Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	
MediaOne Group, Inc.,	)	CS Docket No. 99-251
Transferor,	)	
	)	
To	)	
	)	
AT&T Corp.,	)	
Transferee.	)	

PETITION OF GTE SERVICE CORPORATION, GTE INTERNETWORKING, AND GTE MEDIA VENTURES, INC. TO DENY APPLICATION, OR IN THE ALTERNATIVE, TO CONDITION THE MERGER ON OPEN ACCESS REQUIREMENTS

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MERGER ON OPEN ACCESS REQUIREMENTS

Pursuant to the Public Notice issued by the Commission on July 23, 1999, GTE Service Corporation, GTE Internetworking, and GTE Media Ventures, Inc. (collectively AGTE≅) respectfully submit this petition to deny the Applications of AT&T Corp. (AAT&T≅) and MediaOne Group, Inc. (AMediaOne≅) for authority to transfer control of MediaOne=s licenses to AT&T or, in the alternative, to condition the merger on open access requirements.

INTRODUCTION AND SUMMARY

Convergence. No concept better captures the future of communications than the notion that the barriers between telephony, television, and the Internet are rapidly becoming a relic of

the past. Behind this revolution is a single technology, the broadband transmission of packet-switched data over the Internet. Broadband Internet service is the power behind convergence because it alone allows telephone, video, and data streams to travel over a single medium that has the potential to interconnect all telecommunications users. Broadband Internet access is also bringing consumers revolutionary new services -- from video e-mail to home networking, from on-demand streaming video to interactive e-commerce, and others that are only beginning to be imagined. In Chairman Kennard=s words, the market for broadband service Ais the future of the Internet.≅[1]

Not all people share the same vision of the telecommunications future. Chairman Kennard envisions Aa future in which there are at least four or five facilities-based competitors offering≅ broadband Internet Aservice: from DSL to cable, from terrestrial to wireless and even satellite.≅[2] GTE shares this vision, where multiple providers of Internet on-ramps compete with one another on equal terms to offer a full package of telecommunications services. AT&T Chairman C. Michael Armstrong has a different vision, however. In the words of George Bell, President of Excite@Home, AT&T=s exclusive broadband ISP, AMike=s goal is to maximize

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[1] William E. Kennard, *The Unregulation of the Internet: Laying a Competitive Course for the Future*, Remarks Before the Federal Communications Bar, Northern California Chapter, July 20, 1999, at 2.

[2] *Id.*

the total number of subscribers on *his* system *by whatever means at his disposal*. The only way we have to win is to make AT&T successful doing what it is that they=re doing.≅[3]

[3] Seth Schiesel, *AT&T-AOL Deal Would Rain on Excite@Home=s Parade*, N.Y. TIMES, Aug. 9, 1999, at B1 (emphasis added).

AT&T is attempting to achieve this goal by cornering the broadband market before competitors have a chance to lace up their shoes. This effort is not driven by any acumen on AT&T=s part, but by a two-pronged strategy designed to take advantage of a regulatory imbalance that favors cable providers and disadvantages their rivals. The *first* prong is to offer broadband Internet access to cable customers only if they are also willing to take AT&T=s broadband ISP service -- something that competing providers are barred from doing by Commission rules. Because cable has an extraordinary head start over competing technologies in acquiring broadband customers, AT&T has been able to use this tying strategy to push its market power in broadband access into the fledgling market for broadband content. Indeed, AT&T has frankly announced its intention to seize the first-mover advantage in this market, becoming Athe leading broadband portal≅ and thereby Anail[ing] down the top spot in the broadband media world.≅[4] The benefits stemming from AT&T=s early jump? George Bell continues:

> *I think the critical years are the early years.* Look at the advantages Yahoo! has today, not only because they started 18 months before anybody else. And so you might not think that it=s an important month now or important quarter now when

[4] John Borland, *Broadband Excite May Debut This Fall*, CNET NEWS.COM, May 28, 1999 <www.cnetnews.com>.

you think about the total number of subscribers in broadband . . . *but it absolutely becomes the foundation of people=s brand recognition and loyalty.*[5]

[5] Jim Hu, *AT&T Moves Good for Excite, Exec Says*, CNET NEWS.COM, May 12, 1999 <www.cnetnews.com>.

AT&T=s *second* tactic is to buy up cable and broadband customers. This process began with AT&T=s acquisition of TCI and interests in the cable industry=s other leading providers, and continues today with AT&T=s proposed acquisition of MediaOne. AT&T executives admit that Athe entire TCI acquisition came about because AT&T wanted to get its hands on At Home.≅[6] Likewise, AT&T=s acquisition of MediaOne would give it a 50 percent voting stake in the only other major player in the broadband ISP market, Road Runner. As of August 1, 1999, Excite@Home served roughly 395,000 U.S. customers, while Road Runner counted almost 350,000, giving the two companies combined a greater than 90 percent share of the cable ISP market.[7] By comparison, DSL providers, who offer the closest alternative broadband service, have secured only 116,000 customers.[8] Excite@Home and Road Runner, which will surely be merged if AT&T=s acquisition of MediaOne is approved, therefore control roughly 80 percent of the broadband market.

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[6] Rebecca Blumenstein, *Inside the Tangles of AT&T=s Web Strategy*, WALL ST. J., Aug. 13, 1999, at B4.

[7] Kinetic Strategies, *Cable Modem Customer Count Tops 1 Million*, CABLE DATACOM NEWS, Aug. 1999, at 2 <www.CableDatacomNews.com>.

[8] TeleChoice, *Deployment -- Updated*, Aug. 1999 <www.xdsl.com> (reporting that 73 percent of a total 159,150 DSL customers are residential).

The Commission is obligated to halt this merger-to-monopoly strategy for two reasons. *First*, the proposed merger violates section 613 of the Communications Act, because it will give AT&T/MediaOne direct and affiliated control over more than 64 percent of potential U.S. cable subscribers. To Aenhance effective competition≅ in the market for video programming, Congress instructed the Commission in section 613 to Aprescribe rules and regulations establishing reasonable limits on the number of cable subscribers≅ firms like AT&T are Aauthorized to reach through cable systems≅ they own directly or in which they hold Aan attributable interest.≅ 47 U.S.C. ∋ 533(f)(1). While the Commission has stayed its rules implementing this requirement, Congress=s statutory directive remains as a prohibition on the accumulation of excessive buying power in the hands of any one cable provider. Just as cable providers in the 1980s were able to use monopsony power to crush or co-opt independent programming, so will AT&T/MediaOne be able to take advantage of its market power to undermine competition in the video programming market.

Second, the merger fails the Commission=s public interest standard because it will allow AT&T/MediaOne to stamp out fledgling competition in the market for broadband Internet services. Market power on the Internet stems from two sources. The first is a large customer base, and with roughly 80 percent of broadband customers connected to its network, a combined AT&T/MediaOne would have no rival. The second is an ability to keep customers within the confines of one=s network, rather than roaming the public Internet for other providers= content. In the current closed access environment, AT&T/MediaOne would also enjoy this advantage

because it would be permitted (unlike DSL providers) to hard-wire customers directly to its broadband network. Any customers wishing to access content on the public Internet would be forced to navigate around the obstacles AT&T/MediaOne lays before them.

This unprecedented level of market share and customer control would allow AT&T/MediaOne to engage in numerous anticompetitive actions, including:

! *Establishing proprietary network and software protocols designed to keep applications that run on AT&T/MediaOne=s system from working on the systems of competitors*. This would give AT&T/MediaOne a tremendous advantage because, as a result of its extraordinary customer base, software and content providers would write applications for its network first. Competitors would be left out in the cold.

! *Negotiating exclusive agreements with high-profile content and software providers*. By negotiating exclusive deals with content and software providers, AT&T/MediaOne could deny competitors access to key applications. AT&T/MediaOne would also have the power to anoint the winners and losers in the market for broadband software and content.

! *Discriminating against outside content providers*. Because AT&T/MediaOne would maintain exclusive control over its customers= on-ramp to the Internet, it would be free to choke that connection, forcing customers to turn back to AT&T/MediaOne=s on-net content as a substitute. Content providers that refused AT&T/MediaOne=s overtures for an exclusive deal would also face the threat of being cut off from roughly 80 percent of the broadband market.

! *Engaging in predatory pricing*. Because cable providers are subject to a preferential regulatory regime allowing them to tie broadband access service and broadband ISP service, AT&T/MediaOne could undercut competitors with below-cost prices, secure in the knowledge that it could recoup its losses once competitors go bust.

The merger would therefore allow AT&T/MediaOne to protect its cable television monopoly profits by slowing the loss of viewership occasioned by new broadband technologies, such as streaming video, and by assuring itself a new spring of monopoly rents from emerging

broadband markets. Moreover, the AT&T/MediaOne merger risks extraordinary injury to all participants in the broadband marketplace. Consumers would see severe limitations imposed on their ability to choose between broadband providers; advertisers and Internet merchants would be forced to pay monopoly prices for access to broadband customers -- charges that would ultimately be passed on to consumers; and software and content providers would be forced to accept AT&T/MediaOne=s terms or risk being foreclosed from the lion=s share of the broadband market. The Internet would no longer be the open network of networks that has fueled economic growth and revolutionized the telecommunications marketplace. Instead, it would be a closed network regulated by proprietary protocols and guarded by a gatekeeper intent on shaving off a slice of every profitable activity people conduct on-line.

Worse yet, convergence would no longer mean competition between numerous broadband technologies offering telephone, video, and Internet services. Rather, it would mean that consumers would have to buy all of these services from AT&T/MediaOne alone. The Commission should therefore deny the applications for transfer of control. Only then could Chairman Kennard=s vision of the future, and not Mr. Armstrong=s, prevail.

I. THE MERGER VIOLATES SECTION 613 OF THE COMMUNICATIONS ACT BECAUSE IT WILL ALLOW AT&T/MEDIAONE TO REACH, THROUGH DIRECT AND AFFILIATED CONTROL, AN UNREASONABLE AND ANTICOMPETITIVE NUMBER OF POTENTIAL CABLE SUBSCRIBERS.

In section 613 of the Communications Act, Congress instructed the Commission to Aprescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest.≅ 47 U.S.C. ϶ 533(f)(1)(A). This requirement was prompted by Congress=s recognition that cable providers possess Aundue market power≅ that can be Aused to the detriment of consumers, programmers, and competing video distributors.≅[9] In particular, Congress was concerned that cable providers would, in negotiations over carriage, use this monopsony power to demand Aan exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system.≅[10] Once these interests were secured, Congress recognized that cable providers would have an unchecked ability to Afavor their affiliated programming services,≅ Arefuse to carry other programmers,≅ and Arefuse to sell≅ their programming Ato potential competitors.≅[11]

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[9] S. Rep. No. 102-92, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135.

[10] *Id.* at 24, 1992 U.S.C.C.A.N. at 1157.

[11] *Id.* at 25-26, 1992 U.S.C.C.A.N. at 1158-59.

Congress solved this problem by enacting legislation designed to ensure Acompetitive dealings between programmers and cable operators and between programmers and competing video distributors.≅[12] The first prong of Congress=s approach was to bar cable providers from demanding equity interests from programmers in return for carriage, and to prohibit discrimination against competing providers and their programming affiliates. The second was to adopt horizontal ownership limits -- capping the number of homes any one provider could pass through direct or affiliated control -- to ensure that no cable provider would Ahave the market power to determine what programming services can >make it= on cable.≅[13] By instructing the Commission to adopt regulations establishing such a cap, Congress made explicit its intention that no cable provider be able to Adiscourage entry of new programming services≅ or otherwise Arestrict competition≅ in the market for video programming.[14] The Commission responded to this mandate by imposing a 30 percent horizontal ownership limitation on cable providers, barring any single provider from serving more than 30 percent of total U.S. homes passed.[15]

Although the Commission=s 30 percent cap has been stayed, Congress=s directive in section 613 remains as a prohibition against any single provider accumulating direct or affiliated control over a number of customers large enough to risk the creation of monopsony power. By

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[12] *Id.* at 27, 1992 U.S.C.C.A.N. at 1160.

[13] *Id.* at 33, 1992 U.S.C.C.A.N. at 1166.

[14] H.R. Rep. No. 102-628, at 42 (1992).

[15] *In re Implementation of Sections 11 and 13 of the Cable Act of 1992*, MM Docket No. 92-

any reasonable measure, a combined AT&T/MediaOne would fail this test, controlling the provision of cable service to *more than 64 percent* of all U.S. households passed. This extraordinary combination of direct and attributable interests would stem from AT&T/MediaOne=s controlling ownership of systems passing 27.9 million homes -- alone almost enough to exceed the stayed 30 percent cap -- and attributable ownership of systems passing an additional 33.9 million homes.[16]

264, Second Report and Order, 8 FCC Rcd 8565, at & 3 (1993) (*Horizontal Cap Order*).

[16] If AT&T and MediaOne are allowed to merge, the combined company would have direct control over the cable systems of the former TCI (17.9 million homes passed), MediaOne (8.4 million homes passed), and Lenfest (1.6 million homes passed), giving it direct control over 27.9 million homes passed. Under the Commission=s attribution rules, AT&T/MediaOne would also hold attributable interests in Bresnan (0.3 million homes passed), Cablevision (5.1 million homes passed), Falcon Cable TV (1.3 million homes passed), Time Warner Cable, Kansas City Cable Partners, and Texas Cable Partners (20.6 million homes passed), Susquehanna Cable Co. (0.2 million homes passed), Adelphia Communications (3.3 million homes passed), Century Communications (2.3 million homes passed), and Insight Communications (0.8 million homes passed), giving AT&T/MediaOne affiliated control over 33.9 million homes passed. *See* Warren Publishing, CABLE & STATION COVERAGE ATLAS, Index 170 (1999). The merger would therefore

give AT&T/MediaOne control over 64 percent of the roughly 96.5 million homes passed by cable. *Id.*

Congress intended to prevent any one cable provider from securing this level of monopsony power. As the Commission noted when it adopted the 30 percent cap, the top five cable providers served just under half of the nation=s cable subscribers at the time section 613 was passed. ACongress concluded that this level of concentration, though low relative to other industries, may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market.≅ *Horizontal Cap Order* & 10. *A fortiori*, it is impossible to assert that a *single* provider controlling service to more than 64 percent of all U.S. households passed would not both violate the Communications Act and pose a grave threat to competition.

