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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses from	)	MB Docket No. 02-70
	)	
COMCAST CORPORATION and	)	
AT&T CORP.,	)	
Transferors	)	
to	)	
AT&T COMCAST CORPORATION,	)	
Transferee	)	

COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

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April 29, 2002

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TABLE OF CONTENTS

LIST OF APPENDICES

Number

1. John Haring, Jeffrey Rohlfs and Harry M. Shooshan, *Anticompetitive Effects of the Proposed AT&T/Comcast Merger*, April 29, 2002.

2. Declaration of Dennis W. Carlton, April 26, 2002.

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SUMMARY

This proposed merger comes before the Commission at the same time that, in several other pending proceedings, the Commission has the opportunity to reshape the regulatory landscape governing broadband Internet access to ensure consumers the benefits of true competition. Qwest respectfully urges the Commission to consider this license transfer proceeding against that larger regulatory backdrop, and either to ensure that the regulatory distortions that would prevent meaningful competition with the merged entity are corrected before this merger is approved, or to ensure that the merged entity is subject to the same regulatory constraints that bind its wireline DSL and VDSL competitors.

If the Commission does not take steps in its other pending regulatory proceedings to relieve the artificial regulatory constraints on ILEC broadband and video competition, then allowing this cable merger to proceed without any limiting conditions will intolerably worsen a competitive landscape that already is significantly distorted. Given the substantial market power a merged AT&T Comcast would have for all broadband and video content, the merger would give it anticompetitive advantages that are not balanced by any particular benefits the merger would offer to the public. While the applicants proffer the benefits of widespread cable telephony to justify the transfer of licenses, their promises must be treated with skepticism in light of Comcast's longstanding unwillingness to invest in cable telephony and AT&T's repeated failure to deliver on identical promises used to justify past mergers.

The substantial market power that the merged entity would possess is magnified by the regulatory asymmetry that constrains and burdens AT&T Comcast's wireline broadband and video competitors. If such asymmetry is not rectified, there will be little if any chance that, at least in the AT&T Comcast markets, wireline broadband and video services will ever offer true

competition for residential customers. Consumers, ultimately, will be the real losers. Accordingly, if the Commission is to approve this merger, it must first act to reduce the merger's anticompetitive potential by ensuring that AT&T Comcast's wireline competitors are relieved of Title II constraints on their broadband and video offerings, or to ensure that the merged entity is subject to the same constraints as its most likely competitors.

Moreover, just as it did in its review of the AOL-Time Warner merger, the Commission should impose an open access requirement here. The applicants have themselves committed to offering customers a choice of ISPs, but, left to its own devices, a merged AT&T Comcast would have the incentive and ability to discriminate against disfavored ISPs and thereby undermine competition. The Commission can prevent that conduct and permit the market, rather than the merged entity, to determine which ISPs prevail, by imposing a simple nondiscrimination requirement. Indeed, it would be arbitrary and capricious for the Commission to do otherwise, because the merged entity – which will be dominant in the relevant market – should not be subject to lesser regulation than its less powerful rivals.

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COMMENTS OF QWEST COMMUNICATIONS INTERNATIONAL INC.

Pursuant to section 309(d) of the Communications Act of 1934, as amended,[1/] and the Commission's March 29, 2002 Public Notice, Qwest Communications International, Inc. ("Qwest") respectfully submits these comments on the applications of AT&T Corp. ("AT&T") and Comcast Corporation ("Comcast") for authority to transfer control of AT&T's and Comcast's licenses and authorizations to a merged AT&T Comcast entity.[2/]

1/ 47 U.S.C. § 309(d).

2/ Applications and Public Interest Statement, *Applications for Consent to the Transfer and Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, filed in MB Docket No. 02-70 on Feb. 28, 2002 ("Comcast Application").

INTRODUCTION

The proposed merger would result in unprecedented consolidation within the cable industry, merging the largest and third-largest cable operators[3/] to create an operator that would also hold a 25.5% interest in the second-largest cable operator, Time Warner Entertainment ("TWE"). The merged entity would have a subscriber base and footprint far larger than any to come before – larger indeed than that of any RBOC – and would serve a larger percentage of the cable market than the Commission has ever found to be consistent with the public interest. At the same time, the merger offers no genuine public interest benefits, other than a recycled and barely credible promise to roll out cable telephony, which AT&T has promised several times over without delivering and Comcast has consistently made clear it has no interest in pursuing. The Commission accordingly should carefully consider the implications of this merger and what actions are necessary to reduce the potential that the merged entity will engage in anticompetitive conduct that would impede the ability of wireline broadband and video providers to compete.

The proposed merger would give the merged entity dangerous market power over broadband and video content. If that market power is reinforced by the competitive advantages inherent in the legacy regulatory framework that imposes considerable, asymmetrical burdens on wireline broadband providers, true broadband and video competition in the AT&T Comcast markets will be impossible. It thus becomes imperative that the Commission act to eliminate that regulatory disparity in the context of its various pending broadband rulemaking proceedings.[4/]

3/ *See* Eighth Annual Report, *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd. 1244 ¶ 151 (2002) ("Eighth Annual Video Programming Report").

4/ Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, FCC 02-77, CS Docket No. 02-52 (rel. Mar. 15, 2002) ("Cable Modem NPRM"); Notice of

The Commission should not approve this merger until it has addressed these competitive neutrality concerns in its pending regulatory proceedings; if that is not practicable, the Commission should condition this merger on AT&T Comcast's commitment to abide by any rules that the Commission concludes, at the close of its pending broadband proceedings, should govern wireline DSL and VDSL providers' facilities and services. Any other result would eliminate any meaningful possibility of true broadband competition (as well as VDSL competition) throughout the merged entity's region.

STANDING

Qwest is a party in interest with respect to the proposed AT&T Comcast merger – and thus has standing under section 309(d) of the Act[5/] – because Qwest already competes with both of the proposed merger partners and would compete directly with a merged AT&T Comcast in numerous product markets. Qwest provides local and long distance voice and data services, mobile wireless services, and video services. More specifically, Qwest provides high-speed broadband services, including DSL-based connectivity to the Internet, and is committed to providing video services competitive with those of cable operators, using Qwest's VDSL technology. Qwest's provision of such services, many in areas where AT&T and Comcast hold interests in cable systems, makes Qwest a present or potential competitor with respect to the full range of services that a merged AT&T Comcast would – or promises to – deliver to consumers

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Public Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, 17 FCC Rcd. 3019 (2002) ("Wireline Broadband NPRM"); Notice of Proposed Rulemaking, *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, 16 FCC Rcd. 22745 (2001) ("Broadband Nondominance NPRM"); Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, 16 FCC Rcd. 22781 (2001).

