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

In the Matter of	)	
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Applications for Consent to the	)	
Transfer of Control of Licenses and	)	CS Docket No. 99-251
Section 214 Authorizations from	)	
	)	
MEDIAONE GROUP, INC.,	)	
Transferor	)	
to	)	
AT&T CORPORATION,	)	
Transferee	)	

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To: The Commission

REPLY OF U S WEST TO REPLY COMMENTS OF AT&T AND MEDIAONE

Mark Roellig
Dan L. Poole
Robert B. McKenna
Norman G. Curtright
U S WEST, INC.
1020 19th Street, N.W.
Washington, D.C. 20036
(303) 672-2794

William T. Lake
William R. Richardson, Jr.
Julie A. Veach
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Counsel for U S WEST, INC.

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Pursuant to 47 C.F.R. § 1.45(c), U S WEST, Inc. ("U S WEST") respectfully submits this reply to the response[1/] of AT&T Corp. ("AT&T") and MediaOne Group, Inc. ("MediaOne") to U S WEST's petition to deny the above-referenced applications.[2/]

1/ Reply Comments of AT&T Corp. and MediaOne Group, Inc., in *Applications for Consent to the Transfer of Control of Licenses, MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251 (filed Sept. 17, 1999) ("AT&T Reply Comments").

2/ In accordance with *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission*, Report and Order, 13 FCC Rcd 24816, 24838-39 ¶ 34 (1998), U S WEST reserves the right to supplement its petition to deny within 30 days after AT&T and MediaOne have made available for inspection *all* of the materials filed in response to the Commission's August 9 request for further information.

INTRODUCTION AND SUMMARY

One hardly needs to go to "elaborate lengths" to identify objections to this unprecedented merger.[3] As U S WEST and other parties have demonstrated, AT&T's proposal to combine the largest and third largest cable operators in the country (with attributable interests in the second and seventh largest) raises two serious concerns. These are not concerns, like those AT&T has repeatedly raised in the context of mergers of its competitors, that seek to extort unrelated "public interest" commitments from the applicants. They relate to compliance with Commission rules required by Congress relative to horizontal cable ownership, and with Section 706 of the 1996 Act, which seeks to promote competition in advanced services through a policy of technological neutrality. AT&T's 144 pages of reply comments, its declarations purporting to assure the Commission that vertically integrated cable monopolists have neither the ability nor the intent to discriminate against their programming and MVPD competitors, and Professor Coffee's declarations purporting to substitute for full disclosure from AT&T itself as to the nature of its relationships with Liberty and Time Warner Entertainment, do not come to grips with either of these concerns.

First, this merger of *both* cable programming networks *and* distribution channels would substantially increase the risks of foreclosure for independent video program networks. Congress and the Commission have both already made this judgment in requiring, establishing, and now defending in court a maximum limit on the number of U.S. households passed by any single cable MSO. The 30% limit established by the Commission pursuant to this statutory mandate is dwarfed by this proposed transaction. AT&T's efforts to create for itself a special

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[3] AT&T Reply Comments at 1.

rule far more generous than that long found to be applicable to everyone else are founded on arguments that simply deny the obvious, *i.e.*,

- that AT&T has both the ability and incentive (indeed, a fiduciary duty) to influence the conduct of Liberty (its 100% subsidiary),
- that in establishing a *multiplicity* of behavioral and structural protections against vertically integrated cable MSOs, Congress intended the Commission to enforce all and not merely some of them, and
- that noninsulated limited partnership interests in and board representation on a cable MSO provide a substantial investor like AT&T with sufficient ability and incentive to influence that MSO's conduct to warrant a finding of attribution — particularly an MSO (like TWE or Cablevision) that purchases programming from that substantial investor.

Accordingly, at a minimum, the Commission should condition any grant of this application on a requirement of divestiture by AT&T of attributable interests in cable systems sufficient to comply with the Commission's 30% cap, within 60 days following issuance of the D.C. Circuit mandate upholding the Commission's rules.

Second, this merger substantially increases the number of potential high speed Internet access subscribers that would be served by AT&T's cable systems, while also granting AT&T negative control of Road Runner as well as Excite@Home. The merger thus graphically underscores the need for the Commission to enforce *now* — before it becomes too late to do so — the mandate of Section 706 of the 1996 Act to promote competition in the deployment of advanced services through a policy of technological neutrality between cable modem and DSL

providers. The financial disincentives cited by AT&T in this regard continue to provide compelling evidence in support of the need to address this question promptly. AT&T's untenable arguments that only ILECs have power in the market for their traditional services, while only cable companies have First Amendment protection in deploying advanced services, cannot obscure the substantial dangers regulatory asymmetry poses to the important goals reflected in Section 706. Accordingly, the Commission should condition any grant of this application also on a requirement of nondiscriminatory access to AT&T's cable modem facilities, so long as the Commission continues to insist on saddling DSL providers with loop unbundling, line sharing, DSLAM collocation, and other aspects of what Chairman Kennard has recently characterized as the "quicksand of regulation."

ARGUMENT

I. THIS MERGER AS PRESENTLY STRUCTURED WOULD CREATE A CABLE BEHEMOTH THAT SUBSTANTIALLY EXCEEDS THE SIZE DETERMINED BY THE COMMISSION TO THREATEN THE VIABILITY OF UNAFFILIATED CABLE PROGRAM NETWORKS.

