merger poses in video distribution and broadband services, AT&T and Comcast are tasked with "demonstrat[ing]" benefits with "a higher degree of magnitude and likelihood than [the Commission] would otherwise demand."[70]

The Applicants' primary claim is that, whatever the harm the merger will cause to video and broadband services, it should be approved because it will purportedly "further . . . the deployment of facilities-based local telephone competition." Public Interest Statement at 36. If this contention has a familiar ring, it is because it is the exact same claim AT&T made to justify its two previous cable mergers. Thus, when AT&T sought Commission approval of its merger with MediaOne, it pledged that the combined company would "enhance competition for residential local exchange and exchange access services by enhancing the ability of AT&T and MediaOne to provide facilities-based local telephone service to mass market customers."[71] Likewise, AT&T previously claimed that its proposed union with TCI would enable it to "provide facilities-based residential service" by using TCI's cable facilities to provide for two-way voice telephony.[72]

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[70] *Id.* ¶ 256.

[71] AT&T/MediaOne Applications and Public Interest Statement at 33, CS Docket No. 99-251 (FCC filed July 7, 1999) ("*AT&T/MediaOne Public Interest Statement*").

[72] AT&T/TCI Description of Transaction, Public Interest Showing, and Related Demonstrations at 20, CS Docket No. 98-178 (FCC filed Aug. 31, 1998) ("*AT&T/TCI Public Interest Statement*"). Indeed, AT&T submitted "detailed deployment schedules to the Commission outlining its plans to deliver local exchange and exchange access services following the consummation of the merger." Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3231, ¶ 148 (1999) ("*AT&T/TCI Order*"). There is no record of whether AT&T met those schedules. AT&T also resorted to the claim of local competition in attempting to justify its merger with Teleport, and the Commission relied on it in there as well. *See* Application for Authority to Transfer Control at 8, CC Docket No. 98-24, File No. I-T-C-98-104-TC (FCC filed Feb. 3, 1998) ("In the near term, AT&T expects that the acquisition of TCG will accelerate and expand AT&T's provision of facilities-based local exchange service, primarily to business customers and to multiple dwelling units in high density markets currently served by TCG."); Memorandum Opinion and Order, *Teleport*

There is, however, a distinct difference between the rationale AT&T offered then, and the one it offers now. In both the TCI and MediaOne transactions, AT&T claimed that its proven abilities *as a telephone company* would allow it successfully to deploy cable telephony to the mass market.[73] In fact, it was precisely this synergy that caused the Commission to view those transactions as serving the public interest.[74] Here, however, the merging parties appear to believe that jettisoning those traditional telephone company assets – and returning AT&T's cable assets to a "pure" cable company – is necessary to fulfill the promise of cable telephony. The Applicants cannot have it both ways. In light of this turnaround, the Commission should be highly skeptical of AT&T's pledge here.

Such skepticism is all the more warranted in light of Comcast's oft-stated reluctance to embrace cable telephony. Until this merger, Comcast had made unmistakably clear that it viewed circuit-switched cable telephony with disdain, and that it would only offer telephony "'if there is a way to deliver it with IP.'"[75] Having thus taken "'a hard look at the phone business'"

Communications Group, Inc. and AT&T Corp. For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities-Based and Resold Communications Services, 13 FCC Rcd 15236, 15262-63, ¶ 50 (1998) ("in their applications, Applicants have explicitly identified a set of residential customers that will be served immediately, and thereafter, by the merged entity – customers that live in multiple dwelling units in high density markets") (internal quotation marks omitted).

[73] *See AT&T/MediaOne Public Interest Statement* at 22 (merger would purportedly enhance local voice competition by "combining 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"); *AT&T/TCI Public Interest Statement* at 19-20 ("AT&T contributes its experience in providing toll-quality voice and data traffic, switching technology, a brand name that can compete with incumbent local telephone companies and capital").

[74] *See AT&T/MediaOne Order*, 15 FCC Rcd at 9820, ¶ 7; *AT&T/TCI Order*, 14 FCC Rcd at 3228-31, ¶¶ 145-148.

