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ORIGINAL

Decision 99-03-019 March 4, 1999

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Joint Application of AT&T Corp., Italy Merger Corp. and Tele-Communications, Inc. for Approval Required for the Change in Control of TCI Telephony Services of California, Inc. (U-5698-C) That Will Occur Indirectly as a Result of the Merger of AT&T Corp. and Tele-Communications, Inc.	Application 98-09-039 (Filed September 30, 1998)

OPINION GRANTING MERGER APPLICATION

In this decision, we approve the joint application filed by AT&T Corp. (AT&T), Tele-Communications, Inc. (TCI) and Italy Merger Corp. (collectively, applicants) for authority to transfer control of TCI's California utility subsidiary, TCI Telephony Services of California, Inc. (TCI-Telephony), to AT&T. As explained below, we find the proposed plan of merger by which this change in control will be effectuated to be in the public interest and in accordance with the statutory requirements of § 854(a) of the Public Utilities (Pub. Util.) Code. We also conclude – as we recently did in Decisions (D.) 97-07-060, 98-05-022 and 98-08-068 - that this is an appropriate case in which to exercise our authority under Pub. Util. Code § 853(b) to exempt this transaction from scrutiny under subsections (b) and (c) of Pub. Util. Code § 854.

The Parties to the Proposed Transaction

1. *TCI-Telephony and Its Relation to Other TCI Companies*

TCI-Telephony is a Colorado corporation and an indirect subsidiary of TCI.[1] According to the application, it is the only TCI-affiliated company operating as a public utility subject to this Commission's jurisdiction, and is currently doing business under the name "People Link". Pursuant to Decision (D.) 96-10-064, we granted TCI-Telephony a certificate of public convenience and necessity (CPCN) authorizing it to operate as a competitive local carrier (CLC) offering both resold and facilities-based service. Subsequently, in D. 97-11-039, TCI-Telephony was granted a CPCN authorizing it to provide both inter- and intra-local access and transport area (LATA) services in California as a non-dominant inter-exchange carrier (NDIEC).[2]

The application avers that at the present time, TCI-Telephony's operations are *de minimis*. TCI-Telephony is currently offering local exchange service on a trial basis to approximately 280 customers in San Jose, all of whom live in multiple dwelling units (MDUs). In 1997, TCI-Telephony's total California revenues for telecommunications services were approximately $4400; from January 1 to August 31, 1998, such revenues amounted to $44,755. (Application, p. 3.)

Of course, the TCI affiliates that control TCI-Telephony have extensive operations in California and throughout the nation that are not subject to this

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[1] As explained on page 2, footnote 2 of the application, TCI-Telephony is a wholly owned subsidiary of TCI Wireline, Inc., which in turn is a wholly owned subsidiary of TCI Wireline Services, Inc., which is itself a wholly owned subsidiary of TCI.

[2] Although it received inter-LATA authority in D.97-11-039, TCI-Telephony provides no long-distance telephone service in California, and – prior to the proposed merger – had no plans to expand its telephony operations. (Application, p. 4.)

Commission's jurisdiction. According to the application, TCI's other ventures are currently organized into three groups. The first group consists of TCI's domestic cable operations, which are controlled by TCI Communications, Inc. (TCI-Cable). Through directly and indirectly-held subsidiaries, TCI-Cable offers a wide range of video products (including local broadcast networks, national cable programs and premium and pay-per-view movies) in a number of states. Through subsidiaries under its control, TCI-Cable provides cable television service to approximately 2 million California customers, and passes approximately 3.2 million California homes.

A second TCI group is controlled by TCI Ventures Group (TCI-Ventures), which holds investments in a variety of enterprises. The best known of these is @Home, which provides internet cable services over cable television infrastructure. @Home, in which TCI-Ventures holds about a 40% equity interest and a 70% voting interest, allows residential subscribers to connect personal computers via cable modems to a hybrid fiber-coaxial (HFC) cable broadband network and in that manner obtain "content-enriched, high-speed data services." (*Id.* at 5.)

The third TCI group is organized under Liberty Media Group (Liberty Media), which is a portfolio of cable and satellite programming businesses. Liberty Media's holdings include interests in, among others, MacNeil/Lehrer Productions, Discovery Communications, Inc., USA Networks, QVC, Inc., BET Holdings, Inc. and Fox/Liberty Networks LLC.

The application states that total TCI revenues from all sources in California slightly exceeded $900 million in 1997.

2. *AT&T and Its California Utility Operations*

AT&T is a New York corporation that, on its own and through a number of subsidiaries, is authorized to provide domestic and international telecommunications services throughout the United States.

AT&T has three operating subsidiary groups in California. The first is AT&T Communications of California, Inc. (AT&T-C), which provides local exchange and interexchange telecommunications services pursuant to CPCNs granted by this Commission. Pursuant to D. 97-08-060, AT&T-C (which has been assigned corporate identification number U-5002-C) is classified as an NDIEC.

