

a. AT&T's Acquisition of Control of BellSouth's 2.5 GHz Spectrum
Raises No Competitive Concerns

Clearwire first contends that the merger will cause "AT&T [to] hold enough [2.5 GHz] spectrum to impede promising platforms in that band from providing nationwide broadband services."²⁶⁴ This argument is flawed at every level.

First, even if the 2.5 GHz spectrum represented the only means of offering wireless broadband services—as it patently does not—the merger will not increase concentration of ownership of this spectrum. BellSouth holds 2.5 GHz spectrum in some parts of the southeast, and AT&T holds *no* 2.5 GHz spectrum anywhere. The merger thus will not increase concentration in any area or otherwise constrict the availability of 2.5 GHz spectrum to Clearwire and other competitors—since just as much 2.5 GHz spectrum will be available to others after the merger as was available before the merger.²⁶⁵ To the extent that Clearwire lacks a national footprint, the AT&T/BellSouth merger neither causes nor exacerbates this.

Second, even if Clearwire's complaints about BellSouth's existing 2.5 GHz holdings were properly raised in this merger proceeding, Clearwire is repeating claims that the Commission rejected in the *Sprint/Nextel Merger Order* and that are entirely meritless. The Sprint-Nextel merger was a merger of "the two largest current holders of rights to spectrum in the 2.5 GHz band,"²⁶⁶ and it substantially increased concentration of ownership of 2.5 GHz licenses in some 20 markets, giving Sprint-Nextel over 90% of the 2.5 GHz channels in several

²⁶⁴ Clearwire Pet. at iii.

²⁶⁵ Similarly, while both AT&T and BellSouth hold 2.3 GHz licenses, these licenses do not overlap each other. Indeed, the only overlap of any sorts is in the rural and thinly populated southeastern corner of Orange County, Indiana, where AT&T holds a 5 MHz WCS license and BellSouth holds BRS/EBS spectrum. This overlap plainly is of no competitive significance.

²⁶⁶ *Sprint/Nextel Merger Order* ¶ 147.

markets.²⁶⁷ The Commission there specifically rejected the claim that Clearwire now makes, namely, that “the 2.5 GHz band is intrinsically superior to other spectrum for the provision of wireless services.”²⁶⁸ Instead, the Commission found that “other . . . spectrum should become accessible to competitors,” and “if the 2.5 GHz band is used for the provision of mobile data service, it will be one of many existing and potential inputs into the mobile data services market.”²⁶⁹ And, with specific reference to the 2.5 GHz band, the Commission stated that “it is premature to conclude which spectrum bands will support the services desired in this rapidly evolving market.”²⁷⁰ Indeed, Clearwire itself recognizes this latter fact, for it is considering using spectrum besides 2.5 GHz to provide wireless broadband service.²⁷¹

For the same reason, even if, contrary to fact, the AT&T/BellSouth merger increased concentration of 2.5 GHz spectrum holdings, it could have no conceivable adverse effect on actual and potential competition in wireless broadband services. As the Carlton & Sider Reply Declaration makes clear, the combined company will hold a very small percentage – between 2.4% and 16.1%, depending on the assumptions one makes – of the spectrum available for consumer wireless services, whether CMRS, wireless broadband or both.²⁷²

²⁶⁷ According to exhibits filed with its merger applications, Sprint Nextel holds more than 90% of the BRS/EBS MHz POPs in 16 basic trading areas (“BTAs”), including Detroit and Baltimore. It also holds 99% of the BRS/EBS MHz POPs in two Colorado BTAs.

²⁶⁸ *Sprint/Nextel Merger Order* ¶ 157.

²⁶⁹ *Id.*

²⁷⁰ *Sprint/Nextel Merger Order* ¶ 156. National CMRS carriers, including Verizon Wireless and Sprint Nextel using EV-DO technology, and Cingular using UMTS technology, are already providing mobile wireless broadband services and this growing segment is intensely competitive.

²⁷¹ Clearwire Corp., Form S-1 SEC Registration Statement, at 4 (May 11, 2006), available at <http://www.sec.gov/Archives/edgar/data/1285551/000095012306006136/y20080sv1.htm> (“Clearwire S-1”).

²⁷² The percentages vary depending on the assumptions that underlie the calculations, including whether to include or exclude CMRS, unlicensed spectrum and spectrum that is scheduled or expected to be auctioned.

In addition, as the Commission has found,²⁷³ there are substantial amounts of currently licensed spectrum in other frequency bands that can support the types of services that Clearwire offers. This spectrum includes 18 MHz of Lower 700 MHz spectrum, 6 MHz of Upper 700 MHz spectrum, 5 MHz of 1.6 GHz WCS spectrum, and 30 MHz of 2.3 GHz WCS spectrum, plus the 194-198 MHz of 2.5 GHz BRS/EBS spectrum. In addition, 83.5 MHz of unlicensed 2.4 GHz ISM spectrum and 555 MHz of unlicensed 5 GHz U-NII spectrum are also currently available for use.

Beyond that, additional spectrum suitable for wireless broadband service will be available in the near term. As John Kneuer, Acting Administrator of the National Telecommunications and Information Administration, recently stated, government efforts to make more spectrum available for commercial purposes will mean “lots of capacity” and a market that will soon be “awash in competition.”²⁷⁴ The Commission will auction 90 MHz of 1.7-2.1 GHz AWS spectrum in August 2006, 30 MHz of Upper 700 MHz spectrum in early 2008, and 30 MHz of Lower 700 MHz spectrum in 2008 or 2009. An additional 40 MHz of AWS spectrum also is planned for auction. The Commission is also finalizing rules for the unlicensed use of 50 MHz at 3.65-3.7 GHz, and the Commission is working actively to improve the usefulness of existing spectrum for broadband services. For example, the Commission is expediting the development of testing criteria for devices in the 5 GHz band.²⁷⁵

The wide range of spectrum choices available to wireless broadband providers is confirmed by the wide range of carriers’ wireless plans. QUALCOMM’s subsidiary, MediaFLO

²⁷³ *Sprint/Nextel Merger Order* ¶ 156.

²⁷⁴ Lynn Stanton, *Verizon’s Tauke Warns of Vagueness of Net Neutrality Language*, TR Daily, May 9, 2006.

²⁷⁵ Howard Buskirk, *FCC Pushing for Fast Action on 5 GHz Testing Procedures*, Comm. Daily, May 5, 2006.

