with an MVPD.[289] Section 629 directed the Commission to:

> adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment [collectively "navigation devices"] used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.[290]

99. Pursuant to this directive, the Commission adopted rules requiring MVPDs to provide, upon request, technical information concerning interface parameters that are needed to produce navigation devices that will operate with their video distribution systems.[291] Subscribers have the right to attach any compatible navigation device to an MVPD system, and MVPDs are prohibited from taking actions that would prevent unaffiliated retailers or manufacturers from making and selling compatible navigation devices.[292] We found that "competition in the navigation equipment market is central toward encouraging innovation in equipment and services, and toward bringing more choice to a broader range of consumers at better prices."[293]

100. The rules adopted in the *Navigation Devices Order* address the commenters' concerns that AT&T will exercise excessive market power in the purchase and provision of cable equipment. Under these rules, any manufacturer may produce and sell navigation devices for AT&T's systems directly to AT&T's subscribers, which AT&T cannot prohibit.[294] We note that AT&T may increase its influence in this market by purchasing very large numbers of navigation devices that it leases to its subscribers, pursuant to the Commission's rate rules.[295] However, by requiring MVPDs to grant all equipment manufacturers an opportunity to sell equipment to the MVPDs' subscribers, the navigation devices rules limit MVPDs' ability to exercise excessive market power and dominate the equipment market.

101. In this regard, we note that cable modems are commercially available from a variety of sources. CableLabs has developed industry-wide standards in its DOCSIS project and has already certified the modems of over a dozen manufacturers for retail sale.[296] AT&T's cable Internet customers

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[289] 47 U.S.C. § 549. Section 629 was adopted as part of the 1996 Act.

[290] 47 U.S.C. § 549(a).

[291] *See Navigation Devices Order*, 13 FCC Rcd at 14778, 14787 ¶¶ 8, 34; *see* 47 C.F.R. § 76.1205.

[292] *See* 47 C.F.R. §§ 76.1201, 76.1202.

[293] *Navigation Devices Order*, 13 FCC Rcd at 14775, 14776 ¶ 2. The House Report stated that

> [C]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services arriving by various distribution services.

H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 112 (1995).

[294] *See* 47 C.F.R. §§ 76.1201, 76.1202.

[295] *See* 47 C.F.R. § 76.1206.

[296] Cable Labs, *Cable Labs Certifies Best Data and Com 21 Modems, Re-Certifies GI and RCA Modems, Re-Qualifies Cisco CMTs* (press release), Dec. 9, 1999; *Clearing Shelf Space: Set-Top Boxes Mandated to be Available Via Retail Channels by July 2000*, MULTICHANNEL NEWS, July 19, 1999, at 15A (noting that Circuit City is already

(continued...)

accordingly may buy modems from retailers, rather than rent them from AT&T. The navigation devices rules thus also ameliorate concerns that AT&T will favor affiliated manufacturers or direct its affiliates to do business together as some commenters contend.[297] Moreover, we note that the merged firm would not have significant interests in any cable equipment manufacturer.[298] Accordingly, we find that the merger will not create public interest harms with respect to cable equipment.

C. Broadband Internet Services

102. In this section, we consider the allegations of certain commenters that the proposed merger will result in public interest harms in the provision of broadband Internet services to residential customers. We note that, in order to address the merger's potential anti-competitive impact on the provision of these services, the Justice Department has entered into a proposed consent decree with AT&T.[299] Among other provisions discussed below, the proposed consent decree requires the merged entity to divest its interest in the broadband cable ISP Road Runner no later than December 31, 2001, and to obtain prior approval from the Justice Department before entering into certain types of agreements with Time Warner or with AOL relating to the provision of broadband services.[300] We apply our public interest test to the facts of the proposed transaction as modified by the proposed consent decree. We find that the merger will not violate any provision of the Communications Act or Commission rules as they may pertain to the provision of broadband Internet services to residential customers. We further conclude that the proposed merger will not frustrate the implementation of the Communications Act and its goals as they pertain to the promotion of competition and diversity in the provision of these services.

1. Background

103. *Internet Access Generally.* We have previously described the Internet as "a loose interconnection of . . . tens of thousands of networks that communicate using the Internet protocol (IP)."[301] The Internet supports the delivery of a range of services, such as the World Wide Web ("Web"), e-mail, and file transfer protocol ("FTP"). With these services, customers are able to use their computers

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selling cable modems).

[297] *See, e.g.*, Bell Atlantic Comments at 52-55; SBC Comments at 7-8, 36.

[298] Prior to the merger of General Instruments, Inc. ("GI") and Motorola Corporation ("Motorola"), Liberty held a 6% voting equity interest in GI. Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated November 23, 1999, Transmittal of Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, and Susan Eid, Vice President Federal Relations, MediaOne Group, Inc., to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Nov. 22, 1999, at 2 ("Nov. 22 Marsh-Eid Letter"). However, following GI's merger with Motorola, completed on January 5, 2000, Liberty's holdings would not exceed 4% of Motorola's stock, even if all of Liberty's GI warrants are vested and exercised. *Id.*; *see* Motorola, Inc., *Motorola and General Instrument Complete Merger* (press release), Jan 5. 2000. The Commission generally has not considered equity interests of less than 5% to confer on their holders influence or attributable interests in the held entity. *See, e.g.*, 47 C.F.R. § 76.501 n.2 (a) (recognizing voting stock interests of 5% or more as cognizable).

[299] *See United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000).

[300] *Id.*

[301] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress ("*Universal Service Report*"), 13 FCC Rcd 11501, 11531 ¶ 62 (1998). IP defines the structure of data, or "packets," transmitted over the Internet, and it was created for the purpose of permitting communications among a wide variety of networks.

to communicate with other computer users and engage in sophisticated interaction, including on-line banking, electronic commerce, and video and audio file distribution.[302] We previously identified and described five types of entities involved in Internet services: (1) end users; (2) access providers; (3) application providers; (4) content providers; and (5) backbone providers.[303] As discussed below, some service providers, including the Applicants, now serve a combination of these functions.

104. *Narrowband Internet Access Services.* Most residential and small business consumers currently receive Internet access at a relatively slow speed, typically 28-53 kilobits per second, via traditional "dial-up" telephone connections. With dial-up Internet access services, customers must pay two separate entities. First, customers must pay for the underlying transport service – a traditional local telephone connection provided by LECs. Second, customers must pay an Internet service provider (ISP) separately, typically $20 or less per month, for unlimited access to the Internet.[304] In dial-up access arrangements, customers use modems located in their computers that are connected to twisted-pair copper telephone lines. The customer's computer communicates with the ISP's computer using voice-grade analog signals transmitted via standard telephone lines, much as fax machines communicate using telephone lines.[305]

105. AT&T's dial-up ISP, WorldNet, is one of the largest providers of dial-up residential Internet access service that does not bundle proprietary content with its Internet access.[306] MediaOne does not provide dial-up Internet access service. Therefore, the merger is unlikely to have an adverse effect on competition and diversity in the provision of narrowband Internet access services.

106. *Broadband Internet Access Services.* There are several different technological means by which consumers may obtain broadband (high-speed) access to the Internet.[307] As of April 2000,

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[302] *Id. See also* Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Policy* (OPP Working Paper Series No. 29, 1997) ("*Digital Tornado*") at 10; Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past* (OPP Working Paper Series No. 30, 1998) ("*Internet Over Cable*") at 17-18.

[303] *Universal Service Report,* 13 FCC Rcd at 11531 ¶ 62 (1998).

[304] *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming,* CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24374, 24314 n.197. "Dial-up Internet access" refers to the type of Internet access service for which the customer's computer must place a dial call to the ISP. The customer's local exchange carrier transmits the call to the ISP under the customer's normal local exchange service plan (which could include a separate line used by the customer solely for this purpose). The ISP purchases terminating access service from either an incumbent LEC or a competitive LEC. Once the dial-up connection is established, the ISP provides access to the Internet. For a more complete discussion of the relationship between the ISP and the LEC, see *AT&T-TCI Order,* 14 FCC Rcd at 3194 ¶ 67.

[305] Some customers obtain a higher-quality connection at speeds up to 128 Kbps using Integrated Services Digital Network ("ISDN") services sold by LECs. ISDN services can be used to connect with a wide variety of ISPs, not just the ISP affiliated with the LEC providing the ISDN service.

[306] Application at 13. WorldNet serves 1.8 million residential customers, as compared with America Online's approximately 22 million customers and Earthlink's approximately 3 million customers. AT&T states that its primary focus is residential customers and dial-up service, but that it also offers private line and Frame Relay service at speeds of up to 45 Mbps.

[307] For a more complete discussion of broadband services, see *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission,* Cable Services Bureau, Federal Communications Commission, Oct. 1999 ("*Broadband Today*").

approximately 2 million Americans used cable modems for broadband Internet access, offering speeds that range up to one to ten Mbps depending on the upgrade status of the cable system and the amount of traffic on the shared line.[308] As of year-end 1999, approximately 340,000 Americans obtained high-speed access through digital subscriber line ("DSL") technology.[309] DSL is provided by telephone companies (ILECs and CLECs alike) and offers speeds anywhere from 144 Kbps to well over 1.5 Mbps, depending on the local loop and the type of DSL technology used. In addition, various companies are, or will be in the near to middle term, offering broadband Internet access using a variety of wireless technologies, including fixed wireless and satellite.

107. AT&T and MediaOne each provide to households passed by their cable systems Internet services that combine (a) broadband transport through their cable systems and (b) Internet access and proprietary content through their affiliated ISPs. MediaOne and Time Warner (through TWE, TWE-A/N, and TWI) together hold an 80% ownership interest in Road Runner, and Road Runner is their exclusive cable broadband ISP.[310] Various cable operators, including AT&T, Comcast, Cox Communications, Cablevision Systems and Shaw Cablesystems, hold ownership interests in Excite@Home, and Excite@Home is their exclusive cable broadband ISP. By virtue of a transaction with its cable partners, AT&T recently increased its voting stock interest in Excite@Home from about 57% to 74% and assumed full control of the management of Excite@Home.[311] Excite@Home and Road Runner also have exclusive contracts with other cable operators throughout the country and abroad.[312] Excite@Home is the nation's largest cable broadband ISP and currently has more than 1.5 million subscribers; Road Runner is the second largest cable broadband ISP and has approximately 730,000 subscribers.[313]

108. Some commenters[314] have raised concerns regarding the merger's impact on the

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[308] Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, http://www.cabledatacomnews.com/cmic/cmic16.html; 1999 *Competition Report*, 15 FCC Rcd at 1005 at ¶ 56.

