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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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

To: The Commission

PETITION OF U S WEST TO DENY APPLICATIONS OR TO CONDITION ANY GRANT

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SUMMARY

AT&T and MediaOne propose to merge the largest and third largest cable operators in the United States, and at the same time to provide the merged entity with a 25.5% interest in the second largest cable operator. Under long established attribution rules, this transaction would give AT&T cognizable interests in over 60% of all cable homes passed in the United States. None of AT&T's quibbling around the edges of this fact can avoid the problem that such interests in this many cable systems would be flatly inconsistent with the Commission's considered judgment — that cognizable ownership of systems passing more than 30% of the nation's homes would pose unacceptable risks to the ability of new cable networks to emerge and remain viable. The substantial increase in AT&T's ownership of cable *programming* interests, also resulting from the acquisition of MediaOne (and its TWE interest), only adds further to AT&T's incentive to discriminate against such unaffiliated programmers. Accordingly, any grant of this application should be conditioned on a requirement of divestiture within 60 days following issuance of the D.C. Circuit mandate affirming the Commission's 30% cap, as the Commission has previously provided.

Equally important, this merger increases substantially the number of potential cable modem subscribers that would be subject to AT&T's high speed Internet access service. It also merges AT&T's control of Excite@Home with MediaOne's 35% interest in Road Runner, Excite@Home's principal cable modem service competitor. 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 with substantial unbundling obligations. To do so would be inconsistent with the principles of technological neutrality reflected in Section 706 of the Act, and would severely impair the statutory goal of promoting the

deployment of high speed Internet access services. The question must be addressed now, before the combined AT&T/MediaOne/TWE obtains insuperable regulatory advantages over incumbent LECs in the deployment of these vitally important new services.

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PETITION OF U S WEST TO DENY APPLICATIONS OR TO CONDITION ANY GRANT

Pursuant to Section 309(d) of the Communications Act of 1934, as amended,[1] U S WEST, Inc. ("U S WEST") respectfully submits this petition to deny the applications of AT&T Corporation ("AT&T") and MediaOne Group, Inc. ("MediaOne") for authority to transfer control of MediaOne's licenses and authorizations to AT&T.[2]

INTRODUCTION

This proposed horizontal merger would result in yet further unprecedented consolidation within the cable industry. It would merge the largest and third largest cable

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[1] 47 U.S.C. § 309(d).

[2] *See Transfer of Control of FCC Licenses, MediaOne Group, Inc. to AT&T Corp.*, CS Docket No. 99-251 (filed July 7, 1999) ("*Application*"). AT&T and MediaOne filed many applications for transfer of control with the Cable Services Bureau, the Wireless Bureau, and the Common Carrier Bureau. "*Application*" refers throughout to the common document entitled "Applications and Public Interest Statement" and filed on July 7, 1999.

operators[3] into one that would also hold a 25.5% interest in the second largest cable operator, Time Warner Entertainment ("TWE"). Unlike the recent AT&T/TCI merger, this transaction would dramatically increase the number of cable homes in which AT&T holds an attributable interest — to a number that is *double the size* that the Commission has previously determined to be consistent with the public interest. None of AT&T's quibbling around the edges of this fact can make it disappear.

This transaction would also pose substantial additional threats to competition in various markets. AT&T already holds a variety of video programming interests through TCI, Cablevision, and Liberty Media Group.[4] This merger would provide AT&T with the additional programming interests now held by MediaOne (either directly, or through its 25.5% interest in TWE) in HBO, Cinemax, WB Network, Comedy Central, Court TV, Food Network, Sunshine Network, Music Choice, E! Entertainment, Viewers Choice, Speedvision, Outdoor Life, New England Cable News, and Fox Sports New England.[5] It would thereby not only significantly

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[3] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Fifth Annual Report, 13 FCC Rcd 24284, 24422 (1998) ("*Fifth Annual Report*").

