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OFFICE OF THE SECRETARY

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November 16, 1998

ORIGINAL

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: CS Docket No. 98-178
Application of AT&T Corp and
Tele-Communications, Inc.

Dear Ms. Salas:

Enclosed for filing on behalf of AT&T Corp. ("AT&T") and Tele-Communications, Inc. ("TCI") are 14 copies of the corrected version of AT&T's and TCI's Joint Reply To Comments And Joint Opposition To Petitions To Deny Or To Impose Conditions, originally filed with the Commission on November 13, 1998 (the "Reply"). At the time it was filed with the Secretary, the Reply inadvertently contained several citations to attachments which omitted paragraph numbers for the citation. The corrected version, which was served on the FCC staff and on all parties to the proceeding, contains the appropriate paragraph numbers, corrects the signature block for the filing, and corrects the spacing of headings in the pleading.

Any questions or inquiries concerning this matter should be directed to the undersigned.

Sincerely,

Mark D. Schneider

Mark D. Schneider

Enc.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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OFFICE OF THE SECRETARY

In the Matter of)
)
Joint Application of AT&T Corp.)
and Tele-Communications, Inc.)
for Transfer of Control to AT&T)
of Licenses and Authorizations)
Held by TCI and its Affiliates)
Or Subsidiaries)

CS Docket No. 98-178

**AT&T'S AND TCI'S JOINT REPLY TO COMMENTS AND
JOINT OPPOSITION TO PETITIONS TO DENY OR TO IMPOSE CONDITIONS**

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November 13, 1998

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**AT&T'S AND TCI'S JOINT REPLY TO COMMENTS AND
JOINT OPPOSITION TO PETITIONS TO DENY OR TO IMPOSE CONDITIONS**

Pursuant to the Commission's Public Notice of September 29, 1998, AT&T Corp. ("AT&T") and Tele-Communications, Inc. ("TCI") respectfully submit this joint reply to comments and joint opposition to the petitions to deny or to impose conditions on the applications seeking approval of the transfer of control of FCC authorizations held by subsidiaries of TCI and entities controlled by TCI to AT&T.¹

INTRODUCTION AND SUMMARY

There is no dispute about the effects of the proposed \$48 billion merger of AT&T and TCI. It would greatly accelerate the introduction of competitive local telephone services over TCI's cable systems and make them far more effective competitors with the incumbent local telephone monopolists in residential mass markets and elsewhere. The \$48 billion investment that AT&T would make in purchasing TCI -- and the additional billions of dollars that it would invest to upgrade TCI's

¹ A list of all the parties filing comments, petitions to deny, and petitions to impose conditions is contained in Appendix A.

cable systems to provide telephony -- is the greatest commitment that any carrier has yet made to realize the 1996 Telecommunications Act's central objective of meaningful and vigorous competition in local exchange and exchange access services. The merger similarly presents the greatest prospect of success in this respect of any event in the last three years. It will promote all the "broad aims of the Communications Act," including "implementation of Congress' 'pro-competitive, de-regulatory national policy framework designed to . . . open[] all telecommunications markets to competition,'" "rapid[]" "accelerat[ion of] private sector deployment of advanced telecommunications and information technologies and services," and "the provision of new [and] additional services to consumers."²

Indeed, the sole effect of the merger on consumers is that it will someday soon provide them with new and additional services and greater choices than they have today. They will have the choice of obtaining local exchange services that do not use the facilities of the incumbent LEC, and consumers will be free to obtain these new local services either by themselves or in bundles that include other services as well -- if the merger is allowed to proceed promptly and AT&T-TCI can begin the work needed to deliver these benefits.

Conversely, the merger will not deprive any consumers of any choices that they have today when they subscribe to the local services of an incumbent LEC. Any consumer who selects AT&T-TCI's local telephone services will continue to be free to presubscribe to MCI WorldCom, Sprint, or any other long distance carrier of his or her choice. Any consumer will be free to use the AT&T-TCI exchange services to obtain dial-up access to any Internet service provider or on-line

² See Memorandum Opinion and Order, Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., CC Docket No. 97-211, ¶ 9 (rel. Sept. 14, 1998) ("MCI/WorldCom Order") (citations omitted).

service provider. Similarly, the merger will have no effect on the provision of any service to any cable service subscriber. These consumers will continue to be able to obtain content from providers of on-line services and video programming in the same ways they do today.

Seventeen entities have filed comments on the application for approval of the transfers of control of TCI's licenses that is necessary for the merger. None denies the merger's benefits, and none has made any remotely plausible claim that its overall effect would not be to serve the public interest. Instead, insofar as they oppose the requested approvals, the commenters request that the approval be loaded with conditions that cover an array of disparate subject matters: from Internet access, to the carriage of digital television signals, to resale of cable services, to the provision of inside wiring. But these disparate claims share a common attribute: virtually all have nothing to do with the merger. Instead, they reflect persistent efforts to pursue other, unrelated agendas that can and should be pursued, if at all, only in industry-wide proceedings in which all affected parties can participate, a full record can be compiled, and rules of general applicability can be established.

That single deficiency is sufficient to dispose of the vast majority of the claims. The Commission's well-settled standard for evaluating transfer of control applications in merger proceedings is to determine whether the beneficial effects of the merger outweigh any harmful effects, and it has therefore held that practices and market conditions that would equally be present regardless of whether the merger occurs can play no role in that analysis. It is especially important that this standard be followed here. That is both because these claims are factually and legally complex, and thoughtful consideration of their substantive merits (or lack thereof) would substantially delay, if not threaten altogether, achievement of the critical public interest benefits of the merger, and because the brief, superficial, and in many cases factually and legally inaccurate assertions their proponents offer

in support of their unrelated claims would provide the Commission with no suitable record basis for reasoned decisionmaking if it decided (as it should not) to address them.

A stark example of these claims are the proposals that are primarily championed by one on-line services provider (AOL) and one Internet access provider (MindSpring). They contend that TCI's cable systems should be required to offer them "access" and "interconnections" to broadband transmission facilities at the headend in each TCI cable system that provides a cable service (@Home) that provides Internet access and content. They erroneously claim that the imposition of these common carrier obligations is necessary to enable third parties to compete in Internet access and on-line services markets -- and that consumers otherwise will "pay twice" for on-line content.

These epitomize the claims that cannot be considered in a transfer of control proceeding. TCI has already begun offering @Home to some of its subscribers (less than 10%) and expects to complete the upgrades required to offer @Home to all its subscribers by the end of the year 2000, irrespective of the merger. In addition, @Home and the similar Road Runner service developed by Time Warner are offered by numerous unaffiliated cable operators, and AOL and MindSpring have not advanced and could not advance any grounds for imposing their proposed requirements only on TCI and not on other cable systems. Further, in addition to the fact that TCI has only just begun the cable system upgrades required for these offerings, @Home has gained only a tiny fraction of the market in the areas where it has been offered, so there is ample time to complete any warranted industry-wide proceedings before there is any risk of the "harms" that AOL and MindSpring have postulated.

Beyond that, there is no basis in law or fact for the proposed conditions, and the imposition of them -- either here or in a future industry-wide proceeding -- would severely jeopardize the proposed merger and the immense benefits it could offer consumers. The simple reality is that AT&T can commit to the significant investments required to acquire and upgrade TCI's cable systems for telephony only because the combined revenues from the cable and telephone services would be sufficient to allow AT&T to earn a competitive return. Any condition that would threaten the ability of TCI cable systems to capitalize on the investments necessary to offer @Home will thus fundamentally alter the economics of the proposed merger and impede or altogether prevent the offering of telephone service over cable systems.

Indeed, it is for these and related reasons that Congress has defined offerings like @Home as "cable services" and flatly prohibited the Commission or any other regulatory body from imposing unbundling or other similar common carrier requirements on cable systems. Congress recognized that these offerings are essential to any cable system that hopes to provide telephone services that effectively compete with incumbent LECs and that there further is no substantial possibility that a cable system's unregulated provision of on-line and Internet access services could threaten harm to competition. The reality is that the on-line and Internet access services of cable systems are provided in the market that is now, and will for the foreseeable future, be dominated by AOL and other on-line service providers whose customers use dial up access over the narrowband facilities of LECs. Further, even to the extent there is demand for broadband access, the incumbent LECs have immense advantages and market power in offering that capability. For all these reasons, TCI and other cable systems have overwhelming incentives to assure that their customers may obtain high speed access to the content providers of their choice at the lowest possible cost, and @Home

service has been configured to assure that it does so. In this regard, there is no factual or economic basis for the claims that @Home service is priced in a manner that burdens customers of AOL and other OSPs and makes customers "pay twice" if they use @Home to access the content of other OSPs is unsupported, speculative and unsustainable. Rather, because @Home will derive substantial advertising revenues from its provision of content and use the revenues to help offset network and transmission costs, Mulron Aff., op. cit., ¶¶ 3-4, the effect of @Home's provision of content could be to allow lower the prices to be paid by subscribers who use @Home to access AOL or other third party OSPs. Willig/Ordovery Aff., op. cit., ¶ 43-44.