USA, Inc., plans to use its Lower 700 MHz spectrum to operate a nationwide mediacast network to deliver high-quality video and audio programming to wireless subscribers.²⁷⁶ Aloha Partners, which also holds Lower 700 MHz spectrum, has joined with satellite operator SES Americom to test-market mobile TV through a new subsidiary, Hwire, using the digital video broadcasting-handheld (“DVB-H”) platform.²⁷⁷ Polar Communications, a rural telco, is using its Lower 700 MHz spectrum to provide mass market wireless broadband services in North Dakota, as is IdeaOne, a CLEC in North Dakota.²⁷⁸ Agri-valley is doing the same thing in Michigan.²⁷⁹ Crown Castle’s subsidiary, Modeo, is using its 1.6 GHz WCS spectrum to offer a DVB-H service that will have a high-quality network featuring 10+ video channels and 24+ audio channels.²⁸⁰ And thousands of Wireless Internet Service Providers (“WISPs”) use unlicensed 2.4 GHz and 5.8 GHz spectrum to provide wireless Internet access.²⁸¹

²⁷⁶ Dr. Paul E. Jacobs, QUALCOMM Annual Stockholder Meeting Presentation (Mar. 7, 2006) http://files.shareholder.com/downloads/QCOM/32794915x0x33470/9c0c2390-c334-4993-b2f3-6ced7e48519e/pj_stockholder.pdf; Jo Best, *Verizon Wireless Signs Up for Media FLO*, silicon.com, Dec. 1, 2005, <http://networks.silicon.com/mobile/0,39024665,39154746,00.htm>.

²⁷⁷ Howard Buskirk, *Aloha will Explore using 700 MHz Spectrum for TV on Cellphones*, Comm. Daily, Apr. 25, 2006.

²⁷⁸ Press release, Polar Comm’cns, *Vyyo Launches 700 MHz Solution for US and International Markets* (May 6, 2004), *available at* <http://www.polarcomm.com/pdf/0506/04.pdf>; Press Release, Vyyo Inc, *IdeaOne Group Deploys Vyyo Solution for Delivery of Broadband to Rural Customers* (July 26, 2005), *available at* http://phx.corporate-ir.net/preview/phoenix.zhtml?c=120942&p=irol-newsArticle_print&ID=734856&highlight=-.

²⁷⁹ Press Release, Vyyo Inc., *Agri-Valley Services Deploys Vyyo; 700 MHz (VHF) Solution in Michigan* (June 22, 2004), *available at* <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=104&STORY=/www/story/6-22-2004/0002197542&EDATE=>.

²⁸⁰ Introduction to Crown Castle, *available at* http://www.crowncastle.com/investor/presentations/CCI_Profile.pdf; Crown Castle Int’l Mobile Media Presentation (Dec. 2005), <http://www.crowncastle.com/investor/presentations/investorsDay2005/MichaelSchueppert.pdf>.

²⁸¹ See License Exempt Wireless Internet Service Provider (WISP) Hurricane Katrina Disaster Relief Assistance, *available at* <http://www.broadbandwirelessreports.com/pressreleases/files/FCC%20Briefing%2009152005.pdf>.

Finally, while the Commission's job is to protect the public interest—not the private interests of individual competitors—Clearwire's argument is flawed even on its own terms. Clearwire stops well short of asserting, much less demonstrating, that it could not provide broadband services using 2.5 GHz (or other) spectrum that is not held by BellSouth. Indeed, in Atlanta, which is the city in BellSouth's ILEC service territory where Clearwire says that BellSouth has the most 2.5 GHz spectrum, Clearwire already has at least 24 MHz of 2.5 GHz spectrum.²⁸² And in other cities where Clearwire claims that BellSouth's 2.5 GHz spectrum holdings threaten competition,²⁸³ Clearwire not only holds substantial spectrum but is currently providing service.²⁸⁴

In any event, the suggestion that Clearwire could not be an effective “national” competitor with such limited gaps in its footprint borders on the frivolous. All wireless carriers fill in their footprints over time and rarely achieve 100% coverage. There are many successful regional carriers that do not even seek nationwide coverage.²⁸⁵ And the reality is that Clearwire already has achieved a very broad footprint. Even though Clearwire was founded less than three years ago,²⁸⁶ it is now the second largest holder of 2.5 GHz spectrum in the United States behind only Sprint Nextel (and well ahead of BellSouth),²⁸⁷ with Clearwire's licenses covering

²⁸² A Clearwire subsidiary, Fixed Wireless Holdings, LLC, is the licensee for WHT664, which is the Channel Group F license in Atlanta.

²⁸³ Clearwire Pet. Ex. 1.02 (claiming impact on competition in Jacksonville and Daytona Beach).

²⁸⁴ See Clearwire Services Areas Coverage Map, http://www.clearwire.com/store/service_areas.php.

²⁸⁵ For example, Cricket does not have a national footprint. See Cricket Coverage Map, <https://www.mycricket.com/coverage/>.

²⁸⁶ Clearwire S-1 at 1.

²⁸⁷ *Id.* (“In the United States we use spectrum in the 2.495 to 2.690 Gigahertz, or GHz, band, and we believe that we have the second largest spectrum position in this band in the United States”).

157 million people.²⁸⁸ Indeed, Clearwire says that its “[s]trong [s]pectrum [p]osition” is one of its “[c]ompetitive [s]trengths.”²⁸⁹ These broad spectrum holdings have already allowed Clearwire to offer services in markets with nearly 5 million people and win the business of nearly 100,000 customers.²⁹⁰

In short, this merger does not affect the availability of spectrum that can be used to provide broadband wireless services. The merger thus has no possible adverse effect on competition in wireless broadband services, much less on competition in the larger consumer broadband market where emerging wireless broadband services will merely supplement the array of existing options provided by cable incumbents, ILECs, cellular and PCS carriers, satellite services, and electric utilities and other providers. The Commission should reject Clearwire’s attempts to manipulate the merger process to serve its own private business interests.

b. The Merger Will Not Give AT&T the Incentive or Ability To “Warehouse” 2.5 GHz Spectrum

Clearwire also seeks divestiture of this spectrum on the theory that the merged company “will have the incentive to warehouse or otherwise use spectrum at 2.5 GHz to avoid losing business in the services that would ride on competing independent broadband platforms.”²⁹¹ This is nonsense, for the merger will have no effect on the “incentive” of the merging companies, which is to use this valuable spectrum, for example, to offer fixed wireless broadband services to

²⁸⁸ Clearwire continues to acquire additional 2.5 GHz spectrum - this spring, for example, Clearwire agreed to acquire Winbeam, which holds 2.5 GHz spectrum in Maryland, Pennsylvania, New York and Virginia. Susan Rush, *Clearwire Expands Footprint*, Wireless Week, Apr. 21, 2006, <http://www.wirelessweek.com/article/CA6326992.html>. Clearwire also is swapping spectrum with Sprint Nextel, trading spectrum in nine middle market cities for spectrum in 61 mostly rural areas. *Id.*

²⁸⁹ Clearwire S-1 at 3.

²⁹⁰ Clearwire Pet. at 4.

