



Signature Report

May 16, 2000

Ordinance 13855

Proposed No. 2000-0224.3

Sponsors Irons and Hague

1
2 AN ORDINANCE approving subject to conditions
3 the transfer of control of the franchises and
4 commitments held by TCI Cablevision of
5 Washington, Inc. under Franchise 12132 and Tele-
6 vue Systems, Inc. d/b/a TCI of Washington and TCI
7 Pacific, Inc. under Franchise 11680 to AT&T
8 Corporation; and amending Ordinance 13409,
9 Sections 2, 3, 4, 5 and 6, and adding new sections to
10 Ordinance 13409.

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12
13 SECTION 1. King County is granted authority under federal, state and county
14 law and the terms of existing franchises to grant permission for a transfer of control of the
15 cable Franchises 12132 and 11680.

16 SECTION 2. Ordinance 13409, Section 2, is hereby amended to read as follows:

17 For the reasons set forth in this ordinance (~~the proposed change of control is in~~
18 ~~the public interest if~~)), the council finds a continued conditional approval of transfer of

19 control remains to be in the public's best interest provided that the conditions set forth in
20 this ordinance are fully satisfied. Nothing in this ordinance shall be deemed to relieve
21 AT&T, TCI or franchisees of any obligation imposed by Ordinance 13409.

22 SECTION 3. Ordinance 13409, Section 3, is hereby amended to read as follows:

23 Findings of fact. The council hereby finds the following facts:

24 A. TCI Cablevision of Washington, Inc., and Tele-vue Systems, Inc. d/b/a/ TCI
25 of Washington (together, for the purposes of this ordinance, "franchisees"), subsidiary
26 corporations of Tele-Communications, Inc. (for the purposes of this ordinance, "TCI"),
27 provide cable television service in unincorporated King County pursuant to franchises
28 12132 and 11680, as amended (for the purposes of this ordinance, "franchise
29 agreements").

30 B. TCI (~~has~~) entered into a merger agreement with AT&T Corp. (for the
31 purposes of this ordinance, "AT&T") that resulted in a change of control of TCI and,
32 indirectly, of franchisees.

33 C. TCI and AT&T filed with the county FCC Form 394, and gave notice of the
34 change of control pursuant to the franchise agreements. AT&T stated its intent to cause
35 the franchisees to comply fully with K.C.C. chapter 6.27A and rules promulgated
36 thereunder, and all franchise agreement provisions and other contractual obligations with
37 the county, including without limitation the lease agreement, as amended, between the
38 county and the franchisees, (~~as amended,~~) the construction and performance bonds and
39 the payment bond related thereto and all applicable laws.

40 D. The proposed (~~change~~) transfer of control would constitute a transfer of the
41 franchise agreements and is subject to the county's approval pursuant to Franchise 12132,

42 paragraph 4, Franchise 11680, paragraph 4, K.C.C. 6.27A.030 and ~~((K.C.C.))~~ 6.27A.050.
43 Franchisees TCI and AT&T ~~((have))~~ asserted that King County ~~((must))~~ had to act on
44 ~~((or before))~~ the proposed transfer of control by February 16, 1999 ~~((on the proposed~~
45 ~~change of control))~~, or face an automatic approval of the transfer under federal law. King
46 County does not concede that ~~((it is required to act))~~ action had to be taken by such date
47 ~~((but takes action in this ordinance to remove any ambiguity that a final decision has been~~
48 ~~rendered under 42 USC section 537. The county has requested from the franchisees, TCI~~
49 ~~and AT&T, both orally and in writing))~~ because copies of the contracts between TCI and
50 Excite@Home ~~((necessary to understand the anticompetitive effects of the terms of~~
51 ~~@Home service and the companies have not timely provided such contracts. The county~~
52 ~~is not required to render a final decision until one hundred twenty days has run from the~~
53 ~~submittal of all requested information))~~ were not timely provided, and the transfer
54 application did not appear to be complete. On February 16, 1999, the council adopted
55 Ordinance 13409 to remove any ambiguity that a final decision had been rendered under
56 42 U.S.C. Sec. 537.

57 E. The U.S. Congress by passage of the Telecommunications Act of 1996 has
58 determined that national telecommunications policy should favor competition over the
59 monopolistic provision of telecommunications and cable services. The county agrees that
60 competition in the provision of telecommunications and cable services is in the public
61 interest of King County.

62 F. ~~((In))~~ K.C.C. 6.27A.035~~((, the county has determined that anticompetitive and~~
63 ~~monopolistic acts on the part of a cable system operator, subsidiary or affiliates are~~
64 ~~prohibited))~~ prohibits cable system operators from engaging in anticompetitive or

65 monopolistic acts.

66 G. The franchisees and TCI under the ultimate ownership of AT&T intend to
67 provide local telephone services to the public in competition with existing providers,
68 which the county finds to be in the public interest. Currently, franchisees, TCI and
69 AT&T offer their cable system subscribers in certain incorporated areas of King County
70 Internet access exclusively through Excite@Home, a high-speed cable modem Internet
71 access service which combines access to the Internet with selected content and control
72 features provided by Excite@Home for a single price. AT&T, TCI and franchisees
73 maintain that the exclusivity language in its contract with Excite@Home prohibits it from
74 obtaining high-speed (described as greater than 128 kilobits per second) residential
75 access from any source other than Excite@Home until June 4, 2002, and AT&T has
76 represented that such exclusivity language will not be renewed. AT&T, TCI and
77 franchisees have agreed that once that exclusivity date passes, it will provide
78 nondiscriminatory access, as defined in section 3Q of this ordinance, to its Internet cable
79 modem platform. AT&T, TCI and franchisees have expressed interest in expanding the
80 Excite@Home service into the unincorporated areas of the county.

81 H. The county has received public comment and public testimony from TCI,
82 AT&T, Internet service providers, other technical experts and members of the public
83 regarding the legal, technical, financial and public policy issues raised by the proposed
84 transfer. AT&T, TCI and franchisees indicated that they anticipate using the broadband
85 cable network to provide the public with a range of services, including but not limited to:
86 video cable services, Internet services, video streaming and telephone services. Pursuant
87 to K.C.C. 6.27A.020, all cable providers utilizing the county's public right-of-way for its

88 cable network are subject to a quarterly franchise fee equal to five percent of the cable
89 provider's gross revenues from cable services. For purposes of Ordinance 13409, the five
90 percent franchise fee shall be applied to all cable services offered through the cable
91 system.

