

AT&T's own chairman said it best: "Tomorrow, it's not a narrowband world being optimized. It's a broadband world. I would submit that that's our future in communications -- end-to-end broadband."⁵¹

Nor can AT&T/MediaOne's claim be squared with the business plans of Excite@Home and Road Runner. Neither of these companies offer their broadband ISP service to consumers accessing the Internet over a narrowband connection. As Excite@Home's Web site proclaims, the "Excite@Home service provides a revolutionary experience that combines the best interactive content on the Web with rich multimedia features *only possible using our high-performance network*."⁵² Road Runner's Web site features a similar boast, asserting that "Road Runner is at the forefront of providing an *entirely new* and richly rewarding online multimedia experience."⁵³

Key MediaOne and Excite@Home executives have likewise attested to the fact that broadband service provides consumers a universe of services unavailable to narrowband users. Kelly Ruebel, vice president of Sales and Marketing for MediaOne Internet Services, offers the following advice for marketing cable Internet service:

⁵¹ C. Michael Armstrong, *Networking: The New Generation Comes of Age*, Speech Before ComNet/DC '99 Conference, Jan. 26, 1999 <www.att.com/speeches>.

⁵² Excite@Home Web Site, *A Revolutionary Online Experience* <www.home.com/content> ("On Excite@Home, you can watch Fox News video clips, Bloomberg financial updates, action-packed movie trailers, and sports highlights -- all without the wait. Tune into CD-quality music, news, and sports radio broadcasts right to your desktop. Play Quake II, Unreal, and 100 other top computer games with none of the delays typical of dial-up networks. No other online service lets you do this!").

⁵³ Road Runner Web Site, *World Class Multimedia Programming* <www.rr.com/rdrun/explore/main_feature> (emphasis added).

Stress that it's not all about speed; it's also about what consumers are missing. As you move beyond the early adopter, you will need to showcase what the speed brings to the user's experience. Describing applications like video downloads, music and gaming becomes more critical than just listing 1.5 Mbps. Most users don't even know the Internet offers such exciting multimedia content, given that they have been restricted to dial-up access. It's a brave and more entertaining Web with cable modem service.⁵⁴

Dean Gilbert, Excite@Home's senior vice president and general manager, suggests that cable modem providers are operating in a "new category," where DSL, not narrowband, is a competing service:

Be persistent, consistent and aggressive in your marketing efforts. It takes time to build a new category. Remember you're driving for market share. You need to be leveraging your first-to-market advantage against future services, such as DSL.⁵⁵

The behavior of other Internet players also evidences the marketplace divide between the broadband and narrowband worlds. Excite, which operates a traditional narrowband Internet portal, plans to roll out a new broadband version of Excite over Excite@Home's cable networks as soon as October 1999.⁵⁶ While the new broadband Excite will replace existing @Home content, Excite will continue to offer its narrowband portal to the narrowband market.⁵⁷ Other companies are also offering services that directly cater, and offer discrete content, to the

⁵⁴ Monica Hogan, *Tips for Marketing Broadband Data Access*, MULTICHANNEL NEWS ONLINE, June 7, 1999 <www.multichannel.com/weekly/1999/24/tips24.htm> (surveying 11 cable industry executives to "outline their top 10 tips for marketing cable modems and high-speed Internet access -- and for making sure that cable stays in front of this burgeoning category").

⁵⁵ *Id.*

⁵⁶ See John Borland, *Broadband Excite May Debut This Fall*, CNET NEWS.COM, May 28, 1999 <www.news.com/news>.

⁵⁷ *Id.*

broadband market. In late March, Snap.com “became the first noncable portal to set up a site devoted to steering people with high-speed access to media that has been enhanced to stream above dial-up rates.”⁵⁸ This site is equipped with a link to shut off high-speed features. Likewise, Scour.net has launched a broadband search site that allows users to search for audio and video content and also has separate search engines for “low bandwidth” and “broadband” users.⁵⁹

Yahoo!, after completing a \$5.6 billion acquisition of Broadcast.com, is creating a special “Turbo Yahoo!” platform designed to “upgrade its network of services into a broadband offering.”⁶⁰ Similarly, AOL is planning to launch AOL Plus, a software version that “will detect users’ access speeds and then automatically add broadband services.”⁶¹ Lycos is also developing a new platform “geared toward high-speed users” called Lycos Lightning.⁶² Finally, Disney recently announced that it would purchase majority control of Infoseek -- its partner in the Go Network portal -- to better allow Disney to showcase its entertainment products in a broadband

⁵⁸ Fred Dawson, *RealNetworks Supports Snap Portal*, MULTICHANNEL NEWS ONLINE, May 24, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip.htm>.

⁵⁹ Jim Hu, *Ovitz Invests in Broadband Search Engine*, CNET NEWS.COM, June 10, 1999 <www.news.com/news>.

⁶⁰ Jim Hu, *Lycos Enters High-Speed Access Race*, CNET NEWS.COM, June 24, 1999 <www.news.com/news>.

⁶¹ *Id.*

⁶² *Id.*

medium. As Disney Chairman Michael Eisner noted, “[o]ur content becomes more important as the bandwidth increases.”⁶³

3. Consumers Agree That Broadband and Narrowband Services Do Not Compete, Refusing to Switch to Narrowband Service in the Face of a Significant Broadband Price Increase.

