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

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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Applications for Consent to the Transfer of)
Control of Licenses of)
)
MediaOne Group, Inc.,)
Transferor)
)
To)
)
AT&T Corp.,)
Transferee)

CS Docket No. 99-251

RESPONSE OF SBC COMMUNICATIONS INC.

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RESPONSE OF SBC COMMUNICATIONS INC.

SBC Communications Inc. (“SBC”), by its attorneys, hereby submits its response to petitions against and comments on the application of AT&T Corp. (“AT&T”) and MediaOne Group, Inc. (“MediaOne”) for authority to transfer control of MediaOne and its Commission licenses and authorizations to AT&T.¹ In petitioning to deny that application, SBC explained that the proposed combination of the cable, video programming, Internet, and other assets of AT&T and MediaOne would occasion serious violations of rules designed to protect the public and threatens widespread competitive harms in the markets for video programming, MVPD

¹ See *AT&T Corp. and MediaOne Group, Inc. Seek FCC Consent For A Proposed Transfer Of Control*, CS Docket No. 99-251, DA 99-1447 (Public Notice) (July 23, 1999).

services, set-top boxes, electronic programming guides, and various broadband offerings.² These anticompetitive consequences would be exacerbated by the unjustifiably disparate regulatory treatment of AT&T's and ILECs' broadband offerings.³ As a result, "consumers will pay more for less and will lose many of the very substantial economic and social benefits of an open and fully competitive broadband marketplace."⁴

SBC further demonstrated that the application is materially deficient insofar as it fails to make the required showings for merger approval under the applicable *Bell Atlantic/NYNEX* analysis and that no competitive or other public interest benefits can be credited to the merger.⁵ As discussed below, virtually all other parties commenting on the application effectively supported SBC's showings. The application should, accordingly, be denied.

I. THE RECORD ESTABLISHES THAT THE PROPOSED MERGER WOULD HAVE A SERIOUS ANTICOMPETITIVE IMPACT IN MANY CABLE-RELATED MARKETS

SBC has already documented the unprecedented web of interests that AT&T would possess in cable-related products after the merger. AT&T's access to more than 60% of the homes passed by cable, its influence over 98% of cable Internet subscribers, its interests in approximately 60% of the most popular cable programming, and its equity relationships with set-

² Petition of SBC Communications To Deny Application, CS Docket No. 99-251, at 2-43 (filed Aug. 23, 1999) ("SBC Petition").

³ *Id.* at 43-47.

⁴ *Id.* at 2.

⁵ *Id.* at 16-43, 48-52; see *Applications of NYNEX Corporation, Transferor, and Bell Atlantic Corporation, Transferee*, 12 FCC Rcd 19985 (Memorandum Opinion and Order) (1997).

top box and electronic program guide providers would permit it to dominate the cable industry as well as a number of important related products.⁶ Such a concentration of market power in a single company would not only violate existing FCC cable ownership limitations, but would also cause widespread competitive harms in a striking array of markets. A broad-cross section of parties, including consumer advocates, multi-channel video programming distributors (“MVPDs”), Internet service providers, long distance carriers, resellers, and local exchange carriers concurred in SBC’s analysis.

For example, a coalition of consumer groups pointed out that AT&T’s “post-merger control of cable systems will allow it to act as a gatekeeper of the information spoken and heard by the American public.”⁷ AT&T’s exercise of this gatekeeper power would create barriers to entry for new content providers and a reduction in the number of media voices for both video programming and broadband Internet offerings.⁸ This would cause consumers to experience higher prices, poorer service quality, and fewer choices in the markets for those services.

The Telecommunications Advocacy Project (“TAP”) emphasized that approval of the merger would permit a “proven ‘redliner’” to assume a dominant status in the cable and Internet industries at the expense of universal service principles.⁹ Competing distributors of video programming will lack the leverage to bargain for carriage on reasonable terms against the

⁶ SBC Petition at 2-8.

⁷ Petition To Deny of Consumers Union, Consumer Federation of America and Media Access Project, CS Docket No. 99-251, at 17 (filed Aug. 23, 1999) (“Consumers”).

⁸ *Id.* at 16-18, 29.

