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

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In the Matter of:

Applications for Consent to the
Transfer of Control of Licenses

**MediaOne Group, Inc.,**
Transferor,

To

**AT&T Corp.,**
Transferee

CS Docket No. 99-251

ORIGINAL

**COMMENTS OF**
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## SUMMARY

Earlier this year, the Commission approved the merger of AT&T Corp. ("AT&T") and Tele-Communications, Inc. ("TCI"), which gave AT&T control over 20 million "local loops," and access to 13 million more potential loop customers. No other company controls so many local loops. AT&T now seeks approval for its proposed merger with MediaOne Group, Inc. ("MediaOne"), which would give AT&T control over, or access to, almost 58 million "local loops." If the Commission permits the AT&T/MediaOne merger, AT&T will control approximately 55% of all of the "second loops" in the nation, constituting the nation's most extensive broadband local network platform. Moreover, AT&T most likely will continue to amass more second loops throughout the country if the Commission permits the AT&T/MediaOne merger.

The proposed merger raises one of the most important public policy issues in telecommunications in this decade: broadband access to the Internet. Consumers currently have two choices for broadband access to the Internet: Digital Subscriber Line ("DSL") services from telecommunications companies and cable modem services from cable companies. DSL and cable modem services will likely remain the only two choices for affordable broadband access in many parts of the country for years, which is an eternity in the Information Age. The Commission has already taken steps to ensure that there will be facilities-based competition for the provision of DSL services by requiring the incumbent local exchange carriers ("ILECs") to open their networks to competitors. The question looming now is whether the Commission will take steps to ensure that there will be competition for the provision of cable modem services by requiring cable modem service providers to open their networks to competitors.

The Commission first faced the question of whether cable modem service providers should be required to open their networks to competitors when AT&T sought approval for its merger with TCI, which the Commission approved without requiring AT&T to open its network to competitors. Qwest submits that the AT&T/MediaOne merger is far more alarming than the AT&T/TCI merger due to the size of the broadband local network platform that AT&T will control. Moreover, AT&T has already announced that it will use its control of over 55% of the broadband "second loops" in the nation to exclude broadband competitors.

Qwest believes that the public interest requires the Commission to impose open access requirements on AT&T as a condition for approval of the AT&T/MediaOne merger. Consumers will benefit directly from an open access condition by enjoying: (1) the freedom to select the service provider of their choice; (2) more variety in service providers from which to choose; (3) a greater selection of new and innovative services from which to choose; and (4) lower prices for both DSL and cable modem services. By imposing open access requirements on AT&T, the Commission will alleviate public concern about AT&T's control over the "second loop," which has led many municipalities to consider adopting their own open access requirements, and preserve the question of whether the Commission should adopt uniform, nationwide open access requirements for consideration at a later date.

Qwest submits that the Commission should impose the minimum open access requirements necessary to ensure that AT&T's broadband local loops are integrated into the national telecommunications infrastructure to maximize competition and consumer choice.

Qwest proposes the following minimum set of open access requirements as a first step towards this integration:

1. AT&T must offer unbundled transmission capacity and related facilities and equipment through interconnection to any requesting carrier or information services provider.

2. Any provider may use such capacity, facilities or equipment for the provision of any telecommunications or information service, and cable subscribers should be free to take services offered by any such provider without being required to take services offered by AT&T or providers that it selects.

3. AT&T must offer unbundled transmission capacity and related facilities and equipment to any requesting carrier or information services provider on a non-discriminatory basis.

4. AT&T must offer unbundled transmission capacity and related facilities and equipment to any requesting carrier or information services provider on just and reasonable terms and conditions, including at cost-based rates.

5. AT&T must offer any requesting carrier or information services provider the option of either (a) interconnecting to a network aggregation device owned by AT&T which is capable of scaling and managing subscriber usage to maintain service quality at industry standards, or (b) installing its own network aggregation device at any technically-feasible point in AT&T's cable network.

