

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Applications for Consent to the)	MB Docket No. 02-70
Transfer of Control of Licenses)	
)	
Comcast Corporation and)	
AT&T Corp., Transferors,)	
To)	
AT&T Comcast Corporation,)	
Transferee)	

COMMENTS OF THE



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SUMMARY

ACA represents the interests of more than 930 independent cable companies serving about 7.5 million customers, predominantly in smaller markets and rural areas. ACA members share a vital interest in this proceeding due to the proposed concentration of digital distribution services and substantial programming assets.

The proposed merger will combine in one entity control of the essential digital programming distribution service for small systems – Headend-In-The-Sky, along with substantial satellite and terrestrially delivered programming. Access to these services is essential for smaller market cable systems to: (i) deliver diverse programming; (ii) deploy broadband services over cable; and (iii) compete with the two national DBS providers EchoStar and DirecTV, both of which will not distribute satellite programming to small cable operators. Therefore, the proposed merger threatens harm to three well-established public interests under the Commission’s jurisdiction:

- The preservation and promotion of program diversity.
- The rapid deployment of facilities-based broadband services.
- Maintaining viable local communications businesses that can respond to community needs and interests in smaller markets.

Section 310(d) obligates the Commission to scrutinize these public interest implications of the proposed merger to ensure that it will not cause public interest harm in smaller markets.

To conduct a full and fair public interest evaluation of the proposed merger, the Commission must obtain from Applicants satisfactory answers to four questions related to HITS and program access in smaller markets. These are:

- Will AT&T Comcast continue to make HITS services available to smaller market cable systems on fair and reasonable prices, terms, and conditions?
- Will AT&T Comcast provide smaller market cable systems access to affiliated satellite programming on fair and reasonable prices, terms, and conditions?
- Will AT&T Comcast distribute affiliated terrestrially delivered programming to smaller market cable systems on fair and reasonable prices, terms, and conditions?
- Will AT&T Comcast permit distribution of programming services currently withheld from small cable systems because of exclusive contracts?

ACA does not oppose the merger at this point. Moreover, ACA brings to this proceeding substantial respect and admiration for the Applicants' respective history, industry accomplishments, and management teams. However, a full and fair evaluation of the Application requires that the Applicants address the above questions in order that the Commission may determine whether the concentration of HITS distribution and programming in AT&T Comcast will cause public interest harms in smaller markets.

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I. Introduction

The American Cable Association submits these Comments on behalf of more than 930 independent cable companies located in smaller markets and rural areas. Based on the current record and the experiences of many ACA members, the proposed combination poses a substantial threat to the public interest by:

- Reducing program diversity in smaller markets.
- Reducing or eliminating broadband deployment in smaller markets.
- Weakening or eliminating many small, local communications businesses.

For ACA members and the markets they serve, the potential public interest harms arise from the proposed concentration in one entity of control over the essential digital

programming distribution service for small systems – Headend-In-The-Sky (“HITS”), along with substantial programming interests, both satellite and terrestrially delivered.

AT&T Comcast’s control over this combination of digital distribution and substantial programming interests will give the merged entity overwhelming leverage over smaller cable businesses. Without access to HITS and affiliated programming on fair and reasonable terms and conditions, many smaller market cable systems cannot remain viable in the face of intense DBS competition. If these business fail, smaller market consumers and businesses will lose the benefits of advanced cable and communications services delivered by local businesses.

Because of the potential threats to these important public interests, the Commission needs to examine the Applicants’ plans and commitments concerning HITS distribution and access to programming for smaller market cable operators. In Section III of these Comments, ACA asks four specific questions the Applicants should answer.

At this point, ACA does not oppose the proposed merger. To the contrary, ACA appreciates and respects each company’s respective history, industry achievements, and impressive management teams. At the same time, the transaction will concentrate in one entity control of services that are essential to program diversity and broadband deployment in smaller markets. A full and fair evaluation of the Application requires the Commission to assess whether the concentration of that control in AT&T Comcast will serve the public interest.

