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

RECEIVED
AUG 23 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

In the Matter of AT&T Corporation and MediaOne Group, Inc. Applications for Transfer of Control	CS Docket No. 99-251

To: The Commission

COMMENTS OF ECHOSTAR SATELLITE CORPORATION

EchoStar Satellite Corporation ("EchoStar") hereby submits its Comments in the above-captioned request to transfer control of licenses and authorizations held by MediaOne Group, Inc. ("MediaOne") and its subsidiaries to AT&T Corporation ("AT&T"). EchoStar is a Direct Broadcast Satellite ("DBS") distributor that currently competes against both MediaOne and AT&T, after the latter's acquisition of Tele-Communications, Inc. ("TCI"), in the market for multi-channel video programming distribution ("MVPD") services.[1] In these comments, EchoStar requests that the Commission carefully examine the effect that the proposed merger will have on competition in the markets for MVPD and integrated broadband services, as well as the impact that the proposed merger will have on the market for cable programming.

[1] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses MediaOne Group, Inc., Transferor to AT&T Corp., Transferee*, CS Docket No. 99-251, Application and Public Interest Statement (July 7, 1999) ("AT&T/MediaOne Application"). EchoStar's status as a competitor of MediaOne and AT&T makes it a "party in interest" under the Communications Act, 47 U.S.C. § 309(d)(1), and the Commission's precedent.

No. of Copies rec'd 0+5
List ABCDE

I. THE COMMISSION SHOULD CONDITION APPROVAL OF THE PROPOSED TRANSFER OF CONTROL ON A COMMITMENT BY AT&T AND MEDIAONE TO AFFORD ACCESS TO ITS BROADBAND CAPACITY ON REASONABLE TERMS FOR COMPETING MVPD PROVIDERS

AT&T's proposed acquisition of MediaOne will further strengthen the already formidable chokehold that AT&T holds on the capacity to provide integrated high-speed, high-bandwidth services to American consumers. While other parties to this proceeding will undoubtedly analyze the relevant numbers in extensive detail, AT&T's combined cable systems will, by any reasonable measure, pass a very significant percentage of U.S. households, possibly in excess of 60 percent. Given the very limited amount of competition in local MVPD markets – as the Commission recently observed, such markets "continue to be highly concentrated and characterized by substantial barriers to entry by potential MVPDs"[2] – the result of AT&T's expansive reach will be to give it a degree of broadband access to American households that competitors in the provision of integrated broadband services cannot possibly hope to achieve in the near future.

AT&T's nationwide broadband capacity will significantly raise the barriers to entry for other MVPD providers that seek to offer the integrated broadband service packages that consumers increasingly demand. As the Commission observed in its Fifth Annual Cable Report, "digital audio and digital, high-resolution video, as well as telephony and Internet access through cable modems are becoming high demand services that cable has the bandwidth capacity to offer ... Indications are that customers value receiving these services through 'one-stop shopping.'"[3] EchoStar, for its part, has tried to respond to the

---

2 *In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd. 24284 at ¶ 126 (1998) ("Fifth Annual Cable Report").

3 Fifth Annual Cable Report at ¶ 60. *See also In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, Report, 14 FCC Rcd. 2398 at ¶ 3 ("the demand for broadband capability
(Continued ...)

increasing demand for a package of video and interactive services by innovative products such as its DishPlayer service. On the other hand, EchoStar and all other DBS distributors simply lack the capability to compete against the TCI/MediaOne juggernaut in this regard: they do not have bi-directional broadband access to residential households and, as a result, cannot complement their current one-way video offerings with the kind of truly interactive, integrated broadband service packages that AT&T plainly envisions as the principal motivation for its recent spate of acquisitions.

By itself, AT&T's dominance of cable broadband would not be a significant cause for concern if there were reasonably available alternative methods of bringing broadband access to the home. As it stands, however, the near-time prospects for such alternative methods are quite limited. While the incumbent local exchange carriers have started to make significant investments in xDSL-capable loops, or have announced plans to do so, their nationwide reach remains very limited compared to cable-based broadband access.[4] Moreover, even if these systems were in place, it remains uncertain whether unaffiliated DBS distributors such as EchoStar would have access to these facilities. Other technologies, such as broadband satellite and terrestrial wireless technologies, either remain in the planning stages or have so far achieved only limited consumer reach.

