AT&T understands, of course, that the decision finding the statutory horizontal ownership provision unconstitutional is under appeal and that the Commission has initiated the *Further NPRM* on the horizontal rules and a related *NPRM* on the cable attribution rules.[149] AT&T will comply with all Commission rules. Regardless of the Commission's approval of the Merger, AT&T acknowledges that it will be subject to the general rules established in the ongoing rulemaking proceeding that is the subject of reconsideration and appellate review. While AT&T has supported the proposition that the Merger will not have anticompetitive effects on video programming services,[150] if, under rules the Commission adopts, AT&T exceeds the permitted level of horizontal ownership, it will either obtain an appropriate waiver based on the benefits to competition that will not otherwise be achieved, or bring itself into compliance with the rules.

With regard to the suspended cable horizontal ownership limit, AT&T and MediaOne, in the ongoing proceedings in the various rulemakings, have maintained that the

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[149] *Notice of Proposed Rulemaking, In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992 - Review of the Commission's Cable Attribution Rules*, 13 FCC Rcd. 12990 (1998).

[150] Congress enacted the horizontal limit based on the concerns that cable operators could: (1) exercise monopsony power to force unfair concessions from programmers, *see* H.R. Rep. No. 102-628, at 42-43 (1992), and (2) vertically foreclose entry by programmers, thereby reducing program diversity. *See* S. Rep. No. 102-92, at 32 (1991). As the Commission has acknowledged, the purpose of the horizontal ownership limit relates entirely to the ability of cable operators to affect video programming. *See* Second Report and Order, *In the Matter of Implementation of Sections 11 and 13 of Cable Television Consumer Protection and Competition Act of 1992 - Vertical and Horizontal Ownership Limits*, 8 FCC Rcd. 8565, ¶ 10 (1993) ("*1993 Cable Ownership Order*") ("Congress concluded that [the] degree of [cable] concentration, though low relative to other industries, may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market. Congress was concerned in particular with preventing large vertically integrated cable systems from creating barriers to entry for new video programmers, and from causing a reduction in the number of media voices available to consumers.").

Commission should take the following approach: 1) consistent with the underlying purposes of the rules, attribute to an MSO only those cable systems for which the MSO controls programming choices or purchases programming; 2) consistent with the Commission's proposal in the *Further NPRM*, measure an MSO's horizontal concentration level as a percentage of all MVPD subscribers; and 3) for the reasons set forth in *TCI's* Horizontal Ownership Comments, significantly raise the 30 percent limit. Under this approach, as described above, AT&T would be involved in programming decisions or purchase programming for 26.6 percent (or 23.7 percent after the Falcon, Bresnan and Cox transactions close) of all MVPD subscribers nationwide.[151]

If the Commission instead were to consider AT&T's post-Merger horizontal concentration level on a cable homes-passed basis, then AT&T would be involved in programming decisions or purchase programming for cable systems with approximately

[151] AT&T and MediaOne today do not, and AT&T post-Merger will not, control programming choices or purchase programming for: Cablevision (3,149,000 subscribers; 5,126,000 homes passed); the two AT&T-Time Warner cable joint ventures (1,416,000 subscribers; 2,686,000 homes passed); and TWE (9,734,000 subscribers; 15,254,000 homes passed – after subtracting the two AT&T-Time Warner joint ventures, which are otherwise included in the TWE numbers). As pointed out above, these systems should not be attributed to AT&T because they do not give AT&T any ability to engage in vertical foreclosure or exercise monopsony power. In any event, the homes passed numbers should not be used as a measure because they do not take into account other MVPD competitors. As the Commission itself has proposed, horizontal concentration should be measured by MVPD subscribers, rather than homes passed.

34,760,000 cable homes passed,[152] or approximately 34.8 percent[153] of all cable homes passed. When the Falcon, Bresnan and Cox transactions are completed, AT&T will pass 31,015,000 cable homes, or approximately 31 percent of all cable homes-passed.

As shown above, market shares of this size are no cause for concern because they do not give firms the ability to engage in vertical foreclosure or to exercise monopsony power. Such a conclusion is consistent with Congress' decision in the 1996 Act to raise the national broadcast limit from 25 percent to 35 percent.[154] And, because the broadcast rules still allow for a discount for UHF stations, the effective horizontal limit for broadcasters is well above 35 percent.[155]

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[152] This includes all the homes passed for the AT&T and MediaOne cable systems identified in the charts contained in the Appendices, with the exception of Cablevision, the two AT&T-Time Warner joint ventures, and TWE. In addition, AT&T has subtracted from these numbers 1,155,000 homes passed to account for a reduction in homes passed resulting from the Comcast Exchange. As noted, Comcast also has a separate option to acquire additional cable systems from AT&T. If Comcast exercises that option, AT&T's percentage of cable homes passed will be even further reduced.

[153] This percentage is calculated by dividing 34,760,000 by 100,000,000 cable homes passed. However, the number may be substantially in excess of 100,000,000. Although a Kagan estimate of 95,520,000 total cable homes passed is sometimes cited, that figure is not appropriate for use in measuring an MSO's percentage of cable homes passed. TCI previously submitted to the Commission a separate study *performed by Kagan* indicating that the 95,520,000 estimate is unreliable and that the number could be well in excess of 100,000,000. *See* Letter from Michael H. Hammer, Esq., Willkie Farr & Gallagher, to William F. Caton, Secretary, Federal Communications Commission, *Ex Parte* Presentation, MM Docket No. 92-264 (Oct. 9, 1997). In fact, AT&T believes that given the significant changes in the MVPD marketplace over the past six years since the rule was adopted, the Commission could not now enforce a cable homes-passed test even if the suspended rules were reinstated. For these reasons, and the other reasons set out in TCI's prior comments, AT&T strongly endorses the Commission's proposal in the *Further NPRM* to use an MVPD subscriber test. *See* TCI Ownership Limit Comments at 56-65.