Congress believed that cable monopsony power could only be stemmed by Aimposing limits on the ownership of media outlets that are substantially below those that traditional antitrust analysis would support.≅ *Id.* & 11. The traditional antitrust doctrine relevant here is the prohibition against firms with monopsony power engaging in Avertical foreclosure≅ -- undermining the ability of sellers (here video programmers) to compete by giving exclusive or preferential treatment to other providers. At the time Congress enacted section 613, federal courts had already held that firms with monopsony power violated the antitrust laws by placing as few as 26 percent of the selling opportunities in a given market Abeyond the grasp of . . . competitors.≅[17] Assuming that the market for cable-distributed video programming is national (a conservative assumption), the combined AT&T/MediaOne would still control *28 percent more*

[17] *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304 (9th Cir. 1982).

of the market than other monopsonists found to be in violation of the antitrust laws. AT&T/MediaOne=s share of the video market would therefore be substantially above, not Asubstantially below≅ that which prompted Congress to adopt section 613.

Anticipating this difficulty, AT&T/MediaOne=s Public Interest Statement offers three reasons why the Commission should not block the merger. *First*, AT&T/MediaOne asserts that the market for multichannel video programming delivery is competitive, precluding the combined company from exercising monopsony power against video programmers. But the Commission=s *Fifth Annual Report on Competition in Video Markets* tells a quite different story, concluding that Acable television continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a dominant position in the multichannel video programming delivery (MVPD) marketplace.≅[18] Indeed, AT&T/MediaOne concedes that cable operators still serve 84 percent of all MVPD customers.[19] Only one competing technology, Direct Broadcast Satellite (DBS), has demonstrated any hope of competing with cable, and this service faces serious legal, technical, and economic hurdles. Under current law, DBS providers are prohibited from retransmitting local network broadcasts to customers -- an extraordinary competitive disadvantage that has kept DBS providers from

[18] *Commission Adopts Fifth Annual Report on Competition in Video Markets*, CS Docket No. 98-102, at 1 (Dec. 17, 1998).

[19] Applications and Public Interest Statement of AT&T Corp. and MediaOne Group, Inc., CS Docket No. 99-251, at 46 (July 7, 1999) (AT&T/MediaOne*)*.

signing up 55 percent of the people who actually considered purchasing the service.[20] Although the law may soon change,[21] this legal obstacle will only be replaced by technical difficulties and inflated costs associated with beaming individualized local content to each local market.[22] Likewise, each of the other competing MVPD technologies identified by AT&T/MediaOne are non-starters that are losing Asubscribers and market share[].≅[23] Changing market conditions have therefore not eliminated the need to enforce section 613.

Second, AT&T/MediaOne asserts that any exercise of monopsony power is Aalready largely foreclosed by existing regulations, such as the program access, program carriage, must carry, leased access, and channel occupancy rules, which already prohibit discrimination and require the carriage of programming from diverse sources.≅ AT&T/MediaOne at 59. This assertion is nothing less than an attempt to read section 613(f)(1)(A) out of the Communications Act. Congress enacted many of the restrictions touted by AT&T/MediaOne at the same time it adopted the requirement that the Commission establish a horizontal cap. Congress thus believed such a cap was necessary to safeguard competition *over and above* the other regulations imposed

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[20] *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284, at && 63 n. 274, 68-69 (Dec. 23, 1998) (*Fifth Video Competition Report)*.

[21] *See* Satellite Home Viewers Improvements Act, S. 247, 106th Cong. (1999); Satellite Competition and Consumer Protection Act, H.R. 1554, 106th Cong. (1999).

[22] *See Fifth Video Competition Report* & 71 (ATechnological issues, however, may make nationwide local-into-local service infeasible.≅).

[23] *Commission Adopts Fifth Annual Report on Competition in Video Markets*, CS Docket No. 98-102, at 1 (Dec. 17, 1998).

on cable providers, concluding that Athe diversity of information sources can *only be assured* by imposing limits on the ownership of media outlets.≅[24]

[24] H.R. Rep. No. 102-628, at 42 (1992).

The reason is simple. These regulations touted by AT&T do nothing to protect the emergence of new cable programmers once one provider grows large enough to shut fledgling programmers out of the market. The Communications Act prohibits cable providers from Adiscriminating in video program distribution on the basis of affiliation or nonaffiliation,≅ 47 U.S.C. ϶ 536(a)(3); it does not require cable providers to carry every new channel that comes into being. Because a combined AT&T/MediaOne would control access to 64 percent of all potential cable viewers, new channels would be foreclosed from reaching almost two-thirds of the market if AT&T/MediaOne, for whatever reason, refused their request for carriage. Congress determined that a cable provider controlling only 25 percent of the market may hold Aquite significant≅ monopsony power Adepending on the subscriber level needed to launch and sustain a cable programming service.≅[25] With well more than twice this level of monopsony power, AT&T/MediaOne would serve as a gatekeeper for all new cable programming and exercise unchecked power Ato determine what programming services can >make it= on cable.≅[26]

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[25] *Id.*

[26] S. Rep. No. 102-92, at 33 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1166.

Finally, AT&T/MediaOne urges the Commission to abandon its current five percent voting interest threshold used to determine when cable providers hold an attributable interest in another cable system. In its place, AT&T/MediaOne suggests a rule that attributes ownership to equity stakeholders only when they Acontrol programming choices or purchase programming for≅ another cable provider. AT&T/MediaOne at 62 n.151. The Commission rejected just such an invitation earlier this month, electing instead to Aretain its current active voting stock benchmark at five percent.≅[27] This decision was based on Aa growing body of academic evidence≅ indicating that Ashareholders with ownership interests of five percent or greater may well be able to exert significant influence on the management and operations of the firms in which they invest.≅[28] The Commission=s conclusion is particularly telling here because a combined AT&T/MediaOne would hold voting interests in other cable providers that range from 25 percent to 62.5 percent -- far more than the five percent required to exert influence over programming decisions. The Commission=s recent pronouncement on the efficacy of its existing attribution rules therefore confirms that AT&T/MediaOne would be able to exert significant monopsony power in the market for video programming. It also confirms that AT&T and

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[27] *In re Review of Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, at & 10 (Aug. 6, 1999) (*Broadcast Interests Order).* In the *Horizontal Cap Order*, the Commission concluded that its Abroadcast attribution criteria≅ -- which the Commission left unchanged at a five percent voting stock benchmark -- Aare appropriate to implement the horizontal ownership limits.≅ *Horizontal Cap Order* & 34. AT&T and MediaOne therefore have no basis to ask the Commission to revise those rules here.

[28] *Broadcast Interests Order* && 10-11.

MediaOne=s proposed merger violates section 613 of the Communications Act and cannot be approved.

II. THE MERGER WILL ALLOW AT&T/MEDIAONE TO DOMINATE THE MARKET FOR BROADBAND INTERNET SERVICE, INFLICTING ANTICOMPETITIVE HARM ON CONSUMERS AND UPSTREAM PROVIDERS ALIKE.

As Chairman Kennard has stated, the market for broadband service Ais the future of the Internet.≅[29] Although this market is only in its nascent stages, history has proven that the competitive course of emerging network industries can be disrupted by large players -- like AT&T in the market for local and long distance telephone service -- able to capitalize on an early anticompetitive advantage. The pending merger will give AT&T/MediaOne just such an advantage in the broadband market, combining the two dominant broadband ISPs (Excite@Home and Road Runner) into a monolithic network that will serve roughly 80 percent of all broadband customers. This early advantage will be compounded by the fact that cable modem deployment is accelerating at a pace that far outstrips alternative broadband technologies, and the fact --

[29] William E. Kennard, *The Unregulation of the Internet: Laying a Competitive Course for the Future*, Remarks Before the Federal Communications Bar, Northern California Chapter, July 20, 1999, at 2.

widely recognized in the Internet economy -- that A[w]hoever gets to the household first will win.≅[30]

AT&T/MediaOne=s Public Interest Statement tries to sidestep the merged company=s dominant broadband position by lumping together narrowband dial-up ISPs with broadband providers like Excite@Home and Road Runner, asserting that the Abroad range of choices available today demonstrates that the market is already extremely sensitive to the needs of consumers.≅ AT&T/MediaOne at 69. But broadband and narrowband connections afford consumers access to entirely different products and services -- a fact that will become even more apparent as software and content providers develop additional new media targeted exclusively to broadband customers. Controlling roughly 80 percent of the broadband market, the merger will afford AT&T/MediaOne an unfettered ability to advantage on-net content, discriminate against outside content, and establish proprietary network and software protocols. These actions will drive software and content providers to write for AT&T/MediaOne=s system first, entrenching its first-mover advantage and making it almost impossible to undo the merger=s competitive harm with post-hoc regulation. Moreover, the merger will allow AT&T/MediaOne to protect its existing cable television monopolies by managing and delaying the dissipation in viewership brought on by the emergence of broadband Internet technologies, such as streaming

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[30] Rob Lemos, *Who Will Rule the Broadband Era?*, ZDNN, June 26, 1999, at 1 <www.zdnet.com/zdnn> (quoting an analyst with market research firm Dataquest).

video. Ultimately, the merger will guarantee AT&T/MediaOne=s continued access to a stream of monopoly rents by expanding its reach into lucrative upstream broadband markets for content, applications, advertising, and e-commerce.

A. Broadband and Narrowband Internet Services Constitute Distinct Product Markets. The Availability of Ubiquitous Narrowband Access Therefore Does Nothing to Check the Exercise of Broadband Market Power.

Broadband Internet service consists of two components -- high-speed transport from a customer=s residence to an ISP, and broadband ISP service, which includes a high-speed Internet connection and access to proprietary broadband content. In offering broadband Internet service over cable, Excite@Home, Road Runner, and their affiliated cable providers tie these components together so the high-speed transport component cannot be purchased alone. DSL providers like GTE, on the other hand, are required by Commission rules to unbundle broadband access and ISP service, affording customers their choice of ISPs when purchasing high-speed transport. As the Commission recognized in its order approving AT&T=s merger with TCI, DSL and cable modem services Aprovide Internet access with much higher transmission speeds than

dial-up service.≅[31] Narrowband Internet service, on the other hand, affords customers access to a Arelatively slow-speed≅ connection, typically 28-56 kilobits per second, Avia traditional >dial-up= telephone services provided by LECs.≅[32]

While AT&T/MediaOne asserts that the Arelevant market≅ for determining the merger=s competitive effects Aincludes Internet access services available to consumers over both broadband and narrowband facilities,≅ AT&T/MediaOne at 71, broadband and narrowband Internet services are not part of the same product market. This fact is readily demonstrated by three factors. *First*, and most importantly, broadband connections afford consumers access to entirely different products and services, from real-time video programming and interactive advertising to high-speed telecommuting and home networking. These new applications are driven by the different functionalities provided by broadband connections, including dramatically higher speeds and Aalways-on≅ capability. As the market for broadband services continues to develop, the growth of new applications will proliferate and the divide between broadband and narrowband services will become even more pronounced. *Second*, all of the big Internet players have demonstrated -- through development and implementation of new broadband business plans

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[31] *Applications for Consent to Transfer Control of TCI to AT&T*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd 3160, at & 70 (1999).

[32] *Id.* & 67.

-- their belief that broadband service differs fundamentally from narrowband service. Although AT&T/MediaOne sings a different tune for regulators, key Excite@Home and Road Runner executives have been leaders of this charge. *Third*, consumers themselves have demonstrated their belief that broadband and narrowband services do not compete, evidencing near-complete unwillingness to switch back to narrowband service in the face of a broadband price increase. Each of these factors points to one conclusion -- that the ubiquitous availability of narrowband Internet service cannot discipline AT&T/MediaOne=s exercise of broadband monopoly power.

1. Broadband Internet Service Offers Users Entirely Different Features, Products, and Services Than Narrowband Connections.

Broadband connections provide features and functionalities that are unavailable to narrowband consumers. The speed of a broadband connection is orders of magnitude faster than that afforded by narrowband. Cable systems, for example, are capable of transmitting data between 10 Mbps and 30 Mbps, which vastly out paces analog modem speeds that average less than 50 Kbps.[33] As a result, a five gigabyte file like a 110-minute feature film -- which would take *eight days* to download over a traditional narrowband connection -- can be viewed in real-time by broadband subscribers. Moreover, broadband connections are Aalways on,≅ eliminating any need to wait for a dial-up connection to come on-line and ending the prospect of busy signals during peak hours.[34] AFor the user, there is no delay to dial-in and connect and it is possible for

[33] *See* Strategis Group, HIGH-SPEED INTERNET -- 1998/1999, at 76 (1998) (Strategis Group Report).

[34] *Id.*; *see also* Road Runner Web Site, *Features* <www.rr.com/rdrun/explore/main_features> (AThe Road Runner connection is a persistent connection. There=s no need to perpetually log

information to flow between the home and the network at any time.≅[35] Broadband users also get the benefit of freeing up their telephone line, which need not be dedicated to a narrowband dial-up connection. This eliminates any need for broadband customers, who are typically high-volume users, to go without telephone service or Ainstall a second phone line to use the data connection.≅[36]

These exclusive broadband functionalities Aenable a whole new generation of Internet-based services≅ that are changing Athe Internet as we know it.≅[37] This new generation of broadband services includes:

! *Real-Time Video Programming.* Broadband connections afford consumers the ability to watch video AWebcasts≅ in real time. Content providers like Broadcast.com offer a full menu of real-time viewing options, including sports, local television broadcasts, and news. These programming options are more diverse than any offered by cable providers, affording customers access to local programming from across the country and independent programming by minority-

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in and out, or log off to save connection charges. There are no dial-up/lengthy initiation routines and no hourly fees.≅).

[35] Strategis Group Report at 76; *see also* Janco Partners, *Case Study: High-Speed Access*, MULTICHANNEL NEWS ONLINE, June 14, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip> (AThe incumbent dial-up ISP that we tested took an average of about 1:20 to access, including the dial-up connection and download of the homepage. During busier times (*i.e.*, evening primetime), it can take several attempts to dial in to an ISP with a traditional modem, as thousands of users are battling for a finite number of connections to the server. With Road Runner, you simply click on your browser icon and the homepage is fully downloaded in just a few seconds. Once it is open, it can remain on indefinitely.≅).

[36] Strategis Group Report at 76.

[37] Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/filters> (quoting Hillary Mine, broadband analyst with Probe Research, a New Jersey telecommunications consulting and research firm).

owned television stations and stations dedicated to serving people with disabilities. Other recent start-ups, such as the Digital Club Network, offer Webcasts of real-time music festivals.[38]

[38] *See* Jim Hu, *Music Festival in Tune With Net Space*, CNET NEWS.COM, July 22, 1999 <www. news.com/News>.

