Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)
	)
Applications for Consent to the	)
Transfer of Control of Licenses	)
	)
Comcast Corporation and	)
AT&T Corp., Transferors,	)
	)
To	)
	)
AT&T Comcast Corporation,	)
Transferee	)

APPLICATIONS AND PUBLIC INTEREST STATEMENT

DESCRIPTION OF TRANSACTIONS, PUBLIC INTEREST SHOWING,
AND RELATED DEMONSTRATIONS

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February 28, 2002

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DESCRIPTION OF TRANSACTIONS,
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Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") have entered into an Agreement and Plan of Merger dated December 19, 2001 (the "Agreement") under which Comcast and AT&T have agreed to combine Comcast and AT&T's broadband business.[1] Under the Agreement, AT&T Broadband Corp., a holding company for AT&T's broadband division ("AT&T Broadband"), will be spun-off to AT&T's shareholders. Upon completion of the spin-off, both Comcast and AT&T Broadband will merge with and become wholly-owned subsidiaries of AT&T Comcast Corporation ("AT&T Comcast"). Upon completion of these mergers, Comcast shareholders will receive one share of the corresponding class of AT&T Comcast stock for each of their shares of Comcast stock, and AT&T shareholders will receive in the aggregate for their shares of AT&T Broadband common stock 1.235 billion shares of AT&T Comcast Class A stock.

Pursuant to the Agreement, AT&T and Comcast are each filing simultaneously herewith a series of applications seeking the consent of the Federal Communications Commission ("FCC" or "Commission"), in accordance with sections 214 and 310 of the Communications Act of 1934, as amended (the "Communications Act" or the "Act"),[2] to

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[1] A copy of the Agreement is attached as Appendix 1. A copy of the preliminary proxy statement/prospectus for the transaction, which was filed with the Securities and Exchange Commission ("SEC") on February 11, 2002, is available at: <http://www.cmcsk.com/EdgarSummary.cfm?CIK=22301&FID=950123-02-1150>.

[2] 47 U.S.C. §§ 214, 310.

the transfer of control of FCC licenses and authorizations controlled by their wholly- or majority-owned subsidiaries to AT&T Comcast.[3]

As shown below, the proposed merger, including the transfer of control of these licenses and authorizations, will comply with the Act and the Commission's rules and will promote the public interest by accelerating facilities-based competition in the provision of broadband services, including but not limited to digital video, high-speed Internet service, and local telephony. The Applicants respectfully request that the Commission grant its consent to these transfers.

I. INTRODUCTION AND SUMMARY

The proposed merger of Comcast and AT&T Broadband creates a unique opportunity to accelerate the development and deployment of facilities-based broadband services. By uniting two companies with remarkably complementary assets, this merger will bring more digital services and features, to more Americans, more quickly. The transaction will yield demonstrable benefits in investment, innovation, competition, and new and improved video, data, and voice services, with no offsetting detriments. The merger will therefore serve the public interest.

The merger of Comcast and AT&T Broadband will accelerate the deployment of facilities-based high-speed Internet service and other broadband services. Speeding the deployment of these advanced services not only will benefit consumers by offering them

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[3] The FCC authorizations that are the subject of these transfer of control applications include licenses in the cable television relay service, satellite transmit and receive earth station service, land mobile radio service, common carrier and non-common carrier-point-to-point microwave service, wireless communications service, and international and domestic common carrier service. A list of the licenses to be transferred is attached as Appendix 2.

innovative video and other services, but also will benefit the nation at large by stimulating productivity gains and economic growth. Although Comcast has substantially finished the upgrades to its cable plant necessary to offer broadband services, AT&T Broadband's systems require significant additional investment in order to complete needed upgrades. Due to economies of scale and scope and cost savings resulting from the merger, those upgrades can and will be implemented faster, bringing more benefits to more consumers sooner, than would be possible without the merger. Scale and scope efficiencies and cost savings generated by this merger will also increase the incentive and ability of the merged firm to invest in, and assume the risks associated with, developing and deploying a variety of innovative services and features, such as high definition television ("HDTV"), video-on-demand, and other interactive television ("interactive TV") services.

The proposed merger will also bring benefits in the form of long-awaited local telephone competition, particularly for residential customers. AT&T Broadband brings to this merger its considerable expertise and experience in the provision of circuit-switched telephony over cable plant. It currently markets cable telephony to more than seven million households and serves more than 1.5 million lines. Significantly, Comcast has no comparable offerings, and the merger will thus permit Comcast to accelerate its entry into this market. Although providing local telephone service in competition with incumbent carriers involves substantial business risk, AT&T Comcast will be better equipped to confront that risk than either company could alone, because of the complementary assets and expertise of Comcast and AT&T Broadband. Importantly, this competition will be *facilities-based*, thus allowing the merged company to offer residential customers a broader range of differentiated services and features that are far less dependent on access to the incumbent's facilities on economically-viable terms and conditions.

The proposed merger also will deliver benefits to consumers by stimulating the production and delivery of local and regional programming. Comcast is widely recognized as an industry leader in the development of successful, high-quality programming geared to regional and local markets. The merger will enable AT&T Comcast to extend this expertise to areas in which AT&T Broadband has significant clusters. The merger will also allow the two companies to draw on their respective expertise in community outreach efforts, including initiatives to connect classrooms to the Internet.

The proposed merger will not result in any violations of the Communications Act or the Commission's rules. In particular, it bears emphasis that AT&T Comcast will serve less than 30% of the nation's multichannel video programming distribution ("MVPD") customers, the national limit that was reversed and remanded in *Time Warner II*.[4] That calculation does not include the customers served by the Time Warner Entertainment ("TWE") and Time Warner Inc. ("TWI") cable systems. AT&T, with the full support of Comcast, is firmly committed to completing the sale of its limited partnership interest in TWE. If that divestiture is not completed prior to closing, the Applicants are prepared to take the steps that may be necessary to insulate the interest (and thus render it non-attributable) under the Commission's rules.

[4] *See Time Warner Entm't Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner II*"), *cert. denied sub nom. Consumer Fed'n of Am. v. FCC*, 122 S. Ct. 644 (2001).

The proposed merger will have no anticompetitive effects in any relevant market. Comcast and AT&T Broadband provide services to consumers in different local markets and, therefore, their union will not affect horizontal concentration in any relevant market. Further, the combined entity will not have either the ability or incentive to exercise buyer or seller market power in any relevant market. In addition, AT&T Comcast is fully committed to negotiating mutually beneficial service agreements with Internet service providers ("ISPs") so that its cable customers will have a choice of ISPs. Both AT&T Broadband and Comcast have conducted trials to explore the issues associated with multiple ISP arrangements. Now, each Applicant is actively (and independently) negotiating to reach commercial agreements with unaffiliated ISPs. Indeed, Comcast recently announced that it has executed an agreement with United Online that will provide Comcast's customers in Indianapolis and Nashville with access to United's ISP service, with the potential to roll-out this offering to other Comcast cable systems with the concurrence of both Comcast and United Online.

In summary, the proposed merger of Comcast and AT&T Broadband offers real and substantial benefits to consumers. It will enable AT&T Comcast to accelerate costly investments required to equip cable systems with the capability to deliver and improve high-speed Internet and other broadband services. The proposed combination will also promote facilities-based local telephone competition, particularly for residential customers, and will hasten the development and deployment of other advanced competitive services. The merger will not have any adverse competitive effects in any relevant market.

II. DESCRIPTION OF THE TRANSACTIONS

A. The Proposed Transactions

The AT&T Comcast transaction will occur in several steps and will be subject to the receipt of the necessary governmental approvals and the satisfaction or (to the extent permissible) waiver of other conditions specified in the Agreement, such as required shareholder approvals.

AT&T will (i) assign and transfer to AT&T Broadband all of the assets of AT&T's broadband cable and cable telephony business and (ii) cause AT&T Broadband to assume all of the liabilities of AT&T's broadband business (as reflected in the AT&T Broadband Group balance sheet dated as of December 31, 2000 or as otherwise specified in the Separation and Distribution Agreement between AT&T and AT&T Broadband[5]) that are not at such time assets or liabilities of AT&T Broadband or an AT&T Broadband subsidiary.

AT&T will then spin-off AT&T Broadband to the shareholders of AT&T. Immediately following this spin-off, Comcast and AT&T Broadband will each merge with different, wholly-owned subsidiaries of the newly-created AT&T Comcast Corporation.[6] Following these steps, AT&T Comcast will be the new public company parent of AT&T Broadband and Comcast, both of which will be wholly-owned

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5 A copy of the Separation and Distribution Agreement is attached as Appendix 3.

6 Specifically, Comcast will merge into Comcast Acquisition Corp., a newly formed, wholly-owned subsidiary of AT&T Comcast, with Comcast surviving. AT&T Broadband will merge into AT&T Broadband Acquisition Corp., also a newly-formed, wholly-owned subsidiary of AT&T Comcast, with AT&T Broadband surviving. In addition, at the option of AT&T Comcast, AT&T Broadband Holdings, LLC, which will be a wholly-owned subsidiary of AT&T Comcast, will become an intermediate holding company between AT&T Comcast and AT&T Broadband. Appendix 4 contains a chart that depicts the ownership structure of AT&T Comcast.

subsidiaries of AT&T Comcast. As a result, AT&T Comcast will consist of both companies' cable systems, both companies' interests in programming services, as well as other assets owned by the two companies which are described in detail in section II.B below.

Each Comcast shareholder will receive one share of the corresponding class of AT&T Comcast stock for each share of Comcast stock. Each AT&T Broadband shareholder will receive a number of shares of AT&T Comcast stock determined pursuant to a formula described in the Agreement. Upon completion of the AT&T Comcast transaction, current AT&T shareholders will own shares representing approximately 53% of AT&T Comcast's economic interest and, depending upon which of two alternative capital structures is implemented according to the terms of the Agreement, either approximately 58% or 54% of AT&T Comcast's voting power.[7] Current Comcast shareholders (except for Sural LLC) will own shares representing approximately 41% of AT&T Comcast's economic interest and, depending upon which of the alternative capital structures is implemented, either approximately 3% or 7% of AT&T Comcast's voting power. Sural LLC, which is controlled by Brian L. Roberts, the President of Comcast, and which today holds shares representing approximately 86.7% of Comcast's voting power, will own shares representing approximately 1% of AT&T

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[7] AT&T Comcast will have one of two capital structures upon completion of the transaction that will affect the level of voting power held by various categories of shareholders described above: a "Preferred Structure" that will be implemented if the holders of the Comcast Class A common stock, voting as a single class, and the holders of Comcast Class A common stock and Comcast Class B common stock, voting as a single class, approve the Preferred Structure, or an "Alternative Structure" that will be implemented if the holders of the Class A stock, voting as a single class, do not. The final ownership percentages at the time the transactions are closed are subject to various adjustments as set forth in the Agreement.

Comcast's economic interest and a non-dilutable 33% of AT&T Comcast's voting power upon completion of the transaction.[8] In addition, as the result of an exchange of Quarterly Income Preferred Securities ("QUIPS") it currently holds in AT&T, Microsoft Corporation ("Microsoft") will own approximately 5% of AT&T Comcast's economic interest, but less than 5% of AT&T Comcast's voting power.[9]

Upon completion of the transactions described above, the AT&T Comcast board will consist of 12 members, at least seven of whom will not be employees or officers of AT&T Comcast. AT&T and Comcast will each designate five members to the AT&T Comcast Board and will jointly select two additional members, each of whom will not be an employee or officer of AT&T Comcast. Brian L. Roberts, currently President of Comcast, will become Chief Executive Officer and President of AT&T Comcast, and C. Michael Armstrong, currently Chairman of the Board and Chief Executive Officer of

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[8] Sural LLC, however, may exercise its right to merge into AT&T Comcast immediately preceding the closing, in which event Brian L. Roberts would directly own shares conferring a non-dilutable 33% share of AT&T Comcast's voting power.

[9] Comcast, AT&T and AT&T Comcast have entered into an exchange agreement ("QUIPS Exchange Agreement," a copy of which is attached as Appendix 5), with Microsoft under which, at the time of the AT&T Broadband spin-off, Microsoft will exchange the QUIPS for a number of shares of AT&T Broadband common stock that will be converted in the merger into 115 million shares of AT&T Comcast common stock, representing the percentage of AT&T Comcast's economic interest and voting power that is described above. (The QUIPS Exchange Agreement was originally entered into by Comcast and Microsoft, with AT&T and AT&T Comcast subsequently becoming parties to this agreement pursuant to an Instrument of Admission entered into in December 2001.) AT&T Comcast has agreed that, from completion of the QUIPS exchange transaction, until its fifth anniversary, if AT&T Comcast offers a high-speed Internet service agreement to any third party on any of its cable systems, then it will be obligated to offer an Internet service agreement on non-discriminatory terms with respect to the same cable systems to Microsoft's Internet service provider, The Microsoft Network. In addition, as discussed further in section VI.D below, Microsoft and Comcast Cable Communications, Inc. ("Comcast Cable"), a wholly-owned subsidiary of Comcast, have agreed to a binding term sheet which provides that the parties will conduct a trial during 2002 of an interactive TV platform, including set-top box middleware.

AT&T Corp., will become Chairman of the Board of AT&T Comcast. Brian L. Roberts, in consultation with C. Michael Armstrong, will select the other members of senior management of AT&T Comcast.

B. The Merger Applicants

1. Comcast

Comcast began offering cable service in 1963 in Tupelo, Mississippi, with just over 1,000 cable customers. Under the leadership of the Roberts family,[10] Comcast has since experienced extraordinary growth in the scale and scope of its business. The company has developed and deployed a range of new technologies and programming services as part of its ongoing efforts to improve the services it offers to its customers. As a result, Comcast has established an industry-standard-setting reputation for technology leadership, strong financial performance, and operational efficiency.[11] This has made Comcast a top-tier provider of cable television service, high-speed Internet service, electronic commerce, video programming, and other services to millions of customers. Comcast's aggregate revenues for the year ending December 31, 2001, were $9.7 billion.

Comcast - Cable Systems. Comcast offers its customers a full array of traditional video products, including local broadcast stations; national, regional, and local cable programming channels; premium movie channels; and pay-per-view services. As

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[10] Ralph J. Roberts is currently Comcast's Chairman and Brian L. Roberts is its President.

[11] This has been recognized in many ways, including the company's selection as Operator of the Year in 2000 by *Cablevision Magazine*. *See* Karen Kessler, *Kudos for Comcast* (Sept. 21, 2000), *available at*: <http://www.cedmagazine.com/cedailydirect/0009/cedaily000921.htm>.

of December 31, 2001, Comcast's wholly-owned cable systems served 8.471 million customers in 26 states and passed approximately 13.8 million homes. Over the past six years, Comcast has invested over $5 billion – including $1.85 billion in 2001 alone – to upgrade its cable plant by installing fiber optics and other technological improvements. As the result of these upgrades, 95% of Comcast's customers are currently served by systems that provide bandwidth of 550 MHz or higher, and over 80% of its customers by systems that provide bandwidth of 750 MHz or higher.

Comcast served 2.3 million digital cable customers at the end of 2001, or 27% of its cable customer base. Comcast's digital cable service is now available to nearly 99% of Comcast's customers. Comcast generally offers two digital video services. The original digital service, Comcast Digital Basic, offers roughly 170 channels of multiplexed premium channels, premium pay-per-view channels, and commercial-free, compact disc-quality, music channels. Comcast's Digital Plus service, also referred to as the "digital tier," adds roughly 40 more channels similar in format to those traditionally found on the cable programming service tier (*e.g.*, BBC America, Discovery Civilization, and other commercially supported services). Comcast began making HDTV service available to more than 1.3 million customers in Pennsylvania, New Jersey, and Delaware in November 2001, and plans to launch this service in additional markets. Comcast is also investing significant resources to test and deploy various other services on its state-of-the-art cable systems, including Internet-based home security systems, and personal video recording.

In addition to its wholly-owned systems, Comcast owns a 30% general partnership interest in Clearview Partners, which operates cable systems in Maryland and

Pennsylvania that serve a total of approximately 10,500 cable customers. A chart listing Comcast's cable systems, their ownership structure, and total number of customers, is attached as Appendix 6.[12]

Comcast – Interactive TV Services. Comcast offers a number of services that can be characterized as "interactive TV services."[13] For example, Comcast's digital cable service provides customers with electronic programming guides with improved navigation functionality and parental controls. In addition, having conducted video-on-demand trials in four markets in 2001, Comcast now offers video-on-demand service on cable systems passing over three million homes in 16 markets. Comcast's video-on-demand service offers a variety of content, delivered in real-time over the cable plant, and permits customers to enjoy the kind of functionalities they have come to expect from videocassette recorders and digital videodisc ("DVD") players: stop, pause, fast-forward, and rewind. Comcast has to date acquired access to several hundreds of hours of programming, including new movies and "library" titles (*e.g.*, classic movies or select children's programming). Video-on-demand offerings may also include individual shows that were previously exhibited on certain cable networks.

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[12] Comcast also owns 15% of the common stock of the Susquehanna Cable Company ("Susquehanna Cable") and 18% of the common stock of each of Susquehanna Cable's principal operating subsidiaries. Susquehanna Cable and its subsidiaries serve approximately 192,000 cable customers. Comcast's interest in Susquehanna Cable and its subsidiaries is not attributable because Susquehanna Media Company is a single majority shareholder with an 85% voting interest in Susquehanna Cable and a 70% voting interest in each of its operating subsidiaries. Comcast's interest is therefore exempt from attribution under the Commission's single majority shareholder exemption. *See Time Warner II*, 240 F.3d 1126 (vacating FCC decision to eliminate single majority shareholder exemption from cable attribution rules).

[13] As set forth in section VI.D below, interactive TV services are still in an early stage of evolution characterized by innumerable risks and uncertainties, and the "market" does not lend itself to ready definition.

Comcast is also exploring other offerings that combine traditional video programming with interactive functionalities, including advanced home shopping and digital video recording features.[14] Comcast has conducted interactive TV trials, including trials with Wink Interactive Television in Chesterfield and Prince William Counties, Virginia, and with Liberate Interactive Television in other markets. These interactive services permit customers to access program-related information such as weather, sports updates, and trivia; to play two-way games; to make purchases instantly; and to switch languages dynamically, simply by clicking the remote control during an enhanced program or advertisement.

Comcast – Internet. Comcast High-Speed Internet Service is available to 10.4 million households, or approximately 75% of the homes that Comcast's cable systems pass. At the end of 2001, Comcast High-Speed Internet Service had over 948,100 customers. Comcast's Internet service was previously provided in partnership with Excite@Home, which had substantial contractual responsibility for the maintenance and operation of many of the facilities that connected Comcast's headend equipment to the public Internet. Excite@Home filed for bankruptcy protection in September 2001, and Comcast has now transferred all of its high-speed Internet customers to a network that is owned and managed by Comcast. Comcast dedicated substantial resources to ensure that this transfer was achieved with minimal disruption of customer service.[15]

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14 Comcast has conducted trials with TiVo and Replay TV for digital video recording features.

15 Comcast spent over $140 million in transitioning customers to its own network. Moreover, subsequent to Excite@Home's bankruptcy filing, Comcast helped ensure a smooth transition by reaching an agreement with Excite@Home to continue to support high-speed Internet service for its customers until February 28, 2002. Comcast also hired more than 2,000 additional telephone representatives and sent a series of mailings to each

Comcast's new owned and managed Internet network will provide improved network reliability and customer service. It offers enhanced features such as easier sign-on, self-help, and self-installation, as well as Comcast-managed customer support for both general assistance and specialized assistance for individual problems. The new network will also enable Comcast to provide web-based remote e-mail access; customers will be able to retrieve their web-based e-mail remotely from anywhere they can access the Internet, a feature not available for Excite@Home users. Each customer will also have improved storage capabilities, including 25 megabytes of web-based storage space for large files like MP3s and photographs.

Comcast – Telephony. Comcast provides telephone services to approximately 41,500 customers (for a total of approximately 46,000 lines) in a number of its cable franchise areas in Maryland, Virginia, and Michigan, continuing the telephone operations associated with certain cable systems it acquired during the past several years.[16]

In addition, Comcast Business Communications ("CBC"), a wholly-owned subsidiary of Comcast, offers integrated broadband communications services to over 4,000 business and governmental customers primarily in Pennsylvania, New Jersey, Delaware, Maryland, and Michigan. CBC's services include exchange access, private line, and other services. CBC also provides competitive local exchange service, in the form of high-capacity trunk service, to several dozen small and medium-sized business

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customer to provide information and answer questions about the transition. Despite these considerable efforts, several unforeseen issues nonetheless arose during the transition. Those issues have since been addressed and resolved as they have arisen.