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

## COMMENTS

Qwest Communications Corporation ("Qwest"), by its attorneys and pursuant to the Public Notice of July 23, 1999,[1] hereby comments on the proposed transfer of control to AT&T Corp. ("AT&T") of the licenses and authorizations held by subsidiaries of MediaOne Group, Inc. ("MediaOne") and entities controlled by MediaOne. This transfer of control would take place as the result of the proposed merger of AT&T and MediaOne.

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

## Qwest's Interest in This Proceeding

Qwest is a multimedia communications company that, through its subsidiaries, offers a wide range of retail voice, data, video, and information services over its high-speed network, including domestic and international long distance services, Internet access, Internet protocol ("IP") telephony, web hosting, and web content services. Qwest also sells dark fiber and provides traditional voice, IP telephony, ATM, and frame relay services to other service providers.

Qwest recently completed a high capacity, fiber optic, IP-based network to deliver a new generation of multimedia and voice communications services and applications to consumers throughout the United States. The Qwest Macro Capacity$^{SM}$ Fiber Network is one of the most advanced fiber optic networks in the world. This network has the broadband capacity to send multimedia content – data, images and video – as seamlessly as voice is transmitted over conventional networks. The Qwest network spans over 18,815 miles in more than 130 cities, providing service in areas encompassing approximately 80 percent of the originating data and voice traffic in the United States.

Qwest cannot optimize its advanced backbone network to provide telecommunications and information services to residential and business customers unless it obtains ubiquitous last-mile connectivity. Many competitive carriers are constructing local networks throughout the United States, and Qwest has plans to build-out last-mile facilities in various cities throughout the country. Nevertheless, the economic reality is that competing carriers will not be able to build-out competing facilities to all premises in the United States in the near future, and many premises may never see new local loops built to their locations. As a result, tens of millions of U.S. customers will have only two telecommunications wires into their

homes – the local loop of the incumbent local exchange carrier ("ILEC") and the cable system's loop – for many years.

For Qwest to provide competing services to a broad customer base throughout the country, it must have cost-based wholesale access to the local loops serving those customers. The availability of last-mile connectivity will dictate whether and how Qwest can serve customers, what types of services it can offer, and what prices it can charge. Therefore, it is critical that the Commission take whatever steps are necessary to ensure that local loops operated by dominant cable systems are made available on reasonable, just and non-discriminatory terms to promote competition and consumer choice. Qwest believes that the Commission should address the issue of open access to cable systems for the provision of telecommunications and information services as soon as possible. However, the public interest requires the Commission in this proceeding to address AT&T's responsibility to provide consumers with non-discriminatory access to the broadband service provider of their choice by imposing an open access requirement as a condition for approval of the AT&T/MediaOne merger.

## Comments on the Proposed Merger

### I. THE SIZE OF THE BROADBAND LOCAL NETWORK PLATFORM THAT AT&T WOULD CONTROL RAISES SERIOUS COMPETITIVE ISSUES

The proposed AT&T/MediaOne merger raises one of the most important public policy issues in telecommunications in this decade: broadband access to the Internet. Qwest agrees with Chairman Kennard's recent observation that:

> [a]s we leave the Industrial Age and enter the Information Age, it's clear that despite all the technical advances and globalization, the formula for economic success has remained the same: economic prosperity relies on high-speed access to the critical network of information and commerce. That network is the Internet, and the type of access needed is broadband.[2]

The stage is set for the Internet to become a ubiquitous communications system that instantaneously delivers high-quality, real-time audio, video and information services to consumers throughout the United States and the world. However, consumers must have broadband access to the Internet at competitive prices before this transformation can take place.

