

distribution of video programming, the relevant product market is all MVPD services. More specifically, they claim that video programming services offered by DBS, MMDS providers, SMATV providers, electric utilities, and cable overbuilders are all in the same relevant product market.*” No commenter disputes these claims. Moreover, Applicants’ position is consistent with the Commission’s traditional delineation of the product market for cable services.²³⁸ Therefore, based on the record before us and consistent with our precedent, we find that the relevant product market for evaluating mergers of cable operators is “multichannel video programming service” distributed by all MVPDs.²³⁹

90. Consistent with past practice, we also will treat the relevant geographic market, for purposes of evaluating possible horizontal effects, as local.²⁴⁰ Consumers make decisions based on the MVPD choices available to them at their residences. Technically, the relevant geographic market, therefore, is the residence of each customer, since it would be prohibitively expensive for a customer to change his/her residence to avoid a “small but significant and nontransitory” increase in the price of MVPD service. Because it would be administratively impractical and inefficient to analyze a separate relevant geographic market for each individual customer, however, we will aggregate relevant geographic markets in which customers face similar competitive choices. We thus conclude that the relevant geographic market is the franchise area of a local cable operator.²⁴¹

91. As discussed below, in most relevant geographic areas in which the Applicants provide service, there are two other competing MVPDs—DirecTV and EchoStar, both DBS providers. In addition, in limited areas, overbuilders, MMDS license holders,²⁴² and SMATV providers may also provide competing MVPD services. There is no evidence in the record that there are any “uncommitted entrants”—i.e., firms that would likely enter a relevant geographic market within one year and without the expenditure of significant sunk costs in response to a “small but significant and nontransitory” price increase.”²⁴³

²³⁷ Application at 66-67.

²³⁸ See *Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, 9 FCC Rcd 7442,7467 ¶¶ 49-50 (1994).

²³⁹ See *AOL-Time Warner Order*, 16 FCC Rcd at 6647 ¶¶ 244-45; *AT&T-TCI Order*, 14 FCC Rcd at 3172 ¶ 21.

²⁴⁰ See, e.g., *AT&T-TCI Order*, 14 FCC Rcd at 3172 ¶ 21.

²⁴¹ See *AOL-Time Warner Order*, 16 FCC Rcd at 6647 ¶ 244. We recognize that competitive choices may not be identical throughout the franchise area. For instance, the local cable operator may not offer service to all households. Moreover, cable overbuilders and SMATV providers may offer service only to selected areas within the local cable franchise area. Thus, to be rigorous we would need to define a separate and narrower relevant geographic market wherever cable does not actually provide service, and a separate relevant geographic market wherever other MVPDs do provide service. As a practical matter, however, we do not believe such precision is necessary for purposes of our analysis. There are only approximately 64 cable systems that have overbuilders and 129 cable systems that have a wireless cable provider out of a total of 9667 cable systems. Even in the few cable franchise areas where there is an overbuilder, that overbuilder will generally not serve the entire cable franchise area. Thus, although overbuilders provide significant and effective competition in those areas in which they operate, the scope of their operations is geographically limited and they are likely to provide limited competitive discipline on the market. See *EchoStar-DirecTV Order*, FCC 02-284 at ¶ 130.

²⁴² *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Eighth Annual Report*, 17 FCC Rcd 1244, 1248-49 ¶ 11, 1278-79 ¶ 71 (“*Eighth Video Competition Report*”) (noting that MMDS operators compete with the cable industry in limited areas and recognizing that with the advent of digital MMDS and the Commission’s authorization of two-way MMDS service, most MMDS spectrum eventually will be used to provide high-speed data services).

²⁴³ *Horizontal Merger Guidelines* § 1.32

b. Elimination of Potential Competition

92. CFA contends that the merger will eliminate current and future MVPD competition between AT&T and Comcast.²⁴⁴ CFA argues that AT&T and Comcast might compete in each other's franchise areas.²⁴⁵ Moreover, CFA argues, the merger would remove the most likely competitors in the relevant markets. In particular, in areas where the AT&T franchise areas and the Comcast franchise areas are located in close proximity to one another.²⁴⁶

93. Applicants counter that the proposed merger will not reduce Competition in any of the relevant MVPD markets, because neither operator had pre-merger intentions to overbuild the other's cable systems.²⁴⁷ Applicants also have confirmed that there are no current franchise overlaps or cable system overbuilds between Comcast and AT&T's owned and operated systems. Applicants admit that there are overbuilds with respect to AT&T's non-consolidated systems, but argue that these are insignificant because of the territory and number of households they cover.²⁴⁸

94. *Discussion.* CFA offers no evidence to suggest that AT&T and Comcast would overbuild each other's cable systems such that the proposed merger would diminish competition in these local franchise areas. Applicants deny having any intentions to overbuild, and confirm that they have not overbuilt in each other's franchise areas, with the exception of the few non-consolidated affiliate systems. Accordingly, we cannot conclude from the record that AT&T and Comcast had intentions of overbuilding each other's local markets, or that they were likely to do so.²⁴⁹

c. Access to Video Programming Supplied by Affiliated Programmers

95. Our program access rules were designed to prevent vertically integrated programming suppliers from favoring affiliated cable operators over unaffiliated MVPDs in the sale of satellite-delivered video programming.²⁵⁰ The rules apply to programming supplied by vendors that are affiliated with cable operators, such as through common ownership, when the programming is delivered via satellite from a programming vendor to a cable operator.²⁵¹ The Commission adopted these rules pursuant to section 628 of the Communications Act,²⁵² and recently extended these rules for five years.²⁵³

²⁴⁴ CFA Comments at 19

²⁴⁵ *Id.* at 18-19.

²⁴⁶ *Id.* at 19

²⁴⁷ Application at 66; Applicants' July 2, 2002, Response at 12

²⁴⁸ See Applicants' Reply at 54, n.153. Applicants report twelve instances in which Comcast and an AT&T non-consolidated affiliate hold franchises to serve the same geographic areas. In four of these instances, AT&T non-consolidated affiliates and Comcast have overbuilds. These overbuilds pass 700 homes in the aggregate.

²⁴⁹ Applicants assert that the TWE Agreement contains a non-compete provision and a prohibition on over-building, and that the TCP and KCCP Partnership Agreement, contain non-compete provisions. These provisions do not alter our conclusion that AT&T and Comcast are not potential competitors because (1) they do not govern relations between AT&T and Comcast prior to the merger, (2) in the absence of such provisions, AT&T and Comcast did not overbuild each other to any material extent, and (3) the provisions in the TWE Agreement are a historical legacy originally designed to govern relations between different parties with different incentives and abilities. We need not address the anticompetitive concerns raised by extending these provisions to the Comcast territories because the Applicants have committed not to enforce these provisions. Letter from Arthur S. Block, Senior Vice President, Comcast Corporation, to W. Kenneth Ferree, Chief, Media Bureau (Oct. 7, 2002).

²⁵⁰ 47 C.F.R. §§ 76.1000-76.1004

²⁵¹ *Id.*

²⁵² 47 U.S.C. § 548.

Among other restriction), the rules prohibit any cable operator that has an attributable interest in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including prices, terms, and conditions of sale or delivery, of satellite cable programming or satellite broadcast programming to any unaffiliated MVPD.²⁵⁴ The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices, terms, and conditions of sale of satellite-delivered programming to cable operators and other MVPDs.²⁵⁵ In addition, cable operators generally are prohibited from entering into exclusive distribution arrangements with vertically integrated programming vendors, *i.e.*, vendors that are affiliated with any cable operator.²⁵⁶

96. Commenters focus on possible harms concerning the distribution of regional programming, and claim that the merger will increase AT&T Comcast's incentive and ability to deliver certain *regional* and local *programming* terrestrially so that it may deny its MVPD competitors access to such programming without violating the program access rules. Several commenters argue that the Applicants have each attempted to evade the program access rules by using terrestrial infrastructure to deliver popular regional programming.²⁵⁷ EchoStar complains that lack of access to regional sports programming in Philadelphia has made it difficult for DBS operators to compete with Comcast's cable offerings in the Philadelphia market.²⁵⁸ RCN argues that it has had difficulties securing long-term access to local sports programming from Comcast in Philadelphia.²⁵⁹ Both EchoStar and RCN argue that regional sports programming, in particular, is critical to competition in the distribution of video programming.²⁶⁰ Raintree Electric Light Department ("BELD") argues that local news programming is similarly important in the regional market. BELD complains that it has been unable to secure a distribution agreement with the New England Cable News channel, which is affiliated with AT&T, because the service has been moved to terrestrial delivery.²⁶¹

97. Commenters express concern that Applicants' past use of terrestrial delivery platforms for certain regional programming is an indication that AT&T Comcast plans to increase the use of terrestrial infrastructure for program delivery.²⁶² Several commenters argue that the merger – specifically, the merged entity's increased size – will increase the Applicants' incentive and ability to migrate local and regional programming to terrestrial infrastructure in order to deny competitors' access to such programming.²⁶³ Commenters urge us to place a condition on the merger extending the program access rules to all affiliated programming, including programming delivered over terrestrial infrastructure.²⁶⁴ RCN also argues that Comcast has imposed unfair terms and conditions in its Comcast SportsNet

(...continued from previous page)

²³³ See **Program Access Order**.

²⁵⁴ 47 C.F.R. § 76.1002(a).

²⁵⁵ 47 C.F.R. § 76.1002(b).

²⁵⁶ 47 C.F.R. § 76.1002(c).

²⁵⁷ See, e.g., EchoStar Comments at 7; Everest Comments at 5-6; RCN Comments at 35; SBC Comments at 32

²⁵⁸ EchoStar Comments at 4.

²⁵⁹ RCN Comments at 19-20

²⁶⁰ EchoStar Comments at 4; RCN Comments at 19-20; see also Everest Comments at 5-6

²⁶¹ BELD Comments at 2.

²⁶² BellSouth Comments at 29-30; EchoStar Comments at 2-4; Everest Comments at 5-6; RCN Comments at 19-20; SBC Comments at 31-32.

²⁶³ EchoStar Comments at 5; RCN Comments at 20-21; SBC Comments at 32

²⁶⁴ EchoStar Comments at 6-7; RCN Comments at 12; SBC Comments at 32.

programming contracts²⁶⁵ and that the Applicants should be required to provide access to all affiliated programming on reasonable terms and conditions.²⁶⁶ Finally, Minority TV refers to a complaint by Seren Innovations alleging that AT&T colluded with partners to deny Seren access to the Bay TV programming service.²⁶⁷ Minority TV urges us to deny the proposed transfer.²⁶⁸

98. Applicants oppose these proposals and dispute the proposition that the merger would enhance the Applicants' incentive and ability to impede rival MVPD competitors' access to programming.²⁶⁹ First, Applicants argue, the merger will not consolidate the ownership of significant programming assets.²⁷⁰ Applicants maintain that there are viable substitutes for their affiliated programming, and because of this, any refusal of access to MVPD competitors would only disadvantage their own programming affiliate by forcing the rival MVPDs to turn to unaffiliated substitute programming.²⁷¹ Applicants further explain that the national programming networks in which they hold interests all sell programming to overbuilders and DBS operators.²⁷² They claim that because AT&T Comcast will have only a fractional ownership interest in most of the networks in which it has interests, there would be additional checks on the merged entity's ability to engage in a refusal to deal that would benefit itself while harming the network at issue.²⁷³ Applicants also object to the conditions proposed by several commenters that would require the merged entity to provide its MVPD competitors access to programming that is delivered using terrestrial infrastructure.²⁷⁴ The proposal, they argue, would be tantamount to an expansion of the program access rules that the Commission refused to adopt on an industry-wide basis, or apply as a condition on previous mergers.²⁷⁵

99. Applicants further maintain that the proposed transaction will not result in a significant increase in the level of clustering between systems operated by AT&T and those operated by Comcast.²⁷⁶ According to information produced by the Applicants, there are only four cases in which the proposed

²⁶⁵ RCN Comments at 19-20

²⁶⁶ RCN Comments at 35; see also ACA Comments at 12-13; EchoStar Comments at 6-7.

²⁶⁷ Minority TV Comments at 4-5. According to that complaint, Bay TV was a joint venture between AT&T and the former licensee of KRON-TV, Channel 4, San Francisco, California. AT&T no longer owns any interest in Bay TV. See Linda Haugsted, *AT&T Pulls Plug on Bay TV News Network*, MULTICHANNELNEWS, July 9, 2001 at 15; John Higgins and Steve McClellan, *Ha! TV Blackout*, BROADCASTING AND CABLE (July 9, 2001) at 12.

²⁶⁸ Minority TV Comments at 4-5

²⁶⁹ As discussed below in our evaluation of the alleged benefits of this merger. Applicants also argue that the merger will result in the development of new local and regional programming, building on Comcast's expertise and experience in the Philadelphia market. See Section V.C., *infra*.

²⁷⁰ Applicants' Reply at 55; Applicants' Reply, Ordover Decl. at ¶ 83, Letter from Betsy J. Brady, Vice President, Government Affairs, AT&T Corp. and James R. Coltharp, Senior Director of Public Policy, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, (Nov. 4, 2002) ("Applicants' Nov. 4, 2002 Ex Parte") at 1-2; Applicants' Nov. 5, 2002, Ex Parte at 2-3.

²⁷¹ Applicants argue that ESPN and Fox Sports Networks fall into the category of viable substitute programming. See Applicants' Reply, Ordover Decl. at ¶¶ 85-87; see also Applicants' Nov. 4, 2002, Ex Parte and Applicants' Nov. 8, 2002, Ex Parte.

²⁷² Applicants' Reply at S5.

²⁷³ *Id.* at 56; see also generally Applicants' Nov. 5, 2002, Ex Parte

²⁷⁴ *Id.* at 98.

