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

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

REPLY TO COMMENTS AND PETITIONS TO DENY APPLICATIONS FOR CONSENT TO TRANSFER CONTROL

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Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") (collectively, "the Applicants" or "the parties") submit these reply comments in response to the comments and petitions to deny filed on April 29, 2002 in the above-captioned proceeding.[1] As demonstrated below, many of the issues raised by merger opponents are extraneous, having nothing to do with the prospective effects of the proposed merger, and are, in any event, baseless. And the few arguments that have any theoretical link to the merger rest on false factual assertions and flawed analysis. No merger opponent successfully refutes the Applicants' showing that the merger (i) is in the public interest, (ii) will not result in any violations of the Communications Act of 1934, as amended (the "Communications

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1 Unless otherwise indicated, all comments and petitions to deny cited herein are contained in the record of the above-captioned proceeding. Appendix 1 lists these comments and petitions, as well as the shorthand references to them that are used in these reply comments.

Act" or "Act")[2] or the Commission's rules, and (iii) will have no anticompetitive effects in any relevant market. The Commission should grant the pending transfer of control applications promptly and unconditionally.

I. INTRODUCTION AND SUMMARY

AT&T Broadband, LLC ("AT&T Broadband") and Comcast have demonstrated that their proposed merger will benefit consumers by promoting the development and deployment of facilities-based broadband services and cable telephony. They have also shown that their merger will comply with the Communications Act and the Commission's rules and will have no anticompetitive effects in any relevant market. None of the opposing comments or petitions contradicts these showings. The opposing commenters' assertions instead boil down to unfounded fears, rank speculation, and thinly disguised pursuit of private agendas. And most of the opponents' issues are completely unrelated to the Commission's review of this merger.

The Merger Will Benefit Consumers

No commenter disputes that the merger of AT&T Broadband and Comcast will promote the deployment of high-speed Internet and other broadband services to consumers and increase the supply of local and regional programming. Some commenters, however, challenge AT&T Comcast's ability and incentive to deploy new cable telephony services, arguing that prior mergers involving AT&T Broadband have failed to promote local telephone competition. They also question Comcast's commitment to cable telephony.

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2 47 U.S.C. §§ 151 *et seq.*

The Commission should reject these arguments. Following Commission approval of its prior mergers involving Tele-Communications, Inc. ("TCI") and MediaOne Group, Inc. ("MediaOne"), AT&T Broadband moved promptly to deploy new cable telephony services in markets throughout the country. It now offers a choice of local telephone service to over seven million households and has enrolled over one million cable telephony customers. Moreover, Comcast has publicly committed to the deployment of cable telephony in the nation's fourth and tenth largest markets after closing, recognizing that the merged company will be able to take advantage of the expertise and other assets that AT&T Broadband has developed in building its cable telephony business. The introduction of cable telephony service on Comcast cable systems in the Philadelphia and Detroit areas will mean that about one million additional residential customers will have a competitive alternative to the incumbent local exchange carriers ("LECs"). The merger will thus promote facilities-based local telephone competition, as well as high-speed Internet and other broadband services, and thereby serve the public interest.

The Merger Will Comply With The Communications Act And The Commission's Rules

No party seriously claims that the proposed merger will violate the Communications Act or the Commission's rules. As the Application showed, the merger would even comply with the 30% cable national ownership limit that the U.S. Court of Appeals for the D.C. Circuit has set aside.[3] The only contrary assertions rely on the erroneous notion that cable customers served by Cablevision Systems Corp.

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3 *See Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* MB Docket No. 02-70, Applications and Public Interest Statement at 50 (filed Feb. 28, 2002) ("Application").

("Cablevision") and Time Warner Entertainment, L.P. ("TWE"), should be attributed to AT&T Comcast. As described in the Application, AT&T Broadband has reduced its interest in Cablevision so that it is not attributable under the Commission's rules. As for TWE, AT&T Broadband and Comcast are firmly committed to divesting this interest, and serious efforts toward that result are in progress. In the event the TWE interest is not divested prior to closing, AT&T Broadband will submit to the Commission in a timely manner the certification and waiver request necessary to insulate the interest under the Commission's rules. Comcast and AT&T Broadband have also indicated their willingness to take such additional steps as may be appropriate to ensure that AT&T Comcast would not be able to influence the operations, policies, or practices of TWE prior to its ultimate sale.

The Merger Will Have No Anticompetitive Effects In Any Relevant Market

A number of commenters, led by the regional Bell operating companies ("RBOCs"), assert that the merger will harm competition in the production and distribution of video programming; in the purchase and deployment of set-top boxes, cable modems or related equipment and software; and in the provision of Internet services. None of these parties, however, offers any logical theory or evidence to substantiate these claims. Instead, they rely on bare assertions, boilerplate economic declarations, and bald speculation in an effort to derail or place conditions on the proposed merger in order to advance their own private business interests.

With respect to video programming, the reality is (i) more programming (and more diverse programming) is being produced than at any time in history, (ii) there are more different ways for program producers and program aggregators to deliver their programs to consumers, (iii) vertical integration between program networks and cable operators has been in steady decline for years, and (iv) AT&T Comcast will have minimal programming interests – and powerful incentives to deliver the programs that consumers want. For these and other reasons, AT&T Comcast will have neither the ability nor the incentive to exercise buyer or seller market power. There is even less basis for arguments that AT&T Comcast will harm competition in the provision of broadband Internet services. And no facts or logic have been adduced to explain how or why AT&T Comcast would or could diminish competition in set-top boxes, cable modems, and other related products – much less diminish the RBOCs' ability to provide DSL services or related Internet offerings.

The Commission Should Not Consider Issues That Are Unrelated To Its Review Of The Merger

Some parties unfortunately view the Commission's merger review process as a forum to air policy positions and individual disputes that are completely unrelated to the Commission's review of the merger at issue. This proceeding is no exception. Some commenters openly seek to use this proceeding to advance their pre-existing policy agendas, or to saddle AT&T Comcast with unjustifiable burdens. Others attempt to import into this proceeding private disputes that are already before another tribunal or clearly belong there. Still other parties ask the Commission to address in this merger issues that concern the cable industry as a whole and are already pending before the Commission in rulemaking or other industry-wide proceedings.

The bulk of the comments, in fact, are dedicated to matters that have nothing to do with whether the merger of AT&T Broadband and Comcast is consistent with the Communications Act and the Commission's rules and policies. These extraneous matters raised by the commenters are aimed at pursuing private interests and have no place in this proceeding. They belong in different dockets if not different fora altogether. They should not distract the Commission from what the record makes clear: the proposed merger of AT&T Broadband and Comcast is fully consistent with the "public interest, convenience and necessity" and should be promptly and unconditionally approved.

II. THE MERGER WILL GENERATE SUBSTANTIAL PUBLIC INTEREST BENEFITS

The Applicants demonstrated in their initial submission that the merger of AT&T Broadband and Comcast will produce numerous significant public interest benefits.[4] This initial showing stands unchallenged – and certainly unrebutted. Not a single party disputes that the merger will bring together two companies whose complementary assets and expertise will, among other things, advance the deployment of facilities-based broadband services such as high-speed Internet service, digital video, video-on-demand ("VOD"), interactive television ("ITV"), and high definition television ("HDTV"), and increase the supply of local and regional programming.[5] These efficiencies provide a compelling public interest justification for the proposed merger.[6]

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[4] *See* Application at 28-47.

[5] In fact, a number of commenters agree that the merger is likely to produce substantial public interest benefits. *See, e.g.*, PFF Comments at 6 ("We do believe, as the applicants contend, that the merger is likely to promote more facilities-based competition for high-speed Internet access and other broadband services, as well as more facilities-based competition in the local telephone market."); CapNet Comments at 2 (merger will promote broadband access for consumers and stimulate investment, innovation, and competition); *see also* EchoStar Comments at 5 (acknowledging Comcast's "laudable" programming and technical expertise). Although the commenters do not contest that the parties have demonstrated public interest benefits associated with local programming and advertising, some argue that these synergies constitute evidence that the merger will cause anticompetitive harms. *See, e.g.*, CFA Comments at 22; EchoStar Comments at 5;

Some commenters contest other merger benefits, but their claims are unfounded. As demonstrated in the Application and in the Declaration of Gregory Braden ("Braden Declaration"), Executive Vice President for Strategy and Business Development, AT&T Broadband, attached as Appendix 2, the proposed merger will promote facilities-based local telephone competition, particularly to residential consumers. The allegations to the contrary, which come principally from the RBOCs that have the most to lose from increased local telephone competition, rest entirely on mistaken factual assumptions and faulty logic. The superficial claims that the synergies detailed in the Application and the Declaration of Robert Pick (attached as Appendix 9 to the Application) ("Pick Declaration") will not be realized or passed on to consumers are likewise baseless.

A. The Applicants Have Shown That The Merger Will Promote Deployment Of Cable Telephony

As explained in the Application, the merger will allow Comcast to take advantage of the expertise and infrastructure that AT&T Broadband has developed over the past several years in providing cable telephony services.[7] As the Commission has found in prior merger decisions, these capabilities will "enhanc[e] the merged entity's ability to

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Qwest Comments at 11. As discussed in Section IV.A below, these challenges are baseless.

[6] *See* U.S. Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines § 4 (1992), *available at:* <http://www.ftc.gov/bc/docs/horizmer.htm> ("Horizontal Merger Guidelines") ("Efficiencies generated through merger can enhance the merged firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service or new products.").

[7] Application at 39-42.

compete more effectively with incumbent [LECs] in providing facilities-based local telephony and other new services to residential customers."[8]

Some commenters, however, challenge AT&T Comcast's ability and commitment to deploy new local telephone services.[9] They argue that AT&T's mergers with TCI and MediaOne have failed to deliver the cable telephony services expected to result from those transactions. They also question Comcast's plans to deploy cable telephony after the merger is approved. As discussed below, these allegations are without merit and

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8 *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, ¶¶ 7, 154-69 (2000) ("*AT&T-MediaOne Merger Order*"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, ¶¶ 145-48 (1999) ("*AT&T-TCI Merger Order*"). Contrary to CFA's claims (*see* CFA Comments at 2, 21), the Commission has never found that experience in offering telephone services is irrelevant to success in the local telephony market. Quite to the contrary, the FCC expressly recognized the importance of that expertise in several prior merger orders. *See, e.g., Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control*, 15 FCC Rcd 14032, ¶ 107 (2000) ("*BA-GTE Merger Order*") (concluding that Bell Atlantic and GTE each had "special expertise" in the provision of local telephone service); *Application of Ameritech Corp. and SBC Communications Inc. for Consent to Transfer Control*, 14 FCC Rcd 14712, ¶ 84 (1999) ("*SBC-Ameritech Merger Order*"); *see also Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries*, 12 FCC Rcd 19985, ¶ 107 (1997) ("*BA-NYNEX Merger Order*"). CFA also contends that the FCC has found that cable companies do not need to serve more than 30% of MVPD subscribers nationwide to provide cable telephony, and cites to the Commission's *1999 Horizontal Ownership Order*. *See* CFA Comments at 21 & n.23, citing *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992*, 14 FCC Rcd 19098, ¶ 61 (1999) ("*1999 Horizontal Ownership Order*"). The Commission made no such finding and, in any event, it would be irrelevant to the instant merger. The proposed merger will promote the deployment of cable telephony because of the synergies it will create, not because the merged entity will achieve any particular level of MVPD subscriber penetration. Regardless, the merged entity will fall below the (now-reversed) 30% cap. *See infra* Section III (updating numbers presented in Application at 49).

9 Ironically, these challenges are presented by SBC and Qwest, two incumbent telephone companies who obviously have no interest in promoting local telephone competition.

should be rejected. In fact, AT&T Broadband has rapidly and successfully deployed new cable telephony services since Commission approval of its prior mergers and now offers true local telephone choice to more than 7 million residential consumers; Comcast has publicly committed to offering customers cable telephony in additional markets; and the synergies created by the merger will give AT&T Comcast strong incentives to deploy cable telephony.

1. AT&T Broadband's Roll-Out of Cable Telephony to Residential Cable Customers

Some commenters claim that AT&T Broadband has not met expectations raised in prior merger proceedings regarding cable telephony deployment, and argue that the Commission should therefore discount the Applicants' projections that their merger will promote the deployment of cable telephony to residential customers.[10] These claims, however, are belied by the facts.

As explained in the Braden Declaration, AT&T Broadband has aggressively deployed new cable telephony services in a market fraught with risk, as evidenced by the number of new telephony entrants that have filed for bankruptcy in recent years.[11] Despite the substantial market advantages enjoyed by incumbent providers (including those who seek to block or impede this merger) and their continued resistance to competitive entry into local markets,[12] AT&T Broadband has more than met the cable

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10 CFA Comments at 2, 20-22; CWA Comments at 2-3, 6-8, 24; Qwest Comments at 21-24; SBC Comments at 27-30.

11 *See* Application at 37 n.67.

12 *See* Press Release, Voices for Choices Coalition, *Appears SBC Would Rather Pay Government Fines Than Fulfill Promises of Fair Competition in the Telecom Industry* (Jan. 18, 2002), *available at*: <http://www.voicesforchoices.com/1091/wrapper.jsp?PID=1091-23&CID=1091-012202C&x=42&y=9> (noting that, in the prior 12

telephony expectations generated by AT&T's mergers with TCI and MediaOne.[13] A comparison of the cable telephony penetration rates and number of subscribers, before and after the two mergers, demonstrates this point dramatically.