Consumers currently have two choices for broadband access to the Internet: Digital Subscriber Line ("DSL") services from telecommunications companies and cable modem services from cable companies. DSL services use standard copper phone lines to provide downstream data rates of up to 1.54 Mbps. Cable modem services use coaxial cable to provide downstream data rates of up to 10 Mbps. Although the technology used to provide DSL and cable modem services is remarkably similar, cable modem services are capable of higher data transmission speeds because they utilize coaxial cable, which has higher data transmission capacity than standard copper phone lines, to connect consumers to the Internet.

DSL and cable modem services will likely remain the only two choices for affordable broadband access for the foreseeable future. Qwest shares Chairman Kennard's vision for the future in which there are at least four or five facilities-based competitors offering broadband access. However, Qwest submits that the third, fourth and fifth facilities-based

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2 "The Road Not Taken: Building a Broadband Future for America," Remarks of William E. Kennard, Chairman of the FCC, before the National Cable Television Association in Chicago, Illinois (June 15, 1999) (as prepared for delivery).

competitors are years away from becoming viable alternatives in terms of coverage to DSL and cable modem services, which is an eternity in the Information Age.

The Commission has already taken steps to ensure that there will be facilities-based competition for the provision of DSL services by requiring the ILECs to open their networks to competitors.[3] However, cable modem service providers are not currently required to open their networks to competitors. Consequently, these providers have a monopoly in cable modem services, which are capable of higher transmission speeds than DSL services, immediately upon initiation of service, and cable modem services are being deployed throughout the nation, including areas where DSL may never be deployed due to technical limitations.

The question looming now is whether the Commission will take steps to ensure that there will be competition for the provision of cable modem services, as it has for DSL services, by requiring cable modem service providers to open their networks to competitors. Qwest submits that two open broadband local network platforms will result in lower prices and quicker deployment of broadband access services than one open platform, DSL services over ILEC copper wires, and one closed platform, cable modem services over coaxial cable facilities. Moreover, DSL and cable modem services do not compete on the basis of price alone, because the differences between the services, including the ability of cable modem services to offer

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[3] *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, FCC 99-48, 1999 FCC LEXIS 1327 (rel. March 31, 1999) (adopting measures to ensure that competitive providers of advanced services can collocate in ILEC central offices).

higher data transmission speeds and to serve areas not reachable by DSL services,[4] are significant enough to affect consumer choice. Although a fully competitive DSL market will certainly constrain cable modem service providers from fully exercising their monopoly power, Qwest believes that the unique characteristics of cable modem services will allow cable modem service providers unfairly to exercise market power to the detriment of consumers and competitors. Therefore, the only way to speed the transformation of the Internet and ensure that consumers have the market-based access to advanced telecommunications and information services envisioned by the Telecommunications Act of 1996 ("1996 Act") is to require cable modem service providers to open their networks to competitors.

The Commission first faced the question of whether cable modem service providers should be required to open their networks to competitors when AT&T sought approval for its merger with TCI, which the Commission approved without requiring AT&T to open its network to competitors. The Commission faces this question once more now that AT&T seeks approval for its proposed merger with MediaOne. The Commission will certainly face this question again if it approves the AT&T/MediaOne merger without requiring AT&T to open its network to competitors, because AT&T undoubtedly will continue to amass second loops throughout the country.

The AT&T/MediaOne merger is far more alarming than the AT&T/TCI merger given the breathtaking size of the broadband local platform that AT&T would control. AT&T

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4 *See also* Comments of America Online, Joint Application of AT&T Corporation and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations held by TCI and Its Affiliates or Subsidiaries, CS Docket No. 98-178, 49-54, Appendix A (filed October 29, 1998) (explaining differences between "narrowband" networks and "broadband" networks).

gained control over 20 million "local loops" and access to 13 million more potential loop customers when the Commission approved the AT&T/TCI merger earlier this year. If the Commission permits the AT&T/MediaOne merger, AT&T will have control over, or access to, almost 58 million "local loops." This means that AT&T will control approximately 55% of all of the broadband "second loops" in the nation, which is more than any of the ILECs control.