⁹ Petition To Deny of the Telecommunications Action Project, CS Docket No. 99-251, at 33 (filed Aug. 23, 1999) (“TAP”).

market power held by AT&T through its horizontally and vertically integrated entities. TAP further asserts that AT&T's control over cable Internet services is likely to exacerbate the "digital divide" created by the growing inequitable distribution of access to new technologies among households of varying income levels and racial or ethnic backgrounds.¹⁰

ISPs such as America Online and Mindspring echoed the consumer advocates' concerns regarding the anticompetitive impact on Internet services.¹¹ AOL noted that AT&T's control over critical last mile broadband facilities also would permit the merged entity to deny consumers the ability to access Internet-delivered video programming and to choose among competing electronic program guides, set-top box software, and integrated service offerings combining voice, video, and data capabilities.¹² MCI WorldCom agreed, cautioning the agency about the threat to consumers from the reduction in competition and choice among both Internet services and bundled service offerings that would be occasioned by the merger and by AT&T's policy of tying broadband access to its own Internet services.¹³

Echostar similarly complained about the power over integrated broadband service packages that the merger would confer on AT&T as a result of its control of cable broadband

¹⁰ *Id.* at 13, 19-21.

¹¹ Comments of America Online, Inc., CS Docket No. 99-251, at 8-11 (filed Aug. 23, 1999) ("AOL"); *see* Comments of Mindspring Enterprises, Inc., CS Docket No. 99-251, at 3 (filed Aug. 23, 1999) ("Mindspring").

¹² AOL at 3, 8-11.

¹³ Comments of MCI WorldCom, Inc., CS Docket No. 99-251, at 11 (filed Aug. 23, 1999) ("MCI WorldCom").

access facilities.¹⁴ Such control would permit AT&T to raise barriers to entry and foreclose competition from other MVPDs for such packages.

Commenting parties likewise were almost universally in accord that the public would derive no credible benefits from the merger, even in local exchange markets.¹⁵ It follows that, based on these showings alone, AT&T's application cannot be approved under the *Bell Atlantic/NYNEX* standard. But, the adverse consequences for the public interest will, in fact, be even greater because of the disparate regulatory treatment of alternative broadband services offered by incumbent local exchange carriers. The unnecessary and burdensome regulatory requirements now imposed on ILECs will handicap those entities in providing an effective competitive counterbalance to AT&T's leveraging of its closed cable networks to dominate broadband markets.

II. THE COMPETITIVE HARMS CAUSED BY THE MERGER WILL BE EXACERBATED BY THE MARKET-DISTORTING EFFECTS OF THE DISPARATE REGULATORY TREATMENT OF AT&T AND ILEC BROADBAND SERVICES

The record demonstrates that the Commission's resistance to calls for open access to AT&T's broadband cable transport capabilities magnifies the already substantial competitive risks presented by the proposed merger. The disparate regulatory treatment of ILECs' and AT&T's broadband services – with the former subject to detailed and intrusive open access

¹⁴ Comments of EchoStar Satellite Corporation, CS Docket No. 99-251, at 3-5 (filed Aug. 23, 1999).

¹⁵ *E.g.*, TAP at 29; Consumers at 25; Bell Atlantic Corporation's Petition To Deny the Application, CS Docket No. 99-251, at 55-59 (filed Aug. 23, 1999) ("Bell Atlantic"); AOL at 3-6.

requirements while the latter is permitted to maintain a closed system model – is unwarranted and will exacerbate and perpetuate the competitive harms identified above while severely undermining consumer welfare. Only a level playing field can allow the well established benefits of a competitive broadband marketplace to be enjoyed by the public.

Numerous commenters have recognized that AT&T's closed system model is completely at odds with the Telecommunications Act's and the Commission's consistent endorsement of open access principles, which have been applied in virtually all other communications-related markets. The most striking contrast is with the regulatory treatment of ILEC broadband services, which remain subject to unbundling, interconnection, and resale requirements under the Act and the Commission's rules that far exceed the modest open access obligation commenters seek to have applied to AT&T here.¹⁶ AT&T's resistance even to such a limited obligation is particularly ironic given its vehement support for imposing ever more onerous burdens on ILECs.