In 1998, prior to the AT&T-TCI merger, cable telephony was in its very early stage of development.[14] By 2000, the Commission found that AT&T had substantially met the projections to deploy cable telephony to TCI cable customers that AT&T submitted in the 1999 AT&T-TCI merger proceeding.[15] In the *AT&T-MediaOne Merger Order*, the Commission concluded that the merger would increase the overall telephony penetration rates of AT&T and MediaOne, which at the time were approximately 1.3% and 4% respectively, in areas where the two cable companies offered telephony service.[16] AT&T Broadband has delivered on these projections as well. It has increased the merged entity's penetration rates to 14.8% overall in markets where it offers cable telephony

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months, SBC had paid fines of $53.5 million for anticompetitive behavior); *see also SBC Communications, Inc., Apparent Liability for Forfeiture*, File No. EB-01-IH-0642, Forfeiture Order ¶¶ 3 n.7, 27 (rel. Apr. 15, 2002) (FCC 02-112) (finding that SBC had impeded the FCC Enforcement Bureau's investigation into whether SBC had made misrepresentations to the Commission and had engaged in discriminatory conduct in the provision of DSL services).

13 AT&T Broadband's success in deploying cable telephony refutes CFA's unsupported claim that cable telephony is not a viable business. CFA Comments at 21-22.

14 Braden Declaration ¶ 5.

15 *AT&T-MediaOne Merger Order* ¶ 177 n.485 (citing the record in the proceeding, the Commission found that "AT&T was substantially successful in meeting projections filed in the *AT&T-TCI* proceeding"). Thus, SBC's contention that there is no record that AT&T met its AT&T-TCI projections is incorrect. *See* SBC Comments at 27 n.72. Moreover, SBC elsewhere touts cable telephony's "healthy 15 percent penetration rate," which is due in large part to AT&T Broadband's efforts. *See id.* at 41.

16 *AT&T-MediaOne Merger Order* ¶ 163 n.461.

service and to 30% in some communities.[17] Moreover, since 2000, AT&T Broadband increased the number of markets in which it offers telephony services from eight to sixteen.[18] Just three years after the AT&T-TCI merger, AT&T Broadband is capable of serving approximately seven million households, has enrolled over 1.15 million cable telephony customers, and is adding approximately 40,000 customers every month.[19] Indeed, AT&T Broadband today is the tenth largest local telephone company in the country.[20] These facts clearly refute the unsupported challenges to AT&T Broadband's cable telephony performance.

2. Comcast's Plans for the Deployment of Cable Telephony

Qwest asserts that, "[b]efore announcing its pending merger with AT&T, Comcast was among the most negative of large cable companies about investing in telephony," and argues that the Commission should view Comcast's commitment to cable telephony with skepticism.[21] This argument grossly mischaracterizes Comcast's plans regarding cable telephony both before and after it entered into its merger agreement with AT&T. Comcast has never doubted the enormous business opportunity in offering customers telephony services over its cable plant. To realize that opportunity, however, required the development of the expertise and infrastructure to offer those services.

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17 Application at 36; Braden Declaration ¶ 6.

18 *See AT&T-MediaOne Merger Order* ¶ 163 n.461; Application at 36.

19 Braden Declaration ¶ 5.

20 *Id.*

21 Qwest Comments at 27-28; *see also* SBC Comments at 28-30.

To meet this challenge, Comcast has devoted significant resources to develop cable-delivered IP telephony, recognizing that it would take time to perfect this technology.[22] Its merger with AT&T Broadband offers Comcast the opportunity to promote the deployment of telephony services in a number of markets and generate new business for the merged company. As stated by Mr. Pick, Comcast's Senior Vice President, Corporate Development, based on the information obtained during its due diligence discussions with AT&T Broadband, Comcast

> concluded (i) that AT&T Broadband's business model for cable telephony should be viable and (ii) that AT&T Comcast should be able to take advantage of AT&T Broadband's expertise and experience in cable telephony to expand this business to Comcast's former service areas following the Merger. In light of these conclusions, AT&T Comcast currently plans to continue the roll out of cable telephony to former AT&T systems and to commence the roll-out of cable telephony to former Comcast systems. Based upon this plan, we estimated that, within five years, AT&T Comcast should generate an additional $600 to $800 million in EBITDA [Earnings Before Interest, Taxes, Depreciation, and Amortization] annually by providing cable telephony to Comcast's former service areas. AT&T Comcast's cable telephony business would be one of the few viable national competitors to the ILECs.[23]

Comcast President (and AT&T Comcast CEO) Brian L. Roberts emphasized these same points in a presentation to investors following the announcement of the AT&T Comcast merger on December 19, 2001. During that presentation, Mr. Roberts acknowledged that Comcast had been slow to deploy cable telephony. At the same time, he recognized that "there is no greater revenue opportunity than the hundred billion dollar

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22 *See* Application at 14.

23 Pick Declaration ¶ 12.

a year local phone business,"[24] and indicated that Comcast's merger with AT&T Broadband will enhance its ability to seize this opportunity. In particular, Mr. Roberts noted that the merged company will be able to take advantage of the significant investment AT&T Broadband has already made in developing the expertise and infrastructure to offer circuit-switched cable telephony; Comcast, for example, will not "have to build a new billing system and provisioning system and the switches and [Network Operations Centers]."[25]

Indeed, Comcast has announced that, after closing, the merged company plans to expand cable telephony service into its current cable systems serving two of the nation's ten largest markets, Philadelphia and Detroit, thus offering about one million additional residential customers a choice of local telephone providers.[26] AT&T Comcast's entry into these two major markets will significantly further the Commission's goal of promoting facilities-based local telephone competition to residential customers and is a direct result of the synergies created by the merger.[27]

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24 AT&T Broadband and Comcast Merger, Joint Analyst Meeting, transcript at 7-8 (Dec. 20, 2001). The transcript of this presentation, which has been filed with the Securities and Exchange Commission ("SEC"), is attached as Appendix 3.

25 *Id.* at 8. The Application describes in detail how the merger will enhance the ability of Comcast to offer cable telephony. Application at 39-42. In addition, the Braden Declaration describes a number of AT&T Broadband's cable telephony assets that the merged entity will be able to take advantage of: (1) centralized systems to support voice communication over hybrid coaxial systems; (2) a national telephony operations team; (3) a national provisioning center; (4) back office systems; and (5) cable telephony marketing. Braden Declaration ¶¶ 8-10.

26 *See* Pick Declaration ¶¶ 9-12.

27 CFA argues that the roll-out of cable telephony by AT&T Comcast should be accorded little weight because the local markets at issue already enjoy the highest levels of local telephone competition. CFA Comments at 21-22. This is hardly the case. Even using the broadest possible definition of local telephone competition, new entrants are

3. Strong Marketplace Incentives To Deploy New Services Such As Cable Telephony

As the Commission previously has observed, "[m]arket forces and the desire to meet investor expectations"[28] will also give AT&T Comcast strong incentives to deploy telephony services. Having devoted substantial resources and raised the financing necessary to achieve the merger, AT&T Comcast "will have strong incentives to maximize utilization of its network facilities" in order to recoup costs by offering as many services as possible via the merged entity's plant.[29]

These market incentives have intensified as the cable industry faces an increasingly competitive world of converging technologies. DBS, for example, is

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providing only 9% of all switched access lines. Industry Analysis Division, Common Carrier Bureau, FCC *Local Telephone Competition: Status as of June 30, 2001*, at 1 (Feb. 2002), *available at:* <http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/lcom0202.pdf>. Most (55%) of these lines, however, are provided to medium and large businesses, institutional, and government customers. *Id.* Less than 5.5% of all residential and small business access lines are provided by competitive local exchange carriers. *Id.* at 5, Table 2 (7,793,071 out of 142,110,700) (data revised Mar. 6, 2002). Of this small number, only about one-third are provided by competitive carriers using their own "last mile" facilities; the rest are provided via resale and unbundled network elements. *Id.* at 6, Table 3. By promoting the deployment of cable telephony services to residential customers, the proposed merger will create greater local telephone competition and advance the goals of the 1996 Act. *See generally Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd 15499, ¶ 3 (1996) (opening the local exchange and exchange access markets to competitive entry is one of the principal goals of the 1996 Act's telephony provisions).

28 *See AT&T-MediaOne Merger Order* ¶ 178.

29 *See AT&T-TCI Merger Order* ¶ 148 ("Based on our analysis of the assets and capabilities of the merging firms, this combination is likely to be profitable only if AT&T-TCI's plans for upgrading the cable systems and, where economical, introducing telephony and broadband Internet access, are carried out."); *AT&T-MediaOne Merger Order* ¶ 178 ("The substantial premium paid for TCI and now MediaOne is predicated on AT&T's ability to generate new revenue streams from the upgraded cable plant" and the merged company "will need to generate significant revenues from the provision of local telephony").

steadily increasing its share of total multichannel video programming distribution ("MVPD") subscribers at cable's expense, resulting in a slower rate of subscriber growth for the cable industry.[30] To continue to grow and meet investor expectations, AT&T Comcast will consequently need to offer new services, including cable telephony, to its customers.

Mr. Roberts emphasized this point in a presentation to analysts earlier this year, stating that "what is powering the future here is to aggressively get out and sell the RGUs [revenue generating units]."[31] Like digital cable, VOD, and other new services, cable telephony is a prime source of new "RGUs" that will allow AT&T Comcast to remain competitive and continue its growth.

Contrary to Qwest's speculation that AT&T Comcast's deployment of cable telephony will be too slow,[32] these marketplace forces will impose direct competitive pressures on the merged entity to respond to consumer demand for competitive local telephone service.[33] As incumbent LECs are well aware, marketplace forces created by

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30 In the *2001 Video Competition Report*, the Commission found, "DBS appears to attract former cable subscribers and consumers not previously subscribing to an MVPD." *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, 17 FCC Rcd 1244, ¶ 8 (2001) ("*2001 Video Competition Report*"). Between June 2000 and June 2001, DBS added more than three million subscribers while cable added less than 1.3 million subscribers. *Id.* ¶¶ 7, 8, Table C-1. During that time, DBS subscribers grew by 24%, a growth rate 12 times that of cable subscribers (1.9%). *Id.*

31 *Comcast Conference Call With Investors*, Transcript at 7 (Feb. 7, 2002), *available at*: <http://www.sec.gov/Archives/edgar/data/22301/000095010302000120/0000950103-02-000120.txt>.

32 Qwest Comments at 26.

33 The Commission previously has observed that marketplace forces and investor expectations provide ample incentives for cable companies with telephony and broadband expertise to roll out their services in new markets. *See AT&T-MediaOne Merger Order*

the deployment of cable Internet services forced local telephone companies to begin to market much more aggressively their own high-speed service, DSL.[34]

Qwest also argues that the "break off of AT&T Broadband from AT&T Corporation's long distance business radically decreases the likelihood of any acceleration in the deployment of cable telephony."[35] Aside from the irony of RBOCs worrying about a slow-down of cable telephony deployment, this argument ignores the fact that the cable telephony expertise and infrastructure reside in AT&T Broadband, not AT&T Corp.[36] To be sure, the merged entity will not include AT&T's long distance business, but AT&T Broadband's cable telephony business is EBITDA positive and its financial performance continues to improve,[37] and the viability of that business for both AT&T Broadband and Comcast systems is in no way dependent upon AT&T's long distance business. The synergies recognized by the Commission in approving the prior

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¶¶ 176 n.483, 178; *AT&T-TCI Merger Order* ¶ 146 (declining to grant Qwest and U S WEST's request that the "Commission require Applicants to submit detailed information concerning their plans to offer local exchange service"); *see also Applications of Teleport Communications Group, Inc., Transferor, and AT&T Corp., Transferee, For Consent to Transfer Control of Licenses*, 13 FCC Rcd 15236, ¶ 48 (1998). The Commission, therefore, should follow the same course here and reject CWA's request that the Applicants provide detailed deployment plans. CWA Comments at 6, 8, 24.

34 As the FCC Staff has noted, "the ILECs' aggressive deployment of DSL can be attributed in large part to the deployment of cable modem service. Although the ILECs have possessed DSL technology since the late 1980s, they did not offer the service, for concern that it would negatively impact their other lines of business." Cable Services Bureau, FCC, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission,* at 27 (Oct. 1999), *available at:* <http://ftp.fcc.gov/Bureaus/Cable/Reports/broadban.pdf> (footnotes omitted).

35 Qwest Comments at 26; *see also* SBC Comments at 27-28.

36 *See* Application at 39; Braden Declaration ¶ 8.

37 *See* Braden Declaration ¶ 7.

AT&T mergers – the ability to use AT&T Broadband's back-office systems and expertise in negotiating interconnection agreements[38] – apply with equal strength to the AT&T Comcast merger. As with prior mergers, these synergies will enhance the ability of the merged entity to enter new local telephone markets and compete with the incumbent LECs.[39]

4. Inability To Achieve Benefits by Joint Venture

SBC claims that increasing the deployment of cable telephony is not merger-specific because it can be achieved through a limited joint venture.[40] Claiming that some other hypothetical transaction might also produce telephony benefits does nothing, of course, to disturb the Applicants' demonstration that the real world transaction before the Commission will produce those benefits. In any event, the Commission previously has recognized that joint ventures to offer facilities-based services are notoriously difficult to implement and generally are *not* able to replicate the benefits of a merger.

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38 *See AT&T-MediaOne Merger Order* ¶ 165.

