ORIGINAL

WILLKIE FARR & GALLAGHER

Three Lafayette Centre
1155 21st Street, NW
Washington, DC 20036-3384

202 328 8000
Fax: 202 887 8979

EX PARTE OR LATE FILED

October 1, 1999

RECEIVED
OCT - 1 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W., TW-A325
Washington, D.C. 20554

Re: *Ex Parte* Submission of AT&T Corp.
MM Docket No. 92-264 (Horizontal Ownership Limits)
CS Docket No. 98-82 (Cable Attribution Rules)

Dear Ms. Salas:

Attached are the joint Reply Comments and accompanying Appendices filed by AT&T Corp. and MediaOne Group, Inc. on September 17, 1999 in CS Docket No. 99-251. Please file a copy of these Reply Comments and Appendices in the dockets of the above-captioned proceedings.

An original and four (4) copies of this letter, the Reply Comments, and Appendices are submitted herewith in accordance with Section 1.1206(b) of the Commission's rules.

Thank you.

Respectfully submitted,

Francis M. Buono

Francis M. Buono

No. of Copies rec'd 0+4
List ABCDE

Attachments

Washington, DC
New York
Paris
London

0097704.01

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

RECEIVED

OCT - 1 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

REPLY COMMENTS OF AT&T CORP. AND MEDIAONE GROUP, INC.

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

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

September 17, 1999

(*Additional Counsel listed on following page*)

David W. Carpenter
David L. Lawson
David M. Levy
Lorrie M. Marcil
C. Frederick Beckner III
Sidley & Austin
1722 Eye Street, N.W.
Washington, DC 20006

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

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

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

Table of Contents

INTRODUCTION AND SUMMARY 1

ARGUMENT 5

I. THE MERGER WILL PRODUCE ENORMOUS PUBLIC INTEREST BENEFITS 5

A. Marketplace Evidence Overwhelmingly Confirms The Competitive Benefits Of This Merger 9

B. Neither Solo Efforts Nor Cable Telephony Joint Ventures Can Be Relied Upon To Produce The Public Interest Benefits of This Merger 14

1. Solo efforts by AT&T and MediaOne To Provide Services In MediaOne Service Areas 15

2. Joint ventures and other contractual arrangements 18

C. The Commission Should Give No Weight To Speculation That AT&T Might Abandon Its Plans To Offer Telephony And Other Services Over MediaOne's Cable Network 23

II. THE MERGER WILL HAVE NO SIGNIFICANT ANTICOMPETITIVE EFFECT IN ANY MARKET 26

A. The Merger Will Have No Material Impact In The Video Programming Market 27

1. The Merger Will Not Materially Impact Video Programming Concentration 27

a. AT&T's ownership of Liberty does not affect AT&T's incentive or ability to act in an anticompetitive manner 28

b. This is not a merger of TWE and Cablevision 32

c. MediaOne does not manage or control any programming 37

d. The limited economic interest AT&T is acquiring in video programming raises no competitive concerns. 37

2. The Merger Will Not Give AT&T Monopsony Power or Vertical Foreclosure Power 39

3. The Merger Will Not Violate the Cable Act or the Commission's Rules 47

a. Horizontal rules 48

i. The Merger will not violate any Commission Rule or statute concerning horizontal concentration 48

ii. Current marketplace conditions justify adoption of AT&T's proposed amendments to the cable horizontal ownership rule and the underlying attribution rule 49

iii. AT&T did not ignore the Commission's existing attribution Rules. 53

iv. Failure to allow horizontal ownership of 35 percent for cable, after just raising the limit for broadcasters to 35 percent, would be arbitrary and capricious 55

b. Program Access Rules. 56

i. The Commission should not subject AT&T's terrestrially distributed programming services to the Program Access Rules 56

ii. The Commission should not ban exclusive agreements between AT&T and unaffiliated programmers 58

iii. The Commission should not mandate the sale of AT&T-affiliated programming at specified volume discounts that exceed the Program Access Rule requirements. 60

c. Channel Occupancy Rules 61

d. Program Carriage Rules 64

B. The Merger Will Have No Anticompetitive Impact On MVPD Competition 65

C. The Merger Will Have No Material Impact On Competition Or Standards In The Provisioning Of Internet Or Internet-Related Services 68

1. The Merged Entity Lacks Market Power In Any Relevant Market 71

a. There is a Single Market for the Provision of Broadband and Narrowband Services 71

b. Broadband Services Are Extremely Competitive 79

c. There Is No Separate Market for "Cable Internet Services 88

d. The Merger Does Not Create Or Enhance The Likelihood Of Anti-Competitive Effects In Other So-Called "Markets 90