92 I. ~~((The franchisees are providing, or plan to provide, cable system subscribers~~
93 ~~with Internet access exclusively through @Home, a high speed cable modem Internet~~
94 ~~access service which combines access to the Internet with selected content and control~~
95 ~~features provided by @Home for a single price. AT&T plans, through the franchisees, to~~
96 ~~continue and expand this service if its acquisition of TCI is completed.)) K.C.C.~~

97 6.27A.150 requires cable system operators to comply with the customer service standards
98 established under K.C.C. chapter 6.27A, the cable rules, and the cable system operator's
99 franchise agreement or agreements. For purposes of Ordinance 13409, these customer
100 service standards shall be applied to all cable services offered through the cable system,
101 except as prohibited by law.

102 J. ~~((The county has received public comment from experts familiar with the~~
103 ~~structure and operation of the Internet and the current forms of access to the Internet and~~
104 ~~Internet service provision which evidences that cable modem service promises to be~~
105 ~~superior to other forms of Internet access for residential users and could achieve a~~
106 ~~dominant position in the county market as the preferred form of Internet access.)) During~~

107 the council's review of the transfer request, concerns were raised by Internet service
108 providers, technical experts and members of the public regarding AT&T's, TCI's and
109 franchisees' practice of bundling its high-speed cable modem Internet access with
110 selected content and control features provided by Excite@Home and making this bundled

111 service available for only a single price. Additionally, concerns were raised that cable
112 modem service appeared to be the superior form of high-speed Internet access that would
113 be available to unincorporated area subscribers, and that a dominant position in the
114 market as the preferred form of Internet access would be achieved by AT&T, TCI and
115 franchisees.

116 K. ~~((AT&T claims that there are competitive alternatives to cable modem service,~~
117 ~~but admits that cable modem service provides significantly faster transmission speeds~~
118 ~~than any other data service available now or in the near future in the King County market~~
119 ~~to residential cable subscribers)) AT&T, TCI and franchisees responded by claiming that~~
120 competitive alternatives to cable modem service were available to subscribers, but stated
121 that cable modem service may provide significantly faster transmission speeds in the
122 immediate future than other data service available to residential cable subscribers in the
123 unincorporated areas.

124 L. ~~((The contractual relationship between @Home and TCI is exclusive in TCI~~
125 ~~markets and prohibits the cable operator from obtaining high speed (described as greater~~
126 ~~than 128 kilobits per second) residential access from any source other than @Home until~~
127 ~~June 4, 2002 as described in Securities and Exchange Commission filings submitted by~~
128 ~~@ Home corporation.)) During the council's review of the transfer request, concerns also~~
129 were raised by members of the public regarding AT&T's, TCI's and franchisees' video
130 programming decisions, particularly as they relate to the services offered in the expanded
131 basic video package. Consumers expressed concern that in order to retain the services
132 offered under the less expensive expanded basic service, they would be forced to
133 subscribe to the more expensive digital cable service, which many cannot afford.

134 Additionally, concerns were raised that the rates charged for pay-per view movies were
135 higher for subscribers to the expanded basic package than the rates charged for pay-per
136 view movies for subscribers of the digital cable service.

137 M. ~~((Nondiscriminatory access to cable modem network is consistent with~~
138 ~~K.C.C. 6.27A.035 and in the public interest. For purposes of this ordinance,~~
139 ~~nondiscriminatory access means access to the cable modem platform that is offered on a~~
140 ~~competitively neutral basis to both affiliated and nonaffiliated Internet service providers.~~
141 ~~The effect of nondiscriminatory access policy is that consumers seeking access to the~~
142 ~~Internet via the cable system will be able to connect with the Internet service provider of~~
143 ~~their choice at market driven rates. A nondiscriminatory access policy promotes~~
144 ~~consumer choice and competition in the provision of Internet services.)) Ordinance 13409~~
145 was enacted on February 16, 1999, to grant AT&T and TCI conditional approval of the
146 transfer of control of the franchises and commitments held by TCI Cablevision of
147 Washington, Inc. under Franchise 12132 and Tele-vue Systems, Inc. d/b/a TCI of
148 Washington and TCI Pacific, Inc. under Franchise 11680 to AT&T Corporation.

149 N. ~~((Implementation of a nondiscriminatory access policy for the cable modem~~
150 ~~platform requires resolution of significant technological and economic issues. A further~~
151 ~~study of the issues of competition and open access should be completed by October 8,~~
152 ~~1999 and reported to the council.)) In order to study further the concerns raised during the~~
153 review of the transfer of control request, an expert review panel was established by
154 Ordinance 13409, Section 6. The expert review panel was directed to address any
155 anticompetitive implications associated with AT&T's, TCI's and franchisees' offering of
156 bundled high speed cable modem Internet services including legal, technical, and

157 economic considerations as well as subscriber privacy issues. The expert review panel
158 was required to report its findings to the council by October 8, 1999.

159 O. ~~((Video cable services are of primary concern to the citizens of King County.~~
160 ~~High among citizen complaints received during the transfer of control process is the~~
161 ~~perception that provision of expanded basic video packaging is being eroded. Consumers~~
162 ~~fear the video programming decisions on the part of AT&T, TCI and franchisees, if the~~
163 ~~transfer is approved, will force expanded basic video subscribers to migrate to the more~~
164 ~~expensive digital cable service, which many cannot afford, in order to retain services they~~
165 ~~previously were offered under the less expensive expanded basic service. Further, it~~
166 ~~appears that consumers with expanded basic service must pay more for pay per view~~
167 ~~movies than consumers with digital cable services.)) Ordinance 13409, Section 6,
168 authorized the council to impose additional or different conditions on AT&T, TCI and
169 franchisees as a part of the transfer of control agreement after the expert review panel's
170 report was completed, but prior to March 1, 2000. Additionally, Ordinance 13409,
171 Section 6, required AT&T's, TCI's and franchisees' written confirmation of a standstill
172 and tolling agreement providing that all additional or different conditions imposed on
173 AT&T, TCI and franchisees be considered as if imposed within the one hundred twenty-
174 day time period authorized for review of the transfer of control as described in 42 U.S.C.
175 Sec. 537. AT&T, TCI and franchisees subsequently agreed to extend the standstill and
176 tolling agreement's timeline for council review and imposition of new conditions on the
177 transfer of control agreement to June 1, 2000.~~

178 P. Consistent with the provisions of Ordinance 13409, Sections 4 and 12, AT&T,
179 TCI and franchisees subsequently provided all written confirmations required to the clerk

180 of the council by March 1, 1999, and paid the sum required to the executive office of
181 finance.