²⁹¹ *Id.* at iii, 17.

rural and other customers that cannot be reached by DSL, as well as to offer customers the ability to obtain broadband access outside their offices and homes in places where wireline service is not feasible.

To support its claim that the merger will create incentives to warehouse spectrum, Clearwire asserts that the combination of the non-overlapping 2.3 GHz spectrum that AT&T and BellSouth own will give the merged company the ability to use that spectrum to offer “WiMax-class service” nationally and that this will somehow create incentives for the merged company to “warehouse” 2.5 GHz spectrum in order to block competitors from providing services that compete with AT&T’s 2.3 GHz services.²⁹² There are numerous problems with this claim. Many of AT&T’s and BellSouth’s existing 2.3 MHz licenses are in the C and D blocks, which, due to unresolved regulatory issues, are subject to interference from Digital Audio Radio Service terrestrial repeaters (*i.e.* the ground-based antennas that retransmit signals from Sirius and XM Radio satellites). Such interference is especially intense in downtown areas where there are numerous such repeaters to address poor direct satellite reception caused by tall buildings. Moreover, unlike 2.5 GHz (and even 3.6 GHz), no standards “profile” for WiMax equipment has even been tendered for 2.3 GHz. Since standardization, and the resultant low consumer equipment prices, have been a key to the success of WiFi, the head start held by 2.5 GHz WiMax operators in the standards and equipment development process is a substantial competitive benefit. Further, the narrow amounts of bandwidth associated with many of the combined company’s 2.3 GHz spectrum licenses would constrain its ability to support a robust and commercially viable mobile or fixed broadband data service under current conditions.

²⁹² *Id.* at 2-3, 8-9, 14-15.

In any event, Clearwire's argument simply repeats claims that the Commission has already considered and rejected in industry-wide rulemakings addressing the appropriate use of 2.3 GHz and 2.5 GHz spectrum. Specifically, in those proceedings the Commission considered a broad range of arguments concerning the advantages and disadvantages of allowing ILECs and CMRS providers to acquire such spectrum, and concluded that permitting ILECs and CMRS carriers to hold 2.3 GHz and 2.5 GHz spectrum would not threaten intermodal competition.²⁹³ The Commission there recognized that ILECs that also provide CMRS services have multiple possible uses of this spectrum to benefit consumers. As the Commission held in the *Sprint/Nextel Merger Order*, a merger proceeding is no place to revisit determinations made in that context.²⁹⁴

Beyond that, Clearwire's unsupported assertions ignore the reality that AT&T and BellSouth are not warehousing spectrum today. Both AT&T and BellSouth have been using wireless broadband spectrum in innovative ways to serve customers. For example, notwithstanding the substantial regulatory uncertainties concerning these spectrum bands,²⁹⁵

²⁹³ See, e.g., *In re Amendment of the Commission's Rules To Establish Part 27, the Wireless Communications Service ("WCS")*, Report and Order, 12 FCC Rcd. 10785 (Feb. 19, 1997) (after a rulemaking in which in 55 parties filed comments and 38 filed reply comments, the Commission concluded that there should be no restrictions on WCS license holding besides foreign ownership); *In re Amendment of Parts 1, 21, 23, 74 and 101 of the Commission's Rules To Facilitate the Provision of Fixed and Mobile Broadband Access, Educational and Other Advanced Services in the 2150-2162 and 2500-2690 MHz Bands*, Report and Order and Further Notice of Proposed Rulemaking, 19 FCC Rcd. 14165, ¶¶ 172-73 (July 29, 2004) ("*Broadband Access Facilitation Order*") (after a rulemaking in which 61 parties filed comments, 65 filed reply comments, and 116 filed ex parte comments, the Commission concluded that there should be no restrictions on BRS license holders apart from cable companies providing multichannel video services).

²⁹⁴ See *Sprint/Nextel Merger Order* ¶ 162 ("in the BRS/EBS proceeding, the Commission specifically raised the issue of whether restrictions were necessary for the 2.5 GHz band and determined, after a notice and comment period, that such limits were not in the public interest").

²⁹⁵ The 2.5 MHz band has been in a state of regulatory flux for years, as its use migrated from in-school instructional uses and wireless cable to broadband service, both commercial and educational. See *Broadband Access Facilitation Order* ¶¶ 9-20. As the Commission has

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AT&T is developing and refining WiMax and other fixed wireless technologies as potential solutions for delivering broadband services to its hard-to-reach, in-region customers.²⁹⁶ As AT&T's Chairman and CEO recently said, "A telecommunications market where just 'most' have access to broadband and other new technologies isn't good enough in today's world."²⁹⁷ To that end, AT&T has been using wireless spectrum to bring broadband services to remote rural and other areas to complete the DSL footprint. Thus, AT&T has launched wireless broadband service in Girdwood, Aniak, and Northway, Alaska, and in Frisco, McKinney, Prosper, Centennial, and Little Elm, Texas, and will soon be doing so in Red Oak and Midlothian, Texas, and Pahrump, Nevada. AT&T also has been testing fixed wireless technology in several locations.²⁹⁸

BellSouth has also been active, commercially launching wireless broadband systems using its 2.3 GHz and 2.5 GHz spectrum in six primarily rural or disaster-stricken areas: Palatka, Florida; Deland, Florida; Athens, Georgia; Gulfport, Mississippi; Biloxi, Mississippi; and New

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recognized, the band plan for the 2.5 GHz band is currently in the middle of a multi-year transition to a new band plan that will not end before October 2009 at the earliest. *Sprint/Nextel Merger Order* n.329. See also *Broadband Access Facilitation Order* ¶ 103. As noted, the 2.3 GHz band has been negatively affected by a lack of permanent rules for DARS terrestrial repeaters, which can potentially interfere with WCS and the lack of equipment. *In re Request of AT&T, Inc., BellSouth Corp., Comcast Corp., NextWave Broadband Inc., NTELOS, Inc., Sprint Nextel Corp., Verizon Labs Inc., and WaveTel NC License Corp. for Limited Extension of Deadline for Establishing Compliance with Section 27.14 Substantial Service Requirement*, WT Docket 06-102 (Mar. 22, 2006).

²⁹⁶ Letter from Joan Marsh, AT&T, to Marlene H. Dortch, FCC, CC Docket No. 06-74 (May 9, 2006).

²⁹⁷ Speech of Edward Whitacre, Chairman and CEO, AT&T Inc., to the Detroit Economic Club, (May 8, 2006).

²⁹⁸ See Press Release, AT&T Inc., AT&T Initiatives Expand Availability of Advanced Communications Technologies (May 8, 2006), available at: <http://att.sbc.com/gen/press-room?pid=5097&cdvn=news&newsarticleid=22272>.