2. Because the Merged Entity Lacks Market Power, a Forced Access Condition is Unnecessary and Would Introduce Substantial Regulatory Burdens and Technical Difficulties 101

a. Forced Access Requirements Would Impose Unnecessary Regulatory and Administrative Burdens on the Commission 103

b. A Forced Access Requirement Would Diminish AT&T's Incentives to Invest in Broadband Facilities 106

c. There Are Numerous Technical Difficulties Associated With Any "Mandatory Access" Scheme 109

3. Required Forced Access As A Condition For Approval Of The License Transfers Would Be Unlawful 113

a. AT&T@Home and Road Runner Are Cable Services 114

b. Forced Access Is The Essence Of Common-Carrier Regulation And Therefore Violates Section 621(c) 115

c. Forced Access Constitutes Unauthorized Regulation of the "Provision" and "Content" of Cable Service 119

d. Regulatory Symmetry Is Neither Lawful Nor Necessary 121

e. The Telecommunications Advocacy Project's Allegations of Redlining Are Baseless 127

D. The Merger Will Have No Material Impact On Navigation Device Or Electronic Programming Guide Competition 129

1. Navigation devices 129

2. Electronic Programming Guides ("EPGs") 139

E. The Merger Will Not Violate The Commission's Cellular Cross-Ownership Rule 142

CONCLUSION 144

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

INTRODUCTION AND SUMMARY

The incumbent local exchange carrier ("ILEC") monopolies and other opponents of the AT&T-MediaOne merger ("the Merger") have gone to elaborate lengths to contrive objections to the applications for approval of the necessary license transfers. None of these objections has substance. The combination of AT&T and MediaOne will produce profound public benefits by allowing the more rapid and effective development of a facilities-based alternative to ILECs for millions of the nation's homes and businesses, promoting competition in not just traditional exchange and exchange access services, but also in actual and emerging complementary services that are today dominated by America Online ("AOL") and others.

Assertions that the Commission can or must impose conditions to prevent anticompetitive effects in other "markets" do not withstand even cursory scrutiny and, in many cases, are identical to claims that the Commission emphatically rejected earlier this year. Further, adoption

of many of the proposed conditions would subvert or even prevent the effective competition that the Merger would otherwise create.

The principal benefit of the Merger is indisputable. The large ILECs each control service areas of vast geographic scope and have had intractable monopolies over tens of millions of captive residential and small business customers. Because the assets of AT&T and MediaOne are complementary, the Merger will create a far more effective and formidable competitor to the ILECs than either firm could otherwise provide alone. Indeed, the Merger is the only genuine hope for the emergence in the foreseeable future of widespread alternatives to ILECs in the areas served by MediaOne. That itself is a public benefit of immense significance. Beyond that, establishing alternatives to the ILECs' facilities is the only sure way of guaranteeing that they, AOL, and other dominant suppliers do not extend their market positions in the next generation of new and emerging services.

Earlier this year, the Commission relied on the same public interest benefits in approving the merger of AT&T and Tele-Communications, Inc. ("TCI"). The AT&T-MediaOne combination presents, if anything, a stronger case, for it would assure the existence of at least one committed rival who can aspire to the enormous scale and scope advantages that ILECs have acquired through their own recent mergers and otherwise. No opponent seriously contests these benefits. Instead, they advance other claims that would – and in the case of the ILECs and AOL are intended to – undermine or prevent this competition. Merger Opponents offer two principal claims. First, the ILECs argue that the approvals should be denied because the Merger will allow AT&T to "control access" to "64 percent" of "all potential cable viewers"[1] – and thereby to

[1] GTE at 13.

exercise monopsony or vertical foreclosure power over video programmers. The post-Merger AT&T will, in fact, serve only about 25 percent of current MVPD customers – and of that minority of customers, virtually all have the present option of switching to a non-cable MVPD alternative such as DBS. In these circumstances, there is no plausible argument that video programmers will be beholden to AT&T, which explains why not a single video programmer even filed comments in this proceeding.

The ILECs can argue otherwise only by resort to calculations based on the "homes passed" and "cable-only" criteria of the Commission's "existing" horizontal cable ownership rules. But because those criteria unquestionably produce misleading results, the Commission has already proposed to abandon them. The ILECs' claims are also premised on the unjustifiable attribution to AT&T of operator interests in entities (like Time Warner Entertainment Company, L.P. or Cablevision) in which AT&T will have absolutely no involvement in programming decisions. The approval of the Application will, of course, be subject to the outcome of the Commission's pending rulemaking proceeding on horizontal ownership issues, other generic industry-wide rulemaking decisions, and any proceedings for waiver or other relief from those rules. But these issues are not matters for this license transfer proceeding.

