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October 28, 1999

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, SW, Room TWB-204
Washington, D.C. 20554

RE: Notice of Oral Ex Parte
In the Matter of Applications for Transfer of Control to AT&T Corp. of Licenses and Authorizations Held by MediaOne Group, Inc.
CS Docket No. 99-251

Dear Ms. Roman Salas:

On October 27, 1999, Stephen Garavito, Michael Hammer, David Lawson, Howard Symons, and the undersigned, representing AT&T, and Susan Eid of MediaOne, met with Darryl Cooper, Sunil Daluvoy, Royce Dickens, Imani Ellis-Cheek, Jennifer Fabian, Carl Kandutsch, and To-Quyen Truong of the Commission's Cable Service Bureau. At the meeting, AT&T and MediaOne discussed their Reply Comments and supporting affidavits filed in this proceeding on September 17, 1999. All comments at the meeting were consistent with the parties' September 17th filing and the summary of that submission as presented at the meeting and attached hereto.

Two copies of this Notice are being submitted to the Secretary of the FCC in accordance with Section 1.1206 of the Commission's rules.

Sincerely,

Joan Marsh

cc: D. Cooper
S. Daluvoy
R. Dickens
T. Truong
I. Ellis-Cheek
J. Fabian
C. Kandutsch

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SUMMARY OF REPLY COMMENTS FILED BY AT&T CORP. AND MEDIAONE GROUP,INC.

Filed on September 17, 1999

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FILED BY AT&T CORP. AND MEDIAONE GROUP,INC.
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I. THE MERGER WILL PRODUCE ENORMOUS PUBLIC INTEREST BENEFITS.

A. The Principal Merger Benefit Identified by Applicants: Combining AT&T's and MediaOne's Complementary Assets Will Create a Much More Formidable Competitor to the Large Incumbent Local Telephone Monopolists.

1. Complementary Assets:

- AT&T's brand name and reputation as a reliable provider of telephony services, which will allow the combined entity to overcome the customer awareness and reputational handicaps that limit the effectiveness of all traditional cable companies as suppliers of telephony services. *See* Reply at 17, McGee ¶¶ 7-8, Holmes ¶ 3, Wingfield ¶ 10, Ordover/Willig ¶ 39-40.

- AT&T's vast experience in, and financial resources devoted to, marketing and customer care in competitive mass market telecommunications and internet businesses. *See* Reply at 17, Ordover/Willig ¶¶ 39-41, McGee ¶¶ 9, 13.

- AT&T's experience and accomplishments in obtaining necessary interconnection and other arrangements with incumbent LECs. *See* Reply at 17, McGee ¶ 11, Ordover/Willig ¶ 41.

- AT&T's switching and transport facilities (obtained from TCG) that can be used to avoid inflated incumbent LEC tandem switching and transport charges in connection with the exchange of local traffic. *See* Reply at 17, McGee ¶ 12; Ordover/Willig ¶ 38.

- AT&T's IP telephony research and know-how. *See* Reply at 18, Ordover/Willig ¶ 41, McGee ¶ 12.

- MediaOne's cable network to millions of households, a facilities-based method of access that AT&T could not duplicate without prohibitive expense and delay. *See* Reply at 17, Ordover/Willig ¶ 36, McGee ¶¶ 3-4, 13.

- MediaOne's technical experience in deploying circuit-switched local telephony services over cable. *See* Reply at 18, McGee ¶ 13, Ordover/Willig ¶ 42.

2. Other Synergies:

- The combined entity's increased footprint/potential customer base over which to spread costs that will allow the combined entity an opportunity to counter at least partially the enormous cost advantage enjoyed by incumbent LECs from their ability to spread costs over millions of customers concentrated in very large but self-contained service areas. *See* Reply at 18, Holmes ¶¶ 2, 8-10, Ordover/Willig ¶¶ 19, 43-46.

- Clustering efficiencies from the combination of adjacent cable systems that will allow more cost-effective operation through reduced administrative costs and additional cost-spreading. *See* Reply at 18, Holmes ¶ 10, Ordover/Willig ¶ 35, 43-45.

3. Specific Public Interest Benefits That Will Be Generated By Complementary Assets and Other Synergies:

- The most immediate benefit from the combination of these complementary assets will be in the creation of a more effective local telephone competitor to the incumbent LECs in MediaOne's service areas. *See* Reply at 2, 6, Holmes ¶¶ 9-10, Ordover/Willig ¶¶ 22-24, 46-47.