AT&T has already announced that it will use its control of over 55% of the broadband "second loops" in the nation to exclude broadband competitors. AT&T has stated unequivocally that it will not allow independent ISPs to provide service to its cable modem service customers on the same terms and conditions as ISPs affiliated with AT&T, such as Excite@Home or RoadRunner. Therefore, consumers that want to use a non-affiliated ISP must pay twice for Internet access and related services, once for the affiliated ISP and once for the non-affiliated ISP of their choice. Qwest believes that most consumers who are forced to purchase services from an ISP affiliated with AT&T in order to obtain cable modem service will not pay for additional services from an unaffiliated ISP, even if they prefer the services of the unaffiliated ISP. If AT&T is allowed to exercise its control over 55% of the nation's broadband "second loops" in this way, the currently flourishing competition among large and small ISPs[5] will be quashed, because most consumers will use one of the two ISP providers affiliated with AT&T. This will result in limited consumer choice and inflated rates for broadband services, which could effectively deprive millions of Americans of access to advanced telecommunications and information services.

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[5] Matt Richtel, "Small Internet Providers Survive Among the Giants," NY Times, <www.nytimes.com/library/tech/99/08/biztech/articles/16net.html> (Aug. 16, 1999) (describing the vigorous competition among the more than 5,895 ISPs that offer local access to the Internet).

Qwest believes that the Commission must address the serious competitive issues raised by AT&T's control over such an extensive broadband local network platform by imposing minimum "open access" requirements as a condition for approval of the AT&T/MediaOne merger. Chairman William Kennard recently expressed his belief that "consumers have become accustomed to non-discriminatory access to the Internet Service Provider ("ISP") of their choice,"[6] and that "high-speed broadband networks must and will offer consumers that same choice."[7] However, consumers will not have this choice unless the Commission acts now. Qwest submits that the public interest *requires* AT&T to offer consumers non-discriminatory access to the broadband service provider of their choice, and therefore the Commission should impose an open access requirement on AT&T as a condition for approval of its merger with MediaOne.

## II. THE COMMISSION SHOULD IMPOSE AN OPEN ACCESS REQUIREMENT AS A CONDITION OF APPROVING THE AT&T/MEDIAONE MERGER

The central goal of the 1996 Act is to promote competition in all telecommunications markets by expanding opportunities for new entrants to provide services to their customers.[8] The Commission has recognized repeatedly that the Act seeks to foster entry in telecommunications markets – particularly the local market – by three equally legitimate

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6 Letter dated August 10, 1999 from William E. Kennard, Chairman of the FCC, to Kenneth S. Fellman, Chairman of the Local and State Government Advisory Committee.

7 *Id.*

8 Pub. Law 104-104, 110 Stat. 56 (1996). *See* S. Conf. Rep. No. 104-230, 104th Cong. 1 (1996) (explaining that the 1996 Act erects a "procompetitive deregulatory national framework designed to accelerate rapid private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition.").

methods: resale, use of a carrier's own facilities, and use of wholesale network elements.[9] The Act "neither implicitly nor explicitly expresses a preference for one particular entry strategy."[10] Instead, the goal is to eliminate all barriers to entry and to lower entry costs wherever possible in order to maximize the potential competitive benefits to telecommunications subscribers. In short, the goal of the Act – and therefore, the Commission's obligation – "is to ensure that *all* pro-competitive entry strategies may be explored."[11] In today's marketplace, that objective cannot be achieved unless the Commission takes the steps necessary to ensure that all providers have market-based access to alternative wholesale last-mile facilities.[12]

Minimum open access requirements are justified by the overriding public need for competitive access to the broadband transmission facilities of AT&T's cable systems. The cable industry is expected to introduce the DOCSIS 1.1 industry standard in 1999, which will enable the provision of cable-based Internet Protocol telephony at toll-quality levels.[13] Industry experts expect cable-based Internet access subscribers to surpass the one million mark within the next

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9 Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15509, ¶ 12 (1996) ("Local Competition Order").

