More precisely, "[i]n many cases, discriminatory conduct by an incumbent LEC in its region affects competitors in areas both inside and outside the incumbent's region."[97] For example, if a DSL provider offers service to a business with an office in D.C. and San Francisco, if Verizon were to use its bottleneck local facilities to discriminate against that DSL provider in D.C., it also would have a negative effect on that DSL provider's reputation making it more likely that the business would instead turn to a provider that could offer high quality service in *both* D.C. and San Francisco.[98] Verizon, however, today would not reap the "benefit" of that discrimination because it does not provide DSL service in San Francisco. But post-merger it would, because NorthPoint provides DSL services in San Francisco. Thus, by increasing Verizon's "footprint" the merger allows it to "internalize" better the benefits of discriminating in-region where it controls bottleneck facilities.

Spillover effects also exist because of the presence of fixed costs.[99] A DSL provider's entry into various areas entails fixed costs such as R&D, marketing and regulatory approvals and that must be covered by the sum of the DSL provider's "area-specific profits."[100] If, for example, Verizon makes it less profitable to compete in DC, "less money is available to cover these fixed costs" and the DSL provider is less likely to provide service in other cities or to be as

---

[97] *Bell Atlantic-GTE Merger Order* ¶ 177.

[98] Because in the Internet age it is easy for consumers in one region to learn of problems that a DSL provider is having in another region, this analysis applies broadly and not just simply to multi-location business customers.

[99] *Ameritech-SBC Merger Order* ¶ 192.

[100] *Id.*

effective.[101] Again, by expanding the number of markets in which Verizon's provides DSL service, the merger increases Verizon's incentive to use its bottleneck facilities to discriminate against its in-region DSL provider competitors.

As the Commission has also found, such advanced service providers are particularly vulnerable to an incumbent LEC's anticompetitive use of its bottleneck facilities. Incumbent LECs have both the incentive and ability to "discriminate against companies that depend on the incumbents[] for evolving types of interconnection and access arrangements necessary to provide new services to customers"; "to limit or control the development of new services"; and "to forc[e] competitors to provide [advanced] services identical to the incumbent's . . . [and thereby] stifle competitors' ability to innovate."[102]

III. THE PROPOSED MERGER, WHICH THREATENS SIGNIFICANT HARM TO PRESENT AND FUTURE COMPETITION, PROMISES NO LEGITIMATE BENEFITS.

Applicants assert three public interest benefits of their merger. Applicants claim: (1) that the proposed merger would promote Internet competition; (2) that the proposed merger would promote competition for delivery of video programming; and (3) that the "new" affiliate that Applicants would create enhances the Commission's ability to "benchmark."[103] Each is entirely fabricated, and none can withstand review.

---

[101] *Id. See also Bell Atlantic-GTE Merger Order* ¶ 183 ("Economies of scale and scope, and network effects imply that when incumbent LECs weaken a competitive service in one region, this weakens it in other regions as well.").

[102] *Id.* ¶¶ 181-82.

[103] Public Interest Statement at 3-13.

A. The Proposed Merger Would Not Promote Internet Competition.

Applicants' principal claimed benefit is that "the underlying transaction will enable the "new" NorthPoint to deploy broadband access services aggressively to the mass market nationwide, including in the service territories of the other regional Bell companies, and to compete effectively against the closed cable systems who today control approximately three-quarters of the residential broadband access business."[104] Applicants' merger, however, would do little to promote Internet competition.

First and foremost, the fundamental premise of Applicants' position is simply untrue. Although the well-documented efforts of Verizon and other incumbent LECs to insulate their high-priced ISDN services from competition certainly delayed their deployment of DSL,[105] DSL is now available to more homes than cable modem services.[106] And since incumbent LECs began deploying DSL in earnest (once competition from cable became a reality), DSL sales are soaring and growing much faster than cable modem services. Analysts expect DSL to have *more* subscribers than cable in the very near future.[107] Indeed, some analysts predict that DSL

---

[104] *Id.* at 1. *See also id.* at 3 (claiming that "closed cable systems . . . dominate the broadband access business").

[105] *See Broadband Kingdom* at 23 (noting that BOC reluctance to roll-out xDSL service was "driven by several factors: lack of competition driving the Bells to innovate and invest; concern about the dilutive aspect of undertaking a major network enhancement along with new marketing efforts, and fear of cannibalizing existing high-profit services").

