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

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| In the Matter of | ) | |
| | ) | |
| Applications for Consent to the | ) | |
| Transfer of Control of Licenses and | ) | CS Docket No.99-251 |
| Section 214 Authorizations from | ) | |
| | ) | |
| MediaOne Group, Inc., | ) | |
| Transferor, | ) | |
| | ) | |
| To | ) | |
| | ) | |
| AT&T Corp. | ) | |
| Transferee | ) | |
| | ) | |

**MEMORANDUM OPINION AND ORDER**

**Adopted: June 5, 2000** **Released: June 6, 2000**

By the Commission: Chairman Kennard issuing a statement; Commissioner Furchtgott-Roth concurring in part, dissenting in part and issuing a statement; Commissioner Powell concurring and issuing a statement; and Commissioner Tristani concurring and issuing a statement.

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## I. INTRODUCTION

1. In this Order, we consider the joint application ("Application") filed by MediaOne Group, Inc. ("MediaOne") and AT&T Corp. ("AT&T") (collectively the "Applicants" or "AT&T-MediaOne")[1]

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[1] Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne (continued…)

for approval to transfer control to AT&T of certain licenses and authorizations controlled by MediaOne and its affiliates and subsidiaries, pursuant to Sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("Communications Act").[2] To obtain Commission approval of their Application, the Applicants must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity.[3] In this regard, we must weigh the potential public interest harms of the proposed merger against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the benefits outweigh the harms.[4]

2. We review this merger in the context of an unprecedented convergence of communications services, including a trend toward consolidation in communications industries generally and the cable industry in particular. Cable companies are upgrading their systems to provide a full range of video, data, and voice services. In this proceeding, the Applicants contend that the proposed merger will allow them to provide local telephony and new services more quickly and effectively in order to compete directly with incumbent local telephone exchange carriers ("ILECs"). In contrast, many commenters argue that the merger would create a web of relationships that will allow the Applicants to dominate communications conduits through their cable infrastructure and dominate media content through their vertical integration with content providers. In the proposed merger, the nation's largest cable operator, AT&T, would acquire the nation's fourth largest cable operator, MediaOne, which holds a 25.5% interest in the nation's second largest cable operator, Time Warner Entertainment, LP ("TWE").[5]

3. The merged firm's attributable ownership interests in cable systems serving approximately

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to AT&T, CS Docket No. 99-251 (filed July 7 and 15, 1999) ("Application").

[2] 47 U.S.C. §§ 214(a), 310(d).

[3] *See* 47 U.S.C. §§ 214(a), 310(d). *See also Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order ("*SBC-Ameritech Order*"), 14 FCC Rcd 14712, 14736 ¶ 46 (1999); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order ("*WorldCom-MCI Order*"), 13 FCC Rcd 18025, 18026-27, 18030-32 ¶¶ 1, 8-10 (1998); *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order ("*Bell Atlantic-NYNEX Order*"), 12 FCC Rcd 19985, 19987, 20000-04 ¶¶ 2, 29-32 (1997).

[4] *SBC-Ameritech Order*, 14 FCC Rcd at 14736 ¶ 46 (1999); *WorldCom-MCI Order*, 13 FCC Rcd at 18031-32 ¶ 10.

[5] Counting owned and operated systems alone, MediaOne is the nation's fourth largest cable operator. Under the cable ownership attribution rules, MediaOne is the nation's second largest cable operator because TWE's subscribers are attributable to MediaOne by virtue of MediaOne's 25.5% ownership interest in TWE. *See* 47 C.F.R. § 76.503 n.2. Thus, this merger in fact links the top three cable operators, AT&T, MediaOne, and TWE.

The cable ownership attribution rules, 47 C.F.R. § 76.503 n.2, determine whether the size or type of an entity's ownership interest in a cable system is such that it confers on the entity the ability to influence or control the operations of the cable system or creates economic incentives to take actions that concern the Commission. *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Reform Act Provisions of the Telecommunications Act of 1996: Review of the Commission's Cable Attribution Rules*, CS Docket Nos. 98-82, 96-85, Report and Order ("*Attribution Order*"), 14 FCC Rcd 19014, 19014 ¶ 1 (1999). Thus, the cable ownership attribution rules identify ownership interests that raise issues of concern to the Commission. *See id.*

51.3% of the nation's cable subscribers and a significant number of video programming networks, raises concerns that the merged company will be able to exercise excessive market power in the purchase of video programming.[6] Commenters opposing the merger argue that the merged entity will have the power to determine which video programming networks are successful, thereby limiting the diversity of programming available to viewers. In addition, commenters argue that the merged entity will be able to command excessively large discounts or exclusive contracts from programming networks, thereby hindering competition from alternative providers of multichannel video service. We find that the proposed merger violates the Commission's cable horizontal ownership rules,[7] which are designed to address threats to diversity and competition in the video programming marketplace.

4. Accordingly, as a non-severable condition to our grant of the Application, we will give the Applicants a period of 12 months from the effective date of the horizontal ownership rules, May 19, 2000 to (a) divest their interests in TWE, (b) terminate their involvement in TWE's video programming activities (pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules), or (c) divest their interests in other cable systems, such that they will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide. We also will require the merged firm to file with the Cable Services Bureau, within six months from the closing of the merger, a written document specifying which of the foregoing three compliance options it has elected to pursue. If the merged firm is not in compliance by the May 19, 2001 deadline, then we will require it to place into an irrevocable trust for the purpose of sale the assets that it must divest pursuant to the compliance option that it elected in the foregoing filing to come into compliance with the 30% limit. We also will adopt the Applicants' proposal that, 60 days before the expiration of the 12-month period, May 19, 2001, the Applicants shall file with the Cable Services Bureau a written document (a) stating that it will be in compliance by the May 19, 2001 deadline, or (b) stating that it will not be in compliance and describing the irrevocable trust arrangement that it will establish by the May 19, 2001 deadline for the sale of any assets that it must be divest in order to effectuate the compliance option it had elected. In addition to the above conditions, we will mitigate the potential harm to the diversity of programming and competition during the compliance period by imposing interim conditions on the merged entity. The merged firm must abide by the interim conditions and their enforcement mechanisms, attached hereto as Appendix B, until such time as it has taken the foregoing compliance action.

5. In the broadband arena, the merged firm will be able to provide high-speed Internet access over a vast cable infrastructure. The merged firm also would have major ownership interests in the nation's two largest cable broadband Internet service providers ("ISPs"), Excite@Home and Road Runner. Excite@Home and Road Runner are the exclusive ISPs serving broadband subscribers over the cable systems of AT&T, MediaOne, TWE, Cox Communications, Inc., and Comcast Corporation, among others. Commenters raise concerns that the Applicants, through their cable infrastructure and ownership of Excite@Home and Road Runner, will dominate the provision of broadband Internet services and threaten the openness and diversity of broadband Internet content, software applications, and network architecture. We note that the Department of Justice has entered a proposed consent decree with the Applicants, pursuant to which the merged entity will divest its interests in Road Runner.[8] Given the nascency of broadband Internet services, we find in this Order that growing competition from alternative broadband access providers, the Applicants' commitment to give unaffiliated ISPs direct access to the Applicants'

[6] *See* Section III.B, *infra*.

[7] 47 C.F.R. § 76.503.

[8] *See United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000).

cable systems, and the terms of Applicants' proposed consent decree with the Department of Justice requiring the divestiture of Road Runner make it unlikely that the merged firm would be able to dominate and threaten the openness and diversity of the Internet. Accordingly, we decline to impose conditions in this regard. Nevertheless, we will scrutinize broadband developments closely and review our policies if competition fails to grow as expected, especially if the merged firm fails to fulfill its commitment to open its cable systems or otherwise threatens the openness and diversity of the Internet.

6. In this Order, we also consider whether the proposed merger would result in the violation of any other Commission rules or federal communications policies. In this regard, the Applicants have adjusted the programming services of four cable systems in order to avoid potential violation of the Commission's channel occupancy rules,[9] and MediaOne has reduced its ownership in Time Warner Telecom ("TWT") in order to avoid a potential violation of Section 652(b) of the Communications Act.[10]

7. After reviewing the record in this proceeding and the arguments of the Applicants and commenters,[11] we conclude that the potential public interest benefits, on balance, outweigh the potential public interest harms of the merger. We find that the merger is likely to benefit consumers by enhancing the merged entity's ability to compete more effectively with incumbent local exchange companies ("LECs") in providing facilities-based local telephony and other new services to residential customers. Accordingly, subject to the conditions discussed herein to mitigate the potential public interest harms, we conclude that approval of the Application to transfer control of Commission licenses and authorizations from MediaOne to AT&T will serve the public interest, convenience, and necessity.

## II. PUBLIC INTEREST FRAMEWORK

8. Before the Commission can approve the transfer of control of authorizations and licenses connected with the proposed merger under Sections 214(a) and 310(d) of the Communications Act,[12] we must weigh the potential public interest harms of the merger against the potential public interest benefits to ensure that, on balance, the transfer of MediaOne's licenses and authorizations to AT&T serves the public interest, convenience and necessity.[13]

9. The Applicants bear the burden of proving that the transfer will advance the public interest.[14] In applying this public interest test, the Commission considers four overriding questions: (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision;[15] (2) whether the transaction would result in a violation of Commission rules;[16] (3)

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[9] 47 C.F.R. § 76.504.

[10] 47 U.S.C. § 572(b).

[11] *See* Appendix A for a list of commenters in this proceeding.

[12] 47 U.S.C. §§ 214(a), 310(d).

[13] 47 U.S.C. §§ 214(a), 310(d). *See WorldCom-MCI Order*, 13 FCC Rcd at 18030 ¶ 8; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20000 ¶ 29.

[14] *SBC-Ameritech Order*, 14 FCC Rcd at 14737 ¶ 48; *Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control of Tele-Communications, Inc. to AT&T Corp.*, CC Docket No. 98-178, Memorandum Opinion and Order ("*AT&T-TCI Order*"), 14 FCC Rcd 3160, 3169-70 ¶ 15 (1999); *see also WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 10 n.33 (citing 47 U.S.C. § 309(e) (burdens of proceeding and proof rest with the applicant)).

[15] See *SBC-Ameritech Order*, 14 FCC Rcd at 14737 ¶ 48.

whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of the Communications Act and other statutes;[17] and (4) whether the transaction promises to yield affirmative public interest benefits.[18]

10. The Commission's analysis of public interest benefits and harms includes, among other things, consideration of the possible competitive effects of the transfer.[19] Our public interest analysis is not, however, limited by traditional antitrust principles.[20] In the telecommunications and cable industries for which we have statutory responsibility, as in most others, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.[21] An antitrust analysis – such as that undertaken by the Department of Justice in this case – focuses on whether a proposed merger will reduce existing competition. Our public interest analysis, however, also requires us to determine whether the merger violates our rules, or otherwise would frustrate our implementation or enforcement of the Communications Act and federal communications policy.[22] As we stated in *Bell Atlantic-NYNEX,* "[t]he 1996 Act set a clear national policy that competition leading to deregulation, rather than continued regulation of dominant firms, shall be the preferred means for protecting consumers."[23] In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets.[24]

11. We conduct our public interest review against the backdrop of the "broad aims of the Communications Act," which include, among other things, the implementation of Congress' pro-competitive, deregulatory national policy framework designed to open all communications markets to competition; the preservation and advancement of universal service; and the acceleration of private sector deployment of advanced services.[25] Our public interest analysis may also entail assessing whether the merger will affect the quality and diversity of communications services[26] or will result in the provision of

(…continued from previous page)
[16] *Id*. at ¶ 48.

[17] *Id*. at ¶ 48.

[18] *Id*. at ¶ 48.

[19] *WorldCom-MCI Order,* 13 FCC Rcd at 18030-33 ¶¶ 9-12.

[20] *See Satellite Business Systems,* 62 F.C.C. 2d 997, 1069, 1088 (1977), *aff'd. sub. nom United States v. FCC,* 652 F.2d 72 (D.C. Cir. 1980) (*en banc*); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

[21] *AT&T-TCI Order,* 14 FCC Rcd at 3169 ¶ 14.

[22] *SBC-Ameritech Order,*14 FCC Rcd at 14739 ¶ 50; *AT&T-TCI Order*, 14 FCC Rcd at 3168-69 ¶ 14; *WorldCom-MCI Order,* 13 FCC Rcd at 18030-31 ¶ 9.

[23] *See Bell Atlantic-NYNEX Order,* 12 FCC Rcd at 20035 ¶ 95.

[24] *Id.*

[25] *See SBC-Ameritech Order,* 14 FCC Rcd at 14739 ¶ 50; *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9; *see also* 47 U.S.C §§ 254, 259, 332(c)(7), 706; 1996 Act (Preamble).

[26] *See SBC-Ameritech Order,* 14 FCC Rcd at 14739 ¶ 51 ("[W]hen a transaction is likely to affect local telecommunications markets, our statutory obligation requires us to access future market conditions. In doing so, the Commission may rely upon its specialized judgment and expertise to render informed predictions about future market conditions and the likelihood of success of individual market participants.").

new or additional services to consumers.[27] In making these assessments, the Commission uses its expertise to consider the trends within, and needs of, the communications industry as well as Congress' preference for competitive market structures and outcomes.[28]

12. Following passage of the Telecommunications Act of 1996 ("1996 Act"),[29] local communications markets have been undergoing a transition to competitive markets, so a transaction may have predictable yet dramatic consequences for competition over time even if the immediate effect is more modest. Therefore, when a transaction is likely to affect local communications markets, our statutory obligation requires us to assess future as well as current market conditions. In doing so, the Commission may rely upon its specialized judgment and expertise to render informed predictions about future market conditions and the likelihood of success of individual market participants.[30]

13. Where necessary, the Commission can attach conditions to a transfer of licenses and authorizations in order to ensure that the public interest is served by the transaction.[31] As noted in *AT&T-TCI*, many transfer applications on their face show that the transaction would yield affirmative public interest benefits and would neither violate the Communications Act or Commission rules, nor frustrate or undermine federal communications policies and enforcement of the Communications Act.[32] Such cases do not require extensive review. This is not the case with respect to the merger of AT&T and MediaOne. We analyze the potential public interest harms and benefits of this proposed merger in the next sections. We limit our analysis to those issues that have been raised by the parties to the proceeding and those additional issues that may significantly affect the public interest.[33]

## III. BACKGROUND

### A. The Applicants

14. ***AT&T***. AT&T is the nation's largest provider of domestic and international long distance telephone service.[34] In March 1999, AT&T acquired Tele-Communications, Inc. ("TCI") to integrate its

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[27] *See SBC-Ameritech Order*, 14 FCC Rcd at 14739 ¶ 50; *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9; *Applications of Teleport Communications Group Inc. and AT&T Corp. for Consent to Transfer Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Provide International Facilities Based and Resold Communications Services*, CC Docket No. 98-24, Memorandum Opinion and Order ("*AT&T-Teleport Order*"), 13 FCC Rcd 15236, 15242-43 ¶ 11 (1998); *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 158.

[28] *See SBC-Ameritech Order*, 14 FCC Rcd at 14739 ¶ 50; *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9: *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20003 ¶ 32 ("[T]he Commission examines whether a proposed license transfer is consistent with the policies of the Communications Act, including, among other things, the transfer's effect on Commission policies encouraging competition and the benefits that would flow from the transfer.").

[29] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[30] *SBC-Ameritech Order*, 14 FCC Rcd at 14739 ¶ 51.

[31] *See* 47 C.F.R. § 1.110; *see also WorldCom-MCI Order*, 13 FCC Rcd at 18031-32 ¶ 10; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20001-02 ¶ 30.

[32] *See AT&T-TCI Order*, 14 FCC Rcd at 3170 ¶ 16.

[33] For this reason, we do not analyze services and markets in which the merger is not likely to produce significant public interest harms or benefits.

[34] Federal Communications Commission, *Statistics of Communications Common Carriers* ("*SOCC*") at 7-9 (continued…)

telecommunications business with TCI's cable networks in order to build facilities-based local residential communications networks where TCI operated cable systems.[35] As a result of its acquisition of TCI, AT&T is currently the nation's largest cable operator with a total of 18,959,000 owned and attributable subscribers.[36] AT&T also provides other communications services, including local telephone, wireless mobile telephone, and Internet access services.[37] AT&T's revenues from communications services totaled $59.6 billion in 1999, of which $25.1 billion were derived from business services, $22.0 billion from residential local, long distance, and narrowband Internet access services, $7.6 billion from wireless mobile telephone services, and $4.9 billion from cable and broadband services including broadband Internet access.[38]

15. At the time of its merger with AT&T, TCI was principally a cable operator, although it held a variety of interests through its three business groups: TCI Communications, Liberty Media Group and TCI Ventures Group.[39] The cable systems formerly owned and operated by TCI Communications are now owned and operated by AT&T Broadband & Internet Services ("AT&T BIS").[40] Liberty Media Group, the programming and content arm of TCI, and TCI Ventures Group, the international and miscellaneous holdings arm of TCI, were combined to form a single group called Liberty Media Group

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(Common Carrier Bur., Industry Analysis Div., rel. Nov. 30, 1999).

[35] Application at 8.

[36] *See* Application at App. A.; Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Apr. 7, 2000, Transmittal of Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Deborah Lathen, Chief, FCC Cable Services Bureau, dated Apr. 7, 2000, Attachment (Revised Certified Ownership Filing), ("AT&T Apr. 7 Revised Ownership Filing"); Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Deborah Lathen, Chief, FCC Cable Services Bureau, dated Mar. 17, 2000, Attachment (Certified Ownership Filing), ("AT&T Mar. 17 Ownership Filing") at App. A; Letter from Betsy J. Brady, Esq., Vice President, Federal Government Affairs, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Nov. 24, 1999, Attachment (*Ex Parte* Comments of AT&T Corp. and MediaOne Group, Inc.), ("AT&T Nov. 24 Ownership Filing") at 10; Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Dec. 2, 1999 ("Dec. 2 Garrett Letter"); Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Jan. 19, 2000 ("Jan. 19 Garrett Letter"). Those subscribers of cable systems owned entirely by AT&T (TCI) are considered "owned." Those subscribers of cable systems owned in part by AT&T are considered "attributable" to AT&T if the systems are attributable to AT&T under the Commission's ownership attribution rules, 47 C.F.R. § 76.503 n.2.

[37] AT&T provides its services to residential, business, and government customers in over 250 countries around the world. Application at 6; AT&T Corp., *1998 Annual Report* (Mar. 9, 1999) ("AT&T 1998 Annual Report") at 30-31; *see also* AT&T Corp., *1997 Annual Report* (Feb. 24, 1998) ("AT&T 1997 Annual Report") at 2.

[38] AT&T Corp., *1999 Annual Report* (Mar. 17, 2000) ("AT&T 1999 Annual Report") at 14. In 1998 AT&T's revenues from communications services totaled $53.2 billion, of which $22.9 billion were derived from business long distance services, $22.6 billion from residential long distance services, and $5.4 billion from its wireless services. AT&T Corp., *1998 Annual Report* at 32. TCI's revenues from domestic cable and communications services totaled $6.0 billion in 1998. Tele-Communications, Inc., *Filing 10-K for the Year Ended Dec. 31, 1998* (Mar. 15, 1999) ("TCI 1998 10-K") at II-22. Data are as of December 1998 and 1999.

[39] Tele-Communications, Inc., *1997 Stockholder Report: To Our Shareholders* (Mar. 1998) ("TCI Stockholder Report") at 3 and 5.

[40] Letter from Stephen C. Garavito, General Attorney, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Aug. 4, 1999 at 1.

("Liberty").[41] AT&T wholly owns Liberty through its 100% ownership of the outstanding capital stock of Liberty Media Corporation ("LMC"), for which it issued two classes of Liberty tracking stock, Liberty Group A and Liberty Group B, in order to track Liberty's performance.[42] Liberty tracking stock is held by the shareholders that held TCI-Liberty tracking stock and TCI Ventures tracking stock prior to the AT&T-TCI merger, as well as others that have purchased these publicly traded shares subsequent to that merger.[43]

16. *Cable Systems and MVPD Services*. Many of AT&T's cable television subscribers are served by systems owned and operated directly by AT&T; however, many are also served by systems that are owned in part by other cable operators. For example, AT&T has a 33% equity and 8.9% voting interest in Cablevision Systems Corporation ("Cablevision"), and it has the right to nominate two Cablevision directors.[44] In addition, AT&T owns a 50% interest in two cable partnerships with Time Warner Cable: Kansas City Cable and Texas Cable Partners, LP.[45]

17. AT&T generally divides its interests in cable systems into three categories: (1) owned and operated systems -- AT&T owns 100% of these systems; (2) consolidated systems -- AT&T's interest in these systems is greater than 50% but less than 100%; and (3) non-consolidated systems -- AT&T has an interest of 50% or less in these systems. As of April 2000, AT&T owned-and-operated systems provided service to approximately 10.6 million subscribers, AT&T consolidated systems provided service to approximately 485,000 subscribers, and AT&T non-consolidated systems provided service to approximately 7.4 million subscribers, for a total of 18,959,000 subscribers through all three categories of cable systems.[46] In total, AT&T has attributable ownership interests in cable systems serving 28.3% of the 67.1 million cable subscribers nationwide and 23.0% of the 82.36 million subscribers to multichannel video programming distribution ("MVPD")[47] services nationwide.[48]

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[41] AT&T Corp., *SEC Form S-4: Proxy Prospectus* (Jan. 8, 1999) ("AT&T-TCI Merger Proxy Prospectus") at 1.

[42] Application at 10. LMC wholly owns Liberty. While AT&T issues tracking stock in Liberty, AT&T wholly owns 100% of the capital stock in LMC, Liberty's parent.

[43] *Id.* at 10.

[44] *Id.* at 12.

[45] *Id.* at 12-13. Each of these partnerships has a management committee with six members, three appointed by Time Warner Cable and three by AT&T. *Id.*

[46] AT&T has completed its sale of Falcon Communications, LP to Charter Communications; Lenfest Communications, Inc., to Comcast; and Peak Cablevision, LLC and TCA Cable Partners II to Cox. These sales are reflected in the total subscriber count. In addition to these completed sales, AT&T has entered into, but has not yet completed transactions intended to convert its interest in Bresnan Communications to a non-attributable interest. AT&T has other transactions pending, but not yet final. Transactions that are not yet final are not reflected in total subscriber counts listed above. *See id* at 6 n.12 and App. A; *see also* AT&T Apr. 7 Revised Ownership Filing at 7 n.3; AT&T Mar. 17 Ownership Filing at App. A; AT&T Nov. 24 Ownership Filing at App. A; Dec. 2 Garrett Letter; Jan. 19 Garrett Letter.

[47] MVPDs include cable, direct broadcast satellite ("DBS"), multichannel multipoint distribution services ("MMDS"), and satellite master antenna television ("SMATV") providers. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 99-230, Sixth Annual Report ("*1999 Competition Report*"), 15 FCC Rcd 978, 980 ¶ 3 (generally describing the various types of MVPDs). DBS operators provide programming via satellite to subscribers that own or lease small-diameter receiving dishes. MMDS providers offer programming via microwave facilities (the service is often referred to as "wireless cable service"). SMATV operators, also known as "private cable operators," also frequently use microwave facilities to transmit programming to subscribers without crossing rights-of-way. SMATV subscribers usually reside in

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18. *Video Programming Networks*. AT&T BIS holds all of AT&T's video programming interests, such as AT&T's wholly owned subsidiary Liberty Media Group and AT&T's programming interests held through interests in other cable operators, such as Cablevision. These programming entities deliver a wide range of video programming to their subscribers, including local broadcast stations; national, regional, and local cable programming services; premium movie and pay-per-view services; and sports programming services to homes and businesses nationwide.[49]

19. Through its interest in Liberty, AT&T holds interests in numerous national, international, and regional programming networks.[50] Liberty's programming interests include a 100% interest in the Encore Media Group, which operates video programming networks such as Encore, MOVIEplex, Starz!, and many others.[51] Liberty holds a 49% interest in Discovery Communications, Inc., which operates cable networks such as the Discovery Channel, The Learning Channel, and Animal Planet, and holds minority interests in numerous other programmers.[52] Liberty owns approximately nine percent of the common stock, with less than one percent voting rights, of Time Warner Inc., which in turn owns 74.49% of Time Warner Entertainment ("TWE"), which owns substantial programming assets.[53] In addition, Liberty holds interests in a number of foreign programming service providers, including Flextech P.L.C. in the United Kingdom and Jupiter Programming Co., Ltd., in Japan.[54]

20. In addition, AT&T has a 33% direct interest in iNDEMAND (formerly Viewer's Choice),[55] which purchases the broadcast rights for special events and sells them to other MVPDs for

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multiple dwelling units ("MDUs").

[48] *See* AT&T Apr. 7 Revised Ownership Filing; *see also* AT&T Mar. 17 Ownership Filing at App. A; Paul Kagan Assocs., Inc., *Media Index Data Base*, The Kagan Media Index, Jan. 31, 2000 ("Jan. 31 Kagan Media Index") at 8; *1999 Competition Report,* 15 FCC Rcd at 1090 Tbl. C-1.

[49] Application at 8-9.

[50] *Id.* at 9-10; *See also* Liberty Media Corp., http://www.libertymedia.com.

[51] *Id.*

[52] *Id.* Other Liberty programming interests include: USA Networks; Telemundo Network; Telemundo Station Group; BET Holdings II, Inc.; QVC, Inc.; Regional Programming Partners; Canales ñ; Court TV; MacNeil /Lehrer Productions; TV Guide, Inc.; E! Entertainment Television; Style; Odyssey; International Channel; Sunshine Network; and Encore Media Group. In a transaction completed on July 15, 1999, Liberty sold its interest in Fox/Liberty Networks (which owns interests in various regional sports networks and fX, a regional cable television network) in exchange for non-voting American Depository Receipts of News Corporation. Liberty Media Corp., *News Corporation Completes Acquisition of Fox/Liberty Networks And $1.4 Billion Share Repurchase From MCI WorldCom* (press release), July 15, 1999.

[53] Application at 9-10. The Commission has held that Liberty's ownership of Time Warner stock is non-attributable for purposes of the cable horizontal ownership rules. *See Applications of Turner Broadcasting System and Time Warner for Consent to Transfer of Control,* FCC 96-405, File No.BTCCT-951020KF, *Memorandum Opinion and Order,* 11 FCC Rcd 19595, 19602-04, ¶¶ 17-19 (1996).

[54] Application at 10. In addition to these programmers, Liberty holds interests in MultiThematiques, S.A. (France, Italy, Spain, Poland, Germany); Pramer S.C.A. (Argentina); The Premium Movie Partnership (Australia); and Torenos y Competencias, S.A. (Argentina).

[55] Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Mar. 17, 2000 ("Mar. 17 Marsh Letter").

carriage.[56] AT&T also holds programming interests through its direct interest in Cablevision. AT&T has a 33% equity and 8.9% voting interest in Cablevision and has the right to appoint two directors to Cablevision's board.[57] Cablevision in turn has a 75% ownership interest in Rainbow Media Holdings, Inc. ("Rainbow").[58] Rainbow owns seven national programming networks and, in partnership with FOX Sports Net New York ("Fox"), owns several regional sports networks.[59] Rainbow's programming interests include American Movie Classics, Independent Film Channel, Bravo, and Much Music.[60] Rainbow's programming interests in partnership with Fox include Madison Square Garden Network, Fox Sports Chicago, Fox Sports New England, and Madison Square Garden Metro Guide.[61]

21. *Internet Services*. When it acquired TCI, AT&T acquired an interest in At Home Corporation ("@Home"), which provides content-enriched, high-speed Internet access service over the cable television infrastructure.[62] On May 28, 1999, @Home merged with Excite, Inc.[63] The newly merged company is now called Excite@Home. AT&T holds a 74% voting interest in Excite@Home.[64] The Excite@Home service allows subscribers to connect their personal computers via cable modems to a high-speed network developed and managed by Excite@Home, and obtain access to the public Internet and other online content.[65] AT&T plans to begin offering Excite@Home through set top boxes this summer and fall offering a scaled-down version and a full-service version.[66] Excite@Home is the exclusive provider of cable high-speed Internet access service over the cable systems of AT&T, Comcast, Cox, Cablevision, Shaw, and other cable operators.[67] Excite@Home is the nation's largest cable high-speed Internet access

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[56] AT&T Nov. 24 Ownership Filing at 17.

[57] Application at 12.

[58] *Id.*

[59] *Id.*

[60] Cablevision Systems Corp., *Filing 10–K for the Year Ended Dec. 31, 1999,* at 7-8.

[61] *Id.* On March 28, 2000, Cablevision Systems Corp., announced the creation of a new media partnership between Cablevision's Rainbow Media Holdings, Inc. and PRIMEDIA's New York Magazine. The partnership combines brands and content to create a New York-focused Internet destination providing a one-stop, interactive resource for the region. Cablevision Systems Corp., *Cablevision's Rainbow Media and PRIMEDIA's NEW YORK Magazine Announce Launch of New York's Most Powerful Internet Destination* (press release), Mar. 28, 2000.

[62] Application at 14.

[63] *See* AtHome Corp., http://www/home.net. Prior to its merger with AtHome Corp., Excite.com was a leading Web portal, offering free, personalized services, numerous programmed channels of content, search technology, Web-based email, instant messaging, chat, and online shopping. *Id.*

[64] Application at 17. By virtue of a recent transaction with its cable partners, AT&T increased its voting stock interest in Excite@Home from approximately 57% to 74%. *See* AT&T Corp., *Excite@Home's Principle Cable Partners Extend Distribution Arrangements, AT&T Assumes More Prominent Role* (press release), Mar. 29, 2000. Other entities holding an ownership interest in Excite@Home include Comcast Corp., Cox Communications, Inc. Cablevision Systems Corp., and Shaw Cablesystems Ltd. *See* AtHome Corp., *Filing 10-K/A for the Year Ended 1998*, at 35.

[65] Application at 14; *see* AtHome Corp., *Excite@Home Network: Company Information,* http://www.home.net/corp/about.html.

[66] *See Excite@Home Prepares to Start Internet TV Service,* COMMUNICATIONS DAILY, Mar. 31, 2000.

[67] *See* AtHome Corp., http://www.home.net.

service provider, serving approximately 1.5 million subscribers in the United States as of April 2000.[68] AT&T also provides narrowband Internet access service to approximately 1.8 million customers through its wholly owned subsidiary AT&T WorldNet Service ("AT&T WorldNet").[69]

22. *Local Telephone Service*. In addition to providing long distance telephone services, AT&T also provides local exchange services. As of July 1999, AT&T had approximately 200,000 resale customers and approximately 15,000 cable telephony customers via the cable facilities it acquired in 1999 from TCI.[70] As of May 2000, AT&T provides local telephone service to more than 555,000 resale, unbundled network elements platform ("UNE-P"),[71] cable telephony, fixed wireless, and MDU customers nationwide.[72] AT&T plans to use its wireless spectrum to deliver local exchange service through a fixed wireless system in certain areas where it does not intend to have a cable presence.[73] AT&T has a fixed wireless trial underway in Dallas, Texas and offers service commercially to residential customers in Fort Worth, Texas.[74] AT&T plans to offer fixed wireless local exchange service commercially in two additional

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[68] AtHome Corp., *Excite@Home Reports First Quarter 2000 Financial and Operating Results* (press release), Apr. 19, 2000. As of September 30, 1999, @Home offered service to 20 million homes in the United States and Canada and had approximately 113,000 AT&T @Home subscribers. *See* Kinetic Strategies, *Cable Modem Market Stats & Projections*, http://www.cabledatacomnews.com/cmic/cmic16.html.

[69] AT&T Corp., *AT&T Worldnet Service and Internet Broadcasting Systems Sign Marketing Agreement* (press release), Jan. 17, 2000. With its acquisition of the IBM Global Network ("IGN"), AT&T also obtained approximately 300,000 additional non-corporate billed Internet subscribers in the United States. This number includes customers of other Internet access providers that use the IGN network to provide Internet access to their customers. For purposes of the public interest statement, AT&T included all of these IGN-based customers in its WorldNet figures. The WorldNet service is delivered in the same manner as other narrowband ISPs deliver their service, *i.e.*, over the traditional narrowband public switched telephone network.

[70] Application at 7 and 34. AT&T's pertentage of the total residential customers in the U.S. in 1999 was approximately 0.1991%. This percentage is derived from dividing AT&T's total residential customers, including cable telephony customers (220,000) by the total number of residential access lines of reporting local exchange companies (approximately 110,447,132). *See SOCC*, at 24 Tbl. 2.5 (1998-1999).

[71] AT&T provides residential local telephone service using network element combinations obtained from incumbent LECs. This is called UNE-P service or unbundled network elements platform.

[72] AT&T currently markets and sells local residential telephony in 13 cities in California, Illinois, Texas, and Colorado. *See* AT&T Corp., *AT&T – MediaOne Combination Will Speed Local Phone Competition and Bring High Speed Internet Services to More Consumers, AT&T's Cicconi Says* (press release), Feb. 4, 2000; AT&T's OneRate New York plan combines local and long distance calls on a single bill. As of March 2000, AT&T had 200,000 customers on its AT&T OneRate New York plan. In addition, AT&T has begun to market local telephone and long distance service to some 600,000 Time Warner Cable customers in Albany and Syracuse, New York. These customers are offered AT&T's OneRate NewYork plan. *See* AT&T Corp., *AT&T and Time Warner Cable Announce Joint Marketing Agreement* (press release), Mar. 7, 2000. In addition, AT&T and Insight Communications reached an agreement in March 2000 to deliver AT&T local telephone service in Insight's service areas. *See* AT&T Corp., *Insight Communications and AT&T Reach Agreement in Principle to Offer Local Phone Service* (press release), Mar. 16, 2000; *see also* Letter from Stephen Garavito, General Attorney, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated May 24, 2000.

[73] Frank J. Governali, *AT&T Corp., Analyst Meeting Hits Expectations*, Goldman, Sachs & Co. Investment Research, Dec. 7, 1999 ("Goldman Sachs Dec.7 AT&T Report") at 3.

[74] *See id; see also* AT&T Corp., *AT&T Analyst Meeting: AT&T Fixed Wireless - Lew Chakrin*, Dec. 6, 1999 ("AT&T Fixed Wireless Slides"), http://www.att.com/ir/ep/analyst99/agenda.html; Eric Strumingher, *AT&T Corp., Analyst Meeting Shows Data Focus*, Paine Webber, Dec. 7, 1999 ("Paine Webber Dec. 7 AT&T Report") at

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markets by the end of 2000.[75] Finally, on March 31, 2000, an AT&T-led consortium announced that it will acquire a 39% voting stake in Net2Phone, the leading provider of Internet Protocol ("IP") telephony and other web-based communications services.[76] AT&T Chairman Michael Armstrong said that AT&T, together with Net2Phone, will develop the next generation of voice-enhanced web-based communications services and create a standard in IP telephony.[77]

23. AT&T also offers local exchange service to business customers through its wholly owned subsidiary Teleport Communications Group ("Teleport"), which it acquired in 1998. AT&T acquired Teleport to expand its offering of local exchange and exchange access services for businesses.[78] At the time of its acquisition by AT&T, Teleport was the nation's largest competitive local exchange carrier ("CLEC") and had initiated the development of local telephone networks in 83 metropolitan areas in 28 states throughout the United States.[79] From these operations, through which it served primarily the business market, Teleport had earned revenues of $494.3 million in 1997.[80] AT&T's total business and residential local exchange operations (including the formerly separate Teleport) yielded $901 million in revenues in 1998,[81] and $10.5 billion in revenues in 1999.[82]

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2; Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Feb. 11, 2000 ("Feb. 11 Marsh Letter"); AT&T Corp., *AT&T 'Cuts The Cord' To Provide Services Into Homes* (press release), Mar. 22, 2000.

[75] *See id.*

[76] AT&T Corp., *AT&T-Led Consortium to Acquire 39 Percent Voting Stake in Net2Phone* (press release), Mar. 31, 2000; COMMUNICATIONS DAILY, Apr. 3, 2000, at 2-4.

[77] *Id.*

[78] *AT&T-Teleport Order*, 13 FCC Rcd at 15240 ¶ 8. At the time of its acquisition by AT&T, Teleport also provided residential local telephone service to approximately 12,000 customers nationwide. *AT&T-TCI Order*, 14 FCC Rcd at 3164 ¶ 5.

[79] *AT&T-Teleport Order*, 13 FCC Rcd at 15239 ¶ 5.

[80] *AT&T-TCI Order*, 14 FCC Rcd at 3162 ¶ 3. At the time of the merger, Teleport served 16,500 buildings nationwide. Less than 100 of these buildings were multiple dwelling units.

