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October 17, 2000

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Magalie Salas, Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-A325
Washington, D.C. 20554

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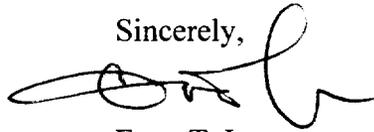
Re: *Joint Application of NorthPoint Communications, Inc. and Verizon
Communications for Authority Pursuant to Section 214 of the Communications
Act of 1934, as Amended, To Transfer Control of Blanket Authorization To
Provide Domestic Interstate Telecommunications Services as a Non-Dominant
Carrier, CC Docket No. 00-157*

Dear Ms. Salas:

I have enclosed for filing in the above-captioned proceeding the original and four copies of the Reply Comments of NorthPoint and Verizon. An electronic copy of the Reply Comments (with attachments) on a read-only diskette has been filed under separate cover with CeCi Stephens, Policy and Program Planning Division, Common Carrier Bureau.

If you have any questions concerning this matter, please contact me at (202) 326-7930.

Sincerely,



Evan T. Leo

Enclosure

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Joint Application of NorthPoint
Communications, Inc. and Verizon
Communications for Authority Pursuant to
Section 214 of the Communications Act of
1934, as Amended, To Transfer Control of
Blanket Authorization To Provide Domestic
Interstate Telecommunications Services as a
Non-Dominant Carrier

CC Docket No. 00-157

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INTRODUCTION AND SUMMARY

NorthPoint and Verizon demonstrated in their Application that the combination of their complementary xDSL businesses in a new “most separate” affiliate will simultaneously advance two core goals of the 1996 Act — promoting competition in all segments of the communications marketplace, and promoting the rapid deployment of advanced telecommunications capability. A broad coalition of public interest groups has filed comments agreeing wholeheartedly with this conclusion, and urging the Commission to approve this transaction.

The only party that seriously disputes this showing is AT&T. AT&T is, of course, the dominant incumbent in the provision of residential broadband access and video — two services that, as a result of this transaction, NorthPoint and Verizon will be able to provide more efficiently and across a broader geographic footprint in direct competition with AT&T. AT&T argues that the transaction is not necessary to achieve these benefits because AT&T and other cable operators already face enough competition. But as the Commission has already found, the theory and facts behind AT&T’s assertion are plain wrong.

AT&T — joined by a few other commenters — also argues that the transaction will reduce competition in some segments of the telecommunications marketplace because it will remove one competitor from the broadband access business. But, as demonstrated in the Application, NorthPoint and Verizon are merely two among many new entrants for broadband access services. Under the Commission’s established standard, therefore, the removal of either NorthPoint or Verizon cannot plausibly be said to eliminate one of a limited number of significant market participants.

I. THE TRANSACTION WILL PRODUCE SIGNIFICANT PROCOMPETITIVE BENEFITS.

NorthPoint and Verizon demonstrated in their Application that this transaction will produce significant procompetitive (and pro-consumer) benefits. Among other things: It will promote the deployment of open broadband access services nationwide in competition with the closed cable systems that dominate the residential broadband access business (and with the other regional Bell companies). It will provide added scale that is needed to compete with AT&T and other cable operators in their core video business. And it will combine the xDSL businesses of NorthPoint and Verizon in a new “most separate” affiliate with independent shareholders and directors, and with an increased focus on the widespread deployment of competing broadband access services.

AT&T — which calls itself the “nation’s largest broadband services company” — is the only party that makes any material effort to challenge the substantial benefits that this transaction will produce. At core, however, its argument boils down to the bald assertion that AT&T and other incumbent cable operators already face enough competition. Because of that, it says, there is no benefit to creating a stronger nationwide open broadband access competitor to take on the dominant closed cable systems. This is nonsense.

A. The Transaction Will Promote Competition for Broadband Access.

As demonstrated in the Application, combining the complementary xDSL operations of NorthPoint and Verizon will allow the new company to roll out broadband access services across a larger footprint nationwide, including in the service territories of the other regional Bell operating companies (“BOCs”). And it will enable the new company to compete more effectively against the closed systems of the cable incumbents, to the ultimate benefit of Internet service providers (“ISPs”) and consumers alike.

In their comments here, a coalition of public interest groups agrees. In their view, “this merger is in the public interest and will promote two very important goals of the Telecommunications Act of 1996 — enhanced competition for broadband access service and an accelerated roll-out of broadband technology to more areas across the United States.” Public Interest Commenters at 3.¹ According to these public interest groups, “the proposed merger will spur investment in high-speed Internet access in geographic areas that benefit small businesses, educational institutions and homes in rural farming communities and low income neighborhoods.” *Id.* at 5. And they also point out that “[a]n added benefit to deploying DSL facilities across a larger footprint is that the DSL platform is an open network . . . provid[ing] literally hundreds of ISPs a more efficient means to access the consumer market and it allows consumers to choose from a variety of ISPs.” *Id.* at 7.

In sharp contrast to the view of these public interest groups, AT&T — and AT&T alone — claims that this transaction will not promote competition for broadband access. *See, e.g.,* AT&T at 32 (asserting that transaction “would do little to promote Internet competition”).² Of course, this is the same AT&T that already is the largest operator of closed cable systems, and

¹ *See* Comments of National Grange, National Black Chamber of Commerce, U.S. Distance Learning Association and U.S. Hispanic Chamber of Commerce at 3, CC Docket No. 00-157 (FCC filed Oct. 2, 2000) (“Public Interest Commenters”).

