

Before the
Federal Communications Commission
Washington, DC 20554

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In the Matter of)
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Applications for Consent to the)
Transfer of Control of Licenses)
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MediaOne Group, Inc.,)
Transferor,)
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To)
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AT&T Corp.,)
Transferee.)

Cable Services Bureau

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FEDERAL COMMUNICATIONS COMMISSION
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**PETITION OF GTE SERVICE CORPORATION,
GTE INTERNETWORKING, AND GTE MEDIA VENTURES, INC.
TO DENY APPLICATION, OR IN THE ALTERNATIVE, TO CONDITION THE
MERGER ON OPEN ACCESS REQUIREMENTS**

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Pursuant to the Public Notice issued by the Commission on July 23, 1999, GTE Service Corporation, GTE Internetworking, and GTE Media Ventures, Inc. (collectively "GTE") respectfully submit this petition to deny the Applications of AT&T Corp. ("AT&T") and MediaOne Group, Inc. ("MediaOne") for authority to transfer control of MediaOne's licenses to AT&T or, in the alternative, to condition the merger on open access requirements.

INTRODUCTION AND SUMMARY

Convergence. No concept better captures the future of communications than the notion that the barriers between telephony, television, and the Internet are rapidly becoming a relic of the past. Behind this revolution is a single technology, the broadband transmission of packet-

switched data over the Internet. Broadband Internet service is the power behind convergence because it alone allows telephone, video, and data streams to travel over a single medium that has the potential to interconnect all telecommunications users. Broadband Internet access is also bringing consumers revolutionary new services -- from video e-mail to home networking, from on-demand streaming video to interactive e-commerce, and others that are only beginning to be imagined. In Chairman Kennard's words, the market for broadband service "is the future of the Internet."¹

Not all people share the same vision of the telecommunications future. Chairman Kennard envisions "a future in which there are at least four or five facilities-based competitors offering" broadband Internet "service: from DSL to cable, from terrestrial to wireless and even satellite."² GTE shares this vision, where multiple providers of Internet on-ramps compete with one another on equal terms to offer a full package of telecommunications services. AT&T Chairman C. Michael Armstrong has a different vision, however. In the words of George Bell, President of Excite@Home, AT&T's exclusive broadband ISP, "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."³

¹ 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.

² *Id.*

³ Seth Schiesel, *AT&T-AOL Deal Would Rain on Excite@Home's Parade*, N.Y. TIMES, Aug. 9, 1999, at B1 (emphasis added).

AT&T is attempting to achieve this goal by cornering the broadband market before competitors have a chance to lace up their shoes. This effort is not driven by any acumen on AT&T's part, but by a two-pronged strategy designed to take advantage of a regulatory imbalance that favors cable providers and disadvantages their rivals. The *first* prong is to offer broadband Internet access to cable customers only if they are also willing to take AT&T's broadband ISP service -- something that competing providers are barred from doing by Commission rules. Because cable has an extraordinary head start over competing technologies in acquiring broadband customers, AT&T has been able to use this tying strategy to push its market power in broadband access into the fledgling market for broadband content. Indeed, AT&T has frankly announced its intention to seize the first-mover advantage in this market, becoming "the leading broadband portal" and thereby "nail[ing] down the top spot in the broadband media world."⁴ The benefits stemming from AT&T's early jump? George Bell continues:

*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.*⁵

AT&T's *second* tactic is to buy up cable and broadband customers. This process began with AT&T's acquisition of TCI and interests in the cable industry's other leading providers, and

⁴ John Borland. *Broadband Excite May Debut This Fall*. CNET NEWS.COM, May 28, 1999 <www.cnetnews.com>.

⁵ Jim Hu. *AT&T Moves Good for Excite, Exec Says*. CNET NEWS.COM, May 12, 1999 <www.cnetnews.com>.

continues today with AT&T's proposed acquisition of MediaOne. AT&T executives admit that "the entire TCI acquisition came about because AT&T wanted to get its hands on At Home."⁶ Likewise, AT&T's acquisition of MediaOne would give it a 50 percent voting stake in the only other major player in the broadband ISP market, Road Runner. As of August 1, 1999, Excite@Home served roughly 395,000 U.S. customers, while Road Runner counted almost 350,000, giving the two companies combined a greater than 90 percent share of the cable ISP market.⁷ By comparison, DSL providers, who offer the closest alternative broadband service, have secured only 116,000 customers.⁸ Excite@Home and Road Runner, which will surely be merged if AT&T's acquisition of MediaOne is approved, therefore control roughly 80 percent of the broadband market.