! *On-Demand Video.* The same streaming video technology that allows broadband consumers to watch real-time Webcasts also allows broadband users to view movies on-demand. A recent startup, Tranz-send Broadcasting, Aplans to take on video-rental stores (and pay-per-view too) with its vision that Webheads can >tell the video store to come to you.=≅[39]

! *Customized Music and Video Libraries.* Music and video files that would take hours or days to download over a narrowband connection can be duplicated in seconds with broadband. Web sites like MP3.com allow visitors to listen to and download thousands of tracks, many by new artists seeking an alternative means to reach a large audience. As Mark Simmer, Lycos Chief Content Officer, noted, A[y]ou will only have a good user experience downloading MP3 if you have a broadband connection.≅[40] Another firm, Atom Corp., which touts itself as a Anext-generation entertainment company,≅ recently debuted a site offering A>shorts= from several 1999 Academy Award nominees, plus licenced titles from the American Film Institute and overseas filmmakers.≅[41]

! *Home Networking.* Broadband connections afford consumers the bandwidth and flexibility to network a number of home computers together, sharing the same Internet connection. This feature allows members of large families to simultaneously research, play games, and watch video Webcasts on the Internet. Industry analysts are predicting that Ahome-networking will take off once faster Internet access≅ becomes more ubiquitous, with the home networking market expected Ato reach $230 million by 1999 and jump to $1.4 billion by 2003.≅[42] Companies like AMX Corporation are even developing products that link home appliances -- heating, air conditioning, lights, and security systems -- to an Internet

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[39] Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/filters>.

[40] Jim Hu, *Lycos Enters High-Speed Race*, CNET NEWS.COM, June 24, 1999 <www.news.com/news>.

[41] Gary Arlen, *Swing and Sway with Big Bandwidth*, MULTICHANNEL NEWS ONLINE, Mar. 29, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip>.

[42] Wylie Wong, *Home Networks Answer the Call*, CNET NEWS.COM, July 13, 1999 <www.news.com/news>.

interface, allowing broadband customers to control their home environment from the road.[43]

[43] *See* Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/filters>.

! *Real-Time Radio Programming*. Over and above their real-time video offerings, broadband content providers like Broadcast.com allow customers to listen to live radio broadcasts from stations across the country. Other radio Webcasters like the GAYBC Radio Network offer original programming dedicated to serving diverse populations.[44]

! *Video Telephony and Video E-Mail*. The same technology that allows businesses to participate in two-way video conferencing over the Internet will allow residential customers to have virtual face-to-face conversations with family and friends. E-mail messages with personalized video clips can also be sent and received over broadband connections.

! *Interactive Multi-Player Gaming.* Broadband connections allow consumers to play games with CD-ROM quality graphics and, more importantly, dramatically enhance the gaming experience when competing against other on-line players. As one on-line gaming magazine recently stated, multiplayer capabilities are the key to a new game=s success: AShip a game with sweet graphics and a compelling story line but less-than-happening multiplayer capabilities, and consider yourself primed for a thorough thrashing by the public and press.≅[45] The one hurdle that remains for most players to overcome is an anemic Internet connection. A[B]andwidth is the Holy Grail of online gaming. . . . [I]f you want to win, a fast Internet connection is crucial.≅[46]

! *High-Speed Telecommuting.* While narrowband telecommuters are limited primarily to dialing into the office to retrieve e-mail, broadband telecommuters can link directly into their corporate LAN, working at home with all the access and capabilities they would have in the office. ACompanies can carve virtual private

[44] *See* Randall Rothenberg, *Rob Glaser, Moving Target*, WIRED, August 1999, at 131.

[45] William O=Neal, *Frag the Lag! Broadband Access: The Gamer=s Edge*, GAMECENTER, April 14, 1999 < www.gamecenter.com/Features/Exclusives/Broadband>.

[46] *Id.*

networks out of the public Internet, creating an extended corporate net that defies geography.≅[47]

[47] Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/filters>.

! *Interactive Advertising and E-Commerce*. The quality and effectiveness of narrowband advertising is limited by dull blinking banners and audio Awell below the near-compact disc quality that comes with broadband access.≅[48] Advertising over broadband connections, by contrast, allows for Arich media ads capable of various interactive features≅ that hook customers by inviting participation.[49] It is therefore not surprising that broadband advertising generates 18 times the recall rate of narrowband advertising.[50] From more effective advertising stems more ubiquitous e-commerce.

This catalogue of broadband services represents only the tip of the iceberg in a market just starting to develop. Over the next few years, as more customers purchase broadband connections, the development of broadband applications will accelerate rapidly. If it is not clear already, it will

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[48] Fred Dawson, *Excite@Home Gets Rolling On Broadband-Enhanced Ads*, MULTICHANNEL NEWS ONLINE, June 14, 1999 <204.243.31.23/cgi-win/ csearch.exe/vsrchtip>.

[49] Corey Grice, *Road Runner Beefs Up Advertising Push*, CNET NEWS.COM, Aug. 4, 1999 <www.news.com.news>.

[50] *See* Fred Dawson, *Excite@Home Gets Rolling On Broadband-Enhanced Ads*, MULTICHANNEL NEWS ONLINE, June 14, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip> (AResearchers are finding that advertising offered at quality levels made possible by access speeds four times or better above dial-up generate 18 times the recall levels of GIF [graphic interface format] banners,≅ according to Macromedia Inc. spokeswoman Andrea Coffey.).

soon become evident that broadband Internet service is as much a revolution over narrowband as the television was over radio.

2. Every Key Player in the Internet Marketplace -- Including AT&T, Excite@Home, and Road Runner -- Recognizes That Broadband and Narrowband Services Do Not Compete.

Despite these extraordinary differences between the content and functionality of broadband and narrowband connections, AT&T/MediaOne nevertheless assert that Internet competitors Aview narrowband and broadband services as substitutes for the foreseeable future.≅ AT&T/MediaOne at 72. This assertion is belied first and foremost by the new name AT&T itself chose for its newly acquired TCI cable systems -- AAT&T Broadband & Internet Services.≅ AT&T=s own chairman said it best: ATomorrow, it=s not a narrowband world being optimized. It=s a broadband world. I would submit that that=s our future in communications -- end-to-end broadband.≅[51]

Nor can AT&T/MediaOne=s claim be squared with the business plans of Excite@Home and Road Runner. Neither of these companies offer their broadband ISP service to consumers accessing the Internet over a narrowband connection. As Excite@Home=s Web site proclaims, the AExcite@Home service provides a revolutionary experience that combines the best interactive content on the Web with rich multimedia features *only possible using our high-*

[51] C. Michael Armstrong, *Networking: The New Generation Comes of Age*, Speech Before ComNet/DC >99 Conference, Jan. 26, 1999 <www.att.com/speeches>.

performance network.≅[52] Road Runner=s Web site features a similar boast, asserting that ARoad Runner is at the forefront of providing an *entirely new* and richly rewarding online multimedia experience.≅[53]

Key MediaOne and Excite@Home executives have likewise attested to the fact that broadband service provides consumers a universe of services unavailable to narrowband users. Kelly Ruebel, vice president of Sales and Marketing for MediaOne Internet Services, offers the following advice for marketing cable Internet service:

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[52] Excite@Home Web Site, *A Revolutionary Online Experience* <www.home.com/content> (AOn Excite@Home, you can watch Fox News video clips, Bloomberg financial updates, action-packed movie trailers, and sports highlights -- all without the wait. Tune into CD-quality music, news, and sports radio broadcasts right to your desktop. Play Quake II, Unreal, and 100 other top computer games with none of the delays typical of dial-up networks. No other online service lets you do this!≅).

[53] Road Runner Web Site, *World Class Multimedia Programming* <www.rr.com/rdrun/explore/main_feature> (emphasis added).

> Stress that it=s not all about speed; it=s also about what consumers are missing. As you move beyond the early adopter, you will need to showcase what the speed brings to the user=s experience. Describing applications like video downloads, music and gaming becomes more critical than just listing 1.5 Mbps. Most users don=t even know the Internet offers such exciting multimedia content, given that they have been restricted to dial-up access. It=s a brave and more entertaining Web with cable modem service.[54]

Dean Gilbert, Excite@Home=s senior vice president and general manager, suggests that cable modem providers are operating in a Anew category,≅ where DSL, not narrowband, is a competing service:

> Be persistent, consistent and aggressive in your marketing efforts. It takes time to build a new category. Remember you=re driving for market share. You need

[54] Monica Hogan, *Tips for Marketing Broadband Data Access*, MULTICHANNEL NEWS ONLINE, June 7, 1999 <www.multichannel.com/weekly/1999/24/tips24.htm> (surveying 11 cable industry executives to Aoutline their top 10 tips for marketing cable modems and high-speed Internet access -- and for making sure that cable stays in front of this burgeoning category≅).

to be leveraging your first-to-market advantage against future services, such as DSL.[55]

[55] *Id.*

The behavior of other Internet players also evidences the marketplace divide between the broadband and narrowband worlds. Excite, which operates a traditional narrowband Internet portal, plans to roll out a new broadband version of Excite over Excite@Home=s cable networks as soon as October 1999.[56] While the new broadband Excite will replace existing @Home content, Excite will continue to offer its narrowband portal to the narrowband market.[57] Other companies are also offering services that directly cater, and offer discrete content, to the broadband market. In late March, Snap.com Abecame the first noncable portal to set up a site devoted to steering people with high-speed access to media that has been enhanced to stream above dial-up rates.≅[58] This site is equipped with a link to shut off high-speed features. Likewise, Scour.net has launched a broadband search site that allows users to search for audio

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[56] *See* John Borland, *Broadband Excite May Debut This Fall*, CNET NEWS.COM, May 28, 1999 <www.news.com/news>.

[57] *Id.*

[58] Fred Dawson, *RealNetworks Supports Snap Portal*, MULTICHANNEL NEWS ONLINE, May 24, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip.htm>.

and video content and also has separate search engines for Alow bandwidth≅ and Abroadband≅ users.[59]

[59] Jim Hu, *Ovitz Invests in Broadband Search Engine*, CNET NEWS.COM, June 10, 1999 <www.news.com/news>.

Yahoo!, after completing a $5.6 billion acquisition of Broadcast.com, is creating a special ATurbo Yahoo!≅ platform designed to Aupgrade its network of services into a broadband offering.≅[60] Similarly, AOL is planning to launch AOL Plus, a software version that Awill detect users= access speeds and then automatically add broadband services.≅[61] Lycos is also developing a new platform Ageared toward high-speed users≅ called Lycos Lightening.[62] Finally, Disney recently announced that it would purchase majority control of Infoseek -- its partner in the Go Network portal -- to better allow Disney to showcase its entertainment products in a broadband medium. As Disney Chairman Michael Eisner noted, A[o]ur content becomes more important as the bandwidth increases.≅[63]

3. Consumers Agree That Broadband and Narrowband Services Do Not Compete, Refusing to Switch to Narrowband Service in the Face of a Significant Broadband Price Increase.

Traditional competition law relies on a well-defined procedure for defining a product market. ATo define a market is to identify producers that provide customers of≅ the merging firms Awith alternative sources for [their] product or service.≅[64] If consumers would be willing

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[60] Jim Hu, *Lycos Enters High-Speed Access Race*, CNET NEWS.COM, June 24, 1999 <www.news.com/news>.

[61] *Id.*

[62] *Id.*

[63] Bruce Orwall, *Disney Agrees to Buy Majority Stake in Infoseek*, WALL ST. J., July 13, 1999, at B7.

[64] Phillip E. Areeda and Herbert Hovenkamp, IIA ANTITRUST LAW ∋ 530(a), at 150 (1995).

to endure a Asmall but significant and nontransitory increase in price≅ without switching to a second product, then the second product is not a substitute and is not properly included in the relevant market.[65] As the Commission has stated, a Arelevant market is typically defined to encompass commodities that are easily substituted for each other.≅[66]

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[65] Department of Justice and Federal Trade Commission Horizontal Merger Guidelines ∋ 1.11 (1997).

[66] *In re Price Cap Performance Review for LECs*, CC Docket No. 93-124, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, at & 116 (1995).

Numerous modes of economic analysis confirm that broadband and narrowband services are not viewed by consumers as substitutes. *First*, a simple comparison of the prices for broadband and narrowband services belies AT&T/MediaOne=s assertion that Athe availability of narrowband alternatives will continue to discipline the price of services available over broadband facilities.≅ AT&T/MediaOne at 72. As Professor Robert Gertner observes, the Aprice charged by cable providers for services provided by @Home and Road Runner are well above those charged by providers of narrowband services.≅ Declaration of Robert H. Gertner, attached as Appendix A, at & 12 (Gertner Declaration). Indeed, some narrowband ISPs have recently indicated that they plan to offer their service for free.[67] These price differences Areflect the fact that customers value the access to broadband Internet services . . . more than conventional narrowband access≅ and that Athere are considerable differences in the nature of the services offered by narrowband and broadband suppliers.≅ *Id.* Traditional antitrust analysis recognizes that the Aabsence of close price relationships among products presumptively indicates that they are in separate markets.≅[68]

Second, the prices charged by cable providers for Excite@Home services vary from region to region, although prices charged by narrowband providers are generally uniform

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[67] *See* Walter S. Mossberg, *Technology Journal*, WALL ST. J., Aug. 19, 1999, at B8 (AMicrosoft is threatening to launch a massive price war . . . by selling free or heavily discounted memberships in its MSN Internet service.≅); Michael Warren, *AltaVista Offers Free Web Access*, ASSOCIATED PRESS ONLINE, Aug. 14, 1999 <www.marketwatch.newsalert.com/bin/story>.

[68] Phillip E. Areeda and Herbert Hovenkamp, IIA ANTITRUST LAW э 534(b), at 180 (1995).

throughout the country. The price charged by broadband providers therefore does not have any demonstrated relationship to narrowband pricing. As Professor Gertner concludes, if broadband and narrowband services were substitutes, Athe price of broadband services would not be expected to vary by region in the presence of a national competitors offering a flat rate price.≅ *Id.*

Third, an analysis of the elasticity of demand for broadband services confirms that broadband users are not sensitive to changes in price and are not willing to switch back to narrowband service in the face of a broadband price increase. As economists Daniel Rubinfeld and J. Gregory Sidak observe, Athere is a sharp distinction between a customer who fits the broadband profile and one who fits the narrowband profit.≅ Typical broadband customers Aare more likely to be male, younger, less wealthy, and spend more time on-line than those who are not.≅ Declaration of Daniel L. Rubinfeld & J. Gregory Sidak, attached as Appendix B, at & 22 (Rubinfeld & Sidak Declaration). A recent Strategis Group study, titled *High-Speed Internet -- 1998/1999*, provides Aa snap-shot current Internet user demand curve for high-speed Internet≅ service that identifies a large core group of price-insensitive residential broadband consumers:

> Today, high-speed Internet services are rarely priced under $40 per month, leaving the market in a mid to low-level price sensitivity range. Consumers willing to pay [for] these services are not particularly sensitive to price. They choose high-speed Internet technology and service based on other features like quality of service, reputation, or ease of setup.