² Although AT&T does not define what it means by “Internet competition,” both it and the Commission have previously used the term “broadband access.” *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., To AT&T Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 9816, ¶ 5 (2000) (“*AT&T/MediaOne Order*”) (discussing competition for “broadband access” and “broadband Internet service providers”); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 14 FCC Rcd 3160, ¶ 75 (1999) (“*AT&T/TCI Order*”) (“broadband Internet access services to residential customers”); AT&T at 34 (“broadband competition”).

that continues to try to evade the Commission's ownership limitations.³ And it is the same AT&T that already controls the largest cable modem provider (Excite@Home), and that has vigorously resisted opening its systems to multiple ISPs.⁴

Despite all of this, AT&T says that it and other cable incumbents already face enough competition, and that DSL is on the verge of overtaking cable. Among other things, it claims that DSL is "available to more homes than cable modem services," that DSL is "growing much faster than cable modem service," and that "[a]nalysts expect DSL to have more subscribers than cable in the very near future." AT&T at 32. AT&T simply has its facts wrong. According to the Commission's own numbers, closed cable systems control approximately *three-quarters* of the residential broadband access subscribers (or at least three times as many residential broadband subscribers as DSL). *See* Pub. Int. Stmt. at 3 n.1; Hazlett Decl. ¶¶ 7, 23; Hazlett Reply Decl. ¶ 6 & Att. 2. And by the end of this year, cable modem service is expected to be available to many more households than DSL — 70 percent more, according to AT&T's own sources.⁵

³ *See, e.g., Telecom: Kennard Chastises AT&T's Lobbying*, National Journal's Technology Daily, Sept. 13, 2000 (quoting FCC Chairman William Kennard: "With the ink hardly dry on the [AT&T/MediaOne] order, AT&T is trying to undo its obligations").

⁴ *See, e.g., Reply Comments of AT&T Corp. and MediaOne Group, Inc. at 71, Applications for Consent to the Transfer of Control of Licenses, MediaOne Group, Inc., Transferor, to AT&T Corp. Transferee*, CS Docket No. 99-251 (FCC filed Sept. 17, 1999) (claiming that "forced access will not provide more consumer choice."); *see also* T. Wallack, *Change Takes Hold at Excite*, San Francisco Chronicle, July 17, 2000, at E1 (quoting Excite@Home Chairman and CEO George Bell: "We have exclusive contracts (with our cable partners) through the year 2002. . . . We have a regulatory environment where the forced-access issue has diminished in scope and scale. . . . In sum, the market conditions that we face over the next two years are enviable and may never come again.").

⁵ *See* AT&T at 33 n.107 (citing C. Crouch, *Broadband Is Coming at High Speed*, PC World, Oct. 12, 2000: "By the end of this year, 41 percent of U.S. households will have access to cable modem service but only 24 percent will have access to digital subscriber line."). The Commission has noted that, by the end of 2000, the largest cable companies "will have upgraded systems that cover at least 61 million (80%) households." D. Lathen, Bureau Chief, Cable

Indeed, AT&T itself, through Excite@Home, has nearly six times the amount of residential subscribers as NorthPoint and Verizon combined. *See* Hazlett Decl. at Att. 3.⁶ And well over one million of these customers will be connected to AT&T's own closed cable systems by year's end.⁷ All this led AT&T's Excite@Home recently to proclaim that, "even after the merger of NorthPoint's and Verizon's digital subscriber line businesses, the 'new' NorthPoint will not be larger, measured in either number of subscribers or revenue generated from subscribers, than Excite@Home," and that "Excite@Home's 'footprint' is larger than that claimed by NorthPoint/Verizon."⁸

Moreover, all other things being equal, cable is expected to retain its dominance for some time to come. Although DSL may be growing slightly faster than cable in percentage terms (given the much smaller base that DSL began with⁹), cable still added more than twice the number of residential subscribers as DSL in the last quarter. *See* Hazlett Reply Decl. ¶ 7 &

Services Bureau, *Broadband Today*, A Staff Report to William E. Kennard, Chairman, Federal Communications Commission, on Industry Monitoring Sessions Convened by Cable Services Bureau at 27 (Oct. 1999).

⁶ AT&T recently extended its control over Excite@Home, thus solidifying its ability to control access on cable networks other than its own. *See* Excite@Home Press Release, *Excite@Home Announces New Board and Completion of Partner Distribution Agreements, AT&T Assumes 74 Percent Voting Stake*, Aug. 28, 2000 (as a result of restructuring, AT&T will gain, "on a fully diluted basis, approximately 25 percent of the economic interest in Excite@Home and 74 percent of the voting interest, as compared to the 24 percent economic interest and 56 percent voting interest AT&T had previously").

⁷ *See* Morgan Stanley Dean Witter, *AT&T BIS 3Q00 Preview* at 3, Oct. 4, 2000 ("*Morgan Stanley AT&T Report*").

⁸ *See* Letter from Lewis Rose, Arent Fox, Counsel for Excite@Home, to Steven Gorosh, Executive Vice President and General Counsel, NorthPoint, and Bill Barr, Executive Vice President and General Counsel, Verizon (Aug. 23, 2000).

⁹ As of first quarter 2000, cable modem providers had approximately 1.8 million residential subscribers — more than three times the number of residential broadband subscribers served by DSL. *See* Hazlett Reply Decl. Att. 2.

