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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

PETITION OF SBC COMMUNICATIONS INC. TO DENY APPLICATION

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EXECUTIVE SUMMARY

AT&T asserts that its proposed merger with MediaOne is about bringing local telephone competition to consumers. Nothing could be further from the truth. In reality, the merger is about reinforcing market power in traditional cable, multichannel video programming distributor ("MVPD"), and video programming markets and extending that power into a host of emerging and vitally important broadband-dependent markets. Simply stated, the merger will impair competition, reduce service choices, and increase consumer costs.

Unprecedented reach and influence. If this merger is consummated, AT&T and its affiliates would have a dominant presence in the supply of a staggering number and diversity of services and products as reflected in the attached diagram (section I):

- AT&T would serve almost two-thirds of the homes passed by the entire cable industry.
- AT&T would control about 98 percent of cable Internet subscribers and almost 85 percent of the total broadband Internet market.
- AT&T would have interests in approximately 60 percent of the most popular cable programming.
- AT&T would have substantial equity relationships with General Instrument, Microsoft, and leading electronic programming guide services.
- AT&T would have interests in both of the two competing cellular providers in at least 37 markets across the country.

Indeed, the merger would create ownership interests and alliances between AT&T/TCI/MediaOne/Liberty Media and a veritable Who's Who of leading cable companies, programmers, broadband ISPs, software companies, and hardware providers. Consequently, it is not an overstatement to suggest that the merger's true goal is to assure that every customer for every cable- or broadband-related service must deal with a company that AT&T either owns or influences. AT&T fully intends to use the resulting market leverage to serve its own private interests to the detriment of the public (section II).

Serious rule violations. Not surprisingly, a merger conferring such a pervasive presence on a single company violates Commission cable ownership and cellular licensing rules designed to preserve competition and protect consumers (section III). While AT&T's public interest statement acknowledges these rules in passing, it presents no basis for assuring compliance. For example, AT&T downplays the phenomenal concentration that would result from the merger by using fanciful attribution principles that bear no resemblance to the attribution rules found in the Code of Federal Regulations. In fact, AT&T analyzes post-merger cable ownership using a standard – whether the combined company has the ability to control the purchasing or selection of programming – that the Commission has expressly rejected.

If the stay of the cable horizontal ownership cap is lifted, AT&T would be immediately and significantly out of compliance. AT&T has nonetheless failed both to disclose plans for divesting systems and to explain how the asserted public interest benefits would be achieved if it is compelled to scale back its empire. Similarly, AT&T has conceded that it will violate the Commission's cross-block cellular rule in 37 markets but has failed to identify these markets or to demonstrate how it will come into compliance.

Widespread competitive harms. The proposed merger, if allowed to proceed, would adversely affect a striking array of markets (section IV). The tremendous concentration resulting from the merger coupled with AT&T's closed network model would diminish consumer choice, foreclose competition, and impede innovation across both established and emerging communications markets:

- **Video Programming.** AT&T would wield monopsony power in the video programming market – effectively assuming control over the purchase of programming nationwide – enabling it to extract anticompetitive concessions from unaffiliated programmers. For example, AT&T could: (1) force unaffiliated programmers to accept lower subscriber fees; (2) demand exclusivity and thereby block rival transmission systems' access to popular programming; (3) effectively preclude the development of new, unaffiliated programming; and (4) place unaffiliated programming on less desirable tiers. Consumers would have fewer and lower-quality programming choices, and potential competitors would think twice before entering the market under these conditions.

- **MVPD Services.** The merger would immediately harm competition in a market where AT&T and MediaOne have already overbuilt. In addition, the vertically-integrated AT&T will have the power and incentive to thwart the development of rival MVPDs by denying them access to choice programming on fair terms and conditions. Moreover, AT&T would be able to continue to choke-off potential competition from Internet video streaming by limiting such streaming to 10 minutes when carried over its broadband Internet access networks.

- **Set-Top Boxes.** AT&T also will be able to leverage its indirect ownership stake in set-top box manufacturers and its massive purchasing power to influence technical standards in ways that benefit its services, impeding the development of open and competing industry standards, contrary to Section 629 of the Act. This danger is compounded by Microsoft's access to AT&T's cable systems, which will enable it to establish a *de facto* set-top box operating system standard.

- **EPGs.** AT&T would likely restrict the availability of competitive electronic programming guide ("EPG") services by discriminating in favor of its affiliated EPGs. For example, AT&T would have the incentive and ability to deny carriage to competitors and strip their signals out of the vertical blanking interval. The merged companies' influence over leading cable modem services – @Home and Road Runner – together with the equity relationship with Microsoft would also enable them to dominate future operations of EPGs, which will combine Internet access and cable programming through browser-based interfaces.

- **Broadband.** AT&T would be able to use its affiliations and exclusive tying arrangements with cable modem providers to harm vertical Internet markets. This danger is heightened by AT&T's apparent intent to convert the Internet into a closed system based on its technology and services.

Deleterious regulatory disparity. The consumer and competitive concerns triggered by this merger might be partially mitigated if SBC and other incumbent LECs could compete on the same basis as AT&T. In reality, though, AT&T enjoys almost absolute regulatory freedom even as it advocates ever more onerous burdens on incumbent LECs (section V). Most strikingly, whether operating as a competitive carrier, as a cable company, or as a broadband access provider, AT&T seeks to run a closed system while escaping effective regulatory control in virtually every aspect of its businesses.