Strategis Group Report at 155-56. The report concludes that, at Aprices above $50 per month, the elasticity is very near 0; a 1% change in price has no effect on demand.≅ *Id.* Thus, a core group of early broadband adopters demonstrate Aprice insensitive demand for high-speed≅ service. *Id.* at 3. Indeed, most broadband consumers Asay they would never go back to relatively sluggish dial-up connections after surfing the Net over a cable or DSL line.≅[69]

[69] Corey Grice, *The Pitfalls of High-Speed Installs*, CNET NEWS.COM, July 28, 1999 <www.news.com/Special Features>.

Broadband service providers are a long way from saturating the market of price-insensitive users. As the Strategis Group Report concludes, A[h]igh-speed data transport and Internet access providers are currently focused on price insensitive users.≅ *Id.* It is therefore unlikely that broadband prices will drop anytime soon to a level required to target customers with significant price elasticity. Rather, as Forrester Research has observed, the trend is that A[p]ent-up demand will prop up broadband prices.≅[70] This sentiment has been confirmed by Excite@Home=s own Chairman, who recently stated that the company Ais a long way from being a demand-limited system. We have 38 million registered Excite users. You think we have any problem generating demand?≅[71] Thus, before the Afirst wave of price competition in high-speed access≅ hits in 2003, Forrester Aexpect[s] a war of words but not of prices between cable and ADSL services,≅ as providers focus on targeting Aearly adopters who will gladly pay a 100% premium for speed.≅[72]

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[70] Forrester Report, *From Dial-Up to Broadband*, April 1999, at 8.

[71] Seth Schiesel, *AT&T-AOL Deal Could Rain on Excite@Home=s Parade*, N.Y. TIMES, Aug. 9, 1999, at B1.

[72] Forrester Report, *From Dial-Up to Broadband*, April 1999, at 8.

B. The Merger Will Give AT&T/MediaOne a Dominant Position in the Market for Broadband Internet Service.

Two ISPs currently dominate the market for broadband service -- Excite@Home and Roadrunner. As of August 1, 1999, Excite@Home served roughly 390,000 U.S. customers, while Road Runner counted more than 350,000, giving the companies combined a greater than 90 percent share of the cable ISP market.[73] By comparison, DSL providers, who offer the closest alternative broadband product, have secured only 116,000 customers.[74] Counting all of the customers served by other broadband technologies (including satellite), Excite@Home and Road Runner control roughly 80 percent of the broadband market.

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[73] *See* Kinetic Strategies, *Cable Modem Customer Count Tops 1 Million*, CABLE DATACOM NEWS, Aug. 1999, at 2 <www.CableDatacomNews.com>.

[74] *See* TeleChoice, *Deployment -- Updated*, Aug. 1999 <www.xdsl.com>.

This extraordinary advantage will not shrink in the near-future. Excite@Home service is currently available to 17 million homes -- a total that grew by two million just in the second quarter of 1999.[75] Likewise, Road Runner service is currently available to more than 10.4 million homes[76] -- a total that will increase rapidly, given that Road Runner=s cable partners are among the systems upgrading their networks most quickly.[77] Excite@Home and Road Runner are likely to capture a considerable percentage of these addressable customers. As BT Alex Brown concluded in a recent report, A[c]able modem penetration rates are as high as 20% in some markets and have the potential to achieve penetration levels of 25% or more in 5-6 years.≅[78] BancBoston Robertson Stephens agrees, concluding that A[o]nce a market has been upgraded, we have seen very high demand for the service, with new subscriber growth contained by the pace at which the cable partners can connect homes.≅[79] Based on this extreme head start, analysts near-uniformly predict that cable modems will control 75-80 percent of the broadband

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[75] *See* Kinetic Strategies, *Cable Modem Customer Count Tops 1 Million*, CABLE DATACOM NEWS, Aug. 1999, at 3 <www.CableDatacomNews.com>.

[76] *See* Kinetic Strategies, *Road Runner Gears Up for Growth*, CABLE DATACOM NEWS, Aug. 1999, at 4 <www.CableDatacomNews.com>.

[77] BT Alex Brown, *Enhanced TV II: The TV and Broadband Services Revolution*, June 1, 1999, at 29.

[78] *Id.* at 31.

[79] BancBoston Robertson Stephens, *Excite@Home: Initiating Coverage of Cable Access Leader*, June 17, 1999, at 4.

market in 2003.[80] As Forrester Research concluded, for Athe next several years, cable ISPs will dominate the high-speed market, capturing 77% of the $8.8 billion in consumer broadband spending in 2003.≅[81] With no rival in the broadband cable ISP market, a combined Excite@Home/Road Runner would therefore be able to maintain its 80 percent market share until at least 2003.

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[80] *See, e.g.*, BT Alex Brown, *Enhanced TV II: The TV and Broadband Services Revolution*, June 1, 1999, at 34 (Aby year-end 2002, fully 20% of high-speed access will be achieved through DSL . . . versus 80 percent for cable modems≅); Forrester Brief, *Consumers Are Ready for Broadband Technologies*, Sept. 16, 1998, at 4 (A[A]s cable modem availability increases, ADSL subscriptions will decrease. Why? Cable modems are faster, don=t require the consumer to do anything except meet the cable guy, and are much cheaper.≅).

[81] Forrester Report, *From Dial-Up to Broadband*, April 1999, at 10.

Excite@Home and Road Runner derive their market advantage from the exclusive relationships they hold with the nation=s largest cable providers. Ownership of Excite@Home is shared between AT&T -- which holds a 58 percent voting interest -- Cox Communications, and Comcast.[82] Similarly, Road Runner is controlled by partners Time Warner, MediaOne -- which holds a 50 percent voting interest -- Advance/Newhouse, Microsoft, and Compaq.[83] Between them, Excite@Home and Road Runner serve as the exclusive ISP for all but two of the 10 leading MSOs, and one of the lone hold-outs, Adelphia, recently completed a merger with AT&T.[84] If combined, Excite@Home and Road Runner would have exclusive agreements to serve 79.1 million U.S. homes passed -- almost 80 percent of all U.S. households passed by cable:[85]

Cable Provider	**ISP**	**Homes Passed (Millions)**
AT&T	Excite@Home	17.9
Time Warner	Road Runner	20.6

[82] *See* Strategis Group Report at 143; *Corrections & Amplifications*, WALL ST. J., Aug. 11, 1999, at A2.

[83] *See* Kalpana Srinivason, *AT&T-MediaOne Merger Protested*, HP ONLINE, Aug. 18, 1999; Strategis Group Report at 145.

[84] *See* Forrester Report, *Cable=s Multiservice Future*, Feb. 1999, at 5; Strategis Group Report at 129-30.

[85] *See* Strategis Group Report at 143-45 (listing Excite@Home and Road Runner=s exclusive relationships); Warren Publishing, CABLE & STATION COVERAGE ATLAS, Index 170 (1999) (providing data on homes passed).

Cable Provider	ISP	Homes Passed (Millions)
MediaOne	Road Runner	8.4
Comcast	Excite@Home	7.3
Cox	Excite@Home	5.5
Cablevision	Excite@Home	5.1
Century	Excite@Home	2.3
Jones	Excite@Home	2.1
Other	Both ISPs	9.9
		TOTAL: 79.1 Million

Although AT&T and MediaOne assert that their transaction Ais not≅ a Amerger between @Home and Road Runner,≅ AT&T/MediaOne at 84, this claim is contrary to Excite@Home=s publicly stated plans, the expectations of analysts, and common sense business strategy. A merger of the two ISPs would allow the combined entity to introduce Road Runner=s sizable customer base -- fueled by exclusive relationships with already-upgraded cable networks -- to Excite@Home=s Aunmatched multi-media content.≅[86] A combined network would not have to

[86] BancBoston Robertson Stephens, *Excite@Home: Initiating Coverage of Cable Access Leader*, June 17, 1999, at 1.

compete for content, software, and advertising, but instead could wield unchecked market power against upstream providers. Indeed, when AT&T=s merger with MediaOne was announced, Excite@Home=s CEO, George Bell, hinted that a merger between the ISPs was in the works:

> I think that the results of last week could not have turned out better for Excite and @Home. AT&T brings in more subscribers with MediaOne. MediaOne owns 35 percent of Road Runner, so it brings the possibility of Excite and @Home being able to do something with Road Runner -- at an operational level or behind -- into sharper focus.[87]

Analysts like Hambrecht & Quist are also anticipating an Excite@Home/Road Runner combination, urging investors to buy Excite@Home shares because, Awith the help of AT&T, Excite@Home could merge with Road Runner, the second largest cable modem initiative.≅[88] Forrester Research agrees, predicting that AT&T and MediaOne will Apool their interests behind the larger, better capitalized @Home≅ rather than having Acompeting broadband efforts.≅[89]

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[87] Jim Hu, *AT&T Moves Good for Excite, Exec Says*, CNET NEWS.COM, May 12, 1999 <www.news.com/news>.

[88] Hambrecht & Quist, *Excite@Home*, July 21, 1999, at 2.

[89] Forrester Report, *From Dial-Up to Broadband*, April 1999, at 11.

The rewards from such a merger would be substantial. *First*, by extending its monopoly power in the broadband access market into vertically related broadband markets like content and advertising, AT&T/MediaOne could ensure that its monopoly rents are not dissipated by competition over access. While cable will continue to Adominate≅ the market for broadband access until at least 2003,[90] at some point competing broadband access technologies may become more widespread. AT&T/MediaOne would therefore have a multi-year window of opportunity to push its market power into vertically related broadband markets, creating a monopoly broadband ISP that customers could access only through a cable connection. Thus, as Rubinfeld and Sidak conclude, Athe merger will allow AT&T to extend its leverage into vertically related markets.≅ Rubinfeld & Sidak Declaration & 46.[91] Once this task is complete, competing broadband access technologies could not dissipate AT&T/MediaOne=s monopoly power, because

[90] *Id.*

[91] *See also* Rubinfeld & Sidak Declaration & 78 (AAT&T=s concentrated control of the broadband Internet access market following the merger will enable the combined entity to extend its economic influence into vertically related markets such as portals, streaming video, streaming video software, and e-commerce.≅).

those access technologies would not offer customers a connection to anything they want. In the words of Stephens analyst John Corcoran:

> The content perspective is important so @Home does not allow itself to become a commodity. Five years from now, high-speed access alone will be a commodity and probably not a great business to be in. But it could be a great business if the company has add-ons that are not commodities that get the people to want to use that service and come back to that service.[92]

Recent scholarship in economics confirms that Atying will preserve monopoly power in the primary market≅ (here, broadband access) Awhenever the alternative producer in the tied market faces entry costs or the demand for the complementary good≅ (here broadband ISP service) is characterized by network effects.≅ Rubinfeld & Sidak Declaration & 47. Because there is no question that broadband ISPs benefit from having more customers on their network, AT&T/MediaOne can reap significant anticompetitive benefits from extending its monopoly power into vertically related broadband markets.

Second, broadband Internet service poses a direct threat to AT&T/MediaOne=s cable monopolies. Broadband service -- with its emphasis on interactive video applications that allow users to determine precisely what content to view and when -- threatens to erode the customer time devoted to watching cable television. By leveraging its monopoly power in the broadband access market into vertically markets for broadband content, AT&T/MediaOne can assure that their cable monopoly profits are not lost to competitors. As Professor Gertner observes,

[92] Mike Farrell, *Bell Rings in With Excite@Home Plans*, MULTICHANNEL NEWS ONLINE, June 14, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip>.

Ainhibiting competition in the provision of broadband video services can protect the existing market power enjoyed by AT&T and others in the provision of cable television services.≅ Gertner Declaration & 16. Rubinfeld and Sidak agree, concluding that, to Aavoid losing cable customers and their associated large margins, AT&T will . . . have an incentive to slow innovations in streaming video.≅ Rubinfeld & Sidak Declaration & 60.

Third, by establishing a position of dominance before any other broadband ISPs are able to get their foot in the door, a merged Excite@Home/Road Runner could capture critical first-mover advantages -- advantages that have proven to be Ahighly durable≅ in Internet and other network industries. *Id.* & 53. Microsoft, for example, established itself as the first-mover in PC operating systems with MS-DOS -- an advantage it has maintained through numerous versions of its Windows operating system. Similarly, Yahoo! established itself as the first-mover in the narrowband portal market and today maintains a Apowerful first-comer brand≅ that keeps it the market leader.[93] On the commerce side, Amazon.com and eBay continue to dominate the markets for on-line book sales and auctions, despite low barriers to entry. These persistent advantages stem directly from the extraordinary brand recognition that comes with being the first big player in a new Internet market. And while these advantages are wholly legitimate when achieved as a result of a single firm=s business acumen, they are decidedly illegitimate when secured solely through an anticompetitive merger. Thus, Professor Gertner concludes, the

[93] Jim Hu, *AT&T Moves Good for Excite, Exec Says*, CNET NEWS.COM, May 12, 1999 <www.news.com/news>.

Commission should act to Aprevent firms from gaining≅ first-mover Aadvantages through the exercise of market power. It is important that competition involving different technologies be determined based on economic efficiency, not on the ability of firms with market power to act to harm rivals.≅ *Id.* & 17.

Excite@Home executives have made it plain that they intend to seize the first-mover advantage in the broadband ISP market. Excite@Home President George Bell recently announced the company=s intention to Abecome the leading broadband portal≅ and thereby Anail down the top spot in the broadband media world.≅[94] He explained that the company plans to accomplish this goal by Atrying to take the first mover advantage,≅ repeating Yahoo!=s strategy of cornering the market Aa good 18 months ahead of≅ competitors.[95] AThere won=t be that many winners left standing at the end of the broadband battle,≅ Bell concluded. AIt may be that those who stay agnostic will find that they=ve been sitting on the sidelines while all the touchdowns are scored.≅[96]

Chairman Kennard has nevertheless suggested that there is no need to stem the market power of a combined Excite@Home/Road Runner because Abroadband is just a nascent industry≅ and because the early broadband customers represent only a Afraction of the over

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[94] John Borland, *Broadband Excite May Debut This Fall*, CNET NEWS.COM, May 28, 1999 <www.news.com/news>.