[106] David Kravets, *DSL Throttles Modems in 1Q, Cable World*, at 8 (May 29, 2000) (2000 WL 12302944); Lawrence J. Magid, *Small Business Tools/Software, Technology and New Products to Help Your Company The ABCs of DSL: Options Abound in Fast Internet Access Service*, Los Angeles Times, at C6 (June 28, 2000).

[107] *DSL's Sneak Attack* (Feb. 1, 2000) (http://www.business2.com/content/magazine/investing/2000/02/01/10431) (discussing International Data Corporation's prediction that number of DSL households in the United States will "balloon from the current 330,000 to 9.3 million – passing right by the 9 million cable-modem homes projected for 2003"). *See also Trouble Ahead for Cable Modems* (Jan. 4, 2000)

(continued . . .)

subscribers will surpass cable modem subscribers in the next year.[108]

Verizon in particular cannot seriously claim that it needs to be bigger to compete against cable modem and other high speed providers. Verizon already has a much larger – and more concentrated – footprint than any cable company. AT&T, the largest MSO, has about 16 million subscribers in actually owned and operated systems, with an additional 20 million subscribers attributed to it by current Commission rules. (The latter figure includes Time Warner's and Cablevision's subscribers.) By contrast, Verizon has over 95 million switched access lines.[109]

Tellingly, Applicants make no attempt to identify any scale or scope economies that Verizon does not already enjoy today. That failure alone is fatal.[110] Since Verizon began deploying DSL in earnest in response to high speed offerings by cable companies, its offering has thrived.[111] In its most recent quarter, Verizon itself added 71,000 new DSL subscribers,

---

(. . . continued)
(http://www.zdnet.com/filters/printerfriendly/0,6061,5018876-10,00) ("particularly heightened competition" from DSL will be main reason for major projected slowdown in cable modem subscribers); *Broadband is Coming at High Speed* (Sept. 13, 2000) (http://www.pcworld.com/pcwtoday/article/0,1510,15035,00) (Cable's share of residential broadband access is expected to shrink to 42 percent by the end of 2004 due to DSL competition). This widespread and growing availability of DSL to end users does not, however, cure the anti-competitive harms to UNE-based local telephone competition that would result from the merger. *Cf.* Section II.A, *supra*.

[108] *Report: DSL Will Overtake Cable Next Year* (July 6, 2000) (http://www.telekomnet.com/news_isp/7-6-00_dsl_cable.asp).

[109] *See* Verizon-NorthPoint Merger Press Release.

[110] *Bell Atlantic-NYNEX Merger Order* ¶¶ 168-71 (refusing to credit unsubstantiated claims of scale economies).

[111] For example, Verizon has dropped prices on its DSL "Bronze Plus" service from $49.95 to $39.95, and has offered free modems to new residential and small business customers who sign one-year contracts in order to attract and retain new subscribers. *Verizon Cuts Prices* (Sept. 6, 2000) (http://www.zdnet.com/filters/printerfriendly/0,6061,2625007-02,00).

bringing its total to 220,000, a 47 percent increase over its first quarter 2000 results.[112] Verizon President and CEO Ivan Seidenberg has announced that the company is on-track to reach its year-end target of 500,000 DSL lines.[113] Verizon also announced it was installing approximately 2,500 DSL lines each day in August 2000, double its June rate.[114]

To the extent Applicants are suggesting that cable providers' early decision to take the risks necessary to bring high speed access to consumers has given them some insurmountable edge that could necessitate extraordinary efforts to help DSL providers (such as turning a blind eye to an anticompetitive merger), that claim has been rejected by the Commission.[115] Applicants' claim is also contradicted by their own expert. In addition to summarizing the numerous DSL competitors to cable, Dr. Hazlett makes clear that other technologies are poised to offer significant broadband competition.[116] For example, Dr. Hazlett notes that LMDS operators already "offer a variety of broadband services to small and medium-sized businesses in

---

[112] *Verizon Communications Announces Second Quarter Results*, Cambridge Telecom Report (Aug. 14, 2000).

[113] *Id.*

[114] *Id.* The other super-BOC, SBC, has likewise enjoyed great success with its DSL product. Indeed, SBC is so confident of DSL's potential that it has embarked upon a $6 billion initiative to upgrade its local networks to make DSL available to nearly all its subscribers, including deploying 25,000 "neighborhood gateways" that will bring DSL service to rural and suburban consumers that it previously could not reach. *See SBC to Invest $6 Billion in DSL Upgrade*, TR Daily (Oct. 18, 1999); *SBC Launches $6 Billion Initiative to Transform it into America's Largest Single Broadband Provider*, Business Wire via Dow Jones (Oct. 18, 1999).