- Equally important, however, the creation of facilities-based competitor with all of the assets necessary for mass market success and of sufficient size to

achieve some of the scale economies that incumbent LECs already enjoy will enhance the combined entity's ability to offer consumers a full range of video, data, Internet and other existing and yet-to-be-deployed services and at the same time guard against the incumbent LECs' ability to extend their dominance into the provision of these other services. *See* Reply at 6, Holmes ¶¶ 8-10, Ordover/Willig ¶¶ 15, 19, 43-47.

B. There Is No Dispute That, If Achieved, These Benefits Will Be Monumental.

1. Incumbent LEC monopolies have proven enormously resistant to competition. *See* Reply at 6, 8, Ordover/Willig ¶¶ 22-30, McGee ¶¶ 5-6, 11, Holmes ¶ 10.

2. Nearly four years after passage of the 1996 Act, it has become clear that incumbent LECs will not be seriously threatened – and that true broad-scale competition will not develop – absent a fundamental restructuring of the ways in which, and the scale on which, entry decisions are approached. *See* Reply at 6, McGee ¶¶ 4-5, 11, Ordover/Willig ¶¶ 22-30, Holmes ¶ 10.

3. AT&T is the only company that has come forward with a $100 billion commitment to make that happen – a broad scale facilities-based entry plan to provide a wide range of services to all consumers in the areas it can serve. *See, e.g.,* Reply at 6, 26.

4. Even GTE and the other incumbent LECs agree that if AT&T's strategy succeeds in spurring local competition faster and on a broader scale that will produce enormous public interest benefits. *See* Reply at 8.

C. The Benefits Are Likely To Be Achieved.

1. Commission Findings Earlier This Year

   - The Commission ruled just six months ago that combining the same types of complementary assets types identified here is likely to produce "tangible public interest benefits." AT&T-TCI ¶ 146-47. *See* Reply at 7.

   - The Commission also recognized that the magnitude of the investment involved in buying a large cable network at today's prices gives AT&T "an obvious incentive to follow through on [its] announced plans" to aggressively deploy, market and support local telephony and other services over acquired cable systems. AT&T-TCI ¶ 184. *See* Reply at 25.

2. Economic Testimony Submitted by Applicants

   - Professors Ordover & Willig confirm in their declaration both that AT&T has strong incentives to make its cable-based entry strategy work and that the types of complementary assets and synergies identified by Applicants are ones that economics and experience teach are likely to generate public interest benefits, particularly where, as here, they promise to create a more effective competitor to existing monopoly providers. *See, e.g.,* Ordover/Willig ¶¶ 17-20, 33-36.

3. Factual Testimony Submitted by Applicants

   - MediaOne Telephony Vice President Nancy McGee describes in her declaration the complementary assets and explains how their combination will allow the combined entity to compete far more effectively with the dominant incumbent LECs than either company could alone. *See* McGee ¶¶ 6-13.

- MediaOne Strategy Executive Vice President Doug Holmes describes in his declaration how a larger footprint, and the resulting enhanced ability to spread costs, will allow the combined entity to compete more effectively with incumbent LECs across the whole range of services. *See* Holmes ¶¶ 9-10; *see also* Wingfield ¶ 10.

4. Marketplace Evidence Submitted by Applicants

- The best evidence that merger creates the best prospect for widespread competition – and that the identified public interest benefits will be achieved – is the incredible pace and breadth of the anticipatory competitive responses following the mere announcement of AT&T's plans to invest tens of billions of dollars in cable-based alternatives to dominant providers' services. *See* Reply at 9-13, McGee ¶ 7, Ordover/Willig ¶¶ 20, 50-52.

- In the past incumbent LECs generally took no steps to lower their prices or accelerate deployment of new services in response to fledgling telephony efforts by traditional cable companies. In fact, as Ms. McGee notes, BellSouth actually *raised* its residential line prices after MediaOne launched its competing offering. *See* Reply at 13-14, Ordover/Willig ¶¶ 51-52, McGee ¶ 7.