[81] The 1999 CLEC Report: Chapter 6 Status of the CLEC Industry: Network Parameters and Revenue Figures, *Table 14: Company Rank by Total Revenue (1998),* New Paradigm Resources Group, Inc., ("1999 CLEC Report") at 28 of 34. AT&T's percentage of CLEC revenue for residential customers is approximately 8.5%. This percentage is derived from dividing AT&T's total residential local exchange service revenue ($901,000,000, which includes revenues from the formerly separate Teleport) by the total revenue for all CLECs ($10,620,615,854). *See* 1999 CLEC Report, at 28 of 34. In 1997, Teleport's total revenues from its local services were $494.3 million, or 10.8% of total CLEC revenues ($4,535,600,000). *See* The 1998 CLEC Report: Chapter 2 Status of the CLEC Industry: Network Parameters and Revenue Figures, *Table 12: Company Rank by1997 Total Revenue,* New Paradigm Resources Group, Inc., at 18 of 22.

[82] The 2000 CLEC Report: Chapter 5 Status of the CLEC Industry: Network Parameters and Revenue Figures, *Table 14: Company Rank by Total Revenue (1999),* New Paradigm Resources Group, Inc., ("2000 CLEC Report") at 38 of 46. AT&T's 1999 CLEC revenue increased over one-thousand percent between 1998 and 1999, while CLEC revenue on a whole increased 150%. *See id.* AT&T's percentage of CLEC revenue for residential customers in 1999 was approximately 39%. This percentage is derived from dividing AT&T's total residential local exchange service revenue ($10,483,200,000 which includes revenues from the formerly separate Teleport) by the total revenue for all CLECs ($26,857,733,000). *See id.*

24. *Mobile Telephone Service*. In addition to the foregoing wireline services, AT&T provides wireless mobile telephone services through its ownership and operation of AT&T Wireless Services Inc. ("AT&T Wireless").[83] AT&T Wireless operates and holds interests in commercial mobile radio service ("CMRS") systems in 26 of the 30 largest service areas in the United States.[84] In 1999, AT&T Wireless generated revenues of approximately $7.6 billion from a client base of 12.2 million.[85]

25. ***MediaOne***. MediaOne is principally a cable operator, though it holds a variety of other interests, including a direct interest in high-speed Internet access provider Road Runner and direct interests in nine video programmers.[86] In addition, through its cable systems, MediaOne provides local telephone service on a limited basis,[87] and holds a 4.9% passive equity interest in wireless telecommunications provider Vodafone Air Touch.[88] MediaOne's combined revenues were approximately $2.9 billion in 1998 and $2.7 billion in 1999.[89]

26. *Cable Systems and MVPD Services.* As of April 2000 MediaOne's domestic owned-and-operated cable television systems provided service to approximately 5 million subscribers.[90] MediaOne also has a 25.51% interest in TWE, which provides cable service through its subsidiary Time Warner

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[83] *AT&T-TCI Order*, 14 FCC Rcd at 3163 at ¶ 4. On March 28, 2000, AT&T filed an amended preliminary prospectus with the Securities and Exchange Commission seeking sale of 360 million shares of AT&T Wireless Group tracking stock representing approximately 15.6% of AT&T's economic interest in the AT&T Wireless Group. AT&T Corp., *AT&T Files Updated Prospectus Relating To AT&T Wireless Group Tracking Stock* (press release), Mar. 28, 2000.

[84] Application at 38.

[85] AT&T Corp., *1999 Annual Report* at 32. In addition, AT&T has placed into a trust arrangement, pending sale over a period of time approved by the Commission and the Department of Justice, approximately 23.8% of the outstanding shares of Sprint PCS Tracking Stock. *See AT&T-TCI Order*, 14 FCC Rcd at 3211 ¶ 107.

[86] Application at 14, 17.

[87] *Id.* at 15.

[88] *Id.* at 16; Letter from Sean Lindsay, MediaOne Group, Inc., to Pieter van Leeuwen, FCC Wireless Telecommunications Bureau, dated Nov. 4, 1999 ("Nov. 24 Lindsay Letter"); Vodafone AirTouch is one of the world's leading wireless telecommunications companies. The company provides a full range of wireless telecommunications services, including cellular, broadband personal communications (known as PCS), paging and data communications. Vodafone Group changed its name to Vodafone AirTouch. *See* Vodafone Airtouch Public Limited Company, *Report of Foreign Private Issuer Filing 6-K*, Sept. 7, 1999, at 2; Since the filing of the Application, Vodafone has merged its U.S. wireless interests with those of Bell Atlantic and formed Verizon Wireless, further diluting MediaOne's stake in Vodafone's U.S. wireless interests. *See In re Applications of Vodafone AirTouch, Plc, and Bell Atlantic Corporation*, Memorandum Opinion and Order, DA 00-721 (WTB/IB, rel. Mar. 30, 2000).

[89] Application at 14. MediaOne Group, *Filing 10-K for the Year Ended December 31, 1999* (2000) ("MediaOne 1999 10-K") at 16. These revenues include domestic cable operations and international broadband and wireless operations. *Id.*

[90] *See* AT&T Apr. 7 Revised Ownership Filing; *see also* AT&T Mar. 17 Ownership Filing at App. A; AT&T Nov. 24 Ownership Filing at App. A; MediaOne Group, *Filing 10-K for the Year Ended 1998*, ("MediaOne 1998 10-K") at 1-2. MediaOne also holds ownership interests in international cable service providers that as of Decemeber 31, 1998, passed approximately 2.6 million homes and provided service to approximately 993,000 subscribers. Among its international cable interests, MediaOne holds a 29.9% interest in Telewest Communications PLC, which provides cable and telecommunications services in the United Kingdom. *Id.*

Cable. The remaining 74.49% interest in TWE is held by Time Warner, Inc. ("TWI"). Under the TWE partnership agreement, MediaOne had co-management rights over Time Warner Cable and standard limited partner rights over TWE.[91] However, when MediaOne sent TWE notice that it was intending to merge with AT&T and was thus terminating the non-competition provisions of the TWE limited partnership agreement, MediaOne's co-management rights over TWE Cable were terminated.[92] Nevertheless, MediaOne retains veto rights over important TWE partnership decisions.[93] Applicants represent that after the merger "AT&T will have no right or ability to participate in the management of the TWE cable systems."[94] As of March 2000, TWE's cable systems served approximately 12.6 million subscribers nationwide.[95] Counting MediaOne's owned-and-operated systems together with the TWE systems in which MediaOne holds a 25.51% interest, MediaOne holds interests in cable systems that serve approximately 17.6 million subscribers, or 26.2% of cable subscribers and 21.4% of MVPD subscribers nationwide.[96]

27. *Video Programming Networks.* MediaOne holds direct ownership interests in seven national programming networks and two regional networks.[97] Those programmers include Food Network, Sunshine Network, Music Choice, E! Entertainment Television, Speedvision, Outdoor Life, iNDEMAND, New England News Network, and Fox Sports New England.[98] MediaOne owns an 11% direct interest in iNDEMAND (previously Viewer's Choice).[99] MediaOne also holds interests in video programmers

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[91] MediaOne 1998 10-K at 19.

[92] AT&T Nov. 24 Ownership Filing at 10 and App. C. MediaOne sent the notice to TWE on August 3, 1999. MediaOne's co-management rights were terminated the next day. *Id.* Under the TWE partnership agreement, Time Warner General and Limited Partners had the right to terminate MediaOne's co-management rights when MediaOne terminated the non-compete clause of the partnership agreement.

[93] AT&T Nov. 24 Ownership Filing at 2 n.7. MediaOne has veto rights over the following TWE partnership matters: the merger of TWE; the sale or transfer of assets constituting more than 10% of TWE assets; the expansion of TWE into new lines of business; the specified issuances of additional partnership interests; the indemnification of any partner or affiliate for liability in excess of $500,000,000; the incurrance of debt for money borrowed above a defined ratio; the admission of a new general partner; certain acquisitions above the greater of $750,000,000 or 10% of TWE's consolidated revenues for its most recent fiscal year; the dissolution of TWE; the voluntary bankruptcy of TWE; the amendment or modification of the TWE partnership agreement; and the transfer or sale of certain major interests in TWE or any sub-partnership thereof. *Id.*

[94] Application at 16. *See also* AT&T Nov. 24 Ownership filing at App. E ("Declaration of Professor John C. Coffee, Jr"); Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Deborah Lathen, Chief, FCC Cable Services Bureau, dated Apr. 7, 2000 ("AT&T does not now have and will not have post-merger any role in the management or operation of the TWI systems, either directly or indirectly through TWE. . . .").

[95] AT&T Apr. 7 Revised Ownership Filing. Because TWE manages and operates the TWI systems, TWI subscribers are attributable to TWE. *See* 47 C.F.R. §§ 76.503 n.2, 76.501 n.1.

[96] *See* AT&T Apr. 7 Revised Ownership Filing; *see also* Jan. 31 Kagan Media Index at 8; *1999 Competition Report,* 15 FCC Rcd at 1090 Tbl. C-1. Counting owned-and-operated systems alone, MediaOne is the nation's fourth largest cable operator. Under the cable ownership attribution rules, MediaOne is the nation's second largest cable operator because TWE's subscribers are attributable to MediaOne by virtue of MediaOne's ownership interest in TWE. *See* 47 C.F.R. §76.502 n.2.

[97] Application at 17.

[98] *Id.* MediaOne holds minority interests in Food Network, Sunshine Network, Music Choice, E! Entertainment Television, Speedvision, Outdoor Life, and Viewer's Choice. MediaOne holds a 50% interest in New England News Network and Fox Sports New England, though it claims no management rights. *Id.*

[99] AT&T Nov. 24 Ownership Filing at 17.

through its 25.51% partnership interest in TWE, which holds large ownership interests in major cable networks including Home Box Office, Turner Network Television, Cable News Network, Cartoon Network, Cinemax, Comedy Central, and the WB broadcast network.[100]

28. *Internet Services*. MediaOne holds an approximate 34.67% interest in the content-enriched, cable high-speed Internet access provider Road Runner.[101] After Excite@Home, Road Runner is the second largest provider of cable high-speed Internet access services in the United States.[102] Road Runner is the exclusive provider of this service over the cable systems of MediaOne, Time Warner, and other cable operators with which Road Runner has exclusive contracts. As of April 2000, approximately 730,000 households nationwide purchased Road Runner services.[103]

29. *Local Telephone Service*. In 1998 and early 1999, MediaOne began offering facilities-based local exchange service to residential customers in seven metropolitan areas: Atlanta, Georgia; Los Angeles, California; Jacksonville and Pompano Beach, Florida; Boston, Massachusetts; Detroit, Michigan; and Richmond, Virginia.[104] As of July 1999, MediaOne had approximately 26,000 local telephony customers nationwide with an overall penetration rate of less than three percent of the homes that it had upgraded to provide local exchange service.[105] As of May 2000, MediaOne has approximately 100,000 local cable telephone customers,[106] representing an overall penetration rate of approximately 4%.[107] In addition, MediaOne also holds an approximate 6% equity and 7.7% voting interest in Time Warner Telecom ("TWT"), a CLEC that provides local exchange and exchange access service primarily to large business customers in urban areas.[108] TWT serves approximately 20 cities, including four cities in New

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[100] Time Warner Entertainment, *Filing 10-K for the Year Ended 1999*, at I-3 and I-4.

[101] Application at 17. The Road Runner joint venture is operated by ServiceCo LLC ("ServiceCo"), which is owned by MediaOne, Time Warner, Inc. and its affiliates ("TWI"), Time Warner Entertainment-Cable ("TWE-Cable"), Compaq, and Microsoft. Compaq and Microsoft each hold a 10% interest in ServiceCo. The remaining 80% interest in ServiceCo is owned by MediaOne, TWI, TWE-Cable, and Time Warner Entertainment-Advance/Newhouse Partnership ("TWE-A/N") through Cable HoldCo, a limited liability corporation. The ownership of Cable HoldCo is as follows: MediaOne has a 31.38% interest, TWI has a 10.7% interest, TWE-Cable has a 24.99% interest, and TWE-A/N has a 32.93% interest. TWE owns a 65.3% interest in TWE-A/N. Subsequently, MediaOne's total interest in ServiceCo (including its proportionate share of the interest held by TWE and TWE-A/N) is 34.67%.

[102] *See* Kinetic Strategies, Cable Internet Service Providers and Systems Integrators, http://www.cabledatacomnews.com/cmic/cmic5.html.

[103] Road Runner, *Road Runner Announces Strong First Quarter* (press release), Apr. 12, 2000. As of September 30, 1999, Road Runner was available to 12.5 million homes in the United States and Canada and had approximately 173,000 MediaOne subscribers. *See* Kintetic Strategies, Cable Modem Market Stats & Projections, http://www.cabledatacomnews.com/cmic/cmic16.html.

[104] Application at 15. MediaOne 1998 10-K at 19.

[105] Application at 15 & n. 39. MediaOne does not provide long distance telephone service. *Id.*

[106] MediaOne Group, Inc., *MediaOne Installs 100,000th U.S. Digital Telephone Customer* (press release), May 18, 2000.

[107] Letter from Susan M. Eid, Vice President, Federal Relations, MediaOne Group, to Magalie Roman Salas, Secretary, FCC, dated May 25, 2000, Transmittal of Letter from Susan M. Eid to Royce Dickens, FCC Cable Services Bureau, dated May 25, 2000 ("May 25 Eid Letter").

[108] Letter from Michelle M. Mundt, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., to Magalie Roman Salas, Secretary, FCC, dated May 9, 2000, Transmittal of Letter from Susan M. Eid, Vice President, Federal

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York; three cities in North Carolina; four cities in Texas; two cities in Florida; two cities in Ohio; and several other cities.[109]

### B. The Merger Transaction and the Application to Transfer Licenses

30. *Proposed Transaction*. On May 6, 1999, AT&T announced its intent to merge with MediaOne.[110] Under the terms of the agreement, AT&T will acquire all shares of MediaOne.[111] MediaOne's shareholders will have the option to convert their shares into cash, shares in AT&T, or a combination of both, based on each shareholder's election.[112] Through the merger, AT&T plans to integrate its communications businesses with MediaOne's cable networks and build on AT&T's multi-billion dollar acquisition of TCI to foster new facilities-based competition in the provision of local telephone service.[113] The Applicants believe that the integration of their networks also will increase consumers' access to a wide array of packaged and a la carte services, including video and content-enriched high speed Internet access.[114] The Applicants contend that the merger will combine AT&T's strong brand name and communications expertise with MediaOne's "last mile" cable facilities and cable telephony expertise, thereby expanding and accelerating the merged entity's ability to compete with ILECs in providing communications services to residential customers.[115]

31. The proposed merger would join the nation's first, second, and fourth largest cable operators. AT&T, the nation's largest cable operator with 28.3% of all cable subscribers nationwide, would acquire MediaOne, the nation's fourth largest cable operator with 7.5% of all cable subscribers.[116] In addition, AT&T would acquire MediaOne's 25.5% interest in TWE, the nation's second largest cable operator with 18.9% of all cable subscribers.[117] After the merger, AT&T would have attributable ownership interests in cable systems that serve 51.3% of the nation's 67.1 million cable subscribers.[118] Of the nation's total 82.36 million television households that subscribe to MVPD service, the merged firm would serve 34.4 million or 41.8% of them.[119]

32. Shortly before entering into the merger agreement, AT&T also entered into a letter agreement with Comcast Corporation ("Comcast"), which contemplates an exchange between AT&T and

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Relations, MediaOne Group, Inc., to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated May 9, 2000 ("May 9 Eid Letter").

[109] See Time Warner Telecom, http://www.twtelecom.com/TimeWarnerCities.

[110] AT&T Corp., *MediaOne Group and AT&T Sign Definitive Merger Agreement* (press release), May 6, 1999.

[111] Application at 1.

[112] *Id.* at 6.

[113] *Id.* at 1, 20.

[114] *Id.*

[115] *Id.* at 18.

[116] *See* AT&T Apr. 7 Revised Ownership Filing; *see also* Jan. 31 Kagan Media Index at 8.

[117] *Id.*

[118] *Id.*

[119] *Id.; see also 1999 Competition Report*, 15 FCC Rcd at 1090 Tbl C-1.

Comcast of certain cable systems.[120] Upon consummation of AT&T's proposed merger with MediaOne, and the fulfillment of certain other conditions, Comcast and AT&T will transfer certain cable systems to one another.[121] In addition, after the filing of the Application, AT&T sold all of its interest in Lenfest Communications, Inc. to Comcast.[122]

33. *Federal Review.* In addition to Commission review, the proposed merger is also subject to review by the Department of Justice ("DOJ").[123] On May 25, the Department of Justice announced a consent decree with AT&T under which AT&T would be required to divest MediaOne's interest in Road Runner by December 31, 2001. Under the consent decree, AT&T also must obtain prior approval from DOJ before entering into certain types of arrangements with AOL or Time Warner that involve residential broadband Internet service.[124]

34. *Local Franchising Authority Review.* Applicants have completed initial regulatory filings with approximately 512 local franchising authorities.[125] Pursuant to Section 617 of the Communications Act, local franchising authorities with jurisdiction to review such transfers or sales of cable systems have 120 days from the date of Applicants' request for a franchise transfer to render a decision.[126] Of the 512 local franchising authorities that have received Applicants' franchise transfer requests, 506 approved the requested franchise transfers without conditions.[127] Two denied the request.[128] Six franchise authorities approved the transfer but imposed Internet access provisions.[129] In three of those six locales, the Internet access provisions were struck down.[130] Appeals are still pending in the remaining cases.[131]

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[120] Application at 6 n. 12.

[121] *Id.* Comcast will transfer to AT&T cable systems in Fort Lauderdale and Davie, Florida; Sacramento, California; Chesterfield, Virginia; Chamblee, Georgia; Chicago, Illinois; Westmoreland, Pennsylvania; and the State of Colorado. AT&T will transfer to Comcast cable systems in Naples and Fort Myers, Florida; Detroit, Michigan; Washington, D.C.; Baltimore and Ocean City, Maryland; the State of New Mexico; Philadelphia, Pennsylvania; and other systems in Michigan or in Nashville, Tennessee. *Id.*

[122] Jan. 19 Garrett Letter.

[123] *See United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000).

[124] *Id.*

[125] Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated June 2, 2000 ("June 2 Marsh Letter"). AT&T and MediaOne were required to seek approval for license transfers in connections with the proposed merger from a total of 512 out of 665 franchises affected. *Id.* A cable operator must obtain local franchising authority approval for the transfer or sale of its cable system only if the franchise agreement so requires. 47 U.S.C. § 537.

[126] 47 U.S.C. § 537; 47 C.F.R. § 76.502.

[127] June 2 Marsh Letter

[128] *Id.* The two local franchising authorities are Cambridge, Massachusetts and Mentor, Ohio. ("As to the Cambridge denial, the Massachusetts Department of Telecommunications and Energy recently ruled that municipal authorities cannot use the open-access issue to block the transfer of cable franchises. The Mentor, OH decision remains pending on appeal.") *Id.*

[129] *Id.*

[130] *Id.* The Massachusetts Department of Telecommunications and Energy determined that franchise authorities have no authority under Massachusetts regulations to impose access conditions as a part of a transfer of control.

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## IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

35. Parties opposing the merger have alleged that the combination of AT&T and MediaOne may harm the public interest with respect to the provision of various services. We address below the effects of the merger on only those services that may be affected adversely by the merger, based on commenters' allegations and our own analysis. Specifically, we examine the merger's potential effects on (1) video programming, (2) cable equipment, (3) broadband Internet services, (4) local exchange and exchange access service, and (5) mobile telephone service. We also address concerns related to (6) the bundling of services and (7) the deployment of services.[132]

### A. Video Programming

36. In this section, we consider the proposed merger's impact on video programming sold by program networks to MVPDs, who then deliver the networks via their distribution systems to their subscribers' television sets. MVPDs include cable, direct broadcast satellite ("DBS"), multichannel multipoint distribution services ("MMDS"), and satellite master antenna television ("SMATV") providers.[133] The relevant services offered by MVPDs using different distribution technologies are sometimes not perfect substitutes for each other (*e.g.*, DBS providers currently may not offer any or may offer only a select number of local broadcast channels in certain areas, which cable, MMDS, and SMATV systems are able to offer).[134] Subscribers, however, can combine services (*e.g.*, by using an antenna to receive broadcast programming over the air when subscribing to DBS services) to obtain services equivalent to those provided by other MVPDs.

37. Companies that own programming networks produce their own programming and/or acquire programming produced by others, then package this programming for sale to MVPDs. As discussed above, AT&T, MediaOne, and TWE have ownership interests in a large number of programming networks, such as American Movie Classics, Cinemax, Home Box Office, and Comedy Central, among

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The Department therefore struck those provisions from the North Andover, Massachusetts and Quincy, Massachusetts approvals. In addition, a federal court in Virginia has ruled that the forced access provisions imposed by the authorities in Henrico County, Virginia were invalid under both federal and state law. *Id.*

131 *Id.* Appeals are still pending as to decisions rendered in Madera County, California (two franchises) and Culver City, California.

132 47 C.F.R. § 76.572.

133 *See 1999 Competition Report*, 15 FCC Rcd at 980 ¶ 3 (generally describing the various types of MVPDs) (Section 628(g) of the Communications Act, 47 U.S.C. § 548(g), requires the Commission to report annually to Congress on the status of competition in markets for the delivery of video programming). DBS operators provide programming via satellite to subscribers that own or lease small-diameter receiving dishes. MMDS providers offer programming via microwave facilities (the service is often referred to as "wireless cable service"). SMATV operators, also known as "private cable operators," also frequently use microwave facilities to transmit programming to subscribers without crossing public rights-of-way. SMATV subscribers usually reside in multiple dwelling units ("MDUs").

134 Congress recently enacted a statute permitting DBS providers to offer local broadcast channels. See Pub. L. No. 106-113, §1000(9), 113 Stat. 1501 (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999 ("SHVIA"), Title I of the Intellectual Property and Communications Omnibus Reform Act of 1999, relating to copyright licensing and carriage of broadcast signals by satellite carriers, codified in scattered sections of 17 and 47 U.S.C.).

others. AT&T, MediaOne, TWE, and other MVPDs also purchase video programming and deliver it on their distribution networks (*e.g.*, cable or DBS) to their subscribers.

38. The proposed merger would combine AT&T and MediaOne, which itself has a 25.5% ownership interest in the TWE partnership. AT&T, TWE, and MediaOne are respectively the nation's first, second, and fourth largest cable companies. Post-merger, AT&T would have attributable ownership interests in cable systems serving 51.3% of cable subscribers and 41.8% of MVPD subscribers nationwide.[135] We analyze below the effects of the merger on the provision of (a) video programming and (b) electronic programming guides ("EPGs") used in advanced cable set-top boxes to direct subscribers to such programming. We also examine the application of the Commission's horizontal ownership rules,[136] program access rules[137] and channel occupancy rules[138] to the merged entity's provision of video programming and Internet services. We conclude that the merger will violate the cable horizontal ownership rules and accordingly order the Applicants to take compliance steps as a condition of this Order. With regard to the remaining video and EPG contentions, we find that the merger will not violate any other Commission rule or the Communications Act, nor frustrate the implementation of the Communications Act or its goals.

### 1. Diversity and Competition in Video Program Purchasing

39. Commenters have raised two types of potential harm that may arise due to the merged firm's increased subscribership. First, the merged firm may exercise excessive power in the purchase of video programming, allowing it to threaten the launch and survival of new and unaffiliated programmers. The result would be a diminishment of the diversity and number of media voices available to the public.[139]Second, because the merged firm will purchase programming for a significantly larger subscriber pool than would either Applicant acting alone, the merged entity may be able to negotiate large programming discounts and exclusive contracts with video programmers. Such action, some commenters argue, would hinder competition from the Applicants' smaller MVPD competitors (*e.g.*, DBS providers and cable overbuilders), who would be unable to offer the same programming choices and/or competitive prices.[140]

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[135] *See* Section III.B, *supra*.

[136] 47 C.F.R. § 76.503.

[137] 47 C.F.R. §§ 76.1000-76.1004.

[138] 47 C.F.R. § 76.504.

[139] *See* US West Comments at 5-6; TAP Comments at 29-30; GTE Comments at 5; WCA Comments at 5; SBC Comments at 21-25; BellSouth Reply Comments at 2-3; SBC Reply Comments at 3.

[140] *See* Echostar Comments at 8-9; Ameritech Comments at 10-11; MCI WorldCom Comments at 4; BellSouth Reply Comments at 5; Seren Reply Comments at 1. Ameritech argues that the volume discounts that AT&T now receives are anticompetitive and unjustified by cost savings. Ameritech Comments at 9. Commenters argue that large cable operators, because of their size, have been able to prevent unaffiliated programmers from dealing with non-cable MVPDs. BellSouth, a multichannel multipoint distribution MVPD, states that it has been denied access to unaffiliated programming networks such as Fox News, TV Land, and the Game Show Network because they have exclusive contracts with cable operators. BellSouth Comments at 6-8. Seren, a cable overbuilder, states that it has been placed at a competitive disadvantage because AT&T's size has caused the Midwest Sports Channel ("MSC"), which carries a 24-hour regional Minnesota sports channel, to enter into an exclusive contract with AT&T. See Testimony of Peter M. Glass, Vice President and General Counsel, Seren Innovations, Inc., FCC Cable Services Bureau AT&T-MediaOne Public Forum (Feb. 4, 2000), Tr. at 131 (hereinafter "Glass Public Forum

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40. In applying the four-prong public interest test, we find that the merger will violate the cable horizontal ownership statute and rules, which establish limits on a cable operator's size in order to prevent it from threatening diversity and competition in the provision of video programming.[141] Accordingly, as a condition to our grant of the Application, we will require the Applicants, within 12 months from the effective date of the horizontal ownership rules, May 19, 2000, to (a) divest their interests in TWE, (b) terminate their involvement in TWE's video programming activities (pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules), or (c) divest their interests in other cable systems, such that they will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide. We find that this divestiture requirement, together with other interim conditions and enforcement mechanisms discussed below, will mitigate sufficiently the merger's potential to frustrate or impair the Commission's implementation or enforcement of the Communications Act and its objectives.

### a. The Merged Firm's Cable Ownership Interests

41. As a preliminary matter, we must determine the extent of the merged firm's cable ownership interests. In the horizontal ownership limits statute, Congress directed the Commission to establish limits on the number of cable subscribers "a person is authorized to reach through cable systems owned by such person, ***or*** in which such person has ***an attributable interest*** . . ..."[142] Our cable ownership attribution rules define what constitutes an "attributable" interest such that the holder of the interest should be subject to the horizontal ownership limit:[143]

> The attribution rules seek to identify those corporate, financial, partnership, ownership and other business relationships that confer on their holders a degree of ownership or other economic interest, or influence or control over an entity engaged in the provision of communications services such that the holders should be subject to the Commission's regulation.[144]

42. Under the Commission's cable ownership attribution rules, the merged entity will have attributable ownership interests in cable systems serving approximately 41.8% of MVPD subscribers nationwide. Approximately 15.3% of the merged entity's subscribership base will derive from its attributable interest in TWE.[145] TWE will be attributable to the merged firm in two ways. First, under our

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Testimony"). WCA argues that the cable operators' purchasing power caused Rupert Murdoch to divest his interest in Echostar, a satellite MVPD, after cable operators refused to carry Murdoch's various Fox networks. WCA Comments at 10.

[141] Communications Act, § 613(f)(1)(A); 47 U.S.C. § 533(f)(1)(A); 47 C.F.R. § 76.504.; *see In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits*, MM Docket No. 92-264, Third Report and Order ("*Horizontal Third Report and Order*"), 14 FCC Rcd 19098, 19102 ¶ 29 n.21 (1999).

[142] Communications Act, § 613(f)(1)(A); 47 U.S.C. § 533(f)(1)(A) (emphasis added).

[143] *See Attribution Order*, 14 FCC Rcd at 19016 ¶ 1.

[144] *Id*., 14 FCC Rcd at 19017 ¶ 2.

[145] TWE owns systems that serve 10,856,000 subscribers and operates TWI Cable (a subsidiary of Time Warner Inc.), which owns cable systems that serve 1,795,000 subscribers, for a total of 12,651,000 subscribers. TWI Cable subscribers are attributable to TWE because TWE has operational control over TWI Cable's systems. *See* 47 C.F.R. § 76.503 n.2; 47 C.F.R. § 76.501 n.1.

attribution rules, a company that appoints a director or officer to a company or partnership, or shares common directors or officers, is deemed to have an attributable interest in that entity.[146] This rule is based on the economic reality that a director or officer has the power to direct the operations of the entity.[147] Accordingly, if the merged firm appoints directors to the TWE board of directors or management committee, or shares common directors and officers with TWE, then TWE is attributable to the merged firm.

43. Second, our cable ownership attribution rules provide that all partnership interests are attributable because, unlike a corporate shareholder, a limited partner may influence or control the operations of the partnership even if its percentage equity interest is very small.[148] In this case, the merged entity's 25.5% partnership interest representing an investment estimated to be worth some $14 to $18 billion in TWE clearly give it an attributable interest.[149] The consent of the merged entity will be required for many major decisions of the TWE partnership.[150] AT&T has emphasized that its partnership interest and multi-billion dollar investment in TWE will create "an aligning of interests" between AT&T and TWE that will facilitate AT&T's provision of local telephony service over the TWE cable systems.[151] Nothing in the record suggests that this alignment of AT&T and TWE's economic interests will not extend to coordination in the video programming arena.[152] However, as discussed below, the cable ownership attribution rules permit AT&T to maintain its partnership interest in TWE and to appoint or share common directors and officers without attribution of ownership, if AT&T has no involvement in the partnership's

[146] 47 C.F.R. § 76.503 n.2(c).

[147] 47 C.F.R. § 76.503 n.2(c); 47 C.F.R. § 76.501 n.2(g); *Attribution Order*, 14 FCC Rcd at 19041 ¶¶ 66-68.

[148] *See Attribution Order*, 14 FCC Rcd at 19039 ¶ 61.

[149] *See* Richard Bilotti, Gary Lieberman, Benjamin Swinburne, *4Q99 Review and 1Q00 Preview: Broadband Big Bang*, Morgan Stanley Dean Witter, Jan. 5, 2000, at 93 (MediaOne Group Estimated 2000 Fair Market Value – $13,869,700,000 interest in TWE).; Chistopher Dixon and Catherine Kim, *AOL Time Warner*, Paine Webber Equity Research, Mar. 1, 2000.

[150] *See* AT&T Nov. 24 Ownership Filing at 2 n.7 (TWE matters requiring Applicants' consent include: "the merger of TWE; sale or transfer of assets constituting more than 10% of the TWE assets; expansion of TWE into new lines of business; specified issuances of additional partnerhsip interests; indemnification of any partner or affiliate for liability in excess of $500,000,000; incurrance of debt for money borrowed above a defined ratio; admission of a new general partner; extension of the corporate services term beyond that contemplated in the LPA; certain acquisitions above the greater of $750 million or 10% of TWE's consolidated revenues for its most recent fiscal year; cash distributions above the level provided for in the LPA; dissolution of TWE; voluntary bankruptcy of TWE; amendment or modification of the LPA; and transfer or sale of certain major interests in TWE or any sub-partnership thereof. Mechanically, these rights are exercised by MediaOne through MediaOne's representatives on the TWE Board.").

[151] Testimony of James W. Cicconi, General Counsel and Executive Vice President Law and Government Affairs, AT&T, FCC Cable Services Bureau AT&T-MediaOne Public Forum (Feb. 4, 2000), Tr. at 72-73 (hereinafter "Cicconi Public Forum Testimony"); Applicants Ownership Reply Comments (Dec. 21, 1999) at 18, 24, 30.

[152] *See* Testimony of Greg Simon, Co-Director, openNET Coalition, FCC Cable Services Bureau AT&T-MediaOne Public Forum (Feb. 4, 2000), Tr. at 89-90 (hereinafter "Simon Public Forum Testimony") ("[AT&T stated that] because of [AT&T's and Time Warner Inc.'s] joint ownership of TWE through [AT&T's interest in] MediaOne, … [AT&T and Time Warner] would be able to align their interests with regard to rolling out local telephony. And, yet, all of a sudden we're asked to believe that they won't align their interests when it comes to programming and video services. One could ask why do you spend so much money to buy companies you then say you have no influence over and you're not going to have any cooperation with.").

video programming activities.[153]

### (i) Waiver of Attribution of Directors and Officers

44. As discussed above, any directors or officers (or the equivalent thereof) that the merged entity appoints to a TWE board or management committee renders TWE attributable to the merged firm.[154] In addition, if the merged firm and TWE share any common directors and officers, then TWE is attributable to the merged firm.[155] In order to avoid this attribution rule, the Applicants may request that the Commission waive attribution for any TWE director or officer, if his or her duties and responsibilities are wholly unrelated to TWE's video programming activities.[156] In addition, if the merged entity and TWE share common directors and officers, the Applicants may seek a waiver from attribution for those directors and officers if their responsibilities are wholly unrelated to both AT&T's and TWE's video programming activities.[157]

### (ii) The Insulated Limited Partnership Exemption

45. The Applicants may render their partnership interest nonattributable as follows: Under the insulated limited partnership ("ILP") exemption, a limited partnership interest shall not be attributed to a partner that "is not materially involved, directly or indirectly, in the management or operation of the video-programming related activities of the partnership and the relevant entity so certifies."[158] In order to satisfy this standard, the limited partner may not engage in the following seven activities (the "ILP test"):

(1) The limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video programming enterprises of the company;
(2) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video programming enterprises;
(3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video programming business;
(4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions;
(5) the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter;
(6) the limited partner may not perform any services for the partnership materially relating to its video programming activities, except that a limited partner may make loans to or act as a surety for the business; and
(7) the limited partner may not become actively involved in the management or operation of the video programming businesses of the partnership.[159]

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[153] *See* 47 C.F.R. § 76.503 n.2(b)&(c).

[154] *See* 47 C.F.R. § 76.503 n.2(c).

[155] *See id.*

[156] *See id.*

[157] *See id.*

[158] *See Attribution Order*, 14 FCC Rcd at 19040 ¶ 64; 47 C.F.R. § 76.503 n.2(b)(1).

[159] *See* 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19040-19041 ¶ 64.

To take advantage of the ILP exemption, the limited partner must file with the Commission a certification, with supporting facts, stating that it is not involved in these seven activities.[160]

46. The cable ownership attribution rules preclude insulation where a limited partner sells video programming to the partnership, based on the recognition that such sales relationships provide the limited partner added capability and incentive to influence the partnership's video programming choices. This preclusion was in effect at the time the proposed merger was announced and remains in effect today. The attribution rules adopted in 1993 permitted insulation where the limited partner did not provide "services for the partnership materially relating to its *media activities*."[161] The rules specifically stated the criteria for insulation under this standard:

> The criteria which would assure adequate insulation for purposes of this certification are described in the Memorandum and Order in MM Docket No. 83-46, FCC 85-252 (released June 24, 1985) ["*1984 Attribution Order on Reconsideration*"] as modified on reconsideration in the Memorandum Opinion and Order in MM Docket No. 83-46, FCC 86-410 (released November 28, 1986) ["*1984 Attribution Order on Further Reconsideration*"].[162]

47. The *1984 Attribution Order on Reconsideration* explains that an insulated limited partner may not perform any services that materially relate to a cable operator's media activities.[163] Again in the *1984 Attribution Order on Further Reconsideration*, the Commission stated that "an exempt limited partner should not perform any services to the limited partnership relating, in any material respect, to its media activities."[164] Given that a cable operator's core media activity is the provision of video programming, there can be no service more material to a cable operator's video programming than the sale of programming to the cable operator. Because video programming is at the heart of "media activities," the Commission in 1989 held that an investor could not shield its investment from attribution if it sold video programming to the investment.[165] Last year, the Commission noted that the sale of video programming was a service materially relating to media activities under the parallel broadcast attribution rule.[166]

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[160] *See* 47 C.F.R. § 76.503 n.2(b)(2) ("[T]he certification must be accompanied by facts, e.g. in the form of documents, affidavits or declarations, that demonstrate that these insulation criteria are met."); *Attribution Order*, 14 FCC Rcd at 19040-19041 ¶ 64.

[161] *See Attribution Order*, 14 FCC Rcd at 19038 ¶ 57 (emphasis added).

[162] 47 C.F.R. § 76.501 n.2(g)(2).

[163] *In re Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, MM Docket No. 83-46, Memorandum Opinion and Order ("*1984 Attribution Order on Reconsideration*"), 58 R.R. 604, 607 ¶ 50 (1985) ("[T]he limited partnership agreement should also bar the exempt limited partner from performing any services to the limited partnership materially relating to its media activities.").

[164] *In re Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, MM Docket No. 83-46, Memorandum Opinion and Order ("*1984 Attribution Order on Further Reconsideration*"), 1 FCC Rcd 802 ¶ 3 (1986).

[165] *See Twentieth Century Corp.*, BTCCT-990617KE, BRCT-88120KM, 4 FCC Rcd 4052, 4054 ¶¶ 15-17 (1989) (although an investor can shield its investment from attribution if the investment is placed in a trust, the investment is not shielded if the investor sells video programming to the investment).