16 All of these telephony customers are located within Comcast's cable footprint.

customers. Comcast's cable telephony and CBC's business offerings also include long distance service, provided primarily on a resale basis.

Comcast has taken a leadership role in developing cable-delivered IP telephony, and is currently conducting "soft switch" lab tests of this technology at its Philadelphia headquarters. In addition, it supports CableLabs, a non-profit research and development consortium of cable television system operators. Comcast President Brian L. Roberts is currently the Vice Chairman of CableLabs and served a term as Chairman. Mark Coblitz, Senior Vice President of Strategic Planning at Comcast, is the industry chairman of CableLabs's PacketCable project,[17] and other Comcast executives have participated actively in this and other CableLabs initiatives.

Comcast – Video Programming. Comcast owns attributable interests in four programming networks that focus on local and regional news, sports, and entertainment. These include: (1) "cn8, The Comcast Network" (100% ownership interest), which provides original local and regional news, public affairs, sports, and family-oriented programming in Pennsylvania, New Jersey, Delaware, and Maryland and which has been nominated for dozens of Mid-Atlantic Emmy Awards; (2) Comcast SportsNet (78%), a regional sports network and frequent Mid-Atlantic Emmy winner serving the Philadelphia area; (3) Comcast SportsNet-MidAtlantic (100%), a regional sports network serving the mid-Atlantic region from Baltimore to portions of North Carolina; and (4) Comcast Sports Southeast (72%), a regional sports network serving Alabama, Arkansas,

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17 This initiative seeks to develop interoperable interface specifications for delivering advanced, real-time multimedia services, including IP telephony, over two-way cable plant. *See* Home Page, CableLabs PacketCable, *available at:* <http://www.packetcable.com> (last visited Feb. 16, 2002).

Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.[18]

In addition to these local and regional programming services, Comcast owns attributable interests in seven national programming networks: (1) QVC, Inc. ("QVC") (58%), a national cable programming network and electronic retailer that provides TV- and web-based shopping in the United States, the United Kingdom, Germany, and Japan;[19] (2) the Discovery Health Channel (20%); (3) E! Entertainment (40%); (4) The Golf Channel (91%); (5) iN DEMAND (11%) (a pay-per-view programming cooperative); (6) The Outdoor Life Network (100%); and (7) style. (40%). Comcast owns a 94% interest in a new original programming network called the G4 Network, scheduled to launch in April 2002, which will provide entertainment, news, and information for video game enthusiasts.[20]

Comcast – Other Holdings. Comcast owns a majority interest in two major-league sports franchises (the Philadelphia Flyers National Hockey League franchise and the Philadelphia 76ers National Basketball Association franchise), Philadelphia's two

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[18] As described in section IV.C below, Comcast also produces "Comcast Newsmakers," "Comcast Local Edition," and other short-form public affairs programs that appear twice hourly on channels carrying CNN Headline News.

[19] QVC offers live retail shopping 24 hours a day, seven days a week. Its state-of-the-art e-commerce web site (QVC.com) offers a retail inventory of approximately 100,000 products. *See* 2000 Comcast Commerce Highlights, *available at*: <http://www.cmcsk.com/annuals/cards.pdf> (last visited Feb. 22, 2002). Last year, QVC shipped more packages than Lands' End, L.L. Bean, and Amazon.com combined. It ranked number one in the online general merchandising category in Forrester's August 2000 and January 2001 PowerRankings. *Id.*

[20] Comcast also owns a non-attributable, approximate 2% voting interest in the Florida News Channel. In addition, it owns a 5.3% general partnership interest in MusicChoice, a provider of commercial-free, compact disc-quality music channels to MVPD systems.

major indoor arenas, and several minor league baseball and hockey teams. In addition, Comcast owns a majority interest in Broadnet, which offers high-speed Internet and e-business services in Europe. Comcast is also a limited partner in Comcast Interactive Capital, a venture capital fund that invests in companies focused on interactive, infrastructure, and Internet technologies and applications.[21]

2. AT&T Broadband

AT&T Broadband is a wholly-owned subsidiary of AT&T Corp. AT&T Corp. currently provides a broad range of communications services through three separate business units: AT&T Consumer Services, AT&T Business Services, and AT&T Broadband. AT&T Comcast will acquire the assets of and services provided by AT&T Broadband, while the assets of and services provided by AT&T Consumer Services[22] and

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[21] *See* Home Page, Comcast Interactive Capital, *available at:* <http://www.civentures.com> (last visited Feb. 16, 2002).

[22] AT&T Consumer Services provides interstate and intrastate long distance communications services to approximately 60 million residential customers throughout the continental United States and provides, or joins in providing with other carriers, communications services to and from Alaska, Hawaii, Puerto Rico, and the Virgin Islands. AT&T Consumer Services also provides international communications services to and from virtually all nations and territories around the world. These consumer communications services include inbound and outbound domestic and international long distance service, calling card services and transaction-based services, such as operator-assisted calling services, directory assistance, prepaid phone cards, voice store and forward messaging services, and accessible communications service for deaf and hearing impaired customers. AT&T Consumer Services also provides local calling resale and wholesale telephony offerings through an unbundled network elements platform, as well as dial-up Internet service through AT&T WorldNet Service. In addition, AT&T Consumer Services offers combined long distance and local services in selected locations and is developing a multi-service platform, the AT&T WorldNet High Speed Service, based upon digital subscriber line ("DSL") technology, for combined voice, data and other broadband services.

AT&T Business Services[23] will be retained by AT&T Corp.

AT&T Broadband is a leading provider of cable television service, cable Internet service, and cable telephony service. AT&T Broadband also has limited video programming interests, and is conducting trials of interactive TV and other services.[24] Each of these lines of business is described in more detail below.

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[23] AT&T Business Services offers a variety of global communications services to over four million customers in 60 countries and 850 cities worldwide, including large domestic and multi-national businesses, small and medium-sized businesses, and government agencies. These business services include business local, long distance, international, and toll-free voice services. AT&T Business Services also offers data and Internet services, including private line services, special access services, and data and IP services such as Frame Relay and Asynchronous Transfer Mode services. AT&T Business Services also provides various managed networking services and outsourcing solutions, including enterprise networking services (which enable specific business applications like e-mail, VoIP, order entry systems, and employee directories; secure remote access intranet and extranet solutions with controlled access; and use of Intelligent Content Distribution Services to accelerate delivery of Internet), Web services (hosting services through a managed environment of network, server, and security infrastructure, including application performance management, database management, hardware and operating system management, storage services, and managed security and firewall services), high availability and security services (high-end integrated solutions to ensure continuous operation of critical business processes, including business continuity and disaster recovery services, information technology, work center, and risk management/business continuity analysis, planning and operational capabilities), as well as wholesale transport services.

[24] AT&T Broadband has entered into four principal network services agreements with AT&T: (1) a Master Carrier Agreement that reflects the market-based rates, terms and conditions on which AT&T Business Services will, *inter alia*, sell long distance services to AT&T Broadband for resale, terminate traffic outside of AT&T Broadband's service area, and provide "administrative services" for internal AT&T Broadband usage, (2) a Local Network Connectivity Services Agreement, pursuant to which AT&T Business Services will, *inter alia*, provide to AT&T Broadband transport, switching, feature functionality, operational engineering, maintenance, purchasing, installation, systems, support services and other functions to support AT&T Broadband's local exchange, intraLATA toll and exchange access telephony offerings, (3) a Master Facilities Agreement that permits AT&T to use AT&T Broadband's existing fiber facilities and to lease new fiber facilities constructed by AT&T Broadband for AT&T, and (4) an Interconnection and Intercarrier Compensation Term Sheet that specifies the terms of interconnection of the parties' networks and of compensation for the exchange of local traffic and the origination and termination of interexchange traffic by one party for the

AT&T Broadband – Cable Systems. AT&T Broadband offers its customers a full array of traditional video products, including local broadcast stations; national, regional, and local cable programming channels; premium movie channels; and pay-per-view services. In 2001, AT&T Broadband's capital expenditures to upgrade plant and deploy advanced services amounted to $3.26 billion, and as of December 31, 2001, approximately 76% of AT&T Broadband's plant had been upgraded to at least 550 MHz and 59% had been upgraded to at least 750 MHz. In 2001, AT&T Broadband earned $7.8 billion in cable distribution revenues.[25]

AT&T Broadband generally divides its interests in cable systems into three categories: (1) owned and operated systems (of which AT&T Broadband is the 100% owner); (2) consolidated systems (in which AT&T Broadband has a greater than 50%, but less than 100%, interest, and which are consolidated for financial reporting purposes); and (3) non-consolidated systems (in which AT&T Broadband has a 50% or less interest). A chart listing all of AT&T Broadband's cable systems, their ownership structure, and total number of customers, is attached as Appendix 7.

Owned and Operated and Consolidated Systems. As of December 31, 2001, AT&T Broadband's owned and operated cable systems served approximately 13.44 million customers. AT&T Broadband's consolidated systems served approximately

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other. In addition, AT&T Broadband and AT&T have entered into a High Speed Internet Services Binding Term Sheet that reflects the rates, terms and conditions on which AT&T will provide managed IP layer services, support and maintenance, and specified subscriber functionalities (such as Internet search and navigation tools) to support AT&T Broadband in its provision of high-speed Internet services to its subscribers.

[25] *See AT&T Group Earnings Commentary - Fourth Quarter 2001* at 12-14 (Jan. 30, 2002) ("*AT&T Group Earnings Commentary*").

121,000 customers. Of the combined 13.56 million customers, approximately 3.5 million (or 26%) were digital cable customers.

Non-Consolidated Systems. AT&T Broadband's non-consolidated cable systems include investments in companies, joint ventures, and partnerships that provide cable, video programming, telephony, and high-speed Internet services similar to those described above. These investments include AT&T Broadband's limited partnership interest in TWE, which owns both cable systems and video programming services. AT&T Broadband's interest in TWE is described in section V.F below; as set forth in that section, the Applicants intend to have no attributable interest in TWE at and after the closing of their merger.

In addition to the TWE interest, AT&T Broadband's non-consolidated systems include the following key investments:[26]

- *Insight Midwest*. Insight Midwest is a Delaware limited partnership formed in 1999 to own and operate certain cable systems in Indiana. AT&T Broadband holds a 50% limited partnership interest, and Insight Communications holds a 50% limited and general partnership interest. The business of the partnership is managed by Insight Communications, as the general partner, although certain matters also require the approval of AT&T Broadband. Insight Midwest currently has approximately 1.2 million customers.

- *Texas Cable Partners*. Texas Cable Partners is a Delaware limited partnership formed in December 1998 to own and operate certain cable systems in Texas. The partnership is owned 50% by AT&T Broadband and 50% by Time Warner Entertainment-Advance/Newhouse Partnership, approximately two-thirds of which is owned by TWE. The general manager of Texas Cable Partners is Time Warner Cable, a division of TWE, although certain governance matters require the approval of the management committee, on which the Time Warner Entertainment-Advance/Newhouse Partnership and AT&T Broadband have equal representation. Texas Cable Partners currently has approximately 1.1 million customers.

[26] For a comprehensive list of all AT&T Broadband investments in non-consolidated systems, see the chart in Appendix 7.

AT&T Broadband's non-consolidated cable systems also include its ownership of shares representing a 4.98% voting interest in Cablevision Systems Corp. ("Cablevision"). Cablevision owns cable systems and provides video programming, telephony, and high-speed Internet services. By virtue of its interest in Cablevision, AT&T Broadband has an indirect interest in Rainbow Media Sports Holdings, Inc. ("Rainbow"), which is 77.1% owned by Cablevision, and which owns interests in a number of national and regional program services.[27] In separate recent offerings, AT&T Broadband sold approximately 19.15 million of its Cablevision NY Group Class A shares, and approximately 15 million of its Rainbow Media Group Class A shares.[28] As a result of these transactions, and giving effect to Cablevision's and Rainbow's super-voting Class B shares (AT&T Broadband owns no Cablevision Class B or Rainbow Class B shares), AT&T Broadband's voting interest in Cablevision is now 4.98%.[29] In addition, in a letter dated June 6, 2001, AT&T Broadband irrevocably and permanently waived its right under the Stockholders Agreement to nominate two directors to the

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27 NBC owns the other 22.9% of Rainbow. Rainbow's national program services include American Movie Classics, Bravo, Independent Film Channel, Mag Rack, MuchMusic USA, and Women's Entertainment. *See* Rainbow Media, *About Rainbow: Company Structure, available at*: <http://www.rainbow-media.com/about/company_struc_index.html> (last visited Feb. 22, 2002). Rainbow's regional program services include the Fox Sports Net services, MSG MetroGuide, MSG Metro Learning Channel, MSG Network, MSG Traffic and Weather, and News 12 Networks. *See id.*

28 The Rainbow shares are a tracking stock meant only to provide an indication of the value of the Rainbow programming assets and do not reflect an ownership interest separate from Cablevision.

29 All the Cablevision and Rainbow shares together have 696,222,649 total votes. AT&T Broadband's Cablevision and Rainbow shares together have 34,686,555 votes. Consequently, AT&T Broadband's voting interest equals 4.98% (*i.e.*, 34,686,555 ÷ 696,222,649 = 4.98%).

Cablevision Board of Directors.[30] The two directors AT&T had previously nominated to the Board resigned as of that same date. Because AT&T Broadband's interest in Cablevision is now below the 5% voting stock threshold, and because AT&T Broadband has no representation on the Cablevision Board (and no right to appoint a representative to the Board), Cablevision (and, therefore, Rainbow) are no longer attributable to AT&T Broadband under the Commission's cable horizontal attribution rules.

AT&T Broadband – Interactive TV Services. AT&T Broadband continues to experiment in the development and deployment of various services that might be called "interactive TV services."[31] AT&T Broadband currently provides an interactive program guide to its 3.5 million digital cable customers and is working with a variety of interactive TV companies to develop, test, and deploy a broad array of interactive services, including video-on-demand, digital video recorders, enhanced interactive content, e-mail, and Internet service through customers' TVs.

For example, with respect to video-on-demand, AT&T Broadband and Diva have conducted trials in Atlanta and Los Angeles, and AT&T Broadband recently launched initial deployments in Atlanta, Los Angeles, Pittsburgh, and San Francisco.[32] With respect to digital video recorders, AT&T Broadband and TiVo recently introduced

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[30] A copy of the letter is attached as Appendix 8.

[31] *See infra* section VI.D (discussing prematurity of attempting to define "interactive TV services").

[32] *See* Press Release, AT&T Broadband, *AT&T Broadband to Launch Video on Demand with DIVA* (Oct. 3, 2000), *available at:* <http://www.att.com/press/item/0,1354,3367,00.html>.

TiVo's digital video recorder to AT&T Broadband customers in select cities.[33] AT&T Broadband is also currently working with interactive TV companies such as WorldGate, Liberate Technologies, and Microsoft to develop interactive services that include, among other services, e-mail, TV-based Internet service, and customized interactive content.[34] In addition, AT&T Broadband and Liberate have entered into a non-exclusive agreement to develop and deploy interactive TV services to the 2,000 cable systems, serving 140 cable operators, that use AT&T Broadband's Headend In The Sky ("HITS") service.[35]

AT&T Broadband – Internet. AT&T Broadband has over 1.5 million high-speed Internet service customers. AT&T's Internet service is available to almost 15 million households, or approximately 61% of homes passed by AT&T Broadband cable

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33 *See* Press Release, TiVo, Inc., *AT&T Broadband and TiVo to Introduce Digital Video Recorders to Cable Customers* (Nov. 7, 2001), *available at:* <http://www.attbroadband.com/services/other/pressreleases/2001_11_07.html>.

34 *See* Press Release, WorldGate Communications, Inc., *AT&T Broadband to Launch WorldGate in Tacoma, Washington* (June 11, 2001), *available at:* <http://www.wgate.com/news/newsReleases/2001/0611.html>; Press Release, AT&T Broadband, *AT&T Broadband Clarifies Interactive Television Position* (Aug. 23, 2001), *available at:* <http://www.att.com/press/item/0,1354,3954,00.html>.

35 *See* Press Release, Liberate Technologies, *AT&T's HITS and Liberate Complete Milestone for Low-Cost ITV Services* (Aug. 22, 2001), *available at:* <http://press.liberate.com/archives/2001/082201_att_hits.html>. AT&T Broadband has also agreed to enter into arrangements with Liberty Media for interactive video services under one of two arrangements, at AT&T Broadband's election. Pursuant to a five-year arrangement, renewable for an additional four-year period, AT&T Broadband will make available to Liberty Media capacity equal to one 6 MHz channel to be used for interactive, category-specific video channels that will provide entertainment, information and merchandising programming. Alternatively, AT&T Broadband may enter into one or more mutually agreeable ventures with Liberty Media for interactive, category-specific video channels that will provide entertainment, information and merchandising programming. Each venture will be structured as a 50/50 venture for a reasonable commercial term, and will provide that Liberty Media and AT&T Broadband will not provide interactive services in the category(s) of interactive video services provided through the venture for the duration of such term other than through the joint venture. At this time, neither option has been pursued.

systems. Prior to its bankruptcy, Excite@Home maintained and operated many of the facilities that connected AT&T Broadband's headend equipment to the public Internet. In connection with the bankruptcy and shutdown of the Excite@Home network, AT&T Broadband invested substantial resources to provision a replacement network and to transition affected customers to the new network. AT&T Broadband's high-speed Internet service is considerably more robust as a result of these changes. In addition, AT&T Broadband is now undertaking to consolidate customers currently on the network built by the former "Road Runner" partnership onto the new network.[36] AT&T Broadband also plans to take a number of steps to enhance the attractiveness of its high-speed Internet service offerings. In particular, AT&T Broadband plans to expand its current product line to include additional features such as home networking and remote e-mail access.

AT&T Broadband – Telephony. AT&T Broadband is an industry leader in cable-delivered mass market local telephony. AT&T Broadband's investment in and deployment of circuit-switched cable telephony technology have enabled it to offer a competitive, facilities-based alternative to the incumbent LECs' telephone services using the same hybrid fiber-coaxial network that supplies AT&T Broadband's video service.

AT&T Broadband currently markets cable telephony service to approximately seven million households in 16 markets, and has over one million customers (or 14.8% of its marketable homes). In the past year, AT&T Broadband added almost one-half million new cable telephony customers, increasing its customer base by over 100%.

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[36] Pursuant to its consent decree with the Department of Justice, AT&T Broadband has divested its interest in Road Runner (acquired as a result of the MediaOne merger). *See infra* note 89.

Currently, AT&T Broadband offers cable telephony services in Atlanta; Boston; the San Francisco Bay Area; Chicago; Dallas; Denver; Hartford; Jacksonville; Pittsburgh; Portland, Oregon; Richmond; Seattle; Salt Lake City; St. Louis; southern California; and the Twin Cities. For 2001, telephony revenues were $495 million.[37] AT&T Broadband offers consumers a variety of options and calling plans with various price points. These options and calling plans range from basic single line service to multiple lines with full feature functionality.

AT&T Broadband – Video Programming. In the last year, AT&T Broadband has dramatically reduced its ownership of video programming services. First, on August 10, 2001, AT&T Broadband completed a tax-free spin-off of Liberty Media Corporation, which owns all of the assets attributed to the Liberty Group, including interests in a large number of video program services. Liberty Media Corporation is now an independent, publicly traded company, which is entirely separate from AT&T Corp. and AT&T Broadband and therefore no longer attributable to AT&T Broadband under the Commission's rules. Second, as noted, now that the Cablevision interest is no longer attributable to AT&T Broadband, the Rainbow video program services are also no longer attributable to AT&T Broadband. Third, last year, AT&T Broadband sold all of its interests in the Food Network, The Outdoor Life Network, Speed Channel, and The Sunshine Network.

[37] *See AT&T Group Earnings Commentary* at 14.

As a result of the foregoing transactions, AT&T Broadband now owns attributable interests in three national video program services[38] – E! Entertainment (10%); style. (10%); and iN DEMAND (44%) – and three regional services – Fox Sports New England (50%), New England Cable News (50%), and Pittsburgh Cable News Channel (30%).