[154] 1996 Act, Pub. L. NO. 104-104, § 202(c)(1), 110 Stat. 56,111 (1996).

[155] 47 C.F.R. § 73.3555(e)(2)(i). For example, both Paxon and Fox have an effective national reach above 40 percent before applying the Commission's 50 percent discount for UHF stations.

(Continued . . .)

Moreover, the cable homes-passed measure completely ignores the considerable increase in the number of subscribers served by competing MVPDs, most importantly DBS, so that it vastly overstates an MSO's ability to engage in vertical foreclosure or to exercise monopsony power. Thus, if the Commission were to retain a homes-passed approach, it at the very least would have to modify its present formula to take into account the established competition from non-cable MVPDs, discussed above, both at present and going forward – *i.e.*, it would have to adopt a self-adjusting formula that would automatically recalculate an MSO's share as MVPD competition increases or decreases. Of course, the Commission could avoid the complexities of such a modified homes-passed approach by adopting the proposal in its *Further NPRM* to implement an MVPD subscriber formula.

In addition, whether measured on a subscriber or homes-passed basis, there is no concern that the Merger will reduce program diversity. First, as noted, AT&T post-Merger will not have sufficient size to enable it to foreclose programming services and thereby limit diversity. Second, the growth of DBS and other non-cable MVPDs provides programmers with additional viable distribution options. Third, as the Commission has found, independent programming sources have increased rapidly, and program diversity is at an all-time high.[156]

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(. . . Continued)
Moreover, because LMAs are not attributable, the effective national reach of certain broadcasters is in the 60 percent range. *See* TCI Ownership Limit Comments at 71-72.

[156] For example, the number of national satellite services has increased from 106 in 1994 to 245 in 1998. During this same time, the percentage of programmers vertically integrated with cable has declined from 53 percent to 39 percent. *See Fourth Annual Video Competition Report* ¶ 158; *Fifth Annual Video Competition Report* ¶ 159. As the Commission recently found, over 70 national programming services unaffiliated with cable operators were planned to be launched in the near future, whereas only five national programming services affiliated with a cable operator were planned for launch. *See Fifth Annual Video Competition Report* at Tables F-3 and F-4.

Fourth, an MSO's ability to limit diversity by dictating content is substantially in check due to the Supreme Court's affirmance of the "must carry" rules in 1997. Finally, the emergence and widespread deployment of digital video technology by cable and non-cable MVPDs is increasing the number of programming outlets and creating additional incentives for the development of diverse new programming sources.[157]

AT&T recognizes that the suspended horizontal ownership rules and the underlying attribution rules attribute to an MSO even small minority ownership interests in cable systems whether or not the MSO buys programming for the system or controls the system's programming choices. AT&T believes this is an unjustifiable and unsupportable approach because such minority interests do not confer the ability to control programming that is at the heart of the horizontal ownership limit.

It is particularly important that the Commission modify the approach taken in the suspended horizontal rules given the high priority Congress placed on the development of local, residential telephone competition in the 1996 Act. AT&T is the only company to step forward with a commitment (and the extraordinary capital investment) to provide expansive, facilities-based alternatives to the ILEC monopolies. AT&T has proven that it stands ready to offer the benefits of telephone competition – lower prices, improved customer service, and technology innovation – to consumers across the nation. In fact, as one financial analyst report recently stated: "Besides AT&T, no other company has yet laid out a coherent plan for attacking a broad swathe of the Bells' residential business."[158]

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[157] *See also* TCI Ownership Limit Comments at 21-44.

[158] *New Communications Industry Takes Shape*, FT Telecoms, at p. 1 (June 9, 1999).

As discussed above in Sections IV and V(A), however, entering and competing in the local telephone business will be exceedingly difficult. The ILEC monopoly is over 100 years old, and the ILECs today still have virtually complete control over the residential subscribers in their territories. In addition, it is enormously expensive, technologically complicated, and labor intensive to upgrade cable systems to compete with the ILEC monopolies, and there is no guarantee that these investments will be successful. The Commission should not adopt cable horizontal rules that prevent AT&T from bringing local telephone choice to millions more consumers and from achieving the economies of scale and other benefits associated with large network size that are critical to providing alternatives to the ILEC monopolies.

The Commission has more than ample authority to adopt horizontal ownership rules that ensure that cable operators do not act anticompetitively in the programming marketplace, but at the same time encourage local telephone competition. In fact, the Communications Act compels such a balance. When Congress adopted the horizontal ownership provision in the 1992 Cable Act, it specifically instructed the Commission to take account of the fact that cable networks were evolving rapidly and had the potential to provide consumers with a vast array of new technologies and services.[159] When Congress spoke again in the 1996 Act, it emphasized most strongly the need to develop local telephony competition, and noted the unique role cable companies could play in developing such competition. The *only* way the Commission can harmonize the 1992 and 1996 Acts is to adopt cable horizontal rules that contain the

[159] For example, Congress mandated that the Commission "account for any efficiencies and other benefits that might be gained through increased ownership or control" of cable systems, 47 U.S.C. § 533(f)(2)(D), and that it adopt rules that "reflect the dynamic nature of the communications marketplace," *id.* § 533(f)(2)(E).

minimum limitations necessary to protect an increasingly competitive video marketplace, but do not hamper the growth that is necessary to stimulate local telephony competition.

