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

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In the Matter of	)	
	)	
Application for Transfer of Control	)	CS Docket 99-251
of FCC Licenses from MediaOne Group, Inc.	)	
to AT&T Corp.	)	

COMMENTS OF MCI WORLDCOM, INC.

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MCI WORLDCOM, Inc. (MCI WorldCom) hereby submits its comments concerning the applications of AT&T Corp. (AT&T) and MediaOne Group, Inc. (MediaOne) (collectively Applicants) for approval of their proposed transfer of control.[1]

I. SUMMARY

The Commission must determine whether AT&T and MediaOne have carried their burden to demonstrate that the proposed acquisition will serve the public interest.[2] MCI WorldCom generally supports the applications because the proposed acquisition would increase facilities-based competition against the incumbent local exchange carriers (ILECs) for both broadband and narrowband local services for voice, data, and Internet traffic. Appl. at 4. To the extent that the acquisition will help AT&T break the ILECs' current monopoly and increase competition to provide telecommunications and Internet services to residential and business consumers, consumers will benefit.

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[1] MediaOne Group, Inc., Transferor, AT&T Corp., Transferee, Transfer of Control Applications, CS Docket No. 99-251 (filed July 7, 1999) (Appl.)

[2] *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 authorizations from Tele-Communications, Inc. Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160, 3168-3170, ¶¶ 13, 15 (Feb. 18, 1999) (AT&T-TCI Merger Order).

However, AT&T's announced policies to tie its Internet service to its broadband telecommunications service and to adopt a closed broadband network architecture would reduce competition on the merits among Internet service and content providers. By further reducing the number of providers of broadband services to residential customers, the acquisition increases the likelihood of coordinated interaction in a duopoly environment where only cable companies and ILECs can provide facilities-based residential broadband service.

The Commission should therefore condition grant of the applications on (i) a prohibition against any tying arrangement that requires purchasers of AT&T's broadband services to buy AT&T's Internet services and (ii) a requirement that AT&T provide competing Internet service providers (ISPs) and competitive local exchange carriers (CLECs) with reasonable and nondiscriminatory interconnection to its broadband network. *See* Part III. The section 251(a) interconnection obligation applies to carriers, and ISPs are not carriers unless they provide the underlying telecommunications capability. Corresponding changes for the same reason: on These two conditions have a large upside because they will prevent exploitation of consumers to the extent that AT&T exercises market power in the provision of broadband services to residential consumers, as it expects to do and as is likely in a duopoly environment. The risks are serious enough that the Commission should address them now, when the problem can be dealt with most effectively. These conditions have little or no downside because they are consistent with the principle of consumer choice embraced by AT&T, they preserve AT&T's ability to sell both broadband and Internet services to those customers who voluntarily choose to purchase both from AT&T, and they entail minimal costs of implementation and enforcement. Because the Commission can more effectively and efficiently enforce conditions that are fully implemented before AT&T acquires MediaOne, and its incentive to bring itself into compliance with transaction-related conditions declines substantially, the Commission should, to the maximum extent, require AT&T to comply with these conditions before any closing occurs.

These conditions simply require AT&T's compliance with sections 251(a) and (b) of the Communications Act. These sections apply to the provision of any local exchange or exchange access telecommunications services, whether narrowband or broadband, and whether provided over cable facilities or the traditional telephony infrastructure. *See* Part V. The Commission should ensure that, as a provider of local voice and advanced services, AT&T will comply with all of the requirements of the Telecommunications Act of 1996 (1996 Act) concerning interconnection, resale, number portability, dialing parity, rights-of-way and reciprocal compensation.

The Commission chose not to impose such conditions when it approved AT&T's acquisition of TCI, largely because it concluded that the TCI acquisition did not increase any competitive threats that would otherwise exist and that these conditions, if they should be imposed at all, should be imposed on all cable companies and not only on AT&T. AT&T-TCI Merger Order, ¶¶ 28, 58, 117, 126. AT&T's proposed acquisition of MediaOne poses new and greater acquisition-specific risks for two reasons. First, the Applicants emphasize that this transaction will permit AT&T to provide broadband local services and accompanying Internet services "far more quickly and effectively than either entity could separately." Appl. at 4; *see id.* at 20, 23-28, 28-29. The harm to competition posed by AT&T's plan to restrict consumers' broadband access to competing Internet service providers would therefore be greater and more imminent than it would be if AT&T does not acquire MediaOne.

Second, and more important, by significantly extending the residential market reach that AT&T gained with its acquisition of TCI, and by combining horizontal ownership of two huge cable monopolies and associated broadband capabilities, AT&T's acquisition of MediaOne threatens to make AT&T-TCI-MediaOne such a major factor as a gateway to residential Internet customers that it can force both Internet service providers and Internet content providers to deal with it on discriminatory terms. AT&T-TCI-MediaOne poses a greater competitive danger than AT&T-TCI because the new company will have an even greater share of Internet users and traffic, and even fewer major providers of residential broadband service will remain, thereby increasing AT&T's ability to exercise market power either unilaterally or through coordinated interaction with the ILECs. *See* Part IV. Consolidation or cooperation among all the major cable companies in providing cable, broadband, and Internet services would harm competition, and AT&T's acquisition of MediaOne is an important enough step toward that unacceptable result that the Commission should impose conditions to ameliorate the competitive harm.

II. THE PROPOSED TRANSACTION

AT&T's acquisition of MediaOne would combine the nation's largest single provider of both multichannel video programming distribution (MVPD) services and telecommunications services, with the third largest provider of MVPD services. AT&T is seeking to extend its existing strengths in the residential market where barriers to facilities-based entry for network-based services to individual homes are the highest and where the Commission has made a strong commitment to encourage competition in MVPD, Internet, and telecommunications services. The stated purpose of the acquisition is to combine AT&T's cable and telecommunications assets with MediaOne's cable assets to produce a company that can sell more services to more residential customers than either company could individually. Appl. at 4, 20, 23-28, 28-29.

Through its recent acquisition of TCI, AT&T is currently the largest cable multiple system operator (MSO) in the United States, with over 19 million cable subscribers.[3] AT&T alone and with the cable companies with which it has joint ventures has approximately 20 million homes and passes approximately 28 million homes out of 65 cable subscribers (43%).[4] MediaOne by itself and with the cable companies with which it has joint ventures has approximately 15 million subscribers and passes approximately 24 million homes out of 65 million cable subscribers (37%).[5] The Commission has consistently held that cable companies have market power over MVPD services to their customers in each of the geographic markets they serve.[6]

AT&T is also the largest telecommunications company in the United States and the world. AT&T is especially strong in the market for residential long-distance services, with approximately 67% presubscribed residential lines in the United States.[7] For these and other reasons, the Commission has consistently identified AT&T as one of the most significant market

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[3] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, CS Docket No. 98-102, at Table C3 (rel. Dec. 23, 1998) (Cable Competition Report).