- That anticompetitive behavior has changed abruptly. The reply comments catalogue numerous competitive responses by incumbent LECs in the form of lower prices and new service offerings directed specifically at AT&T's actual or threatened entry. *See* Reply at 9-14, Ordover/Willig ¶¶ 50-52, McGee ¶ 7.

5. Absence of Contrary Record Evidence

- The incumbent LEC opponents of the merger, the only commenters to address Applicants' public interest benefits showing, have submitted no

evidence to support their bare claims that the identified benefits may not be achieved. *See* Reply at 14.

- Professors Ordover and Willig note that the incumbent LECs' claims merit great skepticism given that the incumbents are the very entities whose commercial self-interest would be most threatened if the merger succeeds. *See* Ordover/Willig ¶ 34.

D. The Benefits Are Merger Specific

1. Solo Efforts by AT&T and MediaOne to Provide New Services in MediaOne Service Areas Would Not Produce the Same Competitive Benefits. *See* Reply at 14-18.

- Commission Findings Earlier This Year

  "[T]he complementary skills and assets of AT&T and TCI suggest that their investment may yield synergies in the execution of their plan. AT&T will be contributing its experience in providing toll-quality voice and data traffic, switching technology, and a brand name that can compete with incumbent LECs. TCI will be contributing a residential wireline network and architecture that currently serves millions of homes." AT&T/TCI Order ¶ 148. *See* Reply at 15-16.

- Economic Testimony Submitted by Applicants

  Professors Ordover & Willig demonstrate that economics predicts that in combining their complementary assets, AT&T and MediaOne will have greater success than if they entered in MediaOne's service areas separately. *See* Ordover/Willig ¶¶ 35-47.

- Factual Testimony

  MediaOne Telephony Vice President Nancy McGee summarizes the obstacles faced by MediaOne as a solo telephony entrant. McGee ¶¶ 6-11; *see also* Holmes ¶¶ 3-7.¶

  As Ms. McGee explains, a new entrant without an established reputation as a provider of telephony services has a particularly difficult time convincing customers to switch due to skepticism that a cable company can provide the top-grade service demanded by consumers of "lifeline" services. McGee ¶¶ 7-8.

  Ms. McGee cites customer surveys that confirm that customers would prefer an AT&T-delivered service over a service delivered by MediaOne or other traditional cable companies, and that some customers that would consider switching to AT&T would not consider switching to MediaOne. McGee ¶ 8; *see also* Holmes ¶ 3, Wingfield ¶ 10.

  Ms. McGee notes that MediaOne's business plan projected only modest local telephony penetration in the coming years at levels that would not unseat the incumbent LECs from their current dominant position. *See* McGee ¶ 10.

  MediaOne Executive Vice President Holmes reiterates that customers are much more likely to switch to AT&T than to MediaOne. *See* Holmes ¶¶ 3-4.

- Marketplace Evidence Submitted by Applicants

  The very different reactions by the incumbent LECs to MediaOne's solo telephony efforts and to AT&T's cable-based local telephony entry – raising prices in the former case and lowering them in the latter case -- confirm beyond doubt

that the incumbent LECs perceive a much greater competitive threat from AT&T as a cable-based competitor than from MediaOne and other traditional cable companies. *See* Reply at 14-15, McGee ¶ 7, Ordover/Willig ¶¶ 20, 50-52.

- Absence of Contrary Record Evidence

  Opponents of the merger have provided no evidence that contradicts the economic and factual testimony and marketplace evidence provided by AT&T that AT&T/MediaOne will enjoy greater success in breaking incumbent LECs monopolies than either AT&T or MediaOne would alone. *See* Reply at 9-10, 15, Ordover/Willig ¶ 53.

2. Contractual Arrangements Short of Merger Would Not Produce the Same Competitive Benefits.

- Economic Testimony Submitted by Applicants

  Professors Ordover & Willig explain why economic theory predicts that cable telephony joint ventures, to the extent they can be consummated at all, are unlikely to provide the full consumer benefits of integration. *See* Reply at 19-20, Ordover/Willig ¶¶ 21, 57-59; *see also* Holmes ¶¶ 4-7, Wingfield ¶¶ 6-9 .

  The rollout of telephony, Internet and other new services over cable networks involves both large contract-specific, sunk investments and enormous uncertainty, the two factors that make a successful joint venture least likely. *See* Reply at 21, Ordover/Willig ¶ 53-65.

