Before The
Federal Communications Commission
Washington, D.C. 20554

In re Applications for Consent to the Transfer of Control of Licenses	)	
Comcast Corporation and AT&T Corp., Transferors,	)	MB Dkt. 02-70
To	)	
AT&T Comcast Corporation, Transferee.	)	

REPLY COMMENTS OF THE BROADBAND SERVICE PROVIDERS ASSOCIATION

The Broadband Service Providers Association ("BSPA") hereby submits the following Reply Comments in connection with the applications of Comcast Corporation and AT&T Corporation to transfer control of certain licenses and authorizations they hold to an entity created by the merger of the two parties' assets.

Interest Of The BSPA

The BSPA was formed in October 2001. It consists of thirteen pioneering companies dedicated to building facilities-based broadband communication networks in communities across the country. These networks rely on state-of-the-art technology capable of delivering multiple communications services to residential and business customers, including digital cable television, voice telephony, and high-speed access to the Internet.[1]

[1] The members of the BSPA are: Altrio Communications, Carolina Broadband, ClearSource, Everest Connections, Gemini Networks, Grande Communications, Knology, RCN,

These companies compete directly with incumbent cable operators and local exchange carriers. They are the embodiment of the express federal goal of bringing facilities-based competition to the national markets for multichannel video, telephony, and data services.[2] That goal has been characterized as the "ultimate objective" of the federal government's broadband policy, the purpose of which is to bring lower prices, better service, and increased offerings to consumers in each of these areas.[3]

Ten years ago, none of the members of the BSPA existed in the form they do today. Their creation was in direct response to the Telecommunications Act of 1996 – which brought down barriers to competition among telephone, cable, and data service providers – and to advances in fiber optic and other technologies that made it possible to provide all of these services through "one wire." While previous efforts to bring competition to these markets often failed, the ability to "bundle" services for consumers provided broadband companies the ability to generate multiple revenue streams from their facilities. It also provided these companies with a foundation to build platforms capable of deploying highly advanced, "next generation" services that cannot be deployed on existing legacy telephone and cable networks.

Seren Innovations, Starpower Communications, Utilicom Networks, WideOpenWest, and WinFirst.

[2] *See, e.g.*, H.R. Rep. No. 102-862, at 2 (1992) (cable operators that do not face competition have undue market power) (conference report for Cable Television Consumer Protection and Competition Act of 1992); S. Rep. No. 104-230, at 1 (1996) (Congress seeks to accelerate the "deployment of advanced telecommunications services to all Americans [and] open[ ] all telecommunications markets to competition") (conference report for Telecommunications Act of 1996).

[3] *See* Remarks of M. Powell, Chairman, FCC, October 23, 2001; *see also* Annual Report, *Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Dkt No. 00-132, ¶ 9 (rel. Jan. 14, 2002) ("Eighth Annual Report").

Although this "new breed" of communications competitors has existed for only a few years, they have already made great strides in developing their networks and giving consumers meaningful choice in the purchase of communications services. By the end of last year, the members of the BSPA had:

- Invested more than $5 billion to build broadband systems in scores of communities nationwide.
- Completed facilities passing more than 4 million homes.
- Over 1 million customers, most of whom purchase multiple communications services.

Nevertheless, these companies face significant challenges. Principal among them are the barriers thrown up by the incumbents they face to slow competitive entry. Yet broadband service providers cannot be abandoned to these tactics. They – and government at all levels – must do everything possible to bring down those barriers so full and fair competition can flourish. Together they must ensure that broadband service providers:

- Have fair access to utility poles and conduits, in order to build their systems.
- Have fair access to residents of multiple dwelling units – often the first toehold for competitors entering a market.
- Have fair access to video programming that customers want to watch.
- Are not discriminated against in the application of franchising, tax and other laws.
- Are free of the predatory pricing tactics many incumbents have been using to slow their entry into new markets.

The proposed merger between AT&T and Comcast has significant implications in each of these areas. The outcome of these merger proceedings will therefore have a major impact on

whether the promise of the broadband industry is met, and the objectives of the federal government's broadband policy are achieved.