[4] *Id.* at ¶ 14 and Tables E-1, E-3, E-5 and E-6.

[5] *Generally,* Cable Competition Report; *Breaking the Rules: AT&T's Attempt to Buy a National Monopoly in Cable TV and Broadband Internet Services*, Consumers Union, Consumer Federation of America and Media Access Project, (filed Aug. 17, 1999).

[6] *Id.* at 6.

[7] Long Distance Market Shares, Fourth Quarter, 1998, Industry analysis Division, Common Carrier Bureau, Federal Communications Commission, March, 1999, Table 4.1.

participants in the mass market for local exchange and exchange access or bundled local exchange, exchange access and long distance service.[8]

AT&T's acquisition of MediaOne, following hard on the heels of its acquisition of TCI, another of the largest cable monopolies in the country, would give AT&T an alternative means of connection to millions of residences. AT&T's plans to significantly invest in its cable infrastructure would enable the network to support two-way interactive local services, including telephony and high-speed Internet access. The combination of its existing and planned local facilities would make AT&T-TCI-MediaOne the largest end-to-end facilities-based CLECs, for residential customers.

III. AT&T-MEDIAONE SHOULD IMPLEMENT THE PRINCIPLE OF COMPETITIVE CHOICE BY UNTYING ITS BROADBAND AND INTERNET SERVICES AND GIVING COMPETING ISPS OPEN ACCESS TO ITS BROADBAND NETWORK

AT&T proposes to limit consumer choice in two important and related ways. First, AT&T will impose a tying arrangement that requires consumers who buy AT&T's broadband service also to buy AT&T's Internet service. Even if the broadband customers would prefer to purchase a competing Internet service instead of AT&T's, the customer is nonetheless forced to purchase Excite@Home's or Road Runner's Internet service. Second, AT&T will not permit ISPs that compete with it to provide Internet services to its broadband customers to connect efficiently with the network that AT&T uses to provide broadband telecommunications services. Instead of connecting directly to AT&T's broadband network, ISPs will have to connect to Excite@Home or Road Runner.

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[8] *In re Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, 20029-20030, ¶ 82 (1997).

Notably, the Applicants do not dispute the principle of open access and consumer choice. AT&T accepts at least in theory the proposition that consumers should be able to use the Internet service they prefer. AT&T pledges to maintain "an open environment through which subscribers can reach any available content on the web." Appl. at 85. AT&T has in fact made a commitment that subscribers will have "direct access" to competing content and on-line service providers of their choice.[9]

But AT&T is not willing to fully implement this principle and compete on the merits to provide Internet services to its broadband customers. Why is AT&T refusing to give consumers unrestricted choice among ISPs, and why is it adopting a closed architecture rather than the open architecture that has defined the essence of the Internet and accounted for its extraordinary growth? AT&T's answer is candid and straightforward: the tie creates "substantial investment incentives" because tying Internet to broadband service will cause AT&T's residential consumers to buy more of AT&T's Internet service than they otherwise would and will therefore increase AT&T's return on its investment in broadband. *See* Appl. at 89-90; *see* Bruce M. Owen and Gregory L. Rosston, *Cable Modems, Access and Investment Incentives*, at i-iv, (unbundling requirement would significantly deter investment) *Ex Parte* on behalf of the National Cable Television Association, CC Docket No. 98-146 (filed Dec. 10, 1998) (NCTA Filing).

That rationale is a compelling argument against, not for, these restrictive policies. AT&T's purported justification has two key aspects. First, its premise is that AT&T will have market power over broadband services. Second, the intended effect of these policies is more

[9] Separate Statement of William Kennard, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee, CS Docket No. 98-178 at 1 (rel. Feb. 17, 1999).

complete exploitation of that market power. To prevent this harm to competition and consumers, the Commission should condition approval on termination of these policies.

The Tying Arrangement. AT&T can achieve the stated purpose of its tying arrangement to substantially increase sales of its Internet service only if it has a significant degree of market power over broadband services — only then will the tie cause more of AT&T's broadband customers to buy AT&T's Internet service than they would if they had the option to buy AT&T's broadband service and a competitor's Internet service. If AT&T's lacks market power over broadband services, customers who prefer a competing Internet service would simply choose a competing broadband service that they could use with their preferred Internet service, thus avoiding the requirement to buy AT&T's unwanted Internet service. Moreover, AT&T will use its cable presence to market its broadband and Internet services, and AT&T also has market power in the MVPD market. An insignificant degree of market power would not have a significant effect on AT&T's investment incentives because it would not cause any significant change in consumer buying habits.

Equally important, the only alternative that AT&T's customers are likely to have to AT&T's broadband service is the broadband service offered by an ILEC.[10] The Commission has recognized that a residential broadband duopoly "would not perform well for consumers."[11] In a duopoly setting, the likelihood of coordinated interaction between the two firms is high. The

[10] MCI WorldCom notes that, while there are other emerging sources of broadband services, such as wireless and satellite-based services, these services are not yet viable competitive broadband service offerings in comparison to those of the ILECs and cable companies.

[11] *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 13 FCC Rcd 15280, 15299, ¶ 52 (1998).

ILECs are making every effort to limit consumer choice, for example, by tying their broadband and Internet services and by failing to implement the Commission's unbundling and resale rules applicable to broadband services.[12] In addition, only six ILECs dominate the provision of local telephone service, and two pairs of them (SBC and Ameritech, and Bell Atlantic and GTE) are seeking to merge. The number of players would shrink even further as a result of AT&T's planned alliances with other major cable providers, including Time Warner, and Excite@Home's agreement with other cable companies to provide Internet service on an exclusive basis.

Local broadband services constitute a market in which a firm can exercise market power, individually or collectively. Although narrowband local services perform some of the same functions, it is not a close enough substitute to prevent the exercise of market power.[13] Moreover, the mass market broadband services offered by ILECs through Digital Subscriber Loop (DSL) technology are not available to many residential customers, particularly in rural areas, because of technical constraints.[14]

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[12] Comments of MCI WorldCom, Inc., at 45-47, *In the Matter of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer of Control*, CC Docket No. 98-184 (filed Nov. 23, 1998) (discussing how ILECs are bundling residential DSL service and Internet service and discriminating against unaffiliated ISPs); Comments of MCI WorldCom, Inc., at 42-44, *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications, Inc., Transferee*, CC Docket No. 98-141 (filed Oct. 15, 1998) (same).