²⁷⁵ *Id.*

²⁷⁶ Applicants' July 2, 2002, Response at 5-6; Applicants' Nov. 4, 2002, Ex Parte at 3-4; Applicants' Nov. 5, 2002, Ex Parte at 2-3.

transaction may create or enlarge a cluster, or merge existing clusters.²⁷⁷ BSPA argues that increases in clustering post-merger will be more significant if AT&T's non-consolidated affiliates are included in the assessment. BSPA urges us to include the non-consolidated affiliates in our analysis because AT&T's ownership in these systems is relevant to the evaluation of market power and potential strategic abuses flowing from the increased regional consolidation and clustering.²⁷⁸ According to BSPA's clustering data, many of BSPA's members operate or are licensed in areas where clustering will increase as a result of the merger.²⁷⁹ Applicants contend that the non-consolidated systems are not relevant to our public interest analysis and that even if we include these systems, the incremental effects on regional concentration are *de minimis*.²⁸⁰

100. *Discussion.* With respect to nationally distributed programming, the record contains little evidence that the program access rules will be insufficient to ensure that competing MVPDs have access to important programming that is affiliated with a cable operator. To the extent that affiliated national programming is delivered via satellite, it is covered by our program access rules. Nothing in the record suggests that the merger would affect the cost of transmitting affiliated national programming over terrestrial infrastructure and thereby make it more cost-effective to deliver such programming in that manner. Nor is there any evidence in the record that Applicants intend to pursue such a strategy. For these reasons, we cannot conclude that the merger will harm the public interest with respect to exclusive distribution of affiliated, satellite-delivered national programming.

101. We recognize that access to certain local and regional programming can be important for alternative MVPDs to compete.²⁸¹ As we recently concluded in our *Program Access Order*, we believe cable operators that are affiliated with programmers generally have the incentive and ability to secure exclusive distribution rights that prevent their MVPD competitors from gaining access to popular programming in which the cable operator has an interest.²⁸² The program access rules prohibit such arrangements with respect to satellite-delivered programming, but not terrestrially-delivered programming. The Commission also stated "we believe that clustering, accompanied by an increase in vertically integrated regional networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."²⁸³

102. A cable operator would be able to harm MVPD rivals by withholding affiliated programming only if the costs of doing so, including both the foregone license fees and advertising revenues and the additional costs of terrestrial delivery, were outweighed by the benefits (*i.e.*, the gain in revenues associated with subscribers' decision to choose the cable operator over a rival). Furthermore, the incentive and ability to deliver programming terrestrially depends on both the size of the region's footprint where the programming is consumed, and the merged entity's share of the MVPD households in the relevant region. We conclude that, in the relevant regional markets, the extent of additional concentration that will result from the merger is not sufficient to have a material effect on AT&T Comcast's incentive or ability to convert existing affiliated regional programming from satellite to

²⁷⁷ Applicants' July 2, 2002, Response at 5.

²⁷⁸ BSPA Oct. 2, 2002 Ex Parte.

²⁷⁹ *Id.*

²⁸⁰ Applicants' Nov. 4, 2002, Ex Parte at 4; Applicants' Nov. 5, 2002, Ex Parte at 2.

²⁸¹ Program Access Order, 17 FCC Rcd at 12132 ¶ 19.

²⁸² Program Access Order, 17 FCC Rcd at 12153 ¶ 65.

²⁸³ Program Access Order, 17 FCC Rcd at 12145 ¶ 47.

terrestrial delivery.”²⁸⁴ Moreover, there is no evidence in the record that Applicants intend to pursue such a strategy with existing programming or that they have the incentive to pursue such a strategy with respect to as-yet-uncreated programming.²⁸⁵ Thus, the merger is not likely to enable AT&T Comcast to enter exclusive contracts with affiliated programmers that would prevent MVPD competitors from distributing such programming. We therefore conclude that the merger will not harm the public interest with respect to distribution of affiliated, satellite-delivered local or regional programming. Accordingly, we decline to impose conditions restricting the use of exclusive contracts between AT&T Comcast and affiliated programmers.

103. To the extent that clustering raises concerns about a cable operator’s ability to secure exclusive distribution rights for certain programming, such concerns would apply industry-wide.²⁸⁶ Further, we conclude above that the merger does not present a public interest harm in this regard. The appropriate forum for the consideration of this issue, therefore, is a rulemaking of general applicability. We have initiated a rulemaking proceeding to establish limits on cable operators’ horizontal reach pursuant to section 613 of the Communications Act, which directs the Commission to establish such limits to prevent cable operators, because of their subscriber reach, from unfairly impeding the flow of programming to consumers.²⁸⁷ Because the issue of regional clustering is an industry-wide phenomenon, we will consider in our pending rulemaking proceeding the relative harms and benefits of clustering as it may affect the flow of local and regional programming to consumers.

104. We also dismiss Minority TV’s petition to deny the transfer of control. Minority TV fails to meet the standard for petitions to deny as expressed in our rules. Its argument consists of an account of third party testimony alleging that AT&T colluded with partners to violate the program access rules. Minority TV makes no attempt to relate this allegation to the specific transaction at hand, or to substantiate any of the allegations with further factual material.²⁸⁸ Disputes of this nature should be

²⁸⁴ In three regions the merger will increase concentration by 3% or less. In the Southeast post-merger concentration will not exceed 25%. See para. 61, *supra*. In addition, AT&T’s local news affiliate, New England Cable News, already is delivered terrestrially, as is AT&T3. See BELD Comments, Exhibit 2; Letter from Michael H. Hammer, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC, (Oct. 25, 2002) at 1. Comcast SportsNet (Philadelphia) also is delivered terrestrially. Applicants’ Nov. 4, 2002, Ex Parte at 3.

²⁸⁵ The merger would enhance Applicants’ ability and incentive to harm MVPD rivals by creating and withholding new terrestrially delivered programming only to the extent such programming has wide consumer appeal, such that rivals’ failure to carry the programming would shift sufficient subscriber-related revenues from the rival to AT&T. For a new programming service to have such competitive significance, it must feature marquee programming, such as popular sports events. Because such programming is generally delivered over a large region due to the cost of acquiring it, the feasibility of terrestrial delivery will depend largely on the size of the regional footprint and the concentration of affiliated cable systems within that footprint. See Applicants’ Nov. 4 Ex Parte at 4 n.7. For this reason, most regional sports programming today is delivered via satellite. Applicants’ Nov. 4 Ex Parte at 2-4. We have found above that the merger is not likely to increase regional concentration to a material extent. In addition, we find below in evaluating the potential public interest benefits of the merger that the merger is not necessary to enable Applicants to create new local or regional programming.

²⁸⁶ Congress opted not to include terrestrially delivered and unaffiliated programming within the scope of the program access rules. For example, the Senate version of the program access provisions was drafted to apply to all “national and regional cable programmers who are affiliated with cable operators. . . .” Conf. Rep. 102-862 at 91. The House version of the provisions applied only to “satellite cable programming vendor[s] affiliated with a cable operator. . . .” *Id.* at 92. The Conference Report adopted the House version with amendments. *Id.* At 93. The Conference Agreement amended the House version to apply also to “satellite broadcast programming vendors.” *Id.*

²⁸⁷ See generally *Further Notice*, 16 FCC Rcd 19074 (2001); 47 USC § 613(f)(2). Under 47 USC § 613(f)(2), when adopting rules to implement 41 USC § 613(f)(1), the Commission is required to, among other things, ensure that cable operators affiliated with video programmers do not unreasonably restrict the flow of the video programming of such programmers to other video distributors.

²⁸⁸ 47 U.S.C. § 309(d).

resolved using the processes set forth in the Commission's program access rules.

d. Access to Video Programming Supplied By Unaffiliated Video Programmers

105. Our program access rules also provide the framework for our analysis of exclusive programming contracts involving programmers that are not affiliated with any cable operator. Commenters focus on possible harms concerning the distribution of regional programming. A few commenters argue that AT&T Comcast's increased size will give it the ability to force unaffiliated programmers to enter into exclusive carriage agreements with AT&T Comcast, thereby denying competing MVPDs and their customers access to popular programming.²⁸⁹ RCN urges us to place a condition on the grant of the applications that would prohibit the merged entity from entering into exclusive contracts with unaffiliated programming networks.²⁹⁰

106. Applicants oppose such a condition. They claim it would be inconsistent with a programmer's self interest to limit the availability of programming in the way that the commenters suggest.²⁹¹ Applicants contend that the only way a programmer would act in a manner inconsistent with this self interest is if the programmer believed AT&T Comcast might drop its programming unless it acceded to AT&T Comcast's terms.²⁹² Applicants claim that the merged entity is not sufficiently large to make a credible threat to drop popular programming if the programmer does not agree to an exclusive deal.²⁹³ The lack of popular programming, they argue, would surely be exploited by their MVPD competitors.²⁹⁴

107. *Discussion.* Although commenters focused on potential harm concerning unaffiliated regional programming, our analysis also applies to potential harms concerning unaffiliated national programming. At the outset, we disagree with Applicants' description of the merged entity's bargaining power vis-a-vis programming networks. In particular, we do not agree that the only way an MVPD could obtain an exclusive arrangement with a programmer is by threatening not to carry the network's programming. We also disagree with Applicants' underlying assumption that it would always be contrary to the programmer's self interest to agree to an exclusive agreement with an MVPD. If, for example, the MVPD seeking an exclusive deal is sufficiently large and can compensate the programmer for the loss of any revenues that it otherwise would receive from competing MVPDs, the exclusive agreement would be consistent with the programmer's self interest.²⁹⁵

108. We are nonetheless unable to conclude that the merger is likely to increase the incentive and ability of the merged entity to secure exclusive programming contracts with programmers that are not affiliated with any cable operator. The record demonstrates that AT&T and Comcast individually already have sufficient presence in their respective franchise areas to secure exclusive contracts for unaffiliated national, local and regional programming.²⁹⁶ The record does not demonstrate that programmers would

²⁸⁹ RCN Comments at 35; ACA Comments at 14

²⁹⁰ RCN Comments at 35.

²⁹¹ Applicants' Reply at 57.

²⁹² *Id.*

²⁹³ *Id.*

²⁹⁴ *Id.* at 57-58.

²⁹⁵ See Applicants' Reply, Shelanski Decl. at ¶¶ 29-34 (discussing incentives of content providers in entering exclusive contracts).

²⁹⁶ Applicants' July 2, 2002, Response at 8-9 and Attachments 9-25. These existing agreements generally prohibit distribution of programming to one or more classes of competitors within the areas served by the Applicants. *Id.*

he more likely after the merger than pre-merger to enter into exclusive agreements with AT&T Comcast. To the extent that a firm's regional concentration may increase its incentive or ability to obtain exclusive distribution rights for unaffiliated programming, we conclude that this transaction is not likely to affect pre-existing regional concentration levels to a degree that will enable AT&T Comcast to obtain exclusive rights that either Applicant could not have obtained pre-merger. AT&T's post-merger national subscriber reach will not exceed our horizontal limits, which are intended, in part, to protect against harms arising from exclusive distribution contracts between cable operators and unaffiliated programmers.²⁹⁷ Likewise, post-merger regional concentration levels are not likely to exceed this level.²⁹⁸ No commenter presented evidence or allegations regarding specific programming networks with which AT&T Comcast could obtain exclusive arrangements merely by virtue of the increase in subscriber share in the region served by the programmer. Thus, we find the merger is not likely to harm competition with respect to the distribution of unaffiliated programming to competing MVPDs.

109. As we have stated above in our discussion of access to affiliated regional programming, the Commission has previously rejected arguments that merger applicants should be required to abide by the program access restrictions with respect to their program carriage agreements with unaffiliated programming vendors.²⁹⁹ In enacting Section 628, Congress did not apply the program access restrictions to programming sold by vendors that are not affiliated with any cable operator.³⁰⁰ For the reasons stated above in our discussion of access affiliated programming, we conclude that our pending rulemaking proceeding on cable horizontal ownership limits is the more appropriate forum for consideration of the potential harms and benefits arising from regional clustering. Thus, we decline to impose any conditions on the merger Applicants that would extend the program access rules or similar restrictions to the Applicants' dealings with programming vendors that are not subject to the rules.

e. Access to Video Programming Aggregation Service

110. A few commenters suggest that AT&T Comcast might harm MVPD competitors by engaging in anticompetitive conduct with respect to video programming aggregation. Specifically, these commenters argue that AT&T Comcast may refuse to sell competing MVPDs the "Headend-in-the-Sky" ("HITS") digital video programming aggregation service offered by AT&T's wholly-owned subsidiary.³⁰¹ They argue that access to this service is essential to smaller cable operators and overbuilders that seek to compete with AT&T Comcast.

111. AT&T's HITS subsidiary obtains rights from programmers to compress, multiplex, and "uplink" content to leased satellite transponders.³⁰² HITS then aggregates and transmits digital video

²⁹⁷ *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, 14 FCC Rcd 19098, 19105-06 ¶ 16 (1999) ("The Commission specifically considered how the behavioral rules interact with the horizontal ownership rules when it adopted the rules in this proceeding. The limit is a structural complement to the other access provisions. Thus, for example, it was explained that the horizontal ownership rules limit the potential for anticompetitive abuses of purchasing power in areas outside of the core areas covered by the program access rules, such as programming contracts between cable operators and non-vertically integrated programmers...").

²⁹⁸ See para. 61, *supra*; Applicants' Nov. 5, 2002, *Ex Parte* at 2-3; Applicants' Nov. 8, 2002, *Ex Parte* at 1.

²⁹⁹ See *AT&T-MediaOne*, 15 FCC Rcd at 9854-55 ¶¶ XI-83; *AT&T-TCI*, 14 FCC Rcd at 3180 ¶ 38.

³⁰⁰ The legislative history reveals that Congress was concerned that vendors that are affiliated with cable operators may have a particular incentive to discriminate in favor of cable operators to the detriment of their MVPD competitors. See Senate Report 102-92 at 25-26, 28.