[309] TeleChoice, Inc. *Deployment – Updated, May 5, 2000*, http://www.xdsl.com/content/resources/deployment_info.asp. DSL technology upgrades the performance of the standard twisted pair (the copper line connecting most homes and businesses) to carry high-capacity data transmission. The technology expands the amount of frequency used over the copper line, whereby the line's high frequencies are used to transmit the data and the lower frequencies are free to transmit voice or fax transmissions. *See Broadband Today* at 20. While most cable modem customers are residential Internet users, it is difficult to discern what portion of DSL subscribers are residential. Some estimates of DSL subscribership (including business lines) are as high as 1.3 million. *See* Neil Strother, *Consumers and Biz Have the Hots for DSL*, ZDNET ANCHORDESK, Dec. 1, 1999, http://www/zdnet.com/anchordesk/story/story_4169.html.

[310] *See* Application at 17 & n.45.

[311] *Id.* at 17; AT&T Corp., *Excite@Home's Principle Cable Partners Extend Distribution Arrangements, AT&T Assumes More Prominent Role* (press release), Mar. 29, 2000.

[312] *See, e.g.* AtHome Corp., *Filing 10-Q for the Quarter Ended Sept. 30, 1999*, at 8-10, 12, 14, 39. (Excite@Home is "the leading provider of broadband Internet services over the cable television infrastructure to consumers. By virtue of our relationships with 21 cable companies in North America and Europe, we have access to approximately 65 million homes, which includes exclusive access to over 50% of the households in the United States and Canada capable of receiving cable television.").

[313] AtHome Corp., *Excite@Home Reports First Quarter 2000 Financial & Operating Results* (press release), Apr. 19, 2000. Road Runner, *Road Runner Announces strong First Quarter* (press release), Apr. 12, 2000.

[314] *See, e.g.*, SBC Aug. 23 Comments at 31-40.

provision of a related category of services, which AT&T refers to as "interactive television services and content."[315] These interactive television services include (but are not limited to) the provision of electronic commerce (shopping), electronic banking, video-on-demand, limited or full-service Internet access, and hyperlinking, all delivered to the consumer's television set via the cable set-top box. Applicants have not yet deployed interactive television services in the mass market but plan to deliver such services to the consumer through an advanced digital set top box, utilizing TVGuide as the EPG.[316] The digital set-top box may also incorporate a cable modem, providing the consumer with full Internet access either on the television screen or on the personal computer.[317]

109. Because Applicants' interactive television offering will include broadband access to the Internet, those interactive services may compete with broadband Internet services delivered over the home computer. The merged entity will require its customers who access the Internet through the digital set-top box to utilize Excite@Home or Road Runner as their ISP until the termination of its exclusive contracts with these affiliated ISPs.[318] Thus, the merged firm's provision of broadband Internet access and interactive services through the set-top box will augment its provision of broadband Internet access through the cable modem. Below, we analyze the merger's potential impact on competition and diversity in the provision of broadband Internet access, whether provided through the cable modem or the set-top box.

2. Discussion

110. The Application indicates that the merged firm would have ownership interests in the two largest cable ISPs, Excite@Home and Road Runner, and cable systems with last-mile facilities reaching nearly 63% of homes passed by cable nationwide.[319] Commenters argue that these ownership

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[315] By "interactive television services," we refer generically to an array of services that AT&T and other broadband providers plan to offer by means of the advanced digital set-top box. The services will be delivered through the consumer's television set or personal computer.

[316] We address the merger's effect on EPG services in Section IV.A., *supra*.

[317] Excite@Home plans to offer the full range of interactive television services over AT&T systems, including Internet access. *See* AT&T Corp., *Excite@Home'sPrinciple Cable Partners Extend Distribution Arrangements, AT&T Assumes More Prominent Role* (press release), Mar. 29, 2000. AT&T plans to begin offering Excite@Home through set top boxes in the summer and fall of 2000 as a two-tier service. The scaled-down version will offer only e-mail, shopping information, news, sports, and weather headlines at no extra cost to digital customers, while for an extra $15 per month, customers will have access to the full Internet, personalized news, weather and sports, e-mail, enhanced TV overlays, electronic commerce, interactive programming, wireless keyboard, and other advanced features. *See Excite@Home Prepares to Start Internet TV Service,* COMMUNICATIONS DAILY, Mar. 31, 2000.

[318] At the Public Forum held on February 4, 2000, AT&T General Counsel Jim Cicconi explained that the Applicants' exclusive contracts with Excite@Home and Road Runner apply to all Internet access via the merged entity's cable systems, including Internet access via the digital set-top box. *See* Cicconi Public Forum Testimony, Tr. 101-02.

[319] *See* Application at Appendix A; Paul Kagan Assocs., Inc., *Media Index Data Base*, The Kagan Media Index, Oct. 31, 1999, at 8. We have received various proposals regarding the appropriate measure of the Applicants' horizontal reach in the provision of broadband Internet services, based on their ownership interests in either cable systems or Excite@Home and Road Runner. Possible measures include, for example: (1) the total number of Excite@Home and Road Runner subscribers; (2) the total number of AT&T and MediaOne broadband Internet subscribers, excluding those of TWE; (3) the total number of AT&T and MediaOne broadband Internet subscribers, including those of TWE; (4) the total number of homes passed by AT&T and MediaOne cable systems, but excluding TWE cable systems; (5) the total number of homes passed by upgraded AT&T and MediaOne cable (continued...)

interests will give the merged entity dominance over the provision of broadband Internet services, thereby threatening competition and diversity in the provision of Internet services, content, applications, and architecture. They observe that Excite@Home and Road Runner are the exclusive ISPs for cable modem users served by the majority of cable systems nationwide, including those of AT&T and MediaOne, and that unaffiliated ISPs currently are denied "open access" to provide broadband services over these cable systems. The issues raised by commenters generally fall into the following categories: broadband Internet content, broadband Internet applications and software, and "open/forced access."

111. *Broadband Internet Content.* Some commenters argue that the merged firm will control such a large portion of the broadband customer base that it could gain *de facto* power to dictate what content, products, and services are available to broadband customers generally, and at what price.[320] When a consumer accesses the Internet through the broadband cable line, the first Web page the consumer sees is the home page of the cable operator's exclusive ISP. To view an alternative web page or Internet portal offered by ISPs not affiliated with the cable operators, the consumer must reconfigure his or her Internet access device or Web browser to go through the unaffiliated ISP, to which the customer must subscribe at an additional cost.

112. Excite@Home and Road Runner, together with the cable operator, determine the content that is placed on their home pages. In addition, both Excite@Home and Road Runner use "caching" technology, a technology that places certain content at regional distribution centers to allow faster access by their customers.[321] Excite@Home and Road Runner cache (a) the content most often accessed by customers as determined by mathematical algorithms, and (b) the content for which content providers have negotiated for preferred caching. Commenters raise concerns that the merged firm could use its control over the Excite@Home and Road Runner home pages and caching technology to discriminate against unaffiliated providers, both in terms of pricing and access to consumers. Commenters argue that the merged entity could use caching technology to slow down, limit or block consumers' access to unaffiliated broadband content.[322] They also argue that, given Excite@Home and Road Runner's dominance in the provision of broadband Internet access, the merged firm could charge monopoly rents to content providers for the right to receive favorable caching on Excite@Home and Road Runner networks, or to be linked to the affiliated ISPs' home pages.[323]

113. *Broadband Internet Applications and Software.* Several commenters, particularly GTE, argue that the Applicants will have both the incentive and the ability to implement proprietary network management and software protocols, designed to render software and content written for their systems incompatible with competing systems.[324] Commenters argue that the merged entity will use the market

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systems, but excluding TWE cable systems; (6) the total number of homes passed by AT&T and MediaOne cable systems, including TWE cable systems; and (7) the total number of homes passed by upgraded AT&T and MediaOne cable systems, including TWE cable systems.

[320] *See, e.g.,* GTE Comments at 49-58; SBC Aug. 23 Comments at 40-43; Bell Atlantic Comments at 43-49.

[321] Excite@Home's caching capabilities are generally described on the company's Internet home page in a document entitled AtHome Corp., *@Home Network Architecture*, http://www.home.net/about/network.html.

[322] *See, e.g.,* GTE Comments at 49-58; Bell Atlantic Comments at 35-39, 43-46.

[323] With respect to pricing, GTE argues that ". . . a combined Excite@Home will be able to demand steep payments – including possible equity positions – from software and content providers in exchange for preferential placement on its system." GTE Comments at 54 (citation omitted).

[324] GTE Comments at 49-53; GTE Nov. 1 Reply Comments at 23-28; SBC Aug. 23 Comments at 33-37.

power of Excite@Home and Road Runner to force applications developers to incorporate proprietary protocols into their software architecture so that new applications cannot work on competing broadband technologies such as DSL.

114. *"Open/Forced Access."* A number of commenters have urged us to address the perceived competitive harms by imposing an "open access" requirement.[325] By "open access," commenters refer to a proposed requirement that cable operators allow independent, unaffiliated ISPs to interconnect with their proprietary cable networks for the purpose of offering broadband Internet access and services to consumers. Opponents to such a regulatory requirement refer to it as "forced access."

