

But even if such arguments could be raised here, they should be rejected because they are premised on the faulty argument that the Merger will give AT&T monopoly power in the “broadband Internet access” market. As demonstrated below, however, AT&T post-Merger will have no ability to exercise market power in the provision of Internet access services or even in the provision of broadband Internet services, and there is accordingly no market failure or other justification for intrusive government regulation.

Opponents can claim otherwise only by disparaging their own competing services and then speculating that AT&T will in the future gain a monopoly. These claims have no basis in fact or theory. Because numerous companies using a variety of technologies are competing to provide consumers with Internet access services, AT&T and MediaOne will not be able to dominate Internet access or leverage market position into monopoly control of any other Internet-related businesses (which are not separate markets in any event). Because the Internet access market is competitive, any attempts by AT&T to engage in such behavior would only result in the loss of customers. In short, AT&T has no incentive to undermine its investments in new and upgraded facilities by denying consumers the benefits of the broadband revolution.

In the year since they filed oppositions to the AT&T-TCI merger, the Opponents have not sharpened their definition of “open access.” To the contrary, they continue to use the same vague and even inconsistent descriptions they proffered last year to describe the proposed condition. “Open access” remains little more than a rhetorical device. AOL, for example, asks the Commission to condition the Merger on an obligation that AT&T provide “non-affiliated ISPs connectivity to the cable platform on rates, terms and conditions equal to those accorded to

affiliated service providers.”²⁰¹ But AOL provides no details about how such an obligation would be implemented or enforced in the real world.

MCI asks the Commission to impose a “prohibition on any tying arrangement” as well as requirements that AT&T make its broadband facilities available for resale, permit CLECs, ISPs, and IXCs to interconnect with its broadband network at any “technically feasible point,” and provide nondiscriminatory interconnection at AT&T’s cable headend.²⁰² GTE asks the Commission to require AT&T and other cable providers affiliated with @Home or Road Runner to “afford competing ISPs open . . . and nondiscriminatory access to their cable modem networks.”²⁰³ U S West states only that it requests “an open access condition.”²⁰⁴ However open access is defined, there can be no doubt that a forced access requirement would require collocation with the cable operators’ facilities. The Commission cannot impose collocation requirements without specific statutory authority. *See Bell Atlantic Tel. Co. v. FCC*, 24 F.3d 1441, 1446-7 (D.C. Cir. 1994). No such authority has been granted.

Unlike some of the proponents of forced access, AT&T and MediaOne provide their subscribers with an “Internet experience” that is more open in ways that matter to consumers interested in the Web’s full capabilities. It is AOL, not AT&T or MediaOne, that has used its dominant position to keep its customers in a “walled garden.” AOL customers do not have the

²⁰¹ AOL at 4.

²⁰² MCI at 12, 16, 17.

²⁰³ GTE at 58-67.

²⁰⁴ U S WEST at 20.

freedom accorded subscribers of AT&T@Home or MediaOne Road Runner to bypass proprietary content and go right to the Internet.

In the real world, forced access will not provide more consumer choice. Instead, it will require pervasive and continuing government regulation on the Internet. And far from being “compelled” by the Communications Act, forced access would treat cable operators as common carriers and therefore is statutorily prohibited.

1. The Merged Entity Lacks Market Power In Any Relevant Market.

Regulatory intervention is appropriate only where the risk of monopoly power is substantial enough to warrant intervention and the proposed regulation will make consumers better off.²⁰⁵ Neither test is met here. As described below, a combined AT&T/Media One entity would not have monopoly power in any relevant market, and the Commission already has concluded that regulatory intervention is unnecessary given the healthy state of competition in the provision of advanced services.

a. There is a Single Market for the Provision of Broadband and Narrowband Services.

Although, as explained below and in the declaration of Professors Ordovery and Willig, the Merger will have no anticompetitive effect under *any* definition of the relevant market, proponents of forced access are plainly wrong in claiming that there is a separate market for “broadband Internet” or “cable Internet” services. Under settled antitrust and economic principles, broadband and narrowband Internet access services are in the same relevant market

²⁰⁵ Ordovery/Willig Decl. ¶ 67.

because there are now, and for the foreseeable future will continue to be, many opportunities for substitution between the two modes of access. Three key facts make this clear.

First, broadband service is priced competitively with narrowband service. When the Commission examined retail prices earlier this year, it found that the total monthly cost of broadband Internet access via cable modem is *exactly the same* as the monthly cost of narrowband Internet access; moreover, the “total first-year costs” were actually lower with the cable modem.²⁰⁶ This is no coincidence. Because they must win price-sensitive customers away from existing substitutes, AT&T and other broadband access providers are driven by market forces to price their services to compete with dial-up access.²⁰⁷

Second, consumers use both narrowband and broadband for the same core applications. The vast majority of valuable Internet applications, such as email and Web access, are available to users regardless of the specific ISP supplying the application, and the vast majority of content available to consumers over the Internet is not tailored to higher bandwidth speeds. Internet content providers can reach essentially the same set of consumers via narrowband or broadband

²⁰⁶ See 706 NOI Report ¶ 87, Chart 3. Specifically, the Commission found that the monthly cost to the consumer for dial-up access is \$20 for the telephone line and \$20 for Internet service. The total monthly cost of broadband access via cable modem is the same – \$40. *Id.* It is appropriate to include the cost of a second line when comparing the price of a cable modem with the price of dial-up access. As GTE admits, broadband customers “are typically high-volume users” who might otherwise “install a second phone line to use the data connection.” GTE at 18-19. See also Ordover/Willig Decl. ¶ 87; AT&T-TCI ¶ 67 (“Many customers purchase additional local telephone lines to provide the transport service for their Internet access services”).

