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In The Matter Of)
)
Transfer of Control of FCC Licenses)
Of MediaOne Group, Inc.)
To AT&T Corporation)

~~CS Docket No. 99-251~~ 00-30

To: The Commission

AUG 24 1999

COMMENTS OF AMERICA ONLINE, INC.

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America Online, Inc. ("AOL"), pursuant to Section 1.51(c) of the Commission's Rules, hereby submits these comments in response to the above-referenced joint applications filed by AT&T Corporation ("AT&T") and MediaOne Group, Inc. ("MediaOne").[1] We believe that any approval of this transaction should be conditioned upon the combined firms' provision of open access to its cable platform in order to empower consumer choice among competing Internet service providers.

We do not repeat the arguments regarding the Commission's authority to impose an open access condition,[2] believing that such authority is clear and recognized by the

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1 Public Notice, *AT&T Corp. and MediaOne Group, Inc. Seek FCC Consent for a Proposed Transfer of Control*, DA 99-1447 (rel. July 23, 1999). The parties' description of the transaction and their public interest showing, filed as an appendix to their application, is referenced hereinafter as "Description of Transaction."

2 For an extensive discussion of the Commission's legal authority to impose such a condition, *see AOL Comments in Joint Application of AT&T Corporation and Tele-Communications, Inc.*, CS Docket No. 98-178 at 39-46 (October 29, 1998).

Commission.[3] Nor do we recite here, in detail, the description of the substantial horizontal and vertical consolidation resulting from this merger, believing that such detailed description will be offered by others and that our recitation would only be cumulative. Rather, AOL focuses here on the need for Commission engagement at this time in order to fulfill the agency's long-standing commitment to competition, choice, and diversity.

Introduction And Summary

The newly combined AT&T/TCI's proposed acquisition of MediaOne's substantial cable, programming, Internet, telephony, and related holdings has spurred broad concerns over the resulting anti-consumer effects spanning video, voice, and data markets.[4] Surely a merger met from the outset with such widespread concern—and, indeed, one filed in the immediate wake of the Commission's arduous SBC/Ameritech approval process—would be understood to be in for serious FCC scrutiny. Yet AT&T has offered public assurance that this merger, just like its TCI deal, wouldn't encounter significant regulatory hurdles.[5]

AT&T claims that "[f]or the same reasons . . . that AT&T's acquisition of TCI was pro-competitive and served the public interest, the Commission also should find that the merger of AT&T and MediaOne is pro-competitive and serves the public interest."[6] But the

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3 *Kennard Claims Jurisdiction Over Cable Unbundling,* Communications Daily (May 20, 1999) ("there's very compelling argument that the FCC has jurisdiction in this area.").

4 *See, e.g., AT&T Household Reach to Be Issue in MediaOne Merger Review,* Communications Daily (May 10, 1999).

5 *Id.* (Citing AT&T's reassurances to financial analysts).

6 Description of Transaction at 4.

Commission embraced the AT&T/TCI merger because it viewed the public interest calculus as easy in that case: great benefits from the long-sought emergence of a new, formidable competitor to incumbent local exchange carriers, and no horizontal effects or merger-specific harm. The Commission found "that the merger of AT&T and TCI is likely to result in benefits for consumers, including a local telephony alternative . . . without creating competitive harm with respect to other services."[7]

The merger now before the Commission is not about bringing new benefits to consumers; it is about one important step in the massive restructuring—or the "RBOC-ization"[8]—of the cable industry, the aggressive effort to extend cable's closed model into a new generation of cable services, and the resulting implications for consumers. This AT&T/MediaOne deal crystallizes the cable world trend: the few remaining big players are consolidating their control over centralized clusters of cable "first mile" loops to consumers, while also banding more tightly together in interlocking relationships to dictate how consumers may obtain advanced services—the coming integration of video, data, and voice—through those cable facilities.

This time around the public interest calculus of the AT&T-TCI deal has been turned on its head. Both AT&T and MediaOne already have developed and pursued aggressive

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7 *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3160 (1999) ("*AT&T/TCI Merger Order*").