[13] F. Bar, S. Cohen, P. Cowhey, B. DeLong, M. Kleeman, and J. Zysman, *Defending the Internet Revolution in the Broadband Age: Why Open Policy Has Been Essential; Why Reversing That Policy Will Be Risky*, Part II, Berkeley Roundatable on the International Economy Working Paper (Aug. 1999) (available at http://e-conomy.berkeley.edu/pubs/wp/ewpl12.html) (BRIE Working Paper).

[14] BRIE Working Paper, Part II.B. In addition, cable broadband service has a significant head-start over DSL service, and existing cable customers may be locked in due to high costs of switching from cable to DSL broadband service. *Id.* Part II.C.

It should be beyond genuine dispute that tying harms consumers if AT&T has market power over broadband, either unilaterally or collectively with the ILECs. Under the antitrust laws, AT&T's tying arrangement is illegal *per se* to the extent that AT&T has market power over broadband services, the tying product.[15] A tying arrangement is "a contract by a party to sell one product [the tying product] but only on the condition that the buyer also purchases a different (or tied) product." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5-6 (1958). Because they are inherently destructive of competition, tying arrangements are unlawful *per se* under the antitrust laws, without further proof of anticompetitive effects, "when the seller has some special ability — usually called 'market power' — to force a purchaser to do something that he would not do in a competitive market." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 16 (1984). When a customer is forced to buy a product that she "might have preferred to purchase elsewhere or on different terms . . . , competition on the merits in the market for the tied item is restrained and the Sherman Act is violated." *Id.* at 12; *Grappone, Inc. v. Subaru of New England, Inc.*, 858 F.2d 792, 795 (1st Cir. 1988) (Breyer, J.).[16] Tying can increase a firm's ability to exploit market

[15] The rule against tying is a special application of the general rule against monopoly leveraging, which prohibits a firm from using monopoly power in one market to lessen competition in another market. *Fineman v. Armstrong World Industries*, 980 F.2d 171, 205 (3d Cir. 1992), *cert. denied*, 507 U.S. 921 (1993); *Alaska Airlines v. United Airlines*, 948 F.2d 536, 548 (9th Cir. 1991), *cert. denied*, 503 U.S. 977 (1992); *Kerasotes Michigan Theatres v. National Amusements, Inc.*, 854 F.2d 135, 136 (6th Cir. 1988), *cert. dism'd*, 490 U.S. 1087 (1989); *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 275 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 711-13 (7th Cir. 1977).

[16] "[A] Seller, possessing significant market power with respect to Product A, may cause anticompetitive harm by tying as follows: by reducing the price of Product A slightly (or by otherwise not fully exploiting its power with respect to Product A), the Seller may induce the Buyer to accept the tie; by doing so, the Seller may build a strong market position in Product B, and *that position* in Product B, in turn, may increase its power to charge high prices with respect to Product A." *Grappone*, 858 F.2d at 795.

power by, for example, facilitating price discrimination or raising barriers to entry. *Jefferson Parish,* 466 U.S. at 12, 15 (discussing buyer's "inability to evaluate the true cost of either product when they are available only as a package"); *Grappone*, 858 F.2d at 795-96.

Here, if the proposed acquisition achieves AT&T's stated goals, it will increase AT&T's ability to use its market power over broadband (and complementary MVPD) services to reduce competition and consumer choice in the market for Internet services. It would be illegal *per se* under the antitrust laws for AT&T to exploit "its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *See Jefferson Parish*, 466 U.S. at 12. It would also violate the Communications Act, and frustrate the public interest, for AT&T to use its increased ability resulting from the MediaOne acquisition to engage in anticompetitive leveraging. The ability of AT&T-TCI-MediaOne to carry out its tying strategy would be greatly enhanced by AT&T's existing strength in the telephony and Internet markets, and its recognized monopoly power over MVPD services, with respect to residential consumers. The ability of CLECs and ISPs to compete with AT&T-TCI-MediaOne to provide local and Internet services would be materially reduced if the ability of AT&T-TCI-MediaOne's customers to exercise their competitive options were impaired. In these, perhaps unique, circumstances it would therefore be contrary to the public interest to permit AT&T to tie together the sale of cable services, local services, long distance services, and Internet services. Consumers should have the freedom to purchase from AT&T any one of these services by itself. AT&T should be willing to rely on "any intrinsic superiority" of its Internet service to "convince freely choosing buyers to select it over others anyway." *See Jefferson Parish*, 466 U.S. at 13 (quotation and citation omitted).

AT&T's primary defense of its tying requirement from the consumer perspective is that consumers benefit from the availability of an integrated service. Appl. at 90. However, there is no issue about whether AT&T can offer its customers a package of broadband and Internet services. The only issue is whether consumers who want to buy AT&T's broadband service but not its Internet service ought to have that choice. Just as AT&T may compete on the merits to provide the two services as a bundled package, it should compete on the merits by allowing customers to purchase either service individually as well as both of them together.

MCI WorldCom does not contend that AT&T should be prohibiting from selling a package of all or some of these services to consumers who *voluntarily* choose to purchase each of them from AT&T. *But see* AT&T-TCI Merger Order, ¶ 126 (discussing "blanket ban on the bundling of services"). Nor does MCI WorldCom take the position that AT&T should be prohibited from providing cost-based discounts to consumers who voluntarily choose to purchase more than one of its services. The condition that MCI WorldCom submits the Commission should impose would prevent AT&T from using its market power over cable services to require consumers to purchase two or more of these services as a package for one price, whether or not they want to purchase all of them from AT&T or prefer to purchase some from another supplier. This condition would give AT&T a full and fair chance to compete on the merits for the local, long distance, and Internet business of its broadband and cable customers; it would give consumers a free choice to select the best product at the best price; and it would give other firms an equal competitive opportunity to win the business of these customers.

AT&T tells the Commission that it should countenance its tying arrangement because it increases AT&T's incentives to invest in broadband capabilities. Appl. at 89-90. But as explained above, AT&T's investment incentives would be affected by an anti-tying rule only if giving consumers a free choice among ISPs and carriers providing underlying telecommunications services means that substantially fewer consumers would subscribe to AT&T's Internet service, and the tie increases AT&T's profits only to the extent that AT&T has market power over broadband services.[17] However, to the extent that the prospect of market power and resulting monopoly returns encourages investment, it is not a legitimate benefit. The fact that investors may be more willing to invest in a firm with an unrestricted ability to exercise market power to the detriment of consumers does not mean that consumers should be left unprotected.