Through its ownership interest in TWE, AT&T Broadband also has an interest in certain program services owned by TWE, including HBO, Cinemax, Comedy Central, and Court TV. As set forth in section V.F below, the Applicants intend to have no attributable interest in TWE at and after the closing of their merger.

3. Connecting Classrooms And Communities

From AT&T Broadband's technological and financial commitment to the Boys and Girls Clubs in the Northeast to Comcast's dedication in providing computers and Internet service to hundreds of schools, both companies have a long history of service in their local communities. AT&T Broadband and Comcast have put broadband technology to work for education.

In conjunction with the industry's Cable in the Classroom program, the companies deliver cable and Internet services to more than nine million students across the country. Today, for example, nine out of 10 schools in AT&T Broadband's service areas comprising 38 states receive more than 540 hours per month of commercial-free, educational programming. AT&T Broadband also provides more than one million students with access to high-speed cable Internet service.

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[38] AT&T Broadband also owns: (1) a *de minimis* interest (less than ¼ of 1%) in USA Networks, Inc.; and (2) an interest in "Odyssey Television," a documentary pay television service distributed in Australia.

As of year end 2001, over 1,200 schools and more than 250 public libraries were receiving free high-speed Internet service from Comcast, and over 8,500 schools received free video programming through Comcast's partnership with Cable in the Classroom. Another Comcast initiative, known as the Comcast Technology Academy, has provided free technology training to over 3,000 K-12 teachers since its launch in January 2001. The program, a partnership between the Comcast Foundation and Cable in the Classroom, began in Montgomery County, Maryland and is currently being expanded through the greater Washington, D.C. area. Comcast also continues to develop its ongoing service initiative, known as Comcast Cares Day, in which employees volunteer their time to complete a variety of neighborhood projects with schools and community organizations. In October 2001, over 6,100 Comcast employees in 26 states volunteered in over 120 projects, including a work day at Anacostia High School with over 400 employees from the Washington and Virginia region.

AT&T Comcast will take advantage of the best practices each company has to offer in continuing and enhancing its service to the community. It will, for example expand its Comcast Cares Day initiative to all AT&T Comcast states upon completion of the merger.

III. MERGER REVIEW STANDARDS

The Commission has stated that it will approve a transfer of control of authorizations and licenses connected with a proposed merger under sections 214(a) and 310(d) of the Act if, after weighing "the potential public interest harms of the merger against the potential public interest benefits," it concludes that, "on balance," the transfer "serves the public interest, convenience and necessity."[39] In assessing the potential public interest benefits of a proposed merger, the Commission "focuses on demonstrable and verifiable public interest benefits that could not be achieved if there were no merger."[40] The Commission's analysis of potential harms encompasses both an examination of potential anticompetitive effects and an inquiry into whether the transaction would violate the Act or the Commission's implementing rules, or otherwise substantially frustrate the Commission's implementation or enforcement of the Act.[41] The Commission has repeatedly stressed that a merger proceeding must focus on *merger-specific* harms (and benefits) and is not an open forum for airing pre-existing or industry-wide disputes.[42]

As set forth in sections IV and VI below, the proposed merger of Comcast and AT&T Broadband will generate substantial public interest benefits and no public interest harms. Moreover, as set forth in section V, the proposed merger will comply with the Commission's rules, including any limits on horizontal and vertical ownership that the

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39 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd 9816, ¶ 8 (2000) ("*AT&T-MediaOne Merger Order*").

40 *Id.* ¶ 154.

41 *Id.* ¶ 9.

42 *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations of Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, ¶ 6 (2000) ("*AOL-Time Warner Merger Order*") ("It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies of the Communications Act that flow from the proposed transaction – *i.e.*, harms and benefits that are 'merger-specific.' The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act.").

Commission may adopt, consistent with the D.C. Circuit's decision in *Time Warner II*, in the separate proceeding the Commission has initiated in light of that decision.[43] The Commission should consequently approve the merger and grant its consent to the transfer of control of the Applicants' licenses and authorizations to AT&T Comcast.

IV. THE MERGER WILL GENERATE SUBSTANTIAL PUBLIC INTEREST BENEFITS.

The merger of Comcast and AT&T Broadband will produce a host of substantial public interest benefits. The combination will create efficiencies and synergies that will allow AT&T Comcast to accelerate the availability of local telephony, digital video, high-speed Internet service, and other broadband services to millions of residential consumers in areas of 41 states. As demonstrated below, these benefits would not be achieved as broadly or quickly without the merger. This increase in facilities-based competition for each of these services will, as the Commission has recognized, provide important consumer benefits by creating choices in a range of services and accelerating competition and innovation for new advanced services and features.[44]

The Commission has previously recognized that cable mergers that bring together complementary assets and thereby create scale and scope efficiencies can greatly benefit the public by accelerating the deployment and availability of new cable-delivered

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[43] *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, 16 FCC Rcd 17312 (2001) ("*Horizontal Ownership FNPRM*").

[44] *See Extension of the Five-Year Build-Out Period For BTA Authorization Holders in the Multipoint Distribution Service*, 16 FCC Rcd 12593, ¶ 6 (2001); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶¶ 103-104 (1999) ("*UNE Remand Order*").

services.[45] In only two years, for example, the complementary assets and experiences of AT&T, TCI, and MediaOne have allowed AT&T Broadband to deploy local telephony and high-speed Internet services that are now marketed to millions of homes.

The merger will not only accelerate the development and deployment of facilities-based services to residential customers by AT&T Comcast – although that alone is of tremendous value to millions of consumers. AT&T Comcast's efforts will also provide a competitive spur to other entities, including incumbent telephone companies, nationwide direct broadcast satellite ("DBS") providers, and others. As the Commission has recognized, the existence of a strong and credible broadband alternative on cable has generated competitive responses in the form of accelerated DSL deployment by incumbent telephone companies,[46] and this proposed merger will only advance this trend.

A. The Merger Will Accelerate The Deployment Of Facilities-Based High-Speed Internet Service, Digital Video, And Other Broadband Services, Particularly To Residential Customers.

Comcast and AT&T Broadband both offer high-speed Internet services, serving a combined 2.5 million customers. The merger will enable AT&T Comcast to offer high-

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[45] *AT&T-MediaOne Merger Order* ¶¶ 7, 160; *see also Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control of Tele-Communications, Inc. to AT&T Corp.,* 14 FCC Rcd 3160, ¶ 147 (1999) ("*AT&T-TCI Merger Order*") (finding that the merger of AT&T and TCI would "create an entity that has incentives to expand its operations and provide facilities-based competition in the local exchange and exchange access markets, and will be able to do so more quickly than either party could alone").

[46] 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." Cable Services Bureau, FCC, *Broadband Today*: *A Staff Report to William E. Kennard, Chairman, Federal Communications Commission,* at 27 (Oct. 1999), *available at:* <http://www.fcc.gov/Bureaus/Cable/Reports/broadbandtoday.pdf> (footnotes omitted).

speed Internet service to more customers sooner and at increased levels of efficiency. By accelerating the deployment of new, robust broadband facilities and introducing innovative applications over these facilities, the proposed merger will substantially benefit consumers as well as stimulate productivity gains and growth in the U.S. economy.[47]

Ability To Finance Capital Expenditures. As noted, over 95% of Comcast's customers are served by systems with a capacity of at least 550 MHz, and over 80% are served by systems with a capacity of at least 750 MHz or greater. With these system upgrades, Comcast's high-speed Internet service is today available to the vast majority of the more than 13 million homes its systems pass. Although AT&T Broadband also has expended significant resources upgrading the former TCI and MediaOne systems, it has experienced a number of delays in its deployment plans as the result of rising capital costs and significant budget constraints related to its heavy debt load. Consequently, substantial additional investment still will be required to complete the upgrade of AT&T Broadband's systems.

AT&T Broadband's merger with Comcast will enhance significantly its access to the capital required to underwrite an aggressive plan for deploying new broadband services such as HDTV and video-on-demand to residential consumers over existing AT&T Broadband systems. Comcast is widely recognized for its proven ability to manage an accelerated program for upgrading its plant while maintaining its operating

[47] As a U.S. Department of Commerce report found, much of the economic growth of the late 1990s can be credited to productivity gains caused by the increased use of new data networks and other technological products. *See* Economics and Statistics Administration, Office of Policy Development, U.S. Department of Commerce, *Digital Economy 2000,* at 1-5, 28 (June 2000), *available at*: <http://www.esa.doc.gov/508/esa/pdf/DIGITAL.pdf>.

margins. It also enjoys a significantly stronger balance sheet than AT&T Broadband, with a ratio of debt to 2001 operating cash flow of less than 4 to 1, compared to AT&T Broadband's ratio of over 8 to 1. The Applicants estimate that the merged entity will have a first year combined debt to operating cash flow ratio of less than 5 to 1, representing a substantial improvement for AT&T Broadband. In addition, Comcast is currently generating high "free cash flow" from its operations (operating cash flow minus interest expenses, capital expenditures, and taxes), providing a significant non-debt source of funding for capital expenditures.

In addition, as set forth in the Declaration of Robert Pick ("Pick Declaration") attached as Appendix 9,[48] it is estimated that, within five years, the merger should result in synergies and efficiencies worth approximately $1.25 to $1.95 billion a year in increased Earnings Before Interest, Taxes, Depreciation, and Amortization ("EBITDA").[49] This estimate includes cost savings due to the elimination of corporate overhead costs and improved operating margins.[50] It also reflects the Applicants' belief that the merger will moderate their programming expenditures in comparison to costs

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[48] Mr. Pick is Senior Vice President, Corporate Development at Comcast, and has been directly involved in evaluating and estimating the synergies and efficiencies that will result from the merger.

[49] *See* Pick Declaration ¶ 7. In the course of calculating potential synergies and efficiencies from this merger, it was necessary to make certain simplifying assumptions and estimates, which inevitably inject a level of uncertainty into the analysis. Moreover, as AT&T Comcast integrates the operations of Comcast and AT&T Broadband, it may modify its plans for the launch and roll-out of services in light of the company's financial and operational performance and broader economic trends and developments. *Id.* ¶ 8.

[50] The Applicants estimate that such operating efficiencies should increase EBITDA by approximately $200-300 million a year after one to three years. *See id.* ¶¶ 25-28.

before the merger,[51] which will help offset the escalating programming costs they have faced in recent years.[52] Cost savings such as these, along with the other synergies and scale economies created by the merger that are described in the following sections, will enhance AT&T Comcast's ability to undertake the significant risks and costs in developing and deploying new, facilities-based services to customers.

Scale Economies. Scale economies should further buttress the combined company's ability to upgrade the AT&T Broadband systems and deploy new services to consumers. It is estimated that AT&T Broadband and Comcast collectively will spend approximately $5.5 billion in 2002 on capital expenditures items and, following the merger, AT&T Comcast will continue to incur capital expenditures.[53] AT&T Comcast should be able to obtain lower prices for many of these capital items as a result of the increased scale of its purchases.[54] Although the precise extent of this decrease cannot be

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[51] It is estimated that the merged entity should save $250-450 million a year in programming expenses. Where permissible under existing programming contracts, AT&T Comcast should be able to obtain the best rate of either AT&T Broadband or Comcast for AT&T Comcast's entire service area with respect to most programming contracts. AT&T Comcast may also be able to take advantage of volume discounts in certain circumstances that will help moderate (but not eliminate) the rate of increase in the growth of programming costs. *See id.* ¶¶ 18-21. At the same time, the proposed merger will raise no buyer market power concerns related to the purchase of video programming. *See infra* section VI.B.3.

[52] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, CS Docket No. 01-129, Eighth Annual Report ¶¶ 9, 184-85 (rel. Jan. 14, 2002) (FCC 01-129) ("*2001 Video Competition Report*").

[53] Pick Declaration ¶ 23.

[54] *Id*.

determined at this point, it is estimated that AT&T Comcast, over the next four years, should be able to save $200-300 million annually.[55]

More generally, the scale economies created by the merger will foster more efficient use of infrastructure (*e.g.*, by allowing for more efficient use of call centers), and provisioning, repair and maintenance (*e.g.*, by providing local/regional scale to support efficient, centralized truck rolls). The merger will also provide national scale that will allow the merged firm more efficiently to defray the enormous research, development, and testing costs associated with new services and features. This increased scale is particularly important to accelerate the development and testing of new interactive TV services, voice-enhanced data service, home networking and security, and other new, and as yet untested, broadband services.[56] In addition to increasing the merged firm's own incentives to make risky investments in such new services and technologies, the combination will create a larger player whose commitment to such services can be expected to accelerate investment and research by the many equipment manufacturers, software developers, and others that are critical to the successful development and deployment of such new services to consumers.

Other Synergies That Will Accelerate Deployment of Broadband Services. AT&T Broadband and Comcast estimate that their proposed merger should create synergies of $100-200 million in EBITDA annually within three years due to the combined company's greater ability to research, develop, and deploy enhanced and new products such as video-on-demand, interactive TV, HDTV, cable-based home security

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55 These benefits are not included in the estimated $1.25 to $1.95 billion in EBITDA noted above. *Id.* ¶ 7, 24.

56 *See, e.g., AT&T-MediaOne Merger Order* ¶ 183.

and networking systems, and e-commerce services.[57] As noted, its combined scale will accelerate implementation and adoption of new products by enabling AT&T Comcast to spread its costs over a larger customer base, thus reducing per-unit costs.[58] The new company will also continue to take a leading role in advancing the adoption of open technology standards in the industry.[59] Such standards create greater certainty for application developers, which promotes investment, and can foster competition among different technology and software developers, which promotes innovation.

The combined company expects to take advantage of other efficiencies as well. For example, the increased level of Internet traffic resulting from combining the two companies' broadband operations will allow AT&T Comcast to take advantage of volume discounts in buying Internet backbone services to transport customer Internet traffic. As noted, where possible, the merged companies can consolidate call centers and other centralized functions of their broadband operations. Additionally, the combined firm will be able to benefit from the particular expertise each has developed in the areas of electronic commerce and customer care. Comcast has gained valuable experience in customer care systems through its QVC operations. AT&T Broadband has developed experience in online customer service and provisioning, including its "e-care" customer care systems (which allow consumers both to order service and to obtain immediate

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[57] *See* Pick Declaration ¶¶ 13-17. This estimate depends, of course, upon actual performance of various new products in ongoing trials and, if launched, in the marketplace, as well as broader economic trends. *Id.* ¶ 17.

[58] *See id.* ¶ 16 (noting the economies of scale associated with implementing the systems and infrastructure necessary to deploy these new products in the combined company's service area).

[59] As explained in section VI.C below, the proposed merger will have no anticompetitive impact on any equipment market.

Web-based self-help) and e-mail, personal Web page, and news group expertise. Both companies' expertise with these innovations can be used by AT&T Comcast to achieve greater effectiveness and efficiencies in customer service.

In the longer term, the benefits of the proposed merger will be even more profound. Digital broadband is extremely versatile and will undoubtedly serve as a platform for many new broadband services and features, some that are anticipated today and others that are not yet anticipated (or possibly even imagined).[60]

In sum, AT&T Comcast will be able to accelerate the deployment of new broadband services to consumers. By way of example, Comcast has conducted trials in Sarasota, Florida, of a new home and family security service enabling customers to view from a remote location (*e.g.*, from their place of work), via a password-restricted Internet website, the presence in their homes of a family member requiring care such as a child or an elderly person. Similarly, activity in a home can be made accessible to remotely located security employees for regular monitoring to identify particular events such as a break-in or other emergency. The merged entity will be able to take advantage of the expertise gained by Comcast from these trials to accelerate the deployment to all its customers of those services that prove feasible and attractive.[61]

B. The Merger Will Promote Facilities-Based Local Telephone Competition, Particularly To Residential Consumers.

The Commission has twice recognized that the merger of an experienced telephony provider and a cable company with more limited telephony experience is

[60] *See*, *e.g.*, *AT&T-TCI Merger Order* ¶ 147 ("the operation of market forces is likely to yield efficiencies and consumer benefits in addition to those we anticipate here").

[61] Pick Declaration ¶ 15.

"likely to benefit consumers by enhancing the merged entity's ability to compete more effectively with incumbent local exchange companies . . . in providing facilities-based local telephony . . . to residential consumers."[62] AT&T Broadband's performance over the past two years has validated the FCC's vision. In the face of formidable technological, economic, and operational challenges, AT&T Broadband now markets cable telephony to approximately seven million households in 16 markets, has over one million customers (or 14.8% of its marketable homes with penetration rates reaching 30% in some communities), and continues to expand the availability of competitive local telephony services to homes throughout the former TCI and MediaOne footprints.

The complementary assets and expertise of AT&T Broadband and Comcast will further accelerate the deployment of facilities-based local telephone competition, creating substantial public interest benefits. Six years after passage of the Telecommunications Act of 1996 ("1996 Act"),[63] virtually all local exchange traffic – and particularly residential traffic – continues to be carried by the incumbent LECs.[64] By promoting the deployment of facilities-based competition, the merger will further Congress's goal of

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[62] *AT&T-MediaOne Merger Order* ¶ 7; *see also id*. ¶¶ 154-69; *AT&T-TCI Merger Order* ¶¶ 145-48.

[63] Pub. L. No. 104-104, 110 Stat. 56 (1996).

[64] *See generally* Industry Analysis Division, Common Carrier Bureau, FCC, *Trends in Telephone Service*, Chapter 9 (Aug. 2001), *available at*: <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/trend801.pdf> ("*Trends in Telephony*"); Industry Analysis Division, Common Carrier Bureau, FCC, *Local Telephone Competition* (May 2001), *available at*: <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-state_Link/IAD/lcom0501.pdf>.

establishing "a pro-competitive, de-regulatory national policy framework" for the U.S. telecommunications industry.[65]

1. Creating A Stronger Telephony Competitor

The deployment of cable telephony in new markets continues to involve considerable business risks. Cable systems entering the telephony business must underwrite large, upfront investments in new plant and develop and implement order processing, customer care, and other complex support systems, so as to overcome the substantial advantages of incumbent providers. As the FCC has often observed, an incumbent LEC's installed infrastructure allows it to serve customers at a lower incremental cost than a facilities-based entrant and to realize scale efficiencies provided by heavily concentrated customer bases.[66] The magnitude of the risks facing new entrants is underscored by the numerous telecommunications companies that have filed for bankruptcy in recent years.[67]

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[65] S. Conf. Rep. No. 104-23, 104th Cong., 2d Sess. 1 (1996); *see also UNE Remand Order* ¶¶ 103-104. The Commission has repeatedly recognized the enormous consumer benefits that will flow from cable-delivered residential local telephone service. *See Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 16 FCC Rcd 15435, ¶ 4 (2001); *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd 3696, ¶ 27 (1999); *Promotion of Competitive Networks in Local Telecommunications Markets*, 14 FCC Rcd 12673, ¶¶ 4-7, 20 (1999); *2001 Video Competition Report* ¶¶ 50-54.

[66] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶¶ 10-11 (1996) (subsequent history omitted); *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket No. 01-337, Notice of Proposed Rulemaking ¶ 29 (rel. Dec. 20, 2001) (FCC 01-360).

[67] These companies include ICG, NorthPoint, Rhythms NetConnections, Covad, Teligent, Winstar, PSINet, Convergent, Metricom, and Global Crossing.

AT&T Comcast will be on a stronger footing in dealing with these substantial business risks because of the complementary assets and expertise of Comcast and AT&T Broadband and the scale economies created by the merged entity. As described in section IV.A, Comcast's financial and management strengths will provide the merged company with a strong balance sheet, a healthy cash flow, and an ability to raise capital, all of which AT&T Comcast will need to deploy telephony services on a broader scale. And, as described below, AT&T Broadband brings to the merged entity extensive experience and expertise in the design, roll-out, provisioning, operations, and marketing of cable telephony in a customer-friendly manner. This expertise is highly scaleable and can be applied to Comcast's cable systems, which currently provide cable-delivered telephone services on only a small scale.

As a result, AT&T Comcast will be better able to expand the availability of telephony over the Comcast systems more quickly, at less expense, and in a more customer-friendly manner. The Applicants estimate that, within five years, leveraging AT&T Broadband's operational and technical expertise in cable telephony should generate synergies of $600-800 million in EBITDA annually.[68] In light of these synergies, Comcast President (and AT&T Comcast CEO) Brian L. Roberts has announced that the merged company intends to begin to deploy telephone service in the Philadelphia and Detroit markets currently served by Comcast after closing, bringing facilities-based local telephone choice to about one million additional homes.[69]

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[68] *See* Pick Declaration ¶ 12.