In fact, applying burdensome regulatory requirements to only one of two incumbent facilities providers in local markets indisputably will undermine competition to the detriment of consumers. Regulatory handicapping of this type inevitably runs the risk of selecting winners and losers from among marketplace participants without regard to the merits of individual technologies or service offerings. Consumers will, thereby, be denied the broader array of services at lower prices that would be available in a fully and fairly competitive marketplace.

¹⁶ Cf. 47 U.S.C. § 251; see *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 13 FCC Rcd 24011 (Memorandum Opinion and Order and Notice of Proposed Rulemaking) (1998); *FCC Promotes Local Telecommunications Competition: Adopts Rules on Unbundling of Network Elements*, FCC Report No. CC 99-41 (News Release) (released Sept. 15, 1999).

It is, thus, not surprising that a number of commenters specifically pointed out the pernicious, anticompetitive impact of the existing regulatory disparity and the lack of open access requirements on AT&T. AOL, for example, extolled the benefits of loop-to-loop last mile facilities-based competition that would be lost were AT&T to be permitted to maintain its closed system model.¹⁷ There simply is no basis for distinguishing between AT&T and ILEC facilities with respect to the need for an open access requirement. Mindspring correspondingly argued that there is no support in the Communications Act for differentiating the regulatory treatment of functionally identical services provided by AT&T and ILECs.¹⁸

Interexchange carriers as well decried the anticompetitive impact of the existing asymmetry in regulation. MCI WorldCom explained that the ability of CLECs and ISPs to compete with AT&T to provide local and Internet services would be materially reduced by the merger absent a “symmetric” open access requirement.¹⁹ Qwest agreed that the failure to require open access to AT&T’s broadband transport capabilities will undermine competition in that market and reduce freedom of choice for consumers.²⁰ Indeed, rural subscribers will “suffer most.”²¹ And, the Telecommunications Resellers Association claimed that symmetrical

¹⁷ AOL at 14.

¹⁸ Mindspring at 16.

¹⁹ MCI WorldCom at 11.

²⁰ Comments of Qwest Communications Corporation, CS Docket No. 99-251, at 8-15 (filed Aug. 23, 1999).

²¹ *Id.* at 14.

regulation of AT&T and ILECs is warranted to effectuate the market opening policies of the Act and foster competition in the local exchange market.²²

Other local exchange carriers likewise confirmed SBC's analysis. Bell Atlantic noted that ILEC broadband facilities are subject to "regulatory hobbling" in the marketplace.²³ GTE explained that ILEC broadband access technologies cannot effectively discipline AT&T's market power because of, *inter alia*, the lack of a level regulatory playing field.²⁴ Finally, US West pointed out that the disparate regulatory treatment of ILEC broadband offerings characterized by the failure to require AT&T to open its closed system model violates the Commission's commitment to technological neutrality in encouraging the deployment of advanced telecommunications services.²⁵ It will, consequently, undermine the objectives of Section 706 of the Act by providing disincentives for the widespread availability of broadband services.

It is indisputable that existing regulatory disparities between the treatment of AT&T and ILEC broadband facilities will increase both the risk that the post-merger AT&T will enjoy anticompetitive market power in broadband-dependent markets and the harm that the public will suffer as a result of AT&T's exercise of that power. In these circumstances, the Commission may not approve the proposed merger under the *Bell Atlantic/NYNEX* standard.

²² Comments of the Telecommunications Resellers Association, CS Docket No. 99-251, at 23-24 (filed Aug. 23, 1999).

²³ Bell Atlantic at 34.

²⁴ Petition of GTE Service Corporation, GTE Internetworking, and GTE Media Ventures, Inc. To Deny Application, or in the Alternative, To Condition the Merger on Open Access Requirements, CS Docket No. 99-251, at 41-48 (filed Aug. 23, 1999).

²⁵ Petition of US West To Deny Applications or To Condition Any Grant, CS Docket No. 99-251, at 17-20 (filed Aug. 23, 1999).

III. CONCLUSION

The record demonstrates that the AT&T/MediaOne merger will adversely affect both competition and consumers in numerous markets and that such harms will be exacerbated by the asymmetrical regulation of AT&T's and ILECs' broadband services. For the foregoing reasons as well as those set out in SBC's earlier-filed petition to deny, the merger applications must be denied.

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September 17, 1999

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