[4] AT&T reports holding interests in a wide range of programmers, including Discovery Communications, Inc., USA Networks, Telemundo Network, Telemundo Station Group, BET Holdings II, Inc., Fox Sports World, Fox Sports World Español, Fox Sports South, Fox/Liberty Networks LLC, QVC, Inc., Regional Programming Partners, Canales ñ, Court TV, MacNeil/Lehrer Productions, TV Guide, Inc., E! Entertainment Television, Style, Odyssey, International Channel, Sunshine Network, Encore Media Group, American Movie Classics, Romance Classics, Bravo, Bravo International, The Independent Film Channel, AMC Music Pop, MuchMusic, and News 12 Network. *See Application* at 9-10, 12.

[5] *See Application* at 17 & n.43.

increase the AT&T presence in cable homes throughout the United States, but also expand the extent of vertical integration of all of these systems.

By increasing the scope of AT&T's cable system coverage by millions of homes, the merger would also permit AT&T to expand the scope of its current regulatory advantage in the vital emerging market for high speed Internet access. Indeed, by merging AT&T's controlling interest in Excite@Home with MediaOne's 35% interest in the competing Road Runner cable modem service, this transaction would leave 90% of cable high speed Internet subscribers with a system affiliated with AT&T. The Commission cannot address the competitive effects of such a transaction without reference to whether it continues to saddle U S WEST and other ILECs in AT&T/MediaOne's geographic markets with more onerous regulatory burdens in deploying their competing DSL services. Otherwise, this merger will pose a significant threat to the Commission's ability to satisfy its obligation under Section 706 of the Act to "accelerate deployment" of such advanced services "by promoting competition" through principles of technological neutrality.[6]

STANDING

U S WEST is clearly a party in interest with respect to the proposed AT&T/MediaOne merger and therefore has standing to oppose this merger under Section 309(d)(1). *See* 47 U.S.C. § 309(d)(1). U S WEST's current and planned business operations would make it a direct competitor with a merged AT&T/MediaOne in numerous product markets. For example, U S WEST already provides local voice, mobile wireless, data, and video

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[6] Pub. L. No. 104-104, Title VII, § 706(b), 110 Stat. 153 (1996); *see* 47 U.S.C. § 157 notes.

services. U S WEST plans to provide long distance voice and data services as soon as it gains regulatory approval to do so. U S WEST's data offerings include both high-speed DSL connectivity (under the brand name MegaBit) and Internet access (under the brand name USWEST.net). U S WEST's provision of these various services — many of them in areas where AT&T and MediaOne hold interests in cable systems — makes U S WEST a present or potential competitor with respect to the full range of services that a merged AT&T/MediaOne would deliver to subscribers over cable broadband facilities. Moreover, U S WEST's Internet service provider offering will be delivered to many consumers who will not have access to U S WEST's DSL connectivity and therefore will need to rely on alternative sources for high-speed connection. Accordingly, U S WEST is well situated to identify some of the competitive threats and market distortions that the AT&T/MediaOne merger would create.

ARGUMENT

I. THE PROPOSED MERGER OF AT&T WITH MEDIAONE WOULD CREATE A CABLE OPERATOR OF NATIONAL SCOPE AND SIZE, IN VIOLATION OF THE PURPOSES OF THE CABLE ACT AND THE COMMISSION'S RULES.

In the 1992 Cable Act, Congress required the Commission to prevent any single cable operator from reaching too many subscribers. *See* 47 U.S.C. § 533(f)(1)(A). Congress did so because of numerous concerns about the growing size of cable operators — and of TCI in particular. It recognized that large cable operators could prevent the emergence of new cable networks by denying them access to sufficient homes to be viable, thus "causing a reduction in the number of media voices available to consumers"[7] and restraining competition in the video

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[7] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, Second Report and Order, 8 FCC Rcd 8565, 8568 ¶ 6

programming market. Alternatively, as TCI's experience had made clear, large cable operators could extort financial interests from new cable networks as the price of access to the subscriber base necessary for their survival.[8] Vertically integrated cable operators also had the incentive to deny access to new cable networks in order to favor video programmers in which they had an interest. In short, Congress saw that large cable operators "could discourage entry of new programming services, restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction."[9]

A. A Merged AT&T/MediaOne Would Have Influence over Access to the Majority of Potential Cable Subscribers and an Even More Powerful Incentive To Deny That Access to Competing Video Programmers.