³⁰¹ ACA Comments at 9-10; SBC Comments at 32-33.

³⁰² Applicants' Reply at 58; Applicants' Reply, Braden Decl. at ¶ 14,

programming to its customer MVPDs.³⁰³ The MVPDs receive the digital transmission using a satellite receiver that is tuned to receive the signals from the HITS transponder.³⁰⁴ They then transmit the video programming to their own subscribers. The MVPDs must still contract with each of the network owners for rights to distribute the programming to their customers.³⁰⁵ ACA and SBC claim that the HITS service gives small MVPDs an inexpensive means of expanding their programming offerings using digital technology without having to upgrade their cable systems.³⁰⁶

112. ACA argues that access to HITS is essential for small cable systems because its use of digital compression and transmission has allowed them to expand their service offerings dramatically.³⁰⁷ ACA claims that HITS allows small systems to offer viewers more programming options, and to generate greater revenues so that they may upgrade systems to provide other enhanced services, such as cable modem service.³⁰⁸ ACA contends that a refusal to provide these systems with HITS services would undermine program diversity in smaller markets.³⁰⁹ Accordingly, ACA's initial comments asked that the Applicants address whether they would continue to make HITS services available to smaller market cable systems "on reasonable prices, terms and conditions."³¹⁰ ACA also asked that Applicants "articulate their plans for protecting the public interest in this area."³¹¹

113. In their Reply Comments, Applicants respond to ACA's concerns about continued access to HITS. Applicants agree to: (i) provide HITS to small cable systems for the foreseeable future; (ii) honor all existing service contracts, and (iii) communicate in advance any substantial changes in the service relationship.³¹² ACA subsequently submitted a letter in support of the merger, noting that Applicants satisfactorily addressed ACA's questions and concerns.³¹³

114. SBC suggests that the Applicants may be able to raise rivals' costs by refusing to provide overbuilders access to HITS. SBC explains that it recently attempted to purchase HITS from WSNet, a reseller of HITS programming, and was denied service. SBC claims that this denial of service was based on the fact that SBC sought to use HITS programming to serve customers in one of AT&T's service areas.³¹⁴ SBC argues that AT&T Comcast could deny HITS service to any overbuilders in the combined company's larger geographic region.³¹⁵ Accordingly, SBC asks us to order AT&T Comcast to divest HITS as a condition to the merger.³¹⁶ Applicants oppose this condition, arguing that it is unrelated to the merger, and that overbuilders in both AT&T and Comcast territories will continue to be able to purchase

³⁰³ Applicants' Reply at 58.

³⁰⁴ Applicants' Reply, Braden Decl. at ¶ 17.

³⁰⁵ Applicants' Reply at 58; Applicants' Reply, Braden Decl. at ¶ 14.

³⁰⁶ ACA Comments at 10.

³⁰⁷ *Id.* at 6.

³⁰⁸ *Id.* at 7.

³⁰⁹ *Id.* at 5-6.

³¹⁰ *Id.* at 10.

³¹¹ *Id.* at 10.

³¹² Applicants' Reply at 61-62.

³¹³ Letter from Matthew M. Polka, President, American Cable Association, to Marlene H. Dortch, Secretary, FCC (May 21, 2002).

³¹⁴ SBC Comments at 13-14.

³¹⁵ *Id.* at 14.

³¹⁶ *Id.* at 32-33.

service directly from HITS.” ACA also opposes this condition, arguing that a divestiture would harm small cable operators and “impose substantial uncertainty on the future of HITS.”³¹⁸

115. As to SBC’s specific claim of denial of service, Applicants explain that the resale limitation in WSNet’s HITS contract only applies to pre-merger AT&T service areas, and only to non-multiple dwelling unit (“MDU”) providers. Applicants claim further that SBC could have requested HITS service directly, rather than going through the WSNet contract.³¹⁹ More fundamentally, Applicants challenge SBC’s assumption that HITS service is an “essential input.”³²⁰ Applicants point out that no proprietary equipment is used to provide or receive HITS services.³²¹ Applicants argue that most MVPDs obtain their digital programming directly from programmers via a direct feed.³²² Others lease their own satellite transponders to aggregate programming from various programmers.³²³ Finally, Applicants contend that there are at least two video programming aggregators that currently provide similar services.”

116. *Discussion.* The record suggests that there are several alternative sources of packaged digital programming, including direct feed options from the programmers themselves. Thus, AT&T Comcast would not have the ability to prevent competing MVPDs from gaining access to other digital programming packages. Therefore it would have little or no incentive to deny them access to HITS. Moreover, AT&T Comcast has committed to continue to provide HITS services to small cable operators. For these reasons, we cannot conclude that competing MVPDs will suffer harm in this context. Accordingly, we decline to require AT&T Comcast to continue to offer HITS to small cable operators on “reasonable prices, terms and conditions.” We also reject SBC’s proposal to require divestiture of HITS as a condition to approval of the Application.

f. Targeted Pricing Discounts

117. RCN, Everest, and BSPA allege that the Applicants have engaged in some form of illegal price discrimination and marketing tactics and that the merger will exacerbate the effects of such tactics on competing MVPDs. Everest argues that KCCP, the incumbent cable operator in Kansas City, Missouri, which is owned jointly by TWE and AT&T, has engaged in price discrimination in violation of the Commission’s uniform pricing rules.³²⁵ Although Everest has filed a complaint before the Commission concerning this conduct, it also asks us to bar KCCP and Comcast from engaging in discount pricing in portions of a franchise area “until after they have received a determination that they are subject

³¹¹ Applicants’ Reply at 59. Applicants also claim that AT&T has an existing contract with the National Cable Television Cooperative (“NCTC”) that allows any NCTC member to obtain the HITS service, regardless of whether the member operates in an AT&T or Comcast service area. *Id.* at 59-60.

³¹⁸ ACA Reply Comments at 5

³¹⁹ Applicants’ Reply at 59

³²⁰ *Id.*

³²¹ *Id.* at 58.

³²² *Id.* at 60.

³²³ *Id.*

³²⁴ *Id.* at 61. Applicants allege that OlympuSAT and TVN offer a variety of digital programming packages to MVPDs. See Applicants’ Reply. Braden Decl. at ¶ 18.

³²⁵ Everest Comments at 1. Section 76.984 of the Commission’s rules prohibit incumbent cable operators from engaging in geographic price discrimination with respect to programming in the basic tier, in the absence of effective competition.

to effective competition in the subject franchise area.””

118. RCN and **BSPA** argue that Comcast has specifically targeted marketing campaigns and price discounts to areas in which overbuilders have begun rolling out services.³²⁷ In particular, RCN challenges Comcast's use of targeted marketing campaigns, in which discounts are offered only to customers of Starpower, RCN's affiliate, or residents of areas in which Starpower competes or has begun to deploy services. RCN alleges that Comcast offers large bonuses to sales representatives who “convert” RCN's subscribers to Comcast, and that the discounts are offered to other residents only if they know about and specifically request the offer.³²⁸ RCN and **BSPA** contend that such discriminatory pricing strategies and anticompetitive marketing tactics could be exacerbated by the merger, as AT&T Comcast will have the incentive and ability to employ such tactics against overbuilders in any market.” RCN and **BSPA** likewise claim that the merger will make anticompetitive pricing strategies more viable, because the merged entity will have larger local footprints and greater reserves from which to spread the costs of targeted discounts. To remedy these concerns, RCN urges us to require AT&T Comcast to post on its website any promotions or discounts offered to any customer.”” **BSPA** supports RCN's proposal.”

119. Applicants maintain that their pricing practices are not unfair, but competitive and consistent with the Communications Act and the Commission's rules.³³² Applicants argue that to the extent that a party believes either Applicant has violated the uniform rate provisions set forth in Section 623(d) of the Communications Act, the party should file the appropriate complaint, rather than make the claim an issue in the transfer review process. They argue that the uniform rate requirement does not preclude promotional rates or discounts.³³³ Applicants also contend that their discounts are not “predatory” and that they do not contain customer-based or geographic restrictions because any customer in the franchise area *who learns of a discount* may receive it upon request.³³⁴ Finally, Applicants argue that price competition between the incumbent cable operator and the new entrant benefits consumers.³³⁵

120. *Discussion.* Although the Applicants deny that they have engaged in predatory pricing behavior, their representations leave open the substantial possibility that the Applicants may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers. We also disagree with Applicants'

³²⁶ Everest Comments at 5

³²⁷ RCN Comments at 23

³²⁸ Letter from L. Elise Dieterich, to Marlene H. Dortch, Secretary, FCC, (Aug. 14, 2002) (“RCN Aug. 14, 2002 Ex Parte”)

³²⁹ RCN Comments at 34.

³³⁰ Andrew Lipman, Jean Kidoo and L. Elise Dieterich, RCN Telecom Services, Inc., Counsel to RCN Telecom Services, Written Ex Parte Comments in Response to Comcast (Aug. 21, 2002) (“RCN Aug. 21, 2002 Ex Parte”). In its initial comments, RCN asked us to impose a uniform subscriber pricing requirement. RCN Comments at 35.

³³¹ Letter from Martin L. Stern, Preston Gates Ellis & Rouvelas Meeds, LLP, to Marlene H. Dortch, Secretary, FCC, (Sept. 19, 2002) (“BSPA Sept. 19, 2002 Ex Parte”).

³³² Applicants' Reply at 113-14; see also Applicants' July 2, 2002, Response at 12-14

³³³ Applicants' Reply at 114

³³⁴ Letter from James H. Casserly, to Marlene H. Dortch, Secretary, FCC, (Aug. 19, 2002) (“Applicants' Aug. 19, 2002 Ex Parte”); Letter from James L. Casserly, to Marlene H. Dortch, Secretary, FCC, (Sept. 10, 2002) (“Applicants' Sept. 10, 2002 Ex Parte”). This argument, however, is questioned by RCN, which complains that Applicants have displayed a lack of candor in addressing predatory pricing issues in this proceeding. See RCN Aug. 27, 2002 Ex Parte at 1

³³⁵ Applicant's Reply at 114-15.

claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among established competitors of relatively equal market power may be procompetitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry.

121. Although we are concerned about the anticompetitive potential for incumbent cable operators to use targeted discounts in defense of their entrenched market positions, the record does not provide us with sufficient evidence to conclude that the merger itself would **increase** AT&T Comcast's incentive or ability to resort to such tactics. Notwithstanding the merger, AT&T and Comcast already have the incentive, and ability to target pricing in an anticompetitive manner, as evidenced by the RCN's and BSPA's allegations and Applicants' responses to those allegations. We do not agree with the Applicants that targeted pricing enhances competition. To the contrary, targeted pricing may keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilder's inability to compete against an incumbent who uses such strategies. Thus, we believe that targeted pricing as described in this record could harm MVPD competition. Nevertheless, we are unable to conclude that this transaction will aggravate the problem. Accordingly, we decline to impose any conditions on the merger that would require the merged entity to post its rates and promotions on its website or otherwise facilitate the dissemination of pricing and discount information within local franchise areas.

122. Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggest, however, that regulatory intervention may be required either at the local, state, or federal level. We take cognizance of the fact that the DOJ may have begun an investigation into this behavior,³³⁶ and that local franchise authorities have imposed requirements of the type RCN advocates to prevent such conduct.³³⁷ The Media Bureau and Enforcement Bureau currently are reviewing complaints by overbuilders concerning these practices.³³⁸ We will continue to monitor allegations of targeted pricing closely and address specific abuses on a case-by-case basis.

g. Additional Allegations of Anticompetitive Behavior

123. RCN claims that the merger will enable AT&T Comcast to engage in additional forms of anticompetitive behavior. Specifically, RCN alleges that Comcast has used the local franchise process to hinder competition in its local franchise areas. RCN argues that Comcast's interference with its local franchise negotiations in Prince George's County, Maryland, and in Philadelphia, Pennsylvania, kept KCN from securing a cable franchise.³³⁹ In addition, both RCN and Everest allege that AT&T and Comcast have unfairly hindered them from competing for subscribers in MDUs. RCN argues that its affiliate, Starpower, has come across several buildings in which Comcast (and its predecessors) have received exclusive rights to serve the building and its tenants.³⁴⁰ Everest also urges us to prohibit KCCP

³³⁶ See Warren's Cable Regulation Monitor, Capitol Hill (Sept. 30, 2002) (discussing congressional testimony with respect to cable pricing investigation).

³³⁷ Letter from Elise Diererich, to Marlene H. Dortch, Secretary, FCC, (Aug. 1, 2002) ("RCN Aug. 1, 2002 Ex Parte").

³³⁸ The Commission's Media Bureau and Enforcement Bureau are currently reviewing complaints alleging this practice. See *Complaint of Altrio Communications Inc., Against Adelphia Communication Corporation For Discriminatory and Predatory Pricing of Cable Services*, CSR-5862-R (filed Mar. 1, 2002); *Complaint of WideOpenWest Holdings, LLC Against Comcast Corporation For Systemic Abuse of Customer Service Standards*, EB-02-MD-033 (filed Mar. 22, 2002).