39 SBC urges the Commission to "requir[e] the merged company to forego reliance on the UNE-P [unbundled network element platform] in any areas where it has cable facilities." SBC Comments at 43. In other words, SBC seeks to use this proceeding to relieve SBC of its own market-opening obligations. This request is yet another obvious gambit by SBC in any and every forum – no matter how far-fetched the connection – to avoid its statutory duties. *See* 47 U.S.C. § 251(c)(3) (requiring incumbent LECs like SBC to provide *any* requesting carrier just, reasonable, and nondiscriminatory access to unbundled network elements); *see also* 47 U.S.C. § 160(d). There is no conceivable nexus between the merger and SBC's obligations under Title II of the Act, and the Commission should disregard SBC's requested condition. *See also* Section V.C (noting that this is not the appropriate forum for resolution of SBC's and other RBOCs' claims regarding regulatory parity).

40 SBC Comments at 30. SBC's claim here is directly contrary to SBC's statements in one of its own prior merger proceedings. *See* SBC-Ameritech Reply Comments, CC Docket No. 98-141, at 41 (filed Nov. 16, 1998) (arguing that cost savings can be identified and achieved "only by [a unified management] systematically and aggressively comparing one way of doing business with another.").

Indeed, the Commission has explicitly acknowledged that a joint venture to offer telephony services "raises complex problems at both the contract negotiation and implementation stages."[41] In the *AT&T-MediaOne Merger Order*, for example, the Commission observed that "[s]uch complex issues as the allocation of bandwidth to telephony services versus traditional video services, and the services to be covered by the joint venture in light of dynamic and rapidly evolving technology and market developments, make arms-length negotiations arduous."[42]

The difficulties of forming joint ventures to provide facilities-based telephone services are also evident in the unwinding of a number of such agreements in recent years. For example, AT&T and British Telecom dissolved their Concert joint venture because it was unable to keep pace with changing market conditions.[43] The former Sprint PCS partnership, composed of Sprint Corp. and a number of cable operators, ran into trouble when the partners were unable to agree on a budget, and because the partners and the partnership had different expectations regarding the partnership's direction.[44] The

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41 *AT&T-MediaOne Merger Order* ¶ 175.

42 *Id.*

43 *See* Wayne Kawamoto, *AT&T, BT to Unwind Concert*, CLEC News (Oct. 17, 2001), *available at:* <http://www.isp-planet.com/cplanet/news/000110/oct17att.html> ("Since Concert was first announced in 1998, the market has witnessed a period of unprecedented change. The venture no longer fits today's market conditions, and the companies agreed that the best way to serve the interests of customers, shareholders and employees was through an orderly unwind.").

44 *See* Fred Dawson, *MSOs Again Eye Cashing Out In Sprint,* Multichannel News (Feb. 23, 1998), *available at:* <http://www.findarticles.com/cf_0/m3535/n8_v19/20465218/p1/article.jhtml> (restructuring talks began after the partners missed the 1998 budget agreement deadline; cable operators had expected that the partnership would lead to cable infrastructure voice services, but "Sprint PCS decided that it couldn't wait for cable upgrades to begin deploying" new services).

Global One partnership between Sprint Corp, Deutsche Telekom AG, and France Telecom, failed in part because the three partners were at odds over their respective international strategies.[45]

The record in this proceeding further confirms that the merger of AT&T Broadband and Comcast will facilitate the deployment of cable telephony, broadband, and other new services in ways that cannot be replicated by a joint venture.[46] As the Braden Declaration explains, a joint venture is not practical because the sheer "size and scope of the goals that are contemplated by the merger are too massive to be achieved through contracts."[47] The synergies created by the merger require the consolidation and sharing of cable infrastructure and other valuable company resources that would not be feasible in a joint venture.[48] The rapid pace of technological evolution and convergence further exacerbate the difficulties of joint venture arrangements because parties cannot reliably predict what business models, service offerings, or technologies are likely to

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45 *See* John Borland, *Sprint Sells Global One Stake*, CNET News.com (Jan. 26, 2000), *available at:* <http://news.com.com/2100-1033-236116.html> ("European members have been at odds over their own merger strategies"); Jessica Hall, *Sprint Says Global One May Restructure*, Reuters News Agency (Jul. 23, 1999), *available at:* <http://www.globetechnology.com/archive/19990723/IBMORE.html> (partners were engaged in "ongoing discussions to address alignment of their respective international strategies"); *see id.* ("Global One has struggled to find a focus and compete against companies that . . . don't rely on partners to provide services"); *Global One May Unravel*, CNNMoney (Oct. 11, 1999), *available at:* <http://money.cnn.com/1999/10/11/news/globalone> (noting tensions between partners).

46 *See AT&T-MediaOne Merger Order* ¶ 175 (concluding that the AT&T-MediaOne merger would "facilitate the development of telephony solutions").

47 Braden Declaration ¶ 11.

48 *Id.*

emerge even in the next six months.[49] As a result of these and other impediments, reaching a joint venture agreement for the provision of cable telephony and other broadband services is inherently difficult and raises substantial transaction costs.

B. The Commission Should Reject Commenters' Other Arguments Regarding The Synergies That Will Result From The Merger

CWA and CFA take issue with certain aspects of the synergies the Applicants estimate will result from the merger. These challenges similarly are without merit and should be rejected.

CWA Claims. In their Application, the parties demonstrated that the merger will significantly enhance AT&T Comcast's access to the capital required to underwrite an aggressive plan for deploying new broadband services over existing AT&T Broadband systems.[50] Specifically, the Applicants estimated that the merged entity will have a first year combined debt to operating cash flow ratio of less than 5 to 1, representing a substantial improvement for AT&T Broadband.[51] CWA argues that this debt analysis is incomplete, because it does not take into account AT&T Broadband's ability to finance a portion of its capital expenditures from internal cash generated by AT&T Corp.'s other lines of business.[52] In particular, CWA unilaterally and erroneously revises AT&T

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[49] *Id.* ¶ 12. This level of uncertainty can limit the flexibility of the joint venture to respond to changes in the marketplace in ways that would not be faced by the merged entity. *Id.*

[50] Application at 30-32.

[51] *Id.* at 31.

[52] CWA Comments at 18. In addition, CWA claims that the parties have actually claimed merger synergies of $4 billion, and cites to two slides from a December 20, 2001 AT&T Comcast Investor Presentation. *See id.* at 20-21. CWA is mistaken. That presentation sets forth two alternate – not cumulative – estimates for potential synergies and efficiencies. The first slide calculates potential synergies and efficiencies of $1.25 to

Broadband's operations to include AT&T Corp.'s EBITDA, and then compares its debt coverage ratio (EBITDA divided by debt service) to AT&T Comcast's debt coverage ratio.[53]

CWA's argument incorrectly attributes all the EBITDA generated by AT&T Corp.'s consumer and business units to AT&T Broadband. To the extent AT&T Broadband receives financial contributions from AT&T Corp., such contributions are in the form of debt, not capital contributions.[54] Recalculating the debt coverage ratio based on AT&T Broadband's stand-alone financial statements to correct for CWA's error confirms that AT&T Comcast's debt coverage ratio post-merger will be more favorable (2.7) than AT&T Broadband's pre-merger ratio (1.2).[55] Further, since CWA's filing, AT&T Comcast has entered into definitive credit agreements for an aggregate of $12.8

$1.95 billion based on the categories presented in the Pick Declaration, including cable telephony, new products, programming cost savings, operating efficiencies, and national advertising sales. *See* AT&T Comcast Investor Presentation at 28 (Dec. 20, 2001), *available at:* <http://www.pressnews.net/cmcsk/downlds/slides/slides.pdf>. The next slide presents an *alternate* calculation of potential synergies and efficiencies of $1.6 billion based on a potential margin improvement of 17%. *Id.* at 29. That projected margin improvement, however, includes the same programming cost savings, operating efficiencies, and other categories of expected merger synergies detailed on the prior page and in the Pick Declaration. To add this alternate estimate of $1.6 billion to the public interest benefits presented in the Application would in fact result in double-counting.

53 CWA Comments at 18-19.

54 As with any loan, AT&T Broadband must repay to AT&T Corp. both the principal and interest on these funds.

55 The Applicants have been unable to replicate CWA's debt coverage ratios. The estimates presented here are based on AT&T Broadband's 2001 EBITDA of $2.1 billion and interest expense of $1.7 billion, *see* AT&T Comcast Corp., Amendment No. 3 to Form S-4 Registration Statement at III-7 (filed May 14, 2002), *available at:* <http://www.sec.gov/Archives/edgar/data/1166691/000095012302005093/0000950123-02-005093-index.htm>, and AT&T Comcast's estimated EBITDA of $5.9 billion and estimated interest expense of $2.2 billion.

billion of new credit facilities to finance the merger and AT&T Broadband's costs, including capital expenditures, post-merger.[56]

CFA Claims. The Applicants estimate that their merger will result in efficiencies that will generate approximately $1.25 to $1.95 billion a year in increased EBITDA.[57] CFA argues, without any support, that these efficiencies "will not be translated into consumer benefits."[58] The record plainly contradicts this assertion.

As described in the Declaration of Professor Howard A. Shelanski, "because AT&T Comcast will have strong incentives to reduce prices and expand output to customers, savings from the merger will result in savings and other benefits for consumers."[59] In particular, as costs decline, the price at which a company may continue to make a profit also declines.[60] A company will then lower its prices and pass through cost savings to its customers so long as the company may increase its output and number of subscribers.[61] In light of the intense competition it will face from DBS in attracting

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56 *See id.* at I-31. Comcast also generates "free cash flow," a non-debt source of financing, and there will be other sources of funds available to the merged entity such as existing cash, subsidiaries' credit lines and sales of both Comcast and AT&T Broadband investments. Application at 31.

57 Application at 31; Pick Declaration ¶ 7.

58 CFA Comments at 2, 22-23.

59 Declaration of Howard A. Shelanski ¶ 40, attached as Appendix 4 ("Shelanski Declaration").

60 *Id.* ¶¶ 41-42. As discussed in more detail in Section IV.A.1 below, the merger will also result in programming cost savings.

61 *Id.* ¶¶ 42.

and retaining subscribers, AT&T Comcast has strong incentives to make sure that "consumers will share in the efficiency gains from this merger."[62]

Moreover, CFA does not challenge the record evidence that merger efficiencies facilitate "network upgrades and the development and deployment of innovative services."[63] New and better services clearly benefit consumers: "[Consumer] welfare also increases as a result of longer-term investments that improve the quality and range of services a cable operator provides to its subscribers. Increased operational efficiencies add to the resources available for such investment, which provides a second avenue through which merger efficiencies will be passed through to consumers."[64]

III. THE MERGER WILL NOT VIOLATE THE COMMUNICATIONS ACT OR THE COMMISSION'S RULES

Significantly, no party in this proceeding explicitly alleges that the proposed merger will violate the Communications Act or the Commission's rules, including the cable horizontal ownership limit. While CFA asserts that "[t]he AT&T/Comcast merger violates . . . several aspects of the FCC rules governing the cable industry," they do not specify the rules to which they are referring.[65] Similarly, SBC asserts that AT&T

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[62] *Id.* ¶ 43.

[63] *Id.* ¶ 44. As set forth in the Pick Declaration, the efficiencies resulting from the merger "should facilitate and accelerate the launch and roll-out of a number of advanced broadband services, including cable telephony, broadband Internet services, Video-on-Demand ("VOD"), and other services." Pick Declaration ¶ 6; *see also* Application at 28-35.

[64] Shelanski Declaration ¶ 44.

[65] CFA Comments at 27-28. In a separate written statement to the Senate Antitrust Subcommittee appended to CFA's comments, certain of the parties joining CFA in its filing asserted that "AT&T/Comcast will not be in compliance with the horizontal ownership limit of 30 percent of the national multichannel video market." Statement of

Broadband's interest in TWE "renders the proposed merger a nonstarter under the governing rules and regulations," but does not identify what those "governing rules and regulations" are.[66] The vagueness of these assertions is perhaps understandable, since it is beyond dispute that the 30% cable horizontal ownership limit established by the Commission was set aside by the *Time Warner II* decision.[67] Indeed, SBC itself acknowledges that this decision "remanded the Commission's horizontal ownership limits."[68]

The few parties who assert that the merger will give AT&T Comcast a share of MVPD subscribers in excess of 30% are mistaken.[69] The Application showed that AT&T Comcast will serve approximately 29.87% of the nation's MVPD subscribers (*i.e.*, 27.28

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the Consumer Federation of America, Consumers Union, Center for Digital Democracy, and the Media Access Project on the AT&T-Comcast Merger at 23, submitted to the Subcommittee on Antitrust, Business Rights and Competition, Senate Judiciary Committee (Apr. 23, 2002) ("CFA Statement"). However, CFA's comments ignore (or fail to mention) the fact that the "30 percent rule" was reversed by the D.C. Circuit. *See Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner II*"), *cert. denied sub nom. Consumer Federation of America v. FCC*, 122 S. Ct. 644 (2001).

66 SBC Comments at 5.

67 *See Time Warner II*, 240 F.3d at 1136.

68 SBC Comments at 5. While SBC goes on to imply that approval of the proposed merger would be inconsistent with "the Commission's mandate under Section 613(f)(1) of the Communications Act," it fails to explain how AT&T's minority, non-controlling interest in TWE, which affords AT&T Broadband no role in TWE and which AT&T Broadband has already begun the process of divesting, is sufficient to render the proposed merger a "nonstarter," particularly in light of the D.C. Circuit's action reversing both the 30% limit and the "no program sale" embellishment of the limited partnership attribution criteria.