Att. 2.¹⁰ And cable modems would have grown even more rapidly but for what Excite@Home describes as “a temporary interruption in the supply of cable modems.”¹¹ According to the Commission and respected analysts alike, cable likely will maintain its lead over DSL for at least the next two to four years. *See Pub. Int. Stmt. at 4 & nn.3, 4.*

Just as AT&T is wrong when it suggests that cable is no longer the dominant broadband access provider, it is equally wrong when it claims that the combination of NorthPoint’s and Verizon’s xDSL businesses will not produce a more effective competitor to the cable incumbents. This transaction gives NorthPoint the capital and other resources that it badly needs but currently lacks in order to sustain its current operations, and to expand these operations into new customer segments (particularly residential) and geographic areas. *See Pub. Int. Stmt. at 5.* While AT&T tries (at 37-38) to mischaracterize this as a “failing firm defense,” the real point is that a transaction that enhances and accelerates the ability of the parties to compete against incumbent service providers is in the public interest, as the Commission has repeatedly concluded.¹² Moreover, this transaction provides Verizon with an immediate and extensive out-

¹⁰ Even in percentage terms, residential DSL customers grew only slightly more (34 percent) than residential cable modem customers (26 percent) in second quarter 2000. *See id.*

¹¹ Excite@Home Press Release, *Excite@Home Reports Second Quarter 2000 Results*, July 19, 2000; *see also* Gartner Interactive Press Release, *Gartner’s Dataquest Says Worldwide Cable Modem Market Grew Nearly 70 Percent in First Quarter 2000*, June 7, 2000 (quoting Patti Reali, senior analyst, Dataquest: “Broadband service providers installed high-speed modems as fast as they could take delivery, and there was literally no stock of inventory to be had during the period.”).

¹² *See, e.g., Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc., Memorandum Opinion and Order*, 13 FCC Rcd 18025, ¶ 199 (1998) (identifying as public interest benefit “merged entity[’s]” ability “to expand its operations and enter into new local markets more quickly than either party alone could absent the merger”); *see also AT&T/MediaOne Order* ¶ 160; *Application of GTE Corporation and Bell Atlantic Corporation For Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order,

of-region presence, an expanded product portfolio to serve business customers that it currently lacks, and a jump start to Verizon's separate data affiliate by infusing it with the added technical capabilities and entrepreneurial management team of the current NorthPoint.

These merger benefits are particularly important because the new NorthPoint will provide an open alternative to closed cable systems. As the Commercial Internet Exchange Association ("CIX") — an ISP trade association — states: "[A]ccess to wholesale DSL service is vital to the continued success of the independent ISPs that cannot utilize cable broadband access, but need to provide high-speed Internet access." CIX at 4. Even AT&T implicitly concedes that, by creating an open competitive alternative to cable for ISPs nationwide, this transaction will benefit ISPs and promote competition. See AT&T at 21-22 (claiming it needs to partner with national data provider to keep costs down). Yet most cable operators, as explained in the Application, have signed exclusive contracts with one of the two dominant cable Internet access providers — Excite@Home or Road Runner — that are not scheduled to expire for 18-24 more months. See Pub. Int. Stmt at 8; Hazlett Decl. ¶ 7. And ISP reports from the recent so-called open access trials strongly suggest that, even after Excite@Home's and Road Runner's exclusive contracts expire, AT&T (and undoubtedly other cable operators as well) will continue to find ways to keep their networks closed.¹³

FCC 00-221, CC Docket No. 98-184, ¶ 262 (rel. Jun. 16, 2000) ("*Bell Atlantic/GTE Order*"); *AT&T/TCI Order* ¶¶ 147-148.

¹³ See, e.g., A. Klein, *Time Warner Access Pledge Questioned*, Washington Post at E01 (Sept. 30, 2000) (quoting David Baker, vice president of law and public policy, EarthLink: "It would be difficult, if not impossible, to offer the service under the terms that they are offering"); see also NorthNet Letter to Robert Pitofsky, Chairman, Federal Trade Commission, and William Kennard, Chairman, Federal Communications Commission, Oct. 10, 2000, at 2, 7 ("By offering terms that are totally unacceptable, Time Warner keeps its network effectively closed.").

B. The Transaction Will Promote Competition For Video Distribution.

As described in the Application, this transaction also will enhance the combined company's ability to develop and deploy new service offerings to compete with cable in its core video business. *See* Pub. Int. Stmt. at 8-11. Only AT&T — which elsewhere calls itself “the largest broadband video company”¹⁴ — disputes this fact, once again based on the argument that it already faces enough video competition and that one additional competitor would have no procompetitive benefit. *See* AT&T at 40.¹⁵ AT&T again is wrong.

As the Commission recently found, cable remains “the dominant technology” for the delivery of video programming, and cable operators are still raising their prices faster than inflation. *See* Hazlett Reply Decl. ¶ 12.¹⁶ Moreover, even accepting AT&T's facts — which put cable's market share at 80 percent (AT&T at 40) — the video distribution market is far more concentrated than the long distance market, where the Commission has squarely rejected

¹⁴ AT&T, *AT&T Group Earning Commentary, Second Quarter 2000*, at 11 <http://www.att.com/ir/pdf/002q_cmnt.pfd> (July 25, 2000).

¹⁵ Of course, this is the same argument that AT&T has relied on to try to bar added competition in its long distance business in New York and elsewhere. *See, e.g.*, Comments of AT&T Corp. in Opposition to Bell Atlantic's Section 271 Application for New York at 94-100, *Application by New York Telephone Company (d/b/a Bell Atlantic — New York), Bell Atlantic Communications, Inc., NYNEX Long Distance Company, and Bell Atlantic Global Networks, Inc., for Authorization to Provide In-Region, InterLATA Services in New York*, CC Docket No. 99-295 (FCC filed Oct. 16, 1999) (“[T]he long distance market already displays the hallmarks of a vigorously competitive market . . . As a result, Bell Atlantic's . . . entry into that market will not bring the consumer benefits Bell Atlantic promises”). Yet a recently released consumer group report estimates that consumers in New York who have switched to Verizon's competitive long distance offerings could save as much as \$120 million dollars a year compared to the prices of the Big Three long distance incumbents. *See* Telecommunications Research & Action Center, *A Study of Telephone Competition in New York* (Sept. 6, 2000).

¹⁶ *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978, ¶ 5 (2000) (“*Sixth Annual Video Report*”); *see* *Implementation of Section 3 of the Cable Television Protection and Competition Act of 1992*, Report on Cable Industry Prices ¶ 4, MM Docket No. 92-266 (rel. Jun. 15, 2000).