³³⁹ RCN Comments at 15-16

³⁴¹ *Id.* at 22.

and Comcast from enforcing any exclusive agreement!, with MDU owners.³⁴¹

124. RCN also argues that Comcast has interfered with RCN's hiring of contractors to construct and install its systems, and that a combined AT&T Comcast would deter contractors in more markets from doing work for overbuilders. RCN alleges that Comcast and its predecessor, Suburban Cable, have attempted to prevent contractors from doing business with RCN in Philadelphia by requiring them to sign non-compete clauses in their contracts and by threatening any contractors found working for RCN with reprisals.³⁴² RCN argues that this tactic has increased its costs, because contractors sometimes demand higher prices to do work for RCN, and has impeded its rollout when contractors are unavailable or abandon their work.³⁴³ RCN alleges further that Comcast has begun to use these tactics in the Washington, D.C. area where RCN's affiliate, Starpower, is rolling out services.³⁴⁴ RCN suggests that the merger will harm overbuilders because the combined entity will be likely to engage in these practices on a broader geographic scale.³⁴⁵

125. Applicants counter that the overbuilders' allegations of interference with the hiring of contractor\, local franchise processes, and MDU access are baseless and that such allegations have nothing to do with the proposed transaction.³⁴⁶ Applicants maintain that there are pro-competitive reasons for keeping contractors from working with competitors, such as to ensure that system design and upgrade plans are not disclosed to competitors.³⁴⁷ Applicants further argue that RCN's suggestion that Comcast could employ all of the viable contractors in the Philadelphia area is "absurd."³⁴⁸ Applicants suggest that RCN has had difficulties negotiating franchises with several franchising authorities, but that these difficulties stem from RCN's inability to raise capital, not from interference by Comcast.³⁴⁹ With respect to the overbuilders' argument concerning MDU access, Applicants claim that new entrants actually have an advantage when it comes to securing exclusive rights with MDU owners, because they are able to provide voice, video and data services, in contrast to a cable incumbent's video-only offering.³⁵⁰ Applicants maintain that they should not be barred from competing with overbuilders for exclusive rights from MDUs.³⁵¹ Finally, Applicants claim that none of overbuilders' allegations of prior anticompetitive action are relevant to the merger proceeding."

126. **Discussion.** The record provides insufficient evidence for us to conclude that the merger will increase the incentive or ability of the Applicants to interfere with: (i) an overbuilder's employment of contractors, (ii) franchise negotiations between an overbuilder and a local franchise authority, and (iii) an overbuilder's access to MDUs. We do not discount the possibility that an incumbent could use its

³⁴¹ Everest Comments at 5.

³⁴² RCN Comment.: at 16-18.

³⁴³ *Id.* at 17-19.

³⁴⁴ *Id.* at 19.

³⁴⁵ *Id.* at 18.

³⁴⁶ Applicants' Reply at 119-20.

³⁴⁷ *Id.* at 119.

³⁴⁸ *Id.* at 119-20

³⁴⁹ *Id.* at 116-17 (citing RCN's Form IO-K (Mar. 29, 2001)).

³⁵⁰ *Id.* at 119. Applicants seem to suggest that incumbent cable operators serving MDUs typically do not offer the full array of voice, video and data services that Applicants are already offering or plan to offer throughout their territories.

³⁵¹ *Id.*

³⁵² *Id.* at 118, 119.

relationships with installers and contractors in an anticompetitive manner that is specifically designed to hinder a new market entrant from rolling out services in its territory. Nor do we discount the possibility that an incumbent may attempt to make the franchising process difficult for new market entrants, and that such action may harm MVPD competition. Indeed, we are sympathetic to the burdens the franchising process imposes on overbuilders, but we are reluctant to interfere with the Applicants' participation in that process. Finally, the record does not support the allegation that the merger will increase the incentive or ability of the Applicants to hinder rival MVPDs through exclusive agreements with MDU owners. Moreover, the Commission is considering issues relating to MVPD competition in MDUs in a separate proceeding which is the more appropriate forum for resolution of non-merger-specific concerns regarding exclusive access to MDUs.³⁵³ For these reasons, we decline to impose the requested conditions.

B. Internet-Related Effects

127. Commenters assert that the merged firm's ability to control high-speed Internet transmission facilities, content, and applications will result in a variety of Internet-related public interest harms.³⁵⁴ They urge us to deny approval of the instant transaction, impose conditions, or take other steps to prevent the merged firm from: (a) discriminating against unaffiliated ISPs over its cable network; (b) impeding or preventing consumer access to the widest possible array of content by limiting unaffiliated content providers' access to its cable modem platform or by limiting other broadband providers' access to its affiliated content; and (c) using its size and its regulatory advantages over DSL to further entrench its market power in the delivery of high-speed Internet access. Commenters assert that in order to avert these potential harms, we should deny the merger, impose a requirement that the merged firm offer non-discriminatory access to its facilities, or establish regulatory parity for competing broadband access service offered by incumbent LECs.

1. Background

128. *Internet Access Service.* As of September 2001, 50.5% of U.S. households had Internet connections.³⁵⁵ The vast majority of them subscribe to "narrowband" service provided over local telephone facilities.³⁵⁶ Residential high-speed, or "broadband,"³⁵⁷ Internet access service became available after narrowband Internet access service had achieved widespread popularity. Residential high-speed Internet access services are provided primarily over coaxial cable in the form of cable modem service offered by cable operators,³⁵⁸ and over copper wires in the form of digital subscriber line ("DSL") services by local exchange carriers.³⁵⁹ Industry analysis estimate that broadband Internet access service is

³⁵³ See *Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 13 FCC Rcd 3659 (1997).

³⁵⁴ See BellSouth Comments at 9-16; CFA Comments at 23-24; CFA Reply to Opposition at 12-18; CFA Supplemental Comments at 1, 4-6; EarthLink Reply Comments at 3, 10; EarthLink Supplemental Comments at 1; EchoStar Comments at 2; Qwest Comments at 9-10, 13-14; SBC Comments at 15-26; Vericon Comments at 15-24.

³⁵⁵ See *Inquiry Concerning High-speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4802 ¶ 9 (2002) ("Cable Modem NPRM").

³⁵⁶ We use the term "narrowband" here to refer to Internet access service that is designed to operate at speeds of less than 200 kilobits-per-second ("Kbps") in both directions. See *Cable Modem NPRM*, 17 FCC Rcd. 4802 ¶ 9 n.19. Narrowband Internet access service is most commonly provided over traditional telephone lines (also known as "dial-up"), which currently allows for the transfer of data at speeds up to 56 Kbps. *Id.*

³⁵⁷ See *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities, Universal Service Obligations of Broadband Providers*, 17 FCC Rcd 3019, 3021 ¶ 1 n.2 (2002) ("Wireline Broadband NPRM").

³⁵⁸ See *Cable Modem NPRM*, 17 FCC Rcd at 4803 ¶ 9.

³⁵⁹ *Id.* The services also are provided over terrestrial wireless radio spectrum by mobile and fixed wireless providers and over satellite radio spectrum by satellite providers. *Id.*

now available to approximately 75% of all the homes in the United States, and approximately 11% of all households subscribe to these services today.'" We have previously held residential high-speed Internet access constitutes a relevant product market in mergers involving cable operators,'" and that the relevant geographic markets for residential high-speed Internet access services are local, because a consumer's choice of broadband Internet access provider is limited to those companies that offer high-speed Internet access services in his or her area.³⁶²

129. **Cable Modem NPRM.** The Commission initiated a rulemaking proceeding to address the complex and controversial issues surrounding access to cable systems by unaffiliated ISPs ("**Cable Modem NPRM**").³⁶³ That proceeding is still pending. That proceeding addresses, on an industry-wide basis and on the basis of a record developed in notice-and-comment rulemaking proceeding, fundamental questions of agency policy regarding whether and to what extent the agency should intervene in the negotiations between cable operators and unaffiliated ISPs with respect to the availability and conditions of access by unaffiliated ISPs to cable systems to their subscribers.

2. Unaffiliated ISP Access to AT&T Comcast Cable Modem Platform

130. **Applicants' Relationships with ISPs.** Each Applicant operates a proprietary broadband Internet access service.³⁶⁴ In addition, Comcast has entered into an agreement with United Online, Inc ("United Online") pursuant to which United Online markets and sells a high-speed ISP service to residential customers using Comcast's cable modem platform.³⁶⁵ AT&T has entered into similar agreements with EarthLink, Net1Plus, Internet Central³⁶⁶ and Galaxy Internet Services.³⁶⁷ EarthLink began offering such service over AT&T's systems in greater Seattle in July 2002, and in New England in October 2002.³⁶⁸ In connection with the TWE Restructuring Agreement, the Applicants will enter into a "three-year non-exclusive agreement" with AOL Time Warner under which AOL high-speed broadband service would be made available on AT&T Comcast cable systems (the "AOL ISP Agreement").³⁶⁹

³⁶⁰ *Srr Cable Modem NPRM*. 17 FCC Rcd at 4803 ¶ 9.

³⁶¹ *AOL-Time Warner Order*, 16 FCC Rcd at 6568 ¶ 56.

³⁶² *Id.* at 6578 ¶ 74.

³⁶³ *Cable Modem NPRM*. 17 FCC Rcd 4798.

³⁶⁴ See Section II.A., *supra*.

³⁶⁵ Applicants' July 2, 2002 Response at 19. In May 2002, United Online launched this service in two markets—Indianapolis, Indiana, and Nashville, Tennessee. *Id.* Comcast states that it expects to negotiate with United Online to expand this service to other markets, and expects to enter into similar agreements with other unaffiliated ISPs. *Id.*

³⁶⁶ Applicants' July 2, 2002 Response at 19-20 (stating that EarthLink will offer broadband Internet services over AT&T's cable modem platform in the greater Boston and Seattle areas, NET1Plus will offer services in Boston, and Internet Central will offer services in Seattle).

³⁶⁷ Letter from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Nov. 6, 2002) ("Applicants' Nov. 6 Ex Parte"); AT&T Broadband, *Galaxy Internet Services and AT&T Broadband Reach ISP Choice Agreement* (press release), Nov. 6, 2002 (stating that Galaxy Internet will offer services over AT&T's systems "throughout the Massachusetts market").

³⁶⁸ See also EarthLink, *EarthLink Offers New England High-speed Cable Internet Service Via AT&T Broadband Network* (press release), Oct. 16, 2002 (announcing launch of EarthLink broadband Internet access service on AT&T systems in Massachusetts, New Hampshire and Maine); EarthLink, *EarthLink Offers Seattle Consumers Choice of High-Speed Cable Internet Over AT&T Broadband Network* (press release), July 15, 2002 (announcing launch of EarthLink broadband Internet access service on AT&T systems in greater Seattle).

³⁶⁹ See TWE Restructuring Press Release. An officer of AT&T has certified that the AOL ISP Agreement "does not give AOL exclusive rights to provide Internet service over any AT&T Comcast cable system, nor does it constrain AT&T Comcast's ability to negotiate and reach agreements with other ISPs in the future." See Letter from Mark C.

(continued....)

Finally, Comcast, AT&T, and AT&T Comcast have entered into an agreement with Microsoft,³⁷⁰ which provides that, for a specified period of time, if AT&T Comcast offers a high-speed Internet service agreement to any third party on any of its cable systems, AT&T Comcast will be obligated to offer an Internet service agreement on non-discriminatory terms with respect to the same cable systems to Microsoft's ISP, The Microsoft Network ("MSN").³⁷¹

131. Several commenters are concerned about the ability of unaffiliated ISPs to access the merged firm's facilities, a concern the Commission has addressed in prior cable mergers, and is addressing in our *Cable Modem NPRM*.³⁷² These commenters urge us to deny the merger, or, at a minimum, to condition the merger on a requirement that the merged firm offer unaffiliated ISPs nondiscriminatory access to their cable modem platform.³⁷³ Some commenters offer the AOL-Time Warner ISP access conditions as a model.³⁷⁴ CFA contends that agreements with one or two unaffiliated ISPs do not alleviate harms that will result from the merger." CFA also suspects that the agreements will impose restrictions on the products that independent ISPs can offer to the public, limitations on the independent ISPs' relationships with customers, uneconomic costs for access to the merged firm's facilities, and unreasonably short contract terms." SBC contends that the anticompetitive consequences of cable operators' refusal to offer ISP choice will be worsened by the merger, because it increases the number of households a single firm can foreclose." SBC asserts that, absent an access requirement, the merged firm will not provide meaningful access to its broadband platform.³⁷⁸

132. Commenters state that their concerns about unaffiliated ISP access are exacerbated by the merged firm's relationships with Microsoft and AOL. Commenters contend that Microsoft's stake in the

(...continued from previous page)

Rosenhlum, Vice President – Law, AT&T Corp., to Marlene H. Donch, FCC Secretary (Oct. 2, 2002).

³⁷⁰ Comcast, AT&T, and AT&T Comcast have entered into a Quarterly Income Preferred Securities ("QUIPS") exchange agreement with Microsoft, pursuant to which, at the time of the AT&T Broadband spin-off, Microsoft will exchange the QUIPS for a number of shares of AT&T Broadband common stock that will be converted in the merger into 115 million shares of AT&T Comcast common stock (the "QUIPS Agreement"). Application at 8 n.9.

³⁷¹ See QUIPS Agreement § 2.02. This obligation applies for a period of five years following the spin-off of AT&T Broadband. Application at 8 n.9. In connection with the QUIPS Agreement, Applicants and Microsoft also agreed to a term sheet providing for a trial of an ITV platform including set-top box middleware ("Set-Top Term Sheet"). *Id.*

³⁷² See generally CFA Comments at 12-15, CFA Reply to Opposition at 12-14, EarthLink Reply Comments at 3, Qwest Comments at 9-10, 13-14, SBC Comments at 17.

³⁷³ EarthLink Reply Comments at 2-9; SBC Comments at 39; Qwest Comments at 29-35.

³⁷⁴ EarthLink Reply Comments at 7-8, SBC Comments at 39-40, Qwest Comments at 34-35.

³⁷⁵ CFA Reply to Opposition at 13. CFA states that the merger will exacerbate the problems faced by unaffiliated ISPs "because one large closed system is worse than two smaller closed systems." CFA contends that by allowing one entity that is opposed to unaffiliated ISP access to control a greater share of the broadband access market, the merger will reduce incentives to grant access to unaffiliated ISPs. CFA Comments at 24.