AT&T's second California subsidiary group consists of four wireless telecommunications companies that serve various areas.[3] These four companies are controlled by AT&T Wireless Services, Inc.

The third subsidiary group (which AT&T controls indirectly) consists of TCG San Francisco (U-5454), TCG Los Angeles (U-5462) and TCG San Diego (U-5389). AT&T acquired control of these companies following its merger with Teleport Communications Group Inc., which we approved in D.98-05-022. Each of these TCG subsidiaries has been authorized by this Commission to provide facilities-based and resold local exchange and intrastate interexchange telecommunications services.

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[3] These four wireless companies are Airsignal (U-2028), AT&T Wireless Services of California, Inc. (U-3010), Redding Cellular Partnership (U-3020) and Santa Barbara Cellular Systems Limited (U-3015). These companies used to be part of McCaw Cellular Communications, Inc. (McCaw), which was acquired by AT&T in 1994. We approved AT&T's acquisition of McCaw in D.94-04-042, 54 CPUC2d 43 (1994).

3. *Italy Merger Corp*

According to the application, Italy Merger Corp. is a newly-created Delaware subsidiary of AT&T that has been formed for the specific purpose of effectuating the AT&T-TCI merger. Under the Agreement and Plan of Restructuring and Merger (Merger Agreement) that is attached to the application as Exhibit J, Italy Merger Corp. will be merged with and into TCI, with TCI becoming a wholly-owned subsidiary of AT&T. After the merger has been effectuated, Italy Merger Corp. will not survive as an ongoing corporation. By structuring the transaction in this fashion, the applicants intend that it be treated as a tax-free reorganization within the meaning of section 368(a) of the Internal Revenue Code of 1986, as amended. (Merger Agreement, ¶ 7.10.) At the time of the merger, TCI shareholders will be entitled to receive 0.7757 shares of AT&T common stock for each share of TCI Class A common stock, and 0.8533 shares of AT&T common stock for each share of TCI Class B common stock, that they hold. (*Id.*, 4.1(a).)

The Nature of the Proposed Merger and Restructuring

At the time the AT&T-TCI merger was announced in June of 1998, it was valued at approximately $31.8 billion. Because TCI holds diverse interests in a variety of enterprises, AT&T plans to engage in a restructuring following the merger. The application presents the following summary of this restructuring.

First, following the merger, each issued and outstanding share of TCI common stock will be converted into a right to receive shares of AT&T, including shares of two "tracking stocks". A tracking stock is typically issued by a diversified corporation and -- although it is common stock of the parent issuer -- is intended to reflect the businesses and assets of a distinct business segment or asset group. The underlying asset or business "tracked" by the tracking stock is commonly referred to as a "group." In connection with this merger, the assets

and businesses of AT&T and TCI will be attributed to one of two groups: the Liberty Media Group[4] or the Common Stock Group. (Application, p. 9.)

According to the application, the Common Stock Group will consist of what are now AT&T and TCI's respective telephone, cable television and internet businesses. The Liberty Media Group, on the other hand, will continue to hold the video programming businesses, among other things. Although the original application noted that AT&T might form a third tracking stock group subsequent to the merger, the applicants' January 15, 1999 letter to the assigned Administrative Law Judge (ALJ) states that AT&T now has no plans to do so.[5]

The application notes that while the merger will result in a change in the ultimate owners of TCI-Telephony and other TCI subsidiaries, it will not involve any immediate change in the way in which AT&T-C, the wireless companies

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[4] The application states that prior to the merger, TCI plans (subject to shareholder approval) to combine its Liberty Media Group with its TCI Ventures Group, whereby each outstanding share of Ventures will be exchanged for .52 shares of Liberty. Subsequently, TCI will combine the business operations of the two groups, and the new combined group will be called Liberty Media Group. Immediately prior to the merger, this new Liberty Media Group will transfer its investments in @Home, the National Digital Television Center and Western Tele-Communications, Inc. to the TCI Group.

Although AT&T will be the legal owner of the assets and businesses of the new Liberty Media Group, the businesses of this group will continue to be managed by the managements of Liberty and Ventures that were in office prior to the merger. These managements will have substantial control over the businesses and affairs of the Liberty Media Group following the merger as a result of agreements negotiated in connection with the merger. (*Id.* at 9, n. 9.)

[5] The statements in the January 15, 1999 letter – which is intended to supplement the application -- are consistent with press reports that AT&T had decided for a variety of reasons not to form a third tracking stock group. *See, e.g.*, "AT&T Widens Local-Service Plans," *Wall Street Journal*, January 11, 1999, p. A3.

controlled by AT&T Wireless Services, Inc. or TCG San Francisco, TCG Los Angeles or TCG San Diego provide service to California customers. The application notes that following the merger, these companies will continue to provide service pursuant to tariffs on file with the Commission, but that they expect to be able to expand their service offerings.