8 David Lieberman, *AT&T Bargains For Cable System Swap*, USA Today, June 18, 1999 at B1 (quoting AT&T's President for Broadband Services Leo J. Hindery, Jr.) ("Lieberman Article").

telephony business plans before this deal. Indeed, this merger offers no public interest benefit that the parties haven't already promised.

What this merger does offer, however, is the means for a newly "RBOC-icized" cable industry reinforced by interlocking ownership relationships to: (1) prevent Internet-based challenge to cable's core video offerings; (2) leverage its control over essential video facilities into broadband Internet access services; (3) extend its control over cable Internet access services into broadband cable Internet content; and (4) seek to establish itself as the "electronic national gateway" for the full and growing range of cable communications services.

To avoid such detrimental results for consumers, the Commission can act to ensure that broadband develops into a communications path that is as accessible and diverse as narrowband. Just as the Commission has often acted to maintain the openness of other last-mile infrastructure, here too it should adopt open cable Internet access as a competitive safeguard—a check against cable's extension of market power over facilities that were first secured through government protection and now, in their broadband form, are being leveraged into cable Internet markets. Affording high-speed Internet subscribers with an effective means to obtain the full range of data, voice and video services available in the marketplace, regardless of the transmission facility used, is a sound and vital policy—both because of the immediate benefit for consumers and because of its longer-range spur to broadband investment and deployment. Here, the Commission need do no more than establish an obligation on the merged entity to provide non-affiliated ISPs connectivity to the cable platform on rates, terms and conditions equal to those accorded to affiliated service providers.

AT&T/MediaOne Is Not AT&T/TCI

The parties to this transaction would have the Commission believe that, at its heart, this is a merger about local telephone competition. But simply invoking the mantra used in the TCI acquisition does not make it so.

There, the Commission found that "[a]lthough some cable operators are successfully entering local exchange markets today, we do not believe TCI presently should be considered a 'most significant market participant' for purposes of our competitive analysis."[9] Here, MediaOne is already committed to, and indeed has been the cable industry leader in, cable telephony. In fact, MediaOne has already been seeking "to upgrade or rebuild substantially all of its systems nationwide by the end of the year 2000."[10] Thus, unlike TCI, MediaOne is already a "most significant market participant" in developing local telephony competition.

And, having already acquired TCI, AT&T doesn't need *another* mega-merger to gain entry into the local exchange business. AT&T already is in. AT&T already has committed. AT&T has shown that it can enter joint ventures with—and need not acquire—other cable operators to pursue the nationwide brand in local telephony it desires.[11] Promoting local

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9 *AT&T/TCI Merger Order* at 3185.

10 Comments of MediaOne, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CC Docket No. 99-230 at 15-16 (Aug. 6, 1999).

11 AT&T has announced such joint venture agreements with Time Warner, Comcast, and other cable operators. *See, e.g.*, *AT&T and Comcast Agree to Swap Cable Systems*, News Release, <http://www.att.com/press/item/01193,467,00.html> (May 4, 1999); *AT&T and Time Warner Form Strategic Relationship to Offer Cable Telephony*, News Release, <http://www.att.com/press/item/0,1193,330,00.html> (Feb. 1, 1999).

exchange competition does not mean that it must be AT&T, and only AT&T, that is to be the cable telephony provider in every local market or—or even two-thirds of all such markets.[12]

Rather than a telephone merger, the proposed consolidation of the AT&T and MediaOne cable systems and programming interests is better understood as an enormous horizontal and vertical consolidation in broadband video facilities and in video and Internet programming. This consolidation is part of what's seen as (together with the rest of the ongoing consolidation in cable ownership) "the RBOC-ization of cable"[13]—namely, the emergence of a limited number of geographically distinct local cable monopolies. This strikingly apt metaphor highlights the structural competitive dangers being built into the cable architecture—danger that the FCC, just this month, underscored for the Court of Appeals in defending the necessity of its national cap on cable ownership.[14]

Further, AT&T/MediaOne's contemplated nationwide grip on the key broadband pipeline to the home also poses a fundamental threat to an open and competitive Internet. The threat is magnified not just by the combination of AT&T and MediaOne facilities, not just by the added block of cable facilities interlocked through @Home's ownership and contractual relationships, but also by the common ownership of the cable industry's two proprietary Internet service providers—@Home and RoadRunner—that have functioned across the nation as the exclusive valves into, and out of, that pipeline.