Congress did not, of course, prescribe by statute the appropriate horizontal ownership limit itself. But if this merger does not implicate the concerns reflected by Congress, no merger ever would. The Chairman of the Federal Trade Commission has noted that "[b]ecause of the economies of scale involved, the successful launch of any significant new channel usually requires distribution on cable systems that cover 40-60% of subscribers."[10] As explained below, this transaction would give AT&T alone cognizable influence over

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(1993) ("*Second Report and Order*").

[8] S. Rep. No. 102-92, at 33 (1991). More recent examples of cable operator efforts to extort favorable terms from programmers have involved obtaining exclusivity rights to cable channels in exchange for carriage of broadcast stations. *See* Comments of BellSouth Corp. at 9, filed in *Annual Assessment of Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230 (filed Aug. 6, 1999).

[9] H.R. Rep. No. 102-628, at 43 (1992).

[10] 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>.

approximately 60% of the country's homes passed. Thus, a merged AT&T/MediaOne would itself have sufficient bottleneck control over subscribers to seal the fate of any cable network.

In fact, it was TCI's size *as of 1992* — enormous then but only half the size contemplated by this merger — that convinced Congress of the need for some limit on the number of subscribers that one cable operator could have. As Senator Danforth, one of the managers of the 1992 Act, cautioned during consideration of Section 613(f)(1)(A), "Right now, one company, TCI, controls programming for a quarter of the homes in America that have cable service. We think that there is a problem if a single company controls that much access, or more access, to the homes of America."[11] Yet a merged AT&T/MediaOne would have interests in as much as 60.8% of homes passed by cable, far more than TCI's holdings in 1992. As the Commission has already determined in establishing its 30% cap[12] — and in defending that standard on judicial review[13] — such influence is far more than adequate to "reduc[e] . . . the number of media voices" available to American consumers.[14] And AT&T/MediaOne would have even greater incentive to do so. Merging with MediaOne would significantly expand the universe of cable networks whose competitors would be subject to AT&T's life-or-death vote.

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[11] 138 Cong. Rec. S672 (daily ed. January 30, 1992) (statement of Sen. Danforth).

[12] *See* 47 C.F.R. § 76.503(a).

[13] *See* 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 *Second Report and Order* at 8576-77 ¶ 25): "A 30% horizontal ownership limit is generally appropriate to prevent the nation's largest [cable operators] from gaining enhanced leverage from increased horizontal concentration . . . ."

[14] *Second Report and Order* at ¶ 6.

Despite AT&T's attempt to confuse the matter, calculating the number of homes that a combined AT&T/MediaOne would pass is quite simple. Purporting to apply the measurements prescribed by the Commission's rules, AT&T has reported to the Commission that it currently passes 35.2 million homes.[15] Through the merger, AT&T would acquire control of the systems of MediaOne, reported in the *Application* to pass 8.5 million more homes.[16] In addition to those 8.5 million homes, MediaOne holds a 25.5% limited partnership interest in TWE, whose cable systems pass another 17.9 million homes.[17] As MediaOne has admitted,[18] these homes passed are attributable to MediaOne (and therefore would be attributable to a merged AT&T/MediaOne) because MediaOne has declined to insulate itself from the management of TWE's cable systems.

AT&T asserts — without any elaboration or support — that it "will have no right or ability to participate in the management of the TWE cable systems."[19] In fact, it would have the right to appoint two of the six TWE board members and participate in its programming

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[15] *See* Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Magalie Roman Salas, Secretary, Federal Communications Commission (June 8, 1999) (reporting pursuant to 47 C.F.R. § 76.503(c) number of homes passed).

[16] *See Application* at 14.

[17] *See id.* at App. B.

[18] *See* Consolidated Comments of MediaOne Group, Inc. at 3, filed in *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, Review of the Commission's Cable Attribution Rules, CS Docket No. 98-82 (filed Aug. 14, 1998).

[19] *Application* at 16.

enterprises.[20] Such rights certainly would qualify as "influence" sufficient to trigger the Commission's concern. *See* 47 C.F.R. § 76.501.

