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WASHINGTON, D.C. 20005-2301
(202) 371-6000
FAX: (202) 371-6279

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FEDERAL COMMUNICATIONS COMMISSION
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August 23, 1999

Via Hand Delivery
Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
445 12th Street, SW
TW-B204
Washington, DC 20554

RE: Comments of Ameritech in Response to FCC's Public Notice Seeking Comment on Applications to Transfer of Control filed by AT&T Corporation and MediaOne Group, Inc. (CS Docket No. 99-251)

Dear Ms. Salas:

On behalf of Ameritech, enclosed are an original and four (4) copies of Comments in response to the FCC's Public Notice in CS Docket No. 99-251 (Applications to Transfer of Control filed by AT&T Corporation and MediaOne Group, Inc.).

Questions concerning this filing may be directed to the undersigned.

Sincerely,

Lawrence R. Sidman

Lawrence R. Sidman

Counsel for Ameritech

Enclosures

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List ABCDE

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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AUG 23 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of Applications of AT&T Corporation, Transferee and MediaOne Group, Inc., Transferor ("MediaOne") For FCC Consent to Transfer of Control Pursuant to Sections 214 and 310(d) of the Communications Act, as amended, of Licenses and Authorizations held by subsidiaries of MediaOne and entities controlled by MediaOne	))))))))))))))	CS Docket No. 99-2

To: The Commission

COMMENTS OF AMERITECH

John T. Lenahan
Christopher Heimann
Ameritech
30 S. Wacker Drive
39th Floor
Chicago, Illinois 60606
(312) 750-5367

Deborah H. Morris
Vice President and General Counsel
Ameritech New Media, Inc.
300 South Riverside Plaza
Suite 1800
Chicago, Illinois 60606
(312) 526-8062

Lawrence R. Sidman
Lisa M. Fowlkes
Verner, Liipfert, Bernhard
McPherson & Hand, Chtd.
901 15th Street, NW
Suite 700
Washington, DC 20005
(202) 371-6000

Its Attorneys

August 23, 1999

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EXECUTIVE SUMMARY

Although Ameritech does not oppose the proposed merger between AT&T Corporation ("AT&T") and MediaOne Group, Inc. ("MediaOne"), Ameritech believes that stringent, procompetitive conditions must be imposed by the Commission, incident to any approval of license transfers necessary to consummate this transaction. Absent such conditions, AT&T's already substantial market power in the multichannel video programming distribution ("MVPD") market and strong presence in the high-speed Internet access market will become so great that it will stifle developing competition in these markets and injure consumers. Moreover, this merger, if approved without conditions, would provide AT&T with a potentially insurmountable advantage in the race to provide bundled services, especially a tied combination of cable programming and cable modem high speed Internet access services, to consumers.

Put simply, the AT&T/MediaOne merger, contrary to the benign and, in fact, misleading depiction of the "new" AT&T in the joint application filed with the Commission, will create a massively vertically integrated and horizontally expansive communications colossus which could destroy competition in three markets: multichannel video programming distribution, high speed Internet access and bundled services.

The only potentially procompetitive benefit claimed from this merger is an alleged increase in competition in one market, local telephony. However, the economics of this transaction and AT&T's past track record regarding offering competitive local telephone services to residential customers raise the most serious questions about whether even this procompetitive benefit will materialize. Indeed, the telephony joint ventures that AT&T has entered into with Comcast and is discussing with Time Warner demonstrate that it is not at all necessary to dominate the MVPD, Internet access and bundled services markets to provide competitive local telephone service. Therefore, to promote competition in local telephony, the Commission cannot sanction the destruction of competition in these other burgeoning markets. This is a bad deal for the American public unless there are strong safeguards against anticompetitive conduct to protect American consumers who watch cable television and use the Internet.

AT&T's merger with TCI, approved without conditions by the Commission earlier this year, provided AT&T with a vast array of assets which it could deploy in an anticompetitive manner to harm competing MVPDs, such as Ameritech, and unaffiliated Internet Service Providers ("ISPs"). As a result of that merger, AT&T acquired: (1) direct control over or other significant interests in cable facilities and infrastructure passing more than 32 million homes or 34 percent of the cable market;[1] (2) through Liberty Media Corporation ("Liberty Media"), controlling or substantial ownership stakes in dozens of cable programming networks, electronic programming guides and sports interests; and (3) a controlling interest in At Home Corporation ("@Home"), the nation's largest provider of high-speed Internet access utilizing cable modems. The Commission erred in not imposing procompetitive conditions on the TCI merger. It should not repeat that mistake here.

The proposed AT&T/MediaOne merger propels AT&T across the threshold of monopoly power. If approved without conditions, it would transform AT&T from a dark cloud threatening

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[1] *See* Exhibit 1 depicting the horizontal concentration of a merged AT&T/MediaOne. These statistics are based on homes passed and subscriber data provided in AT&T's application, reports filed by both AT&T and MediaOne with the Securities & Exchange Commission and data reported by the cable industry trade association. Ameritech notes that these numbers are consistent with the FCC's finding in the *AT&T/TCI* proceeding that TCI, through subsidiaries and joint ventures, held interests in cable systems passing 34.1 million cable homes before certain spinoffs. Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, inc. to AT&T Corp., CS Docket No. 98-178, *Memorandum Opinion and Order*, at ¶ 5 (February 18, 1999) ("*AT&T/TCI Order*").

competition into a tornadic force posing a clear and present danger to competition in multiple markets. It would provide AT&T with a decisive increase in market power in every way imaginable -- horizontally, vertically, geographically, and across product markets.[2] This merger would permit AT&T, the largest cable operator in the country, to gain control of the cable plant of the fourth largest cable operator in the country, as well as its substantial programming interests, and thus be positioned to dictate the terms of program carriage, even to unaffiliated cable operators. Moreover, because of MediaOne's 25 percent ownership stake in Time Warner Entertainment ("TWE"), one of the nation's largest cable operators and one of the largest, and most popular, entertainment programmers in the country, AT&T would gain major influence over TWE's operations. As a consequence, contrary to its assertions, AT&T would gain ownership interests in cable plant infrastructure allowing it to pass more than 56 million homes, or 59 percent of all cable homes passed in the country,[3] ownership stakes in many major cable programming networks, and ownership interests in the largest ***and*** second largest cable modem Internet access providers in the country.

Standing on its own, the AT&T/Media One Merger is unquestionably anticompetitive. The Commission's precedents make clear that it must deny the application unless the merger

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[2] *See e.g.*, Consumers Union, et al., Breaking The Rules: AT&T's Attempt to Buy a National Monopoly in TV and Broadband Internet Services," at 17 (August 17, 1999) ("*Breaking The Rules*")

[3] Exhibit 1. *See also Breaking the Rules*, at vii (estimating that AT&T, after completion of the merger, will pass 55 million homes or over 57 percent of the MVPD market). Comments of BellSouth Corporation, et al, Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230 (*Notice of Inquiry*, FCC 99-148 (rel. June 23, 1999)) at 6 (noting that it has been estimated that after completion of the merger, AT&T will have ownership interests serving approximately 60 percent of all households in the United States) ("BellSouth Competition Comments").

enhances competition.[4] Therefore, the central question facing the Commission in its review is whether it can craft conditions sufficiently strong, meaningful and enforceable that the acquisition, in its totality, can be judged honestly to be procompetitive. The Commission possesses the statutory authority to impose such conditions[5] and has exercised that authority vigorously in telephone company mergers. The Commission is obligated to be even more assertive here where the merger's anticompetitive threat dwarfs those considered by the Commission in telephone markets.

The Commission also must impose stringent conditions on this merger so that approval will not undermine the consent decree entered into by Time Warner and Turner Broadcasting Systems to resolve the Federal Trade Commission ("FTC") review of that transaction.[6] There, the FTC concluded that the proposed merger would provide ***both*** TCI and Time Warner incentives to engage in anticompetitive conduct designed to impair the ability of competing MVPDs to compete viably.[7] This merger, if approved without conditions, would once again

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[4] Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corpiration and Its Subsidiaries, File No. NSD-L-96-10, *Memorandum Opinion and Order,* 12 FCC Rcd 19985, 20001 (1997) ("*NYNEX/Bell Atlantic Order*"). *See also* Application of WorldCom, Inc. and MCI Communications Corporiation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211, *Memorandum Opinion and Order,* 13 FCC Rcd 18025, 18032 (1998) ("*WorldCom/MCI Order*"); Appications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporiation to SBC Communications, CC Docket No. 98-25, *Memorandum Opinion and Order,* 13 FCC Rcd 21292, 21298-21299 (1998) ("*SNET/SBC Order*").