Defending under the 1992 Cable Act a merger of the largest and third largest cable MSOs, coupled with attributable limited partnership interests in the second largest (TWE) and attributable board representation on the seventh largest (Cablevision),[4] requires considerable effort. AT&T begins that effort by arguing that there is currently an abundance of unaffiliated cable programmers. It counts in this mix a number of new independent programmers whose long-term viability is highly uncertain even today, much less with the potential market

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[4] *See* Communications Daily, Sept. 28, 1999, at 7.

foreclosure threatened by this proposed merger.[5] It then advances a "let them eat DBS" argument. Under this theory, unaffiliated programmers could survive by "switching to" satellite outlets — which serve only 15% of the relevant market for television homes.[6] Next, AT&T argues that it would have no incentive to disfavor these unaffiliated programmers (even those that compete for advertising revenues with cable networks in which AT&T and MediaOne have attributable interests) because it would lose subscribers if it did so. This argument — which is *not* supported by AT&T's citation[7] — is one that Congress flatly rejected in the findings on which it based many of the provisions of the 1992 Cable Act.[8] AT&T's continuing effort to

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[5] The Commission reported in 1997 that there were 72 planned (but not launched) national programming services unaffiliated with cable operators. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fourth Annual Report, 13 FCC Rcd 1034, 1223-25 Table F-4 (1998). After about a year, only 8 of those 72 had actually launched service; 37 were still reported as "planned"; and 27 were not reported at all. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24434-38 Table D-2 and 24442-44 Table D-4 (1998) ("Fifth Annual Report"). Of those that actually launched, none was reported to have "distribution on cable systems that cover 40-60% of subscribers," as is required for "the successful launch of any significant new channel." Robert Pitofsky, *Vertical Restraints and Vertical Aspects of Mergers — a U.S. Perspective*, Fordham Corporate Law Institute (Oct. 16-17, 1997), *available at* <http://www.ftc.gov/speeches/pitofsky/fordham7.htm>; Fifth Annual Report at 24450-52 Table D-6.

[6] AT&T Reply Comments at 3. *But see* CRA Analysis at 36: "Program services sell advertising time, and the value to advertisers of the audience a network can deliver often will increase more than proportionately with the size of the audience."

[7] Owen and Wildman's suggestion that the economic interest of MSOs is to encourage new program services was made in the context of a discussion of *non-vertically integrated* MSOs. *See* Bruce M. Owen & Steven S. Wildman, Video Economics 235-36 (1992) ("[T]here appears to be no incentive for an *unintegrated* MSO to refuse to carry a program service likely to increase consumer demand for cable service.").

[8] *See* 47 U.S.C. § 521 note(a)(5).

prove Congress wrong is irrelevant here, but that effort is hardly supported, as it suggests,[9] by the absence from this proceeding of comments from unaffiliated programmers — who obviously would not relish the prospect of displeasing their largest customer.[10]

AT&T's remaining arguments reduce to an effort to deny that it is vertically integrated, to challenge the need for horizontal limits on cable ownership mandated by Congress, to seek special exceptions from attribution rules long made applicable to others, and to deny the clear applicability of those rules. Each of these arguments should be rejected.

A. AT&T and Liberty Have Both the Ability and the Incentive To Act as a Vertically Integrated Firm.

AT&T contends that, although Liberty is a wholly owned subsidiary of AT&T, the Commission can disregard that relationship because neither AT&T nor Liberty has the ability or the incentive to favor the other in relationships with third parties. The Commission already rejected these arguments in the context of the AT&T/TCI merger.[11] It confirmed that, because

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[9] *See* AT&T Reply Comments at 40, 47.

[10] Equally unpersuasive is the suggestion of AT&T's Executive Vice President of Programming that such programmers would have the upper hand in negotiating with the merged entity, based on the fact that their prices have recently increased. *See* Bond Declaration ¶ 9. Programming costs to cable MSOs have increased as a result of increases in the costs of acquiring and producing programs (e.g., professional sports). *See* Fifth Annual Report at 24288, 24298-24300 ¶¶ 9, 24-27 (1998); *see also* CRA Analysis at 25 ("Some cable program services have higher costs than others, and demand, and receive, higher fees from cable operators."). The issue is not whether AT&T pays more for such programming this year than last year, but whether it pays less than it otherwise would in a competitive distribution market.

[11] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3166 ¶ 9 & n.35, 3179 (1999).

AT&T owns 100% of Liberty, Liberty is subject to the program access rules.[12] This conclusion reflects the Commission's judgment that, regardless of tracking stock or other measures, Liberty is sufficiently related to be vertically integrated, with all the consequences that vertical integration entails. Nothing AT&T says undermines this obvious conclusion.

A review of documents filed with the SEC (though not addressed in the FCC application) demonstrates quite clearly that these two companies are joined at the hip. The "Intercompany Agreement Principles" filed with the SEC make clear that Liberty "will be granted preferred vendor status with respect to access, timing, and placement of new programming."[13] Thus, AT&T has agreed to "use its reasonable efforts" to carry such services "on mutual MFN terms and conditions."[14] In addition, AT&T has committed to finalize seven non-arm's-length "pending agreements" made between Liberty and TCI before the merger, and to extend until 2009 *any* existing Liberty-TCI agreement that expires before 2004.[15]

As these terms and conditions make clear, AT&T's relationship with Liberty is essentially no different from any parent's relationship with any 100% subsidiary. AT&T itself admits as much in its own Policy Statement:

> all material matters as to which the holders of the Common Stock and the holders of the Liberty Media Group Common Stock may

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12/ *See id.*

13/ AT&T Corp., SEC Form S-4, Exhibit 2.06, Intercompany Agreement Principles ¶ 1 (filed Jan. 8, 1999).