Second, GTE and other ILECs, and AOL, and other ISPs have once again claimed that the Commission should condition approval of the Applications on a requirement that AT&T systems provide "open access" to all other providers of online or other internet access services. But the Commission refused to impose this requirement in generic industry-wide proceedings earlier this year, after explaining in detail why the purported competition concerns of its proponents were conjectural. In the AT&T-TCI proceeding, the Commission again refused, both

because the claim was foreclosed by its findings in the *Advanced Services Order* and because the claim presented a generic, rather than a merger-specific, issue that could not be considered in a proceeding involving only one of the nation's MSOs.

It is even clearer today than it was earlier this year that the "open access" condition would be both a horrendous public policy and an unlawful one. In particular, the filings in these proceedings demonstrate that "open access" is a meaningless slogan; that the technical obstacles to its implementation remain; that its adoption would impose immense regulation costs on cable operators; and that the only genuine effect would be to delay and impair AT&T's efforts to compete with dominant suppliers.

The proposal is also illegal. Sections 621(c) and 624(f) of the Cable Act flatly bar forced access requirements. In all events, forced access not only rests on the patently erroneous premise that an online service is offered in a different antitrust market if it is delivered by means of cable, rather than a telephone, facilities, but would require the Commission assert authority over entities (Excite@Home and Road Runner) that are not before it in this proceedings.

For similar reasons, there is no substance to the claim that approval of the Merger would create a monopoly in the development of the online services offered *to* cable systems. Even if the transaction would produce a merger of @Home and Road Runner – which it would not – these two firms represent a miniscule fraction of the business of developing online content and Internet connectivity that consumers can access over telephone, cable, or other facilities. Further, even if there were a separate "market" for the provision of online programming content to cable operators – as there patently is not – no entity or consumer could be harmed by the transaction. Virtually all cable operators have already entered into contracts to select their

providers of this programming and connectivity, and those few that have not done so have an array of choices other than @Home and Road Runner.

In short, the Applications should be approved expeditiously so that consumers in MediaOne's service areas and elsewhere can begin to enjoy the full benefits of competition that the dominant providers' anticipatory responses to the mere *announcement* of this Merger have confirmed beyond doubt will arise from the Merger.

ARGUMENT

I. THE MERGER WILL PRODUCE ENORMOUS PUBLIC INTEREST BENEFITS.

The principal benefit that this Merger will bestow on the public is straightforward, familiar and indisputable: the combination of AT&T's and MediaOne's complementary assets will create a much more formidable competitor to the large incumbent local telephone monopolists who control service areas of vast geographic scope and hold captive the millions of consumers in those areas. Benefits to the public will flow not just in the form of increased local telephone competition – although that alone would be a public interest benefit of monumental significance. Instead, the benefits will extend much more broadly as the convergence that defines the modern world of communications otherwise threatens to provide these ILECs and other dominant service providers like AOL with opportunities to extend their dominance over new services.

With a hundred million captive customers that they charge a hundred billion dollars annually, the ILECs and their bottleneck facilities place a colossal drag on the American economy. Time is of the essence in addressing this problem, not only because of the magnitude of the immediate and direct harm to consumers, but also because fostering broad-scale mass-

market competition to the ILECs in the provision of today's core services is the surest way to guarantee that they do not monopolize the provision of next-generation services. Despite the efforts of Congress, this Commission, state regulators and hundreds of companies eager to bring choice to captive consumers, however, the incumbents' bottlenecks have proven enormously resistant to competition.

Indeed, there can no longer be any doubt that competition will continue to exist only at the margins absent a fundamental restructuring of the ways in which – and the scale on which – entry decisions are approached. The Commission should, of course, continue to encourage resale, network element use and other gap-filling entry, but the ILECs will not be seriously threatened until they face at least one large, committed rival that can aspire to the enormous scale and other advantages that the LECs enjoy today by virtue of their incumbencies and recent (and planned) mergers.

AT&T has made the commitment to engage in competition with ILECs across the nation – and assumed the enormous risks associated with that commitment – by, *inter alia*, investing more than $100 billion in the entry strategy AT&T believes holds the most promise for consumers: providing a wide range of AT&T branded and managed services over cable facilities. Earlier this year, the Commission recognized that AT&T's acquisition of TCI's cable systems and its implementation of this new strategy over those systems would serve the public,[2] and the benefits the Commission predicted are already beginning to flow to consumers in TCI's service areas.