Indeed, in the context of a limited partnership like TWE, the Commission's attribution rules squarely address the 25.5% interest that AT&T would acquire through a merger with MediaOne. Those rules, established in 1984 and reaffirmed less than three weeks ago,[21] deem any interest in a limited partnership to be attributable, *unless* the party with the interest certifies that each of the following seven insulating provisions is codified in the limited partnership agreement:

> (1) the limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the media enterprises of the company;
>
> (2) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's media enterprises;
>
> (3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its businesses;
>
> (4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions;
>
> (5) the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter;

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20. *Application* at 16-17.

21. *Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, Report and Order, MM Docket No. 94-150, FCC 99-207 (rel. Aug. 6, 1999) ("*Attribution Order*").

(6) the limited partner may not perform any services for the partnership materially relating to its media activities, except that a limited partner may make loans to or act as a surety for the business; and

(7) the limited partner may not become actively involved in the management or operation of the media business of the partnership.[22]

AT&T has made no such certification. Until and unless it does so, the 25.5% partnership interest of MediaOne in TWE would continue to be attributable to AT&T. There is particular reason to insist on strict compliance with such requirements in assessing what influence AT&T would have over TWE's cable systems. AT&T has been negotiating for months with Time Warner for access to these cable systems, and has now finally obtained that access by *buying* into TWE.[23]

Of course, AT&T asserts that it would not *control* access to nearly so many homes, but this misses the point. As the Commission has recently confirmed, its attribution rules have always been meant to capture "those interests in or relationships to licensees that confer on their holders a degree of *influence* or control such that the holders have a *realistic potential* to affect the programming decisions of licensees."[24] These rules are particularly effective in assessing the potential for influence held by a vertically integrated cable operator such as AT&T/TCI, which has had a compelling way of making its program carriage desires known to

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[22] *Id.* at ¶ 124 n.265; 47 C.F.R. § 76.501 note 2(g).

[23] *See* Eben Shapiro, *Time Warner, AT&T Discuss Cable Deal*, Wall St. J. Europe, Oct. 23, 1998.

[24] *Attribution Order* at ¶ 1 (emphasis added). The Commission has not decided whether to change the application of these rules in the context of cable horizontal ownership. *See id.* at ¶ 6 n.13. That question is the subject of a separate proceeding. *See Review of the Commission's Cable Attribution Rules*, Notice of Proposed Rulemaking, 13 FCC Rcd 12990 (1998).

other cable operators, all of which need access to AT&T's own cable networks on favorable terms.

In short, the foregoing interests would enable a merged AT&T/MediaOne to pass 57.8 million homes.[25] This constitutes 60.8% of the national total of 95.1 million homes passed.[26] Since Congress suggested that "a quarter" of the nation's homes would be of serious concern,[27] and the Commission determined to cap the homes passed that one cable operator may have at 30%,[28] this merger would appear to be "unthinkable" absent substantial divestiture.[29]

B. Arguments About the Wisdom of the Statute and Rules on Horizontal Ownership Have No Place in a Proceeding on Transfer of Control, and in Any Event Are Wrong.

AT&T and MediaOne spend many pages of the *Application* arguing about the wisdom of Congress's decision to impose some limitation on the number of subscribers one cable operator may reach, and of the Commission's decision to set that limit at 30% of homes passed. These arguments have no place in a proceeding to decide whether a transfer of control of MediaOne's licenses and 214 authorizations is in the public interest.

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[25] This figure does not include the homes passed that AT&T may lose through a swap of cable systems with Comcast if the MediaOne transaction is consummated, and it also takes into account the fact that AT&T and MediaOne currently *both* have attributable interests in the Kansas City Cable Partners and the Texas Cable Partners, L.P.

[26] *See Fifth Annual Report* at 24408.

[27] 138 Cong. Rec. S672 (daily ed. January 30, 1992) (statement of Sen. Danforth).

[28] *See* 47 C.F.R. § 76.503(a).

[29] Chairman Reed E. Hundt, Federal Communications Commission, *Thinking About Why Some Communications Mergers Are Unthinkable*, Brookings Institution June 19, 1997, *available at* <http://www.fcc.gov/Speeches/Hundt/spreh735.html>.