[75] Michael Lafferty, *Cable Telephony Sending Mixed Signals*, Communications Eng'g & Design (Apr. 2001) (quoting Mark Coblitz, Comcast vice president of strategic planning), *at* http://www.cedmagazine.com/ced/2001/0401/04a.htm.

and "examining the amount of capital required," Comcast previously concluded that it is "too expensive . . . given that cheaper Internet-protocol telephony solutions could arrive in two to three years."[76] Even now, Comcast's own Senior Vice President for Corporate Development candidly admits that "[t]o date, Comcast's experience with cable telephony has been relatively limited," and that "Comcast has not yet developed any new cable telephony networks on its own initiative, nor has Comcast developed the experience or infrastructure to expand cable telephony on its own."[77]

Indeed, careful examination of the Applicants' claims regarding local competition reveal just how limited they really are. Comcast has committed to offer cable telephony in only two markets, Detroit and Philadelphia,[78] where "AT&T has *already* invested" in the necessary "switching infrastructure."[79] That means that those markets can be served off AT&T's *existing* switches, with virtually no new investment. And, by all accounts, that is exactly what the parties intend to do. Its claims to this Commission notwithstanding, the truth is that Comcast is "'not touching circuit-switched telephony with a 10-foot pole.'"[80] It plans only to "'maintain what AT&T has done because . . . the expense has already been incurred.' That expense doesn't

[76]M. Stump, *Comcast's Phone Forecast: Legacy Subs in Black by '02*, Multichannel News, at 25 (Aug. 27, 2001) (quoting David Watson, Comcast executive vice president of sales, marketing and customer service).

[77] Pick Decl. ¶ 10 (Public Interest Statement App. 9).

[78] *See* Public Interest Statement at 38.

[79] M. Farrell, *AT&T Wants to Tweak Digital Packages Again*, Multichannel News, at 1 (Jan. 14, 2002) (emphasis added).

[80] Jim Barthold, *Comcast Pulls Telephony Turnaround*, Telephony (Jan. 7, 2002) (quoting Michael Goodman, Yankee Group).

include buying switches" or otherwise making any meaningful investment in facilities-based competition.[81]

It is accordingly clear that any increase in cable telephony deployment that the parties plan is not remotely merger-specific: a limited joint venture would easily permit AT&T to serve the customers in question off its own switches, without requiring a full scale merger. Thus, as we discuss in more detail below, if the Commission is to rely on the prospect of cable telephony to temper the threat that the merger poses in broadband and video services, the Commission must take steps to encourage the merged company to invest in *new* facilities to bring *new* services to *new* areas that would not otherwise be served. Absent such conditions, the Applicants' claims regarding local telephony are just so much talk, and nothing more.

IV. ABSENT SPECIFIC AND VERIFIABLE CONDITIONS, THE MERGER CANNOT BE APPROVED.

Like the Commission's current Chairman, SBC believes that any conditions imposed in the merger context should be closely tied to and "squarely supported by the analysis of the harms" of the merger.[82] In this context, that means imposing conditions aimed at (a) addressing the merged company's power over the MVPD market; (b) protecting the nascent broadband market from further dominance by the entrenched cable incumbents; and (c) encouraging the merged company to follow through on its commitment to provide facilities-based voice competition to residential customers.

MVPD Conditions. As noted above, the Applicants appear to concede that they must divest themselves completely of their interest in Time Warner Entertainment to gain approval of the transaction. But that is only a starting point. Even without an interest in Time Warner, the

[81] *Id.* (same) (alteration in original).

[82] *SBC/Ameritech Order*, 14 FCC Rcd at 15214 (separate statement of then-Commissioner Powell).

merged company would possess significant power in the MVPD market. The Commission must take at least two additional steps to ensure that the Applicants do not abuse that power.

Program Access Rules. The 1992 Cable Act bars cable operators from using their control over programming to suppress alternative means of distribution.[83] The Act's program access regime prohibits cable operators from "unduly or improperly" influencing programming vendors in their dealings with unaffiliated distributors[84] or from discriminating against those competitors in the terms offered.[85] The Act and the Commission's implementing restrictions,[86] however, only apply to *satellite*-delivered programming.[87]

All video programming, including all the content distributed over conventional cable TV channels, is now moving toward digital format,[88] and once the content is digital, it can readily be distributed to cable head-ends via the Internet. Cable operators have already begun using fiber-optic delivery as an alternative. As they migrate their content to Web-based distribution, they can apparently escape their program-access obligations entirely. Indeed, that is precisely what

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[83] 47 U.S.C. § 548; 47 C.F.R. § 76.1002.