  Because joint venture parties must necessarily divide the risks and gains *ex ante* on the basis of very imperfect information, the constraints the contract places on the scope and nature of

offerings by the joint venture (as opposed to one of the individual parties) are likely to deny consumers many of the benefits a full merger would bring. *See* Reply at 20-22, Ordover/Willig ¶¶ 59, 63; *see also* Wingfield ¶ 8.

Settled economic principles hold that requiring market participants in these circumstances to obtain critical inputs through contracts rather than merger is likely to result in underinvestment and insufficient new entry. *See* Reply at 20, Ordover/Willig ¶¶ 56-61.

- Factual Testimony Submitted by Applicants

Terry Wingfield, the AT&T Vice President in charge of AT&T's telephony joint venture efforts states in his declaration that although AT&T continues to negotiate aggressively to establish joint ventures to deliver competitive telephony and other services in areas in which it owns no facilities, neither AT&T nor anyone else has been able to conclude such an arrangement. *See* Reply at 22-23, Wingfield ¶ 4.

Mr. Wingfield explains that, in his experience, the difficulties in establishing such an arrangement arise from the competing positions/incentives of the company that owns the cable system and AT&T as a party seeking to provide services over that system. *See* Reply at 22-23, Wingfield ¶ 6-9.

For AT&T flexibility in the scope and features of the service offerings provided by the joint venture is critical to ensure that the joint venture can become and remain an effective competitor to incumbent LECs as technologies, service offerings and customer preferences evolve. *See* Reply at 22, Wingfield ¶ 8-9; *see also* Holmes ¶ 8.

But a cable company that is unaffiliated with AT&T is reluctant to enter into a joint venture

arrangement in which it has only a partial interest if that arrangement may take business away from its core cable business, of which it owns 100%. For that reason, cable companies want inflexible limits on the scope of the venture's offerings. *See* Reply at 21, Wingfield ¶ 7-9.

Particularly given the great uncertainty created by technology and service convergence and evolution, it should be expected – and it has been AT&T's actual experience – that it will be difficult and time-consuming, if possible at all, to hammer out commercial arrangements satisfactory to both parties. To date these difficulties have proven intractable. *See* Reply at 21-23, Wingfield ¶¶ 6-9.

MediaOne Executive Vice President Doug Holmes confirms that MediaOne and other cable companies have considered the possibility of seeking a joint venture or other contractual relationship with AT&T or another telephone company for more than five years, but that discussions have always broken down over the issues identified by Mr. Wingfield. *See* Reply at 21, Holmes ¶¶ 4-6.

As Mr. Holmes explains, the increasing innovation and convergence in telephony, video, data, online and other services makes it increasingly more difficult for the negotiating companies to define their respective roles in any joint venture. *See* Reply at 21, Holmes ¶¶ 6-7.

- Marketplace evidence submitted by Applicants

Despite many attempts, no cable company telephony joint venture has ever been consummated. *See* Homes ¶¶ 5-7.

- Absence of Contrary Record Evidence

  No opponent of the merger has offered any evidence contradicting the economic and factual testimony provided by AT&T. *See* Reply at 26-27.

II. THERE IS NO REASON FOR THE COMMISSION TO ADDRESS THE "FORCED ACCESS" ISSUE IN THE MERGER PROCEEDING

- **"Open Access" is an Empty Slogan.** "Open access" is a meaningless slogan. Even the proponents of "open access" cannot agree on a single workable definition of the term, much less recommend an appropriate regulatory classification and enforcement mechanism. As the Cable Services Bureau recently found, "[t]his fact speaks volumes about the difficulties and appropriateness of establishing a regulatory regime at this early stage in broadband's history." *See* Reply at 4, 69-70.

- **The Commission Has Rejected Forced Access.** In its Broadband Report and in the AT&T/TCI merger, the Commission rejected demands for forced access. The Cable Services Bureau has affirmed this judgment. Nothing in the instant merger warrants reconsideration of this policy. *See* Reply at 3-4.

- **Forced Access is a Generic Issue.** If the Commission decides to adopt forced access requirements, it should only do so in a generic, industry-wide proceeding, not in a transfer of control proceeding involving only two companies. *See* Reply at 3, 68.

- **Forced Access Would Extend Regulation.** Imposing a forced access condition would require the Commission to assert authority over entities (Excite@Home and Road Runner) that are not before it in this proceeding. *See* Reply at 4.