69 *See, e.g.*, BellSouth Comments at 2; CWA Comments at 1; EchoStar Comments at 7-8 & n.6.

million AT&T Comcast subscribers ÷ 91.33 million total MVPD subscribers).[70] This percentage has actually dropped since the filing of the Application for two reasons. First, AT&T Broadband recently signed an agreement to sell to Bresnan Communications cable systems serving approximately 320,000 subscribers in Colorado, Montana, and Wyoming.[71] The effect of closing the Bresnan transaction will be to reduce AT&T Comcast's combined subscribership to approximately 26.96 million (*i.e.*, 27.28 million - 0.32 million). Second, the total number of MVPD subscribers has increased to 92.2 million.[72] Thus, AT&T Comcast would be attributed with approximately 29.24% of all MVPD subscribers (*i.e.*, 26.96 million ÷ 92.2 million).[73] In fact, several of the commenters seeking to impose conditions on the merging parties acknowledge that AT&T Comcast's share of the MVPD marketplace will be *at or below* 30%.[74]

Those parties who claim that AT&T Comcast will serve more than 30% of MVPD subscribers assume the TWE and/or Cablevision subscribers will be attributed to

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70 *See* Application at 50.

71 *See* Press Release, AT&T Broadband, *Bresnan Communications to Acquire Cable Systems in Three States from AT&T Broadband* (Apr. 5, 2002), *available at*: <http://www.attbroadband.com/services/other/pressreleases/2002_04_05.html>.

72 *See Kagan Media Index*, Kagan Media Money at 6 (Apr. 23, 2002).

73 The revenues received by AT&T Broadband from the sale of the systems to Bresnan may be used to purchase new systems in order to fill out certain clusters. AT&T Broadband will of course notify the Commission of the effect on its total subscribership whenever any such system purchase occurs.

74 *See, e.g.*, Qwest Comments at 5 ("AT&T Comcast will account for approximately … 26% of all U.S. MVPD subscribers"); Verizon Comments at 8 ("AT&T Comcast would hold an attributable interest in cable systems serving . . . 30 percent of U.S. MVPD subscribers.").

the merged entity.[75] However, as the Applicants have previously made clear, counting the TWE or Cablevision subscribers is inappropriate for several reasons.[76]

As the Application indicated, AT&T Broadband and Comcast are firmly committed to divesting the TWE interest, and the process of divestiture is underway.[77] Given the steps already taken, it is clear that the Applicants have shown far more than "a mere intention,"[78] or bare "promise" to divest,[79] and have in fact made a real commitment to divest. In this regard, AT&T Broadband continues to pursue actively its option to sell the TWE interest through a public offering, in accordance with the registration rights provisions of the TWE Limited Partnership Agreement ("LPA").[80] In addition, AT&T Broadband has pursued various options for the sale of its TWE interest to AOL Time Warner Inc. ("AOL Time Warner"). Although AT&T Broadband remains confident that

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75 *See, e.g.*, BellSouth Comments at 2 (asserting that AT&T Comcast will serve over 42% of MVPD customers if the Commission were to include the customers in TWE's cable systems); CWA Comments at 1 (stating that AT&T Comcast will serve 37.5% of the MVPD market, taking into account "AT&T's 25 percent attributable interest in [TWE]"); EchoStar Comments at 7-8 & n.6 (arguing that if TWE and TWE subscribers are included, "the combined AT&T Comcast would have more than 40 million subscribers," which EchoStar contends would represent "approximately half of all MVPD subscribers"); CFA Statement at 23 (implying that the Cablevision subscribers should be attributed to AT&T Comcast).

76 *See* Application at 20-21, 51, 57-64. In the Application, the Applicants explained that AT&T Broadband was in the process of exercising an option agreement that would allow it to increase slightly its interest in TWE. *Id.* at 53 n.104. On April 19, 2002, the option was exercised and on May 31, 2002, AT&T Broadband will acquire an additional 2.07% interest in TWE, bring its total TWE interest to 27.58%.

77 *See id.* at 58-61.

78 *See* SBC Comments at 5.

79 *See* CFA Statement at 23-24.

80 *See* Application at 58-61.

it will be able to divest the TWE interest in a satisfactory manner through the registration rights process, it will continue to pursue all its options for divestiture.

In the event the TWE interest is not divested prior to closing, Comcast and AT&T Broadband have indicated that they are prepared to take additional steps as may be appropriate to ensure the ultimate sale of the TWE interest, and to ensure that AT&T Comcast would not be able to influence or control TWE prior to the sale of the interest. These steps could include, for example, insulation of the TWE interest under the Commission's limited partnership attribution rules, before the interest is transferred to AT&T Comcast and until the interest is divested by AT&T Comcast.[81] The Applicants continue to believe that AT&T Broadband already satisfies the seven limited partner insulation criteria and the separate criteria for waiver of Board seats set forth in the Commission's attribution rules.[82] This same conclusion will apply to AT&T Comcast, post-closing, if the TWE interest has not already been divested. Indeed, as explained in the Application, AT&T Broadband currently has no role in or ability to influence (much less control) the management or operations of TWE, including its video programming

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81 In this regard, the D.C. Circuit's decision in *Time Warner II* vacating the "program sale" aspect of the Commission's cable attribution rules "allows AT&T to insulate its interest in TWE, pending divestiture, in a straightforward manner." Application at 62.

82 A limited partner's partnership is not attributable if its partnership interest satisfies seven insulation criteria. *See* 47 C.F.R. §§ 76.503 note 2(b)(2) (limited partnership insulation); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996,* 14 FCC Rcd 19014, ¶ 64 (1999) (setting forth the seven criteria that a limited partner must meet in order to insulate its partnership interest from attribution); *see also* 47 C.F.R. § 76.503 note 2(c) (waiver of attribution to officers and directors).

activities.[83] CFA dismisses the TWE governance arrangements as "management gimmicks," which they assert "do not eliminate the ability of the AT&T parent to influence the decisions of its corporate children."[84] However, CFA does not even attempt to dispute the Applicants' analysis of the provisions of the TWE LPA. Its simplistic and conclusory assertions cannot overcome the reality that, under the terms of the LPA, AT&T Broadband is and will in fact continue to be subject to all of the constraints described in the Application.[85]

In sum, no party provided any valid basis for disputing AT&T Broadband's ability to make the requisite limited partner certification and obtain a waiver for any representatives on the TWE partnership's Board, based on their recusal from the video programming-related activities of both the partnership and the limited partner.[86]

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[83] Application at 57-58.

[84] CFA Comments at 28.

[85] Among other things, as the Application indicated, AT&T Broadband does not have the right under the LPA to communicate with TWE, or AOL Time Warner, the general partner of TWE, on matters pertaining to the day-to-day operations of TWE or its video programming interests. In addition, under the terms of the LPA, the TWE Cable Management Committee (all members of which are appointed by and from AOL Time Warner) has full discretion and final authority over TWE's cable operations. All of MediaOne's rights with regard to the TWE Cable Management Committee were terminated *before* AT&T merged with MediaOne and acquired the TWE interest. The TWE Cable Management Committee's decisions are binding on the TWE Board, which has never met. Moreover, the extent of the Board's power (should it ever meet) and of AT&T Broadband's involvement on that Board is strictly limited to certain extraordinary "investor-protection" matters, should any arise – such as the merger of TWE, the sale of more than 10% of TWE's assets, or TWE's voluntary bankruptcy – and not to any operational matter. As shown in the Application, these investor protection rights are the type that the Commission routinely has held do not trigger attribution. *See* Application at 63 n.119.

[86] Application at 62 n.116, citing 47 C.F.R. § 76.503 note 2(c). As the Application indicates, "[w]ith regard to the AT&T directors on the TWE Board, such directors are not involved in the video programming activities of AT&T Broadband or TWE. A waiver is

It is equally clear, notwithstanding the vague claims of CFA to the contrary,[87] that the steps already taken by AT&T Broadband to reduce its interest in Cablevision below the 5% voting stock threshold and waive its right to nominate two directors to the Cablevision Board of Directors render Cablevision's subscribers not attributable to AT&T Broadband under the Commission's horizontal ownership attribution rules.[88] Again, CFA makes no attempt to analyze the facts surrounding the Cablevision interest, and its bald and unsupported statement that AT&T Broadband "continues to play a game with its stake in Cablevision" simply cannot substitute for factual and legal analysis.[89]

In short, all the evidence in the record substantiates the Applicants' assertion that their proposed merger will not exceed even the 30% horizontal ownership limit reversed and remanded by the court in *Time Warner II*. And even though it is almost certain that any new limit adopted in the pending *Horizontal Ownership FNPRM* proceeding will be higher than 30%, the Applicants will of course (as previously stated) "take all steps necessary to comply with any new cable horizontal ownership limit that may be adopted."[90]

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expressly provided for in these circumstances by the cable attribution rules." *Id.* at 63 (footnotes omitted).

87 *See* CFA Statement at 23.

88 *See* Application at 20-21, 50 n.93.

89 *See* CFA Statement at 23. CFA's allegation that AT&T Broadband holds non-voting equity in Cablevision beyond this 4.98% voting interest is irrelevant. *See id.* AT&T Broadband's total equity interest in Cablevision is approximately 15%. However, since this interest is less than the Commission's 33% equity plus debt attribution threshold, it also provides no basis for attributing Cablevision subscribers to AT&T Broadband. *See* 47 C.F.R. §§ 76.501 note 2(i), 76.503 note 2.

90 Application at 49. Certain parties joining in CFA's comments assert that the Applicants' calculation of their collective share of MVPD subscribers is flawed for

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

Before responding to the specific arguments of the commenters, it is worth noting how far these comments are from the mainstream concerns that mergers might generate. The fundamental fact about this merger is that AT&T Broadband and Comcast are not direct competitors in any relevant geographic or product markets. They do not compete to distribute their programming and they do not compete to buy programming. They do not compete in Internet services. As Professor Carlton concedes, "[s]ince the AT&T and Comcast cable franchise areas do not overlap, the transaction does not reduce the number

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various reasons. *See* CFA Statement at 24-25. With regard to the claim that the methodology adopted "double counts" households that subscribe to both cable and satellite programming services, the approach employed by the Applicants, as CFA concedes, is the one utilized by the Commission itself in its annual video competition reports. *See 2001 Video Competition Report*, App. C, Table C-1. CFA apparently obtains its results only by improperly including these subscribers in the numerator and then excluding them from the denominator. That is entirely inappropriate, because such dual subscribers provide two distinct opportunities for the distribution of programming, thus diminishing the ability of any MVPD to engage in anticompetitive behavior. Moreover, if cable operators were required to count dual subscribers only once for purposes of calculating total MVPD subscribers (*i.e.*, the denominator), consistency would require them to subtract all of their subscribers that also take DBS service from their subscriber count (*i.e.*, the numerator) as well. However, as a practical matter, it is at best unclear whether and how a cable operator could easily and accurately determine how many dual subscribers to delete from the numerator and denominator. Accordingly, the approach adopted by Applicants and the Commission provides a reasonable basis for assessing AT&T Comcast's share of the MVPD marketplace.

CFA's allegation that Applicants overstate the growth rate in the total number of MVPD subscribers in the past six months is equally without merit. The total MVPD subscriber count used in the Application – 91.33 million – was taken directly from a "published, current, and widely cited" industry source, (*i.e.,* the January 29, 2002 edition of *Kagan Media Money*) in compliance with the approach prescribed in the Commission's *1999 Horizontal Ownership Order*. *See* Application at 50 n.94 and sources cited therein. (So, too, with the increased subscriber counts discussed above, resulting from MVPD subscriber growth since the Application was filed.) In contrast, the subscriber figures cited by CFA are based on *its estimate* of growth in the MVPD marketplace since June 2001, which *assumes* that market growth continued at "historic growth rates" during this period. *See* CFA Statement at 24, 39 (Ex. 12).

of providers of video programming services or broadband Internet services available to any consumer and so raises no antitrust concerns regarding horizontal competition."[91] The commenters instead advance implausible theories of "monopsony" and vertical foreclosure. Whatever the viability of these theories in other contexts, they are clearly inapplicable to the present transaction.

A. The Merger Poses No Threat To Competition In The Production And Packaging Of Video Programming

The merged entity will serve less than 30% of MVPD subscribers and will have attributable ownership interests in less than 7% of video programming networks that collectively account for less than 1% of impressions (a metric of viewership) for cable content as rated by Nielsen.[92] Under these circumstances, the proposed merger can pose no possible threat to competition in the production and packaging of video programming. It is uniformly recognized that there are few, if any, contexts in which controlling only 30% of purchases could *ever* give rise to legitimate concerns regarding buyer market power. The video programming marketplace is no exception to that general understanding, as the Commission itself recognized even before many of the most relevant competitive developments and under a static approach that the D.C. Circuit held was far too receptive to buyer market power claims.

To the contrary, as explained below, market conditions and the unique characteristics of video programming create a particularly *hostile* environment for any anticompetitive exercise of buyer market power. The many reasons for this are detailed

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[91] Declaration of Dennis W. Carlton ¶ 4 (Attachment A to SBC Comments) ("Carlton Declaration").