The American Cable Association. ACA represents 930 independent cable companies. Together, ACA members serve 7.5 million cable subscribers, primarily in

smaller markets and rural areas. ACA member systems are located in all 50 states, and in virtually every congressional district. ACA members range from family-run cable businesses serving a single town to multiple system operators that focus on smaller systems and smaller markets. About half of ACA's members serve less than 1,000 subscribers. All ACA members face the challenges of building, operating, and upgrading broadband networks in lower density markets. Many ACA members rely on AT&T-controlled HITS to deliver digital cable services. Nearly all ACA members carry core satellite programming services affiliated with AT&T or Comcast.

II. The Commission must ensure that the proposed merger will not cause substantial public interest harm in smaller markets.

A. Section 310(d) obligates the Commission to scrutinize the public interest implications of the proposed merger.

The Commission's authority to review, deny, or condition proposed transfers under Section 310(d) is well settled.¹ In recent orders, the Commission has thoroughly explained its four-part public interest analysis under Section 310(d).² These Comments focus on the third prong of that test:

Whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act and/or other related statutes, or would interfere with the objectives of the Communications Act and/or other related statutes.³

Under this prong, the Commission will evaluate threats to competition and a range of public interest issues encompassing "the goals, policies, and broad aims of the Communications Act."⁴ In the face of public interest harms, the Commission will reject an application unless the applicants prove that the public interest benefits outweigh the

¹ See 47 U.S.C. §§ 214(a), 310(d). See also *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, FCC 01-12, Memorandum Opinion and Order ("AOL Time Warner Order"), 2001 WL 55636, ¶¶ 1, 19 (rel. Jan. 22, 2001) (Section 301(d) requires the Commission to determine whether the Applicants have demonstrated that the public interest would be served by transferring control of license authorizations); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, FCC 00-202, Memorandum Opinion and Order ("AT&T-MediaOne Order"), 15 FCC Rcd 9816, ¶ 1 (2000); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, FCC 98-225, Memorandum Opinion and Order ("WorldCom-MCI Order"), 13 FCC Rcd 18025, ¶¶ 1, 8-10 (1998).

² AOL Time Warner Order at ¶ 20; AT&T-MediaOne Order at ¶ 9.

³ AOL Time Warner Order at ¶ 20.

⁴ AOL Time Warner Order at ¶ 22; WorldCom-MCI Order at ¶ 9.

potential harms.⁵

B. The proposed merger implicates fundamental goals and objectives of the Communications Act and Commission policy.

In the markets served by independent cable operators, the proposed merger implicates three fundamental goals and objectives of the Communications Act and Commission policy. These are:

- The preservation and promotion of program diversity.
- The rapid deployment of facilities-based broadband services.
- Maintaining a viable small cable sector that can respond to local community needs and interests in smaller markets.

As summarized below, the importance of these public interest objectives is well established. The Commission's authority to protect them in this proceeding should pose no legitimate controversy.

1. The public interest in promoting program diversity in smaller markets.

In evaluating the proposed combination, the Commission has ample authority to examine the potential impact on program diversity. As stated in the *AOL Time Warner Order*:

The Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices. It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."⁶

⁵ *AOL TW Order* at ¶ 1; *WorldCom-MCI Order* at ¶ 10.

⁶ *AOL Time Warner Order* ¶ 23, citing *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994)

Smaller market program diversity issues are at the core of ACA's concerns in this proceeding.

A critical source of diverse programming for smaller market cable operators and consumers is AT&T-owned HITS. Through digital compression technology and solutions designed for smaller headends, HITS has enabled an increasing number of smaller systems to substantially expand service offerings, providing smaller market consumers with access to much more diverse program offerings. Similarly, programmers affiliated with either AT&T or Comcast provide several core satellite services for smaller systems. These factors will give AT&T Comcast tremendous influence over the ability of smaller systems to deliver diverse programming. The overarching public interest question then becomes: How will AT&T Comcast wield this influence?