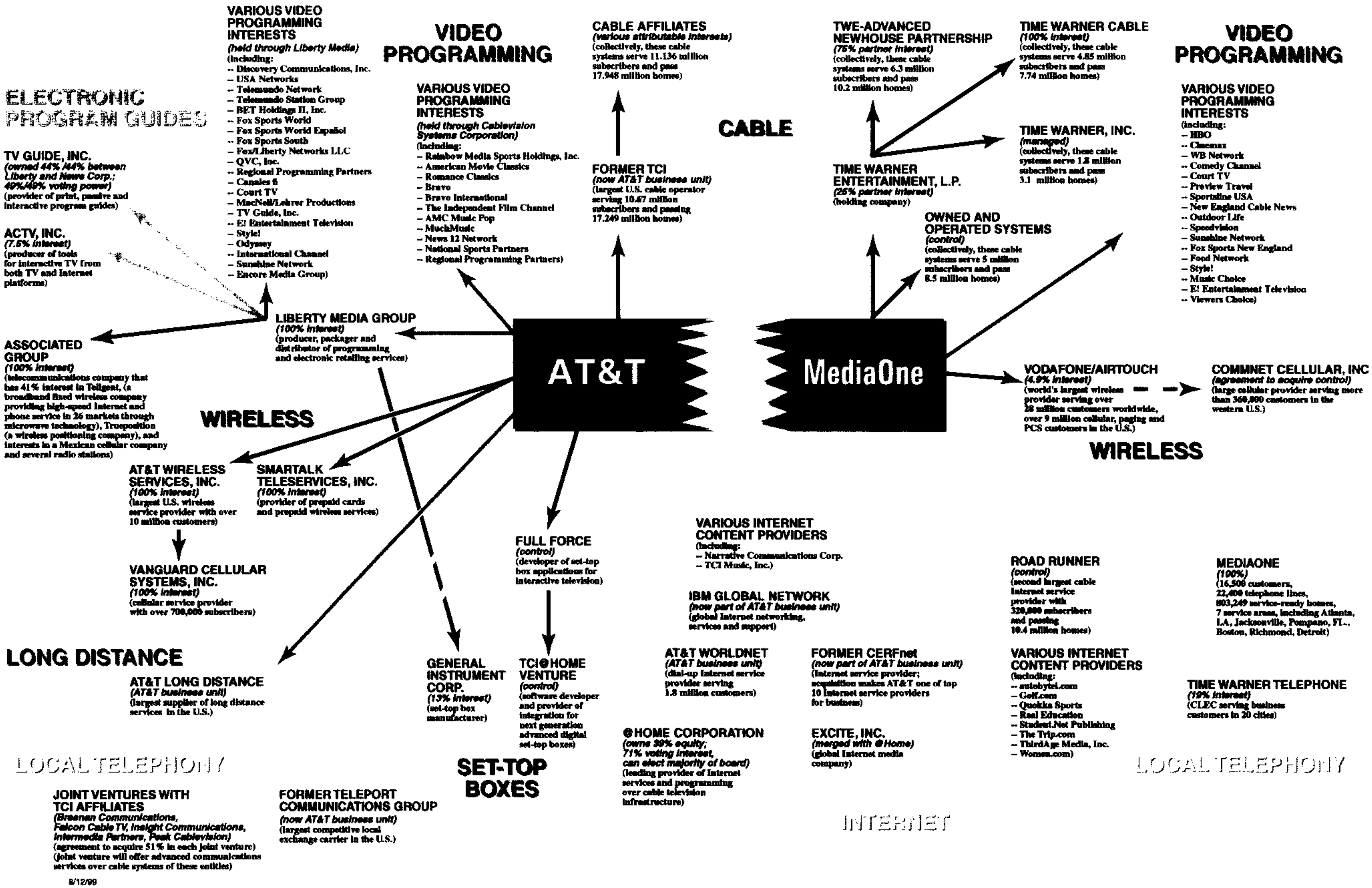
In contrast, AT&T has consistently urged the Commission to impose ever more burdensome regulations on comparable ILEC offerings, ostensibly to ensure the open telecommunications network necessary to promote consumer welfare. If the Commission continues to give effect to AT&T's hypocritical positions, ILECs that offer the same services as AT&T will remain in a regulatory briar patch that exacts an exorbitant price in dollars and delay before services are delivered to consumers. Such disparate regulatory treatment of similarly situated services and competitors will hinder the ability of telephone companies seeking to provide a viable competitive alternative to AT&T.

No demonstrated benefits. Notwithstanding these significant and tangible competitive harms that the merger would produce, AT&T's public interest statement abjectly fails to demonstrate that there are *any* benefits (let alone offsetting benefits) that are both "likely and verifiable" and "achievable only as a result of the merger," as required by the controlling *Bell Atlantic/NYNEX* standard (section VI). First, in marked contrast to the SBC/Ameritech merger, AT&T offers no firm service commitments and provides no affidavits detailing the merged entity's plans to compete in the local telephone or any other market. Even if it had made such commitments, AT&T's track record in fulfilling the claims made in the TCI merger is poor, as it has failed to live up to its commitment to open its broadband access system, leaving no basis to believe the touted benefits will occur.