A. FORCED ACCESS IS NOT NECESSARY

- **No Basis for Regulatory Intervention.** 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. Neither test is met here. 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. *See* Reply at 71, Ordover/Willig ¶ 67.

- **AT&T is a New** Entrant **in the Nascent Internet Marketplace.** As Chairman Kennard has written, "[w]e cannot regulate against problems that have yet to materialize in a market that has yet to develop." AT&T is a new entrant in the highly-competitive Internet market. Numerous companies using a variety of technologies are competing to provide consumers with Internet access services. It is too early to tell which technologies will ultimately prove successful, or whether any one technology will someday dominate. *See* Reply at 85, Ordover/Willig ¶¶ 109, 127-35.

- **Cable Internet Services Ensure Customer Choice.** AT&T and MediaOne provide their subscribers with an "Internet experience" that is open in ways that matter most to consumers interested in the Web's full capabilities. 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. As a new provider of Internet services, AT&T has neither the incentive nor the ability to change course and impose proprietary standards in the future. *See* Reply at 70-71, 86-88, 102-103, Marshall ¶¶ 3-5, 11-13, Ordover/Willig ¶¶ 127-35, Medin ¶ 18.

- **No Separate "Broadband" Market.** There is no separate market for "broadband Internet" services. Broadband service is priced competitively with narrowband service and consumers use both narrowband and broadband for the same core applications. Now and for years to come, broadband and narrowband will compete for the same mass market of Internet subscribers. 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. *See* Reply at 71-79, Ordover/Willig ¶¶ 82-96, Marshall ¶ 9.

- **Substantial Broadband Competition.** Even looking only at broadband Internet services, there is substantial competition. 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. The most significant competitors include ILEC and CLEC DSL services, broadband satellite services, and broadband fixed wireless services. *See* Reply at 79-84, Shulman ¶¶ 14-25.

- **No Separate "Cable Internet" Market.** There is no separate market for "cable Internet services." Narrowband and other broadband providers can and do substitute for cable Internet services. And the Merger will not materially reduce choices for any cable subscriber or any cable operator, because the @Home and Road Runner services do not currently compete in any local geographic market. Moreover, there are many companies that could provide cable Internet services in the event that a combined Excite@Home/Road Runner attempted to raise prices. Such alternatives would constrain any attempt by @Home or Road Runner to exercise market power. *See* Reply at 88-90, Ordover/Willig ¶¶ 104-06.

- **AT&T Lacks Power in *Any* Relevant Market.** 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 so called "neighboring markets," such as Internet content, Internet advertising, portals, video streaming technology and services, IP telephony, Internet software and equipment, or Internet "backbone" services. Indeed, these are not even

individual "markets." Rather, in the case of Internet content and advertising, they are merely a fractional component of the overall content and advertising markets that are available through a wide variety of media. In the case of Internet portals and videostreaming, they are a diverse set of applications that defy classification as a distinct market. And claims regarding AT&T's alleged domination of the "Internet telephony market" are particularly ironic, coming from those who dominate the actual relevant market for local telephone service. *See* Reply at 90-101, Ordover/Willig ¶¶ 116, 119, 120, 126.

- **AT&T Lacks the Ability to "Leverage."** Because AT&T and MediaOne customers can access the Internet through a simple mouse click, AT&T can 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. *See* Reply at 91, Ordover/Willig ¶ 126.

- **AT&T Has Every Incentive to Provide the Widest Array of Content and Applications.** Most importantly, 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 in order to attract new subscribers and retain current ones. *See* Reply at 91-92, Ordover/Willig ¶ 126.

B. FORCED ACCESS IS BAD POLICY

- **Technical Impediments.** The technical obstacles to the implementation of forced access remain. The limited, "friendly" trials GTE and Ameritech have engaged in do not represent what would be necessary in the real world. While forced access may be do-able, it would require a massive commitment of time, energy, and resources to re-engineer cable networks to accommodate the demands of cable's competitors. The delays associated with such a reengineering effort would be significant and contrary to Congressional and Commission policies of encouraging the deployment of broadband alternatives in the marketplace. *See* Reply at 109-112, Medin.