[5] *Id.*

[6] *See In the Matter of Time Warner, et al.,* 1997 FTC Lexis 13 (February 3, 1997) ("*Time Warner Decision/Order*").

[7] *Time Warner Decision/Order*, 1997 FTC Lexis at 16-17, 62-63.

provide AT&T/TCI and Time Warner formidable power to destroy the ability of new entrant MVPDs to compete viably in the MVPD marketplace.

Finally, AT&T's behavior since announcing this merger underscores the essentiality of stringent conditions upon any approval. AT&T has downplayed, to the point of mischaracterization, the significance of its holdings and the extent of its control and influence over entities in which it has a substantial ownership stake, creating a fairy tale view of this transaction and grossly distorting the real effects of this merger on the communications market. The lynchpin of AT&T's idyll is the treatment of the Commission's attribution rules as if they did not exist. Any FCC approval of this transaction must be based on current law, including the Commission's attribution rules, and not on AT&T's fanciful distinction between more than fifty percent and less than fifty percent controlling interest, which cannot serve as the legal basis for the Commission's decision. AT&T also has equivocated regarding the applicability of the Commission's program access rules to cable programming vendors in which it has an attributable interest by repeatedly calling attention to Liberty Media's separate tracking stock status, notwithstanding that it is a wholly-owned subsidiary of AT&T. AT&T's conduct demonstrates that a "trust me" approach here would be folly and cannot serve as a substitute for tough, clear conditions.

In light of these circumstances, it is imperative that approval of this merger be subject to the following strict conditions:

- The Commission should require that AT&T comply with its reinstated horizontal ownership rules.
- The Commission should require any programming vendor in which AT&T has an attributable interest to make programming available to all MVPDs pursuant to Section 628 and the Commission's implementing program access rules, regardless of whether the programming is delivered by satellite or terrestrially.

- The Commission should require any programming vendor in which AT&T has an attributable interest to make programming available to any MVPD at the same price and on the same conditions and terms as it does to AT&T or any of its affiliated MVPDs. This condition should apply on a nationwide basis in order to preclude AT&T-affiliated programming suppliers from evading this condition by offering programming to competing MVPDs at higher prices than MVPDs located in adjacent noncompetitive service areas.

- The Commission should require Liberty Media, if divested from AT&T, to make its programming available to all MVPDs on the same prices, terms and conditions and as it does to AT&T or any of its affiliated MVPDs for a period of five years following the divestiture.

- The Commission should prohibit AT&T from entering into, extending or renewing any exclusive or preferential contracts for programming with unaffiliated programming vendors. As part of this condition, AT&T should be prohibited from coercing or retaliating against programming vendors that refuse to provide exclusive rights or preferential terms or conditions for carriage of programming.

- The Commission should prohibit AT&T from entering into exclusive, proprietary arrangements with hardware and software manufacturers of cable system equipment.

- The Commission should require AT&T to provide open and equal access to its broadband facilities to unaffiliated ISPs at the same prices and on the same terms and conditions as it affords affiliated ISPs.

- The Commission should require that the exclusivity provisions in the AT&T/Excite@Home arrangement be waived.

- The Commission should prohibit AT&T from bundling any packages of video programming and high-speed Internet access with telephone service unless customers are permitted to purchase each element separately.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Applications of AT&T Corporation, Transferee and MediaOne Group, Inc., Transferor ("MediaOne") For FCC Consent to Transfer of Control Pursuant to Sections 214 and 310(d) of the Communications Act, as amended, of Licenses and Authorizations held by subsidiaries of MediaOne and entities controlled by MediaOne	))))))))))))))	CS Docket No. 99-251

To: The Commission

COMMENTS OF AMERITECH

Ameritech respectfully submits these comments in response to the Cable Services Bureau's *Public Notice* seeking comment on the joint applications filed by AT&T Corporation ("AT&T") and MediaOne Group, Inc. ("MediaOne") for Federal Communications Commission ("FCC" or "Commission") approval of the transfer of control to AT&T of licenses and authorizations controlled by affiliates and subsidiaries of MediaOne. Although Ameritech does not oppose the proposed merger, Ameritech believes that this merger, if approved by the Commission, must be subject to stringent, procompetitive conditions. As demonstrated below, this merger, if approved without conditions, will allow AT&T's already enormous market power in the multichannel video programming distribution ("MVPD") and high speed Internet access services markets to become so massive as to destroy competition in those markets and injure consumers. In addition, this merger, if approved without conditions, would provide AT&T with a tremendous advantage in the race to provide bundled services to consumers -- an advantage which AT&T could ultimately use to foreclose competition in that market. In order to mitigate this enormous competitive threat and avoid favoring one market over another, it is imperative that the Commission impose strict conditions on the approval of this merger.

I. COMMISSION PRECEDENTS AND THE TIME WARNER/TURNER CONSENT DECREE REQUIRE THE COMMISSION TO IMPOSE CLEAR, MEANINGFUL AND EASILY ENFORCEABLE CONDITIONS ON ANY APPROVAL OF THE AT&T/MEDIA ONE MERGER

The Commission has stated unequivocally that it will approve the transfer of licenses and other authorizations underlying a merger between communications companies only if the transaction is in the public interest, convenience and necessity."[8] To meet this public interest test, the Commission has made clear that the merger must be procompetitive, that is, "if the harms to competition – *i.e.*, enhancing market power, slowing the decline of market power, or impairing this Commission's ability properly to establish and enforce those rules necessary to establish and maintain the competition that will be a prerequisite to regulation -- are outweighed by benefits that enhance competition."[9] Should the applicants fail to persuade the FCC that the proposed merger is in the public interest, convenience and necessity, the FCC "must" deny the application.[10]

In describing its examination of a proposed merger under this public interest standard, the FCC has elaborated:

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8 *NYNEX/Bell Atlantic Order*, 12 FCC Rcd at 11987.

9 *Id.*

10 *Id.*

> [o]ur examination of a proposed merger under the public interest standard includes consideration of the competition policies underlying the Sherman and Clayton Acts – the Commission is separately authorized to enforce Section 7 of the Clayton Act in the case of mergers of common carriers – but the public interest standard necessarily subsumes and extends beyond the traditional parameters of review under the antitrust laws.[11]

Hence, the Commission does not view its mission as duplicative of the Department of Justice's or Federal Trade Commission's mission which is to determine whether or not a proposed merger will harm competition. Rather, in its view, the Commission's role is more expansive. "In order to find that a merger is in the public interest, we must, for example, be convinced that it will enhance competition."[12]

Despite the smokescreen AT&T attempts to create in its application, the proposed merger is anything but procompetitive. To focus momentarily on only one aspect of this transaction, this merger, when completed, will allow AT&T, already the largest cable operator in the country due to its recent acquisition of TCI, not only to swallow up MediaOne, the fourth largest cable operator in the country, but in the process, gain a very significant 25.51 percent ownership stake in TWE, one of the largest operators and probably the most important programming vendor in the cable industry. The Federal Trade Commission already has recognized and addressed the anticompetitive threat posed by combining the market power of TCI, now part of AT&T's empire, and Time Warner. In its *Decision/Order* resolving the Time Warner/Turner Broadcasting merger, the FTC expressly noted, and sought to remedy, the "likely antitrust effects arising from ... TCI's proposed ownership interest in Time Warner ...."[13] As

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11 *Id.*

12 *Id.*

13 *Time Warner, Inc. et al.,* Proposed Consent Agreement, 61 Fed. Reg. 50301, 50308 (Sept. 25, 1996).

detailed in the FTC's Complaint against the Time Warner/Turner Broadcasting merger, some of those anticompetitive effects were:

- Higher entry barriers into the market for cable programming would have been created as a result of the vertical integration between Turner's programming interests and Time Warner's and TCI's cable distribution interests; and

- TCI's ownership interest in Time Warner would have undermined TCI's incentive to sign up better or less expensive alternative programming, preventing rivals from achieving sufficient distribution to realize economies of scale and thus to erode Time Warner's market power.