Orleans, Louisiana.²⁹⁹ BellSouth has announced plans to expand its offering of this service to additional rural communities in Mississippi, Kentucky, Tennessee, and Georgia.³⁰⁰

Applicants' increasing use of this spectrum should not be surprising, because Clearwire's warehousing argument makes no business sense. The provision of broadband services is intensely competitive. As shown above, there are many different technologies and wireless spectrum options available. Numerous unaffiliated providers will use their own spectrum (or other technologies) to compete fiercely with the merged firm, regardless of whether the merged firm attempts to make productive use of the spectrum or not. Hence, any failure to use the spectrum would simply leave the merged firm that much more susceptible to competitive losses, even as it irrationally wasted a potentially valuable asset.³⁰¹ In sum, there is no basis for the wireless divestitures that Clearwire and others seek.

2. The Merger Will Not Reduce Internet Backbone Competition

AT&T has a Tier 1 Internet backbone; BellSouth does not. The proposed merger thus will neither reduce the number of Tier 1 Internet backbone providers ("IBPs") nor alter the relative balance among those providers such that anticompetitive "de-peering" would be possible. For these reasons, the Commission's findings of no anticompetitive effects for Internet backbone and related services in the *SBC/AT&T Merger Order* are fully applicable here as well.

²⁹⁹ See Press Release, BellSouth Corp., BellSouth Launches Wireless Broadband Service in DeLand, Fla. (Jan. 19 2006), available at http://bellsouth.mediaroom.com/index.php?s=press_releases&item=2797&printable (relating to 2.3 GHz spectrum).

³⁰⁰ *Id.* In addition, BellSouth has commitments to use its EBS licenses to transmit educational content for educational institutions such as Emory University, Atlanta Interfaith Broadcasting, and the Atlanta Public Schools to sites in the Atlanta area. If BellSouth were required to divest the BRS/EBS licenses, these educational programming services could face substantial disruption.

³⁰¹ Carlton & Sider Reply Decl. ¶¶ 79-83.

Of the three commenters that even discuss Internet backbone issues, only one, TWTC, attempts any Tier 1 backbone competition argument.³⁰² TWTC makes three arguments, none of which withstands scrutiny: (1) that AT&T's backbone share may exceed the 37% figure that DOJ regarded as close to a potential tipping point in *WorldCom/Intermedia*; (2) that AT&T "failed" to include business customers in calculating its post-merger share of broadband "eyeballs," and (3) that the impact of conversion of circuit-switched voice traffic to VoIP could be significant.³⁰³ As shown below, even assuming *arguendo* that a 37% share would raise "tipping" concerns (and it would not), the post-merger AT&T does not approach that level by *any* of the metrics of eyeballs, traffic, or revenue, properly measured, and voice conversion from TDM to IP does nothing to change that. As the Commission found less than one year ago, the market for Tier 1 Internet backbone services is "both competitive and dynamic."³⁰⁴ The combination of AT&T and BellSouth will not change that.

a. AT&T/BellSouth Cannot Engage in Anticompetitive De-Peering

It is important to keep in mind the economic foundation upon which prior Internet backbone merger competition concerns were based – whether the merger creates an Internet backbone that is so much larger than its rivals that a strategy of de-peering is profitable. As explained in greater detail in the Reply Declaration of Dr. Marius Schwartz ("Schwartz Reply Declaration"), a credible threat to de-peer requires that the de-peering backbone be able to create

³⁰² Compare TWTC Pet. at 25-32 with Access Point Pet. at 29-34, CFA Pet. at 5-8; Cooper & Roycroft Decl. at 57-62. Access Point's complaint should be dismissed out of hand, as it does not suggest any harm to competition among Tier 1 providers, only that it will have to continue to pay for peering/transit while post-merger BellSouth will not. CFA's Internet discussion describes backbone market structure, but casts its arguments as net neutrality issues, which we address in Section III.E.3 below.

³⁰³ TWTC Pet. at 25-32.

³⁰⁴ *SBC/AT&T Merger Order* ¶ 124.

a “black hole” in the Internet cloud by denying a rival access to a unique base of customers who can only be reached through the de-peering backbone, and cannot easily switch backbone providers. The theory of global de-peering requires as a necessary, but not sufficient, condition that the de-peering Internet backbone have a share of these unique customers in excess of 50%.³⁰⁵ By any measure, AT&T and BellSouth fall well short of that threshold.

(i) Broadband Subscriber Data

The closest proxy to an installed base of unique customers is AT&T’s and BellSouth’s DSL broadband customers (“eyeballs”).³⁰⁶ As measured by this standard, the impact of this merger is insignificant: BellSouth accounts for only about 7% of these eyeballs, and the combined firm would still be under 23%. Over 75% of all eyeballs will remain with other large broadband ISPs, and more than half will remain with the largest cable broadband ISPs.³⁰⁷ As the FCC found in the *SBC/AT&T Merger Order*, these cable ISPs can easily shift their eyeballs among backbones should any IBP attempt to engage in anticompetitive behavior.³⁰⁸

³⁰⁵ Reply Declaration of Dr. Marius Schwartz, at ¶¶ 6-8 (“Schwartz Reply Declaration”). Note that the 37% figure cited by TWTC from *Intermedia* was for WorldCom’s share of traffic in a universe of 15 backbones surveyed by DOJ. See TWTC Pet. at 28 (*citing* Competitive Impact Statement, *United States v. WorldCom, Inc.*, Civ. A. No. 1:00CV02789 (D.D.C. Dec. 21, 2000) at 9-10). AT&T’s lower post-merger share of traffic is in a limited eight-firm Tier 1 universe, and would, of course, be lower still in a 15-firm universe comparable to what DOJ utilized in *Intermedia*.

³⁰⁶ Schwartz Reply Decl. ¶ 11.

³⁰⁷ *Id.* ¶ 12; Public Interest Statement at 103.

³⁰⁸ *SBC/AT&T Merger Order* ¶ 127. In addition, the relative shares of broadband providers are subject to continuing pressure. Competition between telephone and cable companies for broadband customers is intense, and new and existing companies are also expanding into the provision of broadband services, primarily through wireless technologies. These companies will further decrease the proportion of “eyeballs” served by the telcos and cable companies. See FCC, *High-Speed Services for Internet Access: Status as of June 30, 2005* (Apr. 2006) (“*FCC Broadband Report*”) at Table 15 (showing that over 88% of U.S. zip codes are served by two or more broadband providers, and that almost 60% are served by four or more providers).

