Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	
	)	
From	)	MB Docket No. 02-70
	)	
Comcast Corporation and AT&T Corp.,	)	
Transferors,	)	
	)	
To	)	
	)	
AT&T Comcast Corporation,	)	
Transferee	)	
	)	

PETITION TO DENY OF VERIZON TELEPHONE COMPANIES AND VERIZON INTERNET SOLUTIONS D/B/A VERIZON.NET

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EXECUTIVE SUMMARY

In the present regulatory environment, this merger poses a substantial threat to competition in two critical communications markets—the market for broadband Internet access and the market for distribution of video programming. The merged entity would instantly be the dominant provider in both of these markets. Including attributable interests, AT&T Comcast would control access to 37.6 percent of all U.S. cable subscribers and 30 percent of all MVPD subscribers. Similarly, the merged entity would control not only broadband-capable systems passing 25.4 million homes but also one-third of all cable modem subscribers and roughly 23 percent of all broadband Internet access subscribers.

AT&T Comcast would possess substantial market power over providers of both broadband Internet content and video programming. No content provider and, in particular, no new video programming or broadband content service, could risk exclusion from its systems. The merged entity could use that market power to lock up new broadband content services, and to deny competing distribution platforms access to that content. Congress, the federal courts, the Department of Justice and this Commission all have found that cable operators historically have used precisely these tactics to disadvantage potential rivals in their core video programming distribution market, and there is every indication that the merged entity would pursue this strategy in the broadband Internet access market. Through a host of mechanisms, including exacting exclusivity clauses from non-affiliated content providers or promoting technological or copyright solutions incompatible with other broadband platforms, AT&T Comcast could deny popular video programming and other broadband content to competing broadband Internet access providers. In this manner, AT&T Comcast could increase cable modem's already substantial lead on DSL and other broadband competitors such as satellite and fixed wireless.

This merger also would pose a long-term threat to the Commission's goal of increasing competition in the market for distribution of video programming, where the merger partners face little or no effective competition. As AT&T itself has recognized, Internet-based video constitutes a potentially ubiquitous competitor to traditional cable service. However, AT&T Comcast could use its tremendous market power in upstream content markets to block the development of streaming video and video-on-demand applications in order to prevent the Internet from developing into an alternative source of video programming.

The competitive harms flowing from this proposed merger are substantially exacerbated by the present regulatory imbalance between cable modem service and its nearest competitor, DSL. The present regulatory regime creates substantial disincentives for ILECs to invest in DSL and other broadband technologies, and also creates economic disincentives to the creation and deployment of technological solutions that support delivery of broadcast-quality video programming over telephone lines. In antitrust terms, the current asymmetrical regulatory regime is a "market fact" that substantially magnifies the competitive dangers posed by this merger. Because, under the present asymmetrical regulatory regime, this merger threatens substantial public interest harms, the Commission must deny the merger applications unless it first ensures that ILECs can compete with the merged entity on equal terms.

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PETITION TO DENY OF VERIZON TELEPHONE COMPANIES[1] AND VERIZON INTERNET SOLUTIONS D/B/A VERIZON.NET

In the absence of regulatory relief for Verizon and other incumbent local exchange carriers ("ILECs") that will enable them to effectively compete in the broadband Internet access and video programming distribution markets, approving the merger of Comcast Corporation ("Comcast") and AT&T Corporation's broadband business ("AT&T Broadband") will injure competition and deprive consumers of valuable choices. Consequently, unless the Commission grants such relief prior to approving this merger, the parties' applications must be denied.

I. INTRODUCTION AND SUMMARY.

This proposed merger of Comcast and AT&T Broadband jeopardizes competition in the broadband Internet access market and poses a substantial long-term threat to the Commission's

[1] The Verizon Telephone Companies are listed in Appendix A.

goal of fostering effective competition in the market for distribution of video programming. The new entity formed by this proposed merger would be the largest multichannel video programming distributor ("MVPD") in the country, serving over 22 million cable customers—almost double that of the next largest MVPD. It would also be the nation's largest provider of broadband Internet access services, with broadband-capable systems passing 25.4 million homes, or 24 percent of the nation's 106 million homes, and would have roughly 2.5 million broadband subscribers, or approximately 22.7 percent of all broadband subscribers and 34.4 percent of all cable broadband subscribers. Its broadband reach would be double that of its nearest DSL competitors.

As a practical matter, carriage on AT&T Comcast systems would be essential to the survival of any new video programming service or broadband Internet content. As detailed in the Declaration of Dr. Robert W. Crandall (the "Crandall Declaration"), attached hereto as Appendix B, the merged entity would enjoy substantial market power over both non-affiliated video programmers and non-affiliated broadband Internet content providers. The merged entity would have the ability and incentive to use that market power to lock up video programming and other new forms of broadband content, allowing it to literally starve competing platforms of both new and existing video programming and broadband content and applications. The result would be a serious setback to the Commission's goal of fostering increased competition in the market for distribution of video programming and a threat to the healthy intermodal competition that now exists in the broadband Internet access market.

DSL offerings by ILECs serve as the main competitor to cable modem service in the broadband Internet access market. In addition, DSL and related technologies that use the telephone network for video delivery have the potential to provide a ubiquitous, broadcast-

quality competitor to cable for the delivery of traditional video programming to consumers. Indeed, the 1996 Act's repeal of limitations on cable-telephone cross-ownership embodied a congressional recognition that telephone companies represent "the best hope for developing competition in . . . cable television markets."[2] However, DSL technology is placed at a significant competitive disadvantage by a regulatory regime that discourages capital investment and imposes substantial additional regulatory costs on ILECs that are not faced by other competitors.

The competitive harms emanating from this merger would be mitigated if the Commission released Verizon and other ILECs from the regulatory disadvantages under which they now labor in the broadband Internet access market. Regulatory relief would encourage the capital investment necessary to expand the availability of DSL and to develop new technological solutions for the delivery of video programming over upgraded telephone networks, such as Very high bit rate DSL ("VDSL").[3] This proposed merger, and the competitive harms that it threatens, provides an additional reason why broadband regulatory relief is critical. Such relief is necessary to ensure that: (1) Internet-based video programming distribution, the most promising form of ubiquitous competition in the market for the distribution of video programming, emerges; and (2) the cable industry continues to face competition from DSL and other

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[2] 141 Cong. Rec. S8464 (June 15, 1995) (Remarks of Sen. Leahy); *see also* 142 Cong. Rec. H1159 (Feb. 1, 1996) (repeal of the cable-telephone cross ownership rule "will create competition in our telecommunications markets, first by freeing telephone companies to offer cable TV service inside their telephone service areas, and for the first time, bringing genuine competition to the cable market") (Remarks of Rep. Boucher); *id.* at H1162 ("Competition from the telephone companies and many new entrants will replace one of the most needless sets of regulation of the entertainment tier of cable television leaving regulation in place for the so-called life line tier of cable.") (Remarks of Rep. Schaefer).

[3] VDSL provides transmission speeds between 12.9 and 52.8 megabits per second ("Mbps") and has a maximum reach of 4500 wire feet from a central office.

technologies in the broadband Internet access market. Because, under the present asymmetrical regulatory regime, this merger will cause substantial competitive harms in two critical communications markets, the applications must be denied absent regulatory relief for competing broadband technologies.

II. CABLE OPERATORS ARE THE LEADING PROVIDERS OF BOTH MVPD AND BROADBAND INTERNET ACCESS SERVICES TODAY AND AT&T COMCAST WOULD BE THE LARGEST MVPD AND THE LARGEST BROADBAND INTERNET ACCESS PROVIDER.

Cable operators already are the leading providers of both MVPD and broadband Internet access services by a substantial margin and will be for the foreseeable future. The union of Comcast and AT&T Broadband would not only create the largest *cable operator* and *cable modem service provider* but also the largest *MVPD* and *broadband Internet access provider* this nation has ever seen. AT&T Comcast's unprecedented number of MVPD subscribers and broadband subscribers would provide it with substantial monopsony power in the markets for the purchase of video programming and acquisition of innovative broadband content, which it could use to the detriment of competing video programming distributors and broadband Internet access providers. As discussed below, cable operators have a long history of attempting to use control over content to stifle competing delivery systems. The merged entity would have the ability and incentive to extend these tactics to broadband content and hence to threaten the viability of competing broadband Internet access providers.

A. Cable Operators Will Lead The Markets For MVPD And Broadband Internet Access Services For The Foreseeable Future.

Cable operators already enjoy a significant lead in the markets for MVPD and broadband Internet access services. As of June 2001, cable operators served 78.11 percent of all MVPD

subscribers.[4] DBS, cable's next closest competitor in terms of market share, had only 18.2 percent of the market.[5] Internet-delivered video is still in its relative infancy,[6] but is seen by many as a potential competitor to traditional MVPDs in the delivery of video programming and other interactive content.[7] As the FCC has noted, the development of Internet-based video as an effective competitor to MVPDs has been hampered by the inability to guarantee the transmission speeds required for the provision of broadcast-quality video over the Internet.[8] Further capital investment in DSL, VDSL and related technologies will be critical to developing the broadband transmission speeds necessary to support Internet-based delivery of video-on-demand and other video services that have the potential to compete with the dominant cable incumbents' multi-channel video offerings.[9]

Cable also leads all other technologies in the provision of broadband Internet access services. As of the end of 2001, cable already had captured 71 percent of the market for residential broadband Internet access services, with 7.5 million cable modem subscribers.[10]

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4 *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Eighth Annual Report, CS Docket No. 01-129, FCC 01-389, at Appendix C, Table C-1 (rel. Jan 14, 2002) (*"Eighth Annual Video Competition Report"*).

5 *Id.*

6 *Id.*, ¶ 89.

7 *See infra* Section III.B; Crandall Declaration, ¶ 20 ("Indeed, the Internet is the next potential source of widespread competition to cable television in the distribution of video programming.").

8 *Eighth Annual Video Competition Report*, ¶ 92.

9 As noted below, some of the constraints on the transmission speed of cable modem service are, in fact, self-imposed. *See infra* n. 48.

10 *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, CC Docket Nos. 01-337, Comments of Verizon, Appendix A, Broadband Fact Report, at 1 and Figure A (filed Mar. 1, 2001) ("*Broadband Fact Report*").