14/ *Id.*

15/ *Id.* AT&T has also committed to give Liberty capacity for interactive video services, or *at AT&T's election*, enter into "mutually agreeable" joint ventures with Liberty for interactive video services. *Id.*

> have potentially divergent interests shall be resolved *in a manner that is in the best interests of AT&T Corp. and all of its common shareholders.*[16]

For this reason, AT&T's "commitment" to pass through all earnings from Liberty to the tracking stock holders can be ignored by the AT&T Board of Directors, "consistent with its fiduciary duties to AT&T and all of its shareholders."[17] This policy simply reflects basic principles of fiduciary duty.[18]

Indeed, the tracking stock concept relied on by AT&T here rests on a legal "fiction."[19] Tracking stock aims to "maintain[] that a particular class of tracking stock is really common stock of a stand-alone corporation."[20] However, the shares of tracking stock "remain subject to the risks associated with all the businesses, assets, and liabilities of [the] parent

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[16] AT&T Corp., SEC Form S-4, App. C, Policy Statement Regarding Liberty Media Group Tracking Stock Matters ¶ 1 (filed Jan. 8, 1999) (emphasis added) ("Policy Statement"). Nor does Liberty have "complete control" over its financing. AT&T Reply Comments at 31. In fact, Liberty must obtain AT&T's approval to borrow more than 25% of the market capitalization of the Liberty tracking shares if such borrowing would affect AT&T's credit rating. *See* Liberty Media Group, SEC Form S-4, Inter-Group Agreement Between and Among AT&T Corp. and Liberty Media Corporation, Liberty Media Group LLC and Each Covered Entity, dated March 9, 1999, § 1.3, at 3 (filed Sept. 3, 1999) ("Inter-Group Agreement").

[17] *See* Policy Statement ¶ 7.

[18] Indeed, according to Professor Hass, serious fiduciary problems arise in precisely the situation involved here — when an officer of the tracking stock corporation (Liberty Media Corp.) serves on the board of the issuer (AT&T). *See* Jeffrey J. Hass, *Directorial Fiduciary Duties in a Tracking Stock Equity Structure: The Need for a Duty of Fairness*, 94 Mich. L. Rev. 2089, 2095 (1996).

[19] *Id.* at 2095. TCI's premerger tracking stock arrangement has been cited as "perhaps, the most confusing equity structure of any tracking stock corporation." *Id.* at 2177-78 n.17.

[20] *Id.* at 2095.

corporation."[21] Moreover, "[d]ue to [the] indirect link to the corporation as a whole, tracking stocks theoretically should never trade completely like stocks of stand-alone corporations."[22]

Instead of disclosing the facts concerning its Liberty relationship, AT&T has asked an outside consultant to advise the Commission on what *he* believes certain undisclosed documents purport to say about that relationship. It is by no means clear what Professor Coffee reviewed as the basis for these views. But in any event Professor Coffee simply asked the wrong question. He focused on control, and, in particular, four egregious manifestations of control.[23] As noted below, the real question is whether AT&T has any cognizable influence over Liberty. Clearly, it does. AT&T touts the fact that it can appoint only a minority of directors of Liberty for the next seven years,[24] but the ability to appoint even a minority of directors certainly represents cognizable influence over Liberty under the Commission's policies.

For its part, Liberty also retains substantial influence of its own over AT&T. Its Chairman, Dr. John Malone, is a director of AT&T,[25] as well as AT&T's largest individual shareholder.[26] AT&T is obligated to renominate Dr. Malone (or his designee) for reelection to

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21/ *Id.* at 2116.

22/ *Id.* at 2117 (footnotes omitted).

23/ *See* Supplemental Declaration of Professor John C. Coffee, Jr. ¶ 6.

24/ *See* AT&T Reply Comments at 31.

25/ *See* AT&T Corp. SEC Form 13-D, Item 4 (filed March 29, 1999).

26/ *See* John Accola, *Top AT&T Execs in Denver at Huddle Hosted by TCI Corporate Strategy and Integration of Newly Acquired Cable Empire Will Be on the Table*, Denver Rocky Mountain News, April 7, 1999, at 2B.

the AT&T Board for three years.[27] After that time, so long as Liberty tracking shares remain outstanding, AT&T must nominate and recommend election of a person (who may be Dr. Malone) who will "understand and reflect issues of concern to the Liberty Media Group and the holders of AT&T Liberty Tracking Shares."[28] Thus, AT&T has formalized an institutional channel of advocacy for Liberty's interests.

As noted above, AT&T's duties to its shareholders are sufficient to give it the economic incentives it tries to downplay here. But the economic ties between these two companies provide a further incentive to cooperate. AT&T has declined U S WEST's suggestion to disclose the extent of overlapping shareholders between AT&T and Liberty. But the public record reveals that Dr. Malone, the Chairman of Liberty Media Group, has large holdings in both Liberty and AT&T. He is the controlling shareholder of Liberty, holding over 73 million (67.3%) of its vote-rich Class B shares.[29] And he is the largest individual shareholder of AT&T, holding nearly 35 million shares of AT&T common stock.[30] Indeed, six of the nine directors of Liberty hold a total of more than 39 million shares of AT&T stock, representing a present market value of $1.7 billion.[31] Likewise, following the merger TCI officers and directors had their stock

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[27] *See* AT&T Corp., SEC Form S-4, at 51 (filed Jan. 8, 1999).

[28] Inter-Group Agreement § 1.15, at 18-19.

[29] *See* Liberty Media Corp., SEC Form S-4, at 81 (filed Jan. 8, 1999).

[30] *See* Accola, *supra* note 26, at 2B; Liberty Media Corp., SEC Form S-4 (filed Sept. 3, 1999).

[31] *See* Liberty Media Corp., SEC Form S-4, at 81-82 (filed Sept. 3, 1999) (stock value based on market closing 9/28/99). Comparable information with respect to Liberty holdings by AT&T officers and directors is not publicly available. However, public records do reveal that one of AT&T's directors recently acquired 60,000 shares of Liberty's class A tracking

options in TCI and old Liberty converted into stock options in AT&T and new Liberty, which the parties have valued at $45 million.[32] These option holders have a strong financial incentive to favor the other company, which further undermines any claim that AT&T is not vertically integrated with its 100% subsidiary for purposes of the 1992 Cable Act.