182 Q. On October 28, 1999, the expert review panel's final report, Conclusions and
183 Recommendations of the Expert Review Panel, attached to this ordinance (Ordinance
184 13855) as Attachment A, was submitted to the council. The report concluded that it was
185 technically feasible to implement a nondiscriminatory access policy to the cable modem
186 network. For purposes of Ordinance 13409, nondiscriminatory access means access to
187 the cable modem platform that is offered on a competitively neutral basis, regardless of
188 whether or not the service provider is affiliated with AT&T, TCI and franchisees. The
189 effect of a nondiscriminatory access policy is that consumers seeking access to the
190 Internet via the cable system will be able to connect with an Internet service provider or
191 an online service provider of their choice that has entered into a commercial arrangement
192 with AT&T or TCI, at market driven rates.

193 R. The expert review panel agreed on two issues: 1. that AT&T should
194 establish, maintain and upgrade a local peering facility whereby Internet service
195 providers and online service providers could gain nondiscriminatory access to the
196 Excite@Home cable modem platform; and 2. that the council should monitor the
197 development of the market before imposing additional conditions.

198 S. The expert review panel also found that there was a degree of uncertainty
199 about the significance of AT&T's bundling its high-speed cable connection with other
200 Internet services in its Excite@Home offering, and of the harm to competitive markets
201 and consumer choice that might result. Due to this uncertainty, the expert review panel
202 was divided on when the council should intervene. Half of the panel supported taking

203 action now to prepare for the likelihood of AT&T establishing market dominance. These
204 panelists recommended that the council continue its conditional approval of the transfer
205 request, while pursuing negotiations with AT&T over how to implement an equal access
206 policy. These panelists suggested that the council prepare to require AT&T to unbundle
207 its Excite@Home service by September 1, 2000, if competing technologies had not
208 emerged by June 1, 2000, and no agreement with AT&T had been reached. The other
209 half of the panel disagreed with this approach and felt that it was premature to establish
210 deadlines for taking further actions, in part, because AT&T, TCI and franchisees have not
211 yet offered the Excite@Home service to unincorporated areas of King County. The
212 expert review panel recommended to the council that the market be monitored for signs
213 of anti-competitive practices. Those recommendations are contained on pages one
214 through seven of the expert review panel's final report dated October 28, 1999. If such
215 signs were to emerge, these panelists encouraged the council to take immediate corrective
216 actions.

217 T. In addition to developing benchmarks for monitoring purposes, the expert
218 review panel requested AT&T and the Pacific Northwest Open Access Coalition to
219 develop an agreed-upon statement of facts of current market conditions in unincorporated
220 areas. AT&T and the Pacific Northwest Open Access Coalition produced such a
221 document, but due to the fact that most public information on the local availability of
222 high-speed cable services does not differentiate between incorporated and unincorporated
223 areas of the county, it became apparent that some in-depth research would need to occur,
224 and that further study of the economic challenges associated with providing competition
225 and open access in the market should be completed by industry and regulatory

226 economists, and reported back to the council for its consideration.

227 SECTION 4. Ordinance 13409, Section 4, is hereby amended to read as follows:

228 King County hereby approves the transfer of control of TCI to AT&T, subject to
229 the following conditions:

230 A. AT&T and TCI shall confirm in writing that they shall cause the franchisees
231 to comply, and that franchisees agree to comply, fully with K.C.C. chapter 6.27A and
232 rules promulgated thereunder, and with all the franchisees' franchise agreement
233 provisions and other contractual obligations with the county, including without limitation
234 the lease agreement between the county and the franchisees, as amended, the construction
235 and performance bonds and the payment bond related thereto and all other applicable
236 laws.

237 B. AT&T, TCI and franchisees shall confirm in writing that the franchisees shall
238 remain responsible for the obligations and liabilities of the franchisees, known or
239 unknown, under their respective franchise agreements and contracts with the county and
240 under applicable law, before and after the effective date of the change of control.

241 C. AT&T, TCI, franchisees and the applicable bonding company shall confirm in
242 writing that the construction and performance bonds and the payment bond presently
243 filed with the county in connection with the franchisees' franchise agreements and
244 contractual obligations shall remain in full force and effect before and after the effective
245 date of the change of control.

246 D. AT&T, TCI and franchisees shall confirm in writing that approval by the
247 county of the transfer shall not constitute a waiver or release of any rights of the county
248 under the franchise agreements or applicable law, before or after the effective date of the

249 change of control.

250 E. ~~((Franchisees,))AT&T, ((and)) TCI and franchisees, directly or indirectly~~

251 through one or more affiliates, shall not engage in unfair methods of competition in

252 connection with the operation of the cable system, or the delivery of services over that

253 system, in violation of K.C.C. 6.27A.035.~~((The franchise agreements require the~~

254 ~~franchisees to provide two way interactive service by March 1, 2000. Modifications to~~

255 ~~the franchises established milestones for the system upgrade and construction of the~~

256 ~~Institutional Network. The county acknowledges the ability of TCI/AT&T to expedite~~

257 ~~the provision of two way interactive services at a date earlier than required by the~~

258 ~~franchise but provision of such services are subject to K.C.C. 6.27A.035.))~~

259 F. AT&T, TCI and franchisees shall confirm in writing that they and their

260 affiliates have not since the effective date of Ordinance 13409, and shall not during the

261 term of this conditional transfer of control agreement, enter into any agreement(s) which

262 would inhibit or preclude them from offering, after June 5, 2002, nondiscriminatory

263 access, as defined in section 3Q of this ordinance, including unbundled transport and ISP

264 services unincorporated King County.