Finally, if the suspended horizontal rules are reinstated, and if the Commission does not amend the rules in a manner that results in AT&T's compliance with the rules as adopted, AT&T could seek a waiver of the rules. A waiver clearly would be appropriate in those circumstances where competitive harms are nonexistent and there are enormous countervailing benefits that cannot otherwise be achieved.

Given that the proposed transaction threatens none of the competitive harms that the statute and horizontal rules were designed to address, and that it promises enormous public interest benefits – indeed, the only short-term prospect for real local telephone competition for millions of Americans – the horizontal ownership rules should not pose an obstacle to the proposed Merger. This is especially true where, regardless of how the ownership limits are ultimately crafted, AT&T will bring itself into compliance: AT&T will comply with whatever ownership limits emerge from the current judicial and Commission proceedings.

### G. Internet Services

Internet access services allow consumers to connect with the global "network of networks" that comprises the Internet and World Wide Web. These services are provided by companies that combine a range of features including connectivity to the Internet and, in many cases, proprietary content.

AT&T provides its WorldNet Internet access service to approximately 1.8 million customers, out of an estimated 33.7 million Internet users nationwide.[160] AT&T also holds a 25.9 percent equity interest and a 57.9 percent voting interest in At Home Corporation, which provides Internet access services. AT&T offers the @Home service to approximately 74,000 subscribers in connection with cable operations. After the Merger, AT&T will also hold approximately a 35 percent interest in Road Runner, which also provides Internet access services. Through its ownership of MediaOne, AT&T will provide the Road Runner service to approximately 125,000 customers.

The provision of Internet access services is already highly competitive. Internet service providers ("ISPs") compete for customers across a wide variety of features and options, including transmission speed, content, and customer service. Literally hundreds of firms – including America Online ("AOL") (with about 18 million subscribers), Microsoft, the Bell operating companies, major satellite companies (including Hughes, Loral, and Lockheed), and dozens of other wireline and wireless firms – compete to provide consumers access to the Internet and to proprietary content compiled or developed by them or their partners.[161] In its *706*

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[160] According to numbers relied upon by the U.S. Department of Commerce, there are approximately 33.7 million Internet subscribers in the United States, although individual estimates of the market vary significantly from each other. *See* U.S. Department of Commerce, *The Emerging Digital Economy II* at 2 (June 1999) (citing <www.nua.ie/surveys>).

[161] The number of competitors is substantial. *See ACLU v. Reno*, 929 F. Supp. 824, 832-33 (E.D. Pa. 1996) (noting that consumers have a wide variety of avenues available by which to access the Internet, including AOL, Compuserve, the Microsoft Network, and Prodigy). *See also* Leslie Walker, *Rivals Cede Throne to AOL*, Washington Post, April 8, 1999, at E1 (naming some of the 4,000 companies providing dial-up access to the Internet); Boardwatch Magazine's Directory of Internet Service Providers, 11th Ed. 1999 (listing over 5000 ISPs).

*NOI Report*[162] and the order approving the AT&T-TCI merger just a few months ago, the Commission confirmed that "there are a large number of firms providing Internet access services in nearly all geographic markets in the United States, and these markets are quite competitive today."[163]

The Internet and online service business today is dominated by AOL, which serves almost 18 million of the total 33.7 million subscribers. By contrast, AT&T (through WorldNet and @Home) and MediaOne (through Road Runner) currently serve only 2 million and 125,000 subscribers, respectively. Current competitors are well-established, and new competitors are emerging regularly. Clearly, the broad range of choices available today demonstrates that the market is already extremely sensitive to the needs of consumers. Even focusing solely on Internet access services available over broadband facilities, there is no indication of potential anti-competitive effects. Consumers have an array of broadband choices, and these choices can be expanded easily by the entry of additional suppliers. In fact, the Commission has already found that "the preconditions for monopoly appear absent,"[164] and dozens of broadband competitors have entered the market even since that finding was made.

Importantly, the Merger will not have any effect on the ability of customers to access the Internet content of their choice. Concerns about the delivery of integrated cable Internet services are not merger-specific; in any case, such offerings promise numerous pro-competitive benefits to consumers. Because the Merger will enhance competition and create

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[162] *706 NOI Report* ¶¶ 7, 98.

[163] *AT&T-TCI* ¶ 93.

[164] *706 NOI Report* ¶ 48.

more "choice among video- and content- enriched high-speed Internet access services"[165] for consumers, it is demonstrably in the public interest.

### 1. The Internet Access Services Marketplace is Highly Competitive, and AT&T's Investment in Cable Systems will Make it More So

Internet access service is a product comprised of inputs, each of which is available from a wide range of firms. As a threshold matter, consumers need both "connectivity" with the Internet and "transport" between their premises and the connectivity provider.[166] Consumers then use the Internet to access "content" made available on servers connected to the Internet.[167] Companies may offer these three components individually or in a variety of bundles, but to the consumer they are all part of one service: access to the Internet.[168] With respect to any given set of Internet consumers, the relevant geographic markets are local. However, because the same

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[165] *AT&T-TCI* ¶ 147.

[166] The Commission has described Internet access as a combination of "computer processing, information storage, protocol conversion, and routing, with transmission," which allows users to access Internet content and services. Universal Service Report to Congress, *Federal-State Joint Board on Universal Service*, 13 FCC Rcd. 11501, ¶ 63 (1998) ("*Universal Service Report to Congress*"). For purposes of this statement, this component will be referred to as "connectivity."