The Commission is obligated to halt this merger-to-monopoly strategy for two reasons. *First*, the proposed merger violates section 613 of the Communications Act, because it will give AT&T/MediaOne direct and affiliated control over more than 64 percent of potential U.S. cable subscribers. To "enhance effective competition" in the market for video programming, Congress instructed the Commission in section 613 to "prescribe rules and regulations establishing reasonable limits on the number of cable subscribers" firms like AT&T are "authorized to reach through cable systems" they own directly or in which they hold "an attributable interest."

⁶ Rebecca Blumenstein, *Inside the Tangles of AT&T's Web Strategy*, WALL ST. J., Aug. 13, 1999, at B4.

⁷ Kinetic Strategies, *Cable Modem Customer Count Tops 1 Million*, CABLE DATACOM NEWS, Aug. 1999, at 2 <www.CableDatacomNews.com>.

⁸ TeleChoice, *Deployment -- Updated*, Aug. 1999 <www.xdsl.com> (reporting that 73 percent of a total 159,150 DSL customers are residential).

47 U.S.C. § 533(f)(1). While the Commission has stayed its rules implementing this requirement, Congress's statutory directive remains as a prohibition on the accumulation of excessive buying power in the hands of any one cable provider. Just as cable providers in the 1980s were able to use monopsony power to crush or co-opt independent programming, so will AT&T/MediaOne be able to take advantage of its market power to undermine competition in the video programming market.

Second, the merger fails the Commission's public interest standard because it will allow AT&T/MediaOne to stamp out fledgling competition in the market for broadband Internet services. Market power on the Internet stems from two sources. The first is a large customer base, and with roughly 80 percent of broadband customers connected to its network, a combined AT&T/MediaOne would have no rival. The second is an ability to keep customers within the confines of one's network, rather than roaming the public Internet for other providers' content. In the current closed access environment, AT&T/MediaOne would also enjoy this advantage because it would be permitted (unlike DSL providers) to hard-wire customers directly to its broadband network. Any customers wishing to access content on the public Internet would be forced to navigate around the obstacles AT&T/MediaOne lays before them.

This unprecedented level of market share and customer control would allow AT&T/MediaOne to engage in numerous anticompetitive actions, including:

- *Establishing proprietary network and software protocols designed to keep applications that run on AT&T/MediaOne's system from working on the systems of competitors.* This would give AT&T/MediaOne a tremendous advantage because, as a result of its extraordinary customer base, software and content providers would write applications for its network first. Competitors would be left out in the cold.
- *Negotiating exclusive agreements with high-profile content and software providers.* By negotiating exclusive deals with content and software providers, AT&T/MediaOne could deny competitors access to key applications. AT&T/MediaOne would also have the power to anoint the winners and losers in the market for broadband software and content.
- *Discriminating against outside content providers.* Because AT&T/MediaOne would maintain exclusive control over its customers' on-ramp to the Internet, it would be free to choke that connection, forcing customers to turn back to AT&T/MediaOne's on-net content as a substitute. Content providers that refused AT&T/MediaOne's overtures for an exclusive deal would also face the threat of being cut off from roughly 80 percent of the broadband market.
- *Engaging in predatory pricing.* Because cable providers are subject to a preferential regulatory regime allowing them to tie broadband access service and broadband ISP service, AT&T/MediaOne could undercut competitors with below-cost prices, secure in the knowledge that it could recoup its losses once competitors go bust.

The merger would therefore allow AT&T/MediaOne to protect its cable television monopoly profits by slowing the loss of viewership occasioned by new broadband technologies, such as streaming video, and by assuring itself a new spring of monopoly rents from emerging broadband markets. Moreover, the AT&T/MediaOne merger risks extraordinary injury to all participants in the broadband marketplace. Consumers would see severe limitations imposed on their ability to choose between broadband providers; advertisers and Internet merchants would be forced to pay monopoly prices for access to broadband customers -- charges that would ultimately be passed on to consumers; and software and content providers would be forced to

accept AT&T/MediaOne's terms or risk being foreclosed from the lion's share of the broadband market. The Internet would no longer be the open network of networks that has fueled economic growth and revolutionized the telecommunications marketplace. Instead, it would be a closed network regulated by proprietary protocols and guarded by a gatekeeper intent on shaving off a slice of every profitable activity people conduct on-line.