To remedy these anticompetitive risks, the FTC placed a cap (less than 15 percent) on the amount of Time Warner stock that could be held by TCI and imposed a number of additional conditions to strengthen program access protections for competing MVPDs and unaffiliated cable programming vendors.[14] According to the FTC, implementation of this cap (and ancillary protections) was essential to the protection of cable consumers because such protections:

> would restore TCI's otherwise diminished incentives to carry cable programming that would compete with Time Warner's cable programming ... and they would eliminate TCI's ... ability to influence the operations of Time Warner.[15]

In a separate statement directly relevant to the analysis of the AT&T/MediaOne merger, Commissioners Pitofsky, Steiger, and Varney warned that allowing TCI to own 25 percent of TWE would pose severe competitive problems:

> Such a substantial ownership interest, especially in a highly concentrated market with substantial vertically interdependent relationships and high entry barriers, poses significant competitive concerns. In particular, the interest would give TCI greater

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14 *Id.*

15 *Id.* at 50310.

> incentives to disadvantage programmer competitors of Time Warner; similarly, it would increase Time Warner's incentives to disadvantage MVPDs that compete with TCI. The Commission's remedy would eliminate these incentives to act anticompetitively by making TCI's interest truly passive.[16]

But these same difficulties are raised squarely by the AT&T/Media One merger. Since MediaOne owns slightly more than 25 percent of TWE, and since AT&T owns 100 percent of TCI, the effect of the proposed merger would be to allow AT&T/TCI to acquire roughly 25 percent of TWE -- far more than allowed by the FTC only two years ago and precisely the share which provoked dire warnings from a majority of FTC Commissioners. AT&T/TCI would have little incentive to carry independent programming, i.e., non-TWE and non-TCI (Liberty Media) programming; AT&T/TCI would have the ability to influence TWE's operations; and worse, the two programming and operating giants would enjoy the unfettered ability to engage in programming pricing favoritism toward one another, to the detriment of all other competitors. Yet, AT&T's application fails to address these apparent consent decree programming violations.[17]

Similar concerns extend to the cable modem Internet access market. AT&T, through TCI, already holds a 25.9 percent interest in @Home, the nation's largest cable modem Internet access provider. The MediaOne merger would allow it to gobble up 34.67 percent interest in RoadRunner, the second largest cable modem Internet access provider. Consequently, AT&T, by virtue of these significant ownership stakes in both cable modem providers, would possess the

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[16] *Time Warner Decision/Order*, 1997 FTC Lexis at 62-63 (February 3, 1997).

[17] For this reason alone, the Commission should deny the application or require AT&T to demonstrate why these same concerns and limitations do not apply to this larger transaction.

ability to control virtually 100 percent of the cable modem Internet access market.[18] From that monopoly position, AT&T will have unconstrained ability to grant preferential prices and concessions to affiliated ISP service and content providers to the disadvantage of unaffiliated ISPs. Consumers would be the ultimate losers since they would be denied competitive choices in Internet services.

These anticompetitive threats will most certainly become realities if the FCC approves this merger without conditions. As discussed below, AT&T has already demonstrated a willingness to engage in such anticompetitive misconduct, all the while proclaiming its support for competition in the press and before the FCC. Moreover, the breadth of these threats extending across ***multiple*** communications markets, certainly outweighs the unproven promise of competition in only one market -- local telephony. Even if local telephony competition comes to fruition, the Commission should not sacrifice competition in other markets–but rather should ensure that consumers in all markets receive the benefits of robust competition and consumer choice. Consequently, the imposition of conditions is imperative if the Commission is to find any semblance of "procompetitive" benefit as a result of this merger.

Certainly, the imposition of conditions here is within the Commission's statutory authority. As the Commission has stated previously, "[t]he Communications Act permits the Commission to impose such conditions as are necessary to serve the public interest."[19] Indeed, the Commission has exercised aggressively this authority.[20] In light of the enormous potential

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18 *See* Exhibit 2.

19 *NYNEX/Bell Atlantic Order*, 12 FCC Rcd at 20001.

20 *NYNEX/Bell Atlantic, supra*; *Applications of Pacific Telesis Group Transferor, and SBC Communications, Inc., Transferee, For Consent to Transfer Control of Pacific Telesis*

for competitive harm posed by the AT&T/MediaOne merger, the Commission cannot approve the AT&T/MediaOne merger unless it imposes clear, meaningful and easily enforceable conditions that could make the merger procompetitive.

II THE AT&T/MEDIAONE MERGER POSES A SERIOUS THREAT TO COMPETITION IN THE MVPD MARKETPLACE.

A. The MediaOne Merger Will Result in An Unacceptable Increase in AT&T's Market Power in the MVPD Market Unless it is Subject to the Commission's Reinstated Horizontal Ownership Rules.

In a clear example of its "make believe" regulatory strategy, AT&T, in its application, claims that as a result of this merger, it will serve only 18,886,000 to 21,206,000 subscribers or 23.7 to 26.6 percent of the cable market.[21] In calculating these numbers, AT&T, in an obvious attempt to camouflage the vast scope of its market power, apparently included ***only*** subscribers to cable systems over which AT&T deems itself as holding a controlling interest, rather than including subscribers to all of the cable systems in which it has an attributable interest as required by the FCC's rules. Most significantly, AT&T's figures apparently exclude those subscribers served by Cablevision Systems Corporation, in which AT&T holds a 33 percent interest, as well as those subscribers served by TWE.

AT&T takes an even more suspect approach with respect to its programming interests through Liberty Media. Although acknowledging in financial reports, and in the *AT&T/TCI*

Group and Its Subsidiaries, 12 FCC Rcd 2624 (1997). *See, also, Public Notice*, "Pleading Cycle Established for Comments on Conditions Proposed by SBC Communications, Inc. and Ameritech Corporation for their Pending Application to Transfer Control," DA 99-1305 (CCB rel. July 1, 1999);

[21] Application/Public Interest Statement, at 55-56.

proceeding, that Liberty Media is a wholly owned subsidiary,[22] AT&T, in an apparent attempt to avoid the program access rules, now claims that Liberty Media is totally separate from AT&T and that, as a result, AT&T has no control or influence over Liberty Media's operations.[23] AT&T makes a similar argument with respect to the programming interests it will acquire through MediaOne's interests in TWE.[24]

AT&T, throughout its application and in the press, takes the position that only cable systems and program networks in which AT&T has an exercisable majority controlling interest should count towards any measure of its market power.[25] In AT&T's view, minority interests should be ignored, as should interests where AT&T has set up a separate tracking stock or there exists a separate management committee. As Consumers Union, *et al*, recently noted, in AT&T's world, "a company could own all the property in the industry and still pass regulatory muster."[26]

AT&T's view has no basis in reality, let alone the Communications Act or the Commission's rules. When these rules are applied, it is clear that this proposed merger will result in a tremendous increase in AT&T's market power in the video programming distribution market. Specifically, AT&T, as a result of its merger with TCI, acquired ownership of or an

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22 *See e.g.* AT&T Group Earnings Commentary, at 2 (July 29, 1999) ("AT&T Commentary"). *See also AT&T/TCI Order*, at ¶¶ 10, 35.

23 Application/Public Interest Statement at, 10-12, 44.

24 *Id*, at ¶¶ 16, 44.

25 *See e.g,*, James W. Cicconi, "AT&T Story Rings False," *Washington Post* at B6 (May 16, 1999) ("*AT&T Story*").

26 *Breaking the Rules*, at 24.

attributable interest in cable systems passing 32,297,000 cable homes, or approximately 34 percent of the total number of cable homes passed in the U.S.[27] If the MediaOne merger is concluded, AT&T will own controlling or attributable interests in cable systems passing a total of 56,081,000 homes, or 59 percent of the total number of homes passed in the U.S.[28] -- a figure representing virtually twice the 30 percent national horizontal ownership limit adopted by the FCC in its *Horizontal Ownership* proceeding[29] and almost two times the fictitious number suggested by AT&T.[30]

The effect of this merger on AT&T's actual subscriber level is similarly dramatic. As a result of its merger with TCI, AT&T gained control or significant influence over 19,806,000 subscribers or 30 percent of the total number of cable subscribers in the U.S.[31] As a result of this merger, however, AT&T will increase its penetration level to 34,510,000 or roughly 52 percent[32] – approximately twice the percentage of subscribers reported in AT&T's application.[33]

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27 Exhibit 1.