[84] 47 U.S.C. § 548(c)(2)(A); 47 C.F.R. § 76.1002(a).

[85] 47 U.S.C. § 548(c)(2)(B); 47 C.F.R. § 76.1002(b). This prohibition applies to both price and non-price forms of discrimination, such as unreasonable refusals to deal. *See* Notice of Proposed Rulemaking, *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 194, 198, ¶ 15 (1992).

[86] 47 C.F.R. §§ 76.1000-.1004.

[87] Memorandum Opinion and Order, *Echostar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089, 2099, ¶ 21 (1999).

[88] Digital formats are already easier to store, edit, and process; they will soon be easier and cheaper to create at the outset.

Comcast did when it decided to deny regional sports programming to competing distributors in the Philadelphia area. *See supra* p. 11.[89]

The Commission is "aware of the potential for this type of migration and the possible need to address it in the future."[90] The future is now. Regrettably, the concentration of increasing amounts of power among the top cable operators and their captive Internet portals and Web-based content providers could well signal the demise of cable's only serious competitor in MVPD, DBS. This merger is the continuation of a massive trend of "vertically integrated programmers beg[inning] to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules," and the Commission must now impose "'an appropriate response to ensure continued access to programming.'"[91]

The Commission must accordingly condition its approval of the merger on AT&T/Comcast's agreement to distribute its programming on a nondiscriminatory basis regardless of the technology used to distribute its content at the wholesale level. This is particularly important with respect to the combined company's regional sports programming, which – as discussed above – Comcast has refused to make available to its video competitors.

Divestiture of HITS. The Commission must also insist upon complete divestiture of HITS to an unaffiliated third party. As explained above, HITS provides a critical service to

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[89] RCN has asked the Commission "to face up to the commercial reality that the cable industry is resorting to terrestrial transmission in large part to avoid the program access provisions of § 628 of the Act." Comments of RCN Corp. at 20-21, CS Docket No. 99-230 (FCC filed Aug. 6, 1999).

[90] *AT&T/TCI Order*, 14 FCC Rcd at 3180, ¶ 37.

[91] *Id.* ¶ 37 n.119 (quoting Memorandum Opinion and Order and Notice of Proposed Rulemaking, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*; *Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, 12 FCC Rcd 22840, 22861, ¶ 50 (1997)).

start-up MVPDs, yet AT&T has already made clear that it will refuse to permit service to overbuilders in its territory. The only remedy for this blatantly discriminatory conduct is to force the merged company to divest itself of all interest in HITS as a condition precedent to consummation of the merger. The Commission should insist, moreover, that the acquiring party be financially sound, capable of successfully continuing the business, and completely unrelated to the merged company. Nor should the Commission permit any eventual buyback of the divested entity. Particularly in light of AT&T's history of anticompetitive conduct with respect to this service, only complete divestiture to an established concern will suffice to mitigate the threat posed by the merger.

Broadband Conditions. As discussed above, the merger poses a serious threat to the unfettered development of Internet content and to the viability of competing platforms – particularly DSL. By increasing the merging parties' already substantial leverage over content providers, the merger heightens the risk that the Applicants would foreclose competing content, set standards to favor the cable platform, and tilt the market further away from DSL.

By far the best resolution of these competitive concerns is to free ILECs to compete with cable on an equal footing. The Applicants themselves claim – and the Commission itself recognized in *AT&T/MediaOne* – that the DSL platform has the potential to provide a substantial competitive counterbalance to cable's increasing market share. But that can only happen if the Commission removes the burdensome and costly regulations that diminish ILECs' incentives aggressively to deploy broadband facilities. *See* Declaration of Dennis W. Carlton ¶¶ 8-11 (Attachment B hereto); Gertner Decl. ¶ 62.