Traditional competition law relies on a well-defined procedure for defining a product market. “To define a market is to identify producers that provide customers of” the merging firms “with alternative sources for [their] product or service.”⁶⁴ If consumers would be willing to endure a “small but significant and nontransitory increase in price” without switching to a second product, then the second product is not a substitute and is not properly included in the relevant market.⁶⁵ As the Commission has stated, a “relevant market is typically defined to encompass commodities that are easily substituted for each other.”⁶⁶

Numerous modes of economic analysis confirm that broadband and narrowband services are not viewed by consumers as substitutes. *First*, a simple comparison of the prices for broadband and narrowband services belies AT&T/MediaOne’s assertion that “the availability of narrowband alternatives will continue to discipline the price of services available over broadband facilities.” AT&T/MediaOne at 72. As Professor Robert Gertner observes, the “price

⁶³ Bruce Orwall, *Disney Agrees to Buy Majority Stake in Infoseek*, WALL ST. J., July 13, 1999, at B7.

⁶⁴ Phillip E. Areeda and Herbert Hovenkamp, IIA ANTITRUST LAW § 530(a), at 150 (1995).

⁶⁵ Department of Justice and Federal Trade Commission Horizontal Merger Guidelines § 1.11 (1997).

⁶⁶ *In re Price Cap Performance Review for LECs*, CC Docket No. 93-124. Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, at ¶ 116 (1995).

charged by cable providers for services provided by @Home and Road Runner are well above those charged by providers of narrowband services.” Declaration of Robert H. Gertner, attached as Appendix A, at ¶ 12 (Gertner Declaration). Indeed, some narrowband ISPs have recently indicated that they plan to offer their service for free.⁶⁷ These price differences “reflect the fact that customers value the access to broadband Internet services . . . more than conventional narrowband access” and that “there are considerable differences in the nature of the services offered by narrowband and broadband suppliers.” *Id.* Traditional antitrust analysis recognizes that the “absence of close price relationships among products presumptively indicates that they are in separate markets.”⁶⁸

Second, the prices charged by cable providers for Excite@Home services vary from region to region, although prices charged by narrowband providers are generally uniform throughout the country. The price charged by broadband providers therefore does not have any demonstrated relationship to narrowband pricing. As Professor Gertner concludes, if broadband and narrowband services were substitutes, “the price of broadband services would not be expected to vary by region in the presence of a national competitors offering a flat rate price.” *Id.*

Third, an analysis of the elasticity of demand for broadband services confirms that broadband users are not sensitive to changes in price and are not willing to switch back to

⁶⁷ See Walter S. Mossberg, *Technology Journal*, WALL ST. J., Aug. 19, 1999, at B8 (“Microsoft is threatening to launch a massive price war . . . by selling free or heavily discounted memberships in its MSN Internet service.”); Michael Warren, *AltaVista Offers Free Web Access*, ASSOCIATED PRESS ONLINE, Aug. 14, 1999 <www.marketwatch.newsalert.com/bin/story>.

⁶⁸ Phillip E. Areeda and Herbert Hovenkamp, *IIA ANTITRUST LAW* § 534(b), at 180 (1995).

narrowband service in the face of a broadband price increase. As economists Daniel Rubinfeld and J. Gregory Sidak observe, “there is a sharp distinction between a customer who fits the broadband profile and one who fits the narrowband profit.” Typical broadband customers “are more likely to be male, younger, less wealthy, and spend more time on-line than those who are not.” Declaration of Daniel L. Rubinfeld & J. Gregory Sidak, attached as Appendix B, at ¶ 22 (Rubinfeld & Sidak Declaration). A recent Strategis Group study, titled *High-Speed Internet -- 1998/1999*, provides “a snap-shot current Internet user demand curve for high-speed Internet” service that identifies a large core group of price-insensitive residential broadband consumers:

Today, high-speed Internet services are rarely priced under \$40 per month, leaving the market in a mid to low-level price sensitivity range. Consumers willing to pay [for] these services are not particularly sensitive to price. They choose high-speed Internet technology and service based on other features like quality of service, reputation, or ease of setup.

Strategis Group Report at 155-56. The report concludes that, at “prices above \$50 per month, the elasticity is very near 0; a 1% change in price has no effect on demand.” *Id.* Thus, a core group of early broadband adopters demonstrate “price insensitive demand for high-speed” service. *Id.* at 3. Indeed, most broadband consumers “say they would never go back to relatively sluggish dial-up connections after surfing the Net over a cable or DSL line.”⁶⁹

Broadband service providers are a long way from saturating the market of price-insensitive users. As the Strategis Group Report concludes, “[h]igh-speed data transport and Internet access providers are currently focused on price insensitive users.” *Id.* It is therefore

⁶⁹ Corey Grice, *The Pitfalls of High-Speed Installs*, CNET NEWS.COM, July 28, 1999 <www.news.com/Special Features>.

unlikely that broadband prices will drop anytime soon to a level required to target customers with significant price elasticity. Rather, as Forrester Research has observed, the trend is that “[p]ent-up demand will prop up broadband prices.”⁷⁰ This sentiment has been confirmed by Excite@Home’s own Chairman, who recently stated that the company “is a long way from being a demand-limited system. We have 38 million registered Excite users. You think we have any problem generating demand?”⁷¹ Thus, before the “first wave of price competition in high-speed access” hits in 2003, Forrester “expect[s] a war of words but not of prices between cable and ADSL services,” as providers focus on targeting “early adopters who will gladly pay a 100% premium for speed.”⁷²