B. AT&T's Arguments About the Wisdom of the Horizontal Cap Are Both Irrelevant and Wrong.

All of the foregoing arguments by AT&T, however, are just diversions. Congress required the Commission to "prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach,"[33] without regard to the extent of a cable operator's vertical integration.

AT&T again argues that the restriction is unnecessary, because other rules suffice to protect unaffiliated programmers and consumers. Again, *Congress* disagreed. It directed the Commission to promulgate several different kinds of rules — program access rules,[34] program carriage rules,[35] channel occupancy rules,[36] and leased access rules[37] *in addition to* the horizontal ownership cap — because, in Congress's judgment, multiple and overlapping rules

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stock, bringing his total holdings to 431,800 shares. *See* AT&T Corp., SEC Form 4 (filed Sept. 10, 1999) (LEXIS, FEDSEC Library, SEC file).

[32] *See* AT&T Corp., SEC Form S-4, at 6 (filed Jan. 8, 1999).

[33] 47 U.S.C. § 533(f)(1)(A).

[34] *See id.* § 548.

[35] *See id.* § 536.

[36] *See id.* § 533(f)(1)(B).

[37] *See id.* § 532.

were necessary to address the anticompetitive incentives of cable MSOs. It is not U S WEST, but the Commission itself, that in defending the cap provisions of the statute has pointed to a preference for prophylactic "structural regulation."[38] Requiring unaffiliated programmers to file carriage complaints against systems all over the country is not the policy Congress contemplated. And contrary to AT&T's assertions about the need for more "experience" with these rules,[39] it is widely recognized that leased access — or, as some refer to it, "least access"[40] — has been of little use to unaffiliated programmers seeking national coverage. The leased access pricing rules "show[] too much concern for the financial health of cable operators and too little concern for the ability of programmers to afford leased access."[41] Thus, Congress's judgment to supplement these rules with an ownership cap is not only unassailable, but also clearly correct.

C. Congress and the Commission Have Both Rejected AT&T's Attribution Arguments.

AT&T argues that the Commission's established attribution rules for broadcasting should not be applicable to the horizontal cap. This argument is ironic to say the least: in arguing for a 35% (rather than a 30%) cap, AT&T has itself urged that "there is no basis in logic

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[38] Brief for the Federal Communications Commission and the United States at 35, *Time Warner Entertainment Co. v. Federal Communications Commission and United States of America* (D.C. Cir. filed Aug. 13, 1999) (No. 94-1035 and Consolidated Cases) (quoting *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, 13 FCC Rcd 14462, 14479 ¶ 42 (1998).

[39] AT&T Reply Comments at 50 n.138.

[40] Donna M. Lampert, *Cable Television: Does Leased Access Mean Least Access?*, 44 Fed. Comm. L.J. 245 (1992), *cited in ValueVision Int'l, Inc. v. FCC*, 149 F.3d 1204, 1206 (D.C. Cir. 1998).

[41] *ValueVision Int'l*, 149 F.3d at 1208.

or economics" to distinguish broadcasting from cable for purposes of the horizontal ownership restrictions.[42]

With respect to attribution, Congress and the Commission have agreed. During its consideration of the 1984 Cable Act, Congress considered the broadcasting attribution rules and found them to be suitable for the cable industry. It specifically recommended that the Commission use them: "In determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. Section 73.3555 (notes) or other criteria the FCC may deem appropriate."[43] The Commission thereafter specifically found that "the objectives of the broadcast attribution model are consistent with our goals in establishing ownership standards for [cable] subscriber limits."[44] In particular, the Commission recognized that the broadcast rules "focus on ownership thresholds that enable a broadcast licensee to *influence or control* management or programming decisions,"[45] and that it was appropriate to extend the broadcast rules to cable because "the same issues are also relevant to addressing the concerns at issue in this proceeding relating to the ability of cable operators to unduly influence the programming marketplace."[46] AT&T's effort to swim upstream against

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[42] AT&T Reply Comments at 55.

[43] S. Rep. No. 102-92, at 80 (1991).

[44] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership*, Second Report and order, 8 FCC Rcd 8565, 8581 ¶ 35 (1993).

[45] *Id.* (emphasis added).

[46] *Id.*

these considered policy judgments well known to it at the time of its merger should be definitely rejected.[47]

D. AT&T's Interest in Cablevision, and MediaOne's Interest in the TWE Partnership, Are Attributable.

AT&T next argues that its interests in Cablevision and TWE (post-merger) are not really attributable under the Commission's rules. Neither attempt succeeds.

1. Cablevision.

AT&T argues that it does not "control" Cablevision, either through its 8.9% voting interest[48] or through its two seats on Cablevision's board of directors. Control, however, is not the test for attribution. What the Commission's rules count is cognizable influence, which AT&T certainly would have. It is by no means clear whether there is or is not a single majority shareholder in Cablevision for purposes of the Commission's rules.[49] But that question need not be considered here. AT&T's interest entitles it to two seats on Cablevision's board of

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[47] Indeed, the Commission has already decided that, in some instances, *more stringent* attribution rules should apply to cable ownership than to broadcast ownership. *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3365 ¶ 21 (1993); *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 9 FCC Rcd 2642, 2643 ¶ 1 (1993).

[48] *See* Transfer of Control of FCC Licenses from MediaOne Group, Inc. to AT&T Corp., Transfer of Control Applications, CS Docket No. 99-251, at 12 (filed July 7, 1999).