These Joint Reply Comments will develop these and other points in greater detail. Part I demonstrates that most of the claims that have been raised must be disregarded, for they do not relate to the effects of the merger, but merely seek to advance the general business or policy objectives of individual commenters with respect to the markets in which one or both of the Applicants happen to participate. Part II demonstrates that the effect of this merger is positive and exceptionally powerful, for it is designed to achieve the precise public interest objective -- widespread local exchange competition, for service to residential customers in particular -- that was a critical goal of the 1996 Act, and that thus far has proven so difficult to attain.

Parts III through VII of these Joint Reply Comments then address the specific claims made, and conditions proposed, by the seventeen commenters. Although most of these claims should be dismissed at the threshold as irrelevant to the merger, these sections also include, where appropriate, detailed refutations of these claims on the merits. Part III addresses the conditions that have been proposed by AOL and MindSpring. Part IV addresses the similar, but even more extreme, claims of incumbent LECs and others that once the AT&T-TCI cable systems begin providing

telephony, they should be subjected to the obligations that apply to incumbent LECs (as well as the requirements of Sections 251(a) and (b) that will apply to their telecommunications services). Part V addresses the myriad Cable Act issues raised by parties -- many of which attempt to revive the precise arguments that the Commission has rejected on the merits in previous proceedings, and none of which relates to the merger.

Part VI addresses those claims that actually relate to putatively adverse effects of the merger on telecommunications markets. It describes the steps AT&T and TCI will take with respect to Section 20.6 of the FCC's rules, 47 C.F.R. § 20.6, and the aggregation of spectrum as a result of AT&T's ownership of AT&T Wireless, Inc., and TCI's ownership interest in Sprint's PCS ventures. It further responds to, and refutes (a) the illegitimate claims that GTE, which today enjoys a monopoly in the provision of bundled services in its region, makes against the merged entity's future ability itself to offer packages of services, and (b) the claims made by Sprint, a vertically integrated long distance and incumbent local exchange carrier, that the merger threatens long distance competition insofar as it permits AT&T likewise to acquire local facilities (although, unlike Sprint, alternative ones) that may be used to provide exchange access.

Finally, Part VII refutes GTE's erroneous claim that the merger might violate Section 652(a) of the 1996 Act.

I. THE ONLY RELEVANT ISSUES IN THIS PROCEEDING ARE THE EFFECTS OF THE MERGER AND WHETHER IT BENEFITS THE PUBLIC.

Many of the commenters fundamentally misperceive the nature of this transfer of control proceeding and the standard the Commission applies under Section 310. They seek to use this proceeding as an opportunity to pursue claims that are unrelated to the merger and that can be pursued, if at all, only in industry-wide rulemaking proceedings. However, the question under

Section 310 is whether these transfers would serve or disserve the "public interest, convenience, and necessity."³ Accordingly, the exclusive focus of this proceeding is on the effect of the transfer of control itself. No other issues are relevant.

The Commission thus has made clear that the only issue under Section 310 is whether "the proposed transaction, on balance, serves the public interest, considering both its competitive effects and other public interest benefits and harms."⁴ Thus, for example, any conditions the Commission imposes must be "necessary . . . to ensure that the public interest is served by the transaction."⁵ Accordingly, where commenting parties focus on concerns that, even if valid, would equally be present regardless of whether the transaction is consummated, those concerns properly play no part in the Commission's analysis.⁶

Correlatively, where such concerns do not relate to the effects of the transaction, the Commission has consistently required that they be addressed, if at all, in other more appropriate proceedings -- in industry-wide rulemakings insofar as they reflect issues of general applicability,⁷ in

³ See 47 U.S.C. § 310(d).

⁴ See MCI/WorldCom Order, ¶ 10 (emphasis added).

⁵ See id. (emphasis added).

⁶ See, e.g., Memorandum Opinion and Order, Applications of Pacific Telesis Group, Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries, 12 FCC Rcd. 2624, ¶ 2 (1997) (declining to consider competitive concerns that do not "result from the proposed transfer").

⁷ See, e.g., MCI/WorldCom Order, ¶ 160 (holding that the transfer of control proceeding was "not the appropriate forum" to address Internet cost-sharing because "this matter extends beyond the Applicants"); Memorandum Opinion and Order, Applications of NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries, 12 FCC Rcd. 19985, ¶ 221 (1997) (declining to address PIC freeze concerns and deferring to possible
(continued...)

complaint proceedings insofar as they relate to private disputes,⁸ or before other fora insofar as they are not appropriate for resolution by the Commission at all.⁹ This approach has been consistently approved by courts reviewing transfer of control proceedings and analogous license renewal proceedings.¹⁰

⁷ (...continued)

rulemaking); Memorandum Opinion and Order, Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee, For Consent to Transfer Control of McCaw Cellular Communications, Inc. and Its Subsidiaries, 9 FCC Rcd. 5836, ¶ 70 (1994) (holding that equal access issue would be more appropriately addressed in industry-wide rulemaking) ("AT&T-McCaw Order"); id. at ¶¶90-91 ("If the BOCs choose . . . to argue that we should change our policy on cellular resale issues, they must do so in a rulemaking of general applicability that provides a wider range of parties an opportunity to comment"); id. ("NCRA's arguments that we grant cellular resellers the ability both to interconnect to the cellular system and the LEC local loop as well as to purchase NXX codes from the LEC are more appropriately addressed in rulemaking proceedings"); Teleprompter Corp., 87 F.C.C.2d 531, ¶ 39 n.40 (1981) (issues concerning regulation of program providers such as resale common carriers more appropriately raised in petition for rulemaking rather than transfer proceeding).

⁸ See, e.g., AT&T-McCaw Order, 9 FCC Rcd. at ¶¶ 139-140 (dismissing petition to deny alleging anticompetitive conduct "without prejudice" to formal complaint proceeding).

⁹ See, e.g., id. at ¶ 90 ("The BOCs can, if they choose, pursue their arguments to change these restrictions before the MFJ court"); Memorandum Opinion and Order, Application of Centel Corp. and Sprint Corp for Consent to Transfer of Control, 8 FCC Rcd. 1829, ¶¶ 6, 10 (1993) (civil disputes not to be resolved in transfer of control proceeding).

¹⁰ See, e.g., Community Television of S. California v. Gottfried, 459 U.S. 498, 501 (1983) ("rulemaking is generally a 'better, fairer, and more effective' method of implementing a new industry-wide policy than is the uneven application of conditions in isolated license renewal proceedings"); California Ass'n of the Physically Handicapped, Inc. v. FCC, 840 F.2d 88, 96-97 (D.C. Cir. 1988) (same); SBC Communications, Inc. v. FCC, 56 F.3d 1484, 1490-91 (D.C. Cir. 1995) (approving decision to resolve equal access issues in rulemaking proceeding rather than AT&T-McCaw transfer of control proceeding because "in the matter under review, the Commission was required to determine whether the merger of AT&T and McCaw would be in the public interest, not to review the overall level of competition in the cellular industry or the impact of the MFJ upon that competition"); Hale v. FCC, 425 F.2d 556, 560 (D.C. Cir. 1970) (media concentration issue not suitable for "ad hoc action against the licensee" in a renewal proceeding but rather "would be appropriate only in the context of overall rule-making"); National Org. for Women v. FCC, 555 F.2d (continued...)

Pursuant to these principles, most of the claims raised by the commenters are not appropriate for consideration in this proceeding. These include claims that (1) cable systems should have to give ISPs and OSPs access to so-called broadband data transport facilities; (2) cable systems that are upgraded to provide two-way telephony should be subject to Section 251(c) of the Communications Act; (3) the program access rules should be extended to terrestrially-delivered programming; (4) TCI should waive exclusive program arrangements; and (5) TCI should carry digital signals of local broadcasters. These claims are all familiar ones to the Commission, for their proponents have attempted not just to litigate them in the proceedings to which they are germane, but also to inject them in a vast array of proceedings that deal with other matters.

Each of these claims can be and should be denied on the ground that they are outside the scope of this transfer of control proceeding.¹¹ Indeed, that is particularly necessary here, for it is undisputed that the merger will create immense public benefits, and consideration of contentious industry-wide issues in this docket could serve only to delay those public benefits. And it is further the case because, as explained below, each of these claims rests on factual and legal theories that applicants and their experts believe to be meritless as a matter of fact and unsupported as a matter of law and public policy, so the Commission could not possibly embrace them without extensive

¹⁰ (...continued)

1002, 1011 (D.C. Cir. 1977) ("an industry-wide problem may be more appropriately aired and an industry-wide remedy formulated in a general inquiry, such as a rule-making").

¹¹ That is also the case with respect to the request of the Communications Workers of America ("CWA"), which supports the grant of the applications, that the Commission require benchmark data relating to workforce-related issues and monitor those matters post-merger. AT&T is proud of the constructive relationship it has established with its employees and their representatives, and is confident that relationship will continue after the merger. However, the Commission's institutional expertise and statutory responsibility do not include such workforce-related matters, and the Commission should decline to assume the role that CWA recommends.

further proceedings. That is presumably why the entities that have the most to lose from the successful implementation of the merger -- the incumbent LEC monopolies -- have gone to such lengths to attempt to lard this straightforward proceeding with their own extraneous claims.