The Commission has a number of open dockets in which it can do exactly that. In the *Information Services NPRM*, the Commission proposes to deregulate ILEC-provided broadband Internet access as a Title I information service, and to remove the underlying *Computer Inquiries* requirements that force BOCs to strip out a separate telecommunications component and offer it on a common carrier basis. In the *Triennial Review*, the Commission has before it an extensive record that demonstrates beyond legitimate dispute that CLECs are not "impaired" without access to the network elements that ILECs use to provide broadband services. And in the *Non-Dominance Proceeding*, the Commission properly proposes to remove all dominant-carrier regulation associated with ILEC broadband services.

The outcome of those proceedings will have a material effect on the competitive significance of this merger. If the Commission adheres to the goal of establishing a balanced, deregulatory framework for ILEC broadband,[92] then it can be reasonably confident that the ILECs will provide sufficient competition in broadband to diminish the threat posed by this merger. But the Commission cannot allow this merger to go forward as long as ILECs are incapacitated by regulations. To do so could irreparably damage the development of competition in broadband. Indeed, because broadband services are at such a critical stage – and because the

[92] *See, e.g.*, Notice of Proposed Rulemaking, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, CC Docket Nos. 02-33, 95-20 & 98-10, FCC 02-42, ¶¶ 4-6 (rel. Feb. 15, 2002) (articulating goals of "conceptualiz[ing] broadband broadly" across platforms, regulating broadband services "in a minimal regulatory environment," and "develop[ing] an analytical framework that is consistent . . . across multiple platforms"). *See generally, e.g.*, Michael K. Powell, Chairman, FCC, Remarks at the ITU Second Global Symposium for Regulators, Geneva, Switzerland (Dec. 4, 2001) (what is necessary is "a regulatory environment that provides the incentives necessary to deploy new services on the part of the private sector. The more onerous the regulatory environment, the costs of deployment become higher and riskier and more difficult."); *Cable Bureau Suggests Regulatory Forbearance for New Services*, Comm. Daily (Feb. 23, 2001) (noting Chairman Powell's comments that the Commission must move toward "some degree of less regulation" in the broadband market that would be "not so technology-centric"); Kevin J. Martin, Commissioner, FCC, *Framework for Broadband Deployment*, Remarks at the National Summit on Broadband Deployment (Oct. 26, 2001) (the current regime "creates significant disincentives for the deployment of new facilities that could be used to provide broadband. Under such a regime, new entrants have little incentive to build their own facilities, since they can use the incumbents' cheaper and more quickly. And incumbents have some disincentive to build new facilities, since they must share them with all their competitors.").

merger poses such a severe threat – the Commission cannot permit the merger to close unless and until it has actually cleared away the obstacles blocking competition from ILECs. Proposals alone are not enough. Absent effective rules creating deregulatory parity, the merger should not be allowed to proceed.

Accordingly, even if the Commission is confident that it will *eventually* free ILECs to compete with cable on an equal footing, it must take steps *now* that will protect competition until those rules take effect. The Commission's existing broadband dockets are unlikely to be concluded until much later this year, and even then they will surely be subject to a series of appeals that will create continued uncertainty.[93] If the Commission does not prevent the closing of the merger until these dockets are completed, then, in the interim – *i.e.*, until ILECs have sufficient certainty regarding their deregulatory status to deploy aggressively broadband facilities – the Commission must take affirmative steps to level the playing field. That means forcing the combined AT&T/Comcast to compete on terms and conditions that are comparable to those that apply to incumbent LECs:

Spectrum Unbundling. To provide true parity, the Commission must force the Applicants to unbundle spectrum and make it available at cost-based rates. Cable spectrum is already "unbundled" to some degree, of course – cable operators are required to set aside video channels for use by various third parties.[94] In terms of spectrum required, a cable modem service requires two channels: one channel for downstream traffic and another channel for upstream

[93] *Cf. Brand X Internet Servs. v. FCC*, No. 02-70518, *et al.* (9th Cir. filed Mar. 25, 2002) (challenging FCC's *Cable Classification Order*).