B. The Merger Will Give AT&T/MediaOne a Dominant Position in the Market for Broadband Internet Service.

Two ISPs currently dominate the market for broadband service -- Excite@Home and Roadrunner. As of August 1, 1999, Excite@Home served roughly 390,000 U.S. customers, while Road Runner counted more than 350,000, giving the companies combined a greater than 90 percent share of the cable ISP market.⁷³ By comparison, DSL providers, who offer the closest alternative broadband product, have secured only 116,000 customers.⁷⁴ Counting all of the

⁷⁰ Forrester Report, *From Dial-Up to Broadband*, April 1999, at 8.

⁷¹ Seth Schiesel, *AT&T-AOL Deal Could Rain on Excite@Home's Parade*, N.Y. TIMES, Aug. 9, 1999, at B1.

⁷² Forrester Report, *From Dial-Up to Broadband*, April 1999, at 8.

⁷³ See Kinetic Strategies, *Cable Modem Customer Count Tops 1 Million*, CABLE DATACOM NEWS, Aug. 1999, at 2 <www.CableDatacomNews.com>.

⁷⁴ See TeleChoice, *Deployment -- Updated*, Aug. 1999 <www.xdsl.com>.

customers served by other broadband technologies (including satellite), Excite@Home and Road Runner control roughly 80 percent of the broadband market.

This extraordinary advantage will not shrink in the near-future. Excite@Home service is currently available to 17 million homes -- a total that grew by two million just in the second quarter of 1999.⁷⁵ Likewise, Road Runner service is currently available to more than 10.4 million homes⁷⁶ -- a total that will increase rapidly, given that Road Runner's cable partners are among the systems upgrading their networks most quickly.⁷⁷ Excite@Home and Road Runner are likely to capture a considerable percentage of these addressable customers. As BT Alex Brown concluded in a recent report. "[c]able modem penetration rates are as high as 20% in some markets and have the potential to achieve penetration levels of 25% or more in 5-6 years."⁷⁸ BancBoston Robertson Stephens agrees, concluding that "[o]nce a market has been upgraded, we have seen very high demand for the service, with new subscriber growth contained by the pace at which the cable partners can connect homes."⁷⁹ Based on this extreme head start, analysts near-uniformly predict that cable modems will control 75-80 percent of the broadband

⁷⁵ See Kinetic Strategies, *Cable Modem Customer Count Tops 1 Million*, CABLE DATACOM NEWS, Aug. 1999, at 3 <www.CableDatacomNews.com>.

⁷⁶ See Kinetic Strategies, *Road Runner Gears Up for Growth*, CABLE DATACOM NEWS, Aug. 1999, at 4 <www.CableDatacomNews.com>.

⁷⁷ BT Alex Brown, *Enhanced TV II: The TV and Broadband Services Revolution*, June 1, 1999, at 29.

⁷⁸ *Id.* at 31.

⁷⁹ BancBoston Robertson Stephens. *Excite@Home: Initiating Coverage of Cable Access Leader*, June 17, 1999, at 4.

market in 2003.⁸⁰ As Forrester Research concluded, for “the next several years, cable ISPs will dominate the high-speed market, capturing 77% of the \$8.8 billion in consumer broadband spending in 2003.”⁸¹ With no rival in the broadband cable ISP market, a combined Excite@Home/Road Runner would therefore be able to maintain its 80 percent market share until at least 2003.

Excite@Home and Road Runner derive their market advantage from the exclusive relationships they hold with the nation’s largest cable providers. Ownership of Excite@Home is shared between AT&T -- which holds a 58 percent voting interest -- Cox Communications, and Comcast.⁸² Similarly, Road Runner is controlled by partners Time Warner, MediaOne -- which holds a 50 percent voting interest -- Advance/Newhouse, Microsoft, and Compaq.⁸³ Between them, Excite@Home and Road Runner serve as the exclusive ISP for all but two of the 10 leading MSOs, and one of the lone hold-outs, Adelphia, recently completed a merger with

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⁸⁰ See, e.g., BT Alex Brown, *Enhanced TV II: The TV and Broadband Services Revolution*, June 1, 1999, at 34 (“by year-end 2002, fully 20% of high-speed access will be achieved through DSL . . . versus 80 percent for cable modems”); Forrester Brief, *Consumers Are Ready for Broadband Technologies*, Sept. 16, 1998, at 4 (“[A]s cable modem availability increases, ADSL subscriptions will decrease. Why? Cable modems are faster, don’t require the consumer to do anything except meet the cable guy, and are much cheaper.”).

⁸¹ Forrester Report, *From Dial-Up to Broadband*, April 1999, at 10.

⁸² See Strategis Group Report at 143: *Corrections & Amplifications*, WALL ST. J., Aug. 11, 1999, at A2.

⁸³ See Kalpana Srinivason, *AT&T-MediaOne Merger Protested*, HP ONLINE, Aug. 18, 1999; Strategis Group Report at 145.