AT&T's misguided theory that the addition of one more strong entrant has no procompetitive effect.¹⁷

Moreover, the ability to develop a video product is especially important in order to remain competitive with the likes of AT&T, which already is able to offer a bundled service package that includes video and broadband access along with other telecommunications services.¹⁸ As AT&T itself concedes, video is an important part of the product "bundle" that consumers increasingly seek to purchase from a single source.¹⁹ AT&T has claimed that "content distribution . . . needs to be a feature of the network,"²⁰ and in fact AT&T's

¹⁷ See, e.g., *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, ¶ 428 (1999) ("New York Order") ("As a general matter, we believe that additional competition in telecommunications markets will enhance the public interest.").

¹⁸ Cf. AT&T-MediaOne Merger Prospectus, Schedule S-4, at II-5 (SEC filed Aug. 27, 1999) ("MediaOne Group believes that the combined company's ability to offer customers 'one-stop shopping' for all of their video entertainment, information, Internet and communication needs will be a significant advantage to AT&T following the merger. . . . AT&T also has a strong marketing presence in many of the local markets in which MediaOne Group operates, and utilizing the capabilities of AT&T's marketing force along with the bundling of various service offerings could provide operating efficiencies as well as improved customer acquisition.").

¹⁹ See AT&T at 42 ("The potential ability to offer — and receive revenues from — telephone, and high-speed Internet services, as well as traditional cable offerings, appears to be providing new incentives to 'overbuild.'"); AT&T Press Release, *AT&T Broadband to Introduce Uniform Pricing and Packaging of Digital Cable Products*, Aug. 15, 2000 ("[U]nifying AT&T Digital Cable's offerings will form a foundation from which to offer multiple products — including interactive services, high-speed cable Internet access and digital phone service — bundled together as they continue to be deployed nationwide.").

²⁰ Kathleen B. Earley, Vice President, AT&T Internet Services, *Living on the Edge: Network the New Economy*, Speech, As Delivered to Spring Internet World, Los Angeles, CA, Apr. 7, 2000.

Excite@Home recently announced new video services to be offered in connection with its cable Internet access services. *See* Hazlett Reply Decl. ¶ 14 n.14.²¹

AT&T nonetheless claims (at 39-40) that NorthPoint's Blast! technology is not "unique" and that Verizon could obtain similar content delivery services from "numerous" other "content delivery companies," such as Akamai, Digital Island, Sun Microsystems, and Inktomi.²² But that simply misses the point. *See* Hazlett Reply Decl. ¶ 10. As an initial matter, the Commission's merger-review standard does not require parties to show that their merger is the only way to achieve the benefits that will result, only that the merger on balance will further the public interest.²³ In addition, the simple fact is that none of the alternative companies from which AT&T claims Verizon could obtain content delivery provides a content delivery platform integrated with a broadband access network like NorthPoint's. In other words, none can offer the same kind of efficiently integrated video content and distribution network that cable modem providers like AT&T's Excite@Home use.²⁴

²¹ *See* Excite@Home Press Release, *Excite@Home Expands Video Broadband Applications with My Videos*, Oct. 9, 2000; AT&T Press Release, *AT&T Broadband to Launch Video on Demand with DIVA*, Oct. 3, 2000.

²² Significantly, AT&T in effect concedes by pointing to these alternatives that Blast! and other similar technologies are technologically capable of providing a true competitive threat to cable.

²³ *See, e.g., Applications of NYNEX Corporation and Bell Atlantic Corporation For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd 19985, ¶ 157 (1997) ("*Bell Atlantic/NYNEX Order*") (public interest test satisfied when "transaction on balance will enhance and promote, rather than eliminate or retard, competition"); *see also AT&T/MediaOne Order* ¶ 160 ("We recognize that, were they not to merge, MediaOne and AT&T, acting independently or in contractual arrangements with each other and other service providers, may achieve some of the same public benefits promised by the merger.").

²⁴ *See, e.g., At Home Corp., Form 10-K/A* (SEC filed Apr. 28, 2000) ("We use leading caching technologies to store data close to our customers, thereby reducing redundant data requests from the public Internet and improving network efficiency. . . . We believe that this infrastructure represents an efficient means of providing broadband services over HFC networks

Finally, AT&T's argument (at 42) that Verizon and NorthPoint do not need additional scale to attract video content is without merit. As the Commission has recognized, in order to be viable, a programming network needs to be able to reach 15-20 million subscribers. *See Hazlett Decl.* ¶ 17.²⁵ Unless DSL providers — individually or collectively — reach this threshold, the programmers will be unable to reach the kind of scale necessary to develop innovative new forms of programming content that are tailored to this medium. *See Hazlett Reply Decl.* ¶ 11. Moreover, in order for an individual DSL provider to attract content on competitive terms, it needs to achieve a certain minimum scale that, based on experience in the cable industry, may well be between three and six million subscribers. *See Pub. Int. Stmt.* at 10. This transaction will enable the new NorthPoint to reach the three-million level within two years, which neither company alone would do. *See id.* at 11.

C. The New Most Separate Affiliate Will Promote Competition for Broadband Access and Provide a Valuable “Benchmark.”

AT&T also suggests that there will be no benefit from combining NorthPoint's and Verizon's DSL businesses in a new “most separate” affiliate — an affiliate that is more separate than necessary to meet any regulatory requirement. Its argument is doubly flawed.

As an initial matter, AT&T claims (at 43) that the new NorthPoint will be “no more separate” than the advanced services affiliate that Verizon is required to use as a condition of the Bell Atlantic-GTE merger. This is simply false. Among other things, the new NorthPoint will be 45-percent owned by independent shareholders, will have a board that includes independent

and creates an opportunity to extend beyond residential HFC to non-HFC broadband platforms such as digital subscriber lines (DSL) and wireless.”).