[94] *See, e.g.*, 47 U.S.C. § 532(b)(1) ("A cable operator shall designate channel capacity for commercial use by persons unaffiliated with the operator . . . ."); *see also id.* § 522(4) (a "channel" is "a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel"); *see generally FCC v. Midwest Video Corp.*, 440 U.S. 689 (1979).

signals, each consisting of approximately six MHz.[95] Upgraded cable systems – *i.e.*, those that are capable of providing cable Internet service – typically have a bandwidth of between 550 and 750 MHz, approximately ten percent of which is unused.[96] Any claim that hybrid fiber-coax is too limited to support unbundling is accordingly indefensible (especially when placed side by side with the conclusion that spectrum unbundling makes perfect sense in the much narrower capacity of copper wires).

Nor may the Applicants duck this obligation on the grounds of technical infeasibility. Unbundling spectrum poses no significant risk to cable systems, much less a risk substantial enough to permit them to operate a closed system.[97] That certain incumbent cable operators already connect with unaffiliated ISPs, and provide data transmission capacity over hybrid fiber-coax to that ISP, is evidence that transmission capacity can be provided (and spectrum isolated) to unaffiliated providers without adversely affecting traditional cable services.[98] And, to the

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[95] *See Overview of Cable Modem Technology and Services*, Cable Datacom News ("To deliver data services over a cable network, one television channel (in the 50-750 MHz range) is typically allocated for downstream traffic . . . and another channel (in the 5-42 MHz band) is used to carry upstream signals."), *at* http://www.cabledatacomnews.com/cmic/cmic1.html.

[96] *See* Sanford C. Bernstein & Co. and McKinsey & Co., Inc., *Broadband!*, at 39 (Jan. 2000) ("approximately 90%" of upgraded cable capacity "is taken up by traditional video services," and cable operators have "tremendous flexibility to reallocate system bandwidth").

[97] *Cf.* Decision, *Use of the Carterfone Device in Message Toll Telephone Service*, 13 F.C.C.2d 420, 424 (1968); *see also Hush-A-Phone Corp. v. United States*, 238 F.2d 266, 269 (D.C. Cir. 1956) (a customer is free to use communications services in ways which are "privately beneficial without being publicly detrimental").

[98] *See* Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 14 FCC Rcd 20912, 20943, ¶ 63 (1999) ("*Line Sharing Order*") (relying on the fact that ILECs "already provide both analog voice and high-speed data services over one loop by connecting the local loop facility to their DSLAM to utilize the loop's non-voiceband frequency data transmission capability for their own xDSL services"), *petitions for review pending*, *United States Telecom Ass'n v. FCC*, No. 00-1012, *et al.* (D.C. Cir. argued Mar. 7, 2002).

extent that allocation of data channels may cause the cable equivalent of intermodulation or guardband distortions, the Commission may simply force the Applicants, as it did for ILECs in its *Line Sharing Order*, to remedy such problems.[99]

Indeed, all of the technical infeasibility arguments were made to – and rejected by – the Commission in the context of ILEC spectrum unbundling. The Commission justified imposing spectrum unbundling on the grounds that it would lower entry barriers, increase competition, accelerate the roll-out of broadband services, and prevent ILECs from leveraging their dominant position in the local exchange market into adjacent content markets.[100] These economic rationales apply with even greater force to a dominant competitor than they do to a nondominant one.[101] As the above discussion makes clear, the Applicants have more power than ILECs – not less – to leverage control over cable plant into the adjacent ISP market. To prevent them from

[99] The FCC has raised the bar even higher: line sharing will not be considered technically infeasible unless the ILEC can demonstrate to the state commission that DSL conditioning "would interfere with the analog voice service of the line." *Id.* at 20952, ¶ 81. The Applicants, with wires more capacious than the copper pair, must be held to the same standard.