[92] *See* Shelanski Declaration ¶ 8; s*ee also infra* note 301.

in the Declaration of Professor Janusz Ordover ("Ordover Declaration"), attached as Appendix 5. In particular, a supplier of video programming that is denied carriage by a cable company can turn not only to other cable companies, but also to satellite distributors that have nationwide coverage and have attracted over 18 million customers in only a few short years. Indeed, video programming suppliers' customer (and revenue) bases also now extend well beyond U.S. MVPD purchasers. Moreover, as even opponents of the merger concede, it is often the *suppliers* of video programming (including even "niche" programming networks that appeal to small, but loyal audiences) that have the bargaining power. And, because video programming is a "non-rivalrous" good (*i.e.*, once produced, the same video programming "unit" can be sold to an unlimited number of buyers), traditional "monopsony" concerns do not apply at all. For these and other reasons, controlling a particular share of purchases in the MVPD "market" means much less than controlling that same share of purchases in other markets.

Buyer market power claims are particularly misplaced with respect to this merger. Opponents of the merger claim that it will result in foreclosure, *i.e.*, that AT&T Comcast will favor some networks with carriage and deny carriage to those networks' rivals in hopes that the rivals will fail and the favored networks will thereby gain market power over other distributors. Even putting aside the reality that AT&T Comcast will control far too small a share of purchases to decide the fate of any network, such a strategy could make sense only if AT&T Comcast would share in any benefits of empowering the favored networks. But AT&T Comcast will own very little video programming. In short, although the precise level at which buyer market power concerns might arise continues to be debated in ongoing rulemaking proceedings, it is quite obvious that no such concerns arise here.

Notwithstanding these competitive realities, a handful of commenters, led by the RBOCs, proclaim that "[t]he threat of losing carriage" on AT&T Comcast cable systems would constitute "a death threat,"[93] and that this will endow AT&T Comcast with monopsony, foreclosure and other strains of market power. As detailed below and in Professor Ordover's Declaration, none of these claims withstands scrutiny. Moreover, the RBOCs themselves – who make clear that their concern is not so much with the merger as with eliminating their own common carrier obligations – have provided remarkably little in the way of support for their market power claims. Although each of the RBOCs and the coalition led by CFA submitted economic declarations, the declarations contain little beyond general discussions of the economic theories of buyer market power followed by bare assertions that AT&T Comcast will be large enough (and have incentives) to exercise such power. Some of the declarations do not even go that far. Professor Carlton (on behalf of Qwest and SBC), for example, offers no opinion at all, but simply urges the Commission to have a look at the RBOCs' buyer market power allegations.[94] The Commission should certainly do so (as will the Department of Justice, which is of course charged with reviewing all antitrust issues), because any careful analysis of those allegations can only confirm that they are baseless.

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93 John Haring, Jeffrey Rohlfs and Harry M. Shooshan, *Anticompetitive Effects of the Proposed AT&T/Comcast Merger* at 8 (Apr. 29, 2002) (Appendix 1 to Qwest Comments) ("HRS Declaration").

94 Carlton Declaration ¶ 7.

1. Monopsony

Monopsony power is the ability of a buyer to depress the price paid for a product to a level that is below the competitive price and thereby depress output.[95] In order to exercise monopsony power, a buyer must, at a minimum, (i) account for a substantial share of all purchases and (ii) purchase products for which there is a finite supply at any given price level (*i.e.*, a product for which there is an upward sloping supply curve). As explained below, the merger does not make it any more likely that these conditions will be met. Instead, as even the opponents of the merger concede, it is often the suppliers of programming that have the upper hand.

The Non-Rivalrous Nature of Video Programming and the Free-Rider Problem. A merger can create "buyer power" only if it reduces competition among the merging parties to purchase goods from sellers. AT&T Broadband and Comcast do not currently compete to purchase video programming, because a sale to AT&T Broadband does not prevent a sale to Comcast. Instead, video programming is a non-rivalrous product – that is, when one buyer purchases video programming, there is no reduction in supply of video programming available for other buyers. Put another way, once produced, video programming can be supplied to an unlimited number of buyers at little or no additional cost.[96] Even the largest purchaser thus faces an essentially *flat* supply curve and hence refusing to pay enough to cover the supplier's costs would leave the purchaser either with

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95 Horizontal Merger Guidelines § 0.1.

96 Application at 72-73.

no input at all (because the supplier would not produce it) or only an inferior quality input that would degrade the quality of the purchaser's own product.[97]

None of the commenters or their supporting economists disputes this description of the economic nature of video programming. Indeed, they stress the very fact that precludes any monopsony claim here – *i.e.*, that the production of video programming has high fixed (or "first copy") costs and that a programming supplier's marginal cost of delivery to an additional multi-system operator ("MSO") is negligible.[98] Qwest notes that this "public good" aspect of video programming gives AT&T Comcast an incentive to "free-ride," by paying less than its proportionate share of the first copy costs.[99] But *all* purchasers of video programming, large and small, have that incentive, and neither the incentive nor the ability to act on it is enhanced by size. Thus, even if free-riding were a serious problem in this industry – and the remarkable proliferation of video programming proves that it is not – it would not be a *merger-specific* problem.

As Professor Ordover explains, "[f]ree riding is always an issue where there are high fixed costs and low (or zero) marginal costs."[100] Each video programming distributor would like quality programming to be produced, but each wants other distributors to cover the costs of its production (so that the free-rider can then negotiate a better deal with the programmer after the programmer's fixed costs are sunk and its marginal costs of an additional sale are very low). Unless the free-riding problem can be

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97 *See* Application at 72-73; Ordover Declaration ¶¶ 25-27.

98 *See* Qwest Comments at 7; Declaration of Robert H. Gertner ¶ 12 (Attachment A to SBC Comments) ("Gertner Declaration").

99 Qwest Comments at 12-13.

100 Ordover Declaration ¶ 41.

solved, the investment in programming will not be made (or lower-quality, less expensive programs may be produced). In most commercial settings, buyers and sellers recognize the inefficiencies that may result from such opportunistic behavior and find mutually beneficial ways of overcoming them. The consistent increase in the total number of video programming networks – and the steady decrease in the percentage of networks that are affiliated with cable MSOs[101] – confirms that market participants in the video programming marketplace most certainly *have* found ways to address free-riding issues through contractual (*e.g.*, "most favored nations" clauses), reputational, and other means.[102] The important point here, however, is that although free-riding issues can in theory arise in this context, they are not caused by cable ownership concentration, but by the cost structure and non-rivalrous nature of video programming.[103]

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101 The proportion of vertically integrated non-broadcast networks is vastly reduced from a decade ago. *See 2001 Video Competition Report* ¶ 157 (citing "years of decline" of vertical integration). Adjusting for AT&T's divestiture of Liberty (Liberty now is integrated with only a very small cable system in Puerto Rico that provides no basis for "leverage"), vertical integration actually declined again last year, just as in each of the prior several years. *Id.* at n.511.

102 That is unsurprising, because the problems associated with high fixed costs run in both directions in this context. Video programming suppliers are fully aware that cable and other programming distributors deploy long-lived and specialized assets that would be significantly devalued without access to large quantities of quality programming.

103 In fact, if there is any relation at all between cable company size and the ability to free-ride, all indications are that size can be a *disincentive* to the putative free-rider. That is because a larger purchaser can less credibly threaten to free-ride than a smaller purchaser. The larger the cable MSO, for example, the more it will lose from failure to carry programming that consumers value. A larger MSO therefore is more likely than a smaller MSO to consider the impact of reducing its payments to a programming supplier on the financial viability of the supplier. And if, as Qwest and others posit of AT&T Comcast, the buyer becomes so large that it becomes "pivotal" to a video programming supplier's production decision – *i.e.*, the supplier cannot economically produce without that buyer's agreement to cover its proportionate share of the costs of production – that buyer loses altogether "the ability to credibly abdicate responsibility for ensuring that the

Alternative Distribution Outlets. Separate and aside from the fact that the merger will not reduce competition between AT&T Broadband and Comcast, the combined firm's 30% share of the MVPD business is plainly insufficient to confer monopsony power. Any seller of video programming would have, as an alternative to AT&T Comcast, the remaining 70% of MVPDs, as well as a wide array of other video programming buyers, including, among others, foreign cable, satellite, and broadcast distributors, U.S. over-the-air broadcasters, and distributors of videocassettes, digital video discs ("DVDs") and other formats. Accordingly, because of these many alternative buyers, AT&T Comcast will never be able to exercise market power over video programmers.[104]

Seller Power and Programming Cost Savings. The merger is also unlikely to raise monopsony concerns because, as explained in the Application, the large media companies that control the most significant programming content have considerable bargaining power and many potential counter-strategies to prevent AT&T Comcast from exercising any "buyer power." Broadcasters are, of course, guaranteed basic carriage under the "must carry" rules and many "marquee" cable channels are effectively guaranteed carriage because of their popularity. In addition, programmers have

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supplier's costs are covered." *See* Ordover Declaration ¶¶ 35-37 (citing academic literature).

[104] *See* Application at 73-74, citing, *inter alia*, Horizontal Merger Guidelines § 2.211 (merger unlikely to facilitate unilateral exercise of market power if merged firm has less than 35% of relevant market). The "Competitor Collaboration" guidelines that Qwest cites (Qwest Comments at 5 nn.8 & 10) establish a lower absolute "safe harbor" for collaborations among separate economic actors, but these guidelines are inapplicable in the merger context and Qwest cites no case in which either agency has actually pursued a monopsony claim against a firm that accounts for less than 30% of total purchases. Moreover, the antitrust authorities typically *exclude* from their analysis limited ownership interests that are *included* under the Commission's attribution rules.

effectively "bundled" their more popular offerings with newer or weaker networks to boost the distribution of these networks. At most, the merger may permit AT&T Comcast to resist more effectively the demands of programmers for supra-competitive rate increases. This, however, is a pro-competitive benefit, not a reason to object to the transaction.

Lacking any theory of how monopsony concerns could arise in this context, the RBOCs and CFA cite as empirical "proof" of monopsony power the Applicants' statements that they expect programming cost savings as a result of the merger. But the RBOCs' own economic declarations make clear that no such inference is possible. As Professor Gertner (on behalf of SBC) stresses, cost-based volume discounts are commonplace and generally pro-competitive, and there are many other pro-competitive reasons why a larger buyer may obtain lower rates.[105] One such reason is that the larger buyer may have an enhanced ability to resist the *seller's* attempts to exercise market power and charge prices that reflect monopoly rents. And, as Professor Gertner concedes (and as the extraordinary inflation in video programming rates confirms), some video programming suppliers plainly do have market power.[106]

Economic analysis draws a clear distinction between the pro-competitive ability of larger buyers to get cost-based volume discounts (and to drive monopoly rents out of suppliers' prices) and the anticompetitive exercise of market power to push prices *below* cost-based levels.[107] The Commission has, in fact, previously recognized the benefits of

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105 *See* Gertner Declaration ¶¶ 24-25, 39.

106 *Id.* ¶¶ 25-27.

107 *See* Ordover Declaration ¶ 45.

volume discounts and accepted the legitimacy of resulting pricing differentials.[108] Here, the expected future cost savings (as well as the existing differentials between the rates AT&T Broadband and Comcast pay for the same programming) are the result of pro-competitive volume discounts. Such discounts are pro-competitive, because, among other things, they are likely to be passed on, at least in part, to consumers.[109] Indeed, Professor Gertner concedes that, "if some of those savings are passed along to consumers, AT&T Comcast customers will benefit from lower prices."[110]

As detailed in the Application (and the attached Pick Declaration), much of the programming cost savings that Applicants expect are merely a product of the merged firm taking advantage of existing volume discounts or the lower price of two contracts with the same programming supplier.[111] The Applicants do expect that the merged firm may in some future programming negotiations obtain additional cost savings as compared to the rates that either firm would otherwise have obtained. But that reflects expectations of volume discounts, not monopsony power.

Volume discounts are offered and warranted because it is less costly for programming suppliers to deal with larger buyers (*e.g.*, reduced marketing, distribution,

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108 *Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359, ¶¶ 105, 108 (1993) (*"1993 Program Access Order"*).

109 *See* Shelanksi Declaration ¶¶ 40-43.

110 *See* Gertner Declaration ¶ 24.

111 *See* Application at 32 n.51; Pick Declaration ¶¶ 18-21 (expectations based on experience with prior acquisitions or swaps of cable systems).

sales, administration, and legal expenses).[112] In addition, a long-term contract with a large MSO allows a programmer to mitigate the substantial risks associated with its investment in programming development. This reduction in risk is an efficiency reflected in lower prices to that MSO.[113] It is well-recognized that such discounts are generally pro-competitive, and are likely to inure to the benefit of cable customers in the form of better quality of service and moderated rate increases.[114] Congress and the Commission,

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112 *See* Shelanski Declaration ¶ 48 (a contract with a large distributor lowers the programming supplier's transaction costs). Qwest's speculation that any such cost savings are minimal reveals a fundamental lack of knowledge about the video programming marketplace. For example, contrary to Qwest's unsupported assertion that the "costs of contracting for carriage do not loom large" (Qwest Comments at 9), cable MSOs and programming suppliers often negotiate for *years* over the terms of carriage contracts (which may run for many years and involve payments of hundreds of millions of dollars). And Qwest misses the point entirely in suggesting that cable MSOs' own billing, collection and marketing costs are, regardless of MSO size, small – the billing, collection and marketing costs at issue here are the *programming supplier's* billing, collection and marketing costs, and there clearly will be savings to programming suppliers from dealing with AT&T Comcast, rather than AT&T Broadband and Comcast separately.