AT&T.⁸⁴ If combined, Excite@Home and Road Runner would have exclusive agreements to serve 79.1 million U.S. homes passed -- almost 80 percent of all U.S. households passed by cable.⁸⁵

Cable Provider	ISP	Homes Passed (Millions)
AT&T	Excite@Home	17.9
Time Warner	Road Runner	20.6
MediaOne	Road Runner	8.4
Comcast	Excite@Home	7.3
Cox	Excite@Home	5.5
Cablevision	Excite@Home	5.1
Century	Excite@Home	2.3
Jones	Excite@Home	2.1
Other	Both ISPs	9.9
TOTAL: 79.1 Million		

Although AT&T and MediaOne assert that their transaction "is not" a "merger between @Home and Road Runner," AT&T/MediaOne at 84, this claim is contrary to Excite@Home's publicly stated plans, the expectations of analysts, and common sense business strategy. A merger of the two ISPs would allow the combined entity to introduce Road Runner's sizable customer base -- fueled by exclusive relationships with already-upgraded cable networks -- to

⁸⁴ See Forrester Report, *Cable's Multiservice Future*, Feb. 1999, at 5; Strategis Group Report at 129-30.

⁸⁵ See Strategis Group Report at 143-45 (listing Excite@Home and Road Runner's exclusive relationships); Warren Publishing, *CABLE & STATION COVERAGE ATLAS*, Index 170 (1999) (providing data on homes passed).

Excite@Home's "unmatched multi-media content."⁸⁶ A combined network would not have to compete for content, software, and advertising, but instead could wield unchecked market power against upstream providers. Indeed, when AT&T's merger with MediaOne was announced, Excite@Home's CEO, George Bell, hinted that a merger between the ISPs was in the works:

I think that the results of last week could not have turned out better for Excite and @Home. AT&T brings in more subscribers with MediaOne. MediaOne owns 35 percent of Road Runner, so it brings the possibility of Excite and @Home being able to do something with Road Runner -- at an operational level or behind -- into sharper focus.⁸⁷

Analysts like Hambrecht & Quist are also anticipating an Excite@Home/Road Runner combination, urging investors to buy Excite@Home shares because, "with the help of AT&T, Excite@Home could merge with Road Runner, the second largest cable modem initiative."⁸⁸ Forrester Research agrees, predicting that AT&T and MediaOne will "pool their interests behind the larger, better capitalized @Home" rather than having "competing broadband efforts."⁸⁹

The rewards from such a merger would be substantial. *First*, by extending its monopoly power in the broadband access market into vertically related broadband markets like content and advertising, AT&T/MediaOne could ensure that its monopoly rents are not dissipated by competition over access. While cable will continue to "dominate" the market for broadband

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⁸⁶ BancBoston Robertson Stephens. *Excite@Home: Initiating Coverage of Cable Access Leader*, June 17, 1999, at 1.

⁸⁷ Jim Hu, *AT&T Moves Good for Excite, Exec Says*, CNET NEWS.COM, May 12, 1999 <www.news.com/news>.

⁸⁸ Hambrecht & Quist. *Excite@Home*, July 21, 1999, at 2.

⁸⁹ Forrester Report. *From Dial-Up to Broadband*, April 1999, at 11.

access until at least 2003,⁹⁰ at some point competing broadband access technologies may become more widespread. AT&T/MediaOne would therefore have a multi-year window of opportunity to push its market power into vertically related broadband markets, creating a monopoly broadband ISP that customers could access only through a cable connection. Thus, as Rubinfeld and Sidak conclude, “the merger will allow AT&T to extend its leverage into vertically related markets.” Rubinfeld & Sidak Declaration ¶ 46.⁹¹ Once this task is complete, competing broadband access technologies could not dissipate AT&T/MediaOne’s monopoly power, because those access technologies would not offer customers a connection to anything they want. In the words of Stephens analyst John Corcoran:

The content perspective is important so @Home does not allow itself to become a commodity. Five years from now, high-speed access alone will be a commodity and probably not a great business to be in. But it could be a great business if the company has add-ons that are not commodities that get the people to want to use that service and come back to that service.⁹²

Recent scholarship in economics confirms that “tying will preserve monopoly power in the primary market” (here, broadband access) “whenever the alternative producer in the tied market faces entry costs or the demand for the complementary good” (here broadband ISP service) is characterized by network effects.” Rubinfeld & Sidak Declaration ¶ 47. Because there is no

⁹⁰ *Id.*

⁹¹ See also Rubinfeld & Sidak Declaration ¶ 78 (“AT&T’s concentrated control of the broadband Internet access market following the merger will enable the combined entity to extend its economic influence into vertically related markets such as portals, streaming video, streaming video software, and e-commerce.”).

⁹² Mike Farrell, *Bell Rings in With Excite@Home Plans*, MULTICHANNEL NEWS ONLINE, June 14, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip>.

question that broadband ISPs benefit from having more customers on their network, AT&T/MediaOne can reap significant anticompetitive benefits from extending its monopoly power into vertically related broadband markets.