[5/] 47 U.S.C. § 309(d)(1).

over its cable facilities. Accordingly, Qwest is well situated to identify the significant anticompetitive harms and other public interest concerns the proposed merger implicates.

COMMENTS

I. THE PROPOSED MERGER, IF UNCONDITIONALLY APPROVED, WOULD PRODUCE SIGNIFICANT ANTICOMPETITIVE EFFECTS.

Qwest, alone among major telephone companies, is promoting competition in Multichannel Video Programming Distribution ("MVPD") services using VDSL technology,[6] as well as providing broadband services through DSL. As a player in both the video and broadband markets, Qwest has well-founded fears that the combination of AT&T Broadband and Comcast will create a company with the ability to deny Qwest access to, or significantly to raise the price of, video programming and high-quality broadband content. As set forth more fully in the attached statement by Dennis Carlton and report by John Haring, Jeffrey Rohlfs, and Harry Shooshan, the combination of the first and third largest cable operators will give the merged company unprecedented bargaining power over video and broadband content suppliers. Use of such power will reduce the quantity and quality of video programming and broadband content, shift the costs of producing video content to smaller MVPD competitors, and increase the risk of anticompetitive vertical foreclosure.

6/ Qwest currently offers VDSL service in two markets, Phoenix, AZ and Highlands Ranch, CO (just south of Denver). Qwest wants to expand the service and is developing plans to make it available in additional markets soon.

A. The combination of AT&T Broadband and Comcast will give the merged entity increased bargaining power over video and broadband content providers.

Economics literature[7/] and pronouncements by U.S. antitrust enforcement agencies[8/] and this Commission[9/] confirm that a "sufficiently large" buyer in a market will be able to exert bargaining power over sellers, and use that power to harm consumers and competitors. What it means to be "sufficiently large" depends on industry and market conditions, but, under current antitrust guidelines, arrangements that result in a buying unit's accounting for 20% of a given market are subject to scrutiny by antitrust authorities.[10/]

Here, the combination of AT&T Broadband and Comcast will create an entity having a share well in excess of 20% of more than one market. AT&T Comcast will account for approximately 32% of all U.S. cable subscribers and 26% of all U.S. MVPD subscribers (including DBS users). That is nearly twice as many subscribers as the next largest cable operator, AOL Time Warner.[11/] In residential broadband Internet service, the company will be

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7/ *See* SBC Communications Comments, filed in MB Docket No. 02-70 on April 29, 2002, Decl. of Robert Gertner at ¶ 39 and sources cited therein; *see also* Appendix 2, Decl. of Dennis Carlton at ¶ 7 and sources cited therein.

8/ *See* U.S. Dept. of Justice & Federal Trade Comm., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 3.31 (a) (recognizing possible harms of large buying cooperatives); U.S. Dept. of Justice and the Federal Trade Comm., STATEMENTS OF ANTITRUST POLICY ENFORCEMENT IN HEALTH CARE, section 7(A) (1996); *see also* Business Review Letter from the Department of Justice regarding Business Travel Contractors Corporation (1995) (approving joint purchasing arrangement involving air travel that could account for up to 35 percent of the relevant markets), *available at* http://www.usdoj.gov/atr/public/busreview/0280.ht.

9/ *See, e.g.*, Further Notice of Proposed Rulemaking, FCC, *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd. 17312 (2001) ("Cable Ownership Caps FNPRM").

10/ *See* U.S. Dept. of Justice & Federal Trade Comm., ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS § 4.2.

11/ Eighth Annual Video Programming Report, Table C-3.

the largest U.S. provider, with 34% of cable modem subscribers and 23% of all residential broadband subscribers (including DSL customers).[12] Furthermore, AT&T Comcast's market power will be enhanced by its leading position in the nation's top media markets.

1. The merger will create an entity with real bargaining power over video programmers.

In the cable industry, an operator with a 30% share of the nation's subscribers raises significant foreclosure concerns because, unlike in most other industries, a cable distributor with a 30% market share presents a bottleneck for a supplier's access to consumers.[13] In a typical industry, if a distributor refused to carry a supplier's products, nearly 100% of the market's consumers could still purchase the supplier's products from the remaining distributors in the area. Cable is different, because each cable system has a near monopoly over consumers within its footprint: If the cable system does not carry a programmer's channel, the consumers within the cable system's footprint are unlikely to have access to the channel via other means. Or, if they do have access, obtaining the channel requires switching to an entirely new programming delivery system. Most consumers will not incur those high switching costs for the sake of a single channel.

Thus, a large cable operator like AT&T Comcast will have a significant buying threat: programmers must agree to its terms, or risk forgoing carriage to nearly one-third of MVPD subscribers. "The threat of losing carriage on all of the cable systems controlled by these two

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[12] Kinetic Strategies, *Cable Modem Market Stats & Projections*, March 1, 2002, *available at* http://www.cabledatacomnews.com/cmic/cmic16.html.

[13] *See* Appendix 1, John Haring, Jeffrey Rohlf and Harry M. Shooshan, *Anticompetive Effects of the Proposed AT&T/Comcast Merger*, April 26, 2002, at 8; *see also* Gertner Decl. at ¶18.

firms [AT&T Broadband and Comcast] would be extremely serious to virtually all programmers — indeed, it would generally be a death threat."[14]

While DBS may provide some competition to cable, in areas with modern cable systems (*i.e.*, those with high channel capacity and digital technology), DBS's share is much lower than the national average of 18.2%.[15] For example, DBS has a share of 14% or less in 9 of the 13 cities where AT&T Comcast will dominate.[16]

The economics of content creation also play a strong role in the bargaining power AT&T Comcast will have over video programmers. The costs of creating video content are relatively large, and most are fixed and sunk,[17] which makes the incremental sales that contribute to covering those costs critical. A video programmer's total revenues, however, greatly depend on the number of its viewers, from which subscription fees and advertising charges are calculated.[18] Thus, video content providers must reach a large audience in order to recover their costs. A denial of 30% of the market may therefore represent more than a proportional loss of sales; it

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[14] Haring, *et al.* at 8; Gertner Decl. at ¶ 20 ("The combined AT&T Comcast would have a greater ability to 'make or break' content suppliers than either company individually."). In an analogous situation, the Antitrust Division found that each of the four major Computer Reservation Systems had "market power over airlines." Like a cable operator that provides a programmer access to its subscribers, "each CRS provides access to a large, discrete group of travel agents, and unless a carrier is willing to forgo access into those travel agents, it must participate in every CRS." U.S. DOJ Antitrust Division Comments to DOT regarding Computer Reservation Systems, Sept. 19, 1996, *available at* http://www.usdoj.gov/atr/public/comments/crs_comm.htm.