Second, AT&T does not and cannot show that the merger would cause any of the claimed benefits to occur. Each company already is investing in upgrades needed to provide cable telephony. And AT&T's threat to abandon investment in digital cable upgrades if it cannot preserve its closed system is simply not credible.

* * *

Given the impenetrable web of cross-ownership interests the merger would create among AT&T, TCI, MediaOne, Time Warner, Liberty Media, Cablevision, Microsoft, Excite@Home, Road Runner, and the dozens of other companies in the AT&T family, it will be impossible to protect competition and consumers through conditions. The wide-ranging competitive harms stemming from the merger can be prevented only through denial of the Application.



ELECTRONIC PROGRAM GUIDES
TV GUIDE, INC.
(owned 44% /44% between Liberty and News Corp.; 49%/49% voting power)
(provider of print, passive and interactive program guides)
ACTV, INC.
(7.5% interest)
(producer of tools for interactive TV from both TV and Internet platforms)
VARIOUS VIDEO PROGRAMMING INTERESTS
(held through Liberty Media)
(including:
-- Discovery Communications, Inc.
-- USA Networks
-- Telemundo Network
-- Telemundo Station Group
-- BET Holdings II, Inc.
-- Fox Sports World
-- Fox Sports World Español
-- Fox Sports South
-- Fox/Liberty Networks LLC
-- QVC, Inc.
-- Regional Programming Partners
-- Canales ñ
-- Court TV
-- MacNeil/Lehrer Productions
-- TV Guide, Inc.
-- E! Entertainment Television
-- Style!
-- Odyssey
-- International Channel
-- Sunshine Network
-- Encore Media Group)
VIDEO PROGRAMMING
VARIOUS VIDEO PROGRAMMING INTERESTS
(held through Cablevision Systems Corporation)
(including:
-- Rainbow Media Sports Holdings, Inc.
-- American Movie Classics
-- Romance Classics
-- Bravo
-- Bravo International
-- The Independent Film Channel
-- AMC Music Pop
-- MuchMusic
-- News 12 Network
-- National Sports Partners
-- Regional Programming Partners)
CABLE AFFILIATES
(various attributable interests)
(collectively, these cable systems serve 11.136 million subscribers and pass 17.948 million homes)
FORMER TCI
(now AT&T business unit)
(largest U.S. cable operator serving 10.67 million subscribers and passing 17.249 million homes)
CABLE
TWE-ADVANCED NEWHOUSE PARTNERSHIP
(75% partner interest)
(collectively, these cable systems serve 6.3 million subscribers and pass 10.2 million homes)
TIME WARNER CABLE
(100% interest)
(collectively, these cable systems serve 4.85 million subscribers and pass 7.74 million homes)
TIME WARNER, INC.
(managed)
(collectively, these cable systems serve 1.8 million subscribers and pass 3.1 million homes)
TIME WARNER ENTERTAINMENT, L.P.
(25% partner interest)
(holding company)
OWNED AND OPERATED SYSTEMS
(control)
(collectively, these cable systems serve 5 million subscribers and pass 8.5 million homes)
VIDEO PROGRAMMING
VARIOUS VIDEO PROGRAMMING INTERESTS
(including:
-- HBO
-- Cinemax
-- WB Network
-- Comedy Channel
-- Court TV
-- Preview Travel
-- Sportsline USA
-- New England Cable News
-- Outdoor Life
-- Speedvision
-- Sunshine Network
-- Fox Sports New England
-- Food Network
-- Style!
-- Music Choice
-- E! Entertainment Television
-- Viewers Choice)
LIBERTY MEDIA GROUP
(100% interest)
(producer, packager and distributor of programming and electronic retailing services)
ASSOCIATED GROUP
(100% interest)
(telecommunications company that has 41% interest in Teligent, (a broadband fixed wireless company providing high-speed Internet and phone service in 26 markets through microwave technology), Trueposition (a wireless positioning company), and interests in a Mexican cellular company and several radio stations)
AT&T
MediaOne
VODAFONE/AIRTOUCH
(4.9% interest)
(world's largest wireless provider serving over 28 million customers worldwide, over 9 million cellular, paging and PCS customers in the U.S.)
COMMNET CELLULAR, INC
(agreement to acquire control)
(large cellular provider serving more than 360,000 customers in the western U.S.)
WIRELESS
WIRELESS
AT&T WIRELESS SERVICES, INC.
(100% interest)
(largest U.S. wireless service provider with over 10 million customers)
SMARTALK TELESERVICES, INC.
(100% interest)
(provider of prepaid cards and prepaid wireless services)
VANGUARD CELLULAR SYSTEMS, INC.
(100% interest)
(cellular service provider with over 700,000 subscribers)
LONG DISTANCE
AT&T LONG DISTANCE
(AT&T business unit)
(largest supplier of long distance services in the U.S.)
FULL FORCE
(control)
(developer of set-top box applications for interactive television)
GENERAL INSTRUMENT CORP.
(13% interest)
(set-top box manufacturer)
TCI@HOME VENTURE
(control)
(software developer and provider of integration for next generation advanced digital set-top boxes)
SET-TOP BOXES
VARIOUS INTERNET CONTENT PROVIDERS
(including:
-- Narrative Communications Corp.
-- TCI Music, Inc.)
IBM GLOBAL NETWORK
(now part of AT&T business unit)
(global Internet networking, services and support)
AT&T WORLDNET
(AT&T business unit)
(dial-up Internet service provider serving 1.8 million customers)
FORMER CERFnet
(now part of AT&T business unit)
(Internet service provider; acquisition makes AT&T one of top 10 Internet service providers for business)
@HOME CORPORATION
(owns 39% equity; 71% voting interest, can elect majority of board)
(leading provider of Internet services and programming over cable television infrastructure)
EXCITE, INC.
(merged with @Home)
(global Internet media company)
INTERNET
ROAD RUNNER
(control)
(second largest cable Internet service provider with 320,000 subscribers and passing 10.4 million homes)
VARIOUS INTERNET CONTENT PROVIDERS
(including:
-- autobytel.com
-- Golf.com
-- Quokka Sports
-- Real Education
-- Student.Net Publishing
-- The Trip.com
-- ThirdAge Media, Inc.
-- Women.com)
MEDIAONE
(100%)
(16,500 customers, 22,400 telephone lines, 803,249 service-ready homes, 7 service areas, including Atlanta, LA, Jacksonville, Pompano, FL., Boston, Richmond, Detroit)
TIME WARNER TELEPHONE
(19% interest)
(CLEC serving business customers in 20 cities)
LOCAL TELEPHONY
LOCAL TELEPHONY
JOINT VENTURES WITH TCI AFFILIATES
(Bresnan Communications, Falcon Cable TV, Insight Communications, Intermedia Partners, Peak Cablevision)
(agreement to acquire 51% in each joint venture)
(joint venture will offer advanced communications services over cable systems of these entities)
FORMER TELEPORT COMMUNICATIONS GROUP
(now AT&T business unit)
(largest competitive local exchange carrier in the U.S.)
8/12/99