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[12] Moreover, AT&T's MediaOne application provides no service commitments, no implementation schedule, and no investment plan to back up its telephony promises.

[13] Lieberman Article.

[14] *See* Initial Brief for Appellees [FCC] at 26-41, *Time Warner Entertainment Co., v. FCC*, No. 94-1035 (D.C. Cir. filed Aug. 13, 1999).

So, no, this is not *AT&T/TCI redux*. AT&T has demonstrated no significant public interest benefits from this merger that could not be achieved through other business arrangements. The harms posed in the video and data markets, on the other hand, are substantial and merger-specific.[15] Still, viewing this merger only in its piece parts provides only a limited vista—and fails to capture the full breadth of this transaction's significance.

The Bigger Picture: Thwarting Video Competition And <u>Leveraging The Future Of Broadband Communications</u>

While the Commission will be well-served by several of the full market-by-market analyses of the merger submitted in the docket, AOL urges the agency to assess the impact of this consolidation not just by its component parts—but also by stepping back to appreciate its aggregate effects. Even in establishing its *Bell Atlantic/NYNEX* market-by-market test, the FCC still requires applicants to "demonstrat[e] . . . that the proposed transaction is in the public interest"[16] and "to prove that, on balance, the merger will enhance and promote, rather than eliminate or retard, competition."[17] What, then, "on balance," are the cumulative effects this merger would produce for competition and consumers?

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[15] Indeed, as consumer groups have documented, AT&T ignored such FCC formalities as affidavits, documentation of facts, showings of rule compliance and requests for necessary waivers. The parties have failed even to bother with making the showings that the cable horizontal cap and wireless ownership rules require for the extraordinary ownership interests this merger would bring together. *See, e.g., Motion to Dismiss of the Media Access Project*, in CS Docket 99-251 (August 17, 1999).

[16] *Application of NYNEX Corporation, Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, 20001 (Aug. 14, 1997) *("Bell Atlantic/NYNEX Order")* ("[A]pplicants bear the burden of demonstrating that the transaction is in the public interest"); *AT&T/TCI Order* at ¶ 15 ("The Applicants bear the burden of proving that the transaction serves the public interest.").

[17] *Bell Atlantic/NYNEX Order* at 19988.

We submit that, to answer this question, the Commission should examine certain critical "mega-effects" of the proposed AT&T/MediaOne combination. First, the FCC should consider how this merger's video and Internet access components together would serve to keep consumers from obtaining access to Internet-delivered video programming—and thereby shield cable from competition in the video marketplace. Second, the agency should reflect upon how this merger would enable cable to use its RBOC-like structure to limit consumer access to the increasingly integrated video/voice/data communications services offered over the broadband pipe controlled by cable. And finally, the agency should recognize how these two "mega-effects" of the merger together reinforce cable's ability to deny consumers the right to choose: (a) between a competitive video-enhanced Internet service rather than a traditional cable service; (b) among competing cable Internet services; and (c) among competing "bundles" of video/data/voice services that contain multichannel video.

As to the first issue, this merger would significantly enhance AT&T's ability to restrict, or even cut off, consumers from gaining access to Internet-based competition to cable's core market—multichannel video delivery. First, it would dramatically expand the scope of AT&T's control over the cable broadband pipe nationwide, affording AT&T a stake in facilities passing virtually two out of every three U.S. homes reached by cable.[18] This control of broadband transport facilities would be exacerbated by AT&T's joint ownership of

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[18] AT&T, through its recent acquisition of TCI, already holds attributable interests in systems passing over 35 million homes—well exceeding the current cap for cable horizontal ownership. *See Description of the Transaction.* The proposed merger between AT&T and MediaOne would dramatically add to these holdings: if approved, AT&T would gain the ability to control or otherwise influence cable systems serving approximately 23.784 million additional homes, for an apparent total of nearly 59 million homes passed or 62% of the homes passed nationwide. *See id.* at App. B.

