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**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
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| Applications for Consent to the Transfer of Control of Licenses | ) | |
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| MediaOne Group, Inc., Transferor | ) | CS Docket No. 99-251 |
| | ) | |
| To | ) | |
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| AT&T Corp., Transferee | ) | |

# COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH ENTERTAINMENT, INC., BELLSOUTH INTERACTIVE MEDIA SERVICES, INC., AND BELLSOUTH WIRELESS CABLE, INC.

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TABLE OF CONTENTS

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| | | |
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Directed to: The Commission and the Cable Services Bureau

**COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH ENTERTAINMENT, INC., BELLSOUTH INTERACTIVE MEDIA SERVICES, INC., AND BELLSOUTH WIRELESS CABLE, INC.**

BellSouth Corporation and its subsidiaries, BellSouth Entertainment, Inc., BellSouth Interactive Media Services, Inc. and BellSouth Wireless Cable, Inc. (hereinafter referred to collectively as "BellSouth"), by their attorneys, hereby respectfully file their comments in response to the Cable Services Bureau's Public Notice in the above-captioned proceeding.[1]

## I. INTRODUCTION AND SUMMARY

On the heels of its recently completed merger with cable giant Tele-Communications, Inc. ("TCI"), AT&T Corp. ("AT&T") has proposed a $60 billion acquisition of MediaOne Group, Inc. ("MediaOne"), another major cable multiple system

[1] *See* Public Notice, *AT&T Corp. and MediaOne Group, Inc. Seek FCC Consent for a Proposed Transfer of Control,* CS Docket No. 99-251, DA 99-1447 (rel. July 23, 1999).

operator ("MSO"). The combined AT&T/TCI/MediaOne would be the country's largest cable MSO.

As the largest MSO, the merged TCI/MediaOne would have both the ability and the incentive to act anticompetitively. Specifically, TCI/MediaOne would have the ability and incentive to exercise its substantial market power as a buyer of programming to obtain exclusivity arrangements with a number of programmers that are not subject to the program access rules. The effect of such exclusivity arrangements would be to seriously impair the development of meaningful competition by alternative multichannel video programming distributors ("MVPDs").

Although BellSouth does not oppose the AT&T/MediaOne merger, it believes that in order for the merger to be found to be in the public interest, a condition must be imposed to remedy the competitive problem identified above. Thus, BellSouth requests that the Commission impose the following condition on the merged entity: that AT&T/MediaOne shall not enter into an exclusivity arrangement with any video programmer that is not subject to the program access rules, unless AT&T/MediaOne can first demonstrate, in a "Petition for Exclusivity" that complies with 47 C.F.R. § 76.1002(c)(5), that such exclusivity arrangement meets the public interest criteria of 47 C.F.R. § 76.1002(c)(4).

## II. DISCUSSION

### A. BellSouth's Interest in This Proceeding

BellSouth currently holds 21 franchises to provide cable "overbuild" service in local markets throughout the Southeast, representing approximately 1.4 million potential cable households. BellSouth has already launched cable overbuild service in, among other places, Vestavia Hills, Alabama, several communities in metropolitan Atlanta, and South Florida. BellSouth also holds Multipoint Distribution Service ("MDS") and Instructional Television Fixed Service ("ITFS") channel rights covering approximately 3.5 million homes in several markets in Florida, and in Atlanta, New Orleans and Louisville. The company has already launched digital wireless cable service in New Orleans, Atlanta and Orlando, and is in the process of launching similar service in Jacksonville and Daytona Beach.[2] In Atlanta, BellSouth directly competes with MediaOne and TCI. BellSouth also competes with MediaOne in Jacksonville and with TCI in Vestavia Hills, and will soon compete with MediaOne and TCI in various other geographic areas.

To date, BellSouth has invested hundreds of millions of dollars to acquire wireless cable channel rights, deploy transmission and reception equipment, establish the operational infrastructure necessary to develop competitive digital wired and wireless cable systems, and provide distance learning facilities and opportunities for local ITFS licensees. Despite this level of commitment and expertise, however, as discussed below the proposed merger of AT&T and MediaOne will impair BellSouth's ability to compete meaningfully and effectively with the incumbent MSO unless the condition sought by BellSouth is imposed on the merger.