The application offers the following summary of why AT&T and TCI have decided to enter into the proposed merger, and why they deem it to be in the public interest for California customers:

> "Due to the complementary – but not overlapping – nature of AT&T's and TCI's major businesses, the transaction will increase competition in a number of areas without removing competitors from the marketplace. Absent the transaction, AT&T has no plans to offer cable television services, which is TCI's primary business. Likewise, at the time of the merger announcement, TCI had no plans to expand its facilities-based voice telephony on a commercial basis within any cognizable time period, which is AT&T's primary business . . . [A]bsent this transaction, AT&T could not offer extensive facilities-based local telephony services to residential customers for at least the next several years. A combined AT&T and TCI will be capable of providing a complete menu of local and interexchange telephone services to millions of residential customers several years before AT&T's current forecasts had it attempted to proceed independently of TCI."
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> "The TCG merger provided AT&T with technology suitable for customers that could be served over high capacity facilities, such as large businesses and [MDUs], [but] not that needed for meaningful entry into the residential local exchange market. Just as AT&T's earlier acquisition of TCG provided AT&T with the beginnings of a local telecommunications infrastructure geared to the business customer, the TCI transaction will provide AT&T with an infrastructure with which to begin facilities-based entry into local residential markets. The agreement with TCI will allow AT&T to achieve its goal of being able to offer local services through its own facilities." (Application, pp. 11-12.)

Under ¶ 9.2 of the Merger Agreement, the boards of directors of both AT&T and TCI have the right to abandon the merger, upon notice to the other company, if the merger has not been consummated by March 31, 1999. That date can be extended to June 30, 1999 upon the occurrence of certain specified events.

Responses to the Application

Notice of the application appeared in the Commission's Daily Calendar on October 5, 1998. Accordingly, the deadline for filing protests or responses to the application was November 4, 1998. On that date, responses to the application were filed by the Office of Ratepayer Advocates (ORA) and by SRI Consulting (SRI).

ORA supports the application, but states that its support "is contingent upon the explicit accrual of benefits for residential local exchange customers in California." (ORA Response, p. 1.) After noting that previous efforts at two-way cable telephony by incumbent local exchange carriers (ILECs) have been abandoned, ORA continues that AT&T's "commitment to this upgrade of TCI facilities in California is the most critical competitive benefit of the proposed merger," because it will give other providers of local exchange service in California an incentive to innovate. ORA states:

> "Upgrades to existing cable facilities to provide two way toll quality voice telephone communications will facilitate this basis for competition with the ILECs. ORA finds the proposed merger a needed step toward the end of providing actual service alternatives for residential local exchange customers. The influx of AT&T investment and telephony expertise combined with the presence of TCI in millions of homes should permit a hybrid alternative to the facilities-based residential service offered by ILECs." (*Id.* at 5.)

Although ORA does not request a hearing on the application, it does recommend that the Commission monitor the merged company to ensure that the benefits described by the applicants actually materialize:

> "ORA also recommends that the Commission oversee and monitor the California operations of the merged company to ensure that there is no reduction in existing local service offerings, both facilities-based and resold, in markets where AT&T offers resold local service, and that applicants follow through with infrastructure enhancement and offer two way facilities-based telephony as broadly as possible and as soon as possible in TCI's existing service areas in California." (*Id.* at 6.)

The response filed by SRI contains no such qualification. SRI states that "from our industry perspective, we believe that the proposed AT&T/TCI merger will support and stimulate increased competition in the broadband services market, and therefore create new opportunity for innovation and growth both in the consumer and business markets for communications services and applications." (SRI Response, p. 2.) Accordingly, SRI recommends that the proposed merger be approved without delay.

On November 3, 1998, a Motion for Leave to Intervene and Response to the application was filed jointly by the Greenlining Institute and the Latino Issues Forum (collectively, Greenlining). This pleading took no position on the proposed merger, but stated that Greelining was "presently conducting independent research" on nine issues of alleged concern, and that Greenlining "intend[ed] to further amplify upon and/or amend this filing . . . within twenty days." In the Joint Ruling and Scoping Memorandum issued in this proceeding on December 2, 1998, the assigned Commissioner and the assigned Administrative Law Judge (ALJ) concluded that the motion for leave to intervene was procedurally improper, and that Greenlining's *de facto* attempt to gain a 20-day extension of time within which to file a fuller response should be denied. Nonetheless, the Joint Ruling and Scoping Memorandum concluded that Greenlining's pleading should be treated as a response that neither supported nor opposed the application, and that did not request a hearing.

On November 3, 1998, the Enterprise Networking Technology Users Association (ENTUA) also submitted a response to the application. ENTUA, which states that its members "spend billions every year on telecommunications products and services," supports the application because it believes that the AT&T-TCI plan to provide local service "will jumpstart the competition process by introducing a facilities based competitor to the ILECs in California."[6]

No protests to the application, and no other responses, were received.

Categorization, Presiding Officer and Scope of the Proceeding

The applicants requested that this matter should be categorized as a ratesetting proceeding, and that no hearings should be required. By Resolution ALJ 176-3001 (October 8, 1998), the Commission ratified the preliminary determination that this was a ratesetting proceeding, but concluded that a hearing was likely to be necessary. However, in the absence of protests, no prehearing conference was held.