Worse yet, convergence would no longer mean competition between numerous broadband technologies offering telephone, video, and Internet services. Rather, it would mean that consumers would have to buy all of these services from AT&T/MediaOne alone. The Commission should therefore deny the applications for transfer of control. Only then could Chairman Kennard's vision of the future, and not Mr. Armstrong's, prevail.

I. THE MERGER VIOLATES SECTION 613 OF THE COMMUNICATIONS ACT BECAUSE IT WILL ALLOW AT&T/MEDIAONE TO REACH, THROUGH DIRECT AND AFFILIATED CONTROL, AN UNREASONABLE AND ANTICOMPETITIVE NUMBER OF POTENTIAL CABLE SUBSCRIBERS.

In section 613 of the Communications Act, Congress instructed the Commission to "prescribe rules and regulations establishing reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest." 47 U.S.C. § 533(f)(1)(A). This requirement was prompted by Congress's recognition that cable providers possess "undue market power" that can be "used to the detriment of consumers, programmers, and competing video distributors."⁹ In particular, Congress was concerned that cable providers would, in negotiations over carriage, use this

⁹ S. Rep. No. 102-92, at 3 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1135.

monopsony power to demand “an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system.”¹⁰ Once these interests were secured, Congress recognized that cable providers would have an unchecked ability to “favor their affiliated programming services,” “refuse to carry other programmers,” and “refuse to sell” their programming “to potential competitors.”¹¹

Congress solved this problem by enacting legislation designed to ensure “competitive dealings between programmers and cable operators and between programmers and competing video distributors.”¹² The first prong of Congress’s approach was to bar cable providers from demanding equity interests from programmers in return for carriage, and to prohibit discrimination against competing providers and their programming affiliates. The second was to adopt horizontal ownership limits -- capping the number of homes any one provider could pass through direct or affiliated control -- to ensure that no cable provider would “have the market power to determine what programming services can ‘make it’ on cable.”¹³ By instructing the Commission to adopt regulations establishing such a cap, Congress made explicit its intention that no cable provider be able to “discourage entry of new programming services” or otherwise “restrict competition” in the market for video programming.¹⁴ The Commission

¹⁰ *Id.* at 24, 1992 U.S.C.C.A.N. at 1157.

¹¹ *Id.* at 25-26, 1992 U.S.C.C.A.N. at 1158-59.

¹² *Id.* at 27, 1992 U.S.C.C.A.N. at 1160.

¹³ *Id.* at 33, 1992 U.S.C.C.A.N. at 1166.

¹⁴ H.R. Rep. No. 102-628, at 42 (1992).

responded to this mandate by imposing a 30 percent horizontal ownership limitation on cable providers, barring any single provider from serving more than 30 percent of total U.S. homes passed.¹⁵

Although the Commission's 30 percent cap has been stayed, Congress's directive in section 613 remains as a prohibition against any single provider accumulating direct or affiliated control over a number of customers large enough to risk the creation of monopsony power. By any reasonable measure, a combined AT&T/MediaOne would fail this test, controlling the provision of cable service to *more than 64 percent* of all U.S. households passed. This extraordinary combination of direct and attributable interests would stem from AT&T/MediaOne's controlling ownership of systems passing 27.9 million homes -- alone almost enough to exceed the stayed 30 percent cap -- and attributable ownership of systems passing an additional 33.9 million homes.¹⁶

¹⁵ *In re Implementation of Sections 11 and 13 of the Cable Act of 1992*, MM Docket No. 92-264, Second Report and Order, 8 FCC Rcd 8565, at ¶ 3 (1993) (*Horizontal Cap Order*).

¹⁶ If AT&T and MediaOne are allowed to merge, the combined company would have direct control over the cable systems of the former TCI (17.9 million homes passed), MediaOne (8.4 million homes passed), and Lenfest (1.6 million homes passed), giving it direct control over 27.9 million homes passed. Under the Commission's attribution rules, AT&T/MediaOne would also hold attributable interests in Bresnan (0.3 million homes passed), Cablevision (5.1 million homes passed), Falcon Cable TV (1.3 million homes passed), Time Warner Cable, Kansas City Cable Partners, and Texas Cable Partners (20.6 million homes passed), Susquehanna Cable Co. (0.2 million homes passed), Adelphia Communications (3.3 million homes passed), Century Communications (2.3 million homes passed), and Insight Communications (0.8 million homes passed), giving AT&T/MediaOne affiliated control over 33.9 million homes passed. *See* Warren Publishing, *CABLE & STATION COVERAGE ATLAS*, Index 170 (1999). The merger would therefore give AT&T/MediaOne control over 64 percent of the roughly 96.5 million homes passed by cable. *Id.*