[69] As the Pick Declaration indicates, Comcast's experience with cable telephony to date has been relatively limited. Although Comcast has acquired a few existing cable telephony networks through prior acquisitions, these networks are relatively small, and Comcast has not yet developed any new cable telephony networks on its own initiative,

2. Leveraging AT&T Broadband's Substantial Expertise And Experience

AT&T Broadband's cable telephony expertise will enhance the ability of Comcast to offer cable telephony services in two important respects.

Technical and Operational Expertise. Comcast will acquire AT&T Broadband's technical and operational expertise in launching and providing cable telephony. AT&T Broadband has in place the infrastructure and personnel to support the deployment of cable telephony in Comcast service areas. For example, AT&T Broadband has in place centralized systems to support the design, installation, maintenance, and operation of the complex, two-way hybrid fiber-coaxial systems that support digital voice and data applications and that interconnect with both copper twisted-pair and fiber optic technologies used by incumbent LECs.

The AT&T Broadband National Operations team provides support on a wide range of planning, engineering, technical, and operational issues that are faced when deploying complex cable telephony service. The Technical Operations Organization within AT&T Broadband has already developed operational performance metrics to ensure quality cable telephony services, effective training of technicians and field fulfillment personnel, and cost-effective investigation and resolution of field performance issues. That unit also provides subject matter experts for corporate and marketing initiatives. These existing processes and systems, developed at significant cost by AT&T Broadband, can be applied to Comcast's cable systems.

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nor has Comcast developed the experience or infrastructure to expand cable telephony on its own. Pick Declaration ¶ 10. As a result of Comcast's discussions with AT&T Broadband, however, and based on AT&T Broadband's telephony expertise and the resources that will be available due to the merger, Comcast is currently planning to roll-out cable telephony in certain markets after closing. *Id.* ¶ 12.

Cable telephony providers must, of course, be interconnected to, and coordinate with, incumbent LECs (and other competitive LECs) and must interact effectively with a variety of third parties, to ensure not only that calls are completed successfully and billed correctly, but also that all of the necessary number portability, E911, and other databases are correctly populated. This "intimate knowledge of local telephone operations" is vital to the ability to provide quality phone service and cannot be "quickly duplicated by smaller market participants, such as cable operators and [competitive access providers]."[70] AT&T Broadband's National Service Assurance Center supports the provisioning of customer telephone lines, including switch and headend equipment, third party provisioning, local number portability, and E911. Cable telephony providers must also establish interfaces with other LECs for the purpose of rating, recording, and billing traffic for purposes of reciprocal compensation. Again, upon closing, the same organization at AT&T Broadband that now acts as the point of interface for these issues will be available to support cable telephony operations over the Comcast systems. Comcast will also be able to gain the advantage of certain interconnection agreements that AT&T Broadband has with the incumbent LECs serving Comcast's territories.[71]

Back Office Systems. Comcast will gain access to AT&T Broadband's existing back office systems that support cable telephony. These systems allow AT&T

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70 *See Applications of NYNEX Corporation Transferor, and Bell Atlantic Corporation Transferee, For Consent to Transfer Control of NYNEX Corporation and Its Subsidiaries*, 12 FCC Rcd 19985, ¶ 107 (1997) ("*Bell Atlantic-NYNEX Merger Order*").

71 AT&T Comcast "will benefit from AT&T's bargaining leverage [and] expertise in negotiating interconnection with ILECs" and "thus [the merger] is likely to enable [AT&T Comcast] to interconnect with ILECs' networks on better terms . . ." *AT&T-MediaOne Merger Order* ¶ 165. AT&T Broadband also has established customer care systems (including an online customer care platform) that can be leveraged to handle billing and network inquiries of Comcast customers.

Broadband efficiently to take customer orders, to serve as the point of contact for customer care inquiries, to collect and organize the data necessary to bill customers, and to market cable telephony offerings. As the Commission has recognized, having in place these "nuts and bolts" back office capabilities and employees is "essential" to offering local telephone service in competition with incumbent LECs.[72] Not only are AT&T Broadband's back office systems highly robust and efficient, but they employ technologies and processes that will allow AT&T Comcast to use them to support offerings in Comcast territories without incurring substantial additional cost.

The combination with AT&T Broadband will also enhance Comcast's telephone billing capabilities. AT&T Broadband has in place specialized "mechanized" billing software processes, developed over several years, that are sufficiently flexible to handle a service area's unique billing parameters and sufficiently robust to handle substantial increases in volume. These back office billing systems can be used to support telephone entry in Comcast territories at a mass market level.

AT&T Broadband's substantial marketing expertise will help Comcast in the challenge of competing for customers against formidable incumbents in Comcast's service areas. AT&T Broadband has already conducted primary market research on topics such as pricing and offer design – benchmarked against the competition – to assist AT&T in developing successful product offers, programs, and marketing campaigns. And AT&T Broadband has learned a tremendous amount about customer preferences

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[72] *See Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses*, 14 FCC Rcd 14712, ¶ 84 (1999) ("*Ameritech-SBC Merger Order*").

(including the types of marketing that customers like and dislike) as a result of its market experience over the past several years.

Summary. The complementary telephony assets and experience of AT&T Broadband and Comcast will put the merged entity on a stronger footing and help accelerate the pace and effectiveness of local telephone competition in Comcast's service areas. Moreover, the operational, back office, and customer care experience AT&T Broadband has gained from its circuit-switched telephony operations should be applicable to an IP telephony environment.[73] As noted in section II.B.1, Comcast has taken a leadership role in developing cable-delivered IP telephony, and AT&T Broadband has explored this technology as well. IP telephony may result in significantly lower roll-out costs and increased flexibility and may also provide a common infrastructure that supports multiple advanced services. The Applicants are committed to the continued development of IP telephony.

C. The Merger Will Increase The Supply Of Local And Regional Programming.

The combination of AT&T Broadband and Comcast will also benefit consumers by stimulating the production and delivery of local and regional programming. Comcast's established expertise in producing local and regional programming will enhance the ability of the merged entity to offer AT&T Broadband customers the kinds of community-oriented coverage that Comcast already provides today to many of its customers. This includes news, public affairs, coverage of civic and charitable endeavors, sports, and a variety of other kinds of programming – all with a local or regional focus.

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[73] *See* Pick Declaration ¶ 11.

Comcast has been particularly successful in developing and distributing unique, high-quality, local and regional programming. The service now known as "cn8, The Comcast Network" was launched as The Comcast Network in September 1996. Combining the high production values of national cable programming with an emphasis on localized interests, The Comcast Network initially offered an exciting mix of locally focused call-in programs, regional sports coverage, and family entertainment. It quickly found an audience (receiving, for example, tens of thousands of attempted call-ins per month), and also enjoyed critical acclaim. As Comcast has grown, and built stronger clusters, cn8's reach, resources, and quality have all grown, too.

Today, cn8 is one of the nation's largest regional cable networks, serving 3.9 million homes in Pennsylvania, New Jersey, Delaware, and Maryland. It has become the region's most-honored 24-hour diversified network, with 31 Mid-Atlantic Emmy Award nominations in just four years. cn8 News, now two years old, offers two full hours nightly of news and discussions of regional issues, at 7 p.m. and at 10 p.m.[74] Customers have reacted positively, and overall ratings for cn8 increased over 100% during the past year. The success of this programming has enabled Comcast to expand the resources allotted to this endeavor.

Comcast also produces highly localized programming. In the Washington, D.C. area, for example, Comcast produces "Comcast Local Edition," five minutes of

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[74] Last fall, cn8 offered the largest line-up of high-school football games in the nation, with at least one game every weekday afternoon. Press Release, cn8, *Comcast and CN8 to Offer Most Extensive High School Sports Coverage in the Nation* (Sept. 4, 2001), *available at*: <http://www.cn8.tv/press_release_display.asp?press_id=112> (71 games involving 103 high schools in Pennsylvania, New Jersey, and Delaware). And in October 2001, cn8 organized and transmitted a fundraising concert featuring Bruce Springsteen and Jon Bon Jovi to raise funds for Monmouth County (New Jersey) victims and survivors of the September 11 terrorist attacks.

programming every half hour (at 0:25 and 0:55) which appears on the channel carrying CNN Headline News.[75] These short programs include interviews with local government officials, discussions of local and regional issues, and promotion of charitable endeavors. The production and distribution of this programming can be highly localized; a Local Edition in Washington, D.C. may show an interview with a member of the D.C. City Council, while the system in Arlington, Virginia shows an interview with a member of that city's local school board. (Similar programming, with slight differences in emphasis, appears on other Comcast systems in Pennsylvania, New Jersey, Maryland, Delaware, Michigan, and Connecticut under the name "Comcast Newsmakers.")

These activities demonstrably benefit the communities in which Comcast operates. Comcast invests in programming like cn8 and Local Edition/Newsmakers as part of its commitment to public service. Such programming also strengthens the company's image in and connection to the communities it serves, offers potential customers a reason to sign up for Comcast's services, and offers existing customers one more reason to continue to subscribe.

The AT&T Comcast merger will make it possible to expand the areas in which these kinds of programs will be made available by extending Comcast's expertise and resources to areas in which AT&T Broadband has significant clusters. In addition, advertising revenue will increase to reflect the greater number of viewers, and this, too, will justify additional investment. These expectations are based, not on theoretical economic speculation, but on Comcast's own experience. For example, soon after Comcast acquired Greater Media's customers in Center City and South Philadelphia,

[75] CNN Headline News makes these time slots available to other cable operators as well.

Comcast invested approximately $1 million to upgrade a newly acquired studio for cn8.[76] As the customer base grew, Comcast committed additional resources to the venture.[77]

In short, Comcast has the people, facilities, and experience to make local/regional programming work. Because these programs are designed as part of a "branding strategy," Comcast's local and regional programming skills and assets cannot feasibly be deployed to provide this kind of programming in areas where Comcast does not provide cable service. By contrast, they can and will be harnessed to extend quality local/regional programming to areas served by the merged AT&T Comcast.

D. The Merger Will Permit AT&T Comcast To Compete More Effectively In Selling National, Regional, And Local Advertising.

To date, cable operators have lacked the scale necessary to compete for national advertisers.[78] The merger, however, will create for the first time a cable company with the geographic reach to sell advertising on a national scale. In particular, the merged entity will have a market presence in 8 of the top 10 Designated Market Areas ("DMAs").[79] This will give AT&T Comcast a better chance to compete with

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76 Patricia Horn, *Cable Company Plans Upgrade of Philadelphia Studio*, Philadelphia Inquirer, July 28, 1999, 1999 WL 11407568.

77 Press Release, cn8, *CN8 to Expand New Jersey Television Coverage with the Opening of New News Bureaus* (Nov. 29, 2001), *available at*: <http://www.cn8.tv/press_release_display.asp?press_id=117> (new, fully-staffed, state-of-the-art news bureaus opened in Union and Toms River, New Jersey). cn8 currently has 20 studios (some are full-fledged production studios; others are lesser satellite facilities) in Pennsylvania, New Jersey, Delaware, and Maryland.

78 *See* Pick Declaration ¶ 29; *see also* Sallie Hofmeister, *Giant Cable Deal News Analysis: Merger Could Drive A New Round of Consolidation*, L.A. Times, Dec. 21, 2001, *available at:* <http://www.latimes.com/business/la-000100975dec21.story>.

79 Pick Declaration ¶ 29.

broadcasters, DBS, and other outlets in the sale of national advertising.[80] The total cable share of national broadcast advertising is and will remain small, but the merger will introduce a new alternative for national advertisers. At the same time, the potential increase in advertising revenues will help AT&T Comcast offset the costs involved in operating and improving its broadband service to consumers. The Applicants estimate that, even if the merged entity captures only 1% to 2% of the broadcast industry's current revenue for national advertising, it should be able to generate $100-200 million in increased EBITDA annually within one to three years after the merger by combining their national advertising sales efforts.[81]

In addition, the merger will create larger regional footprints,[82] permitting AT&T Comcast in some areas to compete more effectively in local and regional advertising markets. With a larger regional presence, the merged entity can offer advertising time throughout a region and a uniform channel placement selected by the advertiser. Instead of incurring the significant transaction costs of negotiating with many different cable systems in a region, a regional advertiser can take advantage of "one-stop shopping" in buying time on the cable systems serving the area it wants to target. In this way cable

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80 *See id.* ¶ 30. Broadcast television networks attract much larger audiences, and thus have generated much higher advertising revenues than cable. *See 2001 Video Competition Report* ¶ 78.

81 *See* Pick Declaration ¶ 31.

82 For example, AT&T Broadband and Comcast each operate cable system clusters in Connecticut and Pennsylvania; combining these systems will create a larger regional footprint in these areas.

systems can provide advertisers a more effective advertising outlet, although they will continue to have a small share of this market compared to broadcasters.[83]

E. The Public Interest Benefits Cannot Be Achieved Independently Of The Merger.

The efficiencies and synergies created by the merger – and the public interest benefits they will produce – cannot be obtained independently of a merger, such as through the formation of a joint venture. As Mr. Pick explains, there are a number of reasons for this conclusion.[84] In some cases, legal requirements may preclude joint ventures and collaborations among MSOs.[85] In other cases, the venture may involve such an unwieldy governance and ownership structure that efficient operation is effectively precluded.[86]

As the Commission has recognized, joint ventures also "raise[] complex problems at both the contract negotiation and implementation stages."[87] In a world of converging technologies and services, defining the joint venture service is very difficult. In contrast,

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[83] *See* Diane Mermigas, *Bigger Piece of Pie Going to Comcast*, Electronic Media, Feb. 11, 2002, 2002 WL 9504681, at 3 (describing Comcast's current efforts to offer advertisers coverage throughout a DMA as a viable alternative to broadcasters). Cable operators in some instances enter into "interconnect" arrangements that allow them to compete more effectively with broadcasters in offering national and regional advertising. Under such an arrangement, an advertiser can run an advertisement on multiple cable systems throughout a region. Comcast, for example, has entered into interconnect arrangements with Time Warner and other cable companies in different regions of the country. Although these arrangements offer advertisers "one-stop shopping" in buying ad time on multiple cable systems serving a region, they can be difficult and time consuming to negotiate.

[84] *See* Pick Declaration ¶¶ 32-33.

[85] *See id.* ¶ 33.

[86] *See id.*

[87] *AT&T-MediaOne Merger Order* ¶ 175.

a merger "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."[88] The merger will permit full integration of the companies' operations, avoiding the transaction costs and uncertainties created by joint venture and other contractual relationships.

V. THE MERGER WILL NOT RESULT IN ANY VIOLATIONS OF THE COMMUNICATIONS ACT OR THE COMMISSION'S RULES.

The proposed merger will not result in the violation of any provisions of the Communications Act, other applicable statutes, or the Commission's rules. In particular, the proposed merger will not violate the reversed and remanded cable horizontal ownership limit, or any other multiple or cross-ownership limits, the foreign ownership limit, or any programming carriage or program access rules.[89]

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[88] *Id.*

[89] The Applicants have been, and will continue to be, in compliance with the relevant government restrictions on dealings between AOL Time Warner and AT&T. *See United States v. AT&T Corp. & MediaOne Group, Inc.*, No. CIV.A. 1:00CV01176, 2000 WL 1752108 (D.D.C. Sept. 27, 2000) (Final Judgment) (requiring AT&T to: (1) divest its interest in Road Runner on or before December 31, 2001; (2) restrict its role in the management and governance of Road Runner prior to divestiture; and (3) obtain prior approval of the Justice Department before entering into certain agreements with AOL Time Warner with regard to residential broadband service). AT&T has divested its interest in Road Runner, and has not entered into any agreements with AOL Time Warner that would require prior Justice Department approval. The Applicants also note that the Commission and the FTC imposed restrictions on AOL Time Warner as part of their respective merger reviews. *See AOL-Time Warner Merger Order* ¶ 272 (prohibiting AOL Time Warner from entering into certain agreements with AT&T); *America Online, Inc. & Time Warner Inc.*, Complaint, Docket No. C-3989 (Dec. 14, 2000), *available at*: <http://www.ftc.gov/os/2002/12/aolcomplaint.pdf> (FTC Consent Agreement) (prohibiting both exclusive and preferential agreements between AOL Time Warner and other cable operators). While these requirements were imposed on AOL Time Warner, not AT&T, AT&T has not entered into any agreements that would violate these prohibitions.

A. Cable Horizontal Ownership Limit

In October 1999, the Commission adopted a rule prohibiting a cable operator from having an attributable interest in cable systems that account for more than 30% of all MVPD subscribers nationwide.[90] In March 2001, the D.C. Circuit in *Time Warner II* reversed the 30% limit and remanded the rule to the Commission for further consideration.[91] In September 2001, the Commission adopted the *Horizontal Ownership FNPRM* to consider the cable horizontal issue in light of *Time Warner II*.[92] The Commission has not yet reached a decision in that proceeding.

AT&T Comcast will take all steps necessary to comply with any new cable horizontal ownership limit that may be adopted in connection with the pending *Horizontal Ownership FNPRM* proceeding. Moreover, using the dynamic market-power analysis required by *Time Warner II,* the Applicants demonstrate in section VI below that the merger will not have anticompetitive effects in any market or raise the types of buyer market power concerns that led Congress and the Commission to adopt a cable horizontal limit in the first place.

Moreover, the merger would not violate the 30% limit that was set aside in *Time Warner II*. AT&T Comcast will serve 29.87% of the nation's MVPD subscribers. This percentage is calculated as follows:

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90 *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, 14 FCC Rcd 19098, ¶ 5 (1999) ("*1999 Horizontal Ownership Order*").

91 *See Time Warner II*, 240 F.3d at 1136; *see also Fox Television Stations, Inc. v. FCC*, Case No. 00-1222 (D.C. Cir. Feb. 19, 2002), *available at*: <http://www.fcc.gov/ogc/documents/opinions/2002/00-1222.html>.

92 *See generally Horizontal Ownership FNPRM*.

- AT&T Broadband has 13.44 million attributable subscribers in its owned and operated systems, 0.12 million attributable subscribers in its consolidated systems, and 5.24 million attributable subscribers in various partnerships (13.44 million + 0.12 million + 5.24 million = 18.80 million).[93]

- Comcast has 8.48 million attributable subscribers. This includes the 8.47 million subscribers served by Comcast's wholly-owned cable systems and the 0.01 million subscribers served by Clearview Partners in which Comcast holds an attributable interest (8.47 million + 0.01 million = 8.48 million).

- AT&T Comcast will therefore have 27.28 million attributable subscribers (18.80 million + 8.48 million = 27.28 million).

- There are 91.33 million total MVPD subscribers nationwide.[94] Thus, AT&T Comcast would be attributed with 29.87% of all MVPD subscribers (*i.e.*, 27.28 million divided by 91.33 million).

Because this percentage is below the horizontal limit in effect before the ruling in *Time Warner II*, there can be no reasonable basis for concern that the proposed merger would violate any horizontal ownership rule. Although the above calculation does not include the subscribers served by the TWE and TWI cable systems, as set forth in section V.F,

[93] This total does not include Cablevision subscribers because, as noted above, AT&T Broadband's voting interest in Cablevision is now below 5% (and AT&T Broadband no longer has the right to appoint Board members to the Cablevision Board), and, therefore, Cablevision is no longer attributable to AT&T Broadband under the Commission's attribution rules.