On December 2, 1998, the Joint Ruling and Scoping Memorandum was issued, which affirmed the preliminary determination that this application should be treated as a ratesetting proceeding and designated the ALJ as the principal hearing officer. Unlike Resolution ALJ 176-3001, the Joint Ruling and Scoping Memorandum concluded that a hearing was not necessary and that relief could be granted on an *ex parte* basis.[7]

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[6] As noted in the Joint Ruling and Scoping Memorandum, ENTUA's November 3, 1998 submission was not accompanied by a complete certificate of service. After serving additional parties on November 13, 1998, ENTUA's response was accepted for filing and filed on November 16, 1998.

[7] As stated in Conclusion of Law No. 5, we hereby affirm the determination in the Joint Ruling and Scoping Memorandum that no hearing is necessary on the application.

The Joint Ruling and Scoping Memorandum also determined that the scope of the proceeding would be to determine whether the indirect change in control of TCI-Telephony that would occur as a result of the proposed merger would be in the public interest, and under which subsection of Pub. Util. Code § 854 should be reviewed.

Do §§ 854(b) and (c) Apply to the Proposed Transaction?

In view of the fact that this application is unopposed, the principal issue here is to determine how extensive a review of the proposed merger is required under Pub. Util. Code § 854. In this connection, we must first determine whether – as the applicants urge -- the proposed transaction should be reviewed only under the "public interest" standard inherent in § 854(a)[5], or whether the transaction is subject to the more detailed review required by §§ 854(b) and (c).[6]

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[5] Pub. Util. Code § 854(a) provides in pertinent part:

> "No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control either directly or indirectly any public utility organized and doing business in this state without first securing authorization to do so from the commission. The commission may establish by order or rule the definitions of what constitute merger, acquisition, or control activities which are subject to this section. Any merger, acquisition or control without that prior authorization shall be void and of no effect."

In *M. Lee (Radio Paging)*, 65 CPUC 635 (1966), we held that under this section, "[t]he primary question to be determined . . . is whether the proposed transfer would be adverse to the public interest. Questions relating to public convenience and necessity usually are not relevant to the transfer proceeding because they were determined in the proceeding in which the certificate was granted." (65 CPUC at 637.)

[6] Pub. Util. Code § 854(b) provides in full:

> "Before authorizing the merger, acquisition, or control of any electric, gas, or telephone utility organized and doing business in this state, where any of the utilities that are parties to the proposed transaction has gross

Footnote continued on next page

As in D.98-05-022, our recent decision approving the AT&T-TCG merger, the facts concerning the $500 million threshold that can trigger review under §§ 854 (b) and (c) are not in dispute. TCI-Telephony's revenues are *de minimis*, so they do not bring §§ 854(b) and (c) into question. However, the gross annual intrastate California revenues of AT&T's California utility affiliates exceeded $500 million in 1997. (Application, p. 18.)

Applicants argue that, as in the AT&T-TCG merger, we should exercise our power under Pub. Util. Code § 853(b) to exempt this merger from review under §§ 854(b) and (c)). Their argument is as follows:

> "The Commission exempted the similar AT&T/TCG merger from analysis under § 854 (b) and (c). Three considerations led the Commission to grant an exemption in that case, and all three are present here. First, the AT&T/TCG merger did not '"involve putting together two traditionally regulated telephone systems,"

> annual California revenues exceeding five hundred million dollars ($500,000,000), the commission shall find that the proposal does all of the following:
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> (1) Provides short-term and long-term economic benefits to ratepayers.
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> (2) Equitably allocates, where the commission has ratemaking authority, the short-term and long-term forecasted economic benefits, as determined by the commission, of the proposed merger, acquisition, or control, between shareholders and ratepayers. Ratepayers shall receive not less than 50 percent of those benefits.
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> (3) Not adversely affect competition. In making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result."

Pub. Util. Code § 854(c) sets forth eight factors that this Commission must consider in making its public interest determination in cases where the $500 million gross annual revenue test set forth in § 854(b) is triggered.

> because the California affiliates of both AT&T and TCG were nondominant carriers.' . . . AT&T-C's status as an NDIEC was a 'significant factor warranting an exemption from review under §§ 854(b)(1) and (2).' . . . Four months later, AT&T-C remains an NDIEC. . . TCI-Telephony presents an easier case than did TCG. Not only is TCI-Telephony a nondominant carrier, its California revenues are *de minimis*. Second, the Commission pointed out [in D.98-05-022] that because TCG was a nondominant carrier, the Commission lacked ratemaking authority over it 'that would permit a determination and allocation of merger benefits, as required by §§ 854(b)(1) and (2).' . . . Here not only has the Commission imposed no ratemaking scheme on TCI-Telephony that would permit an allocation of benefits, the California operations of that subsidiary are minuscule and the Commission exercises no jurisdiction at all over the other subsidiaries of TCI and their operations. Finally, the Commission noted [in D.98-05-022] that TCG had 'grown under competitive forces at the sole risk of its shareholders without a captive ratepayer base and guaranteed franchise territory to buffer risk and reward.' . . . TCI-Telephony's California utility operation is both limited and experimental. It has neither a captive ratepayer base nor a guaranteed franchise territory. The cable franchises held by its affiliates are subject to an entirely different regulatory regime outside the Commission's area of concern. Governmental entities granting cable franchises impose time limits and subject them to renegotiation under the applicable provisions of the federal Cable Act." (*Id.* at 16-17.)