[95] *Id.*

[96] *Id.*

30 million American homes that are on the Internet.≅[97] Excite@Home=s President has himself explained why this reasoning is misguided:

> *I think the critical years are the early years.* Look at the advantages Yahoo! has today, not only because they started 18 months before anybody else. And so you might not think that it=s an important month now or important quarter now when you think about the total number of subscribers in broadband . . . *but it absolutely becomes the foundation of people=s brand recognition and loyalty.*[98]

Mr. Bell has likewise explained how Excite@Home, combined with Road Runner, plans to implement the broadband vision of AT&T Chairman C. Michael Armstrong: AMike=s goal is to maximize the total number of subscribers on *his* system *by whatever means at his disposal*. The only way we have to win is to make AT&T successful doing what it is that they=re doing.≅[99]

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[97] William E. Kennard, *The Unregulation of the Internet: Laying a Competitive Course for the Future*, Remarks Before the Federal Communications Bar, Northern California Chapter, July 20, 1999, at 2.

[98] Jim Hu, *AT&T Moves Good for Excite, Exec Says*, CNET NEWS.COM, May 12, 1999 <www.news.com/news>.

[99] Seth Schiesel, *AT&T-AOL Deal Would Rain on Excite@Home=s Parade*, N.Y. TIMES, Aug. 9, 1999, at B1 (emphasis added).

Thus, despite the meager protestations of their Public Interest Statement, AT&T and MediaOne have made plain their intention to dominate the broadband market by seizing the early advantage. This development will have an extreme anticompetitive impact on markets for broadband content, advertising, and e-commerce. Excite@Home currently estimates that 60 percent of its revenues in 2002 will be derived from advertising and Ae-commerce related activities like on-line shopping.≅[100] Excite@Home already charges Asignificantly more for ads than its competitors≅[101] -- an action that reflects the market power associated with a locked in exclusive customer base and broadband=s enhanced A[v]isual imagery, audio accompaniment, and unlimited interactivity.≅[102] And, as Rubinfeld and Sidak conclude, once AT&T/MediaOne has Acaptured a sufficiently large share of broadband content and customers, [it] could extract larger economic rents from companies wishing to advertise on the Excite@Home portal.≅ Rubinfeld & Sidak Declaration & 55. Internet advertising is expected to generate $11.4 billion in 2002, and e-commerce is expected to generate $29 billion in transactions by the same year.[103] Merging Excite@Home and Road Runner will allow AT&T/MediaOne to seize the broadband

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[100] Dick Satran, *Excite@Home Denies Merger, But Sees Deals*, REUTERS, Aug. 3, 1999.

[101] Corey Grice, *Road Runner Beefs Up Advertising Push*, CNET NEWS.COM, Aug. 4, 1999 <www. news.com>.

[102] Forrester Report, *Hooked on Broadband*, July 1999, at 7.

[103] *See* Insight Corp., THE MARKET FOR VIDEO AND MULTIMEDIA SERVICES ∋ 7.2.3 (1998); John Borland, *Living Up to the Broadband Future*, CNET NEWS.COM, July 28, 1999 <www.news.com/news>.

first-mover advantage -- eliminating competition for advertising and increasing the tolls that merchants wishing to engage in e-commerce must pay for access to customers.[104]

The anticompetitive advantages AT&T/MediaOne seeks to secure by combining Excite@Home and Road Runner are well-known to the antitrust laws. Two lawsuits recently brought by the Department of Justice illustrate this point forcefully. The government initiated a lawsuit against Microsoft alleging that the company was taking anticompetitive actions against creators of competing Internet browsers to Aprotect its valuable Windows≅ operating system Amonopoly against . . . potential competitive threats.≅[105] Similarly, the Justice Department recently filed suit to prevent a conglomeration of cable providers from purchasing the last remaining orbital satellite slot capable of supporting a competing nationwide video programming

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[104] *See* Strategis Group Report at 128 (A[E]arly research indicates that high-bandwidth ads may prove more successful at attracting purchasers. Cable modem services enjoy a natural opportunity to provide such high-bandwidth ads, which may enable cable ISPs to charge a premium for advertising space or Internet commerce. While still unproven, the potential for these services to become lucrative is enormous.≅).

[105] *United States v. Microsoft*, Civil Action No. 98-1232, Complaint at & 1 (D.D.C. May 18, 1998).

service. The government initiated this suit because the cable providers= acquisition of the satellite slot Awould effectively foreclose the use of this scarce and valuable asset to challenge≅ the cable providers= Amonopoly power,≅ allowing them Ato protect their dominance and monopoly profits for years to come.≅[106]

[106] *United States v. Primestar, Inc.*, Civil Action No. 98-1193, Complaint at Preamble (D.D.C. May 12, 1998).

These cases make it clear that the government=s antitrust enforcement arm does not tolerate the defense of existing monopoly power through anticompetitive behavior or acquisition. AT&T and MediaOne=s attempt to defend their cable monopolies by seizing control over the market for broadband Internet service therefore cannot withstand antitrust scrutiny. Nor do the antitrust laws permit firms to use Amonopoly power attained in one market to gain a competitive advantage in another.≅[107] This long-standing prohibition against monopoly leveraging directly condemns AT&T and MediaOne=s planned effort to use their monopoly power in the market for broadband Internet access to secure control over upstream markets for broadband software, content, advertising, and e-commerce. Further, the antitrust laws squarely condemn a firm accumulating such a large share of the buying power in a given market that firms not chosen as suppliers lack the alternative outlets required to compete. This prohibition against Avertical foreclosure≅ -- which outlaws agreements with the Aprobable≅ effect of foreclosing

[107] *Berkely Photo v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979); *see also Cost Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 951 (9th Cir. 1996) (firm violates Sherman Act ∋ 2 by using or attempting to use Aits monopoly power in the first market to acquire and maintain a monopoly in the second market≅).

Acompetition in a substantial share of the line of commerce affected≅ -- bars AT&T and MediaOne from merging into a broadband monopolist.[108]

Thus, there is no question that the anticompetitive purposes of AT&T and MediaOne=s merger run afoul of the antitrust laws. Their merger must therefore be blocked so long as other competitors in the market will be unable to counter their anticompetitive acts.

C. Competing Broadband Access Technologies Will Not Discipline AT&T/MediaOne=s Market Power, Particularly Once AT&T/MediaOne=s First-Mover Advantage Becomes Entrenched.

While a number of non-cable technologies hold the promise of establishing broadband connections to the home, none will be able to curb AT&T/MediaOne=s market power in the residential broadband market once it establishes its first-mover advantage. Not surprisingly, in setting forth its high-level portrayal of market conditions, AT&T/MediaOne omits mention of the numerous -- and widely acknowledged -- competitive disadvantages suffered by other broadband technologies. These disadvantages are sufficiently great to preclude DSL, wireless, and satellite providers from overcoming the competitive advantage AT&T/MediaOne would secure solely as a result of merging the Excite@Home and Road Runner networks.

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[108] *Tampa Elec Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *see also Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (Clayton Act prohibits agreements whose Atendency [is] to >foreclose= existing competitors or new entrants from competition≅).

The closest threat to cable=s hegemony is DSL. As explained above, cable already has a tremendous head-start over DSL, with U.S. cable modem customers approaching one million and DSL customers just over 100,000.[109] In one typical GTE market -- Tampa, Florida -- Time Warner has already gained 20,000 cable modem customers, while GTE hopes to acquire just 3,000 by the end of this year. *See* Declaration of Dale E. Veeneman & Evertt H. Williams, attached as Appendix C, at & 8 (Veeneman & Williams Declaration). Similarly, in a study of DSL availability in the Washington, D.C. area, Rubinfeld and Sidak observed that Acable-based providers already serve[] 92 percent of the Virginia suburbs, while Bell Atlantic serve[s] only 46 percent.≅ Rubinfeld & Sidak Declaration & 29.

This extraordinary head-start stems from a number of technological hurdles facing DSL providers. While cable modem service can be offered to 97 percent of all U.S. homes,[110] DSL is only capable of serving roughly two-thirds of U.S. households. Strategis Group Report at 69. This limitation is a technological one: signals Apassing over a copper loop degrade as they travel further from their point of origination,≅ and once the copper loop length exceeds 18,000 feet, the signal degrades to a point that the service can no longer be offered. Veeneman & Williams Declaration & 10. Customers living further than 18,000 feet from an ILEC central office are

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[109] *Compare* Kinetic Strategies *Cable Modem Customers Could Top 1 Million*, Cable Datacom News, August 1999, at 2 <www.CableDatacomNews.com> *with* Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/zdn/stories/zones> (placing DSL customer penetration at 74,000).

[110] Strategis Group Report at 69.

therefore disqualified from receiving DSL.[111] AAs a result of this technological constraint, it is estimated that only 65 percent of GTE=s customers qualify for DSL service.≅ *Id.*

This difficulty is compounded by the fact that traditional copper loops, many of which were built decades ago, often are saddled with old equipment that precludes customers from receiving DSL service. Bridged taps -- Asections of copper that are connected to, but not located along, the circuit from the CO to the customer=s premises≅ -- keep DSL from working in a large number of cases because the signal terminates at some point other than the customer=s home. *Id.* & 11. Approximately 56 percent of local loops have bridge taps. *See* Strategis Group Report at 30. Similarly, loading coils -- which regenerate voice signals as they are transmitted along copper loops -- disrupt higher frequency signals in a way that renders DSL service inoperable. *Id*. at 51. Roughly 15-20 percent of access lines in the United States have loading coils. *Id.*

DSL providers also face extreme difficulty providing service to customers whose local loops are connected to digital loop carriers (DLCs). Customers served by DLCs do not have direct copper connections to ILEC central offices. Rather, high-speed fiber connects the central office and a DLC located near the customer=s home, and a copper loop connects the customer to the DLC. *See* Veeneman & Williams Declaration & 13. These DLCs convert analog

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[111] *See* Rubinfeld & Sidak Declaration & 31 (the 18,000 foot limitation Awill severely limit DSL=s ability to impose price discipline on cable-based providers of Internet access in areas located several miles from the central office≅).

transmissions into digital and aggregate signals from multiple loops, creating a more efficient voice-network architecture. To provide DSL service to these customers, DSL providers often must upgrade the capacity of the fiber linking the DLC to the central office to carry the increased traffic load. *Id.* Moreover, because these customers cannot be served by DSLAMs located in the central office, a collocated DSLAM must be installed in every DLC. Most ADLCs have no empty space that can be allocated to DSLAM equipment,≅ so the Aonly solution currently available is to collocate an additional DSLAM-equipped cabinet next to existing DLC.≅ *Id.* & 14. Thus, as the Strategis Group concludes, Aadditional capital expenditures to overcome the problem cannot yet be avoided.≅ Strategis Group Report at 49.

Given these costs, it is Acurrently unprofitable for GTE to offer ADSL service to customers whose loops are provisioned through DLCs.≅ Veeneman & Williams Declaration & 14. In terms of overall success penetrating broadband markets, the obstacles facing DSL providers are Aexacerbated by the fact that DLCs have their greatest penetration in newer suburban markets.≅ Strategis Group Report at 49. In GTE=s markets, for example, 30 percent of customer lines are provisioned through DLCs. *Id.* at 50. Unfortunately, these Ahouseholds are likely to be potential high-speed Internet users,≅ requiring DSL providers to cede even more of the addressable market to cable providers. *Id.*

DSL providers like GTE are taking the steps necessary to overcome these hurdles, but the task cannot be accomplished overnight. Often, bridge taps and loading coils can only be removed by digging up the city streets. *See* Veeneman & Williams Declaration & 12. Adding the

necessary equipment to old DLCs is a costly endeavor that overwhelms the possible revenue that sales to DLC-served customers would provide. *Id.* & 7. In no case is it feasible to invest in new DLCs equipped with DSL equipment to serve customers whose loops are too long to be served from the central office. *Id.* Ultimately, GTE is confident in the ability of DSL providers to compete over the long term *if the playing field is level*. But cable providers are already subject to a preferential regulatory regime that does not require them to open their networks, and this advantage will be compounded for AT&T/MediaOne if this merger is approved. Once the Excite@Home and Road Runner platforms are merged and AT&T/MediaOne secures a first-mover advantage entrenched by anticompetitive behavior, competing broadband technologies like DSL will not be able to close the gap.

AT&T and MediaOne also point to two other broadband technologies -- fixed wireless and satellite -- to support their assertion of a crowded broadband market. AT&T/MediaOne claims, for example, that A[f]ixed wireless services also provide the transport component of Internet access service.≅ AT&T/MediaOne at 78. It is, however, generally accepted by broadband market analysts that wireless broadband providers are not, and will not become anytime soon, serious competitors in the residential market. AIn the U.S., residential wireless Internet subscribers number in the hundreds and it is not likely that there will be a significant number of wireless Internet users by 2003.≅[112] This lack of customer penetration stems from the

[112] Strategis Group Report at 7; *see also* Marc Liggio, *Wireless Internet -- No Threat to Cable*, MULTICHANNEL NEWS ONLINE, Oct. 26, 1998 <204.243.31.23/cgi-win/csearch.exe/vsrchtip> (AHigh-speed wireless Internet access is no threat to the cable industry, at least not today.≅).

fact that Athe wireless Internet carrier must place more of the initial cost burden on the subscriber.≅ Strategis Group Report at 7. For true two-way wireless Internet service, customer equipment is prohibitively expensive due to the need for a transceiver, a modem, and in some cases, an external antenna. AWhere the wireless connection is two-way, monthly service for a single user runs in the $70 to $100 range, plus $400 to $800 in CPE costs and $150 for installation.≅ *Id*. This high up-front cost is a substantial barrier to entry in the residential market, making wireless Internet service viable only for larger business customers.[113]

[113] Marc Liggio, *Wireless Internet -- No Threat to Cable*, MULTICHANNEL NEWS ONLINE, Oct. 26, 1998 <204.243.31.23/cgi-win/csearch.exe/vsrchtip> (AMake no mistake, there is a place for wireless Internet access. That place will likely be in supplying high-speed Internet connections to small or midsized businesses. For them, initial equipment costs are not high when compared with other multiuser options.≅).

Given this marketplace reality, AT&T/MediaOne=s reliance, for example, on Sprint=s Aplans to use wireless cable technology to provide transport for its bundled offerings of voice and broadband Internet access services to consumers≅ is misplaced. AT&T/MediaOne at 78. In fact, ASprint has talked about deploying ION in the home market since it established the service, though its vision of how the business would be structured has evolved substantially.≅[114] Indeed, Sprint=s plans for the service continue to evolve. As Kevin Brauer, president of Sprint=s National Integrated Services division, readily admits: AWe=re building infrastructure throughout the company that will allow us to scale and go after the mass market. . . . But we don=t have that infrastructure in place yet.≅[115] And although Sprint recently has gone on a wireless cable acquisition spree, Brauer also admits that A[s]ince many wireless cable firms have struggled financially of late, with some close to bankruptcy, existing wireless networks are not as technologically advanced as they could be,≅ and thus Sprint must still upgrade these systems.[116] Therefore, it appears, at least in the near term, that Sprint will rely on DSL for its ION strategy, which is only Ato be rolled out initially in three cities.≅[117] Even assuming Sprint=s wireless broadband offering is launched more broadly, as Jupiter Communications= Abhi Chaki observes,

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[114] John Borland, *Sprint Readies ION for Consumer Market*, CNET NEWS.COM, June 17, 1999 <www.news.com/News/Item0,4,38016,00>.