28 *Id.*

29 *See* Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-264, *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 14462, 14464 (1998). *See also* 47 C.F.R. § 76.503. The effectiveness of these rules has been stayed by the Commission pending further judicial review.

30 *AT&T Story, supra.*

31 Exhibit 1.

32 *Id. See also Breaking the Rules*, at vii.

33 Application/Public Interest Statement, at 55-56.

These figures represent a dramatic increase in monopsony power, approaching traditional benchmarks of monopoly power[34], which will enable AT&T to reduce and possibly eliminate competition in the MVPD market. As Ameritech noted in its *Horizontal Ownership* comments,[35] incumbent Multiple System Operators ("MSOs"), such as AT&T, are able to use the economic leverage they derive from their control over a substantial percentage of cable television subscribers to conclude programming agreements with both affiliated and unaffiliated cable programming networks that disadvantage competitors. In order to be economically viable, a programmer must reach a critical mass of viewers, estimated to be approximately 20 million subscribers,[36] a figure which would be eclipsed by the AT&T/MediaOne conglomerate, even if Time Warner's subscribers are excluded from the calculation, which they should not be. Thus, to reach that magic 20 million number in a post AT&T/MediaOne merger world, a programmer need only reach agreement with AT&T. Indeed, it would be difficult for a programmer to reach that number of subscribers without concluding an agreement with AT&T, TWE or both. As a result, this merger would give AT&T enormous leverage in negotiating the terms of carriage agreements and, as a consequence, could enable it to demand exclusive carriage arrangements with unaffiliated programming vendors that deny access to programming by new entrant MVPDs

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[34] *See Arthur Langenderfer, Inc. v. S.E. Johnson Co.*, 917 F.2d 1413, 1443 (6th Cir. 1990) (58 percent share over seven year period sufficient to indicate monopoly power). *Pacific Coast. Agricultural Export Ass'n. v. Sunkist Growrs, Inc.*, 526 F.2d 1196, 1204 (9th Cir. 1975) (share ranging from 45 to 70 percent sufficient to support finding of monopoly power).

[35] Comments of Ameritech New Media, Inc. in Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, MM Docket No. 92-264, (*Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 14462 (1998)) at 4 ("Ameritech Horizontal Ownership Comments").

[36] *Id.*

or, alternatively, extract preferential prices, terms and conditions from any programming vendor, affiliated or unaffiliated, that cannot be justified by any cost savings or economies of scale.

As the largest and second largest cable operators, AT&T and Time Warner, respectively, already possess substantial leverage to extract preferential programming arrangements from even unaffiliated programming networks. This merger will expand greatly AT&T's horizontal market reach, giving it exponentially more leverage to extract preferential prices, terms and conditions for carriage from programming vendors. This increased leverage will also extend to Time Warner as a result of its interlocking interrelationship with AT&T.

This vast increase in horizontal market power is augmented by the almost equally dramatic increase in the number of programming networks in which AT&T will hold an attributable ownership interest. Contrary to its recent claims, AT&T, as a result of the TCI merger, gained controlling ownership interests in dozens of cable programming networks through its wholly-owned subsidiary, Liberty Media.[37] Thus, AT&T already has the ability and incentive to impede competing MVPDs' access to cable programming, such as Discovery Channel, Telemundo Network, BET, E! Entertainment Television, Style, Encore, Fox Sports World, the Sci-Fi Channel, Home Shopping Network, and The Learning Channel. This merger will allow AT&T to expand substantially its level of influence in programming supply through its acquisition of MediaOne's ownership of various cable programming networks, as well as MediaOne's 25 percent interest in TWE. As a result, AT&T will acquire a significant interest in one of the crown jewels of cable programming, HBO, as well as Cinemax, the WB Network, Comedy Central and Court TV. This expansion is in addition to other program networks in

[37] AT&T Commentary, at 2.

which MediaOne holds an interest, such as the Food Network, the Sunshine Network, New England Cable News, and Fox Sports New England. Consequently, AT&T will have far greater ability to use a wide array of anticompetitive tactics to hamper the ability of competing MVPDs to gain access to popular cable programming. As a result, AT&T will be in a strong position to stomp out competition in the MVPD marketplace.

Given AT&T's treatment of the attribution rules in this proceeding, a most basic condition for approval of this merger is that it comply with the Commission's own rules, including its horizontal ownership rules when reinstated. Under the Commission's 1993 rules (which are not being enforced), AT&T would have access to approximately 59 percent of homes based on its ownership of TCI, its pending acquisition of Media One and its minority interests in TWE, Cablevision Systems and smaller cable companies. This horizontal reach far exceeds the Commission's 1993 cap of 30% of homes passed, and presumably will exceed any new rule the Commission issues in its current rulemaking proceeding addressing horizontal ownership. Therefore, this merger must be conditioned on AT&T's compliance with the Commission's reinstated horizontal ownership rules.

B. The Proposed Merger Will Increase AT&T's Ability to Evade the Program Access Rules By Switching Satellite-Delivered Programming to Terrestrial Distribution.

AT&T's acquisition of MediaOne will provide AT&T with greater ability to circumvent the program access rules by migrating satellite-delivered programming to terrestrial distribution. As Ameritech and other MVPDs have stated recently in the Commission's most recent *Cable Competition Report* proceeding,[38] incumbent cable operators, including AT&T and its affiliated

38 Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 99-230, *Notice of Inquiry*, FCC 99-148 (released June

entities, have engaged in increased use of terrestrial distribution of video programming as a method to preclude program access by competing MVPDs.[39] This trend towards terrestrial distribution will likely increase as a consequence of several important marketplace factors including, most significantly, increased cable MSO ownership by telecommunications giants–like AT&T/Teleport–with huge, embedded nationwide fiber optic networks in place; increased consolidation and clustering in the MVPD marketplace; dropping costs of fiber; and the acquisition of sports teams by vertically integrated cable companies.[40] As Ameritech noted in the *AT&T/TCI* proceeding, AT&T, through its vast inter-city fiber network and its ownership of cable systems such as TCI (and now MediaOne), will have both the ability to transport cable programming terrestrially and the means to make terrestrial delivery economically feasible.[41]

In its *AT&T/TCI Order,* the FCC found merit in these concerns raised by Ameritech but took no remedial action:

> [w]e recognize . . . that the integration of TCI's content with AT&T's coast-to-coast fiber optic network may provide the merged entity with the ability and the cost and quality incentives to migrate video programming from satellite to

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23, 1999).

39 *See e.g.*, Comments of Ameritech New Media, Inc. in In the Matter of Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming (*Notice of Inquiry*, CS Docket No. 99-230, FCC 99-148 (released June 23, 1999) at 7-10; Comments of DirecTV, Inc. in *Notice of Inquiry* at 3-4; Comments of Echostar Satellite Corporation in *Notice of Inquiry* at 4; Comments of Optel, inc. in *Notice of Inquiry* at 10; Comments of Wireless Cable Association International, Inc., in *Notice of Inquiry*, at 9-10.

40 ANM Competition Comments, at 7.

41 Comments of Ameritech New Media, Inc. In Applications of AT&T Corporation and Tele-Communications, Inc. for FCC Consent to Transfer of Control Pursuant to Section 310(d) of the Communications Act, as amended, of Licenses and Authorizations Controlled by TCI or its Affiliates or Subsidiaries, at 33.

> terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace.[42]

The proposed MediaOne merger makes it impossible for the Commission to ignore this new reality any longer. AT&T, as the largest long distance telecommunications carrier in the U.S., already has control over the largest fiber backbone network in the country. When coupled with the substantial amount of facilities acquired from Teleport last year,[43] AT&T will gain an unprecedented ability to shift programming from satellite to terrestrial delivery and thereby frustrate the procompetitive purpose of Section 628.