We agree with this reasoning. As we explained in D.97-05-092 (and reiterated in D.98-05-022 and 98-08-068), the legislative history of SB 52 – the 1989 statute that added §§ 854(b) and (c) to the Pub. Util. Code – makes clear that § 853(b) was intended to confer broad discretion upon us to determine whether the so-called "Edison conditions"[10] embodied in §§ 854(b) and (c) should apply to

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[10] As explained in D.98-05-022, the findings required by §§ 854(b) and (c) are known as the Edison conditions because the Legislature intended that the Commission should have to make such findings before it approved the proposed merger of Southern California Edison Company (Edison) and San Diego Gas and Electric Company

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a particular merger. (D.97-05-092, *mimeo.* at 15-17; D.98-05-022, *mimeo.* at 13-14; D.98-08-068, *mimeo.* at 19-22.) We agree with applicants that for the reasons stated in the quotation above, even if it is assumed that the $500 million threshold of Pub. Util. Code § 854(b) has been triggered, it is appropriate to exercise our powers under § 853(b) and exempt this merger from review under §§ 854(b) and (c)." Accordingly, we will review the proposed merger under the "public interest" standard of § 854(a).

Review of the Proposed Merger Under the Public Interest Standard Of § 854(a)

The primary question to be determined in a transfer proceeding under § 854(a) "is whether the proposed transfer would be adverse to the public interest." *M. Lee (Radio Paging Co.)*, 65 CPUC 635, 637 (1966).

As stated in D.97-07-060, our decision approving the proposed merger between MCI Communications Corporation (MCI) and British Telecommunications plc (BT),[12] we have identified a number of factors over the years that are usually considered in making the determination under § 854(a).

(SDG&E), which would have resulted in the largest energy utility in the United States. In D.91-05-028, 40 CPUC2d 159 (1991), we concluded that the necessary findings could not be made, and so disapproved the Edison-SDG&E merger.

[11] Because we agree that this is an appropriate case in which to exercise our exemptive powers under § 853(b), there is no need for us to reach applicants' alternative arguments that (1) §§ 854(b) and (c) do not apply where, as here, a holding company with an NDIEC is acquiring another holding company with *de minimis* utility operations subject to our jurisdiction, and (2) Pub. Util. Code § 854(f) precludes consideration of the revenues of AT&T's California utility affiliates because none of them is being used to effectuate the merger, and because they are affiliates of the *acquiring* company. *See* Application, pp. 17-19; D.98-05-022, *mimeo.* at 7-12.

[12] Subsequent to our approval of the proposed MCI-BT merger, MCI agreed to a merger with WorldCom, Inc. We approved this merger in D.98-08-068.

(*Mimeo.* at 15-17.) First, we inquire whether the proposed utility operation is economically and financially feasible. *R.L. Mohr (Advanced Electronics)*, 69 CPUC 275, 277 (1969); *Santa Barbara Cellular, Inc.*, 32 CPUC2d 478 (1989). There can be no reasonable doubt about that in this case, since AT&T has been quite profitable, with net income of $4.638 billion for 1997, and $4.314 billion for the period January 1-September 30, 1998. The application states (at page 13) that AT&T will be making "a significant investment of capital to upgrade [TCI's] California cable facilities to allow two-way toll quality voice telephone communications." Press reports indicate that this will be part of a nationwide investment of several billion dollars over a period of years to upgrade TCI's facilities. AT&T would obviously not have entered into a merger agreement requiring such investment, and financial markets would not have reacted positively to it,[11] unless it was widely believed that such investment is well within AT&T's financial capabilities.

As part of our examination of the financial feasibility of a transaction, we have traditionally inquired whether the price to be paid is fair to both buyer and seller. D.98-05-022, *mimeo.* at 18-19; *Union Water Co. of California*, 19 CRRC 199, 202 (1920). Given the prevailing competitive market conditions and the nature of the telecommunications industry, the need for a traditional reasonableness review of the purchase price here is obviated by the decisions that AT&T and TCI shareholders will be making on their investment. We note that the exchange ratios of 0.7757 and 0.8533 shares of AT&T common stock for each share of TCI Class A common stock and Class B common stock, respectively, appear to be relatively high. However, we have no reason to second-guess the judgment of either the financial markets or shareholders that TCI's strategically-placed cable

[11] In the time since it was announced, the value of the proposed merger has increased from approximately $31.8 billion to approximately $48 billion.