³⁷⁶ CFA Comments at 23-24; CFA Reply to Opposition at 13-14; Dr. Mark Cooper, *Failure of Intermodal Competition in Cable and Communications Markets* at 36-38 ("**CFA Intermodal Study**"). See also SBC Comments at 39-40; Qwest Comments at 33-34. CFA asserts that to secure access to AT&T Comcast's cable modem platform, AOL capitulated to AT&T Comcast's "superior market power" by agreeing to "highly unprofitable terms." Motion of CFA to Require AT&T and Comcast to Provide Information Material to Consideration of Application to Transfer Control of Licenses (filed Sept. 5, 2002) ("CFA Motion") at 8.

³⁷⁷ SBC Comments at 39.

³⁷⁸ SBC Comments at 40. See also EarthLink Reply Comments at 3-5; Qwest Comments at 29-30.

merged firm is intended to secure access to AT&T Comcast's broadband platform,³⁷⁹ and that the Microsoft relationship will allow AT&T Comcast to steer personal computer buyers away from DSL.³⁸⁰ Some commenters posit that the AOL ISP Agreement is "highly restrictive and exclusionary" and may pose significant impediments to broadband deployment.³⁸¹ EarthLink asserts that the AOL ISP Agreement will create the problems deemed unacceptable in the context of the AOL-Time Warner merger, but "on a much larger scale."³⁸² Instead of AOL gaining access to just Time Warner cable systems, EarthLink notes, AOL will obtain access to the far larger AT&T Comcast array of systems.³⁸³ According to EarthLink, because the Applicants rarely enter into agreements with unaffiliated ISPs, AOL may become the only ISP available on AT&T Comcast systems.³⁸⁴ CFA and EarthLink filed motions urging us to require the Applicants to enter the AOL ISP Agreement into the record in this proceeding, claiming that we cannot evaluate the public interest harms posed by the merger without reviewing and considering public comment on the agreement.³⁸⁵ EarthLink requests that all of the exhibits to the TWE Restructuring Agreement be entered into the record.³⁸⁶

133. Applicants counter that the issue of ISP access is not merger-specific, and object that their opponents' claims are counter-factual given that they already have granted access to unaffiliated ISPs and they face competition from DSL and other broadband service providers.³⁸⁷ Applicants cite their existing relationships with independent ISPs as evidence of their commitment to independent ISP access, and assert that the merged firm will have "ample incentives to expand these agreements in the future."³⁸⁸ Applicants assert that penetration rates for broadband services offered by each applicant still are relatively low, and that the merged firm will face stiff competition from DSL and other broadband platforms. Applicants assert that agreements with unaffiliated ISPs may attract new customers to the merged firm's network and will allow AT&T Comcast to share in a portion of the revenue derived from this increased subscribership. Alternatively, if ISPs affiliate with competing broadband platforms, AT&T Comcast will

³⁷⁹ CFA Reply to Opposition at 17

³⁸⁰ SBC Comments at 25. SBC posits that Microsoft and AT&T Comcast could use a screen during the computer setup and software installation process to market the merged firm's cable modem service. *Id.*

³⁸¹ See CFA Supplemental Comments at 1-2. See also EarthLink Supplemental Comments at 2, 4-5; CFA Motion at 2; Motion of EarthLink, Inc. for Order Requiring Submission of Additional Information, Providing for Supplemental Comment, and Suspending the IXO-Day Review Period (filed Sept. 5, 2002) ("EarthLink Motion") at 2. See also *Memorandum in Response to Questions Propounded by Office of General Counsel Submitted on Behalf of CFA*, et al. at 9-14 (filed Oct. 28, 2002).

³⁸² EarthLink Supplemental Comments at 3-4.

³⁸³ *Id.* at 4

³⁸⁴ *Id.*

³⁸⁵ EarthLink and CFA filed motions urging the Commission to: (a) compel the Applicants to file some or all of the exhibits to the TWE Restructuring Agreement; (b) initiate a pleading cycle seeking comment on the exhibits; and (c) stop the 180-day review period that governs this proceeding pending receipt of the exhibits and the close of the proposed comment cycle. See *EarthLink Motion*, *CFA Motion*. In a prior order, these motions were denied or dismissed as moot to the extent that they requested documents that have already been filed by the Applicants. See *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, FCC 02-301 (rel. Nov. 6, 2002) ("ISP Order").

³⁸⁶ See generally EarthLink Motion

³⁸⁷ Application at 93; Applicants' Reply at 92-93

³⁸⁸ Applicants' Reply at 93. See also Applicants' July 2, 2002 Response at 19-20; Applicants' July 2, 2002 Response at Comcast-FCC-E2 0000037-38 (Statement of Brian Roberts during Comcast United Online Press Conference Call on Feb. 26, 2002).

lose the opportunity to gain the new revenue generated by such new customers.³⁸⁹

134. Applicants view the AOL ISP Agreement as further evidence of their commitment to offering consumers a choice of ISP.³⁹⁰ Applicants state that, far from harming consumers, the AOL ISP Agreement will increase consumer ISP choice and enhance competition among ISPs.³⁹¹ They state that as a result, AT&T Comcast subscribers will be able to obtain broadband Internet access service from a host of ISPs, including an AT&T Comcast affiliated ISP, as well as EarthLink, United Online, Net1Plus, Internet Central, MSN, AOL, and any other ISP that successfully negotiates a mutually satisfactory agreement in the future.³⁹² Applicants state that the AOL ISP Agreement is not exclusive, and could not be exclusive because of each Applicant's existing agreements with other unaffiliated ISPs.³⁹³ Applicants state that the AOL ISP Agreement is not relevant to our review of the proposed merger because the agreement is not contingent on the merger.³⁹⁴ Applicants dismiss commenters' claims concerning the merged entity's relationship with Microsoft as lacking merger specificity, because Microsoft is not making any additional investment in connection with the merger.³⁹⁵ Applicants assert that Microsoft has no incentive to disadvantage DSL, and contend that Microsoft's actual behavior contradicts commenters' allegations.³⁹⁶

135. *Discussion.* Commenters' reliance on the *AOL-Time Warner Order* as authority for the imposition of an ISP access condition is misplaced. We have never mandated, as a merger condition or in any other context, that any cable operator provide access to its systems to unaffiliated ISPs.³⁹⁷ In *AOL-Time Warner*, we supplemented an unaffiliated ISP access condition imposed by the FTC by requiring that, if AOL Time Warner provided such access voluntarily or otherwise, it must do so on

³⁸⁹ Applicants' Reply at 94.

³⁹⁰ See generally Joint Opposition of Comcast Corporation and AT&T Corp. (filed Sept. 13, 2002) ("Applicants' Joint Opposition").

³⁹¹ Applicants' Joint Opposition at 6.

³⁹² *Id.* at 10-11.

³⁹³ *Id.* at 8.

³⁹⁴ In support of this, they cite a provision of the TWE Restructuring Agreement that states that if the merger has not closed by March 1, 2003, AT&T and AOL Time Warner will enter into an agreement substantially identical to the AOL ISP Agreement. Applicants' Joint Opposition at 6-7. The Applicants also have certified in the record that this agreement is identical in all material respects to the agreement involving AT&T Comcast systems, except with regard to the cities in which the agreement will be implemented. See Letter from Mark C. Rosenhlum, Vice President-Law, AT&T Corp. and Arthur R. Block, Senior Vice President and General Counsel, Comcast, to Marlene H. Dortch, FCC Secretary (Oct. 28, 2002). Our own staff review confirms this certification. See *ISP Order*, FCC 02-301 at ¶ 11.

³⁹⁵ Applicants' Reply at 63. Applicants state that although Microsoft will have a 5% equity interest in AT&T Comcast, it will have less than 5% of AT&T Comcast's voting power. *Id.*

³⁹⁶ Applicants' Reply at 68-69. Applicants assert that Microsoft promotes DSL—not cable modem service—to its customers who are interested in broadband. *Id.*

³⁹⁷ With one limited exception, we have consistently refused to intervene in marketplace decisions concerning ISP access to cable facilities or the terms and conditions of such access, despite requests for such intervention by other parties. See *AT&T-TCI Order*, 14 FCC Rcd at 3207 ¶ 96 (1999); *AT&T-MediaOne Order*, 15 FCC Rcd at 9870 ¶ 121 (2000). But see *AOL-Time Warner Order*, 16 FCC Rcd at 6600-03 ¶¶ 126-127 (requiring that, to the extent AOL Time Warner provided access to its cable system to unaffiliated ISPs, all ISPs would receive such access on nondiscriminatory terms).

nondiscriminatory terms.”” These conditions were imposed in light of the fact that the merger of AOL and Time Warner would combine the largest ISP, which itself owned many leading Internet brands and applications, with the second largest cable operator in the nation, which already held an enormous library of multimedia content.³⁹⁹ This unique combination of services, facilities, and content raised competitive concerns that are not presented by the instant merger, even in light of the merged entity’s relationships with Microsoft and AOL. Microsoft’s 54 equity interest in AT&T Comcast, even combined with its agreements with Applicants, is not comparable to the degree of control AOL attained through its acquisition of Time Warner. There also is no evidence that the merger will give MSN the ability or incentive to discriminate against other broadband platforms. To the contrary, MSN is aggressively promoting its “MSN Broadband” product, which is a high-speed Internet access service delivered over DSL.⁴⁰⁰ The merged entity’s relationship with AOL Time Warner also does not present a risk of potential harm comparable to that presented by the merger of AOL and Time Warner. Although the AOL ISP Agreement provides AOL access to AT&T Comcast systems, such an agreement is clearly distinguishable from AOL’s *acquisition* of such systems. In addition, like MSN, AOL actively promotes its proprietary broadband Internet access service over DSL as well as cable.⁴⁰¹

136. Having evaluated, as we have in prior license transfer proceedings, the Applicants’ pre-merger and post-merger incentive and ability to deny unaffiliated ISPs access to their cable systems, we conclude that the merger is not likely to reduce unaffiliated ISP access to the Applicants’ cable systems. Therefore we will not condition the merger on such access or deny the merger on these grounds. First, contrary to the claims of some commencers, the AOL ISP Agreement is not—and cannot be—exclusive.⁴⁰² As Applicants note, they each have entered into other agreements with unaffiliated ISPs, and Comcast has agreed to honor all pre-merger third-party ISP agreements entered into by AT&T.⁴⁰³ AT&T Comcast also is obligated by the QUIPS Agreement to offer an ISP agreement to MSN if AT&T Comcast enters into an ISP agreement with any other party, an obligation that could not be satisfied if the AOL ISP Agreement were exclusive. An officer of AT&T has certified that the AOL ISP Agreement “does not give AOL exclusive rights to provide Internet service over any AT&T Comcast cable system, nor does it constrain AT&T Comcast’s ability to negotiate and reach agreements with other ISPs in the future.”” Our staff review of the AOL ISP Agreement at the DOJ confirms this certification.⁴⁰⁵

137. We do not agree with CFA that the sheer size of the merged firm will make AT&T

³⁹⁸ AOL-Time Warner Order, 16 FCC Rcd at 6600-03 ¶¶ 126-127. We also prohibited AOL Time Warner from entering into exclusive agreements for access to AT&T’s cable systems. AOL-Time Warner Order, 16 FCC Rcd 6547, 6662 ¶ 272.

³⁹⁹ AOL-Time Warner Order, 16 FCC Rcd at 6580 ¶ 78.

⁴⁰⁰ See MSN, *MSN 8 Broadband: A High-Speed Connection Powered by Microsoft Technology*, at <http://resourcecenter.msn.com/access/broadband/default.asp> (visited Aug. 31, 2002).

⁴¹¹ AOL Broadband offers consumers a choice of cable or DSL. See Only on AOL Broadband at <http://free.aol.com/tryaolfree/index.adp?promo=342565&service=aolhsb&> (viewed Nov. 6, 2002).

⁴⁰² For the agreement to be exclusive, the Applicants would have to breach their agreements with several other ISPs, and AOL Time Warner would have to violate the terms of its Consent Agreement with the FTC. The Consent Agreement provides that AOL Time Warner “shall not enter into any agreement with any MSO that would interfere with the ability of such MSO to enter into agreements with any other ISP.” See *In the Matter of America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 at Section III.E. (FTC) (proposed Dec. 14, 2000) (“Consent Agreement”).

⁴⁰³ See Applicants’ Nov. 6 *Ex Parte*.

⁴⁰⁴ See Letter from Mark C. Rosenblum, Vice President—Law, AT&T Corp., to Marlene H. Dortch, Secretary, FCC (Oct. 2, 2002).

⁴⁰⁵ See *ISP Order*, FCC 02-301 at ¶ 13.

Comcast less likely to develop relationships with unaffiliated ISPs. Even if the merger increases the number of subscribers that a single entity can foreclose, SBC has not shown that the Applicants' pre-merger incentives to discriminate against unaffiliated ISPs are any different from their post-merger incentives to discriminate against such ISPs. The Applicants' existing agreements with seven unaffiliated ISPs and Comcast's decision to honor AT&T's pre-merger agreements with unaffiliated ISPs evidence an incentive to offer access to the merged entity's system, and refute commenters' claims. To the extent that we have addressed ISP access issues in prior cable mergers, we have primarily relied on merger applicants' commitments to enter into agreements with unaffiliated ISPs in the future.⁴⁰⁶ Here, the Applicants have not only stated a commitment to ISP choice, but already have executed several agreements, and are currently offering a choice of ISP in a combined total of four markets.⁴⁰⁷ Applicants' existing relationships with unaffiliated ISPs go a step beyond the commitments to ISP choice that we have previously found adequate to protect the public interest in factually similar cable mergers.