[115] *Id.*

[116] *Id.*

[117] *Id.*

Sprint=s program is Aan important baby step≅ but Aby the nature of the service, the people who end up taking it will be the small businesses and home offices.≅[118]

[118] *Id.*

Likewise, AT&T/MediaOne is wrong to assert that satellite providers will soon make serious inroads in the broadband marketplace. Currently, the only satellite Internet service offered in the residential market is Hughes=s DirecPC. It, however, is by no means competitive with cable modem service. Its use, for example, is not as simple as merely pointing a satellite dish out a window; Acustomers need a view of a very specific spot in the southern sky that you=ll find with a compass and specific instructions.≅[119] Nor is it a true two-way broadband service. The user must tie up or purchase a second phone line because uploading is accomplished only by way of a traditional telephone connection, meaning that satellite users cannot enjoy *interactive* broadband services.[120] Up-front costs include about $200 for the DirecPC dish and, unlike the monthly fee charged by cable providers, DirecPC is priced on an hourly basis, requiring high-volume users to pay as much as $129.99 per month for the service.[121] And as Rubinfeld and Sidak observe, ADirectPC will not have an advantage with respect to existing DirectTV subscribers, since customers wanting to add high-speed Internet to their package must purchase a separate dish.≅ Rubinfeld & Sidak Declaration & 37. All of these factors make DirecPC highly unattractive compared to cable modem service. Moreover, as AT&T and MediaOne

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[119] Les Freed & Frank J. Derfler, Jr., *Satellite*, PC MAGAZINE, Mar. 31, 1999 <www.zdnet.com/products/stories/reviews>.

[120] *Id.*

[121] *Id*. (AThe company offers three levels of service: $29.99 per month for 25 hours, $49.99 for 100 hours per month, and $129.99 for 200 hours per month. If you go over your monthly time limit, you pay $1.99 for each additional hour.≅).

acknowledge, the Teledesic and Spaceway satellite services will not be available until at least 2002,[122] and therefore will do nothing to stem AT&T/MediaOne=s first-mover advantage.

[122] AT&T/MediaOne at 79-80.

Over and above these specific deficiencies, all competing broadband technologies suffer a further disadvantage: Once customers sign up for cable modem service, they are unlikely to switch to a new technology due to the high switching costs and service problems associated with installation. The installation costs for ADSL service range from $100 to $500, and modems can cost as much as $610.[123] Two-way wireless broadband service requires customers to buy $400 to $800 in equipment and spend $150 for installation.[124] Likewise, DirecPC costs new subscribers between $300 and $800 for installation.[125] On top of these substantial cost barriers to entry, the installation process for complex services is plagued with Apoor service, difficult appointments, computer problems, and tedious troubleshooting.≅[126] Given cable=s substantial

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[123] *Fast Connections Compared*, PC MAGAZINE, Apr. 22, 1999 <www.zdnet.com/products/stories/reviews>; Veeneman & Williams Declaration & 9 (noting that Ait may cost a customer as much as $300 to switch from cable access to DSL≅).

[124] *See* Marc Liggio, *Wireless Internet -- No Threat to Cable*, MULTICHANNEL NEWS ONLINE, Oct. 26, 1998 <204.243.31.23/cgi-win/csearch.exe/vsrchtip>.

[125] *See Fast Connections Compared*, PC MAGAZINE, Apr. 22, 1999 <www.zdnet.com/products/stories/reviews>.

[126] Corey Grice, *The Pitfalls of High-Speed Installs*, CNET NEWS.COM, July 28, 1999

head start in the residential market, cable modem subscribers who have already incurred significant up-front costs and installation headaches are highly unlikely to switch to DSL or any other technology. This problem will only be compounded by AT&T/MediaOne=s first-mover advantage and anticompetitive actions toward other broadband providers, as customers wanting to switch would only be able to move to broadband networks with anemic content, limited software offerings, and few opportunities for e-commerce.

<www.news.com/SpecialFeatures>.

D. As the Dominant Provider of Broadband Internet Service, AT&T/MediaOne Will Stifle Consumer Choice, Exercise Market Power in Negotiations With Advertisers, Software Developers, and Content Providers, and Undermine Investment in Competing Broadband Technologies.

Market power on the Internet stems from two related sources. The first is a large customer base, and with roughly 80 percent of broadband customers connected to its network, a combined Excite@Home/Road Runner would have no rival. The second is a demonstrated ability to keep customers on one=s network, rather than roaming the public Internet for other providers= content. The ability to keep customers from leaving is particularly important for ISPs seeking to wield market power against advertisers, content and software providers, and Internet merchants, because the more time customers spend on-net, the greater guarantees these vertically related firms have that their products will be seen, used, or purchased.

The closed network architecture employed by Excite@Home and Road Runner is perfectly designed to keep broadband customers from venturing outside Athe walled garden.≅ Strategis Group Report at 128. Excite@Home and Road Runner customers purchase a broadband connection that is hard-wired directly to the ISP.[127] Unlike DSL users, who can use their broadband connection to reach the ISP of their choice, Excite@Home and Road Runner customers purchase connections that terminate exclusively at the cable ISP=s network.[128]

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[127] *See* Declaration of Albert Parisian, attached as Appendix D, at & 9 (Parisian Declaration) (ABecause the system is closed, when cable customers turn on their modem service, they have no choice but to enable a hard-wired connection to their cable provider=s ISP.≅).

[128] *Compare* Veeneman & Williams Declaration & 6 (AGTE=s DSL network is an open access system that allows customers to choose from a variety of≅ ISPs) *with* Parisian Declaration & 9

Because cable modem customers have no opportunity to reach other ISPs apart from Excite@Home/Road Runner, all broadband cable users wishing to access the Internet must do so by passing through AT&T/MediaOne=s gates. AContent from outside ISPs (like AOL), portals (like Yahoo!) and content providers (like Broadcast.com) . . . can only be reached by sending and receiving data through the affiliated ISP=s backbone and over the public Internet connection maintained by that ISP.≅ Parisian Declaration & 9.

(A[T]here is no way to dial around the ISP or otherwise establish a direct connection to any other provider.≅).

Customers logging on to a combined Excite@Home/Road Runner network would first be exposed to AT&T/MediaOne=s own proprietary content. Customers need not venture onto the public Internet to reach this content; rather, it is stored in servers located as near as practicable to each customer=s individual location.[129] One common method of pushing content closer to the user is to cache content originating in far-away servers by replicating it in nearby servers.[130] Excite@Home has indicated that it is planning to locate Aproxy servers for caching at the local head end,≅ meaning that on-net content will be delivered to customers from servers often located within their own neighborhoods.[131] Because this content does not have to pass through the numerous traffic bottlenecks on the public Internet, Excite@Home and Road Runner=s network architecture provides an inherent advantage to their own proprietary content.

In addition to advantaging on-net content, a combined Excite@Home/Road Runner would have numerous means at its disposal to disadvantage competitors and firms operating in vertically related markets. *First*, because its network would be closed and exclusive to cable modem customers, Excite@Home/Road Runner would have a strong incentive to establish

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[129] *See* Parisian Declaration & 8 (AIn closed systems, cable modem customers do not need to access the public Internet to reach content supplied directly by their cable provider=s affiliated ISP.≅).

[130] *See id.* (AWithin the ISP=s point of presence linked to the regional router, the affiliated ISP is able to cache preferred content for the fastest possible delivery to customers (though this may be done elsewhere in the ISP=s very-high-speed national backbone).≅).

[131] Fred Dawson, *RealNetworks, @Home Team Up on Streaming*, Multichannel News Online, Jan 18, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip>.

proprietary network management and software protocols that render software and content written for its system incompatible with competing systems. This task would be easily accomplished given AT&T=s relationship with Microsoft, Microsoft=s well-known acumen at developing closed network standards, and Excite@Home=s stated intention Ato accelerate≅ its Acontent . . . discussions with Microsoft.≅[132] AT&T=s own chairman has made plain that a combined AT&T/MediaOne would adopt such a strategy, arguing that the company cannot Aoffer a seamless set of services≅ unless it Acontrol[s] . . . the interfaces and the specifications, the protocols, the standards, [and] the platforms.≅[133] Excite@Home=s Chief Technical Officer, Milo Medin, recently echoed Mr. Armstrong=s suggestion, explaining in a recent meeting at the Commission that Ahe was working with cable modem manufacturers to make proprietary changes to cable modems≅ and cable modem termination systems. Parisian Declaration & 16.

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[132] Jim Hu, *AT&T Moves Good for Excite, Exec Says*, CNET NEWS.COM, May 12, 1999 <www.news.com>.

[133] C. Michael Armstrong, *Networking: The New Generation Comes of Age*, Speech Delivered at the ComNet >99 Conference, Jan 26, 1999 <www.att.com/speeches/99>.

AOnce these proprietary protocols are established, software and content providers would have a strong incentive to write for AT&T=s system first,≅ because by doing so, they will be assured of reaching the largest number of customers. Rubinfeld & Sidak Declaration & 51. This would have the dual effect of enhancing the standing of Excite@Home/Road Runner=s network -- making it the exclusive outlet for the newest and best broadband software and content -- and denying alternative broadband providers access to the inputs they need to compete. As a recent article in Wired Magazine explained, Aby introducing an incompatible system,≅ networks like the combined Excite@Home/Road Runner can precipitate a AVHS-vs.-Beta standards battle≅ that will be decided not on the relative efficiency of competing technologies, but on the size of the customer base the technologies serve.[134]

Industry analysts expect that Asoftware and applications designed to exploit the high bandwidth market≅ will be developed in earnest once the total number of broadband customers surpasses one million customers.[135] Because this benchmark has just been surpassed, Excite@Home/Road Runner=s early adoption of proprietary standards would have a tremendous impact on the foundation of broadband software and content development. Protocols adopted early on establish the foundation for all future application development. Once closed protocols catch on, it becomes almost impossible to undo the damage, much in the same way that Apple

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[134] Randall Rothenberg, *Rob Glaser, Moving Target*, WIRED, Aug. 1999, at 130.

[135] Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet. com/ zdnn/stories/news>.

Computer has never overcome the disadvantage it faced because application developers wrote (and continue to write) first for PCs.

Ultimately, AT&T/MediaOne=s adoption of proprietary protocols would give it a tremendous advantage over competitors. Not only would AT&T/MediaOne control the most popular broadband content and software, but it would also be able to stock customers= homes with equipment (like set-top boxes) Aincompatible with the services and equipment offered by competitors.≅ Parisian Declaration & 19. Because this equipment will soon control all of the video, Internet, and telephone services customers demand, competitors Aunable to replace the full bundle of services offered by Excite@Home/Road Runner and its cable affiliates would therefore have little hope of offering consumers a valued product.≅ *Id.* Thus, as Professor Gertner concludes, the adoption of proprietary protocols Awould help preserve AT&T=s current position as the leading provider of broadband Internet access and would raise the costs faced by providers of rival broadband access technologies, such as DSL, from offering access services that compete with AT&T=s.≅ Gertner Declaration & 26.

Second, Excite@Home/Road Runner Acould use the bargaining power generated by its large captive customer base to negotiate exclusive arrangements with leading software and content providers.≅ Rubinfeld & Sidak Declaration & 52. These providers would have an extraordinary incentive to conclude such agreements because, by doing so, they would ensure themselves of the same preferential treatment afforded to other on-net content. Such exclusive

agreements are consistent with Excite@Home=s stated plan to Amonetize its start page≅ by offering preferential placement to partners willing to pay Afair value≅ in return.[136]

[136] Dick Satran, *Excite@Home Denies Merger, But Sees Deals*, Reuters, Aug. 3, 1999.

These agreements, moreover, would have a number of highly anticompetitive consequences. In many cases, they would leave competing broadband providers without access to a needed input. RealNetworks, for example, has developed the industry-standard video streaming player; 85 percent of streaming media broadcasts use its technology and numerous Web sites are dedicated exclusively to showcasing RealNetworks-based content.[137] If Excite@Home/Road Runner were to negotiate an exclusive agreement with RealNetworks to control the next version of its application, competing broadband providers would be unable to develop content to play on the upgrade. Excite@Home/Road Runner, on the other hand, would have no difficulty getting new content developed for its system due to the size of its captive audience. The competitive injury caused by such exclusive agreements would correlate directly to how new (and therefore desirable to customers) the service is. If Excite@Home/Road Runner is able to secure exclusive control over the next Akiller app,≅ broadband competitors will suffer an extreme disadvantage. In Professor Gertner=s words, Athese rivals may be forced to operate at an inefficient scale or may be driven from the market.≅ Gertner Declaration & 22.

[137] Randall Rothenberg, *Rob Glaser, Moving Target*, WIRED, Aug. 1999, at 129, 131.

Excite@Home/Road Runner=s exercise of monopsony power in these negotiations also presents a significant threat to competition. Just as cable providers did in the 1980s, a combined Excite@Home/Road Runner will be able to demand steep payments -- including possible equity positions -- from software and content providers in exchange for preferential placement on its system.[138] Moreover, software and content providers that compete with anointed Excite@Home/Road Runner partners will be foreclosed from reaching roughly 80 percent of the broadband marketplace. As Professor Gertner concludes, A[s]uppliers that do not establish preferential relationships with AT&T may face significant difficulties in distributing their services. In the absence of alternative channels of broadband distribution, disfavored providers of broadband services may be driven from the market or may fail to achieve the scale required to provide services efficiently.≅ Gertner Declaration & 21. Excite@Home/Road Runner will therefore have complete control over which application developers live and die; whether developers= services appear on the first screen or are squirreled away behind five mouse clicks; and the exact extent to which application developers are allowed to prosper.

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[138] *See* Parisian Declaration & 19 (A[O]nce these protocols are established and incorporated into equipment throughout the network, Excite@Home/Road Runner would be able to demand equity interests or revenue sharing from broadband content providers wishing to operate on its system.≅).

Third, Excite@Home/Road Runner could affirmatively discriminate against content available on the public Internet, preventing Acustomers from accessing web sites outside of Excite@Home and thereby control[ling] how broadband content is presented to customers.≅ Rubinfeld & Sidak Declaration & 50. Because the IP protocol allows ISPs to see the source of every data packet, and because routers can be configured to block any packets the network administrator wishes to keep out, it would be a simple matter for Excite@Home/Road Runner to block content coming from targeted Internet sites.[139] If, for example, Excite@Home/Road Runner was attempting to advantage its own exclusive broadband music library, it could selectively degrade the quality of its customers= access to MP3.com, the leading music library on the public Internet.