- **Forced Access Would Require "Complex and Burdensome" Regulation.** Forced access requirements would also inevitably embroil government and industry in endless disputes over cost allocation, pricing, technical standards, and even the definition of "access" itself. Regulators, no matter how well informed, cannot equal the free market in terms of responsiveness or flexibility. The Cable Services Bureau and Commissioner Powell have both warned that mandating "open access" will inescapably mire the Commission in common carrier-like regulation. As the Cable Bureau recently observed, the three-year effort by Canadian regulatory to implement "non-discriminatory access" illustrates the kind of regulatory delay and resulting uncertainty that "threatens to slow down the nascent broadband industry and would be inimical to the intent of the 1996 Act." *See* Reply at 103-106, Ordover/Willig ¶¶ 71-72, 74.

- **Forced Access Would Require Extensive and Ongoing Regulatory Oversight.** The adoption of forced access requirements would unleash a never-ending regulatory exercise to catch up with change. As Chairman Kennard and Commissioner Powell have made clear, a forced access requirement would impose

substantial regulatory costs on cable operators and the Commission. Forced access would require extensive and ongoing government supervision to implement. It is disingenuous to assert that such regulation would be easy to administer, and will not require the imposition of common carrier regulation. *See* Reply at 103, 106.

- **Forced Access Will Undermine AT&T's Investment Incentives.** Forced access would diminish AT&T's incentives to invest in broadband facilities. AT&T has raised the funds necessary to acquire TCI and MediaOne and upgrade its cable facilities in the private capital market. These investments are risky and lack a guaranteed return. AT&T's ability and incentive to continue the rollout of broadband facilities and services is closely linked to a stable regulatory environment that promotes investment and rewards risk taking. *See* Reply at 106-108.

- **Undermining AT&T's Investments Will Reduce Competitive Responses by Telcos and Others.** Forced access requirements would also weaken the forces driving investment by others in new facilities. AT&T's investment in broadband has served as a powerful competitive spur to the ILECs and other facilities-based providers, multiplying the benefits of this investment across platforms and services and driving down prices. Since AT&T began investing in cable companies like TCI and MediaOne, deployment of all types of advanced broadband services has skyrocketed. Most notably, the ILECs have announced aggressive plans to accelerate their deployment of DSL technology. By slowing AT&T's investments in broadband facilities and services, forced access will deprive consumers of this valuable competitive spur. *See* Reply at 108.

- **The Success of AT&T's Broadband Investment Depends on its Ability to Market a Full Range of Services.** AT&T can recover its enormous investment in MediaOne only by moving aggressively to deploy, market and support local telephony, high-speed Internet

and other new services as planned. AT&T can commit to the staggering investments required to acquire and upgrade MediaOne's cable systems for telephony only because the *combined* revenues from the cable and telephone services would be sufficient to allow AT&T to earn a competitive return on its enormous planned investment. *See* Reply at 108.

C. FORCED ACCESS WOULD BE UNLAWFUL

- **Communications Act Bars Regulation of Cable as a Common Carrier.** The Communications Act bars the Commission from imposing common carrier or utility requirements on the provision of cable service. Cable Internet services are cable services under the 1996 Act. And forced access requirements unquestionably subject cable systems to common carrier regulation by reason of providing such services. *See* Reply at 113-119.

- **Forced Access is Impermissible Regulation of the Provision of Cable Service.** Forced access also would violate the Communications Act's prohibition against state and local requirements regarding the "provision or content of cable services." Forced access would undeniably condition the provision of cable modem services by AT&T and MediaOne, because AT&T and Media One could not offer @Home or Road Runner unless they allowed any requesting ISP to interconnect with their cable systems and provided it with broadband transmission facilities. *See* Reply at 119-120.

- **Forced Access is Impermissible Regulation of the Content of Cable Service.** A forced access rule would also restrict the content AT&T and MediaOne could provide, by prohibiting AT&T and Media One from carrying one particular type of program (cable Internet services) unless they also offer to carry the services of all third party ISPs who offer competing on-line services. *See* Reply at 121.