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PETITION OF SBC COMMUNICATIONS INC. TO DENY APPLICATION

SBC Communications Inc. ("SBC"), by its attorneys, hereby submits its petition to deny the application of AT&T Corp. ("AT&T") and MediaOne Group, Inc. ("MediaOne") for authority to transfer control of MediaOne and its Commission licenses and authorizations to AT&T.[1] AT&T's acquisition of MediaOne would enable AT&T to dominate the cable industry and have unprecedented influence over related product markets. As shown herein and in the Declaration of Professor Jerry Hausman attached as Appendix A, the proposed transaction would give rise to widespread competitive harms in important new broadband markets, as well as serious violations of rules designed to preserve competition and protect the public.

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[1] *See AT&T Corp. and MediaOne Group, Inc. Seek FCC Consent For A Proposed Transfer Of Control*, CS Docket No. 99-251, DA 99-1447 (Public Notice) (July 23, 1999).

Consequently, consumers will pay more for less and will lose many of the very substantial economic and social benefits of an open and fully competitive broadband marketplace.

These dire consequences are made all the more pernicious by the regulatory disparity between the post-merger AT&T and incumbent local exchange carriers ("ILECs") with which it would compete. In almost every material respect, the rules are skewed to facilitate AT&T's goal of establishing a closed broadband pipe into the home that will permit it to create and sustain market power over the myriad of video, Internet, and other services to be delivered through that pipe. Yet, AT&T has utterly failed to demonstrate any likely and verifiable public benefits resulting from the merger that counterbalance the evident competitive risks and harms in order to justify a grant of transfer authority. Accordingly, the Application must be denied.

I. THE MERGER WOULD GIVE AT&T DOMINANCE OF THE ENTIRE CABLE INDUSTRY AND CONTROL OVER CONSUMER ACCESS TO SERVICES

In the Application, AT&T and MediaOne describe their assets as "complementary" in nature.[2] Complementary indeed, as the proposed transaction would enable AT&T to acquire such extensive audience reach and the levers to key industry assets so as to exercise market power in several communications market sectors. As detailed below, the proposed transaction would result in the combined company and its affiliates controlling the broadband pipe into almost two-thirds of the homes passed by cable in this country – more than double the number permitted by the cable horizontal ownership cap. In addition, the transaction would ensconce

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[2] *Transfer of Control of FCC Licenses MediaOne Group, Inc. to AT&T Corp.*, CC Docket No. 99-251, at 4 (filed July 7, 1999) ("Application").

AT&T at the center of a comprehensive web of ownership relationships (displayed graphically by the chart that follows the Executive Summary) and other affiliations involving numerous key companies in related sectors of the communications industry – giving it the opportunity to exert additional anti-competitive pressures on those product markets.