Cable-based operators added market share faster than any other broadband technology, increasing lines in service by 45 percent during the first half of 2001.[11] In contrast, DSL providers had only 27 percent of the residential market, with 3.3 million subscribers,[12] increasing lines in service by 36 percent during the first half of 2001.[13] And, other competitors have a smaller share. For example, broadband satellite and fixed wireless providers only recently have introduced two-way services, and, while projected to be a significant source of competition in the future, currently have only 100,000 subscribers combined.[14]

At year-end 2001, cable modem service led the market in terms of homes passed, as it was being offered to between 66 and 77 percent of all U.S. households.[15] At the same time, then available telephone-based broadband technologies could only be used to provide service to homes located within 18,000 feet (measured in wire) of the central office.[16] Consequently,

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[11] *High-Speed Services for Internet Access: Subscribership as of June 30, 2001,* Industry Analysis Division, Common Carrier Bureau (Feb. 2002) at 2.

[12] *Broadband Fact Report* at 1 and Figure A.

[13] *High-Speed Services for Internet Access: Subscribership as of June 30, 2001* at 2.

[14] *Broadband Fact Report* at 1 and Figure A.

[15] *Id.* at 14 (citations omitted).

[16] *Id.* (citation omitted). In this respect, even wireless services have an advantage over DSL in that wireless services tend to be "turned on" for an entire geographic area in a single step and typically provide complete geographic coverage. *Review of the Section 251 Unbundling Obligations Of Incumbent Local Exchange Carriers, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98 and 98-147, Comments and Contingent Petition for Forbearance of The Verizon Telephone Companies, Attachment B, UNE Fact Report 2002, at IV-21-2 (filed Apr. 5, 2002) ("*UNE Fact Report 2002*").

during this same time period, DSL service was available only to 43 percent of U.S. homes.[17] As some observers have put it, this gives cable incumbents a "natural advantage" in the ability to attract new subscribers.[18] Cable is expected to maintain its sizable lead over DSL for the foreseeable future, and massive additional investments are needed if telephone companies are to more broadly deploy existing and future generations of broadband technology.[19]

B. The Merger Of Comcast And AT&T Broadband Would Produce The Largest MVPD In The Country.

The merged company's MVPD assets and subscriber base would exceed that of any of its competitors in the MVPD market. Currently, AT&T Broadband is the largest MSO in America, by virtue of its ownership of cable systems serving 13.75 million subscribers.[20] AT&T Broadband also holds attributable interests in cable systems serving an additional 5.24 million subscribers,[21] bringing its total attributable subscribership to 18.99 million. Comcast is the number three MSO and owns or holds an attributable interest in cable systems serving 8.44 million subscribers.[22] The combined AT&T Comcast would thus own cable systems serving 22.19 million subscribers, or 30.4 percent of the approximately 73 million U.S. cable subscribers

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[17] Niraj Gupta, et al., Salomon Smith Barney, Cable and Telecommunications Services, *The Battle for the High-Speed Data Subscriber: Cable vs. DSL*, at 2 (Aug. 20, 2001).

[18] *Broadband Fact Report* at 13 (citations omitted).

[19] *Id.*

[20] *See* NCTA, *Top 25 MSOs* (as of Sept. 1, 2001), at <http://www.ncta.com/industry_overview/top50mso.cfm> ("*NCTA Top 25 MSOs*").

[21] *See Applications for Consent to the Transfer of Control of Licenses*, Applications and Public Interest Statement, MB Docket No. 02-70, at 50 (filed Feb. 28, 2002) ("*Merger Application*").

[22] *See NCTA Top 25 MSOs*.

and 24.3 percent of the approximately 91.33 million U.S. MVPD subscribers.[23] AT&T Comcast's market share would dwarf that of the second largest MSO, AOL Time Warner, which owns cable systems that serve only 12.7 million subscribers.[24] Further, AT&T Comcast would hold an attributable interest in cable systems serving 27.43 million subscribers, which amounts to 37.6 percent of U.S. cable subscribers and 30.0 percent of U.S. MVPD subscribers. Even more problematic is the reality that AT&T Comcast would not be subject to "effective competition" in its provision of MVPD services in over 98 percent of the approximately 4760 cable communities it serves.[25]

C. The Combination Of Comcast And AT&T Broadband Would Produce The Largest Broadband Internet Access Provider.

As a result of the merger, AT&T Comcast would own broadband-capable systems passing 25.4 million of the nation's homes.[26] Or, to put it another way, AT&T Comcast would be the dominant broadband Internet access provider in areas containing approximately 24 percent

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[23] *See id.*; *Kagan Media Money*, Jan. 29, 2002, at 9.

[24] *See NCTA Top 25 MSOs*.

[25] Under the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992) ("*1992 Cable Act*"), "effective competition" exists only: (1) where the franchise area is served by at least two unaffiliated MVPDs, each of which offers comparable video programming to at least 50 percent of households, and at least 15 percent of households subscribing to programming services offered by an MVPD subscribe to services other than those offered by the largest MVPD (the "overbuild test"); (2) where fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system (the "low penetration test"); (3) where a municipal cable system offers service to at least 50 percent of the households in the franchise area (the "municipal test"); or (4) where a LEC or its affiliate (or any MVPD using the facilities of a LEC or affiliate) offers video programming services (other than DTH satellite services) in the franchise area of an unaffiliated cable operator that are comparable to the services offered by the cable operator (the "LEC test"). *See* 47 U.S.C. § 543(l)(1).

[26] *Merger Application* at 12, 22.

of the nation's 106 million homes.[27] Further, AT&T Comcast would have by far the largest subscriber base, providing broadband Internet access service to approximately 2.5 million customers, or 22.7 percent of all broadband subscribers and 34.3 percent of all cable broadband subscribers.[28] AT&T Comcast would control a subscriber base that would far exceed the subscriber bases of the two largest providers of DSL service, SBC and Verizon.[29] AT&T Comcast's subscriber base would be more than 25 times larger than the combined subscriber bases of all satellite and fixed wireless broadband providers.[30]

This merger, if approved, would further extend AT&T Comcast's lead over other broadband Internet access services. From its formation, the merged entity would be the market leader in the provision of broadband Internet access service and could use its dominant position to lock up video programming and other forms of broadband content in order to deny access to competing broadband distribution platforms – enabling it to preserve and expand its lead.

III. THE MERGER WILL CAUSE SIGNIFICANT COMPETITIVE HARMS THAT CAN BE DIMINISHED ONLY BY FREEING VERIZON AND OTHER ILECS FROM REGULATORY BURDENS.

The degree of market power that a combined AT&T Comcast would enjoy in the traditional MVPD and broadband Internet access markets would permit it to engage in conduct

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[27] *See Broadband Fact Report* at 4.

[28] Cable Datacom News, *Cable Modem Market States & Projections* (Mar. 1, 2002), at <http://www.cabledatacomnews.com/cmic/cmic16.html> . Cable Datacom News reports that, at the end of 2001, AT&T Broadband and Comcast had 1,512,000 and 948,100 broadband subscribers, respectively. *Id.*

[29] Cable Datacom News, *Despite @Home Issues, Cable Industry Posts Strong Q4* (Mar. 1, 2002), at <http://www.cabledatacomnews.com/mar02/mar02-2.html> . Cable Datacom News reports that Verizon and SBC finished 2001 with 1.2 million and 1.3 million DSL subscribers, respectively. *Id.*

[30] *Broadband Fact Report* at 1 and Figure A.

that would result in "the loss of the healthy intermodal competition that now exists in the [broadband Internet access] market in the short term, and the loss of broadband Internet access as a potential competitor to cable television's core video business in the long term."[31] In particular, AT&T Comcast could use its market power over content providers to stifle the development of the Internet as a platform for distribution of video programming and other programming services that would compete directly with the merged entity's primary cable offerings. It could also use that same power to lock up other forms of innovative broadband content and foreclose access to competing broadband platforms. The solution is a strong, alternative broadband Internet access platform that is not controlled by cable interests. Unfortunately, by saddling ILECs with unique regulatory burdens that discourage capital investment, the Commission's policies to date have actually discouraged the development of such an alternative platform. Greater availability of DSL service, faster transmission speeds, and the development of new fiber-to-the-home solutions are all retarded by the imposition of regulatory burdens that are inappropriate in the context of new investment in non-dominant services.

A. **As A Result Of The Proposed Merger, AT&T Comcast Would Have Monopsony Power In The Market For The Purchase Of Video Programming.**

The Commission has recognized previously that "if a few cable operators own a large fraction of multichannel distribution capacity and subscribers, they may be able to exercise 'monopsony' buying power that would distort the market for the provision of programming networks to all MVPDs."[32] Likewise, Congress has found that concentration may cause

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[31] Crandall Declaration, ¶ 17.

[32] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Third Annual Report, 12 FCC Rcd 4358, 4424 (1997); *see also, e.g.*, *United*

(Continued...)

"barriers to entry for new programmers,"[33] reducing the number of video programming options available to competitors in the market for distribution of video programming, and, thus, to consumers.

In addition, the Commission has recognized that large incumbent MSOs can disadvantage competitors in the this market "due to the large programming license fee discounts th[at] incumbents receive" and through their ability to "gain[ ] exclusive contracts for nonaffiliated or terrestrially delivered programming."[34] Allowing the MVPD market to become highly concentrated may force new entrants to "pay programming license fees that are so high that continued operation is unprofitable."[35] As the FCC has noted, "[c]able MSOs with a disproportionately large number of subscribers may . . . be able to convince video programming networks not covered by program access rules to grant them exclusive rights at the expense of smaller competitors."[36]

AT&T Comcast will enjoy monopsony power in the market for the purchase of video programming. As discussed above, the merged entity would have a 24.3 percent market share of

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(...Continued)

States v. Syufy Enterprises, Inc., 903 F.2d 659, 663 (9th Cir. 1990); *Annual Assessment of the Status of Competition on the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060, 2123 (1995).

[33] *See Cable Television Consumer Protection Act of 1991, Report of the Senate Committee on Commerce, Science and Transportation*, S. Rep. No. 102-92, at 23-24 (1991) ("Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.").

[34] *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992*, Further Notice of Proposed Rulemaking, 16 FCC Rcd 17312, 17329 (2001).