265 G. AT&T ((and)), TCI and franchisees shall confirm in writing that they shall

266 cause franchisees to interconnect the county I-Net to the public switched telephone

267 network ((in the same physical and technical manner that franchisees make telephone

268 services by means of the cable system available to cable subscribers within the county.

269 This interconnection will be at no cost to the county and)) to enable the county to offer I-

270 Net participants the telephone services offered to cable subscribers and trunk service

271 connections for PBX and NBX-based lines. The establishment and maintenance of the

272 facilities needed to provide this interconnection will be provided at no cost to the county.
273 The interconnection shall be capable of ensuring quality of service between networks and
274 will be made available no later than ((one year)) six months after such telephone services
275 are made available to five percent of the cable subscribers ((anywhere)) within any
276 franchise area in the incorporated or unincorporated county. This interconnection will
277 also be enabled to freely exchange Internet traffic through such network, and the county
278 will thereby be able to use this interconnection to provide Internet services. The county
279 may purchase, in the mix and quantities it desires, and AT&T, TCI and franchisees shall
280 provide telephone, Internet, or other services that it provides anywhere in the
281 incorporated or unincorporated county. The county shall pay for these services at the
282 lowest rate charged to similarly situated customers. At such time as the County contracts
283 for the provision of such services, the County may review the rates for the services every
284 twenty-four months. The county I-Net shall only utilize the preceding interconnection
285 and services for noncommercial purposes such as public agencies or not-for-profit
286 organizations, although ((equipment)) costs of the county may be recovered from I-Net
287 users. The county shall not use these connections to offer commercial, for-profit services
288 to the general public.

289 ~~((G. —AT&T, TCI and franchisees shall make the @Home service~~
290 ~~interconnection available to all Internet service providers (ISPs) and online service~~
291 ~~providers (Sops) through a local interconnection point on terms and conditions that are~~
292 ~~customary in the data networking industry without discrimination, degradation or~~
293 ~~blockage of the content or carriage of data from such an interconnected ISP or OSP.))~~

294 H. AT&T, TCI and franchisees shall confirm in writing that the interconnection

295 facility at the Westin Carrier Hotel has been upgraded to OC 48 capability as of April 30,
 296 2000. AT&T, TCI and franchisees shall continue to meet the local peering protocols
 297 recommended by the expert review panel which requires the Excite@Home service
 298 interconnection to be available to all Internet service providers (ISPs) and online service
 299 providers (OSPs) through a local interconnection point such as is currently provided at
 300 the Westin Carrier Hotel. AT&T, TCI and the franchisees shall confirm in writing that
 301 the Excite@Home service will continue to be interoperable with all generally available
 302 Internet protocol applications and will not restrict services that can be provided by
 303 ~~((providers of))~~ online service~~((s))~~ providers. AT&T, TCI, and the franchisees shall
 304 confirm in writing that customers of the Excite@Home service will continue to be able to
 305 access other ISPs or OSPs on the Internet without having ~~((a))~~ to view content provided
 306 by Excite@Home, if a customer so chooses.

307 I. ~~((AT&T, TCI and franchisees shall notify the county that the merger has been~~
 308 ~~completed within five days of the date that TCI becomes a subsidiary of AT&T.))~~
 309 ~~————J.))~~AT&T, TCI and the franchisees shall confirm in writing that, for a period of
 310 twenty-four months, ~~((commencing for each subscriber when the level of service required~~
 311 ~~to provide high speed cable modem services is made available in the subscriber's service~~
 312 ~~area. King County @Home subscribers))~~ commencing with the effective date of this
 313 ordinance, Excite@Home subscribers in the unincorporated area will be charged no more
 314 than the lower of: (i) \$39.95 per month or (ii) the lowest price per month for which
 315 equivalent Excite@Home service is offered to residential customers in any other AT&T
 316 or TCI cable system in the United States, subject only to exceptions for temporary
 317 promotional offers in ~~((other))~~ AT&T or TCI cable systems.

318 ~~((K-))~~J. AT&T, TCI and the franchisees have orally indicated to the Council that
319 it intends to deploy the Excite@Home cable service in unincorporated King County and
320 shall confirm in writing the commitment of the franchisees to deploy Excite@Home
321 throughout the franchise areas and indicate when full deployment will be realized.

322 K. In addition to the other provisions of this ordinance, AT&T, TCI and
323 franchisees shall confirm in writing that if at any time during the term of the franchise
324 agreement there is a controlling federal judicial ruling or federal regulatory action
325 confirming the power of local franchising authorities to require open and
326 nondiscriminatory access to Internet services over cable modem networks, ~~((then the~~
327 county may immediately require the franchisees to promptly comply with such conditions
328 consistent with K.C.C. 6.27A.020E and Section 1 of the franchise agreements)) or on
329 such networks, then the county, by enactment of a subsequent ordinance amending the
330 franchise agreements, may immediately require AT&T, TCI and franchisees to promptly
331 comply with such conditions consistent with K.C.C. 6.27A.020E and Section 1 of the
332 franchise agreements. The executive shall transmit a proposed ordinance to amend
333 franchise agreements 11680 and 12132, to require nondiscriminatory access, as defined
334 in section 3Q of this ordinance, including unbundled transport and ISP services. If such
335 an ordinance is transmitted to the council for its consideration, the EMP shall
336 immediately review the executive proposal and forward its recommendations on the
337 proposal to the utilities and technology committee, or its successor.

338 L. In the event that nondiscriminatory open access, including unbundled transport
339 and ISP services, is provided pursuant to an agreement with a local franchising authority,
340 on other than a temporary test or promotional basis not to exceed twelve months, by any

341 cable system owned or operated by AT&T, TCI or the franchisees or any affiliate that is
342 owned or operated by AT&T, TCI or franchisees or successors in interest, then AT&T,
343 TCI and franchisees shall provide the same type of access on comparable terms and
344 conditions to cable subscribers in the unincorporated areas of King County.