²⁰⁷ See Marshall Decl. ¶ 9; Ordover/Willig Decl. ¶¶ 83-84. There is also evidence that decreases in broadband service prices may induce marginal narrowband access customers to select a broadband alternative. See Paul Kagan Associates, *High Speed Access Appeal Not A Given In Internet Homes* (May 31, 1999) (finding that price is more important than speed to the majority of users surveyed).

access, and there is no difference between the Web sites that any consumer can access whether using broadband or narrowband. While Opponents make much of the fact that @Home caches content from certain providers,²⁰⁸ AOL and other narrowband services are able to use caching to compete with broadband offerings.²⁰⁹ Caching content locally reduces congestion and allows customers to access this content much more quickly than having to download the content from the public Internet. Indeed, compression algorithms such as “MP3” and a host of caching technologies can be combined on a single platform to greatly enhance the performance of a given narrowband ISP.²¹⁰

Third, as Merger opponents have conceded elsewhere, at the present time and for years to come broadband and narrowband will be competing for the same mass market of Internet

²⁰⁸ For @Home and Road Runner, the use of high-performance caching servers located at the headend level permits more efficient use of cable’s high-speed capabilities to enhance the user experience. On @Home, content from third party websites is cached based on customers’ traffic patterns so that websites that customers visit stay in the cache while websites that customers do not visit exit the cache. Moreover, content providers control whether, and to what extent, their content will be cached by @Home. Caching in these circumstances is used merely to facilitate the customer’s access to this creative environment, not to disadvantage any other content provider. Medin Decl. ¶¶ 19-20.

²⁰⁹ See <<http://webmaster.info.aol.com/caching.html>>.

²¹⁰ See, e.g., *Value Added Services and Incremental Revenue Based on the Traffic Service Software Platform* <www.inktomi.com/products/traffic/tech/value.html>. SkyCache, a two year old company with backing from Intel, uses satellite technology to beam content directly to local ISP servers. <www.skycache.com/caching.html>. Companies like Akami provide a network of servers with dedicated housing that hosts content from customers around the world, keeping browsers from having to cross between ISP networks. John Borland, *Akami Aims to End Web Waits*, (June 15, 1999) <news.cnet.com/category/0-1004-200-343683.html>. Novell has rolled out an Internet caching system as well. Ben Heskett, *Short Take: Novell Teams With Foundry*, (April 30, 1999) <news.cnet.com/news/0-1003-200-341931.html>. Lucent has introduced technology to make downloading easier and faster. *Lucent Unveils New Caching Technology*, (April 26, 1999) <news.cnet.com/news/0-1005-200-341711.html>.

subscribers.²¹¹ As detailed in the Public Interest Statement, the leaders of the largest narrowband providers predict that narrowband will continue to win the battle for most of those consumers. Of course, at one end of the spectrum are some customers who demand high-speed access and are not sensitive to price, just as at the other end there are those who want low-priced access regardless of speed. But both broadband and narrowband providers aspire to more than those “tails” of the distribution, and thus it is the competition for the marginal customer that counts for market definition purposes.²¹² Many millions of current narrowband customers might be persuaded to switch to broadband service – *if* competitive and attractive offerings are available.

For this vast majority of consumers, the choice between narrowband and broadband involves trade-offs that make the two modes of access close substitutes. A person deciding whether to replace dial-up access with a cable modem service will recognize that the cable modem service offers speed and “always on” advantages. But dial-up access has its own advantages: a dial-up customer can access the Internet and use e-mail from remote locations; a cable modem customer cannot. Dial-up service can use existing customer premises equipment. For those dial-up customers who do *not* purchase an extra telephone line, it is less expensive than cable modem service. And for those who do, although the cost is comparable, they obtain an extra line that can also be used for regular voice communications and faxes.²¹³

²¹¹ As AT&T pointed out in the *AT&T-TCI* proceeding, “the fact that AOL has a lower growth rate in areas where @Home is providing service demonstrates that narrowband and broadband Internet access and content are substitutes and, accordingly, in the same market.” *AT&T-TCI* ¶ 77.

²¹² Moreover, there is no way for AT&T to identify those customers that want high speeds and are price insensitive (and charge them a higher price) from the overwhelming number of customers who are price sensitive. Ordover/Willig Decl. ¶ 93.

²¹³ Marshall Decl. ¶ 9.

By contrast, consumers who purchase a cable company's on-line service cannot yet use that capability to make phone calls, hook up a fax machine, or dial up to an employer's server.²¹⁴ Given these trade-offs, and the enormous number of Internet subscribers who will be choosing between access modes in coming years, it can hardly be doubted that there is substantial substitutability between broadband and narrowband Internet access services.

Merger opponents must disregard both the facts and the law to claim otherwise. GTE and Bell Atlantic, for example, argue that broadband does not compete with narrowband because "broadband connections afford consumers access to entirely different products and services."²¹⁵ For the most part, however, customers switching to broadband use it to access the *same* services.²¹⁶ And the fact that some services and content can only be truly enjoyed at high speed is simply not a market-defining fact. The courts have long recognized that two products can be in the same relevant market despite differences in features that are important to some customers. "A car with more features and a higher price is, within some range, in the same market as one with less features and a lower price."²¹⁷

²¹⁴ *Id.*

²¹⁵ GTE at 17; Bell Atlantic at 28-30. For a detailed rebuttal of Opponents' market definition arguments, *see* Ordoover/Willig Decl. ¶¶ 82-96.

²¹⁶ For instance, focus groups of GTE's broadband customers revealed that they "use their ADSL connections to upload and download files, send and receive email, conduct online research, play online games, maintain their own Web sites, and [*sic*] online chatting." <www.gte.com/AboutGTE/NewsCenter/News/Releases/ADSLBronze.html>.