[35] *Id.*

[36] *Id.*

all buyers of video programming, based on the percentage of subscribers it will serve. Given the unique nature of the video programming business, this degree of market power is more than sufficient to allow AT&T Comcast to use its bottleneck control of the cable platform to harm competitors, including both traditional video competitors such as overbuilders and DBS operators, as well as the developing Internet video market.[37]

Further, the true extent of the monopsony buying power that AT&T Comcast would have in the video programming market is revealed when potential purchasers of video programming that do not have significant available channel capacity or serve an insignificant share of the viewing public are excluded from consideration.[38] The ten largest MVPDs serve approximately 85 percent of the market, with the remainder divided among small cable systems.[39] Smaller

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[37] Federal regulators have recognized that video programming services must have access to at least 40 percent of all MVPD subscribers in order to achieve critical mass. *Time Warner Inc.*, FTC Docket No. C-3709, Statement of Chairman Pitofsky, and Commissioners Steiger and Varney, at 7-8; *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Review of the Cable Attribution Rules*, Report and Order, 14 FCC Rcd 19014, 19116 (1999), *reversed and remanded, Time Warner Entertainment Co., L.P. v. United States*, 211 F.3d 1313 (D.C. Cir. 2000). Indeed, antitrust authorities have recognized that carriage on a system with no more than 17 percent market share can be critical for new programming services. *See Time Warner, Inc.*, FTC Docket No. C-3709, Statement of Chairman Pitofsky and Commissioners Stigner and Varney, at 8. Thus, should the merged entity alone refuse to carry a video programming service, a video programmer would need to obtain carriage on at least seven other members of the top ten MVPDs to ensure its viability. For example, a video programmer who was refused access to AT&T Comcast's systems would need carriage on Time Warner, Charter, Cox, Adelphia, Cablevision, Mediacom and Insight to obtain access to 40 percent of MVPD subscribers. *See NCTA Top 25 MSOs*. Thus, the merged entity would possess a virtual veto power over new programming, to the detriment of video programmers, competing MVPDs, and consumers.

[38] *See Time Warner, Inc.*, FTC Docket No. C-3709, Statement of Chairman Pitofsky and Commissioners Stigner and Varney, at 8 (noting that "[a]ttempting to replicate the coverage of [large cable systems] by lacing together agreements with the large number of much smaller MVPDs is costly and time consuming").

[39] *See Eighth Annual Video Competition Report* at Appendix C, Table C-3.

cable operators are less likely to have upgraded systems with the capacity to add channels.[40] These minor players are properly excluded from the market for the purchase of untested video programming, because they do not have the channel capacity or resources to accommodate new and unproven programming. Adjusting for capacity constraints and fragmentation, AT&T Comcast would have roughly a 31 percent market share in the market for the purchase of video programming.[41] That market share would allow it to adversely affect competing video programming distributors, video programmers, and consumers, through its control over the availability of programming sources.

Finally, the merger will combine the video programming interests of the two companies, eliminating competition in the market for the sale of video programming. The combined entity would hold interests in seven national and seven regional programming services.[42] Moreover, AT&T and Comcast have pledged to use Comcast's expertise in regional programming to

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[40] Indeed, the FCC's most recent cable pricing report indicates that fewer than 70 percent of systems are 750 MHz or above, and approximately 10 percent are 330 MHz or less. *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992, Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment*, Report on Cable Industry Prices, MM Docket No. 92-266, FCC 02-107, ¶ 32 and Table 1 (rel. Apr. 4, 2002).

[41] The market share numbers for AT&T Comcast are, in fact, conservative because they do not include attributable interests in other cable systems. When those interests are included, the market share numbers discussed in this section and buying power associated with those shares are even higher.

[42] Currently, AT&T Broadband holds interests in three national programming services: E! Entertainment, style and iN DEMAND. AT&T Broadband also holds interests in three regional programming services, Fox Sports New England, New England Cable News and Pittsburgh Cable News Channel. *Merger Application* at 24-25. Comcast holds interests in seven national programming services: E! Entertainment, The Golf Channel, iN DEMAND, QVC, style, The Outdoor Life Network and Discovery Health Channel. Comcast also holds interests in four regional programming services: Comcast SportsNet, cn8-The Comcast Network, Comcast Sports Southeast and Comcast SportsNet-MidAtlantic. *Id.* at 14-15.

increase the reach of the merged company's regional sports and news networks,[43] a market which the FCC has recognized is particularly important.[44] AT&T Comcast could deny competing video distribution platforms access to affiliated programming, hindering their ability to offer subscribers national and increasingly popular regional programming. Because much of this programming is or could be terrestrially delivered, it would not be subject to the existing program access rules even if those rules were extended.[45]

In sum, following the merger, AT&T Comcast could leverage its tremendous subscriber base in the market for the purchase of video programming to limit access to video programming via the Internet, through either exclusive contract arrangements or by obtaining equity in new or

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43 *See Merger Application at* 42, 44.

44 *See, e.g., Eighth Annual Video Competition Report*, ¶ 171.

45 Although the program access rules currently are intended to give competitors access to Comcast and AT&T Broadband's satellite-delivered video programming, these rules are scheduled to sunset on October 5, 2002. *See* 47 U.S.C. § 628(c)(5); 47 C.F.R. § 76.1002(c)(6). Further, the program access rules do not cover terrestrially delivered programming. *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547, 6651-652 (2001); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 22840, 22861 (1997). Moreover, it appears that entities providing streaming video over the Internet are not protected by the program access rules. *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling, Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, GN Docket No. 00-185, CS Docket No. 02-52, FCC 02-77, n. 236 (rel. Mar. 15, 2002) ("*Cable Broadband Declaratory Ruling and NPRM*") ("Internet video, called 'streaming video' because data are 'streamed' over the Internet to provide continuous motion video, has not yet achieved television quality … Streaming video, therefore, is not consistent with the definition of video programming."); 47 C.F.R. § 602(13) (defining MVPD as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers *multiple* channels of video programming") (emphasis added).

existing video programming services. As discussed in detail below, these harms could be substantially mitigated by freeing ILECs from the regulation that hampers their ability to serve as an alternative platform for the delivery of both traditional video programming and broadband content.

B. The Merger Will Impede The Development Of The Internet As An Alternative Video Distribution Platform.

As detailed in the Crandall Declaration, broadband Internet access represents both an alternative source of video programming and a potential consumer substitute for video programming.[46] Thus, broadband conduits outside of cable control represent a "competitive threat to the significant market power of the cable industry" in the market for distribution of video programming.[47] While current broadband offerings do not presently support the transmission of broadcast-quality television signals over the Internet, next-generation offerings such as VDSL and fiber-to-the-home will.[48] Thus, Internet-based video programming has the

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[46] *See* Crandall Declaration at ¶ 20 (noting that "several surveys show that consumers increasingly perceive Internet-based content to be a substitute for traditional video programming"); *see also* Mark A. Lemley and Lawrence Lessig, *The End of End-to-End: Preserving the Architecture of the Internet in the Broadband Era*, Stanford Law School John M. Olin Program in Law & Economics, Working Paper No. 207, at 25 (2000).

[47] Jerry A. Hausman, et al., *Cable Modems and DSL: Broadband Internet Access for Residential Customers*, American Economic Association and Proceedings, Vol. 91 No. 2 (2001), at <http://papers.ssrn.com/sol3/delivery.cfm/SSRN_ID296375_code020109140.pdf?abstractid=296375>.

[48] *Eighth Annual Video Competition Report*, ¶ 89. Current cable modem service and DSL offerings generally do not offer sufficient bandwidth to provide VHS and higher quality television signals. However, the capacity constraints preventing current cable broadband offerings from permitting the transmission of broadcast quality video are artificial and are "a purely commercial allocation choice by the cable industry." Thomas W. Hazlett and George Bittlingmayer, *The Political Economy of Cable "Open Access,"* Working Paper 01-06, AEI-Brookings Joint Center For Regulatory Studies, at 6 (May 2001). In contrast, the capacity constraints on current DSL offerings are technological.

potential to exert a competitive constraint on cable prices.[49] Indeed, apart from DBS, the Internet is the only existing or potential source of widespread competition to cable in the distribution of video programming. One of the partners to this merger, AT&T, has previously submitted material to the Commission specifically acknowledging this fact: "Internet video streaming clearly competes, at a minimum, with video programming offered by cable systems, satellite companies and television broadcasters."[50]

Congress and the Commission have repeatedly found that cable operators have sought to impede the development of competitive video distribution platforms. Concerns that "the use of exclusive contracts between vertically integrated programming vendors and cable operators served to inhibit the development of competition among distributors" prompted Congress to pass legislation that led to the FCC's program access rules.[51] During hearings on the 1992 Cable Act,

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[49] Cable prices continue to significantly outpace the inflation rate as they have since 1989. With a projected 5% increase in 2002, nominal cable prices will be approximately double what they were at the end of 1989, an average annual increase of 7.8%. By contrast, the nominal prices of all other goods and services increased only 44% over the same period, an average annual increase of 3.3%. *See* U.S. Bureau of Labor Statistics, *CPI Detailed Report*, 2000, 2001; Historical Price Index for All Urban Consumers (CPI-U), Table 25; NABE Outlook, Median Forecast, Nov. 2001; *Stay Tuned for Still-Higher Cable Bills: Comcast Joins Other Providers in New Round of Price Escalation*, Washington Post, Jan. 10, 2002. AT&T Comcast would have a powerful economic incentive to defend its dominant position in the MVPD market—an incentive that cable operators have aggressively acted upon in the past in responding to potential competition from both DBS providers and overbuilders.

[50] *Applications for Consent to the Transfer of Control of Licenses, MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, CS Docket No. 99-251, Reply Comments of AT&T Corp. and MediaOne Group, Inc., Appendix A, Declaration of Janusz A. Ordover and Robert D. Willig, ¶ 117 (filed Sept. 17, 1999).