[15] Eighth Annual Video Programming Report, Table C-1.

[16] DBS has relatively low shares in Chicago (7.5%), Philadelphia (5.4%), San Francisco/Oakland/San Jose (7.5%), Boston (5.4%), Washington, DC (14%), Detroit (9.9%), Seattle/Tacoma (12.2%), Miami (6.6%), and Pittsburgh (8.7%). *See also* Haring *et al.* at 6.

[17] Cable Ownership Caps FNPRM at ¶¶ 15,16 ("[O]nce a programming network produces or acquires programming, there is no use for it other than to sell it to MVPDs for transmission to consumers.").

[18] *See* Gertner Decl. at ¶ 18.

may represent denial of an increment of sales sufficient to prevent the programmer from covering its fixed costs and may force it out of business.[19]

The programmers' need to attract a sufficient audience gives some degree of bargaining power to cable systems — relatively more to larger ones than smaller ones.[20] Indeed, economic analysis demonstrates that "[u]nder reasonable assumptions, [a cable operator] having a national market share *well below 30 percent* could exert significant monopsony power over many cable networks."[21] This is borne out by Comcast's and AT&T Broadband's experience. According to the companies, "the rates that AT&T Broadband [the larger of the two entities] currently pays for basic cable programming are, in the aggregate, generally lower than Comcast's rates for the same group of programming channels."[22]

Indeed, AT&T Broadband and Comcast boast that their increased size will give them greater leverage over programmers. For example, they claim that their programming costs will decrease by $250 - $450 million annually, in part due to their "greater size."[23] These figures far exceed any savings that could be claimed from efficiency gains. As Haring, Rohlfs, and Shooshan explain, large affiliation

> discounts cannot be explained in terms of savings in marketing costs as even small systems often serve many thousands of subscribers. Similarly, billing and collection costs are typically a

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19/ Cable Ownership Caps FNPRM at ¶ 29 ("Networks may not have an incentive to enter the market or to be innovative in their programming if they do not anticipate being able to recover the fixed/sunk costs of network program development."); *see also* Gertner Decl. at ¶¶ 12, 14 & 19.

20/ *See* Gertner Decl. at ¶ 18.

21/ Haring, *et al.* at 16, *quoting* David Waterman and Andrew Weiss, VERTICAL INTEGRATION IN CABLE TELEVISION, 154 (1997).

22/ Comcast Application, Appendix 9, Decl. of Robert Pick at ¶ 19.

23/ Pick Decl. at ¶¶ 20-21.

> small part of revenues, again for even small systems. Transactions costs of contracting for carriage do not loom large and savings in such costs cannot account for the large discounts afforded the larger systems. Costs of satellite distribution to cable headends are largely fixed and do not depend very much on whether any particular cable system receives the signal. Indeed, per-subscriber marketing costs may be higher for the largest MSOs, as they typically bargain for rates, while small cable systems often simply pay off a rate card.[24/]

In other words, an increase in raw bargaining power, as opposed to any procompetitive efficiencies, explains the large reduction in programming costs expected by AT&T Comcast.

2. The combined company also will exert substantial bargaining power over broadband content providers.

The basic economics of producing video content also apply to the creation of broadband content, which is "a costly affair: high production costs, copyright royalties, etc."[25/] A large percentage of high-speed content is expected to consist of streaming video, whose economics are similar, if not identical, to cable video programming. Large fixed production costs, combined with the comparatively small number of current subscribers to broadband services, may require a broadband content provider to reach an even higher percentage of the total broadband audience in order to break even than a traditional cable programmer needs to reach.[26/]

And, just as a cable system can deny a programmer access to its customer by refusing to carry the programmer's channel on its system, broadband distributors have the capacity to control their subscribers' access to broadband content in myriad ways. For example, AT&T

24/ Haring *et al.* at 19.

25/ Reuters, *AOL, NBA Need 25 Million Subscribers to Launch Channel*, April 12, 2002.

26/ Gertner Decl. at ¶¶ 17, 28.

Comcast may prohibit other ISPs that use its network from providing streaming video,[27] or may limit to 10 minutes the length of any streaming video broadcast.[28]

Even without contractually limiting streaming video or other types of content, AT&T Comcast may engage in discriminatory traffic treatment that prioritizes or disfavors certain kinds of packets. This could be as simple as caching its own or favored content locally, so that the favored content reaches broadband consumers much faster than content in which the company does not have an interest.[29] It could also extend to slowing down streaming video packets (to the point that the quality of the transmission is noticeably degraded), or denying ISPs access to the cable network at the cable head end.

Alternatively, the merged entity may simply stall negotiations over carriage rights with other broadband providers. Such a delay will provide AT&T Comcast undue advantage in starting up its own broadband services and give it an opportunity to entrench its market position on a basis unrelated to the quality or desirability of its broadband service.[30]

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[27] *See* Lawrence Lessig, *Clinton Versus the Internet: End Game*, The New Republic, June 19, 2000 ("Under the emerging architecture of the Internet via cable, cable companies will have the power to decide whether their Internet users will be allowed to stream video to computers. Right now, users can't. And, when asked, AT&T's Daniel Somers indicated they won't be allowed to do so in the future, either. Said Somers, AT&T didn't spend $58 billion on a cable system to 'have the blood sucked out of our vein'").

[28] *See Excite@Home Keeps a 'Video Collar,'* MSNBC, Oct. 31, 1999 (noting that "[e]ach cable operator that offers cable modem services delivered by Excite@Home [] must sign a contract that specifically outlines the 10 minute streaming video restriction. Further, the contract says that @Home 'shall require it to use its reasonable best efforts to block or otherwise impair a user's ability to connect' to any streaming video content longer than 10 minutes in length.").

[29] *See* Jerry A. Hausman, J. Gregory Sidak, and Hal J. Singer, *Residential Demand for Broadband Telecommunications and Consumer Access to Unaffiliated Internet Content Providers*, 18 Yale J. on Reg., 129, 158-60 (2001).

[30] *See* Francois Bar *et al.*, *Defending the Internet Revolution in the Broadband Era: When Doing Nothing is Doing Harm* (Economy Working Paper No. 12, August 1999), p. 16.