345 SECTION 5. Ordinance 13409, Section 5, is hereby amended to read as follows:

346 AT&T, TCI and the franchisees have agreed to keep the council informed of
347 issues relative to the franchise((s)) agreements. Through the expiration of the franchise
348 agreements, on at least a quarterly basis, a representative from AT&T, TCI and
349 franchisees, shall attend the ((budget and fiscal management)) utilities and technology
350 committee ((of the council)), or its successor, at dates that are mutually agreeable to the
351 council and the representative described ((herein)) in Ordinance 13409, as amended.

352 A. The representative((s)) shall provide ((an update regarding the franchises,
353 including cable video packaging, system upgrades and local phone service among other
354 contemporary items related to the franchise.)) a franchise update, and so long as release
355 of such information is lawful and, subject to the final sentence of this paragraph, does not
356 disclose confidential and competitively sensitive information, the following information
357 shall be addressed: cable video packaging; status of system upgrades in the
358 unincorporated areas of King County; installation and service data on cable services; the
359 number of customers subscribing to the Excite@Home service (including those located in
360 unincorporated King County, those throughout King County with its incorporated cities,
361 those throughout Washington State and those subscribers located throughout the United
362 States); and market penetrations for Excite@Home and any other high-speed cable
363 modem service provided by AT&T, TCI and franchisees. If AT&T reasonably concludes

364 that any information otherwise required by this section is both confidential and
365 competitively sensitive, it may satisfy its obligations under this section as follows:

366 1. AT&T, TCI and franchisees shall describe the nature of the specific
367 information it seeks to withhold;

368 2. AT&T, TCI and franchisees shall provide a representative of the council the
369 opportunity to review the information on AT&T premises, subject to agreement to
370 reasonable protections to protect the confidentiality of information, including but not
371 limited to nondisclosure provisions; and

372 3. If the council representative reasonably concludes that the information is not
373 both confidential and competitively sensitive, both parties shall promptly appoint two
374 arbitrators, who shall choose a third arbitrator to serve as chair of a panel of the three
375 arbitrators. The arbitrators shall review, under the terms of a reasonable nondisclosure
376 agreement, such information and render a decision binding on the council and AT&T,
377 TCI and franchisees as to whether the information is: a. both confidential and
378 competitively sensitive and may continue to be withheld; or b. either nonconfidential or
379 not competitively sensitive and therefore required to be disclosed.

380 B. AT&T, TCI and franchisees shall mail copies of the quarterly report to the
381 chair of the utilities and technology committee, the expert monitoring panel (EMP), the
382 office of cable communications and the cable services advisory committee no later than
383 ten working days from the council briefing. The office of cable communications must
384 identify any concerns they have identified with the report in writing, within ten working
385 days to the EMP.

386 C. Nothing in this section shall be construed to relieve AT&T, TCI and

387 franchisees of their obligations under the existing terms of the franchise agreements to
388 make available to the county all books and records that the county deems reasonably
389 necessary in order to monitor compliance with the terms of the Cable Ordinance, the
390 franchise agreements, or applicable law. Nothing in this section shall be construed to be
391 a warranty or representation by the county to AT&T, TCI, or franchisees that information
392 provided to the council or its representative pursuant to this section is not a public record
393 subject to the provisions of RCW chapter 42.17.

394 SECTION 6. Ordinance 13409, Section 6, is hereby amended to read as follows:

395 ~~((AT&T, TCI and the franchises and the county have discussed that the potential~~
396 ~~impact of the franchisees' high speed Internet access service on (1) consumer choice of~~
397 ~~Internet and online services and (2) of the competitive impact on other providers of~~
398 ~~Internet and online services in the unincorporated areas of King County need further~~
399 ~~study. AT&T, TCI, and the franchises shall confirm in writing that they will agree to~~
400 ~~support an expert analysis in the county's review of issues raised in the request for~~
401 ~~transfer by an Expert Review Panel (ERP). The ERP will be composed of regulatory~~
402 ~~economists and engineers who are considered experts in the industry appointed by the~~
403 ~~council. The ERP will issue a report with findings to the council by October 8, 1999~~
404 ~~addressing any anticompetitive implications of rolling out bundled high speed cable~~
405 ~~modem Internet services including legal, technical, and economic considerations as well~~
406 ~~as subscriber privacy issues. The ERP will report to the budget and fiscal management~~
407 ~~committee of the council.~~

408 ~~AT&T, TCI and franchisees recognize that additional or different conditions~~
409 ~~regarding nondiscriminatory access and subscriber privacy may be imposed by the~~

410 county after completion of the study but prior to March 1, 2000. AT&T, TCI and
411 franchisees shall confirm in writing that such additional or different conditions shall be
412 subject to a standstill and tolling agreement to include the following:

413 1. The county may impose additional or different conditions which shall be
414 considered as if imposed on the date of enactment of this ordinance. AT&T, TCI and
415 franchisees shall treat such conditions as if they were timely imposed within the 120-day
416 time period authorized for review of the transfer of control as described in 42 USC Sec.
417 537.

418 ~~2. AT&T, TCI and franchisees and King County have not waived any rights,~~
419 ~~obligations, claims, defenses or remedies regarding the county's authority to impose such~~
420 ~~conditions.))~~ The office of cable communications shall provide a written quarterly report
421 to the utilities and technology committee on the status of AT&T's, TCI's and franchisees'
422 franchise compliance.

423 SECTION 7. There is hereby added a new section to Ordinance 13409 to read as
424 follows:

425 A. AT&T, TCI and franchisees and the county have agreed that further study is
426 necessary of the potential impact of the franchisees' high-speed Internet access service
427 on: consumer choice of Internet and online services; and the competitive impact on other
428 providers of Internet and online services in the unincorporated areas of King County.