II. THE MERGER OF AT&T AND TCI WILL INDISPUTABLY CREATE IMMENSE PUBLIC INTEREST BENEFITS.

The proposed merger will produce tremendous benefits for the public. Indeed, none of the seventeen parties who filed comments has even attempted to dispute that, as a result of AT&T's enormous planned investment and the substantial business risks it has determined to assume, the merger will result in the more rapid and effective entry of a new facilities-based provider of local exchange services to residential customers. While a number of parties request that the FCC impose conditions on the merger that will only advance their individual business interests,¹² the commenters similarly do not dispute that the merger would advance the primary purpose of the

¹² A number of parties filed comments on the merger seeking the imposition of conditions with regard to access to, or the carriage of, traditional and digital video programming. *See, e.g.*, Comments Of The Consumer Electronics Manufacturers Association ("CEMA"); Petition To Deny Of Consumers Union, Consumer Federation of America, and Office of Communication, Inc. of the United Church of Christ ("CU/CFA"); Comments of DIRECTV, Inc. ("DIRECTV"); Comments of Echostar Communications Corporation ("Echostar"); Comments of the National Association of Broadcasters ("NAB"); Joint Comments And Request For Imposition Of Conditions of The Wireless Communications Association International, Inc., and Independent Cable And Telecommunications Association ("WCAI/ICTA"). Still other parties filed comments seeking to impose conditions that would require post-merger AT&T to be regulated as an incumbent local exchange carrier ("ILEC") or otherwise be ordered to provide access to its broadband data transport facilities. *See, e.g.*, Comments of America Online, Inc. ("AOL"); Comments of Ameritech; Comments In Opposition of GTE ("GTE"); Comments of MCI WorldCom, Inc. ("MCI WorldCom"); Comments of MindSpring Enterprises, Inc. ("MindSpring"); Comments of Qwest Communications Corporation ("Qwest"); Comments of SBC Communications Inc. ("SBC"); Comments of Sprint Corporation ("Sprint"); Petition Of US WEST To Deny Applications Or To Condition Any Grant ("US WEST"). Other parties have sought to inject private disputes. *See* Petition to Deny of Seren Innovations, Inc. ("Seren").

Telecommunications Act of 1996: creating effective competition to the monopolies of incumbent LECs.

As the Commission has recognized, a "principal goal[]" of the 1996 Act was to open "local exchange and exchange access markets to competition."¹³ The House Report similarly stated that a "main component of the bill promotes competition in the market for local telephone service," and the Senate Report stated that the legislation "reforms the regulatory process to allow competition for local telephone services by cable, wireless, long distance" and other entities.¹⁴ Indeed, the Conference Committee specifically recognized that entry of cable firms into the "field of local telephony" appeared to be possible and to "hold the promise of providing the sort of local residential competition that has consistently been contemplated."¹⁵

Nor does any commenter dispute the central point that AT&T and TCI made in their Application: the proposed merger will expedite the establishment of alternatives to incumbent LEC facilities for residential customers who live in TCI's cable service areas and who today have no meaningful alternative to the incumbent LEC.¹⁶ Although AT&T and TCI have previously undertaken expensive and time-consuming efforts to establish local telephone service in certain local areas, neither party has been able to establish a significant competitive presence in local residential telephone service or is likely to do so in the foreseeable future, absent the expeditious consummation

¹³ Notice of Proposed Rulemaking, Defining Primary Lines, 12 FCC Rcd. 13647, ¶ 25 (1997).

¹⁴ H.R. Rep. No. 104-204, at 48 (1995); S. Rep. No. 104-230, at 5 (1995).

¹⁵ H.R. Conf. Rep. No. 104-458, at 148 (1996) (specifically noting the active plans of Time Warner, Jones Intercable and Cablevision to commence the offering of local telephony service).

¹⁶ See Application, Public Interest Statement, at 16-23, 37-42.

of their merger.¹⁷ Through their combination, AT&T and TCI will be able to implement a business plan that, in reliance on revenue streams from TCI's core and developing services and those anticipated from AT&T-TCI's entry into local telephony, will accelerate that entry as well as enable them to more expeditiously provide diversified digital data and video services to their customers.

This merger thus can only substantially benefit consumers and can cause no conceivable harm. Consumers will not lose any choices in services or service providers that they have today, but will, to the contrary, continue to have all those same choices plus the many additional options that will be available to them from AT&T-TCI.

Today, for example, consumers can choose from among long-distance providers, Internet service providers ("ISPs"), and on-line service providers ("OSPs"), but in almost all instances must take their local telephone service and their access to long-distance service from the incumbent local telephone monopoly that serves their area. As a result of the alternative local exchange facilities that will be established after the merger, however, consumers will have an additional residential telephony option, and the ability to mix and match it with other services from other providers. A consumer will be able, for example, to choose Sprint as its long-distance carrier, AT&T as its local carrier, and America Online (through broadband or narrowband access) as its OSP, as well as any number of other combinations. Further, in addition to providing telephony on a stand-alone basis, AT&T-TCI will also create packages of services for which it believes there to be consumer demand, and these will further expand the options available to customers.

¹⁷ Id. at 3-4, 7, 17-20 (describing AT&T's resale and ADL and SNET Ring efforts, and TCI's limited local telephone services).

What will enable AT&T-TCI to create these new service capabilities and make these unqualified consumer benefits available are the revenue streams the companies expect from TCI's existing video programming services, from the Internet programming it has begun to offer in some areas and is now expanding, and from the telephony services it will offer in the future, along with the considerable additional investment AT&T has determined to make in reliance on those expected returns. TCI has already committed to a \$1.8 billion investment for the initial upgrade of its cable facilities that is necessary to permit it to offer high speed Internet access, digital video, and other interactive programming. These upgrades have already been completed in some of TCI's service areas and will be close to being completed elsewhere by the end of the year 2000.¹⁸ However, TCI does not have the available capital to make the further upgrades of its facilities and to establish the marketing and customer service infrastructure that are required for it to provide toll-quality telephony for the foreseeable future. By contrast, AT&T is investing \$48 billion in purchasing TCI, and has committed that the merged AT&T-TCI will invest the several additional billion dollars required to provide telecommunications services over TCI's cable facilities in the near term.¹⁹ AT&T's plans for this extensive commitment of capital and effort require the taking of significant business risk, but will expedite local telephone service competition in these local areas by a dramatic measure. Because the merger will expedite and make possible choice in local telephony and other services initially to the nearly 21 million homes passed by the cable systems TCI controls, it manifestly serves the public interest sought by Congress in passing the 1996 Act.

¹⁸ AT&T and TCI have described specifically the cost, activities and timing that are associated with the upgrade to provide advanced video and data services. See Application at 39-40.

¹⁹ AT&T and TCI have described specifically the cost, activities and timing that are associated with the upgrade to provide for a competitive local telephone service. See Application at 40-42.

Given the undisputed public interest in the accelerated development of competition to the current ILEC telephone monopolies and the explicit and extensive commitments that AT&T and TCI have made to devote financial, human, and other resources to this effort once the merger is consummated, it would patently disserve the public interest for the Commission to permit the implementation of the merger to be delayed because commenters have raised a series of claims that are extraneous, insubstantial, or both. Because of the overriding importance of a prompt conclusion of the proposed merger, AT&T and TCI will acknowledge in this reply that the consummation of the merger will have no effect on the continued application of the Commission rules that have heretofore governed the applicants' cable, programming, and telecommunications businesses and that will apply to telecommunications services offered through TCI's cable systems in the future. At the same time, the Commission should ensure that the proceeding is not delayed by those commenters who do not deny the merger's benefits and who have raised no substantial claim that the transfers of control themselves could otherwise harm the public interest, but who have sought to litigate a host of highly contentious claims that are extraneous to this proceeding and that can be considered, if at all, in industry-wide rulemaking proceedings.

III. THERE IS NO BASIS IN LAW OR POLICY FOR THE COMMISSION TO CONDITION ITS APPROVAL OF THE MERGER ON THE IMPOSITION OF UNBUNDLING OBLIGATIONS ON TCI'S CABLE FACILITIES.

The first set of extraneous claims are the contentions of AOL, MindSpring, and others. They argue that the Commission should not approve the merger unless it imposes a condition that would require TCI to act as a telecommunications carrier even before AT&T upgrades TCI's cable systems and begins offering any exchange or other telecommunications services. In particular, they contend that TCI should be required to provide unaffiliated providers of Internet access with

unbundled access to TCI's broadband transport facilities so that these firms could provide Internet access and content to TCI's cable subscribers. The proponents of these conditions are quite vague about the precise technical arrangements, and the proposed obligation is variously described as "equal access,"²⁰ "open access,"²¹ "unbundling of broadband cable Internet access services,"²² or "provi[sion of] capacity on local broadband transmission facilities."²³ But it is clear that they want to oblige TCI to provide broadband facilities both to firms like MindSpring that provide only Internet access services ("ISPs") and to firms like AOL that provide both content through proprietary databases and Internet access ("on-line service providers" or "OSPs").