3. AT&T Comcast's concentration in top media markets further enhances its power over programmers.

The location and concentration of AT&T Comcast's cable customers could cause even greater foreclosure effects than the system's national market share alone enables.[31] The combined firm will dominate top media markets and have unprecedented control over access to national media markets. AT&T Comcast will be the leading cable provider in 8 of the nation's top 10 designated market areas (DMAs), and 70% of its subscribers will be situated in the top 20 DMAs.[32] In their public own interest filing, AT&T Broadband and Comcast note that without sufficient scale, and "[i]n particular, . . . a market presence in 8 of the top 10 DMAs," a cable company will not have "the geographic reach to sell advertising on a national scale."[33] This logic, applied in reverse, shows that AT&T Comcast may be able to exclude programming networks from cable's share of the $15 billion[34] national advertising market. Denial of access to the dominant system in most of the top DMAs will significantly impair a programming network's ability to advertise nationally. Because a significant portion of a programming network's revenues comes from advertising sales, exclusion from national advertising will in turn reduce a network's revenues and lower the quantity and quality of its programming. This is equally true with respect to broadband programming, which also depends on advertising revenues that turn on access to a substantial subscriber audience.

31/ *See* Haring *et al.* at 10.

32/ According to Cabletelevision Advertising Bureau's analysis of Nielsen data, AT&T Comcast will serve at least 60% of subscribers in 8 of these 10 DMAs, including Chicago (86%), Philadelphia (84%), San Francisco/ Oakland/San Jose (95%), Boston (76%), Dallas/Fort Worth (63%), Washington, DC (60%), Detroit (75%), and Atlanta (63%). It will command even larger market shares in four other top 20 DMAs, including Seattle/Tacoma (86%), Miami (73%), Denver (93%), and Sacramento (82%), and a majority share in a fifth, Pittsburgh (55%).

33/ *See* Comcast Application at 45.

34/ Pick Decl. at ¶ 31.

B. The merged entity's increased bargaining power is likely to result in competitive harms.

1. The merger will create monopsony power and a free rider problem.

AT&T Comcast's increased bargaining power is likely to lead to monopsony harm.[35] That is, the quality and quantity of video programming may decrease as a result of the reduced rates paid by AT&T Comcast.[36] As Professors David Waterman and Andrew Weiss explain: "Monopsonistic reduction of input prices in some markets would reduce the quality and quantity of cable programming in *all markets* and as a consequence program diversity and the access of programming suppliers to subscribers."[37]

In addition to reducing the output and quality of programming, the merger of AT&T Broadband and Comcast may cause video program costs to be shifted to other MVPD systems. This will occur if AT&T Comcast exerts its bargaining power over its content suppliers so that the prices it pays for content are at a level close to the supplier's marginal costs, and fall below the supplier's average costs. The supplier, in turn, will need to drive harder bargains with other

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35/ Qwest recognizes that, because the Comcast AT&T systems are in different geographic areas, using the term "monopsony" here is not conventional. Monopsony power ordinarily connotes the aggregation of power in a single market. Qwest believes, however, that the term serves as a suitable shorthand, because the issue here is buying power—the effect of which is to reduce output. Moreover, there are other ways to think of the market in which the term "monopsony power" would be more literally and technically accurate. One could think, for example, of Comcast and AT&T as providers of inputs (viewers or subscribers) to persons selling programming or selling advertising. Since the advertising sales would be in a market that is not bounded by the areas in which the input providers provided input, but rather is largely a national market, one can think of this merger as having direct horizontal effects that one normally associates with a monopsony power.

36/ There may be a small number of situations in which AT&T Comcast's increased bargaining power merely reduces the monopoly profits obtained by the programmer, and no reduction in programming quality or quantity results. But this is certainly not true for all programming; if all programmers reaped monopoly profits, none would ever go out of business. *See* Gertner Decl. at ¶¶ 24-25.

37/ David Waterman & Andrew Weiss, VERTICAL INTEGRATION IN CABLE TELEVISION 74-76 (1997).

MVPD systems.[38] As long as the supplier is able to sell its services to enough other MVPD providers at a price above its average costs, the supplier will be able to survive. Thus, AT&T Comcast will be able to "free ride" on a level of content variety and quality that is subsidized by other MVPD systems.[39]

The most obvious harm to competition from such cost shifting occurs when an MVPD system is competing head-to-head with AT&T Comcast or subsidizing its distribution. The cost shifting then has the effect of raising the competitor's costs – disadvantaging it competitively – which, in turn, can lead to increased local market power for AT&T Comcast in those geographic areas where the companies compete directly.[40]

However, anticompetitive effects may occur even in geographic areas where AT&T Comcast does not compete against the MVPD or broadband provider that is subsidizing its content. This is because the MVPD or broadband provider's variable costs increase, thus reducing consumer welfare. As costs increase, sales decline, and consumers are less well off. Economists would characterize this as shifting the supply curve to the left.

2. The combination of the two companies is particularly threatening to competition in broadband.

The merged company's scale will enhance its ability and incentive to undertake actions that will weaken long-term facilities-based competition in the delivery of broadband services. Whereas DBS is the foremost competitor to cable in the distribution of video programming, DSL is the chief competitor to cable modem service in the distribution of broadband services. Cable broadband has a large share lead over DSL, and DSL does not appear to be growing at a rate

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[38] *See* Gertner Decl. at ¶¶ 25-27.

[39] *See* Haring, *et al.* at 5-6; Gertner Decl. at ¶¶ 23-29.

[40] Gertner Decl. at ¶¶ 12, 14 & 16; Carlton Decl. at ¶ 6.

which could close the gap.[41] Moreover, DSL is typically provided by telephone companies on a regional basis, so an alternative broadband service provided via DSL does not enjoy the advantage DBS enjoys against cable of potentially marketing its services to the entire country.

This merger increases the risk that the market will tip permanently to cable modem services, foreclosing the possibility of vibrant long-term competition between cable operators and telephone companies in the provision of broadband access and services.[42] If AT&T Comcast is permitted to exploit its scale to obtain more favorable programming deals for broadband content delivered via cable modem and to deny programming to DSL-delivered broadband services, then DSL will not be able to sustain the necessary price, quality, and diversity of content to become a viable broadband competitor.[43] Broadband services will then be available only from a monopolist cable modem provider, which will mean higher prices and lower quality and quantity of broadband programming for consumers.

3. The merger will result in vertical foreclosure.

The bargaining power AT&T Comcast will have over video and broadband content providers will disadvantage its competitors through vertical foreclosure. AT&T Comcast will be able to use its size to reduce competition between two content providers by denying (or disadvantaging) carriage to one of them, and thereby significantly increasing the chances of its failure. A "winning" content provider, in turn, will have more market power to exercise over non-AT&T Comcast MVPD and broadband systems. If AT&T Comcast owns the "winning" content provider, it will benefit directly from monopoly rents the content provider charges other

41/ *See* ARS Analysis Release, *ARS, Inc. Study Finds Cable Increasing Lead Over DSL*, Nov. 14, 2001 (noting that cable modem service had a larger base of subscribers and a larger percentage gain in subscribers during third quarter 2001 than DSL providers).