[166] *See Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Regulation and Policies*

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48. In the 1999 *Attribution Order*, we replaced the term "media activities" with the term "video-programming related activities" and required the limited partner to certify that it does not provide any service materially related to the partnership's video-programming activities.[167] We amended the rule in order to allow a limited partner to insulate its partnership interest even if it participates in the partnership's other media activities, including the provision of telephony services, so long as it is not materially involved in the partnership's video-programming related activities.[168] We emphasized that our amendment to the ILP rule would not permit a limited partner to insulate itself if it provided services materially related to the limited partnership's video programming activities.[169] Therefore, the new rule maintains the 1993 rule's prohibition against the insulated limited partner's sale of video programming to the partnership.

49. As discussed above in Section III, AT&T and MediaOne hold attributable interests in numerous programming affiliates, including among others, Encore, Bravo, Discovery, New England Sports, BET, American Movie Classics, and STARZ! These affiliates in turn sell their programming to TWE.[170] The Applicants' sale of programming, via its attributable programming affiliates, to TWE is a service for TWE "materially relating to its video programming activities" and provide the Applicants with the added capability and incentive to influence TWE's video programming choices.[171] Accordingly, the merged firm will be deemed materially involved in TWE's video-programming activities, precluding application of the insulated limited partnership exemption. The merged firm thus will have attributable ownership interests in cable systems serving approximately 41.8% of MVPD subscribers nationwide.

#### b. The Merged Firm's Video Programming Purchasing Power

50. Having determined the merged firm's ownership interests and subscribership base, we next consider how this subscribership base translates into the ability to affect competition and diversity in the delivery of video programming to consumers. As discussed above, MVPDs purchase video programming and deliver it on their distribution networks (*e.g.*, cable or DBS) to their subscribers. Each MVPD negotiates license fees with programming networks for the right to carry the networks on the MVPD's distribution systems. The license fees are based, in part, on the MVPD's total subscriber numbers. In addition, the network often grants the MVPD a portion of the network's advertising time, which the MVPD in turn sells to its own advertisers for advertising revenue. Large MVPDs, such as AT&T, MediaOne, and TWE, are likely to purchase programming networks for delivery to their entire nationwide subscribership.

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*Affecting Investment in the Broadcast Industry and Reexamination of the Commission's Cross-Interest Policy*, MM Docket Nos. 94-150, 92-51 and 87-154, Report and Order ("*Broadcast Attribution Report and Order*"), 14 FCC Rcd 12559, 12617 ¶ 133 (1999) ("[A] contractual arrangement to provide programming would be inconsistent with the insulation criterion that 'the limited partner may not perform services for the partnership materially relating to its media activities.'").

[167] *See Attribution Order*, 14 FCC Rcd at 19040 ¶ 64; 47 C.F.R. § 76.503 n.2(b)(1).

[168] *See Attribution Order*, 14 FCC Rcd at 19040 ¶ 63.

[169] *Id.*

[170] For example, the following AT&T and MediaOne affiliates sell their programming to TWE New York City cable systems: Discovery, USA Network, E! Entertainment, Fox Sports New York, MSG, MSG 2, BET Network, BET on Jazz, Sci-Fi Channel, Bravo, Starz!, the Travel Channel, Animal Planet, QVC, and Court TV. *See* U S West Dec. 14 Reply Comments at 11, Attachment (attaching the channel lineups for TWE New York cable systems).

[171] *See* 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19040-19041 ¶ 64;

Programmers attempt to reach subscribers on a regional or national basis to increase the value of their programming to advertisers.

51. Start-up video programmers need to reach a critical level of subscribership quickly in order to achieve long-term financial viability.[172] Video programmers' need for a large number of subscribers confers on AT&T, MediaOne, and TWE, which have access to a large number of subscribers, significant bargaining power.[173] Because cable operators purchase programming based on the number of subscribers they serve, we found in the *Horizontal Third Report and Order* that the number of subscribers served by a cable operator most accurately reflects that cable operator's purchasing market power.[174] The Commission also recognized that measuring the market in terms of cable subscribers alone is inappropriate.[175] DBS operators and other MVPDs purchase video programming for their subscribers from the same market and thus directly affect a cable operator's market power. Consequently, a cable operator's purchasing power should be measured in terms of the percentage of all MVPD subscribers that it serves.[176] Under this MVPD subscriber standard, which we use in our cable horizontal ownership rules and in our analysis below, the merged firm would have attributable ownership interests in cable systems serving approximately 34.4 million, or 41.8%, of the nation's 82.36 million MVPD subscribers.[177]

**c. Potential Harm to Competition and Diversity in Video Programming**

52. In Section 613(f)(1)(A) of the Communications Act, Congress directed the Commission to establish limits on a cable operator's size, because Congress was concerned that concentration in cable system ownership might harm competition and diversity in video programming.[178] Pursuant to this statutory directive, the Commission enacted the cable horizontal ownership rules, which provide that no cable operator may serve more than 30% of MVPD subscribers nationwide.[179] The Commission voluntarily stayed the horizontal ownership rules pending the United States Court of Appeals for the District of Columbia Circuit's ("D.C. Circuit") consideration of a constitutional challenge to Section

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[172] *1999 Competition Report*, 15 FCC Rcd at 1056 ¶ 177.

[173] *See id.* In addition, the merged entity may coordinate its purchasing decisions with other MVPDs, which would further expand the merged entity's bargaining power and ability to prevent the launch of a new programmer that AT&T, MediaOne, and TWE disfavor. *See id.* at ¶ 168. Concentration of ownership among buyers is one indicator that coordinated behavior among buyers will be successful. *Id.* The seven largest cable operators now serve almost 90% of the nation's cable subscribers, and the ten largest MVPDs serve almost 75% of the nation's MVPD subscribers. *Id.* at ¶ 16, Tbl. C-4.

[174] *See Horizontal Third Report and Order*, 14 FCC Rcd at 19108 ¶ 22.

[175] *See id.* at ¶¶ 27-31.

[176] *See id.* at ¶ 30.

[177] *See* Sections III.A and III.B, *supra*.

[178] *See* Communications Act, § 613(f)(1)(A); 47 U.S.C. § 533(f)(1)(A). *See also* 1992 Cable Act, § 2(a)(4); Pub. L. No. 102-385; 47 U.S.C. § 521 note ("The cable industry has become highly concentrated. The potential effects of such concentration are barriers to entry for new programmers and a reduction in the number of media voices available to consumers."); *Horizontal Third Report and Order*, 14 FCC Rcd at 19102-19104, 19113-19114, 19116 ¶¶ 9-14, 38-39, 43; *Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. 92, 102d Cong., 1st Sess. 34 (1991) ("[L]arge MSOs [cable operators] have the market power to determine what programming services can 'make it' on cable.").

[179] 47 C.F.R. § 76.503.

613(f)(1)(A).[180] The D.C. Circuit upheld the constitutionality of the statute on May 19, 2000, on which date the Commission's voluntary stay was automatically lifted and the horizontal ownership rules became immediately effective.[181] In the *Reconsideration of the Horizontal Third Report and Order*, we stated that parties in violation of the rules on the date of the court's decision must come into compliance with the rules within 180 days thereafter.[182] The merged entity's attributable ownership interest in cable systems serving 41.8% of the nation's MVPD subscribers clearly would violate the 30% horizontal ownership limit. We discuss below our horizontal ownership rules and their application to the merged entity.

53. Section 613(f)(2)(A) directs the Commission to set a horizontal ownership limit which would ensure that

> [N]o cable operator or <u>group of cable operators</u> can unfairly impede, either because of the size of any individual operator or because of joint actions by <u>a group of operators</u> of sufficient size, the flow of video programming from the video programmer to the consumer. . .[183]

54. Pursuant to this directive, we found in the *Horizontal Third Report and Order* that, if a cable operator, by itself or in concert with others, can determine the success or failure of a new programming service, then we must conclude that it has excessive purchasing power in the video programming market.[184]

55. As noted above, programming networks generally need to reach a large number of subscribers fairly quickly in order to achieve long term financial viability. In the *Horizontal Third Report and Order*, we found that 15 million subscribers, or close to 20% of MVPD subscribers nationwide, is the minimum number necessary to give a video programmer a reasonable chance of long-term success. In setting the horizontal limit, we also analyzed the new programmer's probable rate of success in reaching subscribers through MVPDs that do not flatly deny it carriage. We found that, on average, a new video programming network is likely to capture approximately 50% of the subscribers that are available to it.[185] Accordingly, we concluded that approximately 40% of the market needs to be available to a new video programming network to give it a reasonable chance of reaching the 15 million subscribers (or 20% of the market) it needs for long-term success. To ensure that, even if two cable operators collectively deny carriage to a new programmer, at least 40% of MVPD subscribers nationwide would still remain available to the programmer, we determined in the *Horizontal Third Report and Order* that a 30% horizontal limit was appropriate.[186]

56. We note that some commenters argue that the Commission should use its public interest authority to require the Applicants to divest TWE instead of permitting the Applicants to choose alternative

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[180] *See In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits,* MM Docket No. 92-264, Order on Reconsideration of the Third Report and Order ("*Reconsideration of the Horizontal Third Report and Order*"), 15 FCC Rcd 1167, 1168 ¶ 6 (2000).

[181] *See id.*, 15 FCC Rcd at 1169 ¶ 8.

[182] *See id*.

[183] *See* Communications Act, § 613(f)(2)(A), 47 U.S.C. § 533(f)(2)(A) (emphasis added).

[184] *See Horizontal Third Report and Order*, 14 FCC Rcd at 19114-19116 ¶¶ 39-43.

[185] *See id.*, 14 FCC Rcd at 19117-19118 ¶¶ 48-49.

[186] *See id.*, 14 FCC Rcd at 19117-19118 ¶¶ 48-54.

methods to comply with the horizontal rules.[187] MAP argues that the merger of "interests in the first, second, and fourth largest cable MSOs, and in many of the most popular cable program services, substantially threatens the viability of emerging cable programmers."[188] In enacting the Section 613(f)(2)(A) directive for the Commission to adopt a horizontal limit that would protect against the threat that "joint actions by a group of operators" would impede the flow of video programming to the consumer, Congress recognized a significant likelihood that cable operators would coordinate their program purchasing decisions.[189] Because cable operators generally do not compete against each other in their respective franchise areas, they may incur no loss from carrying the same programming networks and have little economic disincentive for coordinated action. There is instead the potential for cable operators to gain by carrying the same programming networks in order to spread the costs of such programming over a larger subscriber base. Coordination in purchasing could increase cable operators' ability to get exclusive contracts with unaffiliated networks, to the detriment of alternative MVPDs (such as DBS) seeking to compete against the incumbent cable operators.

57. The concern about coordinated action reflected in the horizontal ownership rules only becomes stronger in light of recent consolidation in the MVPD industry.[190] In 1999 alone, in addition to the proposed merger between AT&T and MediaOne, other announced mergers and acquisitions include those between Adelphia Communications, Century Communications, and FrontierVision; between Comcast, Jones Intercable, Prime Cable (Maryland), and Lenfest Communications; and between Cox Communications, Media General, Prime Cable (Las Vegas), and TCA Cable. Vulcan Ventures acquired Marcus Cable and Charter Communications (which previously had acquired Falcon) in 1998 and purchased control in numerous MSOs in 1999, including Fanch Communications, Avalon, Greater Media, Helcion, Renaissance, and Rifkin. Concentrated markets are more prone to collusive outcomes than are competitive markets.[191]

58. We agree with commenters that the merged entity presents an especially potent force in the

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[187] *See* Letter from Andrew Jay Schwartzman, President and CEO, Media Access Project, to Magalie Roman Salas, Secretary, FCC, dated May 10, 2000 ("MAP May 10 Letter"); Letter from Andrew Jay Schwartzman, President and CEO, Media Access Project, to Magalie Roman Salas, Secretary, FCC, dated May 31, 2000 at 1 ("[I]t is contrary to the public interest to allow AT&T the option of restructuring its relationship with Liberty Media instead of divesting MediaOne's partnership interest in Time Warner Entertainment, LP.").

[188] MAP May 10 Letter at 4.

[189] *See Horizontal Third Report and Order*, 14 FCC Rcd at 19116 ¶ 43 n.99 (citing 47 U.S.C. § 533(f)(2)(A) (directing the Commission to take into account conduct by a single "cable operator or group of cable operators")); *see also WorldCom-MCI Order*, 13 FCC Rcd at 18025 ¶ 36 ("In our analysis of the competitive effects of the merger, we consider whether the merger will increase the likelihood of unilateral anticompetitive conduct by the merged entity or coordinated anticompetitive conduct of multiple market participants."); *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19985 ¶ 121 ("Market performance can also be adversely affected if a merger increases the potential for coordinated interaction by firms remaining in the post merger market."); *see also 1992 Horizontal Guidelines*, 57 Fed. Reg. 41552, 41558 § 2.1 ("Lessening of Competition Through Coordinated Interaction").

[190] *See 1999 Competition Report*, 15 FCC Rcd at 986 ¶ 16, 1053 ¶168, 1094 Tbl. C-4 (ten largest MVPDs serve almost 75% of the nation's MVPD subscribers), 15 FCC Rcd at 1053-54 ¶ 168 (noting that MVPDs may coordinate their purchasing decisions).

[191] *See WorldCom-MCI Order*, 13 FCC Rcd at 18025 ¶ 121 ("As the number of most significant market participants decreases, all other things being equal, the remaining firms are increasingly able to arrive at mutually beneficial market equilibria, to the detriment of consumers. In general, increased concentration facilitates coordinated interaction. . . .").

video programming market because AT&T, MediaOne, and TWE are the industry leaders both in their operation of cable systems and their ownership of video programming networks.[192] Beside being the first, second and fourth largest MVPDs nationwide, AT&T, TWE, and MediaOne also have ownership interests in a significant number of video programming networks (including, among others discussed in Section III above, TWE's HBO, Comedy Central, CNN, TNT, Cartoon Network, Cinemax, and the WB broadcast network; Liberty's Encore, Starz!, Discovery Channel, Telemundo Network, BET, USA Networks, and the Learning Channel; Cablevision's Bravo, American Movie Classics, and the Independent Film Channel; and MediaOne's Golf Channel and Speedvision). TWE owns 100% of three of the top six program networks by number of subscribers, and AT&T owns 49% of one of the top six program networks.[193] In addition, AT&T and TWE together own 100% of four of the top six premium networks.[194] Not only will the merged entity have attributable interests in a vast number of programming networks, including many of the networks with the largest number of subscribers nationwide, but new networks will reduce their chances for long-term success if they do not meet the terms and preferences of the merged firm. The combination of these two factors makes the merged entity a potentially powerful gatekeeper that could affect the diversity of video programming delivered to consumers.

59. We believe these potential harms are sufficiently mitigated by compliance with Section 613(f)(1)(A) and the horizontal ownership rules. Accordingly, as a condition to our grant of the Application, we will require the Applicants to (a) divest their interests in TWE, or (b) terminate their involvement in TWE's video programming activities pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules, or (c) divest their interests in other cable systems, such that the merged firm will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide. We discuss below the compliance period, interim conditions, and enforcement mechanisms that we are adopting pursuant to this condition to our grant of the Application.

#### (i) Applicants' Arguments regarding Lack of Potential Harm

60. The Applicants make four arguments that, they contend, demonstrate that their post-merger size will not threaten competition and diversity in the provision of multichannel video-programming, notwithstanding the findings of the *Horizontal Third Report and Order* supporting our 30% horizontal ownership limit. The Applicants do not request a waiver of the horizontal ownership rules based on the particular characteristics of this merger; thus, they are required to abide by the rule. Nonetheless, in the interest of a complete record, we will address the Applicants' four arguments.

61. First, the Applicants argue that increased competition from other MVPDs, particularly DBS, diminishes the Applicants' program purchasing power because video programmers will be able to obtain carriage on other MVPDs.[195] Although we agree that non-cable MVPDs limit the Applicants'

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[192] This analysis does not even take into account the programming interests of Time Warner, Inc. the general partner of TWE. Time Warner, Inc. would also have an incentive to use its relationship with the merged entity through TWE to promote its own programming.

[193] *See* Paul Kagan Assocs., Inc., *Cable Network Television Household Growth*, 1989-1999, Cable Program Investor, Mar. 17, 2000 at 4-5.

[194] *See* Cahners Business Information, *Cablevision- Database: Network Subscribers*, http:// www. cablevisionmag.com/database/db_pay.asp; *see also* Cahners, Network Subscriber Counts, Cablevision Blue Book, Dec. 1999 at 74.

[195] Application at 45-54.

market power, we already have considered this factor in our analysis supporting the horizontal ownership rules and found that basing our ownership limit on the number of total MVPD subscribers, rather than cable subscribers alone, adequately accounts for video programmers' ability to obtain carriage from other MVPDs. No merger-specific facts suggest that other MVPDs will have such greater effect on the market behavior of the parties to this transaction that the general rule should not apply.

62. Second, the Applicants argue that the expanded channel capacity of their cable systems will permit them to carry more programmers and therefore diminish their ability to harm programmers.[196] In the *Horizontal Third Report and Order*, we found that this argument had little merit because, among other reasons, the growth rate of new programmers rapidly outpaces the growth of new channels[197] and an increase in sheer number of channels cannot be assumed to indicate an increase in the diversity of channels.

63. Third, the Applicants argue that other Commission rules, such as program access, program carriage, must carry, leased access, and the channel occupancy rules foreclose their ability to exert excessive programming market power.[198] While those rules are important, they are complements rather than substitutes to the horizontal ownership rules. Just as Congress and this Commission found reasonable horizontal limits to be necessary despite the existence of those other rules, those other rules do not eliminate the need to apply the horizontal ownership limit in this case.

64. Fourth, apparently arguing that the merged firm should be able to serve 35% of the nation's MVPD subscribers, the Applicants claim that that the Department of Justice has "effectively established a 'safe harbor' against monopsony power challenges when the [purchaser] firms in question account for less than 35% of total purchases."[199] The Applicants claim that the Department of Justice created this safe harbor by disposing of such matters through what the Applicants contend are "routine Business Review" letters.[200] However, the Department of Justice does not "conduct business reviews for proposed mergers."[201] Rather, the Department of Justice issues business review letters when business entities seek to ascertain the Antitrust Division's enforcement intentions with respect to "potential civil, non-merger, conduct."[202] Moreover, the three business review letters that the Applicants cite involve concerted action by numerous unaffiliated purchasers rather than a single entity or affiliated entities, and thus are factually dissimilar to the proposed merger.[203] In any event, the Department of Justice's business

[196] *Id.* at 50.

[197] *Horizontal Third Report and Order*, 14 FCC Rcd at 19104 ¶ 14 n.33.

[198] Application at 59.

[199] *Id.* at 56-58.

[200] *Id.*

[201] Department of Justice Antitrust Handbook at III-126 (3d ed. Feb. 1998) ("with the exception of a very limited number of health care mergers").

[202] *Id.* Furthermore, a business review letter would not bind the Department of Justice because the letter states only the Antitrust Division's enforcement intentions as of the date of the letter, and the Division may bring at a later date "whatever action or proceeding it subsequently determines is required by the public interest." *Id.* at III-130; *see also United States v. Grinnell Corp.*, 30 F.R.D. 358, 363 (D.R.I. 1962).

[203] *See Business Travel Contractors Corp.*, 1995 DOJBRL LEXIS 9 (1995) (entity to purchase discount airline tickets on behalf of a group of corporations); *IFA Shippers' Ass'n*, 1990 DOJBRL LEXIS 2 (1990) (shippers form group to purchase volume discounts from ocean carriers); *Utilities Service Alliance*, 1996 DOJBRL LEXIS 4 (1996) (electric power utilities form alliance to purchase resources).

review letters cannot negate the Commission's rules nor our merger analysis, which is guided by different public interest principles.

#### (ii) Applicants' Waiver Request and the Compliance Conditions

65. The Applicants request that the Commission waive the cable horizontal ownership and ownership attribution rules for 18 months, at the end of which period the Applicants would come into compliance with the rules in effect at that time.[204] The Commission's rules may be waived for good cause shown.[205] A waiver is appropriate only if the applicant shows that (1) special circumstances warrant a deviation from the general rule and (2) a deviation from the rule would better serve the public interest underlying the rule's promulgation.[206] Commission rules are presumed valid, and "an applicant for waiver faces a high hurdle even at the starting gate."[207] For the reasons set forth below, we find that the Applicants have not shown good cause for an 18-month waiver of our ownership rules. Based on the complexity of the business arrangements involved and the many varied interests which the Applicants must divest to ensure compliance, however, we find it appropriate to grant the Applicants a period of 12 months from the effective date of our horizontal ownership rules, May 19, 2000, to effectuate the divestitures required by our current horizontal ownership rules, subject to certain interim conditions and enforcement measures.

66. As the first ground for their waiver request, the Applicants previously argued that the nature of their interests in TWE and programming affiliates such as Liberty and Rainbow does not grant them sufficient control over the day-to-day operations of these entities to implicate the public interest concerns of the cable ownership attribution rules. The Commission has thoroughly considered and rejected these specific arguments in the cable ownership attribution rulemaking proceeding.[208] In that rulemaking proceeding, the Applicants expressly argued that the Commission should apply an "actual control test" and should not deem their interests in Liberty, Rainbow, and TWE to confer influence or control on the Applicants.[209] The Commission rejected these arguments in adopting the revised ownership attribution rules.[210] A "waiver applicant traditionally has a heavy burden to demonstrate that the arguments advanced in support of the waiver request are substantially different from those that have been carefully considered at the rulemaking stage."[211] The Applicants are merely repeating here the arguments and facts that they

[204] Applicants Dec. 21 Ownership Reply Comments at 35.

[205] 47 C.F.R. § 1.3.

[206] *Northeast Cellular Telephone Co., LP v. FCC*, 897 F.2d 1164, 1165 (D.C. Cir. 1990); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

[207] *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972).

[208] *Attribution Order*, 14 FCC Rcd at 19029-19031 ¶¶ 33-37 (rejecting commenters' "day-to-day control" arguments).

[209] *See* Letter from Mark C. Rosenblum, Vice President – Law, AT&T, to William E. Kennard, Chairman, FCC, dated Oct. 1, 1999 at 4 n.4 (incorporating the Applicants Reply Comments from this proceeding into the *Attribution* proceeding); Applicants Sept. 17 Reply Comments at 28-36 (arguing that AT&T's post-merger interests in Liberty, Rainbow, and TWE should not confer influence or control on AT&T).

[210] *See Attribution Order*, 14 FCC Rcd at 19024-19032 ¶¶ 22-39.

[211] *In re Federal-State Board on Universal Service: Startec Global Communications Corp*, CC Docket No. 96-45, Memorandum Opinion & Order ("*Startec*"), FCC 99-75 ¶ 9 n.37 (rel. April 16, 1999) (citing *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680, 683 (D.C. Cir. 1970). *See also Startec*, FCC 99-75 at ¶ 9 n. 38 ("Generally, the Commission need not re-study a matter and reconsider policy every time it receives an application for waiver.") (citing *Wait*, 418 F.2d at 1156-57).

presented in the rulemaking proceeding.[212] The Applicants have not shown how a waiver based on these arguments, which were rejected in the *Attribution* rulemaking proceeding, would serve the public interests underlying the ownership attribution rules rather than undermining the integrity of the rules.

67. Second, the Applicants argue that an 18-month waiver of the horizontal ownership and ownership attribution rules would better serve the public interest than strict adherence to the rules because of the public benefits that the Applicants argue the merger will bring.[213] As a preliminary matter, the Applicants have not demonstrated why their claimed local telephony public interest benefits will be obtainable if they have 18 months in which to divest, but not if they have a shorter period for divestiture. More importantly, the waiver standard requires the Applicants to demonstrate that deviation from the cable horizontal ownership and ownership attribution rules would better serve the public interest underlying these rules, and the Applicants have failed to satisfy this burden of proof.[214] The attribution rules are designed to identify investments and other interests that confer on their holders influence or control. The Applicants' claimed local telephony public benefits cannot negate the harm to video programming competition and diversity that would result from the merged entity's influence or control over the nation's first, second, and fourth largest cable operators. Moreover, the Commission considered the Applicants' arguments regarding the benefits of clustering, economies of scale, and competition with LECs when it adopted the cable attribution rules.[215] The Applicants have presented no new arguments in this regard. Accordingly, we cannot grant the Applicants' request that the Commission waive the cable horizontal ownership and ownership attribution rules for 18 months and allow the Applicants to come into compliance with those rules in effect at the end of that period.

68. In June 1998, long before the Applicants' merger negotiations, the Commission had put the industry on notice that parties in violation of the horizontal ownership rules at the time our voluntary stay is lifted would be required to comply with the rules within sixty days after the lifting of the stay.[216] We specifically warned "particular parties that are now entering into business arrangements that would violate the rules but for the existence of the stay, [that they] should be well aware of the existence of the rules and thus have a full opportunity to comply with them."[217] Thus, at the time of the Applicants' merger negotiations in 1999, the Applicants were on notice that they should not enter into any transaction that would be difficult for them to divest within 60 days after the stay was lifted, and they assumed the risk that they would be forced to divest within 60 days if and when the stay is lifted. In the *Horizontal Third Report and Order* which we adopted in October 1999, three months after the filing of the Application, the Commission decided that 180 days was a more reasonable timeframe for divestitures after the stay was

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[212] *See Startec*, FCC 99-75 at ¶ 9 (in the rulemaking, the Commission considered and rejected the argument that was the applicant's reason for a waiver).

[213] Applicants Ownership Comments (Dec. 21, 1999) at 35-36.

[214] *See Northeastern Cellular*, 897 F.2d at 1166.

[215] *See Attribution Order*, 14 FCC Rcd at 19026 ¶ 26 ("AT&T, TCI, NCTA and MediaOne argue that the Commission should take into account. . . the benefits of clustering and economies of scale. . . . They argue that the Commission should consider the benefits of enabling cable operators to compete with incumbent local exchange carriers.").

[216] *In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits*, MM Docket No. 92-264, Second Memorandum Opinion and Order on Reconsideration ("*Horizontal Second Memorandum Opinion and Order on Reconsideration*"), 13 FCC Rcd 14462, 14492 ¶ 77 (1998).

[217] *Id.*

lifted.[218]

69. The Commission has allowed divestiture periods of more than 180 days in similar situations, however, where parties were required to divest properties in order to comply with Commission rules. Indeed, the Commission has granted parties a period of 12 months in order to comply with our ownership rules in a number of instances involving complex business transactions, most recently in granting the license transfer applications attendant to the merger of CBS and Viacom.[219]

70. In this case, all three of the divestiture options available to the Applicants involve complex business transactions. For example, one means for the Applicants to divest their interest in TWE is to activate their registration rights under the TWE Limited Partnership Agreement and sell their interest in a public offering. However, under the terms of the TWE Limited Partnership Agreement, the Applicants cannot start this process until January 2001, and they will have to follow a series of complex procedures (including an assessment by investment bankers) to effectuate a public offering.[220] Alternatively, if the Applicants choose to cease involvement in TWE's video programming activities and make TWE non-attributable pursuant to the insulated limited partnership exemption and directors/officers attribution waiver provisions, among other steps to assure non-involvement, Applicants would have to divest a variety of video programming network ownership interests, including AT&T's attributable interests in Liberty and Rainbow. The Applicants have emphasized, in particular, the complicated corporate procedures and tax issues involved in the spin-off of Liberty.[221] Finally, if the Applicants choose to retain an attributable interest in TWE and instead divest their ownership interests in other cable systems, they will have to divest from a large number of cable systems, serving approximately 11.8% of MVPD subscribers nationwide, in order to comply with the 30% ownership limit. Consistent with our precedents, we find that the complexity of these transactions supports the granting of a 12-month period for the Applicants to effectuate the necessary divestitures. There is no support in the record, however, for going beyond a 12-month period to give the Applicants 18 months to divest their attributable ownership interests in order to come into compliance with the 30% horizontal ownership limit.

71. Accordingly, as a non-severable condition to our grant of the Application, we will give the Applicants a period of 12 months from the effective date of the horizontal ownership rules, May 19, 2000 to (a) divest their interests in TWE, (b) terminate their involvement in TWE's video programming activities (pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules), or (c) divest their interests in other cable systems, such that they will

[218] *See Horizontal Third Report and Order*, 14 FCC Rcd at 19128 ¶ 73.

[219] *See CBS/Viacom Transfer of Control Order*, File No. BTCCT-19991116ABA, *et al.*, FCC 00-155 at ¶¶ 14-16, 18-22 (rel. May 3, 2000) (granting 12-month period to comply with broadcast national ownership and dual network rule); *In re Applications of Turner Broadcasting System, Inc.*, 11 FCC Rcd 19595 ¶ 41 (1996) (granting 12-month waiver to comply with cable-broadcast cross-ownership rule); *Young Broadcasting, Inc*, 11 FCC Rcd. 14632 ¶ 10 (1996) (granting 12-month period to comply with broadcast-cable cross-ownership rule); *In re Applications of Multimedia, Inc.*, 11 FCC Rcd. 4883 ¶ 6 (1995) (granting 12-month waiver period to come into compliance with multiple ownership rules); *In re Applications of Stockholders of CBS, Inc.*, 11 FCC Rcd 3733 ¶ 95 (1995) (granting 12-month period to come into compliance with national radio and television ownership rules).

[220] *See* Time Warner Entertainment Company, LP, Agreement of Limited Partnership, as amended, art. XIII (Sept. 14, 1993); *see also* Letter from Mark Rosenblum, AT&T Vice President – Law, to Magalie Roman Salas, Secretary, FCC, dated May 24, 2000, Transmittal of Letter from Mark Rosenblum to Deborah Lathen, Chief, FCC Cable Services Bureau, dated May 24, 2000, at 2 ("Rosenblum May 24 Letter").

[221] Rosenblum May 24 Letter at 3-4.

have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide. We also will require the merged firm to file with the Cable Services Bureau, within six months from the closing of the merger, a written document specifying which of the foregoing three compliance options it has elected to pursue. If the merged firm is not in compliance by the May 19, 2001 deadline, then we will require it to place into an irrevocable trust for the purpose of sale the assets that it must divest pursuant to the compliance option that it elected in the foregoing filing to come into compliance with the 30% limit. We also will adopt the Applicants' proposal that, 60 days before the expiration of the 12-month period, May 19, 2001, the Applicants shall file with the Cable Services Bureau a written document (a) stating that it will be in compliance by the May 19, 2001 deadline, or (b) stating that it will not be in compliance and describing the irrevocable trust arrangement that it will establish by the May 19, 2001 deadline for the sale of any assets that it must be divest in order to effectuate the compliance option it had elected.

72. In addition to the above conditions, we will mitigate the potential harm to the diversity of programming and competition during the compliance period by imposing interim conditions on the merged entity. We adopt in this Order the Applicants' proposed interim conditions, subject to certain modifications to fit our divestiture requirements. The interim conditions and their enforcement mechanisms are attached hereto as Appendix B. The Applicants' proposed interim conditions and enforcement mechanisms fall far short of the insulated limited partnership exemption and directors/officers waiver provisions of the cable ownership attribution rules that would establish their non-involvement in TWE's video-programming activities. We deem them sufficient, however, to limit the merged firm's involvement in TWE's video programming activities solely during the period granted by the Commission for compliance with this Order and as a condition for granting the Applicants 12 months from the effective date of our horizontal rules to come into compliance.[222] The merged firm must abide by the interim conditions specified in Appendix B until such time as it has taken the foregoing compliance action.

[222] *See* Letter from Michael Hammer, Esq., Willkie, Farr & Gallagher, to Magalie Roman Salas, Secretary, FCC, dated April 18, 2000, Attachment (Proposed Safeguards Relating to Video Programming) ("AT&T Proposed Video Safeguards"). We believe that extending our six month rule compliance period by an additional six months is a measured and reasoned response to the particular circumstances presented by this case. *See WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972). The *Horizontal Third Report and Order* voluntarily staying the rule pending the Court of Appeals decision found that six months would be a reasonable period to come into compliance for those out of compliance on the date of the decision without any particularized showing. Here applicants will not be out of compliance until the merger closes (which may not occur until a judge has found, after a 60 day period for public comment, that DOJ's proposed consent decree requiring AT&T to divest Road Runner is in the public interest (*see* Section IV.C *infra*)). Although the parties can certainly begin the process necessary to come into compliance prior to closing, if they choose to divest TWE, they cannot activate their registration rights under the TWE Limited Partnership Agreement in order to sell their TWE interest in a public offering until January, 2001. In addition, if they choose to divest other cable systems, we believe it reasonable to give them an additional six months to divest cable systems representing approximately 11% of the MVPD market. We believe that a twelve month period for compliance with the horizontal rules from the date the stay was lifted is reasonable under these circumstances, given our further requirements (1) that applicants elect their option for compliance within six months of closing, thus demonstrating significant progress toward the goal, (2) that they make provision for compliance using an irrevocable trust if they are unable to complete the final details of divestiture themselves by May 19, 2001, and (3) that they comply with the interim conditions they have voluntarily proposed that will partially mitigate the harms addressed by the horizontal ownership rule until they obtain full compliance with the rule. We also note that DOJ similarly accommodated contracts governing relations between the parties in its consent decree requiring divestiture of Road Runner. *See United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment, Competitive Impact Statement at 14 (D.D.C., filed May 25, 2000); *see also* Section IV.C *infra*.

73. The foregoing conditions will bring the merged firm into compliance with Section 613(f)(1)(A) and our cable horizontal ownership rules, thereby satisfying the first two prongs of our public interest test. Finally, under the third prong of our public interest test, we conclude that the Applicants' compliance with the above divestiture requirements also will ensure that the merger will not frustrate nor impair the Commission's implementation of the Communications Act and its objectives with regard to the promotion of competition and diversity in the provision of video programming.[223]

#### d. Compliance With the Horizontal Ownership Certification Provision

74. Consumers Union raises two procedural arguments to deny the merger and a collateral, but substantively related, request for forfeiture. First, Consumers Union argues that the Application is procedurally defective and should be dismissed because it does not contain a cable horizontal ownership certification pursuant to Section 76.503(c) of the Commission's rules,[224] which was in effect at the time the Application was filed.[225] The horizontal certification provision in effect at that time required cable operators that reach 20% or more of homes passed nationwide to certify, prior to acquiring additional systems, the percentage change in ownership resulting from such acquisition.[226] Consumers Union argues that the former Section 76.503 required that the horizontal certification be made at the same time that applications for transfers of licenses are filed with the Commission.[227] Second, Consumers Union filed a request with the Commission ("Consumers Union Forfeiture Request") under Section 1.41 of the

[223] Sections 214(a) and 310(d) of the Communications Act give the Commission independent authority to analyze the potential effect that the merger will have on the delivery of communications services to consumers. The Supreme Court reads the term public interest "broadly, to require consideration of all important consequences including anticompetitive effects." *Denver & Rio Grande Western Railroad v. United States*, 387 U.S. 485, 492 (1967); *see also United States v. FCC*, 652 F.2d 72, 94 (D.C. Cir. 1980) (citing *Denver*, 387 U.S. at 492-494); *Rogers Radio Communications Servs., Inc. v. FCC*, 593 F.2d 1225, 1230 (D.C. Cir. 1978) ("effect on competition [is] clearly a proper factor for the Commission to consider under the public interest, convenience and necessity standard. . . "). For example, in *National Cable Television Association v. FCC*, the D.C. Circuit examined what factors the Commission must weigh when considering whether to permit a telephone company to offer cable services in its telephone service areas as an exception to Commission rules banning cross-ownership of cable companies and telephone companies. *National Cable Television Ass'n v. FCC*, 747 F.2d 1503, 1510 (D.C. Cir. 1984). The court stated that the "FCC might well be required to take [the anticompetitive factors underlying the rules] into account even if it were to abandon entirely the cross-ownership rules." *Id.*

[224] 47 C.F.R. § 76.503(c).

[225] *See* Motion to Dismiss, CS Docket No. 99-251, filed by CU on Aug. 17, 1999 ("Consumers Union Motion to Dismiss") at 2. Section 76.503 has been amended since the Application was filed. *See Horizontal Third Report and Order*, 14 FCC Rcd at 19134, App. B. Prior to the amendment, Section 76.503(c) provided:

> Prior to acquiring additional cable systems any person or entity holding an attributable interest in cable systems reaching 20 percent, or more, of homes passed nationwide must certify to the Commission that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

47 C.F.R. § 76.503(c). In light of the stay of enforcement of the horizontal ownership rules, the Commission relieved cable operators of the Section 76.503(c) requirement that the cable operator certify that no violation of the 30% limit will occur as a result of an acquisition, and ordered that the certification should specify only the incremental change the acquisition makes in terms of the 30%. *See Horizontal Second Memorandum Opinion and Order on Reconsideration,* 13 FCC Rcd at 14492 ¶ 76.

[226] *See* former 47 C.F.R. § 76.503(c).

[227] Consumers Union Motion to Dismiss at 1-5.

