

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In re Applications of)	
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)	
MEDIA GROUP, INC.)	
Transferor,)	
)	
AND)	
)	
AT&T CORP.)	CS Docket No. 99-251
Transferee,)	
)	
For Consent to Transfer Control of Corporations)	
Holding Commission Licenses and Authorizations)	
Pursuant to Sections 214 and 310(d) of the)	
Communications Act)	

**COMMENTS
OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION**

**TELECOMMUNICATIONS
RESELLERS ASSOCIATION**

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SUMMARY

The Telecommunications Resellers Association, a national trade association representing more than 800 entities engaged in, or providing products and services in support of, telecommunications resale, hereby submits the following comments addressing the application of AT&T Corp. and MediaOne Group, Inc. for authority to transfer control of MediaOne to AT&T as part of a proposed merger of the two entities, pursuant to which AT&T is slated to become the parent company of MediaOne. While TRA does not oppose AT&T's purchase of MediaOne, it is strongly of the view that strict resale and network access conditions, as well as other open access requirements, must be imposed on the Commission's approval of that acquisition if the pro-competitive policies embodied in the Telecommunications Act of 1996 (ATelecommunications Act≡) are to be realized.

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TELECOMMUNICATIONS RESELLERS ASSOCIATION**

The Telecommunications Resellers Association ("TRA"),¹ through undersigned counsel and pursuant to Public Notice, DA 99-1447 (released July 23, 1999), hereby submits the following comments addressing the application ("Application") of AT&T Corp. (AAT&T≡) and MediaOne Group, Inc. (AMedia One≡) (collectively, the AApplicants≡) for authority to transfer

¹ A national trade association, TRA represents more than 800 entities engaged in, or providing products and services in support of, telecommunications resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry and to protect and further the interests of entities engaged in the resale of telecommunications services. TRA is the largest association of competitive carriers in the United States, numbering among its members not only the large majority of providers of domestic interexchange and international services, but the majority of competitive local exchange carriers, as well.

control of MediaOne to AT&T as part of a proposed merger of the two entities, pursuant to which AT&T is slated to become the parent company of MediaOne. While TRA does not oppose AT&T's purchase of MediaOne, it is strongly of the view that strict resale and network access conditions, as well as other open access requirements, must be imposed on the Commission's approval of that acquisition if the pro-competitive policies embodied in the Telecommunications Act of 1996 (ATelecommunications Act²) are to be realized.²

² Pub. L. No. 104-104, 110 Stat. 56 (1996).

The instant Application reflects AT&T's second acquisition of a major multi-system cable television (ACATV) system operator,³ providing AT&T, through multiple joint venture arrangements⁴ and upon consummation of its merger with MediaOne, with almost access to more than 40 million homes, representing nearly 50 percent of U.S. households.⁵ Coupled with AT&T's acquisition of Teleport Communications Group Inc. (ATeleport), which at the time of its purchase by AT&T was the nation's largest competitive local exchange carrier, with local telephone networks operational or under construction in 83 metropolitan areas in 28 states⁶ and which roughly a year ago maintained local access networks reaching more than 250 cities nationwide,⁷ and AT&T's ownership and operation of AT&T Wireless Services (AT&T Wireless), which, through an integrated network of cellular and personal communications (APCS) systems, provides wireless telecommunications services to markets covering 93 percent of the U.S. population, including 26 of

³ Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee (Memorandum Opinion and Order), 14 FCC Rcd. 3160 (1999).

⁴ AAT&T-Time Warner Telephone Deal Prompts Bells to Cry Foul over Restrictions on Long Distance, Telecommunications Reports, Vol. 65, No. 6, pp. 6 - 7 (February 8, 1999); AAT&T Forms Five Joint Ventures to Boost Planned Phone Service, Telecommunications Reports, Vol. 65, No. 2, pp. 36 - 37 (January 11, 1999).

⁵ Description of the Transaction, Public Interest Showing and Related Demonstrations at 62 - 63 (APublic Interest Statement); AAT&T-Time Warner Telephone Deal Prompts Bells to Cry Foul over Restrictions on Long Distance, Telecommunications Reports, Vol. 65, No. 6, pp. 6 - 7 (February 8, 1999).

⁶ Application of Teleport Communications Group, Inc. and AT&T Corp. for Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services (Memorandum Opinion and Order), 13 FCC Rcd. 15236 (1998).