---

[2] *See* Memorandum Op. and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd. 3160, ¶¶ 147-48 (1999) ("*AT&T-TCI*").

This Merger promises those same benefits and more to the millions of consumers in MediaOne's service areas and, more broadly, to all consumers as it will spur – and, indeed, already has spurred – both competitive responses from the incumbents and additional entry and innovation. Most directly, as Applicants detailed in the Public Interest Statement, by combining MediaOne's cable assets with AT&T's brand name, engineering and marketing abilities, and extensive communications facilities, the Merger will allow AT&T and MediaOne to offer facilities-based local telephone service in competition with the ILECs much faster and more effectively than either company could provide alone.[3] The Merger will likewise enhance AT&T's ability to offer consumers a full range of video, data, Internet access and other existing and yet-to-be-deployed services.[4] And the Merger will create a combined enterprise of sufficient size to achieve at least some of the scale and clustering economies that the incumbent providers already enjoy from their enormous customer bases and self-contained service areas.[5]

These competitive benefits are so obvious and undeniable that the vast majority of those opposed to the Merger do not even question them. Indeed, even the handful that do bother to address AT&T's public interest benefits showing – principally three of the ILECs that have the

---

[3] *See* Public Interest Statement at 20-32; Declaration of Nancy McGee ¶ 6-13 ("McGee Decl."); *AT&T-TCI* ¶¶ 146-147 (finding that AT&T-TCI merger would produce "tangible public interest benefits" because the merged company would "provide facilities-based competition in the local exchange and exchange access markets . . . more quickly than either party alone could").

[4] *See* Public Interest Statement at 28-30; Declaration of Douglas D. Holmes ¶ 8 ("Holmes Decl."); *AT&T-TCI* ¶ 147 (finding that AT&T-TCI merger would also "create greater customer choice among video- and content-enriched high-speed Internet access services").

[5] *See* Public Interest Statement at 30-31; Holmes Decl. ¶¶ 8-10; Declaration of Professors Ordover and Willig ¶¶ 19, 43-46 ("Ordover/Willig Decl.").

most to gain by *avoiding* the increased competition that the Merger promises[6] – appear to concede the general proposition that the public interest would be furthered by increased cable-based competition. As GTE reluctantly admits, the public interest benefits of such competition "may be substantial." GTE at 68.[7]

Instead, the Opponents assert that the public interest benefits that Applicants (and the Commission) have identified either do not require the Merger or may not follow from it. Specifically, they assert that the Merger is *unnecessary* to increase competition because: (1) AT&T and MediaOne would each offer cable telephony just as effectively if they remained independent, or (2) AT&T and MediaOne could combine their respective resources through a joint venture or other contractual arrangement short of merger. Alternatively, the same parties contend that the Merger may be *insufficient* to increase competition because AT&T may renege on its proposed market entry after consummating the Merger.

The Opponents offer no analysis or evidence to support their speculation, and the actual conduct of these parties makes clear that even they do not believe their claims. The quiet life of the monopolist continued largely unabated following passage of the Telecommunications Act of 1996. The incumbents' customer-unfriendly, one-size-fits-all local telephone offerings changed little. Digital Subscriber Line ("DSL") and other means of transmitting advanced services over

---

[6] The private interests of these firms, unlike the interest of the consuming public, are disserved by any increase in competition for their services. If the incumbent providers truly thought that the proposed Merger was unlikely to intensify the competition facing them, then their logical reaction would be private rejoicing at the folly of AT&T's costly undertaking. That these incumbents actually seek to block the Merger reveals more about its competitive promise than do all the arguments and affidavits they muster. *See* Ordover/Willig Decl. ¶ 34.

[7] *See AT&T-TCI* ¶ 146 ("[T]here does not appear to be any disagreement over the public interest benefit of bringing vigorous competition to the local exchange and exchange access markets.").

the ILECs' traditional narrowband networks languished on the LECs' planning boards for years – even after traditional cable companies and others began deploying their own advanced services.

AT&T's announcements that it will merge with TCI and MediaOne and use their facilities to compete aggressively with the ILECs and other dominant service providers have brought this anticompetitive foot-dragging to an abrupt end. In recent months, the ILECs, joined by AOL and others, have literally stampeded to market new DSL and satellite-based services, and have changed and slashed prices on existing services – steps clearly designed to parry AT&T's expected entry. The solo efforts of MediaOne and other cable companies to market cable telephone service provoked no comparable response. Nor did the threat of entry by joint ventures of telephone and cable companies. Here as elsewhere, a "page of experience is worth a pound of logic," O.W. Holmes, *The Common Law* 1 (1881). This Merger presents the rare case in which the marketplace provides empirical proof of the merger benefits even before the Merger is approved or consummated.

