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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

July 24, 2000

Ms. Magalie Roman Salas, Secretary
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: *In the Matter of Applications for Transfer of Control to AT&T Corp. of Licenses and Authorizations Held by MediaOne Group, Inc., CS Docket No. 99-251; MM Docket No. 92-264*

Dear Ms. Salas:

SBC writes in reference to the Consumers Union's Petition For Reconsideration of the Commission's decision to approve the merger of AT&T and Media One. Two weeks after the Commission issued its decision, the Ninth Circuit Court of Appeals ruled that providers of cable Internet transmission services such as AT&T and MediaOne are "telecommunications carriers" insofar as they provide such services. *See AT&T v. City of Portland*, No. 99-35609 (9th Cir. 2000). This decision dramatically alters the legal landscape surrounding AT&T/MediaOne's legal obligation to provide open access to its cable Internet networks, one of the major issues raised in the AT&T/MediaOne merger proceeding. In light of the Ninth Circuit's ruling, the Commission should reconsider its decision approving the merger without any open access condition, and should at the very least now condition the merger on AT&T/MediaOne's demonstration that it has, or immediately will, comply with the Ninth Circuit's holding.

The Commission's rules state that a petition for reconsideration is appropriate where there are "events which have occurred or circumstances which have changed since the last opportunity to present such matters." 47 C.F.R. 1.106(b)(2)(i). The Ninth Circuit's decision clearly constitutes a changed circumstance that warrants reconsideration of the Commission's decision approving the AT&T/MediaOne merger. In the initial proceedings, numerous parties urged the Commission to require AT&T and MediaOne "to allow independent, unaffiliated ISPs to interconnect with their proprietary cable networks for the purpose of offering broadband Internet access and services." *AT&T/MediaOne Order* ¶ 114. The Commission found, however, that it was unnecessary to impose such a requirement in light of AT&T's and MediaOne's commitments "to open their cable modem platform to unaffiliated ISPs as soon as AT&T's exclusive contract with Excite@Home expires in June 2002 and MediaOne's exclusive contract with Road Runner expires in December 2001." *Id.* ¶ 120.

In light of the Ninth Circuit's decision, however, this commitment – upon which the Commission relied in deciding not to impose an open access requirement – becomes legally insufficient, at least with respect to AT&T/MediaOne's operations in the Ninth Circuit's

jurisdiction.[1] The Ninth Circuit held that "the transmission of Internet service to subscribers over cable broadband facilities is a telecommunications service under the Communications Act." As a result, AT&T/MediaOne – at least within the Ninth Circuit's jurisdiction – is a "telecommunications carrier," which the Act defines as "any provider of telecommunications services." 47 U.S.C. § 153(44). Moreover, the Act provides that a "[a] telecommunications carrier shall be treated as a common carrier under this Act . . . to the extent that it is engaged in providing telecommunications services." *Id.* § 153(44).

As telecommunications carriers and common carriers, cable Internet transmission providers are subject to statutory obligations to provide open access to their networks.[2] And they are subject to these obligations immediately – not in 18 or 24 months when their exclusive contracts with affiliated ISPs expire. But AT&T/MediaOne already has indicated that it has no intention of complying in good faith with the Ninth Circuit's decision. For example, AT&T's General Counsel, Jim Cicconi, stated that "I don't see how anybody on the other side of the argument can view this ruling as anything but a disaster for the open access argument."[3] AT&T's vice president for law, Mark Rosenblum, stated that, "even if the cable modem business were construed as a telecommunications service, it would not necessarily be subject to open-access requirements."[4] Rosenblum further claimed that the Ninth Circuit's decision "does not rule that @Home is a telecom service."[5]

In light of AT&T/MediaOne's statements that it does not intend to provide open access as required by the Ninth Circuit's decision, it is appropriate for the Commission to require AT&T/MediaOne to demonstrate that it complies with these obligations as a condition of being permitted to merge.[6] These additional merger conditions are necessary to ensure

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[1] By very rough estimate, AT&T and MediaOne have 5 million cable subscribers (and pass 8 million homes) within the Ninth Circuit's jurisdiction. *See* Warren Publishing, *Television & Cable Factbook* (1997) (based on 1997 subscriber figures and not accounting for system swaps since that time).