[94] *See Kagan Media Money*, Jan. 29, 2002, at 9 (listing 91.33 million total MVPD subscribers); *see also 1999 Horizontal Ownership Order* ¶ 35 ("[I]n reviewing compliance with the rule, we will accept any published, current and widely cited industry estimate of MVPD subscribership."); *AT&T-MediaOne Merger Order* ¶ 17 n. 48 (relying on data provided by Paul Kagan Associates, Inc. in calculating total number of MVPD customers nationwide).

the Applicants intend to have no attributable interest in TWE at and after the closing of their merger.[95]

B. Cross-Ownership And Multiple Ownership Limits

AT&T Comcast will also be in full compliance with the Commission's various cross-ownership and multiple ownership rules.[96] Neither AT&T Broadband nor Comcast expects to own any attributable interest in a broadcast radio or television station, multichannel multipoint distribution service ("MMDS") system, or satellite master antenna television ("SMATV") system that would implicate the Commission's cable-broadcast cross-ownership or multiple broadcast ownership restrictions or the cable-MMDS or cable-SMATV cross-ownership restrictions.[97] Finally, neither company owns

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[95] If the TWE and TWI subscribers were counted, AT&T Comcast would serve approximately 38.63 million subscribers, or 42.30% of all MVPD subscribers. This is calculated as follows: (1) 18.80 million AT&T Broadband subscribers + 8.48 million Comcast subscribers + 11.35 million TWE/TWI subscribers (TWE and TWI actually serve approximately 12.8 million subscribers, but this includes 1.45 million subscribers served by the Time Warner-AT&T Broadband joint ventures in Texas and Kansas City that are already accounted for in the 18.48 million AT&T Broadband subscriber total) = 38.63 million subscribers; and (2) 38.63 million subscribers ÷ 91.33 million total MVPD subscribers = 42.30%.

[96] *See Fox Television Stations, Inc. v. FCC*, Case No. 00-1222 (D.C. Cir. Feb. 19, 2002), *available at*: <http://www.fcc.gov/ogc/documents/opinions/2002/00-1222.html> (vacating the Commission's cable/broadcast cross-ownership rule).

[97] *See* 47 C.F.R. § 73.3555 (broadcast multiple ownership limits); *id.* § 76.501(a) (cable/broadcast cross-ownership limit); *id*. § 21.912(a) (cable/MMDS cross-ownership limit); *id.* § 76.501(d) (cable/SMATV cross-ownership limit). AT&T Broadband owns 6 SMATV systems (see list attached as Appendix 10), but none of these owned entities will create a cross-ownership issue for the merged entity. Appendix 11 sets forth a list of Comcast SMATV systems. Comcast owns one SMATV system in the Hartford, Connecticut area where an AT&T Broadband owned and operated or consolidated cable system provides cable service. In addition, based on the available information, the Applicants are aware of one Comcast SMATV system in Lions Creek, Indiana, that is located in the franchise area of an AT&T Broadband non-consolidated cable system. Applicants envision that, promptly after closing, these SMATV systems will either be sold or integrated into the existing cable franchise (so that they are no longer operated

a financial interest greater than 10% or has any management interest in a LEC providing telephone exchange service within any of the other company's franchise areas. Thus, the merged entity will fully comply with the Commission's buyout restrictions.[98]

C. Program Access Rules

AT&T Comcast will be in compliance with the Commission's program access rules.[99]

D. Foreign Ownership Limit

AT&T Comcast will not have alien ownership that even approaches the benchmark of any applicable foreign ownership limit.[100]

E. Channel Occupancy Limit

Time Warner II reversed and remanded the Commission's channel occupancy rules,[101] and the Commission is now considering whether to retain the rules as part of its

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"separate and apart" from the franchised cable service in that area). *See* 47 U.S.C. § 533(a); 47 C.F.R. § 76.501(d). Finally, although Comcast owns a small number of SMATV systems in territories served by TWE cable systems, as discussed in section V.F, the Applicants intend to have no attributable interest in TWE at and after the closing of their merger.

[98] *See id.* § 76.505(b) (LEC-cable buyout prohibition); *see also* 47 U.S.C. § 572(b) (statutory prohibition).

[99] The Commission has rejected complaints filed by EchoStar Communications Corp. ("EchoStar") and DirecTV, Inc. ("DirecTV") that alleged Comcast violated the program access rules by refusing to sell terrestrially delivered regional sports programming to DBS competitors. *DirecTV, Inc. v. Comcast Corp and EchoStar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd 22,802 (2000), *appeal pending sub nom. EchoStar Communications Corp. v. FCC*, No. 01-1032 (D.C. Cir. filed Jan. 19, 2001).

[100] *See* 47 U.S.C. § 310(b) (limiting direct alien ownership interests in broadcast, common carrier, and aeronautical licensees to 20% and indirect alien ownership interests to 25%).

[101] *See Time Warner II*, 240 F.3d at 1139.

remand proceeding.[102] AT&T Broadband and Comcast have nonetheless reviewed the channel lineups of all of their respective cable systems as of year end 2001. For purposes of these analyses, AT&T Broadband and Comcast counted all national video program services that are affiliated with AT&T Broadband and Comcast – and even Rainbow and TWE.[103] Based on these analyses, AT&T and Comcast have found that all of AT&T Broadband's cable systems and all of Comcast's cable systems will be in compliance with the remanded 40% channel occupancy limit post merger.

F. AT&T Broadband's TWE Interest

AT&T Broadband, through its wholly-owned subsidiaries, owns a limited partnership interest representing 25.51% of the senior priority (Series A) capital and residual equity capital of TWE.[104] Subsidiaries of AOL Time Warner hold the remaining

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[102] *See Horizontal Ownership FNPRM* ¶ 83 (inviting comment on whether "the Commission may relax, exempt specific cable operators from, or even forego imposing, vertical limits if the Commission determines that such a course of action would be justified given the prevailing market conditions").

[103] For the reasons discussed in sections II.B.2 and V.F, AT&T and Comcast do not believe it is necessary to count the TWE or Rainbow program services in their channel occupancy analyses. Even so, AT&T and Comcast have done so and found that, even counting these services, all of their systems will be in compliance with the remanded channel occupancy limit post-merger.

[104] Under a September 15, 1993 option agreement (originally entered into between TWE and U S WEST, MediaOne's predecessor in the TWE interest), AT&T Broadband obtained the right (when AT&T acquired MediaOne) to increase its Series A capital and residual capital interests in TWE, based on a sliding scale determined by the increase in TWE's average Cable Earnings Before Interest, Taxes, Depreciation, and Amortization ("Cable EBITDA") for the two prior calendar years over TWE's 1994 Cable EBITDA. AT&T Broadband may make a cash payment for this additional interest. Alternatively, AT&T Broadband may elect to exercise a cashless stock appreciation right in which the exercise price would be deducted from the increase in the partnership interest AT&T Broadband would otherwise receive, thereby resulting in a lower net increase amount. Prior to the end of 2001, AT&T Broadband commenced the process for exercising its option by requesting a determination of the fair market value of TWE. AT&T Broadband and TWE have retained an investment bank for the purpose of delivering that

74.49% limited partnership interests in the Series A capital and residual capital of TWE, as well as 100% of the junior priority (Series B) capital of TWE. TWE is a Delaware limited partnership that was formed in 1992 to own and operate substantially all of the business of Warner Bros., Inc., HBO, and the cable television businesses owned and operated by TWI prior to that time. AT&T Broadband acquired its interest in TWE in connection with the MediaOne acquisition. AT&T Broadband has appointed two directors to the TWE Board of Representatives ("TWE Board"). AT&T Broadband and Comcast are firmly committed to divesting AT&T Broadband's interest in TWE. The background of AT&T Broadband's interest in TWE as well as the Applicants' commitment to take the appropriate steps to divest and render this interest nonattributable are described below.

The *AT&T-MediaOne Merger Order*. In the *AT&T-MediaOne Merger Order*, the Commission determined that the merged AT&T-MediaOne entity would have an attributable interest in TWE's cable systems and programming services. As a result, the Commission found that the AT&T-MediaOne merger would violate the Commission's 30% horizontal subscriber limit, and required the merged entity to come into compliance with this limit by May 19, 2001.[105] After the D.C. Circuit in *Time Warner II* reversed

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determination. Following such delivery, AT&T Broadband will have 45 days in which to exercise its option. It is anticipated that any exercise of the option by AT&T Broadband will be a cashless exercise and will involve a net interest of less than 3%. The option represents value that AT&T Broadband is currently entitled to receive based upon TWE's past performance. If the option were not exercised at this time, AT&T Broadband would potentially lose this value under the terms of the option agreement.

[105] *See AT&T-MediaOne Merger Order* ¶¶ 18, 71 (specifying the three options for compliance, namely: (1) divest TWE, (2) terminate AT&T's involvement in TWE's programming activities (pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules), or (3) divest other AT&T cable systems to bring AT&T below the 30% limit); *see also*

and remanded the 30% horizontal limit, the Commission suspended this compliance deadline "[i]n order to afford the Commission an opportunity to determine the relationship, if any, between the Court's decision on the ownership rules and the ownership conditions adopted in [the *AT&T-MediaOne Merger Order*]."[106]

In addition, as part of the AT&T-MediaOne merger, the Commission also imposed operational safeguards on the relationship between AT&T and TWE. The Commission intended these safeguards to serve as interim measures that would apply until AT&T came into compliance with the 30% horizontal subscriber limit. Although, as noted, the Commission has suspended this compliance deadline, it has determined that the safeguards would remain in effect.[107] The safeguards relating to TWE provide, among other things:

- An AT&T officer or director may not also serve as an officer or director of TWE. AT&T may, however, appoint as a TWE director an AT&T employee who is not an AT&T officer or director, as long as the employee is not involved in AT&T's video programming activities. AT&T officers, directors, and employees are prohibited from participating in any way in TWE's video programming activities;
- AT&T and TWE are prohibited from sharing information regarding the price, terms, and conditions for carriage of video programming; and
- AT&T is prohibited from obtaining a volume discount or other favorable terms and conditions from any video programming vendor as a result of TWE's purchase of video programming for, or carriage on, TWE's cable systems.[108]

Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp. Transferee, 16 FCC Rcd 456 (2000) (determining that AT&T had elected to divest TWE to come into compliance with the 30% horizontal ownership limit).

106 *See AT&T-MediaOne Deadline Suspension Order,* 16 FCC Rcd 5835 (2001), *aff'd on reconsideration*, 16 FCC Rcd 20587 (2001).

107 *See AT&T-MediaOne Deadline Suspension Reconsideration Order*, 16 FCC Rcd 20587, ¶ 10 n.35 (2001).

108 *See AT&T-MediaOne Merger Order* at App. B, §§ 3-5 (safeguards relating to TWE).

Also, as part of the AT&T-MediaOne merger, the Commission adopted safeguards relating to AT&T's other programming interests, including Liberty Media, Cablevision/Rainbow, and certain video programmers owned in part by MediaOne that sell programming to TWE (*i.e.*, E! Entertainment, style., Food Network, Fox Sports New England, iN DEMAND, New England Cable News, The Outdoor Life Network, Speed Channel, and The Sunshine Network).[109] As noted, Liberty Media, Cablevision/Rainbow, Food Network, The Outdoor Life Network, Speed Channel, and The Sunshine Network are no longer attributable to AT&T. Accordingly, the only AT&T-MediaOne safeguards that continue to apply (in addition to the TWE safeguards described above) are those relating to E!, style., Fox Sports New England, iN DEMAND, and New England Cable News. These safeguards provide, among other things:

- AT&T is prohibited from attempting to influence, or otherwise participate in, the management or operation of these services.
- AT&T must instruct its representatives serving on the Boards or management committees of any of these services not to attend any Board or management committee meetings, or otherwise have contact with these program services. However, the safeguards do allow AT&T to file requests with the Commission to participate in matters not directly relating to video programming activities that would have a significant impact on any of these program services.[110]

The safeguards relating to TWE and AT&T Broadband's other programming interests also require AT&T to appoint a Corporate Compliance Officer and to engage an independent auditor to conduct an examination every six months of AT&T Broadband's compliance activities. In addition, penalties are prescribed for AT&T's failure to comply

[109] Although MusicChoice was included in this list, it should not have been, as it is a digital *audio* service, not a video programming service.

[110] *See AT&T-MediaOne Merger Order* at App. B, §§ 12-15 (safeguards relating to MediaOne video programming interests).

with the safeguards or reporting requirements. AT&T has appointed a Corporate Compliance Officer and engaged PricewaterhouseCoopersLLP as the independent auditor. AT&T has filed three compliance reports with the Commission since the closing of the AT&T-MediaOne merger. These reports provide details regarding the specific steps AT&T has taken and continues to take to comply with the safeguards.[111]

AT&T Broadband Has No Role In Or Ability To Influence The Management Of TWE. Under the TWE Limited Partnership Agreement ("LPA"),[112] AT&T Broadband has no role in or ability to influence the management or operations of TWE, including its video programming-related activities. AT&T Broadband does not have the right under the LPA to communicate with TWE, or AOL Time Warner, the general partner of TWE, on matters pertaining to the day-to-day operations of TWE or its video programming interests. Under the terms of the LPA, the TWE Cable Management Committee (all members of which are appointed by and from AOL Time Warner) has full discretion and final authority over TWE's cable operations. All of MediaOne's rights with regard to the TWE Cable Management Committee were terminated *before* AT&T merged with MediaOne and acquired the TWE interest.[113] The TWE Cable Management

[111] These reports were filed in CS Docket No. 99-251 on December 15, 2000, June 15, 2001, and December 17, 2001.

[112] The Applicants will submit this document upon adoption of a protective order in this proceeding.

[113] *See* AT&T *Ex Parte* Comments, CS Docket No. 99-251, at 9-10 (filed Nov. 24, 1999); AT&T *Ex Parte* Reply Comments, CS Docket No. 99-251, at 5-6 (filed Dec. 21, 1999). The TWE LPA contains a non-compete clause that precluded MediaOne from engaging in certain lines of business in competition with Time Warner. *See* TWE LPA § 5.5(a). However, MediaOne had the right unilaterally to eliminate the non-compete clause, *see id*. § 5.5(f), and on August 3, 1999, it did so. When the non-compete was eliminated, the TWE LPA then gave Time Warner the right to remove MediaOne's TWE management rights. *See id.* On August 4, 1999, Time Warner sent notice to MediaOne

Committee's decisions are binding on the TWE Board. The TWE Board has never met, and the extent of the Board's power (should it ever meet) and of AT&T Broadband's involvement on that Board is strictly limited to certain extraordinary "investor-protection" matters should any arise – such as the merger of TWE, the sale of more than 10% of TWE's assets, or TWE's voluntary bankruptcy – and not to any operational matter.

Planned Divestiture Of AT&T Broadband's Interest In TWE. AT&T Broadband and Comcast do not view the TWE interest as a long-term investment and are firmly committed to divesting the interest for a reasonable price as quickly and efficiently as possible.[114] The process of attempting to sell the interest is already underway. AT&T Broadband has pursued with AOL Time Warner various options for the sale of its TWE interest to AOL Time Warner in an efficient and expeditious manner. AT&T Broadband also is pursuing its option to sell its TWE interest via a public offering pursuant to a contractual right to registration rights.

AT&T Broadband has taken a number of steps to advance the registration rights option for the sale to the public of the TWE interest. That process began in February

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that it was immediately terminating all of MediaOne's management rights with regard to TWE that it was entitled to terminate, including *all rights* with regard to the Cable Management Committee. (The Applicants will submit this document upon adoption of a protective order in this proceeding.) *See also* Time Warner Entertainment Company, L.P., SEC Form 8-K, at 2 (Aug. 5, 1999) (noting that "MediaOne no longer has a vote on or any right to participate in the Cable Management Committee") (copy attached as Appendix 12). This occurred prior to the merger of AT&T and MediaOne. Thus, when the merger was closed, AT&T did not acquire any ability to participate in the management or operation of TWE, nor has it attempted or had the right to participate in the management or operation of TWE since the merger.

[114] The Applicants, in fact, have a strong business incentive to divest AT&T Broadband's interest in TWE to further improve the merged entity's ability to finance capital expenditures. *See supra* section IV.A.

2001 when AT&T submitted a request to TWE, pursuant to the TWE LPA, that TWE reconstitute itself as a corporation and register for sale in an initial public offering an amount of equity securities (representing converted partnership interests) held by AT&T Broadband (up to the full amount held by AT&T Broadband) determined by an independent investment banking firm so as to provide sufficient trading liquidity and minimize any initial public offering discount. Once AT&T Broadband exercised its registration rights, AT&T Broadband and AOL Time Warner each were required to select investment banking firms which then would jointly select a third investment banking firm to value the partnership. AT&T Broadband named Credit Suisse First Boston as its investment banker for the registration process and AOL Time Warner has named Bear Stearns as its investment banker.

Although the registration rights process has not proceeded as smoothly as AT&T would prefer, and AT&T does not have the ability unilaterally to compel AOL Time Warner's timely cooperation in the process, the registration rights process is now being actively pursued. For example, recently, AT&T Broadband and AOL Time Warner agreed in principle that Banc of America Securities LLC would be the third investment banker to perform the critical function of establishing a value for TWE as part of the registration process. The parties are in the process of negotiating the terms of the Banc of America Securities LLC engagement letter.

The next steps involve, among other things, the third investment banker determining the "registrable amount" and "appraised value" of the converted securities. The registrable amount is the maximum amount of converted securities that can be registered and sold in the IPO without suffering an unreasonable IPO discount. The appraised value is the price at which the registrable amount of converted securities could be sold in a public offering after deducting underwriters' discounts and commissions. Both the registrable amount and the appraised value are highly dependent on current market conditions.

Once the registrable amount and the appraised value are established, TWE may elect either to reconstitute itself as a corporation and register securities equal to the registrable amount or not to reconstitute itself. If TWE elects not to reconstitute itself, AT&T Broadband will have certain "put" rights to require TWE to purchase a portion of AT&T Broadband's partnership interests equal to the registrable amount at a price equal to the appraised value and, if AT&T Broadband exercises that right, TWE will have a "call" right to purchase the remainder of AT&T Broadband's partnership interest. If TWE elects to reconstitute itself, it must promptly commence the process of converting itself into a corporation and registering the securities for sale in a public offering. If TWE elects to pursue a public offering and the aggregate price for which the securities are to be offered to the public (as determined by the managing underwriter for the offering) is less than 92.5% of the appraised value, then TWE has the right to cancel the offering and purchase either all or the offered portion of AT&T Broadband's interest.

The registration rights process is complex and difficult. Further, because it is affected not only by TWE and AOL Time Warner's actions, but also by prevailing market conditions, the process is not subject to unilateral control by AT&T Broadband. Nonetheless, AT&T Broadband is firmly committed to take all the steps necessary to achieve the sale of the TWE interest through the registration rights process and to do so as expeditiously as possible. In addition, as a result of the deemed transfer that may occur as a result of this transaction, the TWE partnership agreement may require that AT&T Broadband give AOL Time Warner a "right of first refusal" to purchase AT&T Broadband's interest in TWE in advance of closing of the merger. If AT&T Broadband offers AOL Time Warner this right of first refusal, AOL Time Warner would have the option to buy the interest. Although AT&T Broadband remains confident that its contractual rights under the partnership agreement will allow it to divest satisfactorily the TWE interest via registration rights, AT&T Broadband will pursue all its options. As can be seen, AT&T Broadband's ultimate ability to dispose of its interest lies in the hands of AOL Time Warner and the public markets, neither of which it can control.

Elimination of Any Attributable TWE Interest By The Time Of Closing. The Applicants intend to have no attributable interest in TWE at and after closing. As noted, AT&T Broadband and Comcast are firmly committed to divesting the TWE interest. The Applicants describe above the actions that have recently been taken to accomplish that result and the basis for their belief that they will be able to divest TWE in a manner that is entirely satisfactory to the Commission. In the event that the sale of the TWE interest to a third party or parties has not been completed when the Applicants are ready to close the merger, AT&T, if it has not already done so, is prepared to take the steps that may be necessary to insulate the interest under the Commission's rules before it transfers that interest to AT&T Comcast. In addition, Comcast and AT&T Broadband will take such additional steps, if any, as may be appropriate to ensure that AT&T Comcast would not be able to influence TWE prior to its ultimate sale.

Since the time that the Commission considered the question of whether AT&T's interest in TWE could be insulated and determined that it could not, the court in *Time*

Warner II vacated the "program sale" aspect of the Commission's attribution rules. That decision allows AT&T to insulate its interest in TWE, pending divestiture, in a straightforward manner. The Commission's rules allow a limited partner to demonstrate that it is not materially involved in the management or operation of the video programming-related activities of a limited partnership, and that its partnership interest is therefore nonattributable for purposes of the cable horizontal ownership limit. In particular, the limited partner may: 1) certify that it has complied with the Commission's seven insulation criteria,[115] and 2) obtain a waiver for any representatives on the partnership's Board, so long as those representatives are recused from the video programming-related activities of both the partnership and the limited partner.[116]

In the Applicants' view, AT&T Broadband satisfies the seven insulation criteria because it: (1) is not an employee of the TWE partnership; (2) is not an independent contractor or agent of the TWE partnership; (3) does not communicate with TWE, or AOL Time Warner, the general partner of TWE, on matters pertaining to the day-to-day operations of TWE's video programming business; (4) is subject to a veto by TWE's general partner with regard to any vote on the admission of new general partners to TWE;[117] (5) has no rights to remove TWE general partners; (6) does not perform any

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[115] *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, 14 FCC Rcd 19014, ¶ 57 n.163 (1999).