@Home and Road Runner, the two major cable ISPs that together serve a reported 98% of all cable Internet subscribers—though of course each maintains exclusive rights within its respective territories.[19]

This combination would remove the possibility that any @Home/RoadRunner "competition" would spur at least one of the cable ISPs to lift the 10-minute cap that *both* currently impose on non-affiliated providers of "streaming video."[20] As AT&T has admitted, by maintaining its broadband facilities as a closed network, AT&T can enforce this anticompetitive "restriction which we imposed on @Home so that we were the determiner of how stream[ing] video worked in our world."[21] Thus, this merger would serve to defend cable's core video market position by blocking consumers' access to video programming delivered via the Internet.

The second "mega-effect" of this proposed merger is of even broader potential consequence. With this merger, AT&T would take an enormous next step toward its ability to deny consumers a choice among competing providers of integrated voice/video/data

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19 *See generally The Battle for the Last Mile,* The Economist, May 1, 1999 at 59.

20 *See, e.g., Prospectus/Proxy Statement of @Home Network*, at 144 (Apr. 27, 1999) ("[A] principal cable partner has the right to block access to content that [. . .] includes streaming video segments of more than ten minutes in duration . . ."); *PC-TV Convergence Driving Streaming Industry Growth,* Warren's Cable Regulation Monitor, Vol. 7, Issue 9 (Mar. 1, 1999) ("One irony of streaming video over Internet is that while cable broadband networks provide fat pipe necessary for quality streaming, major cable online providers @Home and Road Runner both limit consumers to 10-min. streaming segments").

21 Testimony of Leo Hindery, President, TCI, Inc., *Telecom Mergers: En Banc Hearing on Telecom Mergers To Discuss Recent Consolidation Activities in the Telecommunications Industry, Focusing on Three of the Proposed Mergers Before the Federal Communications Commission* (Oct. 22, 1998).

offerings—a communications marketplace that integrates, and transcends, an array of communications services and markets previously viewed as distinct.

"Whether we're talking about the transmission of video, voice or data," AT&T has plainly stated, "we're moving towards a single information opportunity that people would turn to for the variety of services that have always been offered separately."[22] Combining "[m]essaging, movies, e-mail and e-commerce" with the ability to "[d]ownload[ ] from the Internet at speeds up to a hundred times faster than modems commonly in use today," this "confluence of the digital age . . . and the Internet era" looks to "eras[e] the boundaries between applications and devices."[23] And AT&T looks to become the nationwide electronic gateway through which consumers would come to access this increasingly integrated video/voice/data service.

As stated at the time of the TCI merger, the AT&T/TCI plan is for consumers to "have to go through us."[24] Building on its control over critical last mile broadband facilities, AT&T would deny cable consumers the ability to choose among competing electronic program guides ("EPGs") or browsers for these new integrated services. And through combined interests in both @Home and Road Runner, AT&T would derive added leverage over the content,

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22 *See* Remarks by C. Michael Armstrong, *Cable Ready: Convergence and the Communications Revolution,* 1999 National Cable Television Association Convention, June 14, 1999 <http://www.att.com/speeches/99/990614_cma.html> (visited Aug. 20, 1999) (as delivered).

23 *Id.*

24 Ken Auletta, *How the AT&T Deal Will Help John Malone Get Into Your House,* The New Yorker, July 13, 1998, at 25.

commerce, and new applications that broadband should make possible—thereby shaping the terms under which consumers may utilize to advanced communication services.