A. Marketplace Evidence Overwhelmingly Confirms The Competitive Benefits Of This Merger.

Every day brings new evidence that AT&T's enormous investment in cable facilities and its demonstrated commitment to deliver new competing services over those facilities is *already* bringing great benefits to consumers through anticipatory competitive responses by previously unresponsive dominant providers of local telephone and online services. These recent competitive responses have taken two main forms: (1) the offering of new discounted packages of telephone and other services in areas where AT&T has already deployed its cable-based services; and (2) alliances, accelerated deployment and reduced prices for DSL and satellite-

based services that compete with the Internet-based services AT&T has begun to offer over TCI's cable facilities and will offer over MediaOne's facilities. The promoters of these competitive responses include the very parties who insist that AT&T's merger plans offer no significant competitive benefits.

Only one day after SBC's lawyers and economist told the Commission that AT&T's claim that the Merger would lead to immediate competitive responses by the ILECs was "baseless" and even "laughable,"[8] SBC announced that it was launching new discounted packages of telecommunications and entertainment services in Dallas and Fremont, California, the same two local markets initially selected by AT&T for offering packages of telephone services over cable lines.[9] These SBC service packages, known as "Simple Solutions," include telephone service, DIRECTV, wireless service, and dial-up or high-speed DSL Internet access service offered at prices described as from 6 to 35 percent lower than SBC's retail rates. These offerings are a "direct swipe at AT&T," which "all but screams that AT&T Corp.'s cable strategy for entering the local telephony market is forcing regional Bell operating companies to seriously compete for their customers."[10] Spurred by the threat of competition from AT&T, SBC

---

[8] *See* SBC at 51 & Hausman Decl. ¶ 37.

[9] *See* Jessica Hall, *SBC Launches Service Packages To Battle AT&T* (Reuters Aug. 24, 1999) <dailynews.yahoo.com/h/nm/19990824/wr/telecoms_sbc_2.html>; *SBC Launches Telecom/ Entertainment Offerings* (SBC Press Release, Aug. 24, 1999) <http://www.sbc.com/news/articles.html?query_type=article&query=19990824-01.> .

[10] Deborah Solomon, *Pac Bell to Offer Discounted 'Bundle' Deals: Plan for Service Packages Called Direct Shot at AT&T*, San Francisco Chronicle, Aug. 25, 1999, at D1; *SBC Plans Bundles To Go Head-to-Head With AT&T Cable*, Network Briefing, Aug. 25, 1999, (1999 WL 176440065); *SBC's One-Stop Package Includes Entertainment Services*, RCR Radio Communications Report, Aug. 30, 1999, (1999 WL T192155).

now expects its DSL service to pass 9.8 million homes and businesses by the end of 1999 – more than the 8.3 million households that can receive cable modem service.[11]

GTE's actions likewise belie its rhetoric that the competitive benefits of the Merger are "speculative" and "fully achievable without the merger."[12] Just last month, GTE struck a deal with AOL to allow it to reach nearly 4 million homes in GTE's service territories by the end of this year via DSL.[13]

Bell Atlantic also belittles the notion that "the merger would provide consumers of local telephone service with otherwise-unavailable benefits."[14] Since the Public Interest Statement was filed, however, Bell Atlantic has announced that it is accelerating its deployment of DSL service in an effort to be the first in its service territory to offer residential customers high-speed Internet access and other broadband services. Bell Atlantic plans to *double* the number of homes and businesses reached by its DSL service to 17 million lines by the end of 1999.[15]

U S West has launched similar initiatives.[16] Moreover, to attract more high-speed Internet customers "and become even more competitive with AT&T/TCI's cable modem, U S

---

[11] *No DSL Worries for SBC*, Communications Today, June 10, 1999 (1999 WL 18299113).

[12] *See* GTE at 67-73.

[13] Patricia Fusco, *AOL Expands Broadband Offerings*, InternetNews.com (July 27, 1999) <www.internetnews. com/isp-news/article/0,1087,archive_8_169601,00.html>.

[14] Bell Atlantic at 55.

[15] *See, e.g., Bell Atlantic Doubles Infospeed DSL Deployment, Company to Make 17 Million Lines DSL-Capable This Year* (Bell Atlantic Press Release, July 28, 1999) <http://www.ba.com/nr/1999/jul/19990824002.html.>

[16] *U S West "MegaBit Services" ADSL Subscriber Rate Jumps More Than 250 Percent in First Half of 1999* (U S West Press Release Aug. 17, 1999) <http://www.uswest.com/news/081799.html>. The ILECs' accelerated deployment of DSL also refutes Professor

(continued . . .)