42/ *See* Gertner Decl. at ¶ 31.

43/ *See id.* at ¶ 32.

MVPD and broadband systems. Even if AT&T Comcast does not own the winning content provider, it will be able to extract the monopoly rents through contractual arrangement.[44]

AT&T Comcast will also have the ability and motivation to deny programming it controls, through ownership or otherwise, to competing MVPD and broadband systems (including Qwest). As the FCC has noted, denial of programming increases barriers to entry for new competitors.[45] Indeed, there are already examples of the applicants denying programming to their competitors. For example, in Philadelphia, Comcast owns the regional sports channel, which it refuses to make available to its competitors. While such a refusal would be impermissible under Section 628(b) of the Communications Act (the "program access" rules) if the channel were delivered by satellite, Comcast could steer clear of program access obligations by delivering the programming terrestrially.[46] The results of this loophole have been dramatic: DBS penetration rates for Philadelphia are far lower than for the other top 20 cities in the United States.[47]

II. THIS MERGER, COUPLED WITH CABLE'S EXISTING REGULATORY ADVANTAGES, WILL MAKE IT EVEN MORE DIFFICULT FOR WIRELINE COMPANIES TO COMPETE EFFECTIVELY IN THE BROADBAND AND VIDEO MARKETS.

The regulatory asymmetry between cable companies and their wireline competitors in the broadband and video markets will, unless corrected, exacerbate the competitive harms presented

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44/ *See* Gertner Decl. at ¶¶ 20-32.

45/ Fifth Annual Report, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, 13 FCC Rcd. 24284 ¶ 11 (1998).

46/ Memorandum Opinion and Order, *DirecTV, Inc. v. Comcast Corp.*, 15 FCC Rcd. 22802 (2000).

47/ J. Orszag, P. Orszag and J. Gale, *An Economic Assessment of the Exclusive Contract Prohibition Between Vertically Integrated Cable Operators and Programmers,* filed with EchoStar and DirecTV Reply Comments before the FCC, CS Docket No. 01-290 on Jan. 2002, at 22-23; *see also* Gertner Decl. at ¶¶ 43-45.

by the merged entity's market power over video and broadband content.[48] That asymmetry threatens to stifle both video and broadband competition that might mitigate the harms posed by the overwhelming control the merged entity will exercise over video and broadband content.

A. Regulatory asymmetry bolsters the advantages that cable operators currently possess.

As the Commission is well aware, cable companies such as AT&T and Comcast currently enjoy significant regulatory advantages over their wireline competitors in the provision of video and broadband Internet access services. Not surprisingly, the cable companies have parlayed this asymmetrical regulatory environment into a massive advantage in market share. For example, cable is far and away the leading delivery mechanism for broadband Internet services. As of June 2001, out of a total of 9,616,341 "high-speed" (over 200 kbps in at least one direction) Internet access lines, coaxial cable had 5,184,141 (54%), compared to only 2,693,834 for ADSL and 1,088,066 for "other wireline."[49] The numbers in the residential and small business submarket are even starker.[50] And the gap is *increasing*: Cable's percentage increase in subscribership from December 2000 to June 2001 was 45%, compared to 36% for ADSL and 7%

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[48] The Commission is currently addressing the regulatory disparity between DSL and cable modem services in its proceeding considering the proper characterization of wireline broadband services. *See* Wireline Broadband NPRM. As discussed below, while it is clear that the video services offered over Qwest's VDSL facilities are subject to regulation under only Title VI, the Commission has not yet confirmed that the underlying facilities are not subject to Title II.

[49] Third Report, *Inquiry Concerning the 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*, FCC 02-33, CC Docket No. 98-146, Appendix C, Table 1 (rel. Feb. 6, 2002) ("Third Broadband Report").

[50] *See id.*, Table 3 (cable modem providers have about 64% of the residential and small business market, while DSL providers in the aggregate have a share of only approximately 34%).

for other wireline (a 26% increase in combined ADSL and other wireline subscribers).[51] This head start for cable broadband – combined with cable operators' even greater dominance of video services – may be rendered insurmountable in the AT&T Comcast region when coupled with the merged entity's potential stranglehold on video and broadband content.

B. Regulatory asymmetry deters competition that might otherwise mitigate some of the harms presented here.

Competition from VDSL and DSL services could mitigate some of the competitive harms threatened by this merger.[52] Consumers would have alternate outlets to obtain programs denied to them by the dominant cable operator. Content providers would have other distribution channels, decreasing their reliance on the merged entity and limiting its ability artificially to reduce its programming costs. And the existence of multiple content providers would in turn enhance the ability of wireline broadband and video providers to survive, by reducing the risk that a single content provider could exercise market power with respect to a non-AT&T Comcast broadband provider.

But regulatory asymmetry hinders this much needed competition. Simply put, VDSL and DSL competition are unlikely to mitigate the harms posed by the merger, so long as the Commission continues to saddle wireline VDSL and DSL competitors with more onerous regulation than that which applies to cable video and broadband providers.

For example, Qwest has developed a very high-speed VDSL service – incorporating video, data, and voice services – that is both technically and economically viable, and thus could

[51] And, obviously, cable providers added hundreds of thousands more subscribers than did wireline providers over those seven months. *Id.*, Table 1.

[52] While satellite and wireline broadband services are developing, and promise to offer increased competition in the broadband market, cable's dominance is not currently threatened, and, if regulatory distortions are adequately addressed, DSL is the most likely candidate to provide significant competition in the near future.

provide much-needed competition for AT&T Comcast's cable video and broadband services. While Qwest currently has only 50,000 customers using the VDSL services it has deployed in Phoenix and outside Denver, Qwest is eager to provide widespread VDSL service competing with cable video and broadband services. Qwest believes that the law is clear that its VDSL service is a Title VI service subject to regulation no different from that applicable to competing traditional cable service; however, the Commission has never squarely addressed whether such Title VI treatment extends to the underlying facilities that Qwest deploys for VDSL service. The uncertainty regarding this issue, and the possibility that the Commission or competitors might seek to assert Title II obligations on Qwest's VDSL facilities, is a significant disincentive to more widespread deployment of VDSL. The unbundling, pricing, and other requirements under Title II are not only unduly burdensome, but would unfairly distort the market by artificially increasing the costs of VDSL compared to traditional cable service.