429 AT&T, TCI and franchisees shall confirm in writing that it will support further analysis
430 of the economic and market power issues raised in the expert review panel's final report.
431 An expert monitoring panel shall be established to provide this analysis, and shall consist
432 of three or five experts with a background in either industry or regulatory economics, or

433 both. Utilizing the expert review panel's final report as a baseline of analysis, the EMP
434 shall meet at least once a month to review AT&T's, TCI's and franchisees' quarterly
435 reports for data related to market penetration rates and shall monitor the status of high-
436 speed Internet access competition in the unincorporated areas of King County, and shall
437 submit an analysis of this information on a quarterly basis, or more frequently as deemed
438 necessary, to the utilities and technology committee or its successor. If the EMP
439 determines at any point in time that AT&T is engaged in anticompetitive or monopolistic
440 acts, or that AT&T has gained unacceptable power in the marketplace for high-speed
441 Internet access, the EMP shall immediately notify the utilities and technology committee
442 or its successor of its finding and shall provide recommendations to the committee for
443 corrective actions. The EMP shall issue a written report with findings to the council by
444 January 1, 2002, addressing what, if any, type of open access requirements the council
445 should impose on AT&T, TCI and franchisees upon expiration of AT&T's and TCI's
446 exclusive agreement with Excite@Home on June 4, 2002. Members of the EMP shall be
447 appointed by the council and shall report to the utilities and technology committee, or its
448 successor.

449 B. If the office of cable communications or the EMP determines at any time
450 during the term of the conditional transfer of the franchise agreements that: 1. the
451 Excite@Home service provided by AT&T, TCI and franchisees has captured more than
452 two-thirds of the residential customers served by high-speed Internet access via cable and
453 Digital Subscriber Line (DSL) services in the franchise areas; and 2. there are at least
454 35,000 high-speed Internet access customers in those areas in total, then the executive
455 shall transmit an ordinance to amend franchise agreements 11680 and 12132, to require

456 nondiscriminatory access, as defined in section 3Q of this ordinance, including
457 unbundled transport and ISP services. If such an ordinance is transmitted to the council
458 for its consideration, the EMP shall immediately review the executive proposal and
459 forward its recommendations on the proposal to utilities and technology committee, or its
460 successor.

461 SECTION 8. There is hereby added to Ordinance 13409 a new section to read as
462 follows:

463 This conditional transfer of control approval shall only be valid through June 4,
464 2002, unless the council acts to extend this agreement, which extension may impose
465 additional or different conditions on AT&T, TCI and franchisees as described in
466 Ordinance 13409. AT&T, TCI and franchisees recognize that the council may impose
467 additional or different conditions regarding nondiscriminatory access and subscriber
468 privacy if the council determines, upon review of relevant information including but not
469 limited to, recommendations by the EMP, that AT&T, TCI and franchisees possess
470 unacceptable market power in the unincorporated areas of King County for high-speed
471 Internet access. AT&T, TCI and franchisees shall confirm in writing that, provided the
472 new conditions are imposed by June 5, 2002, such additional or different conditions shall
473 be subject to the following standstill and tolling agreement:

474 A. The county may impose additional or different conditions which shall be
475 considered as if imposed within the one hundred twenty-day time period authorized for
476 review of the transfer of control as described in 42 U.S.C. Sec. 537.

477 B. AT&T, TCI and franchisees and King County have not waived any rights,
478 obligations, claims, defenses or remedies regarding the county's authority to impose such

479 conditions.

480 SECTION 9. There is hereby added to Ordinance 13409 a new section to read as
481 follows:

482 A cable services advisory committee (CSAC) is hereby established.

483 A. The purpose of the CSAC shall be to provide comments to the council's
484 utilities and technology committee, the executive office of cable communications,
485 AT&T, TCI and franchisees and the EMP regarding video cable services and Internet
486 services offered through the cable system. The CSAC is charged with identifying ways
487 in which cable system performance could be enhanced, and shall consider issues such as
488 packaging of services, marketing of services and pricing tiers. The CSAC shall
489 determine if there are improvements that could be made at the federal, state and local
490 level of government, as well as if there are improvements that could be made by AT&T,
491 TCI and franchisees to improve the cable system's performance.

492 B. The CSAC shall be composed of ten members, including two representatives
493 each of county council districts 3, 5, 8, 9 and 12. The committee members shall be
494 subject to the appointment process outlined in K.C.C. chapter 2.28. Each member must
495 be nominated for executive appointment by the councilmember representing council
496 districts 3, 5, 8, 9 and 12.

497 C. The CSAC should meet on at least a quarterly basis and should schedule their
498 meetings at a time when the council chambers are available, so that their meetings may
499 be broadcast on King County Civic T.V. The CSAC should be staffed by the manager of
500 King County Civic T.V.

501 SECTION 10. There is hereby added to Ordinance 13409 a new section to read

502 as follows:

503 In the interest of diminishing the "digital divide" and to fully effectuate the I-
504 NET, the council hereby reaffirms its commitment to carefully monitor the progress of
505 the I-NET project as it transitions from the construction phase to the implementation
506 phase.

507 SECTION 11. Where Ordinance 13409, as amended by this ordinance, requires
508 submittal of written confirmations by AT&T, TCI and franchisees, the confirmations
509 shall be filed with the clerk of the council, the chair of the utilities and technology
510 committee and the lead staff of the utilities and technology committee, on or before June
511 15, 2000. If these or any other of the conditions for approval are not satisfied, approval
512 shall be deemed to have been denied as of the date of adoption of this section. The
513 executive is hereby authorized to execute written amendments to the franchise
514 agreements incorporating in substantial form the conditions set forth in Ordinance 13409,
515 as amended by this ordinance.

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SECTION 12. If any provision of this ordinance, or its application to any person or circumstance is held invalid, the remainder of the ordinance, or its application to other persons or circumstances is not affected.

Ordinance 13855 was introduced on 3/20/00 and passed as amended by the Metropolitan King County Council on 5/15/00, by the following vote:

Yes: 13 - Mr. von Reichbauer, Ms. Miller, Ms. Fimia, Mr. Phillips, Mr. Pelz, Mr. McKenna, Ms. Sullivan, Mr. Nickels, Mr. Pullen, Mr. Gossett, Ms. Hague, Mr. Vance and Mr. Irons
No: 0
Excused: 0

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON



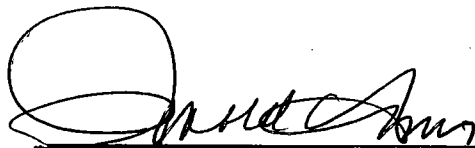
Pete von Reichbauer, Chair

ATTEST:



Anne Noris, Clerk of the Council

APPROVED this 24 day of May, 2000.