2. The public interest in promoting the delivery of broadband services in smaller markets and rural areas.

Since at least 1996, a key element of the Communications Act and Commission policy has been the rapid development of advanced services in smaller markets and rural areas.⁷ ACA member companies have responded and are leading the industry in delivering broadband services to smaller markets. The Commission has received substantial data on ACA members' broadband deployment in response to the *High-*

(quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

⁷ See, e.g., Telecommunications Act of 1996 § 706, Advanced Telecommunications Incentives; *Inquiry Concerning 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, Second Report*, CC Docket No. 98-146, FCC 00-290, 15 FCC Rcd

*Speed Access NOI.*⁸ A recent report by *Independent Cable News* describes continuing progress by smaller systems.⁹

To the credit of TCI and its successor AT&T, a key factor in this success has been the ability to launch digital cable services via HITS. Digital cable via HITS is providing the technological and financial foundation for small systems to meet consumer demand for more programming choices, to respond to DBS competition, and to generate revenues sufficient to upgrade the systems and provide cable modem service. For most ACA members, offering digital cable services via HITS goes hand in hand with launching cable modem service.

Without continued access to HITS services on fair and reasonable prices, terms, and conditions, the delivery of broadband services to many smaller market consumers and businesses is at risk.

20913 (2000).

⁸ *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and other Facilities*, GN 00-185, 15 FCC Rcd 19287 (2000), Comments of American Cable Association ("ACA") (filed Dec. 1, 2000) and Reply Comments of ACA (filed Jan. 10, 2001).

⁹ *Smaller Operators' Evaluations*, *Independent Cable News*, Dec. 2001 (reporting on the growth of high-speed data services provided by smaller cable operators).

3. The public interest in maintaining viable local communications businesses.

Congress and the Commission have long recognized the public interest in maintaining a viable independent cable sector – small communications businesses that can respond to community needs and interests in smaller markets. Through family-owned, small town cable providers and small market MSOs, millions of rural subscribers receive the benefits of a multiplicity of broadcast and satellite programming and, increasingly, advanced services like cable modem service. Moreover, independent cable businesses epitomize the principles of localism. Most smaller cable companies are operated by businesspeople that are directly responsive to local cable-related needs and interests. To protect this public interest, Congress and the Commission have repeatedly acted to alleviate undue regulatory burdens that threaten the viability of this sector.¹⁰ Similarly, and to their credit, companies like AOL and Time Warner have also addressed smaller market public interest issues in the context of merger proceedings.¹¹

By combining in one entity HITS distribution and substantial affiliated programming assets, AT&T Comcast will ultimately have considerable leverage over many smaller cable companies.

III. The Commission must obtain answers to key questions concerning the Applicants' plans and commitments for protecting the public interest in smaller markets.

¹⁰ See, e.g., 47 USC § 543(i) and (m); *Small System Order*, 10 FCC Rcd at 7401-7402 and 7420; *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992, Leased Commercial Access, Second Report and Order and Second Order on Reconsideration*, 12 FCC Rcd 5267 at 5331-5332, 5333 (1997) (small system leased access rules).

¹¹ *AOL Time Warner Order* at ¶¶ 101-103 (acknowledging and resolving small cable public interest concerns).

In light of the potential harms to well-established public interests within the Commission's jurisdiction, the review of the Application must include an assessment of the Applicants' plans and commitments related to those public interests. To assist in this evaluation, ACA asks the Commission to seek answers to four questions set out below, all of which relate to access to programming by smaller market cable operators and consumers.

A. Will AT&T Comcast continue to make HITS services available to smaller market cable systems on fair and reasonable prices, terms, and conditions?

AT&T Comcast will control small cable's essential link to digital television – Headend-in-the-Sky. Initially developed by TCI as a solution for cost-effective capacity expansion for smaller systems, HITS has become the dominant provider of digital programming solutions to smaller market cable systems.¹² HITS enables smaller systems to deliver up to 12 digital programming services on one 6 MHz channel, greatly expanding channel capacity without a full-scale system upgrade.¹³ HITS has become an essential service for small systems as they contend with intense competition from DBS.¹⁴

More than 43% of independent cable systems have launched digital services and

¹² According to the HITS website, its platform is used by over 2,000 smaller cable systems in the United States. See http://www.hits.com/hits_in_the_news.html.

¹³ http://www.hits.com/hits_why_faq_ben01.html.