[167] Content can include traditional text and graphic images, video, audio, and interactive services such as email and "chat."

[168] The Commission has identified various "categories" of Internet services, yet noted that many companies fall into more than one of these categories. *See Universal Service Report to Congress* ¶ 62 (distinguishing between access providers, application providers, content providers, and backbone providers); B. Esbin, *Internet over Cable: Defining the Future in Terms of the Past* at 17 (FCC OPP Working Paper Series No. 30, 1998) (explaining that it "is still possible to differentiate 'online service providers' from 'Internet service providers' or 'ISPs,' although the distinctions have grown blurred in practice.") ("*Internet Over Cable*").

competitive conditions apply nationally, there is no need for separate analysis of any individual market.[169]

The relevant market includes Internet access services available to consumers over both broadband and narrowband facilities.[170] Regardless of whether they rely on broadband or narrowband facilities, firms compete with each other to provide the combination of price, service, speed, and convenience best suited for each consumer. Broadband and narrowband services are priced competitively, each costing about forty dollars per month when a second phone line for dial-up access is factored in. The main advantage of broadband facilities over narrowband facilities is faster speeds. However, the array of applications tailored to the broadband environment is currently quite limited. Moreover, traditional dial-up services may also provide unique email or "chat" features that make them particularly attractive to consumers who value these capabilities.[171] Consumers who use Internet services primarily for such email and "chat" functions have no need for faster download speeds. Moreover, narrowband access is "portable" – it can be used from any location accessible by a normal phone line – while broadband access is not.

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[169] *Accord AT&T-TCI* (declining to analyze any specific local markets for Internet access services).

[170] Even if the Commission finds that broadband and narrowband services are in separate markets, it still should conclude there are no anticompetitive concerns. There is substantial competition and ongoing entry to provide broadband access services. *Accord, AT&T-TCI* ¶ 92 (finding no need to determine whether broadband and narrowband Internet access services are the same or two distinct product markets, because in either case the merger was unlikely to adversely affect the public interest).

[171] Consumers who value such features will tend to "stick" to the service for a longer period of time before switching to an otherwise acceptable substitute.

Competitors themselves view narrowband and broadband services as substitutes for the foreseeable future. Many industry experts agree that Internet access over traditional phone lines shows no signs of diminishing in appeal. Even AOL's chief executive officer, Steve Case, has predicted that five years from now "seventy-five percent of the market will be narrowband because people want it to be as easy and inexpensive as possible."[172] Other AOL executives have explained that the company is "technology agnostic"[173] and believes that broadband services will appeal primarily to consumers who are already online and want to upgrade to a faster connection.[174] AOL does not believe its millions of customers need access speeds much greater than 28.8 kpbs.[175] Prodigy Communications Corp. apparently has reached a similar conclusion, as demonstrated by its recent announcement that it would purchase Cable & Wireless's dial-up Internet access service in a deal worth up to $75 million.[176]

Clearly, the availability of narrowband alternatives will continue to discipline the price of services available over broadband facilities until those services can offer something beyond "faster" downloads. Because narrowband alternatives provide millions of consumers with the basic services they need, it is highly unlikely that even a "monopoly" provider of

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[172] *See Power Lunch*, Television Interview with Steve Case (CNBC broadcast, September 28, 1998).

[173] Ashley Dunn, *AT&T's Bold Move*, Los Angeles Times at C4 (May 6, 1999).

[174] Thomas E. Weber and Stephanie N. Mehta, *AOL Hopes to Trump Cable Deal by Using Some Fast Phone Lines*, Wall Street Journal (May 7, 1999).

[175] *See* Transcript of Panel Discussion, *Cyberspace and the American Dream*, Aspen Summit, (Aug. 25, 1998) (interview with George Vradenburg, AOL's Vice President for Law and Public Policy) ("Vradenburg Interview").

[176] Maura Ginty, *Prodigy to Buy Cable & Wireless U.S.A.'s Dial-Up Service*, InternetNews.com (May 27, 1999) <www.internetnews.com>.

broadband services would be able to raise prices profitably. All these factors demonstrate that broadband access is part of the overall Internet access services market.[177]

Currently, there are "a large number of firms providing Internet access services in nearly all geographic markets in the United States, and these markets are quite competitive today."[178] These firms employ different competitive strategies and offer different combinations of features to attract subscribers. There is no question that the market for Internet access services is "extremely competitive and highly fragmented," with "no substantial barriers to entry."[179] Even with respect to the broadband sector, the Commission reached the same conclusion only a few months ago, finding that there are "a large number of actual participants and potential entrants."[180] In light of this intense competition, the Commission decided that no regulatory intervention on its part was required.[181]

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[177] AT&T, @Home, and Road Runner also provide Internet backbone services, which route traffic between Internet access providers. *See MCI-WorldCom* ¶ 143 n.383 (describing backbone services). Nevertheless, the Merger will not create or enhance market power in the provision of backbone services because only AT&T owns its own facilities to provide these services. @Home and Road Runner each lease facilities from other backbone providers. In any case, even AT&T, @Home and Road Runner combined would have a *de minimis* share of any such "market."

Likewise, while AT&T and MediaOne also provide Internet access services to business customers, there are many companies providing similar services and, after the Merger, AT&T will still only have a *de minimis* share of this business. *Accord, AT&T-TCI* ¶¶ 60-61 (considering only residential usage of Internet access services).