AT&T's ability to obtain a fully adequate return on its local broadband services is not harmed by an anti-tying condition that requires AT&T to compete on the merits for residential subscribers to its Internet services. In this broadband market with huge promise, AT&T can still earn a return sufficient to attract investment, especially since the price of its broadband offering is not directly regulated (although regulation of the price of competing ILEC broadband service would constrain AT&T's pricing power, at least to some degree). To the extent that the future of broadband services is uncertain, *all* providers of broadband service — not just AT&T — will charge a rate that reflects this risk and therefore permits them to attract capital.

Indeed, AT&T has it exactly backwards. Firms with unfettered market power invest *less*, not *more*, than firms without market power because they have an incentive to restrict, not

[17] AT&T appears to argue that tying enables AT&T to gain additional monopoly rent that it would otherwise be unable to extract. *See* AT&T's and TCI's Joint Reply to Comments and Joint Opposition to Petitions to Deny or to Impose Conditions, Declaration of Professor of Janusz A. Ordover and Robert D. Willig, CS Docket No. 98-178 at 15, ¶ 33, (filed Nov. 13, 1998) As if more complete exploitation of monopoly enhances consumer welfare, the cable industry seeks to increase the ability of monopolists to capture monopoly rents by bundling the monopoly product with related products. NCTA Filing at 10, 11.

expand, output. Competition maximizes investment and deployment of advanced capabilities. If the history of the Internet proves anything, it proves that consumer choice lead to more investment and more innovation. *See* BRIE Working Paper, Parts I and II.E.[18]

Nor should the Commission defer action based on AT&T's claim that the market for broadband services is too young, and its future too unpredictable, to permit the Commission to take any action at all. There is no real uncertainty that a huge unmet demand for broadband access exists.[19] It is also reasonable to predict today that only two viable sources of broadband access are likely to exist in the near-to-medium term: the telephony monopoly through DSL, to which competitors are entitled access despite ILEC intransigence; and the cable monopoly through cable modem service. Indeed, the premise of AT&T's argument is that its restrictive policy will give it substantially more Internet business than it would earn if customers had free choice about which Internet service to use with AT&T's broadband service. AT&T expects to have market power over broadband services, either unilaterally or through coordinated interaction in a duopoly environment.

A condition prohibiting tying would not embroil the Commission in detailed oversight of AT&T's day-to-day business activities. Indeed, imposing this condition on AT&T while ILECs are subject to their own nondiscrimination rules would create self-executing competitive constraints pushing all broadband providers to implement an open model: with AT&T subject to

[18] *See Defending the Internet Revolution in the Broadband Era: Why Open Policy Has Been Essential Why Reversing That Policy Will Be Risky*, Francois Bar, Stephen Cohen, Peter Cowhey, Brad DeLong, Michael Kleeman, John Zysman, E-conomy Working Paper 12, August, 1999, at http//e-conomy/berkeley.edu/pubs/wp/ewp12/html.

[19] *See, e.g.*, Seth Schiesel, "The Outlook for Cable Access: An AT&T-AOL Deal Would Rain on Excite@Home's Parade," *New York Times*, p. C1 col.2 (Aug. 9, 1999) (quoting Excite@Home's chairman that "We're a long way from being a demand-limited system").

this condition, ILECs would feel more pressure from AT&T to comply with their nondiscrimination obligations because a closed approach would risk loss of business to AT&T from retail customers, ISPs and content providers that prefer an open environment; and AT&T would likewise be reluctant to take the risk that potential sources of revenue would gravitate to ILECs with open networks. BRIE Working Paper, Part II.

MCI WorldCom does *not* propose that the Commission regulate in current circumstances the price that AT&T charges for its broadband service, because regulation of the price of competing broadband offerings of ILECs provides enough of a constraint. A prohibition against tying would have a procompetitive and proconsumer effect even without regulation of price of tying product. The *per se* antitrust rule against tying benefits consumers even though courts do not regulate the price of the tying product. An anti-tying condition without direct regulation of AT&T's prices for broadband services is also consistent with the approach that Congress took in prohibiting tying of navigation devices to cable services. Section 629, 47 U.S.C. § 629, permits multichannel video programming distributors to offer equipment used to access services offered over multichannel video programming systems "if the system operator's charges to consumers are separately stated."[20] The requirement of separate prices for broadband and Internet services benefits consumers by giving them a choice and permitting them to make a more informed decision among the broadband alternatives that AT&T predicts will emerge. It limits AT&T's ability to leverage market power over broadband services into the Internet by making anticompetitive price discrimination more difficult and keeping entry barriers lower. And it

[20] Section 629 also requires that prices for navigation devices are "not subsidized by charges for any such service." As explained below, MCI WorldCom does not propose that the Commission propose any condition directly related to cross-subsidization issues.

facilitates the Commission's ability to determine whether broadband competition is developing as it should.

MCI WorldCom also does *not* propose that the Commission adopt conditions prohibiting cross-subsidization that it chose not to impose in connection with AT&T's acquisition of TCI. *See* AT&T-TCI Merger Order,¶¶ 114-22. The Commission should continue to expect full compliance with its existing cost allocation rules. *Id.* ¶ 122. If it turns out that reports filed pursuant to these rules demonstrate that AT&T is engaged in cross-subsidization, the Commission can decide the appropriate response at that time.

Finally, a condition prohibiting tying would ensure the reasonable availability of AT&T's telecommunications services for resale on a nondiscriminatory basis pursuant to section 251(b)(1), which applies to AT&T's local broadband services for the reasons discussed below in Part IV. Section 251(b)(1) requires that all telecommunications carriers make their telecommunications services available for resale, and it prohibits the imposition of unreasonable or discriminatory restrictions or limitations on the resale of their telecommunications services.[21] To the extent that bundling of any other service with AT&T local broadband service, would violate section 251(b)(1) by unreasonably or discriminatorily restricting the ability of competitors to resell AT&T's local broadband services, the Commission should impose a condition requiring unbundling of these services.

[21] Significantly, the Commission has determined that the prohibition against discriminatory conditions pursuant to section 251(b)(1) imposes a more stringent standard than the ban against "unreasonable or unjust discrimination" for charges or practices in section 202(a). *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* 11 FCC Rcd 15499, 15612, ¶ 217 (1996) (Local Competition Order).