[49] *See* Ted Hearn, *FCC Moving on Cable-Ownership Rules*, Multichannel News, June 8, 1998, at 48.

directors,[50] and it has selected none other than the CEO and COO of AT&T Broadband and Internet Services to fill these slots.[51] These positions make the cable homes of Cablevision attributable to AT&T.[52]

2. TWE.

As U S WEST explained in its petition, the interest of a limited partner in a limited partnership is attributable, unless the limited partner makes a certification that the limited partnership agreement contains seven very specific insulating criteria.[53] The Commission has only recently reaffirmed this requirement for purposes of broadcast attribution.[54] AT&T has

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[50] *See* Tele-Communications, Inc., SEC Form 8-K, Stockholders Agreements Between Cablevision Systems Corporation and Tele-Communications, Inc. dated March 4, 1998, Article 11 (filed March 6, 1998). AT&T may "nominate" two directors to the board, and the Dolan family interests (which AT&T says control Cablevision) must use "best efforts" to secure their election. *Id.* Article 11(c).

[51] *See* Cablevision, Investors' Overview <http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=CVC&script=100&layout=6>.

[52] *See* 47 C.F.R. § 76.501 note 2(h). Rights to board representation defeat the purposes of any single majority shareholder exception because a single majority shareholder cannot elect the entire board. *See Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, Report and Order, 97 F.C.C.2d 997, 1008-09 ¶ 21 & n.21 (1984), *modified by* Memorandum Opinion and Order, 58 Rad. Reg. 2d 604 (1985).

[53] These criteria must be included in the limited partnership agreement. *See* 47 C.F.R. § 76.501 Note 2(g); *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, Memorandum Opinion and Order, 58 Rad. Reg. 2d 604, 619-20 ¶¶ 48-50 (1985). AT&T/MediaOne's contrary suggestion is unsupportable. It relies on a case that involved an alien ownership interest that was not properly insulated for purposes of compliance with 47 U.S.C. § 310(b). *See Sacramento RSA Limited Partnership*, Memorandum Opinion and Order, 9 FCC Rcd 3182 (1994). In the alien attribution context, the partnership agreement is only "[o]ne of the factors the Commission considers to determine whether the alien partner is sufficiently insulated." *Id.* at 3183 ¶ 7.

[54] *See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, FCC 99-207, at ¶ 131 (rel. Aug. 6, 1999)

declined to make that certification, or to provide a complete description of the nature of the TWE relationship.[55] Rather, it has simply filed another declaration by Professor Coffee stating what *his* understanding of this complex relationship is, and how it interplays with the wrong legal standard and an irrelevant statute.

First, Professor Coffee again focused on the wrong legal question. Instead of addressing whether MediaOne can *influence* TWE, he addresses whether MediaOne can *control* TWE. While the question of control may be "a standard issue in corporate, partnership and securities law,"[56] it is not the relevant question here. The attribution rules are designed to detect "the ability of cable operators to *unduly influence* the programming marketplace."[57]

Second, Professor Coffee's analysis of the Revised Uniform Limited Partnership Act ("RULPA") and Delaware's version of the RULPA is irrelevant. In 1985, the Commission specifically determined that "exempting from attribution those limited partnerships which conform to the provisions of the RULPA is inappropriate,"[58] because — as this case graphically

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("*Broadcast Attribution Order*").

[55] The Commission has asked AT&T for additional information on this question. As noted above, U S WEST reserves the right under the Commission's rules and policies to supplement this filing after obtaining such further information.

[56] Coffee Declaration at 1.

[57] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, 8591 ¶ 35 (1993) (emphasis added).

[58] *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 58 Rad. Reg. 2d 604, 616 ¶ 35 (1985). The Commission recently reaffirmed its decision not to use the RULPA as a standard for evaluating limited partnerships in the broadcasting context. *See Broadcast Attribution Order* ¶ 131.

illustrates — the RULPA provides "inadequate guidance" as to whether a limited partner is materially involved in the partnership. Thus, "the mere fact that a limited partnership conforms to the provisions of the RULPA does not provide meaningful assurance that the limited partner will lack the ability to significantly influence or control partnership affairs."[59] Indeed, according to Professor Coffee, AT&T would continue to have the express right under the RULPA to approve sales, pledges, or other transfers of "any asset or assets" of TWE or incurrence of debt[60] — rights completely inconsistent with nonattribution under the Commission's rules.

Under the Commission's established criteria, AT&T's 25.5% limited partnership interest in TWE (coupled with its 9% nonvoting interest in TWE's controlling parent) would be plainly attributable. First and foremost, AT&T has declined to make the certification required by the Commission's rules.[61] Since there cannot be one attribution "rule for Monday, and another for Tuesday, a rule for general application, but denied outright in a specific case,"[62] AT&T's request for relief to accommodate this merger must fail. But the carriage by TWE of MediaOne and Liberty programming would defeat AT&T's nonattribution argument in any event. The Commission has held that similar attribution requirements applicable to voting trusts would be violated by the existence of a network affiliation agreement, or even by the renewal of

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[59] *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 58 Rad. Reg. 2d 604, 616 ¶¶ 37-38 (1985).

[60] Coffee Declaration ¶ 24.

[61] *See* 47 C.F.R. § 76.501 Note 2(g).

[62] *Frozen Food Express, Inc. v. United States*, 535 F.2d 877, 880 (5th Cir. 1976) (quoting *Mary Carter Paint Co. v. FTC*, 333 F.2d 654 (5th Cir. 1964), *rev'd on other grounds*, 382 U.S. 46 (1965)); *see also Adams Telcom v. FCC*, 38 F.3d 576 (D.C. Cir. 1994).

programming contracts less extensive than a network affiliation agreement.[63] The Commission has recently reaffirmed this same principle in the context of limited partnerships: "a contractual arrangement to provide programming would be inconsistent with the insulation criterion that 'the limited partner may not perform any services for the partnership materially relating to its media activities.'"[64] Indeed, to the extent that Section 5.5(f) of the TWE partnership agreement binds AT&T as the successor of MediaOne, it suggests that TWE may have a right of first refusal to participate jointly with AT&T in the management of its programming interests.[65]

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[63] *See Twentieth Holdings Corp.*, 4 FCC Rcd 4052, 4054 ¶¶ 15-17 (1989); *see also Lorimar Telepictures Corp.*, 3 FCC Rcd 6250, 6254 ¶ 30, 6256 n.15 (1988).