⁷ Description of the Transaction, Public Interest Showing and Related Demonstrations, filed in CS Docket No. 98-178 on September 14, 1998 at 5.

the Nation's 30 largest metropolitan areas,⁸ AT&T's prospective acquisition of MediaOne would render its control of local Abottleneck facilities comparable in scope and scale to that of the largest incumbent local exchange carriers (ALECs). Viewed in conjunction with its control of a majority of the interexchange market,⁹ AT&T joins the largest incumbent LECs as the only entities uniquely positioned to provide a fully integrated telecommunications service package comprised of local exchange, interexchange, international, wireless and broadband services.

Exclusive access by a single entity to essential telecommunications facilities in markets throughout the Nation, TRA submits, is clearly antithetical to the Congressional goal of open and competitive telecommunications markets. Congress did not enact the Telecommunications Act merely to create a local exchange duopoly which would ultimately threaten competition in ancillary telecommunications markets such as the interexchange and broadband markets. In approving the AT&T/MediaOne merger, the Commission must act to ensure that the Congressional

⁸ Public Interest Statement at 8.

⁹ Zolnierek, J., Rangos, K., Eisner, J., Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Long Distance Market Shares Fourth Quarter 1998, Table 3.1 (March, 1999)

vision of a robust telecommunications marketplace populated by numerous service providers is realized.

I. The Merger Must Not Frustrate Federal Telecommunications Policy

Pursuant to Title II and Title III of the Communications Act of 1934, as amended [(Communications Act)], the Commission must review the Applicants' requests to transfer the certificates, licenses, and authorizations involved in this proposed merger and determine whether the transfer serves the public interest, convenience and necessity.¹⁰ Aware that competition is shaped not only by antitrust rules, but by the regulatory policies that govern the interaction of firms inside the industry," the Commission has recognized that the public interest analysis it must undertake pursuant to Sections 214(a) and 310(d) of the Communications Act, 47 U.S.C. §§ 214(a) & 310(d), is not . . . limited by traditional antitrust principles.¹¹ As described by the Commission, A[t]he [Communications Act] public interest standard, and the competitive analysis conducted thereunder, are necessarily broader than the standard applied to ascertain violations of the antitrust laws.¹² As explained by the Commission, A[a]n antitrust analysis . . . focuses solely on whether a proposed merger will harm competition, while the public interest review it must undertake encompasses the

¹⁰ Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985, & 29 (1997).

¹¹ Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee (Memorandum Opinion and Order), 14 FCC Rcd. 3160 at & 14.

¹² Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd.

broad aims of the Communications Act.¹³ Moreover, unlike enforcement actions involving the antitrust laws, A[u]nder the public interest standard, the burden of proof is on the applicant, not the Commission.¹⁴

19985 at & 32.

¹³ Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee (Memorandum Opinion and Order), 14 FCC Rcd. 3160 at & 14.

¹⁴ Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at & 32.

The Commission must find A[a]t a minimum . . . that the merger does not interfere with the objectives of the Communications Act,≡ and determine as well that it would not Afrustrate . . . federal communications policy.≡¹⁵ Because A[t]hat policy is . . . shaped by Congress and deeply rooted in a preference for competitive processes and outcomes,≡¹⁶ the public interest standard applied by the Commission must necessarily encompass the goal Aexpressed in the 1996 Act to establish a >pro-competitive, deregulatory national policy framework designed to . . . open[] all telecommunications markets to competition=≡¹⁷ Couched differently, the Commission must determine Awhether the merger will support the general policies of market-opening and barrier-lowering that underlie the 1996 Act.≡¹⁸ AIn addition, under the public interest standard, the Commission may consider the trends within and needs of the industry, the factors that influenced Congress to enact specific provisions for a particular industry, and the complexity and rapidity of change in the industry.≡¹⁹ Moreover, the Commission should Aalso examine whether the proposed merger has vertical effects that enhance market power.≡²⁰

¹⁵ Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee (Memorandum Opinion and Order), 14 FCC Rcd. 3160 at & 14.

¹⁶ Id.

¹⁷ Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp.. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at & 37.

¹⁸ Id.

¹⁹ Id. at & 31.

²⁰ Id. at & 37.