[139] Parisian Declaration & 15 (AThis blocking capability is already marketed to closed data system providers by router manufacturers (like Cisco), enabled in part by the openness of the IP Protocol, which places a signature on each data packet identifying its point of origin. It is a simple matter to configure router filters to block packets coming from particular portals (like Yahoo! or Lycos) or particular content providers (like Broadcast.com or ESPN.com).≅).

AT&T and MediaOne claim in their Public Interest Statement that A@Home and Road Runner have no incentive to engage in such behavior≅ because engaging in discrimination Awould cause subscribers to switch to other ISPs.≅ AT&T/MediaOne at 84. But the incentive to engage in discrimination is strong when doing so prompts customers to look for on-net substitutes.[140] Moreover, AT&T/MediaOne=s assertion ignores the fact that, over the next few years, the great majority of U.S. households will not have access to an alternative broadband connection. And even for those fortunate few who do have a choice, the critical question is the *relative* value of the broadband ISP service offered by alternative providers. Once Excite@Home/Road Runner has established its first-mover advantage, negotiated exclusive deals with leading software and content providers, and established proprietary protocols that effectively limit the software available to users of competing broadband technologies, customers would not be willing to switch. Indeed, reasonable customers would never abandon Excite@Home/Road Runner because they were barred from reaching a few select sites on the Internet when switching would mean losing access to far more Excite@Home/Road Runner proprietary content.

Finally, to the extent that competitive threats to its hegemony do crop up in certain markets, AT&T/MediaOne could readily drive these competitors from the market through predatory pricing. Predatory pricing schemes typically cannot succeed because firms that price

[140] Parisian Declaration & 14 (ASuch a strategy would encourage customers to rely more extensively on the cable provider=s own content and spend more time on its network, which in turn would increase the premium the provider could charge to advertisers, portals, and content providers for preferred placement on its system.≅).

their services below cost are unable to later raise prices enough Ato compensate for the amounts expended on the predation.≅[141] But because cable providers are subject to a preferential regulatory regime that allows them to tie broadband access and ISP services, AT&T/MediaOne would have no difficulty recovering losses incurred from predatory pricing. By operating a closed system, AT&T/MediaOne would be assured that any new broadband customers would take its ISP service to the exclusion of any other.[142] Customers therefore could not avoid AT&T/MediaOne=s super-competitive price increase by selecting an different ISP.

Ultimately, a combination of Excite@Home and Road Runner risks grave competitive injury to all participants in the broadband marketplace. Consumers would see severe limitations imposed on their ability to choose between broadband providers; advertisers and Internet merchants would be forced to pay monopoly prices for access to broadband customers -- charges that would ultimately be passed on to consumers; software and content providers would be forced to accept the monopsonist=s terms or risk being foreclosed from the great majority of the broadband market.

The express purpose of AT&T/MediaOne=s strategy is to discourage competing broadband providers from investing in alternative technologies. Thus, AT&T and MediaOne miss the mark when they assert that Ainvestment in broadband facilities by cable operators≅ has

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[141] *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 225 (1993).

[142] *See* Parisian Declaration & 20.

spurred ILEC investment in Acompeting facilities.≅ AT&T/MediaOne at 29. AT&T and MediaOne have not offered any explanation for how their merger will accelerate Ainvestment in broadband facilities by cable operators.≅ Both AT&T and MediaOne are well underway in upgrading their systems and have demonstrated the ability to do so without need for a merger. What the AT&T/MediaOne merger will achieve, however, is the creation of a monolithic broadband ISP that DSL providers -- because they are subject to unequal regulatory requirements -- will be powerless to combat. Once the Excite@Home/Road Runner network takes its place as an entrenched first-mover -- fueled by proprietary protocols and exclusive agreements that create a permanent competitive imbalance -- investment in competing broadband technologies will diminish.

E. The Commission Can Eliminate This Threatened Harm to Broadband Competition By Requiring, as a Condition of Merger Approval, That AT&T/MediaOne and Other Cable Providers Contractually Affiliated with Excite@Home and Road Runner Open Their Cable Networks.

Although the Commission has articulated a policy of Acarefully monitor[ing] the situation≅ in the broadband marketplace, this policy will fail to protect broadband competition if it permits consummation of the AT&T/MediaOne merger. The regulatory cost and complexity associated with eliminating monopoly power by post-hoc regulation is confirmed by the numerous highly complex issues -- including the unbundling and pricing of network elements -- associated with the Commission=s implementation of the 1996 Act. Likewise, the antitrust laws are not an effective or easily administrable remedy once a network monopolist becomes entrenched, as proven by the extreme cost and complexity of DOJ=s suit against Microsoft.

As an alternative to blocking the merger outright, the Commission could require, as a condition of merger approval, that AT&T/MediaOne and the other cable providers contractually affiliated with Excite@Home and Road Runner afford competing ISPs open and nondiscriminatory access to their cable modem networks. There can no longer be any debate about the technical feasibility of this solution. As explained Albert Parisian, Director of Business Development for Broadband Data Services for GTE=s cable arm, GTE Arecently demonstrated open cable access on its own Clearwater, Florida cable system.≅ Parisian Declaration & 23. Likewise, Canadian regulators have required Canada=s cable providers to afford competing ISPs open access -- a requirement that Canadian MSOs are currently implementing.[143] Indeed, Canadian MSOs have embraced the idea of open access, concluding that it provides a significant Abusiness opportunity≅ to get independent ISPs on their networks Arather than pushing them onto the networks of . . . competitors.≅[144] This optimism is confirmed by GTE=s own experience in Clearwater, where GTE was inundated with requests from ISPs hoping to offer Internet service over its cable infrastructure. *Id.* & 30. Based on this extraordinary demonstration of demand, GTE is currently in the process of developing a business plan that implements open access on all of its cable systems. *Id.*

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[143] Kinetic Strategies, *Canadian Cable Ops Prepare for Open Access*, CABLE DATACOM NEWS, August 1999, at 8 <www.CableDatacomNews.com>.

[144] *Id.*

Although AT&T has publicly asserted that an open access requirement would impose substantial regulatory burdens on cable providers, the U.S. Code and Code of Federal Regulations are replete with examples of unbundling and nondiscrimination obligations imposed on cable operators. The 1992 Cable Act, for example, barred cable providers from imposing discriminatory terms and conditions on unaffiliated video programmers in exchange for carriage. *See* 47 U.S.C. ∋ 616. Similarly, the Cable Act and implementing Commission regulations preclude cable operators from engaging in Aunfair methods of competition or unfair or deceptive acts or practices≅ that would hinder Aany multichannel video programming distributor from providing satellite cable programming.≅ 47 C.F.R. ∋ 76.1001; *see also* 47 U.S.C. ∋ 528(c)(2). Included in this prohibition is a requirement that no Asatellite cable programming vendor in which a cable operator has an attributable interest . . . discriminate in the prices, terms, and conditions of sale for delivery of satellite cable programming.≅ 47 C.F.R. ∋ 76.1001(d).

Similar nondiscrimination requirements have been imposed on the pricing of cable services. Commission regulations provide, for example, that certain cable operators Amay not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming.≅ *Id.* ∋ 76.921(b). Likewise, cable operators are required to Aunbundle≅ the sale of customer premises equipment and cable service, establishing Arates for remote control units, converter boxes, and other customer equipment . . . separate from rates for basic tier service.≅ *Id.* ∋ 76.923(b). Cable operators can sell this equipment at discounted promotional prices, but only if those offerings are Anot unreasonably discriminatory.≅ These

restrictions are premised on the notion that the market for customer premises equipment is competitive, while the market for cable television service is not, making this case directly analogous to the market for broadband access (not competitive) and the market for broadband ISP service (competitive in an open access world). The Commission=s rationale for adopting the equipment unbundling requirement is therefore directly applicable here:

> We have found, in the common carrier service and equipment markets, that unbundling of service rates from equipment rates has been essential to creating the vigorous competition that now exists in the customer premises equipment market. On the other hand, we have found bundling can eliminate virtually all competition for certain services, Abecause bundling forces . . . subscribers to pay . . . for services even when the subscribers obtain them from other sources.≅ We believe that these findings are equally pertinent to cable equipment and installation markets.
>
> Section 2(b)(5) of the Cable Act of 1992 states that one of the policies the Act is designed to promote is Aensur[ing] that cable operators do not have undue market power vis-a-vis . . . consumers.≅ Bundling of equipment and services is one industry practice that Congress has identified as contributing to the market power of cable operators. We believe that by requiring the unbundling of all cable service rates from equipment and installation, as well as the unbundling of equipment and installation rates from each other, we promote this legislative goal.[145]

[145] *In re Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992*, MM Docket 92-266, Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, && 410-11 (1993).

In the very same way, precluding cable providers like AT&T and MediaOne from tying broadband access service with ISP service is Aessential to creating the vigorous competition≅ that prevails in other Internet markets. Such an open access obligation will be easy to administer, requiring the Commission to impose only three simple conditions on the AT&T/MediaOne merger.

First, the Commission should adopt a condition requiring AT&T/MediaOne and the other cable providers contractually associated with Excite@Home and Road Runner to allow ISPs to interconnect with their cable modem networks on terms and conditions that are nondiscriminatory. Likewise, these cable operators should be required to allow ISPs to interconnect on terms and conditions that are equivalent to those offered to affiliated ISPs like Excite@Home and Road Runner. No further detail is required to implement the interconnection prong of the proposed merger conditions.

As explained in the Parisian Declaration, interconnection with open cable systems can take place at a device called an AISP Subscriber Manager.≅ Parisian Declaration & 23. This device is functionally indistinguishable from a traditional Internet router and is manufactured by numerous firms, including Cisco Systems and RedBack. *Id.* & 25. The subscriber manager is connected to an MSO=s regional switch or router, which itself acts as a traffic aggregation point for smaller groups of cable modem termination systems. *Id.* & 23. Because the ISP Subscriber Manager is no different than a traditional Internet router, interconnection with open cable networks does not differ from the millions of other Internet interconnections taking place between

Internet backbones at public and private peering points, between smaller ISPs that directly exchange traffic, and between large Internet customers like Web hosting services and their backbone providers. *Id.* & 24.

The standards for such interconnection are well-known and need not be detailed in regulations to be implemented in a nondiscriminatory manner. Typical off-the-shelf Subscriber Managers, like those manufactured by Cisco Systems, can accommodate more than 400 ISPs -- more than could possibly want to interconnect in a given market. *Id.* & 25. Moreover, Subscriber Managers are stackable, eliminating any upper limit on the number of ISPs that can interconnect with an open cable system. *Id.* Interconnection with the Subscriber Manager also involves nothing more than plugging the ISP=s fiber into a router port, eliminating any need for collocation of ISP equipment in the cable operator=s space. *Id.* & 24. Thus, none of the difficulties associated with interconnection of telephone networks are present here.[146]

Second, the Commission should ensure that AT&T/MediaOne and other cable providers contractually affiliated with Excite@Home and Road Runner do not charge unaffiliated ISPs discriminatory prices for broadband access. There is no question that cable providers should be compensated for the access portion of broadband service, and GTE is not suggesting that the Commission regulate the price of cable Internet access. But to ensure that competing ISPs are

[146] There is likewise no need to regulate the number or location of Subscriber Managers that cable providers make available to competing ISPs. Cable operators must themselves connect their own affiliated ISP through the same Subscriber Managers, giving them every incentive not to locate them in places that create network inefficiencies or create needless bottlenecks choking the throughput of Internet traffic. *See* Parisian Declaration & 26.

not disadvantaged by being charged a higher price for access *than ISPs affiliated with cable operators*, the Commission should prohibit cable operators from discriminating in their access pricing between Excite@Home, Road Runner, and unaffiliated ISPs. This regulation constitutes no intrusion into cable providers= competitive pricing flexibility; the only justification for charging discriminatory prices to unaffiliated ISPs is an anticompetitive one.

Third, because AT&T/MediaOne will have an additional measure of market power stemming from its control over Excite@Home and Road Runner, the Commission should adopt a third merger condition that would preclude AT&T/MediaOne from engaging in a different form of price discrimination. Instead of charging competing ISPs more for access service, a cable operator with monopoly power in the broadband ISP market could disadvantage competitors by charging *both* its affiliated ISP and unaffiliated ISPs an inflated charge for access. The affiliate could then give away the ISP segment of the service or charge a nominal fee, leaving the cable operator *as a whole* profitable while curtailing the ability of unaffiliated ISPs to compete. For example, assume that the cost of providing a broadband ISP service is $10 per customer, and that a cable provider offers broadband service to its customers for $40 per month. If the cable provider, through internal transfer pricing, charges its own ISP $39 for access, its total margin as a company will remain unaffected. Competing ISPs, on the other hand, will be unable to offer service for less than $49 even though it has been charged a nondiscriminatory price for access.

Again, this problem is easily solved without placing any significant restrictions on AT&T/MediaOne=s ability to price its Internet access service. One simple solution is to require as a condition of merger approval, that AT&T/MediaOne continue to operate Excite@Home and

Road Runner, whether operated independently or merged into one entity, as separate subsidiaries. Because these ISPs have separate boards of directors, separate accounting from their affiliated cable providers, separate creditors, and, in the case of Excite@Home, separate shareholders, they cannot be operated at a permanent loss without escaping detection. The Commission has repeatedly relied on separate subsidiary requirements to solve cost-allocation and price squeeze problems, and the imposition of such a remedy here will have no significant costs because it does nothing more than maintain the status quo.[147]

AT&T and MediaOne may object that Excite@Home and Road Runner own and operate a significant amount of the network infrastructure required to provide broadband Internet service to cable customers. In some markets, Excite@Home owns and operates the cable modem termination systems required to collect IP traffic coming from customer homes. (These systems are the functional equivalent of a DSLAM in a DSL environment. *See* Parisian Declaration & 6.) Likewise, Excite@Home sometimes owns and operates the regional routers that aggregate local traffic and interconnect with the larger Excite@Home network. In an open access world, competing ISPs will be afforded access to these Excite@Home facilities; without them,

[147] *See, e.g.*, *Establishment of Competitive Service Safeguards for LEC Provision of CMRS*, WT Docket No. 96-162, Report and Order, 12 FCC Rcd 15668 (1997) (A[A] separate affiliate requirement is a very effective way to afford the requisite degree of >transparency= to enable competitors and the Commission to detect discrimination.≅).

competing ISPs could not reach end users unless forced needlessly to duplicate these network components.