115. Proponents of "open/forced access" argue that the Applicants' offering of cable broadband transport bundled with their affiliated ISPs' Internet access service and content threatens to alter fundamentally the open nature of the Internet, replacing its open architecture with a closed model derived from the cable television industry.[326] These parties believe that the merged entity will integrate vertically into related markets such as broadband Internet content, software, and equipment.[327] They contend that the merged firm is likely to impose a proprietary architectural standard so as to favor affiliated product and service providers, foreclose effective competition among broadband Internet service providers, and undermine the incentive toward innovation in broadband content and applications.[328] Several commenters also argue that AT&T should be subject to an "open/forced access" requirement as a matter of "regulatory parity," because ILECs offering DSL services are required by law to provide access to competing providers.[329]

3. Findings.

116. We find it unnecessary to determine in this proceeding whether a distinct broadband Internet access market exists, notwithstanding the rigorous debate on the record between the Applicants and commenters on this issue of market definition. We agree with commenters that the proposed merger conceivably could undermine competition and diversity in the emerging broadband Internet arena, *if* customers did not have the ability to choose among viable, alternative broadband Internet access providers or ISPs. However, we find that those harms will be avoided if: (a) consumers can choose among various alternative broadband access providers, such as DSL, wireless, and satellite; or (b) unaffiliated ISPs are permitted access to the merged firm's cable network. As discussed below, we find that there is significant actual and potential competition from both alternative broadband providers and from unaffiliated ISPs that may gain access to the merged firm's cable systems. Moreover, we find that the Justice Department's proposed consent decree with AT&T, requiring it to divest its interest in Road Runner and to obtain prior approval from the Justice Department before entering into certain agreements with Time Warner and AOL, already has addressed the potential harms from a combination of Road

[325] Parties urging "open/forced access" include GTE, Bell Atlantic, Ameritech, AOL, MCI Worldcom, SBC Communications, Mindspring, U.S. West, Bellsouth, Quest, the Telecommunications Advocacy Project, Sprint, and the Consumers Union, *et al.*

[326] *See, e.g.,* MCI WorldCom Comments at 6-26; *Ex Parte* Comments of Professors Mark A. Lemley and Lawrence Lessig ("Lemley and Lessig Comments"), *passim.*

[327] *See, e.g.*. Bell Atlantic Comments at 35-39; GTE Comments at 49-58.

[328] *See* Lemley and Lessig Comments, *passim.*

[329] SBC Aug. 23 Comments at 43-47; MindSpring Comments, *passim*; U S West Aug. 23 Comments at 17-20; Qwest Comments at 3-8; Bell Atlantic Comments at 40-42.

Runner and Excite@Home.

117. *Alternative Providers.* With regard to choice among broadband access providers, there is evidence that ILECs, CLECs, and other competitive providers are aggressively rolling out alternative broadband technologies, notwithstanding cable's early lead in the nascent broadband area.[330] ISPs lacking direct access to provide broadband services over cable systems are entering into alliances with alternative broadband providers, thereby accelerating the deployment of these technologies.[331] Currently, those alternative technologies are attracting new subscribers at an exponential rate, and prices for these new services appear to be falling.[332] In fact, DSL sales are currently growing at a more rapid rate than cable modem sales.[333] Largely in response to cable modem rollout, the Bell Operating Companies ("BOCs") and GTE have launched major initiatives to accelerate their deployment of DSL.[334] Similarly,

[330] In *Broadband Today* (at 42), the Cable Services Bureau found that "[a]s deployment of DSL, satellite, and wireless advances, in large part spurred by rapid cable modem deployment deployment, consumers will have alternative platforms to use for high-speed data access, telephony and video services." Analysts appear to disagree on when or if cable-based Internet access will lose its current lead over alternative broadband technologies. Some believe that the recent surge in DSL deployment signals that cable modem service has only "a six-month lead on DSL technologies," Sylvia Dennis, *DSL Taking off Big Time,* NEWSBYTES NEWS NETWORK, Aug. 17, 1999, 1999 WL 20018859, and that DSL subscribership will surpass cable modem subscribership in 2001. Vito Racanelli, *AOL-Time Warner Deal Leaves Baby Bells Unjustly Shunned,* BARONS, 2000 WL-BARRONS 2363618, Jan. 15, 2000. Others predict that the cable industry will continue to be the high-speed access market leader over the next few years. *See* Yankee Group Report, *Cable Modems and DSL: High-Speed Growth for High-Speed Access,* quoted in Steven Bonisteel, *High-Speed Net in 16.6 Homes by 2004,* NEWSBYTES NEWS NETWORK, Jan. 28, 2000, http://www.newsbytes.com/pubNews/00/142944.html. There is little dispute, however, that cable faces increasing competition from alternative broadband technologies.

[331] *See Broadband Today* at 24-26. *See also* Kinetic Strategies, Inc., *Commercial Cable Modem Launches in North America*, http://www/cabledatacomnews.com/cmic/cmic7.html.

[332] For example, SBC Communications announced in October 1999 its "Project Pronto," a $6 billion commitment to upgrade networks and deploy high-speed DSL technology nationwide. *See* Patricia Fusco, *SBC Makes $6 Billion Broadband Play*, INTERNETNEWS.COM, Oct.18, 1999, http://www.internetnews.com/ISP-news/article/0,1087, 8_220301, 00.html; (based on announcements by RBOCs and other DSL providers, 80 million homes are passed by DSL and 60 million homes are currently servable by DSL) *see also* DSL Prime, *Want to Win in ADSL? US DSL Deployment and Subscribers-Updated Feb. 4, 2000,* http://www.dslprime.com/News_Articles/Availability/ availability.html. ("In March of 1999, industry experts predicted there would be only 500,000-600,000 active DSL lines by the end of 1999. Data from late 1999 indicates the actual number is more than double the predictions, at approximately 1.3 million."). Neil Strother, *Consumers and Biz Have the Hots for DSL,* ZDNET ANCHORDESK, Dec. 1, 1999, http://www.zdnet.com/anchordesk/story/story_4169.html.

[333] Cambridge Telecom Report, *DSL Deployment Surges Well Beyond Projections; Grows Five Times Faster Than Cable in Six-Month Period*, Aug. 17, 1999,1999WL 8104033; Shy Shin Luh, *Digital Subscriber Lines Are the Latest Internet Wave, But Baby Bells Aren't Making the Connection Quickly*, WASHINGTON POST, Aug. 23, 1999 at F5. A recent report by TeleChoice shows spectacular DSL growth during 1999 and projects continued rapid growth in the future. *See* TeleChoice, Inc., *Deployment – Updated Nov. 5, 1999,* http://www.xdsl.com/content/resources/deployment_info.asp. The Yankee Group predicts 4.1 million DSL lines in 2002. *See* Sarah L. Roberts-Witt, *The Coming DSL-Cable Race*, INTERNET WORLD, Nov. 15, 1999, http://www.iw.com/print/1999/11/15/infra/19991115-DSL.html.

[334] The Commission's Cable Services Bureau observed in October 1999 that: "The ILECs' aggressive deployment of DSL can be attributed in large part to the deployment of cable modem service. Although the ILECs have possessed DSL technology since the late 1980s, they did not offer the service, for concern that it would negatively impact their other lines of business. The deployment of cable modem service, however, spurred the ILECs to offer DSL or risk losing potential subscribers to cable." *Broadband Today* at 27 (footnotes omitted). In July 1999, Bell Atlantic (continued...)

the CLECs are aggressively deploying DSL technology.[335] We expect that our recent "line-sharing" rule permitting competitive carriers to obtain access to the high-frequency portion of the local loop from the incumbent LECs will further spur the deployment of DSL broadband services.[336]

118. Fixed wireless broadband technology also holds promise for the future. Presently, Teligent, Inc.[337] and WinStar Communications, Inc.[338] offer a variety of broadband services to small and medium-sized businesses in several metropolitan markets, and have plans to further deploy their services to several new markets throughout the country. In the upcoming months, several new fixed wireless systems plan to offer broadband access through either local multipoint distribution service (LMDS) or multichannel multipoint distribution service (MMDS) technologies. MCI and Sprint, for example, are acquiring struggling licensees and re-deploying their spectrum to provide broadband services.[339] In general, although wireless technology is limited by slower upstream speed as compared to cable and DSL,[340] analysts remain optimistic regarding wireless technology as a competitive broadband provider.[341]

119. Satellite-delivered broadband services also may become viable broadband alternatives in the future, although they currently do not offer high-speed access in the upstream direction.[342] The

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announced that it would double its deployment of DSL during 2000. In the same month, Ameritech launched its DSL program, and GTE announced that it was accelerating DSL deployment. In October 1999, SBC announced its $6 billion "Project Pronto" initiative. *See* Bell Atlantic Corp., *Bell Atlantic Doubles Infospeed DSL Deployment* (press release), July 28, 1999; David Schobert, *Ameritech takes DSL leap – finally*, TELEPHONY, July 26, 1999, 1999WL 11171924; GTE Corp., *GTE to offer lower-priced, higher speed Internet access service while accelerating deployment in 17 states* (press release), July 22, 1999; SBC Communications, Inc., *SBC Launches $6 Billion Broadband Initiative* (press release), Oct. 19, 1999.

[335] Covad's network already passes 25 million homes and businesses, and by the end of 2000 it expects to pass over 40 percent of the homes in the United States. *See* Covad Communications Group, Inc., *Covad Communications Announces Third Quarter Results* (press release), Oct. 20, 1999.

[336] *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Fourth Report and Order, FCC 99-355 (rel. Dec. 9, 1999), recon. pending, United States Telecom Association, *et. al.* v. FCC, No. 00-1012, *et. al.* (D.C. Cir. filed Jan. 18, 2000).

[337] Teligent, Inc, *About Us*, http://www.teligent.com.

[338] Winstar Communications, Inc., *Winstar Info*, http://www.winstar.com/info/content_technology.asp (web page) (viewed May 30, 2000).

[339] *See* Phillips Business Information, Inc., *MCI, Sprint Continue Mad Grab for Access*, BROADBAND NETWORKING NEWS, 1999 WL 7397825 at 1, Aug. 3, 1999.

[340] Sanford C. Bernstein & Co., Inc. and McKinsey & Co., Inc., *Broadband! A Joint Industry Study* (Jan. 2000) ("*Broadband!*") at 33.