[2] Although the Commission could in theory attempt to forbear from applying such regulatory obligations, the Act makes clear that this requires affirmative action, which the Commission clearly has not taken. *See* 47 U.S.C. § 160 (describing three-pronged inquiry that FCC must conduct before exercising forbearance authority); *see also Bell Operating Companies; Petitions for Forbearance from the Application of Section 272 of the Communications Act of 1934, As Amended, to Certain Activities*, Memorandum Opinion and Order, 13 FCC Rcd 2627, ¶ 16 (1998) (making a forbearance determination "is not a simple task"). Moreover, exercising forbearance with respect to cable Internet services would directly contradict the Commission's own precedent. *See, e.g.*, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Memorandum Opinion and Order, 11 FCC Rcd 15499, ¶ 993 ("*Local Competition Order*") ("[w]e believe, as a general policy matter, that all telecommunications carriers that compete with each other should be treated alike regardless of the technology used unless there is a compelling reason to do otherwise."); *Id.* ¶ 997 ("even for telecommunications carriers with no market power, the duty to interconnect directly or indirectly is central to the 1996 Act and achieves important policy objectives. . . . In fact, section 251 distinguishes between dominant and non-dominant carriers, and imposes a number of additional obligations exclusively on incumbent LECs.").

[3] T. Rucker, *Opennet Finds Silver Lining In AT&T Broadband Victory*, National Journal's Technology Daily (June 26, 2000).

[4] M. Richtel, *Both Sides Talk of Victory in Cable Ruling*, New York Times at C2 (June 23, 2000).

[5] *Court Changes Ground Rules For Cable Broadband In Portland Defeat*, Communications Today (June 23, 2000).

[6] Even in merger proceedings where there has been no demonstrated threat of noncompliance with existing or imminent laws, the Commission has required merging parties to demonstrate compliance with such laws as a

AT&T/MediaOne follows the law, and to avoid the inevitable litigation that would result in the absence of a clear federal directive. Specifically, the Commission should require AT&T/MediaOne to demonstrate compliance with two distinct statutory obligations that have emerged as a result of the Ninth Circuit's decision.

1. *AT&T/MediaOne should be required to demonstrate that, under sections 201 and 202 of the Act, it makes available to unaffiliated ISPs the very same telecommunications services it provides to its own cable Internet subscribers.* Section 201(a) of the Act provides that "[i]t shall be the duty of every common carrier engaged in interstate . . . communication by wire . . . to furnish such communication service upon reasonable request therefor." Based on the Act and Commission precedent, it is clear that this section applies to requests by Internet service providers to obtain the very same telecommunications services that AT&T/MediaOne provides to its own subscribers.

First, as described above, cable Internet transmission service providers are common carriers when they provide cable Internet transmission services, and therefore clearly fall within the scope of section 201(a). *Second*, Commission precedent makes clear that "the provision of leased lines to Internet service providers" – the precise telecommunications service that ISPs would obtain from cable Internet providers – "constitutes the provision of interstate telecommunications." *Federal-State Joint Board on Universal Service*, Report to Congress ¶ 67, CC Docket No. 96-45 (rel. Apr. 10, 1998).[7] *Third*, Commission precedent requires that Internet service providers be treated as end users with respect to obtaining access services from telecommunications carriers, and not as common carriers.[8]

AT&T/MediaOne must not only make its "telecommunications service" available upon reasonable request to unaffiliated ISPs, it must offer this service on just, reasonable, and non-discriminatory terms. *See* 47 U.S.C. §§ 201, 202. The Commission should impose conditions to ensure that AT&T/MediaOne does so.

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condition of being permitted to merge. *See, e.g., Application of Ameritech Corp. and SBC Communications, Inc., For Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95 and 101 of the Commission's Rules*, Memorandum Opinion and Order at App. C ¶¶ 37, 53, CC Docket No. 98-141 (rel. Oct. 8, 1999).

[7] *See also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in CC Docket No. 99-68, 14 FCC Rcd 3689, ¶ 1 ("ISP-bound traffic is jurisdictionally mixed and appears to be largely interstate."). This holding is consistent with the Commission's decision that the provision of ADSL service to Internet service providers – which is closely analogous to cable Internet services – is an interstate telecommunications service. *See GTE Telephone Operating Cos., GTOC Tariff No. 1, GTOC Transmittal No. 1148*, Memorandum Opinion and Order ¶ 1, CS Docket No. 98-79 (rel. Oct. 30, 1998) (GTE's ADSL service, "which permits Internet Service Providers to provide their end user customers with high-speed access to the Internet, is an interstate service and is properly tariffed at the federal level.").

[8] As a result, there is no basis to claim that Internet service providers can obtain access from cable operators under section 201(a) only after "the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest." 47 U.S.C. § 201(a). This provision applies only with respect to requests made to common carriers "to establish physical connections with other carriers." The Commission has held that "[t]he definitional sections of the Act make clear that the term 'carriers' is synonymous with the terms 'common carrier,' *which does not include ISPs*." *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934*, Memorandum Opinion and Order, 11 FCC Rcd 21905, ¶ 267 (citing 47 U.S.C. § 153(10)) (emphasis added); *see also* 47 C.F.R. § 69.2(m) ("End User means any customer of an interstate . . . telecommunications service that is not a carrier.").