Nevertheless, this problem should not pose any difficulty for the Commission=s implementation of the proposed merger conditions. In effect, Excite@Home is providing two services, network buildout and management -- an essential component of the cable provider=s broadband access service -- and ISP service offered to end users. Excite@Home is currently compensated for its network management service by receiving a larger share of per-customer revenue than it otherwise would if cable providers operated their own cable modem networks. In an open access environment, Excite@Home would simply revise its agreements with cable providers to secure more direct compensation for performing network management functions.

Nor should the Commission give any weight to AT&T and MediaOne=s assertion that the imposition of an open access requirement would reduce their incentive to invest in broadband access. AT&T/MediaOne at 90. GTE=s own experience as a cable provider confirms that Athe decision to upgrade cable networks to provide data services is usually an easy one. Most of the plant changes needed to support the service are by-products of plant upgrades already made to increase channel capacity, add digital tiers, add pay-per-view, use intelligent set top boxes, introduce interactive television services, and offer on-set program information guides.≅ Parisian Declaration & 29. The returns available on the sale of broadband access alone make it Athe cable provider=s most remunerative use of channel capacity,≅ not including the returns the cable

provider=s affiliated ISP -- even in an open access world -- stands to earn from advertising and e-commerce. *Id.*

GTE=s experience is confirmed by a detailed examination, conducted by Rubinfeld and Sidak, of AT&T=s relative cost of capital and returns just on broadband Internet access. AA basic decision rule in investment theory is that a firm will invest in a project if and only if the >project=s return,= defined as the ratio of expected annual income to investment, exceeds the firm=s weighted-average costs of capital.≅ Rubinfeld & Sidak Declaration & 66. Currently, AT&T=s weighted cost of capital is 12 percent, while its margin on broadband access is 18.1 percent, giving AT&T a A*strong* incentive to undertake the necessary upgrades to provide voice and Internet service to its cable customers, because its project return vastly exceeds its weighted-average costs of capital.≅ *Id.* & 67. Thus, even Aunder an extreme assumption that broadband prices were to fall by 20 percent, the new margin of 12.1 percent would encourage AT&T to continue upgrading its cable system.≅ *Id*. These results are consistent with AT&T=s own long-held position that DSL providers do not need to avail themselves of a closed access regime to recover their investment in providing broadband access service. The costs of providing DSL service are not lower than those associated with offering cable modem service, so what=s good for the goose must also be good for the gander. At bottom, AT&T and MediaOne=s claim is that they need to recover monopoly rents in the ISP market to justify investments in broadband access. This position amounts to nothing less than a confirmation of AT&T/MediaOne=s anticompetitive plans.

Ultimately, the Commission faces the choice of regulating a little now or a lot later. History is replete with examples underscoring the difficulty of undoing network monopolies once they have become entrenched. It bears noting, however, that if AT&T and MediaOne establish that the administration of the proposed merger conditions is too complex to justify the benefits, that conclusion does not justify approval of their merger. To the contrary, if these conditions prove unadministrable, the only conclusion available to the Commission is that no set of conditions will make the AT&T/MediaOne merger serve the public interest. If a regulatory compromise cannot be achieved, the Communications Act requires that AT&T and MediaOne=s application be denied.

III. THE PROCOMPETITIVE BENEFITS AT&T/MEDIAONE ASSERT ARE SPECULATIVE AND, EVEN IF PROVEN, FULLY ACHIEVABLE WITHOUT THE MERGER.

In an effort to satisfy its burden under the Commission=s *Bell Atlantic/NYNEX Order* -- which requires applicants Ato prove that, on balance, the merger will enhance and promote, rather than eliminate or retard competition≅[148] -- AT&T and MediaOne posit procompetitive gains in the markets for local telephone service, Internet access, and video services. AT&T/MediaOne at 30. AT&T and MediaOne support these asserted benefits with nothing more than lawyers= arguments, offering no detailed market analysis to demonstrate that these gains are meaningful, no supporting economic evidence to quantify the asserted gains, nor any sworn testimony from company employees attesting that the merger will bring the companies something they cannot secure alone. As AT&T stated in its Petition to Deny the transfer of GTE=s licenses to Bell Atlantic, because the applicants have Anot provided the detail necessary to evaluate the benefits≅ of the merger, Athe Commission should summarily disregard [their] claims, contrived for purposes of this application.≅[149] This sentiment echoes the Commission=s statement in the

[148] *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control*, Memorandum Opinion and Order, 12 FCC Rcd 19985, at & 3 (1997) (*Bell Atlantic/NYNEX Order*).

[149] Petition of AT&T Corp. to Deny Application, *In re Application of GTE Corp. and Bell Atlantic Corp. for Consent to Transfer Control*, CC Docket No. 98-184, at 48 (Nov. 23, 1998).

Bell Atlantic/NYNEX Order that Aapplicants cannot carry their burden if their efficiency claims are vague and speculative, and cannot be verified by reasonable means.≅ *Id.* & 158.

AT&T and MediaOne first assert that their merger Awill accelerate the deployment of cable telephony≅ by combining MediaOne=s Aexisting cable facilities with AT&T=s strong telephony brand, sophisticated knowledge of marketing telephony services, and technical expertise in establishing and managing telephone networks.≅ AT&T/MediaOne at 21-22. Because MediaOne has thus far Aachieved only modest success≅ in its roll out of local telephone service, *id.* at 23, the merger will, in the applicants= estimation, bring local competition Ato millions of customers in service areas where [AT&T] currently has no facilities,≅ *id.* at 27. In the same vein, AT&T and MediaOne claim that the merger will hasten MediaOne=s deployment of IP telephony and allow AT&T to offer service in a limited number of its own territories more quickly by building on MediaOne=s upgraded systems. *Id.* at 25, 27.

While these asserted benefits may be substantial -- indeed, GTE welcomes AT&T and MediaOne=s entry into the local marketplace -- the applicants have made no serious effort to prove that they cannot be achieved without the merger. In the *Bell Atlantic/NYNEX Order*, the Commission stated that A[p]ro-competitive efficiencies include only those efficiencies that are merger specific, *i.e.*, that would not be available but for the proposed merger.≅ *Id.* & 158. AT&T/MediaOne=s public interest statement fails to carry this burden because it does not explain why the same efficiencies cannot be achieved through contracts. Although AT&T and MediaOne

assert that A[c]ontractual relationships . . . are much less efficient than full integration,≅ AT&T/MediaOne at 31, this conclusory assertion cannot be squared with AT&T and MediaOne=s own behavior in the marketplace.

Earlier this year, AT&T announced agreements with both Time Warner and Comcast to be the exclusive provider of telephone service over their cable lines. These agreements would have allowed AT&T to market local service to Time Warner=s 20.6 million homes passed and Comcast=s 7.3 million homes passed.[150] Because MediaOne itself passes 8.4 million homes,[151] these deals confirm that AT&T believes telephony ventures work when AT&T partners contractually with MSOs much larger than MediaOne. And because AT&T agreed to be Time Warner=s exclusive telephone service provider *for 20 years*, the venture=s duration confirms that AT&T believes telephony contracts will work over the long haul, even as new technologies like IP telephony come on-line.[152]

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[150] *See* Warren Publishing, CABLE & STATION COVERAGE ATLAS, Index 170 (1999).

[151] *Id.*

[152] *See* Leslie Cauley & Rebecca Blumenstein, *AT&T Moves Closer to Local Service*, WALL ST. J., Feb. 2, 1999, at A3.

Indeed, when the AT&T/Time Warner agreement was announced, AT&T Chairman C. Michael Armstrong predicted, in what he termed a conservative estimate, that the venture would sign up 25 percent of Time Warner=s 20.6 million homes passed within four years.[153] Likewise, AT&T President John D. Zeglis stated that AT&T Aplan[s] to give consumers in Time Warner=s cable territories more than a choice in local service . . . . We=re going to combine the information carrying capacity of cable with our own networking expertise to give families an easy-to-use suite of >any distance= communications services.≅[154] Time Warner=s President, Richard D. Parsons, further explained how the agreement would allow AT&T to bring Time Warner=s customers the most advanced broadband services:

> On every level, cable customers are the winners in this combination. In addition to our existing cable systems= capacity to provide high-speed Internet delivery, cable programming and digital services, this venture will provide customers with telephony services through the same architecture. Going forward, the working partnership of Time Warner and AT&T in developing and deploying broadband

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[153] *See id.*; Bruce Mohl, *AT&T, Time Warner Team Up Via Cable*, BOSTON GLOBE, Feb. 2, 1999, at A1.

[154] *Local Competition: AT&T and Time Warner Form Strategic Relationship to Offer Cable Telephony*, EDGE, Feb. 8, 1999.

communications also ensures that our customers will be among the first to enjoy new digital services, such as video telephony.[155]

[155] *Id.*

At the time AT&T=s deal with Time Warner was announced, the *Wall Street Journal* reported AT&T=s intention Ato use the landmark Time Warner pact as a model for forming alliances with other cable companies.≅[156] Among the companies reportedly negotiating such agreements with AT&T were MediaOne and Cox Communications.[157] When AT&T announced its merger with MediaOne, it put the deals with Time Warner and Comcast on hold, and cut off its negotiations with Cox. Thus, not only has AT&T publicly recognized that agreements with other cable providers will provide *precisely the same benefits it claims here*, but the proposed merger has already proven to be *anticompetitive*. Had AT&T proceeded with its telephony joint venture strategy, it could already be rolling out local telephone service to the 41 million homes passed by Time Warner, Cox, Comcast, and MediaOne.[158] There can be no question, therefore, that AT&T=s merger with MediaOne is not about providing local telephone service, but instead, is directed at achieving dominance in the broadband marketplace. This fact is further confirmed by the recent admission of AT&T executives that Athe entire TCI acquisition came about because AT&T wanted to get its hands on At Home.≅[159]

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[156] Leslie Cauley & Rebecca Blumenstein, *AT&T Moves Closer to Local Service*, WALL ST. J., Feb. 2, 1999, at A3.

[157] *Id.*

[158] *See* Warren Publishing, CABLE & STATION COVERAGE ATLAS, Index 170 (1999).

[159] Rebecca Blumenstein, *Inside the Tangles of AT&T=s Wed Strategy*, WALL ST. J., Aug. 13, 1999, at B4.

AT&T/MediaOne also claimss that the merger will Aprovide economies of scale and scope≅ that will Aexpedite AT&T=s ability to provide content-enriched high-speed Internet service.≅ AT&T/MediaOne at 29. The only reason the applicants offer to support this assertion is that Athe upgrades that are required to provide local telephone service over cable plant are also necessary to provide cable Internet services over these facilities.≅ *Id.* But MediaOne has already upgraded over 70 percent of its cable systems and will be close to completing its upgrades by the end of 1999 -- well before AT&T can hope to secure regulatory approval for the merger. Strategis Group Report at 140. Because the Public Interest Statement offers no explanation -- nor is one possible -- for why AT&T needs additional Ascale and scope≅ to upgrade its own cable systems, the Commission should not give any weight to the merger=s asserted Internet benefits. Indeed, as explained in detail above, the merger will visit substantial anticompetitive harm on fledgling markets for broadband Internet services.

Finally, AT&T and MediaOne assert that the merger will increase competition in the market for video services by providing Aadditional motivation for ILECs and others to step up their efforts to provide video programming.≅ AT&T/MediaOne at 30. But they offer no economic support -- or even common sense explanation -- for why ILECs and others need an additional incentive, over and above the monopoly rents currently earned by cable providers, to enter the video market. Indeed, AT&T=s asserted benefit proves, if anything, that the merger will make the market for video services *less competitive*, given that new entrants have a greater

incentive to enter a market only if the incumbent=s collection of greater monopoly rates makes entry more attractive.[160]

In the end, the *Bell Atlantic/NYNEX Order* spells out the Commission=s rule of decision here: AEfficiencies are most likely to make a difference in our public interest review of a merger when the likely adverse competitive effects, absent the efficiencies, are not great. However, efficiencies almost never justify a merger to monopoly or near-monopoly.≅ *Id.* & 158. The pro-competitive benefits that AT&T and MediaOne assert will flow from their merger are speculative, unsupported by any economic analysis or common-sense thinking, and, to the extent they do exist, can readily be achieved without the merger. These insignificant benefits are no counterweight to the extraordinary competitive injury the AT&T/MediaOne merger will inflict on the market for video programming or the nascent market for broadband Internet services. As such, AT&T and MediaOne have offered the Commission no reason to permit the Amerger to monopoly≅ that will be occasioned by combining Excite@Home and Road Runner.

[160] *See, e.g.*, Richard A. Posner, Antitrust Law 9 (1976) (Athe higher price≅ charged by a monopolist is what gives Afirms in other markets an incentive to enter≅).

CONCLUSION

For the foregoing reasons, GTE respectfully requests that the Commission deny AT&T and MediaOne=s application for transfer of control. Alternatively, the Commission can address the merger=s anticompetitive impacts on the market for broadband Internet service by imposing the following three conditions:

(1) AT&T/MediaOne and any other cable provider contractually affiliated with Excite@Home or Road runner must allow any Internet Service Provider to interconnect with their networks on terms and conditions that are nondiscriminatory. This obligation includes, but is not limited to, a requirement that these cable operators allow any Internet Service Provider to interconnect on terms and conditions that are equivalent to the terms and conditions offered to Excite@Home or Road Runner. These cable operators must interconnect with unaffiliated Internet Service Providers through the same routers or ISP Subscriber Managers through which they interconnect with their own affiliated ISPs.

(2) AT&T/MediaOne and any other cable provider contractually affiliated with Excite@Home or Road Runner may not charge unaffiliated Internet Service Providers more for an access connection to a cable customer than these cable operators charge an Excite@Home or Road Runner for an identical connection. This requirement shall apply with equal force regardless of whether the Internet Service Provider pays the cable operator directly for the customer connection or, as indirect compensation for the customer connection, refunds to the cable provider a share of the total customer price paid for Internet access.

(3) AT&T/MediaOne must continue to maintain the separate subsidiary status of both Excite@Home and Road Runner, whether they continue to be operated independently or are merged into one entity. Both subsidiaries, whether they continue to be operated independently or are merged into one entity, must continue to have separate boards of directors and must separately raise private and public capital. Both subsidiaries, whether they continue to be operated independently or are merged into one entity, must continue to maintain separate accounting from affiliated cable operators and any other firms holding an ownership interest.

Dated: August 23, 1999

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, John P. Frantz, certify that two copies of the foregoing Petition of GTE Service Corporation, GTE Internetworking, and GTE Media Ventures, Inc. to Deny Application, or in the Alternative, to Condition the Merger on Open Access Requirements, were served by first-class mail, postage prepaid, on the following:

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