[341] *See* JP Morgan, *Industry Report: The Mobile Millennium – Wireless Telecommunications Services* (May 3, 2000) at 3 ("Last year was an extraordinary year for the wireless industry. The industry added 16.8 million subscribers, up 21% from 13.9 million in 1998. The standard industry metric for subscriber growth is incremental penetration, which is defined as net additional subscribers divided by population. After several years of 3-4% annual incremental penetration, the rate started to accelerate with the introduction of PCS competition in 1997 and has continued to accelerate. Last year the industry achieved more than 6% of incremental penetration, and all indications are that it could reach 7% or more in 2000.").

[342] *Broadband!* at 54 ("Satellite has not been included in our overall estimates because it does not yet offer true broadband service currently, and won't until at least 2002 with the advent of Ka-band two-way service. Current cost
(continued...)

Spaceway network, expected to be operational in 2002, will utilize 16 satellites to provide "bandwidth-on-demand" – the ability to transmit and receive voice, video and data at any time from any location – at speeds of up to 6 Mbps.[343] Teledesic plans to utilize 288 satellites in low earth orbit to provide two-way digital transmission of voice, data and video at low costs, regardless of location. The company is spending $9 billion on its "Internet-in-the-Sky" project, which will provide consumers with broadband Internet service beginning in 2003.[344] In short, the next few years promise significant growth in competition from alternative broadband access providers.

120. *Access by Unaffiliated ISPs.* In addition to the foregoing industry developments, the Applicants have committed to open their cable modem platform to unaffiliated ISPs as soon as AT&T's exclusive contract with Excite@Home expires in June 2002 and MediaOne's exclusive contract with Road Runner expires in December 2001. On December 6, 1999, following meetings with other interested parties, AT&T and MindSpring (an unaffiliated, nationwide ISP)[345] sent a joint letter to Commission Chairman William Kennard setting forth an agreement in principle pursuant to which AT&T committed to provide unaffiliated ISPs access to its cable systems following the expiration of its exclusive arrangement with Excite@Home in 2002. AT&T General Counsel Jim Cicconi has stated that the commitments made in the December 6, 1999 letter also will apply in MediaOne territories, such that Road Runner will no longer be the exclusive ISP for MediaOne cable subscribers following the expiration of MediaOne's exclusive contract with Road Runner.[346] In that letter, AT&T stated its agreement to adhere to various principles of "openness" in order to offer its customers:[347]

- A choice of ISPs;
- The ability to exercise the consumer's choice of ISP without having to pay twice for both that ISP and the cable-affiliated ISP;
- A choice of Internet connections at different speeds, at reasonable and appropriate prices;
- Direct access to all content available on the World Wide Web without any AT&T-imposed charge to

(...continued from previous page)
for two-way CPE for the Ka-band is well over $1,000, and considerable improvement from that level will be required.").

[343] Hughes Network Systems, *Spaceway, http://www.hns.com/spaceway/spaceway.com.*

[344] Motorola, Inc., *Teledesic, Motorola, Boeing, Matra Marconi Space to Partner on 'Internet-in-the-Sky;' Motorola Will Lead Global Industrial Team* (press release), May 21, 1998. In addition, several companies, including DirecPC, eSat and Gilat, are already offering satellite-based broadband Internet service. Hughes Network Systems, *DirecPC Satellite Solution Combines Speed, Bandwidth and Reliability to Deliver Ideal Internet Access Solutions for Business* (press release), Nov. 15, 1999; eSat, Inc., *Introduction to eSat, Inc. Satellite Internet Solutions* (newsletter, updated), http://www.esatinc.com/satellite1.htm; *Microsoft and Gilat Begin 2-Way Satellite Satellite Internet Service: New Telephone-Free Operation Scheduled to reach 20,000 U.S. Sites,* COMMUNICATIONS DAILY (Feb. 17, 2000. AlphaStar International recently began 2-way Ku-band satellite broadband service for residential Internet users of wireless local access. AlphaStar's satellite-based broadband service is expected to compete directly with cable, DSL and wireless offerings, as well as with more established satellite companies such as DirecPC and Gilat-to-Home. COMMUNICATIONS DAILY (May 23, 2000).

[345] MindSpring recently merged with the ISP EarthLink. EarthLink, *EarthLink and MindSpring Complete $4 Billion Merger Creating Nation's Largest Independent ISP* (press release), Feb. 4, 2000.

[346] *See* Cicconi Public Forum Testimony, Tr. at 110-11.

[347] Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Dec. 7, 1999, Transmittal of letter from James W. Cicconi, General Counsel, AT&T, to William Kennard, Chairman, FCC, dated Dec. 6, 1999.

the consumer for such content;

- The continued ability to customize the customer's "start page" and other aspects of their Internet experience; and,
- The functionality of the customer's chosen ISP comparable to that which such ISP has on competing broadband systems, subject to any technical constraints particular to and imposed on all ISPs using AT&T's cable system to deliver high-speed Internet access.

121. To achieve the foregoing objectives, AT&T and MediaOne have also agreed to negotiate, upon the expiration of their exclusive arrangements with Excite@Home and Road Runner, private contracts with multiple ISPs in order to offer those ISPs reasonably comparable access prices, the opportunity to market and bill consumers directly, and the opportunity to differentiate service offerings and to maintain brand recognition in all such offerings. In addition, AT&T has committed to allowing unaffiliated ISPs using its cable systems to obtain Internet backbone capacity from AT&T's own service, if they so choose.[348] Finally, AT&T has committed to facilitating maximum access by its customers to any content of their choosing, including streaming video.[349] We expect the Applicants to adhere to the foregoing commitments and therefore are hopeful that the merged firm and unaffiliated ISPs together will be able to resolve the technical and business issues associated with providing these ISPs direct access to the cable infrastructure to offer broadband services, without the imposition of a government-mandated model.[350]

122. *Justice Department Proposed Consent Decree.* We also consider the impact of the proposed consent decree between the Justice Department and AT&T, which addresses the potential anti-competitive effects from a combination of the nation's two largest cable broadband ISPs, Road Runner and Excite@Home, under the merged entity's influence or control.[351] The proposed consent decree requires the merged entity to divest its interest in Road Runner no later than December 31, 2001, and to exit the joint venture prior to that date if the other relevant owners of Road Runner agree to an earlier departure.[352] In addition, the proposed consent decree requires the merged firm to obtain prior approval from the Justice Department before entering into certain types of agreements with Time Warner or with AOL, which has a pending merger agreement with Time Warner. That requirement, which would remain

[348] Letter from Betsy J. Brady, Vice President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated May 11, 2000, Transmittal of Letter from James W. Cicconi, General Counsel, AT&T, to William E. Kennard, Chairman, FCC, dated May 10, 2000.

[349] *Id.* ("Second, as a matter of principle and of customer satisfaction, AT&T is committed to facilitate maximum access by its customers to any content of their choosing. Therefore, AT&T is committed to developing and negotiating appropriate technical and commercial mechanisms for managing bandwidth usage associated with video streaming on a shared network, and for ensuring the availability of streaming video to customers who desire it.").

[350] In this regard, we note that at least seven of the eleven largest cable operators are exploring means to offer multiple ISPs access to their cable infrastructure. Those cable operators include Time Warner, Charter Communications, Classic Communications, Comcast, Cox Comunications, Insight Comunications, Adelphia Communications, and Cablevision Systems. *See Leading Cable MSOs Quietly Shifting Toward Open Access,* COMMUNICATIONS DAILY, Apr. 6, 2000; Memorandum of Understanding Between Time Warner, Inc. and America Online, Inc. Regarding Open Access Business Practices (Feb. 29, 2000), filed in *Applications for Consent to the Transfer of Control of Licenses, Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee,* CS Docket No. 00-30.

[351] *See United States v. AT&T Corp. and MediaOne Group, Inc.,* Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000).

[352] *Id.*

in place for two years after the merged firm exits Road Runner, would apply to any agreement that proposes joint provision of a residential broadband service or any agreement that would prevent either party from offering a residential broadband service to customers in any geographic region. It also would apply to agreements that would prevent the inclusion of any content in a cable modem service offered by either party, or that would prevent either party from providing preferential treatment to content provided by others.[353] The proposed consent decree thus assures that Road Runner and Excite@Home will not coordinate their actions to the detriment of consumers.

123. Given the nascent condition of the broadband industry and the foregoing promises of competition, we find it premature to conclude that the proposed merger poses a sufficient threat to competition and diversity in the provision of broadband Internet services, content, applications, or architecture to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree. We find that the proposed consent decree adequately addresses commenters' concern that a combination of Excite@Home and Road Runner would have both the ability and the incentive to discriminate against unaffiliated content providers and/or to leverage proprietary software protocols to favor networks owned by or affiliated with the merged entity. Although some possibility of harm may remain, we find that there is an equal or greater probability that growing competition from alternative access providers and unaffiliated ISPs will prevent such perceived harms. The evidence of growing competition from both alternative broadband providers and unaffiliated ISPs gaining access to cable and other broadband networks indicates that any action taken by the merged firm to disfavor unaffiliated broadband content and applications providers is likely to threaten the networks' ability to attract and retain customers. In light of industry trends toward both horizontal and vertical integration, however, we will monitor industry developments closely through our ongoing examination of the deployment of advanced services pursuant to Section 706 of the 1996 Act[354] and the Cable Services Bureau's monitoring of cable operators' provision of broadband services in particular.[355] We are committed to reviewing our policies if competition does not grow as expected.

124. We agree with commenters that the imposition of proprietary architecture and protocols for broadband Internet applications would pose a serious threat to the openness, diversity, and innovation of the Internet and the development of competition in the provision of broadband services. There is little doubt that over the next few years, as more and more customers purchase broadband Internet connections, the development of Internet applications and content specific to broadband will accelerate rapidly.[356] It is important that, to the extent possible, those broadband applications and content have the ability to interface with the full range of competing broadband technologies.

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[353] *Id.*

[354] 1996 Act § 706, 110 Stat. 153.

[355] *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, CC Docket No. 98-146, FCC 00-57 (rel. Feb. 18, 2000). The Commission's past monitoring of market developments pursuant to our Section 706 authority is reflected in the Cable Services Bureau's *Broadband Today* report, released in October, 1999. In that report, the Bureau examined issues related to the deployment of broadband Internet services, primarily focussing on the question of whether the Commission should implement an open/forced access requirement. *See, e.g., Broadband Today* at 9-15.