As the Commission has recognized, A[t]he Communications Act permits the Commission to impose such conditions [on a proposed merger] as are necessary to serve the public interest.²¹ Thus, Section 214(c), 47 U.S.C. § 214(c), authorizes the Commission to attach to a certificate of public convenience and necessity Asuch terms and conditions as in its judgment the public convenience and necessity may require.≡ Likewise, the Commission may grant an application for transfer of control of a permit or license subject to compliance with such conditions as the Commission determines are necessary for the transfer to be in the public interest.²² And Section 303(r), 47 U.S.C. § 303(r) authorizes the Commission to Aprescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of . . . [the Communications] Act.≡ Utilizing this authority, the Commission has imposed conditions not otherwise expressly required by law or regulation on such mergers as those involving Bell Atlantic

²¹ Id. at & 29.

²² 47 C.F.R. § 1.110.

Corporation and NYNEX Corporation,²³ and WorldCom, Inc. and MCI Communications Corporation.²⁴

II. The Telecommunication Act Was Intended To Open Local Markets Broadly to Competition

²³ Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries (Memorandum Opinion and Order), 12 FCC Rcd. 19985 at && 180 - 200.

²⁴ Application of WorldCom, Inc., and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc. (Memorandum Opinion and Order), 13 FCC Rcd. 18025, && 151 - 152, 227 (1998).

As the Commission has recognized, A[t]he fundamental objective of the 1996 Act is to bring to consumers of telecommunications services in all markets the full benefits of vigorous competition.²⁵ To achieve this end, Congress mandated the Aopening of all telecommunications markets to *all providers*,²⁶ reasoning that multiple providers operating in multiple markets would Ablur traditional industry distinctions and bring new packages of services, lower prices and increased innovation to American consumers.²⁶ As envisioned by the Commission, Aproviders of various telecommunications services . . . [would] be able to enter each other=s markets and provide various services in competition with one another,²⁷ offering consumers Athe ability to purchase local, intraLATA, and interLATA telecommunications services, as well as wireless, information, and other services, from a single provider (i.e., >one stop shopping=), and other advantages of vertical integration.²⁷ Thus, A[t]he world envisioned by the 1996 Act is one in which *all providers* will have new competitive opportunities as well as new competitive challenges.²⁸

²⁵ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905, & 7 (1996), *recon.* 12 FCC Rcd. 2297 (1997), *remanded in part sub nom. Bell Atlantic Tel. Cos. v. FCC*, Case No. 97-1067 (D.C. Cir. Mar. 31, 1997), *further recon on remand* 12 FCC Rcd. 15756 (1997), *aff=d sub nom Bell Atlantic Tel. Cos. v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997).

²⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499, & 4 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, 12 FCC Rec. 12460 (1997), *aff/d/vacated in part sub. nom. Iowa Util. Bd v. FCC*, 120 F.3d 753 (1997), *writ of mandamus issued* 135 F.3d 535 (8th Cir. 1998), *aff/d/vacated in part sub. nom. AT&T Corp., et al. v. Iowa Utilities Board*, 119 S.Ct. 721 (1999) (emphasis added).

²⁷ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905 at & 7.

²⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at & 4 (emphasis added).

To achieve these Amarket-opening and barrier-lowering≡ objectives, Congress, recognizing that Athe removal of statutory and regulatory barriers to entry into the local exchange and exchange access markets, while a necessary precondition to competition, . . . [was] not sufficient to ensure that competition will supplant monopolies,≡ mandated the removal of Athe most significant economic impediments to efficient entry into the monopolized local market.≡²⁹ These economic impediments Congress identified as Aeconomies of density, connectivity, and scale≡ enjoyed by incumbent local exchange carriers (ALECs≡).³⁰ To facilitate competitive entry, Congress directed that Athese economies be shared≡ through imposition of Section 251(c) network interconnection, network unbundling and resale coupled with prescribed wholesale discounts.³¹ As described by the

²⁹ Id. at && 10 - 11.

³⁰ Id. at & 11.

³¹ Id. at && 11 - 12.

