times AT&T's customers and 80 times the customers of @Home; CompuServe alone adds an additional 2 million customers to AOL's reach. For its part, MSN has approximately 1.4 million customers. Other significant Internet service providers include GTE Internetworking, PSINet, EarthLink Sprint Internet, MCI Internet, MindSpring Enterprises, Erols and NETCOM On-Line Communications Services, Inc. Another venture, "Road Runner," is also on its way to establishing itself as an Internet service competitor.[69] The ILECs also are developing competitive broadband Internet service businesses through their Asynchronous Digital Subscription Line ("ADSL") and Integrated Services Digital Network ("ISDN") services. Ameritech (Michigan and Illinois), BellSouth Communications (Southeast United States), and Bell Atlantic (Pennsylvania, New York, Massachusetts and the District of Columbia) all have current Internet service operations or have announced plans to offer such service within the next year. Finally, others, including SBC Communications and US West.net, provide service or can be expected to provide competitive service in the near future.

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[69] Road Runner, the owners of which include Time Warner (37%), MediaOne (34%), Microsoft and (10%) and Compaq (10%), has access to at least 27 million homes, although only approximately 7.5 million of those homes currently are passed by upgraded, two-way HFC cable.

C. **Conclusion.**

As is demonstrated above, the proposed Merger will not reduce competition in any service, but will promote competition for many, if not all, of these services. In particular, as a result of the Merger, AT&T and TCI plan to combine their complementary assets and expertise to produce new competition to ILECs with respect to the provision of residential local exchange and exchange access service. The Merger is likely to enable the post-Merger AT&T to mount more quickly a challenge to the dominant position currently held by ILEC service providers, thereby increasing competition for both the local residential and business telephone services. With respect to Internet services, the Merger should create a stronger participant that will provide new and differentiated services in an effort to challenge the more established competitors.

The Merger also will not adversely affect competition in the provision of other services provided by the Merger Parties. Competition in the provision of wireless mobile telephone services, multichannel video programming distribution services and video programming services will not be affected adversely, because only one of the Merger Parties is an actual or potential participant in the provision of these services. With respect to these services as well, the Merger will enhance competition rather than restrict it.