[64] *Broadcast Attribution Order* ¶ 133. AT&T attempts to brush this problem aside in a footnote. AT&T Reply Comments at 36-37 n.94. AT&T's "alter ego" argument clearly fails, because as noted above Liberty is nothing less than a 100% AT&T subsidiary, and because in any event AT&T holds an attributable interest in Liberty. *See Broadcast Attribution Order* ¶ 55.

[65] If MediaOne (or its successor) wishes to conduct any "Programming and Filmed Entertainment Business" other than one "previously disclosed on Schedule 5.5" to the partnership, it

> must offer to the Partnership the right to own or conduct (or negotiate the terms on which the Partnership may own or conduct) such Programming and Filmed Entertainment Business (it being understood that if the Partnership exercises such right, the Partnership and [MediaOne] shall co-manage such Programming and Filmed Entertainment Business).

Time Warner Entertainment Company, L.P., SEC Form 10-K, Exhibit 3.2, Amendment Agreement § 5.5(f) (filed March 30, 1994).

II. AT&T HAS NO REAL RESPONSE TO THE REQUIREMENTS OF SECTION 706 WITH RESPECT TO TECHNOLOGICAL NEUTRALITY BETWEEN CABLE MODEM AND DSL SERVICES.

This merger also increases substantially the reach of AT&T's already dominant cable modem service offerings throughout the United States. And it merges AT&T's control of Excite@Home with MediaOne's interest in the principal cable modem service competitor to Excite@Home, Road Runner — an interest AT&T now admits (for the first time) would provide it with negative control of Road Runner.[66] The merger thus would align the two providers that currently provide service to at least 90% of all cable modem subscribers.[67]

In these circumstances, as U S WEST urged in its petition, the Commission cannot evaluate this merger without consideration of the effects on competition of continuing to handicap competing DSL providers of high speed Internet access service[68] with substantial loop unbundling, DSLAM collocation, and other obligations that are part of what Chairman Kennard

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[66] *See* AT&T Reply Comments at 89 n.276.

[67] *See* Petition of U S WEST To Deny Applications or To Condition Any Grant at 14 n.40, in *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corporation, Transferee*, CS Docket No. 99-251 (filed Aug. 23, 1999) ("U S WEST Petition").

[68] AT&T's efforts to avoid compliance with regulatory obligations applicable to all others is premised in significant part on the argument that only by granting its application will the Commission spark competition by DSL providers. This is pure rhetoric. U S WEST, for one, has been actively planning and deploying DSL service since well before AT&T even announced its merger with TCI. *Compare* U S WEST, Inc., *U S WEST Brings Lightning Fast New Internet Access to Homes in 40 Cities by June 1998; Nation's 1st Regionwide Deployment of High-Power ADSL Internet and Data Networking*, January 29, 1998 <http://www.uswest.com/news/012998.html> *with* AT&T Corp., *AT&T, TCI To Merge, Create New AT&T Consumer Services Unit*, June 24, 1998 <http://www.att.com/press/0698/980624.cha.html>.

has recently characterized as a "morass of regulation."[69] Failing to consider these competitive effects would be inconsistent with the principle of technological neutrality reflected in Section 706 of the Act, which expressly directs the Commission to encourage the deployment of advanced telecommunications capability "without regard to any transmission media or technology," and to do so "by utilizing . . . measures that promote competition in the local telecommunications market." 47 U.S.C. § 157 note. No better example of this problem can be found than that of line sharing. In its reply comments, AT&T argues that "control and management by a single entity is necessary to ensure that one use does not interfere with, or degrade the quality of, another subscriber offering."[70] Given the policies underlying Section 706, this argument certainly cannot be accorded any greater force here than the very same argument advanced by ILECs with respect to the Commission's pending line sharing proposal — *a proposal that AT&T does not support.*[71]

Although continuing to pound the table about how regulations "would reduce investment in cable infrastructure and deny or delay the availability"[72] of its own advanced service offerings, AT&T sneers at ILECs' concerns about the need for technological neutrality as

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[69] Remarks of Chairman Kennard at NATOA 19th Annual Conference, Sept. 17, 1999, at 6.

[70] AT&T Reply Comments at 123.

[71] *See* Reply Comments of U S WEST Communications, Inc. at 18-22, in *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147 (filed July 22, 1999).

[72] AT&T Reply Comments at 106.

a "crude appeal to playground justice."[73] However "crude" AT&T perceives this statutory policy to be, the Commission has long recognized the force of it.[74] Indeed, in asserting the primacy of its statutory authority in this area, the Commission has recently cautioned the Ninth Circuit in the Portland case that regulatory disparity between AT&T and competing ILEC broadband service providers "might undermine the objectives of section 706 by impeding the reasonable and timely deployment of advanced telecommunications capability to all Americans."[75] The CRTC has reached the same "crude" conclusion in Canada.[76]

AT&T itself is quick to recognize the "significant competitive advantage" afforded those who provide service "free of the onerous regulations that apply to their . . . counterparts" using different technologies.[77] But in its view, regulatory asymmetry at the expense of ILECs — in an emerging market for high speed Internet access that Excite@Home and Road Runner currently *dominate* — is just fine. First, AT&T argues, "[d]ifferential regulation is . . . necessary to prevent ILECs from abusing their bottleneck monopolies."[78] Second, AT&T asserts that it alone has taken "substantial risk" in developing and deploying

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[73] Ordover-Willig Declaration ¶ 79.