The commenters seek to impose these common carrier obligations on TCI because -- independently of the merger -- TCI recently began offering its cable subscribers a service (@Home) that delivers proprietary content and provides Internet access at much higher speeds than do services that use the narrowband dial up access provided by ordinary telephone lines. The Internet access and proprietary content is provided by @Home, which is a separate corporation in which TCI and other cable systems have made investments and which has established a network of broadband transmission facilities and servers and other computers that are designed to deliver information content at high speeds when integrated with cable facilities that are upgraded to have specified broadband capabilities. TCI has, to date, completed approximately 10% of the \$1.8 billion upgrade that is

²⁰ MindSpring, p. 17.

²¹ AOL, p. 31.

²² GTE, p. 4.

²³ US WEST, p. 28.

required to upgrade its cable plant for two-way capability and that is expected to be completed by the end of the year 2000, irrespective of the merger.

In the areas that have been upgraded, TCI @Home is a service that is provided to subscribers under the same arrangements that apply to Home Box Office and other cable services. TCI purchases the @Home programming from @Home, and TCI then sells the programming to individual subscribers.

Where TCI offers @Home, it is a new entrant in a highly competitive market that has been served exclusively by ISPs and OSPs that use narrowband facilities of LECs. Approximately 29 million of the nation's 100 million homes receive Internet access services, and the principal complainant in this proceeding (AOL) has over 14 million customers. In those areas where @Home has been offered, it has been taken by about 1.3% of the homes (representing about 2.1% of the cable subscribers). TCI @Home is available today to 1.4 million homes (of over 20 million homes passed), and TCI has attracted only 27,000 subscribers. Mulron Aff. ¶¶ 3-4 (Tab C).

TCI and @Home have overwhelming incentives to assure that their services are priced competitively with the alternatives that use ILEC networks. In this regard, in addition to the huge percentage of customers who now use -- and will continue to use -- narrowband dial up access from LECs to reach OSPs, LECs have formidable advantages over cable systems in providing broadband transport. As explained below, while cable systems must upgrade entire systems before they can offer high speed Internet access and content to a single customer, LECs can rapidly provide upgrades to each individual customer who requests it and is located within 18,000 feet of a central office. Further, to the extent the capability is requested for customers who are further than 18,000 feet from an office, the LEC need only run fiber over existing monopoly facilities to within 18,000 feet of that

customer. In these regards, it is commonplace for LECs to decide to deploy broadband in an area only after a cable system or other entity announces it will do so but for the LEC to complete the deployment for customers who want it in advance of the other entity. The monopolies afford them numerous other unique advantages in providing and marketing broadband capacity as well as the fact that narrowband dial up access is the preferred choice of the vast bulk of subscribers.

Further, cable systems have incentives efficiently to provide high speed Internet access and on-line services at competitive prices for reasons other than the revenues that they will earn if they win business from service providers who rely on LEC narrowband or broadband facilities. The provision of the content enables the programming providers to sell advertising, which allows it to recover network costs of its services from sources other than its share of subscriber revenues. The offering of services like @Home to cable subscribers enables a cable operator to broaden and strengthen its relationship with its subscribers, thus enhancing the cable system's ability to retain other business from those customers and to provide them still other services in the future, such as telephone service. Indeed, the cable system's offering of on-line services enhances the ability of the cable system to offer telephone services because of the marketing synergies between the two sets of services, and because the upgrades required to offer Internet access and content are a precursor to those required to provide telephony. For these reasons, the ability of TCI to offer Internet access and @Home and to capitalize on all the direct and indirect benefits of the facility upgrades that allow it are major features of the value of TCI's cable systems to AT&T and to its commitment to upgrade them for telephony.

Despite the fact that TCI has overwhelming incentives to ensure that its customers may reach other providers of content under reasonable arrangements that permit TCI to recover its

costs and the value of TCI's investment, AOL, MindSpring, and others have here claimed -- as they have in pending industry-wide proceedings -- that commercial negotiations cannot be relied upon to maximize consumer welfare and that the Commission should impose common carrier obligations on TCI's broadband cable facilities. As explained below, the imposition of these duties is prohibited by the Communications Act, and rests on a series of factual claims that are erroneous.

A. The Proposals Are Outside The Scope Of This Proceeding, And It Would Subvert The Public Interest To Address Them Here.

The short answer to these claims is that they raise an industry-wide issue that is entirely outside the scope of this transfer of control proceeding: what obligations could and should apply to cable systems to the extent they offer two-way programming services that include Internet access. There is nothing in the proposed AT&T-TCI merger that could permit the imposition of different obligations on TCI than on other cable systems operators, and any such obligations should be established in generic, industry-wide proceedings. AOL's and MindSpring's claims relate to a cable Internet service that is being offered by TCI today, entirely independently of the merger, as well as to Time Warner's Road Runner service and any other like services. Indeed, these commenters expressed the same unsupported concerns, and proposed the same "solutions," totally independent of this merger in the Commission's pending inquiry on "advanced telecommunications capability," showing that they too recognize that, whatever their merits, these are issues of broad applicability that should be addressed, if at all, only in such a proceeding.²⁴

²⁴ See, e.g., AOL 706 NOI Comments, pp. 4, 9-10; MindSpring 706 NOI Comments, p. 28. See also Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 (rel. August 7, 1998) ("Section 706 NPRM"), AOL Comments, pp. 2, 4. The Commission likewise raised the issue of the appropriate regulatory model for broadband cable facilities in the generic notice-of-
(continued...)

Moreover, these cable services are in their infancy. TCI's upgrade of its cable plant to two-way capability is only about 10% complete, and TCI is only one of many companies in nearly every sector of the communications industry investing in broadband capability within the same time frame. Under no conceivable view is there an urgent need for immediate action, and a premature decision right now would be counterproductive, for any projections concerning the ways in which these services and the broader market will evolve, and the effect of changes in regulation on their development, would at this time be necessarily speculative.

It would also patently defeat the public interest even to consider these broader industry-wide issues in the context of this transfer of control proceeding. As noted above (see supra pp. 12-14), an undisputed public benefit of the AT&T-TCI merger is that it will accelerate the implementation of the upgrades to TCI and other cable systems that will provide genuine alternatives to the incumbent LEC monopolies. Applicants believe that it would violate the Communications Act, the Commission's existing regulations, and rational public policy to accept these commenters' broad claims. Under any circumstances, the issues are contentious, involve complex questions of the economic and technical feasibility of particular arrangements, and would require extensive legal and factual analysis. By contrast, the "record" made by these commenters in this transfer of control proceeding is confined to unsupported assertions that are flatly wrong based on today's market conditions, and there is substantial doubt whether the Commission could validly impose these conditions under any set of facts.

²⁴ (...continued)
inquiry proceeding. See Section 706 NOI at ¶¶ 39-40, 77-82.

B. The Terms Of The Act Foreclose Imposition Of Unbundling Obligations On TCI's Broadband Transmission Facilities.

Aside from the lack of any empirical basis for imposing unbundling obligations on TCI's broadband cable plant, there is no legal foundation for the Commission to take such unprecedented action. To the contrary, the Communications Act expressly prohibits "common carrier or utility" regulation of cable systems by reason of providing cable service,²⁵ and further precludes the imposition of any "requirements" (whether labeled "common carriage" or not) "regarding the provision or content of cable service" beyond those Congress itself imposed.²⁶ This policy was reaffirmed and expanded in the Telecommunications Act of 1996.

As the Commission recently recognized, the Senate version of the bill that ultimately became the 1996 Act specifically was amended to make clear that cable operators are not engaged in the provision of "telecommunications service" to the extent they provide cable services.²⁷ Additionally, the 1996 Act expanded the definition of "cable service"²⁸ – and thus the scope of cable's protection against treatment as a common carrier or utility – to include "interactive services,"

²⁵ See 47 U.S.C. § 541(c).

²⁶ See 47 U.S.C. § 544(f)(1).

²⁷ See In the Matter of Federal-State Joint Board on Universal Service, CC Docket 96-45, Report to Congress, FCC 98-67 at ¶ 44 (rel. April 10, 1998) ("Universal Service Report to Congress") (explaining that the reference to cable service was deleted from the Senate definition of "telecommunications services" so that courts would not interpret the term "too broadly and inappropriately classify cable systems . . . as telecommunications carriers"). As Senator Pressler, Chairman of the Senate Commerce Committee at the time, explained, the change was "intended to clarify that carriers of broadcast or cable services are not intended to be classed as common carriers under the Communications Act to the extent that they provide broadcast or cable services." 141 Cong. Rec. S7996 (June 8, 1995) (statement of Sen. Pressler). This change was carried forward to the enacted statute.