At every key link in the broadband distribution chain for video/voice/data services, AT&T would possess the ability and incentive to limit consumer choice. Whether through its exclusive control of the EPG or browser that serve as consumers' interface;[25] its integration of favored Microsoft operating systems in set-top boxes;[26] its control of the cable broadband pipe itself;[27] its exclusive dealing with its own proprietary cable ISPs; [28] or the required use of its own "backbone" long distance facilities;[29] AT&T could block or choke off consumers' ability to choose among the access, Internet services, and integrated services of their choice. Eliminating consumer choice will diminish innovation, increase prices, and chill consumer demand, thereby slowing the roll-out of integrated service.

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25 *See, e.g., Comments of the National Cable Television Association,* CS Docket No. 97-80 (May 16, 1997).

26 *See, e.g.*, Jim Davis, *Microsoft deal prompts hardware questions,* CNET News.com, May 10, 1999 <http://www.news.com/News/Item/0,4,36287,00.html> (noting that the "$5 billion investment by Microsoft in AT&T [ensures] that at least 7.5 million cable set-tops would use Microsoft's Windows CE software").

27 As noted, AT&T/MediaOne would control the cable broadband transport into the homes of almost two-thirds of all potential customers. *See* n.17, *supra*.

28 AT&T and MediaOne each hold a large interest in one of two major cable broadband Internet service providers, @Home and Road Runner, respectively. Each of these ISPs demand to be a given MSO's exclusive cable ISP. *See, e.g., At Home Corp. SEC Form 424B4*, filed May 20, 1999, at 5-8; *Road Runner website* at www.rr.com/rdrun/company/main_profile.html. *See generally* n.13, *supra*, and accompanying text.

29 *See, e.g.*, @Home Press Release, *@Home Network to Create Internet Backbone with Initial Capacity for 5 Million Broadband Users,* Jan. 6, 1999 <http://www.home.net/news/pr_990105_01.html> ("@Home Network . . . today announced a long-term agreement with

Is This What Broadband Was Meant To Be?

By strengthening cable's grip on the video marketplace, this merger would undermine Congress and the Commission's efforts to spur greater video competition and solve the long-standing "cable problem."[30] And the familiar shadow of higher prices, lower quality, and lost choice would fall as well over an Internet market that has thrived on intense competition in price, performance, service, innovation, and content—and thereby generated tremendous investment to continue the growth cycle. Across video, data, and new integrated video/voice/data markets, this deal would reduce actual competition, forfeit potential competition, sacrifice consumer choice, undermine broadband investment, stifle innovation, limit diversity, and deny consumers better services at lower prices.

This is not what the deployment of broadband, nor the advent of "one-stop shopping" for communications services, was supposed to mean for consumers.

An Open Access Safeguard Offers A Critical Competitive Check

It is not too late for the Commission to tackle the key obstacle to its competitive vision for broadband deployment and one-stop shopping across an expanding array of communications services. Not yet. Given AT&T's determined pursuit of end-to-end control of the key broadband pipe for delivery of voice, video, and data and the further entrenchment of its ability to deny consumers an Internet alternative to traditional video services, it is

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(...Continued)
AT&T to create a nationwide Internet Protocol (IP) network utilizing AT&T's Dense Wave Division Multiplexing (DWDM) backbone").

30 *See, e.g.*, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24287 (1998) ("We find that cable television continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a dominant position in the MVPD marketplace").

inevitable that policymakers will at some point be compelled to address AT&T's broadband gatekeeper role. The real question is when—and how.

The Commission surely could choose to continue to "vigilantly monitor" the situation for some years. Then, long after cable has begun building its "electronic national gateway," perhaps a wrenching, court-ordered restructuring of the communications industry might be the answer. The alternative might be a massive re-regulation that swamps Congress, the FCC, the industry, and even consumers in its wake. In the interim, consumer choice would be diminished and broadband would fail to fulfill its potential. Instead, the Commission could take action now to lay out a pro-competitive access policy that responds to "[c]onsumers—the people who actually drive a market—[who] deserve and will demand an open platform."[31]

The key, after all, is the ability to use "first mile" pipeline control to deny consumers direct access to, and thus a real choice among, the content and services offered by independent providers. Open access would provide a targeted and narrow fix to this problem. AT&T simply would not be allowed to control consumers' ability to choose service providers other than those AT&T itself has chosen for them. This would create an environment where independent, competitive service providers will have access to the broadband "first mile" controlled by AT&T—the pipe into consumers' homes—in order to provide a full, expanding range of voice, video, and data services requested by consumers. The ability to stifle Internet-based video competition and to restrict access to providers of broadband content, commerce and other new applications thus would be directly diminished.