[116] *See* 47 C.F.R. § 76.503 (note 2(c)).

[117] *See* TWE LPA § 12.1(c)(i)(G). The admission of a new general partner requires the consent of *both* AOL Time Warner's and AT&T Broadband's representatives on the TWE Board of Representatives. Consequently, AOL Time Warner may exercise veto power over the admission of any new general partner by simply refusing to approve such admission.

services for TWE materially related to TWE's video programming activities;[118] and (7) has no role in the management or operation of TWE.[119] All of these limitations will apply to AT&T Comcast, post-closing, if the TWE interest has not already been divested.

With regard to the AT&T directors on the TWE Board, such directors are not involved in the video programming activities of AT&T Broadband or TWE.[120] A waiver is expressly provided for in these circumstances by the cable attribution rules.[121]

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[118] The Commission concluded in the *AT&T-MediaOne Merger Order* that AT&T's limited partnership interest in TWE was not insulated because AT&T's "sale of programming, via its attributable programming affiliates, to TWE is a service for TWE 'materially relating to its video-programming activities'" and that, as a result, AT&T post-merger "will be deemed materially involved in TWE's video-programming activities, precluding application of the insulated limited partnership exemption." *AT&T-MediaOne Merger Order* ¶ 49. In *Time Warner II*, however, the D.C. Circuit vacated the rule prohibiting the sale of programming by the limited partner to the partnership. *See Time Warner II*, 240 F.3d at 1143 ("We agree with petitioners that the no-sale criterion bears no rational relation to the goal, as the Commission has drawn no connection between the sale of programming and the ability of a limited partner to control programming choices.").

[119] AT&T Broadband's representatives on the TWE Board may vote only on certain extraordinary "investor protection" events, such as the merger of TWE, the sale of more than 10% of TWE's assets, incurrence of debt for money borrowed above a defined ratio, or voluntary bankruptcy. *See* TWE LPA § 12.1(c)(i)-(ii). Commission precedent makes clear that the fact that AT&T Broadband holds these investor protection rights does not preclude insulation of the interest. All of these rights are the types the Commission has in the past routinely permitted insulated limited partners, L.L.C. members, and other entities to vote on in order to protect their investment without triggering attribution. *See, e.g.*, *Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, 58 RR 2d. 604, ¶ 50 n.72 (1985) (identifying "a number of powers which a limited partner may exercise consistent with [the insulation] guidelines"); *Applications of Roy M. Speer, Transferor, and Silver Management Co., Transferee, for Transfer of Control of SKIL Broadcasting Partnership*, 11 FCC Rcd 14147, ¶ 25 (1996) (rights to participate in fundamental matters "are permissible investor protections that neither substantially restrict [the managing party's] discretion nor rise to the level of attributable influences"); *Applications of Quincy D. Jones, Transferor, and Qwest Broadcasting L.L.C., Transferee, for Transfer of Control of Quincy Jones Broadcasting Inc.,* 11 FCC Rcd 2481, ¶ 29 (1995) ("The right to participate in matters involving extraordinary corporate action . . . does not ordinarily undermine the nonattributable character of otherwise noncognizable interests.").

If insulation of the TWE interest became necessary because AT&T Broadband has not been able to sell the interest to a third party or parties prior to closing, AT&T Broadband will submit to the Commission in a timely manner the necessary certification and waiver request. Further, as noted above, before closing, Comcast and AT&T Broadband will take such additional steps, if any, as may be appropriate to ensure that AT&T Comcast would not be able to influence TWE prior to its ultimate sale. As a result, TWE cable systems subscribers should not be attributed to AT&T Comcast.

VI. THE MERGER WILL HAVE NO ANTICOMPETITIVE EFFECTS IN ANY RELEVANT MARKET.

The Commission's framework for analyzing the potential anticompetitive effects of a merger is well-established. The Commission first identifies the markets that "may be affected adversely by the merger."[122] The Commission next identifies the firms that

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[120] AT&T Broadband has appointed two directors to the TWE Board, William Prip and David Barach. Their job title at AT&T is the same, Treasury Director-Capital Markets. Neither serves as an officer or director of AT&T Corp. or AT&T Broadband. Their responsibilities as Treasury Directors include: assessing and executing funding opportunities in the debt and equity capital markets; managing debt and equity balances through redemptions, repurchases, and retirements; managing financial risk through the use of interest rate and equity derivative instruments; evaluating financial impacts of capital markets related to mergers and divestments; and integrating corporate planning processes with AT&T's capital markets activities. Neither has any role in the video programming-related activities of AT&T Corp. or AT&T Broadband. Similarly, neither has any role in the video programming-related activities of TWE.

[121] *See* 47 C.F.R. § 76.503 (note 2(c)) ("In the case of common or appointed directors and officers, if common or appointed directors or officers have duties and responsibilities that are wholly unrelated to video-programming activities for both entities, the relevant entity may request the Commission to waive attribution of the director or officer").

[122] *AT&T-MediaOne Merger Order* ¶ 35. *Cf.* Department of Justice Reply Comments, CS Docket No. 98-82 (filed Feb. 19, 2002) (setting forth the Department's role in enforcing and analyzing the competitive implications of mergers and acquisitions in the MVPD industry).

participate in each relevant market.[123] The Commission then examines "market conditions and . . . the way in which the transaction is likely to alter the market."[124]

Comcast and AT&T Broadband provide services to consumers in different local markets and therefore the proposed merger will have no measurable impact on horizontal concentration in any relevant market.[125] Additionally, as demonstrated below, the combined entity will not have either the ability or incentive to exercise buyer market power in any relevant market.

A. Multichannel Video Programming Distribution

The merger will not have any adverse effect on competition in the business of multichannel video programming distribution. As the Commission has recognized, the

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[123] *Ameritech-SBC Merger Order* ¶¶ 71-72; *Bell Atlantic-NYNEX Merger Order* ¶ 58.

[124] *Bell Atlantic-NYNEX Merger Order* ¶ 96.

[125] The Applicants have determined that none of Comcast's cable franchises (including the franchises operated by Clearview Partners) overlaps with any of the franchises associated with AT&T Broadband's owned and operated or consolidated systems. In addition, AT&T Broadband has requested the most current franchise information from its non-consolidated systems, and, based on the information these systems have provided to date, there are no significant overlaps between the AT&T Broadband non-consolidated system franchises and Comcast's franchises. Although there are a small number of situations in which a Comcast cable system and an AT&T Broadband non-consolidated cable system both hold a franchise in the same area, it appears that none of these situations involves significant overbuilds between the two systems. Based on the information available to them, the Applicants have also identified 29 franchise areas where Comcast and TWE both have franchises that operate in the same area. Although Comcast and TWE have limited overbuilds in nine of these franchise areas, these overbuilds are modest and some are limited to a few dozen homes. Moreover, as discussed in section V.F, the Applicants intend to have no attributable interest in TWE at and after the closing of their merger. Finally, the Applicants have identified a small number of areas in which Comcast operates SMATV systems in territories served by cable systems in which AT&T Broadband currently has an attributable interest. As set forth in note 97, *supra*, the Applicants will take the necessary steps to ensure compliance with the Commission's cable-SMATV cross-ownership rule.

appropriate "geographic scope" for analyzing MVPD competition is "local."[126] AT&T Broadband and Comcast cable systems reach different residences and businesses and compete in different local markets. Therefore, their proposed merger will not reduce actual competition in any relevant local distribution market. Nor will the merger have any impact on potential competition in the relevant MVPD markets, because neither AT&T Broadband nor Comcast had any pre-merger plans to overbuild the other's cable systems.[127]

Further, the merged company faces intense competition from DBS providers. DirecTV and EchoStar, two DBS providers, distribute video programming throughout the United States and compete directly in all local markets served by AT&T Broadband, Comcast and other cable operators. In less than ten years, DBS has grown from serving no multichannel video subscribers to serving over 17 million subscribers, almost 19% of all MVPD subscribers.[128] Last year alone, DBS grew *twelve times faster* than cable, with both DirecTV and EchoStar experiencing tremendous subscriber growth.[129] Indeed, four out of five new customers now are choosing DBS over cable, and almost one-half of existing DBS subscribers are former cable customers.[130] In addition, AT&T Comcast will also face retail MVPD competition in many localities from MMDS providers

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126 *Horizontal Ownership FNPRM* ¶ 19.

127 *See AT&T-MediaOne Merger Order* ¶ 95.

128 *See* AT&T Comments, CS Docket 98-82, at 18 (filed Jan. 4, 2002); Comcast Comments, CS Docket 98-82, at 21 (filed Jan. 4, 2002).

129 *See 2001 Video Competition Report* ¶¶ 55-58.

130 *See* J.D. Power & Associates, *2001 Syndicated Cable/Satellite TV Customer Satisfaction Study*, at 79 (Sept. 2001).

(including WorldCom and Nucentrix), SMATV providers (including Direct Cable, FreeAir Networks, and MCU Communications), MVPD services offered by electric utilities (including Starpower, Seren, and Sigecom), and cable "overbuilders" (including RCN, WideOpenWest and Knology).

B. Video Programming Production And Packaging

In addition, the merger will not adversely affect competition in the production and packaging of video programming for sale to MVPDs. As explained in detail below, AT&T Comcast will have neither "seller power" that would allow it to raise prices for, or discriminate in the distribution of, video programming, nor "buyer power" that would allow it to insist on anticompetitive terms and conditions for programming that it purchases from others.

When the Commission began tracking the number of national programming networks in 1992, there were 87 such networks. By 2001, that number had grown to 294, an increase of 238%.[131] Driven by strong consumer demand for video programming capacity due to digital upgrades, entry shows no signs of abating. The Commission's *2001 Video Competition Report* (Table D-4), for example, identifies 51 new programming services that are being planned for launch. Moreover, large, well-financed companies, such as Disney, News Corp., GE, Liberty Media, Viacom, and Vivendi, own many of these programming networks, including the "big four" broadcast TV companies (ABC, CBS, Fox, and NBC).[132]

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[131] *See 2001 Video Competition Report* ¶ 157.

[132] Kagan Media, *Cable Program Investor*, Sept. 11, 2001, at 4.

1. Market Definition

The relevant geographic market for the purchase and sale of video programming is quite broad and, for many types of programming, international in scope. There are no significant limitations on transporting programming and, as a result, video programming can be sent to virtually any distribution outlet in the world for roughly equivalent costs. Moreover, the only limiting factor on the international distribution of U.S.-produced content is whether there is foreign demand for that content. Foreign demand is quite strong; international sales now account for a very substantial portion of video programmers' businesses. [133]

Defining the product market contours, that is, identifying the relevant buyers and sellers, is complex because video programming producers have many distribution outlets and the importance of those outlets may vary from one type of programming to another. For example, broadcasters, as the Commission has recognized, compete with MVPDs in the purchase of much video programming.[134] There are many other important purchasers of video programming as well. Video programming producers deal with program "packagers" (*i.e.*, networks and syndicators) that act as middlemen and aggregate content for resale to cable, DBS, broadcast, and other retail distributors. Program producers also license their products to numerous other retail distributors directly, such as firms that own

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[133] *See* AT&T Comments, CS Docket 98-82, at 30 (filed Jan. 4, 2002); *see also* Declaration of Janusz A. Ordover ¶¶ 58-61, attached to AT&T Comments, CS Docket No. 98-82 (filed Jan. 4, 2002) ("Ordover Horizontal Ownership Declaration") (describing in detail the international scope of video programming purchasing).

[134] *See 2001 Video Competition Report* ¶ 13 ("Broadcast networks and stations are competitors to MVPDs in the advertising and program acquisition markets.").

movie theaters, retail stores, or Internet video-streaming sites.[135] All of these firms vie to serve the consumer demand for video programming, and many producers of video programming derive revenues from sales to many or all of these channels. These alternative channels are relevant to any foreclosure inquiry, *i.e.*, to determining whether a program producer could obtain sufficient revenues to recover the cost of the programming if the alleged forecloser refused to distribute the programming.

It is unnecessary in this case, however, to delineate the precise boundaries of the relevant product market. As explained below, it is clear that AT&T Comcast will account for only a very small percentage of video program sales and that the merger will not create or enhance seller market power. And, even if MVPD purchasers in the domestic market alone are considered, AT&T Comcast, which will purchase video programming for cable systems that serve less than 30% of MVPD subscribers, will have no buyer market power.[136]

2. Seller Market Power

The merger will not reduce competition or create market power in the sale of video programming by AT&T Comcast. Simply put, the combined company will have

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[135] *See id.* ¶¶ 89-98.

[136] As set forth in section V.F above, the Applicants intend to have no attributable interest in TWE at and after the closing of their merger. Moreover, TWE subscribers should not be attributed to AT&T Comcast for purposes of measuring the buyer market power. Under the unique TWE partnership arrangement, AT&T has no ability to influence or control TWE's programming decisions. Competition analysis properly focuses on the economic realities of ownership. *See, e.g.*, *Broadcast Music, Inc. v. Columbia Broad. Sys.*, *Inc.*, 441 U.S. 1, 14 (1979) (federal competition laws "ha[ve] always been discriminatingly applied in the light of economic realities"); *Alvord-Polk, Inc. v. F. Schumacher & Co.,* 37 F.3d 996, 1007 (3d Cir. 1993) ("Antitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form.").

only very modest programming interests and no enhanced ability to control the pricing of video programming to MVPDs.

AT&T Broadband owns attributable interests in three national video program services – E! Entertainment (10%), style. (10%), and iN DEMAND (44%) – and attributable interests in three regional networks – Fox Sports New England (50%), New England Cable News (50%), and Pittsburgh Cable News Channel (30%).[137] Comcast owns attributable interests in seven national video program services – E! Entertainment (40%), The Golf Channel (91%), iN DEMAND (11%), QVC (58%), style. (40%), The Outdoor Life Network (100%), and Discovery Health Channel (20%) – and four regional program services – Comcast SportsNet (78%), cn8, The Comcast Network (100%), Comcast Sports Southeast (72%), and Comcast SportsNet-MidAtlantic (100%).[138] Comcast's regional programming interests serve different geographic areas than do AT&T Broadband's regional programming interests. Comcast has announced that it will launch an additional new original programming network, the G4 Network, later this year.

Thus, AT&T Comcast will have ownership interests in a total of 24 video programming networks, or 6.4% of the 374 services.[139] This very limited set of post-

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[137] As noted above, AT&T has significantly reduced its ownership of video programming services in the last year, by: 1) completing a spin-off of all of its interest in Liberty Media; 2) selling a portion of its interest in Cablevision (and, therefore, Rainbow Media), and removing its two Board members from the Cablevision Board of Directors, so that the interest is no longer attributable; and 3) selling its interests in several other programming services, including Food Network, The Outdoor Life Network, Speed Channel, and The Sunshine Network.

[138] Comcast also owns a *de minimis* interest (2%) in another regional programming service, Florida News Channel.

[139] Consistent with the Commission's *2001 Video Competition Report*, iN DEMAND is treated as 11 multiplex services. *See 2001 Video Competition Report* at Tables D-1, D-2. The 6.4% share figure is determined by dividing 24 national and regional services (*i.e.*,

merger interests (many of which are minority interests) presents no concentration problem or threat of competitive harm, particularly when viewed against the backdrop of the highly competitive video programming marketplace, and the far more significant program holdings of other media entities.[140]

3. Buyer Market Power

AT&T Broadband and Comcast are, of course, buyers of video programming. Based upon the Commission's analysis of prior cable mergers, there are two theories of competitive harm that could be raised by an assertion that the merger creates buyer "market power": first, that the merger would reduce horizontal competition in the purchasing of programming and thereby create buyer "monopsony" power; and second, that the merger would increase the incentive and ability of the merged firm to engage in vertical foreclosure in the purchasing of video programming from video programming producers. As explained below, the merger will not create any anticompetitive consequences under either of these theories.

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13 services plus 11 iN DEMAND services) by the 374 total national and regional services. *See id*. at Tables D1-D3. If regional and national services are considered separately, the combined shares are 5.8% for national (six national services plus 11 iN DEMAND services divided by the 294 total national services) and 8.8% for regional (seven regional services divided by 80 total regional services). *Id*.

[140] For the reasons noted above, this analysis does not include the video programming interests owned by TWE. TWE owns interests in HBO, Cinemax, Comedy Central, and CourtTV. Even if the ten TWE programming interests (seven HBO services plus Cinemax, Comedy Central, and CourtTV) were considered, the combination of the AT&T Broadband and Comcast interests would still be less than 10% of the total national services (17 Comcast and AT&T Broadband programming services plus 10 TWE programming services divided by 294 total national programming services). Such a small share could not possibly have an adverse impact on the competitive supply of programming. *See 2001 Video Competition Report* at Tables D-1, D-2 (divide 27 national services (the 17 services from above plus 10 TWE national services)) by the 294 total national services).

Traditional Monopsony Theory. Traditional monopsony theory holds that a firm buying a sufficiently high percentage of the output of a group of sellers may have the ability to set unilaterally the price it pays for goods or services produced by the sellers.[141] This theory has no applicability in the present case for several reasons.

First, AT&T Broadband and Comcast simply do not compete in the purchase of video programming so the transaction will not reduce competition in any way. The economic literature documenting the ability of companies to exercise this type of monopsony power was developed in the context of "rivalrous" goods – *i.e.*, a good that, when sold to one buyer, cannot be sold to another buyer.[142] As the Commission has recognized, however, video programming is not a rivalrous good: "[c]onsumption of the programming of a video programming network . . . by one viewer does not reduce the amount of the good available for another viewer."[143] This critical aspect of the "market structure" for video programming negates the normal intuition that a very large purchaser may be able to exercise monopsony power over sellers.

Where, as here, the "goods" in question are non-rivalrous, an MVPD "monopsonist" (that is a price setter) would choose the same bundle of programming as a competitive purchaser.[144] A cable MSO's appetite for quality programming is driven by consumer demand and *retail* competition that are independent of, and would be unchanged by, the acquisition of "monopsony" power over program packagers or

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141 Robert Pindyck & Daniel Rubinfeld, *Microeconomics,* 352-54 (2001).

142 *See* Ordover Horizontal Ownership Declaration ¶ 67.

143 *Horizontal Ownership FNPRM* ¶ 15.

144 *See* Ordover Horizontal Ownership Declaration ¶¶ 66-82 (explaining in detail why monopsony power is not a concern in this context).

producers. Thus, as a cable MSO gets bigger, there is no change in its incentives or practical ability – as determined by the marketplace – to buy the programming that is likely to produce the greatest number of viewers relative to the cost of the programming. For these reasons, even a cable "monopsonist" would purchase the same amount of programming as a non-monopsonist.

Second, the susceptibility of a producer or packager of video programming to "victimization" by a cable MSO turns, in large part, on the programmer's distribution alternatives.[145] There are unlikely to be any circumstances in which a buyer that accounts for 30% of total purchases could exercise buyer market power, and here, of course, the distribution channels and revenue sources available to video programmers extend well beyond the MVPDs, of which the combined firm will account for less than 30%.[146] The Commission has itself found that an MSO that purchases programming for systems that serve less than 30% of MVPD subscribers has no buyer market power.[147] Moreover, when the Commission addresses the *Time Warner II* remand of its cable cap, the analysis required by the court is almost certain to result in a subscriber limit *higher* than the *1999 Horizontal Ownership Order*'s 30% cap. Indeed, the dramatic changes in the video

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145 *See*, *e.g.*, *Permian Basin Area Rate Cases*, 390 U.S. 747, 794 n.64 (1968); *United States v. Syufy Enters.*, 903 F.2d 659, 666 (9th Cir. 1990).

146 *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 2.211 (1992), *available at*: <http://www.ftc.gov/bc/docs/horizmer.htm> (merger unlikely to facilitate unilateral exercise of market power if merged firm has less than 35% of relevant market); U.S. Department of Justice and Federal Trade Commission, Statements of Antitrust Enforcement Policy in the Health Care Area, Joint Purchasing Arrangements Among Health Care Providers (Sept. 15, 1993), *available at*: <http://www.ftc.gov/reports/hlth3s.htm#7> (joint purchasing arrangements among entities that purchase less than 35% of the total purchases of a product or service raise no competitive concerns and generally should not be subject to *any* antitrust scrutiny).