TWTC does not dispute these numbers, but asserts a need for data on the merging parties' share of medium and large business lines that they will "control" after the transaction.³⁰⁹ This information is not relevant to the economic analysis for two reasons: (a) such customers, especially the larger ones, are likely to be "multi-homed" on multiple backbones, and thus not be unique customers of AT&T or BellSouth, and (b) "control" over such customers is illusory given that dedicated Internet access is highly competitive, and switching costs are low.³¹⁰ In any event, the relative extent of Applicants' share of *business* Internet connectivity is subsumed in the analysis of the traffic data, as reflected in the Schwartz Reply Declaration.³¹¹ There is no need for further data, as the record evidence clearly supports the finding that there is no competitive issue.³¹²

(ii) Traffic and Revenue Data

Since no opponent suggests that AT&T's post-merger share of broadband eyeballs is anywhere near sufficient to warrant further scrutiny, they are left to assert that other metrics—traffic and revenue—should be used.³¹³ But the merged company's share using these less reliable metrics is still far too low to raise any plausible concern, and opponents can claim otherwise only by vastly overstating Applicants' shares.

Traffic is an imprecise measure of customers uniquely served by an IBP for several reasons. First, high traffic customers (DIA and ISP) often are served by multiple IBPs, and thus are not uniquely accessible through a single IBP. Second, the shift of even a small number of

³⁰⁹ TWTC Pet. at 31.

³¹⁰ *SBC/AT&T Merger Order* ¶¶ 73, 127, 128.

³¹¹ Schwartz Reply Decl. ¶¶ 14-16 and Table 1.

³¹² *SBC/AT&T Merger Order* ¶ 137 (combined SBC/AT&T and Verizon/MCI share of eyeballs of under 30% not a competitive concern).

³¹³ TWTC Pet. at 29, 31-32; Cooper & Roycroft Decl. at 58-59.

large customers to a competing IBP can radically alter traffic shares.³¹⁴ As the Commission noted in the *SBC/AT&T Merger Order*, there are no significant barriers to cable companies and other ISPs shifting millions of customers' Internet traffic to other backbones, which can result in a sea change in the IBPs' relative shares of traffic carried.³¹⁵

But even using traffic data as a snapshot of the relative size of a backbone, the combined share here is well below the levels required for any plausible concern about global de-peering. According to RHK Research data, as of the fourth quarter of 2004, legacy AT&T carried approximately 12.6%, and legacy SBC carried approximately 5.8%, of North American Internet traffic.³¹⁶ Utilizing additional data from the first part of 2006, the parties have calculated that BellSouth's regional backbone carried less than 2% of North American Internet traffic. Given the extremely small increment to AT&T's traffic represented by the addition of BellSouth's regional traffic, and the unconcentrated nature of this market, there is simply no basis to conclude that the merger would "tip" the market to one in which AT&T/BellSouth could threaten global de-peering. Even limiting the traffic universe to just Tier 1 IBPs, the resulting share for AT&T after the merger of less than 30% (which includes both residential and business "eyeballs") would still be very far below both the relevant tipping point of a 50% share and even below TWTC's 37% figure.³¹⁷

Nor do the revenue data provide any refuge, as this argument³¹⁸ relies upon flawed data to reach an erroneous conclusion. While the Commission in the *SBC/AT&T Merger Order* cited

³¹⁴ Schwartz Reply Decl. ¶ 14.

³¹⁵ *SBC/AT&T Merger Order* ¶¶ 127, 135, n.405.

³¹⁶ Schwartz Reply Decl. ¶ 15 and Table 1.

³¹⁷ Schwartz Reply Decl. ¶ 16 and Table 1.

³¹⁸ TWTC Pet. at 29, n.45 citing *SBC/AT&T Merger Order* ¶ 135 (describing the 40% as a "moderate share").

revenue numbers from third party sources submitted by the parties, it did so without endorsing revenue as the correct, or even the best, measure of an IBP's market position.³¹⁹ As Dr. Schwartz explains in detail, from the information available in this record, it is clear that the third party revenue data, and, in particular, the data on which TWTC and the Cooper & Roycroft Declaration rely, greatly overstate the revenues of the merging parties.³²⁰ When Applicants' actual revenue numbers are used, their post-merger, Tier 1 revenue share is about 29%, which is more consistent with both their share of traffic and eyeballs, and far below the relevant threshold of concern.³²¹

Even accurately measured revenues, however, are a poor indicator of relative IBP market shares because of the manner in which Internet access is priced.³²² Large ISPs (those with the greatest number of end users or traffic) often receive substantial discounts in their purchases of Internet backbone services relative to the prices paid by smaller ISPs and individual consumers. Therefore, revenue shares underemphasize the relative size and importance of an IBP with a high proportion of large ISP customers, and overemphasize an IBP with a higher proportion of smaller ISPs and individual consumers, due to the higher per-unit prices paid by these end

³¹⁹ *SBC/AT&T Merger Order* ¶ 123, n.363. In fact, the Commission expressly found that “no complete and reliable data sources are available to measure the relative strength of Internet backbone providers.” *Id.* at ¶ 122.

³²⁰ Schwartz Reply Decl. ¶¶ 19-22. There are likely a number of reasons for these inaccuracies in the revenue data presented. First, AT&T and BellSouth do not publish this revenue information, nor is it otherwise made publicly available. In addition, because AT&T and BellSouth both commonly sell Internet backbone services in connection with other bundled non-Internet backbone services, it would be virtually impossible for any third party to independently calculate these revenues.

³²¹ *Id.* at ¶ 23 and Table 2.

³²² *Id.* ¶¶ 17-18.

users.³²³ Absent the ability to control for the variations in the characteristics of the customers served by each Tier 1 Internet backbone provider, the IDC revenue information relied upon by merger opponents is not a reliable indicator of the competitive strength of those companies.

In the *SBC/AT&T Merger Order*, the Commission concluded its analysis of global de-peering by stating:

[W]e agree with the Applicants that the proposed merger is unlikely to create a single dominant Tier 1 Internet backbone provider with a market share that is overwhelmingly disproportionate to its rivals, which was the key concern in prior backbone mergers. . . . Peering and de-peering decisions are driven by a backbone's incentives to maximize network efficiency and lower interconnection costs, and we do not see how the proposed merger would materially alter this calculus.³²⁴

For all of the foregoing reasons, the Commission's prior conclusions apply with equal force here.

b. A Combined AT&T/BellSouth Lacks Sufficient Installed Base To Engage in Targeted De-Peering

Opponents also argue that they (or their Tier 1 backbone providers) will be selectively de-peered by the merged firm, because AT&T/BellSouth will gain a sufficient increase in market share from this merger to alter the competitive analysis just completed by the Commission in *SBC/AT&T*.³²⁵ These arguments are not credible on either the economic theory of competitive harm, or on the facts before the Commission.

As the Commission found, "peering and de-peering decisions are driven by a backbone's incentives to maximize network efficiency and lower interconnection costs," not by the relative

³²³ *Id.* In the IDC revenue data, for example, Level 3 is listed as having only \$283 million in upstream transit and DIA revenue, a mere 25% of the revenues listed by IDC for legacy AT&T, yet at the same time its share of Internet traffic exceeded legacy AT&T's share. *Id.* ¶ 19 and Tables 1 and 2.