2. *AT&T/MediaOne should be required to demonstrate that, under sections 251(a) of the Act, it stands ready, willing, and able to provide interconnection to other telecommunications carriers.* Section 251(a) requires telecommunications carriers – which under the Ninth Circuit's jurisdiction includes cable Internet transmission providers – to interconnect with "other telecommunications carriers." Although this provision does not require cable Internet transmission providers physically to interconnect with ISPs – which are information service providers not telecommunications carriers[9] – it does require them to provide interconnection to telecommunications carriers that have ISPs as their customers.[10]

The Commission has found, for example, that where a telecommunications carrier has "interconnected or gained access" under section 251(a), it "may offer information services through the same arrangement, so long as they are offering telecommunications services through the same arrangement as well." *Local Competition Order* ¶ 995. In other words, so long as the entity obtaining the interconnection is using that interconnection to provide a telecommunications service, it may also use it to provide information services, or it may use the interconnection to provide telecommunications services to information services providers. As the Commission explained, "[u]nder a contrary conclusion, a competitor would be precluded from offering information services in competition with the incumbent . . . under the same arrangement." *Id.* "By rejecting this outcome," the Commission held, "we provide competitors the opportunity to compete effectively with the incumbent by offering a full range of services to end users without having to provide some services inefficiently through distinct facilities or agreements." *Id.*

With respect to the nature of the interconnection that AT&T/MediaOne must provide, sections 201 and 202 again come in to play. The Commission should impose conditions ensuring that AT&T/MediaOne provides interconnection to its cable Internet transmission network on just, reasonable, and nondiscriminatory terms. *See* 47 U.S.C. §§ 201, 202.

Finally, there are compelling justifications for requiring AT&T/MediaOne to comply with an open access obligation as a condition of its merger, rather than waiting until after an industry-wide rulemaking is conducted to impose such an obligation.[11]

For one thing, a rulemaking on this matter could take a year or two or more, and within this time AT&T/MediaOne will be making numerous merger-related decisions regarding how to integrate, configure, and expand its local cable networks. These merger-related decisions are

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[9] *See Local Competition Order* ¶ 995 ("enhanced services providers that do not also provide . . . telecommunications, and are thus not telecommunications carriers within the meaning of the Act, may not interconnect under section 251.").

[10] This conclusion is reinforced by the structure of the Act, which makes clear that telecommunications carriers may not impose any restrictions on the kinds of services that other telecommunications carriers interconnecting under section 251(a) provide. Section 251(a) on its face contains no such limitations, whereas Congress in section 251(c) did place service-based limitations on the interconnection required. Under section 251(c)(2), incumbent LECs have a duty to provide interconnection only "for the transmission and routing of telephone exchange service and exchange access." Under the statutory canon *expressio unis*, Congress's expression of a limitation in section 251(c) suggests the exclusion of such limitation in section 251(a). *See, e.g., O'Melveny & Myers v. FDIC*, 512 U.S. 79, 85 (1994); *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 730-31 (1989).

[11] To avoid any inconsistency between the open access conditions it should impose now and those it may adopt in a future rulemaking, the Commission may implement a sunset provision under which any open access conditions imposed in this proceeding would be made consistent with any future open access conditions the Commission adopts.

likely to affect AT&T/MediaOne's ability to modify its network to provide open access down the road. For example, there are still numerous systems that AT&T/MediaOne has not yet upgraded to provide cable Internet services. It certainly would be more efficient to design these networks from the beginning with open access capabilities, rather than adding these capabilities a year or two from now. Requiring a modification later, after the merger integration process has been implemented, would in fact impose unnecessary costs that consumers will ultimately have to bear. It is therefore in the public interest – and possibly in AT&T/MediaOne's own interest – to define their open access obligations sooner rather than later.

For another thing, by the time an industry-wide rulemaking is completed, many ISPs who would otherwise thrive in providing broadband Internet access over cable might vanish under the weight of the AT&T/MediaOne monopoly. By the time AT&T/MediaOne's exclusive contracts expire, its lead in the residential broadband market may be so great that many other ISPs will not be able to compete or survive.[12]

Respectfully submitted,

[12] *See, e.g.*, Petition of SBC Communications To Deny Application at 40-43, *Applications for Consent to the Transfer of Control of Licenses of MediaOne Group, Inc., to AT&T Corp.*, CS Docket No. 99-251 (filed Aug. 23, 1999).

Certificate of Service

I, Mary Ann Bloodworth, do hereby certify that I caused one copy of the attached letter to be served by either first-class mail or hand delivery upon the parties listed below.

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July 24, 2000
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