The increased use of terrestrial distribution by AT&T is openly conceded in AT&T's proudly stated business goal of achieving the maximum level of consolidation and clustering of cable systems, thus making the use of terrestrial distribution much more economically feasible. As AT&T explained in its earnings commentary,

> "[o]ne of AT&T's key strategy objectives is to deploy an array of facilities-based telecommunications services across a broad footprint. TCI's clustering activity augmented through various cable partnerships . . . provides AT&T with a concentrated, facilities-based presence in numerous major markets."[44]

Clustering makes terrestrial distribution of regional programming, such as local news and very popular regional sports programming, far more economically attractive because of the large concentration of subscribers in a city or geographic area. The effects of AT&T's clustering strategy already can be seen in major markets throughout the country. For example, as the maps

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42 *AT&T/TCI Order*, at ¶ 37.

43 Teleport has 491,000 miles of fiber, spanning 9,474 route miles. *FCC Releases Fiber Deployment Update*, 1998 FCC Lexis 4544, Table 14 (September 4, 1998).

44 AT&T Commentary, at 9.

in Exhibit 3 demonstrate, as of July 1, 1999, Chicago, Illinois was served by seven cable incumbents: AT&T, Time Warner, MediaOne, Jones Communications, Multimedia, Prime Cable, and Optel.[45] However, after the completion of several system swaps and purchases, it is expected that AT&T will own virtually all of the cable systems serving the Chicago area.[46]

AT&T also has positioned itself to be the beneficiary of system swaps involving other cable incumbents in which it either has a substantial interest or has entered into a joint venture. For example, in light of a commitment from Comcast Cablevision ("Comcast") to provide AT&T-brand local telephony service in all of Comcast's markets,[47] AT&T will be a beneficiary of system swaps and purchases that will leave Comcast as the sole incumbent cable operator in Detroit, Michigan.[48] By virtue of its telephony agreement with Comcast, AT&T could exploit this relationship to gain favored status for the terrestrial distribution of regional programming.

Similarly, as a result of its ownership interests in TWE and Cablevision and its local telephony agreement with TWE, AT&T will be a beneficiary of cable system swaps and purchases in Cleveland, Ohio that will result in increased local system ownership by Time Warner.[49] Thus, terrestrial distribution will clearly be far more economically feasible in this city.

AT&T and other cable operators in which AT&T holds a substantial ownership interest or has a joint venture already have demonstrated a willingness to use terrestrial distribution to

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45 Exhibit 3, Map 1.

46 Exhibit 3, Map 2.

47 News Release, "AT&T and Comcast agree to swap cable systems," (May 4, 1999).

48 *See* Exhibit 3, Maps 3 and 4.

49 *See* Exhibit 3, Maps 5 and 6.

evade the program access rules and act in an anticompetitive manner. For example, in recent complaints filed with the FCC, Microwave Satellite Technologies, Inc. and RCN Telecom Services of New York charge that Cablevision migrated previously satellite delivered sports programming to terrestrial distribution in an effort to evade both the statutory and regulatory program access obligations.[50] Comcast, with whom AT&T has entered into joint ventures including the telephony branding agreement, also has engaged in similar conduct when it switched popular Philadelphia sports programming from satellite delivery to terrestrial distribution.[51] The fact that the most egregious examples of evasion of the program access rules by shifting to terrestrial distribution involve cable companies in which AT&T has a substantial ownership stake or is otherwise deeply involved highlight the danger to competition posed by this practice.

In light of the above, it is imperative that the Commission require that any programming vendor in which AT&T has an attributable interest make programming available to all MVPDs pursuant to Section 628 of the Communications Act and the FCC's implementing program access rules, 47 C.F.R. § 76.1000 *et seq.*, regardless of whether that programming is delivered terrestrially or by satellite. Imposition of this condition is essential to prevent the anticompetitive evasion of the program access rules which would be made possible by the new

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[50] *See* Program Access Complaint filed by Microwave Satellite Technologies, Inc. v. Cablevision Systems Corporation, MSG Sports Network, Inc., Fox Sports Network - New York and Rainbow Programming Holding, Inc., filed July 8, 1999; Program Access Company of RCN Telecom Services of New York, Inc. v. Cablevision Systems Corporation, MSG Sports Network, Inc. and Fox Sports Network, CSR-5404-P (filed May 7, 1999).

[51] *DirecTV v. Comcast Corp*, DA 98-2151, rel. October 27, 1998. *Echostar Communications Corp. v. Comcast Corp.*, DA 99-235, rel. January 26, 1999.

physical and economic reality created by this merger and the attendant increase in consolidated, clustered cable operations within geographic regions.

C. AT&T Will Have The Ability To Use Its Increased Bargaining Power to Demand Exclusive or Preferential Contracts From Unaffiliated Programming Suppliers Thereby Denying Access to Programming by Competing MVPDs.

If this merger is approved without conditions, AT&T also will have far greater ability to use its control over substantial numbers of cable subscribers, and resulting monopsony power, to extract exclusive or preferential contracts from <u>un</u>affiliated program suppliers. Indeed, AT&T, as well as cable operators in which AT&T has an attributable interest, have already demonstrated their willingness to use their leverage to engage in this type of anticompetitive conduct. For example, contrary to its claim in the *AT&T/TCI* proceeding,[52] AT&T has continued to maintain TCI's agreement with Tribune Broadcasting ("Tribune") that affords AT&T exclusive distribution rights for Tribune's highly popular ChicagoLand TV ("CLTV") network, a 24-hour cable news channel in the Chicago area. This arrangement is not subject to the program access rules both because Tribune is not affiliated with a cable operator, and because CLTV is delivered terrestrially to AT&T.

Other MVPDs also have reported difficulties in obtaining carriage of popular programming due to exclusive contracts. For example, in its comments in the *Cable Competition Report*, Hiawatha Broadband Communications, Inc. ("Hiawatha") reported difficulties in

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[52] Joint Reply To Comments of AT&T and TCI at n. 143 in *AT&T/TCI* proceeding.

obtaining unaffiliated programming, such as MSNBC and Fox News, because of exclusive contracts with Bresnan Communications, a cable operator owned by AT&T.[53]

These tactics have also threatened competitive MVPDs' carriage of sports programming which, as the FCC has noted previously, is critical to the ability of new entrant MVPDs to compete in the video marketplace.[54] For example, in its Competition Comments, Hiawatha reported its inability to gain carriage of Midwest Sports Channel, a popular regional sports network because of an exclusive agreement with AT&T affiliate Bresnan.[55] MediaOne, itself, has engaged in such tactics. Last year, Ameritech was nearly forced to drop Classic Sports Network ("CSN") when CSN entered into an exclusive carriage agreement with incumbent cable operators, including MediaOne and Time Warner. This exclusivity arrangement was particularly surprising because CSN had been carried by Ameritech on a non-exclusive basis since Ameritech initiated its cable operations. Only after Ameritech filed a program access complaint against MediaOne and Time Warner did the incumbents agree not to enforce the exclusivity provisions of their contracts against Ameritech, ensuring that Ameritech could continue to carry this very popular programming.

AT&T's increased monopsony power as a result of this merger will clearly provide it with even greater negotiating leverage to demand exclusive contracts and other unjustifiable

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[53] Comments of Hiawatha Broadband Communications, Inc. in Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CS Docket No. 99-230, (*Notice of Inquiry*, FCC 99-148 (released June 23, 1999)) at 5 ("Hiawatha Competition Comments"). *See also* ANM Competition Comments, at 6-7.

[54] Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming, CS Docket No. 98-102, *Fifth Annual Report*, 13 FCC Rcd 24284 at ¶ 171 (1998).

[55] Hiawatha Competition Comments, at 5.

preferences from unaffiliated programmers. Accordingly, the Commission should prohibit AT&T, as a condition for approval of the merger, from entering into, extending or renewing any exclusive or preferential contracts for programming with unaffiliated programming vendors. As part of this condition, AT&T should be prohibited from coercing or retaliating against programming vendors that refuse to provide exclusive rights or preferential terms or conditions for carriage of programming.

D. AT&T Will Have The Ability To Use Its Increased Bargaining Power To Extract Substantial Non-Cost Justified Price Discounts From Programmers To the Disadvantage of New Entrant MVPDs.

The proposed AT&T/MediaOne merger will also increase markedly AT&T's ability to extract preferential prices for programming at the expense of new entrant MVPDs, such as Ameritech. This discriminatory conduct results from the bargaining power of large cable incumbents, such as AT&T, to demand huge but unjustifiable price discounts from suppliers. If this merger is approved without procompetitive conditions, AT&T will gain unprecedented programming bargaining power with the corresponding ability to act in a discriminatory and anticompetitive manner to new MVPD competitors. Although the confidential nature of programming agreements makes determinations of the exact pricing levels for programming virtually impossible, Ameritech believes that it is paying as much as 45 percent more for some programming than incumbent cable operators such as AT&T.