Reply Comments

The proposed merger between AT&T and Comcast would create a $72 billion cable industry colossus, with systems dominating 17 of the nation's 20 largest markets, serving nearly 22 million subscribers across the country, and with access to approximately 18 million more. The resulting company, to be called AT&T Comcast, would provide cable service to nearly one of every three cable subscribers nationwide, and its facilities would connect to over one fifth of all American homes.[4]

AT&T Comcast would also be the largest single provider of high-speed data services and Internet-based telephony to residential consumers. The company would own, either in whole or in part, numerous programming services important to consumers, and have enormous resources to develop more. It would, by far and away, have the greatest ongoing investment and activity level in the emerging market for interactive television services. The bargaining power of this behemoth would be staggering.

The merger parties are well known to the members of the BSPA, which in some cases have been competing with these incumbents for years. In fact, if the merger is consummated,

[4] The merger would also transfer to the merged entity AT&T's interest in the systems it now owns through joint ventures with other major multiple system owners (MSOs). These systems presently serve an additional 5 million subscribers in markets across the country. *See* Applications and Public Interest Statement, Description of Transactions, Public Interest Showing, and Related Demonstrations, *In re Applications for Consent to the Transfer of Control of Licenses, Comcast Corp. and AT&T Corp., Transferors, to AT&T Comcast Corp., Transferee*, Appendix 7 (filed Feb. 28, 2002) ("Applications and Public Interest Statement").

BSPA members will compete with the merged entity in more that 60 percent of their current franchise areas.

These prior experiences, moreover, have made clear to BSPA members that this merger should not be permitted unless significant controls are imposed on the resulting merged entity.

The Merger Would Have An Anticompetitive Impact On BSPA Members

Among all the comments filed with the Commission concerning the proposed merger, one overriding concern is expressed: that while the merger parties claim their combined resources would make possible the deployment of additional cable television and broadband services to consumers across the country, their resulting market power would provide them with the means to undermine competition as well.

The BSPA shares this view, and believes that its members are the most vulnerable to actions by the merged entity to achieve this goal. We also believe that consumers have the most to lose if the merged entity does so.

In fact, while many of the comments submitted in this proceeding – and, in fact, the application of the merger parties themselves – focus on current and anticipated competition between the merged entity and direct broadcast satellite ("DBS") providers, or incumbent local exchange carriers ("ILECs"), neither of these classes of competitor is capable of competing with the merged entity in each of its product markets. Nor, based on recent experience, does either impose any price restraint on the merged entity in any of them. Only facilities-based competitors, which offer consumers a full bundle of video, data and telephone services, do.

It is for this reason, the BSPA believes, that the merger parties have been so aggressive of late in their efforts to put broadband competitors out of business. To date, they have not

succeeded. Yet if the merger is consummated, the resulting entity would have such enormous market power, and such unparalleled leverage over programmers and other suppliers, that its ability to do so would be enhanced substantially.

To prevent this result, and ensure that the most viable form of competition in the broadband marketplace is allowed to evolve, this merger – and the transfer of these licenses – should be conditioned on binding commitments by the merger parties not to exercise their market power to choke off competition.

The areas in which these commitments should be made are dictated by both the methods the merger parties have used to restrain competition in the past, and the opportunities the merger would create for them to do so in the future. These areas include, at a minimum, the following:

- Denying access to key programming content, including crucial "next generation" offerings such as interactive and "video on demand" programming.
- Denying access to customers through exclusive or perpetual service contracts, and through actions that impede competitors' use of public rights of way.
- Engaging in discriminatory and/or predatory pricing activities intended to eliminate long-term competition.

A. Program Access Is Crucial

As Chairman Powell has recognized, "content is king" in the broadband world. Unless a competitor carries what subscribers want to watch, it cannot survive.

Comcast and AT&T today own numerous national and regional programming services that BSPA members need in order to compete. The merger parties have also announced their intention to use their combined resources to gain control over additional programming services.

The merger parties have also shown that they will use their control over programming as a sword against competitors, and to undermine efforts to enter the merged entity's markets.