[100] *See id.* at 20916, ¶ 5 (lack of access "materially diminishes the ability of competitive LECs to provide certain types of advanced services to residential and small business users, delays broad facilities-based market entry, and materially limits the scope and quality of competitor service offerings"); *id.* at 20930, ¶ 35 ("we find that unbundled access to the high frequency portion of the loop offers the best opportunity to see these nascent markets evolve into competitive markets"); Third Report and Order and Fourth Further Notice of Proposed Rulemaking, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, 3783, ¶ 190 (1999) ("*UNE Remand Order*") (without access to DSL-capable loops, ILECs, "rather than the marketplace, would dictate the pace of the deployment of advanced services"), *petitions for review pending, United States Telecom Ass'n v. FCC*, Nos. 00-1015 & 00-1025 (D.C. Cir. argued Mar. 7, 2002); Report and Order, *Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services*, 14 FCC Rcd 4289, 4295, ¶ 9 (1999) ("BOCs remain the dominant providers of local exchange and exchange access services in their in-region states, and thus continue to have the ability to engage in anticompetitive behavior against competitive ISPs.") (footnote omitted).

[101] *Line Sharing Order*, 14 FCC Rcd at 20929, ¶ 32 (noting necessity of considering actual market activity).

doing so while ILECs remain regulated, the Commission must force them to unbundle spectrum and permit competitors to differentiate, to some degree, the quality and features of their service offerings.

Advanced Services Affiliate. To ensure the efficacy of a spectrum unbundling requirement, the Commission should force the Applicants to carve out their own cable modem service operations into a separate subsidiary that would stand on equal footing with competing providers and interact with the cable incumbent through nondiscriminatory OSS interfaces. In recent ILEC mergers, the Commission required the merging parties to create separate advanced services affiliates that would "level [the] playing field between [the ILEC] and its advanced services competitors," and "greatly accelerate competition in the advanced services market by lowering the costs and risks of entry and reducing uncertainty, while prodding all carriers, including [the ILECs], to hasten deployment."[102] The same economic logic should require cable operators – with approximately 70 percent of residential broadband users, and tentacles into upstream and downstream markets – to place their advanced services in separate affiliates, and to comply with the Commission's affiliate transactions rules.[103]

It is important to note that SBC advances these conditions reluctantly. Unlike some other parties that frequently appear before the Commission – in particular, AT&T – SBC has always been principled in its position that *de*regulation across-the-board is the best possible approach to broadband services. Open competition among the various platforms – unfettered by costly and cumbersome regulation – is by far the best alternative for consumers, competitors, and their respective shareholders and employees. But this is not what we have in place today. Instead, we

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[102] *SBC/Ameritech Order*, 14 FCC Rcd at 14859-60, ¶ 363; Memorandum Opinion and Order, *Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, For Consent to Transfer Control*, 15 FCC Rcd 14032, 14149, ¶ 261 (2000).

[103] *See, e.g.*, 47 C.F.R. § 32.27.

have a truly upside-down state of affairs, where the dominant providers compete free from all regulation, while the second-to-market, nondominant players are stifled by burdensome regulation. As long as this perverse imbalance is in place, the Commission should not approve a transaction that will only contribute to the already decisive advantages that the dominant cable incumbents enjoy in the marketplace.

Open Access. The Commission should also impose an "open access" requirement equivalent to that imposed by the FTC and endorsed by this Commission in connection with the AOL Time Warner merger. As explained above, with few exceptions, cable operators in general – and the Applicants in particular – generally prevent unaffiliated ISPs and portals from accessing cable customers directly. This merger would make the anticompetitive consequences of that practice, by increasing the number of households that a single firm can foreclose. Access akin to that imposed on Time Warner cable systems could partially mitigate this concern, by helping to ensure that content providers are not foreclosed from reaching the Applicants' broadband subscribers.

The Commission should not be deceived by Comcast's eleventh-hour agreement to carry United Online, and AT&T's similarly last-ditch deals with Earthlink and NET1 Plus. These deals raises many of the same problems that tripped up AOL Time Warner's "voluntary" open access pledge. In particular, their lack of transparency renders it impossible to determine whether they involve "brand" restrictions, "non-discriminatory" terms of carriage, or "troubling . . . pricing conditions."[104] Absent some assurance that the terms of these deals reflect a fair accommodation of the competing interests – and are not simply another example of the Applicants' ability to exert leverage over content suppliers – the Commission should place no stock in them.

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[104] *See AOL/Time Warner Order*, 16 FCC Rcd at 6589-90 ¶¶ 94-95.