10 *Id.*

11 *Id.*

12 Ending the ILECs' stronghold on telecommunications network facilities is a key to the development of competition everywhere. *Id.* at 15506, ¶ 4 (local competition "is intended to pave the way for enhanced competition in *all* telecommunications markets, by allowing all providers to enter all markets") (italics in original).

13 *Cable IP Telephony Primer*, Cable Datacom News (Kinetic Strategies, Inc.) (visited May 13, 1999) http://www.cabledatacomnews.com/internettv/cmic17.html .

few months.[14] As a result, cable will soon become the broadband "second loop" into virtually all homes and businesses in competition with the ILECs.

If the proposed AT&T/MediaOne merger is consummated, AT&T will control the "second loop" into over 58 million premises in the United States, which represents nearly 55% of all of the broadband "second loops" in the United States. AT&T's cable systems already provide the only last-mile alternative that is comparable in geographic scope and telecommunications capacity to the ubiquitous networks of the ILECs. For tens of millions of U.S. citizens and businesses, the ILECs and AT&T will control the only two loops into their premises for the foreseeable future. The Commission must impose a minimum open access requirement as a condition for merger approval to ensure that AT&T's last-mile broadband facilities become viable wholesale alternatives to the ILECs' local loops so that all Americans can benefit from multiple providers of basic and advanced telecommunications and information services at affordable rates. If the Commission fails to act, AT&T will have the ability and the incentive to exploit the public by excluding competitors, limiting consumer choices, and charging inflated rates. Many Americans will be left with no service at all because they cannot afford to pay the above-market rates that AT&T will demand.

Imposing an open access merger condition on AT&T will directly promote the Commission's fundamental goal of regulating "so as to make available . . . a rapid, efficient, Nation-wide and world-wide wire and radio communications service with adequate facilities at reasonable charges."[15] The Commission has long recognized that this language calls for the

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14 *Cable Modem Market Stats & Projections*, North American 2-Way Cable Modem Subscriber Projections 1997-2002, (Kinetic Strategies, Inc.) (visited April 26, 1999) http://www.cabledatacomnews.com/cmic/cmic16.html.

15 47 U.S.C. §152(a).

development of "a nationwide broadband communications grid" in which cable systems play a crucial part.[16] In 1996, Congress also made it a top priority for the Commission to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . measures that promote competition in the local telecommunications market."[17] Just as open access requirements promoted competition in the narrowband local telecommunications market, open access will promote competition in the broadband local telecommunications market, as well as encourage deployment of both broadband and narrowband advanced telecommunications capabilities. Because AT&T would control access to nearly 55% of all of the broadband "second loops" in the nation, it is crucial that the Commission impose minimum open access requirements on AT&T and its affiliates.

Minimum open access requirements will serve the public interest and fulfill the Commission's statutory responsibilities and policy objectives in numerous ways. Minimum open access requirements will ensure that all types of subscribers in regions of the country served by AT&T have meaningful access to advanced and basic services over broadband facilities at competitive rates. Qwest and other competing providers need wholesale access to ubiquitous last-mile connectivity in order to deliver basic and advanced services broadly to customers throughout the United States. By requiring AT&T to offer open access to its broadband transmission networks, the Commission will create the first real wholesale last-mile alternative to the ILECs' local loops for multiple requesting carriers for over 55% of the broadband "second loops" in the nation.

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16 *See, e.g.,* Cable Television Rules, Memorandum Opinion and Order, 49 F.C.C. 2d 1078, 1083-84, ¶ 14 (1974).

17 47 U.S.C. § 157 nt.