[51] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition*, Notice of Proposed Rulemaking, 16 FCC Rcd 19074, 19075 (2001); *see also* 1992 Cable Act, § 2(a)(5); S. Rep. No. 102-92 at 25-26; *House Comm. on Energy and Commerce*, H. Rep. No. 102-638, at 41 (1992); *Storer Cable Communications, Inc. v. Montgomery, Ala.*, 826 F. Supp. 1338 (M.D. Ala.), *vacated due to settlement*, 866 F. Supp. 1376 (1993) (holding that competing cable operator who alleged that incumbent MSO's exclusive dealing agreements with affiliated and unaffiliated

(Continued...)

several members of Congress noted that many programmers refused to make programming available to competing MVPDs, harming the ability of competitors to offer a viable service to consumers.[52] In two communities in South Carolina, for example, cable operators had entered into exclusive agreements with certain program services, wholly eliminating the ability of competing MVPDs to obtain access to that programming and harming the development of competition.[53] As Senator Danforth noted:

> Wireless cable and home satellite dish program distributors often cannot get fair treatment from the companies selling cable programming and are forced to pay much higher prices for programming, if they can get it at all. . . . [M]any cable programmers, especially those who are not owned by cable MSOs, fear that the major cable companies which represent their primary source of revenues will retaliate if they allow equal access to cable's competitors. Cable MSOs often have a life-or-death control over new programming services, and have at times exercised this control in devastating ways.[54]

(...Continued)

video programmers hindered and restrained competition among cable operators in the local cable market in price, service, quality of transmission and facilities and cable programming stated a claim under the Sherman Act); *Viacom Int'l, Inc. v. Time, Inc.*, 785 F. Supp. 371 (S.D.N.Y. 1992) (holding that programmer's allegations that cable MSO leveraged monopoly power in local markets to distort competition in national market for pay television programming services stated a claim for monopolization under the Sherman Act).

[52] *See, e.g.*, 138 Cong. Rec. S16657-58 (Oct. 5, 1992) (Remarks of Sen. Pressler); *Cable Television and Consumer Protection Act of 1990, Committee on Commerce, Science and Transportation*, S. Rep. No. 101-381, at 63 (1990) ("Prior to the legislation, some programmers and operators entered into contracts explicitly providing for the exclusive carriage of such programming.").

[53] *See* 138 Cong. Rec. S14254-55 (Sept. 21, 1992) (Remarks of Sen. Hollings). Indeed, "[a]t the 1991 hearing, Ted Turner testified that his company has granted exclusive rights for the sale of TNT to many cable operators and as a result that service is not available to other multichannel video providers. He also testified that larger cable operators are entitled to discounts on his company's programming services that are not available to smaller companies." S. Rep. No. 102-92, at 26.

[54] 137 Cong. Rec. S590 (Jan. 14, 1991) (Remarks of Sen. Danforth).

Congress "received much testimony about cable operators exercising their market power derived from their de facto exclusive franchise and lack of local competition. This testimony provided evidence that programmers are sometimes required to give cable operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system."[55] Similarly, the terrestrial delivery of certain programming (*e.g.*, Comcast SportsNet) is designed to avoid providing such content to competing MVPDs (*e.g.*, DBS providers).[56] More recently, cable operators have tried to discourage programmers from distributing their video content over the Internet.[57]

Absent regulatory relief that frees the ILECs to further invest in broadband deployment and thus compete more effectively against AT&T Comcast, there would be no competitive constraint upon AT&T Comcast to prevent it from taking anticompetitive measures to preserve its lead in the distribution of video programming to consumers.[58] AT&T Comcast could

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[55] *Cable Television and Consumer Protection Act of 1990, Committee on Commerce, Science and Transportation*, S. Rep. No. 101-381, at 21-22 (1990); *see also Cable Television Consumer Protection and Competition Act of 1990, Committee on Energy and Commerce*, H.R. Rep. No. 101-682, at 37 (1990) ("Witnesses before the Committee testified that in order to compete effectively, competing multichannel video system operators require access to much of the popular programming available on traditional cable systems. However, these witnesses charge that the most popular cable networks, including HBO, Showtime, TNT, ESPN, and regional pay sports channels, generally are unavailable to potential competitors as a result of exclusive dealing arrangements with traditional cable systems or are available only at discriminatorily high rates and on unfavorable terms.").

[56] *Eighth Annual Video Competition Report*, ¶¶ 14, 17, 114 (rel. Jan. 14, 2002); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, 6013, 6073 (2001); *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Sixth Annual Report, 15 FCC Rcd 978, 986-87 (2000).

[57] *See* Crandall Declaration, ¶ 22.

[58] *See Id.*, ¶ 21 (noting that this merger "would provide AT&T-Comcast with an enhanced ability to control the development of the emerging rival platform for distributing video").

undermine the development of the Internet as an alternative video distribution platform in a variety of ways. The merged entity could use its control over a significant number of broadband subscribers to create technical impediments to the distribution of Internet-based video programming over its broadband facilities, thereby threatening the viability of the Internet as a video distribution platform.[59] For example, @Home's agreement with cable operators contained a 10-minute limit on streaming video, which applied only to streaming video delivered at a rate of 30 frames per second (*i.e.*, only to broadcast quality streaming video).[60] As another example, AT&T Comcast, as the conduit provider, could support the adoption of a cable-only Digital Rights Management ("DRM") standard for streaming video over the Internet. As Dr. Crandall notes, this "would force broadband content providers to adopt the same cable-only standard" and, "[i]n the absence of streaming video available over DSL, consumers would choose cable modem to view streaming video."[61]

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[59] *Id.*, ¶ 21 ("AT&T Comcast could degrade the quality of streaming video downloaded over the Internet."); *see also* Hausman, et al., *supra* note 47, at 306 ("[A] vertically integrated broadband provider can limit the duration of streaming videos of broadcast quality to such an extent that they can never compete against cable programming."); Lemley and Lessig, *supra* note 46, at 25 ("By gaining control over the network architecture … cable providers are in a position to affect development of the architecture so as to minimize the threat of broadband to their own video market.").

[60] Stefanie Olsen, *Battle Brews Over Web Streaming*, CNET News.com (May 31, 2001), at <http://news.com.com/2102-1023-267638.html>; *see also* Lemley and Lessig, *supra note* 46, at 25 ("By gaining control over the network architecture … cable providers are in a position to affect development of the architecture so as to minimize the threat of broadband to their own video market."); *Excite@Home Keeps a "Video Collar*," ZDNet US (Nov. 1, 1999), at <http://news.zdnet.com.uk/story/0,,t269-s2074794,00.html>. Prior to the demise of Excite@Home, it was AT&T and Comcast's sole ISP.

[61] Crandall Declaration, ¶ 15. Dr. Arnaud Robert, NagraVision, and Graham Stubbs, Graham Stubbs Associates, *Digital Cable: The Key to Your Content*, Communications Technology (Feb. 2002), at http://www.cabletoday.com/ct2/archives/0202/0202digitalrights.htm ("Digital rights management and broadband media distribution are bound, and one will unlikely appear without the other.")

Moreover, AT&T Comcast's monopsony power in the purchase of video programming would enable it to extract commitments from popular video programming services and other new forms of broadband content—which rightfully believe that they need to obtain carriage on AT&T Comcast's systems to remain successful—not to distribute their content over other broadband platforms.[62] Both Congress and the Commission have recognized that large cable operators have the incentive and ability to harm competitors in this manner.[63]

In addition, it was the threat of such anticompetitive conduct that led the Department of Justice to seek an injunction against the proposed acquisition of the satellite assets of MCI Communications Corp., The News Corporation Limited, and K. Rupert Murdoch by Primestar, which was controlled by five of the largest cable companies in the United States, including Tele-Communications, Inc. and MediaOne Group (both of which were acquired by AT&T

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[62] *See* Crandall Declaration, ¶ 2 ("AT&T-Comcast could also use its position as a buyer in the traditional video programming market to deny video programming to alternative broadband platforms for applications such as streaming video, thereby rendering its broadband rivals less attractive to consumers.").

[63] In passing Section 616, which instructs the FCC to establish regulations governing carriage agreements, Congress was concerned with the effect a cable operator's market power would have both on programmers and on competing MVPDs. Congress stated

> In addition to using its market power to the detriment of consumers directly, a cable operator with market power may be able to use this power to the detriment of programmers. Through greater control over programmers, a cable operator may be able to use its market power to the detriment of video distribution competitors.

S. Rep. No. 102-92, at 23-24; *see also Time Warner Entertainment Co., L.P. v. FCC*, 240 F.3d 1126, 1133 (D.C. Cir. 2001) ("Congress considered, among other things, the ability of MSOs dominant in specific cable markets to extort equity from programmers or force exclusive contracts on them.") (citations omitted). Similarly, the Commission has noted that "strategic vertical restraints (achieved by vertical integration, exclusive distribution contracts, or monopsony pressure) can [ ] deter entry into the distribution market for delivered multichannel video programming." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Second Annual Report, 11 FCC Rcd 2060, 2135 (1995).

Broadband) and Comcast Corporation.[64] The DOJ recognized that the acquisition by large cable companies of additional power in the MVPD market through the acquisition of a DBS orbital slot would provide them with the ability and incentive to curtail entry by innovative MVPD firms.[65] As a result of the lawsuit, the parties entered into a consent decree that mandated actions far beyond what was required under the FCC's cable rules, in observation of the distinct harms to the MVPD market that the merger would cause. In specific recognition of the merged entity's ability to use its market power to discourage video programmers from providing their content to competing MVPDs, the consent decree specifically enjoined the merged entity from entering into or enforcing any exclusive distribution agreement with any video programmer, or entering into any agreement with any unaffiliated cable MSO to obtain video programming on an exclusive basis.[66] In related litigation, the attorney generals of 45 states and the District of Columbia filed complaints alleging violations of the Sherman Act by Primestar.[67] As a result of those lawsuits, another consent decree was filed, which similarly sought to constrain the merged entity's ability to engage in anticompetitive conduct, including exclusive programming arrangements, discriminatory terms in affiliation agreements, and retaliation against programmers as a result of their provision of programming services to unaffiliated cable systems.[68]

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[64] *See* Complaint, *United States v. Primestar, Inc.* (D.D.C. filed May 12, 1998) (No. 1:98CV01193(JLG)), at http://www/usdoj.gov.80/atr/cases/f1700/1757.htm.

[65] *Id.* at ¶ 95.

[66] *United States v. Primestar, Inc.*, Civ. A. No. 93 Civ. 3913 (JES), 1994 WL 196800 (S.D.N.Y. Apr. 4, 1994).

[67] *New York v. Primestar*, Civ. A. Nos. 93 Civ. 3868 (JES) to 93 Civ. 3907 (JES) and 93 Civ. 5799 (JES) to 93 Civ. 5804 (JES), 1993 WL 720677 (S.D.N.Y. Sept. 14, 1993).

[68] *Id.* at *8 - *9.