[115] *See* Memorandum Opinion and Order, *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd. 3160, ¶¶ 92-96 (1999); *AT&T-MediaOne Merger Order* ¶¶ 116-28 (same). *See generally* Deployment of Advanced Telecommunications Capability: Second Report (August 2000).

[116] *See* Hazlett Dec. ¶¶ 31-33.

several metropolitan areas";[117] that "DBS is rapidly improving its broadband capabilities";[118] and that Sprint and WorldCom are already deploying extensive fixed-wireless networks.[119] Finally, Applicants' suggestion collides with the recent announcement by StarBand that this fall it will begin offering high-speed two-way Internet access services via satellites.[120]

Second, the public does not benefit from Verizon's commitment to fund NorthPoint's build out plan because, absent this merger, Verizon would have both the identical incentives and the identical resources to focus on its *existing* data subsidiary. Indeed, absent this merger, Verizon might satisfy the out-of-region entry condition imposed by the *Bell Atlantic-GTE Merger Order* by *expanding* its existing advanced services operations into other territories thereby increasing competition, rather than acquiring an existing provider and increasing concentration instead.

Third, NorthPoint has already made a substantial investment in Verizon's region (primarily in collocating DSLAMs in Verizon central offices and other related facilities) and these facilities simply parallel Verizon's existing investment. What Verizon must mean, therefore, when it says it will invest in the "new" NorthPoint, is simply that it will shut down one of the other operations within Verizon's territory while expanding service outside of Verizon's territory. The critical difference from a competitor and consumer perspective, however, is that in Verizon's territory, two competing networks will be reduced to one if the merger is consummated.

---

[117] *Id.* ¶ 31

[118] *Id.* ¶ 32.

[119] *Id.* ¶ 33.

Applicants' claim that the merger provides Verizon with "access to approximately 1,000 central offices in the largest markets outside of its local exchange territory, where it will compete with the other regional Bell companies,"[121] is equally unavailing. This "out-of-region" entry benefit is the very same public interest "benefit" that Bell Atlantic and GTE repeatedly assured the Commission would be realized if only the Commission allowed their merger into Verizon. According to Verizon, *that* was the merger that was to "finally enable one of the Bell companies to attack the local markets of the other Bells on a widespread and effective basis . . . with its local telephone facilities broadly dispersed throughout the United States, *GTE is the 'enabler'* that will allow Bell Atlantic to attack other Bell company strongholds across the country."[122] The promised out-of-region entry included voice and advanced data services.[123] Either Bell Atlantic and GTE misstated the procompetitive effects of the merger that created Verizon in order to obtain approval by this Commission, or having achieved the scale they claimed they needed in order to execute their much touted out-of-region strategy, they in fact will not do so other than by further mergers.

Applicants are likewise wrong in claiming that allowing Verizon to acquire NorthPoint's "OSS2000" system and other NorthPoint expertise is in the public interest.[124] To the contrary,

---

(. . . continued)

[120] *See* http://www.gilat2home.com/index1.html.

[121] Public Interest Statement at 5-6.

[122] Public Interest Statement of Bell Atlantic and GTE at 1 (filed in CC Docket 98-184) (emphasis added).

[123] *Id.*, Declaration of John Curran ¶ 2.

[124] *See* Public Interest Statement at 6.

this would be profoundly *anti*competitive. As noted in a recent report the OSS2000 is "an automated electronic bonding initiative that provides seamless order entry between the ILECs (three currently), the company, and an ISP network service provider."[125] That is why, from the ISP's and public's perspective, it is so important to keep NorthPoint out of the clutches of a dominant incumbent LEC DSL provider like Verizon that has already demonstrated that it is willing to manipulate its OSS for anticompetitive purposes.[126]

That this concern is well-founded can be demonstrated by what is now occurring in New York. Throughout the past six months, Verizon has effectively blocked the development of systems and processes that would allow for the beginnings of competition for voice and data service combinations.[127] And even after the Commission announced its ruling to compel Verizon to agree to support line splitting so that customers could receive voice/data service combinations from carriers other than Verizon itself, Verizon still has not developed the OSS interfaces necessary to support efficient ordering and processing of "UNE-P" orders with DSL.[128]

Finally, Applicants make a "failing firm" defense by asserting that the merger is necessary for NorthPoint to meet its need for working capital in order to execute its current business plan.[129] This claim is belied by the above-discussed press statement issued by NorthPoint the very same day the merger was announced, which reported that NorthPoint's

---

[125] Ing Barings Report at 29.