Commission, Section 251(c), because of its Acentral importance . . . to opening local markets to competition, is a Acornerstone[] of the framework Congress established in the 1996 Act.³²

ASection 251 neither explicitly nor implicitly expresses a preference for one particular entry strategy.³³ As Congress correctly recognized, A[i]t is essential for local competition that the various methods of entry into the local telecommunications market contemplated by the Act -- construction of new facilities, purchase of unbundled network elements, and resale -- be truly available.³⁴ This is because of Athe likelihood that entrants will combine or alter entry strategies over time.³⁵

Resale has proven to be the initial entry strategy of choice in most markets, for most carriers. It remains the most common service strategy among smaller providers and in less densely populated markets. Use of unbundled network access is most common among carriers that have introduced some of their own facilities and should become more prevalent once AUNE-platforms≡ become more ubiquitously available. Network interconnection as an entry strategy is limited to the most concentrated sectors of the largest markets, with subscriber loops presenting the single largest obstacle to full facilities-based competition. As the Commission has recognized, local loops are the

³² Deployment of Wireline Services Offering Advanced Telecommunications Capability (Memorandum Opinion and Order), 13 FCC Rcd. 24011, & 76 (1998), *recon. pending, petition for review filed U S WEST Communications, Inc. v. FCC*, Case No. 98-1410 (D.C.Cir. April 5, 1999).

³³ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at & 12.

³⁴ Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543, & 21 (1997).

³⁵ Id.

quintessential monopoly asset, underlying the economies of density, connectivity, and scale that the Telecommunications Act was principally designed to address.³⁶

³⁶ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (Second Further Notice of Proposed Rulemaking), CC Docket No. 96-98, FCC 99-70, & 32 (released April 16, 1999).

In short, Congress envisioned, and adopted measures designed to facilitate the emergence of, a dynamic local exchange market, populated by numerous carriers, including both large and small providers. As noted above, bringing the full benefits of vigorous competition to consumers of telecommunications in all markets was the fundamental objective of the Telecommunications Act.³⁷ Only by allowing all providers to enter all markets will the Congressional vision of vigorous competition be realized.³⁸ Markets populated by a few large providers tend to be competitively stagnant, with dynamism introduced only through entry by aggressive new competitors. Thus, the Commission has recognized that "in markets that have not achieved full competition," an active resale market helps to replicate many of the features of competition . . . [and] hastens the arrival of competition by speeding the development of new competitors."³⁹ Resale, more often than not undertaken by small entities which are able to serve narrower niche markets that may not be easily or profitably served by large corporations,⁴⁰ drives competition by encouraging competitive pricing, . . . discouraging unjust, unreasonable, and unreasonably discriminatory carrier practices, . . . promoting innovation and the efficient deployment and use of telecommunications facilities, . . . improving carrier management and

³⁷ Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905 at & 7.

³⁸ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at & 4.

³⁹ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 11 FCC Rcd. 18455, & 10 (1996), *pet. for recon pending, aff=d sub nom. Cellnet Comm. v. FCC*, Case No. 96-4022 (6th Cir. July 7, 1998).

⁴⁰ Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), GN Docket No. 96-113, FCC 96-216, & 6 (1996).

marketing, . . . generat[ing] increased research and development, and . . . positively affect[ing] the growth of the market for telecommunications services.⁴¹

Put differently, Congress did not adopt the Amarket-opening and barrier-lowering provisions of the Telecommunications Act to substitute a duopoly or a staid oligopoly for the existent monopoly. Rather, Congress intended that all telecommunications markets be opened to Arobust competition.⁴²

III. The Very Reasons Cited By AT&T And MediaOne For Approving The Proposed Acquisition Argue Strongly For Strict Conditions On That Action

As justification for their merger, AT&T and MediaOne emphasize the unique competitive position AT&T will occupy in the local telephone market following its acquisition of MediaOne, highlighting in so doing AT&T=s enhanced ability to compete with the incumbent LECs given its access to local CATV connections into nearly 50 percent of American homes. Certainly, TRA does not disagree with the Applicants that AT&T will be far better able than other alternative providers of local exchange service to compete with the incumbent LECs given its ownership of, and joint venture access to, CATV facilities throughout the Nation. TRA submits, however, that the very reasons argued most strongly by AT&T and MediaOne for Commission approval of their proposed merger argue with equal strength for imposition of resale and network unbundling obligations, as well as other open access requirements, on AT&T comparable to those currently imposed on the incumbent LECs.

⁴¹ Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services, 11 FCC Rcd. 18455 at & 11

⁴² Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905 at & 13.