[178] *AT&T-TCI* ¶ 93. *See also 706 NOI Report* ¶ 90 (according to one study, over 90 percent of the country has access by a local call to several Internet service providers).

[179] 1998 MindSpring Enterprises, Inc. 10-K at 18. *See also* 1998 America OnLine, Inc. 10-K at 17 (listing a wide range of competitors in the "rapidly-changing" marketplace).

[180] *706 NOI Report* ¶ 48.

[181] *Id.* ¶¶ 100-101.

The wisdom of that decision has been borne out by developments in the Internet market since January 1999. For example, every day there are more and more broadband transport alternatives.[182] In just the last few months, AOL has announced deals with several Bell companies to use DSL service to provide high-speed Internet access. AOL has also continued its "AOL Anywhere" strategy through alliances with manufacturers of set-top boxes and electronic organizers and the acquisition of the major provider of on-screen program guides.[183] In addition, Hughes Electronics Corp. announced that it will invest $1.4 billion in a two-way broadband data satellite network, Spaceway, that will begin providing service in the United States by the year 2002;[184] Sprint and MCI announced deals to acquire wireless cable companies;[185] Nextel introduced the first Internet-ready wireless phone;[186] and several data CLECs have had wildly successful initial public offerings.[187] Because the number of broadband alternatives increases

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[182] The stable regulatory environment created by the Commission has given providers of Internet access – and the financial community supporting them – the confidence to make the necessary investments.

[183] *See* Stephen Buel, *'AOL Anywhere' Philosophy Is Wider Reach, Marketing Muscle*, Mercury News (Nov. 24, 1998) (describing AOL's "relentless drive to extend its supremacy across computer-based communicating"); Paul Fahri and Mike Mills, *AOL Seeks Boost Via Phone, TV*, Washington Post (Dec. 8, 1998); Andrea Peterson, *AOL, 3Com Form Partnership to Let Users Get E-mail on Palm Organizers*, Wall Street Journal (June 23, 1999).

[184] *Hughes Invests $1.4B in Network* (March 17, 1999) <www.mercurycenter.com/ svtech/news/breaking/ap/docs/2496651.htm>.

[185] *See* Jason K. Krause, *Wireless Cable Makes a Surprise Comeback*, The Industry Standard, April 29, 1999 (describing MCI-WorldCom's acquisition of CAI Wireless Systems and Sprint's acquisition of People's Choice TV and American Telecasting) <www.thestandard.net>.

[186] Sarah Schafer, *Nextel First With Net Ready Phone*, Washington Post, at E3 (June 9, 1999).

[187] *Covad Shares Surge After $140 Million IPO Placed*, TR Daily, January 22, 1999; Corey Grice, *Rhythms Triples on First Day of Trading*, CNET News.com (Apr. 7, 1999) <www.news.com>. Microsoft recently announced a $50 million deal with Rhythms, which also

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every day, there is no way to monopolize the Internet access market by bundling broadband "transport" with connectivity or content.

As described in more detail below, AT&T and MediaOne compete with a vast array of companies that utilize different combinations of transport, connectivity, and content to attract subscribers:

- Some companies provide only connectivity, or "pure" Internet access.
- Some combine connectivity with transport over their own facilities, while others offer a "bundle" that includes transport purchased from a third party.
- Some providers include proprietary and non-proprietary content in their bundle, while other companies offer only content.
- Cable operators, which have chosen to provide a seamless offering that includes high-speed transport, connectivity, and content, offer customers yet another option for accessing the Internet.

All of these different providers compete in one Internet access "market," although they may offer different components or combinations of components to consumers.

**ILECs.** All of the ILECs offer Internet access services to their subscribers that include transport and content. For example, Bell Atlantic offers "Bell Atlantic.net," a dial-up Internet access service at speeds up to 56 Kbps.[188] Bell Atlantic is also deploying DSL technology and using it to provide broadband Internet access service to its subscribers. Bell Atlantic has announced plans to make its "Infospeed DSL" service available to 8 million homes

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received another $30 million from MCI WorldCom in January. *Microsoft makes its first DSL stake*, CNET News.com, March 17, 1999 <www.news.com>.

[188] *See Bell Atlantic.net for Home* <www.bellatlantic.net/home/banet/south>.

by the end of 1999 and 16 million homes by the end of 2000.[189] US WEST offers subscribers to its US WEST.net Internet access service a choice of transport either over standard phone lines or US WEST's "MegaBit" DSL service.[190] US WEST currently has 35,000 subscribers for its "MegaBit" services,[191] which are offered in forty cities and are capable of reaching several million customers throughout US WEST's sixteen state region.[192]

GTE and Southwestern Bell offer Internet access three different ways: dial-up access over standard phone lines, ISDN, or DSL.[193] SBC's DSL Internet access service is available to two million homes and SBC plans to increase its availability to 8.4 million homes by the end of 1999.[194] GTE has announced plans to offer its DSL services in approximately 300 central offices in 16 states, the nation's broadest deployment of ADSL technology, which will enable GTE to offer "end-to-end Internet solutions on a broader scale."[195] BellSouth offers its

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[189] Corey Grice, *Price Cuts Raise Stakes in DSL Race*, CNET News.com, March 31, 1999, www.news.com.

[190] *See MegaBit Services - Internet Connection* <www.uswest.com/products/data/dsl/connection.html>.

[191] John Borland, *US West Works on National DSL Strategy*, CNET News.com (May 21, 1999) <www.news.com>.