113 *See* Ordover Declaration ¶ 44; Shelanski Declaration ¶ 48 (by contracting with a large distributor, a programmer has "greater certainty about the number of potential viewers, and hence prospects for success, for a particular program (especially during the early phase of the launch)"). In addition, "[v]olume discounts may also ameliorate the potential free riding issue discussed above. As noted, large MSOs are more likely to be the entities that make the financial commitment necessary to allow the programmer to recover its costs thereby making production of the programming possible. A most-favored-nation clause and/or volume discounts allow a large MSO to protect itself from smaller MSOs obtaining a much better rate from the programmer after the programmer has been assured recovering of its fixed costs from its agreements with the large MSOs, and thereby provide another incentive for the large MSO to make the investment in the first place." *See* Ordover Declaration ¶ 46.

114 *See, e.g.*, Ordover Declaration ¶ 45; Janusz Ordover & Robert Willig, *Economist's View: The Department of Justice Draft Guidelines for the Licensing and Acquisition of Intellectual Property*, Antitrust (Spring 1995) ("[V]olume-sensitive pricing, in particular volume discounts . . . . enhance downstream efficiency and thus should be regarded as procompetitive."); U.S. Department of Justice and Federal Trade Commission, *Statements of Antitrust Enforcement Policy in Health Care*, 4 Trade Reg. Rep. (CCH) ¶ 13,153, at 20,812 (1996) (joint purchasing agreements can allow

as noted, have explicitly included volume discounts among the permissible bases for programming price differences paid by various MVPDs; the program access rules therefore permit "economies of scale, cost savings, or other direct or legitimate economic benefits reasonably attributable to the number of subscribers" to be taken into account.[115]

If AT&T Comcast, by virtue of its size, can obtain additional cost savings by more effectively resisting programming suppliers' attempts to earn monopoly rents, that, too, will serve the public interest. The efficient production of video programming (at competitive market levels of quantity and quality) will occur so long as the costs of production (including an appropriate return on capital) are covered, and thus negotiating down the monopoly rents demanded by a video programming supplier will have no impact on the quantity or quality of programming produced.[116] At the same time, if there are no such rents to be lowered, AT&T Comcast will, as explained above, have strong incentives to pay enough to ensure that suppliers of video programming can continue to turn a profit and that quality programming continues to be produced (even if, contrary to

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participants to "obtain volume discounts" that "allow the participants to achieve efficiencies that will benefit consumers"). *See generally* Jean-Jacques Laffont and Jean Tirole, *Competition in Telecommunications* Ch. 2 (MIT Press 2000); *see* Shelanski Declaration ¶¶ 46-49.

[115] 47 U.S.C. § 548(c)(2)(B)(iii); *1993 Program Access Order* ¶ 108.

[116] Haring, Rohlfs and Shooshan assert, without citation or explanation, that suppliers of video programming (and "creative talent") must earn monopoly rents "to induce an optimal supply of those resources." HRS Declaration at 7. As Professor Ordover explains, that is false – competitive market prices are adequate to attract both capital and labor. *See* Ordover Declaration ¶¶ 26, 70.

fact, AT&T Comcast's less than 30% share of MVPD purchases somehow gave it the ability to demand below-cost prices).[117]

Risk of Coordinated Action. Finally, SBC claims that the real monopsony concern here arises from the fact that the merger will "reduce the number of major distribution outlets for video programming" and thereby "increase the likelihood of coordinated action among the ones that remain."[118] But collusive behavior to exercise monopsony power (*i.e.*, by restricting purchases of programming) is no more plausible in this context than unilateral behavior to exercise monopsony power. The law prohibits collusion because it allows a group of market participants to behave as a single larger participant, and, for the reasons explained above, even the largest cable company would lack any incentive to restrict its purchases of a non-rivalrous good, because the incremental costs of supply do not increase as greater quantities of programming are purchased. In any event, the D.C. Circuit's decision in *Time Warner II* makes abundantly clear that "the economic commonplace that, all other things being equal, collusion is less

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117 Professor Gertner provides no support for his assertion that the "launch support" payments that programming networks routinely pay to their cable (and satellite) distributors reflect the exercise of monopsony power by large cable operators over "weak" suppliers of programming (Gertner Declaration ¶ 52), and the marketplace facts conclusively refute that assertion. Networks pay launch support to both large and small distributors and even the large media companies that own the most popular networks pay launch support. Indeed, all of the launch support examples that Professor Gertner gives are of relatively large and successful programming networks (Fox News, Animal Planet, Sci-Fi Channel). Launch support is a function, not of buyer size, but of the rational desires of programming suppliers to encourage concerted efforts aggressively to market new launches to attract viewership (and the associated advertising and subscriber revenues). *See* Ordover Declaration ¶ 71.

118 SBC Comments at 9.

likely when there are more firms,"[119] is a patently insufficient rationale for Commission restrictions on a cable company's horizontal reach (and speech).

Moreover, as explained by Professor Ordover, the structure of the video programming business is ill-suited for coordinated action among buyers. Video programming agreements are private, long-term contracts for which prices are not published. In addition, both video programmers and MSOs have heterogeneous structures, some being vertically integrated and some not.[120] Implementing and enforcing collusive agreements in such a setting would be quite difficult and unlikely.[121]

In sum, none of the merger opponents' "monopsony"-related arguments is even theoretically plausible, much less consistent with the marketplace facts.[122]

2. Foreclosure

In the video programming business, foreclosure may occur when a vertically-integrated MVPD refuses to distribute video programming sold by an upstream competitor. Foreclosure is competitively significant only if it lessens competition in some relevant market. The usual minimum requirements for such competitive injury are: (i) that access to the foreclosed portion of the market is essential to the economic viability

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119 *Time Warner II*, 240 F.3d at 1132-33.

120 *See* Ordover Declaration ¶ 50. Professor Ordover also explains that a cartel would likely have even less incentive than a single large MSO to restrict its purchases of programming and to free ride. *Id.* ¶ 51.

121 *See* Horizontal Merger Guidelines § 2.11 (factors impeding coordinated interaction include: "product heterogeneity," "incomplete information," "differences in vertical integration").

122 Qwest misleadingly suggests that rigorous antitrust scrutiny is triggered by buyers with as low as 20% of relevant purchases. As explained in note 104 above, the authorities cited by Qwest are inapposite.

of the excluded programmer; and (ii) that the foreclosing MVPD has significant programming interests to "benefit" from this foreclosure. These conditions are not met here. Instead, as explained below, AT&T Comcast will own very little video programming that could benefit from a plan to drive other suppliers of video programming out of business – and will own many cable systems that would be *harmed* by any reduction in their supply of quality programming. Notwithstanding these facts, the RBOCs and CFA all claim that AT&T Comcast will possess and have incentives to exercise such "foreclosure" power. These claims neither are nor could be substantiated.

Minimum Viable Scale for Programming. Foreclosure theory addresses the possibility of harms to competition when a vertically integrated firm's "downstream" division (here, programming distribution) refuses to buy from rivals of its upstream division (here, programming production and packaging). Of course, any firm, large or small, can "foreclose" in the sense of refusing to buy from a particular seller or group of sellers (*e.g.*, because the asking price is too high or the quality is too low). Foreclosure can be competitively significant only if the integrated firm is sufficiently large that its upstream competitors' inability to sell to the firm's downstream division precludes the upstream competitors from covering their costs.[123]

The Commission has consistently ruled that a cable MSO that accounts for less than 30% of MVPD purchases is *not* sufficiently large to pose a serious threat of anticompetitive foreclosure[124] – even if, contrary to the holdings of the D.C. Circuit,

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[123] *See* Ordover Declaration ¶ 52.

[124] *See Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCC Rcd 8565, ¶¶ 3, 25 (1993); *1999 Horizontal Ownership Order* ¶¶ 5, 53.

collusion could be assumed and the demonstrated willingness of customers to switch to DBS could be ignored.[125] And the record in the Commission's current cable horizontal ownership limit proceeding demonstrates that even MSOs significantly larger than 30% would not pose a foreclosure threat.[126] Neither the RBOCs nor CFA even attempt to reconcile their claims here with the Commission's prior holdings. Nor do they bother to address the decisions of the antitrust agencies and courts that recognize that 30% is not sufficiently large even in markets where there is a much more favorable environment for foreclosure.[127]

Instead, these commenters resort to anecdotal suggestions that the minimum viable scale for video programming networks is high. SBC, for example, suggests that a network cannot survive without 25 million MVPD subscribers.[128] SBC's only "evidence" is the posturing of AOL Time Warner and the National Basketball Association ("NBA") that they will not launch their new sports channel until they sign up systems serving 25 million subscribers.[129] Whatever one makes of that statement – and it

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125 *Time Warner II*, 240 F.3d at 1131 ("while collusion is a form of anti-competitive behavior that implicates an important government interest, the FCC has not presented the 'substantial evidence' required by *Turner I* and *Turner II* that such collusion has in fact occurred or is likely to occur; so its assumptions are mere conjecture"); *id.* at 1134 ("a company's ability to exercise market power depends not only on its share of the market, but also on the elasticities of supply and demand, which in turn are determined by the *availability* of competition."); *id.* ("in revisiting the horizontal rules the Commission will have to take account of the impact of DBS on that market power").

126 *See, e.g.,* Declaration of Janusz Ordover (attached as Appendix A to AT&T Comments, CS Docket No. 98-82) (filed Jan. 4, 2002).

127 *See, e.g.*, Application at 73 n.146, 76-77 n.153 (citing cases).

128 SBC Comments at 6.

129 *See id.* at 6 n.13.

is laughable to suggest that a joint venture between one of the world's largest media conglomerates and the NBA would be at the mercy of AT&T Comcast or anyone else – SBC never connects the dots between its 25 million subscriber assumption and its conclusion that AT&T Comcast will be able to "make or break" video programming suppliers. That is because there are over *65 million* MVPD subscribers that are today served by distributors other than AT&T Broadband or Comcast. Accordingly, even under SBC's assumption, carriage on AT&T Comcast cannot, by definition, be necessary for viability.

SBC's 25 million subscriber assumption and Verizon's even higher assumption are demonstrably wrong.[130] There are close to 50 national cable programming networks that have been successfully launched and that remain in operation today with fewer than *15 million* MVPD subscribers (and the Commission has itself recognized that

130 In lieu of any actual analysis, Verizon says that statements made by the Federal Trade Commission ("FTC") in connection with the merger of Time Warner and Turner Broadcast Systems establish that a network needs carriage to 40% of subscribers to be viable. But the FTC has long stressed that its unproven allegations settled by entry of a consent decree do not have precedential value. *See Beatrice Foods Co.*, 86 FTC 1 (1975), citing *United States v. DuPont Co.,* 366 U.S. 316, 330 n.12 (1961) ("[A] consent order entered into by the Commission is not an adjudication on the merits of a matter and is not binding. The Commission in such a proceeding does not determine the legality or illegality of the conduct involved, consent orders contain no complete findings of fact, and many of the factors considered are known only to the Commission and are not a part of the public record."). Further, even if the FTC had ruled on the merits that 40% carriage was necessary in 1997 (and had some basis for that ruling), a much lower percentage would be appropriate today to account for both growth in total MVPD subscribers and, more critically, the emergence of DirecTV and EchoStar as successful, ubiquitous alternatives to cable. *See Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992,* 16 FCC Rcd 17312, ¶ 53 (2001) ("*Cable Rules Remand Notice*") ("It is important to note . . . that the FTC decision was reached in 1997, when both MVPD competition and channel capacity were at lower levels than today").

programming suppliers can be viable with 15 million subscribers).[131] This group includes a number of well-known networks that were launched more than five years ago such as BET on Jazz, Discovery Kids Channel, and STARZ!, as well as more recently launched networks, such as Oxygen and National Geographic Channel.[132] Indeed, many networks, including some that are more than five years old, have fewer than *three million* subscribers.[133]

Alternative Distribution Outlets. Recognizing that no rational foreclosure claim can be based on a minimum viable scale argument given these marketplace realities, Qwest contends that it is the *location* of AT&T Comcast's systems that will give it foreclosure power. Because AT&T Comcast systems will be located in eight of the top ten DMAs, Qwest claims, networks that are not carried by AT&T Comcast would have to reduce their advertising rates (by some unspecified amount). Even if that bare assertion could be proved (*i.e.*, that no other groupings of DMAs and subscribers with similar demographics would be as attractive to advertisers), it would hardly establish that networks would need carriage on AT&T Comcast systems to be *viable*. In all events, the

131 *1999 Horizontal Ownership Order* ¶¶ 40-42.

132 Comcast's G4 network was launched with carriage to only three million homes, and style., after three and one-half years of rapid growth, remains well under 25 million.

133 *See* Comments of AT&T, CS Docket No. 98-82, at 60-62 (filed Jan. 4, 2002). Of course, video programming suppliers have many alternative non-MVPD distribution and revenue sources, and thus viability does not turn solely on the subscriber and advertising fees generated by sales to U.S. MVPDs. For example, more and more programming produced in the U.S. is being carried abroad by foreign MVPDs and broadcasters, and foreign sales are becoming a significant portion of many programming networks' business. This trend is bound to increase as a result of the sustained growth in cable and satellite television world-wide and the current conversion towards digital television in many significant markets, such as Europe and Asia. *See* Ordover Declaration ¶ 74. Similarly, some programming producers now earn more from DVD sales/rentals than from MVPD distribution.

claim is entirely implausible. AT&T Comcast will not serve New York or much of Los Angeles, the two *largest* DMAs (which alone account for about 40% of the households in the top ten DMAs);[134] AT&T Comcast will not be the only cable provider even in the next eight DMAs,[135] and, in any event, DBS providers serve *all* DMAs.