In the meantime, however, AT&T's overwhelming control of residential broadband capacity will permit it to roll out integrated broadband services on a nationwide basis in the very short term – indeed, through its acquisition of TCI, it has already started to do so. Because AT&T's MVPD competitors do not

---

is growing rapidly") ("Advanced Services Report"); id. at ¶¶ 85-90 (1999) (describing how "demand for residential broadband is going to grow in coming years").

4 *See, e.g.*, Advanced Services Report at ¶¶ 54, 58 (estimated cable broadband subscriptions somewhere between 350,000 and 700,000; LEC broadband subscriptions approximately 25,000).

have reasonably available alternative methods of providing broadband access to the home, AT&T will be able to exercise its control over those facilities to provide a package of integrated broadband services that its MVPD competitors cannot possibly match. The result will be to hobble the ability of DBS providers and other MVPD providers to compete against AT&T's already dominant position in the MVPD market, and thereby limit the range of competitive alternatives that are available to consumers with respect to both MVPD and integrated broadband services. Moreover, given the tremendous cost of developing and deploying residential broadband systems on a nationwide basis, this is not a disability from which competitors could readily recover. Once AT&T is established as the dominant provider of nationwide broadband services to the home – as it almost certainly will be, particularly if the Commission approves the present transaction – the barriers for new entrants to that market are likely to be overwhelming.

As EchoStar first noted in its comments in the AT&T/TCI merger proceeding, the competitive disadvantage faced by AT&T's MVPD competitors is similar to, but actually more acute than, the disadvantage confronting Internet service providers (ISPs).[5] As the ISPs have argued in several proceedings before the Commission, there is a significant risk that AT&T will combine its unrivalled broadband access capabilities with its own Internet content, to the exclusion of alternative content sources. In the case of EchoStar and the rest of the MVPD market, however, the risk is in one sense even more serious, as AT&T (through TCI and, perhaps, MediaOne) already distributes its own highly-developed content (its programming packages) to a subscriber base of many millions of households, compared to AT&T's significantly more limited penetration of the market for Internet content. Unlike the market for Internet content – where AT&T is the "upstart" market entrant, albeit a formidable one – AT&T already

---

[5] *See In the Matter of AT&T Corporation and Tele-Communications, Inc. Applications for Transfer of Control*, CS Docket No. 98-178, Comments of EchoStar Satellite Corporation at 6 (October 29, 1998).

dominates the MVPD market. Thus, its ability to significantly foreclose competition from other MVPD providers is as simple as offering integrated service packages over the nationwide broadband capacity that it exclusively controls.

It is no secret that, as a general matter, the Commission has been optimistic about the prospects for competition in the provision of residential broadband services.[6] At the same time, however, the Commission has also recognized that it must "continue to monitor broadband deployment closely" to ensure that the goal of providing "reasonable and timely" broadband access to all Americans is fulfilled. *See* Section 706 of the Communications Act, P.L. 104-104, Title VII, § 706 (reproduced at 47 U.S.C. § 157). AT&T's proposed acquisition of MediaOne is precisely the type of event that should compel the Commission to reevaluate the basis for its general optimism about the future of broadband competition. Through this acquisition, AT&T will further entrench its already significant hold on residential broadband capacity and thereby forestall the emergence of competitive alternatives in this market.

Under these circumstances, the Commission should reconsider its previous disinclination to mandate broadband access and, in light of the overwhelming control of residential broadband capacity that this transaction will provide to AT&T, condition its approval of the transaction upon a commitment by the applicants to make these facilities available to competing MVPD distributors for the purpose of complementing their own broadband offerings, at least in those markets in which the applicants choose to bundle MVPD services with other advanced and basic communications offerings. Any such commitment should, of course, permit the applicants to provide such access on reasonable terms and conditions to be

---

6 *See, e.g.*, Advanced Services Report at ¶ 101 ("the record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers. On this basis we see no reason to action on this issue at this time.").

negotiated by the parties or, in the absence of such agreement, on terms and conditions prescribed by the Commission.[7]

In addition, the Commission should condition its approval of this transaction upon the applicants' acceptance of certain restrictions upon their ability to bundle MVPD services with advanced and basic telephone services. In particular, the Commission should prohibit the merged entity from imposing any sort of exclusivity requirement on its customers, and should also require the merged entity to offer its MVPD, advanced, and basic telephone services on a separate, unbundled basis, thus allowing consumers to turn to other distributors for their MVPD needs. Similarly, the Commission should bar the merged entity from imposing any direct or indirect restrictions that inhibit an AT&T customer from subscribing to another MVPD distributor or that provide the customer with substantial disincentives to do so (such as unwarranted price differentials between bundled and unbundled AT&T offerings, technical difficulties in integrating AT&T services with other MVPD products, and the like).