²¹⁷ *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 598-99 (1st Cir. 1993) (rejecting argument that HMOs are in a separate product market from other forms of medical care that do not limit the patient's choice of doctors).

In the landmark case of *United States v. E.I. du Pont de Nemours & Co.*,²¹⁸ the Supreme Court rejected the claim that cellophane is in a different market from other wrapping materials because, “despite cellophane’s advantages, it has to meet competition from other materials.” In *FTC v. Owens-Illinois, Inc.*,²¹⁹ the court rejected the claim that glass containers were in a separate market from metal and plastic containers. Despite obvious differences in features, and the fact that *some* customers would only purchase glass, there was *enough* competition between the different materials to include them in a single market. Similarly, in *United States v. Gillette Co.*,²²⁰ the court refused to limit the market to fountain pens. Although some customers were devoted to fountain pens and would purchase nothing else, many other customers would “substitute other modes of writing,” and the market was defined accordingly. The Merger opponents cannot justify their market definition simply by pointing to differences in the features supported by broadband and narrowband, or by showing *some* customers do not regard the two as reasonable substitutes.

Opponents’ claim that broadband services must be in a separate market because they “cost much more” is similarly flawed. In fact, as noted above, the price of cable modem service (about \$40 per month) is comparable to the price of dial-up access when the customer purchases a second line. To be sure, before cable modem service came on the scene, some *LECs* charged much higher prices for *their* broadband DSL offerings, but those LEC prices have been coming

²¹⁸ 351 U.S. 377, 399 (1956).

²¹⁹ 681 F. Supp. 27 (D.D.C.), *vacated as moot following completion of merger*, 850 F.2d 694 (D.C. Cir. 1988).

²²⁰ 828 F. Supp. 78 (D.D.C. 1993).

down now that the LECs have decided to compete for the huge base of Internet subscribers who might decide to switch from narrowband to broadband.²²¹ In any event, it is common to see a wide range of prices among products in the same relevant market.²²² The “[c]ourts have repeatedly rejected efforts to define markets by price variances or product quality variances.”²²³

GTE also argues that broadband must be a separate product market because “the prices charged by cable providers for Excite@Home services vary from region to region.”²²⁴ This argument is refuted by the very source that GTE cites.²²⁵ It shows that the regional variations in price are quite small; the difference between the highest and lowest prices charged by various

²²¹ For example, U S West offers a \$30 per month DSL service, GTE has a \$32.50 offering, and Southwestern Bell has a \$39 package. See <www.uswest.com/products/data/dsl/>; <www.gte.com/DSL/pack_price.html>; <www.swbell.com>.

²²² Indeed, even within the so-called “broadband market,” there is a wide range of prices. Depending on the access speed, the price for residential DSL services ranges from \$50 to \$190 at Bell Atlantic, from \$39 to \$129 at Southwestern Bell, from \$30 to \$80 at US West, and from \$32.50 to \$95 per month at GTE. See <www.bellatlantic.com/infospeed/more_info/pricing.html>; <www.swbell.com>; <www.uswest.com/products/data/dsl/>; <www.gte.com/DSL/pack_price.html>.

²²³ *Murrow Furniture Galleries, Inc. v. Thomasville Furniture Indus., Inc.*, 889 F.2d 524, 528 (4th Cir. 1989) (rejecting argument that premium, brand-name furniture is a separate market). For example, in *Matter of Coca-Cola Bottling Co of New York*, 93 F.T.C. 110 (1979), the relevant market was “all wines,” and thus encompassed products that varied enormously in price and quality. The FTC rejected an attempt to place Mogen David and other low-priced, sweetened wines in a separate product market because “the record demonstrates at least some competitive overlap or interchangeability of end use between Mogen David and other wines.”

²²⁴ GTE at 27.

²²⁵ See <<http://www.home.net/source/>>. It is also refuted by the ILECs’ public statements. “While other companies may be making noise about DSL, we’re making our numbers with aggressive deployment and pricing, increasing customers, and a hockey-stick-shaped growth curve.” *U S West “MegaBit Services” ADSL Subscriber Rate Jumps More Than 250 Percent in First Half of 1999* (U S West Press Release Aug. 17, 1999) <<http://www.uswest.com/news/081799.html>>.

cable operators – who independently determine the prices they will charge for @Home-based services in their respective service areas – is only \$5 per month. Moreover, the cited data show that the cost of narrowband service *also* varies by region (because of differences in local telephone rates). Thus, the price variations, although small, are entirely consistent with the other evidence establishing that broadband and narrowband are competing products in the same relevant market.²²⁶

Remaining arguments are equally unfounded. GTE proclaims in a caption that consumers “Refus[ed] to Switch to Narrowband Service in the Face of a Significant Broadband Price Increase.”²²⁷ This is pure fiction. Nowhere in its filing does GTE identify any significant broadband price increases, let alone a refusal by broadband customers to switch in response. Moreover, GTE’s assertion that “broadband users are not sensitive to changes in price”²²⁸ is belied by GTE’s own behavior. The company recently cut its DSL price by 20 percent, and now offers customers a variety of DSL services at different speeds with prices ranging from \$32.50 to \$215.²²⁹ Moreover, GTE is teaming up with AOL to offer DSL service to existing AOL subscribers for about \$20 per month.²³⁰ Thus, GTE is marketing its products on the assumption

²²⁶ See Ordoover/Willig Decl. ¶ 87. The Commission should disregard Bell Atlantic’s citation of a study by Dr. Hausman that was submitted in connection with the TCI merger. Bell Atlantic at 31-32. In that proceeding, AT&T explained why the Hausman study was fundamentally flawed and why, in any event, it supported the conclusion that broadband and narrowband are in the same product market. Dr. Hausman did not resubmit his study in this proceeding, and Bell Atlantic makes no attempt to respond to those criticisms. See Ordoover/Willig Decl. ¶ 94.