As explained above, claims that AT&T Comcast will be sufficiently large to have foreclosure power cannot survive even a static analysis that wrongly assumes that bad programming decisions have no consequences. When, as the law requires, the dynamic effects of the ubiquitous availability of DBS are considered,[136] the RBOCs' foreclosure claims are not even facially plausible.

Anticompetitive foreclosure necessarily implies refusing to carry popular, competitively priced programming. Doing that is very costly for any cable operator, because cable operators face retail MVPD competition in all markets from DBS providers (and in some markets from other MVPDs as well) and also compete with over-the-air broadcasters and others for viewers (and advertising dollars). Quality and quantity of programming are obviously key competitive drivers, and customers unquestionably can and do switch if dissatisfied with the programming being delivered. That has highly relevant implications for both the ability and incentive to foreclose.

Specifically, it means that a cable operator's 30% (or greater) share today does not imply an ability to prevent a video programming supplier from reaching 30% (or

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[134] *See Population & Households – Market Statistics,* 2001 Demographics U.S.A., County Edition.

[135] For example, AT&T Broadband serves approximately 65-75% of the MVPD homes in the Boston, Dallas-Fort Worth and Atlanta DMAs.

[136] *See Time Warner II,* 240 F.3d at 1134.

more) of MVPD subscribers. DBS providers have the ability to serve virtually *all* cable subscribers, and attempting to foreclose programming that customers enjoy would unquestionably induce some customers to switch to DBS or other alternatives.[137] Thus, the "victim" of any attempt by AT&T Comcast to foreclose desirable programming would have access not only to the over 65 million subscribers of other MVPDs, but also potentially to AT&T Comcast's own subscriber base.[138] Here, it is particularly important to recognize that cable carriage deals are long-term contracts. Thus, when determining whether alternative distribution outlets are adequate, a network would not look merely at the current shares of those alternative distributors, but at their *expected* number of subscribers over the entire contract period – recognizing, of course, that a cable company's refusal to carry desirable programming would accelerate the defection of that company's subscribers to DBS and other rivals.[139]

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[137] *See* Ordover Declaration ¶¶ 17, 19, 22. The dispute between Cablevision and the Yankees & Sports Entertainment Network ("YES") provides a recent example of the alternative programming outlets available to programmers. Cablevision has dropped YES from its cable lineup because of a dispute over, among other things, the price Cablevision should pay for carrying this network. This has resulted in thousands of Cablevision subscribers "defect[ing] to satellite-delivered DirecTV in order to watch Yankees games." Knight-Ridder Tribune Business News, 2002 WL 21242307 (May 3, 2002). When Time Warner dropped Disney's ABC network from its channel lineup in its 2000 dispute with Disney over carriage rights, DBS providers launched an aggressive – and successful – campaign to lure subscribers away from Time Warner. *See* The Orange County Register, 2000 WL 4831317 (May 6, 2000); The Patriot Ledger, 2000 WL 9127623 (May 5, 2000).

[138] *See* Ordover Declaration ¶ 73.

[139] In fact, neither AT&T Comcast nor any other MSO even have the ability to wall off their own systems to particular programs. Program producers can sell to broadcasters that are guaranteed basic tier carriage by the "must-carry" rules or to any of the many networks that are *de facto* "must-see TV" by virtue of their popularity. *See* Ordover Declaration ¶ 56-57, 74. Moreover, potent counter-strategies are available to the owners of programming networks. Many network owners, for example, hold exclusive rights to one or more very popular programming networks that, if not carried, would place an

Because the availability of DBS and the demonstrated willingness of customers to switch are fatal to any claim that AT&T Comcast will have foreclosure power, CFA and the RBOCs employ a "head in the sand" approach, pretending that DBS is not a substitute for AT&T Comcast's MVPD services. They first contend that the fact that DBS generally has lower market shares in urban areas than in rural areas proves that DBS competition will not discipline cable programming choices in the urban areas served by AT&T Comcast.[140] That is a *non sequitur*, because, as the D.C. Circuit made clear, it is the "*availability*" of DBS, not its market share at any given point in time, that is relevant in assessing market power.[141] DBS services are as available in urban areas as in rural areas, and urban cable customers plainly are willing to switch to DBS. In fact, as CFA concedes, more than half of DBS subscribers are in urban areas and "*two thirds* of *new* [DBS] subscribers have been from urban areas."[142] The fact that DBS growth rates are today higher in urban than rural areas merely confirms that the current disparity between urban and rural DBS shares is just a relic of the fact that when satellite services were first introduced (and were much more expensive than cable services), they were targeted at the primarily rural customers that had no cable alternative. Today, in contrast, DBS services

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MSO at a significant competitive disadvantage. A threat by AT&T Comcast to drop a "second tier" network owned by one of these network owners could thus be met with a threat to deny AT&T Comcast carriage rights to the entire package of programming, including "must-see" networks. *See id.* ¶ 82.

140 CFA Comments at 19; *id.*, Mark Cooper, *The Failure of 'Intermodal' Competition in Cable Markets* at 6-13 (Apr. 2002) (attached to CFA Comments) ("Cooper Report"); SBC Comments at 12 & Gertner Declaration ¶ 45 (DBS is insufficient to check cable's market power).

141 *Time Warner II*, 240 F.3d at 1134.

142 Cooper Report at 11 (emphasis added).

are similar to cable services in pricing for comparable programming packages, offer at least as many programming channels, and are aggressively marketed to all consumers.[143]

CFA argues in the alternative that DBS is a "niche" product that is attractive only to "high end" customers, and not to "lunch bucket" cable customers.[144] That assertion is contrary to recent, rigorous empirical work, which has uniformly concluded that "DBS is a substitute for cable service."[145] CFA's survey evidence, rather than contradicting this conclusion, supports it. CFA's survey reports that nearly *one-third* of dissatisfied cable subscribers would consider switching to DBS.[146] Any foreclosure attempt that led to the defection of even a small fraction of that many customers would have disastrous financial consequences for any MSO.[147]

The availability of DBS and the willingness of customers to switch means that even a cable company that truly had the ability to "make or break" programming networks would be disinclined to refuse to carry competitively priced programming that would appeal to its subscribers. Because the fixed costs of building and operating a cable

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143 As explained below, the DBS share in Philadelphia in no way implies that a lack of certain sports programming (or anything else) deprives DBS of the ability to compete effectively in that DMA.

144 CFA Comments at 16-17; Cooper Report at 11-22.

145 *Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992,* Report on Cable Industry Prices, 16 FCC Rcd 4346, ¶ 53 (2001) ("*2000 Price Survey*"); *see also* Ordover Declaration ¶¶ 121-123 (summarizing studies).

146 Cooper Report at 13.

147 Even CFA concedes that its survey evidence shows that digital cable services and DBS are close substitutes (Cooper Report at 21-23), and hence that AT&T Comcast's millions of digital cable customers would be at risk if AT&T Comcast refused to carry desirable programming.

system are very high relative to the incremental costs of serving additional customers, most of the revenue lost when dissatisfied customers leave (or never sign up in the first place) flows straight away from the bottom line. For these reasons, bad programming decisions are very costly even if only a very small percentage of dissatisfied customers vote with their feet.[148]

AT&T Comcast's Limited Programming Interests. Finally, the foreclosure claims raised here ignore the fact that AT&T Comcast will have interests in very few programming networks and that most of those interests will be fractional interests.[149] As most of the opponents of the merger recognize, incentives to attempt foreclosure of unaffiliated programming are triggered by ownership of affiliated programming. Where, as here, a cable MSO has very limited programming interests, there are obviously few opportunities to favor affiliated programming even assuming the ability to do so. And

148 Moreover, because a large MSO obviously stands to suffer greater customer losses from sub-optimal programming than a small MSO, foreclosure would be much *more* costly to a merged AT&T Comcast than to either company alone. At the same time, the larger the MSO, the *lower* the gains from foreclosure, because the larger the foreclosing MSO, the fewer subscribers served by other distributors. The fewer the subscribers served by other distributors, the lower the revenues to be gained by the MSO's programming affiliate from exercising purported market power over those other distributors. As Dr. Besen has demonstrated, a loss of less than *one* percent of subscribers would render a foreclosure strategy unprofitable for a "30%" cable MSO. *See* Declaration of Stanley Besen ¶ 53 (Jan. 4, 2002) (attached as Exhibit B to Comments of AT&T Corp., CS Docket No. 98-82). Once again, the opponents of the merger do not even attempt to dispute these facts.

149 *See* Application at 14-15, 24-25. In this regard, SBC's claim that AT&T Comcast will have incentives to attempt foreclosure to benefit networks owned by TWE should be dismissed out of hand. SBC Comments at 9-10. Because AT&T Broadband (and its successors) lack any control or influence over TWE, AT&T Comcast would have no direct way to share in even the minority interest "benefits" of any such foreclosure (but would bear the full brunt of subscriber losses). *See* Ordover Declaration ¶¶ 91-94. Moreover, even if it could be carried off, any such strategy to raise TWE rivals' costs would take years to bear fruit, *see id.*, but AT&T has already invoked the registration rights process and intends to dispose of its TWE interest as soon as possible.

any incentives to favor even the "affiliated" networks are necessarily weak if the benefits of foreclosure would have to be shared with other owners (while the costs would be borne solely by the foreclosing MSO).[150]

The specific networks in which AT&T Comcast will own interests are particularly ill-suited to benefit from any attempted foreclosure. To be successful, a foreclosure strategy must competitively cripple the rival networks, because only then could the integrated firm hope to gain market power over other programming distributors.[151] Where several networks compete with the MSO's affiliated network, simply disabling one or two will not do the job, because the surviving rivals would still constrain the rates the affiliated network could charge to other MSOs. As Professor Ordover explains, given the number of programming networks that are in the same "space" as the networks affiliated with AT&T Comcast and the strength of these networks' programmers (many of which are aligned with major media/content providers, like Disney, Viacom, and AOL Time Warner), there is simply no realistic prospect that AT&T Comcast could adequately drive out – and keep out – sufficient numbers of rival programmers such that it could gain power in the programming market.[152]

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150 *See* Ordover Declaration ¶ 63.

151 *See id.* ¶ 64.

152 *See id.* SBC's suggestion that AT&T Comcast would have incentives to attempt foreclosure for the benefit of networks with which it is *not* affiliated is even more ridiculous. *See* Gertner Declaration ¶¶ 20-23. As Professor Ordover explains, any such strategy would be unworkable for a host of reasons even beyond the many reasons catalogued above regarding why AT&T Comcast would have neither the ability nor incentive to foreclose for the benefit of its own affiliates. *See* Ordover Declaration ¶¶ 95-116.

In sum, when the relevant marketplace and company-specific facts are properly analyzed using established economic tools, it is obvious that AT&T Comcast will have neither the ability nor the incentive to exercise buyer market power in the purchase of video programming.

B. The Merger Will Not Harm Competition In Multichannel Video Programming Distribution

RCN, SBC and other commenters claim that AT&T Comcast will use control over video programming to impede MVPD competition. These claims are also baseless.[153]

Denial of Affiliated Programming. In addition to claiming that AT&T Comcast would exercise foreclosure power to give its programming affiliates a leg up in selling to other MVPDs, some commenters claim that AT&T Comcast would disable rival MVPDs by refusing to sell them that affiliated programming.[154] There would be no point,

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153 Comcast and AT&T Broadband provide services in different local markets and therefore the proposed merger will have no measurable impact on horizontal concentration in any relevant market. *See* Application at 65 & n.125. The Applicants have further analyzed the degree to which their respective systems overlap, and this analysis confirms that there are no franchise overlaps or cable system overbuilds between Comcast and AT&T Broadband's owned, operated, or consolidated systems. There are only twelve instances where Comcast and an AT&T Broadband non-consolidated affiliate hold franchises to serve the same geographic areas; within these franchise areas, there are only four areas where Comcast and an AT&T Broadband non-consolidated affiliate have overbuilds. In the aggregate, these overbuilds pass less than 700 homes. The Applicants have also further analyzed potential overlaps between Comcast systems and TWE-affiliated cable systems, although our information concerning the precise locations of the latter is somewhat limited. Based on the available information, the Applicants have now identified 22 instances where Comcast and a TWE-affiliated cable system hold franchises to serve the same geographic areas; within these franchise areas, there appear to be only six actual overbuilds between Comcast and TWE-affiliated systems. In aggregate, these six overbuilds pass approximately 21,000 homes. As explained in the Application and in Section III, the Applicants are firmly committed to divesting AT&T Broadband's interest in TWE.

154 *See* RCN Comments at 25-29; Gertner Declaration ¶ 43.

however, in gaining power in the video programming market in order to sell *less* programming.

As an initial matter, this refusal to sell programming claim is not plausible (or merger-specific) because the merger will not bring together significant programming assets. As Professor Ordover explains, a cable MSO that sought to use affiliated programming to raise rivals' costs would, at a minimum, need to control unique "must have" content. If there are viable substitutes for the MSO's programming (or low barriers to entry), the MSO wields only a "rubber knife" – the rival MVPD will substitute other programming, and the MSO's refusal to deal will have disadvantaged only its programming affiliate.[155] That is precisely the situation here, because each of the few AT&T Comcast-affiliated programming networks faces competition.[156] Even if that were not so, however, AT&T Comcast would have powerful incentives to sell its programming to other outlets. As the Commission has recognized, the costs of producing video programming are large, fixed and sunk,[157] and thus sales to additional MSOs flow straight to the bottom line.[158] That explains why the national networks in which AT&T Broadband and Comcast hold interests are, in fact, sold to both overbuilders and DBS providers, and the merger will do nothing to change that.[159]

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155 *See* Ordover Declaration ¶ 88.