Second, broadband Internet service poses a direct threat to AT&T/MediaOne's cable monopolies. Broadband service -- with its emphasis on interactive video applications that allow users to determine precisely what content to view and when -- threatens to erode the customer time devoted to watching cable television. By leveraging its monopoly power in the broadband access market into vertically related markets for broadband content, AT&T/MediaOne can assure that their cable monopoly profits are not lost to competitors. As Professor Gertner observes, "inhibiting competition in the provision of broadband video services can protect the existing market power enjoyed by AT&T and others in the provision of cable television services." Gertner Declaration ¶ 16. Rubinfeld and Sidak agree, concluding that, to "avoid losing cable customers and their associated large margins, AT&T will . . . have an incentive to slow innovations in streaming video." Rubinfeld & Sidak Declaration ¶ 60.

Third, by establishing a position of dominance before any other broadband ISPs are able to get their foot in the door, a merged Excite@Home/Road Runner could capture critical first-mover advantages -- advantages that have proven to be "highly durable" in Internet and other network industries. *Id.* ¶ 53. Microsoft, for example, established itself as the first-mover in PC operating systems with MS-DOS -- an advantage it has maintained through numerous versions of its Windows operating system. Similarly, Yahoo! established itself as the first-mover in the narrowband portal market and today maintains a "powerful first-comer brand" that keeps it the

market leader.⁹³ On the commerce side, Amazon.com and eBay continue to dominate the markets for on-line book sales and auctions, despite low barriers to entry. These persistent advantages stem directly from the extraordinary brand recognition that comes with being the first big player in a new Internet market. And while these advantages are wholly legitimate when achieved as a result of a single firm's business acumen, they are decidedly illegitimate when secured solely through an anticompetitive merger. Thus, Professor Gertner concludes, the Commission should act to "prevent firms from gaining" first-mover "advantages through the exercise of market power. It is important that competition involving different technologies be determined based on economic efficiency, not on the ability of firms with market power to act to harm rivals." *Id.* ¶ 17.

Excite@Home executives have made it plain that they intend to seize the first-mover advantage in the broadband ISP market. Excite@Home President George Bell recently announced the company's intention to "become the leading broadband portal" and thereby "nail down the top spot in the broadband media world."⁹⁴ He explained that the company plans to accomplish this goal by "trying to take the first mover advantage," repeating Yahoo!'s strategy of cornering the market "a good 18 months ahead of" competitors.⁹⁵ "There won't be that many winners left standing at the end of the broadband battle," Bell concluded. "It may be that those

⁹³ Jim Hu, *AT&T Moves Good for Excite, Exec Says*, CNET NEWS.COM, May 12, 1999 <www.news.com/news>.

⁹⁴ John Borland, *Broadband Excite May Debut This Fall*, CNET NEWS.COM, May 28, 1999 <www.news.com/news>.

⁹⁵ *Id.*

who stay agnostic will find that they've been sitting on the sidelines while all the touchdowns are scored."⁹⁶

Chairman Kennard has nevertheless suggested that there is no need to stem the market power of a combined Excite@Home/Road Runner because "broadband is just a nascent industry" and because the early broadband customers represent only a "fraction of the over 30 million American homes that are on the Internet."⁹⁷ Excite@Home's President has himself explained why this reasoning is misguided:

*I think the critical years are the early years. Look at the advantages Yahoo! has today, not only because they started 18 months before anybody else. And so you might not think that it's an important month now or important quarter now when you think about the total number of subscribers in broadband . . . but it absolutely becomes the foundation of people's brand recognition and loyalty.*⁹⁸

Mr. Bell has likewise explained how Excite@Home, combined with Road Runner, plans to implement the broadband vision of AT&T Chairman C. Michael Armstrong: "Mike's goal is to maximize the total number of subscribers on *his* system by *whatever means at his disposal*. The only way we have to win is to make AT&T successful doing what it is that they're doing."⁹⁹

⁹⁶ *Id.*

⁹⁷ William E. Kennard, *The Unregulation of the Internet: Laying a Competitive Course for the Future*, Remarks Before the Federal Communications Bar, Northern California Chapter, July 20, 1999, at 2.

⁹⁸ Jim Hu, *AT&T Moves Good for Excite. Exec Says*, CNET NEWS.COM, May 12, 1999 <www.news.com/news>.

⁹⁹ Seth Schiesel, *AT&T-AOL Deal Would Rain on Excite@Home's Parade*, N.Y. TIMES, Aug. 9, 1999, at B1 (emphasis added).

Thus, despite the meager protestations of their Public Interest Statement, AT&T and MediaOne have made plain their intention to dominate the broadband market by seizing the early advantage. This development will have an extreme anticompetitive impact on markets for broadband content, advertising, and e-commerce. Excite@Home currently estimates that 60 percent of its revenues in 2002 will be derived from advertising and “e-commerce related activities like on-line shopping.”¹⁰⁰ Excite@Home already charges “significantly more for ads than its competitors”¹⁰¹ -- an action that reflects the market power associated with a locked in exclusive customer base and broadband’s enhanced “[v]isual imagery, audio accompaniment, and unlimited interactivity.”¹⁰² And, as Rubinfeld and Sidak conclude, once AT&T/MediaOne has “captured a sufficiently large share of broadband content and customers, [it] could extract larger economic rents from companies wishing to advertise on the Excite@Home portal.” Rubinfeld & Sidak Declaration ¶ 55. Internet advertising is expected to generate \$11.4 billion in 2002, and e-commerce is expected to generate \$29 billion in transactions by the same year.¹⁰³ Merging Excite@Home and Road Runner will allow AT&T/MediaOne to seize the broadband

¹⁰⁰ Dick Satran, *Excite@Home Denies Merger, But Sees Deals*, REUTERS, Aug. 3, 1999.