²²⁷ GTE at 26.

²²⁸ *Id.* at 27.

²²⁹ See <www.gte.com/DSL/pack_price.html>; <www.gte.com/AboutGTE/NewsCenter/News/Releases/ADSLBronze.html>.

²³⁰ See <www.gte.com/AboutGTE/NewsCenter/News/Releases/ADSLtoAOL.html>.

that many customers *are* price-sensitive and, further, that today's narrowband subscribers will switch to broadband if attractive prices are available.

Finally, the evidence that GTE cites to support its claim that the key Internet players treat narrowband and broadband as services that do not compete,²³¹ proves exactly the opposite. The major ISPs are developing broadband platforms – such as “Turbo Yahoo!,” “AOL Plus” and “Lycos Lightning” – precisely because they know that millions of Americans will be choosing between broadband and narrowband.

In sum, no evidence refutes the fact that the mass market of Internet subscribers provides an enormous arena of competition between narrowband and broadband providers. As long as there are millions of narrowband customers who might switch to broadband, the pricing of the latter will be constrained by the pricing of the former. At the present time, and for the foreseeable future, broadband and narrowband Internet access services are therefore in the same product market.

b. Broadband Services Are Extremely Competitive.

Even looking only at broadband services, the Internet access market is vigorously competitive. The Commission has examined the market for broadband services twice in the past year and both times it has concluded that healthy competition is developing between a variety of providers using a multitude of technologies.²³² Unsatisfied with the Commission's conclusions and refusing to acknowledge the substantial broadband competition AT&T faces, the Opponents

²³¹ See GTE at 22-25.

²³² 706 NOI Report ¶¶ 7, 35, 98; AT&T-TCI ¶¶ 93-96. See also Letter from William E. Kennard, Chairman, Federal Communications Commission, to Mr. Kenneth S. Fellman, Esq., Chairman, Local & State Government Advisory Committee (Aug. 10, 1999).

resort to disparaging their own services and playing up the strengths of cable modem services, in sharp contrast to their own SEC filings.²³³ In fact, the broadband alternatives to cable modem service are a real and vibrant presence in the marketplace.

The most obvious competitors of broadband cable modem services are the DSL services being deployed throughout the nation by incumbent and competitive LECs. DSL technology provides ultra-fast, always-on access to the Internet over ordinary copper phone lines. By the end of the second quarter of 1999, there were almost two hundred thousand DSL lines in service in the United States.²³⁴ According to industry analysts, the number of DSL subscribers is growing at a significantly faster rate than that for cable modem services.²³⁵ Goldman Sachs projects that there will be half a million DSL subscribers by the end of 1999.²³⁶

Although the ILECs attempt to deflect attention from their DSL services by pointing out “technological” limitations on these services, the truth is that the only real limitation on DSL technology is the unwillingness of the ILECs to make the necessary investments. Current technological advancements have already been deployed to minimize many, if not all, of these supposed technical limitations.²³⁷ Continuing technological solutions, if ILECs’ are willing to

²³³ See 1998 Ameritech Corp. 10-K at 5 (December 31, 1998).

²³⁴ See *DSL Deployment Surges Well Beyond Projections; Grows 5 Times Faster Than Cable in 6-Month Period*, (August 16, 1999) <<http://www.telechoice.com/content/pressreleases/8171999.asp>>.

²³⁵ *Id.* See also U S WEST Press Release <www.uswest.com/news/081799.html> (“DSL is growing at a consistently faster pace than cable modem services.”).

²³⁶ See *The Race to Build the Broadband Kingdom*, Goldman Sachs Investment Research (August 12, 1999).

²³⁷ Shulman Declaration ¶¶ 14-25.

make the necessary investment to upgrade their networks, will expand the ILECs' already substantial ability to offer xDSL services to achieve nearly ubiquitous coverage.²³⁸ For example, while basic DSL was once available only within 18,000 feet of a central office that has been equipped with a DSL access multiplexor ("DSLAM"),²³⁹ DSL access products can now carry DSL services to residences with loops that are as much as 20 miles (120,000 feet) from the central office.²⁴⁰ Equipment manufacturers have also developed and deployed next generation DLCs that have the ability to bring DSL services to neighborhoods served by DLCs today by integrating the DLC/DSLAM functions at the ILEC's remote terminal.²⁴¹

In addition to these technological advancements, the ILECs fail to address the impact that introduction of the G.lite standard, an ITU-sponsored standard that will allow "plug-and-play" ADSL modems, will have upon the availability of DSL service, and, at least in this proceeding, they likewise ignore other available advantages that DSL service enjoys by virtue of its scalability and its reliance on a dedicated line architecture that passes over 98 percent of all

²³⁸ *Id.*

²³⁹ Analysts estimate that approximately 75 percent of all telephone lines are within 18,000 feet of an ILEC's central office. *See, e.g.,* Salomon Smith Barney Equity Research, *xDSL - Breaking the Local Loop Bottleneck* (April 9, 1999) at 5.

²⁴⁰ Shulman Decl. ¶¶ 14-15. Recently, GoDigital Telecommunications announced a DSL access product that can carry DSL services to residences more than 20 miles from a central office even without the use of a Remote Terminal. *See GoDigital Telecommunications, Inc. Introduces Long Loop High Speed Internet Access Support with its GDSL BRI-3 Product Line*, <www.godigital.com/press/index.html> (March 21, 1999). Copper Mountain has teamed with GoDigital to provide voice-over-IDSLS. *See, e.g., Copper Mountain enables DSL Voice*, ISP Business News (August 23, 1999).