Open Access. A corollary of a condition prohibiting tying is a condition protecting the ability of AT&T's competitors in the Internet and telephone businesses to interconnect on efficient and nondiscriminatory terms with AT&T's broadband network. If competing ISPs, CLECs, and interexchange carriers (IXCs) cannot as a practical matter serve AT&T's broadband customers as efficiently as AT&T, these customers' ability to exercise competitive choice would be nullified. Accordingly, AT&T should permit CLECs, ISPs, and IXCs to interconnect with its local broadband network at any technically feasible point that facilitates the ability of consumers to maximize their competitive alternatives.

There no longer appears to be a dispute that open access is technically feasible and requires minimal incremental expenditure. AT&T can both provide open access and maintain full control over the features and quality of its broadband and Internet services. Ongoing work within the industry has demonstrated the availability of several methods of competitive access. One method, favored by the Canadian Association of Internet Providers (CAIP) and the Canadian Radiotelevision and Telecommunications Commission (CRTC), can be accomplished using AT&T's existing headend routing equipment with relatively minor changes in the interface between AT&T and ISPs and in the management and distribution of ISP-specific IP addressing. Alternative methods may involve more investment in a subscriber management system, but reduce AT&T's subsequent operations costs. Each of these methods involves access to an interconnection point at the headend of AT&T's systems, and none involves unbundled access to the physical coaxial broadband tranmission media. With nondiscriminatory interconnection at the headend, ISPs can offer the same quality of service provided by Excite@Home or Roadrunner (for example, by caching close to customers) and avoid the quality and delay issues created when traffic is sent to and received from Excite@Home or Roadrunner over the Internet.

Given the continued regulation of ILEC broadband service and the competitive pressures that a symmetric open access rule would impose on all broadband providers (*see* BRIE Working Paper, Part II.D), there is no current need for detailed rules concerning terms and conditions for open access to AT&T's broadband network.

Failure to impose this condition would risk the creation of a duopoly for residential consumers, with AT&T and the incumbent LECs dividing between themselves the market for facilities-based broadband services in those geographic markets where AT&T or its partners provide cable service. AT&T should not be allowed to deny competing CLECs, ISPs, or interexchange carriers a fair opportunity to serve AT&T's broadband customers who would choose a competitive alternative if they had the option to do so. The ability of Internet and long-distance companies to interconnect on efficient and nondiscriminatory terms with local telephone companies has served consumers extraordinarily well, producing a flowering of competition from hundreds of IXCs and thousands of ISPs. The Commission should continue its efforts to maintain a competitive Internet and telephony marketplace by conditioning approval of the acquisition on AT&T's commitment to provide reasonable and nondiscriminatory interconnection with its broadband network through open access. Before AT&T consummates its acquisition of MediaOne, AT&T should submit a detailed implementation plan and schedule, and the Commission should determine whether the proposal satisfies this condition.

The Commission's Authority. Imposing these conditions is well within the Commission's power, both generally and in the context of merger approvals.

The Commission has the authority to prohibit tying, and require open access, for any and all cable companies that choose to provide telecommunications services, including broadband services used to access the Internet. As explained below in Part IV, AT&T will clearly be providing a telecommunications service when it provides broadband access to the Internet, and carrier providing the underlying telecommunications services for ISPs need to interconnect with AT&T's local broadband network.. AT&T therefore is subject to all the duties of any local exchange carrier imposed by section 251, including the duty under section 251(a)(1) "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers"and the duty to makes its services available for resale on reasonable and nondiscriminatory terms under section 251(b)(1). Pursuant to sections 251(d)(3) and 201(b),[22] the Commission has the power to define the method and point of interconnection under section 251(a)(1) and to ensure compliance with the resale and other requirements of section 251.

Moreover, sections 201(b) and 202(a) prohibit carriers from engaging in any unjust or unreasonable practice or to make any unjust or unreasonable discrimination, and this duty is fully applicable to AT&T's broadband services, especially in light of the Commission's ruling that local services are interstate in nature to the extent they are used to access the Internet.[23] Because AT&T's policies of tying and closed access constitute unreasonably discriminatory practices that reduce competition for broadband and Internet services, conditioning grant of the applications on these requirements would simply require AT&T and MediaOne to comply with their obligations under the Communications Act.

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[22] *See Iowa Util. Board v. FCC*, 119 S. Ct. 721, 729-31 (1999) (Commission's rulemaking authority under section 201(b) extends to implementation of local competition provisions of 1996 Act).

[23] Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic, Declaratory Ruling, CC Docket Nos. 96-98, 99-68, FCC 99-38 (rel. Feb. 26, 1999), pets. for rev. pending, Bell Atlantic Tel. Cos. v. FCC, Case No. 99-1094 (D.C. Cir. 1999).

In addition to its general authority over telecommunications services, the Commission has the legal authority to impose this condition as part of its review of this proposed acquisition. The Commission has consistently concluded that it may impose conditions on mergers and acquisitions "in order to ensure that the public interest is served by the transaction."[24] Section 214(c) of the Act, 47 U.S.C. § 214(c), authorizes the Commission to attach to any license "such terms and conditions as in its judgment the public convenience and necessity may require," and section 303(r) authorizes the Commission to prescribe such restriction or conditions, not inconsistent with law, as may be necessary to carry out the provisions of the Act."[25]

It is appropriate for the Commission to impose these two conditions in this docket limited to the MediaOne acquisition because these conditions directly address transaction-specific competitive concerns. With AT&T's acquisition of MediaOne, its anticompetitive policies present a greater threat to competition than if it controls only the former TCI's broadband and cable capabilities. AT&T/TCI/MediaOne will be the largest cable company and the largest telecommunications company in the world, and it will have an enormous presence in the residential market, where the largest unmet need for broadband capability exists. AT&T's fundamental rationale for the acquisition is that the acquisition will make MediaOne a much more significant player in the broadband market and much more quickly than it would otherwise be (because of AT&T's financial capability, customer base, and marketing resources), and the more significant a player AT&T-TCI-MediaOne is, the greater the anticompetitive risks. And

[24] *AT&T-TCI Merger Order*, ¶ 15.

[25] *Id.*, ¶ 15 n.57 (citation omitted).

the whole premise of AT&T's defense of its tying policy is that it will have some degree of market power over broadband services.