network will give AT&T valuable infrastructure that, with additional investment, will greatly assist AT&T's entry into the residential local exchange market. Indeed, AT&T's share price has increased substantially since the proposed merger was announced in June of 1998, which suggests that as investors learn more about the benefits of the proposed merger, the more attractive they find the deal.[11]

We have also traditionally inquired under § 854(a) whether the proposed merger is likely to result in a broader base for financing, with more resultant flexibility. *Southern California Gas Co.*, 74 CPUC 30, 50; *modified on other grounds* 74 CPUC 259 (1972). According to the applicants, the proposed merger meets that test:

> "The financial condition of the California affiliates will be maintained or improved by the proposed transaction. Since the California affiliates are not parties to the proposed transaction, their financial condition is not directly affected by it. No new debt is being assumed by any California affiliate in connection with this transaction. The transaction is structured as a stock for stock exchange; therefore, in essence, the financing of the parent companies is being combined and maintained." (Application, pp. 13-14.)

The fact that AT&T is the acquiring party seems sufficient to satisfy another test we have traditionally applied in merger proceedings: *viz.*, whether the new owner of the business is experienced, financially responsible and adequately equipped to carry on the business being acquired. *City Transfer and*

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[11] AT&T's decision to buy and upgrade TCI's network, rather than go through the time-consuming process of building its own local exchange network, leads us to conclude that the proposed merger may also result in efficiencies and savings in operating costs, another factor we have traditionally considered under Pub. Util. Code § 854(a). *Southern California Gas Co.*, 70 CPUC 836, 837 (1970).

Storage Co., 46 CRRC 5, 7 (1945). AT&T's presence adds weight to applicants' assertion that "combining the experienced management of both companies will maintain or improve the high quality of TCI and AT&T management in California and be fair and reasonable to the employees of both companies." (Application, p. 14.)[15]

The final aspect of the public interest determination we must make under § 854(a) is whether the proposed merger raises any antitrust concerns, because we are required to take into account the antitrust aspects of any application before us. *Northern California Power Agency v. Public Utilities Commission*, 5 Cal.3d 370, 379-80 (1971). In this case, antitrust questions have both a state and a federal aspect, since issues have been raised at the national level that are not before us here.

In terms of its effects on relevant markets in California, we agree with ORA that the proposed merger raises no antitrust concerns:

> "In ORA's opinion, this proposed merger will not result in any further concentration of long distance offerings, or local cable offerings or of high capacity offerings of the merged companies. Instead, the proposed merger represents a further convergence of technologies and service provisioning." (ORA Response, p. 4.)

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[15] Although it is not a factor traditionally considered under an § 854(a) analysis, we note the applicants' representation that the proposed merger will not only be fair to AT&T and TCI employees in California, but is likely to increase employment by the two companies here:

> "The parties anticipate that there will be no overall reductions in the public utility employee work force in California, and no change in the union status of these employees as a result of the merger. Because of the opportunities for expansion into new businesses created by the combined AT&T/TCI enterprise, the parties anticipate that there will be an expansion in the size of the AT&T/TCI work force in California." (*Id.* at 14.)

Two issues have been raised at the federal level in connection with the proposed merger. First, as a condition of giving its approval, the United States Department of Justice (DOJ) has required TCI's affiliate, Liberty Media Group, to transfer all of its stock in Sprint PCS, the mobile wireless telephone business of Sprint, to an independent trustee who will have approximately five years to sell the stock. DOJ conditioned its approval of the merger upon this sale because AT&T is the largest provider of mobile wireless services in the United States, Liberty Media Group owns about 23.5% of the stock of Sprint PCS, and DOJ wanted to ensure that competition within the mobile wireless services market was not reduced. On December 30, 1998, DOJ announced that AT&T and TCI had agreed to the divestiture of the Sprint PCS stock, and a consent decree embodying the agreed-upon sale procedure was published in the Federal Register pursuant to the Tunney Act. Upon expiration of a 60-day comment period, the U.S. District Court for the District of Columbia may enter a final judgment reflecting the consent decree.[16]

The other issue that has been raised at the federal level is whether AT&T should be required to provide all internet service providers with nondiscriminatory access to the high-speed internet service, @Home, that AT&T will control after consummation of the merger. One recent press report has characterized the issue as follows:

> "By providing high-speed Internet service over cable systems on a broad scale, AT&T will be able to offer millions of consumers the ability to navigate through the World Wide Web at speeds up to 100 times faster than the typical connection through ordinary phone lines.

[16] The matter has been assigned Number 98 3170 (Antitrust) in that court.