While BSPA members today have a measure of protection from these tactics in the federal "program access" rules, those rules have significant limitations, and may expire this fall unless the Commission decides to extend them.

For example, Comcast today owns three regional sports networks: Comcast SportsNet, which is carried on Comcast systems in the Philadelphia market; Comcast SportsNet Mid Atlantic, which is carried on Comcast systems in the Washington and Baltimore markets; and Comcast Sports Southeast, which is carried on Comcast Systems in various markets in the Southeast. All three networks feature real time sporting events played by local professional and collegiate teams, as well as sports news and discussion shows. Comcast has exclusive rights to much of the programming carried on these networks.[5]

BSPA members must have equal access to these programming services in order to compete effectively. Many potential customers care deeply about sports, and will not subscribe to the service of any competitor that does not carry the sports programming they want to watch.[6] This fact has been borne out by BSPA member RCN: according to a survey it conducted, 40-58

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[5] *See* Applications and Public Interest Statement, at 14.

[6] Eighth Annual Report, ¶¶ 171-74; *see also Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, ¶ 183 (rel. Jan. 8, 2001) ("Seventh Annual Report"); *Impact of Sports Programming Costs on Cable Television Rates*, GAO/RCED-99-136, at 3 (June 1999).

percent of cable subscribers indicated that they would be less likely to subscribe to a cable system if it lacked local sports programming.[7]

Comcast, moreover, has previously shown that it is willing to use its control over this programming to suppress competition. For example, in the late 1990s when it was establishing Comcast SportsNet, it assiduously refused to allow RCN (or DirecTV or EchoStar) to carry that service on any of its systems in the Philadelphia area. The DBS providers both filed complaints against Comcast with the FCC, but because this programming service is not distributed by satellite, and is instead distributed by terrestrial means, neither was able to persuade the Commission to order Comcast to grant it access to this programming.[8] RCN was able to avoid this fate, but just barely – Comcast today allows RCN to carry the service on a short term basis only. Even that arrangement may change depending on the Commission's final action with respect to its program access rules.

The proposed merger could lead to an expansion of these tactics. It would, for example, provide an incentive for both Comcast and AT&T to discriminate in the sale of their programming not only to benefit their own systems, but those of their new partner as well. It would provide additional leverage to obtain exclusive access to programming owned by third parties, which the merged entity could use to pressure its competitors in multiple markets.

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[7] *Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 15 FCC Rcd 978, ¶ 184 n.650 (2000) ("Sixth Annual Report").

[8] The Cable Television Consumer Protection and Competition Act of 1992 forbids vertically integrated cable programming vendors from granting cable operators exclusive access to any "satellite delivered cable programming service." 47 U.S.C. § 528(d)(2). *See* Eighth Annual Report, ¶ 162.

Finally, the merger parties have expressed their intention to develop new programming services, which they could use to the same end. These services include both the traditional fare of cable television systems, and what is emerging as the "next generation" of broadband video services – including interactive television and video on demand offerings. More importantly, they have strongly implied they do not intend to share these new services with competitors. As stated in the merger parties' Applications, these new programming services will offer "potential customers a reason to sign up for Comcast's services, and . . . existing customers one more reason to continue to subscribe.[9]

To the extent such services were the sole source for regional sporting events and other highly popular programming, new entrants could be denied access to the ingredients that are most critical to their success as competitors.[10]

B. Barring Access To Consumers Impedes Entry

In order for a facilities-based competitor to succeed, it must have fair access to potential customers, and reasonable use of public rights of way. The merger parties have denied both to members of the BSPA, and the merger promises even more of the same.

A principal means used to do so has been to offer MDU owners financial and other inducements to sign long-term exclusive contracts before the competitor is ready to provide service – and thus cannot make any matching offers – and in some cases before MDU

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[9] Applications and Public Interest Statement, at 42, 44.