Similarly, Qwest's widespread and aggressive offering of DSL services will be significantly impeded if such services are not subject to the same regulation under Title I – rather than Title II – that the Commission recently clarified applies to the cable modem services with which DSL competes. Divergent regulation of these head-to-head rivals makes no sense, and inevitably favors the less-burdened competitor.

C. The Commission should remove the regulatory asymmetry deterring competition for cable video and broadband services.

If the Commission approves the license transfers, yet fails to rectify the regulatory asymmetry between cable and wireline video and broadband services, it will cement the merged entity's dominant position in the marketplace and thereby effectively guarantee that the merger does *not* advance the public interest. The Commission should instead level the regulatory playing field and permit the market, rather than the Commission's legacy regulations, to determine the rivals' relative successes in the video and broadband marketplace. Doing so is entirely consistent with both the Act and the principles animating the Commission's continuing revision of its regulatory scheme.

The Act provides that "[i]t shall be the policy of the United States to encourage the provision of new technologies and services to the public."[53] It further requires that the Commission "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans . . . by utilizing . . . regulating methods that remove barriers to infrastructure investment."[54] In light of the Act's admonitions, the Commission has repeatedly affirmed a governing principle of competitive neutrality, under which outmoded regulation is to be discarded when overtaken by changes in the marketplace.[55] As Chairman Powell has cautioned, the Commission "should not dare to pick technology winners or losers,"[56] in part because "rais[ing] the cost of one industry player but not the cost to others to whom the rationale also runs, seems patently unfair and will skew competitive development."[57]

By continuing to subject the competing platforms here to differing regulation, the Commission would contravene the Act and its own pronouncements, retaining barriers to

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53/ 47 U.S.C. § 157.

54/ Section 706(a), Telecommunications Act of 1996, notes following 47 U.S.C. § 157.

55/ *See, e.g.*, Memorandum Opinion and Order, *Merger of MCI Communications Corporation and British Telecommunications PLC*, 12 FCC Rcd 15351 at ¶ 29 n.46 (1997).

56/ Commissioner Michael K. Powell, Federal Communications Commission, *Technology and Regulatory Thinking: Albert Einstein's Warning*, Legg Mason Investor Workshop, March 13, 1998, *available at* http://www.fcc.gov/Speeches/Powell/spmkp804.html.

57/ Commissioner Michael K. Powell, Federal Communications Commission, *Letting Go of the Bike: A Holiday Parable on Communications Mergers in a Season of Competition*, Practicing Law Institute, Dec. 10, 1998, *available at* http://www.fcc.gov/Speeches/Powell/spmkp820.html.

infrastructure investment and picking a technology "winner" by imposing higher costs on VDSL and DSL than on cable. The effects of that market distortion would be magnified in AT&T Comcast's region, given the anticompetitive advantages the merged entity will have.

Further, there is no reason to subject wireline LECs – who are relative newcomers to the video and broadband markets, and certainly do not have a dominant position there – to greater regulatory constraints than those that apply to cable video and broadband services, which do possess a dominant position. It is simply absurd to deter ILECs from significantly *entering* the video and broadband market by treating them as though they already *monopolize* that market. As previously noted, ILECs are running a distant second to cable companies such as AT&T and Comcast in the provision of broadband services, let alone video.

It is similarly absurd to protect a merged AT&T Comcast – which clearly would be the dominant player in the cable video and broadband market, and would possess size advantages to further solidify and expand its position – from meaningful competition by keeping in place regulatory asymmetry specifically burdening ILECs. The Commission can avoid this outcome, and the otherwise certain harms that it would engender, by rectifying current regulatory asymmetry in either of two ways: by removing the onerous regulatory burdens on ILECs, or imposing similar burdens on the merged entity. The former method is clearly preferable, because it is deregulatory and thus permits the market to determine who prevails in the video and broadband arena. But if the Commission chooses not to remove the burdens restricting ILECs, it must impose similar burdens on the merged entity, rather than permit the merged entity to benefit from – and consumers, programmers, and competitors to be harmed by – the regulatory asymmetry that otherwise would be the death knell to competition in the AT&T Comcast region.

III. AT&T AND COMCAST'S RECYCLED PUBLIC INTEREST JUSTIFICATION FOR THIS MERGER SHOULD BE GIVEN LITTLE, IF ANY, WEIGHT.

Removal of regulatory asymmetry to prevent the harms posed by this merger is particularly necessary here, because there is little reason to believe that the applicants will ultimately deliver the benefits that they have proffered to meet their burden of justifying the merger. AT&T has twice before justified transfers of licenses in cable mergers by asserting that the transfers would promote the rapid deployment of cable telephony. And both times, the Commission approved the transfers largely on the basis of AT&T's assurances. Those assurances had at least an air of plausibility about them when they were first made, since, before AT&T's decision to spin off AT&T Broadband, cable telephony appeared to be a means for AT&T to protect its long distance business, offering AT&T the chance to provide consumers with a bundled voice offering. Nonetheless, the promised cable telephony has yet to be delivered. Nor is there any reason to believe this time it will be: Following this merger, AT&T Comcast will not even have the incentive formerly provided, at least allegedly, by AT&T's long distance business. This considerable shift in AT&T's incentives, coupled with Comcast President Brian Roberts's outspoken skepticism about cable telephony, leave little reason to believe that this will be the merger that finally brings cable telephony to the American public.

Mr. Roberts – who would be CEO and President of the merged entity and would control 33% of its voting power[58/] – has, within the past year, reiterated his intention to "dampen spending on cable telephony until cheaper, IP-based telephony [is] ready to be introduced."[59/] Thus, any assertion that Mr. Roberts – who will *not* have a long distance business to protect –

[58/] Comcast Application at 7-8. C. Michael Armstrong of AT&T would be Chairman of the Board, but apparently would not serve as an officer in the new company. *See id.* at 8-9.

[59/] *Comcast Bid Would Reshape Pay-TV*, Television Digest, July 16, 2001. *See also* Irwin Stelzer, *AT&T Hopes Cut Off*, Sunday Times - London, July 15, 2001 (quoting Roberts as asking "How fast do you want to go with yesterday's technology?").

will deploy telephony even as rapidly as did Michael Armstrong, much less *more rapidly*, strains credulity.

A. The applicants must demonstrate a public interest benefit justifying the transfer of licenses.

Under the Act and the Commission's rules and precedent, the Commission may not approve the requested license transfers unless AT&T and Comcast demonstrate that the proposed transfers of control will serve the public interest. Section 214(a) prohibits the acquisition or operation of any line unless the Commission finds that such acquisition or operation is justified by "the present or future public convenience and necessity."[60/] And section 310(d) prohibits the transfer of any Title III license unless the Commission finds that the "public interest, convenience and necessity will be served thereby."[61/] Thus, "to obtain Commission approval of their Application, [AT&T and Comcast] must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity."[62/] Under 47 U.S.C. § 309(e), "the burden of proof" that a proposed transfer of licenses will serve the public interest "shall be upon the applicant[s.]"[63/] Where, as here, an unconditioned transfer would result in the public interest harms discussed in Part I, *supra*, the burden is heavy indeed.