> "But there is a catch. AT&T intends to require that any customer who subscribes to its high-speed cable modem service must also pay the monthly fee of $40 or so for Internet access provided by the At Home Corporation, of which AT&T will be the largest shareholder when it completes the acquisition of TCI.
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> "That has prompted protests by other Internet providers that fear they may be frozen out and complain that AT&T will control the computer standards for video, audio and other transactions.
>
> "Both sides say the outcome of the battle – which is just beginning before regulators and Congress here, and in courts and municipalities around the nation – may determine whether the Internet will continue to be a free-wheeling technology or be dominated by a handful of large corporate interests."[17]

As this quotation indicates, the dispute between AT&T and internet service providers over nondiscriminatory access may eventually become an issue of national importance. However, no party has raised the issue in this proceeding, and as we recently stated in D.98-08-068 – our decision approving the MCI-WorldCom merger – internet services "are offered in an arena generally unregulated by this Commission or any other State or Federal regulatory body." (*Mimeo.* at 20.) Accordingly, while we note the pendency of this potentially important issue, we express no opinion on it, and will await whatever action the FCC, local cable authorities and the courts may ultimately take in connection with it.[18]

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[17] "AT&T Find Internet and a Crowd of Critics," *New York Times*, February 4, 1999, p. A1. *See also* "FCC Fight Erupts Over Internet Access," *Wall Street Journal*, January 22, 1999, p. A3 (noting that America Online Inc. is leading the coalition of internet service providers opposing AT&T at the FCC.)

[18] We note that according to a recent press report, the Mount Hood Cable Regulatory Commission -- the municipal cable authority for Portland, Oregon and surrounding communities – has conditioned its approval of the transfer of TCI's local cable franchise

Footnote continued on next page

Taking all of the above-noted factors into account, we conclude that the proposed merger between AT&T and TCI is in the public interest, and we will therefore approve it.[19]

Waiver of Comment Period

This is an uncontested matter in which the decision grants the relief requested. Accordingly, pursuant to Pub. Util. Code Section 311(g)(2), the otherwise applicable 30-day period for public review and comment is being waived.

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on agreement by AT&T to provide nondiscriminatory access to its cable platform. "Must AT&T Give Internet Rivals Access to TCI's Network?", *Wall Street Journal*, January 15, 1999, p. A-1. AT&T has recently filed a lawsuit in U.S. District Court challenging the constitutionality of this action. *See* "AT&T and TCI challenge Portland Rule in Court," *TRI Video Competition Report*, January 25, 1999.

[19] In approving this merger, we decline to adopt ORA's suggestion that we should "oversee and monitor the California operations of the merged company" to ensure that "applicants follow through with infrastructure enhancement and offer two way facilities-based telephony as broadly as possible and as soon as possible in TCI's existing service areas in California." (ORA Response, p. 7.)

ORA's suggestion is vague, and it has offered nothing beyond the quoted material in the way of suggestions for how to structure the proposed oversight and monitoring. Moreover, if we were to engage in a program of oversight and monitoring, it would almost certainly lead to delays in the infrastructure enhancement described in the application, and it would chill AT&T's incentive to make the investment necessary for that enhancement.

As AT&T's vigorous participation in our Open Access and Network Architecture Development (R.93-04-003/I.93-04-002) and Local Competition (R.95-04-043/I.95-04-044) proceedings attests, it has long desired to enter the local exchange residential market. Its decision to do so through a merger with TCI and its willingness to make the investment necessary to upgrade TCI's facilities persuade us that it is unnecessary to require "the extensive post merger monitoring ORA desires." (D.98-08-068, *mimeo.* at 28.)

Findings of Fact

1. Applicants filed for approval of the proposed merger between AT&T and TCI by application under Pub. Util. Code § 854(a).

2. Notice of the application appeared in the Commission's Daily Calendar on October 5, 1998. The protest period expired on November 4, 1998.

3. On November 3, 1998, ENTUA submitted a response to the application that supports the proposed merger without condition. ENTUA's response was not accompanied by a complete proof of service. After serving additional parties on November 13, 1998, ENTUA's response was accepted for filing and filed on November 16, 1998.

4. On November 3, 1998, Greenlining filed a motion for leave to intervene and response to the application. This pleading takes no position on the proposed merger, but states that Greenlining is conducting research on nine issues of alleged concern and expects to amend or amplify its filing within 20 days.

5. On November 4, 1998, ORA filed a response to the application. ORA's response supports the proposed merger, conditioned upon oversight and monitoring by this Commission to ensure that the California operations of the merged company actually result in the benefits described in the application.

6. On November 4, 1998, SRI filed a response to the application. SRI's response supports the proposed merger without condition.

7. On November 16, 1998, applicants filed a reply to the responses of ORA, SRI and Greenlining.

8. On December 2, 1998, the assigned Commissioner and the assigned Administrative Law Judge (ALJ) issued a Joint Ruling and Scoping Memorandum that, among other things, ruled that (a) Greenlining's motion for leave to intervene was procedurally improper, and (b) the time within which Greenlining was required to submit a response to the application should not be

extended. The Joint Ruling and Scoping Memorandum also ruled that Greenlining's November 3, 1998 pleading would be treated as a response that neither supported nor opposed the application, and that did not request a hearing.

9. No protests to the application have been filed.

10. AT&T is a New York corporation that provides domestic and international telecommunications services throughout the United States. It is primarily a long-distance carrier.

11. TCI is a Delaware corporation with one indirectly-held California subsidiary, TCI-Telephony, that is subject to this Commission's jurisdiction. TCI-Telephony is a Colorado corporation.