AT&T and MediaOne declare that Amore than three years after the passage of the 1996 Act, incumbent local exchange carriers (AILECs≡) retain monopoly control over local exchange and exchange access service areas nationwide,≡ stressing that Acompetition for residential and small business (A $\text{mass market}\equiv$) local exchange and exchange access service has been virtually nonexistent.≡⁴³ TRA concurs with the Applicants' assessment, agreeing as well that the manifest explanation for this limited competitive intrusion into what the Commission has correctly characterized as Aone of the last monopoly bottleneck strongholds in telecommunications≡⁴⁴ is "the ILECs' continued abuse of their bottleneck networks."⁴⁵ Moreover, TRA agrees with AT&T and MediaOne that this disturbing circumstance is unlikely to change dramatically until either enforcement pressure sufficient to compel compliance with statutory market-opening obligations is brought to bear on the incumbent LECs, or a sufficient number of facilities-based providers enter the local exchange market to create a vibrant wholesale market for local services.

⁴³ Public Interest Statement at 2 - 3.

⁴⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (First Report and Order), 11 FCC Rcd. 15499 at & 4.

⁴⁵ Public Interest Statement at 21.

TRA further agrees with AT&T and MediaOne that AT&T's access to CATV facilities, both through its acquisition of Tele-Communications, Inc. ("TCI") and MediaOne and its various joint venture arrangements with Time Warner, Inc. and a number of TCI affiliates, will position it as by far and away the most potent competitor facing the incumbent LECs in the local market. As the Applicants point out, and the Commission has previously recognized, CATV system operators possess an essential competitive asset -- *i.e.*, "the 'second wire' into most homes " -- not possessed by any provider of local exchange service other than the incumbent LECs.⁴⁶ AT&T, on the other hand, is indeed "one of only a few firms that possesses the experience, brand name, assets and financial resources that are essential for quick and substantial entry into the retail residential local exchange and exchange access markets."⁴⁷

⁴⁶ Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee (Memorandum Opinion and Order), 14 FCC Rcd. 3160 at & 48; Public Interest Statement at 22.

⁴⁷ Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee (Memorandum Opinion and Order), 14 FCC Rcd. 3160 at & 47; Public Interest Statement at 21 - 22.

The combination of these complementary assets will, as the Applicants detail, allow MediaOne, as it will TCI and AT&T's CATV joint venture partners, to overcome "lack of brand recognition, and, accordingly, consumer confidence, as . . . provider[s] of telecommunications services," "relative lack of telephone network management expertise," absence of "telephone marketing and customer care experience," and assorted technological and infrastructure limitations and inefficiencies.⁴⁸ AT&T, of course, will now be able to overcome incumbent LEC resistance to competitive entry by securing "last mile" access to local subscribers from its CATV subsidiaries and partners. Moreover, as described by the Applicants, AT&T will obtain economies of scale and scope as its local service "footprint" expands to encompass an area equivalent to that served by SBC Communications Inc. ("SBC") and its proposed merger partner, Ameritech Corporation ("Ameritech").⁴⁹ Indeed, the Applicants acknowledge that with a footprint comparable to that of a number of the largest incumbent LECs, AT&T can "achieve the same economies of scale, and . . . compete on an equal footing with, ILECs."⁵⁰

TRA, accordingly, does not dispute that AT&T's acquisition of MediaOne will speed the availability of a competitive mass market local telecommunications alternative to consumers. Moreover, TRA recognizes that this benefit would not be achieved absent AT&T's purchase of MediaOne and TCI, and its various CATV joint venture arrangements. Replication of existing CATV infrastructure on a wide scale would be, as described by the Applicants, "economically infeasible."⁵¹

⁴⁸ Public Interest Statement at 22 - 26.

⁴⁹ Id. at 26 - 28.

⁵⁰ Id. at 28.

⁵¹ Id. at 31.

And CATV system operators, for the many reasons identified by Applicants, lack the wherewithal to compete effectively against the incumbent LECs in the local telephone market.

Hence, TRA does not dispute that, on one level, AT&T's acquisition of MediaOne, like its earlier purchase of TCI, is pro-competitive; a duopoly, by definition, involves more competition than a monopoly. But as the Commission recognized in awarding only two cellular licenses per market, a duopoly offers only a "marginal amount of facilities-based competition."⁵² As described by the U.S. Department of Justice, the cellular market populated by only two facilities-based providers is not a model of dynamic competition:

⁵² Cellular Communications Systems, 86 FCC 2d 469, & 19 (1981), *modified* 89 FCC 2d 58 (1982), *further modified* 90 FCC 2d 571 (1982), *appeal dismissed sub nom. United States v. FCC*, Case No. 82-1526 (D.C. Cir. May 3, 1973).