²⁵ *See also Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, Third Report and Order, 14 FCC Rcd 19098, ¶ 42 (1999) (“[F]or purposes of this analysis, we will assume that a new programmer

directors, and will have a management team led by the current NorthPoint and focused uniquely on the broadband access business. None of this is required by the Bell Atlantic-GTE merger conditions.

AT&T's only response is that, to the extent that the transaction will result in a more separate affiliate, it proves only that the "existing separate affiliate structure is inadequate." *Id.* at 44. Quite the contrary, the Commission previously held that the existing separate affiliate structure "will greatly accelerate competition in the advanced services market," *Bell Atlantic/GTE Order* ¶ 262, and enhance the Commission's ability to monitor the development of broadband competition through regulatory benchmarking, *see id.* ¶ 133; *SBC/Ameritech Order* ¶363 & n.674.²⁶ The even greater separateness here will provide still further assurances that that will be the case.²⁷

II. THE TRANSACTION WILL PRODUCE NO OFFSETTING COMPETITIVE HARMS.

As demonstrated in the Application, the combination of NorthPoint's and Verizon's complementary xDSL businesses will have no countervailing adverse impact on competition. This is true both because, as new entrants into the broadband access business, the applicants have focused primarily on offering complementary services to different customers using different

needs 15 million subscribers in order to have a reasonable chance to achieve economic viability.").

²⁶ *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control*, Memorandum Opinion and Order, 14 FCC Rcd 14712 (1999) ("*SBC/Ameritech Order*").

²⁷ The Commission previously rejected Covad's half-hearted claim (at 7) that the Commission should require here what it characterizes as "true structural separation," but what is really a complete divestiture. *See, e.g.,* Comments of Covad Communications Company at 7, *Applications of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, For Consent to Transfer Control*, CC Docket No. 98-184 (FCC filed Mar. 1, 2000); *Bell Atlantic/GTE Order* ¶ 263. There is no reason to revisit that decision here.

technologies, and because they face intense competition from the dominant cable incumbents and a myriad of other actual and potential competitors.

With respect to residential customers, no party disputes this showing. Nor could they. While a few commenters do claim that the transaction will limit broadband access competition for certain business customers, the truth of the matter is that NorthPoint and Verizon do not compete for these customers today. There are, however, a wide range of other actual and potential competitors who do. Such competitors include incumbent cable operators, which are the dominant providers of residential broadband access services and are expanding aggressively to add business customers, as well as numerous data CLECs, traditional CLECs providing DSL, the Big Three long distance carriers, incumbent LECs, fixed wireless providers, and satellite providers. The removal of either Verizon or NorthPoint from this group would not, therefore, result in the elimination of one of “a small number” of “most significant market participants.” *Bell Atlantic/GTE Order* ¶ 98.

Moreover, contrary to the claims of several commenters, the transaction will reduce, not increase, the likelihood of discrimination. This transaction does not involve the kind of horizontal or vertical integration that the Commission has found to be a necessary predicate of such concerns in the past. Moreover, combining the operations of NorthPoint and Verizon in a separate affiliate more independent than is required by any regulatory requirement will provide even further assurance that discrimination will not occur.

A. The Transaction Raises No Horizontal Concerns.

As described in the Application, NorthPoint and Verizon are new entrants into the broadband access business with historically complementary operations and services. *See Pub. Int. Stmt.* at 3, 5; *see also CIX* at 3. As the Commission has found in the past — and as only a few commenters dispute — competition for both NorthPoint’s and Verizon’s respective

customer segments is intense. Thus, regardless of whether the Commission examines residential broadband competition separately, or together with business broadband competition, this transaction poses no risk of a loss of broadband access competition.²⁸

1. *This transaction poses no risk of harm to competition for the provision of broadband access to residential customers.*²⁹ As described above and in the Application, cable operators are the dominant providers of broadband access to these customers, with control over approximately *three-quarters* of the residential broadband access business. *See supra* p.4; Pub. Int. Stmt. at 3-4; Hazlett Decl. at Att. 3; Hazlett Reply Decl. ¶ 6 & Att. 2. In fact, although its brief here conveniently omits any mention of it, the most dominant provider of all is AT&T. By the end of this year, AT&T expects to have more than one million cable modem subscribers connected to its own closed cable network, *see supra* p.5, with that number doubling to some two million subscribers next year.³⁰ Of course, AT&T also has many more cable modem customers — over a million more — than just those connected to its own cable network by virtue of its control of

²⁸ Only one commenter — CIX — appears to suggest that the Commission should engage in a more formal market definition. *See* CIX at 3-6. But the Commission has rejected this approach in other mergers involving advanced services, *see AT&T/TCI Order* ¶ 92; *AT&T/MediaOne Order* ¶ 116, and there is no basis to depart from such precedent here.

²⁹ *See* CIX at 6 (Commission should separately analyze effect in “consumer broadband” market); NAS at 1 n.1 (Commission has looked separately at competition for “residential and business-class DSL product markets”).