[126] *See* http://www.fcc.gov/eb/LoTelComp/271.html

[127] Huels Dec. ¶¶ 10-11.

[128] *Id.* ¶ 11.

[129] Public Interest Statement at 5.

business was thriving and its revenues were growing strongly. Thus, even if NorthPoint needed capital to continue expanding, there can be little doubt that NorthPoint, a leader with a market capitalization over a billion dollars in a rapidly growing business,[130] could raise substantial sums from financial markets and other private or public investors. And even if Applicants could show that the necessary capital could only be raised from a merger, there are numerous potential merger partners for NorthPoint that do not raise the same anticompetitive problems as this merger.

B. This Merger Is Not Necessary To Ensure Competition For The Delivery Of Video Programming.

Applicants contend that the public would benefit from the merger because the "new" NorthPoint would provide competition to "dominant" cable systems in the delivery of video programming.[131] Applicants claim that the merger would facilitate the deployment of NorthPoint's "unique streaming technology" by "giving the company the scale necessary to attract the most sought after video content providers on competitive terms."[132] Every predicate in Applicants' argument is flawed.[133]

---

[130] *See* http://www.quicken.com/investments/snapshot/?symbol=NPNT.

[131] *See* Public Interest Statement at 9; Hazlett Dec. ¶¶ 11-20.

[132] Public Interest Statement at 9.

[133] Relatedly, Applicants claim that "cable operators have already recognized the video streaming is a threat, which explains why they have imposed limits on the use of streaming video over their networks." Public Interest Statement at 9. That claim too is false. As AT&T has explained, because of the shared nature of bandwidth on cable systems, video streaming could threaten to degrade the speed at which all cable subscribers are able to access the Internet. Ex Parte Reply Comments of AT&T Corp. and MediaOne Group, Inc. at 28 (Dec. 14, 1999) (filed in CS Docket No. 99-251). Moreover, there is no evidence that cable operators are, in fact, blocking streaming video, and competition provides powerful incentives not to do so except as necessary to protect the quality of service provided to all customers. Finally, and most fundamentally, AT&T has "committed to developing and negotiating appropriate technical and commercial mechanisms for managing bandwidth usage associated with video streaming on a

(continued . . .)

Even if Applicants were correct that there was little competition in distribution of video programming, Applicants' claim that a merger is necessary to give them the ability to offer streaming video is false. Applicants' own expert contradicts their claim that NorthPoint controls "unique" technology – Professor Hazlett concedes that NorthPoint's "Blast" service is in fact "similar to Qwest's."[134] NorthPoint's service would simply use caching to locate content as close a possible to the DSL consumer in order to facilitate fast and uninterrupted download times.[135] Not only is there nothing revolutionary or proprietary about such an approach – which means, of course, nothing prevents Verizon from using it independent of this merger – there are numerous "content delivery" companies that deal directly with content providers and use their own facilities to replicate bandwidth-heavy content close to customers.[136]

Providers of this "content delivery service" are proliferating and prospering. Akamai, with a market capitalization of approximately $25 billion,[137] has over 2000 servers in place[138] – sufficient capacity to serve peak demand of the world's top 25 web sites combined.[139] Likewise, Digital Island, Inc., Sun Microsystems, Inc., and Inktomi Corp. have entered into an agreement whereby Digital Island will deploy up to 5,000 Sun servers equipped with Inktomi's Traffic

---

(. . . continued)
shared network, and for ensuring the availability of streaming video to customers who desire it." *AT&T-MediaOne Merger Order* ¶ 121 & n.349.

[134] Hazlett Dec. ¶ 14 n.11.

[135] *Id.*

[136] *See generally* Luc Hatlestad, *Caching Goes Ca-Ching*, Red Herring, at 200 (Feb. 2000).

[137] *See* http://www.upside.com/texis/mvm/print-it?387e33d00&t+/texis/mvm/people/story.

[138] *See* http://www.akamai.com/service/network.html.

[139] *See* http://www.akamai.com/news/press537.html.