[356] *See* Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999, http://www.zdnet.com/zdnn/stories/news (industry analysts expect that "software and applications designed to exploit the high bandwidth market" will be developed in earnest once the total number of broadband customers surpasses one million).

125. In our monitoring of broadband developments, we have seen no evidence of cable operators imposing proprietary protocols. According to the Applicants, "both AT&T and MediaOne have used open standards in their broadband systems."[357] The Applicants argue that, as "nascent" service providers in an Internet arena still dominated by established narrowband providers, they have "neither the incentive nor the ability to change course and impose proprietary standards in the future."[358] Commenters have provided no evidence to the contrary. Given the increasingly rapid deployment of alternative broadband technologies, we cannot conclude that the merged firm will have sufficient bargaining power in this emerging field to give it the incentive and the ability to establish proprietary interfaces for new broadband software applications. If the merged entity imposes proprietary protocols, providers of applications and content tailored to those protocols will be forced to forego alternative broadband outlets such as DSL. Were the merged firm to attempt such a strategy, it is more likely than not that software developers could find adequate outlets in alternative broadband providers to discipline the merged firm's anti-competitive action.

126. We also decline to impose an "open/forced access" requirement on the merged firm's cable systems as a condition of this merger based on arguments regarding alleged disparate regulatory treatment of cable operators and telephone companies offering broadband Internet access.[359] As we noted in our *Amicus Brief* to the U.S. Court of Appeals for the Ninth Circuit, the Commission has not determined whether Internet access via cable system facilities should be classified as a "cable service" subject to Title VI of the Act, or as a "telecommunications" or "information service" subject to Title II.[360] There may well come a time when it will be necessary and useful from a policy perspective for the Commission to make these legal determinations. However, those legal determinations would have industry-wide application, as well as legal and practical implications that extend far beyond the contours of this particular merger. Our review of this merger does not provide an appropriate forum for a determination of the legal status of cable broadband Internet access services.

127. We find insufficient evidence to support the imposition of an "open/forced access" requirement on the merged entity at this time, given the potential for competition from alternative broadband providers and the potential for unaffiliated ISPs to gain direct access to provide broadband

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[357] Applicants Sept. 17 Reply Comments at 86.

[358] *Id.*

[359] MCI WorldCom and MindSpring argue that the Commission, in the context of its merger review, should rule that AT&T and MediaOne, insofar as they provide Internet access over cable, should be classified as "common carriers" subject to the provisions of Title II of the Communications Act of 1934. *See* MindSpring Comments at 3, 7-16; MCI WorldCom Comments at 26-32. MindSpring further argues that the Admininstrative Procedure Act (5 U.S.C. §§ 551 *et. seq.*) requires the Commission to decide whether Title II applies to the Applicants because, given the Applicants' prior arguments that an "open/forced access" requirement would prevent their investments to make system upgrades, such a requirement would cause the anticipated benefits of the merger to disappear. *See* MindSpring Comments at 19-21. We find this scenario unpersuasive, particularly because the Applicants continue to project extensive system upgrades and deployment of new services following the December 6, 1999 AT&T-MindSpring letter memorializing AT&T's "open access" commitment, which is discussed above.

[360] *Amicus Curiae* Brief of the FCC at 9-11, *AT&T Corp. v. City of Portland,* No. CV 99-65 PA (9th Cir. filed Aug. 16, 1999). The issue is pending in the forementioned litigation. In addition, the United States Court of Appeals for the Eleventh Circuit recently held that the Commission is not authorized under the 1996 Pole Attachment Act, 47 U.S.C. § 224, to regulate pole attachments for cable facilities used to provide "Internet service" because such service is neither a "cable service" nor a "telecommunications service." *Gulf Power Company v. FCC,* No. 98-6222, slip. op. at 26- 30 (11th Cir. Apr. 11, 2000).

services over the cable infrastructure. We remain concerned, however, that the recent trend toward both horizontal and vertical consolidation in the broadband services industry has the potential to threaten the openness, competition, and innovation of the Internet and the diversity of media voices that are available to Americans.[361]

128. Therefore, although we decline to impose "open/forced" access on the Applicants as a condition of the proposed merger, we will continue to aggressively monitor broadband developments and the steps taken by the merged entity to provide unaffiliated ISPs with direct access to its cable systems.[362] We are cognizant of the merged firm's incentives and ability to use its control of the Excite@Home home page and "caching" technology to negotiate exclusive content agreements in order to disadvantage alternative broadband providers.[363] We will review our "hands-off" policy if competition fails to grow as expected, especially if we find signs of the following possible market failures: (a) if competition from alternative broadband providers (such as DSL, satellite, and wireless) does not develop as anticipated; (b) if the merged firm fails to fulfill expeditiously its commitment to open its systems to unaffiliated ISPs, either by limiting access to a few large ISPs, through pricing or other contractual terms, or by utilizing technology that would make an open access regime difficult or costly to implement; or (c) if the merged firm successfully enters into exclusive agreements with broadband Internet content or applications providers so as to disadvantage competing broadband providers.

D. Local Exchange and Exchange Access Service

129. In this section, we consider the merger's potential public interest harms with respect to the provision of local exchange and exchange access service (*i.e.*, local telephone service).[364] The

[361] These concerns are exemplified by AT&T's recent acquisition of 32% of Internet telephony provider Net2Phone for $1.4 billion in cash, as part of a consortium of large media players including AOL and Liberty Media. (The consortium will hold a 39% voting interest.) The deal will require AT&T to work closely with AOL. AT&T Chairman Michael Armstrong stated that the company will soon announce another partnership with AOL in an undisclosed technology company. *See* AT&T Corp., *AT&T Consortium to Acquire 39 Percent Voting Stake in Net2Phone* (press release), Mar. 31, 2000.

[362] Some commenters argue that our review of the merger of AT&T and MediaOne should consider the impact of the proposed merger of AOL and Time Warner, Inc. *See* Schwartzman Public Forum Testimony, Tr. at 19-21. We find that it is inappropriate to consider the proposed merger of AOL and Time Warner in this proceding based on: (a) the assumption that the AOL-Time Warner merger will be approved and consummated, and (b) speculation regarding the competitive effects of that merger before full comment and review of the evidence has been completed. We conclude that the competitive effects of the proposed merger of AOL and Time Warner should be evaluated separately and fully in that merger review proceding.

[363] *See* ¶ 112, *supra*; *see also* Letter from Lorrie M. Marcil, Esq., Sidley & Austin, to Magalie Roman Salas, Secretary, FCC, dated Apr. 3, 2000, attaching e-mail message from Susan K. Marshall, AT&T, to Carl Vogel, AT&T, dated Aug. 26, 1999 (Bates Nos. 002759, 02769-02771).

[364] The Communications Act defines "local exchange carrier" as any person that is engaged in the provision of telephone exchange service or exchange access. 47 U.S.C. § 153(26). The term "telephone exchange service" means "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area, operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47). The term "exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services." 47 U.S.C. § 153(16).

proposed merger would not violate any provision of the Communications Act or the Commission's rules with respect to these services. Accordingly, we proceed to the next step of examining whether the merger would hinder competition in the provision of these services and thereby frustrate the implementation of the pro-competitive goals of the 1996 Act. We conclude that the merger would not harm the development of competition in the provision of local exchange and exchange access service.

130. AT&T's acquisition of MediaOne will eliminate a competitor in markets where both AT&T and MediaOne are now providing service or would be likely to provide service absent the merger. Thus, we first ask whether AT&T already serves, or absent the merger, would serve some of the same markets as MediaOne such that the merger would eliminate an actual or potential competitor in the provision of local exchange and exchange access service. If so, we must determine whether the merger will inhibit the development of competition in the provision of these services.

131. MediaOne, as a cable operator, is most likely to provide local telephony services to residential and small business customers passed by its cable systems. There is no evidence in the record that MediaOne currently provides or plans to target large business customers not passed by its cable systems, and Applicants state that MediaOne "has never been or even sought to be a significant provider of telephony services to business customers."[365] The proposed merger therefore will not eliminate in MediaOne a uniquely qualified potential competitor that possesses scarce assets or capabilities with respect to the provision of local telephone service to larger business customers. Although MediaOne owns a minority interest in the competitive LEC TWT, which provides local telephony services to larger businesses in some franchise areas served by AT&T, MediaOne recently relinquished all management rights and reduced its equity and voting interests in TWT to less than 10%.[366] To the extent AT&T will acquire a passive minority interest in TWT, we believe the larger business market is sufficiently competitive that AT&T's acquisition of this interest will not harm competition.[367] Accordingly, our examination of competitive concerns will focus on local exchange and exchange access services provided to residential and small business customers.

132. AT&T provides local telephone service to more than 555,000 customers throughout the United States.[368] Approximately 60,000 of these customers are served through AT&T's own cable

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[365] Application at 36.

[366] Section 652(b) of the Communications Act prohibits cable operators from acquiring a financial interest greater than 10% or any management interest in a LEC serving the cable operator's franchise area. 47 U.S.C. § 572(b); *see* 47 C.F.R. § 76.505(b). MediaOne previously held a 14.7% equity interest and an 18.3% voting interest in TWT. Letter from Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., to Magalie Roman Salas, Secretary, FCC, dated Mar. 24, 2000, Transmittal of Letter from Susan M. Eid, Vice President, Federal Relations, MediaOne, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Mar. 24, 2000. In response to concerns that the proposed merger of AT&T and MediaOne may violate Section 652(b), MediaOne reduced its equity and voting interests in TWT to approximately 6% and 7.7%, respectively, thereby also relinquishing its management rights. *See* May 9 Eid Letter. MediaOne's action rendered moot the question of whether AT&T's acquisition of MediaOne would violate Section 652(b). 47 U.S.C. § 572(b).