- **Regulatory Symmetry is Neither Lawful nor Necessary.** Calls for regulatory symmetry disregard the fundamental differences in market power between cable companies -- which are entering new markets with no Internet or local telephone customers -- and the entrenched providers of those services. Regulatory symmetry also ignores the substantial risk cable companies have taken in developing and deploying broadband facilities -- while telephone companies constructed their facilities in a protected regulatory environment -- and the First Amendment rights of editorial discretion enjoyed by cable companies. Congress deliberately crafted different regulatory schemes for cable and telephony with these differences in mind, and any attempts to disrupt Congress's carefully constructed regulatory balance should be rejected. See Reply at 121-126, Ordover/Willig ¶¶ 77, 79.

III. EFFECTS ON VIDEO PROGRAMMING MARKET

A. Video Programming Concentration

- AT&T's ownership of Liberty: AT&T's ownership of Liberty has been structured to ensure that: (1) Liberty and AT&T are economically distinct entities; and (2) Liberty is operationally independent from AT&T. Thus, any anticompetitive action that AT&T might take to benefit Liberty (e.g., vertical foreclosure) cannot possibly benefit AT&T because AT&T has no right to participate in any increased revenues or value Liberty might realize from such foreclosure. Similarly, Liberty has no incentive to take any action to benefit AT&T because Liberty does not participate in AT&T's increased revenues or value. Finally, because AT&T and Liberty are operationally independent, neither can compel the other to take such actions, even if they had incentives to do so. Furthermore, DOJ has not found that AT&T controls Liberty. *See* Reply at 29-32; Coffee at ¶¶ 8-16.

- AT&T's Interests in TWE: AT&T post-Merger will not be involved, directly or indirectly, in the management or operation of the video programming related activities of TWE. Liberty's sale of programming to TWE should not in any way be considered a sale by AT&T to TWE because AT&T has nothing to do with (and derives no economic benefit from) any such sale. *See* Reply at 33-35.

- AT&T's interest in Rainbow: Likewise, the sale of programming by Rainbow to TWE should not affect AT&T's insulation in the TWE partnership because AT&T in no way controls Rainbow. Cablevision (and the Dolan family), not AT&T, controls the Rainbow programming services. See Reply at 36.

- MediaOne's programming interests: MediaOne does not manage or control any programming. Under these

circumstances, it makes no sense to view a sale of programming by these entities as a sale by MediaOne -- or AT&T post-Merger. *See* Reply at 37.

- Antitrust HHI analysis: The limited, silent ownership interests AT&T will acquire through this Merger have only a very slight impact on its pricing incentives (see CRA Report at 12-15), and pose no threat of undue concentration in the video programming marketplace. *See* Reply at 38.

B. Monopsony Power/Vertical Foreclosure

- There can be no credible claim that AT&T will have power over price or significantly raise rival programmers' costs when these programmers can reach three-fourths of their potential U.S. customers through other MVPDs, whose programming decisions will be uncontrolled and uninfluenced by AT&T. See Reply at 39.

- The presence and success of DBS providers -- with their national coverage, 10 million subscribers, and winning 2 out of 3 subscribers -- means that any attempt by AT&T to mistreat programmers would be futile and would only drive AT&T's cable customers to its DBS competitors. Reply at 40-42.

- Opponents of the proposed Merger assert that even if video programmers have far too many alternative outlets to fall prey to AT&T alone, AT&T might collude with other cable companies to drive down programming prices or foreclose disfavored programming. Even ignoring that these opponents fail to provide a shred of evidence that this Merger will encourage such patently unlawful conduct, the civil and criminal antitrust laws have proven quite sufficient to deal with price-fixing and other cartel behavior. Reply at 43.

- Many programmers are large and sophisticated commercial actors that hold exclusive rights to unique

programming content that subscribers demand and without which an MSO would be competitively handicapped. This clearly mitigates any buying power that AT&T or any MSO might have. Skyrocketing programming costs also contradict the argument that AT&T or any MSO could exercise monopsony power to harm programmers. Reply at 46-47.

C. Violations of Cable Act and FCC Rules

1. Horizontal Rules

- AT&T has committed to complying with whatever ownership limit emerges when the court rules on the constitutionality of those limits. Reply at 48.

- Changes in the horizontal ownership limits are justified by marketplace and regulatory developments, including: (1) the increase in MVPD competition; (2) must carry, program carriage, and other regulations that target the same concerns as the horizontal rule; and (3) digital deployment and expanding channel capacity. Reply at 49-50.