Commission's rules[228] requesting that the Commission initiate a forfeiture proceeding based on allegations that AT&T has made material misrepresentations to, and failed to be candid with, the Commission regarding AT&T's filing practices under Section 76.503(c), that AT&T has filed its certifications late, and that AT&T has failed to report in its certifications sufficient information for the Commission to assess the impact of the reported transactions.[229] Third, Consumers Union filed a supplemental pleading in this proceeding to argue that the Commission should deny the Application on the grounds that the facts alleged in the Consumers Union Forfeiture Request demonstrate that AT&T does not have the requisite character to hold Commission licenses.[230]

75. AT&T disagrees with Consumers Union's interpretation of the former Section 76.503(c) and argues that this provision required only that AT&T file the certification prior to closing a transaction, not at the time it filed its Application in this proceeding or applications for transfers relating to other transactions.[231] While AT&T admits that some of its Section 76.503(c) letters were filed after transactions had closed, AT&T states that pre-closure filing was not always possible because, in some instances, AT&T and its predecessor TCI were unable to obtain cable homes passed information from the systems they were acquiring prior to closing.[232]

76. *Findings*. In the *Horizontal Third Report and Order*, we revised the horizontal certification provision to require information on the number of cable subscribers, a more readily accessible number than cable homes passed, and to clarify that certifications must be filed concurrently with applications for transfers of licenses.[233] This new certification requirement went into effect on February 9, 2000.[234] In the future, applications for transfers of licenses by cable operators serving 20% or more of the MVPD market will be rejected if not accompanied by the new Section 76.503(g) certification. However, former Section 76.503(c) did not specify that certifications be filed concurrently with applications for license transfers. Under these circumstances, and given the extensive homes passed and subscriber information provided in the Application, we find that AT&T's representations to the Commission with

[228] 47 C.F.R. § 1.41

[229] *See* Complaint Against AT&T Corp. and Tele-Communications, Inc. for Misrepresentation to the Commission, Willful and Repeated Violations of 47 C.F.R. § 76.503(c) and for Lack of Candor, filed by MAP on Oct. 7, 1999 ("Consumers Union Forfeiture Request") at 1-8, attached to Supplement to Petition to Dismiss or Deny, CS Docket No. 99-251, filed by Consumers Union on Oct. 7, 1999 ("CU Supplement").

[230] *See* CU Supplement at 1-8.

[231] Opposition of AT&T Corp. and MediaOne Group, Inc. to Motion to Dismiss, CS Docket No. 99-251, filed on Aug. 23, 1999 ("Applicants Aug. 23 Opposition") at 1-2.

[232] Opposition of AT&T Corp. to Consumers Union Forfeiture Request (incorporated into the record of this proceeding), filed on Oct. 18, 1999, at 4.

[233] *See Horizontal Third Report and Order,* 14 FCC Rcd at 19134 App. B, new Section 76.503(g). Section 76.503(g) provides:

> Prior to acquiring additional multichannel video-programming providers, any cable operator that serves 20% or more of multichannel video-programming subscribers nationwide shall certify to the Commission, concurrent with its applications to the Commission for transfer of licenses at issue in the acquisition, that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

47 C.F.R. § 76.503(g).

[234] *Horizontal Third Report and Order*, 14 FCC Rcd at 19134 App. B, new Section 76.503(g).

regard to its interpretation of the rules and its filing practices do not indicate bad character that would justify denying the Application. Consumers Union's motions to dismiss are therefore denied. However, given that the former rule clearly required that certifications be filed prior to closing, on delegated authority, the Cable Services Bureau granted the Consumers Union Forfeiture Request in part and issued a Notice of Apparent Liability to AT&T for apparent violations of former Section 76.503(c).[235]

### 2. Program Access Issues

77. The program access rules are designed to prevent vertically integrated programming suppliers from favoring affiliated cable operators over unaffiliated MVPDs in the sale of satellite-delivered programming.[236] Commenters request that the Commission apply the program access rules to AT&T's affiliated programming that is delivered terrestrially and prohibit AT&T from entering into exclusive contracts with unaffiliated networks.[237] Commenters argue that AT&T's increased size will give it the ability to force unaffiliated programmers to enter into low-cost and/or exclusive carriage agreements with AT&T, thereby denying competing MVPDs and their customers access to popular programming.[238] In addition, commenters argue that the merger would increase the possibility that AT&T will migrate affiliated programming from satellite to terrestrial delivery so that it will not be required to give competing MVPDs access to this programming.[239] The commenters argue that AT&T has the ready means to migrate programming to terrestrial delivery because AT&T possesses a coast-to-coast fiber optic network.[240] Commenters add that the merger will increase AT&T's size so that it can cluster more systems, which would further facilitate the terrestrial delivery of programming, especially regional programming.[241] The commenters argue that AT&T's purported ability to lock up unaffiliated programming through exclusive contracts and to shield terrestrially delivered affiliated programming from the program access rules will

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[235] *See In re AT&T Corp.: Apparent Liability for Forfeiture*, NAL/Acct. No. X12000001, Notice of Apparent Liability, DA 00-978 (CSB rel. May 2, 2000) (finding that AT&T had filed certifications late on three separate occasions). Consumers Union also filed a request that the Consumers Union Forfeiture Request be transferred from the Cables Services Bureau to the Enforcement Bureau for consideration. *See* Complaint Against AT&T Corp. and Tele-Communications, Inc. for Misrepresentation and Lack of Candor to the Commission, Willful and Repeated Violations of 47 C.F.R. § 76.503(c) (incorporated into the record of this proceeding), filed by Consumers Union, Consumer Federation of America and Media Access Project on April 14, 2000. In light of the Cable Services Bureau action, we deny this request as moot.

[236] 47 C.F.R. §§ 76.1000-76.1004.

[237] EchoStar Comments at 8-9; WCA Comments at 3; Ameritech Comments at 18-19; BellSouth Comments at 9; Seren Reply Comments at 13-14.

[238] WCA Comments at 2; EchoStar Comments at 8-9; Ameritech Comments at 18-19; BellSouth Reply Comments at 3; Seren Reply Comments at 1-2. BellSouth states that it does not have access to MSNBC, Fox News, TV Land, and the Game Show Network because they are not affiliated with cable operators but have exclusive contracts with cable operators. BellSouth Comments at 6-8.

[239] WCA Comments at 13-15; Ameritech Comments at 13-16.

[240] WCA Comments at 13; BellSouth Comments at 8-9.

[241] WCA Comments at 15. WCA states that the New England Cable News Network recently migrated from satellite to fiber delivery; Comcast's Philadelphia sports network is delivered by fiber; Cablevision's New York MSG Metro programming is delivered by fiber; and the Tribune Company recently migrated nearly 50 Chicago Cubs games from WGN to the fiber-delivered Chicago-Land Television Network. WCA Comments at 16-17.

substantially impair the ability of other MVPDs to compete.[242]

78. Several commenters also request that the Commission reaffirm that Liberty's programming is subject to the program access rules.[243] Ameritech requests that, if AT&T divests its interests in Liberty, Liberty be subject to the program access rules for five years thereafter.[244] In addition, Ameritech requests that the Commission require AT&T to offer affiliated programming to all MVPDs on the same terms, conditions, and prices that the programming is provided to AT&T cable systems and affiliates.[245]

79. *Findings*. The program access rules apply to cable operators and to programming vendors that are affiliated with cable operators and deliver video programming via satellite to a cable operator.[246] The Commission adopted these rules pursuant to Section 628 of the Communications Act,[247] through which Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other MVPDs in the sale of satellite cable and satellite broadcast programming.[248] Among other restrictions, the rules prohibit any cable operator that has an attributable interest[249] 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.[250] The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices or terms and conditions of sale of satellite-delivered programming to cable operators and other MVPDs.[251] In addition, cable operators generally are prohibited from entering into exclusive distribution arrangements with affiliated programming vendors.[252]

80. For the reasons stated in the *Program Access Order*, we decline to apply the program access rules or equivalent restrictions to terrestrially delivered programming distributed by the merged company.[253] We recognize, however, that the integration of MediaOne's cable systems and content with

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[242] *See, e.g.,* BellSouth Comments at 9.

[243] DIRECTV Comments at 4-5; Ameritech Comments at 19.

[244] Ameritech Comments at 19-23.

[245] Ameritech Comments at 18-19.

[246] 47 C.F.R. §§ 76.1000-76.1004.

[247] 47 U.S.C. § 548.

[248] 1992 Cable Act § 2(a)(5).

[249] The attribution of corporate interests for purposes of the program access rules is determined under sections 76.501 and 76.1000(b) of the Commission's rules. *See* 47 C.F.R. §§ 76.501 n.2., 76.1000(b).

[250] 47 C.F.R. § 76.1002(a).

[251] 47 C.F.R. § 76.1002(b). This restriction is subject to certain limited exceptions. *Id.*

[252] 47 C.F.R. § 76.1002(c). Relief may be granted pursuant to a Commission determination that specific exclusive arrangements are in the public interest. 47 C.F.R. § 76.1002(c)(4). In addition, exclusive arrangements entered into prior to June 1, 1990, are "grandfathered," or exempt from the exclusivity prohibition, provided they were not extended or renewed after October 5, 1992. 47 C.F.R. § 76.1002(e).

[253] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("*Program Access Order*"), 12 FCC Rcd 22840, 22861 ¶ 50 (1997). As we stated in the
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AT&T's coast-to-coast fiber optic network may provide the merged entity with the ability and the cost and quality incentives to migrate video programming from satellite to terrestrial delivery. Such a migration could have a substantial impact on the ability of alternative MVPDs to compete in the marketplace. As we indicated in the *Program Access Order* and the *AT&T-TCI Order*, we remain aware of the potential for this type of migration and the possible need to address it in the future.[254] As we stated in *AT&T-TCI*, if it appears that the movement of programming from satellite to terrestrial delivery is frustrating the pro-competitive purposes of Section 628, we will so notify Congress.

81. We further decline to condition the merger on the imposition of anti-exclusivity restrictions that are not required by the program access rules. If parties believe any existing exclusivity agreements violate the program access rules, the program access complaint process is the appropriate forum in which to resolve any such grievance.[255] Commenters have not alleged that existing exclusivity arrangements are unlawful, and we do not find that this merger provides a basis for the Commission to declare unlawful AT&T's future exclusivity agreements to the extent that they conform to current rules.[256]

82. We also reject Ameritech's proposal that the Commission mandate the sale of AT&T's affiliated programming on certain prices, terms, and conditions. Neither the merger nor the Commission's rules provide any basis for the imposition of a mandate that AT&T price its programming at any particular level, provided the pricing is not unlawfully discriminatory.[257]

83. We reaffirm that the program access rules apply to Liberty by virtue of AT&T's ownership interest in Liberty and its directors on Liberty's board.[258] However, we find no basis in the rules to subject Liberty to the program access rules if AT&T divests its interest in Liberty and Liberty is no longer affiliated with a cable operator. In short, we find that it would be inappropriate to apply to non-vertically integrated cable operators and programming vendors program access rules that were adopted to address anticompetitive harms arising from vertical integration.

### 3. Channel Occupancy Limits

84. The Commission's channel occupancy rule provides that a cable operator may not devote more than 40% of its activated channels to the carriage of affiliated programming networks.[259] Bell Atlantic argues that, given the number of cable networks in which AT&T and MediaOne have attributable interests, the merged entity will be in violation of this rule.[260] Bell Atlantic requests that the Commission

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*Program Access Order*, there are no indications at this time that terrestrial delivery of programming formerly delivered by satellite is a significant competitive problem. However, if, as a trend, vertically integrated programmers began to switch from satellite delivery to terrestrial delivery for the purpose of evading the Commission's rules, we would "consider an appropriate response to ensure continued access to programming." *Id.*

[254] *Program Access Order*, 12 FCC Rcd at 22861-62 ¶¶ 50-51; *AT&T-TCI Order*, 14 FCC Rcd at 3160, 3180 ¶ 37.

[255] 47 C.F.R. § 76.1003.

[256] *See AT&T-TCI Order*, 14 FCC Rcd at 3160, 3180 ¶ 38.

[257] *See id.*, 14 FCC Rcd at 3180 ¶ 39.

[258] *See also AT&T-TCI Order*, 14 FCC Rcd at 3160, 3179 ¶ 35 n.117 ("AT&T-TCI acknowledge that the merged firm will be subject to the Commission's program access rules.").

[259] *See* 47 C.F.R. § 76.504. This restriction applies only to the first 75 activated channels. *Id.*

[260] Bell Atlantic Comments at 9-12.

require the Applicants to provide a market-by-market disclosure of their channel line-ups and demonstrate that they will not violate the channel occupancy rule.[261]

85. In response to the Commission's request, the Applicants reviewed the channel line-ups on their systems and determined that the proposed merger would cause channel occupancy rule violations in four systems in Decatur, Illinois; Battle Creek, Minnesota; Minot, North Dakota; and Westport, West Virginia.[262] However, AT&T states that it has adjusted the channel line-ups in all four systems such that there will be no channel occupancy violations when the merger closes.[263] Accordingly, the proposed merger will not result in any violation of the channel occupancy rules.

### 4. Arguments That the Cable Rules Apply to Internet Access Services

86. Some commenters argue that the merged firm's carriage of Excite@Home and Road Runner will cause it to violate the program carriage and the channel occupancy rules. These rules, however, apply solely to the carriage of video programming.[264] As we found in *IVI*, ISP Internet access services, similar to those services provided by Excite@Home and Road Runner, do not constitute "video programming" as that term is defined in the statute and the Commission's rules and orders.[265] In *IVI,* the Commission did not decide whether a service that comprises only video programming delivered over the Internet would constitute "video programming" as that term is used in the Commission's rules and the Communications Act.[266] However, Excite@Home and Road Runner are not services comprised only of video programming. Thus, we disagree with commenters' contentions that AT&T and MediaOne are in violation of the program carriage rules by denying carriage to unaffiliated ISPs and by AT&T's decision to limit Internet video-streaming provided by ISPs and carried over its cable systems to ten minutes.[267] For

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[261] Bell Atlantic Comments at 12-14.

[262] *See* Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Mar. 17, 2000, Transmittal of Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Deborah Lathen, Chief, FCC Cable Services Bureau, dated Mar. 17, 2000.

[263] *Id.*; Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T, to Magalie Roman Salas, Secretary, FCC, dated May 17, 2000, Transmittal of letter from Douglas G. Garrett to Royce Dickens, Cable Services Bureau, dated May 17, 2000.

[264] *See* 47 C.F.R. § 76.504(a) (channel occupancy limits); 47 C.F.R. § 76.1301(c) (program carriage).

[265] *In re Internet Ventures, Inc., Internet On-Ramp, Inc.*, CSR-5407-L, Memorandum Opinion and Order ("*IVI*"), FCC 00-37 ¶¶ 12-13 (rel. Feb. 18, 2000). In *IVI*, Internet Ventures, an ISP, petitioned the Commission for a declaration that ISPs are entitled to commercial leased access under Section 612 of the Communications Act, 47 U.S.C. § 532. *Id.* at ¶ 1. Section 612 permits unaffiliated video programmers to lease channel capacity on a cable system in order to "originate, produce and provide independent video programming." *Id.* at ¶ 3. The Communications Act defines "video programming" to mean "programming provided by, or generally considered comparable to programming provided by, a television broadcast station," 47 U.S.C. § 522(20), and the leased access statute requires cable operators to reserve channel capacity only for video programming. 47 U.S.C. § 532(a); *see IVI*, FCC 00-37 at ¶ 13. The Commission found that ISPs provide a variety of services that are not video programming – including access to web sites, electronic mail, and video messaging – and accordingly are not entitled to purchase cable channel capacity under the leased access rules for the carriage of such services. *Id.*

[266] *IVI*, FCC 00-37 at ¶ 13. The Commission stated that "regardless of the source of the video content," the provider would be required to comply with all requirements of the rule and statute at issue. *Id.*

[267] *See* Bell Atlantic Comments at 14-16; SBC Comments at 27, 29; AOL Comments at 8-9; SBC Reply Comments at 4. Commenters argue that AT&T's streaming limitation constitutes discriminatory treatment against unaffiliated ISPs.

the same reason, we reject Bell Atlantic's argument that the merged firm's provision of Internet services through its affiliates Road Runner and Excite@Home should count towards the channel occupancy limits.[268]

### 5. Electronic Programming Guides

87. In this section, we examine the proposed merger's potential impact on the use of EPGs. We find that the proposed merger will not violate the Communications Act or any Commission rules as they may pertain to EPGs, nor will it frustrate the implementation of the Communications Act or its goals. Thus, the merger will not result in public interest harms with respect to EPGs.

88. EPGs are on-screen directories of programming delivered through advanced set-top boxes. These programming guides are interactive, with searching and sorting capabilities that take viewers directly to video programming listed on the screen. The purchasers of EPGs are MVPDs such as cable operators and DBS operators, as well as subscribers. Liberty currently owns a 44% share of EPG provider TV Guide, Inc., which in turn owns Prevue Guide, another EPG provider.[269] AT&T has a ten-year contract with TV Guide, Inc. under which TV Guide will provide the exclusive EPG for AT&T systems.[270]

89. Commenters argue that the proposed merger poses three types of harms with regard to EPGs. First, commenters argue that AT&T will harm unaffiliated video programming networks and interactive service providers (collectively "content providers") by using EPGs to steer subscribers toward affiliated content providers and away from unaffiliated content providers.[271] Second, commenters argue that AT&T will harm unaffiliated EPG providers by selecting AT&T-affiliated EPGs for its cable systems. Third, commenters argue that AT&T will lock EPG providers into exclusive contracts and thereby prevent such EPGs from dealing with other MVPDs.[272] While we find that AT&T's compliance with the video programming conditions discussed above will mitigate the possibility of these three alleged harms, we find also that the record here does not demonstrate that special requirements should be placed on AT&T in this regard. In a rulemaking proceeding of general applicability, the Commission has committed to monitor the EPG market to determine whether Commission action is necessary.

90. We find that our requirement that AT&T reduce its attributable cable system ownership interests will circumscribe AT&T's purported ability to harm unaffiliated content providers,[273] unaffiliated

[268] *See* Bell Atlantic Comments at 9-12.

[269] *See* TV Guide, Inc., Filing S-4/A, dated July 2, 1999 at 6. Gemstar International Group Inc. and TV Guide shareholders have approved a merger between the two entities. *See* TV Guide, Inc., *Gemstar International Group Limited and TV Guide, Inc. Shareholders Approve Merger* (press release), Mar. 17, 2000 ("The transaction will close as soon as it receives regulatory approval . . .."). After the merger, Liberty and News Corp. will each own approximately 19.5% of the equity (for a total of 39% of the equity) of TV Guide International, the new name for the Gemstar/TV Guide merged entity. *See Gemstar International Group Limited, Gemstar & TV Guide Announce Merger Agreement* (press release), Oct. 4, 1999 ("TV Guide shareholders will, in the aggregate, receive approximately 45% of the fully diluted shares of the combined company").

[270] TV Guide, Inc., *TV Guide Interactive & TCI Sign Long Term Agreement* (press release), Mar. 8, 1999.

[271] *See, e.g.,* SBC Comments at 37-39; AOL Comments at 10.

[272] *See, e.g.,* Ameritech Comments at 24-26.

[273] EPGs are video programming activities as that term is used in the ILP exemption because they permit a viewer to select video content for viewing. AT&T agreed not to be involved in TWE's EPG use or selection until it has complied with the divestiture requirements of this Order. *See* AT&T Video Safeguard Proposal at 2.

EPGs, and other MVPDs because AT&T, post-divestiture, will serve a smaller share of the MVPD market. The video programming conditions will limit the number of MVPD subscribers for whom AT&T may select an EPG. To the extent that AT&T may steer its own subscribers away from unaffiliated content providers via AT&T's own EPG, we note that the divestiture requirement limits AT&T's size and ensures that other MVPDs will provide sufficient alternative outlets for unaffiliated content providers.

91. With regard to unaffiliated EPG providers who would like access to AT&T's cable systems, the record does not demonstrate that AT&T will exercise undue influence in a purported EPG marketplace by using only one EPG. Because AT&T's horizontal size will be limited as a result of this Order, unaffiliated EPGs will have access to more MVPD subscribers that are not affiliated with AT&T. Moreover, the limited evidence presented in this record appears to demonstrate that even AT&T's own subscribers will have access to alternatives to TV Guide.[274]

92. The record also does not demonstrate that the proposed merger will enable AT&T to prevent EPG providers from serving other MVPDs. TV Guide is free under its ten-year contract with AT&T to offer its EPG to other MVPDs. We find insufficient grounds to conclude that AT&T will lock EPG providers into exclusive contracts.[275]

93. The commenters have not demonstrated that special requirements should be placed on AT&T alone in its selection and use of EPGs. Under our general rulemaking authority, in order to promote consumer choice, we have committed to "monitor developments with respect to the availability of electronic programming guides to determine whether any action is appropriate in the future."[276] Therefore, to the extent that evidence accrues that demonstrates the necessity of Commission action in the EPG market, we will consider it at that time. We also note that, to the extent that commenters are concerned that cable operators may steer viewers away from broadcast programming via EPGs, we have requested comment in the digital must carry proceeding on "whether any rules are necessary to ensure fair competition between electronic programming guides controlled by cable operators and those that are controlled by broadcasters."[277]

### 6. MVPD Competition

94. BellSouth argues that the merger will eliminate current and future MVPD competition between AT&T and MediaOne in local areas where the Applicants have overlapping or adjacent cable franchise areas.[278] BellSouth contends that, in the absence of the proposed merger, AT&T and MediaOne would build over ("overbuild") each other's cable systems, thereby offering consumers in those areas two

[274] AT&T states that its subscribers will be able to purchase set-top boxes and television sets that contain alternative EPGs. Applicants Sept. 17 Reply Comments at 141 (citing Kathy Haley, *New Directions*, Broadcasting & Cable at 18-36 (Sept. 6, 1999)). We also note that AT&T's cable subscribers may purchase such EPG and video-recording devices as TIVO and Replay and use them as alternatives to AT&T's TV Guide.

[275] *See, e.g.,* Ameritech Comments at 24-26.

[276] *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order ("*Navigation Devices Order*"), 13 FCC Rcd 14775, 14820 ¶ 116 (1998).

[277] *In re Carriage of the Transmission of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15129 ¶ 82 (1998).

[278] BellSouth Comments at 20-28.

MVPD cable choices.[279] However, we find no evidence in the record to suggest that AT&T and MediaOne would overbuild each other's cable systems such that the proposed merger would diminish competition in these local areas.

95. AT&T and MediaOne own small overbuilt systems in only two areas. First, in 1993, one of AT&T's predecessors acquired a system in Fayetteville, Georgia, which overbuilt in part a system of one of MediaOne's predecessors. As of February 21, 2000, AT&T's and MediaOne's Fayetteville overbuilt systems passed 975 homes in common, and AT&T served 447 subscribers.[280] Second, in 1991, AT&T's predecessor acquired a system in Powder Springs, Georgia, which overbuilt in part a system of one of MediaOne's predecessors. As of February 21, 2000, AT&T's and MediaOne's Powder Springs overbuilt systems passed 1,931 homes in common, and AT&T served 152 subscribers.[281] Since the initial acquisition of the Fayetteville and Powder Springs overbuilt systems, the system owners have not constructed anymore overbuilds, and there is no evidence to suggest that AT&T and MediaOne would overbuild one another absent the merger.[282] AT&T and MediaOne hold overlapping franchise authority in 13 other areas, but have no overbuilds in these areas.[283] There is no evidence that they would overbuild each other in these areas absent the merger. We find that the proposed merger is unlikely to diminish MVPD competition between the Applicants to a degree that would warrant the denial of the Application or the imposition of conditions.

### B. Cable Equipment

96. In this section, we consider the proposed merger's potential public interest harms with respect to cable equipment. This equipment is the hardware that cable companies use to deliver services to the home. It includes cable modems, cable telephony equipment, and set-top boxes that deliver a range of services to the subscriber. The Bell telephone companies argue that AT&T's size will enable it to favor affiliates to the detriment of unaffiliated cable equipment manufacturers, deny cable competitors access to cable equipment, and exercise excessive market power against equipment manufacturers in general.[284]

[279] *Id.* at 21.

[280] *See* Letter from Michelle M. Mundt, Esq., Mintz Levin Cohn Ferris Glovsky and Popeo PC, to Magalie Roman Salas, Secretary, FCC, dated Mar. 8, 2000, Transmittal of Letter from Michelle M. Mundt, Esq., to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Mar. 8, 2000, Attachment at 1 ("Mar. 8 Mundt Letter").

[281] *Id.*

[282] *Id.*, Attachment at 1-2.

[283] The overlapping franchise areas are Alaiedon and Woodstock Township, Michigan; Coweta County, Fayette County, Fulton County, and Peachtree City, Georgia; Dade County, Florida; Hoffman Estates, Inverness, and Tazewell County, Illinois; and Beaumont, Murrieta, and Riverside County, California. *See* Letter from Michelle M. Mundt, Esq., Mintz Levin Cohn Ferris Glovsky and Popeo PC, to Magalie Roman Salas, Secretary, FCC, dated Feb. 24, 2000, Transmittal of Letter from Michelle M. Mundt, Esq., to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Feb. 24, 2000, Attachment ("Feb. 24 Mundt Letter"). Franchise authorities generally grant cable operators franchises for the entire franchise area, but the franchised cable operator does not always intend to serve the entire franchise area. Thus, although MediaOne and AT&T have overlapping franchise authority in these 13 franchise areas, they are serving separate portions of these areas.

[284] *See, e.g.,* Ameritech Comments at 23 (deny cable competitors access to cable equipment and exercise market power against equipment manufacturers); Bell Atlantic Comments at 52-55 (AT&T could direct affiliate Excite@Home to purchase equipment from affiliate General Instruments, Inc.); SBC Comments at 7-8, 36 (noting AT&T's vertical integration); SBC Reply Comments at 3 (merger would harm equipment market).

Commenters also argue that AT&T will be able to dictate set-top box architecture, thereby reducing innovation and consumer choice.[285] These commenters request that the Commission deny the merger or prohibit AT&T from entering into exclusive, proprietary agreements with hardware and software manufacturers of cable equipment.[286]

97. *Findings.* We find that the proposed merger will not result in any violation of the Communications Act or the Commission's rules as they pertain to cable equipment, nor will the merger frustrate the Commission's implementation of statutory goals or policies. The Commission's rules regarding navigation devices,[287] as discussed below, alleviate concerns regarding competition in the production and sale of set-top boxes and modems. We do not find that this merger warrants the imposition of special restrictions on AT&T apart from these rules. As we stated in the *Navigation Devices Order*, we will monitor the market to determine whether the navigation devices rules should be amended to counter future anticompetitive conduct.[288]

98. Section 629 of the Communications Act charged the Commission with ensuring the commercial availability of "navigation devices" – equipment which is used to access video programming and other services provided by MVPDs – to consumers from retailers and manufacturers not affiliated with an MVPD.[289] Section 629 directed the Commission to:

> adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment [collectively "navigation devices"] used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.[290]

99. Pursuant to this directive, the Commission adopted rules requiring MVPDs to provide, upon request, technical information concerning interface parameters that are needed to produce navigation devices that will operate with their video distribution systems.[291] Subscribers have the right to attach any compatible navigation device to an MVPD system, and MVPDs are prohibited from taking actions that would prevent unaffiliated retailers or manufacturers from making and selling compatible navigation devices.[292] We found that "competition in the navigation equipment market is central toward encouraging innovation in equipment and services, and toward bringing more choice to a broader range of consumers at better prices."[293]

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[285] *See* SBC Comments at 36; openNET Reply Comments at 14.

[286] *See, e.g.,* Ameritech Comments at 24-26; SBC Reply Comments at 2.

[287] 47 C.F.R. § 76.1200 *et seq*.

[288] *See Navigation Devices Order,* 13 FCC Rcd at 14776 ¶ 2.

[289] 47 U.S.C. § 549. Section 629 was adopted as part of the 1996 Act.

[290] 47 U.S.C. § 549(a).

[291] *See Navigation Devices Order*, 13 FCC Rcd at 14778, 14787 ¶¶ 8, 34; *see* 47 C.F.R. § 76.1205.

[292] *See* 47 C.F.R. §§ 76.1201, 76.1202.

[293] *Navigation Devices Order*, 13 FCC Rcd at 14775, 14776 ¶ 2. The House Report stated that

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100. The rules adopted in the *Navigation Devices Order* address the commenters' concerns that AT&T will exercise excessive market power in the purchase and provision of cable equipment. Under these rules, any manufacturer may produce and sell navigation devices for AT&T's systems directly to AT&T's subscribers, which AT&T cannot prohibit.[294] We note that AT&T may increase its influence in this market by purchasing very large numbers of navigation devices that it leases to its subscribers, pursuant to the Commission's rate rules.[295] However, by requiring MVPDs to grant all equipment manufacturers an opportunity to sell equipment to the MVPDs' subscribers, the navigation devices rules limit MVPDs' ability to exercise excessive market power and dominate the equipment market.

101. In this regard, we note that cable modems are commercially available from a variety of sources. CableLabs has developed industry-wide standards in its DOCSIS project and has already certified the modems of over a dozen manufacturers for retail sale.[296] AT&T's cable Internet customers accordingly may buy modems from retailers, rather than rent them from AT&T. The navigation devices rules thus also ameliorate concerns that AT&T will favor affiliated manufacturers or direct its affiliates to do business together as some commenters contend.[297] Moreover, we note that the merged firm would not have significant interests in any cable equipment manufacturer.[298] Accordingly, we find that the merger will not create public interest harms with respect to cable equipment.

### C. Broadband Internet Services

102. In this section, we consider the allegations of certain commenters that the proposed merger will result in public interest harms in the provision of broadband Internet services to residential customers. We note that, in order to address the merger's potential anti-competitive impact on the provision of these

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> [C]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services arriving by various distribution services.

H.R. Rep. No. 104-204, 104th Cong., 1st Sess. 112 (1995).

[294] *See* 47 C.F.R. §§ 76.1201, 76.1202.

[295] *See* 47 C.F.R. § 76.1206.

[296] Cable Labs, *Cable Labs Certifies Best Data and Com 21 Modems, Re-Certifies GI and RCA Modems, Re-Qualifies Cisco CMTs* (press release), Dec. 9, 1999; *Clearing Shelf Space: Set-Top Boxes Mandated to be Available Via Retail Channels by July 2000*, MULTICHANNEL NEWS, July 19, 1999, at 15A (noting that Circuit City is already selling cable modems).

[297] *See, e.g.*, Bell Atlantic Comments at 52-55; SBC Comments at 7-8, 36.

[298] Prior to the merger of General Instruments, Inc. ("GI") and Motorola Corporation ("Motorola"), Liberty held a 6% voting equity interest in GI. Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated November 23, 1999, Transmittal of Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, and Susan Eid, Vice President Federal Relations, MediaOne Group, Inc., to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Nov. 22, 1999, at 2 ("Nov. 22 Marsh-Eid Letter"). However, following GI's merger with Motorola, completed on January 5, 2000, Liberty's holdings would not exceed 4% of Motorola's stock, even if all of Liberty's GI warrants are vested and exercised. *Id.*; *see* Motorola, Inc., *Motorola and General Instrument Complete Merger* (press release), Jan 5. 2000. The Commission generally has not considered equity interests of less than 5% to confer on their holders influence or attributable interests in the held entity. *See, e.g.,* 47 C.F.R. § 76.501 n.2 (a) (recognizing voting stock interests of 5% or more as cognizable).

services, the Justice Department has entered into a proposed consent decree with AT&T. [299] Among other provisions discussed below, the proposed consent decree requires the merged entity to divest its interest in the broadband cable ISP Road Runner no later than December 31, 2001, and to obtain prior approval from the Justice Department before entering into certain types of agreements with Time Warner or with AOL relating to the provision of broadband services.[300] We apply our public interest test to the facts of the proposed transaction as modified by the proposed consent decree. We find that the merger will not violate any provision of the Communications Act or Commission rules as they may pertain to the provision of broadband Internet services to residential customers. We further conclude that the proposed merger will not frustrate the implementation of the Communications Act and its goals as they pertain to the promotion of competition and diversity in the provision of these services.

### 1. Background

103. *Internet Access Generally.* We have previously described the Internet as "a loose interconnection of . . . tens of thousands of networks that communicate using the Internet protocol (IP)."[301] The Internet supports the delivery of a range of services, such as the World Wide Web ("Web"), e-mail, and file transfer protocol ("FTP"). With these services, customers are able to use their computers to communicate with other computer users and engage in sophisticated interaction, including on-line banking, electronic commerce, and video and audio file distribution.[302] We previously identified and described five types of entities involved in Internet services: (1) end users; (2) access providers; (3) application providers; (4) content providers; and (5) backbone providers.[303] As discussed below, some service providers, including the Applicants, now serve a combination of these functions.

104. *Narrowband Internet Access Services*. Most residential and small business consumers currently receive Internet access at a relatively slow speed, typically 28-53 kilobits per second, via traditional "dial-up" telephone connections. With dial-up Internet access services, customers must pay two separate entities. First, customers must pay for the underlying transport service – a traditional local telephone connection provided by LECs. Second, customers must pay an Internet service provider (ISP) separately, typically $20 or less per month, for unlimited access to the Internet.[304] In dial-up access

[299] *See United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000).

[300] *Id.*

[301] *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report to Congress ("*Universal Service Report*"), 13 FCC Rcd 11501, 11531 ¶ 62 (1998). IP defines the structure of data, or "packets," transmitted over the Internet, and it was created for the purpose of permitting communications among a wide variety of networks.

[302] *Id. See also* Kevin Werbach, *Digital Tornado: The Internet and Telecommunications Polic*y (OPP Working Paper Series No. 29, 1997) ("*Digital Tornado*") at 10; Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past* (OPP Working Paper Series No. 30, 1998) ("*Internet Over Cable*") at 17-18.

[303] *Universal Service Report*, 13 FCC Rcd at 11531 ¶ 62 (1998).

[304] *Annual Assessment of the Status of Competition in the Market for Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24374, 24314 n.197. "Dial-up Internet access" refers to the type of Internet access service for which the customer's computer must place a dial call to the ISP. The customer's local exchange carrier transmits the call to the ISP under the customer's normal local exchange service plan (which could include a separate line used by the customer solely for this purpose). The ISP purchases terminating access service from either an incumbent LEC or a competitive LEC. Once the dial-up connection is established, the ISP provides access to the Internet. For a more complete discussion of the relationship between the ISP and the LEC, see *AT&T-TCI Order,* 14 FCC Rcd at 3194 ¶ 67.

arrangements, customers use modems located in their computers that are connected to twisted-pair copper telephone lines. The customer's computer communicates with the ISP's computer using voice-grade analog signals transmitted via standard telephone lines, much as fax machines communicate using telephone lines.[305]

105. AT&T's dial-up ISP, WorldNet, is one of the largest providers of dial-up residential Internet access service that does not bundle proprietary content with its Internet access.[306] MediaOne does not provide dial-up Internet access service. Therefore, the merger is unlikely to have an adverse effect on competition and diversity in the provision of narrowband Internet access services.

106. *Broadband Internet Access Services.* There are several different technological means by which consumers may obtain broadband (high-speed) access to the Internet.[307] As of April 2000, approximately 2 million Americans used cable modems for broadband Internet access, offering speeds that range up to one to ten Mbps depending on the upgrade status of the cable system and the amount of traffic on the shared line.[308] As of year-end 1999, approximately 340,000 Americans obtained high-speed access through digital subscriber line ("DSL") technology.[309] DSL is provided by telephone companies (ILECs and CLECs alike) and offers speeds anywhere from 144 Kbps to well over 1.5 Mbps, depending on the local loop and the type of DSL technology used. In addition, various companies are, or will be in the near to middle term, offering broadband Internet access using a variety of wireless technologies, including fixed wireless and satellite.

107. AT&T and MediaOne each provide to households passed by their cable systems Internet services that combine (a) broadband transport through their cable systems and (b) Internet access and proprietary content through their affiliated ISPs. MediaOne and Time Warner (through TWE, TWE-A/N, and TWI) together hold an 80% ownership interest in Road Runner, and Road Runner is their exclusive

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[305] Some customers obtain a higher-quality connection at speeds up to 128 Kbps using Integrated Services Digital Network ("ISDN") services sold by LECs. ISDN services can be used to connect with a wide variety of ISPs, not just the ISP affiliated with the LEC providing the ISDN service.

[306] Application at 13. WorldNet serves 1.8 million residential customers, as compared with America Online's approximately 22 million customers and Earthlink's approximately 3 million customers. AT&T states that its primary focus is residential customers and dial-up service, but that it also offers private line and Frame Relay service at speeds of up to 45 Mbps.

[307] For a more complete discussion of broadband services, see *Broadband Today*: *A Staff Report to William E. Kennard, Chairman, Federal Communications Commission,* Cable Services Bureau, Federal Communications Commission, Oct. 1999 ("*Broadband Today*").

[308] Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, http://www.cabledatacomnews.com/cmic/cmic16.html; 1999 *Competition Report*, 15 FCC Rcd at 1005 at ¶ 56.