[10] An example of the "next generation" of programming services the merged entity will control is In Demand, which offers exclusive access to certain pay-per-view movies and events to digital cable subscribers. To the extent competitors could not carry this service, or had to pay discriminatory rates or accept unreasonable conditions to do so, they would be at a substantial competitive disadvantage in the marketplace.

owners even realize that competition is coming to their areas. Comcast in particular has been very aggressive in this regard. For example, in Charleston, South Carolina, Comcast has been dogged in preventing Knology from offering service in buildings where Comcast has "perpetual easements" to provide exclusive service, and equally determined in its efforts to convince other MDU owners to cancel their service with Knology. Another means used for this purpose is to delay "make ready" work to utility poles and underground conduits in order to accommodate competitors' facilities.

These tactics impose substantial financial burdens on BSPA members, and directly reduce the level of competition they are able to provide. They are plainly used to eliminate from the market the only competitor incumbents have that can provide consumers with a more complete range of communication services than they themselves can.

BSPA members believe that, given the track record of the merger parties, the consolidation of their assets and management would lead to the use of these tactics in devastating coordinated campaigns in multiple service areas targeting one or more of them. If that were to happen, competition would suffer, if not disappear altogether.

C. Anticompetitive Pricing Tactics Undermine Competition

BSPA members are today being targeted with significant anticompetitive pricing campaigns that have slowed their entry and sapped the financial resources they have for expansion elsewhere. In some – including those dominated by Comcast – the frequency and intensity of these tactics has increased significantly in the last year.

For example, throughout southeastern Michigan, customers of WideOpenWest ("WOW") are being offered rate discounts of 33 percent, 50 percent, and more, for periods of six months

and beyond, to switch back to Comcast. They are also being offered free digital service, free pay per view, and other giveaways. Existing Comcast customers are being offered similar benefits not to cancel their service in order to subscribe to service from WOW. These offers are not publicized, nor are they made available to anyone other than the competitor's customers and Comcast customers who have expressly requested to be disconnected in order to switch over to the competition.

These tactics are already imposing an enormous strain on some BSPA members, and the merger would only make this situation worse. Thus, for example, the merged entity could simultaneously engage in anticompetitive discounting of rates in multiple markets served by one competitor, thereby forcing that competitor to fight battles – and expend scarce resources – in each of these markets at the same time.

The Commission has already recognized the anticompetitive threat posed by these tactics: "The vast resources of a large MSO may simply prove too much if brought to bear in a targeted fashion against a single system entrant. . . . [S]uch practices . . . tend to limit competition and discourage new entry."[11]

Combining the resources of both AT&T and Comcast, without preventing the merged entity from targeting BSPA members in this manner, would have precisely this result, thereby undermining competition in the market for broadband services across the country.

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[11] Eighth Annual Report, at ¶ 209.

Remedies

For the foregoing reasons, the proposed merger between AT&T and Comcast has significant potential to reduce competition in the national and local markets for broadband services. To minimize this result, the Commission should impose conditions on the merger, including the following:

(1) The merged entity should either be required to divest itself of all programming services in which either merger party now holds an ownership interest, or should:

   (a) be prohibited from denying any competing provider of broadband services access to any local, regional, or national programming service in which it has an attributable interest, and

   (b) provide enforceable guarantees that the rates and terms for such services are fair, reasonable, and nondiscriminatory.

(2) The merged entity must not enter into any exclusive agreements with programmers, equipment suppliers, software concerns, and content providers for interactive and VOD services, that would prevent competing broadband service providers from obtaining such products and services on fair and comparable terms.

(3) The merged entity must cease the practice of preventing or impeding timely access to utility poles and conduits to install broadband facilities, or imposing or causing by action or inaction make-ready charges that are not reasonable, cost-based or verifiable.

(4) The merged entity must cease the use of exclusive easements, access agreements, long-term service agreements and other comparable means to prevent fair access to MDU customers.

(5) The merged entity must agree to a uniform pricing structure throughout each of its competitive franchise areas, and end all forms of selective discounting that singles out the customers of its competitors, or its own customers attempting to switch to competitors, for special discounts, benefits or cash payments. Furthermore, the pricing structure must be published so existing and potential customers are aware of it.

Conclusion

For all the foregoing reasons, the members of the BSPA believe the merger parties' application for the Commission's consent to the transfer of their FCC licenses to the merged entity should not be approved, except upon conditions that accomplish the foregoing objectives.

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