Server and Content Delivery Suite. Xcelera.com's subsidiary Mirror Image Internet obtained a $32 million infusion from Hewlett Packard to accelerate its deployment of caches at key Internet exchange locations around the world and provide content delivery services to e-businesses.[140] Mirror Image has entered into a joint venture with AboveNet Communications Inc., and will have access to Above Net's unique network model that enables it to offer "one hop" connectivity and network performance to its clients.[141] And Adero has deployed over 40 "nodes" to provide content delivery service world wide.[142]

In all events, Applicants' fundamental premise is false; there is already significant competition for distribution of video programming due to the explosive growth in the deployment of DBS and other MVPD technologies. Non-cable MVPDs now serve more than 20 percent of all multichannel video subscribers nationwide.[143] DBS providers have deployed alternative systems that can serve cable customers throughout the nation, already have 13 million subscribers,[144] and are adding 3 million new subscribers a year.[145] DirecTV and EchoStar alone

---

[140] *See* http://www.infoworld.com/articles/el/xml/99/12/21/99122elmirror.xml; http://www.mirror-image.com/news/pressrelease.cfm?news?item_id=31.

[141] *See* http://www.mirror-image.com/news/pressrelease.cfm?news_item_id=35. At each of AboveNet's Internet exchange facilities, content and service providers connect to each other in a LAN environment and then directly connect to the rest of the Internet through an extensive network of more than 300 private and public peering agreements with ISPs and backbone providers worldwide. This architecture can reduce the multiple network hops information often takes to reach its final destination on the Internet. The resulting "one-hop" network is highly redundant and is designed to deliver superior network performance. *Id.*

[142] http://www.adero.com/index.html.

[143] *See The Kagan Media Index*, at 8 (July 31, 2000).

[144] According to recent statistics in *The Kagan Media Index*, there are 17 million non-cable subscribers (or 20 percent of the 84.9 million MVPD subscribers), including: 13.4 million DBS subscribers, 1.3 million backyard dish subscribers, 1.5 million SMATV subscribers, and 0.8 million wireless cable subscribers. *See The Kagan Media Index*, at 8 (July 31, 2000).

have achieved a combined 15.8 percent national share of all MVPD subscribers[146] and rank today as the third and sixth largest MVPDs, respectively, in terms of just current subscribers.[147] They are each far larger than any cable MSO in terms of reach and population of potential subscribers. The DBS subscriber base is growing at a percentage rate that is 20 times as fast as cable (and more than half of new DBS subscribers are former cable customers).[148]

Last year, Congress in the Satellite Home Viewer Improvement Act[149] removed what was the last remaining regulatory obstacle to widespread acceptance of DBS – the inability of DBS providers to retransmit their subscribers' local broadcast stations.[150] A recent study conducted by the satellite industry found that the availability of local broadcast channels contributed significantly to new subscriber growth for DBS in the first quarter of this year.[151] Indeed, as noted, DBS last year added almost 3 million new subscribers – more than in any previous year.

(. . . continued)

[145] *Cable, DBS, Other Video Players Square Off Over Regulations*, Communications Daily (Sep. 12, 2000).

[146] *See The Kagan Media Index*, at 8 (July 31, 2000).

[147] *See* Sixth Annual Report, *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, 15 FCC Rcd. 978, Table C-3 (1999) ("*Sixth Annual Competition Report*")

[148] *See Sixth Annual Competition Report* ¶¶ 20, 70 (comparing cable's 1.8 percent subscriber growth rate to the 39 percent growth rate for DBS); *Pay-TV War Between DBS And Cable Heats Up*, Communications Daily (Aug. 23, 2000) (estimating half of new DBS customers former cable customers).

[149] Pub. L. No. 106-113, § 1000(9), 113 Stat. 1501 (1999) (enacting S. 1948, including the Satellite Home Viewer Improvement Act of 1999).

[150] Other recent developments have further smoothed the ability of DBS to offer services to customers. *See, e.g.*, 47 U.S.C. § 303 note (preempting local zoning regulations impinging on the ability of homeowners to deploy satellite dishes).

[151] *See* Press Release of Satellite Broadcasting & Communications Association, *New Study Shows Satellite TV Growth Coming At The Expense Of Cable* (June 28, 2000).