²⁴¹ *See* Shulman Decl. ¶¶ 16-19. *See also Lucent Technologies Launches Breakthrough DSL Platform to Deliver High-Quality Voice, Data and Video Services*, (September 7, 1999) <http://biz.yahoo.com/bw/990907nj_lucent_1.html>.

United States households.²⁴² In addition, this architecture allows incumbents to avoid incurring the lion's share of the costs for upgrading a line with DSL until it has a DSL customer.²⁴³ As a result of these developments, analysts' predictions that 90 to 95 percent of American homes will be DSL-capable within the next five years reflect the most realistic representation that DSL services will be widely available to consumers.²⁴⁴

Other broadband competitors use satellite facilities to deliver high speed Internet access services. One advantage of satellite technology over other high-speed access methods is its widespread availability – satellite Internet access services can be provided to any location in the United States. Another advantage is the capability to provide service immediately upon request, without the need to make changes to the network infrastructure or incur significant incremental costs. Despite Opponents' claims to the contrary, several companies are currently providing satellite Internet access service, including DirecPC,²⁴⁵ eSat, Inc.,²⁴⁶ Gilat,²⁴⁷ NSN InSAT, and

²⁴² Shulman Declaration ¶¶ 6, 11-13. In their public pronouncements, GTE touts the advantages of DSL over cable modems. See "DSL vs. Cable Modems," <www.gte.com/dsl/comp.html> (GTE web site discussing why DSL service is superior to cable modem service).

²⁴³ In contrast, due to the shared nature of cable services, the entire area served by a headend office must be upgraded in order to provide service to any single customer.

²⁴⁴ According to Goldman Sachs analysts, by year-end 2004, upwards of 90% of American homes will be DSL capable. See Goldman Sachs, *Communacopia: The Race to Build the Broadband Kingdom*, (August 12, 1999); see also *The Cook Report* (September 1999) <<http://www.cook@cookreport.com>> (once the distance of DSL connectivity extends to 5.5/6 miles, 95% of homes will be reachable by DSL technology); Carol Wilson, *Is 'G.Lite' ADSL the Real Thing?* Inter@ctive Week (November 2, 1998) (discussing ITU approval of a G.Lite-sponsored ADSL standard designed to better deliver a user-friendly DSL service to the home).

²⁴⁵ DirecPC touts broadband satellite as the only technology platform that can offer "nationwide access to the Internet at speeds of up to 400 kbps today." <<http://www.direcpc.com/consumer/index>>. ZDNet describes the DirecPC services as "fast, useful, and affordable." Frank J. Derfler, Jr., *DirecPC 2.0*, ZDNet (Aug. 25, 1998) <<http://www.zdnet.com/products/stories/reviews/0,4161,2131474,00.html>>.

Visiosat. All of these companies provide medium to high speed downstream Internet access (400 kbps or higher) and medium to low speed upstream access (56 kbps and higher).

Another serious competitor for cable modem services is broadband fixed wireless. Despite GTE's claim that "broadband market analysts" have written off the wireless broadband industry, several companies are currently deploying or conducting trials of broadband fixed wireless services, including American Telecasting Inc.,²⁴⁸ CAI Wireless Inc.,²⁴⁹ CS Wireless Inc.,²⁵⁰ Speedus.Com,²⁵¹ DirectNET,²⁵² Teligent Fixed Wireless,²⁵³ SpeedChoice,²⁵⁴ Advanced

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²⁴⁶ eSat features high-speed satellite Internet access within the United States and has plans to extend service to Asia, Europe, Africa, South America and the Middle East. <www.esatel.com/carrier.htm>.

²⁴⁷ A leader in VSAT technology, Gilat Satellite Networks Ltd. provides satellite based, end-to-end enterprise networking and interactive broadband data services to six continents. This Israel based company's largest customer is MCI/US Postal Service. <www.gilat.com>.

²⁴⁸ American Telecasting Inc. offers high-speed Internet access through its featured WANTWEB. ATI's customer markets are primarily based in the Western and mid-Central United States. <www.amtele.com/ci_index.htm>.

²⁴⁹ CAI Wireless offers high-speed Internet access service using MMDS spectrum in Washington, D.C., Philadelphia, Boston, Rochester, Albany and New York City. <www.caiwireless.com>.

²⁵⁰ CS Wireless Systems provides high-speed Internet access using MMDS spectrum in San Antonio, Cleveland, Dayton, Minneapolis and Bakersfield, CA. <www.caiwireless.com/markets.html>.

²⁵¹ Speedus.com services the Manhattan, Brooklyn and Queens NYC metro regions with high speed Internet access via a local multi-point distribution service ("LMDS") spectrum. <www.speedus.com>.

²⁵² DirectNET offers wireless Internet service in South Florida <www.directnet1.net>.

²⁵³ Teligent Fixed Wireless provides a digital wireless network for small to mid-size businesses in all major metropolitan markets across the United States. <www.teligent.com>.

Radio Telecom,²⁵⁵ GoFast,²⁵⁶ Nucentrix Broadband Networks,²⁵⁷ IJNT,²⁵⁸ People's Choice TV,²⁵⁹ Wavepath,²⁶⁰ Wireless One,²⁶¹ and WBS Cable TVM. Fixed wireless spectrum is broad enough to carry high-bandwidth data applications, including video-over-data and voice-over-data.²⁶² MMDS spectrum, for example, offers several times the bandwidth of DSL.²⁶³ Other companies are using spectrum in the MDS, ITFS, and LMDS bands.

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²⁵⁴ A wireless, data communications service and an ISP, SpeedChoice services nine metropolitan markets in the Midwest and Southwest. <www.speedchoice.com>.