[2] BellSouth also operates several analog wireless cable systems, and holds the MDS/ITFS channel rights to serve Miami, Florida.

### B. AT&T/MediaOne Must Demonstrate That Their Proposed Merger is in the Public Interest

As the Commission has stated on numerous occasions, the burden of proof is squarely on the merging parties to demonstrate that their merger benefits the public interest.[3] As part of its assessment of the public interest, the Commission considers the possible competitive effects of the transaction.[4] The Commission has recognized, however, that its public interest analysis of competition goes beyond traditional antitrust principles and encompasses the broader policy goals of the Communications Act.[5]

At the outset, it should be noted that the proposed AT&T/MediaOne merger presents the Commission with a very different situation from the one it confronted in the AT&T/TCI proceeding. In that proceeding, the Commission was basically dealing with the merger of a telephone company with a cable company.[6] In the instant proceeding, by contrast, the Commission is facing a proposed merger between two of the largest cable MSOs -- TCI and MediaOne. The merger of AT&T and MediaOne would create the country's largest cable MSO. The AT&T/MediaOne merger would also increase consolidation in an industry currently experiencing rapid consolidation, and one that is already dominated by only a small and dwindling number of large MSOs.

As discussed below, the merged AT&T/MediaOne would have substantial market power as a buyer of video programming, and would have the incentive and ability to

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[3] *E.g.*, *In re* Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp., 14 F.C.C.R. 3160, 3169 (1999) [hereinafter *TCI Order*].

[4] *Id.* at 3168.

[5] *See id.* at 3168-69.

[6] *See id.* at 3161, 3163.

exercise that market power to the competitive detriment of competitors and would-be MVPD competitors.

### C. AT&T/MediaOne Would Have the Incentive and Ability to Enter Into Anticompetitive Exclusivity Arrangements With Video Programmers

Access to video programming on fair and non-discriminatory terms continues to be of paramount importance to BellSouth in its efforts to compete effectively with incumbent MSOs. In order for there to be viable competition to the incumbent MSO in a given geographic area, the competitor MVPD must be able to offer a broad, comprehensive package of programming to its subscribers. A substantial amount of popular programming is outside the scope of the program access provisions.[7] If a significant portion of the universe of desirable programming is unavailable to a new competitive entrant because of an exclusivity arrangement with the incumbent MSO, the new entrant will be foreclosed from any meaningful opportunity to compete.

The Commission has long recognized that concentration of ownership among cable operators is significant in the program access context because it increases the buying power of the major cable MSOs and facilitates their ability to coordinate their conduct.[8] Thus, it is important to note that consolidation within the cable industry is

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[7] See discussion at pages 7-8 infra.

[8] *In re* Implementation of Section 302 of the Telecommunications Act of 1996 - Open Video Systems, 11 F.C.C.R. 18223, 18322 (1996). *See also In re* Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 13 F.C.C.R. 24284, 24362 (1998) [hereinafter *1998 Annual Report*] ("Although cable operators usually do not compete to serve the same subscribers in local downstream markets, they may have an incentive to coordinate their decisions in the upstream market for the purchase of programming on a national or regional level. Concentration of ownership among buyers in this market is one indicator of the likelihood that coordinated behavior among buyers will be successful").

accelerating at an unprecedented pace and will increase even further should the Commission permit AT&T to acquire MediaOne in the wake of AT&T's recent acquisition of TCI. AT&T's acquisition of MediaOne would create the country's largest MSO. It has been estimated that AT&T's common ownership of MediaOne and TCI will give AT&T ownership interests in cable systems serving approximately 60 percent of all cable subscribers in the United States.[9] Other MSOs have also intensified their efforts to consolidate with each other and, as a result, it is estimated that the top seven MSOs now serve over 54.1 million subscribers (i.e., 82 percent of all cable subscribers in the United States) and pass 87.1 million homes (i.e., 92 percent of all homes passed).[10]

The Commission fully recognizes the dominant role that cable MSOs play in controlling the distribution of video programming.[11] Simply stated, as a general rule video programmers cannot survive without the MSOs. There are already a number of programmers that have acceded to the cable MSOs' demands for programming

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[9] *E.g., Statement of U.S. Senator Mike DeWine re: Joint Hearing of Senate Judiciary Committee and Antitrust, Business Rights and Competition Subcommittee, "Broadband: Competition and Consumer Choice in High-Speed Internet Services and Technologies"* (July 14, 1999).