[309] TeleChoice, Inc. *Deployment – Updated, May 5, 2000*, http://www.xdsl.com/content/resources/deployment_info.asp. DSL technology upgrades the performance of the standard twisted pair (the copper line connecting most homes and businesses) to carry high-capacity data transmission. The technology expands the amount of frequency used over the copper line, whereby the line's high frequencies are used to transmit the data and the lower frequencies are free to transmit voice or fax transmissions. *See Broadband Today* at 20. While most cable modem customers are residential Internet users, it is difficult to discern what portion of DSL subscribers are residential. Some estimates of DSL subscribership (including business lines) are as high as 1.3 million. *See* Neil Strother, *Consumers and Biz Have the Hots for DSL*, ZDNET ANCHORDESK, Dec. 1, 1999, http://www/zdnet.com/anchordesk/story/story_4169.html.

cable broadband ISP.[310] Various cable operators, including AT&T, Comcast, Cox Communications, Cablevision Systems and Shaw Cablesystems, hold ownership interests in Excite@Home, and Excite@Home is their exclusive cable broadband ISP. By virtue of a transaction with its cable partners, AT&T recently increased its voting stock interest in Excite@Home from about 57% to 74% and assumed full control of the management of Excite@Home.[311] Excite@Home and Road Runner also have exclusive contracts with other cable operators throughout the country and abroad.[312] Excite@Home is the nation's largest cable broadband ISP and currently has more than 1.5 million subscribers; Road Runner is the second largest cable broadband ISP and has approximately 730,000 subscribers.[313]

108. Some commenters[314] have raised concerns regarding the merger's impact on the provision of a related category of services, which AT&T refers to as "interactive television services and content."[315] These interactive television services include (but are not limited to) the provision of electronic commerce (shopping), electronic banking, video-on-demand, limited or full-service Internet access, and hyperlinking, all delivered to the consumer's television set via the cable set-top box. Applicants have not yet deployed interactive television services in the mass market but plan to deliver such services to the consumer through an advanced digital set top box, utilizing TVGuide as the EPG.[316] The digital set-top box may also incorporate a cable modem, providing the consumer with full Internet access either on the television screen or on the personal computer.[317]

109. Because Applicants' interactive television offering will include broadband access to the Internet, those interactive services may compete with broadband Internet services delivered over the home computer. The merged entity will require its customers who access the Internet through the digital set-top

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310 *See* Application at 17 & n.45.

311 *Id.* at 17; AT&T Corp., *Excite@Home's Principle Cable Partners Extend Distribution Arrangements, AT&T Assumes More Prominent Role* (press release), Mar. 29, 2000.

312 *See, e.g.* AtHome Corp., *Filing 10-Q for the Quarter Ended Sept. 30, 1999*, at 8-10, 12, 14, 39. (Excite@Home is "the leading provider of broadband Internet services over the cable television infrastructure to consumers. By virtue of our relationships with 21 cable companies in North America and Europe, we have access to approximately 65 million homes, which includes exclusive access to over 50% of the households in the United States and Canada capable of receiving cable television.").

313 AtHome Corp., *Excite@Home Reports First Quarter 2000 Financial & Operating Results* (press release), Apr. 19, 2000. Road Runner, *Road Runner Announces strong First Quarter* (press release), Apr. 12, 2000.

314 *See, e.g.,* SBC Aug. 23 Comments at 31-40.

315 By "interactive television services," we refer generically to an array of services that AT&T and other broadband providers plan to offer by means of the advanced digital set-top box. The services will be delivered through the consumer's television set or personal computer.

316 We address the merger's effect on EPG services in Section IV.A., *supra.*

317 Excite@Home plans to offer the full range of interactive television services over AT&T systems, including Internet access. *See* AT&T Corp., *Excite@Home'sPrinciple Cable Partners Extend Distribution Arrangements, AT&T Assumes More Prominent Role* (press release), Mar. 29, 2000. AT&T plans to begin offering Excite@Home through set top boxes in the summer and fall of 2000 as a two-tier service. The scaled-down version will offer only e-mail, shopping information, news, sports, and weather headlines at no extra cost to digital customers, while for an extra $15 per month, customers will have access to the full Internet, personalized news, weather and sports, e-mail, enhanced TV overlays, electronic commerce, interactive programming, wireless keyboard, and other advanced features. *See Excite@Home Prepares to Start Internet TV Service,* COMMUNICATIONS DAILY, Mar. 31, 2000.

box to utilize Excite@Home or Road Runner as their ISP until the termination of its exclusive contracts with these affiliated ISPs.[318] Thus, the merged firm's provision of broadband Internet access and interactive services through the set-top box will augment its provision of broadband Internet access through the cable modem. Below, we analyze the merger's potential impact on competition and diversity in the provision of broadband Internet access, whether provided through the cable modem or the set-top box.

### 2. Discussion

110. The Application indicates that the merged firm would have ownership interests in the two largest cable ISPs, Excite@Home and Road Runner, and cable systems with last-mile facilities reaching nearly 63% of homes passed by cable nationwide.[319] Commenters argue that these ownership interests will give the merged entity dominance over the provision of broadband Internet services, thereby threatening competition and diversity in the provision of Internet services, content, applications, and architecture. They observe that Excite@Home and Road Runner are the exclusive ISPs for cable modem users served by the majority of cable systems nationwide, including those of AT&T and MediaOne, and that unaffiliated ISPs currently are denied "open access" to provide broadband services over these cable systems. The issues raised by commenters generally fall into the following categories: broadband Internet content, broadband Internet applications and software, and "open/forced access."

111. *Broadband Internet Content.* Some commenters argue that the merged firm will control such a large portion of the broadband customer base that it could gain *de facto* power to dictate what content, products, and services are available to broadband customers generally, and at what price.[320] When a consumer accesses the Internet through the broadband cable line, the first Web page the consumer sees is the home page of the cable operator's exclusive ISP. To view an alternative web page or Internet portal offered by ISPs not affiliated with the cable operators, the consumer must reconfigure his or her Internet access device or Web browser to go through the unaffiliated ISP, to which the customer must subscribe at an additional cost.

112. Excite@Home and Road Runner, together with the cable operator, determine the content that is placed on their home pages. In addition, both Excite@Home and Road Runner use "caching" technology, a technology that places certain content at regional distribution centers to allow faster access

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[318] At the Public Forum held on February 4, 2000, AT&T General Counsel Jim Cicconi explained that the Applicants' exclusive contracts with Excite@Home and Road Runner apply to all Internet access via the merged entity's cable systems, including Internet access via the digital set-top box. *See* Cicconi Public Forum Testimony, Tr. 101-02.

[319] *See* Application at Appendix A; Paul Kagan Assocs., Inc., *Media Index Data Base*, The Kagan Media Index, Oct. 31, 1999, at 8. We have received various proposals regarding the appropriate measure of the Applicants' horizontal reach in the provision of broadband Internet services, based on their ownership interests in either cable systems or Excite@Home and Road Runner. Possible measures include, for example: (1) the total number of Excite@Home and Road Runner subscribers; (2) the total number of AT&T and MediaOne broadband Internet subscribers, excluding those of TWE; (3) the total number of AT&T and MediaOne broadband Internet subscribers, including those of TWE; (4) the total number of homes passed by AT&T and MediaOne cable systems, but excluding TWE cable systems; (5) the total number of homes passed by upgraded AT&T and MediaOne cable systems, but excluding TWE cable systems; (6) the total number of homes passed by AT&T and MediaOne cable systems, including TWE cable systems; and (7) the total number of homes passed by upgraded AT&T and MediaOne cable systems, including TWE cable systems.

[320] *See, e.g.*, GTE Comments at 49-58; SBC Aug. 23 Comments at 40-43; Bell Atlantic Comments at 43-49.

by their customers.[321] Excite@Home and Road Runner cache (a) the content most often accessed by customers as determined by mathematical algorithms, and (b) the content for which content providers have negotiated for preferred caching. Commenters raise concerns that the merged firm could use its control over the Excite@Home and Road Runner home pages and caching technology to discriminate against unaffiliated providers, both in terms of pricing and access to consumers. Commenters argue that the merged entity could use caching technology to slow down, limit or block consumers' access to unaffiliated broadband content.[322] They also argue that, given Excite@Home and Road Runner's dominance in the provision of broadband Internet access, the merged firm could charge monopoly rents to content providers for the right to receive favorable caching on Excite@Home and Road Runner networks, or to be linked to the affiliated ISPs' home pages.[323]

113. *Broadband Internet Applications and Software.* Several commenters, particularly GTE, argue that the Applicants will have both the incentive and the ability to implement proprietary network management and software protocols, designed to render software and content written for their systems incompatible with competing systems.[324] Commenters argue that the merged entity will use the market power of Excite@Home and Road Runner to force applications developers to incorporate proprietary protocols into their software architecture so that new applications cannot work on competing broadband technologies such as DSL.

114. *"Open/Forced Access."* A number of commenters have urged us to address the perceived competitive harms by imposing an "open access" requirement.[325] By "open access," commenters refer to a proposed requirement that cable operators allow independent, unaffiliated ISPs to interconnect with their proprietary cable networks for the purpose of offering broadband Internet access and services to consumers. Opponents to such a regulatory requirement refer to it as "forced access."

115. Proponents of "open/forced access" argue that the Applicants' offering of cable broadband transport bundled with their affiliated ISPs' Internet access service and content threatens to alter fundamentally the open nature of the Internet, replacing its open architecture with a closed model derived from the cable television industry.[326] These parties believe that the merged entity will integrate vertically into related markets such as broadband Internet content, software, and equipment.[327] They contend that the merged firm is likely to impose a proprietary architectural standard so as to favor affiliated product and service providers, foreclose effective competition among broadband Internet service providers, and

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[321] Excite@Home's caching capabilities are generally described on the company's Internet home page in a document entitled AtHome Corp., *@Home Network Architecture*, http://www.home.net/about/network.html.

[322] *See, e.g.,* GTE Comments at 49-58; Bell Atlantic Comments at 35-39, 43-46.

[323] With respect to pricing, GTE argues that ". . . a combined Excite@Home will be able to demand steep payments – including possible equity positions – from software and content providers in exchange for preferential placement on its system." GTE Comments at 54 (citation omitted).

[324] GTE Comments at 49-53; GTE Nov. 1 Reply Comments at 23-28; SBC Aug. 23 Comments at 33-37.

[325] Parties urging "open/forced access" include GTE, Bell Atlantic, Ameritech, AOL, MCI Worldcom, SBC Communications, Mindspring, U.S. West, Bellsouth, Quest, the Telecommunications Advocacy Project, Sprint, and the Consumers Union, *et al.*

[326] *See, e.g.,* MCI WorldCom Comments at 6-26; *Ex Parte* Comments of Professors Mark A. Lemley and Lawrence Lessig ("Lemley and Lessig Comments"), *passim.*

[327] *See, e.g.*. Bell Atlantic Comments at 35-39; GTE Comments at 49-58.

undermine the incentive toward innovation in broadband content and applications.[328] Several commenters also argue that AT&T should be subject to an "open/forced access" requirement as a matter of "regulatory parity," because ILECs offering DSL services are required by law to provide access to competing providers.[329]

**3. Findings.**

116. We find it unnecessary to determine in this proceeding whether a distinct broadband Internet access market exists, notwithstanding the rigorous debate on the record between the Applicants and commenters on this issue of market definition. We agree with commenters that the proposed merger conceivably could undermine competition and diversity in the emerging broadband Internet arena, *if* customers did not have the ability to choose among viable, alternative broadband Internet access providers or ISPs. However, we find that those harms will be avoided if: (a) consumers can choose among various alternative broadband access providers, such as DSL, wireless, and satellite; or (b) unaffiliated ISPs are permitted access to the merged firm's cable network. As discussed below, we find that there is significant actual and potential competition from both alternative broadband providers and from unaffiliated ISPs that may gain access to the merged firm's cable systems. Moreover, we find that the Justice Department's proposed consent decree with AT&T, requiring it to divest its interest in Road Runner and to obtain prior approval from the Justice Department before entering into certain agreements with Time Warner and AOL, already has addressed the potential harms from a combination of Road Runner and Excite@Home.

117. *Alternative Providers.* With regard to choice among broadband access providers, there is evidence that ILECs, CLECs, and other competitive providers are aggressively rolling out alternative broadband technologies, notwithstanding cable's early lead in the nascent broadband area.[330] ISPs lacking direct access to provide broadband services over cable systems are entering into alliances with alternative broadband providers, thereby accelerating the deployment of these technologies.[331] Currently, those alternative technologies are attracting new subscribers at an exponential rate, and prices for these new services appear to be falling.[332] In fact, DSL sales are currently growing at a more rapid rate than cable

[328] *See* Lemley and Lessig Comments, *passim.*

[329] SBC Aug. 23 Comments at 43-47; MindSpring Comments, *passim*; U S West Aug. 23 Comments at 17-20; Qwest Comments at 3-8; Bell Atlantic Comments at 40-42.

[330] In *Broadband Today* (at 42), the Cable Services Bureau found that "[a]s deployment of DSL, satellite, and wireless advances, in large part spurred by rapid cable modem deployment deployment, consumers will have alternative platforms to use for high-speed data access, telephony and video services." Analysts appear to disagree on when or if cable-based Internet access will lose its current lead over alternative broadband technologies. Some believe that the recent surge in DSL deployment signals that cable modem service has only "a six-month lead on DSL technologies," Sylvia Dennis, *DSL Taking off Big Time,* NEWSBYTES NEWS NETWORK, Aug. 17, 1999, 1999 WL 20018859, and that DSL subscribership will surpass cable modem subscribership in 2001. Vito Racanelli, *AOL-Time Warner Deal Leaves Baby Bells Unjustly Shunned*, BARONS, 2000 WL-BARRONS 2363618, Jan. 15, 2000. Others predict that the cable industry will continue to be the high-speed access market leader over the next few years. *See* Yankee Group Report, *Cable Modems and DSL: High-Speed Growth for High-Speed Access,*quoted in Steven Bonisteel, *High-Speed Net in 16.6 Homes by 2004*, NEWSBYTES NEWS NETWORK, Jan. 28, 2000, http://www.newsbytes.com/pubNews/00/142944.html. There is little dispute, however, that cable faces increasing competition from alternative broadband technologies.

[331] *See Broadband Today* at 24-26. *See also* Kinetic Strategies, Inc., *Commercial Cable Modem Launches in North America,* http://www/cabledatacomnews.com/cmic/cmic7.html.

[332] For example, SBC Communications announced in October 1999 its "Project Pronto," a $6 billion commitment to upgrade networks and deploy high-speed DSL technology nationwide. *See* Patricia Fusco, *SBC Makes $6*
(continued…)

modem sales.[333] Largely in response to cable modem rollout, the Bell Operating Companies ("BOCs") and GTE have launched major initiatives to accelerate their deployment of DSL.[334] Similarly, the CLECs are aggressively deploying DSL technology.[335] We expect that our recent "line-sharing" rule permitting competitive carriers to obtain access to the high-frequency portion of the local loop from the incumbent LECs will further spur the deployment of DSL broadband services.[336]

118. Fixed wireless broadband technology also holds promise for the future. Presently, Teligent, Inc.[337] and WinStar Communications, Inc.[338] offer a variety of broadband services to small and

(…continued from previous page)
*Billion Broadband Play,* INTERNETNEWS.COM, Oct.18, 1999, http://www.internetnews.com/ISP-news/article/0,1087, 8_220301, 00.html; (based on announcements by RBOCs and other DSL providers, 80 million homes are passed by DSL and 60 million homes are currently servable by DSL) *see also* DSL Prime, *Want to Win in ADSL? US DSL Deployment and Subscribers-Updated Feb. 4, 2000*, http://www.dslprime.com/News_Articles/Availability/ availability.html. ("In March of 1999, industry experts predicted there would be only 500,000-600,000 active DSL lines by the end of 1999. Data from late 1999 indicates the actual number is more than double the predictions, at approximately 1.3 million."). Neil Strother, *Consumers and Biz Have the Hots for DSL,* ZDNET ANCHORDESK, Dec. 1, 1999, http://www.zdnet.com/anchordesk/story/story_4169.html.

333 Cambridge Telecom Report, *DSL Deployment Surges Well Beyond Projections; Grows Five Times Faster Than Cable in Six-Month Period*, Aug. 17, 1999,1999WL 8104033; Shy Shin Luh, *Digital Subscriber Lines Are the Latest Internet Wave, But Baby Bells Aren't Making the Connection Quickly*, WASHINGTON POST, Aug. 23, 1999 at F5. A recent report by TeleChoice shows spectacular DSL growth during 1999 and projects continued rapid growth in the future. *See* TeleChoice, Inc., *Deployment – Updated Nov. 5, 1999,* http://www.xdsl.com/content/resources/deployment_info.asp. The Yankee Group predicts 4.1 million DSL lines in 2002. *See* Sarah L. Roberts-Witt, *The Coming DSL-Cable Race*, INTERNET WORLD, Nov. 15, 1999, http://www.iw.com/print/1999/11/15/infra/19991115-DSL.html.

334 The Commission's Cable Services Bureau observed in October 1999 that: "The ILECs' aggressive deployment of DSL can be attributed in large part to the deployment of cable modem service. Although the ILECs have possessed DSL technology since the late 1980s, they did not offer the service, for concern that it would negatively impact their other lines of business. The deployment of cable modem service, however, spurred the ILECs to offer DSL or risk losing potential subscribers to cable." *Broadband Today* at 27 (footnotes omitted). In July 1999, Bell Atlantic announced that it would double its deployment of DSL during 2000. In the same month, Ameritech launched its DSL program, and GTE announced that it was accelerating DSL deployment. In October 1999, SBC announced its $6 billion "Project Pronto" initiative. *See* Bell Atlantic Corp., *Bell Atlantic Doubles Infospeed DSL Deployment* (press release), July 28, 1999; David Schobert, *Ameritech takes DSL leap – finally*, TELEPHONY, July 26, 1999, 1999WL 11171924; GTE Corp., *GTE to offer lower-priced, higher speed Internet access service while accelerating deployment in 17 states* (press release), July 22, 1999; SBC Communications, Inc., *SBC Launches $6 Billion Broadband Initiative* (press release), Oct. 19, 1999.

335 Covad's network already passes 25 million homes and businesses, and by the end of 2000 it expects to pass over 40 percent of the homes in the United States. *See* Covad Communications Group, Inc., *Covad Communications Announces Third Quarter Results* (press release), Oct. 20, 1999.

336 *See In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Third Report and Order, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* Fourth Report and Order, FCC 99-355 (rel. Dec. 9, 1999), recon. pending, United States Telecom Association, *et. al.* v. FCC, No. 00-1012, *et. al.* (D.C. Cir. filed Jan. 18, 2000).

337 Teligent, Inc, *About Us*, http://www.teligent.com.

338 Winstar Communications, Inc., *Winstar Info,* http://www.winstar.com/info/content_technology.asp (web page) (viewed May 30, 2000).

medium-sized businesses in several metropolitan markets, and have plans to further deploy their services to several new markets throughout the country. In the upcoming months, several new fixed wireless systems plan to offer broadband access through either local multipoint distribution service (LMDS) or multichannel multipoint distribution service (MMDS) technologies. MCI and Sprint, for example, are acquiring struggling licensees and re-deploying their spectrum to provide broadband services.[339] In general, although wireless technology is limited by slower upstream speed as compared to cable and DSL,[340] analysts remain optimistic regarding wireless technology as a competitive broadband provider.[341]

119. Satellite-delivered broadband services also may become viable broadband alternatives in the future, although they currently do not offer high-speed access in the upstream direction.[342] The Spaceway network, expected to be operational in 2002, will utilize 16 satellites to provide "bandwidth-on-demand" – the ability to transmit and receive voice, video and data at any time from any location – at speeds of up to 6 Mbps.[343] Teledesic plans to utilize 288 satellites in low earth orbit to provide two-way digital transmission of voice, data and video at low costs, regardless of location. The company is spending $9 billion on its "Internet-in-the-Sky" project, which will provide consumers with broadband Internet service beginning in 2003.[344] In short, the next few years promise significant growth in competition from alternative broadband access providers.

120. *Access by Unaffiliated ISPs.* In addition to the foregoing industry developments, the Applicants have committed to open their cable modem platform to unaffiliated ISPs as soon as AT&T's

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[339] *See* Phillips Business Information, Inc., *MCI, Sprint Continue Mad Grab for Access*, BROADBAND NETWORKING NEWS, 1999 WL 7397825 at 1, Aug. 3, 1999.

[340] Sanford C. Bernstein & Co., Inc. and McKinsey & Co., Inc., *Broadband! A Joint Industry Study* (Jan. 2000) ("*Broadband!*") at 33.

[341] *See* JP Morgan, *Industry Report: The Mobile Millennium – Wireless Telecommunications Services* (May 3, 2000) at 3 ("Last year was an extraordinary year for the wireless industry. The industry added 16.8 million subscribers, up 21% from 13.9 million in 1998. The standard industry metric for subscriber growth is incremental penetration, which is defined as net additional subscribers divided by population. After several years of 3-4% annual incremental penetration, the rate started to accelerate with the introduction of PCS competition in 1997 and has continued to accelerate. Last year the industry achieved more than 6% of incremental penetration, and all indications are that it could reach 7% or more in 2000.").

[342] *Broadband!* at 54 ("Satellite has not been included in our overall estimates because it does not yet offer true broadband service currently, and won't until at least 2002 with the advent of Ka-band two-way service. Current cost for two-way CPE for the Ka-band is well over $1,000, and considerable improvement from that level will be required.").

[343] Hughes Network Systems, *Spaceway*, *http://www.hns.com/spaceway/spaceway.com*.

[344] Motorola, Inc., *Teledesic, Motorola, Boeing, Matra Marconi Space to Partner on 'Internet-in-the-Sky;' Motorola Will Lead Global Industrial Team* (press release), May 21, 1998. In addition, several companies, including DirecPC, eSat and Gilat, are already offering satellite-based broadband Internet service. Hughes Network Systems, *DirecPC Satellite Solution Combines Speed, Bandwidth and Reliability to Deliver Ideal Internet Access Solutions for Business* (press release), Nov. 15, 1999; eSat, Inc., *Introduction to eSat, Inc. Satellite Internet Solutions* (newsletter, updated), http://www.esatinc.com/satellite1.htm; *Microsoft and Gilat Begin 2-Way Satellite Satellite Internet Service: New Telephone-Free Operation Scheduled to reach 20,000 U.S. Sites,* COMMUNICATIONS DAILY (Feb. 17, 2000. AlphaStar International recently began 2-way Ku-band satellite broadband service for residential Internet users of wireless local access. AlphaStar's satellite-based broadband service is expected to compete directly with cable, DSL and wireless offerings, as well as with more established satellite companies such as DirecPC and Gilat-to-Home. COMMUNICATIONS DAILY (May 23, 2000).

exclusive contract with Excite@Home expires in June 2002 and MediaOne's exclusive contract with Road Runner expires in December 2001. On December 6, 1999, following meetings with other interested parties, AT&T and MindSpring (an unaffiliated, nationwide ISP)[345] sent a joint letter to Commission Chairman William Kennard setting forth an agreement in principle pursuant to which AT&T committed to provide unaffiliated ISPs access to its cable systems following the expiration of its exclusive arrangement with Excite@Home in 2002. AT&T General Counsel Jim Cicconi has stated that the commitments made in the December 6, 1999 letter also will apply in MediaOne territories, such that Road Runner will no longer be the exclusive ISP for MediaOne cable subscribers following the expiration of MediaOne's exclusive contract with Road Runner.[346] In that letter, AT&T stated its agreement to adhere to various principles of "openness" in order to offer its customers:[347]

- A choice of ISPs;
- The ability to exercise the consumer's choice of ISP without having to pay twice for both that ISP and the cable-affiliated ISP;
- A choice of Internet connections at different speeds, at reasonable and appropriate prices;
- Direct access to all content available on the World Wide Web without any AT&T-imposed charge to the consumer for such content;
- The continued ability to customize the customer's "start page" and other aspects of their Internet experience; and,
- The functionality of the customer's chosen ISP comparable to that which such ISP has on competing broadband systems, subject to any technical constraints particular to and imposed on all ISPs using AT&T's cable system to deliver high-speed Internet access.

121. To achieve the foregoing objectives, AT&T and MediaOne have also agreed to negotiate, upon the expiration of their exclusive arrangements with Excite@Home and Road Runner, private contracts with multiple ISPs in order to offer those ISPs reasonably comparable access prices, the opportunity to market and bill consumers directly, and the opportunity to differentiate service offerings and to maintain brand recognition in all such offerings. In addition, AT&T has committed to allowing unaffiliated ISPs using its cable systems to obtain Internet backbone capacity from AT&T's own service, if they so choose.[348] Finally, AT&T has committed to facilitating maximum access by its customers to any content of their choosing, including streaming video.[349] We expect the Applicants to adhere to the foregoing commitments and therefore are hopeful that the merged firm and unaffiliated ISPs together will

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[345] MindSpring recently merged with the ISP EarthLink. EarthLink, *EarthLink and MindSpring Complete $4 Billion Merger Creating Nation's Largest Independent ISP* (press release), Feb. 4, 2000.

[346] *See* Cicconi Public Forum Testimony, Tr. at 110-11.

[347] Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Dec. 7, 1999, Transmittal of letter from James W. Cicconi, General Counsel, AT&T, to William Kennard, Chairman, FCC, dated Dec. 6, 1999.

[348] Letter from Betsy J. Brady, Vice President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated May 11, 2000, Transmittal of Letter from James W. Cicconi, General Counsel, AT&T, to William E. Kennard, Chairman, FCC, dated May 10, 2000.

[349] *Id.* ("Second, as a matter of principle and of customer satisfaction, AT&T is committed to facilitate maximum access by its customers to any content of their choosing. Therefore, AT&T is committed to developing and negotiating appropriate technical and commercial mechanisms for managing bandwidth usage associated with video streaming on a shared network, and for ensuring the availability of streaming video to customers who desire it.").

be able to resolve the technical and business issues associated with providing these ISPs direct access to the cable infrastructure to offer broadband services, without the imposition of a government-mandated model.[350]

122. *Justice Department Proposed Consent Decree.* We also consider the impact of the proposed consent decree between the Justice Department and AT&T, which addresses the potential anti-competitive effects from a combination of the nation's two largest cable broadband ISPs, Road Runner and Excite@Home, under the merged entity's influence or control.[351] The proposed consent decree requires the merged entity to divest its interest in Road Runner no later than December 31, 2001, and to exit the joint venture prior to that date if the other relevant owners of Road Runner agree to an earlier departure.[352] In addition, the proposed consent decree requires the merged firm to obtain prior approval from the Justice Department before entering into certain types of agreements with Time Warner or with AOL, which has a pending merger agreement with Time Warner. That requirement, which would remain in place for two years after the merged firm exits Road Runner, would apply to any agreement that proposes joint provision of a residential broadband service or any agreement that would prevent either party from offering a residential broadband service to customers in any geographic region. It also would apply to agreements that would prevent the inclusion of any content in a cable modem service offered by either party, or that would prevent either party from providing preferential treatment to content provided by others.[353] The proposed consent decree thus assures that Road Runner and Excite@Home will not coordinate their actions to the detriment of consumers.

123. Given the nascent condition of the broadband industry and the foregoing promises of competition, we find it premature to conclude that the proposed merger poses a sufficient threat to competition and diversity in the provision of broadband Internet services, content, applications, or architecture to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree. We find that the proposed consent decree adequately addresses commenters' concern that a combination of Excite@Home and Road Runner would have both the ability and the incentive to discriminate against unaffiliated content providers and/or to leverage proprietary software protocols to favor networks owned by or affiliated with the merged entity. Although some possibility of harm may remain, we find that there is an equal or greater probability that growing competition from alternative access providers and unaffiliated ISPs will prevent such perceived harms. The evidence of growing competition from both alternative broadband providers and unaffiliated ISPs gaining access to cable and other broadband networks indicates that any action taken by the merged firm to disfavor unaffiliated broadband content and applications providers is likely to threaten the networks' ability to attract and retain customers. In light of industry trends toward both horizontal and vertical integration,

[350] In this regard, we note that at least seven of the eleven largest cable operators are exploring means to offer multiple ISPs access to their cable infrastructure. Those cable operators include Time Warner, Charter Communications, Classic Communications, Comcast, Cox Comunications, Insight Comunications, Adelphia Communications, and Cablevision Systems. *See Leading Cable MSOs Quietly Shifting Toward Open Access*, COMMUNICATIONS DAILY, Apr. 6, 2000; Memorandum of Understanding Between Time Warner, Inc. and America Online, Inc. Regarding Open Access Business Practices (Feb. 29, 2000), filed in *Applications for Consent to the Transfer of Control of Licenses, Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee,* CS Docket No. 00-30.

[351] *See United States v. AT&T Corp. and MediaOne Group, Inc.,* Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000).

[352] *Id.*

[353] *Id.*

however, we will monitor industry developments closely through our ongoing examination of the deployment of advanced services pursuant to Section 706 of the 1996 Act[354] and the Cable Services Bureau's monitoring of cable operators' provision of broadband services in particular.[355] We are committed to reviewing our policies if competition does not grow as expected.

124. We agree with commenters that the imposition of proprietary architecture and protocols for broadband Internet applications would pose a serious threat to the openness, diversity, and innovation of the Internet and the development of competition in the provision of broadband services. There is little doubt that over the next few years, as more and more customers purchase broadband Internet connections, the development of Internet applications and content specific to broadband will accelerate rapidly.[356] It is important that, to the extent possible, those broadband applications and content have the ability to interface with the full range of competing broadband technologies.

125. In our monitoring of broadband developments, we have seen no evidence of cable operators imposing proprietary protocols. According to the Applicants, "both AT&T and MediaOne have used open standards in their broadband systems."[357] The Applicants argue that, as "nascent" service providers in an Internet arena still dominated by established narrowband providers, they have "neither the incentive nor the ability to change course and impose proprietary standards in the future."[358] Commenters have provided no evidence to the contrary. Given the increasingly rapid deployment of alternative broadband technologies, we cannot conclude that the merged firm will have sufficient bargaining power in this emerging field to give it the incentive and the ability to establish proprietary interfaces for new broadband software applications. If the merged entity imposes proprietary protocols, providers of applications and content tailored to those protocols will be forced to forego alternative broadband outlets such as DSL. Were the merged firm to attempt such a strategy, it is more likely than not that software developers could find adequate outlets in alternative broadband providers to discipline the merged firm's anti-competitive action.

126. We also decline to impose an "open/forced access" requirement on the merged firm's cable systems as a condition of this merger based on arguments regarding alleged disparate regulatory treatment of cable operators and telephone companies offering broadband Internet access.[359] As we noted in our

[354] 1996 Act § 706, 110 Stat. 153.

[355] *See Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable And Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant To Section 706 of the Telecommunications Act of 1996*, Notice of Inquiry, CC Docket No. 98-146, FCC 00-57 (rel. Feb. 18, 2000). The Commission's past monitoring of market developments pursuant to our Section 706 authority is reflected in the Cable Services Bureau's *Broadband Today* report, released in October, 1999. In that report, the Bureau examined issues related to the deployment of broadband Internet services, primarily focussing on the question of whether the Commission should implement an open/forced access requirement. *See, e.g.*, *Broadband Today* at 9-15.

[356] *See* Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999, http://www.zdnet.com/zdnn/stories/news (industry analysts expect that "software and applications designed to exploit the high bandwidth market" will be developed in earnest once the total number of broadband customers surpasses one million).

[357] Applicants Sept. 17 Reply Comments at 86.

[358] *Id*.

[359] MCI WorldCom and MindSpring argue that the Commission, in the context of its merger review, should rule that AT&T and MediaOne, insofar as they provide Internet access over cable, should be classified as "common

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*Amicus Brief* to the U.S. Court of Appeals for the Ninth Circuit, the Commission has not determined whether Internet access via cable system facilities should be classified as a "cable service" subject to Title VI of the Act, or as a "telecommunications" or "information service" subject to Title II.[360] There may well come a time when it will be necessary and useful from a policy perspective for the Commission to make these legal determinations. However, those legal determinations would have industry-wide application, as well as legal and practical implications that extend far beyond the contours of this particular merger. Our review of this merger does not provide an appropriate forum for a determination of the legal status of cable broadband Internet access services.

127. We find insufficient evidence to support the imposition of an "open/forced access" requirement on the merged entity at this time, given the potential for competition from alternative broadband providers and the potential for unaffiliated ISPs to gain direct access to provide broadband services over the cable infrastructure. We remain concerned, however, that the recent trend toward both horizontal and vertical consolidation in the broadband services industry has the potential to threaten the openness, competition, and innovation of the Internet and the diversity of media voices that are available to Americans.[361]

128. Therefore, although we decline to impose "open/forced" access on the Applicants as a condition of the proposed merger, we will continue to aggressively monitor broadband developments and the steps taken by the merged entity to provide unaffiliated ISPs with direct access to its cable systems.[362]

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carriers" subject to the provisions of Title II of the Communications Act of 1934. *See* MindSpring Comments at 3, 7-16; MCI WorldCom Comments at 26-32. MindSpring further argues that the Admininstrative Procedure Act (5 U.S.C. §§ 551 *et. seq.*) requires the Commission to decide whether Title II applies to the Applicants because, given the Applicants' prior arguments that an "open/forced access" requirement would prevent their investments to make system upgrades, such a requirement would cause the anticipated benefits of the merger to disappear. *See* MindSpring Comments at 19-21. We find this scenario unpersuasive, particularly because the Applicants continue to project extensive system upgrades and deployment of new services following the December 6, 1999 AT&T-MindSpring letter memorializing AT&T's "open access" commitment, which is discussed above.

[360] *Amicus Curiae* Brief of the FCC at 9-11, *AT&T Corp. v. City of Portland,* No. CV 99-65 PA (9th Cir. filed Aug. 16, 1999). The issue is pending in the forementioned litigation. In addition, the United States Court of Appeals for the Eleventh Circuit recently held that the Commission is not authorized under the 1996 Pole Attachment Act, 47 U.S.C. § 224, to regulate pole attachments for cable facilities used to provide "Internet service" because such service is neither a "cable service" nor a "telecommunications service." *Gulf Power Company v. FCC*, No. 98-6222, slip. op. at 26- 30 (11th Cir. Apr. 11, 2000).

[361] These concerns are exemplified by AT&T's recent acquisition of 32% of Internet telephony provider Net2Phone for $1.4 billion in cash, as part of a consortium of large media players including AOL and Liberty Media. (The consortium will hold a 39% voting interest.) The deal will require AT&T to work closely with AOL. AT&T Chairman Michael Armstrong stated that the company will soon announce another partnership with AOL in an undisclosed technology company. *See* AT&T Corp., *AT&T Consortium to Acquire 39 Percent Voting Stake in Net2Phone* (press release), Mar. 31, 2000.

[362] Some commenters argue that our review of the merger of AT&T and MediaOne should consider the impact of the proposed merger of AOL and Time Warner, Inc. *See* Schwartzman Public Forum Testimony, Tr. at 19-21. We find that it is inappropriate to consider the proposed merger of AOL and Time Warner in this proceding based on: (a) the assumption that the AOL-Time Warner merger will be approved and consummated, and (b) speculation regarding the competitive effects of that merger before full comment and review of the evidence has been completed. We conclude that the competitive effects of the proposed merger of AOL and Time Warner should be evaluated separately and fully in that merger review proceding.

We are cognizant of the merged firm's incentives and ability to use its control of the Excite@Home home page and "caching" technology to negotiate exclusive content agreements in order to disadvantage alternative broadband providers.[363] We will review our "hands-off" policy if competition fails to grow as expected, especially if we find signs of the following possible market failures: (a) if competition from alternative broadband providers (such as DSL, satellite, and wireless) does not develop as anticipated; (b) if the merged firm fails to fulfill expeditiously its commitment to open its systems to unaffiliated ISPs, either by limiting access to a few large ISPs, through pricing or other contractual terms, or by utilizing technology that would make an open access regime difficult or costly to implement; or (c) if the merged firm successfully enters into exclusive agreements with broadband Internet content or applications providers so as to disadvantage competing broadband providers.

### D. Local Exchange and Exchange Access Service

129. In this section, we consider the merger's potential public interest harms with respect to the provision of local exchange and exchange access service (*i.e.*, local telephone service).[364] The proposed merger would not violate any provision of the Communications Act or the Commission's rules with respect to these services. Accordingly, we proceed to the next step of examining whether the merger would hinder competition in the provision of these services and thereby frustrate the implementation of the pro-competitive goals of the 1996 Act. We conclude that the merger would not harm the development of competition in the provision of local exchange and exchange access service.

130. AT&T's acquisition of MediaOne will eliminate a competitor in markets where both AT&T and MediaOne are now providing service or would be likely to provide service absent the merger. Thus, we first ask whether AT&T already serves, or absent the merger, would serve some of the same markets as MediaOne such that the merger would eliminate an actual or potential competitor in the provision of local exchange and exchange access service. If so, we must determine whether the merger will inhibit the development of competition in the provision of these services.