²⁵⁵ ART combines fiber-optic and broadband wireless technologies to offer a data communications network in the San Jose, Seattle, Phoenix and Portland metropolitan areas. <www.art-net.net>.

²⁵⁶ GoFast.Net offers end-to-end Internet access using DSL and IDSN technology. <www.gofast.net>.

²⁵⁷ Nucentrix Broadband Networks provides broadband wireless Internet access in small to midsize markets in the central United States <www.nucentrix.net>.

²⁵⁸ IJNT International delivers wireless Internet access to Utah, California and Texas. <www.ijnt.net>.

²⁵⁹ People's Choice TV offers wireless broadband services in Chicago, Detroit, Indianapolis, Houston, Phoenix, St. Louis, Milwaukee, Salt Lake City, Tucson and Albuquerque. <www.sprint.com/Stemp/press/releases/9904/9904120773.html>.

²⁶⁰ Concentric offers its broadband wireless service in partnership with Wavepath using privately licensed MMDS spectrum in the 2.1-2.6 GHz band. Concentric offers both asymmetric and symmetric service at speeds from 384K to 1.5mb. Through its affiliation with Wavepath, the San Francisco Bay area's leading high-speed wireless Internet connectivity company, Concentric's wireless technology is installed in thousands of houses in the San Francisco area and it plans to expand the service and roll it out in other areas. <www.concentric.com> or <www.wavepath.com>.

²⁶¹ Wireless One provides broadband high-capacity access in Southeastern states such as Florida, Georgia, Tennessee, Alabama, Mississippi, Texas and Louisiana. <www.wireless-one.com>.

²⁶² Jason Krause, *Wireless Cable Makes a Surprise Comeback*, The Industry Standard (April 29, 1999) <www.thestandard.net>.

As explained in detail in the accompanying Declaration of Professors Ordoover and Willig,²⁶⁴ claims that AT&T will have some sort of “first mover” advantage in a “broadband” market are entirely misplaced.²⁶⁵ Arguments that cable modems are “first-to-market” define the market in an exceedingly narrow – and static – fashion. As demonstrated herein, the market is much more dynamic, with numerous competitors offering alternatives to cable modem technology. It is too early to tell which technologies will ultimately prove successful, or whether any one technology will someday dominate. Rather than imposing a burdensome requirement that will hobble the provider of one promising new technology, consumers will be served best by an environment that encourages more competition – from firms using cable, wireless, wireline, xDSL, satellite, and other technologies as yet unknown.

More specifically to this Merger, AT&T and MediaOne have only begun deploying cable modem services nationwide. Opponents may argue that cable companies have insurmountable “advantages,” but the facts do not bear them out. Even in the areas in which AT&T has upgraded its systems, only about 2% of AT&T subscribers take the @Home service. As for MediaOne, approximately half of its cable systems have been upgraded so as to be capable of

(. . . continued)

²⁶³ *Overview of Wireless Cable Modem Technology and Services*, (<www.cabledatacomnews.com/wireless/cm10.html>).

²⁶⁴ Ordoover/Willig Decl. ¶¶ 109, 127-35. This view is shared by other economists. Professor Scherer has explained why it is extremely difficult to pick out “first movers.” See F.M. Scherer, *First-Mover Advantages from Pioneering New Markets: Comment*, 9 Rev. Indus. Org. 173 (1994). Moreover, there is no guarantee that industry pioneers will succeed in developing a mass market. See *Why First May Not Last*, *The Economist*, Mar. 16, 1996, at 65. Nor should innovation be blocked to protect monopolists who choose not to innovate.

²⁶⁵ See GTE 38-39, 52-53; SBC 43; Rubinfeld/Sidak Dec. ¶ 51; Gertner Dec. ¶¶ 17, 26-27.

providing Road Runner.²⁶⁶ Even in these upgraded systems, only about 3% of MediaOne subscribers take the Road Runner service. For both companies, upgrading the remaining systems will take additional time and money.

The forced access proponents attempt to side-step these inconvenient facts by hypothesizing that the Merger will give AT&T the ability to impose proprietary interfaces.²⁶⁷ The truth, however, is that both AT&T and MediaOne have used *open* standards in their broadband systems – in contrast to the AOL's proprietary standards for instant messaging and e-mail – and AT&T has publicly stated that it is committed to the continued use of open standards.²⁶⁸

As the nascent player in Internet services, AT&T has neither the incentive nor the ability to change course and impose proprietary standards in the future. The inescapable fact is that AT&T and MediaOne provide access to only a tiny fraction of the Internet subscribers in this country. If AT&T were to abandon its commitment to an open, compatible platform, it would have to persuade content providers to develop material specifically for its system. Any content providers dealing with AT&T would thus face higher costs (because of the need to accommodate AT&T's proprietary design) and the extra trouble would net them *less* exposure (because their applications and content could not be accessed by customers connecting to the Internet by other means). Such a strategy would reduce the incentive that content providers have to develop

²⁶⁶ See Card Decl. ¶ 7.

²⁶⁷ See Gertner Decl. ¶¶ 17, 26-27; Rubinfeld/Sidak Decl. ¶ 51.

²⁶⁸ Marshall Decl. ¶ 11-13.

material for AT&T's platform. In these circumstances – when a firm must depend on the innovative activities of others – there are strong incentives toward adoption of open standards.²⁶⁹

Equally, if not more, important, customer resistance would defeat a proprietary strategy of adopting closed standards (and hence the incentive to attempt it). Customers want access to as much content as possible. Having only a small fraction of Internet subscribers, AT&T must convince customers to switch from the industry leaders in order to make its investments pay off.²⁷⁰ That is why AT&T is committed to open standards.