But AT&T's policy arguments are unavailing in any event. First, the *Application* states that cable systems are subject to "thriving" competition from other video programming delivery technologies.[30] But the Commission has recognized that "cable operators continue to be the main distributors of multichannel video programming controlling 85.3% of the total MVPD subscribers."[31]

Second, AT&T asserts that the horizontal ownership cap is superfluous because other rules, such as the program carriage and leased access rules, would prevent any anticompetitive conduct. This argument is novel, but obviously untenable. Congress instructed the Commission to promulgate *all of these rules*. It thus determined that the ability and incentive of large cable operators to engage in vertical foreclosure could not be adequately addressed solely by the filing of case-by-case complaints. As the Commission has argued to the D.C. Circuit, the other rules are not designed to address the exercise of market power by cable operators on other channels. And as a structural regulation, the horizontal ownership rule "generally is more easily enforced and detected than conduct regulation."[32]

Finally, AT&T makes various arguments that it does not really "control" Liberty, because it has issued a separate Liberty tracking stock. The horizontal ownership cap, of course, does not apply only to vertically integrated cable operators. But this tracking stock argument fails in any event. As one commenter has recently observed, "Liberty has been spun out and back

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[30] *Application* at 45.

[31] *Fifth Annual Report* at 24374 ¶ 153.

[32] *See* Brief for the Federal Communications Commission and the United States at 35-36, *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).

so much its corporate logo should be a yo-yo."[33] In its review of the AT&T/TCI merger, the Commission made clear that "Liberty will be a wholly owned subsidiary of AT&T," and thus treated as vertically integrated for purposes of the program access rules.[34] AT&T has demonstrated no basis for overturning that conclusion. It has made no showing that shareholders of Liberty do not overlap substantially with shareholders of AT&T, or that the two will not share common officers or directors. Indeed, John Malone — the former CEO of TCI — is in fact a member of both boards.[35] AT&T's argument here is thus both wrong as well as irrelevant.

Of course, the Commission has decided to stay the effectiveness of the 30% cap. But the Commission should make clear again what it made clear long before AT&T elected to enter into its agreement to acquire these MediaOne and TWE interests: "parties that are now entering into business arrangements that would violate the rules . . . should be well aware of the existence of the rules and thus have a full opportunity to be prepared to comply with them" upon their effective date — which will be sixty days after any D.C. Circuit mandate upholding them.[36]

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[33] *Consumer Groups Say AT&T-MediaOne Is Bad for Consumers*, Communications Daily, Aug. 18, 1999, at 2; *see Telecommunications Inc. and Liberty Media Corp.*, Applications for Consent to Transfer Control of Radio Licenses, 9 FCC Rcd 4783 (CSB 1994).

[34] *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, 3179 ¶ 35 (1999) ("*TCI Order*").

[35] *See* <http://www.att.com/factbook/co_directors.html>; AT&T Corporation Form 13-D, Schedule I (filed May 27, 1999).

[36] *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking, 13 FCC Rcd 14462, 14492 ¶ 77 (1998).

AT&T has known about these rules for years, and any grant of this application should include this divestiture condition.

C. The Commission Should Make Clear Now That AT&T Has Demonstrated No Basis for a Waiver of the Horizontal Ownership Rules.

AT&T and MediaOne also suggest that they would be entitled to a waiver of the horizontal ownership rules.[37] As noted above, a cable operator the size of a merged AT&T/MediaOne is far larger than what concerned Congress when it passed Section 613(f)(1)(A), and what the Commission determined would require divestiture. Indeed, a waiver to permit AT&T to acquire TCI, then MediaOne, and also the MediaOne interest in the TWE systems would completely eviscerate the statute as well as the rule. It is appropriate for the Commission to grant waivers "where particular facts would make strict compliance inconsistent with the public interest [and] special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[38] But a waiver in this situation would *leave* no general rule, and would be premised on nothing other than arguments against the statute and the rule. In this situation, the Commission should make clear that any request for a waiver by AT&T and MediaOne would be denied.[39]

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[37] *See Application* at 61, 67.

[38] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990) (citing *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969)).