The Commission's authority to impose these conditions is, of course, well established. Under Section 310(d) of the Communications Act, the Commission can only authorize the transfer of

---

7 It is important to note that the request for an open access condition with respect to the present transaction arises in a context of heightened concern compared to the request for a similar condition that EchoStar and many others submitted with respect to the AT&T/TCI merger. As the Commission recently observed in the amicus brief that it submitted to the Ninth Circuit in *AT&T Corp. v. City of Portland*, No. 99-35609 (9th Cir.) ("FCC Amicus Brief"), one of the principal reasons why the Commission declined to impose an open access requirement in the AT&T/TCI merger was because of TCI's representation that its customers would continue to be able to gain direct access to alternative providers of Internet services. Because "nothing would change as the result of the transfer of the licenses from TCI to AT&T," the Commission concluded that the imposition of conditions was inappropriate in that case. *See* FCC Amicus Brief at 14. In this instance, however, AT&T's acquisition of MediaOne, another MVPD, represents a massive horizontal concentration that could significantly foreclose competitive alternatives for MVPD and integrated broadband services. Thus, there is an even more direct nexus here between the harms that will result from the transaction under review and the condition that EchoStar is seeking to mitigate those harms.

MediaOne's licenses and authorizations if the transfer serves "the public interest, convenience, and necessity." 47 U.S.C. § 310(d). As the Commission has observed, this standard encompasses the "broad aims of the Communications Act," including, *inter alia,* the "promotion of the competition policies of the Sherman and Clayton Acts, and enhancing access to advanced telecommunications and information services in all regions of the Nation."[8] Pursuant to this mandate, the Commission has, on numerous occasions, imposed appropriate restrictions on the transfer of cable and other Title III licenses.[9] Moreover, the imposition of these conditions would not in any way be tantamount to the imposition of common carriage obligations under Title II of the Communications Act, as it would only require AT&T to make its broadband facilities available to competitors if it chose to bundle MVPD services with other communications services, and would not impose the interconnection, unbundling, and resale obligations of Sections 251 and 252 of the Act. *See* 47 U.S.C. §§ 251, 252.

Lastly, the imposition of these conditions on the proposed transaction would not in any way penalize AT&T, TCI, and MediaOne for their investments in broadband networks. The merged entity will benefit significantly from the increased traffic on its network, the revenues from which are necessary to offset the substantial investments that these companies have made in those facilities. Thus, far from being unfair, a requirement of open access on reasonable terms will merely ensure that the profits the company

---

[8] *See In the Matter of Teleport Communications Group Inc., Transferor, and AT&T Corp., Transferee, for Consent to Transfer Control of Corporations Holding Point to Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Service,* 13 FCC Rcd. 15236 at ¶ 11 (1998) ("Teleport Order") (internal citations and quotations omitted).

[9] *See, e.g., In the Application of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries,* 12 FCC Rcd. 19985 at n. 62 (1997) (If the Commission is able to determine that [a Title III license transfer] application would serve the public interest if particular conditions are met, the Commission can grant the application subject to compliance with the specified conditions.")

earns are competitive, not supra-competitive. While respecting the applicants' investments, these conditions would appropriately prevent the applicants from using their bottleneck control over residential broadband facilities to augment their market power in the MVPD market – an outcome that would only serve to limit consumer choice and harm the public interest.