In any event, the train has already left the station. Virtually all Internet content is written to existing open, compatible standards which are used industry-wide and are constantly reviewed and updated by standard-setting bodies such as the Internet Engineering Task Force (“IETF”).²⁷¹ And it is by now well established in the Internet arena that market forces reward those who embrace the open standards and punish those who attempt to displace them.²⁷² As Lemley observed, “it seems indisputable that the [Internet] market is driven towards standardization by a variety of forces.”²⁷³

²⁶⁹ See Ordoover/Willig Decl. ¶¶ 133-35.

²⁷⁰ *Id.* ¶¶ 127-35.

²⁷¹ See Medin Decl. at ¶ 18. One need only skim through the activities of the IETF's many working groups to appreciate the breadth and depth of its standard-setting activities. See <<http://www.ietf.org/proceedings/98dec>>.

²⁷² See Ordoover/Willig Decl. ¶ 131.

²⁷³ Mark A. Lemley, *Antitrust and the Internet Standardization Problem*, 28 Conn. L. Rev. 1041, 1045 (1996). See also Mark A. Lemley and David McGowan, *Legal Implications of Network Economic Effects*, 86 Calif L. Rev. 479, 552 (1998) (“The success of the Internet is due largely to its spectacular interoperability”); William Kennard, *Wall Street Journal*, p. A18, Aug. 24, 1999 (“the Internet's open protocols as well as FCC decisions not to regulate the Internet - - are at the heart of the network's growth. E-Mail, the Web and Internet radio are only some of the applications that have been developed and deployed in this open environment”).

Moreover, there is no truth to opponents' claim²⁷⁴ that, once cable broadband gains a foothold, its customers will be "locked in" due to the prohibitive cost of switching to other carriers. GTE turns the theory on its head. AT&T does not impose any such switching costs. Its Internet customers pay only monthly charges pursuant to short-term contracts. Indeed, the switching costs that GTE complains about are not those charged by AT&T, but those imposed by GTE and its fellow LECs. *See* GTE at 47-48 ("The installation costs for ADSL range from \$100 to \$500, and modems can cost as much as \$610"). The issue, therefore, is not one of AT&T locking customers in, but of its competitors imposing unnecessary up-front charges – which is hardly a reason to say that the Merger is not in the public interest.

c. There Is No Separate Market for "Cable Internet Services."

In a futile effort to define a "market" that they can claim AT&T would "monopolize," some opponents argue for a separate "cable Internet services" market.²⁷⁵ There is no basis for such an argument. Narrowband and other broadband providers can and do substitute for cable Internet services. But even if this were a merger of @Home and Road Runner – which it is

²⁷⁴ GTE at 47.

²⁷⁵ Most Opponents argue that broadband is a separate market. *See, e.g.*, GTE 16-18; U S West 14-15; MCI 9. Some argue that cable modems are the "preferred" means of broadband access. *See, e.g.*, Bell Atlantic 20-22, 30-31; SBC 40-41; U S West 16; GTE 29, 30-31. As a result, they claim the Merger will allow AT&T to eliminate Road Runner, which is its only real competition in that market. *See, e.g.*, Ameritech 26. Only one Merger opponent argues that cable Internet services comprise a stand-alone market. Cooper Report (CU/CFA) 55-60. Although this argument is not supported by any meaningful data, there is no doubt that the Merger would not pose any anti-competitive effects even in such a narrowly defined market. *See infra*.

not²⁷⁶ – there would be no anticompetitive effects. Looking solely at cable Internet services, the Merger does not materially reduce choices for any cable subscriber or any cable operator.

@Home and Road Runner services do not currently compete in any local geographic market. Even Opponents concede such a “merger” would not increase concentration in any relevant market.²⁷⁷ Moreover, there are many companies that could provide cable Internet services in the event that a combined @Home/Road Runner attempted to raise prices, including those already discussed in the Public Interest Statement:

Convergence.com, an Atlanta-based company that provides high speed Internet access for its cable customers, which include Rifkin & Associates, Time Warner, Tele-Media, and Wharf Cable;²⁷⁸

High Speed Access Corp. (HSA), which recently announced new agreements with sixteen cable operators passing over 300,000 homes, bringing HSA’s total affiliate footprint to 1.8 million homes;²⁷⁹

Befera Interactive Cablenet, which is partnering with cable operators covering 120,000 homes in the central U.S, including Range Cable and Midwest Communications in Minnesota;²⁸⁰ and

Online System Services Inc., which provides a turnkey Internet package designed for small cable operators.²⁸¹

²⁷⁶ @Home and Road Runner will each remain an independent company after the Merger, with AT&T able to exert only negative control over each.

²⁷⁷ See Rubinfeld/Sidak Decl. at 22.

²⁷⁸ See <www.convergence.com/news_center/docs/rifkinrelease.html>.

²⁷⁹ See <www.cabledacomnews.com/sep99/sep99-6.html>.

²⁸⁰ Befera provides complete end-to-end digital turnkey options for medium-sized cable systems. See <www.befera.com>.

²⁸¹ Online System Services’ Internet package, i2u, offers cable operators an integrated package that includes local cable TV advertising insertion management, Internet content, and commerce applications. See <www.cabledacomnews.com/jul98/july98-5.html>.

Such alternatives would constrain any attempt by @Home or Road Runner to exercise market power. In this regard, as Professors Ordover and Willig point out, the ILECs' repeated references to the fact that many large cable companies have chosen either @Home or Road Runner, provides no basis for concluding that competing cable modem services are inferior, because many of those cable companies hold equity interests in either @Home or Roadrunner.²⁸²

Even in the absence of existing alternative suppliers, however, a company could easily and quickly enter the market to provide broadband services in the event that @Home or Road Runner attempted to increase prices. The equipment necessary to provide high-speed caching is commercially available, and any broadband access provider could tailor its services to the cable marketplace in the event that opportunity arose. Moreover, even if AT&T were to acquire a "monopoly" on broadband access to cable subscribers in its service area, it would have no incentive to foreclose others from providing content, portal services, or Internet access to subscribers. Any attempt to block customers' access to other portals or content, or to more efficient providers of cable modem service, would reduce the value of Internet access to subscribers, reducing the amount that subscribers would pay for the service.²⁸³

d. The Merger Does Not Create Or Enhance The Likelihood Of Anti-Competitive Effects In Other So-Called "Markets."