Congress intended to prevent any one cable provider from securing this level of monopsony power. As the Commission noted when it adopted the 30 percent cap, the top five cable providers served just under half of the nation's cable subscribers at the time section 613 was passed. "Congress concluded that this level of concentration, though low relative to other industries, may enable some MSOs to exercise excessive market power, or monopsony power, in the program acquisition market." *Horizontal Cap Order* ¶ 10. *A fortiori*, it is impossible to assert that a *single* provider controlling service to more than 64 percent of all U.S. households passed would not both violate the Communications Act and pose a grave threat to competition.

Congress believed that cable monopsony power could only be stemmed by "imposing limits on the ownership of media outlets that are substantially below those that traditional antitrust analysis would support." *Id.* ¶ 11. The traditional antitrust doctrine relevant here is the prohibition against firms with monopsony power engaging in "vertical foreclosure" -- undermining the ability of sellers (here video programmers) to compete by giving exclusive or preferential treatment to other providers. At the time Congress enacted section 613, federal courts had already held that firms with monopsony power violated the antitrust laws by placing as few as 26 percent of the selling opportunities in a given market "beyond the grasp of . . . competitors."¹⁷ Assuming that the market for cable-distributed video programming is national (a conservative assumption), the combined AT&T/MediaOne would still control 28 percent more of the market than other monopsonists found to be in violation of the antitrust laws.

¹⁷ *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 676 F.2d 1291, 1304 (9th Cir. 1982).

AT&T/MediaOne's share of the video market would therefore be substantially above, not "substantially below" that which prompted Congress to adopt section 613.

Anticipating this difficulty, AT&T/MediaOne's Public Interest Statement offers three reasons why the Commission should not block the merger. *First*, AT&T/MediaOne asserts that the market for multichannel video programming delivery is competitive, precluding the combined company from exercising monopsony power against video programmers. But the Commission's *Fifth Annual Report on Competition in Video Markets* tells a quite different story, concluding that "cable television continues to be the primary delivery technology for the distribution of multichannel video programming and continues to occupy a dominant position in the multichannel video programming delivery (MVPD) marketplace."¹⁸ Indeed, AT&T/MediaOne concedes that cable operators still serve 84 percent of all MVPD customers.¹⁹ Only one competing technology, Direct Broadcast Satellite (DBS), has demonstrated any hope of competing with cable, and this service faces serious legal, technical, and economic hurdles. Under current law, DBS providers are prohibited from retransmitting local network broadcasts to customers -- an extraordinary competitive disadvantage that has kept DBS providers from signing up 55 percent of the people who actually considered purchasing the service.²⁰ Although

¹⁸ *Commission Adopts Fifth Annual Report on Competition in Video Markets*, CS Docket No. 98-102, at 1 (Dec. 17, 1998).

¹⁹ Applications and Public Interest Statement of AT&T Corp. and MediaOne Group, Inc., CS Docket No. 99-251, at 46 (July 7, 1999) (AT&T/MediaOne).

²⁰ See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 98-102, Fifth Annual Report, 13 FCC Rcd 24284, at ¶¶ 63 n. 274, 68-69 (Dec. 23, 1998) (*Fifth Video Competition Report*).

the law may soon change,²¹ this legal obstacle will only be replaced by technical difficulties and inflated costs associated with beaming individualized local content to each local market.²² Likewise, each of the other competing MVPD technologies identified by AT&T/MediaOne are non-starters that are losing “subscribers and market share[.]”²³ Changing market conditions have therefore not eliminated the need to enforce section 613.

Second, AT&T/MediaOne asserts that any exercise of monopsony power is “already largely foreclosed by existing regulations, such as the program access, program carriage, must carry, leased access, and channel occupancy rules, which already prohibit discrimination and require the carriage of programming from diverse sources.” AT&T/MediaOne at 59. This assertion is nothing less than an attempt to read section 613(f)(1)(A) out of the Communications Act. Congress enacted many of the restrictions touted by AT&T/MediaOne at the same time it adopted the requirement that the Commission establish a horizontal cap. Congress thus believed such a cap was necessary to safeguard competition *over and above* the other regulations imposed on cable providers, concluding that “the diversity of information sources can *only be assured* by imposing limits on the ownership of media outlets.”²⁴

²¹ See Satellite Home Viewers Improvements Act, S. 247, 106th Cong. (1999); Satellite Competition and Consumer Protection Act, H.R. 1554, 106th Cong. (1999).