The merged entity also could demand large programming discounts—which are unavailable to emerging Internet-based video programming distributors—from program suppliers that need carriage on AT&T Comcast's systems to remain economically viable.[69] Such conduct would hinder competition from emerging Internet-based video distributors, who would be unable to offer the same programming choices and/or competitive prices. In addition, as Dr. Crandall notes, broadband content providers are unlikely to make the large initial investment necessary to produce new offerings if they cannot obtain carriage on the AT&T Comcast system.[70] AT&T will have a strong incentive to use this market power over broadband content to steer the development of broadband Internet access away from content that would compete with its primary cable service offerings. Finally, the merged entity could refuse to provide its affiliated programming—both traditional video offerings and broadband content—to Internet-based video distributors.

In sum, unconstrained, AT&T Comcast could act to undermine the development of the Internet as an alternative platform for the distribution of video programming and other innovative broadband content that could compete with its core cable service offerings.[71] The antidote is a strong, alternative broadband Internet access platform that is not affiliated with or beholden to cable interests. In the short term, such a platform can provide the necessary subscriber base to encourage development of new broadband content. Rather than steer the

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69 *See supra*, note 37; *see also* Crandall Declaration at ¶ 13 ("AT&T-Comcast's combined purchasing power would allow it to demand equity interests or exclusive distribution rights from start-up broadband Internet content providers who sought access to AT&T-Comcast's cable modem subscribers.").

70 Crandall Declaration, ¶ 18.

71 *Id.*, ¶ 2.

Internet away from the development of video programming alternatives, DSL providers have every incentive to encourage and expand streaming video and other video offerings on the Internet. In the longer term, upgraded telephone networks offer the most promising new source of ubiquitous competition to cable operators. Unfortunately, the present regulatory regime discourages ILEC capital investment in DSL and other broadband technologies. By tying one hand behind each ILEC's back, the present regulatory regime could allow AT&T Comcast to remake the broadband Internet access market in the image of the MVPD market (*e.g.*, a market dominated by cable with limited competition and consumer choice).

C. **The Merger Would Enable AT&T Comcast To Stifle Intermodal Competition To Cable Modem Service In The Broadband Internet Access Market.**

Approval of this merger without first providing the ILECs with regulatory relief would also impair the ILECs' ability to compete in the provision of broadband Internet access more generally. AT&T Comcast would control broadband-capable systems passing 25.4 million of the nation's homes. Further, AT&T Comcast would control 22.7 percent of all broadband subscribers and have roughly twice the subscriber base of its largest DSL competitors. As Dr. Crandall notes, "[b]y combining their downstream cable modem platforms in the broadband [Internet] access market, the proposed merger of AT&T and Comcast could significantly affect the competitive dynamics of the upstream broadband Internet content market."[72]

Through its control of broadband content providers' access to over one-fifth of all broadband subscribers, AT&T Comcast would have the ability to limit the delivery of compelling, new broadband-specific content (*e.g.*, interactive, on-demand content) to its own

[72] *Id.*, ¶¶ 9, 12.

cable modem platform, thus precluding alternative last mile platforms such as DSL, wireless and satellite services from obtaining desirable content.[73] AT&T Comcast could therefore stunt the growth of DSL and strangle nascent competitors such as satellite and wireless broadband in their infancy because customers wishing to obtain this content would be forced to obtain broadband Internet access from AT&T Comcast or risk not having access to their desired content.[74]

If the Commission grants the ILECs regulatory relief, however, it will restore their market-based incentives to invest additional capital in broadband deployment and to compete more effectively against AT&T Comcast. As the ILECs make inroads in the broadband Internet access market, the merged firm's market power and, thus, its ability to leverage that market power to the detriment of other broadband Internet access providers would be mitigated.[75] The Commission must therefore provide the ILECs with regulatory relief to ensure that AT&T Comcast faces more effective competition in the marketplace for the purchase of broadband content and the market for broadband Internet access services.

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[73] *Id.* ("Given its enhanced bargaining position, AT&T-Comcast … could thereby reduce the supply of non-affiliated broadband content available to subscribers through current and future competitors of AT&T-Comcast."). The Department of Justice previously indicated that, by virtue of the number of broadband subscribers it controls, a large cable modem provider such as AT&T Broadband has leverage in its negotiations with broadband content providers. Amended Complaint, ¶¶ 29, 33-34, *United States v. AT&T Corp. and MediaOne Group, Inc.*,) (D.D.C. filed May 26, 2000) (No. 1: 00CV01176 (RCL)) at http://www.usdoj.gov/atr/cases/f4800/4800.htm. The proposed merger of AT&T Broadband and Comcast only further increases the combined firm's purchasing power.

[74] Crandall Declaration, ¶ 2, 19 ("If the Commission approves the proposed merger, rival platforms such as DSL, may find it difficult to compete with cable modem service in the distribution market. AT&T Comcast could use its enhanced power in the procurement and development of broadband Internet content to achieve an artificial advantage over DSL in the broadband [Internet] access market.").

[75] *Id.*, ¶ 3 ("If the Commission were to unshackle the ILECs and allow downstream competition to thrive, DSL providers like Verizon could expand and provide an alternative platform for non-affiliated content providers.").

IV. UNLESS THE COMMISSION ALLOWS THE ILECS TO COMPETE EFFECTIVELY WITH AT&T COMCAST, IT MUST DENY THIS MERGER.

A. The Current Regulatory Regime Stands As An Impediment To The Development Of A Fully Competitive Broadband Internet Access Market And Thereby Constrains The ILECs From Providing More Effective Competition To Cable Operators In Both The Video Distribution And Broadband Internet Access Markets.

The evolution of the market for broadband Internet access services to date has been shaped by competition across a number of platforms, including cable, DSL, wireless, and satellite.[76] Nevertheless, cable continues to extend its lead over other platforms—and this merger would only accelerate that trend. DSL technologies offered by telephone companies are the second player in this market and the most important present source of competition to cable operators. Regulatory parity is thus critical to ensuring that consumers continue to benefit from competition in broadband Internet access services, including Internet-delivered video that could offer a consumer substitute for traditional video programming services. As Dr. Crandall explains, "[t]he anticompetitive threat presented by the proposed merger of AT&T and Comcast exists because the only competitors who are currently capable of imposing a competitive restraint on cable modem providers—namely, DSL providers—are constrained by the Commission's own regulations."[77] Here, the presence of asymmetrical regulation is a "market

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[76] *See* Assistant Attorney General Joel I. Klein, The 1996 Telecommunications Act: An Antitrust Perspective, Written Statement to the Subcommittee on Antitrust, Business Rights and Competition, Committee on the Judiciary, United States Senate 3 (Sept. 17, 1997), at http://www.usdoj.gov:80/atr/public/testimony/1209.htm ("the full potential of the Telecom Act will not be realized until alternative technologies . . . can be developed and deployed and other important innovations have a chance to take place").

[77] Crandall Declaration, ¶ 23.

fact" that the Commission must take into account in evaluating the potential competitive harms posed by this merger.[78]

In order to expand the reach of, and the bandwidth available on, their broadband networks, Verizon and the other ILECs must upgrade their facilities. As described above, technical limitations limit the present availability of DSL to only 43 percent of U.S. homes.[79] In addition, due to network design and capacity constraints, the vast majority of xDSL customers have access to a maximum downstream transmission speed of 1.5 Mbps.[80] While that amount of bandwidth is adequate to access much of the content available over the Internet today (including some streaming video), it is likely not sufficient to provide broadcast-quality full-screen video,

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[78] It is well-settled in the antitrust context that the existence and effect of regulation is a "market fact" that must be considered in assessing the prospects for market-wide competitive harm. *MCI Communications Corp. v. American Tel. and Tel. Co.*, 708 F.2d 1081, 1105-06 (7th Cir. 1983) ("[A]n industry's regulated status is an important 'fact of market life,' the impact of which on pricing and other competitive decisions 'is too obvious to be ignored.' . . . For this reason, the Supreme Court has repeatedly recognized that consideration of federal and state regulation may be proper even after the issue of antitrust immunity has been resolved." (quoting *ITT v. General Telephone and Electronics Corp*., 518 F.2d 913, 935-36 (9th Cir. 1975) (footnote omitted); citing *United States v. Marine Bancorporation*, 418 U.S. 602, 627 (1975)); *see, e.g.*, *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) ("where regulatory and antitrust regimes coexist, . . . antitrust analysis must sensitively 'recognize and reflect the distinctive economic and legal setting" of the regulated industry to which it applies.'") (citing *Otter Tail Power Co. v. United States*, 410 U.S. 366, 372 (1973); Watson & Brunner, Monopolization by Regulated "Monopolies": The Search for Substantive Standards, 22 Antitrust Bull. 559, 565 (1977)) (Breyer, J.); Assistant Attorney General Joel I. Klein, The Importance of Antitrust Enforcement in the New Economy, Address Before the New York State Bar Association Antitrust Law Section Program 15 (Jan. 29, 1998), at http://www.usdoj.gov:80/atr/public/speeches/1338.pdf ("in analyzing market power issues, we must take cognizance of any differences that might characterize the specific market under consideration").

[79] *See supra* n. 17.

[80] Computer Science and Telecommunications Board, National Research Council, *Broadband Bringing Home the Bits*, at 126 (2002).

either to the PC or the TV, that is an effective substitute to traditional cable service. Such offerings will likely require a minimum of 3 Mbps in the downstream direction.[81]

To expand the reach and capacity of their networks to this extent, ILECs must invest billions of dollars in new broadband facilities and equipment. However, Verizon and the other ILECs face onerous regulations that undermine their investment incentives.[82] For example, these regulations enable competitors to buy unbundled network elements at rates set based on a hypothetical "least cost, most efficient" network, resulting in wholesale prices that often are below actual cost. Competitive carriers in effect have an option on ILEC capital investments – when those investments are successful the competitive carrier can reap the benefits, when they are not the ILEC alone bears the down-side risk.[83] Further, current regulations require ILECs to file tariffs for their own broadband services and require rates to be set based on cost-plus regulation or as measured against traditional telephone benchmarks. This regulatory regime is completely inappropriate to new investments made in a market where the ILECs not only face competition but, in fact, are the second mover. In such a regulatory environment, ILECs have substantially diminished incentives to make the large, up-front capital investments that are

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81 *Eighth Annual Video Competition Report*, ¶ 89.

82 Crandall Declaration, ¶ 23. The Commission itself has noted that the current regulatory regime may have a disincentive effect on investment. *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 13 FCC Rcd 24012, 24093 (1998); *see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor To AT&T Corp., Transferee*, Memorandum Opinion and Order, 14 FCC Rcd 3160, 3204-05 (1999). Courts also have recognized this to be the case. *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366, 428-429 (1999) (Breyer, J., concurring in part and dissenting in part).