[39] Any benefits to the telephony market that this merger may bring are irrelevant to the question whether AT&T/MediaOne would need to comply with the horizontal ownership rules. AT&T and MediaOne are free to offer cable telephony now. They do not need to merge or to violate the Commission's 30% cap in order to do so. In fact, MediaOne already offers cable telephony. *See Application* at 15. And the principal justification offered by AT&T for acquiring TCI was to facilitate its doing the same thing.

II. ABSENT CONSIDERATION OF THE REGULATORY SCHEME APPLICABLE TO COMPETING DSL SERVICES, THE MERGER WILL SOLIDIFY AT&T'S ARTIFICIAL REGULATORY ADVANTAGES IN THE PROVISION OF BROADBAND INTERNET ACCESS, IN VIOLATION OF THE PRINCIPLE OF TECHNOLOGICAL NEUTRALITY EMBODIED IN SECTION 706 OF THE ACT.

The proposed acquisition by AT&T of the cable systems owned by MediaOne, and of MediaOne's additional 25.5% partnership interest in the cable systems owned by TWE, also raises serious issues with respect to the state of competition in the emerging market for high speed Internet access. As noted in part I, a merged AT&T/MediaOne would have cognizable influence over 60% of potential high speed cable Internet access subscribers. Moreover, the merger would join AT&T's controlling interest in Excite@Home with MediaOne's 35% interest in Road Runner, thus aligning the two leading providers of this new service — which currently provide service to 90% of all cable modem subscribers.[40/]

As Congress recognized in Section 706, this new service will be critical to the future development of the Nation's economy. The popularity of high speed Internet access, offering far quicker and more convenient access to the burgeoning supply of information available over the Internet, has led to unprecedented growth of this new service — perhaps greater than any other communication service of the twentieth century. This rapid growth is completely inconsistent with AT&T's unsupported assertion that broadband and narrowband Internet access constitute a single market, and the proposition is totally illogical. It is similar to the argument that the automobile and the horse and buggy were part of the same market because,

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[40/] Excite@Home serves about 620,000 cable modem subscribers, and Road Runner serves about 340,000. Together these two account for over 90% of today's total cable modem subscribers. *See* Cable Modem Info Center, Cable Modem Market Stats & Projections <http://www.cabledatacomnews.com/cmic/cmic16.html>.

in the beginning, owners of the latter outnumbered owners of the former. As the Commission has noted, demand for broadband capability is growing rapidly, because it provides "many *new* services and vast improvements to existing services" — including "real-time video," the ability to "download feature-length movies in a matter of minutes," "chang[ing] web pages as fast as changing the channel on a television," and "increased prospects for at-home learning and working."[41] Investment of "tens of billions of dollars" in broadband outpaces that of other industries, and is "large even by the standards of America's communications business."[42] AT&T's assertion that broadband and narrowband are fungible is belied by AT&T-controlled @Home, which considers broadband to be far superior to "typical" narrowband connections: "the @Home experience . . . includes Internet service over hybrid fiber co-axial, or HFC, cable at transmission speeds up to 100 times faster than typical dial-up connections, 'always on' connection and rich multimedia programming through our broadband Internet portal."[43]

But whether or not broadband is currently a separate market,[44] AT&T's merger raises substantial concerns about the future of broadband competition. Cable is currently far and

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[41] *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*, Report, CC Docket No. 98-146, FCC 99-5, at ¶ 3 (rel. Feb. 2, 1999) ("*706 Report*") (emphasis added).

[42] *Id.* at ¶ 35.

[43] At Home Corp., Form 10-K for the Fiscal Year Ended Dec. 31, 1998, at 3 (filed Feb. 9, 1999).

[44] To the extent this factual question is relevant to the Commission's analysis, the Commission cannot grant the application without first holding a hearing to resolve it. *See* 47 U.S.C. § 309(e). *Cf. Radio Athens, Inc. v. Federal Communications Commission*, 401 F.2d 398 (D.C. Cir. 1968).

away the leading delivery mechanism for broadband Internet access. Of those homes with a broadband Internet connection today, about one million receive broadband service over cable.[45] By contrast, only 100,000 subscribers currently rely on DSL.[46] Cable modem services thus already have a substantial headstart over DSL, and as noted above, @Home and Road Runner together serve nearly all these cable modem subscribers.