²² See *Fifth Video Competition Report* ¶ 71 (“Technological issues, however, may make nationwide local-into-local service infeasible.”).

²³ *Commission Adopts Fifth Annual Report on Competition in Video Markets*, CS Docket No. 98-102, at 1 (Dec. 17, 1998).

²⁴ H.R. Rep. No. 102-628, at 42 (1992).

The reason is simple. These regulations touted by AT&T do nothing to protect the emergence of new cable programmers once one provider grows large enough to shut fledgling programmers out of the market. The Communications Act prohibits cable providers from “discriminating in video program distribution on the basis of affiliation or nonaffiliation,” 47 U.S.C. § 536(a)(3); it does not require cable providers to carry every new channel that comes into being. Because a combined AT&T/MediaOne would control access to 64 percent of all potential cable viewers, new channels would be foreclosed from reaching almost two-thirds of the market if AT&T/MediaOne, for whatever reason, refused their request for carriage. Congress determined that a cable provider controlling only 25 percent of the market may hold “quite significant” monopsony power “depending on the subscriber level needed to launch and sustain a cable programming service.”²⁵ With well more than twice this level of monopsony power, AT&T/MediaOne would serve as a gatekeeper for all new cable programming and exercise unchecked power “to determine what programming services can ‘make it’ on cable.”²⁶

Finally, AT&T/MediaOne urges the Commission to abandon its current five percent voting interest threshold used to determine when cable providers hold an attributable interest in another cable system. In its place, AT&T/MediaOne suggests a rule that attributes ownership to equity stakeholders only when they “control programming choices or purchase programming for” another cable provider. AT&T/MediaOne at 62 n.151. The Commission rejected just such an invitation earlier this month, electing instead to “retain its current active voting stock

²⁵ *Id.*

²⁶ S. Rep. No. 102-92, at 33 (1992), *reprinted in* 1992 U.S.C.C.A.N. 1133, 1166.

benchmark at five percent.”²⁷ This decision was based on “a growing body of academic evidence” indicating that “shareholders with ownership interests of five percent or greater may well be able to exert significant influence on the management and operations of the firms in which they invest.”²⁸ The Commission’s conclusion is particularly telling here because a combined AT&T/MediaOne would hold voting interests in other cable providers that range from 25 percent to 62.5 percent -- far more than the five percent required to exert influence over programming decisions. The Commission’s recent pronouncement on the efficacy of its existing attribution rules therefore confirms that AT&T/MediaOne would be able to exert significant monopsony power in the market for video programming. It also confirms that AT&T and MediaOne’s proposed merger violates section 613 of the Communications Act and cannot be approved.

II. THE MERGER WILL ALLOW AT&T/MEDIAONE TO DOMINATE THE MARKET FOR BROADBAND INTERNET SERVICE, INFLECTING ANTICOMPETITIVE HARM ON CONSUMERS AND UPSTREAM PROVIDERS ALIKE.

As Chairman Kennard has stated, the market for broadband service “is the future of the Internet.”²⁹ Although this market is only in its nascent stages, history has proven that the

²⁷ *In re Review of Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, MM Docket No. 94-150, Report and Order, at ¶ 10 (Aug. 6, 1999) (*Broadcast Interests Order*). In the *Horizontal Cap Order*, the Commission concluded that its “broadcast attribution criteria” -- which the Commission left unchanged at a five percent voting stock benchmark -- “are appropriate to implement the horizontal ownership limits.” *Horizontal Cap Order* ¶ 34. AT&T and MediaOne therefore have no basis to ask the Commission to revise those rules here.

²⁸ *Broadcast Interests Order* ¶¶ 10-11.