Moreover, AT&T's expanded footprint threatens greater harm than that posed by any other single provider of broadband services. The acquisition increases the harm to consumers, and the danger to competition is greater, because AT&T-TCI-MediaOne would have such a high percentage of cable subscribers (more than the 30 percent that would be proscribed by the Commission's horizontal ownership rules that have been stayed). The Commission need not and should not stand by while AT&T entrenches its dominant position through an acquisition that decreases the ability of Internet service and content providers to deal on reasonable and nondiscriminatory terms with a mammoth cable-broadband-Internet company. *See* Part IV.

It is true that consumers and competition would benefit if the Commission adopts a general regulation prohibiting *all* cable companies that offer broadband telecommunications services from tying them to Internet or other services, and requiring them to provide open access to their broadband networks. But the fact that imposing these requirements on AT&T through a merger condition would not solve the entire problem does not mean that the Commission should not solve part of the problem — and a part made far more serious by AT&T's acquisition of MediaOne.

There is an equally important reason why the Commission should act now and not wait to address these issues through a rulemaking applicable to all cable companies. It would be more efficient and potentially less costly for AT&T to build out its broadband network from the beginning consistent with open access principles; it may be more complicated for AT&T to build a closed network today and later convert it to an open architecture. Moreover, proceedings to adopt these requirements begun only after AT&T acquires individual or collective market power over broadband services may be protracted, leaving consumers and competition unprotected in the meantime. It would therefore be in the public interest to establish the basic ground rules for AT&T's broadband network now.

At a minimum, the Commission should put AT&T on notice that it proceeds at its own risk if it does not give consumers the free choice to which it now pays only lip service. AT&T should not be heard to complain that it should be given a lengthy period of time to bring itself into compliance if the Commission later adopts a general rule requiring cable companies to provide nondiscriminatory interconnection to competing ISPs.

IV. ALLOWING AT&T TO FURTHER EXPAND HORIZONTAL OWNERSHIP OF CABLE SYSTEMS WOULD THREATEN INTERNET AS WELL AS PROGRAMMING AND MVPD COMPETITION

The proposed acquisition would exacerbate several dangers by increasing substantially AT&T's horizontal ownership of major cable systems — an increase that would violate the Commission's horizontal ownership rules if they had not been stayed. The same policies that support a cap on ownership to protect nondiscriminatory access to programming support a cap on ownership to protect nondiscriminatory access to broadband telecommunications services used in large part to access the Internet. The huge national footprint that AT&T would gain through its proposed acquisition of MediaOne would threaten Internet competition in much the same way that it would threaten access to programming from competing MVPD systems.

A company with a large and disproportionate share of Internet traffic from customers that are effectively locked into its Internet service by market power over loop facilities may be able to impede Internet competition. Internet users, including consumers and content providers, demand that their ISPs provide universal connectivity — the ability to exchange Internet traffic with any other Internet user. When one ISP, through its exclusive discriminatory control over the local loop facilities, artificially controls access to a greater percentage of Internet customers than other ISPs, loss of connectivity to that preferred ISP may hurt other ISPs more than loss of connectivity to any of the other ISPs would hurt the preferred ISP. Any resulting inequality in bargaining power may enable the preferred ISP to impose a deal in which other ISPs pay it more (on a per-unit basis) to terminate their traffic than the preferred ISP pays them to terminate its traffic. As a result, the preferred ISP could be able to increase the costs of rivals that are no less efficient or innovative, and the consequence for consumers would be higher prices for Internet services. If the preferred ISP becomes influential enough and reaches a critical mass, a tipping effect may occur that enables it to wield spiraling power over Internet services.[26]

If broadband becomes the predominant form of access to the Internet, AT&T's expanded footprint, combined with tying arrangements and closed network architecture, could enable AT&T to capture a predominant share of Internet business. The acquisition of MediaOne could give AT&T millions of additional broadband and therefore Internet customers, and AT&T's anticompetitive strategies of tying and closed network architecture would give it more Internet business than it would earn through fair competition. By significantly increasing Internet traffic from customers locked into AT&T's Internet service through abuse of market power over broadband loops, the acquisition may give AT&T the ability to exploit a lopsided share of Internet traffic in its dealings with other ISPs that need to exchange Internet traffic with it. The acquisition could therefore enable AT&T to increase its Internet business to the point that, either

[26] *See* Comments of MCI WorldCom, Inc., at 35-48 and [declaration of Kelley and Baseman], *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Ameritech Corporation, Transferor, to SBC Communications, Inc., Transferee*, CC Docket No. 98-141 (filed Oct. 15, 1998).

individually or with the ILECs, it could achieve market power, for example, by forcing other ISPs to accept asymmetric interconnection agreements.

By the same token, if permitted to expand its power through the proposed MediaOne acquisition, AT&T would be able to exert power over Internet content providers and advertisers, including providers that do not use AT&T as their ISP. If AT&T provides Internet service to a significant percentage of end users, it could also create a new Internet "portal" and steer users to that site, thereby giving AT&T great influence over the providers seeking access to those users. AT&T would control the first screen that it displays to its customers, and content providers and advertisers that want to be featured on that screen would have to do business with AT&T on its terms.

The danger is heightened because of the substantial, and potentially increasing, concentration among providers of broadband access to residential consumers. The two most likely sources of broadband access in the near future are cable companies and ILECs. AT&T is attempting to consolidate its control over broadband access to cable customers not only through its acquisitions of TCI and MediaOne but also through its planned alliances with other major cable providers, including Time Warner, and Excite@Home's agreement with other cable companies to provide Internet service on an exclusive basis. As a result of previous ILEC mergers, only six remaining ILECs dominate the provision of local telephone service, and that number would decline to four if SBC and Bell Atlantic are allowed to complete their mergers with Ameritech and GTE. The fewer the major providers of broadband access, the greater the risk of coordinated interaction between them. Even if AT&T by itself would not achieve national market power of Internet services, AT&T, SBC-Ameritech, and Bell Atlantic-GTE would control broadband access to a huge number of residential customers. The small number of competitors makes it easier for them to act on their incentive to cooperate rather than compete, especially here where new entrants seeking to provide ubiquitous broadband service to residential consumers currently face such high barriers to entry. The result could be a series of regional duopolies or a national cartel.