West is rolling out a lower-cost, 'part-time'" DSL service.[17] And BellSouth currently sells DSL wholesale to some 16 Internet service providers for resale, and expects to provide DSL to the top 30 cities in its service territory by year-end 1999.[18]

AOL, the dominant Internet service provider, has also responded directly to AT&T's merger proposals by entering into partnerships with Bell Atlantic, SBC, Ameritech and GTE to provide high-speed Internet access and other services over their DSL facilities,[19] and an alliance with Hughes Electronics to develop and promote satellite-based broadband Internet services

---

(. . . continued)
Hausman's claim that the Commission's TELRIC pricing policies are discouraging ILEC investments in advanced network facilities. *See* Hausman Decl. ¶ 37.

[17] Peter Lewis, *U S West Unveils Inexpensive Service to Lure Internet Customers*, Seattle Times, July 9, 1999 (1999 WL 17356061); *see also U S West Catapults High-Speed Internet Access to Mass Market With Nation's First "DSL-On-Demand" at $19.95/Mo. For Casual Internet Users* (Sept. 15, 1999) <http://biz.yahoo.com/prnews/990915/co_U_S_WES_1.html>. ("Today, casual Internet surfers in nearly 40 cities in 12 states can blast past the slow downloads and delays of traditional dial-up Internet access with U S WEST MegaBit Select, a breakthrough 'DSL-on-demand' service that is designed and priced specifically for recreational Internet use.").

[18] 1998 BellSouth Report to Shareholders at 3; Remarks of F. Duane Ackerman, Chairman and CEO of BellSouth Corp., to Technology Forum, Washington, DC (May 19, 1999) <http://cluser1.bellsouthonline.com/investor/ir_speeches.html>.

[19] *See America Online and Bell Atlantic Form Strategic Partnership to Provide High-Speed Access for the AOL Service* (AOL Press Release, Jan. 13, 1999) <http://www-db.aol.com./corp/news/press/view?release=544&search=BellAtlantic%20Atlantic.>; *America Online and SBC Communications to Offer High Speed Upgrade to AOL Members* (AOL Press Release, Mar. 11, 1999) <http://www-db.aol.com/corp/news/press/view?release=689&search=Ameritech.>; *Ameritech, America Online Ink Pact for High-Speed DSL Access* (OAL Press Release, July 21, 1999); *America Online and GTE Partner to Bring Broadband ADSL Service to AOL Members* (AOL Press Release, July 27, 1999) <http://www-db.aol.com/corp/news/press/view?release=708&search=GTE.>; *see also* Public Interest Statement at 81-82.

together with Hughes' DIRECTV television entertainment service.[20] These deals give AOL the potential to reach 65 percent of U.S. homes with DSL service.[21] The AOL deals, after literally years of industry foot-dragging, indicate that "DSL finally may be poised to come into its own."[22]

This outpouring of responsive offerings contrasts dramatically with the trickle of DSL and related activity that occurred before AT&T's merger announcements with TCI and MediaOne. DSL was devised in 1987, and its viability was tested "throughout the early '90s."[23] Yet the ILECs shrank from commercializing it, even after the advent of cable modems.[24] It is widely recognized that the delay stemmed from fears that DSL would cannibalize sales of lucrative existing offerings such as ISDN, T-1 lines, and second lines for multi-phone households.[25] The TCI and MediaOne deals and AT&T's bold new competitive strategy have

---

[20] *See America Online and Hughes Electronics Form Strategic Alliance to Market Unparalleled Digital Entertainment and Internet Services* (AOL Press Release, June 21, 1999) <http://www-db.aol.com/corp/news/press/view?release=669&search=hughes.>.

[21] *Id.*

[22] Thomas Nolle, *Is This Finally The Year of DSL?* Network World, August 16, 1999, at 51. (1999 WL 11620261).

[23] Brian L. Hilman, *ADSL Comes Home*, Telephony, May 24, 1999 (1999 WL 11171533).

[24] There are 20 installed telephone lines configured to support asymmetric DSL for every installed cable line that is configured for modem service. *See* Patrick Flanagan, *Will The RBOCs Turn DSL Into Another ISDN?* Telecommunications, May 1, 1999, (1999 WL 12371469).