[192] *See US WEST Company Profile* <www.uswest.com/com/insideusw/info.profile.html>.

[193] *See, e.g., SBC We Make It Easy* <www.public.swbell.net/home.html>; *GTE Products and Services* <www.gte.net/pands/residential/dsl.html>.

[194] *See America Online and SBC Communications to Offer High Speed Upgrade to AOL Members* (March 11, 1999) <www-db.aol.com/corp./news/press/ view?release=579>.

[195] *See GTE to Offer Ultra-Fast Internet Access* <www.gte.com/AboutGTE/news/adsl041398.html>.

customers their choice of "FastAccess" ADSL service or "Internet access for less,"[196] while Ameritech offers both "Ameritech.net" dial-up and SpeedPath ADSL services.[197]

**CLECs.** Competitive LECs generally provide the transport component of Internet access service, by itself or bundled with connectivity. For example, Sprint is now offering its Sprint ION high-speed Internet access and telephone service to consumers,[198] while NorthPoint Communications offers wholesale high speed DSL service to ISPs nationwide.[199] Concentric Network Corporation's interconnection agreement with NorthPoint allows Concentric to offer a high-speed Internet access service to small and medium size businesses, telecommuters, and residential subscribers.[200] Covad Communications has a "Telesurfer" DSL transport service for consumers, which is available from several ISPs who bundle it with their Internet services.[201] A new "lite" version of DSL, which is not quite as fast but much easier to

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[196] *See BellSouth Buzz* <www.bellsouth.net/cgi-bin>. BellSouth's DSL services will reach six million lines by September 1999. *BellSouth Launches High-Speed BellSouth.net FastAccess ADSL Internet Service in Memphis* (May 3, 1999) <www.bellsouthcorp.com/ proactive/documents/render/26162.vtml>.

[197] *See Ameritech Home Products - Internet services* <www.ameritech.com/ products/ answer/data.html>.

[198] *See Sprint Launches ION Offer for Residential Customers*, TR Daily (June 21, 1999).

[199] *See Northpoint Communications Will Surpass Combined Bells' DSL Deployment* <www.northpointdsl.com/about/press_981215a.html>; *see NorthPoint Communications: Partners Resources* <www.northpointdsl.com/partners2/ index.html>.

[200] *See* <www.concentric.net/ corporate_info/about_concentric.html>.

[201] *See* < www.covad.com/partners>.

install, is viewed by Northpoint and Covad as a way to accelerate the deployment of high-speed access to consumers.[202]

**Wireless.** Fixed wireless services also provide the transport component of Internet access services. According to one industry analyst, "[w]ireless broadband provides firms an excellent way to deliver the last mile of Internet access."[203] For example, Teligent, which uses microwave signals to offer local phone and Internet services to small and medium businesses, has launched service in 23 markets and plans to offer service in 17 more by the end of 1999.[204] Sprint and MCI-WorldCom recently acquired several wireless cable licensees, including People's Choice TV, American Telecasting, and CAI Wireless,[205] whose spectrum is wide enough to carry high-speed services. Sprint plans to use wireless cable technology to provide transport for its bundled offerings of voice and broadband Internet access services to consumers.[206] MCI-WorldCom and Vulcan Ventures recently invested $300 million dollars each in Metrocom Inc., which provides "last mile" wireless Internet access at 128 kilobits per second

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[202] Jon Healey, *High-Speed Internet Access Gets a Boost*, San Jose Mercury News (June 22, 1999).

[203] Phil Harvey, *Waking Up to Fixed Wireless*, www.UpsideToday.com (June 4, 1999) <www.upside.com>.

[204] Corey Grice, *Short Take: Teligent Expands into Four New Markets*, CNET News.com (Feb. 8, 1999) <www.news.com>.

[205] John Borland, *Wireless Cable Bidding War Ahead?*, CNET News.com (June 17, 1999) <www.news.com>; Jason Krause, *Wireless Cable Makes a Surprise Comeback* (April 29, 1999) <www.the standard.net/articles/display/0,1449,4412,00.html? home.tf>.

[206] John Borland, *Sprint Readies ION for Consumer Market*, CNET News.com (April 12, 1999) <www.news.com>.

via its Ricochet microcell system.[207] And Lucent has developed a wireless end-to-end network solution that will allow companies to offer consumers and businesses a direct high-speed wireless connection to the Internet.[208]

**Satellite.** Satellite services provide subscribers with yet another option for Internet access that includes transport and connectivity. For example, DirecPC, a product of Hughes Network Systems, enables consumers to access the Internet at high speeds through digital satellite transmissions.[209] The Chairman of Hughes has announced that the DirecPC system is up and running and ready to compete with other high-speed services.[210] AOL and Hughes have reached an agreement to develop dual purpose AOL TV/DirecTV set top boxes, and by early next year AOL's Internet access service will be available nationwide via the DirecPC satellite network.[211] Teledesic, another global satellite concern, is spending $9 billion on its "Internet-in-the-Sky" project, which will provide consumers with affordable, worldwide, "fiber-like" access to telecommunications services such as broadband Internet access, video-

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[207] *Metricom Gets $600 Million Equity Jolt From Vulcan, MCI Worldcom*, TR Daily (June 21, 1999). As part of the transaction, MCI Worldcom signed a non-exclusive wholesale agreement with Metricom to market and sell a co-branded high-speed Internet service. Bob Sullivan, *Wireless Internet Service Gets $1 Billion Boost From Allen, MCI* (June 21, 1999) <www.msnbc.com/news/282296.asp>.