The Department's extensive investigations into the cellular industry . . . indicate that cellular duopolists have substantial market power. . . . The basic structural problem with cellular markets is well known -- the fact that they are and have been duopolies with (at least until very recently) absolute barriers to entry. While the FCC's decision to issue two cellular licenses -- rather than only one -- was motivated by a desire to stimulate competition, . . . two firm markets are not particularly competitive.⁵³

The issue the Commission must address here is not, therefore, whether there is a pro-competitive element to AT&T's acquisition of MediaOne, but rather, whether a "marginal amount of facilities-based competition" is consistent with the Congressional intent evidenced in the Telecommunications Act. Did Congress envision a telecommunications landscape in which the only viable competitive provider of local exchange service for nearly 50 percent of American homes would be a Bottleneck provider with a local service "footprint" equal to the combined service areas of three of the original seven regional Bell Operating Companies ("BOCs"), particularly if that entity also controlled a majority of the long distance market, as well as local networks reaching more than 250 cities nationwide and wireless systems covering 93 percent of the U.S. population, including 26 of the 30 largest metropolitan areas? Did Congress intend for local telephone markets throughout the Nation to be dominated by two providers which would likely then come to dominate ancillary service markets, such as the long distance and broadband markets, as well?

TRA believes that this latter scenario will come to pass unless resale and network unbundling, and other open access obligations, comparable to those currently imposed on the incumbent LECs are imposed here on AT&T as a condition to Commission approval of its acquisition of MediaOne. While the incumbent LECs will remain obligated to provide unbundled access to their

⁵³ Implementation of Section 602(B) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions with Respect to Commercial Mobile Services (First Report), 10 FCC Rcd. 8844, & 65 (1995) (*citing* Memorandum of the United States in Response to the Bell Companies' Motions for Generic Wireless Waivers, submitted in United States v. Western Electric Co., Civ. Action No. 82-0192 (HHG) (D.D.C. July 25, 1994).

networks and to make their services available at wholesale rates for resale whether or not AT&T is subjected to like requirements, TRA submits that the recalcitrance exhibited to date by the incumbent LECs in complying with these requirements will only increase if their principal competitor is not equally constrained. The limited competitive inroads Applicants point to as necessitating their merger will increase significantly only to the extent that AT&T acquires market share; other competitors may well see an erosion of market share as AT&T begins to offer a full array of services they are unable to match.

TRA's resale carrier members have been able to compete effectively against AT&T in the interexchange market because they have been able to offer a menu of services comparable to that provided by AT&T, while besting AT&T with respect to price and customer service. They cannot compete effectively against AT&T, either in the local market or for that matter in the long distance or broadband market, if AT&T, through unfettered use of the "second wire" offers an integrated package of local exchange, interexchange, international, wireless and broadband services while they are left with such service offerings as can be secured through, and in spite of, the incumbent LECs.

The Commission had it right when it declared that the Telecommunications Act "fundamentally change[d] telecommunications regulation" by creating a "procompetitive paradigm."⁵⁴ The linchpin of this new regulatory paradigm is the requirement that "economies of density, connectivity, and scale" that derived from exclusive franchises and subscriber financed investment in infrastructure must be shared with new market entrants. Incumbent LECs, which "often held

⁵⁴ Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at && 1, 185.

exclusive franchises to serve their territories," and whose "ubiquitous network[s] [were] financed over the years by the returns on investment under rate of return regulation" were required to "share their networks in a manner that enables competitors to chose among three methods of entry into local telecommunications markets, including those methods that do not require a new entrant, as an initial matter, to duplicate the incumbents, networks."⁵⁵ Such action was deemed to be as critical to the introduction of local exchange competition as the elimination of legal and regulatory barriers to market entry.⁵⁶

Application of this "procompetitive paradigm" to the network of CATV systems created by AT&T is no less central to realization of the Congressional goal of "robust competition" in the provision of local telecommunications services. Like the local telephone networks of the incumbent LECs, CATV systems were "cordoned off from competition" for many years, constructed and operated as they were under exclusive franchises. And like the incumbent LECs' local telephone networks, CATV systems were funded and financed by captive subscribers whose alternatives were limited. While these features were not potent enough to drive Congress to impose open access requirements on CATV system operators in the Telecommunications Act, likely due to the many reasons cited by Applicants for MediaOne's limited success in entering the local telephone market, they warrant such action now because of the economies of scale and scope the marriage of AT&T and the CATV community have created.