[367] *See AT&T-TCI Order*, 14 FCC Rcd at 3186 ¶ 50 ("incumbent LECs are facing increasing competition in markets for local exchange and exchange access services provided to business customers, and 'numerous new entrants are rapidly entering this market'"); *SBC-SNET Order*, 13 FCC Rcd at 21301-02 ¶ 20; *AT&T-Teleport Order*, 13 FCC Rdc at 15250-01 ¶ 27.

[368] Letter from Stephen Garavito, General Attorney, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated May 24, 2000.

system facilities.[369] AT&T's cable telephony service is available in Fremont and San Jose, California; Arlington Heights, Illinois; Dallas, Texas; and Hartford, Connecticut.[370] AT&T also provides facilities-based local telephone service on a trial basis in Dallas, Texas, and commercially to residential customers in Fort Worth, Texas using fixed wireless facilities.[371] AT&T plans to offer service commercially in two additional markets by year-end 2000.[372] AT&T has stated that its fixed wireless initiative is designed to allow it to provide local telephone service on a facilities basis in areas where it does not own cable facilities.[373]

133. MediaOne provides facilities-based local telephone service using its cable system facilities to approximately 100,000 local telephone service customers.[374] The service is available in Atlanta, Georgia; Boston, Massachusetts; Jacksonville and Pompano Beach, Florida; Detroit, Michigan; Los Angeles, California; and Richmond, Virginia.[375] According to the Applicants, MediaOne serves less than 4% of the homes that are passed by its cable facilities that have been upgraded to provide telephone service.[376]

134. AT&T and MediaOne currently compete with each other in only one market in suburban Atlanta, where AT&T provides resold local telephone service and MediaOne provides facilities-based service.[377] When the Application was filed, MediaOne served approximately 5,000 customers (less than 3% of the market) in this service area.[378] According to AT&T, its "Georgia market efforts never advanced beyond the readiness testing phase," and its local telephony resale plans "were suspended indefinitely in October/November 1997."[379] AT&T states that "service continued to be provided to the then-existing base until those customers opted to cancel or terminate their service, [and the] embedded

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[369] *Id.*

[370] *See* Section III.A. *infra.* In 1999, market trials of telephony services were launched in the San Francisco Bay Area, Chicago, Pittsburgh, Dallas, Denver, Seattle, Salt Lake City, and Portland. AT&T Corp., *AT&T – MediaOne Combination Will Speed Local Phone Competition and Bring High Speed Internet Services to More Consumers, AT&T's Cicconi Says* (press release), Feb. 4, 2000.

[371] *See* AT&T Fixed Wireless Slides; *see also* Goldman Sachs Dec. 7 AT&T Report; Paine Webber Dec. 7 AT&T Report at 2; Feb. 11 Marsh Letter; AT&T Corp., *AT&T 'Cuts The Cord' Top Provide Services Into Homes* (press release), Mar. 22, 2000.

[372] *See* AT&T Fixed Wireless Slides; *see also* Goldman Sachs Dec. 7 AT&T Report; Paine Webber Dec. 7 AT&T Report, at 2; Feb. 11 Marsh Letter.

[373] *See* AT&T Fixed Wireless Slides; *see also* Goldman Sachs Dec. 7 AT&T Report; Paine Webber Dec. 7 AT&T Report, at 2; Feb. 11 Marsh Letter.

[374] MediaOne Group, Inc., *MediaOne Installs 100,000th U.S. Digital Telephone Customer* (press release), May 18, 2000.

[375] Application at 34.

[376] May 25 Eid Letter.

[377] Application at 34 n.71.

[378] *Id.* In Georgia, AT&T and MediaOne together serve less than 15,000 local customers through facilities-based service and resale. *Id.* at 35.

[379] Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Feb. 18, 2000, Transmittal of Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Feb. 18, 2000.

base that remains today includes only a few thousand customers."[380]

135. *Findings*. We recognize that MediaOne's "second wire" into the home might permit it in the long term to become a sustained and effective competitor for residential telephone service in its franchise areas even absent the merger. We do not believe it likely, however, that MediaOne would be a potential competitor in markets outside of its local franchise areas that AT&T either now serves or would be likely to serve. Our previous findings are that cable operators such as MediaOne lack the telecommunications brand-name reputation and expertise to be "most significant market participants" for purposes of competitive analysis in markets outside of the cable operators' local franchise areas.[381]

136. Unlike MediaOne, however, AT&T does have the capability to be a "most significant market participant" in the mass market. Specifically, the Commission has held previously that AT&T is one of only a few firms that currently possesses the experience, brand name, assets, and financial resources that are essential for effective entry into the retail residential local exchange and exchange access markets.[382] AT&T has announced a fixed wireless initiative to provide local exchange service in areas where it does not intend to have a cable presence.[383] There is no evidence in the record, however, that AT&T has specific business plans to provide local exchange service to mass market customers in specific, identified MediaOne franchise areas. Thus, it is unclear whether and when AT&T would deploy a fixed wireless system and offer local exchange service on a mass market basis in MediaOne's franchise areas if AT&T did not merge with MediaOne. We conclude, based on the record before us, that the proposed merger will not harm the development of competition for local exchange and exchange access service provided to residential and small business consumers. As described in the potential public interest benefits section below, we find that AT&T and MediaOne acting independently would not be able to offer facilities-based local telephone service as efficiently or as effectively as they could through their proposed merger.

E. Mobile Telephone Service

137. We determine that the merger will not result in violation of the Communications Act or Commission rules with respect to mobile telephone service and that it will not frustrate the Commission's implementation of the Communications Act or Commission policies. Accordingly, we find that the merger presents no public interest harms with respect to this service.

138. The Applicants state that, through their respective interests in AT&T Wireless and Vodafone AirTouch Plc ("Vodafone"), the merged entity will have interests in both channel blocks in 37 cellular service areas.[384] AT&T owns and operates AT&T Wireless Services, Inc., which has a

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[380] *Id.*

[381] *See, e.g.*, *AT&T-TCI Order*, 14 FCC Rcd at 3185 ¶ 47. The term "most significant market participant" refers to service providers that are "either in the market already or are the most likely to enter and to have an effect on the market . . . ." *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20024-25 ¶ 70.

[382] *AT&T-TCI Order*, 14 FCC Rcd at 3185 ¶ 47.

[383] AT&T Corp., *AT&T 'Cuts the Cord' To Provide Services Into Homes* (press release), Mar. 22, 2000; Goldman Sachs Dec. 7 AT&T Report, at 3. While AT&T's fixed wireless initiative predated the announcement of the proposed merger, AT&T's specific statements that it plans to use fixed wireless to provide local exchange service in areas where it does not have a cable presence occurred after the filing of the Application.

[384] Application at 40-41 n.91. These overlapping interests include cellular interests held by BCP CommNet, L.P., which was acquired by Vodafone AirTouch. *Applications of BCP CommNet, L.P. Transferor, and Vodafone* (continued...)

controlling interest in one of the two cellular channel blocks in these service areas.[385] MediaOne gained an interest in Vodafone of approximately 4.9 percent when Vodafone acquired AirTouch Communications, Inc., in which MediaOne held a passive interest.[386] MediaOne's interest in Vodafone therefore is a minority, non-controlling interest that is not attributable for purposes of our cellular cross-ownership rules.

139. Under Commission rules in force when the Application was filed, a party that had a controlling interest in a license for one cellular channel block was prohibited from having any direct or indirect ownership interest in licensees for the other cellular channel block in an overlapping cellular service area ("CGSA").[387] In September 1999, however, the Commission revised its cellular cross-ownership rule in recognition of broad advances in competition within the mobile telephony sector.[388] Specifically, the rule now allows a party with a controlling, or otherwise attributable, interest in one of the cellular licensees to have a non-controlling, or otherwise non-attributable, ownership interest of up to five percent in the other cellular licensee in the CGSA.[389] Hence, we determine that the proposed merger will not result in violation of our cellular cross-ownership rule. In addition, because MediaOne itself does not provide mobile telephone service, and its interest in affiliated providers of this service is not attributable under Commission rules, we find that the merger will not result in any other public interest harms with respect to the provision of mobile telephone service.

F. Bundling

140. Several commenters raise concerns that the merged firm will have the ability and incentive to engage in anticompetitive bundling strategies.[390] They allege that the merged entity may condition the purchase of one service on the purchase of another service in a manner that injures competitors and consumers. To prevent such harm, the parties ask the Commission to approve the merger on the condition that the merged firm refrain from such bundling practices and instead offer each of its services (local and long distance telephone, cable, and Internet) on a stand-alone basis.

141. While the Applicants state that the merged entity will offer packages of bundled services, there is no evidence that it will condition the purchase of one service on the purchase of another. Indeed, the Applicants have committed to offering their local phone service, long distance

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Airtouch, PLC Transferee, for Consent to Transfer of Control of Licenses, Memorandum Opinion and Order, DA 99-3009 (WTB, rel. Dec. 27, 1999).

[385] *Id.* at 8.

[386] Nov. 24 Lindsay Letter; *see also* Application at 16. Since the filing of the Application, Vodafone has merged its U.S. wireless interests with those of Bell Atlantic and formed Verizon Wireless, further diluting MediaOne's stake in Vodafone's U.S. wireless interests. *See In re Applications of Vodafone AirTouch, Plc, and Bell Atlantic Corporation*, Memorandum Opinion and Order, DA 00-721 (WTB/IB, rel. Mar. 30, 2000).

[387] 47 C.F.R. § 22.942(a) (1999).

[388] *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket Nos. 98-205 *et al.*, Report and Order, FCC 99-244 (rel. Sept. 22, 1999) ("*Spectrum Cap Order*").

[389] 47 C.F.R. § 22.942(a) (2000 forthcoming); *Spectrum Cap Order*, FCC 99-244 at ¶ 74. This rule continues to require that a party with a controlling interest in one cellular licensee in a CGSA may not have a controlling interest, no matter how small, in the other licensee in that market.