[208] *Lucent Technologies Introduces Industry's Most Comprehensive Network Solution for High-Speed Wireless Access to the Internet*, PR Newswire (March 18, 1999).

[209] *See Hughes Network Systems Launches DirecPC 2.0 With New Service Pricing, Bundled ISP Service, Electronic Program Guide, Turbo Webcast and Turbo Newscast; Latest Version of DirecPC Offers Customers the Ultimate in Speed, Service and Convenience* (June 23, 1998) <www.direcPC.com/about/ pr_20.html>.

[210] STREET SIGNS, The Faber Report: Interview with Michael Smith, Chairman and CEO of Hughes Electronics (CNBC Broadcast June 21, 1999).

[211] *AOL, Hughes in $1.5 Billion Marketing Agreement*, TR Daily (June 21, 1999).

conferencing, and high-quality voice and digital data service beginning in 2003 using a constellation of 288 low-Earth-orbit satellites.[212]

In March 1999, Hughes announced that it will invest $1.4 billion in a two-way broadband data satellite network, Spaceway, that will begin providing service in the United States by the year 2002.[213] Hughes' goal for the Spaceway project is to provide customers with two-way, high speed Internet access using small dish antennas.[214] Other satellite-based providers, including Motorola, Lockheed Martin, Alcatel Espace, and Loral, are projected to invest over 25 billion dollars to establish their broadband satellite services in the next decade.[215] According to industry analysts, these emerging broadband satellite providers will offer their services to a wider market, including consumers.[216]

**Others.** In addition to all this, there are thousands of dial-up ISPs that offer Internet access service across the nation. These ISPs generally provide connectivity and varying degrees of content. They may also offer bundled packages that include transport over ILEC or CLEC phone lines. A few large companies serve the vast majority of subscribers – AOL has

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[212] *See Teledesic, Motorola, Boeing, Matra Marconi Space to Partner on 'Internet-in-the-Sky;' Motorola Will Lead Global Industrial Team,* (May 21, 1998) <www. teledesic.com/newsroom/05-21-98.html>. *See also In the Matter of En Banc Hearing on Broadband Services* (July 9, 1998), Transcript Comments of Scott Hooper, co-CEO of Teledesic and Chairman of Nextlink Communications at 9-13 <www.fcc.gov/enbanc/070998/ eb070998.html>.

[213] *See Hughes Invests $1.4B in Network* (March 17, 1999) <www. mercurycenter.com>.

[214] *Putting the Internet in Orbit,* Washington Post, at F5 (April 12, 1999).

[215] *See generally* Pioneer Consulting, *Global Broadband Access Markets,* Executive Summary (1998).

[216] *See* Pioneer Consulting, *Satellite Data Networks: The Internet's Next Frontier,* Executive Summary at 7 (1997).

almost 18 million subscribers,[217] Microsoft has 1.7 million,[218] Earthlink has 1.1 million[219] and Prodigy has 700,000[220] members.

Many ISPs are beginning to offer Internet access services over broadband facilities as well. AOL has formed strategic alliances with SBC and Bell Atlantic to provide high-speed connectivity for its customers through the ILECs' ADSL networks.[221] AOL describes DSL as a "fabulous technology"[222] and predicts that it will be able to provide DSL-based Internet service to more than half of its customers by the end of 1999.[223] If AOL's negotiations with U S WEST and BellSouth are successful, "AOL's [DSL offerings] would blanket the country."[224] Prodigy has also announced an alliance with Bell Atlantic to provide DSL services to Prodigy customers in Bell Atlantic's service areas, which it says is the first step

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[217] *See* Ted Bridis, *Microsoft Browser Is Winner – Except in Court*, San Diego Union-Tribune, May 25, 1999.

[218] Leslie Walker, *Rivals Cede Throne to AOL*, Washington Post, at E1 (April 8, 1999).

[219] *EarthLink Surpasses One Million Members*, Jan. 4, 1999 <www.earthlink.net/about/pr/1mm.html>.

[220] Walker *supra* n.218.

[221] *See America Online and SBC Communications to Offer High Speed Upgrade to AOL Members* <www-db.aol.com/corp/news/press/view?release=579>; *AOL to Utilize SBC's DSL Service to Offer High Speed Upgrade to Members in Pacific Bell, Southwestern Bell and Nevada Bell Regions*, (March 11, 1999) <www.businesswire.com>; *America Online and Bell Atlantic Form Strategic Partnership to Provide High-Speed Access for the AOL Service* <www-db.aol.com/corp/news/press/view?release=544>.

[222] Weber and Mehta *supra* n.174.

[223] Bernhard Warner, *AOL Set to Rumble on AtHome's Turf* (March 11, 1999) <www.thestandard.net/articles/display/0,1449,3795,00.html>.

[224] Weber and Mehta *supra* n.174.

in its plan to make high-speed access available to its customers nationwide.[225] In addition, AOL has noted that it – and presumably other ISPs – can take other steps, such as caching, to satisfy customers who desire higher speeds.[226]

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Clearly, the Internet access market is competitive, with numerous companies offering services to residential subscribers "over a variety of media using a variety of technologies."[227] The number and variety of companies providing the various components of Internet access demonstrate that there are multiple competitive strategies for delivering Internet services to consumers. As the foregoing discussion demonstrates, there is no "best" arrangement for providing Internet access to consumers. This proliferation of alternative approaches to providing Internet access services is a sign of the robust marketplace competition that the Commission seeks to promote. Certainly, as set forth below, there are no issues specific to the Merger that require the regulation of AT&T and MediaOne's cable Internet offerings.