¹⁰¹ Corey Grice, *Road Runner Beefs Up Advertising Push*, CNET NEWS.COM, Aug. 4, 1999 <www.news.com>.

¹⁰² Forrester Report, *Hooked on Broadband*, July 1999, at 7.

¹⁰³ See Insight Corp., THE MARKET FOR VIDEO AND MULTIMEDIA SERVICES § 7.2.3 (1998); John Borland, *Living Up to the Broadband Future*, CNET NEWS.COM, July 28, 1999 <www.news.com/news>.

first-mover advantage -- eliminating competition for advertising and increasing the tolls that merchants wishing to engage in e-commerce must pay for access to customers.¹⁰⁴

The anticompetitive advantages AT&T/MediaOne seeks to secure by combining Excite@Home and Road Runner are well-known to the antitrust laws. Two lawsuits recently brought by the Department of Justice illustrate this point forcefully. The government initiated a lawsuit against Microsoft alleging that the company was taking anticompetitive actions against creators of competing Internet browsers to "protect its valuable Windows" operating system "monopoly against . . . potential competitive threats."¹⁰⁵ Similarly, the Justice Department recently filed suit to prevent a conglomeration of cable providers from purchasing the last remaining orbital satellite slot capable of supporting a competing nationwide video programming service. The government initiated this suit because the cable providers' acquisition of the satellite slot "would effectively foreclose the use of this scarce and valuable asset to challenge" the cable providers' "monopoly power," allowing them "to protect their dominance and monopoly profits for years to come."¹⁰⁶

¹⁰⁴ See Strategis Group Report at 128 ("[E]arly research indicates that high-bandwidth ads may prove more successful at attracting purchasers. Cable modem services enjoy a natural opportunity to provide such high-bandwidth ads, which may enable cable ISPs to charge a premium for advertising space or Internet commerce. While still unproven, the potential for these services to become lucrative is enormous.").

¹⁰⁵ *United States v. Microsoft*, Civil Action No. 98-1232, Complaint at ¶ 1 (D.D.C. May 18, 1998).

¹⁰⁶ *United States v. Primestar, Inc.*, Civil Action No. 98-1193, Complaint at Preamble (D.D.C. May 12, 1998).

These cases make it clear that the government's antitrust enforcement arm does not tolerate the defense of existing monopoly power through anticompetitive behavior or acquisition. AT&T and MediaOne's attempt to defend their cable monopolies by seizing control over the market for broadband Internet service therefore cannot withstand antitrust scrutiny. Nor do the antitrust laws permit firms to use "monopoly power attained in one market to gain a competitive advantage in another."¹⁰⁷ This long-standing prohibition against monopoly leveraging directly condemns AT&T and MediaOne's planned effort to use their monopoly power in the market for broadband Internet access to secure control over upstream markets for broadband software, content, advertising, and e-commerce. Further, the antitrust laws squarely condemn a firm accumulating such a large share of the buying power in a given market that firms not chosen as suppliers lack the alternative outlets required to compete. This prohibition against "vertical foreclosure" -- which outlaws agreements with the "probable" effect of foreclosing "competition in a substantial share of the line of commerce affected" -- bars AT&T and MediaOne from merging into a broadband monopolist.¹⁰⁸

Thus, there is no question that the anticompetitive purposes of AT&T and MediaOne's merger run afoul of the antitrust laws. Their merger must therefore be blocked so long as other competitors in the market will be unable to counter their anticompetitive acts.

¹⁰⁷ *Berkely Photo v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979); *see also Cost Management Services, Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 951 (9th Cir. 1996) (firm violates Sherman Act § 2 by using or attempting to use "its monopoly power in the first market to acquire and maintain a monopoly in the second market").

¹⁰⁸ *Tampa Elec Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961); *see also Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997) (Clayton Act prohibits agreements whose "tendency [is] to 'foreclose' existing competitors or new entrants from competition").

C. Competing Broadband Access Technologies Will Not Discipline AT&T/MediaOne's Market Power, Particularly Once AT&T/MediaOne's First-Mover Advantage Becomes Entrenched.

While a number of non-cable technologies hold the promise of establishing broadband connections to the home, none will be able to curb AT&T/MediaOne's market power in the residential broadband market once it establishes its first-mover advantage. Not surprisingly, in setting forth its high-level portrayal of market conditions, AT&T/MediaOne omits mention of the numerous -- and widely acknowledged -- competitive disadvantages suffered by other broadband technologies. These disadvantages are sufficiently great to preclude DSL, wireless, and satellite providers from overcoming the competitive advantage AT&T/MediaOne would secure solely as a result of merging the Excite@Home and Road Runner networks.