12. Directly and indirectly-held subsidiaries of TCI-Cable offer cable television service to approximately 2 million California customers and pass approximately 3.2 million California homes.

13. Italy Merger Corp. is a Delaware subsidiary of AT&T that has been formed for the specific purpose of effectuating AT&T's merger with TCI and ensuring that the transaction qualifies as a tax-free reorganization under § 368(a) of the Internal Revenue Code.

14. Under the Merger Agreement, shareholders of TCI will, at the time the merger is completed, receive 0.7757 shares of AT&T common stock for each share of TCI Class A common stock that they hold, and 0.8533 shares of AT&T common stock for each share of TCI Class B common stock that they hold.

15. AT&T wishes to enter into the merger so that it can acquire TCI's existing cable network and, after additional investment, use this network as the basis for facilities-based local exchange offerings to residential customers. AT&T prefers such an acquisition of infrastructure to the time-consuming alternative of constructing local exchange infrastructure.

16. TCI wishes to enter into the merger so that it can enjoy the benefits of AT&T's financial strength and brand-name recognition.

17. After the merger is consummated, AT&T's and TCI's respective California subsidiaries will continue to serve their customers pursuant to existing tariffs on file at the Commission.

18. In 1997, AT&T's California subsidiaries had gross intrastate California revenues in excess of $500 million.

19. In D.97-05-092, 98-05-022 and 98-08-068, the Commission concluded that it has power under Pub. Util. Code §§ 853(b) and 854(a), upon an appropriate showing, to exempt from review under §§ 854 (b) and (c), a merger to which a California utility with gross annual California revenues in excess of $500 million is a party.

20. AT&T-C, TCG San Francisco, TCG Los Angeles, and TCG San Diego are all NDIECs.

21. TCI-Telephony is an NDIEC.

22. The proposed merger between AT&T and TCI does not involve putting together two traditionally regulated telephone systems.

23. Because TCI-Telephony is an NDIEC, the Commission does not exercise the type of ratemaking authority over it that would allow an allocation of merger benefits, as required by § 854(b).

24. TCI-Telephony has grown under competitive forces at the risk of its shareholders, without a captive ratepayer base or guaranteed service territory.

25. A merger with TCI is likely to enable AT&T to hasten its entry into the facilities-based residential local exchange market in California.

26. The price to be paid by AT&T for TCI's shares is not unreasonable.

27. A merger with AT&T is likely to enhance TCI's ability to attract and retain high quality, experienced managers.

28. Under the Merger Agreement attached to the application as Exhibit L, the total employment in California of the merged AT&T-TCI company is likely to increase.

29. The DOJ has approved the proposed merger subject to the sale of the 23.5% interest in Sprint PCS held indirectly by TCI, and AT&T and TCI have agreed to such sale.

Conclusions of Law

1. For the reasons set forth in Finding of Fact (FOF) Nos. 22, 23 and 24, this is an appropriate case in which to exercise the Commission's exemptive powers under §§ 853(b) and 854(a) and hold that, regardless of the fact that AT&T's California affiliates have gross annual intrastate revenues in excess of $500 million, the proposed merger should be exempt from review under §§ 854(b) and (c), and should instead be reviewed under § 854(a).

2. The proposed merger between AT&T and TCI will not result in any further concentration in the long distance market, the local cable market or the high capacity market within California.

3. Because the proposed transaction involves only a change in the underlying ownership of facilities, it can be seen with certainty that the merger between AT&T and TCI will not have a significant effect upon the environment.

4. For the reasons set forth in FOF Nos. 25-29 and Conclusion of Law Nos. 2-3, the proposed merger between AT&T and TCI is in the public interest, and should be approved pursuant to Pub. Util. Code § 854(a).

5. The conclusion in the Joint Ruling and Scoping Memorandum that no hearing is necessary, and that this application be considered on an *ex parte* basis, should be affirmed.

6. The approval set forth herein is not a finding of the value of the rights and property to be transferred.

ORDER

IT IS ORDERED that:

1. On or after the effective date of this order, AT&T Corp. (AT&T), Tele-Communications, Inc., and Italy Merger Corp. are authorized to merge in accordance with the terms set forth in Application (A.) 98-09-039.

2. Within 30 days after the change of control authorized herein has taken place, AT&T shall file with the Commission's Docket Office, for inclusion in the formal file of A.98-09-039, written notice that said change of control has taken place.

3. The authority granted in Ordering Paragraph 1 shall expire if not exercised within 12 months after the effective date of this order.

4. In the event that the books and records of the applicants or any affiliates thereof are required for inspection by the Commission or its staff, applicants shall either produce such records at the Commission's offices, or reimburse the Commission for the reasonable costs incurred in having Commission staff travel to any of applicants' offices.

This order is effective today.

Dated March 4, 1999, at San Francisco, California.

RICHARD A. BILAS
President
HENRY M. DUQUE
JOSIAH L. NEEPER
Commissioners