[25] *See Telco & Cable Internet Strategies: The Dawn of Carrier-Class Access*, 1997 Jupiter Strategic Planning Services/IT47, at 31; Eric Krapf, *Why Cable Modems Are Winning*, Business Communications Review, Dec. 1, 1998, at 16 (19998 WL 13819636); Patricia Horn, *Bell Atlantic, America Online Team on High-Speed Internet Access*, The Philadelphia Enquirer, Jan. 14, 1999, (1999 WL 5571963); Brian L. Hilman, *ADSL Comes Home*, Telephony, *supra* note [23]; Steve Alexader, *California Firm Answers Pleas for Faster Net Access*, Minneapolis Star Tribune, June 24, 1999, at D1 (1999 WL 7502921) (noting industry analysts' view that the "Bells are worried about their own DSL services cannibalizing the T1 telephone line business");

(continued . . .)

now replaced that anti-competitive fear with a pro-competitive one: "The prospect of cannibalizing actual or potential revenue streams is easier to swallow if the alternative is having someone else eat your lunch."[26]

In short, there is nothing at all speculative about the increased competition that will result from the transaction. Rather, the incumbent suppliers' unambiguous and unprecedented response to this Merger and the TCI merger confirm beyond any possible doubt that this Merger will serve the public in precisely the ways Applicants have identified.

B. Neither Solo Efforts Nor Cable Telephony Joint Ventures Can Be Relied Upon To Produce The Public Interest Benefits of This Merger.

The marketplace conduct of the incumbent service providers also refutes any notion that either MediaOne acting alone or a joint venture between MediaOne and AT&T could offer competitive benefits approaching those of the proposed Merger. Independent cable companies' fledgling efforts to provide telephony services have nowhere provoked any competitive response by the incumbent providers comparable to their welter of new service and price initiatives since AT&T announced its merger proposals with TCI and MediaOne,[27] and, despite Herculean efforts

---

(. . . continued)
Mergie Semilof, *Computer Reseller News* (Aug. 9, 1999), at 2 (1999 WL 2103741) ("RBOCs have held back [DSL] from the business market because they haven't wanted to cannibalize their ISDN.").

[26] Hilman, *supra*. *See also* Report, *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd. 2398, ¶ 42 & n.84 (1999) ("It is widely believed that incumbent LECs' recent moves to offer broadband to residential customers are primarily a reaction to other companies' entry into broadband") ("*706 NOI Report*").

[27] McGee Decl. ¶ 7 (noting price *increases* by Bell South in areas where MediaOne offered competing telephony services before announcement of the Merger).

on the part of AT&T, joint venture agreements with cable companies have to date not even proven possible to obtain.

Moreover, Opponents leave essentially unchallenged the structural reasons identified in the Public Interest Statement why solo and joint ventures are *inherently* unlikely to provide an equally effective method of entry into cable telephony. Here, it is important to recognize that the only hypotheticals even arguably relevant in this context are AT&T's and MediaOne's solo efforts or a MediaOne joint venture *in MediaOne's service areas*. Whatever the prospects for other cable companies or other joint ventures, consumers in MediaOne's service areas can benefit only from cable-based services delivered over MediaOne's facilities.

1. Solo efforts by AT&T and MediaOne To Provide Services In MediaOne Service Areas.

Opponents of the Merger offer not one shred of economic or empirical analysis to support their claim that AT&T and MediaOne, acting independently, would enjoy comparable prospects of successful competitive entry as the AT&T-MediaOne combination. Indeed, those opposing the Merger do not even mention Applicants' showing in their Public Interest Statement that these benefits require such a merger, or the near consensus in financial and telecommunications circles that AT&T's cable telephony strategy poses the only substantial threat to the dominant service providers for the foreseeable future.[28]

Instead, Opponents merely assert that AT&T and MediaOne would continue to invest in local cable telephony even without the Merger. This is an attack on a straw man. AT&T and MediaOne have never claimed that they would refuse to invest in cable telephony without the

[28] *See* Public Interest Statement at 22-32.

Merger. But the relevant question is whether the combination of AT&T's and MediaOne's complementary assets means that true facilities-based competition will be provided *faster* and *more effectively* than either company could manage alone. The answer to that question is clearly yes.

As the Commission found in its order approving the AT&T-TCI merger, the combination of the "second wire" into the home provided by cable companies with AT&T's brand name, telephony experience and resources creates a competitor for local residential services that will be far more effective than either would be alone:

> [T]he complementary nature of the merging firms' assets means that the combined firm will be able to provide an alternative to the incumbent LECs' services for residential customers far more quickly and effectively than either could separately. TCI possesses the 'last mile' assets, while AT&T possesses a brand name, experience, and financial resources that improve TCI's ability to capitalize on its network assets. We are committed to ensuring that residential local exchange competition becomes a reality sooner rather than later. One way this may occur more quickly is through combinations of complementary assets by emerging entrants such as AT&T and TCI.[29]

These conclusions apply with equal force to the AT&T-MediaOne Merger. By combining the complementary assets of the two firms, the proposed Merger will create a far more effective competitor. Together, the two firms will possess the necessary resources; separately, neither does.