²⁹ 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,

competitive course of emerging network industries can be disrupted by large players -- like AT&T in the market for local and long distance telephone service -- able to capitalize on an early anticompetitive advantage. The pending merger will give AT&T/MediaOne just such an advantage in the broadband market, combining the two dominant broadband ISPs (Excite@Home and Road Runner) into a monolithic network that will serve roughly 80 percent of all broadband customers. This early advantage will be compounded by the fact that cable modem deployment is accelerating at a pace that far outstrips alternative broadband technologies, and the fact -- widely recognized in the Internet economy -- that "[w]hoever gets to the household first will win."³⁰

AT&T/MediaOne's Public Interest Statement tries to sidestep the merged company's dominant broadband position by lumping together narrowband dial-up ISPs with broadband providers like Excite@Home and Road Runner, asserting that the "broad range of choices available today demonstrates that the market is already extremely sensitive to the needs of consumers." AT&T/MediaOne at 69. But broadband and narrowband connections afford consumers access to entirely different products and services -- a fact that will become even more apparent as software and content providers develop additional new media targeted exclusively to broadband customers. Controlling roughly 80 percent of the broadband market, the merger will afford AT&T/MediaOne an unfettered ability to advantage on-net content, discriminate against outside content, and establish proprietary network and software protocols. These actions

1999, at 2.

³⁰ Rob Lemos. *Who Will Rule the Broadband Era?*, ZDNN, June 26, 1999, at 1 <www.zdnet.com/zdnn> (quoting an analyst with market research firm Dataquest).

will drive software and content providers to write for AT&T/MediaOne's system first, entrenching its first-mover advantage and making it almost impossible to undo the merger's competitive harm with post-hoc regulation. Moreover, the merger will allow AT&T/MediaOne to protect its existing cable television monopolies by managing and delaying the dissipation in viewership brought on by the emergence of broadband Internet technologies, such as streaming video. Ultimately, the merger will guarantee AT&T/MediaOne's continued access to a stream of monopoly rents by expanding its reach into lucrative upstream broadband markets for content, applications, advertising, and e-commerce.

A. Broadband and Narrowband Internet Services Constitute Distinct Product Markets. The Availability of Ubiquitous Narrowband Access Therefore Does Nothing to Check the Exercise of Broadband Market Power.

Broadband Internet service consists of two components -- high-speed transport from a customer's residence to an ISP, and broadband ISP service, which includes a high-speed Internet connection and access to proprietary broadband content. In offering broadband Internet service over cable, Excite@Home, Road Runner, and their affiliated cable providers tie these components together so the high-speed transport component cannot be purchased alone. DSL providers like GTE, on the other hand, are required by Commission rules to unbundle broadband access and ISP service, affording customers their choice of ISPs when purchasing high-speed transport. As the Commission recognized in its order approving AT&T's merger with TCI, DSL and cable modem services "provide Internet access with much higher transmission speeds than

unbundle
DSL

dial-up service.”³¹ Narrowband Internet service, on the other hand, affords customers access to a “relatively slow-speed” connection, typically 28-56 kilobits per second, “via traditional ‘dial-up’ telephone services provided by LECs.”³²

While AT&T/MediaOne asserts that the “relevant market” for determining the merger’s competitive effects “includes Internet access services available to consumers over both broadband and narrowband facilities,” AT&T/MediaOne at 71, broadband and narrowband Internet services are not part of the same product market. This fact is readily demonstrated by three factors. *First*, and most importantly, broadband connections afford consumers access to entirely different products and services, from real-time video programming and interactive advertising to high-speed telecommuting and home networking. These new applications are driven by the different functionalities provided by broadband connections, including dramatically higher speeds and “always-on” capability. As the market for broadband services continues to develop, the growth of new applications will proliferate and the divide between broadband and narrowband services will become even more pronounced. *Second*, all of the big Internet players have demonstrated -- through development and implementation of new broadband business plans -- their belief that broadband service differs fundamentally from narrowband service. Although AT&T/MediaOne sings a different tune for regulators, key Excite@Home and Road Runner executives have been leaders of this charge. *Third*, consumers themselves have demonstrated their belief that broadband and narrowband services do not compete, evidencing near-complete

market

³¹ *Applications for Consent to Transfer Control of TCI to AT&T*, CS Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd 3160, at ¶ 70 (1999).

³² *Id.* ¶ 67.

unwillingness to switch back to narrowband service in the face of a broadband price increase. Each of these factors points to one conclusion -- that the ubiquitous availability of narrowband Internet service cannot discipline AT&T/MediaOne's exercise of broadband monopoly power.

1. Broadband Internet Service Offers Users Entirely Different Features, Products, and Services Than Narrowband Connections.