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[31] Chairman FCBA Remarks.

Moreover, an open access requirement would provide choice and competition of another kind as well. It would allow ISPs to choose between the first-mile facilities of telephone and cable operators based on their relative price, performance, and features. This would spur the loop-to-loop, facilities-based competition contemplated by the Telecommunications Act of 1996, thereby offering consumers more widespread availability of Internet access; increasing affordability due to the downward pressures on prices; and a menu of service options varying in price, speed, reliability, content, and customer service.

The essence of an open access policy is thus competition, not regulation. Open access would create a competitive check on conduct—a far more preferable option than a behavioral check requiring constant step-by-step scrutiny of a cable operator's dealings with every provider of content or new applications to make sure that the company's conduct doesn't skew its network in favor of affiliated service providers.

This approach does not require imposition of legacy common carrier regulation. The model for such early, targeted safeguarding is drawn directly from the existing cable regulatory framework, but its policy foundation cuts across all FCC regulation. **Any cable television system operator that provides any Internet service provider access to its broadband cable facilities would have to provide a requesting ISP comparable access to its facilities on rates, terms, and conditions equal to those under which it provides access to its affiliate or to any other person.**

Cable op must allow all requesting ISPs to interconnect

Commission policy already reflects the fundamental concern that cable operators' ability and incentive to exercise bottleneck control over their distribution facilities may impede both consumer choice and the development of competitive markets. Cable broadband deserves no less a competitive check.

Bringing Cable Internet Access In Step With FCC Competition Policy

Adoption of an open access policy would be fully in step with the FCC's competition policy. The "open platforms" principle our proposal advances reflects the approach outlined, with great prescience, by Vice President Gore in January 1994. The Vice President articulated a "National Information Infrastructure" policy predicated upon open network access for all information providers.[32] Indeed, the Administration later specifically announced the U.S. policy goal of "ensuring that online service providers can reach end-users on reasonable and nondiscriminatory terms and conditions."[33]

The Commission has also firmly embraced an "open platforms" policy as central to its overarching competition agenda—at least for *one* of the two incumbent local facilities-based providers of advanced services. Yet according to the FCC's recent amicus brief on the subject, "[f]unctionally, Internet access provided through cable modems is no different from the broadband capability provided over other facilities such as the wireline telephone network. . . . "[34] As this brief further explained: "If the same type of Internet access service is offered over cable systems as well as telephone networks, it is not readily apparent why the classification of the service should vary with the facilities used to provide the service."[35]

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32 *See generally*, *Vice President Al Gore's Speech before the ITV*, National Information Infrastructure, Buenos Aires (March 21, 1994).

33 The White House, *A Framework for Global Electronic Commerce*, July 1, 1997, at 11 ("*Global Electronic Commerce*").

34 *Amicus Curiae* Brief of the Federal Communications Commission, *AT&T, et al. v. City of Portland,* CV No. 99-35609, at 25 (9th Cir. filed Aug. 16, 1999).

35 *Id.*

These FCC observations reflect the essence of the Commission's oft-repeated view that it must break free of outdated regulatory pigeonholes if it is to adapt its rules to a world of converging technologies, services and industries. Quite to the contrary, however, review of Commission pronouncements on the issue of cable Internet access—juxtaposed against the policy pillars of the Commission's otherwise prevailing agenda for competition in advanced services—reveal FCC policies squarely at war with themselves:

- **On Consumer Choice**: The FCC has long emphasized: that "consumers must ultimately have the right to choose providers" as a "fundamental right;"[36] the importance of "broadband pipes [being] used to expand, not restrict, consumer choice;"[37] and how the consumer benefits from one-stop shopping arise "only when all providers have a fair and realistic opportunity to offer each service" that goes into the bundle.[38]