³²⁴ *SBC/AT&T Merger Order* ¶¶ 124, 129.

³²⁵ *E.g.* TWTC Pet. at 29-30.

amount of traffic carried by the networks.³²⁶ In fact, AT&T historically peered with IBPs that were one tenth its size (as measured by their estimated total Internet traffic).³²⁷ Here, as in the SBC/AT&T merger, the parties' combined market share will remain moderate, and there will remain a sufficient number of large rival Tier 1 IBPs, so there is no basis for concern that this merger will result in any change in the existing competitive dynamic.

Further, as the Commission noted, the ability of customers to change IBPs provides a powerful check against any potential strategy of targeted degradation and de-peering, since the combined company would suffer a loss of competitiveness against all of the other IBPs that continue to peer with both it and the targeted carrier.³²⁸ Moreover, the targeted carrier would likely become a customer of one of the other Tier 1 IBPs, thereby strengthening that carrier relative to AT&T/BellSouth.³²⁹ For these reasons, the merger will not create any incentive for AT&T after the merger to engage in targeted degradation or de-peering.

c. Conversion of Voice Traffic Does Not Alter The Analysis

TWTC suggests that conversion of voice traffic to VoIP could somehow alter the Commission's prior analysis that the backbone market is "both competitive and dynamic."³³⁰ The facts do not support any such concern for several reasons: (1) voice traffic as IP is not bandwidth intensive, so converting circuit-switched voice to IP does not materially increase total

³²⁶ *SBC/AT&T Merger Order* ¶ 129.

³²⁷ *See Schwartz Reply Decl.* ¶ 29.

³²⁸ *SBC/AT&T Merger Order* ¶¶ 129, 136 n.408. If an IBP were to engage in a strategy of targeted de-peering, and thereby degrade the performance of its own network relative to that of other non-targeted IBPs, there is no evidence that its subscribers would remain loyal, rather than defect to one of the many alternatives that would continue to offer full connectivity. *Id.* ¶ 129. The market for Internet access services is intensely competitive, and there are an increasing number of competing broadband alternatives. *See Public Interest Statement at 108-09; Schwartz Reply Decl.* ¶¶ 53-57.

³²⁹ *See SBC/AT&T Merger Order* ¶¶ 127, 129.

³³⁰ *Id.* ¶ 124. *See TWTC Pet.* at 31.

backbone traffic; (2) the selection of the backbone to be utilized for VoIP traffic is made by the broadband provider, and as the parties have shown, post-merger they will be the broadband provider to less than 23% of broadband customers, leaving more than 75% of all potential voice conversion traffic as potential traffic on other backbones, and (3) for the foreseeable future, VoIP traffic will be terminated via the PSTN, which will therefore remain a competitive bypass alternative, and a constraint on backbone providers' competitive behavior. Nothing about the conversion of voice to IP implicates the *relative* share of Tier 1 Internet Backbone traffic that the post-merger AT&T will carry.

3. The Commission Should Not Impose Any So-Called "Net Neutrality" Conditions on this Merger

The Commission should rebuff the demands of merger opponents to impose so-called "net neutrality" conditions on the merger. Opponents offer nothing more than conclusory assertions – without any economic or other analytical explanation – as to how this transaction could lead to anticompetitive Internet behavior.³³¹ Their demands are thus unrelated to merger-specific effects and have no place in a merger proceeding.³³² Moreover, there is nothing

³³¹ See Comments of Access Integrated Networks; Access Point Pet.; TWTC Pet.; TWTC Pet., Declaration of Graham Taylor ("Taylor Decl."); MSVS Comments; Comments of Georgia Public Service Commission; New Jersey Ratepayer Advocate Comments; Baldwin & Bosley Decl.; CDD Pet.; Petition to Deny of Consumer Federation of America, *et al.*; Cooper & Roycroft Decl.; Petition to Deny of the Concerned Mayors Alliance (June 5, 2006) ("CMA Pet.").

³³² See *SBC/AT&T Merger Order* ¶ 55; see also *AT&T/Comcast Merger Order* ¶ 31 (2002); *In re Applications of S. New England Telecomms. Corp. & SBC Commc'ns Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, 21306, ¶ 29 (1998). It is obvious to even the most casual observer that "net neutrality" issues are part of an on-going policy debate, quite apart from this proceeding. For example, these issues have been the subject of numerous congressional hearings, in which a wide array of industry representatives and other parties have participated, and they are the subject of pending legislation. They are a perfect illustration of why the Commission has held that industry-wide issues should be addressed in industry-wide proceedings, both to ensure the broadest participation and to ensure that any change from the status quo is evenly applied. See *SBC/AT&T Merger Order* ¶ 55; *In re Applications of S. New England Telecomms. Corp. & SBC Commc'ns Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 21292, 21306, ¶ 29 (1998).

“neutral” about imposing conditions only on AT&T³³³ and not on the cable companies and other broadband providers. Impairing AT&T’s ability to compete in this way would conflict with the Commission’s *Wireline Broadband Order*, which leveled the regulatory playing field between DSL and cable modem services for the competitive benefit of consumers.³³⁴

So-called “net neutrality” rules also would be bad public policy. A quote offered by one of merger opponents is telling: “There is no consensus on precisely what ‘Network Neutrality’ means – and thus no consensus on what rules are required to achieve it.”³³⁵ Merger opponents nevertheless would have the Commission abandon its long-standing “hands off” policy and regulate the Internet based on principles that they cannot articulate. As explained in the Schwartz Reply Declaration, rather than moving down the path of regulating the Internet in this proceeding, the Commission should leave the further evolution of Internet business models in the first instance to the competitive marketplace.³³⁶

a. The Merger Will Have No Effect Upon the Merged Companies’ Incentives or Abilities to Engage in Anticompetitive Behavior

There is no merger-specific effect that could justify imposing so-called “neutral” regulatory requirements upon the merged company. Merger opponents’ attempts to find a merger-specific connection amount to only conclusory assertions that are easily dispensed with:

³³³ AT&T also notes that, in connection with the SBC/AT&T merger, it has accepted, for a period of two years, to “conduct business in a manner that comports with the principles set forth in the FCC’s Policy Statement, issued September 23, 2005 (FCC 05-151).” *SBC/AT&T Merger Order*, Appendix F.

³³⁴ *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (Sept. 23, 2005) (“*Wireline Broadband Access Framework Report*”), appeal pending sub nom. *Time Warner Telecom v. FCC*, Civ. A. No. 05-4769 (D.C. Cir.).

³³⁵ See Baldwin & Bosley Decl. ¶ 220 (quoting George S. Ford *et al.*, Phoenix Center for Advanced Legal & Economic Public Policy Studies, *Net Neutrality and Industry Structure* at 2, (Apr. 2006) (“*Phoenix Center Paper*”).