[74] *See* U S WEST Petition at 18-19.

[75] Brief of the FCC as Amicus Curiae at 26, *AT&T Corp. v. City of Portland* (9th Cir. filed Aug. 16, 1999) No. 99-35609.

[76] *See Regulation Under the Telecommunications Act of Cable Carriers' Access Services*, Telecom Decision CRTC 99-8 (July 6, 1999), at ¶ 44; *Regulation Under the Telecommunications Act of Certain Telecommunications Services Offered by "Broadcast Carriers,"* Telecom Decision CRTC 98-9 (July 9, 1998), at ¶ 76.

[77] AT&T Reply Comments at 59-60 (addressing DBS operators).

[78] AT&T Reply Comments at 126.

broadband facilities, while ILECs have done so "in a protected regulatory environment."[79] Finally, AT&T argues that cable companies *alone* enjoy First Amendment protections in deploying broadband facilities.[80] These arguments require little response.

There is nothing about the facilities or customer relationships of an ILEC that makes it a more appropriate subject of regulation in this new market than AT&T would be — as the party controlling the two dominant providers, Excite@Home and Road Runner. Each controls critical facilities into the home (cable "last miles" in the case of AT&T, and telephone local loops in the case of an ILEC) that have heretofore been used to supply a regulated monopoly service, and that can be upgraded through substantial investments to supply broadband services. Each has customer relationships with residential subscribers that, until recently, have been relatively immune from competition.

Nor is there any basis to AT&T's claim that it alone has borne investment "risk" in deploying broadband services. The underlying facilities of both parties — cable wiring in the case of AT&T, and local loops in the case of the ILEC with which it will be competing — were installed under a regime of regulated monopoly (albeit far less closely supervised in the case of AT&T's cable systems). In both cases, the upgrades required to convert those facilities to supply broadband services require significant investments to implement new technologies that entail business risks; the rate of return will be determined by the investing company's performance in the broadband marketplace. Yet only the ILEC is currently subject to the "quicksand of

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79/ *Id.* at 113.

80/ *See id.*

regulation" that AT&T argues substantially diminishes the incentives necessary to make these business investments, and that Chairman Kennard has urged is "not good for America."[81]

AT&T's First Amendment argument is truly Orwellian. Its view is that, while all broadband providers are equal, some are more equal than others under the Constitution, because they and they alone qualify as "speakers." To state this remarkable proposition is to reject it. The issue here is not what "the historic role"[82] of cable operators and telephone companies may have been in their respective delivery of video programming and telecommunications services. It is what rights they both may have in competing in the wholly new market for advanced services. The notion that the First Amendment discriminates in favor of some providers of broadband services over others because of their genealogy is obviously the very antithesis of what that Amendment was designed to accomplish.

Ultimately, AT&T is forced to fall back on the untenable position that — despite the clear thrust of Section 706 — Congress enacted a regulatory scheme that the Commission must construe to *require* disparate regulation. As the Commission has advised the Ninth Circuit, however, its statutory authority makes it uniquely qualified to *prevent* "regulatory disparity."[83]

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[81] Remarks of Chairman Kennard, *supra* note 69, at 6.

[82] AT&T Reply Comments at 122.

[83] Brief of the FCC as Amicus Curiae at 26, *AT&T Corp. v. City of Portland* (9th Cir. filed Aug. 16, 1999) No. 99-35609. AT&T repeats its arguments, rejected by the district court in the Portland litigation, that the Commission (like Portland) would be barred under the Act from regulating AT&T's provision of advanced services to ensure the kind of technological neutrality required by Section 706. For a rebuttal of these arguments (without reference to *the Commission's* authority under Title I or Section 706), see Opposition Brief of Defendant-Intervenor-Appellees U S WEST Interprise America, Inc., GTE Internetworking Inc., and OGC Telecomm, Ltd. at 31-46, *AT&T Corp. v. City of Portland* (9th Cir. filed Sept. 7, 1999) No. 99-35609.

And the time to exercise that authority is here and now — before the injury to competition in this nascent market for advanced services becomes irreparable.

CONCLUSION

For the reasons set forth above and in U S WEST's original petition, any grant of these applications should be conditioned on (1) a requirement of divestiture of attributable interests in cable systems sufficient to comply with the Commission's 30% cap, within 60 days following issuance of the D.C. Circuit mandate upholding that cap, and (2) a requirement of nondiscriminatory access to AT&T's cable modem facilities, so long as DSL providers are required to comply with loop unbundling, line sharing, DSLAM collocation, and other regulatory burdens.

Respectfully submitted,

William T. Lake
William R. Richardson, Jr.
Julie A. Veach
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037-1420
(202) 663-6000

Mark Roellig
Dan L. Poole
Robert B. McKenna
Norman G. Curtright
U S WEST, INC.
1020 19th Street, N.W.
Washington, D.C. 20036
(303) 672-2794

Counsel for

U S WEST, INC.