83 *See* Crandall Declaration, ¶¶ 23-24.

necessary to expand the reach and capacity of their broadband services.[84] Cable companies, on the other hand, which are unimpaired in their provision of broadband services by investment distorting regulations like Section 251's unbundling and resale requirements, have made the necessary investments to upgrade their networks to offer cable broadband service to roughly 81 million homes.

Should these regulatory conditions persist, the level of competition in the broadband marketplace will erode. As C. Michael Armstrong, CEO of AT&T, has noted: "No company will invest billions of dollars to become a facilities-based . . . provider" if other companies "can come along and get a free ride on the investment and risk of others." [85]

B. **The Commission Must Promptly Adopt Deregulatory Parity For All Broadband Platforms.**

In a number of recent proceedings, the Commission has stated that "broadband services should exist in a minimal regulatory environment that promotes investment and innovation in a competitive market."[86] Further, the FCC has set forth the goal of developing a consistent, cross-platform, national broadband regulatory framework.[87] In implementing these goals, the Commission must act to reduce the ILECs' regulatory disincentives to investment in broadband

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[84] *See generally*, Crandall Declaration, ¶¶ 23-24 for a discussion of how "Verizon and the other ILECs face onerous regulations that undermine their investment incentives."

[85] C. Michael Armstrong, Chairman and CEO, AT&T, Telecom and Cable TV: Shared Prospects for the Communications Future, Remarks before the Washington Metropolitan Cable Club, Washington, D.C. (Nov. 2, 1998).

[86] *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities; Universal Service Obligations of Broadband Providers; Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services; 1998 Biennial Regulatory Review—Review of Computer III and ONA Safeguards and Requirements*, Notice of Proposed Rulemaking, CC Docket Nos. 02-33, 95-20 and 98-10, FCC 02-42, ¶ 5 (rel. Feb. 15, 2002) ("*Wireline Broadband NPRM*"); *Cable Broadband Declaratory Ruling and NPRM*, ¶ 5.

[87] *Wireline Broadband NPRM*, ¶ 6; *Cable Broadband Declaratory Ruling and NPRM*, ¶ 6.

facilities by granting them regulatory relief. The granting of such relief to Verizon and the other ILECs also is essential in order to mitigate the competitive harms that clearly are threatened by this merger. Indeed, it is only by being allowed to compete on equal terms with AT&T Comcast and other dominant cable operators that Verizon and other competing broadband platform providers can avoid being locked out of obtaining access to video programming and other new forms of broadband content. Therefore, absent significant changes in the present regulatory regime for broadband, this merger threatens to cause significant competitive harms in both the MVPD market and the broadband Internet access market. As a result, the merger applications should be denied unless the FCC first grants regulatory relief to Verizon and the other ILECs.

V. CONCLUSION

For all of the foregoing reasons, Verizon requests that the Commission deny the merger application unless it first grants regulatory relief to Verizon and the other ILECs who offer DSL services in order to ensure effective competition in the broadband Internet access market.

Respectfully submitted,

THE VERIZON TELEPHONE COMPANIES
AND VERIZON INTERNET SOLUTIONS
D/B/A VERIZON.NET

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April 29, 2002

APPENDIX A

VERIZON TELEPHONE COMPANIES

The Verizon Telephone Companies listed below are local exchange carriers that provide high-speed Internet access through DSL technologies as well as other communications services:

Contel of the South, Inc., d/b/a Verizon Mid-States
GTE Midwest Incorporated, d/b/a Verizon Midwest
GTE Southwest Incorporated, d/b/a Verizon Southwest
The Micronesian Telecommunications Corporation
Verizon California, Inc.
Verizon Delaware Inc.
Verizon Florida Inc.
Verizon Hawaii Inc.
Verizon Maryland Inc.
Verizon New England Inc.
Verizon New Jersey Inc.
Verizon North Inc.
Verizon Northwest Inc.
Verizon Pennsylvania Inc.
Verizon South Inc.
Verizon Virginia Inc.
Verizon Washington DC Inc.
Verizon West Coast Inc.
Verizon West Virginia Inc.

APPENDIX B

DECLARATION OF DR. ROBERT W. CRANDALL

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

In the Matter of	)	
	)	
Applications for Consent to the Transfer of Control of Licenses	)	
	)	
From	)	MB Docket No. 02-70
	)	
Comcast Corporation and AT&T Corp., Transferors,	)	
	)	
To	)	
	)	
AT&T Comcast Corporation, Transferee	)	

DECLARATION OF ROBERT W. CRANDALL

Introduction and Summary of Conclusions

Qualifications

I. Two of the Relevant Product Markets Affected by the Proposed Merger of AT&T and Comcast Are the Broadband Internet Content Market and the Broadband Internet Access Market

II. The Proposed Merger Would Increase AT&T-Comcast's Ability to Lock Up Broadband Internet Content And Restrict Access To Rival Broadband Internet Access Providers
   - A. The AT&T-Comcast Merger Would Increase the Ability of the Combined Firm to Lock Up Broadband Content
   - B. The AT&T-Comcast Merger Would Increase The Ability of the Combined Firm to Deny Access to Broadband Content By DSL and Other Competing Platform Providers
   - C. The Ability To Limit Competition Would Benefit AT&T-Comcast In Several Ways
     1. The Proposed Merger Could Enable AT&T-Comcast to Extend Its Power into the Provision of Broadband Internet Content Services and Thereby Preserve and Expand its Market Power in the Broadband Internet Access Market
     2. The Proposed Merger Could Enable AT&T-Comcast to Preserve Its Position in the MVPD Market

INTRODUCTION AND SUMMARY OF CONCLUSIONS

1. The proposed merger of AT&T Broadband and Comcast creates the real risk that the combined entity could reduce competition in the rapidly evolving market for broadband Internet services. By consolidating two major distributors of broadband Internet content, the proposed merger could increase the ability of AT&T-Comcast to extend its power into the upstream broadband content market and, by locking up access to broadband content services, foreclose access to broadband content services by competing broadband distribution platforms. The Commission should not approve the merger until it has eliminated the regulatory barriers that it has placed in the way of cable-modem services' principal rival, digital subscriber line service (DSL) supplied by incumbent local telephone companies.

2. If the Commission approves the proposed merger, rival platforms such as DSL may find it difficult to compete with cable modem service in the distribution market. AT&T-Comcast could use its enhanced power in the procurement and development of broadband Internet content to achieve an artificial advantage over DSL in the broadband access market. AT&T-Comcast could also use its position as a buyer in the traditional video programming market to deny video programming to alternative broadband platforms for applications such as streaming video, thereby rendering its broadband rivals less attractive to consumers. If successful, AT&T-Comcast could force consumers to pay more for broadband content and thereby deprive subscribers of competitive choices in the broadband Internet access market. Finally, the elimination of DSL as a competitive threat would allow AT&T-Comcast to control

the development of the Internet as a rival platform for traditional video programming. If it feared that sales of video over the Internet were cannibalizing sales of video over cable television, AT&T-Comcast could take anticompetitive steps to slow the Internet's development of video streaming over a rival platform.

3. One way to invigorate competition in the broadband Internet content market is to ensure that non-affiliated broadband content providers have alternative distribution platforms over which to distribute their programs. Under current conditions, non-affiliated content providers are beholden to the interests of cable modem providers because regulatory policies have suppressed the growth of broadband services delivered over telephone lines. Consolidation of these cable providers could allow them to exert considerable buying power over nascent content suppliers. If the Commission were to unshackle the ILECs and allow downstream competition to thrive, DSL providers like Verizon could expand and provide an alternative platform for non-affiliated content providers. Because DSL providers currently have such a small share of the downstream broadband Internet access market and are restrained by existing Commission regulations, non-affiliated content providers are likely to be dissuaded from investing in broadband Internet content as long as vertically integrated cable modem providers can deny access to their broadband conduit. Combining AT&T Broadband and Comcast would exacerbate this problem and reduce the non-affiliated content providers' incentive to develop broadband content even further.

QUALIFICATIONS

4. My name is Robert W. Crandall. I am the chairman of Criterion Economics and Senior Fellow in Economic Studies at the Brookings Institution in Washington, a position that I have held since 1978. My areas of economic research are antitrust, telecommunications, the

automobile industry, competitiveness, deregulation, environmental policy, industrial organization, industrial policy, mergers, regulation, and the steel industry.

5. I have written widely on telecommunications policy, the economics of broadcasting, and the economics of cable television. I am the author or co-author of five books on communications policy published by the Brookings Institution since 1989.[1] In addition, I have published four other books on regulation and industrial organization with the Brookings Institution.[2] My scholarship has been cited on numerous occasions by the federal judiciary and the Federal Communications Commission (FCC).

6. I have been a consultant on regulatory and antitrust matters to the Antitrust Division of the U.S. Department of Justice, to the Federal Trade Commission, to the Canadian Competition Bureau, and to numerous companies in the telecommunications, cable television, broadcasting, newspaper publishing, automobile, and steel industries. I have also been a consultant to the Environmental Protection Agency and the U.S. Department of the Treasury.

7. I was an Assistant Professor and Associate Professor of Economics at the Massachusetts Institute of Technology between 1966 and 1974. I also taught at George Washington University. I have twice served in the federal government. I was Acting Director, Deputy Director, and Assistant Director of the Council on Wage and Price Stability in the

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1. ROBERT W. CRANDALL & LEONARD WAVERMAN, WHO PAYS FOR UNIVERSAL SERVICE? WHEN TELEPHONE SUBSIDIES BECOME TRANSPARENT (Brookings Institution 2000); ROBERT W. CRANDALL & LEONARD WAVERMAN, TALK IS CHEAP: THE PROMISE OF REGULATORY REFORM IN NORTH AMERICAN TELECOMMUNICATIONS (Brookings Institution 1996); ROBERT W. CRANDALL & HAROLD FURCHTGOTT-ROTH, CABLE TV: REGULATION OR COMPETITION? (Brookings Institution 1996); ROBERT W. CRANDALL, AFTER THE BREAKUP: U.S. TELECOMMUNICATIONS IN A MORE COMPETITIVE ERA (Brookings Institution 1991); ROBERT W. CRANDALL & KENNETH FLAMM, CHANGING THE RULES: TECHNOLOGICAL CHANGE, INTERNATIONAL COMPETITION, AND REGULATION IN COMMUNICATIONS (Brookings Institution 1989).