³³⁶ Schwartz Reply Decl. ¶¶ 30-32, 61.

- Alleged harms from vertical integration of broadband access and Internet content/ applications lack factual support.³³⁷ AT&T is not a major creator or supplier of video or broadband content, and merging with BellSouth will not change that fact (in contrast to the combination of AOL's portal and Time Warner's video content and cable distribution system).³³⁸
- The assertion based on Cisco marketing materials that equipment is available to manage and prioritize Internet traffic³³⁹ has nothing to do with this transaction. Such equipment was available before (since 1999 according to the cited papers), and this merger will not make it any more so.
- Vague assertions about the "growing size" of AT&T's broadband customer base³⁴⁰ add nothing to the analysis, since no one disputes the Applicants' showing that together their share of residential broadband customers will be less than 23%.³⁴¹ Any concern about leverage over content providers is foreclosed by the Commission's prior finding in *Comcast/AT&T Broadband* that controlling 29% of MVPD subscribers would not "impair the quality or quantity of programming available to consumers."³⁴²

Put simply, no opponent has put forth a credible argument that this merger will change Applicants' ability or incentives to block anyone's access to the Internet, or to degrade the quality of their Internet service.³⁴³ Nor could opponents, because this merger will not create or

³³⁷ See generally CDD Pet.; Cooper & Roycroft Decl. at 46-57.

³³⁸ See also Schwartz Reply Decl. ¶ 34.

³³⁹ See Cooper & Roycroft Decl. at 49-50.

³⁴⁰ *Id.* at 46.

³⁴¹ See Public Interest Statement at 103. Even this share, however, overstates the combined company's relative competitive significance, for example because Internet content and applications tend to be "global" in scope (or, at a minimum, global as to English-speaking countries).

³⁴² See *Comcast/AT&T Merger Order* ¶ 30. Since that time, the FCC's determination has been borne out. None of the comments opposing the acquisition of Adelphia by Comcast and Time Warner has suggested that Comcast's acquisition of AT&T Broadband resulted in Comcast being able to unduly depress video content charges, or adversely affect competition in the development and distribution of video content. See *In re Applications of Adelphia Communications & Time Warner, Inc. & Comcast Corp.*, 20 FCC Rcd 20073 (MB Dec. 20, 2005). Moreover, as compared to the competition to cable offered at the time by satellite providers, cable today represents a considerably stronger competitive presence in broadband. See, e.g., *FCC Broadband Report* at Table 7 and Chart 11.

³⁴³ Merger opponents repeat AT&T Chairman and CEO Edward Whitacre's November 2005 statement about AT&T's desire to seek a return on the capital invested in building its network for the proposition that AT&T will somehow discriminate against Internet content. See, e.g., Cooper

Footnote continued on next page

enhance “market power” in either the Internet backbone or Internet access segments. Indeed, as there is absolutely no merger-specific basis for the consideration of “net neutrality” issues in this proceeding, longstanding FCC precedent dictates that determination should end the inquiry on this issue.³⁴⁴

b. Net Neutrality Regulation on an Industry-Wide Basis Is Also Undesirable

Beyond the very sound principle that merger review should be limited to issues specific to that merger, there are compelling policy reasons not to consider net neutrality regulatory conditions here. Even if considered on an industry-wide basis, caution is particularly applicable here where the risks of mis-regulation of a previously unregulated and highly successful Internet are high.

Net neutrality proponents describe an Internet world in which everything that has worked well to date can be attributed to the “neutrality” of the Internet, and therefore any shift in neutrality must be a bad thing.³⁴⁵ But they fail to note that the Internet has succeeded because

Footnote continued from previous page
& Roycroft Decl. at 5. Aside from the obvious point that Mr. Whitacre’s statement makes no claim whatsoever about any intent to discriminate, merger critics conveniently ignore AT&T’s unequivocal position on this issue: “Let me be clear: AT&T will not block anyone’s access to the public Internet, nor will we degrade anyone’s quality of service. Period. End of Story.” Edward Whitacre, Chairman and CEO, AT&T, Remarks at the Inaugural Conference of TelecomNext (Mar. 21, 2006), *available at* <http://www.ustelecom.org/TelecomNEXT/speeches/whitacre.pdf>.

³⁴⁴ As the Commission repeatedly has recognized, “[a]n application for a transfer of control of Commission licenses is not an opportunity to correct any and all perceived imbalances in the industry.” *In re General Motors Corp. and Hughes Electronics Corp. and News Corp. Ltd. For Authority to Transfer Control*, Memorandum Opinion and Order, 19 FCC Rcd. 473, 534, ¶ 131 (Jan. 14, 2004) (“*GM/Hughes Order*”). On the contrary, “merger review is limited to consideration of merger-specific effects.” *Comcast/AT&T Merger Order* ¶ 11.

³⁴⁵ See Cooper & Roycroft Decl. at 47.

the government properly has concluded not to regulate, but to let the market work.³⁴⁶ Nor do they acknowledge the obvious fact that today's Internet is vastly different than it was just a few years ago, and it continues to evolve at a rapid pace. New applications are placing greater demands on the network. For example streaming video and gaming are both bandwidth-intensive and require high quality of service, while VoIP is sensitive to packet loss and latency.³⁴⁷ In addition, there is an ongoing explosion in Internet traffic - for example, Internet traffic through just one exchange is predicted to double from March 2006 to December 2006, and double again by October 2007.³⁴⁸

The impact of these developments is obvious: more investments to expand capacity are required. But, as an MIT Working Group explained, the incentives to make such investments are easily undermined:

bandwidth intensive behaviors . . . impose additional costs on network operators. The broadband value chain is headed for a train wreck. Any business that expects to reach its customers or employees through ever-better mass-market broadband Internet access, whether wired or wireless, is in for a rude awakening. Unless the broadband incentive problem is recognized and dealt with now....³⁴⁹

³⁴⁶ See 47 U.S.C. § 230(b)(2) (2000) (declaring as the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation").

³⁴⁷ See Taylor Decl. ¶ 28.

³⁴⁸ See DAIWA Institute of Research, Ltd; EuroTelco Snapshot (Apr. 4, 2006), http://www.ams-ix.net/news/archive/Snapshot_bandwidth_data.pdf. The same report shows half-year growth rates for traffic between North America and Asia of 69.4%, and between North America and Europe of 32.6%. *Id.* at 2. See also Christopher T. Heun, "The Tale of the Tube," *InternetWeek* (Mar. 17, 2006), available at <http://www.internetweek.cmp.com/183700712> (noting BellSouth's estimates that the average user downloads about 2 gigabits of data every month, but if a subscriber were to watch five standard definition movies per month, 9 gigabits of data would be involved, while all television viewing in standard definition and high definition would require 224 gigabits and 1,120 gigabits of data per month, respectively). See Schwartz Reply Decl. ¶ 42, n.29.