Although the two major DBS providers' offerings are ubiquitously available to consumers nationwide, they are not the only alternative distribution networks to cable systems. There has also been a recent increase in cable "overbuilds" – particularly from recently deregulated electric utilities that have entered the MVPD market and are looking for ways to use their existing rights-of-ways and infrastructure to generate additional revenues. The convergence of broadband voice, video and data services and the proliferation of new competitive telecommunications companies made possible by the Act appears to be changing the economics of overbuilds. The potential ability to offer – and receive revenues from – telephone, and high-speed Internet services, as well as traditional cable offerings, appears to be providing new incentives to "overbuild."[152] This is why these new competitors have raised "billions of dollars of equity,"[153] and are deploying broadband facilities on a large-scale basis.

Applicants' claim that they need to increase the size of their DSL subscriber base in order to be able to purchase "to attract the most sought after video content providers on competitive terms"[154] is also unavailing. If cable operators were in a position to demand unreasonable terms from video programmers, then those programmers would be delighted to bypass cable operators by distributing programming via the Internet. In other words, if programmers had no alternative distribution networks, DSL providers would, regardless of their size, have no problems securing

---

[152] The CEO of Digital Access, Inc., a company that intends to compete against the incumbent cable operator in Indianapolis, puts it nicely: "What makes this work, and what didn't make it work five years ago, is that instead of competing for a market share of a $35 average cable bill, you are competing for the opportunity to take $100 to $150 out of the home for voice, video and data." *Comcast Has a Battle on its Hands*, Philadelphia Inquirer (June 11, 2000).

[153] Donaldson, Lufkin & Jenrette, *Cable Operators: Who Wants To Borrow a Billion?*, Media and Entertainment, at 7 (April 18, 2000)

[154] Public Interest Statement at 9.

video programming because programmers would be anxious to play DSL providers off against cable operators and thereby obtain more favorable carriage agreements.

C. The "New" Affiliate That Applicants Would Create Is No More Separate Than Verizon's Existing Advanced Services Affiliate.

In the *Bell Atlantic-GTE Merger Order*, the Commission required Verizon to provide advanced services such as DSL through a "separate affiliate."[155] Remarkably, in their Public Interest Statement, Applicants assert that a *benefit* of this transaction is that Verizon will continue to adhere to these existing separate affiliate conditions after it acquires NorthPoint and merges its operations with Verizon's existing advanced services affiliate.[156] But simply agreeing to comply with a condition already imposed cannot be said to be a benefit of this merger.

Recognizing that, Applicants go on to assert that the new affiliate they intend to create will be sufficiently "separate" that the new affiliate will prevent Verizon from using its bottleneck facilities to discriminate against rival advanced service providers and act as a "benchmark" to help detect such market power abuses.[157] Applicants claim that the new advanced services affiliate improves upon the prior separate affiliate in three respects. First, Applicants state that the new affiliate will not be wholly owned by Verizon but will have

---

[155] *Bell Atlantic-GTE Merger Order* ¶ 260.

[156] Public Interest Statement at 11.

[157] *Id.* at 11-13. Applicants must be claiming that the existing structural safeguards are inadequate to prevent market power abuses, otherwise, by definition, there would be no public interest benefit to the "most separate" affiliate applicants proposed. On that fundamental issue, applicants and AT&T are in agreement. AT&T has repeatedly argued that the separate affiliate requirements imposed in the *Bell Atlantic-GTE Merger Order* (and the *Ameritech-SBC Merger Order*) are insufficient to prevent incumbent LECs' from exercising market power in favor of their advanced services affiliates. *See, e.g.*, Comments of AT&T Corp. on Proposed Conditions (July 19, 1999) (filed in CC Docket No. 98-141). Rather than needlessly repeat those arguments, AT&T hereby incorporates them by reference.

minority shareholders.[158] Second, Applicants state that the minority shareholders will have some board representation and Verizon will nominate some "independent" board members.[159] Finally, Applicants state that many existing NorthPoint managers will continue with the new affiliate, that they will continue to use the NorthPoint brand, and that they will maintain NorthPoint's existing headquarters as the headquarters of the new affiliate.[160]

To the extent that existing separate affiliate structure is inadequate, Verizon should have a duty to take corrective actions independent of this merger. But the "improvements" Applicants propose here do nothing to correct the existing deficiencies with Verizon's advanced services affiliate. The logic behind the Commission creating a separate affiliate requirement in the first place was that Verizon could use its control over critical last mile facilities to discriminate in favor of its DSL services.[161] Indeed, the Commission expressly found that the merger of Bell Atlantic and GTE enhanced both their ability and incentive to engage in such discrimination.[162] The Commission hoped that by creating a separate advanced services affiliate, Verizon would have to treat its affiliate the same as other advanced services providers and that this would prevent Verizon from acting on its incentives to use its bottleneck facilities anticompetitively.[163]

Although not spelled out in the Public Interest Statement, Applicants seem to be arguing that making the affiliate more "independent" of Verizon somehow lessens either the incentive or

---

[158] Public Interest Statement at 11.