A. The Combined Company And Its Affiliated Systems Would Pass Almost Two-Thirds Of U.S. Homes Passed By Cable

In the Application, AT&T deliberately attempts to minimize the extensive reach of the combined entity in the cable market. It states that, after the transaction, AT&T would be involved in programming decisions for cable systems serving only 26.6 percent of all Multichannel Video Programming Distributor ("MVPD") subscribers nationwide.[3] AT&T further asserts that this equates to only 31 percent of U.S. cable homes passed.[4] Not only are these numbers unsubstantiated, but they grossly understate AT&T's actual holdings.[5]

Appropriate application of the cap and current attribution rules makes clear that, after the transaction, AT&T and its attributable affiliates would control almost two-thirds of cable homes passed nationwide. AT&T, through its acquisition of TCI, already has attributable interests in systems passing over 35 million homes.[6] The merger would appear to garner AT&T interests in cable systems serving at least 23.9 million more homes. Specifically, AT&T would acquire:

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3 *Id.* at 62.

4 *Id.* at 63.

5 *See, infra,* at I.B.

6 *See* Application at Appendix A. *See also* Letter to Magalie Roman Salas, Secretary, Federal Communications Commission, from Douglas G. Garrett, Senior Regulatory Counsel, AT&T (June 7, 1999) (specifying 35,197,000 cable homes passed).

- 100 percent of MediaOne, which serves roughly 5 million subscribers and passes 8.5 million homes; and
- MediaOne's partnership interest in Time Warner Entertainment L.P., which has:
    - 100 percent control over Time Warner Cable (4.85 million subscribers and 7.74 million homes passed);
    - a majority partner interest in TWE-Advanced Newhouse Partnership (6.3 million subscribers and 10.2 million homes passed);[7] and
    - although not mentioned in the application, management control of Time Warner, Inc.'s cable systems (1.8 million subscribers and 3.1 million homes passed).[8]

Thus, after the transaction, the combined entity would pass more than 62 million homes or 65 percent of the homes passed by cable nationwide.[9]

In addition, AT&T already has reached exclusive agreements to provide telephony services over various cable systems, including the systems controlled by Time Warner, Inc., Bresnan Communications, Insight Communications, Intermedia Partners, and Peak Communications.[10] AT&T has announced that, after the transaction, it expects to enter into a similar arrangement with Comcast, whose systems currently reach 4.5 million subscribers and

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[7] Application at Appendix B.

[8] *MediaOne 1998 Investor Handbook*, at 30 <http://www.mediaonegroup.com/investorinfo/publicationsframe.html>.

[9] Even if the management interest in Time Warner, Inc. were not attributable, the combined entity would still pass 58,981,000 homes or 62 percent of the homes passed nationwide. These calculations reflect the deduction of 2,686,000 homes passed for systems in which AT&T and MediaOne (through Time Warner) both currently hold interests (and thus would otherwise be double counted). Application at 62 n.151.

[10] *AT&T and Time Warner Form Strategic Relationship to Offer Cable Telephony,* News Release (Feb. 1, 1999) <http://www.att.com/press/item/0,1193,330,00.html>; *AT&T Reaches Agreements to Form Commercial Joint Ventures with Five Cable Operators*, News Release (Jan. 8, 1999) <http://www.att.com/press/item/0,1193,275,00.html>.

may increase by as many as 2,000,000 as a result of this merger.[11] Although not currently attributable for purposes of the horizontal cap, such exclusive arrangements clearly extend AT&T's influence over more systems and thus over more U.S. consumers.

B. The Transaction Would Also Position AT&T At The Center Of An Extensive Web Of Relationships Reaching Into Virtually Every Related Sector Of The Communications Industry

Aside from extending AT&T's already substantial reach within the cable market sector, the transaction would ensconce AT&T at the center of a vast array of ownership relationships and other affiliations involving key companies in related sectors of the communications industry. Through an interlocking "web" of interests—graphically shown in the previous chart—encompassing AT&T/TCI, Liberty Media, MediaOne, Comcast, Excite@Home, Road Runner, Microsoft and other major players, AT&T's pervasive reach would give it the ability and incentive to exert additional anticompetitive pressures on those product markets, particularly markets for new broadband services.

The proposed transaction would position AT&T as an Internet gatekeeper – able to control or influence the two dominant providers of broadband Internet access whose services are tied to the purchase of cable-modem access. Through its acquisition of TCI earlier this year, AT&T acquired control of At Home Corporation, the leading provider of Internet services and programming over the cable television infrastructure, serving 620,000 customers and passing 17

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[11] *AT&T and Comcast Agree to Swap Cable Systems*, News Release (May 4, 1999) <http://www.att.com/press/item/0,1193,467,00.html>.

million homes.[12] The acquisition of MediaOne would also give AT&T more than a one-third interest in Road Runner, which has 320,000 customers and passes 10.4 million homes.[13] Together, these companies serve approximately 98 percent of all cable-modem Internet subscribers and over 80 percent of all high-speed Internet access subscribers using any platform.[14]

The transaction would also expand AT&T's significant presence in related Internet businesses. In particular, the combined entity would have substantial interests in a major web portal[15] as well as a variety of Internet content providers.[16] Such vertical integration will only increase AT&T's market power over all Internet-related services.

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12 *Excite@Home Reports Second Quarter 1999 Results,* Press Release <http://www.home.net/news/pr_990720_01.html>. @Home recently merged with Excite, Inc., a major web portal, to create Excite@Home.