¹⁴ Craig Kuhl, *Quick Take from HITS Boosts Small Op Hopes*, Broadband Week, Jan. 21, 2002 at http://www.broadbandweek.com/news/020128/020128_cable_small.html (quoting independent cable operators that HITS is the only means by which smaller cable companies can compete with DBS).

nearly all of these systems use HITS services.¹⁵ HITS is well aware of its importance to the small cable sector. As the HITS website states:

[HITS] give[s] small cable systems an economical way to increase their program offering to subscribers without the capital cost of buying and building a new digital headend...making it possible to compete head-to-head with the Direct Broadcast Satellite Services.”¹⁶

In short, HITS is more than just a business unit of the Applicants. It has become an essential digital distribution service for smaller market cable operators and their customers.

Access to HITS on fair and reasonable prices, terms, and conditions is fundamental to the ability of smaller systems to deliver diverse digital programming to smaller market consumers and to compete with the two national DBS companies. The Applicants should articulate their plans for protecting the public interest in this area.

B. Will AT&T Comcast provide smaller market cable systems access to affiliated satellite programming on nondiscriminatory prices, terms, and conditions?

Comcast and AT&T have attributable interests in several important national programming networks.¹⁷ As ACA has explained in the program access proceeding, access to cable-affiliated programming is essential for the continued viability of smaller systems.¹⁸ If cable-affiliated programmers were to withhold programming from small

¹⁵ *Smaller Operators' Evaluations*, Independent Cable News (Dec. 2001).

¹⁶ http://www.hits.com/news_hits_2_home01.html.

¹⁷ *Public Interest Statement* at 15 and 25.

¹⁸ *In the Matter of: Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, CS Docket No. 01-290 (“Section 628(c)(5) Proceeding”), Comments of ACA (filed December 3, 2001) at 4-11; and Reply Comments of

cable operators, those cable operators and their subscribers would lose between 30% and 42% of programming on basic or expanded basic tiers.¹⁹ The impact on program diversity is manifest.

Both Comcast and AT&T advocate the unqualified sunset of the program access regulations.²⁰ ACA agrees that the arguments in support of a sunset have merit when limited to major national competitors like EchoStar and DirecTV.²¹ At the same time, these arguments fail to address the program diversity issues of smaller cable systems and their subscribers.²²

Outside of the program access proceeding, it is necessary and proper for the Applicants to address the public interest in smaller market programming diversity in the context of this merger. A commitment to compliance with program access regulations alone does not satisfy the Commission's public interest inquiry.²³ As a result of the leverage AT&T Comcast will have over smaller cable operators because of the aggregation of HITS distribution and programming assets, and because the merged company will assume the preeminent leadership role in the industry, the Applicants should go further. They should address with some specificity how they will support the public interest in access to affiliated satellite programming by smaller market cable systems and consumers.

ACA (filed January 7, 2002) at 2-3.

¹⁹ *Section 628(c)(5) Proceeding*, Comments of ACA at 11.

²⁰ *Section 628(c)(5) Proceeding*, Comments of Comcast Corporation (filed December 3, 2001) at 4; and Comments of AT&T Corp. (filed December 3, 2001) at 2.

²¹ *Section 628(c)(5) Proceeding*, Reply Comments of ACA at 6-7.

²² *Section 628(c)(5) Proceeding*, Reply Comments of ACA at 4-6.

C. Will AT&T Comcast distribute affiliated terrestrially delivered programming to smaller market cable systems on fair and reasonable prices, terms, and conditions?

The merged entity will control a significant amount of regional programming. AT&T Broadband owns attributable interests in Fox Sports New England, New England Cable News, and Pittsburgh Cable News Channel. Comcast owns attributable interests in The Comcast Network, Comcast SportsNet, Comcast SportsNet-Mid Atlantic, and Comcast Sports Southeast.²⁴ As indicated in the *Public Interest Statement*:

Comcast is widely recognized as an industry leader in the development of successful, high-quality programming geared to regional and local markets.²⁵

Moreover, one of the claimed benefits of the merger is the ability to leverage Comcast's expertise in regional programming and develop similar regional sports and news services in current AT&T clusters.²⁶ Nearly all of these services are terrestrially delivered and generally exempt from the program access regulations.