³⁴⁹ See Broadband Working Group of the MIT Communications Futures Program, *The Broadband Incentive Problem*, Cambridge University Communications Research Network (Sept. 2005), available at http://cfp.mit.edu/groups/broadband/docs/2005/Incentive_Whitepaper_09-28-05.pdf. Note that the Working Group includes not only academics but also representatives of British Telecom, Cisco, Comcast, DT/T-Mobile, FT, Intel, Motorola, Nokia and Nortel.

Business models, including price and service options, need to evolve as the Internet evolves in order to ensure that network operators maintain incentives to invest in additional capacity.³⁵⁰

Regulatory conditions restricting Internet service or pricing options would reduce incentives to continue to invest in network capacity and performance. In fact, as Dr. Schwartz explains, the prospective application of so-called “net neutrality” regulation would likely have the *anti-consumer* effect of preempting new service and pricing options.³⁵¹ Imposing restrictions on evolving business models is hardly likely to lead to more investment and new entry in broadband.³⁵² Moreover, restricting broadband providers’ ability to differentiate their service offerings from one another will likewise retard investment and entry.³⁵³

Opponents seek to prejudice the debate by incorrectly characterizing the prospects of upstream charges as “paying twice” for the same service – delivery of content.³⁵⁴ While

³⁵⁰ See *id.* at 11 (“[A] critical problem exists which, unless solved, will ultimately stunt the growth of the industries that constitute the broadband value chain.... Good solutions to this problem need to align the incentives of network operators and upstream stakeholders.... Solutions that achieve this alignment will produce the revenues necessary to support ongoing operator investments in more capable networks, enabling innovation and growth to continue in all parts of the broadband value chain.”).

³⁵¹ See Schwartz Reply Decl. ¶¶ 44-50, 61.

³⁵² See Letter from Albert Cinelli, President, QComm Corp., *In the Matter of Consumer Protection In the Broadband Era*, WC Docket No. 05-271 (Mar. 16, 2006) (stating that “[t]o the extent Net Neutrality becomes law ... [QComm] will have no choice but to immediately stop the build out of our rural FTTP networks.”). The potential for well-meaning regulation to have unintended consequences is well illustrated by the disparate former treatment of DSL and cable modem Internet services. While the government mandated that telephone companies’ DSL services were subject to extensive access rules, cable modems remained unregulated. “Unregulated cable modems sprinted to a commanding lead among broadband subscribers, dominating regulated DSL networks nearly two-to-one, 1999 through year-end 2002. When DSL network access obligations were reduced in early 2003, however, the trend quickly switched. By 2004, new DSL subscribers pulled even with new cable modem customers. By 2005, DSL subscriber additions surged ahead. . . . The empirical evidence demonstrates that regulating open access failed to improve broadband networks.” Thomas Hazlett, *Neutering the Net*, *Fin. Times*, Mar. 20, 2006.

³⁵³ See *Phoenix Center Paper*; see also Schwartz Reply Decl. ¶¶ 58-60.

³⁵⁴ See Baldwin & Bosley Decl. ¶ 227.

consumers and content/application providers may pay for their connectivity to the Internet, the debate is about whether it is efficient for one side of the market to pay only close to the incremental costs of service in light of the need to cover the large fixed costs of enhanced consumer broadband networks, and the high incremental costs of extending such networks to individual consumers.³⁵⁵ Net neutrality proponents seek to push those costs solely onto consumers.³⁵⁶ Yet it is basic economics that raising access prices will slow the adoption of broadband by consumers, and thus reduce the potential network audience available to the Internet content and access providers.³⁵⁷

At bottom, the net neutrality regulatory camp rests its claims on an asserted lack of broadband competition. But the claim that AT&T will have over half the nation's wireline telephone lines is wholly irrelevant in a world where cable modem service continues to be the predominant form of consumer broadband.³⁵⁸ Similarly, the assertion that monopoly-style price regulation is necessary because a "cozy duopoly" of telco and cable³⁵⁹ is only "one step away from monopoly," defies logic.³⁶⁰ Broadband access is characterized by rapid growth, lower prices, sharp changes in relative market shares, and the emergence of new technologies, all characteristics of vigorous competition, not monopoly.³⁶¹ AT&T's and BellSouth's gains in DSL against cable broadband providers reflect just how vigorous this competition has been and

³⁵⁵ Schwartz Reply Decl. ¶¶ 48-49.

³⁵⁶ See Baldwin & Bosley Decl. ¶ 227.

³⁵⁷ Schwartz Reply Decl. ¶ 50.

³⁵⁸ See Baldwin & Bosley Decl. ¶ 217; see also *FCC Broadband Report* at 3 (noting that cable modem service represents approximately 61% of the 42.9 million high-speed lines in service).

³⁵⁹ See Cooper & Roycroft Decl. at 7.

³⁶⁰ See Baldwin & Bosley Decl. ¶ 146.

³⁶¹ See Schwartz Reply Decl. ¶¶ 53-57.

continues to be,³⁶² and the Commission should not now place its regulatory thumb on the scales to influence this robustly competitive marketplace. “The broadband marketplace before us today is an emerging and rapidly changing marketplace that is markedly different from the narrowband marketplace that the Commission considered in adopting the *Computer Inquiry* rules.”³⁶³

As the history of the Internet conclusively demonstrates, competition and innovation are best served by letting the marketplace decide what products, services, and prices will be offered, rather than constraining market forces by government regulation. Any departure from this principle could profoundly affect the future of the Internet. It should be considered only in proceedings of industry-wide applicability, and then only if there is clear evidence that there is a real competitive problem that the marketplace is unable to resolve. That is decidedly not the case here.

IV. THE COMBINATION OF APPLICANTS’ LEC OPERATIONS WILL HAVE NO ADVERSE EFFECT ON THE PUBLIC INTEREST

Some merger opponents contend that the “most serious” public interest issues involve the merger’s combination of Applicants’ separate and non-overlapping incumbent LEC operations.³⁶⁴ In particular, they assert that this combination will facilitate discrimination and deprive regulators of a valuable benchmark. These claims ignore the very predicates of the Commission decisions upon which they rely. Those decisions dealt with facts that the Commission expressly found would persist for only a few years³⁶⁵ in markets “undergoing a

³⁶² See *FCC Broadband Report* at Table 9.

³⁶³ *Wireline Broadband Report* ¶ 47.

³⁶⁴ See *Access Point Pet.* at 20-24; *Cbeyond Comments* at 78-96; *Baldwin & Bosley Decl.* ¶¶ 199-212; *Sprint Nextel Comments* at 6-9; *TWTC Pet.* at 32-71.

³⁶⁵ *SBC/Ameritech Merger Order* ¶ 161; *Bell Atlantic/GTE Merger Order* ¶ 154.