Broadband connections provide features and functionalities that are unavailable to narrowband consumers. The speed of a broadband connection is orders of magnitude faster than that afforded by narrowband. Cable systems, for example, are capable of transmitting data between 10 Mbps and 30 Mbps, which vastly out paces analog modem speeds that average less than 50 Kbps.³³ As a result, a five gigabyte file like a 110-minute feature film -- which would take *eight days* to download over a traditional narrowband connection -- can be viewed in real-time by broadband subscribers. Moreover, broadband connections are "always on," eliminating any need to wait for a dial-up connection to come on-line and ending the prospect of busy signals during peak hours.³⁴ "For the user, there is no delay to dial-in and connect and it is possible for information to flow between the home and the network at any time."³⁵ Broadband users also get

³³ See Strategis Group, HIGH-SPEED INTERNET -- 1998/1999, at 76 (1998) (Strategis Group Report).

³⁴ *Id.*; see also Road Runner Web Site, *Features* <www.rr.com/rdrun/explore/main_features> ("The Road Runner connection is a persistent connection. There's no need to perpetually log in and out, or log off to save connection charges. There are no dial-up/lengthy initiation routines and no hourly fees.").

³⁵ Strategis Group Report at 76; see also Janco Partners, *Case Study: High-Speed Access*, MULTICHANNEL NEWS ONLINE, June 14, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip> ("The incumbent dial-up ISP that we tested took an average of about 1:20 to access, including the dial-up connection and download of the homepage. During busier times (*i.e.*, evening primetime), it can take several attempts to dial in to an ISP with a traditional modem, as

the benefit of freeing up their telephone line, which need not be dedicated to a narrowband dial-up connection. This eliminates any need for broadband customers, who are typically high-volume users, to go without telephone service or “install a second phone line to use the data connection.”³⁶

These exclusive broadband functionalities “enable a whole new generation of Internet-based services” that are changing “the Internet as we know it.”³⁷ This new generation of broadband services includes:

- *Real-Time Video Programming.* Broadband connections afford consumers the ability to watch video “Webcasts” in real time. Content providers like Broadcast.com offer a full menu of real-time viewing options, including sports, local television broadcasts, and news. These programming options are more diverse than any offered by cable providers, affording customers access to local programming from across the country and independent programming by minority-owned television stations and stations dedicated to serving people with disabilities. Other recent start-ups, such as the Digital Club Network, offer Webcasts of real-time music festivals.³⁸
- *On-Demand Video.* The same streaming video technology that allows broadband consumers to watch real-time Webcasts also allows broadband users to view movies on-demand. A recent startup, Tranz-send Broadcasting, “plans to take on

thousands of users are battling for a finite number of connections to the server. With Road Runner, you simply click on your browser icon and the homepage is fully downloaded in just a few seconds. Once it is open, it can remain on indefinitely.”).

³⁶ Strategis Group Report at 76.

³⁷ Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/filters> (quoting Hillary Mine, broadband analyst with Probe Research, a New Jersey telecommunications consulting and research firm).

³⁸ See Jim Hu, *Music Festival in Tune With Net Space*, CNET NEWS.COM, July 22, 1999 <www.news.com/News>.

video-rental stores (and pay-per-view too) with its vision that Webheads can 'tell the video store to come to you.'"³⁹

- *Customized Music and Video Libraries.* Music and video files that would take hours or days to download over a narrowband connection can be duplicated in seconds with broadband. Web sites like MP3.com allow visitors to listen to and download thousands of tracks, many by new artists seeking an alternative means to reach a large audience. As Mark Simmer, Lycos Chief Content Officer, noted, "[y]ou will only have a good user experience downloading MP3 if you have a broadband connection."⁴⁰ Another firm, Atom Corp., which touts itself as a "next-generation entertainment company," recently debuted a site offering "'shorts' from several 1999 Academy Award nominees, plus licenced titles from the American Film Institute and overseas filmmakers."⁴¹
- *Home Networking.* Broadband connections afford consumers the bandwidth and flexibility to network a number of home computers together, sharing the same Internet connection. This feature allows members of large families to simultaneously research, play games, and watch video Webcasts on the Internet. Industry analysts are predicting that "home-networking will take off once faster Internet access" becomes more ubiquitous, with the home networking market expected "to reach \$230 million by 1999 and jump to \$1.4 billion by 2003."⁴² Companies like AMX Corporation are even developing products that link home appliances -- heating, air conditioning, lights, and security systems -- to an Internet interface, allowing broadband customers to control their home environment from the road.⁴³

³⁹ Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/filters>.

⁴⁰ Jim Hu, *Lycos Enters High-Speed Race*, CNET NEWS.COM, June 24, 1999 <www.news.com/news>.