60/ 47 U.S.C. § 214(a).

61/ *Id.* § 310(d).

62/ Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd. 9816 at ¶ 1 (2000) ("MediaOne Order").

63/ 47 U.S.C. § 309(e).

B. The applicants attempt to justify the transfer by proffering a public interest benefit that AT&T has twice before promised and failed to deliver and in which Comcast has indicated it has no intent to invest.

To meet their "burden of proving that the transfer[s] will advance the public interest,"[64] AT&T and Comcast rely in substantial part on the assertion that the proposed merger will facilitate their provision of widespread local and exchange access telephony services using their cable facilities,[65] because the merger will combine the expertise, experience, and telecommunications facilities of AT&T with the expanded cable footprint and advanced cable plant of Comcast.[66] The existence of a second widespread facilities-based local telephone service provider would benefit the public, as the Commission recognized in approving each of AT&T's two previous cable mergers.[67] But the mere *potential* of such a provider, without a realistic expectation that it will appear, obviously provides none of those public interest benefits. The public will benefit from increased facilities-based competition only if AT&T Comcast *actually* deploys cable telephony. If that promise is not fulfilled, the public will bear the harms of the merger – restricted choice in various broadband arenas and higher prices – with no countervailing benefits. And past experience with AT&T, the severing of AT&T's cable business from its long distance business, Brian Roberts's skepticism of cable telephony – and

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64/ MediaOne Order at ¶ 9 (citing 47 U.S.C. § 309(e)).

65/ *See* Comcast Application. The parties also make vague assertions that the merger will accelerate the rollout of broadband Internet and digital video services, and that Comcast will guide AT&T in the production and delivery of local and regional programming. But it is clear that any real gains from the merger, beyond sheer increased size and a prettier balance sheet for AT&T, will come exclusively in the field of cable telephony, where "the complementary assets and expertise of Comcast and AT&T," *id.* at 38, will make rapid rollout of this facilities-based service possible.

66/ *See id.* at 38-39.

67/ See MediaOne Order; Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd. 3160 (1999) ("TCI Order").

even the application itself – demonstrate that AT&T Comcast is unlikely to deliver the promised facilities-based competition.

1. AT&T made identical promises with respect to TCI and MediaOne, but failed to deliver.

"Fool me once, shame on you; fool me twice, shame on me." In its two prior cable mergers, AT&T justified the transfer of Commission licenses by promising to deploy widespread cable telephony. In support of its TCI merger application, AT&T assured the Commission that one of two "primary benefits of the merger" would be the promotion of facilities-based competition in local telephony.[68/] AT&T justified its acquisition of MediaOne by making the same pledge.[69/]

The Commission approved both mergers in reliance on these promises. The Commission found that the TCI merger would provide "a local telephony alternative to many residential customers now served only by incumbent local exchange companies."[70/] Similarly, the Commission found that the MediaOne merger was "likely to benefit consumers by enhancing the merged entity's ability to compete more effectively with incumbent [LECs] in providing facilities-based local telephony and other new services to residential customers."[71/]

The Commission's past reliance on AT&T's alleged "intentions" has twice proven to be ill-considered, because AT&T has failed to fulfill its promises to provide widespread cable

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68/ *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI to AT&T,* filed in CS Docket 98-178 on Sept. 14, 1998, at 13 ("TCI Application") (first sentence of "Merger Analysis" section of "Public Interest Showing").

69/ *Applications for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee,* filed in CS Docket 99-251 on July 15, 1999, at 4 ("MediaOne Application").

70/ TCI Order at ¶ 1.

71/ MediaOne Order at ¶ 7.

telephony over the extensive cable plant it has acquired. This is not a failure of technology or resources, but of commitment. AT&T, through its mergers, has amassed ever greater facilities, passing ever more homes nationwide with advanced cable plant that could be upgraded to provide telephony at a modest cost per consumer. Thus, AT&T cannot credibly be said to lack the economies of scale necessary for such investment. Yet consumers have yet to enjoy the promised benefits of widespread cable telephony. Three years after the TCI merger and two years after the MediaOne merger, AT&T has made cable telephony available to only one-third of the 22 million homes passed by its expansive and technologically advanced cable plant,[72/] and has scarcely a million customers.[73/]

This plainly does not fulfill the promises that AT&T made to justify its prior license transfers. For example, in the MediaOne Application, AT&T touted its willingness and ability to roll out telephony *quickly*, asserting that (1) it "ha[d] proceeded to upgrade TCI's cable network and deploy local telephony facilities, and already ha[d] begun providing facilities-based local exchange telephone service in Freemont, California,"[74/] (2) MediaOne already had upgraded about a million homes to use cable telephony at the time of filing,[75/] and (3) even prior to the merger announcement, "MediaOne projected completion of the upgrade of most of its local networks by the end of the year 2000."[76/] But AT&T recently conceded that:

> [O]n telephony, we currently have one million subscribers and that's over 6.7 million telephony ready homes. By the end of 2002, the joint

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[72/] *See* Comcast Application at 23 ("AT&T Broadband currently markets cable telephony service to approximately seven million households").

[73/] See *id.*

[74/] MediaOne Application at 8.

[75/] *Id.* at 15.

[76/] *Id.* at n.60.

company will have 11.2 million homes. We should be able to add after that about, we haven't finalized a number yet, but about 5-6 million telephony homes a year.[77]

This statement, even if taken at face value, indicates that AT&T does not expect or intend to offer cable telephony to all 38 million homes the *merged* entity will pass until at least 2007, despite its assertion that its cable plant will be 100% "state-of-the-art" – and thus capable, or nearly so, of providing local and exchange access telephony services – by the end of next year.[78] Past experience suggests that AT&T will fall far short of even that modest five-year goal. Indeed, fully crediting the figures AT&T provided at its December 20, 2001 Joint Analyst Meeting, a transcript of which it filed with the SEC, and its application here, AT&T added only about 300,000 telephony ready homes during that two and a quarter month span — an annual pace of 1.6 million homes, which, if kept, would mean that cable telephony would be available to all of the merged company's subscribers in 2021.

2. AT&T's spin off of AT&T Broadband means that the giant cable company this merger will create will have no long distance telephone service interests — and thus sharply reduced incentives to deploy cable telephony.