²⁸ Pub. L. No. 104-104, § 301(a)(1) (adding "or use").

including information services and enhanced services.²⁹ As the legislative history explains, this change reflects the evolution of cable services from the traditional one-way provision of video programming to include interactive services.³⁰ Under the expanded definition of “cable service,” Internet access and other advanced services are considered cable services if they are provided by a cable operator over a cable system.³¹ A recent Working Paper published by the FCC’s Office of Plans and Policy supports this reading of the statute.³²

²⁹ H.R. Conf. Rep. 104-458, 104th Cong., at 169 (1996). See also 142 Cong. Rec. H1156 (daily ed. Feb. 1, 1996) (statement of Rep. Dingell) (explaining that the revised definition of cable service “strengthens the ability of local governments to collect fees for the use of public right-of-way. For example, the definition of the term ‘cable service’ has been expanded to include game channels and other interactive services. This will result in additional revenues flowing to the cities in the form of franchise fees.”). MindSpring objects that this interpretation of section 602(6) is “absurd” and contrary to “common sense.” MindSpring at 20. In making this characterization, however, MindSpring ignores the legislative history. Likewise, in claiming that Internet access is “not a programming service,” it completely disregards the broad definition of “other programming service” in section 602(14). See 47 U.S.C. § 522(14) (“the term ‘other programming service’ means information that a cable operator makes available to all subscribers generally”).

³⁰ H.R. Conf. Rep. 104-458, 104th Cong., at 169 (1996).

³¹ Even if the Commission does not ultimately conclude that Internet access services provided via broadband cable facilities are cable services, such services are at most “information services.” The Commission has found that, like cable services, “information services” remain in a separate category from “telecommunications services” after enactment of the 1996 Act. Universal Service Report to Congress at ¶ 45-46. An information service provider “does not offer telecommunications” – *i.e.*, a “transparent transmission path” – even though it uses telecommunications to provide the information service. Id. at ¶ 39. Whether cable’s advanced services offerings are cable services or information services, there is no “telecommunications service” for the Commission to regulate under Title II.

³² B. Esbin, INTERNET OVER CABLE: DEFINING THE FUTURE IN TERMS OF THE PAST, FCC Office of Plans and Policy Working Paper Series, No. 30, at 88 (August 1998) (“The Commission could reasonably conclude that Internet access services . . . , when provided by a cable operator over its cable system, come within the revised definition of ‘cable services’ under Title VI.”).

Despite AOL's bald assertion that unbundled access is "in no sense tantamount to a common carrier obligation,"³³ unbundled access is in fact at the heart of the obligations that incumbent local exchange carriers owe to other providers of telecommunications services.³⁴ As set forth above, Congress expressly limited the reach of the Section 251 unbundling obligation to incumbent LECs and nothing in the 1996 Act authorizes the Commission to apply it to entities other than incumbent LECs. Indeed, Congress specifically rejected proposals to adopt a unified regulatory framework for advanced services that would subject the cable services of cable systems to the kind of obligations that apply to incumbent LECs.³⁵

AOL all but concedes that the Commission lacks statutory authority to require unbundled access to TCI's broadband cable facilities when it calls on the Commission to act quickly, "[r]ather than await a belated Congressional response."³⁶ Other commenters try to sidestep this express statutory prohibition by urging the Commission to subject AT&T and TCI to "safeguards" that are "similar" to those imposed on common carriers.³⁷ In the face of Congress's explicit directive

³³ See AOL, p. 33.

³⁴ 47 U.S.C. § 251(c)(3).

³⁵ See, e.g., Stevens Draft Includes "Title VII" Provision; Senator Hopes to Include Language in Other Bills, Telecommunications Reports (Apr. 18, 1994) at 1-2; White House Working to Include "Title VII" in Telecom Bills; Hollings Says Provision "Isn't Realistic At This Time", Telecommunications Reports (February 28, 1994) at 4-6.

³⁶ See AOL, p. 25.

³⁷ See US WEST, pp. 21, 27; GTE, pp. 16-17; Ameritech, pp. 11.

that “any cable system shall not be subject to regulation as a common carrier or utility by reason of providing any cable service,”³⁸ however, such an action would violate the Act.

AOL and GTE also point to the existence of cable regulation as if the mere existence of Title VI justifies the imposition of their conditions.³⁹ Nothing in Title VI, however, provides support for the notion that such conditions can appropriately be “inferred” from the sweeping generalities upon which these commenters would have the Commission rely. The various statutory provisions they cite do not support the imposition of new regulation on the advanced broadband services AT&T and TCI plan to deploy.⁴⁰ The nature and history of the Title VI provisions cited by the merger opponents make this clear.

The Title VI regulations that AOL and others cite were deliberately crafted by Congress in response to specific issues identified as part of the legislative process. In particular, regulations relating to cable rates,⁴¹ in-home cable wiring,⁴² signal security and signal theft,⁴³

³⁸ 47 U.S.C. § 541(c).

³⁹ See AOL, pp. 26-27, GTE, pp. 46.

⁴⁰ It should be made clear that the merger is not intended to undermine or vitiate the applicability of existing cable regulations.

⁴¹ 47 U.S.C. § 543; H.R. Rep. 102-862, at 62-66 (1992). The Commission’s rules followed Congress’s directive. See 47 C.F.R. § 76.900 et seq.

⁴² 47 U.S.C. § 624(i); 47 C.F.R. §§ 76.800-806.

⁴³ 47 U.S.C. § 544a. The Commission responded by implementing rules codified at scattered sections of 47 C.F.R. See In the Matter of Implementation of Section 17 of the Cable Television Consumer Protection and Competition Act of 1992, Compatibility Between Cable Systems and Consumer Electronics Equipment, ET No. 93-7, 9 FCC Rcd 1981 (1994).

commercial availability of navigation devices,⁴⁴ program access, leased access,⁴⁵ program carriage and must carry obligations were adopted only after extensive debate and specific legislative findings.⁴⁶ While this list demonstrates that Congress clearly has exercised authority over the cable industry in the past, it is equally clear that Congress has never imposed unbundling and open access conditions on cable operators.

Instead of the sweeping “principles” and themes that AOL seeks to identify, however, Title VI imposes several discrete and tailored obligations that are designed to address specific problems Congress identified through the legislative process.⁴⁷ Although at times these requirements affect the services provided over cable systems, Congress has never forced cable operators to become

⁴⁴ 47 U.S.C. § 549. The Commission’s rules implemented the legislative directive. See 47 C.F.R. § 76.1200 et seq.

⁴⁵ 47 U.S.C. § 532(c). The Commission implemented the statute. 47 C.F.R. § 76.970. Significantly, cable systems were not even subject to mandatory access requirements for video programming until Congress specifically enacted such a requirement in 1984. See Cable Communications Policy Act of 1984, Pub. L. No. 98-549 (Oct. 30, 1984), codified at 47 U.S.C. §§ 601 et seq. See also H.R. Rep. No.934, 98th Cong., 2d Sess. (1984) at 36 (explaining intent to remedy lack of statutory authority found in FCC v. Midwest Video Corp., 439 U.S. 1063 (1979)). The leased access requirements themselves are express and narrow statutory exceptions to the ban on common carrier regulation of cable systems, and specifically preclude the imposition of additional such obligations by “[a]ny Federal agency, State, or franchising authority” by rule or as a condition of obtaining or renewing a cable franchise. 47 U.S.C. § 532(b)(2), (3). Other media of mass communications are not subject to access requirements, either because of the lack of statutory authorization for such requirements, Columbia Broadcasting System, Inc. v. Democratic National Committee, 412 U.S. 94 (1972), or because such requirements have been held to violate the First Amendment. Miami Herald v. Tornillo, 418 U.S. 241 (1974).

⁴⁶ H.R. Rep. 102-862, 102d Cong., 2d Sess., (1992), at 91-94.

⁴⁷ The Commission has never espoused in Title VI regulation the “principles” of consumer choice and open access identified by AOL, nor has it ever asserted that such a thematic reading of the statute provides a basis for a wholesale revision of traditional cable regulation – let alone doing so out of whole cloth in a merger proceeding, as AOL and GTE suggest.

common carriers or sell transport capacity to the general public.⁴⁸ Such requirements would be irreconcilable with the historic role of cable operators as editors and creators of content, and not merely carriers.⁴⁹ There is no support whatsoever in these provisions for the imposition of unbundling requirements on the new advanced services and facilities that AT&T and TCI are seeking to provide.

On the contrary, the Communications Act specifically forbids all federal and state agencies from imposing “requirements regarding the provision or content of cable services, except as expressly provided in this subchapter.”⁵⁰ By its terms, this prohibition bars all “requirements” relating to the “provision or content of cable service” -- whether those requirements are deemed “common carriage” regulation or not. Section 544(f)(1)'s direct prohibition on the imposition of any legal requirements regarding the content or provision of cable service beyond those expressly imposed by Congress thus unambiguously forecloses the claim that the existence of some statutory provisions regulating cable service somehow extends an invitation for the Commission on its own initiative to impose additional restrictions.

⁴⁸ See 47 U.S.C. § 541(c).

⁴⁹ See Turner Broadcasting, Inc. v. FCC, 114 S.Ct. 2445, 2456 (1994) (“cable programmers and cable operators engage in and transmit speech”) (citing Leathers v. Medlock, 499 U.S. 439, 444) (1991)).