138. Commenters raise concerns about the prices charged to unaffiliated ISPs by the merged entity for access to its facilities, and limitations on the services or packages of services that the unaffiliated ISPs may offer. The record, however, does not support a finding of a merger-specific harm. Rather, these concerns are industry-wide in nature; therefore, it is more appropriate to consider them in our *Cable Modem NPRM*, which will address whether the Commission should regulate the prices cable operators can charge unaffiliated ISPs or prohibit cable operators from limiting the services offered by unaffiliated ISPs.⁴⁰⁸

139. The concerns raised by commenters are not specific to AT&T Comcast's agreements with unaffiliated ISPs, but relate to the business relationships between all cable operators and all unaffiliated ISPs. The question of whether government intervention is necessary or appropriate to ensure that unaffiliated ISPs have access to cable systems built with private capital is squarely at issue in our *Cable Modem NPRM*, as are the terms and conditions of such access. We conclude that the merger is not likely to create a public interest harm with regard to unaffiliated ISP access to AT&T Comcast systems.

3. Quantity, Quality, and Diversity of Internet Content

140. Some commenters assert that the merger would present harms affecting Internet content. Specifically, they allege that: (1) the merged firm will have the incentive and ability to favor affiliated broadband content and discriminate against unaffiliated content;⁴⁰⁹ (2) the merged firm will limit access to its affiliated content, which would reduce the amount of content available to subscribers of competing

⁴⁰⁶ See *AT&T-TCI Order*, 14 FCC Rcd at 3206-07 ¶¶ 95-96 (1999); *AT&T-MediaOne Order*, 15 FCC Rcd at 9869-70 ¶¶ 120-121 (2000).

⁴⁰⁷ See para. 130, *supra*.

⁴⁰⁸ Moreover, even if we find as part of our rulemaking proceeding that limitations on services are harmful, and even if such limitations were among terms of the AOL ISP Agreement, such limitations in the AOL ISP Agreement still would not present a merger-specific harm because the AOL ISP Agreement for AT&T Comcast systems is identical to that for AT&T systems only. See *ISP Order*, FCC 02-301 at ¶ 11.

⁴⁰⁹ Some commenters claim that the merged firm will have the incentive and ability to favor affiliated Internet content by giving it preferential placement or preferential caching, and to discriminate against unaffiliated content, either by limiting its cable modem subscribers' access to unaffiliated content or by degrading the quality of delivery of such content. See Vericon Comments, Crandall Decl. ¶ 13; SBC Comments at 16-18; SBC Comments, Gertner Decl. ¶¶ 1X-29; CFA Comments at 15-16. Qwest asserts that the merged firm will have the incentive and ability to engage in vertical foreclosure, for example by extracting monopoly rents for affiliated content provided to other broadband ISPs. Qwest Comments 14-15; Qwest Comments, Haring Decl. at 14-15. Verizon asserts that the because the merger will expand the distribution footprint available to each Applicant's affiliated broadband content, it will enhance the merged firm's incentive and ability to favor its own content and discriminate against unaffiliated content. Vericon Comments, Crandall Decl. ¶ 12.

broadband access services and harm competing providers of such services;" and (3) the merged firm will have monopsony power in the market for the purchase of broadband content.'" Commenters claim that these concerns are particularly acute with regard to the delivery of video programming over the Internet, an offering that would compete not only with the merged firm's affiliated broadband content, but also with its core multichannel video programming business.⁴¹² We conclude that the merger is not likely to result in harms to the quantity, quality, or diversity of Internet content, and we decline to impose conditions or reject the merger on the basis of alleged harms to Internet content.

141. *Discrimination Against Unaffiliated Content/Favoring Affiliated Content.* We find that the alleged potential harm to unaffiliated broadband content producers arising from the merged firm's potential foreclosure, degradation, or restriction of access to unaffiliated content is not a merger-specific issue. Applicants have very limited interests in Internet content, making it unlikely that they would achieve any benefit from discriminating against unaffiliated content.'" Further, the merger will not give the Applicants greater incentive or ability to discriminate against unaffiliated content. Commenter concerns about harm to consumers or broadband content producers from content discrimination are therefore not sufficiently merger-specific to justify denial of or the imposition of conditions on the requested license transfers.

142. *Refusal of Access to Affiliated Content.* We find that the merger is unlikely to result in harm to consumers or competition from the merged firm's refusal to provide other broadband Internet service providers with access to affiliated content. Applicants have very little affiliated Internet content, and that which they have is far from the kind of unique, highly popular content that might raise competitive concerns.⁴¹⁴ For example, the Applicants cite data showing that Yahoo.com contains 136,000 pages of content, that AOL.com contains 97,000 pages of content, and that Comcast.net contains only 52 pages of content.'" Although it is certainly possible that the merged firm will add new, compelling Internet content to its portal or establish entirely new sites with compelling Internet content, the Applicants assert that such a development is more likely to benefit consumers than to harm consumers or competition in the broadband Internet access market.⁴¹⁶ We agree. Even if the merged firm entered into a joint venture or other strategic relationship with a highly popular, content-rich portal or other service, it is

⁴¹⁰ Qwest Comments at 15; Verizon Comments, Crandall Decl. ¶¶ 12-18. Verizon claims that the merged firm's combined purchasing power will allow it to demand equity interests or exclusive distribution rights from start-up broadband Internet content providers who need access to the merged firm's cable modem customers. Verizon Comments at 22 n.69; Verizon Comments, Crandall Decl. ¶ 13. Verizon claims that AT&T Comcast could then refuse to supply affiliated content to rival conduits such as DSL or create content in a format that is compatible only with cable modem service. Verizon Comments, Crandall Decl. ¶ 14.

⁴¹¹ Qwest Comments at 9-10; Qwest Comments, Haring Decl. at 14-15; Verizon Comments, Crandall Decl. ¶ 11; CFA Comments at 15-16. In light of the relatively small number of current broadband subscribers, commenters posit that a broadband content provider may need to reach an even higher percentage of the total broadband audience in order to "break even" than would a cable programmer. Qwest Comments at 9; SBC Comments, Certner Decl. at ¶¶ 17, 28.

⁴¹² See Verizon Comments at 15-23, Verizon Comments, Crandall Decl. ¶ 22.

⁴¹³ Applicants assert that AT&T Comcast will be unable to engage in foreclosure of unaffiliated content because its share of the broadband Internet access market will be too small to effectively foreclose any content provider, and because the merged firm's subscribers will be free to access any broadband content they desire. Applicants' Reply at 84-85. Applicants state that they have never blocked subscribers' access to any Internet content. *Id.*; see also Applicants' Reply, Coblitz Decl. at ¶ 28.

⁴¹⁴ Applicants' Reply at 87. Applicants state that their limited content holdings can be accessed by all Internet users and are not offered exclusively to either Applicant's cable modem subscribers. *Id.* at 85-86.

⁴¹⁵ *Id.* at 87-88.

⁴¹⁶ *Id.* at 88.

not clear from the record that the merged firm would be likely to withhold access to its affiliated content.⁴¹⁷

143. *Monopsony Power.* We have previously concluded that there are two separate product markets for residential Internet access service – high-speed Internet access service and narrowband service.⁴¹⁸ Among the facts we cited as evidence of this market distinction is that certain content is accessible only to consumers with a high-speed connection to the Internet.⁴¹⁹ However, we have not previously determined whether there is a market for the purchase of broadband content that is distinct from the market for the purchase of Internet content in general. We need not do so here. There is no convincing evidence the merged entity actually would have market power with respect to any Internet content, or that it would have the ability or incentive to exercise such market power if it did.⁴²⁰

144. *Video Over Internet Harms.* Commenters assert that because an Internet video offering would compete with multichannel video programming, the merged firm will have the incentive to engage in anticompetitive conduct that will impede the development of this offering. Applicants counter that such claims are “highly speculative” and state that AT&T Comcast will not have the incentive or ability to force anyone to adopt cable-only standards, establish technical impediments, or withhold access to affiliated programming.⁴²¹ They further state that if the merged firm somehow attempted to block the distribution of video programming to its broadband customers, this would only drive consumers to DSL and cause AT&T Comcast to lose subscribers.⁴²² We have no reason to believe that the merger makes such conduct any more likely than it would be absent the merger. Therefore, the merger is not likely to create public interest harms in this regard.

145. In our *Cable Modem NPRM*, we invited comment on several questions concerning Internet content, including whether cable modem access providers are presently denying or degrading access to unaffiliated Internet content or services,⁴²³ whether the threat that subscriber access to Internet content or services could be blocked or impaired is sufficient to justify some form of regulatory intervention at this time,⁴²⁴ and whether a finding of such blocking or impairment in the future should trigger regulatory intervention.⁴²⁵ We are presently reviewing comments on these and other issues as part of that proceeding, which is the best forum in which to evaluate issues pertaining to cable operators’ discrimination against unaffiliated content, cable modem subscribers’ access to unaffiliated content, and monopsony concerns.

⁴¹⁷ *Id.* at 89. According to Applicants, any attempt to limit distribution of affiliated content would allow a rival content provider to expand output and replace that content. *Id.* at 88.

⁴¹⁸ *AOL-Time Warner Order*, 16 FCC Rcd at 6574-78 ¶¶ 68-74

⁴¹⁹ *Id.* at 6576-77, ¶ 71

⁴²⁰ Applicants contend that there is no “broadband content” market, because there is very little content that is created exclusively for broadband platforms. Applicants’ Reply at 80. Applicants also note that the most likely types of broadband content—music, video, and games—also can be distributed through non-Internet means, such as retail sales and rentals. *Id.* at 82-83. Applicants contend that even if the market for the purchase of broadband content is confined to broadband Internet access providers, AT&T Comcast’s 22.7% share of the residential broadband Internet access market is too low to raise any monopsony concerns. *Id.* at 81-82.

⁴²¹ Applicants’ Reply at 92

⁴²² *Id.* at 92

⁴²³ *Cable Modem NPRM*, 17 FCC Rcd. at 4845 ¶¶ 86-87

⁴²⁴ *Id.* at 4845 ¶ 87.

⁴²⁵ *Id.* at 4846 ¶ 92.

4. Other Effects on Competing Broadband Platforms.

146. Several commenters assert that because the merged firm will enjoy an unprecedented share of the broadband Internet access market, the merger should be denied or conditioned on establishment of regulatory parity for incumbent LECs, either by relaxing or removing regulations applicable to incumbent LECs or by imposing requirements on the merged firm to make its regulatory status more similar to that of incumbent LECs.⁴²⁶ These commenters state that the merged firm will have roughly twice the broadband subscriber base of its largest DSL competitors,⁴²⁷ and claim that DSL is not "growing at a rate which could close the gap" between cable and DSL market shares.⁴²⁸ Qwest asserts that the 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 Internet access and services.⁴²⁹

147. The incumbent LECs propose several different approaches to establishing the regulatory parity they seek. Verizon urges us to deny the merger application unless we first grant regulatory relief to incumbent LECs.⁴³⁰ The proposed approaches include: conditioning the merger on the establishment of regulatory parity through action in other open rulemaking proceedings;⁴³¹ imposing spectrum unbundling or unaffiliated ISP access requirements on the merged firm to make its regulatory status comparable to that of incumbent LECs;⁴³² and/or denying the merger application.⁴³³

148. *Discussion.* We decline to relax or remove regulations applicable to incumbent LECs in the context of this proceeding, to condition our approval of the merger on actions that we may or may not take in the context of other proceedings, or to impose new requirements on the merged firm in order to give the merged firm a regulatory status of an incumbent LEC. We do not agree with incumbent LECs that the merged entity's size poses a risk of harm to DSL service, and we will not reject the merger on these grounds. As we stated previously, the geographic market relevant to broadband Internet access is local.⁴³⁴ The merger will not change the size of the competitor that incumbent LECs face in the individual markets where they offer DSL service, and incumbent LECs have not shown that the merged firm's share of broadband Internet access subscribers nationally will result in competitive harms. Finally, incumbent LECs' efforts to secure changes to the regulations applicable to their services in the context of this proceeding are misdirected. The instant proceeding is not an appropriate forum for consideration of changes to rules of broad applicability, including the rules applicable to certain incumbent LEC offerings. In short, none of the regulatory parity issues raised are specific to this merger.

⁴²⁶ See generally BellSouth Comments at 23-27; Qwest Comments at 15-18, 35; SBC Comments at 33-35; Verizon Comments at 25-29.

⁴²⁷ Verizon Comments at 23.

⁴²⁸ Qwest Comments at 13-14. See also Verizon Comments at 5-7; BellSouth Comments at 17.

⁴²⁹ Qwest Comments at 14.

⁴³⁰ Verizon Comments at 25-29.

⁴³¹ BellSouth Comments at 24-27. Specifically, BellSouth asks that, in our Wireline Broadband Proceeding, we forbear from enforcing the following with regard to incumbent LEC broadband services: 1) price cap regulations; 2) the requirement to file tariffs on more than one day notice with cost support; 3) restrictions on contract carriage; and 4) any dominant carrier section 214 requirements that might apply. BellSouth also asserts that the Commission should remove UNEs related to broadband services from the UNE list.

⁴³² SBC Comments at 35-36; Qwest Comments at 29-35.

⁴³³ Qwest Comments at 29-36.

⁴³⁴ See note 362, *supra*.

149. CFA asserts that AT&T and Comcast already possess market shares “approaching monopoly levels” in the high-speed Internet access market, which justifies denying approval of the merger or imposing remedies⁴³⁵ to prevent the accumulation of market power.⁴³⁶ The study cited by CFA in support, however, does not specify what market shares AT&T or Comcast possess in any market in which they offer high-speed Internet access, nor does it explain what share of the market would approach the monopoly level. Instead, CFA’s study cites data reported by the Commission based on responses to our Form 477 which shows, among other things, that approximately one-fifth of the country has only one choice of broadband service provider. The fact that the merged firm may be the sole provider of residential high-speed Internet access in any of the markets it serves does not demonstrate that the merger is decreasing competition in the market for residential high-speed Internet access. Because the relevant geographic market for the provision of broadband Internet access is local, and because AT&T and Comcast do not compete against each other for residential high-speed Internet access consumers in their respective local markets, the merger will not reduce competition or otherwise harm this market. We therefore decline to impose conditions or deny the Application on these grounds.