[390] Echostar Comments at 6; Qwest Comments at 17-18 n.21; Ameritech Comments at 33.

phone service, MVPD service, and Internet service each on a stand-alone basis, in addition to offering bundled packages of services.[391] As we stated in the *AT&T-TCI Order*, a blanket condition prohibiting bundling of any form could have the unintended effect of denying consumers substantial benefits.[392] The merged firm may well have lower costs in billing and servicing customers that subscribe to several of its offerings.[393] In such a case, the merged firm could pass its cost savings to consumers in the form of lower prices. Purchasing the package of bundled services thus could be cheaper than the sum of purchasing each of the bundled services on a stand-alone basis.

142. Even if the merged firm decided to condition the purchase of one service on the purchase of another, it could inflict competitive harm only if it had sufficient market power in the provision of one of the bundled services.[394] So long as the merged firm lacks such market power, consumers will not be harmed, because they have the ability to choose from a number of alternative providers for each of these services. As discussed in our analysis of the relevant services above, AT&T will not gain such power in any market through its merger with MediaOne.

143. Various commenters argue that the Applicants will exploit their alleged dominance of local MVPD markets to pursue anticompetitive bundling strategies. Ameritech and EchoStar contend that the horizontal reach of the merged entity will allow Applicants to require purchasers of its cable television service also to purchase its telephony and Internet services.[395] Although cable television continues to be the dominant technology for the delivery of video programming in the MVPD marketplace, its market share continues to decline.[396] In the *1999 Cable Competition Report*, we found that the rate of growth for non-cable MVPD subscribers was substantially greater than the rate of growth for cable subscribers.[397] Moreover, the potential harm alleged by the commenters is not specific to the merger. If we were to accept *arguendo* these commenters' contention that the Applicants (and other cable operators) enjoy a monopoly in their local MVPD markets, then, even without the merger, AT&T and MediaOne each already would have the ability to require buyers of MVPD service to buy telephony and Internet services in their respective markets. Commenters have not alleged that either AT&T or MediaOne have engaged in such practices. As the Commission recognized in the *AT&T-TCI Order*, the merger is not the cause of this alleged competitive threat, and the merger license transfer proceeding thus

[391] Nov. 22 Marsh-Eid Letter at 4; *see also* Application at 42.

[392] *See AT&T-TCI Order*, 14 FCC Rcd at 3219 ¶ 125.

[393] *Id.*

[394] *AT&T-TCI Order*, 14 FCC Rcd at 3219 ¶ 126. In other words, consumers would not be harmed if rivals could offer a similar package of bundled services. To illustrate with a simple non-telecommunications example, a firm that bundled flour and sugar could inflict no competitive harm on either sugar or flour sellers because each could match the offer by buying the other product in an open, competitive market. The bundling would be profitable (*i.e.*, a sound business strategy) only if there were some efficiency associated with selling flour and sugar as a bundled package.

[395] Ameritech Comments at 32; EchoStar Comments at 6. Ameritech further contends that AT&T could tie-up consumers with long-term contracts and high exit fees that foreclose competition from new entrants in the MVPD and Internet access markets. Ameritech Comments at 33.

[396] *1999 Competition Report*, 15 FCC Rcd at 981 ¶ 5.

[397] *Id.*, 15 FCC Rcd at 981 ¶ 7. Non-cable MVPD subscribers increased 26% (to nearly 14.2 million) from the previous year, whereas cable subscribers grew only 2% for the same period. Much of the increase in non-cable MVPD subscribers is attributable to the growth of DBS. See *id.* at ¶¶ 8, 16. Currently, DBS subscribers represent over 12.5% of all MVPD subscribers, an increase of approximately 39% since June 1998. *See id.* at ¶¶ 8, 70.

is not the appropriate forum to address this issue.[398] We will continue to rely on competition or, in its absence, the antitrust laws, to protect against this danger, just as we did before the merger.[399] If parties allege that the merged firm has engaged in any anticompetitive bundling tactics or that it has failed to offer each service on a stand-alone basis, the Commission will address such conduct at that time as a separate enforcement matter.

G. Universal Service/Deployment

144. TAP and SBC seek Commission denial of the requested license transfers between AT&T and MediaOne based on allegations that MediaOne has engaged in discriminatory deployment of new services ("redlining") and will continue to do so post-merger.[400] After reviewing MediaOne's deployment data, however, TAP conceded at the February 4, 1999, public forum on this merger that there exists no evidence of actual discrimination by MediaOne.[401] After extensive investigation of SBC's and TAP's allegations, we find no evidence that MediaOne engaged in discriminatory deployment in the past or that the merged firm will engage in such a practice in the future.

145. TAP asserts that discriminatory deployment violates the Communications Act and subverts the public interest.[402] The Commission is deeply committed to the goal of delivering the potential of broadband to all Americans, regardless of their race, ethnicity, or income level. Recognizing the importance of TAP's and SBC's allegations of discriminatory deployment, we requested extensive deployment data from the Applicants and carefully investigated the matter. TAP's allegations rest on maps it created to illustrate the upgrade of MediaOne systems with respect to various ethnic, minority, and low-income communities in Los Angeles, California, and Richmond, Virginia.[403] Based on these maps, TAP asserts that MediaOne engaged in systematic discrimination in its deployment of cable plant upgrades and broadband service offerings. These maps purport to show that MediaOne actively decided not to provide service to certain areas with high concentrations of minority populations.[404]

146. We determine that TAP has alleged sufficient facts for the Commission to consider, as a factor in its public interest determination, whether the proposed merger would aggravate a situation where either of the merging parties deployed facilities in a discriminatory manner.[405] We conclude that

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[398] *AT&T-TCI Order*, 14 FCC Rcd at 3219 ¶ 126.

[399] *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. § 1; *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-62 (1992); CA Bus. & Prof. Code § 16720 (California); C.R.S.A. § 6-4-104 (Colorado); F.S.A. § 542.18 (Florida); IL ST CH 740 § 1013 (Illinois); N.J. St. § 56:9-3 (New Jersey); NY Gen. Bus. § 340 (New York); TX Bus. & Com. § 15.05 (Texas).

[400] TAP Comments at 33-34; TAP Supplement to Petition to Deny at 3 ("TAP Supplement"); SBC Sept. 17 Reply Comments at 3.

[401] Testimony of Khalil Munir, Executive Director, TAP, FCC Cable Services Bureau AT&T-MediaOne Public Forum (Feb. 4, 2000), Tr. at 186-88 (hereinafter "Munir Public Forum Testimony").

[402] TAP Comments at 16, 18-19.

[403] *Id.* at 15; TAP Supplement at Exhibit A. TAP's allegations are based on its examination of MediaOne's initial network design, construction schedules, and actual service areas for the greater metropolitan areas of Los Angeles, California, and Richmond, Virginia.

[404] TAP Supplement at 2.

[405] 47 U.S.C. § 309(d)(1).

such actions would be contrary to the purpose of the Communications Act[406] and the fundamental goal of the 1996 Act to bring communications services "to all Americans."[407]

147. Before we are required to designate an issue for evidentiary hearing to examine whether the merger is not in the public interest, however, we must find that the specific claims of those parties opposing the application raise substantial and material questions of fact.[408] In reaching this determination, the Commission may consider "the entire record, weighing the petitioner's evidence against facts offered in rebuttal."[409]

148. The Commission staff requested that MediaOne provide additional information to address the redlining allegations. After a thorough review of this information, we find no evidence that MediaOne upgraded and deployed its new and advanced services in a discriminatory manner. First, many of the communities that MediaOne allegedly "redlined" are not within its franchise areas, and therefore, could not be upgraded by the company.[410] Second, TAP's maps depict the availability of the Excite@Home service in various localities in order to make the inference that only affluent or non-ethnic areas received this particular high-speed Internet service. Excite@Home's service areas are irrelevant to the determination whether MediaOne has redlined minority communities because MediaOne does not offer this service and has no control over its deployment.[411] Third, TAP's methodology understates the extent of MediaOne's deployment and, in some cases, excludes a number of communities currently receiving broadband Internet services.[412] In determining whether a specific area received broadband services, TAP compared ZIP code data with MediaOne's website information.[413] This methodology,

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[406] Section 1 of the Communications Act charges the Commission with ensuring that communictaions services are made available, "so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national originn, or sex . . . "). 47 U.S.C. § 151.

[407] Joint Manager's Statement, S. Conf. Rep. No. 104-230 at 113. *See* 47 U.S.C. § 254(b)(3) (the 1996 Act envisions that "[c]onsumers in all regions of the Nation, including low income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information service. . .").

[408] 47 U.S.C. § 309(d)(2); *WorldCom-MCI Order*, 13 FCC at 18144 ¶209.

[409] *Astroline Communications Company Ltd. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

[410] Letter from Susan Eid, Vice President, Federal Relations, MediaOne Group, Inc., to Magalie Roman Salas, Secretary, FCC, dated Oct. 14, 1999, Attachment (Ex Parte Presentation of MediaOne Group) ("MediaOne Oct. 14 Redlining Rebuttal Filing ") at 3. While TAP's maps illustrate that the low-income communities of Boyle Heights, Huntington Park, South Gate, El Monte, Bell, Cudahy, Pacoima, Norwalk, and Hawthorne were not upgraded, these communities are not franchised to be served by MediaOne. Accordingly, MediaOne could not have upgraded those communities.

[411] *Id.* at 3 n.7.

[412] *Id.* at 2. MediaOne stated that it was difficult to ascertain the precise areas where TAP alleges that discriminatory deployment occurred, because TAP's maps did not include ZIP codes, community names, nor any other geographic references. *Id.* at 2 n.3. MediaOne produced its own maps that illustrated its franchise areas with relevant geographic information. *See* MediaOne Oct. 14 Redlining Rebuttal Filing; Letter from Lorrie M. Marcil, Esq., Sidley & Austin, to Magalie Roman Salas, Secretary, FCC, dated Jan. 27, 2000, Attachment (Ex Parte January 14, 2000 MediaOne Presentation on Status of Deployment of High-Speed Internet and Local Telephone Services in MediaOne Markets) ("MediaOne Jan. 27 Deployment Status Update"). In addition to Los Angeles and Richmond, MediaOne produced maps and demographic data for the following areas: Northern California; Ohio; New York; New Hampshire; Minnesota; Michigan; Massachusetts; Florida; and Atlanta, Georgia.