### 2. The Merger will Not have any Anticompetitive Effects in the Internet Access Services Market

Because the Internet access services market is competitive, and the "preconditions for monopoly appear absent,"[228] the Merger will not have any anticompetitive effects. AT&T's post-Merger interest in two firms that provide Internet access services over cable facilities in no

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[225] *Prodigy, Bell Atlantic Join in DSL Access Alliance*, TR Daily (May 25, 1999).

[226] *See* Vradenburg Interview, *supra* n.175.

[227] *AT&T-TCI* ¶ 60. *See also AT&T-TCI* ¶ 93; *706 NOI Report* ¶ 48.

[228] *See 706 NOI Report* ¶ 48.

way changes that conclusion. AT&T's cable Internet service subscribers, as well as its other Internet customers, will continue to have numerous broadband and narrowband alternatives available to obtain Internet access services. No firm will be able to raise prices as a result of the Merger.

#### a. Residential Internet access services will remain competitive post-Merger

After the Merger, A&T will have a very small share of the residential Internet access services market.[229] Moreover, residential customers will continue to have dozens of alternatives to choose from to obtain Internet access – available over both broadband and narrowband facilities. As the Commission concluded when it reviewed the AT&T-TCI merger, there are, in fact, "a large number of firms providing Internet access services" in markets that are already "quite competitive."[230] Because the Merger will not significantly reduce overall consumer choice for Internet access services, it does not raise any competitive concerns.

Even focusing solely on services offered over broadband facilities, the foregoing analysis does not change. As set forth above, many firms are deploying or beginning to deploy high-speed Internet access services using a wide range of alternative technologies, including DSL, satellite, fixed wireless, and others.[231] AT&T will reach a *de minimis* share of this

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[229] Even treating this transaction as a merger of WorldNet, @Home and Road Runner, which it is not, AT&T would have less than 2.4 million out of approximately 33.7 million subscribers in an increasingly competitive market (about a seven percent share).

[230] *AT&T-TCI* ¶ 93.

[231] *See id.* ¶ 94.

sector.[232] The availability of so many alternatives ensures a competitive environment in which any attempted price increase would surely be defeated.

**b. The Merger will not impede access to Internet content**

The Merger will not create impediments to Internet access. To begin with, even if this transaction were a merger between WorldNet, @Home and Road Runner, which it is not, the merged company would not have monopoly power in the "sale" of Internet access. Combined, these services would reach a trivial share of the market. Any attempt by WorldNet, @Home, and Road Runner to foreclose subscriber access to Internet content could easily be defeated by consumers switching to other Internet access providers.

Arguments about foreclosing access also fail to recognize that WorldNet, @Home, and Road Runner have no incentive to engage in such behavior. To the contrary, unreasonable content restrictions imposed by any of these companies, or their cable system affiliates, would cause subscribers to switch to other ISPs. Because the cable Internet services in particular do not have many subscribers, any subscriber losses would have dramatic consequences far outweighing the purported "benefits" of imposing anticompetitive restrictions.[233] Thus, it makes no sense to argue, as some have, that the provision of Internet

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[232] The company will have less than 200,000 cable Internet subscribers through its cable systems. AT&T will not "control" @Home or Road Runner's day-to-day operations, but even assuming *arguendo* that it would, the @Home and Road Runner combined subscriber count would be only about 600,000 – still a very small number of subscribers.

[233] For this reason, concerns that have been raised about legitimate restrictions imposed on the @Home and Road Runner services to limit video streaming applications are entirely misplaced. Cable Internet services actually *expand* the number of Internet applications available to consumers. Ancillary restrictions on the use of these services, which help manage bandwidth

(Continued . . .)

access services over cable facilities will lead to anti-competitive restrictions on access to Internet content.

Moreover, WorldNet, @Home, and Road Runner already provide an open environment through which subscribers can reach any available content on the Web. AT&T is pledged to ensuring that cable Internet access service subscribers are just "one click away" from all Internet content.[234] In addition to the proprietary and tailored content available to them, many WorldNet, @Home, and Road Runner subscribers also access proprietary content from providers not affiliated with AT&T or MediaOne. As the Chairman of AT&T has stated, "[w]e want to encourage as much content as possible."[235]

In fact, competition will create incentives for ISPs to *expand* the array of content available to their subscribers, to improve the quality of the content that does exist, and to provide easier access to the content that subscribers prefer. This is particularly true for services like @Home and Road Runner, which rely on an innovative and untested technology.

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(. . . Continued)
utilization, are entirely reasonable. Moreover, consumers have a wide range of alternatives available to them if they consider such time restrictions too limiting.

[234] *See AT&T-TCI* ¶ 72 n.212 (referencing @Home's commitment to "full and open access to the entire Web" following its merger with Excite); *id.* ¶ 95 (referencing AT&T's commitment to ensure that @Home subscribers have access to unaffiliated online services after the merger). *Cf. id.* ¶ 96 (concluding that nothing about the AT&T-TCI merger would deny any customer the ability to access the Internet content or portal of his or her choice, based on the representations described above).

[235] C. Michael Armstrong, *Cable Ready: Convergence and the Communications Revolution*, Remarks before the National Cable Television Association (June 14, 1999) <www.att.com/speeches>. *See also* C. Michael Armstrong, *Telecom and Cable TV: Shared Prospects for the Communications Future*, Remarks before the Washington Cable Club, (Nov. 2, 1998) ("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.").