13 *Road Runner Continues Strong Growth*, Press Release <http://www.rr.com/rdrun/company/press/july13299.html>. Additionally, AT&T is one of the top 10 Internet providers for businesses through its WorldNet unit and newly acquired CERFnet. It would take little effort for AT&T to convert these customers over to broadband.

14 *See generally The Battle for the Last Mile*, The Economist, May 1, 1999, at 59; *@Home Network Reports First Quarter Results*, Press Release (Apr. 13, 1999).

15 As indicated above, AT&T-controlled @Home recently acquired Excite. In addition, through Microsoft's $5 billion investment, AT&T would have an equity relationship with the Microsoft Network, the nation's second largest ISP, and a score of Microsoft-owned websites.

16 AT&T controls Narrative Communications Corp., which provides media advertising and direct marketing solutions for the World Wide Web, and TCI Music, Inc., a music entertainment company delivering audio and video music via TV and Internet. In addition to the Microsoft properties discussed in the preceding footnote, by acquiring MediaOne, AT&T would gain interests in numerous other content providers including autobytel.com (nationally branded Internet-based purchasing program for new and certified pre-owned vehicles), Golf.com (home to NBC's golf coverage and online editions of Golf Digest and Golf World), Quokka Sports (new form of entertainment that brings fans in-depth event coverage), Real Education (provider of turnkey Internet-based learning solutions for higher education institutions and corporations),

Additionally, the proposed transaction would significantly add to AT&T's already substantial stable of video programming assets, garnering it significant ownership interests in roughly 60 percent of the most popular cable programming in the U.S. AT&T already holds a 100 percent equity interest in Liberty Media Group, whose principal programming and related assets include numerous programming channels, program production and distribution companies, and electronic retailers.[17] AT&T also holds indirect interests in a variety of other programmers through its interest in Cablevision.[18] In acquiring MediaOne, AT&T would obtain interests in additional programming assets, including many popular cable channels and production companies.[19]

Further, the combined entity would have substantial interests in manufacturers of software and/or equipment used to access and manipulate such programming. AT&T currently participates in the creation and manufacturing of electronic program guides through its interests in TV Guide, Inc.[20] and ACTV, Inc.[21] AT&T also has a significant presence in the set-top box

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(Continued...)
Student.Net Publishing (website with online content targeting college students), TheTrip.com (online travel agency), ThirdAge Media, Inc. (leading network of content websites for adults 45 and older), and Women.com (leading network of content websites for women). *MediaOne 1998 Investor Handbook* <http://www.mediaonegroup.com/investorinfo/publicationsframe.html>.

17 For a list of these assets, *see* Application at 9.

18 Cablevision has ownership stakes in Rainbow Media Sports Holdings, Inc. which owns numerous programming channels. For a list of these assets, *see* Application at 12.

19 For a list of these assets, *see* Application at 17 & n.43.

20 TV Guide, Inc. is a provider of print, passive, and interactive program guides.

21 ACTV, Inc. is a producer of tools for interactive TV from both TV and Internet platforms.

market through its control of the TCI/@Home venture[22] and Full Force,[23] as well as its investment in General Instrument Corp.[24] Microsoft's recent alliance with AT&T raises additional concerns about anticompetitive activity in these markets.[25]

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22 AT&T is engaged in a joint development effort with @Home to develop software and provide integration services for next generation advanced digital set-top boxes.

23 Through @Home, AT&T controls Full Force, a developer of set-top box applications for interactive television.

24 AT&T owns 13 percent of General Instrument through Liberty Media. Application at 12, n.31. General Instrument has announced that AT&T, through Liberty Media, has agreed to purchase an additional 10 million shares of General Instrument, raising AT&T's ownership stake to approximately 20 percent. Appendix A, Declaration of Professor Jerry A. Hausman, at 16 n.34 ("Appendix A, Hausman Declaration").

25 Through an existing agreement with TCI, Microsoft will install its proprietary Windows CE operating system in 5 million TCI cable set-top boxes. In addition, Microsoft's $5 billion investment in AT&T may put Windows CE in an additional 5 million AT&T next-generation cable set-top boxes. This compares to a market consisting of barely one million broadband set-top boxes today. And future generations of hardware for WebTV, the leading provider of Internet access via TV which is 100 percent owned by Microsoft, will also reportedly employ the Windows CE operating system. *See* John Markoff, *Microsoft Hunts Its Whale, The Digital Set-Top Box*, N.Y. Times (May 10, 1999) <http://www.nytimes.com/library/tech/99/05/biztech/articles/10box.html>.

AT&T's electronic program guide investments also may receive a boost from AT&T's recent alliance with Microsoft Corp. The companies have plans to create a "new, pay-one-bill service featuring interactive TV bundled with phone service, e-mail, and other Internet features—all through one, superfast cable," and to incorporate Microsoft's Windows CE operating system. *See* Noelle Knox, *Microsoft-AT&T Plan Combines TV, Telephone, E-mail*, The Arizona Republic, May 7, 1999 (AT&T currently plans to test this service in three cities, two of which will use the Microsoft operating system).

Microsoft is an increasingly common link between cable MSOs (both in the United States and abroad) and related broadband service companies and manufacturers. The software giant also owns 11 percent of Comcast and 10 percent of Road Runner. Moreover, Microsoft has invested a reported 5 million dollars as a "strategic partner" in @Home Solutions, which was formed in April 1999 to serve subscribers of small and midsize cable TV operators.