In these circumstances, this merger presents the Commission with a critical choice. One the one hand, the proposed merger would affiliate AT&T with over 90% of cable-based broadband access to the Internet. AT&T's Chairman has stated repeatedly that imposition of any open access requirements on broadband Internet access by cable companies, no matter how unobtrusive, would utterly decimate the ability of AT&T to invest in broadband technology. In his view, "[n]o company will invest billions of dollars to become a facilities-based broadband services provider if competitors who have not invested a penny of capital nor taken an ounce of risk can come along and get a free ride on the investments and risks of others."[47] The Commission has indicated some significant sympathy with this position — and the concomitant

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[45] *See* Cable Modem Info Center, Cable Modem Market Stats & Projections <http://www.cabledatacomnews.com/cmic/cmic16.html>; *see also* Mike Farrell, *Cable-Modem Count Nears 1M*, Multichannel News, July 26, 1999, at 3 ("Cable-modem penetration in North America is expected to break the 1 million-customer milestone next month, as subscriber numbers for the two top data-over-cable-service providers — Excite@Home and Road Runner — increased significantly in the second quarter.").

[46] *See Cable Telephony To Penetrate over 10% of Homes Passed by 2005*, PR Newswire, July 22, 1999.

[47] C. Michael Armstrong, AT&T Chairman & CEO, *Telecom and Cable TV: Shared Prospects for the Communications Future* at 4, Washington Metropolitan Cable Club, Washington, D.C., Nov. 2, 1998, *available at* <http://www.att.com/speeches/98/981102.maa.html).

position that AT&T should be able to deploy broadband Internet access without any open access requirements.

On the other hand, the Commission has proposed saddling the main facilities-based competitors to this increasingly dominant market player — incumbent LEC services, both directly to customers and to competitive providers of broadband services — with unbundling, access, pricing, and other rules and regulations which are many times more burdensome than those that anyone is even whispering should be applied to AT&T. There is a clear disconnect here — a kind of "schizophrenic infrastructure regulation" that "hyperregulate[s]" only those entities likely to provide any competition to this new AT&T behemoth, while adopting a "laissez-faire approach" to AT&T.[48]

We submit that this merger — which will vault AT&T into a position of access to over 90% of all cable modem subscribers — cannot be reviewed without consideration of this regulatory disconnect. As the Commission has recently recognized, the absence of technological neutrality "might undermine the objectives of section 706 by impeding the reasonable and timely deployment of advanced telecommunications capability to all Americans."[49] If the Commission continues to permit AT&T to offer cable modem service without regulatory restrictions, and to

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[48] *The Internet Freedom Act and the Internet Growth and Development Act of 1999: Hearings on H.R. 1686 and H.R. 1685 Before the House Judiciary Committee*, June 30, 1999, at 10 (statement of Scott Cleland, Managing Director, Legg Mason Precursor Group).

[49] Brief for the Federal Communications Commission as Amicus Curiae at 25-26, *AT&T Corp. v. City of Portland* (9th Cir. filed Aug. 16, 1999) (No. 99-35609).

require ILECs alone to provide broadband transmission capacity to other competitors,[50] its actions will do just that.

The Commission has long held that the public interest factors governing its review of merger applications must include consideration of principles of competitive neutrality.[51] As Commissioner Powell has cautioned, "[w]e should not dare to pick technology winners or losers, whether consciously or unconsciously."[52] Under the pro-competitive principles underlying the 1996 Act, that is the role of the marketplace. And one corollary to this principle is clear: "To raise the costs of one industry player but not the cost to others to whom the condition rationale also runs, seems patently unfair and will skew competitive development."[53]

These concerns are not new. The Commission has recognized, since the very outset of its consideration of high speed Internet access service, that "it may distort the performance of the market to have separate regimes of regulation for competitors in a converging

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[50] *See* Motion of Federal Communication Commission for Remand To Consider Issues, U S WEST Communications, Inc. v. FCC (D.C. Cir. filed June 22, 1999) (No. 98-1410); *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Second Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-70 (rel. April 16, 1999).

[51] *See, e.g., Merger of MCI Communications Corp. and British Telecommunications plc*, 12 FCC Rcd 15351,15365 n.46 (1997).