⁵⁰ 47 U.S.C. § 544(f)(1) (emphasis added). Requirements favoring particular programs or types of programs are particularly suspect. See Time Warner Cable v. City of New York, 943 F. Supp. 1357, 1399 n.36 (S.D.N.Y. 1996) (city’s use of PEG channels to promote competition among cable systems “is at odds with the structure established by the Cable Act and violates both Section 544(f)(1) and the First Amendment insofar as such power is used to curb an operator’s freedom of decisionmaking over its commercial channels.”) (emphasis added). But see United Video, Inc. v. FCC, 890 F.2d 1173, 1189 (D.C. Cir. 1989) (holding that syndicated exclusivity rules could be imposed without violating section 544(f)). Whatever the merits of United Video, that decision did not create a wholesale exception for regulating cable operators in the absence of express Congressional direction.

In short, Congress could not have been clearer in foreclosing the imposition on cable systems of the obligations that AOL, MindSpring, and other ISPs and OSPs are here proposing. Congress presumably did so because it recognized -- for the reasons stated more fully below -- that a cable operator's use of its system to provide information services to its subscribers may reduce the revenues of the entrenched ISPs who offer their services over ILEC monopolies, but cannot harm competition or the interests of consumers in internet access, on-line content, or other such information service markets.

C. The Access Proposals Depend On A Series Of Unsupported Claims That Are Wrong As A Matter Of Fact, Unsound As A Matter Of Economics, and Internally Inconsistent.

The proposals of AOL and MindSpring further rest on a series of mistaken assumptions about the nature of broadband offerings in general and TCI's services in particular. Foremost, contrary to their claims, there is no "separate market" for broadband transport -- which itself is a capability that can be more readily developed and deployed by incumbent LEC monopolies. Because the market for Internet access and content services is competitive (and dominated by AOL) and because TCI does not control an essential input, TCI has no incentive or ability to interfere with its customers' access to nonaffiliated content.

Beyond that, as Professors Willig and Ordober demonstrate, TCI has enormous economic and commercial incentives to allow its customers efficiently to reach whichever service provider the customer wants to reach. See Willig/Ordober Aff. ¶¶ 47-52. That is particularly so because -- as AOL's own expert explains -- TCI must be entitled to set whatever prices the market will bear in order to assure that it is fully compensated for the full value of the investments it has made and all the costs it incurs in providing access to other unaffiliated service providers, including

opportunity costs. In this regard, the @Home service is designed to optimize the Internet experience available to TCI's cable subscribers. Subscribers can access everything AOL subscribers get from the World Wide Web, in addition to content tailored for @Home's broadband Internet environment. If they want access to AOL's proprietary content on the broadband platform, they can get that directly from AOL through @Home under arrangements that are highly efficient. The arrangements do not "tie" two products, and there is no basis for the assertions that subscribers who use @Home to obtain high speed access to AOL are effectively "paying twice" for content.

As Professors Willig and Ordober explain, there is thus simply no basis to regulate the conditions under which TCI should provide access to unaffiliated content. Willig/Ordober Aff., ¶¶ 47-52. Reliance on marketplace forces and the negotiation of commercial arrangements will lead to the adoption of the most efficient arrangements to allow cable subscribers to use the services of others -- without diminishing the incentives to make the investments necessary to accelerate widespread use of cable systems to offer facilities-based residential telephone competition or otherwise jeopardizing this procompetitive merger.

1. Services Using Broadband and Narrowband are Not Separate Markets, and AOL's Claim that Broadband Services Pose Any Substantial Threat to Competition in Information Services is False and Contradicted by its Own Public Statements.

The various access proposals made by AOL, MindSpring, and others, are premised on the faulty assumption that the price for cable Internet services and other broadband offerings is not constrained by the price for narrowband services. Thus, these commenters contend, these broadband services comprise a separate "input market."⁵¹ If true -- and if TCI in fact had a natural

⁵¹ See AOL, Hausman Aff. "A" ¶ 3.

monopoly over "last-mile high-speed data transport capability"⁵² -- this claim would be potentially significant. However, as discussed infra pp. 34 - 39, TCI does not have such a monopoly. More fundamentally, there is simply no separate market for broadband and narrowband services, because narrowband lines are competitive substitutes for broadband transmission capacity.

That these products are offered in the same market is vividly confirmed by the fact on which AOL's expert Professor Hausman incongruously relies: that AOL has had a lower growth rate in areas in which @Home is offered. Indeed, the real import of Professor Hausman's affidavit appears to be that broadband access is such a superior product that all or virtually all customers will prefer it and that AOL and other ISPs or OSPs would be anticompetitively disadvantaged if marketplace forces could not assure that they could efficiently obtain broadband access for their customers at a price that reflects only its greater value. While the market does provide that very assurance -- for the reasons stated below -- it is patently not the case that broadband access is superior and would be preferred by most or even a substantial number of the existing customers of AOL or other ISPs or OSPs. Indeed, AOL's contrary assertions are refuted by common sense, marketplace experience, and the public statements of both AOL's Chairman and its General Counsel.

To be sure, cable Internet services provide data transmission speeds that far exceed those obtained over traditional narrowband phone lines. But there are a number of reasons why many customers believe it is more attractive to obtain a traditional LEC phone line for use in conjunction with dial-up ISP or OSP service than to rely on a broadband alternative. Traditional dial-up modem service is generally less expensive than TCI's @Home service, and uses existing CPE. Moreover, as AOL notes (p. 32), purchasers of TCI's @Home service cannot use that service to obtain broadband

⁵² See AOL, p. 31.

access to the Internet from remote locations. Finally, when customers choose to purchase a second phone line to use with a dial-up modem service, those customers can obviously use that second line for regular voice communication, as well as for a fax. By contrast, consumers who purchase TCI's cable Internet service instead cannot use that capability to make phone calls, hook up a fax machine, or dial up to an employer's server. In light of these features, the availability of narrowband service will significantly constrain the price of broadband, for as the price of broadband increases the demand for narrowband will also increase. Willig/Ordoover Aff. ¶ 12. That is why GTE's own affiant ultimately concedes that "narrowband can be used to provide services that are substitutes in demand for broadband when relative prices compensate for quality differences."⁵³

Moreover, actual marketplace evidence demonstrates that narrowband service is an attractive substitute to broadband services for many consumers. Although the "base of homes with access to two-way upgraded plant," which can order @Home's programming today, now stands at 10 million homes, @Home itself reports "an overall penetration rate of 2.1% at September 30, 1998." That is, only 210,000 homes out of 10 million have subscribed to cable modem service today.⁵⁴ By contrast, approximately 29,000,000 of 100,000,000 homes nationwide subscribe to some form of Internet access service.⁵⁵ Thus, while presumably 2.9 million homes in @Home's upgraded distribution area subscribe to Internet service, only 210,000 -- 1 in 15 -- have chosen to obtain that service by subscribing to @Home's cable Internet service. Mulron Aff. ¶ 2. That millions of

⁵³ See GTE, Spulber Aff., p. 10. Spulber ignores, however, that narrowband service has its own features that make it more attractive to some customers than broadband cable Internet service.

⁵⁴ http://www.home.net/corp/news/pr_981013_01.html.

⁵⁵ The Forrester Report Volume 4, Number 9, January, 1998, page 6, Figure 3.

customers nationwide who could order cable broadband Internet service today have presumably chosen to obtain Internet service over traditional narrowband phone lines rather than by subscribing to cable Internet service proves dramatically that narrowband is in fact a true demand substitute for broadband service.

Indeed, in contrast to narrowband dial-up service providers, TCI's broadband service is a fledgling. As the Transfer Application notes, the parties combined represent less than three percent of the estimated Internet customers in the United States.⁵⁶ Only about 27,000 of TCI's customers subscribe to @Home, its cable Internet service. AOL, by contrast, has 13.5 million subscribers,⁵⁷ more than *Time*, *Newsweek*, and *U.S. News and World Report* combined. AOL's most significant competitor, the Microsoft Network, has about 2 million subscribers, while AT&T WorldNet and Prodigy each have only about 1 million.

In light of this marketplace experience, it should come as no surprise that AOL's public statements assert precisely the opposite of its filings in this docket. It has publicly stated that narrowband and broadband facilities are substitutes for obtaining access to Internet services and that narrowband will be the choice of the vast majority of subscribers in this market. For example, AOL's chief executive officer, Steve Case, recently stated that, even "five years" from now "seventy-five percent of the market will be narrowband because people want it to be as easy and inexpensive as

⁵⁶ Transfer Application at 36.

⁵⁷ See, e.g., Hoover's Online News Alert: Capsule for America Online, Inc. (visited Nov. 12, 1998) <<http://www.hoovers.com/capsules/15558.html?ticker>> (noting that AOL's 13.5 million subscribers make it the world's number one provider of online services, with over 60 percent of market share); About the Company: Profile (visited Nov. 12, 1998) <<http://www.aol.com/corp/profile/>> (explaining that AOL's over 12 million members make it the largest interactive online community in the world).

possible.”⁵⁸ More recently, Case has likened broadband to what “first class is to the airlines”⁵⁹ – a premium service, but hardly a separate market.