³⁰ *See Morgan Stanley AT&T Report* at 3. As AT&T has stated, it has the ability to “combin[e] existing cable facilities with AT&T’s strong telephony brand, sophisticated knowledge of marketing telephony services, and technical expertise in establishing and managing telephone networks,” which enables it “to provide an alternative to the incumbent LECs’ services for residential customers.” *See Application of MediaOne and AT&T at 22, Application of MediaOne Group, Inc., Transferor, AT&T Corp. Transferee, for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, for Transfer of Control of Authorizations to Provide International Resale Communications Services*, CS Docket No. 99-251 (FCC filed July 19, 1999).

the largest cable modem service provider, Excite@Home.³¹ AT&T also is in the process of deploying a fixed wireless network to provide broadband access to residential customers. *See* Hazlett Decl. ¶ 33.³² And it holds an interest in the nation's largest data CLEC.³³

Even apart from the dominance of AT&T and its fellow cable incumbents, this transaction can have no effect on competition because there are a number of other actual or potential entrants into the residential broadband access business. For example, more than a dozen data CLECs are already providing DSL services to residential customers, and others have plans to do so. *See* Hazlett Reply Decl. ¶ 16.³⁴ Two of the largest incumbent local exchange carriers — SBC and Qwest — also have plans to provide DSL services in Verizon's territory, and both serve or plan to serve residential customers.³⁵ In fact, one of them — SBC — recently

³¹ *See* Excite@Home Press Release, *Excite@Home Reports Second Quarter 2000 Results*, Jul. 19, 2000 (1,800,000 Excite@Home cable modem subscribers); AT&T Press Release, *AT&T Second Quarter Reported Earnings Per Share Are 53 Cents, Operational Profits Are 57 Cents Per Share*, Jul. 25, 2000 (689,000 AT&T cable modem subscribers).

³² The Commission has recently noted that "AT&T has committed itself to widespread deployment of its fixed wireless access system" and that AT&T "claims to be on track to have 1.5 million fixed wireless subscribers by year-end 2000." *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, Fifth Report, FCC 00-289, App. E at 3-4 (rel. Aug. 18, 2000) ("*Fifth CMRS Report*").

³³ *See* Covad Press Release, *Covad Communications Enters into Strategic Relationships with AT&T and NEXTLINK*, Jan. 4, 1999 (noting \$25 million AT&T investment in Covad in addition to commercial agreements for the purchase of transport services, marketing and resale of Covad DSL services, and collocation of Covad equipment).

³⁴ Based on their Web sites, the following data CLECs provide DSL service to residential customers: Covad, Vitts, Jato, Broadview Networks, ConnectSouth, Edge Connections, Highspeed, IP Communications, Log On America, New Edge Networks, Pathnet, Picus, Rhythms NetConnections.

³⁵ J. McKay, *Qwest Plans Street Fight*, tele.com, Aug. 5, 1999, <http://www.teledotcom.com/news0899/news080599_2.html>; S. Schiesel, *SBC is Going National with Its Local Service*, N. Y. Times, Oct. 9, 2000, at C1.

announced that it would team up with the largest data CLEC.³⁶ Moreover, as even AT&T concedes, the competitors also include the other major long distance carriers, including Sprint and WorldCom's "extensive fixed wireless networks," DBS providers that are "ubiquitously available to consumers nationwide," and cable overbuilders that, according to AT&T, "are deploying broadband facilities on a large-scale basis." AT&T at 35, 42. In fact, Sprint recently announced that, "in an effort to attract more residential customers," it was lowering the price of its ION service, which is a bundle that includes DSL, local, and long distance service.³⁷

2. *This transaction poses no risk of harm to competition for the provision of broadband access to business customers.* Of the three commenters that address broadband competition for business customers, all but Prism agree that that Verizon's ADSL service does not compete against NorthPoint's SDSL service in the provision of broadband access to business customers. See NAS at 2; CIX at 4.³⁸ These commenters do claim, however, that NorthPoint's SDSL service competes with Verizon's T-1 services in the provision of broadband access to business

³⁶ See Covad Press Release, *Covad and SBC Form Marketing Agreement to Deliver Broadband Nationwide*, Sept. 11, 2000 (SBC will acquire 6 percent ownership interest in Covad for \$150 million, and companies formed agreement under which SBC provides \$600 million in guaranteed revenue to Covad over six years). Combined, SBC and Covad had 537,000 DSL subscribers as of the end of the second quarter 2000. See SBC News Release, *SBC Reports 9.8% Revenue Growth as Part of 2Q Earnings*, Jul. 20, 2000; Covad News Release, *Covad Communications Announces Record Second Quarter Results*, Jul. 26, 2000.

³⁷ S. King, *Sprint ION Access is Getting Less Costly; Company Hopes New Packages Have Mass-Market Appeal*, Kansas City Star, at C1 (Oct. 11, 2000). Sprint claims that, by the end of 2001, its broadband DSL service will be in the top 85 cities and reach 33 percent of all U.S. homes. Sprint News Release, *Sprint Expands Consumer Broadband Offerings* (Oct. 11, 2000).

³⁸ Only Prism (at 4) claims that NorthPoint's and Verizon's DSL services do compete for business customers, citing company Web sites. In reality, although Verizon sells its ADSL service to business customers, and NorthPoint sells its SDSL service to residential customers, there has been very little interest in either offering by such customers. See *Ex Parte* Letter from M. Glover and M. Olsen to J. Jennings, CC Docket No. 00-157 (Aug. 31, 2000). This demonstrates as an empirical matter that NorthPoint's and Verizon's existing services are not economic substitutes for these customer segments. See Carlton/Sider Reply Decl. ¶¶ 32-38.

customers. *See* NAS at 2-3; CIX at 3-4.³⁹ But as described in the Reply Declaration of Dennis Carlton and Hal Sider, because of significant differences in price and quality, SDSL services and T-1 services are not substitutes for one another, are used by different customer segments, and do not compete with one another to any meaningful extent.⁴⁰

As an initial matter, T-1 services provide a considerably higher quality of service than SDSL services. *See* Carlton/Sider Reply Decl. ¶¶ 16-19. For example, T-1s are typically provided with a guaranteed bandwidth that is the same as the maximum rated speed, whereas SDSL is provided with a “committed information rate” that is typically half of the maximum rated speed. *See id.* ¶ 16. Because of technical differences (such as network monitoring and alarm features), T-1s are also typically provided with far superior service guarantees compared to SDSL service, and the mean time to repair a T-1 line is correspondingly less than the mean time to repair an SDSL line (4 hours compared to 24 hours). *See id.* ¶ 17.⁴¹

As a result of its superior quality — and the different infrastructure and resources needed to support it — T-1 service is considerably more expensive than SDSL service for comparable

³⁹ CIX claims (at 4 n.6) that the *Second Advanced Services Report* (at ¶ 99) supports its statement that SDSL “competes with T-1 lines in the business market.” But the *Second Advanced Services Report* made no such finding, stating merely that both T1 and SDSL are “traditional wireline services” that belong to a category that “is primarily used by business customers.” Moreover, the Commission has found that large business customers (the primary users of T-1 service) are a distinct class of customers from small and mid-sized business customers (the primary users of SDSL service). *See, e.g., Bell Atlantic/NYNEX Order* ¶¶ 50, 53 (services that “appeal strongly” to small and/or medium-sized businesses “are often not acceptable substitutes for the services preferred by the other segments”).