⁴¹ Gary Arlen, *Swing and Sway with Big Bandwidth*, MULTICHANNEL NEWS ONLINE, Mar. 29, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip>.

⁴² Wylie Wong, *Home Networks Answer the Call*, CNET NEWS.COM, July 13, 1999 <www.news.com/news>.

⁴³ See Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/filters>.

- *Real-Time Radio Programming.* Over and above their real-time video offerings, broadband content providers like Broadcast.com allow customers to listen to live radio broadcasts from stations across the country. Other radio Webcasters like the GAYBC Radio Network offer original programming dedicated to serving diverse populations.⁴⁴
- *Video Telephony and Video E-Mail.* The same technology that allows businesses to participate in two-way video conferencing over the Internet will allow residential customers to have virtual face-to-face conversations with family and friends. E-mail messages with personalized video clips can also be sent and received over broadband connections.
- *Interactive Multi-Player Gaming.* Broadband connections allow consumers to play games with CD-ROM quality graphics and, more importantly, dramatically enhance the gaming experience when competing against other on-line players. As one on-line gaming magazine recently stated, multiplayer capabilities are the key to a new game's success: "Ship a game with sweet graphics and a compelling story line but less-than-happening multiplayer capabilities, and consider yourself primed for a thorough thrashing by the public and press."⁴⁵ The one hurdle that remains for most players to overcome is an anemic Internet connection. "[B]andwidth is the Holy Grail of online gaming. . . . [I]f you want to win, a fast Internet connection is crucial."⁴⁶
- *High-Speed Telecommuting.* While narrowband telecommuters are limited primarily to dialing into the office to retrieve e-mail, broadband telecommuters can link directly into their corporate LAN, working at home with all the access and capabilities they would have in the office. "Companies can carve virtual private networks out of the public Internet, creating an extended corporate net that defies geography."⁴⁷
- *Interactive Advertising and E-Commerce.* The quality and effectiveness of narrowband advertising is limited by dull blinking banners and audio "well below

⁴⁴ See Randall Rothenberg, *Rob Glaser, Moving Target*, WIRED, August 1999, at 131.

⁴⁵ William O'Neal, *Frag the Lag! Broadband Access: The Gamer's Edge*, GAMECENTER, April 14, 1999 < www.gamecenter.com/Features/Exclusives/Broadband>.

⁴⁶ *Id.*

⁴⁷ Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999 <www.zdnet.com/filters>.

the near-compact disc quality that comes with broadband access.”⁴⁸ Advertising over broadband connections, by contrast, allows for “rich media ads capable of various interactive features” that hook customers by inviting participation.⁴⁹ It is therefore not surprising that broadband advertising generates 18 times the recall rate of narrowband advertising.⁵⁰ From more effective advertising stems more ubiquitous e-commerce.

This catalogue of broadband services represents only the tip of the iceberg in a market just starting to develop. Over the next few years, as more customers purchase broadband connections, the development of broadband applications will accelerate rapidly. If it is not clear already, it will soon become evident that broadband Internet service is as much a revolution over narrowband as the television was over radio.

2. Every Key Player in the Internet Marketplace -- Including AT&T, Excite@Home, and Road Runner -- Recognizes That Broadband and Narrowband Services Do Not Compete.

Despite these extraordinary differences between the content and functionality of broadband and narrowband connections, AT&T/MediaOne nevertheless assert that Internet competitors “view narrowband and broadband services as substitutes for the foreseeable future.” AT&T/MediaOne at 72. This assertion is belied first and foremost by the new name AT&T itself chose for its newly acquired TCI cable systems -- “AT&T Broadband & Internet Services.”

⁴⁸ Fred Dawson, *Excite@Home Gets Rolling On Broadband-Enhanced Ads*, MULTICHANNEL NEWS ONLINE, June 14, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip>.

⁴⁹ Corey Grice, *Road Runner Beefs Up Advertising Push*, CNET NEWS.COM, Aug. 4, 1999 <www.news.com.news>.

⁵⁰ See Fred Dawson, *Excite@Home Gets Rolling On Broadband-Enhanced Ads*, MULTICHANNEL NEWS ONLINE, June 14, 1999 <204.243.31.23/cgi-win/csearch.exe/vsrchtip> (“Researchers are finding that advertising offered at quality levels made possible by access speeds four times or better above dial-up generate 18 times the recall levels of GIF [graphic interface format] banners,” according to Macromedia Inc. spokeswoman Andrea Coffey.)