147 *1999 Horizontal Ownership Order* ¶¶ 46, 50, 52.

industry that the *Time Warner II* court observed in the rulemaking record from 1999 are even more pronounced today: DBS has continued its explosive growth, cable channel capacity has further increased, and the extent of vertical integration between cable MSOs and video program networks has further declined.[148] *A fortiori*, a merger that results in an entity with less than 30% of the U.S. MVPD "market" today cannot be considered to raise any monopsony concerns.[149]

Distribution Foreclosure. Nor could the combination of AT&T Broadband and Comcast trigger any "distribution foreclosure" concerns. Such concerns could arise if the merged entity would have sufficient market power in the distribution of programming such that it would have the incentive and ability to foreclose access to its cable systems by refusing to buy programming that viewers desire from unaffiliated program packagers or producers. As demonstrated below, AT&T Comcast will have neither the incentive nor ability to foreclose other programmers.

As an initial matter, AT&T Comcast will not have the incentive to foreclose unaffiliated video program packagers or producers because AT&T Comcast will have only modest video programming interests and the damage caused by distribution foreclosure to its core MVPD business could be substantial. The business of AT&T

[148] *See 2001 Video Competition Report* ¶¶ 13, 32, 157, 186. Adjusting for AT&T's divestiture of Liberty (Liberty now is integrated with only a very small cable system in Puerto Rico that provides no basis for "leverage"), vertical integration declined again last year, just as in each of the prior several years. *Id.* at n.511 ("if we did not count Liberty Media as being vertically integrated, the ratio of vertically integrated channels would decrease from 35 percent in 2000 to 31 percent in 2001"); *see also* Comcast Reply Comments, CS Docket No. 98-82, at 24 & n.72 (filed Feb. 19, 2002).

[149] This is particularly true given that the Commission also assumed a much more "concentrated" industry than exists today. *See 1999 Horizontal Ownership Order* ¶¶ 47, 53 (assuming only four cable MSOs in the U.S., with the two largest having 30% of the MVPD "market" and the two smallest having 20% of the "market").

Comcast will be, first and foremost, the MVPD business, that is, the distribution of video programming to consumers. If the company were to refuse to carry quality programming preferred by consumers, it would critically damage its core business and disadvantage itself in competition with other MVPDs, particularly DBS providers. It is clear that consumers view DBS and cable as substitutes and have demonstrated that they would readily switch from cable to DBS if they viewed AT&T Comcast's offering as inferior.[150] As a result, any action by AT&T Comcast that degraded the quality of its programming – by foreclosing competitively priced unaffiliated programming that customers want – would cause AT&T Comcast to lose customers to DBS or other MVPDs. Moreover, given the modest programming interests of AT&T Comcast, the potential benefits of such a strategy would be essentially non-existent.[151]

In addition to lacking the incentive to foreclose independent video programming, AT&T Comcast will have no ability to foreclose. In order to engage in foreclosure successfully, AT&T Comcast would have to control such a substantial percentage of *all*

[150] *See supra* section VI.A.

[151] Moreover, Dr. Besen has illustrated how a larger MSO, such as AT&T Comcast, would have even less incentive to engage in such distribution foreclosure than would a smaller MSO. As compared to a small MSO, a large MSO stands to suffer greater customer losses (to DBS and other MVPDs) from basing programming decisions on factors other than customer preferences. Because cable companies incur high fixed costs regardless of the number of subscribers served, the loss of even relatively few subscribers has a significant impact on the profitability of the strategy. At the same time, the larger the MSO, the *lower* the gains will be from foreclosure. This is because the larger the foreclosing MSO, the fewer subscribers served by other MVPDs, and the lower the revenues to be gained by the MSO's programming affiliate from raising prices to other MVPDs. As Dr. Besen showed in his testimony in the cable horizontal ownership rules proceeding, an entity the size of the combined AT&T Comcast would have no incentive to undertake foreclosure (even if, contrary to fact, it had the ability) because the expected gains from this strategy would not offset the expected losses. *See* Declaration of Stanley M. Besen ¶¶ 41-57, attached to AT&T Comments, CS Docket No. 98-82 (filed Jan. 4, 2002).

distribution channels to which rival video programmers could turn as to be able to drive them out of business or substantially raise their costs. But, as explained above, even focusing solely on MVPD distribution channels, AT&T Comcast will purchase programming for systems that serve less than 30% of subscribers. As noted, the Commission has found that a 30% share of MVPD subscribers is insufficient to create buyer market power or raise foreclosure concerns.[152] Similarly, antitrust courts have consistently rejected claims that even absolute control of such a small share of purchases gives rise to competitive concerns.[153] Video programmers, of course, understand marketplace dynamics and would recognize that, even without AT&T Comcast they would effectively have access to more than the approximately 70% static share of other MVPDs. This opportunity is even more meaningful than a static analysis reflects, because any attempt by AT&T Comcast to base its programming decisions on anything other than customer demand could only increase the relative appeal of DBS and other competitors.[154]

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[152] *See supra* note 147.

[153] *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 46 (1984) (O'Connor J., concurring) (30% foreclosure insufficient); *Sewel Plastics v. Coca-Cola Co.*, 720 F. Supp. 1196, 1214 (W.D.N.C 1989) (40% foreclosure insufficient); *Gonzales v. Insignares*, No. C84-1261A, 1985 WL 2206, at *2 (N.D. Ga. 1985) (same). Additionally, this competitive analysis cannot be side-stepped on the assumption that AT&T Comcast can gain market power that it does not individually possess by acting collusively with other MSOs. The notion of "coordinated" action in this context defies basic economics. MVPDs that are unaffiliated with a particular video programmer have no incentive to foreclose rivals to that programmer. All that would accomplish is to make the unaffiliated MVPD's service less attractive. Moreover, these unaffiliated MVPDs would be among the "targets" of the foreclosure strategy – the principal reason to weaken the rival programmer is to be able to raise the prices the affiliated programmer charges to other MVPDs. There is thus no mutual benefit to be shared by colluding.

[154] *See Horizontal Ownership FNPRM* ¶ 22 ("[T]he competitive presence of DBS reduces cable operators' incentives to choose programming for reasons other than quality

Programmers also have effective counter-strategies that can be employed to prevent attempted distribution foreclosure. For example, most programmers are large multinational firms that own several different programming networks, including broadcast networks.[155] Even if AT&T Comcast were relatively indifferent as to whether it carried some of these networks, many of these programmers hold exclusive rights to very popular programming and are able to package their less popular programming with popular programming when negotiating carriage on cable systems. A threat by AT&T Comcast to drop one of these programmers' "second tier" networks could thus be met with a threat by the programmer to retaliate by denying AT&T Comcast carriage of its entire package of programming, including the programmer's most popular networks, or to increase significantly the price for the "marquee" programming that every cable operator must have. In fact, it is quite common for programmers to use "bundling" in this fashion to gain "bargaining power" as well as to lessen the competitive pressures on their "weaker" offerings that face substitutes. In particular, broadcast networks with other programming interests have bargaining power vis-à-vis cable operators in negotiating

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because a cable operator that selects programming on some other basis risks loss of subscribers if high quality programming is available via DBS."); *accord Time Warner II*, 240 F.3d at 1134 ("[A] company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the availability of competition"); *see also* National Cable and Telecommunications Association ("NCTA") Comments, CS Docket 98-82, at 14 (filed Jan. 4, 2002) ("What this means is that a cable operator that refuses to carry attractive programming services may now, in addition to failing to attract new subscribers and failing to maximize revenues from existing subscribers, lose existing subscribers to its competitors.").

[155] *See 2001 Video Competition Report* at App. D.

retransmission agreements and can, for example, require cable operators to buy less popular programming as a condition of obtaining popular broadcast network offerings.[156]

For all of these reasons, the proposed merger will not create any buyer market power in the purchase of video programming.

C. Set-Top Boxes, Cable Modems, And Other MVPD Consumer Equipment

Whether the relevant equipment market is defined broadly as encompassing all "navigation devices" as defined by the Commission in its commercial availability proceeding,[157] or more narrowly as individual types of devices such as modems and set-top boxes, the merger will have no adverse effect on any equipment market. As explained below, AT&T Comcast will account for a small fraction of the overall purchases of modems and set-top boxes and other navigation devices and thus will have no ability to exercise buyer market power over manufacturers of such devices.

[156] Moreover, AT&T Comcast will not have the ability to deny carriage on the cable systems that it owns and operates because programmers can obtain carriage on cable systems under leased access regulations or by striking carriage deals with broadcast TV networks who, in turn, have carriage rights under "must carry" and retransmission consent regulations. *See* 47 U.S.C. §§ 532, 534; 47 C.F.R. §§ 76. 970, 76.971 (leased access); 76.56, 76.57 (must carry); and 76.64 (retransmission consent). AT&T Comcast similarly will not have the market power to control the price of its programming, another requirement for a successful distribution foreclosure strategy. Without the market power over the price of programming, foreclosure would just cause losses (from subscribers lost by the refusal to carry valuable programming) without any corresponding gains. Where, as here, the "secondary market" (*i.e.*, video programming production and packaging) is deconcentrated and entry is possible, there is no real prospect of gaining such power over price. *See* AT&T Comments, CS Docket No. 98-82, at 52-53 (filed Jan. 4, 2002).

[157] *See Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (ongoing Commission rulemaking on navigation devices); 47 C.F.R. § 76.1200(c) (defining navigation devices as including "devices such as converter boxes, interactive communications equipment, and other equipment used by consumers within their premises to receive multichannel video programming and other services offered over multichannel video programming systems").

Moreover, because of intense competition, AT&T Comcast could have no conceivable incentive to do anything that would affect adversely the quantity or quality of available equipment that consumers need to enjoy its services.

The relevant geographic market for MVPD customer equipment is global. Set-top boxes, modems, and other navigation devices are purchased by MVPDs and MVPD customers in the U.S., as well as by MVPDs, consumers, and other buyers worldwide. For example, set-top boxes manufactured by Pace have been installed in 13 million homes throughout the U.S., Europe, Latin America, Australia, and the Far East,[158] while Scientific-Atlanta sells its products in the U.S., Europe, South America, and Asia.[159] Cable operators in the U.S. will purchase nearly one million digital set-top boxes from five foreign manufacturers this year, accounting for nearly 14% of cable set-top box deployments currently forecast for 2002.[160] Similarly, Com21, a U.S. company, generates 69% of its revenue from Europe and Asia.[161] Toshiba, headquartered in Japan,

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158 *See* Press Release, Pace, *Pace Ranked World's Third Largest Cable Set-Top Box Supplier* (Nov. 27, 2001), *available at:* <http://www.pacemicro.com/pressroom/newspopup.asp?section=release&id=180>.

159 *See* Kagan, *Digital Set-Top Boxes: U.S. Shipments 2000-2005*, Feb. 21, 2001 ("*Kagan Report*") (also noting that Motorola has been marketing its boxes aggressively in South America). The same is true for satellite set-top boxes, where Korean manufacturers expect to capture 30% of the global market by 2005. *See Set-Top Box Exports Grow to $1.5 Bil. by 2005*, Korea Times, Dec. 15, 2001. CableLabs has certified approximately 60 modem manufacturers as part of its DOCSIS program, a six fold increase over the last two years, and nearly 200 models of cable modems received CableLabs' DOCSIS certification. *See* CableLabs Certified Cable Modem Products, *available at:* <http://www.cablelabs.com/certification.html> (last visited Jan. 24, 2002).

160 *See* Business Wire, *Pioneer and Sony Digital Cable Set-Top Box Deployments Changing Market Landscape* (Sept. 27, 2001), *available at:* <http://investor2.cnet.com/newsitem-bloomberg.asp?symbol=6MU3BTCQBQ&Ticker=SNE>.

161 *See* Melissa Phillips, Cahners In-Stat Group, *Cable Modem Market Analysis* 28 (Oct. 2001).

and Samsung, based in Korea, are leading suppliers of modems to the U.S. Motorola, the industry leader, sells its modems throughout the world.[162]

With approximately 91 million subscribers, the entire U.S. cable industry represents less than a quarter of the 317 million worldwide cable and DBS subscribers, and AT&T Comcast will serve less than 30% of U.S. MVPD purchasers.[163] Thus, the relevant AT&T Comcast "share" of set-top box and cable modem purchases does not even rise to double digits. AT&T Comcast, accordingly, cannot be considered to have the power to do anything to harm the production or supply of such equipment.[164]

Even assuming *arguendo* that the relevant geographic market were limited to the United States, AT&T Comcast would not have market power and would have no ability to harm set-top box and cable modem manufacturers. The combined entity's less than 30% share of U.S. MVPD subscribers will be far too low to support any claim of buyer market power for many of the same reasons discussed above with respect to video

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[162] *See id.* at 27-31 (also noting that Ericsson, a Swedish company, sells cable modems in the Americas, Europe, and Asia, and that Terayon, a U.S. company, exports to the Asia-Pacific region); *see also* Press Release, Toshiba, *Berry to Lead Cable Modem Manufacturer's Product Line Expansion* (July 24, 2001), *available at*: <http://www.toshiba.com/taisnpd/news/releases/010724.html> (noting that, in the first quarter of 2001, cable modem sales from Toshiba accounted for more than 26% of all cable modems sold in North America).

[163] It is appropriate to consider the entire global MVPD equipment base, as opposed to simply the cable base, because equipment manufacturers who supply set-top boxes or modems to cable MSOs also manufacture and supply similar equipment (that largely reflects the same research and development efforts and costs) to cable MSOs' video and Internet competitors. For instance, Motorola, Pace, and Sony each manufacture set-top boxes for cable and DBS providers. *See* Cahners In-Stat, *Set-Top Box Internet Access* (Sept. 2001).

[164] *See NCTA Industry Overview 2001* at 16 (Dec. 2001), *available at:* <http://www.ncta.com/pdf_files/2001IndOvrvw.pdf>; Michelle Abraham & Mike Paxton, Cahners In-Stat Group, *Worldwide Digital Satellite and Cable TV Services* 59, 67 (Dec. 2000).

programming. Indeed, in the AT&T-MediaOne merger, the Commission concluded that an entity with 42% of U.S. MVPD subscribers attributed to it had no ability to exercise buyer power over set-top box or modem manufacturers.[165]

Just as importantly, cable equipment can be purchased directly by consumers. The ability to sell cable equipment directly to consumers allows equipment manufacturers simply to bypass any cable company, no matter how large, that refused to pay competitive market prices.[166] There is a steadily growing retail market for cable equipment. For example, Motorola's cable modems can be purchased in over 1,000 retail stores throughout the United States, including Best Buy, Circuit City, CompUSA, and The Wiz, or directly through Motorola's Web site.[167] Similarly, both RCA and Toshiba sell their cable modems through Best Buy and CompUSA and directly to consumers through their own Web sites.[168] Indeed, cable operators support such retail distribution

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[165] *See AT&T-MediaOne Merger Order* ¶ 42.

[166] *See id.* ¶¶ 97, 100 (navigation device rules "alleviate concerns regarding competition in the production and sale of set-top boxes and modems," and "by requiring MVPDs to grant all equipment manufacturers an opportunity to sell equipment to the MVPDs' subscribers, the navigation device rules limit MVPDs' ability to exercise excessive market power and dominate the equipment market").

[167] *See* Motorola Comments, CS Docket No. 01-129, at 2 (filed Aug. 3, 2001).

[168] *See* Press Release, Toshiba, *Berry to Lead Cable Modem Manufacturer's Product Line Expansion* (July 24, 2001), *available at:* <http://www.toshiba.com/taisnpd/news/releases/010724.html>; *Modems from BestBuy.com*, *available at:* <http://www.bestbuy.com/ComputersPeripherals/ModemsNetworking/Modems.asp?m=488&cat=540&scat=54> (last visited Feb. 22, 2002); *CompUSA Cable Modems*, *available at:* <http://www.compusa.com/products/products.asp> (last visited Feb. 22, 2002); RCA Digital Cable Modems, *available at:* <http://ww.rca.com/product/viewproductcategory/0,,CI305,00.html> (last visited Feb. 21, 2002).

channels because they are instrumental in attracting new customers.[169]

In addition, the OpenCable Application Platform ("OCAP") middleware specification, recently released by CableLabs, will encourage the development of additional retail distribution and competition by establishing an interactive broadband service platform based on open industry standards.[170] The six largest cable operators – including both AT&T Broadband and Comcast – have committed to support OCAP in their cable networks,[171] and leading consumer electronics equipment providers have also

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[169] *See, e.g.*, Linda Haugsted, *Operators Shop for Retail Shelf Space: Partnerships with Electronics Chains Push Broadband Sales*, Multichannel News, July 23, 2001, at 8A (noting that 12.5% of Cox's modem sales in the first quarter of 2001 were made in retail sales, up from 2% a year earlier); *id.* (noting that Cablevision is selling 5,000 modems a week out of 26 Wiz stores); AT&T Comments, CC Docket No. 98-146, at 10 (filed Sept. 24, 2001) (noting importance of retail in marketing cable modem service); Press Release, Comcast Cable*, Comcast Expands Retail Presence with Best Buy* (Oct. 18, 2001), *available at:* <http://www.comcast.com/press_room/viewrelease.asp?pressid=98> (offering Comcast's high-speed internet and digital cable TV services at Best Buy, thus making it easy for customers to obtain new services). These services are also sold at CompUSA, Circuit City, and Staples, as well as on-line through Comcast's home page. *See* Internet Products: Where Can I Get It?, *available at:* <http://www.comcastonline.com/wherecanigetit.asp?> (last visited Feb. 22, 2002). Furthermore, in a unique effort to attract new customers, Comcast has set up High-Speed Internet Mall Kiosks that offer products, information, and sampling of the service. *See* Internet Products: Comcast High Speed Internet Mall Kiosks, *available at:* <http://www.comcastonline.com/kiosks.asp> (last visited Feb. 22, 2002).

[170] Press Release, CableLabs, *CableLabs Publishes OCAP Middleware Specifications* (Jan. 3, 2002), *available at:* <http://www.cablelabs.com/news_room/PR/02_pr_OCAP_010302.html>. The OCAP standard is largely based on the European Multimedia Home Platform ("MHP") middleware specification, thus creating an opportunity for worldwide interoperability of interactive applications and content. *See id.* (also quoting Canal+ Technologies CEO as saying that "[l]everaging MHP as the foundation for OCAP sends a strong message that the US cable market is definitively a member of the global digital television community").

[171] *See Ex Parte* Letter from Neal Goldberg, NCTA, to Chairman Powell, FCC, filed in PP Docket No. 00-67 (Jan. 3, 2002).

endorsed the effort.[172] Similarly, in October 2001, the NCTA launched an industry-wide initiative to encourage manufacturers of digital set-top boxes to make available to retail outlets the same set-top boxes with embedded security that are made available to the local cable operator.[173] Under the initiative, cable operators will authorize and support these "integrated" retail boxes in their systems.

Finally, given the ubiquitous availability of DBS and DSL alternatives, AT&T Comcast will have no *incentive* to exercise market power against set-top box or modem manufacturers. Any action by a cable operator that has the effect of restricting the supply of high-quality equipment that enables consumers to access operator-provided services would cause the operator to lose cable customers to the DBS competitors and Internet customers to DSL or other competing providers. Thus, AT&T Comcast will be compelled by market forces to deal fairly with equipment manufacturers and to ensure that it and its customers have access to the best quality state-of-the-art equipment at the best possible price.[174]

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[172] *See, e.g.*, *id.* at p. 2 of attached press release (quoting Paul Liao, CTO of Matsushita, as saying that "the OCAP specification is a good step toward a consistent, open, and more global platform, which should permit the development of an expanding world of advanced interactive cable services").

[173] *See Ex Parte* Letter from Robert Sachs, NCTA, to Chairman Powell, FCC, filed in CS Docket No. 97-80, at 2 (Oct. 10, 2001).

[174] As a result of AT&T's spin-off of Liberty Media (and thus Liberty's ownership interest in Motorola), neither AT&T nor Comcast has an attributable ownership interest in Motorola or any other set-top box or modem manufacturer. Accordingly, the combined entity will have no incentive or ability to act anticompetitively with regard to any equipment manufacturer.