150. EchoStar asserts that each Applicant enjoys a “lion’s share” of the market for high-speed Internet access in its respective territories, and that its proposed merger with DirecTV should be approved in order to create a more viable competitor to the merged firm’s broadband offering.⁴³⁷ EchoStar’s comments are misplaced here, as its proposed merger is the subject of a separate proceeding.⁴³⁸

5. Conclusion

151. We conclude that the merger is not likely to reduce unaffiliated ISP access to cable facilities, impede or prevent consumers’ access to Internet content, or allow Applicants to dominate the broadband Internet access market. Accordingly, we will not deny or impose conditions on our approval of the Application as requested by commenters.

C. Telecommunications Services

152. Comcast provides residential cable telephony services to approximately 46,000 lines in certain of its franchise areas in Maryland, Virginia, and Michigan.⁴³⁹ In addition, Comcast, through certain subsidiary corporations, provides a variety of communications services to over 4,000 business and governmental customers primarily in Pennsylvania, New Jersey, Delaware, Maryland, and Michigan.⁴⁴⁰ AT&T Broadband provides residential cable telephony services to over one million customers in 16 markets.” No commenter alleges that the proposed transaction would result in telephony-related public interest harms.

153. We conclude that the proposed transaction would not harm competition in any relevant

⁴³⁵ CFA Comments at 15. CFA does not specify what remedies would be appropriate,

⁴³⁶ CFA Comment, at 15-16; *CFA Intermodal Study* at 41-49.

⁴³⁷ EchoStar Comments at 9.

⁴³⁸ *EchoStar-DirecTV Order*. FCC 02-284.

⁴³⁹ Application at 13.

⁴⁴⁰ *Id.*

¹⁴¹ These markets are: Atlanta, Boston, San Francisco, Chicago, Dallas, Denver, Hartford, Jacksonville, Pittsburgh, Portland (Oregon), Richmond, Seattle, Salt Lake City, St. Louis, southern California, and Minneapolis-St. Paul. *Id.* at 23-24.

telecommunications market. Conicast and AT&T Broadband largely compete in separate geographic markets, and, to the extent their service areas overlap, we find no material increase in concentration that would raise the potential of competitive harm. In addition, we find that AT&T Comcast will not be, nor will it be affiliated with, a carrier that possesses market power on the foreign end of any U.S. international route.⁴⁴² Although certain Comcast subsidiaries own or control fixed wireless broadband companies in foreign markets, there is no basis in the record to conclude that any of these companies possesses market power in the provision of facilities or services that are necessary for the provision of U.S. international service.⁴⁴³ The proposed transaction, therefore, does not raise concerns with respect to potential leveraging of foreign market power into the U.S. international services market or require that we condition the international section 214 authorizations being transferred on compliance with our international dominant carrier safeguards.⁴⁴⁴

D. Set-Top Box Issues

154. Some commenters claim the proposed merger will negatively impact the development of a retail consumer market for set-top boxes, *i.e.*, the equipment consumers use to access the services offered over cable systems. For many cable systems, subscribers must lease a set-top box from their cable operator to view scrambled programming and access advanced services such as the digital program tier and impulse pay-per-view. Section 629 of the Communications Act instructs the Commission to adopt regulations that allow manufacturers and retailers to develop equipment incorporating set-top box functionality for consumer retail purchase.⁴⁴⁵ Its purpose is to provide consumers with the benefits of competition in the manufacture and sale of these devices. Section 629 further directs the Commission not to prescribe regulations that would jeopardize the security of the cable system. We find that the merger will not foreclose the development of consumer choices for equipment.

155. In the *Navigation Devices Order*, we adopted rules to implement section 629.⁴⁴⁶ Cable operators must separate out conditional access or security functions from other functions of the set-top box and make available modular security components, also called Point of Deployment modules or "PODs."⁴⁴⁷ The cable industry, through its research and development consortium CableLabs, formed the OpenCable project to develop interface specifications for connecting a POD to set-top box purchased at retail.⁴⁴⁸ According to CableLabs, the OpenCable specifications will allow equipment sold at retail to be portable across cable systems. We are monitoring the development of the commercial availability of set-top boxes and other navigation devices and have commenced a proceeding to review the effectiveness of

⁴⁴² See 47 C.F.R. § 63.09(e) (defining "affiliated" for purposes of the Commission's Part 63 rules that apply to international section 214 authorizations). See also *AT&T International Section 214 Application* at 7; *Comcast International Section 214 Application* at 4.

⁴⁴³ See *Comcast International Section 214 Application* at 4.

⁴⁴⁴ See *Rules and Policies on Foreign Participation in the U.S. Telecommunications Market*, 12 FCC Rcd 23891, 23987, 23991-99 ¶¶ 215, 221-239 (1997). Order on Reconsideration, 15 FCC Rcd 18158 (2000).

⁴⁴⁵ 47 U.S.C. § 549(a)

⁴⁴⁶ *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775 (1998) ("*Navigation Devices Order*").

⁴⁴⁷ 47 C.F.R. § 76.1204

⁴⁴⁸ Cable Television Laboratories, Inc., or CableLabs, is a "non-profit research and development consortium that is dedicated to pursuing new cable telecommunications technologies and to helping its cable operator members integrate those technical advancements into their business objectives." See <http://www.cablelabs.com/about/> (visited Oct. 24, 2002).

our rules.⁴⁴⁹

156. CFA argues that Comcast President Brian Roberts' role as the vice-chair of CableLabs will allow him to influence CableLabs in the development of industry standards.⁴⁵⁰ CFA further contends that AT&T uses its analog set-top box leasing program to subsidize its digital set-top boxes and has an interest in ensuring that the equipment market remains closed.⁴⁵¹ CFA contends that AT&T provides Microsoft preferential treatment for set-top box operating software.⁴⁵² CEA contends that the merger would create "potentially insurmountable obstacles" to the development of a retail market for set-top boxes, and urges the Commission to condition the merger on the Applicants' pledge to comply with the same set-top box standards as those set for competitors.⁴⁵³ Applicants reply that the merger will have no adverse effect on any equipment market.⁴⁵⁴ Applicants contend that the market for MVPD equipment and related software is global and that the merged entity will account for "a small fraction" of all purchases of navigation devices.⁴⁵⁵ In addition, AT&T maintains that CableLabs' decisions are reached by consensus, precluding the ability of any particular entity to influence CableLabs' improperly.⁴⁵⁶ With regard to their relationship with Microsoft, Applicants state that Comcast has reached an agreement to run a limited trial of Microsoft ITV set-top box software ("Set-Top Term Sheet").⁴⁵⁷ Applicants submit that the agreement does not obligate it to a commercial deployment of the software unless several conditions are met.⁴⁵⁸ Even if those conditions are met, they assert, Comcast will not have any obligation to deploy the software to more than 25% of its customer base using this functionality.⁴⁵⁹ They further assert that the Set-Top Term Sheet does not apply beyond the current generation of set-top boxes.⁴⁶⁰ Applicants state that they have an incentive to avoid becoming dependent upon a single set-top box software vendor.

157. **Discussion.** Commenters have not raised any merger-specific concerns regarding harm to the market for set-top boxes. General claims regarding the development of a consumer retail set-top market will be addressed in the navigation devices proceeding. We have rules in place aimed at achieving a retail set-top box market and, as stated above, we continue to monitor developments to evaluate whether progress is being made toward the goal of consumer choice in navigation devices. Accordingly, we need

⁴⁴⁹ *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, 15 FCC Rcd 18199 (2000) ("*Navigation Devices Further Notice*").

⁴⁵⁰ CFA Comments, Appendix B at 5; *see also*, SBC Comments at 23-25 (asserting that the merged entity's relationship to Microsoft will allow it to "dictate the terms on which set-top boxes will operate").

⁴⁵¹ CFA Comments at 24.

⁴⁵² *Id.* at 25.

⁴⁵³ CEA Reply to Opposition at 2. CEA submits that the Applicants also should be required to: 1) pledge to investigate manufacturers' complaints concerning the current CableLabs certification process and work expeditiously to enable self-certification; and 2) disavow those aspects of the POD-Host Interface License Agreement ("PHILA license") that enable cable operators to disable high-definition outputs, home network connections, and recordable interfaces. *Id.* *see also* Statement of Robert A. Perry, Vice President, Mitsubishi Digital Electronics America before the Subcommittee on Antitrust, Business Rights and Competition, Senate Judiciary Committee, April 23, 2002 (appended to CEA Reply).

⁴⁵⁴ Applicants' Reply at 62.

⁴⁵⁵ *Id.*

⁴⁵⁶ *Id.* at 65.

⁴⁵⁷ Application at 86; *see also* note 371, *supra*.

⁴⁵⁸ Applicants' Reply, Coblitz Decl. at ¶ 8.

⁴⁵⁹ *Id.*

⁴⁶⁰ *Id.*

not address this issue in the context of this merger.

158. Finally, we find nothing to link the relationship between the Applicants and Microsoft to any impairment to the development of a consumer set-top box market. Cable operators generally may make agreements regarding the technology contained in the set-top boxes they provide to subscribers as long as such agreements do not compromise support of the open cable standards. Applicants have preserved their ability to use other set-top box in the Set-Top Term Sheet. Accordingly, we decline to condition approval of this merger upon any facet of Applicants' compliance with section 629.

E. Interactive Television

159. The Commission has not previously defined ITV, although it has characterized ITV as a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams.⁴⁶¹ ITV is evolving rapidly, and the services it provides may enable increased viewer control of the television viewing experience by permitting the integration of video and data services – including Internet content - and by allowing real-time interaction with other viewers.⁴⁶² In connection with its review of the AOL Time Warner merger, the Commission issued a *Notice of Inquiry* to consider whether industry-wide rules were needed to address any impediments to the development of ITV services and markets.⁴⁶³ The NOI sought to gather a more complete record on the ITV industry generally and the deployment of ITV services by cable operators, in particular.

160. Commenters are concerned that Applicants will be able to shape the evolution of ITV services or deny competitors access to those services through the use of exclusive agreements. We find these claimed harms speculative and conclude that the merger is not likely to produce public interest harms related to ITV.

161. CFA states that Applicants will be able to determine how competitive and non-discriminatory the market for ITV services will be through Comcast Interactive Capital, a venture capital fund with widespread investments in broadband services, telecommunications, electronic commerce, and entertainment.⁴⁶⁴ Additionally, CFA asserts that Comcast has ordered 300,000 Pace 700 series set-top boxes with integrated cable modems that can support multiple middleware applications. Also, CFA submits that Comcast has an advantage in the emerging VOD marketplace because of its ownership interest in iNDEMAND, a VOD service provider.⁴⁶⁵ This interest, CFA continues, has allowed Applicants to make "substantial inroads" with content suppliers.⁴⁶⁶ CFA suggests that the merger will remove AT&T as an alternative deployment avenue for competitors of iNDEMAND.⁴⁶⁷ In this regard it states that a competitor to iNDEMAND, Diva, has been able to secure VOD deployments with AT&T and suggests that this will no longer be possible after the merger.⁴⁶⁸ RCN complains that Comcast is limiting competitive access to some VOD technologies, such as Worldgate's TV Gateway product, in which

⁴⁶¹ *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321, 1323 ¶ 6 (2001) ("ITV Proceeding").

⁴⁶² *Id.* at 1322 ¶ 1

⁴⁶³ *Id.*

⁴⁶⁴ CFA Comments, Appendix B at 5

⁴⁶⁵ CFA Comments, Appendix B at 6

⁴⁶⁶ *Id.*

⁴⁶⁷ *Id.* at 7.

⁴⁶⁸ *Id.* at 7.

Comcast has a financial interest.” RCN proffers that if the ability of the largest incumbent cable operators to negotiate exclusive arrangements is not constrained, and if that ability were to be exercised with multiple vendors in multiple markets, RCN could “effectively” be “locked out” of the market for new ITV technologies.”

162. CFA believes that relationships between Applicants and others such as MetaTV and Microsoft may impede competition in the ITV market, especially with regard to extent to which competing middleware will be able to utilize the merged firm’s platform.⁴⁷¹ In addition, CFA states that both AOL Time Warner and AT&T principally use Gemstar’s EPG to guide subscribers in the channel selection process.” CFA contends that AOL Time Warner and AT&T Comcast may, through their joint interest in TWE, stifle competition by limiting subscriber access to EPG services other than those offered by Gemstar.”

163. Applicants state that the merger will not harm competitors or consumers with respect to the provision of ITV services.⁴⁷⁴ Applicants explain that Comcast currently offers VOD services over a number of its digital cable systems, and both Comcast and AT&T offer their digital cable customers EPGs. Applicants state that they cannot engage in unfair competition in the provision of ITV services because the combined entity will have less than a 30% share of the U.S. MVPD subscriber base, and it therefore will lack market power in this area.⁴⁷⁵ Applicants also state that since Comcast and AT&T do not compete with each other in the provision of ITV services, the merger will have no adverse effect on competition in this business.⁴⁷⁶ Applicants further state that they have entered into arrangements with a number of unaffiliated ITV providers despite Comcast having a financial interest in certain ITV companies.⁴⁷⁷ These facts, they argue, demonstrate that they are not inclined to discriminate against non-affiliated ITV service providers.