The closest threat to cable's hegemony is DSL. As explained above, cable already has a tremendous head-start over DSL, with U.S. cable modem customers approaching one million and DSL customers just over 100,000.¹⁰⁹ In one typical GTE market -- Tampa, Florida -- Time Warner has already gained 20,000 cable modem customers, while GTE hopes to acquire just 3,000 by the end of this year. See Declaration of Dale E. Veeneman & Everett H. Williams, attached as Appendix C, at ¶ 8 (Veeneman & Williams Declaration). Similarly, in a study of DSL availability in the Washington, D.C. area, Rubinfeld and Sidak observed that "cable-based

¹⁰⁹ Compare Kinetic Strategies *Cable Modem Customers Could Top 1 Million*, Cable Datacom News, August 1999, at 2 <www.CableDatacomNews.com> with Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/zdn/stories/zones> (placing DSL customer penetration at 74,000).

providers already serve[] 92 percent of the Virginia suburbs, while Bell Atlantic serve[s] only 46 percent.” Rubinfeld & Sidak Declaration ¶ 29.

This extraordinary head-start stems from a number of technological hurdles facing DSL providers. While cable modem service can be offered to 97 percent of all U.S. homes,¹¹⁰ DSL is only capable of serving roughly two-thirds of U.S. households. Strategis Group Report at 69. This limitation is a technological one: signals “passing over a copper loop degrade as they travel further from their point of origination,” and once the copper loop length exceeds 18,000 feet, the signal degrades to a point that the service can no longer be offered. Veeneman & Williams Declaration ¶ 10. Customers living further than 18,000 feet from an ILEC central office are therefore disqualified from receiving DSL.¹¹¹ “As a result of this technological constraint, it is estimated that only 65 percent of GTE’s customers qualify for DSL service.” *Id.*

This difficulty is compounded by the fact that traditional copper loops, many of which were built decades ago, often are saddled with old equipment that precludes customers from receiving DSL service. Bridged taps -- “sections of copper that are connected to, but not located along, the circuit from the CO to the customer’s premises” -- keep DSL from working in a large number of cases because the signal terminates at some point other than the customer’s home. *Id.* ¶ 11. Approximately 56 percent of local loops have bridge taps. *See* Strategis Group Report at 30. Similarly, loading coils -- which regenerate voice signals as they are transmitted along

¹¹⁰ Strategis Group Report at 69.

¹¹¹ *See* Rubinfeld & Sidak Declaration ¶ 31 (the 18,000 foot limitation “will severely limit DSL’s ability to impose price discipline on cable-based providers of Internet access in areas located several miles from the central office”).

copper loops -- disrupt higher frequency signals in a way that renders DSL service inoperable. *Id.* at 51. Roughly 15-20 percent of access lines in the United States have loading coils. *Id.*

DSL providers also face extreme difficulty providing service to customers whose local loops are connected to digital loop carriers (DLCs). Customers served by DLCs do not have direct copper connections to ILEC central offices. Rather, high-speed fiber connects the central office and a DLC located near the customer's home, and a copper loop connects the customer to the DLC. *See Veeneman & Williams Declaration* ¶ 13. These DLCs convert analog transmissions into digital and aggregate signals from multiple loops, creating a more efficient voice-network architecture. To provide DSL service to these customers, DSL providers often must upgrade the capacity of the fiber linking the DLC to the central office to carry the increased traffic load. *Id.* Moreover, because these customers cannot be served by DSLAMs located in the central office, a collocated DSLAM must be installed in every DLC. Most "DLCs have no empty space that can be allocated to DSLAM equipment," so the "only solution currently available is to collocate an additional DSLAM-equipped cabinet next to existing DLC." *Id.* ¶ 14. Thus, as the Strategis Group concludes, "additional capital expenditures to overcome the problem cannot yet be avoided." *Strategis Group Report* at 49.

Given these costs, it is "currently unprofitable for GTE to offer ADSL service to customers whose loops are provisioned through DLCs." *Veeneman & Williams Declaration* ¶ 14. In terms of overall success penetrating broadband markets, the obstacles facing DSL providers are "exacerbated by the fact that DLCs have their greatest penetration in newer suburban markets." *Strategis Group Report* at 49. In GTE's markets, for example, 30 percent

of customer lines are provisioned through DLCs. *Id.* at 50. Unfortunately, these “households are likely to be potential high-speed Internet users,” requiring DSL providers to cede even more of the addressable market to cable providers. *Id.*

DSL providers like GTE are taking the steps necessary to overcome these hurdles, but the task cannot be accomplished overnight. Often, bridge taps and loading coils can only be removed by digging up the city streets. *See Veeneman & Williams Declaration* ¶ 12. Adding the necessary equipment to old DLCs is a costly endeavor that overwhelms the possible revenue that sales to DLC-served customers would provide. *Id.* ¶ 7. In no case is it feasible to invest in new DLCs equipped with DSL equipment to serve customers whose loops are too long to be served from the central office. *Id.* Ultimately, GTE is confident in the ability of DSL providers to compete over the long term *if the playing field is level*. But cable providers are already subject to a preferential regulatory regime that does not require them to open their networks, and this advantage will be compounded for AT&T/MediaOne if this merger is approved. Once the Excite@Home and Road Runner platforms are merged and AT&T/MediaOne secures a first-mover advantage entrenched by anticompetitive behavior, competing broadband technologies like DSL will not be able to close the gap.