D. Interactive TV Services

The merger will not harm consumers or competition with respect to the provision of interactive TV services. As with MVPD and other services discussed above, Comcast and AT&T Broadband do not compete with each other in the provision of interactive TV services, so the merger will have no adverse effect on competition in this business. Moreover, as explained below, the merger will not enhance the ability or the incentive of AT&T Comcast to engage in anticompetitive conduct in providing these services to its customers.

Comcast currently offers video-on-demand over a number of its digital cable systems, and both Comcast and AT&T Broadband offer their digital cable customers interactive programming guides. As described in section II.B, the two companies also are exploring other offerings that could be characterized as interactive TV services. There are innumerable risks and uncertainties concerning the future success of interactive TV including, among others, what services consumers want, how those services can best be provided under current market conditions, and which business models will allow service providers to recoup the significant investments required to provide those services. Indeed, as both Comcast and AT&T Broadband have previously demonstrated, given the nascent and highly dynamic nature of interactive video services, it is entirely premature to even attempt to define, much less regulate, "interactive TV services."[175]

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[175] *See generally* Comcast Comments, CS Docket No. 01-7 (filed Mar. 19, 2001) ("Comcast Interactive TV NOI Comments"); AT&T Comments, CS Docket No. 01-7 (filed Mar. 19, 2001) ("AT&T Interactive TV NOI Comments"); *see also AOL-Time Warner Merger Order* ¶ 218 ("Given the infancy of [the interactive TV service] market and the limited record before us, it would be imprudent to endorse a comprehensive definition of ITV services."); David Ward, *Experts Say Interactive TV Profits Still Are Years Away*, Communications Daily, Mar. 1, 2001, 2001 WL 5052673 (quoting Jack

Even at this nascent stage, there is substantial evidence of emerging competition and innovation in the provision of interactive TV services.[176] Numerous companies are investing substantial resources in developing, deploying, and distributing interactive TV content, equipment, and services. These companies range from traditional video distributors and programmers, to providers of operating systems, middleware, and other software products, to consumer electronic manufacturers who are creating integrated/web-enabled TVs and game consoles.[177]

In this highly competitive, fast-evolving, and risk-laden environment, AT&T Comcast will have no market power in the provision of interactive TV services. The combined entity will have less than a 30% share of U.S. MVPD subscribers, which, for the same reasons discussed above with respect to video programming, is far too low to create market power concerns. There is a wide range of distribution platforms for interactive TV services, including cable, DBS, and terrestrial broadcast television. DBS providers have been particularly aggressive in pursuing the development and deployment of interactive TV services. It is estimated that, by the end of 2003, satellite television providers will have 9.3 million interactive customers, compared to 7.8 million for the

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Tauper, Executive Vice President, Game Show Network, as saying, "Right now [interactive TV] is not a business, it's an expense.").

[176] Both Applicants have filed comments in response to the Commission's Notice of Inquiry regarding interactive TV that describe in detail the dynamic and highly competitive nature of interactive TV services. *See* AT&T Interactive TV NOI Comments at 8-28; Comcast Reply Comments, CS Docket No. 01-7, at 2-8 (filed May 11, 2001) ("Comcast Interactive TV NOI Reply Comments").

[177] *See* AT&T Interactive TV NOI Comments at 9 (setting forth list of companies involved in interactive TV services); *see also AOL-Time Warner Merger Order* ¶ 231 ("At this early and fluid stage of the ITV market, there are a growing number of firms that now provide or plan to provide ITV service.").

cable industry.[178] Telephone companies can also provide a platform for interactive TV services through DSL technology.[179] In addition, broadcasters are pursuing opportunities to use their digital spectrum to provide datacasting and multicasting interactive TV services. There are a variety of other interactive TV distribution methods as well.[180]

Separate and aside from the merger agreement with AT&T, Microsoft and Comcast Cable have agreed to a binding term sheet which provides that the parties will conduct a trial during 2002 of an interactive TV platform, including set-top box middleware.[181] If the trial results meet agreed technical specifications, the platform

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178 *See* The Meyers Group, *Interactive Television Outlook 2000*, at 51 (June 2000) (citing findings made by the Carmel Group); *see also Cable Burned by Bird*, CEDaily, Jan. 22, 2001 ("According to a report from Cahners In-State Group, digital direct-to-home satellite services are pulling way ahead of digital cable TV providers in the race to get interactive digital television services to market."); Goldman Sachs, Global Equity Research, *Satellite Communications: DBS Operators,* Dec. 18, 2000, at 28 ("We believe DBS operators will beat cable to the punch as they aggressively roll out interactive and personal video recording (PVR) services over the next 3-6 months and beyond.").

179 *See* ITV REPORT.COM, *Kingston Communications Signs Up for Pace's Digital Set-Tops* (Sept. 6, 2000), *available at:* <http://www.kcom.com/news38.html> (quoting Paul Ashmore, Sales Director, Pace Micro, as saying, "DSL technology is a highly effective way for telecommunications companies to rapidly expand the capability of their established networks, enabling them to provide high quality interactive television services challenging traditional network operators in the delivery of home entertainment services.").

180 *See* AT&T Interactive TV NOI Comments at 22-23.

181 Set-top box middleware acts as an interface between set-top box hardware and interactive TV software applications. The purpose of middleware is to reduce or eliminate the need to customize applications software for each set-top box model. Middleware permits application software developers to write one version of a program which will work on a number of different set-top boxes. Effective middleware should reduce the costs of software development and encourage the development of more and varied interactive TV applications. As noted above, CableLabs is currently developing OCAP, which is intended to enable the developers of interactive TV services and applications to design such products so that they will run successfully on any cable television system in North America, independent of set-top or television receiver hardware or operating system software choices.

meets defined competitive requirements, and if a launch would meet Comcast Cable's reasonable business objectives, Comcast Cable has agreed that it will commercially launch the Microsoft platform to at least 25% of its newly installed middleware customer base.

The testing arrangement with Microsoft is plainly pro-competitive because it will facilitate the development and testing of a new middleware product. At present, Comcast Cable has not deployed any set-top box middleware in its systems. Comcast Cable is evaluating various potential middleware products for both current and future generations of set-top boxes. To the extent that the testing is successful, the testing arrangement will result in a new and better product that would reduce the costs and increase the variety of applications software for set-top boxes – clearly a pro-competitive result that benefits consumers.

The testing arrangement is also quite flexible in scope and will not result in anticompetitive consequences. Comcast Cable is under no obligation to deploy the Microsoft interactive TV platform or middleware unless a number of conditions are met, including (i) the trial results meet agreed technical specifications; (ii) the platform meets certain defined competitive requirements, including being compliant with industry standards for future generation set-top boxes, including the OCAP standard; and (iii) either (a) deployment would meet Comcast Cable's reasonable business objectives or (b) Comcast Cable deploys an alternative middleware solution for the current generation of set-top boxes. Failure of any of these conditions excuses any roll-out obligation on the part of Comcast Cable.

In addition, even if these conditions are met, Comcast Cable is only obligated to launch the Microsoft platform in 25% of its newly installed middleware customer base on existing Comcast systems. Accordingly, under any and all circumstances, AT&T Comcast will remain free to test and deploy alternative set-top box platforms and middleware. Indeed, Comcast has a general company policy of working with two or more vendors for any particular product or service and, if Comcast Cable deploys a middleware product, it expects that it will deploy more than one such product. Comcast Cable believes that the flexible 25% commitment was necessary to induce Microsoft to invest the financial and organizational resources in the development of set-top box middleware for Comcast Cable's systems.

In the end, consumers plainly will have a range of choices for competitive interactive TV platforms. As a result, AT&T Comcast will have strong market incentives to afford its customers the widest selection of features, functions, and content, or risk losing those customers to rivals. Moreover, Comcast and AT&T Broadband have no significant interests in interactive content, and do not have any interests in interactive TV set-top box equipment or technologies that would raise any competitive concerns.[182] As a result, AT&T Comcast will have neither the ability nor the incentive to discriminate against the interactive content of unaffiliated video programming networks.

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[182] Indeed, the Applicants have entered into arrangements with a number of unaffiliated providers of interactive services. *See, e.g., supra,* section II.B. Comcast, for example, has entered into such arrangements even though it has investments in competing providers. It has launched interactive services using Wink, despite having invested in RespondTV, and it has entered into a strategic volume purchase agreement for video-on-demand systems from Concurrent, notwithstanding Comcast's equity stake in Concurrent's rival, SeaChange. *See* Comcast Interactive TV NOI Reply Comments at 7-8.

E. Telephone Services

Local Telephone Services. The merger will have no adverse effect on competition in local telephone markets; instead, as explained above, the merger will enhance competition in these markets. Although many carriers have attempted to enter local telephone markets since passage of the 1996 Act,[183] incumbents continue to serve more than 90% of local telephony customers.[184] As described above, AT&T Broadband and, to a much more limited extent, Comcast provide local telephone services in competition with incumbent LECs using their cable facilities.[185] AT&T Broadband and Comcast offer local telephony services in different geographic markets and thus do not compete with each other. Nor was there any potential competition between the AT&T Broadband and Comcast cable telephony offerings, because, as described above, the cable systems owned by the two companies do not overlap.[186] Accordingly, the combination of AT&T Broadband and Comcast cannot be considered to raise any competitive issues in local telephony markets. To the contrary, as explained above, the combination of the

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183 Interexchange carriers, including AT&T, WorldCom, and Sprint, as well as start-up competitive LECs, such as McLeod, Allegiance, Time Warner Telecom, XO, and Focal, and, more recently, cable companies, including AT&T Broadband and Cox, have attempted to enter local markets and compete with incumbents by using their own facilities or by leasing access to incumbent facilities (or reselling incumbent services) pursuant to sections 251 and 252 of the Act. 47 U.S.C. §§ 251-252.

184 *Trends in Telephony* at Chapter 9.

185 As described in section II.B.1, Comcast also operates as a "traditional" competitive LEC in several states. From a competition stand point, this business is *de minimis*. CBC has fewer than 50 competitive LEC business customers.

186 *See AT&T-MediaOne Merger Order* ¶ 135 (cable operators generally cannot be considered potential entrants into local phone markets outside their service territories); *AT&T-TCI Merger Order* ¶ 47.

complementary assets of AT&T Broadband and Comcast will accelerate facilities-based local telephone competition.[187]

Interexchange Telephone Services. The proposed merger will have no measurable impact on long distance concentration or competition. Although both Comcast and AT&T Broadband provide interexchange services to business and residential customers, each provides service primarily through resale and has only a negligible share.

There are numerous participants in the highly competitive interexchange market. Facilities-based providers with ubiquitous networks include AT&T Corp., WorldCom, and Sprint. Several companies, such as Williams Communications, specialize in "wholesaling" long distance to entities that lack their own facilities. Verizon and SBC also offer interexchange services in several states and are now providing substantial amounts of long distance service. There are also hundreds of resellers of long distance service.

F. Internet Services

AT&T Broadband and Comcast do not compete in the provision of high-speed Internet service and, hence, the merger will not create or enhance market power in the provision of this service. As the Commission has recognized, the relevant market for Internet service is local.[188] The combination of AT&T Broadband's approximately 1.5

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[187] In addition, AT&T Corp. will presumably continue to independently pursue its competitive LEC strategy in competition with AT&T Comcast.

[188] *See AOL-Time Warner Merger Order* ¶ 74.

million Internet customers[189] and Comcast's approximately one million Internet service customers will not increase concentration in any relevant market because AT&T Broadband and Comcast provide service in different, non-overlapping geographic areas.

Nor will the merger create or enhance market power in the purchase or delivery of Internet content or applications. There are over 100 million Internet service customers in the United States. AOL Time Warner alone has over 33 million U.S. Internet customers,[190] and there are several thousand other ISPs nationwide, including such major players as MSN, Earthlink, and United Online (recently created by the merger of Juno and NetZero), each of which serves more customers than AT&T Broadband and Comcast combined.

Even if the analysis focused only on the delivery of high-speed Internet service,[191] AT&T and Comcast collectively serve no more than a quarter of the more than 10 million

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[189] AT&T WorldNet is not being transferred to AT&T Broadband, but will remain with AT&T.

[190] *See* Press Release, Nielsen/Netratings, *Broadband Audience Surpasses 21 Million In November, Setting A Record High* (Dec. 11, 2001), *available at:* <http://www.nielsen-netratings.com/pr/pr_011211.pdf>.

[191] As AT&T explained in detail in the AT&T-MediaOne merger proceeding, there is currently no separate market for high-speed Internet services. *See* AT&T-MediaOne Reply Comments, CS Docket No. 99-251, at 71-79 (filed Sep. 17, 1999). This is so for at least three independent reasons. First, high-speed service is priced competitively with dial-up, narrowband service. Second, consumers use both narrowband and high-speed Internet service for the same core applications. Third, at least for the present, all Internet service suppliers (both high-speed and dial-up) will be competing for the same mass market of Internet customers, the vast majority of which currently subscribe to narrowband services. *See, e.g.,* Economics and Statistics Administration, National Telecommunications and Information Administration, U.S. Department of Commerce, *A Nation Online: How Americans Are Expanding Their Use of the Internet*, at 37 & Fig. 3-2 (Feb. 2002), *available at:* <http://www.ntia.doc.gov/ntiahome/dn/anationonline2.pdf> (Internet users with dial-up access are only slightly less likely to make phone calls, play games, chat, trade stocks, or engage in other Internet activities than individuals with broadband access; the sole exception is viewing television or movies or listening to the

high-speed Internet customers.[192] High-speed subscribership continues to grow rapidly.[193] AOL Time Warner, for example, reports that it has nearly 2 million high speed Internet customers, an increase of more than 250,000 customers in just three months.[194] In the face of strong and increasing competition from incumbent LEC and other DSL providers, as well as a number of fixed terrestrial wireless and satellite-based competitors,[195] AT&T Comcast will continue to have every incentive to encourage the development and delivery of content and applications that enhance the high-speed Internet experience of its customers.

As in other recent proceedings at the FCC to consider the transfer of control and assignment of cable television systems, some commenters are likely to urge the Commission to condition its approval of this merger on requirements that the combined entity provide access to its cable facilities to unaffiliated ISPs on government-mandated

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radio: "28.8 percent of broadband users engaged in these activities, compared to 18.8 percent of Internet users generally.").

192 *See Inquiry Concerning the 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*, CC Docket 98-146, Third Report, Appendix C at 1 (rel. Feb. 6, 2002) (FCC 02-33) (as of June 30, 2001, there were a total of 9.6 million high-speed lines in service); *see also* Cable Datacom News, *Cable Modem Market Stats & Projections* (Dec. 21, 2001), *available at:* <http://www.cabledatacomnews.com/cmic/cmic16.html>.

193 Nielsen estimates that broadband subscribership increased by 90% in 2001. *See* Press Release, Nielsen/Netratings, *Broadband Audience Surpasses 21 Million In November, Setting A Record High* (Dec. 11, 2001), *available at*: <http://www.Nielsen-netratings.com/pr/pr_011211.pdf>.

194 *See AOL Time Warner Quarterly Earnings Release, AOL Time Warner Reports Results for Full Year and Fourth Quarter* (Jan. 30, 2002).

195 *See* Cable Datacom News, *Overview of Wireless Broadband Technology & Services*, *available at:* <http://www.cabledatacomnews.com/wireless/cmic10.html> (last visited Feb. 21, 2002).

terms. Because there are no merger-specific issues in this regard, the Commission has rejected such proposals in several of its more recent merger decisions, and should do so here as well.[196] Moreover, the Commission is considering these very issues in an ongoing proceeding[197] and has sought comment on whether imposing an access requirement is a desirable (and lawful) goal.[198] Finally, both AT&T Broadband and Comcast already have ample market incentives to make commercially reasonable, customer-friendly arrangements with unaffiliated ISPs in order to maximize the attractiveness of their Internet offerings to customers and potential customers. Given the need to compete with DSL and other comparable offerings, AT&T Broadband and Comcast have significant incentives to offer their customer a choice of ISPs.[199]

In fact, Comcast has announced that it has executed an agreement with United Online that will provide Comcast's customers in Indianapolis and Nashville with access to United Online's ISP services, with the potential to roll-out this offering to other Comcast cable systems with the concurrence of both Comcast and United Online. In addition, AT&T Broadband and Comcast have gained important experience in the separate multiple-ISP trials they have conducted. Comcast is conducting a technical trial

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[196] *See*, *e.g.*, *AT&T-TCI Merger Order* ¶¶ 94-96; *AT&T-MediaOne Merger Order* ¶¶ 120-23.

[197] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, 15 FCC Rcd 19287 (2000).

[198] *See id*. ¶¶ 32-33; *see also Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Notice of Proposed Rulemaking ¶¶ 47-48 (rel. Feb. 15, 2002) (FCC 02-42) (seeking comment on whether to modify or eliminate existing access obligations on dominant providers of wireline broadband Internet access service).

[199] It is only in the past few months that Excite@Home's cessation of service has removed contractual obstacles to the companies' multiple ISP efforts.

over its Longport, New Jersey cable system to offer select Comcast customers the option of using EarthLink as their broadband ISP. Comcast has conducted a similar trial over the same Comcast cable system with Juno's broadband Internet service. These trials, which began last year and are expected to conclude this year, are providing important information regarding a number of complex technical issues involved in supporting multiple ISPs over a broadband cable system, including the provisioning of service, the assignment of Internet Protocol ("IP") addresses, and the operation of various broadband network components.

AT&T Broadband completed the first technical and operational testing phase of its Boulder, Colorado trial, with four participating ISPs (EarthLink, Juno, WorldNet, and Excite@Home), in April 2001. The second phase of the Boulder trial, which focused on billing, customer usage, and customer care tools, was completed in August 2001. AT&T Broadband had planned a late 2001 limited commercial offering of its "Broadband Choice" initiative to customers in the Boston suburban area. Although the Excite@Home bankruptcy diverted critical engineering and other resources, the new network facilities will ultimately improve the delivery of multiple ISP access, and AT&T remains committed to launching that capability on its Massachusetts and other cable systems.

The Applicants are fully committed to offering customers a choice of ISPs, subject to negotiation of mutually beneficial terms. The trials conducted by both Comcast and AT&T Broadband will afford a solid foundation upon which the combined company can develop the means for offering customers a choice of ISPs. For example, they will help AT&T Comcast and ISPs address issues regarding installation, maintenance of customer data and records, billing, customer service, operation of call centers, "trouble ticketing" for various system components (*e.g.*, modems, routers, etc.), assignment of IP addresses, and the operation of various other system components (*e.g.*, regional data centers). The commitment of each Applicant to customer choice is reflected in the fact that each is currently negotiating independently to enter into commercial service arrangements with unaffiliated ISPs.

VII. PROCEDURAL MATTER

The subsidiaries and affiliates of AT&T and Comcast hold a number of licenses and authorizations to operate cable television relay service, satellite transmit and receive earth station service, business radio service, common carrier and non-common carrier-point-to-point microwave service, wireless communications service, and international and domestic common carrier service. The proposed merger will result in the transfer of control of all of these authorizations. Given the ongoing regulatory activity of both AT&T and Comcast, including the need for these parties to file applications with the Commission during the period in which the instant transfer of control will remain pending at the Commission, the Applicants request that the Commission's grant of its consent to the transfer of control of these licenses and authorizations include the authorization for AT&T Comcast to acquire control of: (1) any authorizations issued to Comcast or any subsidiaries or affiliates, or to AT&T or any of its affiliates to the extent such authorizations are related to AT&T Broadband's business, during the Commission's consideration of the transfer of control applications and the period required for the consummation of the transaction following approval; (2) construction permits held by licensees involved in this transfer of control that mature into licenses after closing and that may have been omitted from the transfer of control applications; and (3) applications that will have been filed by such licensees and that are pending at the time of consummation of the proposed transfer of control. Such action would be consistent with prior decisions of the Commission.[200]

VIII. CONCLUSION

For the foregoing reasons, the proposed merger of AT&T Broadband and Comcast will serve the public interest. The Applicants respectfully request that the Commission grant these applications promptly and provide for any other authority that

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[200] *See, e.g., AT&T-MediaOne Merger Order* ¶ 185; *AT&T-TCI Merger Order* ¶ 156.

the Commission finds necessary or appropriate to enable the Applicants to consummate the proposed merger.

Respectfully Submitted,

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February 28, 2002