Ron Sims, County Executive

Attachments A. Conclusions and Recommendations of the Expert Review Panel, dated October 28, 1999

13855

CONCLUSIONS AND RECOMMENDATIONS OF THE EXPERT REVIEW PANEL

This statement contains the Expert Review Panel's conclusions and recommendations on how a broad policy of "non-discriminatory access" for AT&T's new Excite@Home service can be best carried out to support vigorous competition and consumer choice for Internet services in unincorporated King County. Employing new cable modem technology, the Excite@Home service will soon allow residents to send data to and from the Internet at very high speed over AT&T's cable television lines. In establishing this Panel, the Metropolitan King County Council raised the concern that AT&T will dominate the market for high-speed access to the Internet and may use that power to restrict the choice of other Internet services as well. In Ordinance 13409, the Council specifically charged the Expert Review Panel with "addressing any anticompetitive implications of rolling out bundled high speed cable modem Internet services including legal, technical, and economic considerations as well as subscriber privacy issues."

The Panel has examined the potential problem and weighed various solutions to recommend to the Council. After considering information on a wide range of issues, the Panel has concluded the following:

1. *The Panel agrees that the Council should continue to encourage a vigorously competitive market for Internet services, and be concerned with market power which interferes with consumer choice.*¹ If AT&T is successful at marketing its cable modem service and its ability to carry information at high speed between King County homes and the Internet is not seriously challenged by other companies, the troublesome market conditions that the Council has noted may arise.

However, at this time AT&T is not yet offering cable modem service in unincorporated King County. The company is working to complete the upgrade of its cable network and has agreed not to deploy the service until the Council's review process is complete. As required by AT&T's franchise agreement, that upgrade is scheduled to be complete throughout the county by March of 2000. Without an actual offering of cable modem service, the Panel finds that there is uncertainty about whether AT&T will possess unacceptable power in the marketplace for high-speed Internet access.

¹ The term "market power" is explained in Point #3.

2. *The Panel agrees that certain principles of non-discrimination are appropriate as a foundation for a pro-competitive policy. In that regard, the Panel recommends that the Council immediately ensure that AT&T fulfills its commitment to treat all Internet traffic that it carries as part of its cable modem service equally. By "equally", we mean that:*

- AT&T will not block or limit access to information at any site on the Internet, including the sites of competitors to AT&T or Excite@Home.
- AT&T will not make it more difficult or more cumbersome to transmit information efficiently to or from sites that are not affiliated with AT&T or Excite@Home.
- AT&T will provide fast access to local sources of information via "local peering" -- that is, direct connections between AT&T's local cable network and local sources that avoid the congestion of unnecessarily sending information through distant regional or national facilities.
- Any consumer can easily connect to any Internet services or online content of his or her choice without viewing any AT&T or Excite@Home sponsored information by "clicking" on an "icon" -- that is, the symbol which represents the consumer's preferred service -- which appears on his or her computer desktop.

The technical specifications for equal treatment of all Internet traffic are provided in the Technical Appendix to these conclusions and recommendations -- Part II of this report.

3. *The Panel agrees that the following considerations should lead the Council to consider further action beyond the non-discrimination principles in Point #2:*

- Any failure by AT&T to continue to comply with the requirements for equal treatment of all Internet traffic as described above
- Market conditions in which consumers have shown that they value cable modem access highly, but in which viable alternatives to AT&T's service for high-speed Internet access have not emerged -- that is, in which AT&T has "market power"
- Any other situation in which substantial consumer dissatisfaction arises and which may manifest itself as complaints about AT&T's cable modem service.
- Any decision by AT&T to agree to and implement a more expansive version of so-called "open access" as part of its cable franchises elsewhere in the United States, or to enter into agreements with unaffiliated Internet service or content providers.

4. *In response to the Council's question of whether it is technically and economically feasible to implement non-discriminatory access, the Panel generally does agree:*

- Each of the three different approaches which have been proposed for non-discriminatory access is technically feasible. These approaches are local peering, unbundling of the Excite@Home service into a separate transport offering, and so-called leased capacity.
- Local peering, as endorsed by the Panel in Point #2 and as it is being implemented by AT&T, is also economically feasible.
- While unbundling of the Excite@Home service can be accomplished at a definable cost to AT&T, the viability of the separate transport service -- after that cost has been passed on to competitors who wish to use it -- is uncertain.
- The economic feasibility of providing leased capacity, where competing providers of Internet services are offered a portion of the overall capacity of AT&T's cable modem system, was not resolved in testimony provided to the Panel.

5. *However, there is a degree of uncertainty about the significance of AT&T's bundling of high-speed connections with other Internet services in its Excite@Home offering, and of the harm to competitive markets and consumer choice that might result.* This follows from the uncertainty about whether AT&T will possess unacceptable power in the marketplace for high-speed Internet access. [See the sidebar on the next page which explains when "bundling" may become anti-competitive "tying".]

In this regard, members of the Panel have weighed the advantages and disadvantages of different courses of action for the Council to take under these current circumstances. The Panel has identified two alternative courses for further action:

- *Wait for actual conditions to emerge.* The Council could carefully monitor the market for the problematic circumstances noted in Point #3 above. Should any of those circumstances emerge after AT&T begins to offer cable modem service, the Council would proceed to consider additional measures as described in supporting sections of the report.
- *Take steps now to prepare for the likelihood of market power.* Alternatively, the Council could monitor the market, but stand ready to impose a requirement that AT&T "untie" its cable modem package unless a competitive market emerges within the next year or the company voluntarily offers consumers the option of combining its high-speed connections with the Internet services of other companies.