⁴⁰ The same is true with respect to fractional T-1 services, *see* Carlton/Sider Reply Decl. ¶¶ 5, 14-31, though no commenter separately addresses this product.

⁴¹ T-1 and fractional T-1 services also can offer greater bandwidth than SDSL services in many instances. *See* Carlton/Sider Reply Decl. ¶ 19.

amounts of bandwidth. *See id.* ¶¶ 20-21.⁴² As Covad has recently stated elsewhere, “T1 lines . . . are much more expensive than DSL, and prohibitively expensive for residential and even many business users.”⁴³ For example, whereas NorthPoint sells 1.544 Kbps SDSL service to ISPs for approximately \$173 per month, T-1 service (for the same bandwidth) typically sells for roughly three to four times that amount. *See id.* ¶ 20.

In light of these price and quality differences, T-1 and SDSL services are purchased by different kinds of customers. *See id.* ¶¶ 22-23.⁴⁴ T-1s are sold primarily for use by large businesses, whereas SDSL service is typically sold for use by small- and mid-sized businesses. *See id.* ¶ 22. Moreover, NorthPoint’s own survey data reveal that the vast majority (more than 85 percent) of its SDSL subscribers formerly used dial-up Internet access and that a very small number (only 3 percent) previously used T-1 service. *See id.* ¶ 23 & Table 2. If SDSL and T-1 were substitutes, it would be expected that a large number of customers would have abandoned their T-1 service in favor of lower priced SDSL service, which simply has not occurred. *See id.* ¶ 23. In addition, the available evidence demonstrates that, despite the rapid expansion of SDSL service in the last two years, the prices for T-1 services have not fallen — which also would be expected if these services did compete with each other. *See id.* ¶ 24.

⁴² Whether two products compete depends on whether their “price, use and qualities” render them interchangeable. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 404 (1956).

⁴³ Second Am. Compl. ¶ 59, *Covad Communications Co., et al. v. Bell Atlantic Corp., et al.*, No. 1:99CV01046 (GK) (D.D.C. filed Aug. 10, 2000).

⁴⁴ *See Bell Atlantic/NYNEX Order* ¶¶ 50, 53; IIA Phillip E. Areeda, *et al.*, *Antitrust Law* ¶ 530a, at 150 (1995) (“To define a market is to identify producers that provide customers of a defendant firm (or firms) with alternative sources for the defendant’s product or services.”); *Levine v. Central Fla. Med. Affiliates, Inc.*, 72 F.3d 1538, 1552 (11th Cir.) (same), *cert. denied*, 519 U.S. 820 (1996).

Apart from the erroneous claim that SDSL and T-1s compete, none of the commenters claims that the transaction will adversely affect broadband competition for business customers. This is hardly surprising. As demonstrated in the Application, 97 percent of the central offices where NorthPoint and Verizon provide service contain two or more other facilities-based DSL competitors (virtually all of which serve business customers), and approximately 90 percent contain three or more. AT&T's Excite@Home and other cable modem providers have also begun providing broadband services to business customers. *See* Hazlett Reply Decl. ¶ 18.⁴⁵ And fixed wireless, according to WinStar's CEO, "already is playing a role in the deployment of next-generation networks."⁴⁶ Traditional CLECs, IXC's, and incumbent LECs have all also entered the race to provide broadband access to business customers. *See* Pub. Int. Stmt. at 17-19; Hazlett Decl. ¶¶ 28-30. These carriers are well-positioned: in more than 95 percent of the central offices in which both NorthPoint and Verizon provide DSL service there are four or more competing carriers of some variety with collocation. *See* Carlton/Sider Reply Decl. ¶ 27.

3. *This transaction poses no risk of harm to competition for voice services.* AT&T — and only AT&T — makes the extraordinary claim (at 18-28) that this transaction will harm its ability to compete for local voice services. Even though it has spent billions to become the dominant provider of broadband access services, AT&T now claims that it will be unable to compete for voice customers unless it can provide a bundle of "voice and data over a single line"

⁴⁵ *See also* Letter from Lewis Rose, Arent Fox, Counsel for Excite@Home, to Renee Baruch, Counsel, Verizon (Aug. 25, 2000) ("In response to your question, Excite@Home does provide broadband services to businesses through its @Work division.").

⁴⁶ *Fixed Wireless Entrants Tout Alternatives to Slow DSL Rollouts*, TR Daily (Oct. 5, 2000); *see also* *Fifth CMRS Report* App. E at 2 ("One of the great advantages of fixed wireless is its ability to provide broadband, or high-speed, services relatively cheaply and quickly in comparison with wireline technologies. . . . Many fixed wireless operators provide such services . . .").

(using unbundled network element platforms). According to AT&T's contorted theory, this transaction limits its ability to offer such a bundle because it reduces by one the number of data CLECs that AT&T supposedly could partner with in Verizon's territory. This claim is particularly absurd coming from AT&T.