[52] Commissioner Michael K. Powell, Federal Communications Commission, *Technology and Regulatory Thinking: Albert Einstein's Warning*, Legg Mason Investor Workshop March 13, 1998, *available at* <http://www.fcc.gov/Speeches/Powell/spmkp804.html>.

[53] Commissioner Michael K. Powell, Federal Communications Commission, *"Letting Go of the Bike": A Holiday Parable on Communications Mergers in a Season of Competition*, Practicing Law Institute Dec. 10, 1998, *available at* <http://www.fcc.gov/Speeches/Powell/spmkp820.html>.

market."[54] Indeed, as the Commission advised the Ninth Circuit only a week ago in the *City of Portland* case, the Commission determined in its Section 706 report that it was the intent of Congress that "our broadband policy be technologically-neutral."[55] Chairman Kennard, too, has cited technological neutrality as one of the seven principles central to promoting the rapid deployment of these critical new services.[56] While "AT&T . . . prefer[s] gaming the regulatory process to competing in the marketplace," the failure to consider the consequences of this regulatory disconnect "seriously threaten[s] . . . the availability of high-speed data service on fair and affordable terms."[57]

The Commission never addressed this problem in its review of the AT&T/TCI merger. In that case, it bypassed the question because it concluded that "the open access issues would remain equally meritorious (or non-meritorious) if the merger were not to occur."[58] This horizontal merger, however, clearly requires consideration of the problem, because it significantly expands AT&T's cable modem service interests. It thereby threatens to permit

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[54] *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion*, Notice of Inquiry, 13 FCC Rcd 15280, 15281 ¶ 4 (1998).

[55] Brief of the Federal Communications Commission as Amicus Curiae at 29, *AT&T Corp. v. City of Portland*, No. 99-35609 (9th Cir. filed Aug. 16, 1999) (quoting *706 Report* at ¶ 74).

[56] *See Chairman William E. Kennard Receives Alliance for Public Technology Pioneer Award; Outlines Guidelines for Bandwidth*, Federal Communications Commission, News (Feb. 27, 1998), *available at* <http://www.fcc.gov/Bureaus/Miscellaneous/News_Releases/1998/nrmc8018.html>.

[57] *McCain Bill To Ensure Regulation-Free Internet*, Press Release (May 13, 1999) *available at* <http://www.senate.gov/~mccain/intfree.htm>.

[58] *TCI Order* at 3207 ¶ 96.

AT&T to use regulatory asymmetry to advance an insurmountable headstart in this important new service. Perhaps this regulatory disconnect was once legitimately viewed as an industry-wide concern. But the plain fact is that with this merger AT&T has now *become* the industry. The time to act is thus here and now — before the injury to competition by DSL providers becomes irreparable. In the absence of any changes to the Commission's DSL regulatory policies, this merger cannot be granted consistent with Section 706 absent an open access condition.

CONCLUSION

For the foregoing reasons, the Commission should deny the AT&T/MediaOne applications, or condition them as set forth herein, or in the alternative designate the applications for hearing on substantial and material issues concerning the merger's effect on competition between cable modem and incumbent LEC DSL services.

Respectfully submitted,

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August 23, 1999

DECLARATION OF DAN L. POOLE

1. I am the Associate General Counsel responsible for federal regulatory advocacy of U S WEST, Inc. ("U S WEST"). I have personal knowledge of the operations of U S WEST described in the foregoing Petition of U S WEST To Deny Applications or To Condition Any Grant ("Petition"), and of the high speed data technologies employed by U S WEST and its cable competitors as described therein.

2. The facts as set forth in the Petition are true and correct as to the best of my knowledge, information, and belief.

I declare under penalty of perjury that the foregoing is true and correct.

Dan L. Poole

Executed on August 23, 1999

CERTIFICATE OF SERVICE

I, Julie Veach, do hereby certify that on the 23rd day of August, 1999, I caused true and correct copies of the foregoing Petition of U S WEST, Inc. to Deny Applications or to Condition any Grant to be served by hand* or by first-class mail, postage prepaid, upon the parties on the attached service list.

Julie Veach

Julie Veach

* Denotes Hand Delivery Via Messenger

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