[413] TAP Supplement at 3.

however, does not fully capture the extent of MediaOne's broadband deployment. Cable franchise areas do not correlate with ZIP code boundaries, and MediaOne's website does not contain all relevant and current deployment information.[414]

149. Commission staff further requested that MediaOne produce its own maps and demographic data to illustrate in detail its franchise areas, the condition of upgrades in these areas, and the availability of broadband services, as well as average household income levels and ethnic composition (white, black, and Hispanic).[415] Based on our review of this data, we find no correlation between MediaOne's deployment and race, ethnicity, and income-levels. While it appears that certain ethnic-minority and low-income communities were not completely upgraded at a given date, there were several white and affluent communities that were similarly situated.[416] The inverse also appeared to be true: certain ethnic minority communities were offered broadband services well before the predominantly white and affluent communities.[417] When presented with this new data, TAP conceded at the Cable Services Bureau's February 4, 2000 public forum in this proceeding that there is no evidence of discriminatory deployment by MediaOne.[418]

150. MediaOne's upgrade and deployment schedule appears to be a function of resource constraints, engineering, and competitive pressures. Cable system upgrades that transform a one-way video network to a two-way broadband network are complex and time-consuming projects that require enormous capital expenditures, a skilled labor-force, and available supply of advanced equipment. Due to these constraints, cable operators cannot upgrade all of their systems simultaneously. Instead, cable system upgrades are a multiyear and multiphase endeavor, whereby the operator upgrades certain systems and offers new services on an incremental basis. Cable operators generally upgrade their systems based on engineering factors, such as the state of the current plant (capacity, hub and line conditions, two-way capability) and system clusters.[419] Based on the record before us, we find that MediaOne's upgrades and deployment do not reflect any discrimination on the basis of race, ethnicity, or income levels.

151. TAP also argues that, in low-income and minority areas where MediaOne did provide service, the product was inferior and the service quality was poor when compared to the affluent non-

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[414] MediaOne Oct. 14 Redlining Rebuttal Filing at 4. MediaOne states that, to avoid customer confusion, it lists ZIP code information on its website only after a majority of the nodes in a ZIP code are activated. In some instances, MediaOne decided not to list ZIP codes on its website, because its franchise area may encompass only a portion of a particular ZIP code. *Id.* at 4 n.10.

[415] *See* MediaOne Jan. 27 Deployment Status Update.

[416] For example, in Atlanta the affluent and predominantly white communities (*e.g.*, Acworth, Kennesaw, Marietta) were in the same upgrade condition as predominantly black and low-income areas (*e.g.*, Douglasville, Decatur).

[417] Letter from Howard J. Symons, Esq., Mintz, Levin, Cohen, Ferris, Glovsky, and Popeo, P.C., to Magalie Roman Salas, Secretary, FCC, dated Nov. 18, 1999, Attachment (Ex Parte Presentation of MediaOne Reviewing MediaOne's Oct. 14 Redlining Rebuttal and Depiction of MediaOne's Deployment of Broadband Facilities in Altanta, Los Angeles and Richmond) ("MediaOne Nov. 18 Redlining Rebuttal Filing"); MediaOne Jan. 27 Deployment Status Update. MediaOne's properties in the Atlanta metropolitan area—with a high percentage of minorities and a low average household income—will be offered advanced new services before some of the affluent, predominantly white suburbs will receive these services. MediaOne Nov. 18 Redlining Rebuttal Filing.

[418] Munir Public Forum Testimony, Tr. at 186-88.

[419] *See* MediaOne Jan. 27 Deployment Status Update at 1.

minority areas.[420] The anecdotes of customer complaints gleaned by TAP from periodicals,[421] however, do not provide sufficient evidence to suggest that these experiences and complaints are unique to MediaOne's minority or low-income subscribers.

152. The record evidence does not raise substantial and material questions of fact regarding whether applicants either have engaged in or will engage in discriminatory conduct by avoiding minority communities in their deployment of facilities.[422] The record does not contain any evidence that MediaOne treated low-income and minority communities in a discriminatory fashion. For these reasons, we are not persuaded that the merger threatens our universal service goal that all Americans share in the benefits of broadband deployment. Thus, we decline to deny the merger on these grounds or impose any condition concerning the merged firm's upgrade schedule and deployment plans.[423]

153. Los Angeles County asks the Commission to require AT&T to adopt MediaOne's social contract obligations or to impose similar obligations on the merged firm as a condition of approving the merger.[424] Among other things, the social contract requires MediaOne to rebuild and upgrade its cable systems, create a streamlined (or "lifeline") basic service tier, and provide free cable connections and Internet service (where otherwise available) to schools in the communities that are covered by the social contract.[425] The social contract provisions generally apply to a cable operator that acquires MediaOne systems only if the acquiring operator elects to adopt the social contract.[426] The social contract ends on December 31, 2000.[427] We decline to require AT&T to adopt the MediaOne social contract as a condition of our approval of the Application. Such a requirement would go beyond the provisions of the social contract, and Los Angeles County has not provided reasons why such a measure would be necessary or appropriate.[428] Moreover, AT&T has notified the Commission that it agrees to be bound by MediaOne's

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[420] TAP Comments at 15.

[421] *Id.* at 15-16.

[422] *WorldCom-MCI Order*, 13 FCC at 18144 ¶ 209.

[423] *See* APT Reply Comments at 1-4 (seeking a condition requiring equitable deployment of the merged firm's high-speed cable infrastructure). Citing Section 706 of the 1996 Act, 110 Stat. 153, APT argues that the Commission should exercise its jurisdiction to eliminate the digital divide between the information rich and the information poor. To this end, APT asks that the Commission create a social compact as a condition for approval of the proposed merger. This social compact would require AT&T to allocate a portion of the synergy savings resulting from the merger to fund research and development of technology applications that address the needs of underserved communities. APT also requests that the Commission obtain AT&T's enforceable pledge to deploy its upgraded high-speed networks equitably throughout its service territory. APT Reply Comments at 1-4.

[424] Letter from Pastor Herrera, Jr., Director, County of Los Angeles Dept. of Consumer Affairs, to Magalie Roman Salas, Secretary, FCC, dated Jan. 18, 2000 ("Los Angeles County Comments").

[425] *Social Contract for Continental Cablevision*, 11 FCC Rcd 299 (1995) ("*Social Contract*"), *amended by Continental Cablevision, Inc. Amended Social Contract*, 11 FCC Rcd 11118 (1996) ("*Amended Social Contract*"). Continental Cablevision, Inc., was later renamed MediaOne. *See Social Contract*, 11 FCC Rcd at 361-64; *Amended Social Contract*, 11 FCC Rcd at 11157-60, 11164-67. The Social Contract also allows MediaOne to increase rates by up to $1.00 per subscriber per year to recover the costs of system upgrades. Amended Social Contract Section III.D, 11 FCC Rcd at 11161.

[426] *Social Contract*, 11 FCC Rcd at 365-66; *Amended Social Contract*, 11 FCC Rcd at 11164. Certain provisions apply automatically to the acquiring operator. Social Contract Section III.H.2., 11 FCC Rcd at 356-66.

[427] *Social Contract*, 11 FCC Rcd at 369; *Amended Social Contract*, 11 FCC Rcd at 11174-75.

[428] Los Angeles County states that such a condition would not be unprecedented, citing a May 1999 Cable Services (continued...)

social contract obligations.[429] Thus, AT&T will be bound by MediaOne's social contract.

V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

154. In addition to assessing the potential public interest harms from the merger, we must consider whether the merger is likely to produce any public interest benefits.[430] We employ a balancing test to determine whether the potential public interest benefits outweigh the potential public interest harms. In *SBC-Ameritech*, we noted that "as the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest."[431] Our analysis focuses on demonstrable and verifiable public interest benefits that could not be achieved if there were no merger.[432] Public interest benefits may include merger-specific cost saving efficiencies and beneficial conditions proffered by the Applicants or by other parties, or imposed by the Commission.[433]

155. The Applicants claim the merger will produce public benefits in the provision of local telephony, broadband Internet, and digital cable service that outweigh any conceivable public interest harms.[434] The Applicants attempt to quantify the estimated benefits from the merger and contend that "a conservative estimate of potential savings for consumers from the increased competition exceeds $600 million per year, or $3.7 billion in net present value."[435] This estimate is based on the assumption that the merger will accelerate deployment and competition in the provision of facilities-based local telephony and new services.[436]

156. The Applicants have not produced a post-merger deployment plan, to be measured against AT&T's and MediaOne's independent pre-merger deployment plans, in order to demonstrate the extent to which the merger actually will accelerate deployment and competition in the provision of local

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Bureau order concerning AT&T's adoption of the Time Warner Cable social contract with respect to systems that AT&T acquired from Time Warner Cable. Los Angeles County Comments at 2. The order Los Angeles County cites, however, merely approved AT&T's request to adopt the social contract obligations; the order did not impose these obligations as a condition of Commission approval of AT&T's merger with TCI. *See Time Warner Social Contract*, 14 FCC Rcd 7774 (1999).

[429] Letter from Betsy Brady, Esq., Vice President Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Apr. 13, 2000.

[430] *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255; *AT&T-TCI Order*, 14 FCC Rcd at 3168 ¶ 13; *WorldCom-MCI Order*, 13 FCC Rcd at 18134-35 ¶ 194.

[431] *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 256; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157.

[432] *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255.

[433] *Id.*

[434] Application at 28-29; Letter from Stephen C. Garavito, General Attorney, AT&T, Magalie Roman Salas, Secretary, FCC, dated Nov. 24, 1999, Transmittal of Letter from Stephen C. Garavito, General Attorney, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Nov. 24, 1999 ("Nov. 24 Garavito Letter") at 6-13; Letter from David M. Levy, Esq., Sidley & Austin, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, Dated Dec. 8, 1999, Attachments (Declaration of R. Glenn Hubbard and William H. Lehr) ("Hubbard-Lehr Decl."); Ordover-Willig Decl.

[435] Hubbard-Lehr Decl. at ¶ 20.

[436] *Id.* at ¶ 20.