II. THE COMMISSION SHOULD CONDITION APPROVAL OF THE PROPOSED TRANSFER OF CONTROL ON AT&T'S ACCEPTANCE OF MEASURES DESIGNED TO REDUCE ITS OLIGOPSONY POWER IN THE MARKET FOR UNAFFILIATED PROGRAMMING

TCI and MediaOne are, respectively, the first and third largest MVPD providers in the United States. Together with MediaOne's 25.52 percent in Time Warner Entertainment, this transaction involves, in effect, the merger of the top three such providers. *See* Fifth Annual Cable Report, Table C-3. While the detrimental consequences of this tremendous horizontal concentration are many, chief among them is the significantly increased buying power that the combined TCI/MediaOne entity will have in the market for unaffiliated programming.

As the Commission noted in the Fifth Annual Cable Report, it is estimated that a programmer needs 15 to 20 million subscribers to ensure the long-term viability of a program. *See* Fifth Annual Cable Report at ¶ 152. Even prior to the proposed merger, TCI is the only multiple system operator ("MSO") to fall within this range, with approximately 18 million subscribers. *Id.* When combined with the approximately five million subscribers of MediaOne (and without even counting the many more millions of subscribers of Time Warner and Cablevision who would also be attributed to the merged entity), AT&T/MediaOne will be far and away the only MSO that is truly capable of sustaining individual programs on the strength of its own subscriber base.[10] Roughly speaking, each of the remaining MSOs in the top ten

---

[10] *See* Fifth Annual Cable Report at ¶ 152; AT&T/MediaOne Application at 16.

– which collectively control 71 percent of the market – has no more than four million subscribers, and several of them have less than two million. *See* Fifth Annual Cable Report, Table C-3. Thus, given the strong incentive that unaffiliated programmers face to reduce the transaction costs of dealing with multiple MSOs, they will, as a practical matter, have no choice but to deal with the combined TCI/MediaOne in obtaining carriage of their programs.[11]

The anti-competitive effect of this oligopsony power cannot be underestimated. The TCI/MediaOne entity, as the only MSO that has the exclusive ability to sustain independent programming, will exercise tremendous leverage in negotiations with unaffiliated programmers. These programmers will have little power to resist demands for below-market pricing, program exclusivity, and other conditions that impede the ability of other MVPD providers to secure access to the programming on comparable terms, or even to secure access to the programming at all.

Given their exclusive focus on vertically-integrated programming, the Commission's program access rules simply do not address the kind of oligopsony power that the combined TCI/MediaOne entity could exercise in the market for *unaffiliated* programming. Since the availability of programming is critical to the success of any MVPD provider, and is equally critical to the goal of securing broad consumer choice in programming options, the Commission should address this problem by imposing appropriate conditions on the proposed transaction. At a minimum, these conditions should prohibit all exclusive arrangements between the combined TCI/MediaOne entity and a programming vendor, irrespective of whether the vendor is vertically-integrated or unaffiliated. These conditions should also impose appropriate safeguards against below-market pricing for programs that are carried by TCI/MediaOne. Only in this

---

[11] *See id.* at ¶ 152 ("The fewer operators a programmer needs to negotiate with, the lower the transaction costs of securing carriage.").

manner can the Commission ensure that the purchasing power of TCI/MediaOne is not used to forestall MVPD competition and reduce the programming choices that are available to consumers.

III. CONCLUSION

For the foregoing reasons, EchoStar requests that the Commission condition its approval of the proposed merger on a commitment by the applicants: (1) to provide access to its broadband facilities to competing MVPD providers, on reasonable terms and conditions, wherever the merged entity offers bundled MVPD and advanced or basic communications services; and (2) to accept reasonable restrictions on their ability to exercise oligopsony power in the market for unaffiliated programming, including a prohibition on exclusivity arrangements and below-market pricing.

Respectfully submitted,

David K. Moskowitz
Senior Vice President and General Counsel
EchoStar Satellite Corporation
5701 South Santa Fe
Littleton, CO 80120
(303) 723-1000

Philip L. Malet
Pantelis Michalopoulos
Matthew S. Yeo
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036
(202) 429-3000

Its Attorneys

Dated: August 23, 1999

CERTIFICATE OF SERVICE

I, Matthew S. Yeo, hereby declare that I have this 23rd day of August, 1999, caused copies of the foregoing to be sent by messenger (indicated by *) or first-class mail to the following:

Chairman William Kennard*
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 8-B201
Washington, D.C. 20554

Commissioner Susan Ness*
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 8B-1115
Washington, D.C. 20554