Indeed, absent Commission intervention, there is every reason to believe that the Applicants will *not* provide meaningful access to unaffiliated ISPs. Years ago, AT&T told the Commission that it would negotiate "private contracts with *multiple* ISPs in order to offer those ISPs reasonably comparable access prices, the opportunity to market and bill consumers directly, and the opportunity to differentiate service offerings and to maintain brand recognition in all such offerings."[105] The Commission expressly relied on that promise in approving AT&T's last cable merger.[106] But AT&T still has not delivered. One confidential agreement with a *single* nationwide ISP – and another with a regional ISP with fewer than 15,000 residential customers[107] – hardly qualifies as access for "multiple" ISPs. Moreover, there is reason to believe that other access negotiations have broken down because AT&T *refuses* to allow competing content providers "to maintain brand recognition" in their offerings.[108] Thus, absent unfettered competition between DSL and cable modem service, Commission intervention is necessary to force the Applicants to provide meaningful access to ISPs, for they plainly will not do so on their own.

Local Competition Conditions. As noted above, to offset the competitive harms posed by the merger, the Applicants claim that their transaction is necessary to increase local voice competition. In truth, however, the Applicants promise to offer service only to existing customers that are *already* within reach of AT&T's switches, and that could *already* be served

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[105] *AT&T/MediaOne Order*, 15 FCC Rcd at 9870, ¶ 121 (emphasis added).

[106] *See id.* ("We expect the Applicants to adhere to the foregoing commitments . . . .").

[107] *See* AT&T Press Release, *AT&T Broadband and NET1 Plus Reach ISP Choice Agreement* (Apr. 23, 2002).

[108] *See* J. Angwin & M. Peers, *AOL Rethinks Its Game Plan on Internet Access*, Wall St. J., at A6 (Apr. 19, 2002) (noting that AOL's "[t]alks with most of the top 10 cable operators have stalled [in part] over the cable industry's demands" regarding "who 'controls' the customer").

through a simple joint marketing agreement. The Applicants have made no commitment to invest in new facilities, and apparently have no plans to do so.

Particularly in light of the significant competitive threat posed by the merger, the Commission should have every reason to expect more. Fully 77 percent of all homes in the United States are served by cable with two-way capabilities,[109] and cable operators already offer circuit-switched telephony services to 10 percent of all U.S. homes.[110] In those areas in which it is offered, consumers have responded. Of the 10 million homes in which cable telephony is offered, 1.5 million have subscribed – a healthy 15 percent penetration rate. Putting aside their apparent unwillingness to commit to providing voice service, the Applicants plainly have no technical justification – and little business justification – for refusing to deploy telephony throughout their region.

None of this is to say, however, that SBC believes that the Commission should mandate specific deployment targets, as it did in the *SBC/Ameritech Order*. SBC continues to believe that the Commission should refrain from interfering in a company's decisions whether to enter a particular geographic area, or to offer a particular service. As Chairman Powell has explained, such interference risks "substitut[ing] regulators' judgments about how communications resources should be allocated for the judgments of consumers and competitors in the marketplace."[111]

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[109] *Broadband 2001* Table 6.

[110] *JP Morgan Cable Industry Report* at 53 & Table 22; NCTA, *Cable Telephony: Offering Consumers Competitive Choice* at 2 (July 2001).

[111] Memorandum Opinion and Order, *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd 18025, 18171 (1998) (separate statement of then-Commissioner Powell).

Instead, the Commission should take steps simply to encourage the Applicants to deploy cable telephony more broadly. In this regard, perhaps the chief obstacle to true facilities-based competition in the residential segment has been, and remains, the availability of the UNE-platform. The platform is, of course, "physically similar to resale. In each case, the CLEC uses the ILEC network to provide service to the end user and essentially limits its own functions to marketing, inputting the order into the ILEC's systems, and billing."[112] Accordingly, the UNE-P is defined not by expanding output, consumer choice, product quality, or market price, but by federal and state regulators and the TELRIC pricing regime. Because it has been easier and cheaper for CLECs to piggy-back on the incumbent's network permanently rather than build out networks of their own, CLECs have adopted business strategies that center on indefinite reliance on UNEs.[113] And, although the Commission hoped that competitors would rely on UNEs only until it is "practical and economically feasible to construct their own networks,"[114] the UNE-P has, in fact, become the end-game in the residential market.[115]

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[112] Commerce Capital Markets, *Status and Implications of UNE-Platform in Regional Bell Markets* (Nov. 12, 2001).