Executive Office of the President. In 1974-75, I was an adviser to Commissioner Glen O. Robinson of the FCC.

8. I received an A.B. (1962) from the University of Cincinnati and a Ph.D. in Economics (1968) from Northwestern University.

I. TWO OF THE RELEVANT PRODUCT MARKETS AFFECTED BY THE PROPOSED MERGER OF AT&T AND COMCAST ARE THE BROADBAND INTERNET CONTENT MARKET AND THE BROADBAND INTERNET ACCESS MARKET

9. For the purpose of this declaration, I focus my attention on the proposed merger's effect on the broadband Internet content market and consequently on the broadband Internet access market. By combining their downstream cable modem platforms in the broadband access market, the proposed merger of AT&T and Comcast could significantly affect the competitive dynamics of the upstream broadband Internet content market and, by doing so, increase the merged firm's ability to restrict the availability of broadband content to competing broadband platform providers.[3]

10. Figure 1 presents the vertical relationships between the product markets affected by the proposed merger.

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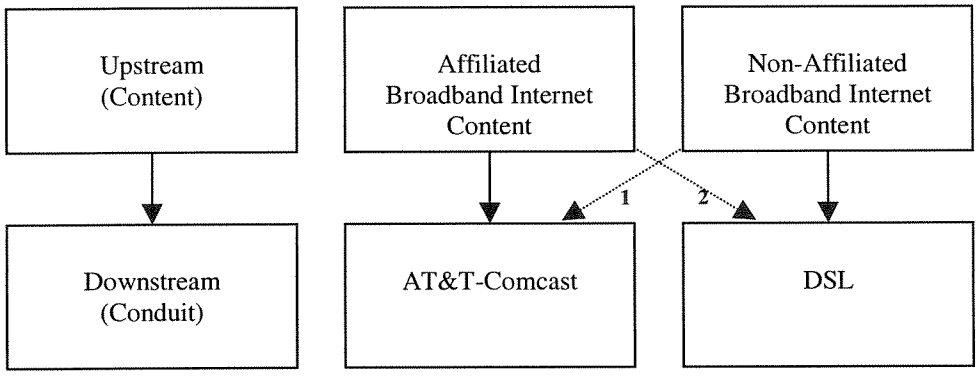
2. ROBERT W. CRANDALL & PIETRO S. NIVOLA, THE EXTRA MILE: RETHINKING ENERGY POLICY FOR AUTOMOTIVE TRANSPORTATION (Brookings Institution 1995); ROBERT W. CRANDALL, MANUFACTURING ON THE MOVE (Brookings Institution 1993); ROBERT W. CRANDALL & DONALD F. BARNETT, UP FROM ASHES: THE U.S. MINIMILL STEEL INDUSTRY (Brookings Institution 1986); ROBERT W. CRANDALL, HOWARD K. GRUENSPECHT, THEODORE E. KEELER & LESTER B. LAVE, REGULATING THE AUTOMOBILE (Brookings Institution 1986).

3. For a detailed review of how the size of the downstream footprint relates to the incentives of a vertically integrated cable modem provider to discriminate against non-affiliated content, see Daniel L. Rubinfeld & Hal J. Singer, *Vertical Foreclosure in Broadband Access?*, 49 J. IND. ECON. 299 (2001) (concluding that "imposing an open access condition on AOL Time Warner undermines its ability to engage in content discrimination.").

FIGURE 1: PRODUCT MARKETS AFFECTED BY PROPOSED MERGER OF AT&T AND COMCAST IN A REPRESENTATIVE GEOGRAPHIC MARKET WITHIN AT&T-COMCAST'S REGION



As Figure 1 shows, broadband Internet content is an input for broadband Internet access providers such as cable modem and DSL operators. The dashed line labeled number 1 represents the flow of content from non-affiliated broadband content providers to AT&T-Comcast's broadband Internet conduit. The dashed line labeled number 2 reflects the flow of AT&T-Comcast content to rival distribution platforms such as DSL. As I demonstrate below, AT&T-Comcast could interfere with either or both of those channels as a means to increase its power in the broadband Internet content market and thereby injure rival broadband distribution platforms such as DSL.

11. The proposed merger would increase AT&T-Comcast's purchasing power in the broadband Internet content market. According to *Cable Datacom News*, there were 7,170,617 cable-modem subscribers out of a total of 10,838,487 broadband subscribers at the end of 2001.[4] AT&T and Comcast had 1,512,000 and 948,100 cable broadband subscribers, respectively, at year-end 2001, or one-third of all cable-modem subscribers and 22.7 percent of all broadband subscribers in the country. Given the increasing concentration of cable systems in the hands of

the largest cable multiple system operators (MSOs), the merger could provide AT&T-Comcast with the power alone or in combination with one or two other MSOs to exert monopsony power in the purchase of innovative broadband Internet content. Moreover, AT&T-Comcast's combined share of buying power in the market for the purchase of traditional video programming—AT&T-Comcast admits that its share will be 30 percent under the Commission's rules, excluding the Time Warner Entertainment interest—provides AT&T-Comcast an additional lever over broadband Internet content providers.

II. THE PROPOSED MERGER WOULD INCREASE AT&T-COMCAST'S ABILITY TO LOCK UP BROADBAND INTERNET CONTENT AND RESTRICT ACCESS TO RIVAL BROADBAND INTERNET ACCESS PROVIDERS

12. By expanding its distribution footprint, the proposed merger would give AT&T-Comcast greater ability to favor current and future AT&T broadband content over non-affiliated content. Non-affiliated content providers who did not agree to the terms demanded by AT&T-Comcast would face the ominous prospect of being foreclosed from one-third of all cable modem subscribers, thereby dooming attractive new investments in broadband content. Given its enhanced bargaining position, AT&T-Comcast, acting alone or in concert with another major MSO, could thereby reduce the supply of non-affiliated broadband content available to subscribers through current and future competitors of AT&T-Comcast.

A. The AT&T-Comcast Merger Would Increase the Ability of the Combined Firm to Lock Up Broadband Content

13. The proposed AT&T-Comcast merger would allow the merged firm to limit the availability of non-affiliated broadband content to one-third of all cable modem subscribers.

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4. Cable Datacom News, Cable Modem Market Stats & Projections (visited Apr. 25, 2002) <http://www.cabledatacomnews.com/cmic/cmic16.html>.

AT&T-Comcast's combined purchasing power would allow it to demand equity interests or exclusive distribution rights from start-up broadband Internet content providers who sought access to AT&T-Comcast's cable modem subscribers. After acquiring those interests, AT&T-Comcast could give preferential placement to its affiliated broadband content on the welcome screen for Comcast's cable modem subscribers. Alternatively, AT&T-Comcast could give preferential caching treatment to its affiliate broadband content, and thereby slow the relative speed with which Comcast's cable modem subscribers access non-affiliated broadband content.

B. The AT&T-Comcast Merger Would Increase The Ability of the Combined Firm to Deny Access to Broadband Content By DSL and Other Competing Platform Providers

14. AT&T-Comcast could also refuse to supply its affiliated content or content for which it extracts exclusive distribution rights to rival conduits such as DSL and other competing broadband platform providers. This form of discrimination is referred to in the economics literature as conduit discrimination.[5] For example, AT&T-Comcast could require that, as a condition for receiving preferential placement on AT&T-Comcast's home page, non-affiliated broadband content providers would become exclusive affiliates of AT&T-Comcast in particular or of cable-modem services in general. To start-up broadband content providers seeking access to the largest base of broadband customers, such an offer might be difficult to refuse. This form of discrimination would give AT&T-Comcast an artificial advantage over DSL that would be difficult to overcome.

15. Alternatively, AT&T-Comcast could engage in conduit discrimination by designing its format to be compatible with cable modem service but not with DSL. For example, AT&T-Comcast could support a cable-only Digital Rights Management standard, which would

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5. *See, e.g.*, Rubinfeld & Singer, *supra* note 3.

force broadband content providers to adopt the same cable-only standard. In the absence of streaming video available over DSL, consumers would choose cable modem to view streaming video. All of these strategies would be much less deleterious to competition if either AT&T or Comcast undertook them independently.

16. The Commission should consult the history of content development for cable television's traditional video distribution product. After various regulatory obstacles to the development of cable programming were removed in the late 1970s, cable MSOs began to develop their own content through wholly-owned entities or consortia among MSOs. As cable television grew from a mere 15 million subscribers in 1979 to 56 million in 1991,[6] it achieved a position of market dominance in the provision of multichannel video programming distribution (MVPD) services. Because of its vertical integration into programming, it could deny this content to new distribution technologies, such as direct broadcast satellites (DBS). Indeed, DBS might have been delayed significantly longer had Congress not required that cable-owned programming distributed by satellite be made available to new distribution platforms. Because DBS operators were not licensed for many years after cable's thrust into programming investment, cable enjoyed a massive advantage in the MVPD market. The Commission could avoid this problem in the development of Internet broadband by assuring that competing platforms, such as DSL, are able to compete with cable modems before allowing cable MSOs to combine to achieve buying power in the development of content.

C. The Ability To Limit Competition Would Benefit AT&T-Comcast In Several Ways

17. The enhanced ability to limit competition that results from the proposed merger would generate a number of benefits for AT&T-Comcast. First, the merged firm could increase

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6. National Cable Television Association, Cable Television Developments (Spring 1998) at 2.

its control over broadband content and discourage investment by non-affiliated content suppliers, thereby increasing the value of AT&T-Comcast's affiliated broadband Internet content, and thereby reducing the total supply of content to Internet users. Second, because competing broadband Internet access platforms such as DSL depend on the availability of innovative broadband Internet content, the merged firm could impede DSL's ability to develop into a rival platform for the distribution of broadband Internet content. Finally, if AT&T-Comcast could impose exclusivity on its affiliated broadband content, DSL providers such as Verizon would be less attractive to broadband Internet access subscribers. The unavailability of popular broadband content, combined with the asymmetrical regulatory burdens presently imposed upon DSL, would significantly hamper DSL providers' ability to compete with cable modem in the broadband Internet access market. The result could be the loss of the healthy intermodal competition that now exists in that market in the short term, and the loss of broadband Internet access as a potential competitor to cable television's core video business in the long term.