Consumers will directly benefit from the wholesale market in broadband capacity that open access rules for the telecommunications facilities of AT&T would create. *First*, consumers will have more freedom in selecting a service provider, because AT&T will not be able to force consumers to purchase the services of affiliated ISPs and competitors will have access to AT&T's broadband capacity at cost-based rates, which will encourage market entry by new service providers. *Second*, consumers will be able to select from a greater variety of new service offerings, because multiple broadband service providers will compete more vigorously than ISPs that are guaranteed market share by exclusive arrangements with AT&T. *Third,* consumers of both DSL and cable modem services will benefit from lower prices resulting from competition, or at least the threat of competition, provided by two fully open broadband local network platforms. These results are consistent with, and indeed required by, Congress's mandates in Section 1 and Section 706 of the Telecommunications Act.

The adverse consequences of regulatory inaction are high. Without open access rules, AT&T's control of 55% of the broadband "second loops" in the nation will be unchallenged. AT&T will have the incentive and the ability to engage in various exclusionary and discriminatory activities designed to inflate profits artificially at the expense of cable subscribers. *First*, AT&T will not permit subscribers to use the service provider they prefer. Rather, AT&T will either prevent unaffiliated providers from using their cable facilities to reach customers, or sign an exclusive arrangement with one provider for such access. Where AT&T awards an exclusive contract to an unaffiliated provider, it will insist upon a premium for permitting the provider to share in its inflated rents, and consumers ultimately will pay the price through higher service rates. Subscribers who wish to use other providers will be denied their choice, or they will be made to pay a monetary penalty, such as AT&T/TCI's requirement that

the subscriber purchase the @Home Network's service as a prerequisite for subscribing to an unaffiliated provider.

*Second*, allowing AT&T to gain exclusive control over 55% of the nation's broadband "second loops" will impede the growth of the overall industry. Entry by service providers will be more difficult, and the development of technologies and service offerings will be impeded. A market characterized by a few service providers charging inflated prices is inherently less dynamic and innovative than a market characterized by many service providers charging competitive rates.

*Third*, AT&T will require subscribers to purchase a bundled "package" of services – in effect, forcing the subscriber to purchase unwanted services in order to obtain access to desired services. Unable to shop among competing providers, subscribers will be faced with taking the entire package or being denied access to service altogether. Either way, subscribers will suffer from the absence of competing carriers through open access requirements.

*Fourth*, AT&T will charge excessive rates for their telecommunications and information service packages. In a monopoly or duopoly market context, the profit-maximizing price for a service provider is significantly higher than in a competitive market environment. The harm is not only that some subscribers will pay more than they otherwise would for these services, but that some subscribers who could afford to pay for service at competitive rates will be priced out of the market, and therefore excluded from advanced services, by the excessive cable system rates. Without open access requirements, fewer subscribers will be able to afford to obtain advanced services. Therefore, Congress' and the Commission's desire to ensure broad-based access by subscribers to basic and advanced telecommunications and information services will remain unfulfilled.

The subscribers who will suffer most are those in sparsely-populated areas or with lower traffic volumes. Those subscribers will have two and only two telecommunications wires into their homes for the foreseeable future. Without open access requirements, they will obtain and use broadband advanced services accessed by cable modem services – if they can afford to do so at all – on the terms and conditions dictated to them by AT&T. Adopting the minimum open access requirements proposed herein will begin to break the logjam that currently prevents subscribers in rural and other less densely populated areas, as well as residential and small business customers, from obtaining advanced services through competing providers at market-based rates.