A recent study conducted by James N. Dertouzos[56] and Steven S. Wildman,[57] attached as Exhibit 4, supports this conclusion.[58] Specifically, the Dertouzos/Wildman Study revealed massive, non-cost justified price differentials for programming between new entrants and large cable incumbents.[59] For example, a study of rate cards for 12 networks revealed maximum discounts for all 12 basic cable networks averaging approximately 17 percent with a high of 25 percent and a low of approximately three percent, with most being in the 15 to 25 percent range.[60] The number of subscribers required to qualify for the maximum discount ranged from one million to 10 million, while an MSO with less than 250,000 subscribers would receive no discount for fully half of the networks examined.[61] The study also examined industry average discounts offered by 33 basic programming networks, as reported by Paul Kagan Associates. This examination revealed industry discounts ranging from zero to 91 percent and a mean discount of 45 percent for the 33 networks.[62]

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56 Senior Economist, RAND Corporation.

57 Professor of Telecommunications, Michigan State University. Principal, LEGG, Inc.

58 *See* Exhibit 4 ("Dertouzos/Wildman Study").

59 *Id.*

60 Dertouzos/Wildman Study, at 6.

61 *Id.*, at 6-7.

62 *Id.*, at 9, 11-12. The networks examined included: Arts & Entertainment, American Movie Classics, The Cartoon Network, Country Music Television, CNBC, CNN/Headline News, CNN(fn), The Comedy Channel, The Family Channel, Fox Sports, FX, The Golf Channel, Home and Garden TV, The History Channel, Lifetime, MTV, Nickelodeon, Prevue, Sci-Fi, TBS, Turner Movie Classics, The Learning Channel, TNT, The Nashville Network, USA, VH1, and the Weather Channel.

These price differentials result in a crippling cost disadvantage for new entrants. As the Dertouzos/Wildman Study demonstrates, a 100,000 subscriber MVPD providing the 33 networks examined in the Dertouzos/Wildman Study would face a total annual programming cost disadvantage of over $6.2 million, or just under $62 per subscriber per year, compared to a large MSO such as AT&T. This is roughly the cost to consumers of two months of cable service.

A comparison of programming costs as a percentage of analog service revenue for Ameritech New Media and Time Warner systems, as reported by Morgan Stanley Dean Witter,[63] corroborates this epidemic of discriminatory pricing practices. Moreover, it indicates that these estimates of the programming cost disadvantage of entrants and small MVPDs based on Kagan industry data understates the true disadvantage because the Kagan data compares top of card rates to industry average rates, rather than to the lower rates paid by the largest MSOs. For Time Warner, the 1997-1998 two-year average of analog services programming costs as a percentage of analog revenues was 22.1 percent.[64] For the last quarter of 1998 and the first quarter of 1999, Ameritech New Media spent slightly more than double Time Warner's percent of analog revenues for programming.[65] Thus, for every dollar of revenue generated, Ameritech New Media paid more than twice what Time Warner paid for programming.[66]

Ameritech is not the only MVPD that has raised concerns about the discriminatory pricing practices of programming vendors subjected to irresistible pressure by large MSOs such

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[63] Morgan Stanley Dean Witter, "U.S. and the Americas Investment Research: Entertainment," April 9, 1999, page 90.

[64] Dertouzos/Wildman Study, at 13.

[65] *Id.*, at 13.

[66] *Id*

as AT&T. BellSouth, for example, recently noted, "the rapid consolidation of the cable industry will only further aggravate the competitive imbalance created by steep volume discounts which cable programmers offer exclusively to large MSOs."[67] Similarly, Optel stated, "discriminatory pricing in the programming market is widespread. In Optel's experience, the cost of programming, on a per-subscriber basis, for new entrants in the MVPD market is many times that for large cable MSOs."[68]

These massive price discounts cannot be justified by cost or economies of scale. As the Dertouzos/Wildman Study explains, although new entrants can be expected to take some customers away from incumbents, their efforts typically <u>increase</u> the total number of subscribers in a market – a competitive benefit to program networks.[69] In light of this phenomenon, new entrant MVPDs such as Ameritech should expect to pay ***lower***, not higher, program network fees.

The proposed AT&T/MediaOne merger, however, will undoubtedly result in an increased ability on the part of AT&T to extract unjustifiable price discounts from both affiliated and unaffiliated programmers. As explained above, the tremendous increase in monopsony power that will result from this merger clearly will provide AT&T with increased leverage to negotiate preferential pricing from all video programmers, including unaffiliated programmers.[70]

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67 BellSouth Competition Comments, at 12.

68 Optel Competition Comments, at 10.

69 Dertouzos/Wildman Study, at 3.

70 *See e.g.*, Echostar Competition Comments, at 6 ("This leverage is real: in the few instances where they dare to speak to the issue, unaffiliated programmers admit that they are forced to offer cable operators below-market prices in order to obtain carriage.").

Similarly, AT&T's increased cable programming ownership interests, particularly in TWE, will provide it with increased influence over affiliated programmers to charge even greater non-cost justified price differentials to new entrants that disadvantage them in the marketplace. For these reasons, it is imperative that the Commission require any programming vendor in which AT&T holds an attributable interest to make available its programming to any MVPD requesting it on the same prices, terms and conditions as those provided to AT&T or any of its affiliated other MVPDs. This condition should apply on a nationwide basis in order to preclude AT&T's affiliated programming suppliers from evading this condition by offering programming to competing MVPDs at higher prices than MVPDs located in adjacent noncompetitive service areas.[71]

The Commission should also apply this condition for a period of five years to Liberty Media in the event that AT&T divests its interest in Liberty Media. Such a condition will ensure that Liberty Media will not evade the program access rules during a period of temporary divestiture if it then "rejoins" AT&T/TCI, as it has done in the past.

E. AT&T's Interests In Cable Equipment Manufacturers Will Allow It to Restrict Access to Advanced Cable Technologies By Competing MVPDs.

The proposed merger also will increase AT&T's ability to deny access to advanced cable system equipment and software to competing MVPDs or to discriminate against competitors in the development and marketing of hardware and software for advanced services and products such as digital cable set-top boxes and electronic programming guides.

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[71] *See e.g. Time Warner, Inc. et al*, Docket No. 961-0004, Agreement Containing Consent Order, at 10 (deeming Time Warner in violation of nondiscrimination condition if the carriage terms "offer[ed] to the competing MVPD . . . outside the service area overlap are set at a higher level compared to . . . MVPDs so as to avoid the [nondiscrimination] restriction.")

Set-top boxes are critical to the future of the cable industry because, in a digital environment, it is likely that most, if not all, cable signals will travel through the set-top box before being displayed on the television. Cable set-top boxes are, therefore, the last gateway to the digital cable subscriber.

And as we enter the digital era, electronic programming guides will become a critical element in the provision of MVPD service. Consumers will increase their reliance on interactive electronic programming guides as they try to maneuver through the maze of hundreds of channels. Electronic programming guides also provide consumers with related data services, providing additional information to accompany one's channel selection.

Electronic programming guides also can be used anticompetitively because they can selectively steer viewers to certain programmers and content providers. This affects competitors to cable incumbents because the ability of a vertically-integrated cable operator to steer viewers to its own or affiliated programming via the electronic programming guide will make its business more lucrative. This power is exemplified where that cable operator also has control or significant influence over the digital set-top box or other equipment that operates the electronic programming guide software components. Here, the operator is not only the gatekeeper, but the master of all content that flows through the gate.

AT&T already has placed itself in such a position. Through TCI, AT&T holds a 13 percent interest in General Instruments, Inc. ("GI"), the largest cable digital set-top box manufacturer in the country.[72] In addition, AT&T, as a result of its merger with TCI, also owns Prevue Interactive and TV Guide, two leading electronic programming guide services.

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[72] Application/Public Interest Statement, at 12, n.31.

Consequently, AT&T is in a central position from which to control not only the gate, but the traffic flowing through the gate.