[10] *Yankee Group Demands a Recount - Report Says Cable Industry Figures Don't Add Up,* PR Newswire, June 11, 1999. *See also* Lawrie Mifflin, *Cox to Acquire TCA Cable for $3.26 Billion,* N.Y. Times, May 13, 1999, at C1; Jim Cooper, *Paul Allen's Charter Acquires Two More MSOs,* MediaWeek, May 31, 1999.

[11] *See 1998 Annual Report*, 13 F.C.C.R. at 24363 ("[W]e find that downstream local markets for the delivery of video programming remain highly concentrated. . . .[A]s of June 1998, the shares of the market participants, grouped by competing technologies, would be roughly: cable, 85.3%; DBS/HSD, 12.1%; wireless cable, 1.3%; and SMATV, 1.2%.").

exclusivity.[12] A programming service has no chance of success without access to a critical mass of subscribers. Programmers, therefore, are becoming even more dependent on the large MSOs as AT&T and others tighten their control over distribution on a national and regional scale. As noted by Federal Trade Commission Chairman Pitofsky and two other FTC Commissioners with respect to Time Warner's acquisition of Turner Broadcasting:

> [T]he launch of a new channel that could achieve marquee status would be almost impossible without distribution on either the Time Warner or TCI cable systems. Because of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on MVPDs that cover 40-60% of subscribers . . . . TCI and Time Warner are the two largest MVPDs in the U.S. with market shares of 27% and 17%, respectively. Carriage on one or both systems is critical for new programming to achieve competitive viability.[13]

As noted above, BellSouth's exclusivity concerns involve programming that is outside the scope of the program access rules, for example programming services that are

[12] *See Raising the Exclusivity Ante,* Cable World, July 15, 1996, at 1; *TCI Defends Exclusive Carriage Deals to Senate,* Media Daily, Oct. 13, 1997; Statement of Matthew Oristano, Chairman, People's Choice TV Corp., before the FCC, at 6 (Dec. 18, 1997) ("[T]here are today alliances between cable and broadcast TV (NBC, Fox, CBS) which create exclusivity, cable and satellite programmers (Murdoch) which create exclusivity, . . . and cable and former cable operators (Viacom) which create exclusivity. The cable industry control of programming, if diagrammed with all of its equity, licensing, carriage agreements, and quid pro quo relationships, creates a web which has the effect of ensnaring all competitors"). *See also* Letter from William E. Kennard, Chairman, FCC, to W.J. (Billy) Tauzin, Chairman, Subcommittee on Telecommunications, Trade, and Consumer Protection, Committee on Commerce, U.S. House of Representatives, Responses to Questions at 1 (Jan. 23, 1998) (identifying the Game Show Network, Home & Garden Television, TV Land, MSNBC and Fox News as program services that are currently subject to exclusivity arrangements).

[13] *In re* Time Warner Inc., 61 Fed. Reg. 50,301, 50,313 (1996) (Proposed Consent Agreement With Analysis to Aid Public Comment - Separate Statement of Chairman Pitofsky, and Commissioners Steiger and Varney) (footnote omitted).

not vertically integrated with cable operators.[14] In fact, BellSouth currently does not have access to services such as MSNBC, Fox News, TV Land and the Game Show Network, all of which allegedly do not qualify as "vertically integrated" under the Commission's current definition of that term. The Commission's *1998 Annual Report* recognizes that more than half of the programming services in operation today are not "vertically integrated" and therefore are not covered by the program access rules.[15]