These sources of synergies, which are detailed in the Public Interest Statement and in the attached affidavit of Nancy McGee, the head of MediaOne's telephony product development and marketing efforts, and which the Merger opponents leave essentially unchallenged, include:

---

[29] *AT&T-TCI* ¶ 48.

(1) MediaOne's cable network to millions of households, a facilities-based method of access that AT&T could not duplicate without prohibitive expense;[30]

(2) The local telephone facilities that AT&T obtained through its acquisition of TCG, which AT&T/MediaOne can use to interconnect to incumbent networks at end offices rather than tandem switches, thereby avoiding ILECs' charges for needless tandem switching and shared transport;[31]

(3) AT&T's brand name and reputation as a reliable provider of telephony services, which will allow MediaOne to overcome the customer awareness and reputational handicaps that limit the effectiveness of all traditional cable companies as suppliers of telephony services;[32]

(4) AT&T's experience in competitive markets, including two decades of experience marketing long distance services in competition with MCI, Sprint and hundreds of other aggressive rivals; costly but invaluable experience negotiating the hurdles of obtaining interconnection and unbundled network elements from ILECs; and significant experience in mass market Internet business through its WorldNet offerings, and its recent purchase of IBM's IGN network earlier this year;[33]

---

[30] *See* Ordover/Willig Decl. ¶ 36. CU's claim that AT&T's acquisition of TCI's cable facilities obviates any benefit from acquiring MediaOne's facilities is puzzling. There is virtually no overlap between the households served by MediaOne and the households served by TCI. Thus, AT&T's physical access to TCI's customers does no good to captive consumers in MediaOne's service areas.

[31] *See* McGee Decl. ¶ 12; Ordover/Willig Decl. ¶ 38. Bell Atlantic's claim that the Commission should be concerned about the loss of potential mass market local telephone competition in MediaOne's service areas between MediaOne and AT&T is both unfounded and ironic. AT&T and MediaOne do not compete, actually or potentially, in the provisions of mass market local telephone service. AT&T's ownership of limited switching and transport facilities that it uses to provide competing service to large business customers does nothing to overcome the mass market local *loop* bottleneck that prevents AT&T – in the absence of the MediaOne facilities that can be used to bypass that bottleneck – from effectively competing with the ILECs. Moreover, Bell Atlantic, with nearly 100 percent of the residential customers in its service territory, is the last party with standing to complain about any reduction of potential competition between two companies that collectively serve only a tiny fraction of one percent of the residential customers in the same territory.

[32] *See* McGee Decl. ¶ 8; Ordover/Willig Decl. ¶ 39-40.

[33] *See* Ordover/Willig Decl. ¶ 41.

(5) AT&T's experience in the development of packet switching IP telephony; and

(6) MediaOne's head start in deploying cable telephony with a circuit switching architecture and related customer premises equipment – know-how that will enable AT&T to jump-start its deployment of cable telephony on the TCI system until IP-based cable telephony can be deployed.[34]

Moreover, the Opponents' speculation ignores completely the economies of scale and clustering that will be permitted by the Merger and could not be achieved otherwise. As explained above, these are among the most critically important of the merger benefits, as they are necessary to counter at least partially the enormous cost advantage enjoyed by incumbent providers from their ability to spread their fixed costs of service over millions of customers within self-contained service areas.[35]

Opponents also ignore the limited success achieved by MediaOne in marketing telephone services to its cable customers. Only a tiny fraction of the customers that could do so have, in fact, chosen MediaOne's telephone services. Although MediaOne's massive investment and efforts are certainly to be lauded, this track record provides empirical confirmation of the difficulty of solo entry by cable companies into local telephony and Internet services.[36]

2. Joint ventures and other contractual arrangements.

The opponents of the Merger also offer no meaningful response to the inherent structural difficulties of entering cable telephony in this country through a joint venture or other contractual arrangement short of merger.[37] So far as Applicants are aware no such joint venture

---

[34] *See* McGee Decl. ¶ 13.

[35] *See* Holmes Decl. ¶¶ 8-10; Ordover/Willig Decl. ¶¶ 19, 43-46.

[36] *See, e.g.*, Public Interest Statement at 23-24; McGee Decl. ¶¶ 5, 10.

[37] *See, e.g.*, SBC at 49-50; Bell Atlantic at 56; GTE at 69-72; Consumers Union at 25-26.