- The FCC should change the cable attribution rules such that an MSO would not be deemed to have an attributable interest where: (1) the MSO does not buy programming for the system; and (2) the MSO is not involved in, or have access to, any information regarding the programming decisions of the system. Adoption of the proposed test is further supported by the benefits to local telephone and broadband competition that the Merger will create. Reply at 51-52.

- AT&T did not ignore the suspended attribution rules. Appendices A and B of the Public Interest Statement contain a list of all cable systems in which AT&T and MediaOne hold interests. Reply at 53.

- The FCC should raise the horizontal limit at least to the 35% limit enjoyed by the broadcasters. Reply at 55.

2. Program Access Rules

- The FCC should not: (1) subject AT&T's terrestrially distributed programming services to the program access rules (the FCC already has decided against such a result in recent program access orders); (2) ban exclusive agreements between AT&T and unaffiliated programmers (the Cable Act specifically allows for exclusive arrangements under certain circumstances); or (3) mandate the sale of AT&T-affiliated programming at specified volume discounts (the FCC already ruled against such a proposal in the AT&T/TCI merger order). Reply at 56-60.

3. Channel Occupancy Rules

- The Merger proceeding is an inappropriate forum for considering claims that AT&T post-Merger will violate the channel occupancy rules, particularly since any analysis under those rules would be highly fact-intensive. Furthermore, @Home and Road Runner do not count has channels for purposes of the channel occupancy rules because they are not video programmers. Reply at 61-63.

4. Program Carriage Rules

- AT&T and MediaOne are not violating the program carriage rules by refusing to deal with ISPs other than @Home and Road Runner because ISPs are not video programming vendors for purposes of the rules. Reply at 64.

IV. IMPACT ON MVPD COMPETITION

- The Merger will have no anticompetitive impact on MVPD competition. First, actual competition between AT&T and MediaOne is de minimis (less than 3,000 overbuilds and divestiture of systems in areas where authority to offer service). Second, the "potential competition doctrine" does not apply to this Merger because cable companies, unlike the ILECs, have been free to compete for years and are not "precluded competitors" (the focus of the potential competition analysis). Third, even if the potential competition doctrine applied, the Merger would still not have anticompetitive effects because there are a large number of equally capable "overbuilders," including DBS, electric utilities, ILECs, and wireless cable. Reply at 65-68.

V. IMPACT ON NAVIGATION DEVICE MARKET

- **Monopsony Power**: The Merger will not give AT&T the ability to exercise monopsony power over navigation device manufacturers. First, there are far too many buyers in the market for navigation devices for AT&T to exercise monopsony power. Second, the Commission's retail sale order allows manufacturers to bypass any cable company that refused to pay competitive market prices by employing a retail distribution strategy. Third, there is already retail competition in the market for cable modems. Indeed, even prior to the retail sales order, market forces and open industry standards had begun to spur retail competition for cable modems. CableLabs has developed standards for cable modems in its DOCSIS project and has certified the products of 11 modem suppliers for retail sale. Retailers are offering cable modems for sale in their stores today, and such offerings are expected to increase greatly as more manufacturers are certified and begin to role out new products. Reply at 129-133.

- **Foreclosure**: AT&T will not, as some parties assert, deny navigation device manufacturers access to AT&T customers in order to favor GI. AT&T has no direct ownership interest in, exercises no control over, and can derive no economic benefit from, GI or its operation because Liberty, not AT&T, has an

ownership interest in GI. Even if AT&T could purse a foreclosure strategy, it would fail because the navigation device market is competitive (and becoming more so) and GI's competitors would succeed without AT&T. Reply at 133-136.

- **Proprietary Standards**: AT&T has neither the ability nor the incentive to force GI to use proprietary standards to foreclose GI's rivals and allow GI to dominate the set-top market. First, the Commission's retail sale order requires AT&T and other MVPDs to publish interface standards that would allow manufacturers to build navigation devices to interface with MVPD-supplied security modules and bars MVPDs from asserting intellectual property rights that prevent navigation devices from being made available to subscribers from retailers. Second, AT&T does not have the ability to direct GI's operations. Third, any such strategy would prove costly to AT&T, particularly in an environment in which industry-wide open standards and retail availability will predominate. Finally, AT&T has favored open standards and retail availability of navigation devices (e.g., Microsoft must publish its standards for software used in AT&T's digital converters) and has always purchased from numerous suppliers. Reply at 136-139.