Several cases have dealt with complaints against Comcast for declining access to its terrestrially delivered programming.²⁷ When Comcast squares off against national DBS competitors like EchoStar and DirecTV, the policy and economic arguments

²³ *AOL Time Warner Order* at ¶ 22; *WorldCom-MCI Order* at ¶ 9.

²⁴ *Public Interest Statement* at 14-15 and 25.

²⁵ *Id.* at 4.

²⁶ *Id.* at 44.

²⁷ *DirecTV, Inc. v. Comcast Corporation*, 15 FCC Rcd 22802 (2000), *aff'd*, *EchoStar Communications Corporation v. Comcast Corporation*, 14 FCC Rcd 2089 (1999); *DirecTV, Inc. v. Comcast Corporation*, 13 FCC Rcd 21822 (1998), *appeal pending sub nom. EchoStar Communications Corporation v. FCC*, No. 01-1032 (D.C. Cir.).

²⁸ See *Section 628(c)(5) Proceeding*, Comments of Comcast Corporation at 9-13.

supporting exclusive terrestrially delivered programming have merit.²⁸ EchoStar and DirecTV have the wherewithal to develop or purchase their own programming. Not so for smaller cable companies.

For the small cable sector, the program diversity concerns discussed above apply with equal force to terrestrially delivered programming. By definition, smaller cable companies are not developers or purchasers of unique programming. They are purely local or regional distributors of programming owned by others.

This fundamental distinction between the Applicants' principal competitors and smaller market cable operators triggers the public interest in program diversity. When Comcast declines to provide EchoStar access to Comcast SportsNet, EchoStar has an incentive, and the means, to develop its own exclusive programming. When Comcast declines to provide a small cable system access to Comcast SportsNet, the small system and its customers have no genuine alternative. Programming withheld because of exclusivity is programming lost for smaller market cable systems and their customers.

Put another way, the corner grocery cannot support house brands. And there are many "corner grocery" cable systems remaining. More than half of ACA's members serve less than 1,000 subscribers.

As a result of the leverage AT&T Comcast will have over smaller cable operators because of their aggregation of HITS distribution and programming assets, the Applicants should address how they will support the public interest by providing access to terrestrially delivered programming to smaller market cable systems and consumers.

D. Will AT&T Comcast permit distribution to smaller market cable systems of programming currently withheld under exclusive contracts?

As described in ACA's Comments in the *Section 628(c)(5) Proceeding*, ACA members report that they cannot obtain access to certain programming, reportedly due to exclusive contracts with AT&T.²⁹ As a result, no ACA member can carry TVLand in digital format.

ACA recognizes that Applicants may have legitimate competitive and business reasons in differentiating their program offerings from those of EchoStar or DirecTV. But ACA has heard no supportable rationale for why the largest cable operator should prevent the smallest cable operators from carrying services like digital TVLand.

By having access to digital TVLand, small systems can free an additional 6 MHz channel for a variety of uses – analog programming, multiple channels of digital programming, cable modem service, etc. Any of these results would advance the public interest in program diversity and the deployment of advanced services.

Beyond that, ACA is concerned that AT&T's exclusive digital TVLand contract is a bellwether of how AT&T Comcast might lock up an increasing amount of programming. The Applicants should address in this proceeding any plans to exclude small systems from carrying digital TVLand or other programming. Only then can the Commission evaluate how this conduct would square with important public interest concerns in smaller markets.

²⁹ *Section 628(c)(5) Proceeding*, Comments of ACA at 15-16.

IV. Conclusion

AT&T Comcast will control HITS digital distribution services as well as substantial satellite and terrestrially delivered programming. ACA members will have no choice but to transact with the combined company. AT&T Comcast will have ultimate leverage over many smaller cable businesses and smaller market consumers. The question then becomes: How will AT&T Comcast use this leverage?

ACA agrees that the AT&T Comcast merger presents many exciting possibilities for consumers, including for customers served by smaller cable businesses. At the same time, the power gained by AT&T Comcast over smaller market cable systems implicates important public interest concerns related to smaller markets that must be addressed in this proceeding.

ACA therefore requests the Commission require the parties to answer the key public interest questions raised in these Comments.

Respectfully submitted,

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