131. MediaOne, as a cable operator, is most likely to provide local telephony services to residential and small business customers passed by its cable systems. There is no evidence in the record that MediaOne currently provides or plans to target large business customers not passed by its cable systems, and Applicants state that MediaOne "has never been or even sought to be a significant provider of telephony services to business customers."[365] The proposed merger therefore will not eliminate in MediaOne a uniquely qualified potential competitor that possesses scarce assets or capabilities with respect to the provision of local telephone service to larger business customers. Although MediaOne owns a

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[363] *See* ¶ 112, *supra*; *see also* Letter from Lorrie M. Marcil, Esq., Sidley & Austin, to Magalie Roman Salas, Secretary, FCC, dated Apr. 3, 2000, attaching e-mail message from Susan K. Marshall, AT&T, to Carl Vogel, AT&T, dated Aug. 26, 1999 (Bates Nos. 002759, 02769-02771).

[364] The Communications Act defines "local exchange carrier" as any person that is engaged in the provision of telephone exchange service or exchange access. 47 U.S.C. § 153(26). The term "telephone exchange service" means "(A) service within a telephone exchange, or within a connected system of telephone exchanges within the same exchange area, operated to furnish to subscribers intercommunicating service of the character ordinarily furnished by a single exchange, and which is covered by the exchange service charge, or (B) comparable service provided through a system of switches, transmission equipment, or other facilities (or combination thereof) by which a subscriber can originate and terminate a telecommunications service." 47 U.S.C. § 153(47). The term "exchange access" means "the offering of access to telephone exchange services or facilities for the purpose of origination or termination of telephone toll services." 47 U.S.C. § 153(16).

[365] Application at 36.

minority interest in the competitive LEC TWT, which provides local telephony services to larger businesses in some franchise areas served by AT&T, MediaOne recently relinquished all management rights and reduced its equity and voting interests in TWT to less than 10%.[366] To the extent AT&T will acquire a passive minority interest in TWT, we believe the larger business market is sufficiently competitive that AT&T's acquisition of this interest will not harm competition.[367] Accordingly, our examination of competitive concerns will focus on local exchange and exchange access services provided to residential and small business customers.

132. AT&T provides local telephone service to more than 555,000 customers throughout the United States.[368] Approximately 60,000 of these customers are served through AT&T's own cable system facilities.[369] AT&T's cable telephony service is available in Fremont and San Jose, California; Arlington Heights, Illinois; Dallas, Texas; and Hartford, Connecticut.[370] AT&T also provides facilities-based local telephone service on a trial basis in Dallas, Texas, and commercially to residential customers in Fort Worth, Texas using fixed wireless facilities.[371] AT&T plans to offer service commercially in two additional markets by year-end 2000.[372] AT&T has stated that its fixed wireless initiative is designed to allow it to provide local telephone service on a facilities basis in areas where it does not own cable facilities.[373]

133. MediaOne provides facilities-based local telephone service using its cable system facilities

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[366] Section 652(b) of the Communications Act prohibits cable operators from acquiring a financial interest greater than 10% or any management interest in a LEC serving the cable operator's franchise area. 47 U.S.C. § 572(b); *see* 47 C.F.R. § 76.505(b). MediaOne previously held a 14.7% equity interest and an 18.3% voting interest in TWT. Letter from Howard J. Symons, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., to Magalie Roman Salas, Secretary, FCC, dated Mar. 24, 2000, Transmittal of Letter from Susan M. Eid, Vice President, Federal Relations, MediaOne, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Mar. 24, 2000. In response to concerns that the proposed merger of AT&T and MediaOne may violate Section 652(b), MediaOne reduced its equity and voting interests in TWT to approximately 6% and 7.7%, respectively, thereby also relinquishing its management rights. *See* May 9 Eid Letter. MediaOne's action rendered moot the question of whether AT&T's acquisition of MediaOne would violate Section 652(b). 47 U.S.C. § 572(b).

[367] *See AT&T-TCI Order*, 14 FCC Rcd at 3186 ¶ 50 ("incumbent LECs are facing increasing competition in markets for local exchange and exchange access services provided to business customers, and 'numerous new entrants are rapidly entering this market'"); *SBC-SNET Order*, 13 FCC Rcd at 21301-02 ¶ 20; *AT&T-Teleport Order*, 13 FCC Rdc at 15250-01 ¶ 27.

[368] Letter from Stephen Garavito, General Attorney, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated May 24, 2000.

[369] *Id.*

[370] *See* Section III.A. *infra.* In 1999, market trials of telephony services were launched in the San Francisco Bay Area, Chicago, Pittsburgh, Dallas, Denver, Seattle, Salt Lake City, and Portland. AT&T Corp., *AT&T – MediaOne Combination Will Speed Local Phone Competition and Bring High Speed Internet Services to More Consumers, AT&T's Cicconi Says* (press release), Feb. 4, 2000.

[371] *See* AT&T Fixed Wireless Slides; *see also* Goldman Sachs Dec. 7 AT&T Report; Paine Webber Dec. 7 AT&T Report at 2; Feb. 11 Marsh Letter; AT&T Corp., *AT&T 'Cuts The Cord' Top Provide Services Into Homes* (press release), Mar. 22, 2000.

[372] *See* AT&T Fixed Wireless Slides; *see also* Goldman Sachs Dec. 7 AT&T Report; Paine Webber Dec. 7 AT&T Report, at 2; Feb. 11 Marsh Letter.

[373] *See* AT&T Fixed Wireless Slides; *see also* Goldman Sachs Dec. 7 AT&T Report; Paine Webber Dec. 7 AT&T Report, at 2; Feb. 11 Marsh Letter.

to approximately 100,000 local telephone service customers.[374] The service is available in Atlanta, Georgia; Boston, Massachusetts; Jacksonville and Pompano Beach, Florida; Detroit, Michigan; Los Angeles, California; and Richmond, Virginia.[375] According to the Applicants, MediaOne serves less than 4% of the homes that are passed by its cable facilities that have been upgraded to provide telephone service.[376]

134. AT&T and MediaOne currently compete with each other in only one market in suburban Atlanta, where AT&T provides resold local telephone service and MediaOne provides facilities-based service.[377] When the Application was filed, MediaOne served approximately 5,000 customers (less than 3% of the market) in this service area.[378] According to AT&T, its "Georgia market efforts never advanced beyond the readiness testing phase," and its local telephony resale plans "were suspended indefinitely in October/November 1997."[379] AT&T states that "service continued to be provided to the then-existing base until those customers opted to cancel or terminate their service, [and the] embedded base that remains today includes only a few thousand customers."[380]

135. *Findings*. We recognize that MediaOne's "second wire" into the home might permit it in the long term to become a sustained and effective competitor for residential telephone service in its franchise areas even absent the merger. We do not believe it likely, however, that MediaOne would be a potential competitor in markets outside of its local franchise areas that AT&T either now serves or would be likely to serve. Our previous findings are that cable operators such as MediaOne lack the telecommunications brand-name reputation and expertise to be "most significant market participants" for purposes of competitive analysis in markets outside of the cable operators' local franchise areas.[381]

136. Unlike MediaOne, however, AT&T does have the capability to be a "most significant market participant" in the mass market. Specifically, the Commission has held previously that AT&T is one of only a few firms that currently possesses the experience, brand name, assets, and financial resources that are essential for effective entry into the retail residential local exchange and exchange access markets.[382] AT&T has announced a fixed wireless initiative to provide local exchange service in areas where it does not intend to have a cable presence.[383] There is no evidence in the record, however, that

[374] MediaOne Group, Inc., *MediaOne Installs 100,000th U.S. Digital Telephone Customer* (press release), May 18, 2000.

[375] Application at 34.

[376] May 25 Eid Letter.

[377] Application at 34 n.71.

[378] *Id.* In Georgia, AT&T and MediaOne together serve less than 15,000 local customers through facilities-based service and resale. *Id.* at 35.

[379] Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Feb. 18, 2000, Transmittal of Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Feb. 18, 2000.

[380] *Id.*

[381] *See, e.g.*, *AT&T-TCI Order*, 14 FCC Rcd at 3185 ¶ 47. The term "most significant market participant" refers to service providers that are "either in the market already or are the most likely to enter and to have an effect on the market . . . ." *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20024-25 ¶ 70.

[382] *AT&T-TCI Order*, 14 FCC Rcd at 3185 ¶ 47.

[383] AT&T Corp., *AT&T 'Cuts the Cord' To Provide Services Into Homes* (press release), Mar. 22, 2000; Goldman

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AT&T has specific business plans to provide local exchange service to mass market customers in specific, identified MediaOne franchise areas. Thus, it is unclear whether and when AT&T would deploy a fixed wireless system and offer local exchange service on a mass market basis in MediaOne's franchise areas if AT&T did not merge with MediaOne. We conclude, based on the record before us, that the proposed merger will not harm the development of competition for local exchange and exchange access service provided to residential and small business consumers. As described in the potential public interest benefits section below, we find that AT&T and MediaOne acting independently would not be able to offer facilities-based local telephone service as efficiently or as effectively as they could through their proposed merger.

### E. Mobile Telephone Service

137. We determine that the merger will not result in violation of the Communications Act or Commission rules with respect to mobile telephone service and that it will not frustrate the Commission's implementation of the Communications Act or Commission policies. Accordingly, we find that the merger presents no public interest harms with respect to this service.

138. The Applicants state that, through their respective interests in AT&T Wireless and Vodafone AirTouch Plc ("Vodafone"), the merged entity will have interests in both channel blocks in 37 cellular service areas.[384] AT&T owns and operates AT&T Wireless Services, Inc., which has a controlling interest in one of the two cellular channel blocks in these service areas.[385] MediaOne gained an interest in Vodafone of approximately 4.9 percent when Vodafone acquired AirTouch Communications, Inc., in which MediaOne held a passive interest.[386] MediaOne's interest in Vodafone therefore is a minority, non-controlling interest that is not attributable for purposes of our cellular cross-ownership rules.

139. Under Commission rules in force when the Application was filed, a party that had a controlling interest in a license for one cellular channel block was prohibited from having any direct or indirect ownership interest in licensees for the other cellular channel block in an overlapping cellular service area ("CGSA").[387] In September 1999, however, the Commission revised its cellular cross-ownership rule in recognition of broad advances in competition within the mobile telephony sector.[388] Specifically, the rule now allows a party with a controlling, or otherwise attributable, interest in one of the cellular licensees to

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Sachs Dec. 7 AT&T Report, at 3. While AT&T's fixed wireless initiative predated the announcement of the proposed merger, AT&T's specific statements that it plans to use fixed wireless to provide local exchange service in areas where it does not have a cable presence occurred after the filing of the Application.

384 Application at 40-41 n.91. These overlapping interests include cellular interests held by BCP CommNet, L.P., which was acquired by Vodafone AirTouch. *Applications of BCP CommNet, L.P. Transferor, and Vodafone Airtouch, PLC Transferee, for Consent to Transfer of Control of Licenses*, Memorandum Opinion and Order, DA 99-3009 (WTB, rel. Dec. 27, 1999).

385 *Id.* at 8.

386 Nov. 24 Lindsay Letter; *see also* Application at 16. Since the filing of the Application, Vodafone has merged its U.S. wireless interests with those of Bell Atlantic and formed Verizon Wireless, further diluting MediaOne's stake in Vodafone's U.S. wireless interests. *See In re Applications of Vodafone AirTouch, Plc, and Bell Atlantic Corporation*, Memorandum Opinion and Order, DA 00-721 (WTB/IB, rel. Mar. 30, 2000).

387 47 C.F.R. § 22.942(a) (1999).

388 *1998 Biennial Regulatory Review Spectrum Aggregation Limits for Wireless Telecommunications Carriers*, WT Docket Nos. 98-205 *et al.*, Report and Order, FCC 99-244 (rel. Sept. 22, 1999) ("*Spectrum Cap Order*").

have a non-controlling, or otherwise non-attributable, ownership interest of up to five percent in the other cellular licensee in the CGSA.[389] Hence, we determine that the proposed merger will not result in violation of our cellular cross-ownership rule. In addition, because MediaOne itself does not provide mobile telephone service, and its interest in affiliated providers of this service is not attributable under Commission rules, we find that the merger will not result in any other public interest harms with respect to the provision of mobile telephone service.

### F. Bundling

140. Several commenters raise concerns that the merged firm will have the ability and incentive to engage in anticompetitive bundling strategies.[390] They allege that the merged entity may condition the purchase of one service on the purchase of another service in a manner that injures competitors and consumers. To prevent such harm, the parties ask the Commission to approve the merger on the condition that the merged firm refrain from such bundling practices and instead offer each of its services (local and long distance telephone, cable, and Internet) on a stand-alone basis.

141. While the Applicants state that the merged entity will offer packages of bundled services, there is no evidence that it will condition the purchase of one service on the purchase of another. Indeed, the Applicants have committed to offering their local phone service, long distance phone service, MVPD service, and Internet service each on a stand-alone basis, in addition to offering bundled packages of services.[391] As we stated in the *AT&T-TCI Order*, a blanket condition prohibiting bundling of any form could have the unintended effect of denying consumers substantial benefits.[392] The merged firm may well have lower costs in billing and servicing customers that subscribe to several of its offerings.[393] In such a case, the merged firm could pass its cost savings to consumers in the form of lower prices. Purchasing the package of bundled services thus could be cheaper than the sum of purchasing each of the bundled services on a stand-alone basis.

142. Even if the merged firm decided to condition the purchase of one service on the purchase of another, it could inflict competitive harm only if it had sufficient market power in the provision of one of the bundled services.[394] So long as the merged firm lacks such market power, consumers will not be harmed, because they have the ability to choose from a number of alternative providers for each of these services. As discussed in our analysis of the relevant services above, AT&T will not gain such power in any market through its merger with MediaOne.

[389] 47 C.F.R. § 22.942(a) (2000 forthcoming); *Spectrum Cap Order*, FCC 99-244 at ¶ 74. This rule continues to require that a party with a controlling interest in one cellular licensee in a CGSA may not have a controlling interest, no matter how small, in the other licensee in that market.

[390] Echostar Comments at 6; Qwest Comments at 17-18 n.21; Ameritech Comments at 33.

[391] Nov. 22 Marsh-Eid Letter at 4; *see also* Application at 42.

[392] *See AT&T-TCI Order*, 14 FCC Rcd at 3219 ¶ 125.

[393] *Id.*

[394] *AT&T-TCI Order*, 14 FCC Rcd at 3219 ¶ 126. In other words, consumers would not be harmed if rivals could offer a similar package of bundled services. To illustrate with a simple non-telecommunications example, a firm that bundled flour and sugar could inflict no competitive harm on either sugar or flour sellers because each could match the offer by buying the other product in an open, competitive market. The bundling would be profitable (*i.e.*, a sound business strategy) only if there were some efficiency associated with selling flour and sugar as a bundled package.

143. Various commenters argue that the Applicants will exploit their alleged dominance of local MVPD markets to pursue anticompetitive bundling strategies. Ameritech and EchoStar contend that the horizontal reach of the merged entity will allow Applicants to require purchasers of its cable television service also to purchase its telephony and Internet services.[395] Although cable television continues to be the dominant technology for the delivery of video programming in the MVPD marketplace, its market share continues to decline.[396] In the *1999 Cable Competition Report*, we found that the rate of growth for non-cable MVPD subscribers was substantially greater than the rate of growth for cable subscribers.[397] Moreover, the potential harm alleged by the commenters is not specific to the merger. If we were to accept *arguendo* these commenters' contention that the Applicants (and other cable operators) enjoy a monopoly in their local MVPD markets, then, even without the merger, AT&T and MediaOne each already would have the ability to require buyers of MVPD service to buy telephony and Internet services in their respective markets. Commenters have not alleged that either AT&T or MediaOne have engaged in such practices. As the Commission recognized in the *AT&T-TCI Order*, the merger is not the cause of this alleged competitive threat, and the merger license transfer proceeding thus is not the appropriate forum to address this issue.[398] We will continue to rely on competition or, in its absence, the antitrust laws, to protect against this danger, just as we did before the merger.[399] If parties allege that the merged firm has engaged in any anticompetitive bundling tactics or that it has failed to offer each service on a stand-alone basis, the Commission will address such conduct at that time as a separate enforcement matter.

### G. Universal Service/Deployment

144. TAP and SBC seek Commission denial of the requested license transfers between AT&T and MediaOne based on allegations that MediaOne has engaged in discriminatory deployment of new services ("redlining") and will continue to do so post-merger.[400] After reviewing MediaOne's deployment data, however, TAP conceded at the February 4, 1999, public forum on this merger that there exists no evidence of actual discrimination by MediaOne.[401] After extensive investigation of SBC's and TAP's allegations, we find no evidence that MediaOne engaged in discriminatory deployment in the past or that the merged firm will engage in such a practice in the future.

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[395] Ameritech Comments at 32; EchoStar Comments at 6. Ameritech further contends that AT&T could tie-up consumers with long-term contracts and high exit fees that foreclose competition from new entrants in the MVPD and Internet access markets. Ameritech Comments at 33.

[396] *1999 Competition Report*, 15 FCC Rcd at 981 ¶ 5.

[397] *Id.*, 15 FCC Rcd at 981 ¶ 7. Non-cable MVPD subscribers increased 26% (to nearly 14.2 million) from the previous year, whereas cable subscribers grew only 2% for the same period. Much of the increase in non-cable MVPD subscribers is attributable to the growth of DBS. See *id.* at ¶¶ 8, 16. Currently, DBS subscribers represent over 12.5% of all MVPD subscribers, an increase of approximately 39% since June 1998. *See id.* at ¶¶ 8, 70.

[398] *AT&T-TCI Order,* 14 FCC Rcd at 3219 ¶ 126.

[399] *See, e.g.*, Sherman Antitrust Act, 15 U.S.C. § 1; *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451, 461-62 (1992); CA Bus. & Prof. Code § 16720 (California); C.R.S.A. § 6-4-104 (Colorado); F.S.A. § 542.18 (Florida); IL ST CH 740 § 1013 (Illinois); N.J. St. § 56:9-3 (New Jersey); NY Gen. Bus. § 340 (New York); TX Bus. & Com. § 15.05 (Texas).

[400] TAP Comments at 33-34; TAP Supplement to Petition to Deny at 3 ("TAP Supplement"); SBC Sept. 17 Reply Comments at 3.

[401] Testimony of Khalil Munir, Executive Director, TAP, FCC Cable Services Bureau AT&T-MediaOne Public Forum (Feb. 4, 2000), Tr. at 186-88 (hereinafter "Munir Public Forum Testimony").

145. TAP asserts that discriminatory deployment violates the Communications Act and subverts the public interest.[402] The Commission is deeply committed to the goal of delivering the potential of broadband to all Americans, regardless of their race, ethnicity, or income level. Recognizing the importance of TAP's and SBC's allegations of discriminatory deployment, we requested extensive deployment data from the Applicants and carefully investigated the matter. TAP's allegations rest on maps it created to illustrate the upgrade of MediaOne systems with respect to various ethnic, minority, and low-income communities in Los Angeles, California, and Richmond, Virginia.[403] Based on these maps, TAP asserts that MediaOne engaged in systematic discrimination in its deployment of cable plant upgrades and broadband service offerings. These maps purport to show that MediaOne actively decided not to provide service to certain areas with high concentrations of minority populations.[404]

146. We determine that TAP has alleged sufficient facts for the Commission to consider, as a factor in its public interest determination, whether the proposed merger would aggravate a situation where either of the merging parties deployed facilities in a discriminatory manner.[405] We conclude that such actions would be contrary to the purpose of the Communications Act[406] and the fundamental goal of the 1996 Act to bring communications services "to all Americans."[407]

147. Before we are required to designate an issue for evidentiary hearing to examine whether the merger is not in the public interest, however, we must find that the specific claims of those parties opposing the application raise substantial and material questions of fact.[408] In reaching this determination, the Commission may consider "the entire record, weighing the petitioner's evidence against facts offered in rebuttal."[409]

148. The Commission staff requested that MediaOne provide additional information to address the redlining allegations. After a thorough review of this information, we find no evidence that MediaOne upgraded and deployed its new and advanced services in a discriminatory manner. First, many of the communities that MediaOne allegedly "redlined" are not within its franchise areas, and therefore, could not be upgraded by the company.[410] Second, TAP's maps depict the availability of the Excite@Home service

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[402] TAP Comments at 16, 18-19.

[403] *Id.* at 15; TAP Supplement at Exhibit A. TAP's allegations are based on its examination of MediaOne's initial network design, construction schedules, and actual service areas for the greater metropolitan areas of Los Angeles, California, and Richmond, Virginia.

[404] TAP Supplement at 2.

[405] 47 U.S.C. § 309(d)(1).

[406] Section 1 of the Communications Act charges the Commission with ensuring that communictaions services are made available, "so far as possible, to all the people of the United States, without discrimination on the basis of race, color, religion, national originn, or sex . . . "). 47 U.S.C. § 151.

[407] Joint Manager's Statement, S. Conf. Rep. No. 104-230 at 113. *See* 47 U.S.C. § 254(b)(3) (the 1996 Act envisions that "[c]onsumers in all regions of the Nation, including low income consumers and those in rural, insular, and high cost areas, should have access to telecommunications and information service. . .").

[408] 47 U.S.C. § 309(d)(2); *WorldCom-MCI Order*, 13 FCC at 18144 ¶209.

[409] *Astroline Communications Company Ltd. v. FCC*, 857 F.2d 1556, 1561 (D.C. Cir. 1988).

[410] Letter from Susan Eid, Vice President, Federal Relations, MediaOne Group, Inc., to Magalie Roman Salas, Secretary, FCC, dated Oct. 14, 1999, Attachment (Ex Parte Presentation of MediaOne Group) ("MediaOne Oct. 14 Redlining Rebuttal Filing ") at 3. While TAP's maps illustrate that the low-income communities of Boyle Heights,

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in various localities in order to make the inference that only affluent or non-ethnic areas received this particular high-speed Internet service. Excite@Home's service areas are irrelevant to the determination whether MediaOne has redlined minority communities because MediaOne does not offer this service and has no control over its deployment.[411] Third, TAP's methodology understates the extent of MediaOne's deployment and, in some cases, excludes a number of communities currently receiving broadband Internet services.[412] In determining whether a specific area received broadband services, TAP compared ZIP code data with MediaOne's website information.[413] This methodology, however, does not fully capture the extent of MediaOne's broadband deployment. Cable franchise areas do not correlate with ZIP code boundaries, and MediaOne's website does not contain all relevant and current deployment information.[414]

149. Commission staff further requested that MediaOne produce its own maps and demographic data to illustrate in detail its franchise areas, the condition of upgrades in these areas, and the availability of broadband services, as well as average household income levels and ethnic composition (white, black, and Hispanic).[415] Based on our review of this data, we find no correlation between MediaOne's deployment and race, ethnicity, and income-levels. While it appears that certain ethnic-minority and low-income communities were not completely upgraded at a given date, there were several white and affluent communities that were similarly situated.[416] The inverse also appeared to be true: certain ethnic minority communities were offered broadband services well before the predominantly white and affluent communities.[417] When presented with this new data, TAP conceded at the Cable Services Bureau's

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Huntington Park, South Gate, El Monte, Bell, Cudahy, Pacoima, Norwalk, and Hawthorne were not upgraded, these communities are not franchised to be served by MediaOne. Accordingly, MediaOne could not have upgraded those communities.

[411] *Id.* at 3 n.7.

[412] *Id*. at 2. MediaOne stated that it was difficult to ascertain the precise areas where TAP alleges that discriminatory deployment occurred, because TAP's maps did not include ZIP codes, community names, nor any other geographic references. *Id*. at 2 n.3. MediaOne produced its own maps that illustrated its franchise areas with relevant geographic information. *See* MediaOne Oct. 14 Redlining Rebuttal Filing; Letter from Lorrie M. Marcil, Esq., Sidley & Austin, to Magalie Roman Salas, Secretary, FCC, dated Jan. 27, 2000, Attachment (Ex Parte January 14, 2000 MediaOne Presentation on Status of Deployment of High-Speed Internet and Local Telephone Services in MediaOne Markets) ("MediaOne Jan. 27 Deployment Status Update"). In addition to Los Angeles and Richmond, MediaOne produced maps and demographic data for the following areas: Northern California; Ohio; New York; New Hampshire; Minnesota; Michigan; Massachusetts; Florida; and Atlanta, Georgia.

[413] TAP Supplement at 3.

[414] MediaOne Oct. 14 Redlining Rebuttal Filing at 4. MediaOne states that, to avoid customer confusion, it lists ZIP code information on its website only after a majority of the nodes in a ZIP code are activated. In some instances, MediaOne decided not to list ZIP codes on its website, because its franchise area may encompass only a portion of a particular ZIP code. *Id.* at 4 n.10.

[415] *See* MediaOne Jan. 27 Deployment Status Update.

[416] For example, in Atlanta the affluent and predominantly white communities (*e.g.*, Acworth, Kennesaw, Marietta) were in the same upgrade condition as predominantly black and low-income areas (*e.g.*, Douglasville, Decatur).

[417] Letter from Howard J. Symons, Esq., Mintz, Levin, Cohen, Ferris, Glovsky, and Popeo, P.C., to Magalie Roman Salas, Secretary, FCC, dated Nov. 18, 1999, Attachment (Ex Parte Presentation of MediaOne Reviewing MediaOne's Oct. 14 Redlining Rebuttal and Depiction of MediaOne's Deployment of Broadband Facilities in Altanta, Los Angeles and Richmond) ("MediaOne Nov. 18 Redlining Rebuttal Filing"); MediaOne Jan. 27
(continued…)

February 4, 2000 public forum in this proceeding that there is no evidence of discriminatory deployment by MediaOne.[418]

150. MediaOne's upgrade and deployment schedule appears to be a function of resource constraints, engineering, and competitive pressures. Cable system upgrades that transform a one-way video network to a two-way broadband network are complex and time-consuming projects that require enormous capital expenditures, a skilled labor-force, and available supply of advanced equipment. Due to these constraints, cable operators cannot upgrade all of their systems simultaneously. Instead, cable system upgrades are a multiyear and multiphase endeavor, whereby the operator upgrades certain systems and offers new services on an incremental basis. Cable operators generally upgrade their systems based on engineering factors, such as the state of the current plant (capacity, hub and line conditions, two-way capability) and system clusters.[419] Based on the record before us, we find that MediaOne's upgrades and deployment do not reflect any discrimination on the basis of race, ethnicity, or income levels.

151. TAP also argues that, in low-income and minority areas where MediaOne did provide service, the product was inferior and the service quality was poor when compared to the affluent non-minority areas.[420] The anecdotes of customer complaints gleaned by TAP from periodicals,[421] however, do not provide sufficient evidence to suggest that these experiences and complaints are unique to MediaOne's minority or low-income subscribers.

152. The record evidence does not raise substantial and material questions of fact regarding whether applicants either have engaged in or will engage in discriminatory conduct by avoiding minority communities in their deployment of facilities.[422] The record does not contain any evidence that MediaOne treated low-income and minority communities in a discriminatory fashion. For these reasons, we are not persuaded that the merger threatens our universal service goal that all Americans share in the benefits of broadband deployment. Thus, we decline to deny the merger on these grounds or impose any condition concerning the merged firm's upgrade schedule and deployment plans.[423]

153. Los Angeles County asks the Commission to require AT&T to adopt MediaOne's social

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Deployment Status Update. MediaOne's properties in the Atlanta metropolitan area—with a high percentage of minorities and a low average household income—will be offered advanced new services before some of the affluent, predominantly white suburbs will receive these services. MediaOne Nov. 18 Redlining Rebuttal Filing.

[418] Munir Public Forum Testimony, Tr. at 186-88.

[419] *See* MediaOne Jan. 27 Deployment Status Update at 1.

[420] TAP Comments at 15.

[421] *Id.* at 15-16.

[422] *WorldCom-MCI Order*, 13 FCC at 18144 ¶ 209.

[423] *See* APT Reply Comments at 1-4 (seeking a condition requiring equitable deployment of the merged firm's high-speed cable infrastructure). Citing Section 706 of the 1996 Act, 110 Stat. 153, APT argues that the Commission should exercise its jurisdiction to eliminate the digital divide between the information rich and the information poor. To this end, APT asks that the Commission create a social compact as a condition for approval of the proposed merger. This social compact would require AT&T to allocate a portion of the synergy savings resulting from the merger to fund research and development of technology applications that address the needs of underserved communities. APT also requests that the Commission obtain AT&T's enforceable pledge to deploy its upgraded high-speed networks equitably throughout its service territory. APT Reply Comments at 1-4.

contract obligations or to impose similar obligations on the merged firm as a condition of approving the merger.[424] Among other things, the social contract requires MediaOne to rebuild and upgrade its cable systems, create a streamlined (or "lifeline") basic service tier, and provide free cable connections and Internet service (where otherwise available) to schools in the communities that are covered by the social contract.[425] The social contract provisions generally apply to a cable operator that acquires MediaOne systems only if the acquiring operator elects to adopt the social contract.[426] The social contract ends on December 31, 2000.[427] We decline to require AT&T to adopt the MediaOne social contract as a condition of our approval of the Application. Such a requirement would go beyond the provisions of the social contract, and Los Angeles County has not provided reasons why such a measure would be necessary or appropriate.[428] Moreover, AT&T has notified the Commission that it agrees to be bound by MediaOne's social contract obligations.[429] Thus, AT&T will be bound by MediaOne's social contract.

## V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

154. In addition to assessing the potential public interest harms from the merger, we must consider whether the merger is likely to produce any public interest benefits.[430] We employ a balancing test to determine whether the potential public interest benefits outweigh the potential public interest harms. In *SBC-Ameritech*, we noted that "as the harms to the public interest become greater and more certain, the degree and certainty of the public interest benefits must also increase commensurately in order for us to find that the transaction on balance serves the public interest."[431] Our analysis focuses on demonstrable and verifiable public interest benefits that could not be achieved if there were no merger.[432] Public interest benefits may include merger-specific cost saving efficiencies and beneficial conditions proffered by the

[424] Letter from Pastor Herrera, Jr., Director, County of Los Angeles Dept. of Consumer Affairs, to Magalie Roman Salas, Secretary, FCC, dated Jan. 18, 2000 ("Los Angeles County Comments").

[425] *Social Contract for Continental Cablevision*, 11 FCC Rcd 299 (1995) ("*Social Contract*"), *amended by Continental Cablevision, Inc. Amended Social Contract*, 11 FCC Rcd 11118 (1996) ("*Amended Social Contract*"). Continental Cablevision, Inc., was later renamed MediaOne. *See Social Contract*, 11 FCC Rcd at 361-64; *Amended Social Contract*, 11 FCC Rcd at 11157-60, 11164-67. The Social Contract also allows MediaOne to increase rates by up to $1.00 per subscriber per year to recover the costs of system upgrades. Amended Social Contract Section III.D, 11 FCC Rcd at 11161.

[426] *Social Contract*, 11 FCC Rcd at 365-66; *Amended Social Contract*, 11 FCC Rcd at 11164. Certain provisions apply automatically to the acquiring operator. Social Contract Section III.H.2., 11 FCC Rcd at 356-66.

[427] *Social Contract*, 11 FCC Rcd at 369; *Amended Social Contract*, 11 FCC Rcd at 11174-75.

[428] Los Angeles County states that such a condition would not be unprecedented, citing a May 1999 Cable Services Bureau order concerning AT&T's adoption of the Time Warner Cable social contract with respect to systems that AT&T acquired from Time Warner Cable. Los Angeles County Comments at 2. The order Los Angeles County cites, however, merely approved AT&T's request to adopt the social contract obligations; the order did not impose these obligations as a condition of Commission approval of AT&T's merger with TCI. *See Time Warner Social Contract*, 14 FCC Rcd 7774 (1999).

[429] Letter from Betsy Brady, Esq., Vice President Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Apr. 13, 2000.

[430] *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255; *AT&T-TCI Order*, 14 FCC Rcd at 3168 ¶ 13; *WorldCom-MCI Order*, 13 FCC Rcd at 18134-35 ¶ 194.

[431] *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 256; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157.

[432] *SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255.

Applicants or by other parties, or imposed by the Commission.[433]

155. The Applicants claim the merger will produce public benefits in the provision of local telephony, broadband Internet, and digital cable service that outweigh any conceivable public interest harms.[434] The Applicants attempt to quantify the estimated benefits from the merger and contend that "a conservative estimate of potential savings for consumers from the increased competition exceeds $600 million per year, or $3.7 billion in net present value."[435] This estimate is based on the assumption that the merger will accelerate deployment and competition in the provision of facilities-based local telephony and new services.[436]

156. The Applicants have not produced a post-merger deployment plan, to be measured against AT&T's and MediaOne's independent pre-merger deployment plans, in order to demonstrate the extent to which the merger actually will accelerate deployment and competition in the provision of local telephony and other new services. The Applicants instead provide a narrative description of the manner in which the merger will combine (1) AT&T's strong brand name, telecommunications expertise, experience and resources in marketing and customer care, experience in obtaining interconnection and other agreements with ILECs, and head start in developing IP telephony, with (2) MediaOne's upgraded cable network and technical expertise in deploying circuit-switched local telephony services over cable facilities.[437] The Applicants assert that their complementary assets and resources will bring local competition "to millions of customers in service areas where AT&T currently has no facilities, hasten MediaOne's deployment of IP telephony, and allow AT&T to offer service in a limited number of its own territories more quickly by building on MediaOne's upgraded system."[438] They maintain that this combination of complementary assets means that "true facilities-based competition will be provided faster and more effectively than either company could manage alone."[439]

157. The Applicants further contend that joint venture agreements and other contractual arrangements will not produce the same efficiencies as the proposed merger, stating that a joint venture would be "much less efficient than full integration."[440] They maintain that it is extremely difficult for a cable company that owns facilities potentially capable of providing multiple existing and future services,

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[433] *Id.*

[434] Application at 28-29; Letter from Stephen C. Garavito, General Attorney, AT&T, Magalie Roman Salas, Secretary, FCC, dated Nov. 24, 1999, Transmittal of Letter from Stephen C. Garavito, General Attorney, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Nov. 24, 1999 ("Nov. 24 Garavito Letter") at 6-13; Letter from David M. Levy, Esq., Sidley & Austin, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, Dated Dec. 8, 1999, Attachments (Declaration of R. Glenn Hubbard and William H. Lehr) ("Hubbard-Lehr Decl."); Ordover-Willig Decl.

[435] Hubbard-Lehr Decl. at ¶ 20.

[436] *Id*. at ¶ 20.

[437] Application at 18; Applicants Sept. 17 Reply Comments at 16-18; Nov. 24 Garavito Letter at 6-10; Applicants Dec. 21 Ownership Reply Comments at 27.

[438] Application at 20, 25; Applicants Sept. 17 Reply Comments at 5-26; Applicants Dec. 21 Ownership Reply Comments at 27.

[439] Application at 22; Applicants Sept. 17 Reply Comments at 16-17; Nov. 24 Garavito Letter at 6-10; Applicants Dec. 21 Ownership Reply Comments at 27 n.41.

[440] Application at 31-32; Applicants Sept. 17 Reply Comments at 18-23.

and a telephone company that wants to use those facilities to compete with offerings of an ILEC, to agree in advance on limits on the services that the telephone company will offer, the amount of cable bandwidth it may use, and the calculation of returns to the joint venture.[441] AT&T asserts that the outcomes of its joint venture negotiations are extremely unpredictable given the dynamic and rapidly evolving technology and markets involved.[442] In these circumstances, AT&T contends that it will be difficult and time-consuming to hammer out commercial arrangements satisfactory to both parties, particularly given the large initial investments involved.[443] Applicants argue further that the rollout of telephony, Internet, and other new services over cable networks requires large contract-specific investments.[444] Once made, these investments are sunk.[445] They cannot be re-deployed elsewhere or recovered upon termination of the project.[446] Thus, Applicants maintain, joint venture agreements and other contractual arrangements are far less efficient and attractive than an outright merger.[447]

158. AT&T contends that it has been unable to consummate any joint ventures, and that a merger is the best way to obtain the complementary resources necessary to maximize its competitive potential.[448] The Applicants state that AT&T and MediaOne attempted to form a joint venture, but ultimately determined that a full merger was the best way to obtain the complementary resources necessary to maximize their competitive potential. AT&T maintains that its ability to deploy telephony and other services on a broad scale over its facilities and those of MediaOne is critical to the success of its efforts to consummate joint ventures with other unaffiliated cable companies in the future.[449] For example, AT&T's Senior Vice-President for Telephony Ventures and Broadband and Internet Services alleges that the cable companies with which he has had discussions have stressed the importance of AT&T demonstrating the value of its brand, experience, and expertise in providing telephony services over its own cable facilities if they are to be convinced that the risks associated with a joint venture in this dynamic market are worth taking.[450]

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[441] Ordover-Willig Decl. at ¶ 62; Declaration of Terrell Wingfield, Jr., Attachment Appendix D to Applicants Sept. 17 Reply Comments ("Wingfield Decl.") at ¶¶ 6-9; Declaration of Douglas D. Holmes, Attachment Appendix C to Applicants Sept. 17 Reply Comments ("Holmes Decl.") at ¶ 6; Applicants Sept. 17 Reply Comments at 19.

[442] Wingfield Decl. at ¶ 9.

[443] *Id.* at ¶¶ 6-9; Holmes Decl. at ¶ 6.