For example, AT&T could use its significant gatekeeper power to influence the development of standards and technology for the manufacture of cable set-top boxes. In addition, AT&T could enter into exclusive or preferential agreements with affiliated or "favored" equipment manufacturers and software developers, providing them with a significant headstart in the race to develop digital cable set-top boxes or software to be used with such boxes. Indeed, AT&T has already entered into such a deal with Microsoft in which Microsoft made a $5 billion investment in AT&T, and, in return, AT&T agreed to purchase up to an additional 10 million advanced set-top boxes from Microsoft and to license Microsoft client/server software that supports a range of digital services such as e-mail and interactive television entertainment.[73]

Moreover, AT&T's control of two major electronic programming guide services provides it with tremendous power to discriminate in favor of affiliated or favored programmers. For example, AT&T could use its control to manipulate its set-top box and the electronic programming guide to steer viewers to programs of affiliated or favored programmers. Similarly, as digital set-top boxes and electronic programming guides play an increased role in the delivery of broadband services to the home, AT&T would have tremendous power to steer viewers to Internet content of affiliated or favored providers such as Microsoft.[74] Consequently, the Commission, in approving the AT&T/MediaOne merger must prohibit AT&T from entering into exclusive, proprietary arrangements with hardware and software vendors of cable system

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[73] News Release, "AT&T, Microsoft announced agreements to accelerate deployment of broadband services."

[74] *See e.g.*, "There's Nothing on TV," *PC World* (July 1999).

equipment.

III. THE AT&T/MEDIA MERGER WILL STIFLE CONSUMER CHOICE AND COMPETITION IN INTERNET ACCESS MARKETS.

With its control over a massive amount of broadband infrastructure, as well as Exite @Home, the largest cable modem Internet access provider in the country, and Excite, Inc., the Number 8 Web portal,[75] AT&T has already positioned itself as a dominant keeper of the broadband pipe, the broadband gate, as well as a master of its content. Its acquisition of MediaOne's substantial ownership stake in RoadRunner, the second largest cable modem Internet access provider, will solidify that position and will allow AT&T to eliminate its only potential source of competition in this market.

As a result of its ownership or significant interests in both principal cable modem Internet access providers currently in the market, AT&T will have virtually unconstrained power and incentive to discriminate against unaffiliated ISPs, enter into exclusive agreements such as its exclusivity arrangement with Excite@Home, and engage in other anticompetitive tactics designed to foreclose access to its broadband facilities by unaffiliated ISPs. Indeed, AT&T is already guilty of such conduct. AT&T's combined stake in Excite@Home and RoadRunner resulting from the MediaOne merger makes it imperative that the Commission impose an "open access" condition on AT&T's broadband facilities.

Despite its promises to the FCC in the *AT&T/TCI* proceeding, customers of AT&T's service are, in fact, precluded from meaningful access to unaffiliated ISPs on AT&T's facilities. Specifically, in the *AT&T/TCI* proceeding, AT&T submitted the following statement concerning

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75 "Inside the Tangles of AT&T's Strategy," Wall Street Journal, at B1 (August 13, 1999).

the availability of unaffiliated online services:

> Even if an online service provider cannot or does not want to enter into [an agreement providing TCI customers with unimpeded access to that provider], customers of TCI@Home, TCI's cable Internet service can still access that provider through their TCI/IP connections using a "bring-your-own-access plan" like that actively marketed by AOL. TCI customers subscribing to AOL under the BYOA plan today can connect directly to AOL by "double clicking" on the AOL icon on their computer desktop. They do not have to "go through" @Home or view any @Home-provided content or screens. In fact, if they so desire, customers will be able to remove the @Home icon from their desktop completely. *This will continue to be the case after the merger.*[76]

Contrary to this representation, customers of Excite@Home are, in fact, being denied meaningful access to unaffiliated ISPs.

As described in the attached affidavit from Ali Shadman, President of Ameritech New Media, rather than serve as a vehicle for "open access," AT&T's "click through" access has merely served as a vehicle by which to deny consumers a choice in Internet access other than that offered by Excite@Home.[77] As Mr. Shadman explains, under the AT&T "click-through" method:

> All of the cable modem subscribers' data traffic is routed initially through the affiliated ISP's network, which provides subscribers with Internet protocol (IP) addresses, data traffic routing, traffic management, initial security filtering, and other services. As a consequence, ***end users must subscribe to the affiliated ISP in order to obtain cable Internet access, e-mail and other Internet-related services.***
>
> Although end users can access other ISPs' content and services under the "Click Through Access" model, they can do so only through the affiliated ISP as an intermediary. End users must pay a monthly service charge to the affiliated ISP for proprietary content and services (like e-mail, chat groups, and other services) even if the end user does not use those services, but rather uses comparable

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[76] *AT&T/TCI Order*, at ¶ 95 (emphasis added)

[77] *See* Exhibit 5.

services provided by another ISP.[78]

This view was echoed recently by the Legg Mason Precursor Group which stated, [C]ustomers who want a different ISP must pay twice for a second ISP in addition to @Home."[79]

Thus, consumers who wish simply to use Excite@Home's high speed broadband transport to connect with an unaffiliated ISP must subscribe to ***both*** Excite@Home's bundled Internet access offering and to the ISP of their choice, paying for two different services to receive the one they desire.[80] This additional charge to "click through" is nothing more nor less than a monopoly toll levied by a gatekeeper on consumers, which has the further pernicious effect of steering consumers away from unaffiliated ISPs.

This "click-through" model also provides cable operators such as AT&T and their affiliated ISPs tremendous power over the speed and quality of traffic transmitted between the end user and the unaffiliated ISP. As the Consumers Letter states, cable MSOs, such as AT&T, have the ability to manipulate their broadband networks to discriminate against unaffiliated Internet content with respect to both speed and quality of transmission of Internet content.[81] For example, as Mr. Shadman notes, cable operators and their affiliated programmers can "intentionally . . . block or add delays (latency) to traffic destined to unaffiliated ISPs because all

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78 *Id.*, at 6 (emphasis added).

79 Whyman B., "Why Consumer E-Commerce Depends on Cable Access," Legg Mason Precursor Research (July 13, 1999) ("*E-Commerce*").

80 Letter dated July 29, 1999 from Center for Media Education, Consumer Federation of America, Consumers Union, Media Access Project to FCC Chairman William E. Kennard at 4 ("Consumers Letter").

81 Consumers Letter., at 1-5. *See also E-Commerce, supra.*

data traffic must initially pass through the affiliated ISP's network."[82]

In addition, the link between Internet access and content is another flash point for anticompetitive abuses. For example, AT&T's Excite@Home has announced plans to make Excite, which it recently acquired, its default portal.[83] As a result, AT&T and Excite@Home will have tremendous power to steer Internet users towards products and services offered by other affiliated suppliers to the disadvantage of competitors. Indeed it appears that such discriminatory conduct will be the rule, not the exception. Therefore, affiliated Web portals, such as Excite, will receive preferential treatment over nonaffiliated Web portals such as Yahoo![84]

AT&T's acquisition of MediaOne's share of RoadRunner will provide it with control over virtually all cable modem Internet access service. Consequently, with this merger, AT&T will have solidified its position as the dominant provider of cable modem Internet access, having eliminated the only source of potential competition in the market. To mitigate this patently anticompetitive result, it is imperative that the Commission, as a condition of its approval of the proposed merger, impose two related conditions that are needed to protect consumer choice and competition in the Internet access and content markets if this merger is approved. First, the commission should require that AT&T make the appropriate arrangements to waive the exclusive contract arrangements that currently exist with Excite@Home. Second, and in addition, the Commission should require AT&T to provide open and equal access to its broadband facilities to

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[82] Exhibit 5 at 7.

[83] *E-Commerce, supra.*

[84] See WSJ, 8/18/99, discussing Internet conflict between Mr. Hindery, advocating "more democratic" treatment, compared to Mr. Jermoliak, Excite@Home, CEO, who intends to give Excite "a very high profile in the At Home domain."

unaffiliated ISPs at the same prices and on the same conditions and terms as it affords to affiliated ISPs.