II. AT&T'S EXPLOITATION OF ITS DOMINANT POSITION IN MULTIPLE BROADBAND MARKETS WILL HARM CONSUMERS

AT&T has made clear that its acquisition strategy is premised on positioning itself for the day "when the cable device on the TV becomes a virtual communications center."[26] At that time, AT&T avowedly intends to assume a gatekeeper role, making sure that it controls access by consumers to broadband service providers and by such providers to consumers. As succinctly stated by TCI's chairman at the time of its merger with AT&T, they will "*have to go through us*."[27] Contemporaneous press reports explained that:

> Going 'through us' has been cable's game .... Now Malone foresees a *new gatekeeper role*, with the whole cable industry aligning with AT&T to form a single giant network ... @Home and [Road Runner] are poised to become *the electronic gateway to the Internet*.[28]

The CEO of @Home has echoed these sentiments, asserting that "[w]e have access to the home. If [another ISP] wants to get there with broadband, *they will have to work through us*."[29] He dismissed the notion that another ISP could reach potential broadband customers directly with one word: "ridiculous."

If achieved, the gatekeeper status sought by AT&T will confer on it an inordinate level of market power which AT&T fully intends to exploit in furtherance of its own private interests. For example, the head of AT&T's Internet businesses, Leo Hindery, could not have been more

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26 Remarks of C. Michael Armstrong, *Cable Ready: Convergence and the Communications Revolution*, 1999 NCTA Convention (June 14, 1999).

27 Ken Auletta, *The Talk of The Town*: *How the AT&T deal will help John Malone get into your house*, The New Yorker, July 13, 1998, at 25 (emphasis added).

28 *Id.*

candid about AT&T's plans in connection with the 10-minute video streaming limitation it imposes on ISPs accessed through Excite @Home: It is a "restriction which we imposed on @Home so that we were the determiner of how streaming video worked in our world ...."[30] The broad horizontal and vertical scope of AT&T's entanglements will give it both the incentive and ability to exert anticompetitive control over a host of other broadband offerings in which it has taken a financial interest or which merely must transit its closed last mile transmission pipe to consumers.

Just as in the case of cable-modem Internet access, where AT&T would have consumers pay twice to reach the ISP offering they want, the likely consequences of the merger will be to increase the costs of and reduce the choices available to consumers in each of the affected market segments. This will cause higher prices and fewer competitive alternatives for video programming services themselves, multichannel video programming distributors, cable set top boxes, electronic program guides, and broadband Internet access offerings. The public interest will not countenance such a result.

(Continued...)

[29] Saul Hansell, *The Battle For Internet Supremacy is Shifting to the Companies That Sell the Connections to Users*, N.Y. Times, June 29, 1998, at D4 (emphasis added).

[30] En Banc Hearing on Telecom Mergers to Discuss Recent Consolidation Activities in the Telecommunications Industry, Focusing on Three of the Proposed Mergers Before the Federal Communications Commission, Transcript (Oct. 22, 1998) ("Unofficial Hearing Transcript").

III. ON ITS FACE, THE MERGER VIOLATES COMMISSION RULES ENACTED TO PROMOTE COMPETITION AND PROTECT CONSUMERS

In order to protect against market domination and the damaging anticompetitive effects that follow, the Commission – often at the direction of Congress – has adopted ownership caps and cross-ownership limitations in cable and other communications services. The proposed transaction would clearly and substantially violate at least two of these. Nevertheless, AT&T virtually ignores such restrictions. Indeed, the Application only briefly mentions these important competitive safeguards – and understates the extent to which the transaction would violate these rules.

A. The Merger Would Not Only Violate The Cable Horizontal Ownership Cap, But Shatter It

The FCC's cable horizontal ownership cap rules prohibit any cable operator from having an attributable interest in more than 30 percent of the homes passed by cable nationwide.[31] While these rules have been temporarily stayed pending judicial review of the underlying statutory provision,[32] the Commission has recognized the potential anticompetitive effects against which they guard and, thus, has continued to monitor large cable operators' audience reach. For example, the agency recently ordered that MSOs must notify the Commission before

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[31] 47 C.F.R. § 76.503.

[32] *Daniels Cablevision, Inc. v. U.S.*, 835 F. Supp. 1 (1993).

acquiring attributable interests in any additional cable systems that would result in a total ownership percentage of 20 percent or more of homes passed nationwide.[33]

AT&T, however, cavalierly ignores these ownership cap and notification requirements. Instead, it provides an incomplete description of the combined company's holdings that fails to disclose the full extent of its cable reach post-merger. Substituting its own self-serving analytical framework that minimizes the calculated scope of its post-merger operations, AT&T disregards the rules' defined attribution criteria and reference market.

AT&T unilaterally calculates its attributable post-transaction cable systems based upon those systems for which it "would be involved in programming decisions or purchase programming,"[34] rather than those in which it would have an attributable interest or ability to influence as defined under the rules. As a result, AT&T excludes from its calculation its interest in Cablevision and two existing ventures with Time Warner, as well as the interest in Time Warner Entertainment, L.P. that it will acquire when the MediaOne transaction is completed.[35] Yet, the Commission has specifically rejected arguments that the attribution criteria in this context should focus exclusively on control, observing that its rules "have long recognized that

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[33] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, 13 FCC Rcd 14462, 14492 (1998).