[444] Contract-specific investments refer to expenditures that a company must make to perform its contractual obligations or to receive the benefits of the other party's performance, but that cannot be recovered should the company terminate the contract before full performance by the other party. Examples of such investments include costs of research and development, licensing and permitting, acquisition of real estate and capital assets, installation of cable and customer premises equipment, marketing and advertising, and staffing of customer care centers. Ordover-Willig Decl. at ¶¶ 55-58.

[445] Applicants Sept. 17 Reply Comments at 21.

[446] Application at 32; Applicants Sept. 17 Reply Comments at 21; Ordover-Willig Decl. at ¶ 60.

[447] Nevertheless, AT&T has stated that it "will continue to pursue all reasonable opportunities to provide consumers nationwide with a facilities-based local service alternative to the ILECs," including joint ventures and other contractual arrangements. Holmes Decl. at ¶ 4.

[448] Wingfield Decl. at ¶¶ 2-6.

[449] Wingfield Decl. at ¶ 10.

[450] Wingfield Decl. at ¶ 10. Applicants further assert that their ownership interest in TWE may create an alignment of interests between the merged entity and TWE to facilitate a telephony joint venture, and that the (continued…)

159. Many commenters acknowledge the public interest benefits from the creation of a facilities-based provider of local exchange and exchange access services that competes directly with the incumbent LECs.[451] Some commenters argue, however, that the pro-competitive benefits asserted by the Applicants are speculative, unsupported by any economic analysis, and can be achieved readily without the merger.[452] They also argue that Applicants fail to substantiate their claims beyond a general reference to economic efficiencies and to AT&T's branding, reputation, and marketing expertise.[453] These commenters contend that the merger is unnecessary to increase competition because AT&T and MediaOne could offer cable telephony just as effectively if they remain independent or if they combine their respective resources through a joint venture or contractual arrangement short of merger.[454] Finally, some commenters argue that there is no legitimate public interest justification for the merger because it will give AT&T unprecedented dominant market power.[455]

160. *Findings*. We recognize that, were they not to merge, MediaOne and AT&T, acting independently or in contractual arrangements with each other and other service providers, may achieve some of the same public benefits promised by the merger. We find, however, that the merger is likely to accelerate competition among providers of local telephony, video, and broadband services in the service areas of MediaOne, AT&T, and other cable operators with whom the merged entity may enter telephony joint ventures or other contractual arrangements. Given the requirements and commitments discussed above to mitigate the potential harms from the merger, we conclude that, on balance, the potential public benefits offered by the merger of AT&T and MediaOne outweigh the potential harms.

### A. MediaOne

161. Through this merger, MediaOne will gain access to AT&T's established telephony brand name, reputation, expertise, and telecommunications facilities. As a result, post-merger MediaOne is likely to achieve greater local telephony penetration and will be able to provide new services more effectively, both on a bundled and stand-alone basis in competition with the ILECs.[456]

162. We recognize that MediaOne's independent deployment experience indicates a significant potential for success in the local telephony market even if there were no merger. Since 1995, MediaOne has invested about $4.1 billion in upgrading its traditional, one-way, analog cable plant to two-way, high-

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success of this arrangement also may help the merged firm to secure joint ventures with other cable companies. *Id.*; *see also* Cicconi Public Forum Testimony, Tr. at 72-73; Applicants Dec. 21 Ownership Reply Comments at 18, 24, 30.

[451] AOL Comments at 3-4; WCA Comments at 3; US West Aug. 23 Comments at 2; Ameritech Comments at iii; Bell Atlantic Comments at 20-25; MCI WorldCom Comments at 1; Consumers Union Aug. 23 Comments at 24; TAP Comments at 23; GTE Comments at 67; SBC Aug. 23 Comments at 17; BellSouth Comments at 4.

[452] Consumers Union Aug. 23 Comments at 25; SBC Aug. 23 Comments at 20; SBC Reply Comments at 5; GTE Comments at 67-69; BellSouth Reply Comments at 3; OpenNET Reply Comments at 9; Seren Reply Comments at 3.

[453] Consumers Union Aug. 23 Comments at 24-25; OpenNET Reply Comments at 9.

[454] GTE Comments at 69-71; Ameritech Comments at iii; OpenNET Reply Comments at 9.

[455] WCA Comments at 3; Consumers Union Aug. 23 Comments at 32; TAP Comments at 25; BellSouth Reply Comments at 3-5; Ameritech Comments at iii.

[456] Application at 22-28.

speed, digital facilities.[457] This upgrade will be 70% complete by year-end 1999 and 90% complete by year-end 2000.[458] Among cable companies, MediaOne has been relatively aggressive in upgrading its network and offering new services. The fact that MediaOne has low penetration rates at present may simply reflect the difficulties faced by any new entrant in the local telephony market, rather than a lack of expertise or customer acceptance. We note in this regard that the Applicants themselves have stated that their ability, post-merger, to use MediaOne's expertise in system upgrade, deployment, and marketing of local telephony services will increase the speed and success of local telephony offerings in AT&T's service areas.[459]

163. Nevertheless, the Applicants have provided evidence that, in MediaOne's franchise areas, AT&T local telephony service will provide a greater competitive challenge to the ILECs. First, the Applicants' market studies indicate that consumers are far more likely to purchase local telephony services from AT&T, based on the strength of AT&T's brand name, than from a cable operator, and that consumers believe AT&T has far greater telecommunications expertise than MediaOne.[460] The Applicants state that a lack of (a) brand name recognition, (b) consumer acceptance of cable-provided telephony, and (c) technical and marketing expertise have hampered MediaOne's success in the local telephony business. In areas where it offers local exchange service, MediaOne's market share is less than 4%.[461]

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[457] *Id.* at 15.

[458] *Id.* In 1995, MediaOne (formerly Continental Cablevision) entered into a Social Contract with the Commission which, among other things, required MediaOne to upgrade its systems substantially by December 31, 2000. *See Social Contract for Continental Cablevision, Inc.*, 11 FCC Rcd 299 (1995), *amended by Continental Cablevision, Inc. Amended Social Contract*, 11 FCC Rcd 11118 (1996). Continental Cablevision, Inc., was later renamed MediaOne.

[459] Letter from Lorrie M. Marcil, Esq. Sidley & Austin, to Magalie Roman Salas, Secretary, FCC, dated Feb. 22, 2000, Transmittal of Letter from Stephen C. Garavito, General Attorney AT&T, and Susan Eid, Vice President, Federal Relations, MediaOne Group Inc., to Deborah Lathen, Chief, FCC Cable Services Bureau, dated Feb. 22, 2000 ("Benefits Letter") at 5 Attachments (AT&T and MediaOne's Independent Deployment Plans and Schedules) ("Benefits Letter Supporting Confidential Documents").

[460] *See* Benefits Letter at 6 ("[I]n a brand study that measured other local telephone service brands against an AT&T standard of '100,' MediaOne registered a mere '5.'").

[461] May 25 Eid Letter; Application at 22-24; Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Jan. 12, 2000, Transmittal of Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, and Susan Eid, Vice President, Federal Relations, MediaOne Group Inc., to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Jan. 12, 2000, at 1. AT&T submitted a chart showing its projection of increased local telephony market penetration in MediaOne franchise areas post-merger. While AT&T's nationwide local telephony subscribership totals less than 1.3% of the number of homes it has upgraded for local telephony service, AT&T's projection of MediaOne's post-merger penetration rate is based on the assumption that AT&T has a penetration rate of 1% per month in areas where it has marketed the service. Benefits Letter at 10; Letter from Stephen C. Garavito, General Attorney, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Mar. 29, 2000, Transmittal of Letter from Stephen C. Garavito, General Attorney, AT&T, to Royce Dickens, FCC Cable Services Bureau, dated Mar. 29, 2000, at 2. Based on information AT&T provided about the markets and time periods included in its calculation, it is unclear whether AT&T would be able to maintain a consistent 1% penetration rate over the long-run. *See* Letter from Joan Marsh, Director, Federal Government Affairs, AT&T to Magalie Roman Salas, Secretary, FCC, dated Apr. 24, 2000, Transmittal of Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Royce Dickens, FCC Cable Services Bureau, dated Apr. 24, 2000. Of the 22 communities listed, AT&T commenced service to only eight before December, 1999. *Id*. The earliest service-initiation date was September, 1999. *Id*. Thus, the 1% figure reflects relatively little (continued…)

164. Second, AT&T and MediaOne will share telephony switches and transport, thereby ensuring that these facilities are utilized more efficiently.[462] The Applicants will interconnect the MediaOne network with the switches and local facilities that AT&T obtained through its acquisition of Teleport.[463] The Applicants also will combine and standardize network operations centers, customer service centers, and disaster recovery teams, thus giving MediaOne the benefit of AT&T's resources and expertise as well as greater economies of scale.[464]

165. Third, MediaOne will benefit from AT&T's bargaining leverage, expertise in negotiating interconnection with ILECs, and mechanized back-office systems to interface with ILECs' operations support systems.[465] The merger thus is likely to enable MediaOne to interconnect with ILECs' networks on better terms and provision customer orders more efficiently.

166. Fourth, AT&T appears to be more advanced than MediaOne in its research of packet-switched telephony.[466] Packet-switched telephony has the potential to offer significant cost advantages and efficiencies to the cable operator in the provision of voice over the cable network. Access to AT&T's research and development in packet-switched telephony is likely to expedite MediaOne's offering of that technology over its cable systems.

167. Finally, the merger will give MediaOne access to AT&T's long distance network, enabling the merged company to offer a bundled package of local and long distance services in MediaOne's areas and, thus, compete more vigorously against the ILECs in the provision of telephony services.[467] Accordingly, although the Applicants have stated that they will continue to upgrade systems and deploy cable telephony in accordance with MediaOne's current schedule, the merged firm is likely to achieve deeper market penetration based on an increase in customer acceptance of its local telephony offering and the volume of customer orders that it can provision in a given period.[468]

### B. AT&T

168. The merger's impact on AT&T's rollout of local telephony and other new services is likely to be more limited. Applicants state that the merger will enable AT&T to cluster some of its systems with

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experience in a small fraction of the communities AT&T plans to serve.

[462] Benefits Letter at 7-8.

[463] *Id.* at 11-12

[464] *Id.* at 11.

[465] *Id.* at 6-7.

[466] *Id.* at 8. On March 31, 2000, an AT&T-led consortium announced that it will acquire a 39% voting stake and a 32% economic stake in Net2Phone, the leading provider of packet-switched telephony over the Internet and other web-based communications services. AT&T plans to invest $725 million for a 51% interest in the consortium. AT&T's Liberty Media and other partners, including British Telecom, are expected to purchase the remaining partnership interest. AT&T Chairman Michael Armstrong said that AT&T, together with Net2Phone, will develop the next generation of voice-enhanced web-based communications services and create a standard for packet-switched telephony over the Internet. COMMUNICATIONS DAILY, Apr. 3, 2000, at 2-4; AT&T Corp., *AT&T-Led Consortium to Acquire 39 Percent Voting Stake in Net2Phone* (press release), Mar. 31, 2000.

[467] Benefits Letter at 6.

[468] *Id.* at 9.

neighboring MediaOne systems and obtain substantial capital and operational cost savings from the sharing of facilities.[469] The Applicants offer no evidence, however, that their current clusters, already very large, are not sufficient in size to provide the economies of scale necessary to efficient provision of local telephony and other new services. As to areas where AT&T currently lacks cable systems, AT&T owns numerous Teleport switches in major metropolitan areas throughout the United States that provide the building blocks to construct new telephone networks.[470] In addition, AT&T's recently announced fixed wireless initiative provides an alternative means to offer local telephone service.[471] AT&T's extensive resources and incentives for independent deployment suggest that it would find alternative means to provide local telephony competition outside of its cable franchise areas, both independently and in conjunction with other cable operators, even if it did not merge with MediaOne.

169. There is evidence, however, that the merger may facilitate AT&T's offering of local telephony and other new services to customers. As a result of the proposed merger, AT&T will gain MediaOne's expertise in the provision of circuit-switched local telephony service over cable networks. AT&T has identified MediaOne personnel with upgrade, deployment, and marketing expertise that will enable AT&T to improve the efficiency of its deployment of circuit-switched telephony over AT&T cable systems until packet-switched telephony can be deployed on those systems.[472] AT&T also will be able to use the headend facilities of neighboring MediaOne systems in some areas where the MediaOne system is already upgraded.[473] Consequently, the merger is likely to increase AT&T's efficiency in providing local telephony and other new services in competition with the ILECs.

### C. Joint Venture and Other Contractual Arrangements

170. Having found that the combination of AT&T's and MediaOne's assets will offer public interest benefits, especially in the provision of local telephony services, we next consider whether similar benefits can be achieved through joint venture or other contractual arrangements. We find that the merger is likely to facilitate the delivery of these benefits to consumers.

171. We recognize that the provision of local telephony services over the cable infrastructure does not hinge on AT&T's acquisition of ownership interests in the MediaOne and TWE cable systems. AT&T recently entered a series of contractual arrangements with Insight Communications ("Insight"), Cablevision, Time Warner, and Comcast to offer AT&T-branded local and long distance telephony services together with these cable operators' MVPD and Internet services.[474]

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[469] *Id.* at 12.

[470] Teleport has switches necessary for telephony services in the top 40 markets. Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Oct. 25, 1999, Attachment (AT&T Ex Parte Oct. 23, 1999 Presentation).

[471] *See supra* Section III.A.

[472] Benefits Letter at 5, 8. Currently, IP telephony lacks the quality of service and reliability necessary for voice services on a commercial scale.

[473] Application at 27; Benefits Letter at 12. The Applicants state that they have the potential to cluster systems in the following areas: North Central Connecticut; Atlanta and Central and Northern Alabama; Pompano and Dade County, Florida; Jacksonville and North Central Florida; and Sacramento and San Francisco, California. Benefits Letter at 12.

[474] Letter from David L. Lawson, Esq., Sidley & Austin, to Magalie Roman Salas, Secretary, FCC, dated Mar. 22, 2000, Attachments (AT&T-Comcast Joint Venture; AT&T-Time Warner Joint Venture, AT&T-Cablevision Joint

(continued…)

172. AT&T's joint operating agreement with Insight provides that AT&T will be the local exchange carrier of record and will provide telephony services to customers using its brand name. The services will be provided through use of Insight's cable infrastructure and AT&T's switching, transport, and long distance services. AT&T will install and maintain the needed switching equipment. In addition to AT&T's regional and national marketing efforts, Insight will market and bill the services as AT&T's agent, both separately and bundled with Insight's MVPD and Internet services. AT&T will compensate Insight for use of the local loops, installation and maintenance services at customers' residences, and sales to customers.[475]

173. AT&T's agreements with Cablevision and Time Warner, entered in February and March 2000 respectively, provide for joint marketing of AT&T-branded telephony service and these companies' cable services.[476] AT&T also previously signed a letter of intent with Time Warner in February 1999 to establish a joint venture to provide local telephony service using the Time Warner cable systems.[477] In addition, "Comcast has agreed to offer AT&T-branded telephony in all of its markets on an expedited basis, as soon as AT&T has concluded separate telephony agreements with at least two other non-AT&T-affiliated multiple system operators. Comcast will be entitled to the most favorable terms AT&T has reached with any of those cable operators."[478]

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Marketing Agreement; AT&T-Time Warner Joint Marketing Agreement).

[475] *See* AT&T Corp., *Insight Communications and AT&T Reach Agreement in Principle to Offer Local Phone Service* (press release), Mar. 16, 2000. AT&T and Insight have previously established a joint venture for the provision of cable service. In December 1997, TCI of Indiana Holdings, LLC and Insight Communications Company, LLC announced a 50-50 partnership combining systems in Indiana, to be called Insight Communications of Indiana, LLC. Tele-Communications, Inc., *TCIC and Insight Announce Partnership and Cable System Trade* (press release), Dec. 2, 1997. On Oct. 1, 1999, Insight Communications Company, LLC and AT&T Broadband each contributed its 50% interests in Insight Communications of Indiana, LLC, as well as their respective 50% interests in InterMedia Capital Partners VI, L.P., to form a new partnership known as Insight Midwest, L.P. Insight Communications is the general partner of this new partnership, and an affiliate of AT&T Broadband is the limited partner. Insight Midwest, through its subsidiaries, is the largest owner and operator of cable television systems in the States of Indiana and Kentucky. As of Dec. 31, 1999, Insight Midwest's cable television systems passed approximately 1.2 million homes and served approximately 748,800 customers. As of Dec. 31, 1999 Insight Communications Company, LLC served 935,000 customers, a portion of which are customers that are managed by Insight Midwest. *See* Insight Communications Company, LLC, *Filing 10-K for the Year-ended December 31, 1999*, at 5.

[476] *See* AT&T Corp., *AT&T and Cablevision to Create High-Value Telecommunications Bundle for New York Metropolitan Area Customers* (press release), Feb. 23, 2000; AT&T Corp., *AT&T and Time Warner Cable Announce Joint Marketing Agreement* (press release), Mar. 7, 2000. *But see* AT&T Corp., *Insight Communications and AT&T Reach Agreement in Principle to Offer Local Phone Service* (press release), Mar. 16, 2000. The Insight agreement, when finalized, will be the first such joint operating agreement that AT&T enters into with a cable operator. *Id.* As noted above, AT&T already owns 50% of a joint venture with Insight that serves 748,000 subscribers. Unlike the Insight agreement, AT&T's joint marketing agreements with Cablevision and Time Warner do not provide that AT&T branded telephony will be provided over Cablevision's or Time Warner's cable infrastructure.

[477] Letter from David L. Lawson, Esq., Sidley & Austin, to Magalie Roman Salas, Secretary, FCC, dated Mar. 22, 2000, Attachment (AT&T-Time Warner Joint Venture Agreement dated Feb. 3, 1999).

[478] *See* Comcast Corp., *AT&T and Comcast Agree to Swap Cable Systems – Comcast to Add 2 Million New Subscribers; Two Companies to Collaborate in Offering Cable Telephony* (press release), May 4, 1999. AT&T's
(continued…)

174. The foregoing contractual arrangements, which combine AT&T's telecommunications brand name and expertise with the cable operators' infrastructure, promise many of the same potential benefits as a merger and also provide a model to facilitate AT&T's negotiation of contractual arrangements with other cable operators.[479] Furthermore, the value of the cable infrastructure for the delivery of local telephony services is now well recognized.[480] The incentive to extract maximum value from their cable assets makes it likely that cable operators nationwide will seek to provide local telephony services over their cable systems, whether in conjunction with AT&T, other competitive LECs, or independently.[481] We are not persuaded that the proposed merger is the only means to assure widespread, effective local telephony deployment by AT&T and other cable operators.

175. Nevertheless, we accord some weight to the Applicants' argument that a joint venture that contemplates the provision of telephony services by one party (AT&T) over the facilities of another cable operator raises complex problems at both the contract negotiation and implementation stages. Such complex issues as the allocation of bandwidth to telephony services versus traditional video services, and the services to be covered by the joint venture in light of dynamic and rapidly evolving technology and market developments, make arms-length negotiations arduous. AT&T's merger with MediaOne will create an alignment of the parties' economic interests that will reduce the areas of friction between the two companies and facilitate the development of telephony solutions. AT&T's achievement of a successful telephony rollout over the merged firm's cable infrastructure may serve as a cable telephony model that would make it easier for AT&T to negotiate and implement joint ventures and other contractual arrangements with cable operators in which it has no ownership interest.[482] Consequently, while the proposed merger is not the only route to local telephony deployment by cable operators, it is likely to hasten market penetration, including joint venture efforts, and increase cable operators' ability to compete effectively with the incumbent LECs.

### D. Applicants' Deployment Projections

176. In the course of the *AT&T-TCI* proceeding, AT&T submitted to the Commission certain information regarding its plans for upgrade of the TCI cable systems and its projections for deployment of

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joint venture negotiations with Time Warner and Comcast appeared headed for successful conclusion prior to the announcement of the proposed merger of AT&T and MediaOne. The lack of "complete" written joint venture agreements between these parties at the present time likely indicates that these negotiations are on hold pending the completion of the merger of AT&T and MediaOne and its resultant impact on the ownership interests and relationships between the merged firm, Time Warner, and Comcast.

[479] We note that of the foregoing contractual arrangements, only the AT&T-Insight joint operating agreement involves more than just a marketing agreement. The parties intend to operate over Insight's cable infrastructure and use AT&T's switching, transport and long distance services. *See* AT&T Corp., *Insight Communications and AT&T Reach Agreement in Principle to Offer Local Phone Service* (press release), Mar. 16, 2000.

[480] Jessica Reif Cohen and Nathalie Brochu, *Cable Television: Q3 Preview*, Merrill Lynch, Oct. 25, 1999, at 16.

[481] Cox was offering residential telephone service to 870,000 homes in six markets and was serving 60,000 subscribers as of June 1999. Jones has deployed telephony to 62,000 homes in the Washington, D.C. area, and as of June 1999, was serving 12,000 subscribers. Paul Kagan Assocs., Inc., *Telephony Deployments by Cable Operators*, Cable TV Financial Databook, July 1999, at 72; *1999 Competition Report*, 15 FCC Rcd at 1010 ¶ 67.

[482] AT&T's rollout of cable telephony over TCI's cable systems could also serve this purpose. MediaOne's facilities, however, generally have been upgraded to a greater extent than TCI's facilities.

new broadband and local telephony services.[483] AT&T cautioned, however, that it might fall short of these deployment projections as a result of a variety of factors, including unanticipated facilities problems, switch availability and capacity, geographic and economic challenges, changes in franchising agreements, labor availability, municipal authorizations, etc.[484]

177. As part of the instant proceeding, AT&T filed revised upgrade and deployment projections in October 1999 and March 2000, which indicated that, for most of the markets identified, AT&T was substantially successful in meeting projections filed in the *AT&T-TCI* proceeding.[485] AT&T's track record in meeting its upgrade and deployment projections supports our finding that, although the instant merger between AT&T and MediaOne may not provide benefits on the scale projected by the Applicants, it is likely to have a positive impact on deployment of telephony and other new services.

178. Consequently, we find that the merger will create an entity that has the ability and the incentives to expand its operations and provide facilities-based competition against the incumbent LECs more effectively than either party alone could. AT&T repeatedly has assured the Commission that it intends to provide residential local exchange service in the near future.[486] AT&T and MediaOne have submitted independent deployment schedules to the Commission outlining their individual plans to deliver local exchange and exchange access services.[487] In addition to these assurances, we believe the merger itself provides AT&T and MediaOne strong incentives to follow through on their announced plans. The substantial premium paid for TCI and now MediaOne is predicated on AT&T's ability to generate new revenue streams from the upgraded cable plant.[488] By acquiring these cable systems, AT&T has made a significant investment to diversify its asset base from assets comprised entirely of long distance voice to assets that offer local voice connectivity and broadband capability to nearly one-third of consumers in the

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[483] AT&T did not provide any projections of the number of broadband Internet or local telephony subscribers it expected to obtain. *See* Letter from Betsy J. Brady, Esq., Vice-President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Jan. 7, 1999, Attachment (AT&T Telephony Plans Over TCI Facilities). AT&T planned to deploy cable telephony in ten major markets in 1999. *See* Letter from Michael Armstrong, Chairman, AT&T, to William E. Kennard, Chairman, FCC, dated Feb. 8, 1999, Transmitted by Letter from Betsy J. Brady, Esq., Vice-President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated February 9, 1999 ("Feb. 8 Armstrong Letter") at 1.

[484] Feb. 8 Armstrong Letter at 2. The Commission noted in the *AT&T-TCI Order*, 14 FCC Rcd at 3230 ¶ 148, that AT&T's deployment plans lent support to its assurances that "it intend[ed] to provide residential local exchange service in the foreseeable future," although the Commission did not make the fulfillment of these deployment projections a condition of approval of the license transfers.

[485] AT&T Upgrade/Deployment Memorandum dated Oct. 1999; Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Mar. 7, 2000, Attachment (Status of AT&T-TCI deployment); Letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to To-Quyen Truong, Associate Chief, FCC Cable Services Bureau, dated Mar. 27, 2000. AT&T maintains that the March 27, 1999 projections are fully consistent with those of October and March 7, 1999.

[486] Application at 3-4, 20; Letter from Stephen C. Garavito, Senior Attorney, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Nov. 24, 1999, Transmittal of Letter from Stephen C. Garavito, Senior Attorney, AT&T, to To-Quyen Truong, Associate Bureau Chief, Cable Services Bureau, dated Nov. 24, 1999 ("Nov. 24 Garavito Letter") at 6, 10; Cicconi Public Forum Testimony, Tr. at 7.

[487] Benefits Letter Supporting Confidential Documents; Benefits Letter; Nov. 24 Garavito Letter at 3-4, 13.

[488] Jack Grubman, Saloman Smith Barney Report, Nov. 29, 1999 ("Nov. 29 Grubman Report"). The future revenue streams are (1) telephony, (2) high speed data, (3) digital TV, (4) interactive services, and (5) basic cable.

United States.[489] For AT&T to make a reasonable economic return on its investment, it will need to generate significant revenues from the provision of local telephony, among other services.[490] Market forces and the desire to meet investor expectations provide ample incentives for AT&T to maximize utilization of its network facilities and deliver all possible new services. Considering the assets and capabilities of AT&T and MediaOne, we believe that the Applicants will execute a full and expeditious rollout of telephony and broadband Internet services to make this merger profitable. Based on the foregoing considerations, we find that the merger is more likely than not to yield public interest benefits for consumers.

## VI. PROCEDURAL MATTERS

179. Consumers Union filed a motion to consolidate our review of the instant merger and the pending AOL-Time Warner merger.[491] Consumers Union asserts that the motion to consolidate was necessitated by AT&T's and MediaOne's initial refusal to certify Time Warner cable system subscribership figures, and to provide certain information about the TWE limited partnership agreement.[492] Citing *Ashbacker Radio Corp. v. FCC*, MAP also argues that it would be contrary to the public interest and administratively inefficient to consider the two pending applications independently, because the grant of either application may preclude grant of the other.[493] Consumers Union contends that the Commission must regard the applications as mutually exclusive and consider them together.[494] Finally, Consumers Union argues that consolidation is necessary because the AT&T-MediaOne merger would fundamentally change the nature of the relevant markets and of the applicants in the AOL-Time Warner merger.[495] Based on our review of Consumer Union's arguments and the Applicants' opposition, we conclude that consolidation of the two proceedings is unnecessary.

180. In their opposition to the Consumers Union motion, AT&T and MediaOne state that they have already provided the Commission with the subscriber and TWE partnership information Consumers Union claims is missing.[496] They also argue that Consumers Union's claim of mutual exclusivity and its reliance on *Ashbacker* is misplaced and that Consumers Union's proposal to consider the two mergers simultaneously is unlawful and unworkable.[497]

181. Under *Ashbacker*, applications are "mutually exclusive" and thus subject to simultaneous consideration by the Commission only where "the grant of one application would require the denial of the

[489] Nov. 29 Grubman Report.

[490] Nov. 29 Grubman Report. According to some industry analysts, AT&T will need to achieve 30% market penetration for its local telephony service. At that level, local telephony should account for approximately 20% of AT&T's overall earnings by year-end 2004; Nov. 24 Garavito Letter at 3-4.

[491] Motion of Consumers Union, The Consumer Federation of America, and the Center for Media Education To Consolidate (Apr. 11, 2000) ("Consumers Union Motion").

[492] *Id.* at 1.

[493] *Id*. at 5 (citing *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945)).

[494] Consumers Union Motion at 5. Where an administrative body is confronted by mutually exclusive applications, it must consider them simultaneously, and select the application which will best serve the public interest. *Ashbacker*, 326 U.S. at 329.

[495] Consumers Union Motion at 1.

[496] Opposition of AT&T Corp. and MediaOne Group, Inc. to Motion To Consolidate (April 21, 2000) at 2-3.

[497] *Id.*

other."[498] In *Ashbacker*, for example, two applicants were seeking to use the same spectrum to operate their respective broadcast stations, so that one application could not be approved without necessarily depriving the other applicant of a hearing.[499] Consumers Union has not established that the Commission's grant of the AT&T-MediaOne and AOL-Time Warner license transfer applications are mutually exclusive as a matter of law, such that approval of one application would necessarily preclude approval of the second application. AT&T's delay in providing information regarding subscribers and the TWE partnership agreement is not sufficient reason to consolidate the two merger proceedings.[500] Finally, we have already addressed the threat of anticompetitive effects from coordinated action between the merged entity and other large industry players in the MVPD industry in light of recent consolidation activities,[501] as well as the recent trend toward both horizontal and vertical consolidation in the Internet and broadband services industry.[502]

182. In addition, we note that Consumers Union filed in this proceeding a petition for declaratory ruling concerning the Commission *ex parte* rules[503] and Applicants' compliance with those rules.[504] We do not, at this time, address the merits of the questions that were raised in that petition, which was addressed to the General Counsel for initial consideration. Nonetheless, we observe that the Commission, in its decision-making process with respect to this matter, has relied on no information or arguments that have not been made part of the record of this proceeding.

## VII. CONCLUSION

183. For all of the foregoing reasons, we conclude that the Applicants have carried their burden of showing that, on balance, the proposed merger will serve the public interest, convenience, and necessity, subject to the conditions specified in this Order. To avoid potential harm to competition and diversity in video programming in particular, and as a non-severable condition of our approval of the Application, the Applicants must reduce their attributable cable system ownership interests such that the merged firm will serve no more than 30% of all MVPD subscribers nationwide by May 19, 2001.[505] In addition, with

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[498] *R.L. Mohr, d/b/a RadioCall*, 85 F.C.C. 2d 596 at ¶ 34 (1981). Under Section 309(a) of the Communications Act, the Commission determines "in the case of each application filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of such application . . . ." 47 U.S.C. § 309(a).

[499] *Ashbacker*, 326 U.S. at 328.

[500] AT&T in fact responded to the information requests at issue. *See* Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T Broadband and Internet Services, to Magalie Roman Salas, Secretary, FCC, dated Apr. 7, 2000, Transmittal of Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T Broadband and Internet Services, to Deborah A. Lathen, Chief, FCC Cable Services Bureau, dated Apr. 7, 2000; Letter from Michelle M. Mundt, Mintz Levin Cohn Ferris Glovsky and Popeo PC, to Magalie Roman Salas, Secretary, FCC, dated Apr. 7, 2000, Transmittal of Letter from Susan M. Eid, Vice President, Federal Relations, MediaOne Group, Inc., to Deborah Lathen, Chief, FCC Cable Services Bureau, dated April 7, 2000.

[501] *See* Section IV.A.1.c., *supra*.

[502] *See* Section IV.C.3, *supra*

[503] 47 C.F.R. §§ 1.1200, *et seq.*

[504] Consumers Union, Consumer Federation of America, and Media Access Project, Request for Expedited Ruling Interpreting the Commission's *Ex Parte* Rules and Their Application, CS Docket No. 99-251, filed on May 2, 2000.

[505] The Applicants must reduce their attributable cable ownership interests by (a) divesting their interests in TWE, (b) terminating their involvement in TWE's video programming activities (pursuant to the limited partnership

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respect to broadband Internet services, Applicants have entered into a consent decree with the Department of Justice. As discussed above, the consent decree would require, among other things, that AT&T divest its interest in Road Runner by December 31, 2001. Applicants have further committed to provide unaffiliated ISPs with direct access to the merged firm's cable systems. On the potential harms side of our public interest balancing test, we find that the conditions set forth in this Order, the requirements of the DOJ consent decree, and the industry developments discussed herein (including in particular developing competition from alternative broadband Internet access providers) sufficiently mitigate the potential for competitive harms from the merger. On the potential benefits side, we are satisfied that the combination of the Applicants' complementary assets and capabilities will allow them to compete more effectively against incumbent LECs in the provision of local telephony and new services than they could alone or through contractual arrangements. Accordingly, we conclude that the positive public interest benefits promised by this merger are sufficient to support the Commission's approval of AT&T's and MediaOne's Application, under the public interest balancing test of Sections 214(a) and 310(d) of the Communications Act, subject to the conditions specified in this Order. The Commission will issue a public notice listing the specific license and authorization transfers granted by this Order.

## VIII. ORDERING CLAUSES

184. Accordingly, having reviewed the Application and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Application filed by AT&T Corp. and MediaOne Group, Inc. IS GRANTED subject to the conditions stated below.

185. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for AT&T to acquire control of:

a) any authorization issued to MediaOne, its subsidiaries, or its affiliates during the Commission's consideration of the Application and the period required for consummation of the merger transaction following approval;

b) construction permits held by licensees involved in this transfer that matured into licenses during the Commission's consideration of the Application or that mature into licenses after closing of the merger transaction and that may have been omitted from the transfer of control Application; and

c) applications filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.[506]

186. IT IS FURTHER ORDERED that this grant IS CONDITIONED on our requirement (the "Video Condition") that the Applicants, by May 19, 2001, either (a) divest their interests in TWE, (b)

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exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules), or (c) divesting their interests in other cable systems, such that they will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide. Appendix B also lists other interim conditions and enforcement mechanisms by which the Applicants must abide as a non-severable condition of exercising our grant of the Application.

[506] *See WorldCom-MCI Order*, 13 FCC Rcd at 18153 ¶ 226(c).

terminate their involvement in TWE's video programming activities (pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules, 47 C.F.R. § 76.503 n.2), or (c) divest their interests in other cable systems, such that they will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide.

187. IT IS FURTHER ORDERED that this grant IS CONDITIONED on our requirement that AT&T shall file with the Cable Services Bureau, within six months after the merger's closing, a written document stating which one of the three compliance options specified in the Video Condition it has elected. AT&T shall complete its divestiture of the elected assets by May 19, 2001.

188. IT IS FURTHER ORDERED that this grant IS CONDITIONED on our requirement that, if the Applicants have not complied with the Video Condition by the May 19, 2001 deadline, then, on May 19, 2001, the Applicants shall place into an irrevocable trust for the purpose of sale the assets that it must divest in order to effectuate the Video Condition compliance option it has elected pursuant to paragraph 187 above.

189. IT IS FURTHER ORDERED that this grant IS CONDITIONED on our requirement that 60 days before May 19, 2001, the Applicants shall file a written document with the Cable Services Bureau (a) stating that it will be in compliance by the May 19, 2001 deadline, or (b) stating that it will not be in compliance and describing the irrevocable trust arrangement that it will establish by the May 19, 2001 deadline for the sale of the assets that it must divest in order to effectuate the Video Condition compliance option it has elected pursuant to paragraph 187 above.

190. IT IS FURTHER ORDERED that this grant IS CONDITIONED on our requirement that AT&T and MediaOne shall comply with the conditions set forth in Appendix B, until the Applicants have (a) divested their interests in TWE, (b) terminated their involvement in TWE's video programming activities (pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules, 47 C.F.R. § 76.503 n.2), or (c) divested their interests in other cable systems, such that they will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide.

191. IT IS FURTHER ORDERED that compliance with all conditions imposed herein is a non-severable condition of the grant of the Application.

192. IT IS FURTHER ORDERED that all references to AT&T and MediaOne in this Order shall also refer to their respective officers, directors, and employees, as well as to any affiliated companies, and their officers, directors, and employees.

193. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Motion to Dismiss and the Petition To Dismiss or Deny filed by the Consumers Union, Consumer Federation of America, and Media Access Project; the Petition of SBC Communications, Inc. to Deny Application; Bell Atlantic Corporation's Petition to Deny the Application; the Petition of GTE Service Corporation, GTE Internetworking, and GTE Media Ventures, Inc. to Deny Application, or in the Alternative, to Condition the Merger; the Petition of U S WEST To Deny Applications or To Condition Any Grant; and the requests of any party requesting similar relief, ARE DENIED.

194. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309,

310(d), that the Motion to Consolidate filed by the Media Access Project on behalf of Consumers Union, the Consumer Federation of America, and the Center for Media Education IS DENIED.

195. IT IS FURTHER ORDERED that the Request by Consumers Union, Consumer Federation of America, and Media Access Project to transfer its Complaint Against AT&T Corp. and Tele-Communications, Inc. from the Cable Services Bureau to the Enforcement Bureau dated April 14, 2000 IS DISMISSED AS MOOT.

196. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release, in accordance with Section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

## APPENDIX A
## List of Commenters

AcQuarulo, Giacomo
Alliance for Public Technology ("APT")
Ameritech New Media, Inc. ("Ameritech")
America OnLine, Inc. ("AOL")
Bell Atlantic Corporation ("Bell Atlantic")
BellSouth Corporation ("BellSouth")
Brewer, Patricia J.
BroadSoft, Inc. ("BroadSoft")
Chamber of Commerce of Northwest Connecticut
Consumers Union, Consumer Federation of America, and Media Access Project ("Consumers Union")
Detroit Urban League
DirecTV, Inc. ("DirecTV")
EchoStar Satellite Corporation ("EchoStar")
Global Wireless Consumers Alliance ("Global")
Greater New Haven Chamber of Commerce
GTE Service Corporation ("GTE")
MCI WorldCom, Inc. ("MCI WorldCom")
MindSpring Enterprises, Inc. ("MindSpring")
National Cable Television Association ("NCTA")
openNET Coalition ("openNET")
Qwest Communications Corporation ("Qwest")
SBC Communications, Inc. ("SBC")
Seren Innovations, Inc. ("Seren")
Sprint Corporation ("Sprint")
Telecommunications Advocacy Project ("TAP")
Telecommunications Resellers Association ("TRA")
U S West
Wireless Communications Association International, Inc. ("WCA")

# APPENDIX B

## SAFEGUARDS RELATING TO VIDEO PROGRAMMING

## I. BACKGROUND AND DEFINITIONS

1. As a condition of exercising the grant of the merger application, AT&T shall, during the Compliance Period, comply with the following enumerated safeguards. These safeguards shall become effective at the Merger Closing Date. The safeguards shall be null and void if AT&T and MediaOne do not merge and there is no Merger Closing Date.