Contrary to AT&T's assertions, there are no significant technical obstacles to imposing an open access condition on its cable platforms. Indeed, a recent trial supports this view.[85] Further, as Ali Shadman explains:

> There is no reason...why technology could not be adapted or developed to permit a choice of ISPs. Indeed, Ameritech is currently working with outside vendors to develop technology and equipment built around DOCSIS standards that will permit cable modem subscribers to select from multiple ISPs, and has initiated a trial with AOL and Ameritech.net to test a limited version of this technology.
>
> ....
>
> Under the trial, Ameritech New Media's cable modem subscribers will be able to subscribe to Ameritech.net or AOL. In either case, Ameritech New Media's subscribers will have a direct, unmediated access to the ISP of their choice.[86]

Under this method, cable subscribers would have a real, meaningful choice of ISPs, with direct unmediated access to their selected ISPs.[87] Moreover, this method would eliminate the ability of the cable operator or its ISP affiliate to control the content of Internet traffic, thus, foreclosing one method by which AT&T and its affiliates could engage in anticompetitive conduct against competitors.[88] Consequently, there is every reason to impose Ameritech's proposed condition on AT&T.[89]

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[85] "GTE Forces Open-Access Issue With Cable-Modem Test," *Cablevision*, at 32 (July 30, 1999).

[86] Exhibit 5 at 4, 12-13.

[87] *Id.*, at 13.

[88] *See Id.* at 13-14

[89] Depending on the legal classification of cable modem services ultimately adopted by the Commission, this condition might well be required by law apart from any conditions imposed by the Commission necessary to ensure that this merger is procompetitive.

IV THE AT&T/MEDIAONE MERGER POSES A MAJOR THREAT TO COMPETITION IN THE BUNDLED SERVICES MARKET.

In its *AT&T/TCI Order*, the Commission refused to impose conditions regarding AT&T's proposed bundled service offering, stating that "although we expect some of these services [MVPD, local exchange, exchange access, Internet access, and mobile telephony] may be offered on a bundled basis in the future . . . [a]t present, such a bundled service offering is a new offering in some markets and nonexistent in others."[90] In addition, with respect to bundled services involving cable, the Commission stated, "[w]e are not persuaded that the merged firm is likely to follow an anticompetitive bundling strategy. Should the merged firm engage in anticompetitive tying of services to cable service, we will deal with that behavior forthrightly."[91]

AT&T states in its application, that it intends to provide bundled "packages of voice, video and Internet services to millions of American consumers on an expedited basis."[92] Yet, AT&T fails to address the anticompetitive implications of this strategy for the bundled services market.[93] The Commission, however, must address the future because it is now. This is the context in which the Commission must safeguard consumers from the price gouging and deprivation of choice that will inevitably flow from this merger unless the Commission makes its approval subject to meaningful conditions. AT&T's access, as a result of this merger, to a massive network of backbone fiber and "last mile" wire, coupled with its ownership interests in

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90 *AT&T/TCI Order*, at ¶ 19.

91 *Id.*, at ¶ 126.

92 Application/Public Interest Statement, at 42.

93 For this reason alone, the Commission should deny AT&T's application as incomplete, or require that it supplement its filing with an appropriate analysis of the impact of this proposed transaction on the bundled services market.

leading cable systems and most major programming network and both major cable modem Internet access providers, provides it with a unique ability to bundle monopoly cable television services with more competitive cable modem access services and other more competitive services.

No other service provider is situated to offer competitive packages of services to counter AT&T's anticompetitive bundling strategy. Local exchange carriers ("LECs") , for example, are precluded from doing so by federal regulations that prohibit LECs from providing interexchange service until they gain FCC approval under Section 271, something which has not yet occurred anywhere, and state laws that prohibit combinations of offerings of regulated and unregulated services, including services such as Ameritech New Media's "Americhecks" program. Under that program, Ameritech New Media distributed $10 checks to its customers to help pay for services offered by Ameritech -- local phone, cable and wireless phone service, leaving it up to the consumer's discretion which services they wanted "Americhecks" to pay for. This program was widely successful in attracting subscribers to Ameritech's cable service and, more importantly, in jumpstarting competition in local cable markets. Despite these benefits, Ameritech was ultimately precluded by several state public utility commissions from offering Americhecks to pay for local phone service.

The characteristics of this merger, coupled with the regulatory dichotomy between AT&T and LECs, provides AT&T with a formidable headstart in the race to offer bundled packages to consumers of services that feature cable television and cable modem Internet access. Because AT&T can provide these bundled services free of the regulatory constraints imposed on LECs, AT&T is positioned to develop cost structures through which it can subsidize additional new services.

In addition, AT&T will be able to offer its bundled services in a market virtually free of competition. As a result, AT&T will have formidable power and incentive to engage in monopolistic behavior designed to suffocate competition in the cable television and cable modem Internet access market. For example, AT&T could require its customers to purchase Excite@Home or RoadRunner's cable modem Internet service together with AT&T cable service as a package. AT&T might also require purchase of monopoly cable television and/or cable modem service as a condition to subscribing to AT&T's competitive local telephone service. Alternatively, AT&T could charge exorbitantly high prices to consumers of AT&T's monopoly cable service who did not wish to purchase its competitive long distance service. In addition, AT&T could tie up consumers with long term contracts and high exit fees. Such practices would virtually destroy the ability of competing new entrant MVPDs or unaffiliated ISPs to compete for subscribers in markets where AT&T's bundled services are offered.

In order to prevent AT&T from engaging in such anticompetitive practices, Ameritech strongly urges the Commission, as a condition of its approval of the merger, to prohibit AT&T from bundling any package of video programming or high-speed Internet service with telephone service unless the customer is permitted to purchase each element separately.

VI. CONCLUSION

As demonstrated above, AT&T's proposed merger with MediaOne poses a real and substantial threat to competition in multiple markets. Far more than the merger with TCI, this merger, if approved without conditions, will allow AT&T to augment and consolidate its dominant market power in virtually every segment of the multichannel video programming distribution and cable modem Internet access service markets. In order to mitigate the anticompetitive effects of this merger and to ensure that consumers do, in fact, receive the public interest benefits promised by AT&T, Ameritech urges the Commission to impose the following strict conditions:

- The Commission should require that AT&T comply with its reinstated horizontal ownership rules.
- The Commission should require any programming vendor in which AT&T has an attributable interest to make programming available to all MVPDs pursuant to Section 628 and the Commission's implementing program access rules, regardless of whether the programming is delivered by satellite or terrestrially.
- The Commission should require any programming vendor in which AT&T has an attributable interest to make programming available to any MVPD at the same price and on the same conditions and terms as it does to AT&T or any of its affiliated MVPDs. This condition should apply on a nationwide basis in order to preclude AT&T-affiliated programming suppliers from evading this condition by offering programming to competing MVPDs at higher prices than MVPDs located in adjacent noncompetitive service areas.
- The Commission should require Liberty Media, if divested from AT&T, to make its programming available to all MVPDs on the same prices, terms and conditions and as it does to AT&T or any of its affiliated MVPDs for a period of five years following the divestiture.
- The Commission should prohibit AT&T from entering into, extending or renewing any exclusive or preferential contracts for programming with unaffiliated programming vendors. As part of this condition, AT&T should be prohibited from coercing or retaliating against programming vendors that refuse to provide exclusive rights or preferential terms or conditions for carriage of programming.
- The Commission should prohibit AT&T from entering into exclusive, proprietary arrangements with hardware and software manufacturers of cable system equipment.
- The Commission should require AT&T to provide open and equal access to its broadband facilities to unaffiliated ISPs at the same prices and on the same terms and conditions as it affords affiliated ISPs.
- The Commission should require that the exclusivity provisions in the AT&T/Excite@Home arrangement be waived.

- The Commission should prohibit AT&T from bundling any packages of video programming and high-speed Internet access with telephone service unless customers are permitted to purchase each element separately.

Respectfully submitted:

AMERITECH, INC.

Lawrence R. Sidman

Lawrence R. Sidman
Lisa M. Fowlkes
Verner, Liipfert, Bernhard
McPherson & Hand, Chartered
901-15th Street, NW
Suite 700
Washington, DC 20005
(202) 371-6000

Its Attorneys

John T. Lenahan
Christopher Heimann
Ameritech
30 S. Wacker Drive
39th Floor
Chicago, Illinois 60606
(312) 750-5367

Deborah H. Morris
Vice President and General Counsel
Ameritech New Media, Inc.
300 South Riverside Plaza
Suite 1800
Chicago, Illinois 60606
(312) 526-8062

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