AT&T and MediaOne also point to two other broadband technologies -- fixed wireless and satellite -- to support their assertion of a crowded broadband market. AT&T/MediaOne claims, for example, that “[f]ixed wireless services also provide the transport component of Internet access service.” AT&T/MediaOne at 78. It is, however, generally accepted by broadband market analysts that wireless broadband providers are not, and will not become

anytime soon, serious competitors in the residential market. “In the U.S., residential wireless Internet subscribers number in the hundreds and it is not likely that there will be a significant number of wireless Internet users by 2003.”¹¹² This lack of customer penetration stems from the fact that “the wireless Internet carrier must place more of the initial cost burden on the subscriber.” Strategis Group Report at 7. For true two-way wireless Internet service, customer equipment is prohibitively expensive due to the need for a transceiver, a modem, and in some cases, an external antenna. “Where the wireless connection is two-way, monthly service for a single user runs in the \$70 to \$100 range, plus \$400 to \$800 in CPE costs and \$150 for installation.” *Id.* This high up-front cost is a substantial barrier to entry in the residential market, making wireless Internet service viable only for larger business customers.¹¹³

Given this marketplace reality, AT&T/MediaOne’s reliance, for example, on Sprint’s “plans to use wireless cable technology to provide transport for its bundled offerings of voice and broadband Internet access services to consumers” is misplaced. AT&T/MediaOne at 78. In fact, “Sprint has talked about deploying ION in the home market since it established the service, though its vision of how the business would be structured has evolved substantially.”¹¹⁴

¹¹² Strategis Group Report at 7; *see also* Marc Liggio, *Wireless Internet -- No Threat to Cable*, MULTICHANNEL NEWS ONLINE, Oct. 26, 1998 <204.243.31.23/cgi-win/csearch.exe/vsrchtip> (“High-speed wireless Internet access is no threat to the cable industry, at least not today.”).

¹¹³ Marc Liggio, *Wireless Internet -- No Threat to Cable*, MULTICHANNEL NEWS ONLINE, Oct. 26, 1998 <204.243.31.23/cgi-win/csearch.exe/vsrchtip> (“Make no mistake, there is a place for wireless Internet access. That place will likely be in supplying high-speed Internet connections to small or mid-sized businesses. For them, initial equipment costs are not high when compared with other multiuser options.”).

¹¹⁴ John Borland, *Sprint Readies ION for Consumer Market*, CNET NEWS.COM, June 17, 1999 <www.news.com/News/Item0,4,38016.00>.

Indeed, Sprint's plans for the service continue to evolve. As Kevin Brauer, president of Sprint's National Integrated Services division, readily admits: "We're building infrastructure throughout the company that will allow us to scale and go after the mass market. . . . But we don't have that infrastructure in place yet."¹¹⁵ And although Sprint recently has gone on a wireless cable acquisition spree, Brauer also admits that "[s]ince many wireless cable firms have struggled financially of late, with some close to bankruptcy, existing wireless networks are not as technologically advanced as they could be," and thus Sprint must still upgrade these systems.¹¹⁶ Therefore, it appears, at least in the near term, that Sprint will rely on DSL for its ION strategy, which is only "to be rolled out initially in three cities."¹¹⁷ Even assuming Sprint's wireless broadband offering is launched more broadly, as Jupiter Communications' Abhi Chaki observes, Sprint's program is "an important baby step" but "by the nature of the service, the people who end up taking it will be the small businesses and home offices."¹¹⁸

Likewise, AT&T/MediaOne is wrong to assert that satellite providers will soon make serious inroads in the broadband marketplace. Currently, the only satellite Internet service offered in the residential market is Hughes's DirecPC. It, however, is by no means competitive with cable modem service. Its use, for example, is not as simple as merely pointing a satellite dish out a window; "customers need a view of a very specific spot in the southern sky that you'll

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

find with a compass and specific instructions.”¹¹⁹ Nor is it a true two-way broadband service. The user must tie up or purchase a second phone line because uploading is accomplished only by way of a traditional telephone connection, meaning that satellite users cannot enjoy *interactive* broadband services.¹²⁰ Up-front costs include about \$200 for the DirecPC dish and, unlike the monthly fee charged by cable providers, DirecPC is priced on an hourly basis, requiring high-volume users to pay as much as \$129.99 per month for the service.¹²¹ And as Rubinfeld and Sidak observe, “DirectPC will not have an advantage with respect to existing DirectTV subscribers, since customers wanting to add high-speed Internet to their package must purchase a separate dish.” Rubinfeld & Sidak Declaration ¶ 37. All of these factors make DirecPC highly unattractive compared to cable modem service. Moreover, as AT&T and MediaOne acknowledge, the Teledesic and Spaceway satellite services will not be available until at least 2002,¹²² and therefore will do nothing to stem AT&T/MediaOne’s first-mover advantage.

Over and above these specific deficiencies, all competing broadband technologies suffer a further disadvantage: Once customers sign up for cable modem service, they are unlikely to switch to a new technology due to the high switching costs and service problems associated with installation. The installation costs for ADSL service range from \$100 to \$500, and modems can

¹¹⁹ Les Freed & Frank J. Derfler, Jr., *Satellite*, PC MAGAZINE, Mar. 31, 1999 <www.zdnet.com/products/stories/reviews>.

¹²⁰ *Id.*

¹²¹ *Id.* (“The company offers three levels of service: \$29.99 per month for 25 hours, \$49.99 for 100 hours per month, and \$129.99 for 200 hours per month. If you go over your monthly time limit, you pay \$1.99 for each additional hour.”).

¹²² AT&T/MediaOne at 79-80.