The break off of AT&T Broadband from AT&T Corporation's long distance business radically decreases the likelihood of any acceleration in the deployment of cable telephony. As Michael Armstrong explained, protecting its central long distance business was the principal reason AT&T invested in cable telephony in the first place: "The [TCI] merger is the key to making AT&T the 'any distance' company we need to be and our customers want us to be."[79]

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[77] *See* December 20, 2001 Joint Analyst Meeting (filed by AT&T with the SEC as a Form 425 on Dec. 21, 2001), at 10 (comments of Bill Schleyer).

[78] *See id.*

[79] Mary Mosquera, *FCC Approves AT&T-TCI Merger*, TechWeb News, Feb. 17, 1999, *available at* http://content.techweb.com/wire/story/TWB19990217S0027. *See also* Seth

AT&T's 1999 Annual Report similarly explained that "AT&T is successfully transforming itself from a domestic long distance company to an any-distance, any-service global company."[80/] AT&T Comcast will be the opposite of such an "any-distance, any-service global company": It will be a domestic cable television company—a company unlikely to be in any great rush to invest in local telephony, and one made up of two entities that have shown no evidence in the past of an appetite to actually invest in the cable telephony business.

3. There is no reason to believe Comcast's recent telephony conversion will last beyond the approval of this merger.

Before announcing its pending merger with AT&T, Comcast was among the most negative of large cable companies about investing in telephony;[81/] it was a cable television provider "with no switches and no desire to acquire them."[82/] Indeed, Comcast "has been adamant that the technology does not yet exist to create a profitable cable telephone service."[83/] The financial community was quick to perceive that this merger foreshadows a *slowdown* of

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Schiesel, *For AT&T's Chief, a Redefined Cable Landscape*, N.Y. Times, Jan. 16, 2000, at BU1 (quoting Armstrong as conceding that "[t]he long-distance business is not a growth business. . . . [long distance] voice, by itself doesn't have the value to really sustain itself as a stand-alone business.").

[80/] AT&T Corporation, *1999 Annual Report*, at 3, *available at* http://www.att.com/ar-1999/pdf/att_ar1999.pdf.

[81/] *See, e.g.* Michael Lafferty, *Cable Telephony Sending Mixed Signals*, Cahners Communications, Engineering & Design, April 1, 2001, *available at* http://www.cedmagazine.com/ced/2001/0401/04a.htm ("Comcast Corp. is pacing itself telephony-wise, says Mark Coblitz, Comcast's vice president of strategic planning.").

[82/] *Cable Telephony: Available in a Variety of Packages*, NewsEdge, Dec. 7, 2000, *available at* http://www.adc.com/Stories/newsroom/others/NewsEdge_12-7-00.html.

[83/] *Richard Waters, Comment & Analysis: Cable Television's Family Affair: Richard Waters Asks Whether the Roberts Clan Will Change Their Approach to Broadband After the Planned Merger of Comcast and AT&T Broadcast*, Financial Times, Dec. 21, 2001.

AT&T's investment in cable telephony, not a speedup.[84] Only the need for clearance of this merger prompted Comcast abruptly to "embrace[]" cable telephony.[85] That "courthouse conversion" merits skepticism.

4. The application itself confirms that the proffered public interest benefit is likely empty.

Indeed, the application itself demonstrates that AT&T and Comcast are making no true *commitment* to deploying cable telephony. Hidden in a footnote and couched in vague terms is the Applicants' concession that even their *promise* is conditional: "as AT&T Comcast integrates the operations of Comcast and AT&T Broadband, it may modify its plans for the launch and roll-out of services in light of the company's financial and operational performance and broader economic trends and developments."[86] While there is, of course, always the chance that "financial and operational" and other developments will interfere with the best-laid plans, in this particular case there seemingly is far more than just a chance. If the past is a predictor of the future, this statement confirms two things: *First*, once again, AT&T has promised cable telephony as a ticket to merger approval, yet will fail to vindicate its promise thereafter; and *second*, Comcast has not really changed its spots with respect to cable telephony.

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[84] *See* Jared Sandberg, *An AT&T-Comcast Deal Could Set Back Telephone, Cable Convergence*, The Wall Street Journal, July 12, 2001 ("For some insight into how Comcast might handle AT&T's telephone service, one need look no further than Detroit. At the end of last year, Comcast acquired the AT&T cable system there, which had been offering customers local phone service using a circuit-switched network. Comcast says it has no plans to expand the service and is simply trying to get it to the break-even point. In the seven months it has owned the system, the company has added little more than 5,000 phone subscribers. Cox, by contrast, adds that many subscribers in less than two weeks.").

[85] *See* Jessica Hall, *Comcast Endorsed Telephony To Win AT&T Cable Unit*, Reuters, Dec. 20, 2001, *available at* http://investor.cnet.com/investor/news/newsitem/0-9900-1028-8246225-0.html ("Comcast had initially balked at AT&T's expensive foray into cable telephony. But it later embraced the nascent technology").

[86] Comcast Application at n.49.

In short, the Commission must approach the public interest justification for this merger in a skeptical vein, and accord it little if any weight. The inadequacy of that public interest justification highlights the need for the Commission to ensure that the merged entity is not in a position to obtain substantial anticompetitive advantages in its markets — a goal the Commission can best achieve by ensuring that there is robust competition from other broadband and video platform providers in the market.

IV. THE COMMISSION SHOULD CONDITION ITS APPROVAL OF THE LICENSE TRANSFERS ON THE MERGED ENTITY'S OFFERING NONDISCRIMINATORY ACCESS TO ITS CABLE MODEM PLATFORM FOR ALL ISPS.

The Commission should condition its approval of the transfers on merged entity's providing open access to competitive ISPs. This transfer implicates the same concerns the Commission considered with respect to AT&T-TCI and AT&T-MediaOne, but those concerns are exacerbated here by the sheer size of the proposed entity. Far larger than the entity created by AT&T's past cable mergers (and far larger than AOL Time Warner), a merged AT&T Comcast would have control over a huge share of the coaxial pipe that can be used to connect American consumers to the Internet. The company accordingly would have both the ability and the incentive to abuse that market power. And the factors weighing against imposing a field-leveling access condition on AT&T that the Commission found plausible in the past clearly are no longer valid. More particularly, in the aftermath of AOL-Time Warner, it is clear that broadband Internet access is a distinct market and that multiple-ISP access is technically and economically feasible over cable plant.

Indeed, both AT&T and Comcast have given lip service to multiple-ISP access for years. They have even reiterated their "commit[ment] to offering customers a choice of ISPs" in their