[34] Application at 62.

[35] *Id.* at 62 n.151. Through this self-serving redefinition of the attribution rules, AT&T manages to delete 14,299,000 subscribers and 23,066,000 homes passed from its total number of attributable cable systems.

parties that have less than a majority equity interest in a media property can influence management and programming decisions."[36]

AT&T also resists using the homes passed standard in discussing its interests. Instead, AT&T bases its analysis on its subscribers (using its own limited attribution definition described above) as a percentage of all MVPD subscribers. Such an approach both understates AT&T's actual market power within the cable industry and ignores the pertinent market definition prescribed by the Commission. Where AT&T does mention in passing the percentage of cable homes passed by the combined entity, even that number is distorted. AT&T calculates that percentage using an unsubstantiated and inflated estimate of the total homes passed nationwide (100 million),[37] rather than the number endorsed by the Commission and generally used for such calculations (95.1 million).[38]

In fact, as discussed above, were AT&T correctly to apply the cable horizontal ownership cap and attribution rules, post-merger AT&T would have attributable interests in cable systems

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[36] *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992*, 8 FCC Rcd 6828, 6852 (1993). Accordingly, the Commission's ownership caps and cross-ownership rules in other communications services also deem minority interests attributable. *See, e.g.,* 47 C.F.R. §§ 20.6, 73.3555, 101.1003.

[37] Application at 63 n.153.

[38] *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd 24284, 24294 (1998) (*"Fifth Annual Video Competition Report"*). Interestingly, AT&T indicates that a study supporting the 100 million homes passed number was submitted to the Commission in October 1997. Application at 63 n.153. Yet, when the *Fifth Annual Video Competition Report* was released in December 1998, the Commission did not endorse this number, relying instead on more recent Kagan studies showing homes passed at 95.1 million in 1998. *Fifth Annual Video Competition Report,* at 13 FCC Rcd at 24294, Appendix B, Table B-1.

that pass almost two-thirds of the homes passed by cable nationwide.[39] Such extensive audience reach would not simply violate the cap, but completely eviscerate it.

It comes as no surprise, therefore, that AT&T offers no commitments to a plan for how it would divest systems or explanations for how the merger would benefit the public in the event the stay of the ownership cap were lifted. AT&T's failure to address how it would comply with the law is a grave omission.

B. The Merger Would Violate The Cellular Cross-Ownership Rule

In a similar effort to prevent anticompetitive activity in the mobile telephone market, the Commission has adopted several rules designed to limit the ability of one company to monopolize spectrum or own competing providers in the same geographic area. One of these is the cellular cross-ownership restriction, which prohibits any entity from having a direct or indirect interest in overlapping cellular systems in the same geographic area, unless the interests pose no threat to competition.[40] The rule underscores that an entity that actually controls a cellular licensee may not have *any* interest in an overlapping cellular licensee.[41]

In the proposed transaction, AT&T, the largest provider of wireless services (including cellular) in the U.S., would acquire MediaOne's interest in Vodafone Airtouch Plc, which

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39 *See, supra,* at I.A. This total would also include the 3.1 million homes passed by Time Warner, Inc.'s cable systems, over which MediaOne apparently has management control. Although not mentioned in the Application, MediaOne indicates such an attributable, management relationship in its 1998 Investor Handbook. *MediaOne 1998 Investor Handbook*, at 30 <http://www.mediaonegroup.com/investorinfo/publicationsframe.html>.

40 47 C.F.R. § 22.942.

41 *Id.*

provides cellular and other wireless services to over 9 million U.S. customers. Once again, AT&T acknowledges only in passing that this merger of interests would result in a number of violations of the cellular cross-ownership restriction – 37 to be exact.[42] Vodafone's announced agreement to buy CommNet Cellular raises the prospect of even more prohibited overlaps.[43] Nevertheless, AT&T fails to provide any analysis to explain or justify such overlapping interests. It seems to assume instead that the cross-block rule will simply be eliminated by the time the merger closes, will somehow not apply to its overlaps, or will be automatically waived.

Amazingly, AT&T even fails to identify which markets will contain overlaps, what the combined entity's interest would be in each licensee, or the number of actual competitors to the combined entity in each of these markets. Indeed, AT&T provides absolutely no basis upon which the Commission can conclude that the merged entity's ownership of these interests would pose no threat to competition under the rule[44] or upon which to justify an outright waiver. Absent such a showing, these overlaps are clearly inconsistent with the Commission's regulations and cannot be permitted.

For its part, AT&T merely notes that the merged entity's cross-block interests would not violate the CMRS spectrum cap.[45] However, the cross-block rule and the spectrum cap are

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42 Application at 40-41 n.91.

43 CommNet provides cellular service to approximately 360,000 customers located in the western United States.

44 AT&T does note that MediaOne has "monetized" most of its holdings in Vodafone, thus reducing its real interest. Application at 40. However, monetization has not been recognized by the Commission as a method of reducing attributable interests for purposes of the cellular cross-block rule.

45 47 C.F.R. § 20.6.