September 29, 1999

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 29th day of September, 1999, I caused true and correct copies of the foregoing Reply of U S WEST to Reply Comments of AT&T and MediaOne to be served either by hand* or by first-class mail, postage prepaid, on the following:

Julie A. Veach

Julie A. Veach

Chairman William E. Kennard*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-B201
Washington, DC 20554

Commissioner Susan Ness*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-B115
Washington, DC 20554

Commissioner Harold Furchtgott-Roth*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A302
Washington, DC 20554

Commissioner Michael Powell*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-A204
Washington, DC 20554

Commissioner Gloria Tristani*
Federal Communications Commission
445 Twelfth Street, SW
Room 8-C302
Washington, DC 20554

To-Quyen Truong*
Associate Chief, Cable Services Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 3-C488
Washington, DC 20554

Frances Eisenstein*
International Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 6-C866
Washington, DC 20554

Walter Strack*
Wireless Telecommunications Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 3-C204
Washington, DC 20554

* Denotes Hand Delivery Via Messenger

Sunil Daluvoy*
Cable Services Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 4-A737
Washington, DC 20554
(Served with Diskette)

International Transcription Service, Inc.*
1231 20th Street, NW
Washington, DC 20036
(Served with Diskette)

Mark C. Rosenblum
Stephen C. Garavito
Lawrence J. Lafaro
AT&T Corp.
Room 3252G1
295 North Maple Avenue
Basking Ridge, NJ 07920

Susan M. Eid
Sean C. Lindsay
MediaOne Group, Inc.
1919 Pennsylvania Avenue, NW
Suite 610
Washington, DC 20006

Howard J. Symons
Michelle M. Mundt
Mintz Levin Cohn Ferris Glovsky & Popeo, P.C.
701 Pennsylvania Avenue, NW, Suite 900
Washington, DC 20004

Wesley R. Heppler
Robert L. James
Cole Raywid & Braverman, L.L.P.
1919 Pennsylvania Avenue, NW, Suite 200
Washington, DC 20006

David W. Carpenter
Mark D. Schneider
David L. Lawson
Lorrie M. Marcil
C. Frederick Beckner
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006

Philip L. Verveer
Michael H. Hammer
Michael G. Jones
Francis M. Buono
Wilkie Farr & Gallagher
1155 21st Street, NW, Suite 600
Washington, DC 20036

Andrew J. Schwartzman
Harold Feld
Randi M. Albert
Cheryl A. Leanza
Media Access Project
1707 L Street, NW
Suite 400
Washington, DC 20036

John Norton
Cable Services Bureau
Federal Communications Commission
445 Twelfth Street, SW
Room 4-A726
Washington, DC 20554

* Denotes Hand Delivery Via Messenger

Leon M. Kestenbaum
Jay C. Keithley
Michael B. Fingerhut
Sprint Corporation
1850 M Street, NW
11th Floor
Washington, DC 20036

Khalil Munir
Executive Director
Telecommunications Advocacy Project
1221 11th Street, NW
Washington, DC 20001

Shook, Hardy & Bacon
600 14th Street, NW
Suite 800
Washington, DC 20005-2004

Charles C. Hunter
Catherine M. Hannan
Hunter Communications Law Group
1620 I Street, NW
Suite 701
Washington, DC 20006

Paul J. Sinderbrand
Robert D. Primosch
William W. Huber
Wilkinson Barker Knauer, LLP
2300 N Street, NW
Suite 700
Washington, DC 20037-1128

George Vradenburg, III
Jill A. Lesser
Steven N. Teplitz
America Online, Inc.
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

John T. Lenahan
Christopher Heimann
Ameritech
30 S. Wacker Drive
39th Floor
Chicago, IL 60606

Deborah H. Morris
Ameritech New Media, Inc.
300 South Riverside Plaza
Suite 1800
Chicago, IL 60606

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

John Thorne
Robert F. Griffen
Bell Atlantic Corporation
1320 North Courthouse Road
8th Floor
Arlington, VA 22201

* Denotes Hand Delivery Via Messenger

Evan T. Leo
Geoffrey M. Klineberg
Kellogg Huber, Hansen,
Todd & Evans, PLLC
1301 K Street, NW
Suite 1000 West
Washington, DC 20005-3317

Richard G. Taranto
Farr & Taranto
1850 M Street, NW
Suite 1000
Washington, DC 20036-5802

William B. Barfield
Thompson. T. Rawls, II
Alan L. Silverstein
BellSouth Corp.
1155 Peachtree Street, NE
Suite 1800
Atlanta, GA 30309

Michael Tessler
Broadsoft
200 Perry Parkway
Suite 1
Gaithersburg, MD 20877-2177

Gary M. Epstein
James H. Barker
Kimberly S. Reindl
Latham & Watkins
1001 Pennsylvania Avenue, NW
Suite 1300
Washington, DC 20004

David M. Moskowitz
Echostar Satellite Corporation
5701 South Santa Fe
Littleton, CO 80120

Philip L. Malet
Pantelis Michalopoulos
Matthew S. Yeo
Anthony C. Epstein
Steptoe & Johnson LLP
1330 Connecticut Avenue, NW
Washington, DC 20036

William P. Barr
John F. Raposa
David E. Wheeler
GTE Service Corporation
1850 M Street, NW
Suite 1200
Washington, DC 20036

Steven G. Bradbury
John P. Frantz
Kelion N. Kasler
J. Peter Ban
Kirkland & Ellis
655 15th Street, NW
Washington, DC 20005

Kecia Boney
Larry Fenster
Lisa B. Smith
MCI WorldCom, Inc.
1801 Pennsylvania Avenue, NW
Washington, DC 20006

* Denotes Hand Delivery Via Messenger

Earl W. Comstock
John W. Butler
Sher & Blackwell
1850 M Street, NW
Suite 900
Washington, DC 20036

Dave Baker
Mindspring Enterprises, Inc
1430 West Peachtree Street
Suite 400
Atlanta, GA 30309

Genevieve Morelli
Paul F. Gallant
Qwest Communications Corporation
4250 North Fairfax Drive
Arlington, VA 22203

Robert J. Aamoth
Steven A. Augustino
Todd D. Daubert
Kelley Drye & Warren LLP
1200 19th Street, NW
Suite 500
Washington, DC 20036

Roger K. Toppins
Michael Zpevak
SBC Communications, Inc.
One Bell Plaza
Room 3008
Dallas, TX 75202

Richard E. Wiley
R. Michael Senkowski
Robert J. Butler
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006

* Denotes Hand Delivery Via Messenger