Further consolidation of cable monopolies could also harm Internet competition through its detrimental effect on access to programming. Congress and the Commission have recognized that excessive horizontal concentration among cable companies, among other things, jeopardizes nondiscriminatory access to video programming by other firms seeking to compete against the remaining behemoths.[27] By significantly increasing the percentage of cable customers to which programming providers can obtain access only through AT&T, and by increasing AT&T's interest in programming providers themselves, the proposed acquisition of MediaOne may threaten the ability of ISPs and Internet content providers to obtain nondiscriminatory access to programming. As AT&T's promised expansion of two-way broadband capabilities occurs, the ability to provide video programming may become increasingly important for ISPs, and not only for cable, direct broadcast satellite, and broadcast television providers. As a result, denial of nondiscriminatory access to the same programming that AT&T provides to its Internet and broadband customers may cripple the ability of competing ISPs to compete with AT&T's Internet service, furthering entrenching AT&T as a dominant provider of Internet services.

The Commission's on-going review of its horizontal ownership rules would inform the Commission's assessment of the competitive risks that increased horizontal concentration poses

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[27] Cable Television Consumer Protection and Competition Act of 1992, Pub, L. No. 102-385, 106 Stat. 1460; *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits,* Second Report and Order, MM Docket No. 92-264, 8 FCC Rcd 8565 (1993); 47 C.F.R. § 76.503.

to Internet competition. At a minimum, the Commission should formally condition its approval of the MediaOne acquisition on AT&T's prompt compliance with any future horizontal ownership rule, as AT&T has committed to do so. Appl. 61, 67.

V. AT&T'S LOCAL BROADBAND SERVICES ARE TELECOMMUNICATIONS SERVICES SUBJECT TO TITLE II

Before ruling on AT&T's applications, the Commission should decide whether the local broadband services that AT&T will provide after its proposed acquisition of MediaOne constitute telecommunications or cable services. This determination is a logical prerequisite for any assessment of whether AT&T's announced post-acquisition plans are consistent with its obligations under the Communications Act and the Commission's regulations concerning provision of telecommunications and cable services. Moreover, resolution of this issue will provide important guidance both for firms providing broadband services over networks initially designed only to support cable services, and for telecommunications and cable firms contemplating transactions similar to AT&T's proposed transaction with MediaOne.

AT&T appears to recognize that the local telephony services it plans to provide through major upgrades of the MediaOne network are telecommunications services. AT&T acknowledges that it will provide "local exchange" and "exchange access" services over these networks initially engineered for cable service. Appl. at 4, 33-37. AT&T does not dispute that local exchange services and exchange access for interstate and intrastate services that it provides are telecommunications services subject to the generally applicable requirements of Title II, including sections 201, 202, and 251. The area of dispute is whether AT&T's proposed broadband (versus narrowband) local services likely to be used primarily for Internet access should be classified as telecommunications services subject to the requirements of Title II, or as cable services subject to the requirements of Title VI. Broadband local services, including those used for access to Internet services, are "telecommunications services" under the plain language of the Act and under functional approach adopted by the Commission, which focuses on the nature of the service rather than the type of technology used to provide the service. Just as broadband services provided by ILECs are telecommunications services, broadband services that compete with these ILEC services and that run on networks also used to provide cable services are telecommunications services.

The plain language of the statute demonstrates that provision of Internet access over a broadband network, whether or not the network is also used to provide cable services, is a "telecommunications service." Section 3(46), as amended by the 1996 Act, 47 U.S.C. § 153(46), defines "telecommunications service" as "[t]he offering of telecommunications for a fee directly to the public . . . *regardless of the facilities used*" (emphasis added). The classification of services as telecommunication services is clearly not based on the facilities used to provide such services. Similarly, section 706 of the 1996 Act defined "advanced telecommunications capability" as broadband capability "without regard to any transmission media or technology." The Act defines "telecommunications" as the "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The transmission of Internet traffic over *any* broadband facilities falls squarely within this definition. Local broadband services are also "local exchange services" under the 1996 amendment to section 3(47) of the Act, 47 U.S.C. § 153(47), which expanded the definition of "telephone exchange service" to include "comparable service" provided through local exchange plant or a system of "other facilities." *See* Report to Congress, ¶ 86, *In re Federal-State Joint Board on Universal Service,* CC Docket No.

98-67 (rel. April 10, 1998) (Universal Service Report) (redefinition of "telephone exchange services" was intended to include "provision of alternative local loops for telecommunications services, separate from the public switched network").

The fact that the facilities are also used to provide a non-telecommunications service does not make the local broadband service any less of a telecommunications service or local exchange service, or the carrier any less of a telecommunications carrier. An entity may be "treated as a common carrier under this [Act] . . . *to the extent it is engaged in providing telecommunications services*." 47 U.S.C. § 153(44). Congress expressly anticipated that cable companies would provide telecommunications services subject to Title II. *See* 47 U.S.C. § 541(b)(3)(A) ("If a cable operator or affiliate thereof is engaged in the provision of telecommunications services -- such cable operator or affiliate shall not be required to obtain a franchise under this subchapter for the provision of telecommunications services," and "the provisions of this subchapter [of Title VI] shall not apply to such cable operator or affiliate for the provision of telecommunications services"): 47 U.S.C. § 522(7) ("cable system"does "*not* include . . . a facility of a common carrier which is subject, in whole or in part, to the provisions of [Title II of the Act], except that such facility shall be considered a cable system . . . to the extent such facility is used in the transmission of video programming directly to subscribers") (emphasis added); *see also* H.R. Rep. No. 98-934, at 44, *reprinted at* 1984 U.S.C.C.A.N. 4655, 4681 (H. Rep. No. 98-934) (noting that cable operators may offer mixture of cable and non-cable services, including "communications services"); *id.* at 60, *reprinted at* 1984 U.S.C.C.A.N. at 4697 (Congress did not intend 1984 Cable Act to mandate that all services offered by cable company be deemed cable services); *id.* at 41, *reprinted at* 1984 U.S.C.C.A.N. at 4678 (Cable Act did not affect "existing regulatory authority over the use of a cable system to provide non-cable services, such as private line data transmission or voice communication that competes with services provided by telephone companies"). As the Commission recently explained to the Ninth Circuit, "not every service offered over cable facilities is a 'cable service' under the Communications Act."[28]

Classifying as telecommunications services local broadband services provided by companies that also provide cable services is required by the Commission's "functional approach" to classification. Universal Service Report, ¶ 86. Under this approach, "the classification of a provider should not depend on the type of facilities used. . . . Its classification depends rather on the nature of the service being offered to customers." *Id.* ¶ 59; *see id.* ¶ 105. Thus, "[a] telecommunications service is a telecommunications service regardless of whether it is provided using wireline, wireless, *cable*, satellite, or some other infrastructure." *Id.* ¶ 59 (emphasis added). "Functionally, Internet access provided through cable modems is no different from the broadband capability provided over other facilities such as the wireline telephone network, wireless telecommunications systems, or satellite facilities." FCC Amicus Brief, at 25.