First, AT&T is living proof that there are many ways to provide broadband access as part of a competitive service bundle. AT&T, of course, already is the dominant provider of broadband access, although it refuses to allow any competitors to provide voice, data, or any combination thereof on its network. This allows it to sell its own broadband access service as part of a bundled service package that includes voice and video as well. Indeed, AT&T openly proclaims that its "preferred strategy for entering local markets is through use of its own facilities," and that this "strategy was a primary factor behind AT&T's purchase of TCI and MediaOne."⁴⁷ AT&T already provides both data and voice telephony over a large and rapidly increasing portion of its own cable network,⁴⁸ already has joint-marketing agreements with Cablevision and Time Warner (for AT&T to sell telephone service where Cablevision or Time Warner is the cable incumbent),⁴⁹ already has acquired an interest in the country's largest data

⁴⁷ Opposition of AT&T Corp. at 9, *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order (FCC filed Oct. 16, 2000).

⁴⁸ As of June 30, 2000, 73 percent of AT&T's broadband plant had been upgraded to at least 550 MHz, with the majority of the network upgraded to 750 MHz. In addition, 63 percent of the broadband video plant was two-way capable as of the end of the second quarter. See AT&T, *AT&T Group Earnings Commentary, Mid-Year 2000*, <http://www.att.com/ir/pdf/002q_cmnt.pdf> (July 25, 2000).

⁴⁹ See AT&T Press Release, *AT&T and Cablevision to Create High-Value Telecommunications Bundle for New York Metropolitan Area Customers*, Feb. 23, 2000; AT&T Press Release, *AT&T And Cablevision Systems Corporation Unveil Plans To Give Customers "Something Extra,"* May 4, 2000; AT&T Press Release, *AT&T and Time Warner Cable Announce Joint Marketing Agreement*, Mar. 7, 2000.

CLEC, and is rolling out its own fixed wireless services. AT&T's only real complaint appears to be that it has not yet completely cornered the market for broadband access.

In any event, as AT&T itself concedes (at 34-35, 42), there are many technologies that are being used to provide residential broadband access, giving voice CLECs numerous options for broadband access partners. For example, voice-based CLECs could, as AT&T does, partner with cable operators, myriad other CLECs that provide DSL service, MMDS providers, satellite providers, or others. *See* AT&T at 35; Hazlett Decl. ¶¶ 27-33; Hazlett Reply Decl. ¶ 16.⁵⁰

Second, entry barriers in providing DSL are low, which ensures that voice-based CLECs can either provide DSL themselves or obtain it from others. As the Commission has recognized, new competitors are able to deploy DSL facilities quickly, and at relatively low cost, and are guaranteed all of the other ingredients they need for entry through the Commission's *UNE Remand Order*, *Line Sharing Order*, and collocation orders.⁵¹ Widespread entry in Verizon's region confirms that entry barriers are low: in the last 12 months alone, at least 20 carriers that focus on providing DSL services have begun operating in Verizon's region, or have announced plans to do so. *See* Pub. Int. Stmt. at 16 n.27.⁵² And, while not as readily susceptible to

⁵⁰ As noted above, *see supra* p.15, AT&T is deploying its own fixed wireless network to mass market customers, which further undermines its claim that it needs access to NorthPoint's network.

⁵¹ *See, e.g., Second Advanced Services Report* ¶ 196 ("The availability of unbundled network elements and line sharing has spurred tremendous investment in DSL deployment.").

⁵² AT&T's complaint (at 21) that, "because the Commission eliminated DSLAMs from the list of network elements subject to unbundling, competitive LECS do not have the option of leasing that equipment from Verizon," is therefore both untrue and irrelevant. DSLAMs were never on the list of UNEs. They were excluded precisely because the Commission found that "advanced services providers are actively deploying facilities to offer advanced services such as xDSL across the country," and because "Competitive LECs and cable companies appear to be leading the incumbent LECs in their deployment of advanced services." *Implementation of the Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696, ¶ 307 (1999).

measurement, traditional voice CLECs have announced that they are deploying their own DSL facilities in increasing numbers. *See id.* 17-18; Hazlett Decl. ¶ 28.

Entry barriers for AT&T itself are particularly low.⁵³ Like other traditional CLECs, AT&T already has extensive collocation arrangements in place in Verizon's region.⁵⁴ And many of these central offices are already equipped to provide DSL service.⁵⁵ Moreover, in many central offices in which it has collocation, AT&T has obtained substantially more than the standard 100 square feet. AT&T could, therefore, easily install its own DSLAMs. Or it could share the CO space it is warehousing with other DSL providers, reducing their costs of entry further still, and eliminating AT&T's claim that smaller DSL providers might refuse to allow AT&T to establish connections "because they eat up scarce collocation space in the DSL provider's cage." AT&T at 25.

Third, because AT&T cannot deny the existence of numerous new DSL entrants, or the fact that it could provide DSL itself, AT&T argues instead that there are only three existing *national* DSL-only providers from which it could obtain DSL facilities on a nationwide basis, and that the merger will eliminate one of these providers. *See id.* at 22, 25-26. But this simply ignores the fact that the overwhelming majority of NorthPoint's existing facilities — the facilities that AT&T claims it desperately needs to be able to serve mass-market customers over a single line — are SDSL facilities that are designed for business applications, and that do not

⁵³ AT&T attempts to exaggerate the difficulty of this task by claiming (at 26) that it took NorthPoint "five years" to build out its network. In fact, NorthPoint began deploying DSL facilities in March 1998 (half the time that AT&T suggests), and the overwhelming majority of these facilities were designed for business customers, not the mass-market customers for which AT&T claims it needs these facilities. NorthPoint, Form 10-K405 (SEC filed Mar. 30, 2000).

⁵⁴ *See* New Paradigm Resources Group, *CLEC Report 2000*, AT&T Carrier Profile at 25-27.

⁵⁵ *See id.*