With equal candor, AOL's Senior Vice President and General Counsel, George Vradenburg, has publicly admitted that the vast majority of AOL's customers have no need for access at speeds that are any greater than 28.8 kbps, and that AOL can take other steps (such as caching) to satisfy those customers who desire higher speed. Vradenburg likewise admitted that in contrast to available narrowband offerings, broadband involves "pretty high" installation costs, is "pretty difficult" to install, and that customer demand for these high-priced alternatives is highly price sensitive.⁶⁰

⁵⁸ See Power Lunch, Television Interview with Steve Case (CNBC broadcast, September 28, 1998).

⁵⁹ Diane Mermigas, Still a Cyber-pioneer, Electronic Media (Nov. 9, 1998), p. 32 (interview with Case).

⁶⁰ See Transcript of panel discussion between Peter Huber, moderator, and George Vradenburg, AOL, at Aspen Summit '98 (Cyberspace and the American Dream), August 25, 1998:

Peter Huber, Moderator:

How does the bandwidth situation look from AOL's perspective?

George Vradenburg, Senior Vice President and General Counsel of AOL:

Well the market is about 25 million households. It is growing about 5 to 7 million a year. Consumers are continuing to sign on in somewhat of an excess of an average 28.8 kilobits; we are seeing that most of that, virtually 99% of that, is narrowband services and so customers are continuing to sign up and they are using the service. It went from about 12 minutes a day a few years ago to 45 minutes today. So their average usage, even as the growth in the number of consumers is going up, their average use is going up. Most of the applications are E-mail or chat or access to information, and only to a limited extent do they go to the web, and to the extent that we have a little problem in performance on the web, we do a lot of caching to compensate for that. So basically in terms of the growth of our business, there's sort of not a wall that we are seeing in terms of access.

(continued...)

As against this actual empirical data, the various commenters between them have submitted only one affidavit which purports to demonstrate that "last mile broadband data transport and last mile narrowband Internet data transport are in different input markets."⁶¹ Hausman's analysis, however, is significantly flawed. First, in performing his regressions, Hausman purports to use data regarding the "price of narrowband Internet service" and the price of "broadband Internet service." However, while Hausman uses prices for @Home and Road Runner as inputs for broadband Internet, Hausman admits that the variable for narrowband Internet service includes "only the price of last mile narrowband data transport, not the price paid to the ISP."⁶²

Second, Hausman's affidavit completely fails to reveal how significant the price changes he observed were for the "narrowband Internet transport" he was examining. As a matter of standard antitrust economics, the question is quite significant. Products are said to be in different

⁶⁰ (...continued)

Peter Huber, Moderator:

No bandwidth crisis at all! This is going to be a short panel. You foresee a crisis coming or are we in good shape?

George Vradenburg:

I think we have an opportunity coming down the pike, but for all the reasons that were described by Mr. Trujillo, there are a lot of new applications that are potentially available on high-speed connections, and I think the question is whether or not those high-speed bandwidth services are going to get rolled out. We're not seeing them rolled out very quickly now. There're going very, very slowly. There's a price sensitivity. There's still a technology uncertainty. There're still penetration doubts. As I say, the cost to install is still pretty high; pretty difficult. So we're seeing a fairly slow roll out on the high-speed pipes so far.

⁶¹ See AOL, Hausman Aff., ¶ 3.

⁶² See Hausman Aff., p. 5 n.6.

markets only when significant nontransient price changes in one do not affect the demand for the other.⁶³ Without information on the significance of the price changes, Hausman's affidavit is simply of no use in assessing whether broadband and narrowband transmission constitute separate product markets. See Willig/Ordover, ¶ 13.

Third, Hausman's conclusions are based on a sample of such small size (29 observations) as to be meaningless. For all these reasons, Professor Hausman's proposed market definition and assertion that services that use broadband transport are unconstrained by services using narrowband are meaningless.⁶⁴

2. Even if the Market Definition were Restricted to Broadband Transmission, TCI Would Still Not Possess a Bottleneck Monopoly.

Even if the relevant market were somehow deemed to be restricted to "broadband services," TCI would by no means be a bottleneck monopoly provider. Far from offering the "only presently available means for delivering integrated broadband services,"⁶⁵ TCI is facing competition

⁶³ See DOJ 1992 Merger Guidelines, § 1.11 (a "price increase of five percent lasting for the foreseeable future").

⁶⁴ See Willig\Ordover, ¶¶ 13-22 (explaining additional flaws in Hausman's econometric analysis).

⁶⁵ See US WEST, p. 11 (emphasis omitted).

from RBOCs,⁶⁶ CLECs,⁶⁷ ISPs,⁶⁸ wireless providers,⁶⁹ satellite companies,⁷⁰ and others, who are all investing billions of dollars to deploy broadband facilities and compete for customers. Many of these entities are aggressively building facilities on timetables similar to TCI's. Local exchange carriers in particular are aggressively deploying xDSL service to compete with cable's broadband service,⁷¹ and each industry will provide the other with a constant incentive to improve the quality, price, and availability of their respective services.

Indeed, the xDSL services that are currently being deployed and offered by the incumbent LECs alone constitute a significant and attractive commercial alternative to the Internet cable services that TCI and others offer. Although AOL and others repeatedly appear to suggest that the advantages offered by cable modem service are somehow unique, the truth is that the LECs' DSL

⁶⁶ See Bell Atlantic 706 NOI Comments at 2; Bell South 706 NOI Comments at i, 17-37; GTE 706 NOI Comments at 10; SBC 706 NOI Comments at i, 5-7; US West 706 NOI Comments at 8-9.

⁶⁷ See Allegiance Telecom 706 NOI Comments at 3; Association for Local Telecommunications Services 706 NOI Comments at 9; DSL Access Telecommunications Alliance at 4; Intermedia Communications 706 NOI Comments at 11; Northpoint Communications 706 NOI Comments at 1.

⁶⁸ See AOL 706 NOI Comments; MindSpring 706 NOI Comments.

⁶⁹ See Cellular Telecommunications Industry Association 706 NOI Comments at 13-23; Personal Communications Industry Association 706 NOI Comments at 13-23; Teligent 706 NOI Comments at 4; Wireless Communications Association International 706 NOI Comments at 3-4.

⁷⁰ See Skybridge 706 NOI Comments at 2, 3; Teledesic 706 NOI Comments at 2.

⁷¹ See, e.g., BellSouth 706 NOI Comments at 13-14, GTE 706 NOI Comments at 10, US WEST 706 NOI Comments at 8-9, MediaOne 706 NOI Comments at 11-12, Appendix A, NCTA 706 NOI Comments at 14-17. Bell Atlantic recently announced that it was introducing its Infospeed DSL service in selected East Coast markets, including Washington, D.C., and that over seven million subscribers on the East Coast will have access to Infospeed DSL service by the end of 1999. See, e.g., Bell Atlantic Introduces Infospeed DSL Service (Oct. 5, 1998) <<http://www.ba.com/nr/1998/Oct/19981005001.html>>; Introducing Bell Atlantic Infospeed DSL, Wall Street Journal, October 5, 1998 at C26.

services also offer an "always on" connection, and the transmission speeds the LECs offer over their lines match, and may exceed, those offered by TCI. "Typically, @Home operates at speeds in the range of 1,500 to 3,000 Kbps."⁷² By contrast, both Bell Atlantic and US WEST offer services at speeds of up to 7.1 megabits per second.⁷³

Moreover, contrary to the assertions made by AOL and others, DSL offerings are no less readily available in the marketplace than are cable Internet services. US WEST today offers DSL services in dozens of communities in its service area in response to announcements by CLECs and cable companies of their advanced services deployment plans, including Phoenix, Tucson, Denver, Colorado Springs, Boulder, Minneapolis-St. Paul, Portland, Seattle, and Salt Lake City.⁷⁴ Bell Atlantic likewise has advertised that by next year it will be offering DSL services in every major city in the Washington, D.C. and Boston corridor.⁷⁵ Indeed, the LECs can upgrade any loops that are under 18,000 feet long to provide DSL services with relatively little cost, and where loops are of longer length LECs can perform targeted upgrades by deploying fiber closer to the homes and serving customers over digital loop carrier configurations.

In addition to the LECs' DSL services, companies using fixed wireless technology, such as WinStar and Teligent, are investing billions of dollars and are currently deploying nationwide wireless broadband systems that will reach the large majority of small business customers in the next

⁷² The World Wide Wait is Over, <<http://www.home.net/home/speed.html>>.

⁷³ Bell Atlantic Introduces Infospeed DSL Service to the Washington, D.C. and Pittsburgh Markets, <http://www.ba.com/nr/1998/Oct/19981005001.html>; Megabit Services General Product Descriptions, <http://www.uswest.com/com/customers/interprise/>.