[113] *See, e.g.*, *UNE Fact Report 2002* at II-18 to II-19; Ex Parte Letter from Albert H. Kramer, Dickstein Shapiro Morin & Oshinsky (representing Birch Telecom) to Dorothy Attwood, Chief-CCB, FCC, CC Docket No. 96-98, at 1 (filed Jan. 17, 2001) ("it is not economical to self-provision switching for customers served by individual analog lines, even where a switch has already been deployed and the cost of that switch is regarded as a sunk cost") (emphasis omitted); *id.* at 3, 7 (Birch has "abandon[ed] serving customers using self-provisioned switching, unless those customers have sufficient needs to justify a DS-1 facility" and will not even serve customers that are "located a few blocks from one of its switches," despite the fact that "Birch has been able to rapidly build a customer base").

[114] *UNE Remand Order*, 15 FCC Rcd at 3701, ¶ 6.

[115] Thus, for example, AT&T continues to free-ride on ILEC facilities, with no end in sight. AT&T provides UNE-P service to approximately one million residential customers in New York and approximately 400,000 in Texas – enough customers, in New York alone, to fill five to ten switches. AT&T also operates 19 local voice switches in New York and 22 in Texas. Yet AT&T does not appear to have converted a single residential customer in New York or Texas to its own switch. The experience has been no different in other states where AT&T has

The platform has accordingly substantially diminished the incentives of CLECs – particularly cable providers – to invest in their own facilities. To ensure that it does not have that effect with respect to the merged company, the Commission should take the simple step of requiring the merged company to forego reliance on the UNE-P in any areas where it has cable facilities. If, as the Applicants claim, the merger will make the Applicants "better able to expand the availability of telephony over the Comcast systems more quickly, at less expense, and in a more customer-friendly manner" than has previously been available,[116] the condition will not impede competition. On the contrary, it will ensure that the combined company's self-proclaimed incentive to deploy facilities-based competition is not undermined by the prospect of regulatory arbitrage.

This condition should also extend to any company that engages in joint marketing arrangements with the merged company to sell the merged company's local exchange service. As AT&T itself has emphasized, customers are increasingly buying "a bundled package of local and long distance services,"[117] and it appears that is indeed how the Applicants plan to market their local service.[118] To ensure that the Applicants do not circumvent this condition merely by teaming with a carrier – say, for example, a long-distance carrier – that itself utilizes the platform

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signed up large numbers of UNE-P customers. *See UNE Fact Report 2002* at II-17 to II-18 & nn.54-55; *see also* Supplemental Declaration of Michael Lieberman ¶ 20, CC Docket No. 01-324, attached to Ex Parte Letter from Peter Keisler, Sidley Austin Brown & Wood (representing AT&T), to William F. Caton, Acting Secretary, FCC (filed Feb. 8, 2002) (AT&T has recently stated that it has not pursued a strategy of converting platform customers to its own facilities "to provide basic local residential service to customers anywhere in the country").

[116] Public Interest Statement at 38.

[117] *See, e.g.*, Brief of Appellants and Intervenor at 3, *WorldCom, Inc. v. FCC*, No. 01-1198, *et al.* (D.C. Cir. filed Apr. 22, 2002).

[118] Public Interest Statement at 17 n.24.

in the merged company's service area, the Commission should insist that such arrangements involve telephony exclusively over Applicants' facilities in their service areas.

Audit. To ensure compliance with each of these conditions, the Commission should impose – as it has in other mergers of comparable size – an annual, comprehensive audit, and it should initiate aggressive enforcement action for any failure to implement not just the spirit, but the letter of the conditions.

CONCLUSION

The proposed merger of AT&T and Comcast will harm the public interest unless it is granted only subject to the above stated conditions.

Respectfully submitted,

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