2. For purposes of this document only, the following definitions shall apply:

a) "**AT&T**" means AT&T Corp., all of its wholly owned subsidiaries, and any entities controlled by AT&T Corp. AT&T shall not include Liberty Media Corp.
b) "**Cablevision**" means Cablevision Systems Corp.
c) "**Compliance Action**" means that AT&T has complied with the Order by (1) divesting its interest in TWE, (2) terminating its involvement in the Video-Programming activities of TWE such that TWE is no longer attributable to AT&T under the Commission's cable ownership attribution rules, 47 C.F.R. § 76.503 n.2, or (3) divesting its interests in other cable systems such that, including subscribers served by TWE, AT&T serves no more than 30% of all multichannel video programming distribution system subscribers in the United States.
d) "**Compliance Deadline**" means May 19, 2001.
e) "**Compliance Period**" means the period of time commencing on the Merger Closing Date and continuing until AT&T has taken the Compliance Action.
f) "**Corporate Compliance Officer**" means an employee of AT&T appointed pursuant to paragraph 16 below who shall be responsible for overseeing AT&T's compliance with these safeguards.
g) "**Liberty**" means Liberty Media Corp.
h) "**MediaOne**" means MediaOne Group, Inc.
i) "**MediaOne Video Programming Interests**" means those Video Programming entities in which MediaOne has an attributable interest, specifically E! (including Style), Food Network - TVFN, Fox Sports New England, iN DEMAND (previously Viewer's Choice), Music Choice, New England Cable News, Outdoor Life, Speedvision, and Sunshine Network.
j) "**Merger Closing Date**" means the day on which, pursuant to their merger agreement, AT&T and MediaOne cause a certificate of merger to be executed, acknowledged, and filed with the appropriate state.
k) **"Order"** means the Commission order to which this Appendix is attached.
l) "**Rainbow**" means Rainbow Media Sports Holdings, Inc., a majority-owned subsidiary of Cablevision Systems Corp.
m) "**TWE**" means Time Warner Entertainment Company, LP.
n) "**Video Programming**" means video programming as defined in 47 U.S.C. § 522(20) and the Commission's implementing regulations as of January 1, 2000.

## II. SAFEGUARDS

### SAFEGUARDS RELATING TO TWE

3. No officer or director of AT&T shall also be an officer or director of TWE. AT&T may appoint an employee (who is not an officer or director of AT&T) to the TWE Board of Directors, provided that such employee is not involved in the Video Programming activities of AT&T.

4. No officer, director, or employee of AT&T shall, directly or indirectly, influence or attempt to influence, or otherwise participate in, the management or operation of the Video Programming activities of TWE. In particular, no member of the TWE Board of Directors appointed by AT&T shall be involved in the following matters:

a) the decisions of TWE regarding which Video Programming services are purchased for or carried on TWE's cable systems;
b) negotiation of the prices paid by TWE for Video Programming carried on TWE's cable systems;
c) setting the schedule for rollout of Video Programming by TWE's cable systems;
d) marketing by TWE of Video Programming carried on TWE's cable systems;
e) setting the budget for the Video Programming operations of TWE's cable systems (except that AT&T may be involved in setting the overall TWE budget for Video Programming operations provided that AT&T's access to TWE budget information does not include information concerning individual budget components of TWE's Video Programming operations, e.g., personnel, overhead, marketing, and program purchasing);
f) selecting the electronic programming guide used by TWE's cable systems;
g) the hiring, firing, or supervising of TWE employees directly involved in the Video Programming activities of TWE's cable systems; or
h) assessing the performance of any Video Programming service carried by TWE's cable systems.

5. AT&T may not receive information from TWE regarding the price, terms, and conditions which TWE negotiates for the carriage of Video Programming on the TWE cable systems, nor provide information to TWE regarding the price, terms, and conditions which AT&T negotiates for the carriage of Video Programming on the AT&T cable systems. AT&T may not obtain from any Video Programming vendor a volume discount or other favorable terms and conditions as a result of TWE's purchase of Video Programming for, or carriage on, TWE's cable systems.

### SAFEGUARDS RELATING TO LIBERTY

6. To the extent that there is a director, officer, or employee of Liberty that also is a director or officer of AT&T ("Joint Director or Officer"), the following safeguards shall apply:

a) The Joint Director or Officer may not, directly or indirectly, influence or attempt to influence, or otherwise participate in, matters relating to the Video Programming activities of AT&T, including the following:

1) the decisions of AT&T regarding which Video Programming services are

purchased for or carried on AT&T's cable systems;

2) negotiation of the prices paid by AT&T for Video Programming carried on AT&T's cable systems;

3) setting the schedule for rollout of Video Programming by AT&T's cable systems;

4) marketing by AT&T of Video Programming carried on AT&T's cable systems;

5) setting the budget for the Video Programming operations of AT&T's cable systems (except that the Joint Director or Officer may be involved in setting the overall AT&T budget for Video Programming operations provided that the Joint Director or Officer's access to AT&T budget information does not include information concerning individual budget components of AT&T's Video Programming operations, e.g., personnel, overhead, marketing, and program purchasing);

6) selecting the electronic programming guide used by AT&T's cable systems;

7) the hiring, firing, or supervising of AT&T employees directly involved in the Video Programming activities of AT&T's cable systems; or

8) assessing the performance of any Video Programming service carried by AT&T's cable systems.

b) AT&T shall take all necessary steps to ensure that the Joint Director or Officer does not participate in, or have access to information, documents, or other materials of any kind concerning, the Video Programming related activities of AT&T's cable systems; and

c) No employee, officer, or director of AT&T may communicate with the Joint Director or Officer concerning the Video Programming related activities of Liberty or the Video Programming related activities of AT&T's cable systems.

7. AT&T shall take the following actions with respect to any individuals whom AT&T appointed to the Liberty Board of Directors prior to the Merger Closing Date:

a) within 14 days of the Merger Closing Date, AT&T shall submit to the Cable Services Bureau the names of individuals who are not directors, officers, or employees of AT&T and whom AT&T proposes to appoint to the Liberty Board of Directors;

b) upon approval by the Cable Services Bureau of these proposed new directors, AT&T will remove the current directors it has appointed to the Liberty Board of Directors and replace them with the directors approved by the Cable Services Bureau; and

c) in the event that the Cable Services Bureau notifies AT&T in writing that it does not approve one or all of the proposed new directors, AT&T will submit to the Cable Services Bureau the name of a new proposed director (or directors) within 14 days of such notice. Upon approval by the Cable Services Bureau of the alternative new director(s), AT&T will remove the current director(s) it has appointed to the Liberty Board of Directors and replace such director(s) with the alternative new director(s) approved by the Cable Services Bureau.

8. If, for whatever reason, a Liberty director approved by the Cable Services Bureau and appointed by AT&T pursuant to the previous paragraph may no longer serve on the Liberty Board of Directors, AT&T shall, within 14 days of learning that such director may no longer serve on the Liberty

Board of Directors, submit to the Cable Services Bureau the name of an individual it proposes to appoint as a replacement to the Liberty Board of Directors. AT&T shall appoint such replacement director pursuant to the terms for appointing directors described in the previous paragraph.

9. The Liberty directors approved by the Cable Services Bureau and appointed by AT&T will have duties and obligations common to corporate directors. However, such directors shall only communicate with AT&T regarding matters of waste of corporate assets, mismanagement, or fraud.

**SAFEGUARDS RELATING TO CABLEVISION AND RAINBOW**

10. AT&T shall take all necessary steps to ensure that any directors it appoints to the Cablevision Board of Directors are recused from any and all involvement in the management or operation of Rainbow.

11. No employee, officer, or director of AT&T shall, directly or indirectly, influence or attempt to influence, or otherwise participate in, the management or operation of Rainbow.

**SAFEGUARDS RELATING TO iN DEMAND AND THE MEDIAONE VIDEO PROGRAMMING INTERESTS**

12. AT&T shall have no role in the management or operation of iN DEMAND or the MediaOne Video Programming Interests during the Compliance Period. AT&T shall instruct its representatives serving on the Boards of Directors or management committees of iN DEMAND and the MediaOne Video Programming Interests not to attend any Board or other management committee meetings, receive any materials or other information, or otherwise have any contact with iN DEMAND or the MediaOne Video Programming Interests during the Compliance Period.

13. No officer, director, or employee of AT&T shall, directly or indirectly, influence or attempt to influence, or otherwise participate in, the management or operation of iN DEMAND or the MediaOne Video Programming Interests.

14. Notwithstanding the previous two paragraphs, AT&T may file with the Cable Services Bureau a written request to participate in matters that would have a significant impact on iN DEMAND or the MediaOne Video Programming Interests but which are not directly related to the Video Programming activities of iN DEMAND or the MediaOne Video Programming Interests. If the Bureau does not deny the request within 14 days of receipt of the request, the request shall be deemed granted. In the event such request is granted (either by issuance of an order granting the request or by a failure to deny the request within 14 days), AT&T's ability to participate in iN DEMAND or the MediaOne Video Programming Interests shall be limited to the specific matters that are the subject of the request.

15. The safeguards in the preceding three paragraphs shall terminate immediately to the extent that iN DEMAND or any of the MediaOne Video Programming Interests no longer sell programming to TWE.

## III. ENSURING COMPLIANCE WITH AND ENFORCEMENT OF THESE SAFEGUARDS

16. Corporate Compliance Officer

a) AT&T shall appoint a Corporate Compliance Officer to oversee AT&T’s implementation of and compliance with these safeguards; to monitor AT&T's compliance program; to ensure that payments due under these safeguards are timely made; and to consult with the Chief of the Cable Services Bureau and other appropriate individuals as the Chief deems necessary on an on-going basis regarding AT&T’s compliance with these safeguards. The Corporate Compliance Officer shall provide to the independent auditor (described in the next paragraph) copies of all documents regarding compliance that AT&T provides to the Commission and consult with the independent auditor regarding AT&T’s compliance with these safeguards. The audit committee of AT&T’s Board of Directors shall oversee the Corporate Compliance Officer’s fulfillment of these responsibilities. The requirements of this subparagraph shall remain in effect until all other safeguards set out herein have expired or terminated.

b) The Corporate Compliance Officer shall notify the independent auditor and the Chief of the Cable Services Bureau immediately upon discovering a material failure on the part of AT&T to comply with any of the safeguards described herein.

c) Not later than 60 days after the Merger Closing Date, AT&T shall submit to the Cable Services Bureau a plan for compliance with these safeguards. The compliance plan shall be afforded confidential treatment in accordance with the Commission’s normal processes and procedures. A letter providing notice of the filing shall be filed the same day with the Secretary of the Commission for the public record.

d) The Corporate Compliance Officer shall designate AT&T's corporate secretary to attend AT&T Board of Directors meetings on his or her behalf and to carry out the duties of the Corporate Compliance Officer during such meetings. The Corporate Compliance Officer shall meet with the corporate secretary prior to AT&T Board of Directors meetings to review the safeguards described herein, and after AT&T Board of Directors meetings to ensure that the safeguards were adhered to during the meetings.

e) The Corporate Compliance Officer shall meet with AT&T's appointees to the TWE Board of Directors prior to TWE Board of Directors meetings to review the safeguards described herein, and after TWE Board of Directors meetings to ensure that the safeguards were adhered to during the meetings.

17. Independent Auditor

a) Within 30 days of the Merger Closing Date, AT&T shall, at its own expense, engage an independent auditor to conduct an examination resulting in a positive opinion (with any exceptions noted) regarding AT&T's compliance with these safeguards during the Compliance Period. The engagement shall be supervised by persons licensed to provide public accounting services and shall be conducted in accordance with the relevant standards of the American Institute of Certified Public Accountants ("AICPA"). The independent auditor shall be acceptable to the Chief of the Cable Services Bureau. The independent auditor shall file a report regarding AT&T's compliance with the safeguards described herein every 6 months from the Merger Closing Date until the end of the Compliance Period.

b) The independent auditor shall have access to books, records, and operations of AT&T, and key AT&T personnel, which are necessary to fulfill the audit requirements of this section. The independent auditor shall notify AT&T's Corporate Compliance Officer of any inability to obtain such access.

c) The independent auditor may verify AT&T's compliance with these safeguards through contacts with the Commission, or with TWE, Liberty, Cablevision, Rainbow, iN DEMAND, or the MediaOne Video Programming Interests.

d) The independent auditor shall notify the Corporate Compliance Officer and the Chief of the Cable Services Bureau immediately upon discovering a material failure on the part of AT&T to comply with any of the safeguards described herein.

e) The independent auditor's reports shall include a discussion of the scope of the work conducted, a statement regarding AT&T's compliance or non-compliance with these safeguards, and a description of any limitations imposed on the auditor in the course of its review by AT&T, or other circumstances that might affect the auditor's opinion. The independent auditor's report shall be made publicly available, except for any confidential material it may include.

f) For 6 months following submission of the final audit report, the Commission shall have access to the working papers and supporting materials of the independent auditor at a location in Washington, D.C. that is selected by AT&T and the independent auditor. Copying of the working papers and supporting materials by the Cable Services Bureau shall be allowed but shall be limited to copies required to verify compliance with and to enforce these safeguards. Any copies made by the Cable Services Bureau shall be returned to AT&T by the Cable Services Bureau no later than 12 months after the submission of the final audit report. The Cable Services Bureau's review and/or copying of the working papers and supporting materials shall be kept confidential pursuant to the Commission's rules and procedures.

18. Enforcement

a) The specific enforcement mechanisms established by these safeguards do not abrogate, supersede, limit, or otherwise replace the Commission's powers under the Communications Act. Compliance or non-compliance with these safeguards by AT&T does not in itself constitute compliance or non-compliance with any federal, state, or local law or regulation, except AT&T's obligation to comply with these safeguards.

b) Penalties During the Compliance Period

1) If the Chief of the Cable Services Bureau issues a written determination that during the Compliance Period a failure to comply with one or more of these safeguards has occurred, the Bureau Chief may, at his or her discretion, impose penalties as follows:

(i) for the first failure, a forfeiture not to exceed $100,000; and

(ii) for additional failures, forfeitures not to exceed $250,000 per each such failure.

2) If the Chief of the Cable Services Bureau issues a written determination that during the Compliance Period there has been a continuing failure to comply with one of the safeguards described herein, then the Chief may, at his or her discretion, impose the penalties described in the previous subparagraph (if such penalties have not previously been imposed for such failures), plus the following additional penalties:

(i) a maximum of $10,000 per day from the start of such continuing failure (such starting date to be determined by the Chief of the Cable Services Bureau); and

(ii) to the extent that AT&T does not file with the Cable Services Bureau within 5 business days of receiving the written determination of a continuing failure a document providing adequate assurance, as determined by the Cable Services Bureau, that such continuing failure has been cured, a maximum of $100,000 per day for each day beyond the 5 day cure period.

c) In determining the appropriateness and extent of any penalties imposed pursuant to these safeguards, the Chief of the Cable Services Bureau shall take into account the materiality of the failure to comply with such safeguards, and the good faith efforts and reasonable commercial diligence of AT&T in attempting to comply with such safeguards. Any determination by the Chief of the Cable Services Bureau pursuant to the safeguards described herein is appealable by AT&T to the Commission.

d) AT&T shall be strictly obligated to make the payments for failure to comply as required by these safeguards, and no showing of a willful violation shall be necessary in order to enforce such payments. AT&T shall not be liable for any payments, however, if the Chief of the Cable Services Bureau grants a waiver request filed by AT&T in which AT&T will have the burden of proof to demonstrate that the failure to meet a safeguard was caused by a *force majeure* event or an Act of God. If the Chief of the Cable Services Bureau refuses to grant a waiver, AT&T may appeal that decision to the Commission.

e) AT&T shall make payments due under these safeguards within 10 business days of a determination by the Chief of the Cable Services Bureau or the Commission that payment is due. If the Commission has not taken an action to designate or administer a fund in order for AT&T to make a payment required under these safeguards, AT&T shall make its payment into an interest bearing escrow account pending such action. If AT&T's obligation to make a payment is disputed by AT&T, AT&T shall make the disputed payment into an interest bearing escrow account within 10 business days of the date the payment was due. Within 10 business days of making a payment of a disputed amount into escrow, AT&T shall file with the Cable Services Bureau a verified statement of the grounds on which payment is not required. Subject to rights of rehearing and appeal, the escrowed payments (including any accrued interest) shall be returned to AT&T or paid to the appropriate fund in accordance with the final and non-appealable Commission or judicial order resolving the dispute.

f) Enforcement Mechanisms related to Compliance Action

1) No later than 6 months after the Merger Closing Date, AT&T shall file a written document with the Cable Services Bureau to identify which of the three options specified under the Compliance Action it has elected to pursue.

2) No later than 60 days before the Compliance Deadline, AT&T shall file a written document with the Cable Services Bureau stating that:

(i) AT&T will take the Compliance Action by the Compliance Deadline; or

(ii) AT&T will not take the Compliance Action by the Compliance Deadline. In this event, AT&T also will describe the extent to which it will not be in compliance with the Order, identify the assets (including cable system interests and/or Video Programming interests) that it must divest in order to effectuate the Compliance Action option that it has elected pursuant to subparagraph 18(f)(1), and submit a proposed irrevocable trust agreement for the purpose of sale of these assets pursuant to the next subparagraph.

3) If AT&T has not taken the Compliance Action by the Compliance Deadline, then, on the Compliance Deadline, AT&T shall transfer into an irrevocable trust for the purpose of sale the assets AT&T designated pursuant to subparagraph 18(g)(2)(ii).

## STATEMENT OF CHAIRMAN WILLIAM E. KENNARD

*In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp (CS Docket No. 99-251)*

My approval of this merger is a conditioned approval. I rely on the specific commitments and concessions made by AT&T, detailed conditions that will require AT&T to divest significant portions of its cable holdings, as well as the strict compliance deadlines and enforcement mechanisms we adopt today. This decision strikes the appropriate balance between promoting competition in local telephone service and protecting competition in cable and high-speed Internet service.

Under Section 310(d) of the Communications Act, when presented with an application to transfer licenses, we must determine whether the application serves the public interest, convenience, and necessity. Therefore, with the able assistance of the Cable Services Bureau, we undertook a careful, thorough, and deliberate assessment of the potential public interest harms and benefits of this transaction.

**Merger Conditions**

AT&T's application, as originally filed, was inconsistent with the public interest and presented significant diversity and competition concerns. As proposed, AT&T-MediaOne would have served 34.4 million consumers or 51.3 percent of cable subscribers nationwide (41.8 percent of subscribers to multichannel video programming distributors). However, the merger we approve today looks very different from the application initially presented to us by the parties.

First, AT&T has made meaningful *commitments* and *concessions*. It has already completed all necessary steps to comply with our channel occupancy rules. MediaOne has reduced its ownership in Time Warner's local telephony subsidiary. In December 1999, AT&T also committed to provide non-discriminatory access to unaffiliated Internet service providers, and more recently, AT&T has promised that non-discriminatory principles will also apply in MediaOne territories. Finally, AT&T-MediaOne must also divest its interests in broadband ISP Road Runner, as part of the proposed consent decree with the Department of Justice.

Second, we impose specific, non-severable *conditions* on the merger that will prevent the merged entity from serving as a gatekeeper in the video programming market. This condition addresses one of my most serious concerns about the original merger application—AT&T's proposal to serve more than half of all cable subscribers <u>and</u> maintain influence over much of the nation's most popular cable television programming.

Therefore, as an express condition of our approval, AT&T must comply with our 30 percent horizontal ownership rule by May 19, 2001, twelve months from the date the U.S. Court of Appeals for the D.C. Circuit upheld the constitutionality of the statute which authorizes our horizontal ownership rule. Within six months after closing its merger with MediaOne, AT&T must make an irrevocable election among three divestiture options. AT&T must also comply with specific interim conditions and enforcement mechanisms designed to protect the public interest while the merged entities complete these divestitures.

We expressly reject AT&T's argument that our horizontal ownership and attribution rules should not apply to its union with MediaOne. We also deny its request to grant the merged entity flexibility to comply with whatever horizontal ownership rules are in effect in 18 months. Neither of these options would have served the public interest.

**Protecting and Promoting Competition and Diversity**

During our review of this merger, a number of commenters urged the Commission to go beyond its horizontal ownership rules and direct AT&T to divest specific cable holdings. These arguments, however, failed to identify specific harms that would not be sufficiently mitigated by a strict application of our current rules, given the state of the marketplace as it exists today.

As outlined above, our current horizontal limits impose constraints on AT&T that will preserve the competitiveness and diversity of the video programming market, while allowing the economies of scale and significant investment necessary to foster the deployment of new and advanced services to American consumers. Our horizontal limits ensure that AT&T's acquisition of MediaOne will prevent it—either on its own or in collusion with other parties—from foreclosing meaningful opportunities for new video programmers to enter the market. Therefore, while AT&T can invest in developing competitive telephone and broadband alternatives beyond the 30 percent subscriber limit, it cannot provide video services to those consumers, even as a wholesaler of popular video content.

I look forward to seeing the benefits of competition in the local telephony marketplace that AT&T has argued will result from its merger with MediaOne. I will be following with keen interest AT&T-MediaOne's efforts in this regard, and I daresay, so will the American people.

**An Open Access Commitment**

Some parties have urged us to impose an "open access" condition on the merged entity. We have declined to do so here. As I have noted previously, the development and deployment of high-speed, broadband Internet access is vitally important to the nation as it will deliver the next generation of Internet services to Americans. Consumers should have a choice among alternative broadband providers. I believe that there are powerful marketplace incentives to ensure that consumers have such choices. Therefore, I have consistently advocated that we allow the nascent broadband marketplace a chance to develop before imposing a government-ordered regime.

I have been encouraged by voluntary commitments by AT&T and other cable operators to open their systems so as to accommodate consumer choice. Indeed, AT&T has made these commitments to the FCC on the record in this proceeding, including the commitment that they will not restrict video streaming. Notwithstanding these commitments, however, we have yet to see a fully developed and functioning system that provides broadband service alternatives to consumers. Therefore, my continued support for the Commission's vigilant restraint policy ultimately depends on how AT&T fulfills its voluntary commitments in the broadband arena.

**FCC's Merger Review Framework**

Finally, an important issue has been raised about the relationship between the Commission's rules and the public interest standard embodied in sections 214(a) and 310(d)) of the Communications Act. I write separately today to clarify the public interest framework we applied here and to emphasize the critical importance and continued relevance of the Commission's mandate to balance specific public interest harms and benefits.

As the Commission has gained more experience reviewing merger-related applications, we have in recent years articulated our approach to the public interest standard in terms of the four questions outlined in the text of the Commission's decision in this case: (1) whether the transaction would result in a violation of the

Communications Act or any other applicable statutory provision; (2) whether the transaction would result in a violation of Commission rules; (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of the Communications Act and other statutes; and (4) whether the transaction promises to yield affirmative public interest benefits.

This four-part public interest framework is not new and clarifies the Commission's historical approach to applying the public interest standard. The fact that a particular case does not expressly recite the test does not mean that it is inconsistent with this framework.

I understand that critics of this framework are concerned that it may not give adequate weight to the Commission's rules. They note that it was originally articulated in cases involving common carriers and recommend that we apply a different, less flexible standard where the Commission has adopted many specific and prophylactic rules. I disagree. The four-part framework takes appropriate account of the Commission's rules, and, like the public interest standard it implements, is properly applied to our decisions.

The relationship between the Commission's rules and the public interest standard was eloquently described by Judge Harold Leventhal over thirty years ago in a seminal case reversing the FCC for not giving adequate attention to an application for a waiver of one of its rules:

> "The Commission is charged with administration in the 'public interest.' That an agency may discharge its responsibilities by promulgating rules of general application which, in the overall perspective, establish the 'public interest' for a broad range of situations, does not relieve it of an obligation to seek out the 'public interest' in particular, individualized cases." *WAIT Radio v. FCC, 418 F.2d 1153, 1157 (D.C. Cir. 1969).*

Rules are important and are not to be departed from lightly. Our public interest framework acknowledges this by directing us to first ask questions about consistency with the Communications Act and our rules. But, under the public interest standard, when circumstances that were not considered in the original rulemaking arise, they properly may call either for waiver of the rule or for the imposition of additional requirements not imposed by the rule.

In the case before us, for example, both the applicants (in their request for additional time to come into compliance with the cable horizontal ownership rules) and the opponents (in their requests for additional conditions) ask the Commission to depart from a strict application of the its rules. Under the circumstances of this case, the Commission determines, on the one hand, that a limited departure from the rule's requirements is warranted to allow the applicants a commercially reasonable period of time to come into compliance with the horizontal ownership rule. On the other hand, the record does not reveal public interest harms not sufficiently mitigated by the existing rules that would require the imposition of additional conditions.

The Commission's decision in this case, with its balanced consideration and response to the requests from the opposing parties to depart from our rules, seems the best answer to the concern that the four-part public interest framework would create too much uncertainty about when the agency might depart from its rules. By contrast, alternate approaches would either over-emphasize the rigidity of our rules or allow too little priority to the Commission's "obligation to seek out the 'public interest' in particular, individualized cases." *WAIT Radio, 418 F.2d at 1157.*

I, therefore, fully support the reasoning and outcome of this case.

**In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Media One Group, Inc., Transferor, To AT&T Corp., Transferee, CS Docket No. 99-251**

**STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH, CONCURRING IN PART AND DISSENTING IN PART**

I concur in the approval of Media One's application to transfer certain licenses and authorizations to AT&T conditioned upon compliance with extant Commission (FCC) rules and applicable statutory provisions, such as the cable-telco buyout prohibition. I must dissent, however, from the importation of the so-called "four-pronged public interest test" from our common carrier decisions into this new context and also from the "interim conditions" imposed upon AT&T regarding its interest in Time Warner Entertainment (TWE).

As I have stated many times, I believe that we should review license transfer proposals for consistency with the Communications Act and existing administrative regulations.[1] Contrary to the language of this Order, the proper approach to the question of the merged entity's power in the video programming market is simply to apply the cable horizontal ownership limits. These rules have an express statutory basis, and Congress mandated that we adopt them out of the very concerns that animate the comments on this issue. There should be no "public interest" overlay that might subject a party to either a less or more restrictive understanding of horizontal ownership restrictions; if that were so, then the rules would not be rules at all, and regulated parties could never ascertain their compliance with our regulations. I do not deny that section 309 requires a "public interest" finding, but to my mind that standard is applied and satisfied when specifically applicable rules are applied and satisfied.

Accordingly, I do not support the public interest framework referenced throughout this Order. *See, e.g.,* Order at para. 8. The first two prongs provide that the proposed transfer should not result in a violation of the Communications Act or other statutory provision or Commission regulation, which is all well and good.[2] The remaining prongs, however, are phrased at such a level of bureaucratic generality that it is, an initial matter, difficult to grasp what they actually mean. *See id.* (asking "whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act , or would interfere with the objectives of the Communications Act and other statutes" and "whether the merger promised to yield affirmative public benefits"). The Commission's *implementation* of the Act can only properly depend on what it has been *authorized to do* under the Act, so I do not see what this adds to the analysis. "Interfering with an objective" of the Act connotes, I take it, something other than violating the Act, so this language seems an express attempt to expand Commission

[1] I have recognized this principle and applied extant regulations to pending applications even when I might disagree with the regulations as a matter of policy. *See, e.g.,* Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part, *In the Matter of CBS/Viacom* (rel. May 3, 2000) (concurring in application of national broadcast cap to instant application because rule, while under regulatory review, was effective at time of Commission review).

[2] Notably, we limited ourselves to just this narrow sort of review in the *CBS/Viacom* matter. There, we made *no* mention of a public interest overlay, a four-pronged test, or anything other than the statutes and rules that governed the transaction in question. The approach taken here represents a marked departure from that one, and I see nothing inherent in the nature of the transactions – both are transfers of section 309 licenses – that could rationally justify today's abrupt and unexplained change in course.

jurisdiction beyond that actually conferred by Congress. And referring to "public interest benefits," without more, as an element of the "public interest test" is wholly circular. In short, what these prongs seem designed to do, and indeed allow, is departure from the terms of the Act and our own regulations. Such departure amounts to a violation of our statutory limits and unfairly subjects merging parties to unknowable and undefined standards.

For similar reasons, I dissent from the "safeguards" governing AT&T's relationship with TWE. In implicit recognition of the fact that the horizontal ownership cap is indifferent as to the video programming nature of companies with cable subscribers, the Order relies on the third prong of the above test as the source of its authority for these conditions. In particular, the Order states the requirements will "ensure that the merger will not frustrate [or] impair the Commission's implementation of the Communications Act and its objectives with regard to the promotion of competition and diversity in the provision of video programming." Order at para. 80. But our "objectives" with respect to video programming are delineated by section 613. If the rules promulgated pursuant to that provision do not address AT&T's ability to keep some of their subscribers in TWE as opposed to elsewhere, then neither can this Order, whether permanently or on an interim basis. Indeed, the fact that the Commission declines under the horizontal cap regulations to mandate divestiture of TWE as an ultimate matter suggests that it lacks power to do so even temporarily.

# # #

**CONCURRING STATEMENT OF**
**COMMISSIONER MICHAEL K. POWELL**

*Re: Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee.*

I support the Commission's decision today to grant the transfer of licenses from MediaOne Group, Inc. to AT&T Corp. I concur in the decision, however, because I am concerned about the manner in which our public interest authority is applied in the item. Generally, I support the application of our four-part public interest test in the context of large and complicated telephone mergers. However, where rules comprehensively embody our goals and fulfill the public interest standard without rote application of the four factors, I believe that simply applying the rule is a better approach. It is the approach we took recently in our decision to approve the CBS/Viacom[1] merger, and I believe it should have been followed here.

The Communications Act states that authorizations made by the Commission must be made upon a finding that the public interest, convenience and necessity would be served.[2] In some circumstances, the Commission has extrapolated this standard into a four-part public interest test.[3] To my mind, the across-the-board application of this four-part test threatens the benefits that come from clear and concise rules of government. It is a constant mantra of this Agency that the public and industry benefit from clear and specific rules and regulations. For example, we bemoan rule by waiver and strive to make our rules the final arbiter of issues presented to the Commission. This was an important goal of ours in revising the cable horizontal ownership rules last October,[4] as well as our broadcast ownership rules in August.[5] I commend this approach and remain committed to it.

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[1] *In the Matter of the Applications of Shareholders of CBS Corporation, and Viacom, Inc., For Transfer of Control of CBS Corporation and Certain Subsidiaries, Licensees of KCBS-TV, Los Angeles, CA, et al*., 15 FCC Rcd 8230 (2000).

[2] See, *e.g*., 47 U.S.C. Sections 214(a), 310(d).

[3] According to that test, the Commission will evaluate whether an applicant has met its burden of proof that the transfer will advance the public interest by considering the following factors:

1) Whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision;
2) Whether the transaction would result in a violation of Commission rules;
3) Whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of the Communications Act or other statutes; and
4) Whether the merger promises to yield affirmative public interest benefits.

[4] Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits, 14 FCC Rcd 19098 (1999).

[5] *Review of the Commission's Regulations Governing Television Broadcasting; Television Satellite Stations Review of Policies and Rules*, 14 FCC Rcd 12903 (1999).

I would argue, however, that importation of the four-part public interest test as an overlay to the application of specific rules that already address identified harms makes the rules less clear in a way that is detrimental to the public interest. In cable and broadcast regulation, for example, we have an extensive and comprehensive set of structural rules whose goal is the redress of myriad harms to the public interest. As the industry prepares to comply with these extensive rules, and structure business decisions around them, they deserve the benefit of certainty as to how these rules are going to be applied. The public deserves the benefits of knowing the ground rules we will use to evaluate mergers as well.

Rote application of the test implies that even if you were to comply with the rules specifically designed to address the harms at issue, we may still find that the activity proposed would "frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of the Communications Act or other statutes." Such an approach, I believe, subsumes the rules and puts too much weight on our more ambiguous "public interest" authority. That authority is meant to complement, not override, existing rules. In addition, it adds a layer of uncertainty that makes the application of even the clearest of our rules a vague and ambiguous process. In circumstances where we have a rule that addresses issues raised by a merger, I would apply the rule and find that the public interest is satisfied.

As a result, I concur in today's decision.

**CONCURRING STATEMENT OF COMMISSIONER GLORIA TRISTANI**

In the Matter of Applications for Consent to the Transfer of Control
*Of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*

As with its approval of the CBS-Viacom merger, the Commission has once again failed to consider seriously the significant impact that an AT&T-MediaOne combination could have on the diversity of media voices. By focusing primarily on technical compliance with our rules, the Commission has not sufficiently analyzed whether the proposed transaction will undercut a fundamental purpose of the Communications Act -- maintaining independent sources of news and information.[1]

The importance of television to the democratic process cannot be overstated. A majority of Americans still rely on television as their primary source of electoral information.[2] How information is presented – or not presented – has the power to shape public opinion and debate. Under today's decision, AT&T could come into compliance with the horizontal ownership rules by divesting its interest in small cable systems that lack significant programming assets rather than divesting its interest in Time Warner Entertainment (TWE) and/or Liberty Media. If AT&T chooses that course, it will own, or have an attributable interest in, 22 of 59 (37%) of the basic cable services that have reached the requisite number of subscribers – 15 million – to achieve viability.[3] AT&T will also own, or have an attributable interest in, 3 of the top 4 premium channels (HBO, Cinemax and Starz!).[4]

This level of concentration should not be looked at in a vacuum. Rather, it must be examined in the context of the number of independent voices to which consumers have access on television. The major television broadcast networks – ABC/Disney, CBS/Viacom, News Corp./Fox and NBC – own 18 of the 59 basic cable networks that have reached the 15 million-subscriber mark, and 1 of the top 4 premium services (Showtime). Thus, when combined with a merged AT&T-MediaOne, five companies will control 40 of 59 (68%) of the currently viable cable networks, the top four premium cable channels, as well as all of the major broadcast networks. Adding Time Warner's non-TWE programming to the mix means that six companies will control at least 47 of 59 (80%) of today's viable cable programming services.

[1] See, e.g., Communications Act, 47 U.S.C. § 257 (1996) (noting that one of the "policies and purposes" of the Communications Act favors a "diversity of media voices"); Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 567 (1990) ("Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission*");* Turner Broadcasting System, Inc. v. FCC, 512 U.S. 622, 663 (1994) ("[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (quoting United States v. Midwest Video Corp., 406 U.S. 649, 668 n. 27 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945))).

[2] *Arkansas Ed. Television Commission v. Forbes*, 523 U.S. 666 (1998).

[3] *See* Paul Kagan Assocs., *Cable Network Television Household Growth 1998-1999*, *Cable Program Investor*, at 4-5 (Mar. 17, 2000); Liberty Media Corp., *Affiliate List*, http://www.libertymedia.com (last updated 1999); Time Warner Inc., *10-K for the year ended 12/31/99*, at I-3 to I-7; AT&T/Media One Application. *See also* Horizontal Ownership Third Report and Order, 14 FCC Rcd 19098 (1999) at para. 41.

[4] *See* Cahners Business Information, *Cablevision Database: Network Subscribers*, www.cablevisionmag.com/database/db_pay.asp (last updated 2000).

Thus, as a result of this merger, five or six large companies may end up controlling the vast majority of what American see and hear on television. True, our horizontal rules are designed to ensure that *theoretically* a new programmer would not need carriage on the largest cable systems in order to survive, but we cannot ignore the reality of what Americans are actually watching. This is not simply an academic exercise, but a matter of critical importance to our democracy. As the New York Times recently stated:

> The rules that govern concentration in telecommunications are unlike antitrust laws. In the bottled water and sneaker markets, mergers are allowed unless antitrust authorities can prove that added concentration would do harm. If the authorities err, and permit excessive consolidation, about all that happens is that the price of bottle water rises and innovation slacks off in the design of sneakers. But in telecommunications, the threat that concentration might shut off sources of information is profound.[5]

It's time for the FCC to realize that we are not dealing with bottled water or sneakers, but with the dissemination of news and information -- the lifeblood of our democratic way of life. In the past few years, the number of entities that control what people watch on television has dwindled to alarming levels. With this decision, the FCC has failed yet again to stem this crisis and ensure a robust marketplace of ideas.

[5] *The F.C.C.'s Ownership Rules*, The New York Times at A24 (June 2, 2000).