⁷⁴ www.uswest.com/com/insideusw/news/060598.html

⁷⁵ <http://www.ba.com/nr/1998/Oct/19981005001.html>

few years.⁷⁶ And satellite providers such as Hughes DirecPC currently enable users everywhere to download the World Wide Web at 400 kbps using DirecPC and will roll out a two-way high-speed service within the next year.⁷⁷

Landline CLECs are also rolling out similar advanced services. For example, RCN is currently deploying fiber to pass over 9 million homes throughout the Boston/Washington corridor and will soon deploy broadband facilities to pass millions of homes in hundreds of California communities.⁷⁸ RCN has partnered with Boston Edison and Potomac Electric Power Co. to build the fiber-optic networks in the Boston and Washington, D.C. areas and will make use of the utilities' substantial resources and fiber optic infrastructure, which can be adapted to carry these new services.⁷⁹ As part of its broadband deployment strategy, RCN is also aggressively acquiring regional ISPs so that it can quickly provide competitive Internet access services directly into customers'

^{76/} See WinStar 706 NOI Comments at 2-3; Teligent 706 NOI Comments at 5-7; Bell Atlantic 706 NOI Comments at 7; Attachment A at 3-4.

^{77/} See, e.g., AT&T 706 NOI Comments at 17; NCTA 706 NOI Comments at 19; Bell Atlantic 706 NOI Comments at 7, Attachment A at 5; US WEST 706 NOI Comments at 11.

^{78/} See, e.g., Bell Atlantic 706 NOI Comments, Attachment A at 3 (citing RCN Press Release "RCN Doubles On Net Homes Passed; Advanced Fiber Connections Up More Than 135%" (July 22, 1998)). RCN has thus far passed 122,000 homes with "advanced fiber." *Id.*

^{79/} See, e.g., Chet Dembeck, Telecom Battle Heats Up, Washington Business Journal (June 22, 1998); Hiawatha Bray, RCN to Buy Two 'Net Service Providers, Boston Globe Online (January 22, 1998) <www.boston.com>.

homes.⁸⁰ Other competitive LECs have raised \$15-20 billion to significantly expand fiber deployment for the provision of advanced services.⁸¹

Although AOL claims that the LECs have to date been slow in deploying their DSL services,⁸² until the advent of Internet cable service the LECs had little incentive to provide their own advanced services. That is precisely what competition is about. TCI's deployment of cable Internet services will spur the LECs to accelerate further their competing offerings, and to lower their prices. If customers are currently dissatisfied with existing LEC DSL offerings, that is no basis for placing obstacles before the deployment of TCI's competing services. It is instead further grounds for granting a quick approval of the requested transfers. Willig/Ordoover Aff. ¶ 26.

3. TCI Has Every Incentive to Provide Subscribers with Content from Diverse Sources in the Most Efficient Way, and the Challenges to TCI's Current Arrangements are Spurious.

In all events, under any view of the foregoing facts, TCI's economic incentives are to assure that its and @Home's facilities can be efficiently deployed by their customers to access whatever other services they want to use. That is particularly so because, as AOL's expert Professor

^{80/} RCN Press Release, "RCN REPORTS RECORD GAINS IN REVENUE, NETWORK CONNECTIONS AND HOMES PASSED; Company Continues to Aggressively Build Its Northeast Customer Base and Local Broadband Fiber-Optic Network" (August 11, 1998) ("In the last 90 days, we have continued to intensify our construction schedule in all of our markets, added on-net customer connections ahead of expectations and quietly became one of the nation's top Internet service providers. At quarter's end, RCN was providing more than 400,000 people with access to this powerful new medium. Unlike other ISPs, RCN is also able to provide Internet services, including high-speed access, over its own fiber network.") <<http://www.rcn.com/investor/press/08-98/08-11-98.html>>.

^{81/} See, e.g., e.spire 706 NOI Comments at 6-7, DATA 706 NOI Comments at 7; ALTS 706 NOI Comments at 9.

⁸² See AOL Comments, pp. 52-54.

Hausman states and as AOL purports to concede, TCI must be entitled to price any "access" services at whatever price the market will bear in order to assure it recovers the full value of the investments it has made and whatever costs it incurs in assuring customers can reach other service providers, including opportunity costs. In this regard, neither AOL nor any complainant offered any factual support for their bald assertions that the arrangements through which TCI's @Home customers now access AOL are inefficient or in any way anticompetitive. In particular, there is no "tie-in," and there is no factual basis for the assertion that any customers "pay twice" for anything under these arrangements.

TCI is a new entrant in a well developed market where it is fundamentally competing not just with content providers and ISPs who use LECs' existing narrowband facilities, but also with those who now use or potentially could use the broadband facilities that are or can be deployed by others. Unlike its Internet service competitors,⁸³ however, TCI and @Home are investing in the construction and deployment of networks designed to optimize the broadband capabilities of the existing cable infrastructure for the provision of high speed Internet and online services. As part of these efforts, a unique proprietary backbone and regional data centers bring data closer to the user through caching and replication technologies, helping to overcome the delays that characterize other networks. @Home plans to expand deployment of additional data centers as TCI and other cable companies upgrade their networks for two-way communication. @Home actually activates the cable

⁸³ Notably, AOL sold its AOL Network Services backbone facilities to WorldCom in exchange for WorldCom's CompuServe subscribers. With that transaction, AOL abandoned its strategy of investing in facilities and turned its focus solely to providing content and other services. See Rajiv Chandrasekaran, AOL Shifts Its Strategic Direction; Content Focus Lauded; Deal's Price Questioned, Washington Post, Sept. 9, 1997, at C1; see also Rajiv Chandrasekaran, AOL's Man With a Mission: Marketing Whiz Bob Pittman Is Out to Make the Service a True Mass Medium, Washington Post, Feb. 15, 1998, at H1.

modems of TCI subscribers who sign up for the service and retains an ongoing role in provisioning the service to end users. @Home also provides end-to-end management of its network on a continuous basis, permitting it to address performance bottlenecks before they affect the user experience.

Significantly, @Home provides an open environment through which subscribers can reach any available content on the World Wide Web. In fact, many @Home subscribers use the service daily to access the proprietary content and services provided by America Online, the Microsoft Network, Yahoo, Amazon.com, and more. In addition to these sites, @Home also provides unique content tailored for the broadband environment through partnerships with a vast array of unaffiliated providers. These offerings feature enhanced audio, video, and interactive functionalities.

Further, to the extent that customers wanted to reach other kinds of Internet services, TCI already has economic incentives to permit that to occur in whatever form was most efficient if -- as AOL's expert states must be allowed -- TCI can charge rates that recover the full value of the investments that TCI has made and whatever costs it incurs in providing that arrangement, including opportunity costs. Neither MindSpring nor AOL has remotely shown that TCI has deployed or priced its services and facilities in a way that is inefficient or that it has refused any reasonable request that satisfies Professor Hausman's standard.

In the case of MindSpring, it is an ISP and offers no proprietary content. There is conceivable benefit to consumers in the "access" arrangements that it (and AOL) have proposed in order to enable them to provide Internet access to TCI's subscribers over TCI's cable system, for they would inherently result in an Internet access service that is inherently costlier than TCI's. That is so

because substantial investments would be required to allow TCI's cable systems to "interconnect" with multiple ISPs and because any ISP that could attract customers would require the construction of facilities to connect each of TCI's headends to the ISP's network -- but those added facilities are not needed for the TCI @Home service.

AOL offers content as well as Internet access. Neither TCI nor @Home has ever attempted to restrict its customers from accessing any available content on the World Wide Web, and TCI's @Home customers access the content and services of AOL daily. Moreover, AT&T and TCI have repeatedly stated that customers should have "easy access to the on-line content of their choice."⁸⁴ TCI and AT&T recognize that denying their customers access to online services would not be in their or their customers' best interests. "Our message to the largest OSP and all the others couldn't be more direct: if you've got a service our customers want, we want you on our system."⁸⁵

Nor is there anything anticompetitive or demonstrably inefficient about any aspect of the arrangements through which @Home customers currently reach AOL or other OSPs.⁸⁶ The

⁸⁴ Remarks of Michael Armstrong, Chairman and CEO of AT&T, before the Washington Metropolitan Cable Club (Nov. 2, 1998) ("Armstrong WMCC Remarks"); Remarks of Leo Hindery, President and Chief Operating Officer, TCI, before FCC Mergers En Banc.

⁸⁵ C. Michael Armstrong, "Telecom and Cable TV: Shared Prospects for the Communications Future," Remarks to Washington Metropolitan Cable Club (Nov. 2, 1998) ("Armstrong WMCC Remarks").

⁸⁶ In addition to these problems, AOL's proposal is fraught with difficulties and uncertainties. As set forth in the attached Affidavit of Milo Medin, Senior Vice President and Chief Technical Officer of @Home Networks, AOL overlooks a variety of problems inherent in any proposal to obtain "unbundled" access. See Affidavit of Milo Medin, attached hereto at Exhibit D. For example, IP routers are designed to forward packets based on the destination IP address. Neither the DOCSIS/MCNS standards nor the IETF standards require source address based routing. Mr. Medin points out numerous additional questions about AOL's proposal, as well, e.g. provisioning the cable modem, resolution of customer interference issues, enabling of dynamic services, and enabling of
(continued...)