⁵⁵ Id. at && 10 - 15; Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Michigan (Memorandum Opinion and Order), 12 FCC Rcd. 20543 at && 11 - 13.

⁵⁶ Id.

TRA will not attempt to argue here that AT&T is an incumbent LEC "successor or assign" under Section 251(h)(1), 47 U.S.C. § 251(h)(1), or that AT&T has "substantially replaced" the incumbent LECs under Section 251(h)(2), 47 U.S.C. § 251(h)(2). In TRA's view, such an analysis is not required here. The Commission may act under its broader authority to condition grants of authority to transfer Commission licenses, permits and other authorizations in such manner as may be necessary to achieve the "market-opening and barrier-lowering [policies] that underlie the 1996 Act." Just as the Commission has recognized that mergers among BOCs and other large incumbent LECs threaten the goals of the Telecommunications Act and has imposed conditions on such mergers so as not to "frustrate . . . federal communications policy" as "[t]hat policy is . . . shaped by Congress and deeply rooted in a preference for competitive processes and outcomes," so too should it condition its approval of AT&T's acquisition of MediaOne so as to ensure the emergence of "robust competition," the achievement of which is the "fundamental goal" of the Telecommunications Act.⁵⁷

Typically, TRA has had little sympathy for incumbent LEC pleas for symmetrical regulation, principally because of the absence of any balance in market power among competing providers of local exchange service. Treating incumbent and competitive LECs equally in the application of regulatory oversight and constraints generally cannot be justified because of the tremendous economies of scale, scope and density uniquely enjoyed by incumbent LECs. AT&T, through its control of the "second wire" across such a large service "footprint" has, however, achieved scale and scope economies comparable to those enjoyed by even the largest incumbent LECs. Symmetrical regulation of AT&T and the incumbent LECs hence is warranted, not to protect

⁵⁷ Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee (Memorandum Opinion and Order), 14 FCC Rcd. 3160 at & 14; Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934 (First Report and Order), 11 FCC Rcd. 21905 at & 13.

the competitive position of the incumbent LECs, but to accomplish the objectives Congress sought to achieve in imposing on incumbent LECs the various "market-opening and barrier-lowering" obligations it deemed necessary to foster competition in the local exchange market.

TRA recognizes that the Commission to date has been unwilling to subject AT&T and its CATV affiliates and joint venture partners to resale and network unbundling, and other open access, requirements comparable to those borne by the incumbent LECs. The Commission, however, has limited its consideration of this matter to the applicability to AT&T of Section 251(h), ultimately concluding that AT&T is not a "comparable carrier" thereunder. As noted above, TRA believes that such an analysis is far too narrow, failing to encompass the "broad aims of the Communications Act" the Commission acknowledges must be considered in its public interest analysis. Under this restricted approach, AT&T could acquire or partner with every CATV system operator in the Nation and not face regulatory requirements any more demanding than those imposed on the smallest competitive LEC. The case for imposition on AT&T of network unbundling and meaningful resale obligations, as well as other open access requirements, was strong in the context of its acquisition of TCI. Now, following its joint venture arrangements with Time Warner and a number of TCI affiliates, it is substantially stronger in the current context of its acquisition of MediaOne.

TRA, accordingly, urges the Commission to condition its approval of AT&T's acquisition of MediaOne upon performance by AT&T of the following:

! Make available for resale at wholesale rates calculated in accordance with Section 252(d)(3) of the Communications Act, 47 U.S.C. § 252(d)(3), local exchange and broadband services provided using the second wire into subscriber homes;

! Provide unbundled access to the "second wire" and the other components of its exchange/exchange access network at cost-based rates calculated in accordance with Section 252(d)(1) of the Communications Act, 47 U.S.C. § 252(d)(1);

! Provide interconnection to its local networks at any technically feasible point at cost-based rates calculated in accordance with Section 252(d)(1) of the Communications Act, 47 U.S.C. § 252(d)(1); and

! Afford any requesting Internet service provider nondiscriminatory access to its broadband facilities.

IV Conclusion

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to grant the Application of AT&T to acquire MediaOne, but to condition that grant in a manner consistent with the above.

Respectfully submitted,

**TELECOMMUNICATIONS
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CERTIFICATE OF SERVICE

I, Charles C. Hunter, do hereby certify that a true and correct copy of the foregoing document has been served by First Class Mail, postage prepaid, on the individuals listed below, on this 23rd day of August, 1999.

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