Regulatory inaction could also lead to differing open access requirements imposed by various local franchising authorities across the nation. Public concern about AT&T's exclusive control of the broadband "second loop" has prompted many of the 30,000 local franchising authorities in the United States to consider adopting open access requirements, particularly in light of the recent court decision upholding the open access rules that the city of Portland and Multnomah county imposed as a condition of approving the AT&T/TCI merger.[18] In June, the National Association of Counties passed a resolution stating that its 1,800 associated counties believe that "local government franchise authorities have the authority to require that all

[18] AT&T Corp. et al. v. City of Portland and Multnomah County, No. CV 99-65-PA (D. Or. June 3, 1999). For example, Broward County, Florida, and San Francisco, California have imposed open access requirements on AT&T. In Los Angeles, three of five commissioners on the Los Angeles Board of Information Technology have resigned because they favor imposing open access requirements and the mayor does not. Robert Duggan, one of the resigning commissioners, explained that requiring open access to cable modems is "sound public policy for the city." Without open access, "there is no level playing field," and "cable companies will control every aspect of high-speed Internet access (i.e., price, transport/conduit, packaging, interface, content, cost, technical standards, customer service, innovation, etc.)." *Another L.A. Board Member Resigns, Citing Mayor's Stand on Open Access,* TR Daily (June 21, 1999).

cable companies provide open access to all ISPs." The resolution also states that the Commission and Congress should work to create an open access system that encourages competition.

As Chairman Kennard recently noted, "[i]f each and every one of [the 30,000 local franchising authorities in the United States] decided on their own technical standards for two-way communications on the cable infrastructure, there would be chaos."[19] Qwest agrees that varying cable open access standards imposed by municipalities across the country would be less desirable than a uniform, nationwide open-access requirement imposed by the Commission, because varying standards could harm the development of advanced services by making regional or national entry more difficult and by chilling investment. By imposing open access requirements as a condition of merger approval, the Commission will alleviate public concern about AT&T's control over the "second loop" and preserve the question of whether the Commission should adopt generally applicable open access requirements for consideration at a later date. For these reasons, Qwest urges the Commission to impose open access requirements on AT&T as a condition for approval of its merger with MediaOne.

## III. MINIMUM OPEN ACCESS REQUIREMENTS SHOULD ENSURE THAT COMPETITORS HAVE NON-DISCRIMINATORY ACCESS TO AT&T'S CABLE SYSTEMS

Cable systems can be operated on an open access basis using technology that is readily available today, as the recent GTE, AOL and CompuServe pilot program has begun to

[19] Remarks of William E. Kennard, Chairman of the Federal Communications Commission, before the National Cable Television Association, Chicago Illinois (June 15, 1999).

demonstrate.[20] The technology used to provide cable modem services is remarkably similar to the technology used to provide digital subscriber line ("DSL") services, although the coaxial cable used to provide cable modem services is capable of higher transmission speeds than the copper wire used to provide DSL services. Both technologies consist of a telephone and/or computer, a modem, and a transmission line that connects to a network aggregation device, which allows the system to be connected to public or private telecommunication networks.

The key difference between DSL and cable modem systems is that DSL systems use dedicated lines to connect subscribers while cable modem systems use shared network facilities to connect subscribers. This difference is not an obstacle to cable open access because the shared network facilities can be managed by adding additional headends or using readily available aggregation devices that can scale subscriber usage and manage data streams. Significantly, the need to manage the shared network facilities of cable modem systems arises from the number of subscribers to the system, not from the number of service providers. Consequently, cable system operators face the same issues whether the cable modem system is served by one broadband service provider or multiple broadband service providers.

Qwest recognizes that there are numerous ways to implement cable open access, and that different techniques might be appropriate for different systems. The important point is not that one particular technique should be preferred over all others, but that cable open access is feasible and should be required as a condition for approval of the AT&T/MediaOne merger. Objections that cable open access is not feasible because subscriber usage would overwhelm the

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[20] Despite claims to the contrary by @Home, a subsidiary of AT&T, the recent test by GTE Corp and America On Line demonstrates that it is technically feasible to allow open access to cable infrastructure. *See, e.g.*, Patricia Fusco, Internet News.com (June 14, 1999) <http://www.internetnews.com/isp-news/article/0,1087,8_137621,00.html>.

cable systems ignore reality. Multiple users can share cable transmission capacity at acceptable quality levels using methods available today, and more advanced methods are currently being developed.