  Why then, "if a cable company were to monopolize the access market," is the "loss of consumer choice... probably overstated"?[39] And why is it not the provider of choice but rather "the ability to access the Internet content. . .of his or her choice" that matters?[40]

- **On Openness**: The FCC has recognized that a key "characteristic of the Internet that [has] contributed to its growth [is] its . . . openness"[41] and that broadband consumers will also "want and expect choice [and] openness."[42]

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36 *Hearings Before the Senate Judiciary Subcomm. on Antitrust, Business Rights and Competition* (separate statement of William Kennard) (Mar. 4, 1998).

37 *See Report to Congress on the Deployment of Advanced Services* (separate statement of William Kennard) (Jan. 28, 1999).

38 *Hearings Before the Senate Judiciary Subcomm. on Antitrust, Business Rights and Competition, supra.*

39 Remarks by FCC Commissioner Michael Powell Before the Federal Communications Bar Association, Chicago Chapter, Chicago, IL (June 15, 1999).

40 *Testimony Before the Senate Judiciary Subcommittee on Antitrust, Business Rights* (March 4, 1998).

41 *See Report to Congress on the Deployment of Advanced Services* (separate statement of Susan Ness) (Jan. 28, 1999).

42 Chairman FCBA Remarks.

Why then, as to cable Internet access, is "it not clear that the perceived benefits of mandating open access outweigh their apparent economic and technological costs"[43] and that open access would not "chill investment in cable modem service"?[44]

- **On Merger Review:** The Commission has found the SBC/Ameritech proceeding and other ILEC mergers to be appropriate vehicles for establishing advanced services deployment policy.[45]

  Why then, "while these [cable Internet access] concerns are important," are they deemed "not unique or specific to [the AT&T/TCI] merger?"[46]

- **On "Unregulation" of the Internet**: The Commission has held to the fundamental distinction that "[w]e seek not to regulate the Internet, but rather to ensure that Internet services which rely on telecommunications transmission capacity, remain competitive, accessible, and devoid of entry barriers." [47]

  Why then would an open cable Internet access policy somehow be painted as "regulation of the Internet"?

The Commission need wait no longer to adopt a cable open access policy fully in step with the competitive advanced services agenda the FCC has otherwise held firm.

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43 *Id.*

44 *Letter from William Kennard to the Local and State Gov't Advisory Committee*, at 2 (Aug. 10, 1999).

45 *See, e.g., Pleading Cycle Established For Comments on Conditions Proposed by SBC Communications Inc. and Ameritech Corporation For Their Pending Applications to Transfer Control*, DA 99-1305, CC Docket No. 98-141 (rel. July 1, 1999) (proposing Internet-related conditions on the proposed merger); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, 18103, 18109-112 (1998) (requiring MCI to divest its Internet holdings).

46 *Citing Pro-Competitive Benefits to Consumers, Commission Approves AT&T-TCI Merger*, Report No. CS 99-2, 1999 WL 74135 (Feb. 17, 1999).

47 *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, 18103-104 (1998).

Conclusion

With this deal's consolidation of cable's control over consumer choice among traditional and advanced video and integrated video/voice/data services, the place and time to act is here and now. The Commission should proceed while the architecture for cable broadband is still under construction. To wait any longer would allow the fundamentally anti-consumer approach of the cable industry to take root in the Internet and spread its closed broadband facility model nationwide. Must consumers await an "MFJ for the 21st Century"?

Obliging AT&T to afford unaffiliated ISPs access on nondiscriminatory terms and conditions—so that they, in turn, may offer consumers a choice in broadband Internet access—would be a narrow, easy to administer, and effective remedy. It would safeguard, rather than regulate, the Internet and the new communications marketplace. The openness it would afford is critical to a world in which—as boundaries are erased between communication services and applications—we ensure that consumers likewise are truly afforded choice without bounds.

Respectfully submitted,

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