1. The Proposed Merger Could Enable AT&T-Comcast to Extend Its Power into the Provision of Broadband Internet Content Services and Thereby Preserve and Expand its Market Power in the Broadband Internet Access Market

18. AT&T-Comcast would have several incentives to engage in content discrimination, including the extension of its power into the market for broadband Internet content. To the extent that the production costs of broadband content (like traditional video programming) are fixed and must therefore be spread across large numbers of subscribers, such discrimination could force non-affiliated content providers to operate below minimum viable level of subscribers. If those non-affiliated broadband content providers were dissuaded from developing their products, AT&T-Comcast would likely realize greater sales of broadband

content or higher prices or both. In addition to increasing the profits of AT&T-Comcast, content discrimination would reduce consumer welfare.

19. AT&T-Comcast would have another strong incentive to foreclose non-affiliated broadband Internet content providers—namely, to preserve its market power in the broadband Internet access market. For broadband access subscribers, the relative attractiveness of DSL to cable modem service will depend on the availability of broadband content that can be accessed by DSL customers. Stated differently, if a broadband customer must subscribe to cable modem service to access marquee broadband Internet content, it is likely that DSL providers will lose market share. As the availability of broadband content offerings through DSL connections diminishes, DSL's ability to constrain the price of cable modem service will lessen. If AT&T-Comcast, acting alone or in concert with one or more other MSOs, is successful at preserving its power in the broadband Internet access market, the price of cable modem services and the ratio of cable modem subscribers to DSL subscribers should continue to increase.

2. The Proposed Merger Could Enable AT&T-Comcast to Preserve Its Position in the MVPD Market

20. The above analysis assumes that broadband Internet access and MVPD services are perceived by consumers to be *complements*. However, the broadband Internet access market could evolve into a rival platform for the distribution of traditional video programming. Indeed, the Internet is the next potential source of widespread competition to cable television in the distribution of video programming. Writing on behalf of AT&T, Professors Janusz A. Ordover and Robert D. Willig acknowledged this fact: "Internet video streaming clearly competes, at a minimum, with video programming offered by cable systems, satellite companies and television

broadcasters."[7] The implications of such a development on a cable MSO's strategy toward broadband Internet services would be significant. Indeed, several surveys show that consumers increasingly perceive Internet-based content to be a substitute for traditional video programming:

- According to a Yankee Group survey in March 2002, 33 percent of broadband subscribers said that they used their personal computer to watch video streamed over the Internet in the prior three months, followed by downloading movies (23 percent) and watching DVDs (23 percent).[8]

- A 2002 Sage Research survey found that 44 percent of U.S. households were willing to pay for broadband-delivered entertainment services.[9]

- A November 2001 survey by the Yankee Group showed that 42 percent of all consumers who had ever used online video had viewed streaming video of news in the previous three months.[10]

- An April 2002 survey by Jupiter Media Matrix found that 44 percent of women with children admit that their usage of the Internet decreased with the time they spent watching television, which suggests that at least that segment of the population perceive the two platforms to be substitutes.[11]

- According to the second annual UCLA Internet Report, which is funded by the National Science Foundation, Internet users spent only 12.3 hours per week watching television, compared to 16.8 hours per week for non-Internet users.[12] In addition, the study found that the longer Internet users had been online, the lower their television viewing habits were.

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7. Reply Comments of AT&T Corp. and MediaOne Group, Inc., *Applications for Consent to the Transfer of Control of Licenses, MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, CS Docket No. 99-251, Appendix A, Declaration of Janusz A. Ordover and Robert D. Willig, ¶ 117 (filed Sept. 17, 1999).

8. Press Release, Yankee Group, *PC Evolving Beyond 'Computing' to Become More Entertainment-Centric, Says the Yankee Group* (rel. March 4, 2002) <http://www.yankeegroup.com/public/news_releases/news_releases_by_date.jsp?Index=10>.

9. Sage Research, *Consumers at the Gate: Mounting Demand for Broadband-Enabled Services*, February 2002, *available* at http://www.sageresearch.com/FebBroadband.htm.

10. Press Release, Yankee Group, Yankee Group Survey Reveals New Insights Regarding Interactive Online Consumers (rel. Nov. 20, 2001).

11. Press Release, Jupiter Media Matrix, *Internet Usage Cannibalizes TV Watching For Women With Children, Reports Jupiter Media Metrix* (visited Apr. 18, 2002) <http://www.jmm.com/xp/jmm/press/pressreleaselist.xml>.

12. Dennis K. Berman, *Survey Suggests Access to Internet Reduces Time Spent Watching TV*, WALL ST. J., at B11 (Nov. 29, 2001).

- A May 2001 study by Scarborough Research found that 42 percent of online users had consumed some form of streaming media in the past 30 days, and more than a quarter of online users (26 percent) had watched streaming video.[13]

As more compelling broadband applications develop, these online tendencies to substitute the Internet for cable television should become even more pronounced.

21. The elimination of DSL as a competitive threat would provide AT&T-Comcast with an enhanced ability to control the development of the emerging rival platform for distributing video. With that threat eliminated (or at least severely weakened), AT&T-Comcast could degrade the quality of streaming video downloaded over the Internet, thereby increasing (or at the very least, maintaining) the demand for cable television service—without a concern that it might lose broadband Internet customers to DSL providers. Indeed, @Home's agreement with cable operators contained a 10-minute limit on streaming "broadcast quality" video,[14] evidence that cable MSOs already are considering the above anticompetitive calculus. Similarly, cable operator's decisions to artificially limit the bandwidth devoted to cable modem service may also be motivated in part by a desire to ensure that broadband Internet access does not develop into an alternative platform for multi-channel video distribution.

22. Finally, AT&T-Comcast could deny competing distribution platforms such as DSL access to traditional video programming on AT&T-Comcast's cable television systems. For example, in May 2001, the Disney Corporation alleged that Charter Communication's proposed limits on how much ESPNews programming could be streamed over Charter's cable modems.[15] By combining its share of the MVPD market, AT&T-Comcast could obtain even more influence

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13. Press Release, Scarborough Research, *First Scarborough National Internet Study Reveals Changes In How Online Consumers Use Traditional And Internet Media* (rel. May 9, 2001) (visited Apr. 23, 2002) <http://www.scarborough.com/scarb2002/press.htm>.

14. *Excite@Home Keeps a "Video Collar,"* ZDNET US (Nov. 1, 1999) (visited Apr. 25, 2002) <http://news.zdnet.com.uk/story/0,,t269-s2074794,00.html>.

over video programming networks to limit the amount of video streaming posted on their web sites. Because much of the traditional video programming is or could be terrestrially delivered, it would not be subject to the existing program access rules even if those rules were extended.[16] Although such behavior would impose costs for AT&T-Comcast in the broadband Internet access market (all broadband Internet platforms would be less valuable, including cable modems), the benefits of preserving its substantial margins in the MVPD market might outweigh those costs. Its total package of services—video programming plus Internet services—would still include all of the content that is excluded from the Internet. On the other hand, such exclusion would hurt DSL and other broadband conduits much more because they have no video product to fill their bundled offerings.

III. THE COMMISSION MUST DEREGULATE DSL TO PRESERVE COMPETITION IN THE PRODUCTION OF BROADBAND INTERNET CONTENT, AND ULTIMATELY COMPETITION IN THE BROADBAND INTERNET ACCESS MARKET

23. The anticompetitive threat presented by the proposed merger of AT&T and Comcast exists because the only competitors who are currently capable of imposing a competitive restraint on cable modem providers—namely, DSL providers—are constrained by the Commission's own regulations. Verizon and the other ILECs face onerous regulations that undermine their investment incentives. These regulations enable competitors to buy unbundled network elements at rates determined by hypothetical-cost pricing methodologies and thus, via wholesale prices that often are below actual cost, to reap the economic benefits that result when

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15. Stefanie Olsen, *Battle Brews Over Web Streaming* (May 31, 2001) (visited Apr. 25, 2002)<http://news.com.com/2102-1023-267638.html>

16. Although the program access rules currently provide competitors access to Comcast and AT&T Broadband's video programming, my understanding is that these rules are scheduled to sunset on October 5, 2002 and that they do not cover terrestrially delivered programming in any event. It is also my understanding that entities providing streaming video over the Internet are not protected by the program access rules.

ILECs upgrade their facilities. In essence, competitive carriers have an option for the indefinite lease of the ILECs' capital assets—allowing them to reap all the benefit of the ILECs' successful capital investments and while avoiding any commitment of their own capital with the attendant risks of non-recovery. In such a regulatory environment, ILECs have sharply attenuated incentives to make the investments necessary to expand the reach and capacity of their broadband services.

24. Regulatory relief is needed on both the retail and wholesale side of the DSL industry. On the retail side of the business, the Commission should cease to require local telephone companies to file tariffs for their own broadband services and should no longer mandate that rates be set based on cost-plus regulation or as measured against traditional telephone benchmarks. Nor should the Commission apply the unbundling and other infrastructure-sharing obligations on broadband facilities and services.

25. Non-affiliated content providers are less likely to be willing to invest in broadband Internet content as long as vertically integrated cable modem providers can deny access to their broadband conduit and there is no major competitive alternative to this conduit. Combining AT&T and Comcast would exacerbate this problem and reduce the non-affiliated content providers' incentive to develop broadband content even further. The short-term results would be less competition in the market for broadband Internet content, and, therefore, less competition in the distribution of broadband content. The long-term result could be the consolidation of broadband Internet access services in the hands of the AT&T Comcast and the other major MSO's, which is likely to eliminate the broadband platform as a potential competitor to its core video business. If the Commission were to unshackle DSL providers and allow

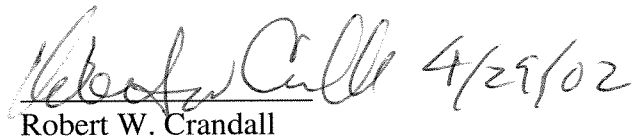
competition in the broadband Internet access market to thrive, DSL providers like Verizon could expand and provide an alternative platform for non-affiliated content providers.

CONCLUSION

26. Given the asymmetric regulation of broadband Internet access providers, the proposed merger would have anticompetitive effects in both the production and distribution of broadband Internet content. Unless the ILECs receive immediate Commission relief from the regulatory constraints that limit their ability to compete effectively for broadband Internet access customers, the proposed merger of AT&T and Comcast and any further MSO consolidations should not be approved.

* * *

Pursuant to 28 U.S.C. 1746(2), I, Robert W. Crandall, declare under penalty of perjury that the foregoing is true and correct. Executed at Washington, D.C. on this 29th day of April, 2002.



Robert W. Crandall