Qwest submits that the Commission should impose the minimum open access requirements necessary to ensure that AT&T's broadband local loops are integrated into the national telecommunications infrastructure in a way that maximizes competition and consumer choice. Qwest proposes a minimum set of open access requirements as a first step towards this integration. By adopting those requirements, the Commission will address today's most significant barriers to the provision of telecommunications and information services over the cable systems' ubiquitous local loops, of which AT&T will control over 55%. The result will be a tangible improvement in the ability of Qwest and other competing carriers to provide a full range of basic and advanced services to all types of subscribers at competitive rates in regions served by AT&T.

***First,*** the Commission should adopt a rule requiring AT&T to offer telecommunications capacity and related facilities and equipment through interconnection to any requesting telecommunications carrier or information services provider, unbundled from any other retail or wholesale offerings of AT&T. Requesting carriers and providers must be able to obtain transmission capacity with sufficient bandwidth and any technically feasible conditioning for the provision of telecommunications and information services.

***Second***, the Commission should authorize any requesting telecommunications carrier or information services provider to use the capacity and related facilities and equipment provided by AT&T's cable television systems for the provision of any telecommunications or information service. As a corollary unbundling rule, the Commission should prohibit AT&T

from requiring a subscriber to take (or pay for) any service offered by AT&T or a provider selected by AT&T in order to subscribe freely to the telecommunications and information services offered by unaffiliated carriers and providers over AT&T's broadband local loop.[21]

***Third***, the Commission should adopt a rule that requires AT&T to offer unbundled transmission capacity and related facilities and equipment to any requesting telecommunications carrier or information services provider on non-discriminatory terms and conditions. That requirement should be broad enough to prevent AT&T from discriminating among unaffiliated requesting carriers and service providers, as well as ensuring that AT&T does not discriminate in favor of affiliated providers of telecommunications and information services.

***Fourth***, the Commission should adopt a rule that requires AT&T to offer unbundled transmission capacity and related facilities and equipment to any requesting telecommunications carrier or information services provider on just and reasonable terms and conditions, including at cost-based rates. AT&T should be entitled to recover any costs it has reasonably incurred to upgrade its network to enable the provision of telecommunications and information services to subscribers.

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[21] More specifically, AT&T should be prohibited from requiring the subscriber to take any telecommunications, information, cable television, or other service as a condition of being able to subscribe to a telecommunications or information service offered by an entity not affiliated with AT&T over AT&T's broadband local loop. The cable industry has a long history of tying services and equipment, which has raised the concern of regulators and prompted legislation to prevent anticompetitive behavior. *See, e.g.,* 47 U.S.C. 521 note (a) (finding, among other things, that cable systems have monopoly power and that there are significant barriers to entry); S. Rep. No. 105-63, at 46 (1997), (discussing concerns about the availability of cable programming at fair and competitive prices and restrictions on bundling); S. Rep. No. 102-92, at 3-12 (1991), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135-44 (recognizing that cable operators bundle transmission, equipment and programming and use their market power, and that it is difficult to contain their market power).

***Fifth***, the Commission should adopt a rule that AT&T must offer any requesting carrier or information services provider the option of either (a) interconnecting to a network aggregation device owned by AT&T that is capable of scaling and managing subscriber usage to maintain service quality at industry standards, or (b) installing its own network aggregation device at any technically-feasible point in the cable network. This requirement would give requesting carriers or information services providers the option of using equipment owned by AT&T, some form of which must be installed to facilitate broadband services whether open access is required or not, or equipment owned by themselves.

## Conclusion

For the foregoing reasons, Qwest urges the Commission to impose an open access requirement as a condition of approving the AT&T/MediaOne merger. The Commission also should expeditiously initiate a rulemaking proceeding to adopt minimum open access requirements for dominant cable systems and their affiliates.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of August, 1999, I caused copies of the foregoing Comments of Qwest Communications Corporation to be hand delivered to the following:

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