THE DIFFERENCE BETWEEN "BUNDLING" AND "TYING"

The Panel agrees that the question of whether AT&T has power over the market for high-speed Internet access is important to resolving the controversial issues of "bundling" and "tying". The term "**bundling**" refers to marketing two products in a package, such as hamburgers and French fries. The service that AT&T is currently planning to offer, Excite@Home, combines a high-speed connection for passing data between homes and the Internet with other services such as electronic mail, Web hosting and use of information data bases -- that is, other services are bundled with the high-speed capability. AT&T does not sell the high-speed connection to consumers separately at this time.

The term "**tying**" refers to a particular situation where consumers are forced to buy a second product if they want the first product -- because a firm is the exclusive (or nearly so) provider of that first product. This tying arrangement can force consumers to buy the firm's second product even if competitive (and possibly superior) alternatives to it are available. For example, the old Bell System once required that consumers of telephone service buy Bell System telephones as well -- even though other kinds of handsets were available.

If AT&T becomes one of several different providers of high-speed connections to King County residents, its bundling of other services with the high-speed capability need not be a problem. In fact, it may be desirable. Consumers who like the convenience of the Excite@Home bundle with the electronic mail, Web and information features that AT&T has selected can purchase it, while those who like the mail, Web or information services of other companies can shop for their high-speed connections elsewhere. Those alternative providers of high-speed connections may also sell a bundle of services.

Even if AT&T were to be the dominant provider of high-speed connections in unincorporated King County, bundling would not necessarily be undesirable or a problem. The company could allow consumers the option of buying the Excite@Home bundle of services or combining an AT&T high-speed connection with the email, Web services and information of any other companies. In this case, AT&T's possible market power over high-speed connections would not limit consumer choice for other Internet services.

(continued on next page)

However, if AT&T does gain market power over high-speed connections and only offers the bundled Excite@Home service, the prospects for vigorous competition and consumer choice in King County could be seriously threatened. In this circumstance, a refusal to offer an unbundled option for high-speed connections would be an example of anti-competitive tying, where consumers are forced to buy a second product or service because of a firm's control over the market for the first.

6. **Members of the Panel differ in their views as to which of the two courses for further action in Point #5 would best serve the Council's interest in encouraging a competitive market and consumer choice.** Among the core reasons for this divergence are:
- Different views on the ease or difficulty of correcting any market power problem at a later time. Some members believe it will be possible to readily correct any problem after actual market conditions emerge, while others believe that the delay and increasing political challenge of initiating action later will harm consumers and the cost to consumers of switching service providers will entrench AT&T in the market.
 - Different expectations about the extent to which AT&T will face competition in the near term in unincorporated King County. Some members believe that there is a high likelihood that AT&T will have substantial and enduring market power, while others believe more strongly that competing technologies will soon reach even outlying areas and consider the prospect of AT&T market power uncertain at this time.
 - Different assessments of the difficulty and magnitude of the costs of implementing a County requirement that AT&T offer an unbundled version of its Excite@Home service. Some members believe that a local requirement for unbundling would involve a lengthy process with considerable administrative and litigation costs for the County, while others believe that it is possible to craft a timely and simplified method of enforcement if the Council begins to consider the process of implementation now.
7. **The course of action which entails waiting for actual conditions to emerge is favored by four Panel members (Sharon Nelson, Roger Noll, Martin Rood and Rick White).** Under this alternative, the Council would carefully monitor for the circumstances highlighted in Point #3 and consider additional measures – including the possibility of a requirement for AT&T to untie the sale of its high-speed connections from its sale of other Internet services -- should any of them arise.

These members believe this alternative would have several advantages:

- It would recognize that we are at an early stage of the market's development, and allow the potential of various competing technologies for high-speed connections to emerge. A competitive market for high-speed connections would resolve concerns about the potential for market power and tying of services much more simply than a regulatory solution.
- It would allow AT&T and potential competitors to make decisions on deployment, marketing and business alliances based solely on the most effective and efficient way to develop the market for high-speed connections, and would preserve incentives for AT&T to invest further in this capability. It would not distort the incentives of the marketplace in a way that would discourage the deployment of new technologies.
- It would allow the Council to benefit from observing the actual development of market conditions before making any decision on the need for further intervention and spending of scarce fiscal resources on what may be a controversial local regulation.
- It would allow the Council to first observe the outcome of litigation between AT&T and other jurisdictions and the mounting pressure on the Federal Communications Commission to establish national rules before undertaking the task of making and enforcing rules -- as well as engaging in a costly and lengthy adversarial battle with AT&T over jurisdiction or the justification for intervention.

The second course of action -- taking steps now to prepare for the likelihood of market power -- is favored by four Panel members (Bill Andersen, Ron Johnson, Ralph Sims and Jeffrey Sterling). These members of the Panel believe that despite the uncertainty, it is probable that AT&T will have market power in unincorporated King County -- that is, there will be significant consumer demand for high-speed access to the Internet and that substitutes will not be generally available in the near term. In addition, the consequences of inaction could be to allow AT&T to become entrenched and -- with ample resources and monopoly rents to protect -- difficult to dislodge without protracted legislative proceedings and time-consuming litigation. After the fact measures would provide only a partial remedy after much damage may have been done to consumers and businesses in King County.

These members believe that the Council should pursue whatever steps it can easily take now and in the future to protect consumer choice from the effects of such power, and should unequivocally commit to a course of action protecting King County consumers and businesses. They strongly recommend that the Council:

- Continue the conditional approval of the AT&T TCI transfer while entering into immediate negotiations with AT&T seeking agreement about how an equal access policy can be implemented. Such a policy would include the components of the non-discrimination policy noted in Point #2 and, in addition, would include an undertaking by AT&T to make the option available to its subscribers to buy high-speed connections without other AT&T or Excite@Home services, or alternatively to allow competing service providers the option of buying the high-speed connections and offering them to their customers. In this way, subscribers would have a choice of Internet service providers.
- Absent a negotiated agreement, be prepared to impose by September 1, 2000 a suitable remedy for any market power that has emerged (as shown by a lack of significant high-speed competition by June 1, 2000, for example) or for any shortfall in AT&T's commitment to implement and sustain high-quality local peering.
- To minimize enforcement costs for the County, clearly state that it is not preempting any separate private right of action otherwise available to any person who is injured as a result of a violation of the non-discriminatory access policy.

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