An additional example of BellSouth's concerns is terrestrially-delivered programming, which is similarly outside the scope of the program access rules.[16] The proposed AT&T/MediaOne merger raises particular concerns in this regard due to AT&T's incentive and ability to evade the program access rules by migrating MediaOne's programming interests from satellite to terrestrial delivery. As the Commission stated in its Order in the recent AT&T/TCI merger,

> We recognize, however, 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 terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace . . .[W]e remain aware of the potential for this type of migration and the possible need to address it in the future.[17]

The Commission's observation is also particularly relevant in the Atlanta market, where BellSouth competes head-to-head with MediaOne for video, voice and high-speed Internet access subscribers. MediaOne currently is engaged in an extensive network

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[14] *See* 47 C.F.R. §§ 76.1000-1002; *TCI Order*, 14 F.C.C.R. at 3177.

[15] *See 1998 Annual Report*, 13 F.C.C.R. at 24376.

[16] *See* 47 C.F.R. §§ 76.1000-1002; *TCI Order*, 14 F.C.C.R. at 3178.

[17] *TCI Order*, 14 F.C.C.R. at 3180.

upgrade of its Atlanta cluster (encompassing approximately 900,000 households passed), and has commenced similar upgrades in other large metropolitan areas, including Boston, Los Angeles, Minneapolis/St. Paul, Detroit and Miami.[18] Should the Commission approve AT&T's acquisition of MediaOne, AT&T would have both the facilities and the incentive to migrate critical programming to MediaOne's regional networks as well as to its own nationwide network.

As noted above, a merged AT&T/MediaOne would have substantial market power as a buyer of video programming. More importantly, AT&T/MediaOne would have the incentive and the ability to exercise that market power to obtain exclusivity arrangements from those programmers not subject to the program access rules. If AT&T/MediaOne were to be able to enter into such exclusivity arrangements with a significant number of programmers, the ability of MVPDs to provide meaningful, effective competition to the incumbent AT&T/MediaOne system would be substantially impaired. Thus, as a condition of approving the merger, the Commission should prohibit AT&T/MediaOne from entering into such exclusive arrangements.

BellSouth recognizes, however, that there may be times when exclusivity arrangements between AT&T/MediaOne and a programmer would be appropriate. Specifically, an exclusivity arrangement would be appropriate when it satisfies the same public interest criteria as would be applicable to exclusivity arrangements that were subject to the program access rules, i.e., the criteria in 47 C.F.R. § 76.1002(c)(4).

Thus, for the reasons stated above, BellSouth respectfully requests that the following provision be imposed as a condition of the Commission's approval of the

[18] *See, e.g.*, Carl Weinschenk, *AT&T's Alone in the Crowd - - Possible Concerns Over Joint Ventures Prompt Carrier's MediaOne Bid,* tele.com, May 3, 1999.

license transfers in connection with the proposed AT&T/MediaOne merger: that AT&T/MediaOne shall not enter into an exclusivity arrangement with any video programmer that is not subject to the program access rules, unless AT&T/MediaOne can first demonstrate, in a "Petition for Exclusivity" that complies with 47 C.F.R. § 76.1002(c)(5), that such exclusivity arrangement meets the public interest criteria of 47 C.F.R. § 76.1002(c)(4).

## III. CONCLUSION

For the reasons stated above, BellSouth respectfully urges the Commission to condition its approval of the subject license transfers in connection with the merger of AT&T and MediaOne on the imposition of the provision sought by BellSouth relating to programming exclusivity.

Respectfully submitted,

BELLSOUTH CORPORATION
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BELLSOUTH INTERACTIVE MEDIA SERVICES, INC.
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August 23, 1999

**CERTIFICATE OF SERVICE**

I, Anthony V. Jones, hereby certify that true copies of the foregoing COMMENTS OF BELLSOUTH CORPORATION, BELLSOUTH ENTERTAINMENT, INC., BELLSOUTH INTERACTIVE MEDIA SERVICES, INC., AND BELLSOUTH WIRELESS CABLE, INC. were served this 23rd day of August, 1999, on the following by hand delivery:

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