164. In response to concerns about the effects of the merged entity’s relationship with Microsoft on ITV services, Applicants assert that their Set-Top Term Sheet with Microsoft is in the public interest because it will result in a new and better product that would reduce the costs and increase the variety of applications software for set top boxes.⁴⁷⁸ Applicants state that Comcast is under no obligation to deploy the Microsoft ITV platform or middleware unless certain technical, competitive and reasonable business objectives are met. Moreover, under any or all circumstances, Applicants will remain free to test and deploy alternative set top box platforms and middleware.⁴⁷⁹

⁴⁶⁹ RCN Comments at 32-33

⁴⁷⁰ *Id.*

⁴⁷¹ CFA Comments at 25, Appendix B at 6

⁴⁷² See CFA Comments, Appendix B at 6

⁴⁷³ *Id.*

⁴⁷⁴ Application at 84.

⁴⁷⁵ Application at 85. The Applicants argue that DBS, LECs, and terrestrial broadcast television now offer or will offer ITV applications in competition with cable operators. *Id.*

⁴⁷⁶ Application at 84.

⁴⁷⁷ Application at 88 and n.182. Applicants note that Comcast has launched interactive services using **Wink**, despite having invested in RespondTV, and it has entered into a strategic volume purchase agreement for video-on demand systems from Concurrent, notwithstanding Comcast’s equity stake in Concurrent’s rival, SeaChange. *Id.*

⁴⁷⁸ *Id.*

⁴⁷⁹ *Id.* at 88

165. *Discussion.* The record does not indicate that the merger will create or enhance Applicants' incentive or ability to impede technological developments in the emerging ITV market. We therefore conclude that the merger would not create any public interest harm in this particular line of business. As Applicants note, the merged entity will serve fewer than 30% of MVPD subscribers. We agree with Applicants that this would be too small a share to enable the merged entity to exercise market power in any ITV market and, contrary to RCN's speculation, circumscribes its ability to negotiate exclusive arrangements with multiple vendors in multiple markets effectively locking out competitors. Also, Comcast's agreement with Microsoft obligates Comcast to deploy Microsoft middleware in no more than 25% of current generation set-top boxes and, even then, only if several conditions precedent are met.⁴⁸⁰ Moreover, the legal and technical issues involved in the delivery of cable ITV services are being considered in a proceeding of general applicability, now pending before the Commission.⁴⁸¹ Competitive concerns regarding the deployment of ITV, particularly VOD and EPGs, by the cable industry are more suited for resolution in that proceeding. Finally, we cannot agree with CFA that the merger will be responsible for foreclosing AT&T as a deployment platform for VOD providers that compete with INDEMAND. AT&T is already the 44% owner of INDEMAND⁴⁸² and Comcast is an 11% owner.⁴⁸³ Whatever incentives or disincentives the Applicants have to carry VOD competitors to INDEMAND already exist and should not be altered by the merger. Accordingly, this asserted harm is both speculative and not merger-specific.

F. Cross-Ownership Rules

1. Cable/SMATV Cross-Ownership

166. Our rules provide that “[n]o cable operator shall offer satellite master antenna television service (“SMATV”), as that service is defined in § 76.5(a)(2), separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator’s cable system, either directly or indirectly through an affiliate owned, operated, controlled, or under common control with the cable operator.”⁴⁸⁴ Applicants state that neither AT&T nor Comcast expects to own any attributable interest in a broadcast radio or television station, MMDS system, or SMATV system that would implicate the Commission’s cable-broadcast cross-ownership or multiple broadcast ownership restrictions or the cable-MMDS or cable-SMATV cross-ownership restrictions.⁴⁸⁵

167. Although AT&T owns six SMATV systems, it states that none of these will create a cross-ownership issue for the merged entity. Comcast states that it owns one SMATV system in the Hartford, Connecticut, area where an AT&T cable system provides cable service. **Also**, Comcast states that it owns one SMATV system in Lions Creek, Indiana, which is located in the franchise area of an AT&T non-consolidated cable system. Applicants state, however, that “promptly after closing, these SMATV systems will either be sold or integrated into the existing cable franchise (so that they are no longer operated ‘separate and apart’ from the franchised cable service in that area).”⁴⁸⁶ Applicants also state that “although Comcast owns a small number of SMATV systems in territories served by TWE cable systems . . . the Applicants intend to have no attributable interest in TWE at and after the closing of

⁴⁸⁰ Applicants’ Reply, Coblitz Decl. at ¶ 8.

⁴⁸¹ See *ITV Proceeding*, 16 FCC Rcd 1321

⁴⁸² Application at 25.

⁴⁸³ *Id.* at 15.

⁴⁸⁴ 47 CFR § 76.50 l(d).

⁴⁸⁵ Application at 51

⁴⁸⁶ Application at 51-52. n.97.

their merger.”⁴⁸⁷ Based on Applicants’ assertions, and the lack of adverse comments on this issue in the record, we find that Applicants can comply with § 76.501(d), if the above-noted steps are taken. We therefore condition our grant to require that, as of closing, AT&T Comcast shall comply with our cable/SMATV cross-ownership rule.

2. Section 652 - Cable-Telco Buyout Prohibition

168. Our rules provide that “[n]o cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 % financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator’s franchise area.”⁴⁸⁸ Applicants state in that neither AT&T nor Comcast “provides telephone exchange service outside of its respective cable franchise area.”⁴⁸⁹ Applicants also state that neither AT&T nor Comcast “is affiliated with, or has a management interest in, a LEC providing telephone exchange service within the few areas where the two companies have overlapping cable franchises.”⁴⁹⁰ No commenter has challenged these assertions. On this record, we conclude that the proposed merger will not violate section 652.

G. Other Potential Public Interest Harms

169. Prime Communications, Inc. (“Prime”) argues that the proposed transaction would result in harm to local automobile advertising markets.⁴⁹¹ According to Prime, it is “an independent advertising agency that competes directly with AT&T Media Services” in producing cable advertising and purchasing advertising time on cable.⁴⁹² Prime’s customers are “mainly automobile dealers in the Boston” area, and Prime’s web portal service, CableCars.com, competes against AT&T’s service, Vehix.com, for web-based automobile advertising.⁴⁹³ Prime alleges that AT&T is using its “monopoly position” in cable to attempt to eliminate competition in “ancillary business” such as “the provision of local car web sites.”⁴⁹⁴ Specifically, Prime alleges that AT&T – after a failed attempt to purchase Prime IQ, a web-based tool for determining the effectiveness of different types of advertising – has refused to allow Prime to purchase cable television advertising, which, according to Prime, places it at a competitive disadvantage.⁴⁹⁵ In addition, Prime asserts that AT&T has engaged in a number of other allegedly anticompetitive activities, including (1) unlawfully bundling the Vehix.com service with cable advertising, (2) engaging in an illegal price squeeze by “offering Prime’s customers discriminatory below-cost discounts,” (3) leveraging its monopoly power to subsidize the Vehix.com service, and (4) violating the “essential facilities doctrine” by precluding Prime from making direct purchases of cable advertising.⁴⁹⁶

⁴⁸⁷ *Id.* at 52, n.97

⁴⁸⁸ 47 U.S.C. § 572(b)

⁴⁸⁹ Applicants’ June 28, 2002 Response to Document and Information Request at 2

⁴⁹⁰ *Id.*

⁴⁹¹ Prime Reply at 2

⁴⁹² *Id.* at 3.

⁴⁹³ *Id.* According to Prime, AT&T owns 49% of Vehix.com. Letter from John F. Kamp, Wiley, Rein & Fielding, LLP, to Marlene H. Dortch, Secretary, FCC (Jul. 23, 2002) (“Prime Presentation”).

⁴⁹⁴ *Id.*

⁴⁹⁵ *Id.*

⁴⁹⁶ Letter from John F. Kamp, Wiley, Rein & Fielding, LLP, to Marlene H. Dortch, Secretary, FCC (Aug. 23, 2002) (“Prime Aug. 23, 2002. Ex Parte Letter”), at 3-4. Prime also submitted an economic analysis prepared by Dr.

(continued....)

170. Prime argues that, **if** the proposed transaction is consummated, AT&T's allegedly anticompetitive actions "will be expanded into new markets in Comcast's territory."⁴⁹⁷ Asserting that the market here is characterized by "network effects[,] wherein a service's value increases substantially with the addition of new users," Prime argues that the merged entity will be able use its position in the cable market to achieve a dominant position in the Internet automobile advertising market, thereby "magnify[ing] those network effects."⁴⁹⁸ Prime urges **us** to condition the proposed transaction by requiring AT&T to permit all independent advertising agencies to purchase cable advertising on a direct and nondiscriminatory basis, and to unbundle its Vehix.com service from its cable advertising.⁴⁹⁹

171. AT&T responds that Prime's allegations are the subject of pending litigation in federal court and that they should be resolved there.⁵⁰⁰ AT&T also asserts that Prime can and has purchased cable advertising on AT&T's systems through third parties.⁵⁰¹ AT&T claims that "there is no relevant 'cable advertising' market" for it to dominate because cable competes with other media for advertising dollars.⁵⁰² Further, AT&T states that Internet-based automobile advertising is sufficiently competitive to preclude Vehix.com from driving out competition.⁵⁰³ Finally, AT&T argues that the harms alleged by Prime are unrelated to the proposed transaction and should accordingly be dismissed.⁵⁰⁴

172. Even assuming Prime's alleged harms are merger-specific,⁵⁰⁵ we decline to impose the conditions that Prime requests. Although Prime asserts that the on-line automobile advertising market is a "network industry" susceptible to "tipping,"⁵⁰⁶ Prime admits that Vehix.com currently is not the largest

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Michael A. Turner in which opines that AT&T has acted "anticompetitive[ly] and . . . abuse[d] its monopoly power." See Prime Aug. 23, 2002, Ex Parte Letter, Attachment ("Turner Analysis") at 4.

⁴⁹⁷ Prime Aug. 23, 2002, Ex Parte Letter at 5.

⁴⁹⁸ *Id.*

⁴⁹⁹ See Prime Presentation; Prime Aug. 23, 2002, Ex Parte Letter at 7.

⁵⁰⁰ Letter from David L. Lawson, Sidley, Austin, Brown & Wood, LLP, to Marlene H. Dortch, Secretary, FCC (Aug. 1, 2002) at 1.

⁵⁰¹ *Id.* at 2.

⁵⁰² *Id.*

⁵⁰³ *Id.* at 2-3.

⁵⁰⁴ *Id.* at 7.

⁵⁰⁵ Prime's economic analysis suggests that AT&T's incentive to engage in alleged anticompetitive conduct arises from its 49% interest in Vehix.com. See Turner Analysis at 42. Because the merged entity presumably would have the same ownership interest in Vehix.com and therefore the same economic incentives as AT&T with respect to this service, the proposed transaction could create an incentive to spread the alleged anticompetitive conduct to new markets. Prime admits, however, that Comcast also currently bundles its cable advertising with the Vehix.com service, which is one of the allegedly anticompetitive practices that Prime claims occurs in the Boston market. See Prime Presentation. Accordingly, the proposed transaction may have no effect on the potential for such conduct in Comcast service areas.

⁵⁰⁶ Tipping can occur in markets that experience network effects. In that type of market, a service provider's value to its customers is based on the number of customers it has. If a service provider has enough customers, other potential service providers may find it difficult to attract a sufficient number of customers to provide a comparable or even an attractive service. At that point, the market is said to have "tipped" in favor of the dominant provider. See generally *AOL-Time Warner Order*, 16 FCC Rcd at 6613-19 ¶¶ 153-67.

or even the second largest web-based automobile advertiser in the nation.” Prime also indicates that Vehix.com has become a significant national player in the on-line automobile advertising market only within the past two years.⁵⁰⁸ Thus, we would expect that the merged entity may undertake various legitimate means, consistent with the antitrust laws, to promote the Vehix.com service. Prime does not allege that AT&T has engaged in *apert* violation of the antitrust laws, and the record in this proceeding does not support a finding that the relevant product and geographic market is “cable advertising” or that the conduct complained of would in fact constitute an anticompetitive practice in violation of the federal antitrust laws.⁵⁰⁹ Accordingly, we conclude that the merger is not likely to harm the public interest as alleged by Prime, and we reject Prime’s proposed conditions.

V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

173. In addition to assessing the potential public interest harms of this merger, we must consider whether the merger is likely to produce public interest benefits.” We also consider whether those benefits are merger-specific and verifiable,” and we evaluate those benefits on a sliding scale: as the likelihood and magnitude of the potential harm increases, Applicants will be required to demonstrate that the claimed benefits are commensurately likely and substantial.”

174. Applicants claim that the proposed transaction will produce the following public interest benefits:⁵¹³

- Accelerated deployment of facilities-based high-speed Internet service, digital video, and other broadband services, particularly to residential consumers.
- Accelerated deployment of facilities-based local telephone competition, particularly to residential consumers.
- An increased supply of local and regional programming
- Greater competition in the markets for local, regional, and national advertising.

We examine each in turn

A. Accelerated Deployment of Broadband Services

175. **Background.** Applicants assert that the proposed transaction will allow for the provision

⁵⁰⁷ See Prime Presentation: Turner Analysis at 43, 57. Contrary to Prime’s contentions (see Prime Aug. 23, 2002, Ex Parte Letter at 5 n.7), this distinguishes Vehix.com from AOL’s instant messaging service at issue in the *AOL-Time Warner Order*. See 16 FCC Rcd at 6615 ¶¶ 160.

⁵⁰⁸ See Turner Analysis at 43 (indicating two year growth period of Vehix.com service); Prime Presentation (same).

⁵⁰⁹ We expect that the pending federal court litigation between Prime and AT&T will determine whether AT&T’s alleged conduct in the Boston market is unlawful.

⁵¹⁰ *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157; *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd at 18025, 18134-35 ¶ 94 (“*WorldCom-MCI Order*”); *AT&T-TCI Order*, 14 FCC Rcd at 3168 ¶ 13; *AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154; *AOL-Time Warner Order*, 16 FCC Rcd at 6666 ¶ 281.

⁵¹¹ See *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶¶ 157-58.

⁵¹² See *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 256

⁵¹³ Application at 2-4.