Commissioner Harold W. Furchtgott-Roth*
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 8A-302
Washington, D.C. 20554

Commissioner Michael K. Powell*
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 8A-204
Washington, D.C. 20554

Commissioner Gloria Tristani*
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 8A-204
Washington, D.C. 20554

Donald Abelson, Bureau Chief*
International Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 6-C723
Washington, D.C. 20554

Christopher J. Wright*
General Counsel
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 8C-755
Washington, D.C. 20554

Rosalee Chiara*
International Bureau –Satellite and
Radiocommunication Division
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 6-A521
Washington, D.C. 20554

Deborah Klein*
Cable Services Bureau
Federal Communications Commission
The Portals – 445 Twelfth Street, S.W.
Room 4-A-820
Washington, D.C. 20554

Deborah Lathen*
Chief, Cable Services Bureau
Federal Communications Commission
The Portals – 445 Twelfth Street, S.W.
Room 3-C-740
Washington, D.C. 20554

Karen Kosar*
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 4-A833
Washington, D.C. 20554

Linda Haller
International Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 6-C747
Washington, D.C. 20554

William Johnson*
Federal Communications Commission
The Portals
445 12th Street, S.W. – Room 3-C740
Washington, D.C. 20554

Ari Fitzgerald
Federal Communications Commission
The Portals
445 Twelfth Street, N.W. – Room 8-B201N
Washington, D.C. 20554

Royce Dickens
Policy and Rules Division
Cable Services Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, N.W. – Room 3-A802
Washington, D.C. 20554

Steven Broeckaert*
Federal Communications Commission
The Portals – 445 Twelfth Street, S.W.
Room 4-C-82
Washington, D.C. 20554

Bruce D. Sokler*
Fernando R. Laguarda
Mintz, Levin, Cohn, Ferris
Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W.
Suite 900
Washington, D.C 20004

Mr. Burt Braverman*
John D. Seiver
Maria T. Browne
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006
Counsel for Speedvision

David J. Wittenstein*
David E. Mills
Elisa P. Rosen
Dow, Lohnes & Albertson, PLLC
1200 New Hampshire Avenue, N.W.
Suite 800
Washington, D.C. 20036
Counsel for Comcast

Helgi Walker
Federal Communications Commission
The Portals
445 Twelfth Street, N.W. – Room 8-A302
Washington, D.C. 20554

Walter Strack
Wireless Telecommunications Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 3-C204
Washington, D.C. 20554

Karl Kensinger
Satellite and Radiocommunications Division
International Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, N.W. – Room 6-A663
Washington, D.C. 20554

Marcia Glauberman
Federal Communications Commission
The Portals
445 Twelfth Street, N.W. – Room 3-A738
Washington, D.C. 20554

Stephen J. Flessner*
Director of FCC Compliance
Cable Regulatory Compliance Department
National Digital Television Center, Inc.
Terrace Tower II
5619 DTC Parkway
Englewood, CO 80111-3000

International Transcription Services, Inc.
1231 20th Street, N.W.
Washington, D.C. 20037

Wesley R. Heppler
Cole, Raywid & Braverman, LLP
1919 Pennsylvania Avenue, N.W.
Suite 200
Washington, D.C. 20006

Toqugen Truong
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 5-C311
Washington, D.C. 20554

Evette Keene
Video Services Division
Mass Media Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 2-A767
Washington, D.C. 20554

Sherille Ismail
Telecommunications Division
International Bureau
Federal Communications Commission
The Portals
445 Twelfth Street, S.W. – Room 6-A827
Washington, D.C. 20554

Rick D. Bailey
Vice President
Federal Government Affairs
AT&T
1120 20th Street, N.W.
Washington, D.C. 20036

Mark C. Rosenblum, Esq.
Vice President
Law and Public Policy
AT&T
295 North Maple Avenue
Basking Ridge, New Jersey 07920

Mark D. Schneider, Esq.
Sidley & Austin
1722 Eye Street, N.W.
Washington, D.C. 20006

Andrew Schwartzman
President and CEO
Media Access Project
1707 L Street, N.W.
Suite 400
Washington, DC 20036

Susan M. Eid
Sean C. Lindsay
MediaOne Group, Inc.
1919 Pennsylvania Avenue, N.W.
Suite 610
Washington, D.C. 20006

Matthew S. Yeo