[159] *Id.*

[160] *Id.* at 11-12.

[161] *Bell Atlantic-GTE Merger Order* ¶ 260-72; *Ameritech-SBC Merger Order* ¶¶ 363-68.

[162] *Bell Atlantic-GTE Merger Order* ¶¶ 173-85, 260.

[163] *Bell Atlantic-GTE Merger Order* ¶¶ 260-62; *Ameritech-SBC Merger Order* ¶¶ 363-68.

ability of Verizon to discriminate in favor of the affiliate. But, even if Verizon had *no* representation on the new advanced services affiliate's board, it continues to have a large *economic* interest in the affiliate and, hence, continues to have a powerful incentive to discriminate in ways that advance the affiliate's business.

Further, whether or not Verizon has control over the advanced services affiliate's board has no impact on Verizon's ability to use its bottleneck facilities to discriminate against rival DSL providers and give the affiliate preferred treatment. Thus, for example, no vote of the advanced services affiliate's board is necessary for Verizon to give the affiliate preferential collocation arrangements. Nor does Verizon need to consult with the affiliate's management to deny rivals unique arrangements that would allow them to provide new, innovative services that Verizon and its affiliate do not provide. The additional "safeguards" Applicants propose could only be relevant if it were the advanced services affiliate – rather that Verizon – that controlled bottleneck assets.

Finally, and most fundamentally, Applicants miss the point that the advanced services affiliate directly *benefits* when Verizon discriminates against the affiliate's rivals. Thus, even if Verizon had no role in running the new affiliate, there would be no reason for the affiliate's management to try to stop Verizon from discriminating in its favor (which, of course, they have no ability to do). To the contrary, even truly "independent" management would have incentive to enter into preferential arrangements with Verizon and to encourage Verizon to impede the affiliate's rivals.

CONCLUSION

For the foregoing reasons, the Joint Application should be denied.

David L. Lawson
C. Frederick Beckner III
SIDLEY & AUSTIN
1722 Eye Street, NW
Washington, DC
(202) 736-8088

Mark C. Rosenblum
Lawrence J. Lafaro
Aryeh S. Friedman
295 North Maple Avenue
20006 Room 3252G3
Basking Ridge, NJ 07920
(908) 221-8410

Howard J. Symons
James J. Valentino
Tara M. Corvo
MINTZ, LEVIN, COHN, FERRIS,
GLOVSKY and POPEO, P.C.
701 Pennsylvania Avenue, NW
Suite 900
Washington, DC 20004
(202) 434-7300

Attorneys for AT&T Corp.

October 2, 2000

CERTIFICATE OF SERVICE

I, Margo B. Adams, hereby certify that on this 2nd day of October, 2000, I caused true and correct copies of the Public and/or Private** version of the foregoing Opposition of AT&T Corp. to be hand-delivered to the following persons:

Magalie Roman Salas**
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Janice Myles
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., 5-B145
Washington, D.C. 20554

James Bird
Office of the General Counsel
Federal Communications Commission
445 12th Street, S.W., 8-C818
Washington, D.C. 20554

Office of Public Affairs
445 12th Street, S.W., Room CY-0314
Washington, D.C. 20554

Jessica Rosenworcel**
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., 5-C221
Washington, D.C. 20554

CeCi Stephens*
Policy and Program Planning Division
Common Carrier Bureau
Federal Communications Commission
445 12th Street, S.W., 5-C140
Washington, D.C. 20554

ITS
445 12th Street, S.W., CY-B402
Washington, D.C. 20554

Michael K. Kellogg**
Kellogg, Huber, Hansen,
Todd & Evens, P.L.L.C.
1301 K Street, N.W., Suite 1000W
Washington, D.C. 20005

Gary M. Epstein**
Latham & Watkins
1001 Pennsylvania Ave., N.W., Suite 1300
Washington, D.C. 20004

Margo B. Adams

* Served one (1) paper copy and one (1) diskette copy