Consistent with this functional approach, the Commission determined that the interconnection obligations of section 251 of the Act apply to all facilities and equipment used to provide local services utilizing advanced capabilities.[29] Thus, xDSL technology, another means of providing broadband Internet access, is a "telecommunications service."[30] The xDSL

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[28] Brief of the Federal Communications Commission as Amicus Curiae, at 20, *AT&T Corp. v. City of Portland*, No. 99-35609 (9th Cir. dated Aug. 16, 1999 (FCC Amicus Brief).

[29] *In re Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24012, 24017, ¶ 11 (1998) (Advanced Services Order) , *petition for review pending*, No. 98-1410 (D.C. Cir.) (Advanced Services Order).

[30] *Id.*, ¶ 36.

transmission constitutes a "telecommunications service," and the Internet service is an "information service."[31]

A company that provides Internet services, which involve both telecommunications services and information services within the meaning of 47 U.S.C. § 153(20), may be a provider of telecommunications services to the extent it provides the underlying transmission capability. When a company provides both telecommunications and information services, it must be classified as a telecommunications carrier to the extent it is providing telecommunications services. Local Competition Order, ¶ 995. The service offered by an information service provider "is not subject to Title II, and is categorized as an information service." Universal Service Report, ¶ 69 n.138. However, as the Commission determined, when "the information service provider owns the underlying facilities, it appear it should itself be treated as providing the underlying telecommunications," so "providers of pure transmission capacity to support Internet services are providers of 'telecommunications.'" *Id.* at ¶ *105*. The legislative history of the 1996 Act supports this conclusion. *See* S. Rep. No. 104-230, at 18 (1995) (S. Rep. No. 104-230) (""the underlying transport and switching capability on which these interactive [information] services are based . . . are included in the definition of 'telecommunications services'"); *see also* Conf. Rep. No. 104-458, at 116 ("the House recedes to the Senate . . . with respect to the definitions of . . . 'telecommunications,' 'telecommunications carrier,' and 'telecommunications service'").

AT&T cannot avoid the obligations applicable to all providers of local telecommunications services by trying to categorize its local broadband service as a cable

[31] *Id.*, ¶¶ 35-36.

service. Local broadband transmission, and most services currently categorized as information or Internet services, do not meet the statutory definition of cable service because of their fundamentally two-way nature.[32] Customers who use local broadband services to access the Internet or for other purposes typically interact with and collect information outside the closed transmission paths associated with the operation of a cable system.[33]

The Commission has recognized that cable companies offering high-speed connections to the Internet are in direct competition with traditional telecommunications providers. Advanced Services Order, ¶ 24. "[A]s a general policy matter, all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is some compelling reason to do otherwise."[34] No reason, much less a compelling reason, exists to treat

[32] "[T]he term 'cable service' means (A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and (B) subscriber interaction, if any, which is required for the selection or use of such video programming or other programming service." 47 U.S.C. § 602(6). *See* H. Rep. No. 98-934, at 41 (defining cable service as one-way "mark[ed] the boundary between those services provided over a cable system which would be exempted from common carrier regulation under section 621(c) and all other communications services that could be provided over a cable system"); *id.* at 41-42 (exemption of video programming from common carrier regulation does not "affect existing regulatory authority over use of a cable system to provide non-cable communication services, such as private line data transmission or voice communication that compete with services provided by telephone companies"); *id* at 43-44 (describing narrow limits on two-way subscriber interactions within scope of cable services). Even if broadband and information services technically fall within the statutory definition of "cable services" (and they do not), the Commission would have ancillary jurisdiction under section 4(i) of the Act to the extent that cable broadband services are the functional equivalent of telecommunications services. *See* 47 U.S.C. § 154(i) (Commission may make rules "as may be necessary in the execution of its functions").

[33] *See* 47 U.S.C. § 602(7) ("The term 'cable system' means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community").

[34] Local Competition Order, 11 FCC Rcd at 15989, ¶ 993.

broadband local services provided over traditional telecommunications networks differently from functionally equivalent services provided over cable systems. To the contrary, compelling reasons require AT&T's broadband services to be treated the same as competing broadband services.

Classifying AT&T's broadband local services as telecommunications services is consistent with, and indeed demanded by, AT&T's own arguments in support of the proposed transaction. AT&T itself states that integrating "its telecommunications business with TCI's cable networks" means that AT&T is "build[ing] facilities-based local residential *telecommunications* networks where TCI operated cable systems," that the same upgrades to its cable plant support both local telephone service and cable Internet services, and that "the broadband network" it is building will help it to compete against telecommunications carriers "such as ILECs." Appl. at 8, 29, 32 (emphasis added). AT&T also appears to concede, as noted above, that the local exchange and exchange access services it will provide over networks that also support cable service are telecommunications services. *See* Appl. at 4, 33-37. Of course, these narrowband local services are used for Internet access, and AT&T expressly argues that broadband and narrowband services are in the same market. Appl. at 71, 83-84. Similarly, AT&T argues that its broadband local services competes directly with ILEC and CLEC broadband services, which offer the same kinds of capabilities. Appl. at 75-78. In these circumstances, it would make no sense to treat as telecommunication services AT&T's narrowband local services and the broadband local services offered by AT&T's acknowledged competitors, but not AT&T's broadband local services.

CONCLUSION

For the foregoing reasons, MCI WorldCom requests that the Commission grant the applications subject to the following conditions:

1. AT&T may not tie its Internet service to its broadband service, and AT&T shall separately state its prices for broadband access and Internet service;

2. AT&T shall give competing telecommunications carriers and ISPs direct, open access to its broadband local network that satisfies the interconnection requirements of section 251(a) pursuant to an implementation plan and schedule submitted to, and approved by, the Commission before AT&T completes the acquisition of MediaOne;

3. AT&T shall comply with the requirements of Title II in providing local telecommunications services, whether narrowband and broadband, and whether used for voice, data, or Internet traffic; and

4. AT&T shall promptly comply with any horizontal ownership rule implemented by the Commission.

Respectfully submitted,

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Certificate of Service

I, Lonzena Rogers, do hereby certify, that on this twenty-third day of August 1999, I caused to be served by first class United States Postal Service, a true copy of MCI WorldCom, Inc. Comments, in the matter of AT&T and MediaOne Group, Inc. Consent for Proposed Transfer of Control on the following:

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