Numerous Merger opponents argue that the Merger will allow AT&T to engage in anti-competitive conduct with respect to neighboring markets. In doing so, these parties ignore or fail

²⁸² See Ordover/Willig Decl. ¶¶ 104-06.

²⁸³ See *id.* ¶¶ 120, 126.

to recognize several essential points.²⁸⁴ First, as demonstrated above, AT&T lacks a monopoly or market power in *any* relevant market. In the absence of market power, there is no basis for arguments by Merger opponents that AT&T has unique advantages in neighboring markets.

Second, because AT&T and MediaOne customers can access the Internet through a simple mouse click, AT&T could not realistically expect to capture any monopoly rents by “leveraging.” Consumers can – and significant percentages do – readily bypass AT&T’s preferred content or applications by going straight to the Web, and thus could easily defeat any potential “leveraging” strategy. The Internet also makes it possible for competitors to reach AT&T’s subscribers, eliminating the possibility of anti-competitive “tying” as well. More to the point, AT&T would have no incentive to restrict subscriber access to unaffiliated content and applications because such actions would drive consumers away from AT&T’s cable Internet services. Rather, AT&T has every reason to make the broadest possible array of content and applications available to its subscribers. And content providers have no incentive to agree to such restrictions, either, because doing so would dramatically cut into their audience size.²⁸⁵

Internet Content. Opponents argue without support that the Merger would give AT&T the incentive and ability to dominate Internet content, notwithstanding AT&T’s incipient position as a provider of Internet services. Opponents do not even attempt to address the Commission’s decisions to refrain from requiring the “unbundling” of cable Internet services from the underlying transport. Clearly, allowing cable companies to offer integrated content and high-speed access through services such as @Home and Road Runner encourages continued

²⁸⁴ See *Id.* ¶¶ 108-15.

²⁸⁵ See Ordoover/Willig Decl. ¶ 126.

investment in broadband facilities and provides consumers with an attractive product in the marketplace.²⁸⁶ There is no reason why it would be better for the Commission to determine which “bundle” of services consumers value most than to allow consumers to make that choice for themselves.

In any event, “Internet content” is not a relevant market. The Internet provides access to a wide range of news, entertainment, cultural, educational, and informational material. Such material does not constitute a relevant “market” – either as independent offerings or a collected “bundle.” A wide range of substitutes available through audio, video, electronic, and non-electronic media could easily substitute in the event that a hypothetical monopolist were to attempt to exercise market power in the “market” for such content delivered over the Internet. In fact, AT&T could not monopolize Internet content *even if it were a relevant market*. The very nature of the Internet, which eliminates entry barriers entirely, makes it possible for anyone to make alternatives available in the event that any one company attempted to dominate content on the Web. Whether or not AT&T’s so-called “preferred” content providers would be “technologically advantaged” is irrelevant, because if AT&T subscribers were dissatisfied with the unique experience @Home sought to create for them, they would have alternatives from which to choose.²⁸⁷

²⁸⁶ See, e.g., Remarks by FCC Chairman William E. Kennard Before the Federal Communications Bar, Northern California Chapter, San Francisco, California (July 20, 1999).

²⁸⁷ See Ordoover/Willig Decl. ¶ 126. No Internet service provider has an incentive to discriminate against popular unaffiliated content. In fact, @Home and Road Runner cache heavily trafficked sites to facilitate transmission, regardless of whether these sites are content partners or not.

Internet Advertising. Merger opponents also argue that AT&T will leverage its power into the market for Internet advertising.²⁸⁸ U.S. online advertising revenue is only a fractional component of the overall advertising market.²⁸⁹ Advertisers themselves do not view the Internet as a separate advertising “market.”²⁹⁰ Moreover, there are numerous advertising opportunities available on the Internet, making it impossible for this so-called “market” to be monopolized. The sheer number of Internet advertisers means that no one company could ever monopolize Internet advertising. Because AT&T’s customers can choose to make any Internet access company their “home page,” and do not have to view AT&T’s welcome screen at all, AT&T will not dominate advertising on Internet access services, but will compete for opportunities with entrenched market leaders like AOL, whose “multibranded portal strategy” has earned it advertising deals with numerous popular vendors, including Macy’s, J. Crew, Eddie Bauer, and Toys ‘R Us.²⁹¹

Second, only a small fraction of Internet advertising takes place on the home pages of Internet access companies at all. Much advertising takes place within a proprietary service’s web pages; is placed on popular web sites, like CNN.com (general advertising) or frommers.com (travel-related advertising); or is located on the home pages of Internet search engines like

²⁸⁸ See, e.g., GTE at 50-51; MCI at 24; Bell Atlantic at 35-38.

²⁸⁹ See Mick O’Leary, *Can Telcos Become Portals to the Internet*, Global Telecom Business, (Sept. 1998) <www.globaltelecomsbusiness.com>.

²⁹⁰ See Valerie Seckler, *Portals’ ability to drive Cybersales ‘Overrated,’* WWD, (April 12, 1999) at p.6 (citing president of Land’s End that the Web “is just another channel for our products”).

²⁹¹ *AOL Builds Up Shopping Sites*, (Oct. 28, 1998) <www.news.com/News/Item/0,4,280411,00.html>.