156 *See id.* ¶ 87.

157 *Cable Rules Remand Notice* ¶¶ 15-16.

158 *See* Ordover Declaration ¶ 83 n.93.

159 Regional sports programming is no exception. As explained in detail in Section V.A.1, Comcast currently sells regional sports programming to RCN and other overbuilders. Further, many of the games of the teams featured on Comcast's regional sports networks are carried on local broadcast television stations, which rival MVPDs are

Moreover, AT&T Comcast will, as noted, have only fractional ownership interests in most of the networks at issue. The other owners would obviously have no interest in foregoing sales to advance AT&T Comcast's self interest.[160] In some instances, others actually control the operations of the network; in all instances, AT&T Comcast would risk fiduciary obligation challenges to any actions that benefited only its particular financial interests at the expense of other owners.

The commenters further speculate that the merged entity might some day have substantial programming interests and could possibly begin foreclosing competition at some unidentified point in the future. But the creation of new content would, of course, be procompetitive. Moreover, the Commission cannot base its merger review process on speculation about future possibilities and scenarios. Otherwise, any proposed merger, no matter how small the applicants' market shares, could be stopped simply on the basis of unfounded conjecture.

Denial of Unaffiliated Programming. RCN also claims that AT&T Comcast will deny overbuilders access to *un*affiliated programming.[161] According to this theory,

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free to carry. More comprehensive line-ups of games are available to rival MVPDs through packages available from the leagues. Of course, putting aside any obligations imposed by the program access rules (which are discussed in Section V.A below), there are entirely legitimate and pro-competitive reasons why a vertically-integrated MSO might choose not to distribute certain programming to rivals. For example, such a decision might enhance product differentiation and "inter-brand" competition. Or the decision might simply be the result of the parties' inability to agree on appropriate terms of carriage. In any event, it is not inconsistent with the antitrust laws, which acknowledge the "long-recognized right" of a business "freely to exercise [its] own independent discretion as to parties with whom [it] will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919).

[160] *See* Ordover Declaration ¶ 94.

[161] RCN Comments at 29.

AT&T Comcast will demand that a network not sell to a rival overbuilder as a condition to gaining carriage on AT&T Comcast systems. And because AT&T Comcast will be large, this theory goes, programmers will have no choice but to accede to such demands.

As an initial matter, the Communications Act expressly precludes a cable operator from "coercing a video programming vendor to provide, and from retaliating against such a vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system."[162] In addition, AT&T Comcast would have no *ability* to coerce exclusive arrangements. As noted, a network has strong incentives to sell its programming as broadly as possible. Thus, no network would simply give in to a demand to refuse to sell programming to an overbuilder unless it believed that the MSO's threat to exclude it was credible (and that the costs of exclusion were greater than the profits foregone by agreeing to the exclusive).[163]

But for all of the reasons explained above – including that AT&T Comcast will not be sufficiently large to "make or break" any network and that DBS and other competition makes it suicidal to refuse to carry programming that customers want – AT&T Comcast plainly could *not* credibly threaten to turn away desirable programming. Indeed, both AT&T Comcast and the unaffiliated network would be fully aware that any such refusal would be followed by aggressive marketing campaigns by DBS providers and cable overbuilders to ensure that customers are aware that they carry the popular programming (and that AT&T Comcast does not).[164] And if the programming in

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162 47 U.S.C. § 536(a)(2).

163 *See* Ordover Declaration ¶¶ 99, 101.

164 *See*, *e.g.*, *supra* note 137.

question were not popular and competitively priced, AT&T Comcast would have no particular incentive to seek exclusivity and the overbuilder would hardly be disadvantaged by losing the "opportunity" to carry it.[165]

Denial of Access to HITS. Lastly, SBC and ACA contend that AT&T Comcast might disable overbuilders by refusing to sell them its "Headend in the Sky" (or "HITS") service.[166] HITS is a wholly-owned subsidiary of AT&T Broadband that aggregates and transmits digital video programming via satellite to cable operators and other MVPDs, which in turn transmit that content to their own subscribers.[167] In order to provide this service, HITS obtains the rights from programming networks (primarily networks that are not affiliated with either AT&T Broadband or Comcast) to multiplex and "uplink" their content to leased satellite transponders for transmission to the headends of MVPDs that purchase the HITS service (and that have separately contracted with each of the network owners for the rights to distribute the programming).[168] The HITS service relies entirely upon non-proprietary, off-the-shelf equipment and processes.[169]

SBC contends that it recently attempted to purchase service from WSNet, a company that receives digital programming from HITS and others and "resells" it,

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165 Furthermore, because many networks are themselves owned by large cable operators, those vertically integrated firms could respond in kind to an AT&T Comcast threat by threatening not to carry AT&T Comcast-affiliated programming. *See* Ordover Declaration ¶ 101. In addition, it is well established that exclusive agreements may be pro-competitive and efficiency enhancing. *See generally Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

166 *See* SBC Comments at 13-14; ACA Comments at 7-10.

167 *See* Braden Declaration ¶ 14.

168 *Id.*

169 *Id.* ¶ 16.

primarily to MVPDs that serve multiple dwelling units ("MDUs"). SBC claims that WSNet refused SBC's request, citing a provision in the WSNet contract with HITS that limits WSNet's ability to resell HITS content in AT&T Broadband's service areas.[170] Based on this one incident, SBC assumes both that the HITS service will be unavailable to overbuilders in the Comcast service territories after the merger, and that HITS service is an essential input to a competitive digital programming service. Neither of those assumptions is true.

The HITS-WSNet agreement – which lasts until June 2006, "expressly allows WSNet to sell HITS programming to *any* cable overbuilder in any *Comcast* territory."[171] The resale limitation in the HITS contract with WSNet applies only to pre-merger AT&T Broadband service areas (and only to non-MDU providers).[172] Any concern about *that* limitation – and, as explained below, there should be none – is therefore not merger-specific.[173]

More broadly, overbuilders in both AT&T Broadband and Comcast territories can today, and post-merger, purchase service *directly* from HITS. AT&T Broadband has an existing contract with the National Cable Television Cooperative ("NCTC") that allows any NCTC member (and NCTC admits overbuilders as members) to obtain the HITS service regardless of the territory served by the NCTC member, and several overbuilders

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170 *See* SBC Comments at 24-25.

171 *See* Braden Declaration ¶ 23.

172 *See id.*

173 *See* Ordover Declaration ¶¶ 114-116.

do, in fact, subscribe to HITS and provide cable services in both AT&T Broadband and Comcast service areas.[174]

Most fundamentally, HITS is in no sense a "bottleneck" input for the distribution of digital cable programming. The MVPDs that purchase the HITS service account for less than a quarter of all digital MVPD subscribers.[175] Many MVPDs obtain their satellite-delivered digital programming directly from the owners of that programming (virtually all of whom now offer such "direct feeds").[176] Others either self-provide (by leasing their own satellite transponders) or turn to one of the other HITS-like services.[177] There are benefits and costs to each approach. For example, direct feeds allow an MVPD to design its own customized digital channel line-up, while this is not technically possible with HITS.

SBC contends that the advantages of HITS are overwhelming because the headend set-up costs associated with a HITS subscription can cost almost $500,000 less than the cost of some undisclosed alternative.[178] SBC provides no support for or explanation of its figures and no such generalization can be made, because the relative costs will depend upon each MVPD's preferences and circumstances.[179] SBC ignores that HITS charges per-subscriber transmission fees that direct feed recipients do not pay.

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174 *See* Braden Declaration ¶ 24.

175 *See id.* ¶ 19.

176 *See id.* ¶¶ 25-26.

177 *See id.*

178 SBC Comments at 13.

179 *See* Braden Declaration ¶¶ 27-28.

And the relative fixed costs will depend upon the individual MVPD's programming choices. An MVPD that chooses popular digital programming from large, established providers like Disney, AOL Time Warner and Viacom, or from independent transmission cooperatives that have existing compressed multiplexed digital programming packages may not, in fact, incur substantially high fixed costs compared to a HITS subscription.[180] That explains why MVPDs that serve more than 75% of all digital MVPD customers (including a number of overbuilders) do not subscribe to HITS. And it is clear, for example, that SBC could negotiate directly with: (1) HITS; (2) individual programmers for distribution by satellite, fiber, or some other method; (3) WSNet for satellite distribution of programming WSNet provides independent of HITS; or (4) other distributors of VOD, pay-per-view, specialty, and other digital programming, such as TVN or OlympuSAT.[181]

Finally, ACA has expressed concern about continued access by smaller cable systems serving rural markets and their customers to digital programming provided via HITS.[182] In fact, HITS has entered into several long-term contracts with a number of such cable systems. The parties intend to continue to provide this service to such cable systems for the foreseeable future, to honor all existing service contracts, and to

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180 *See id.*

181 *See* TVN Entertainment Corp., *TVN Corporate History* (last visited May 10, 2002), *available at*: <http://www.tvn.com/tvnfinaltmp/corporatehistory.html> (describing TVN service); OlympuSAT, *Overview* (last visited May 10, 2002), *available at*: <http://www.olympusat.com/overview-frame.html> (describing OlympuSAT service).

182 *See* ACA Comments at 10.

communicate in advance to HITS customers any substantial changes in the service relationship.[183]

C. The Merger Will Have No Anticompetitive Effects Relating To Set-Top Boxes, Cable Modems, Or Related MVPD Equipment Or Software

As explained in the Application, the merger will not increase the incentive or ability of the combined company to exercise market power in the purchasing or deployment of set-top boxes, cable modems, or related MVPD equipment or software.[184] None of the commenters seriously contests this conclusion. It is undisputed that the market for MVPD equipment and related software is global and that AT&T Comcast's combined purchases of these products will account for only a small fraction of any relevant market. Even within the United States, AT&T Comcast will serve less than 30% of MVPD subscribers, and with that share (or even a significantly higher share), it would not be able to exercise market power even if the international scope of this business were wholly ignored.

Since they are unable to demonstrate that the merger will create or enhance market power in the purchasing of MVPD equipment or software, several commenters attempt to derail or impose conditions on the merger by seeking to invoke the specter of

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183 Moreover, contrary to SBC's and ACA's claims, the merged entity's size, programming interests, and HITS' ownership interest will not give it the incentive or ability to act anticompetitively in the program distribution marketplace. This issue is discussed at greater length earlier in this section, but it is worth noting that the collection of interests referenced by SBC and ACA is actually *less* substantial in this merger than was the case in the AT&T-MediaOne merger. In particular, while the relative share of the MVPD market and the HITS interest are roughly equivalent in the two mergers, the programming interests are significantly less in this merger in light of AT&T's divestiture of Liberty Media and other programming interests.

184 Application at 78-83.

Microsoft gaining "control" over set-top box middleware. They also raise issues relating to the future technical development and retail sales of set-top boxes. As explained below, however, the merger will have no anticompetitive consequences relating to MVPD equipment or software.

1. Microsoft's Alleged Influence with AT&T Comcast

Several commenters suggest that Microsoft will have an undue influence over AT&T Comcast and will use this influence to "control set-top software" and "dictate the terms on which set-top boxes will operate."[185] This claim is without merit for several reasons.

First, the claim is not merger-specific. Microsoft is not investing additional money in connection with the transaction, but is instead converting its existing QUIPS investment in AT&T Corp. to an investment in AT&T Comcast common stock. Accordingly, there is no reason to believe that the merger will in any way enhance Microsoft's influence over the combined company.

Second, Microsoft's equity interest in AT&T Comcast will not give it the ability to control or influence AT&T Comcast. As explained in the Application, Microsoft will own approximately 5% of AT&T Comcast's economic interest, but *less* than 5% of AT&T Comcast's voting power.[186] Sural LLC, which is controlled by Comcast President Brian L. Roberts, will control a non-dilutable 33% share of AT&T Comcast's voting power upon completion of the transaction.

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185 SBC Comments at 24; CFA Comments at 25-26.

186 Application at 8.

Third, as explained in the Declaration of Mark Coblitz ("Coblitz Declaration"), Senior Vice President for Strategic Planning, Comcast, attached as Appendix 6, "AT&T Comcast will have a powerful incentive to avoid becoming dependent upon a single software vendor for the operating systems or middleware used on set-top boxes."[187] Simply put, it is clearly not in AT&T Comcast's self-interest to help any software vendor obtain market power relating to set-top box software. Such market power would only serve to add profits to the software company at the expense of the cable industry and cable customers. As Mr. Coblitz notes, "[f]or this reason, Comcast has historically insisted on working with at least two vendors in most product areas."[188]

Indeed, history confirms that AT&T Broadband and Comcast have not allowed themselves to be dominated by Microsoft despite the fact that Microsoft has made substantial investments in both companies at various times. Significantly, neither AT&T Broadband nor Comcast currently use Microsoft software for their set-top boxes, but instead each uses the software of other vendors.[189] Furthermore, as explained in the Application, Comcast's term sheet agreement with Microsoft regarding Microsoft's interactive TV middleware is specifically designed to *prevent* Microsoft from exercising control over Comcast.[190] Comcast has deliberately preserved its ability to test and deploy

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187 Coblitz Declaration ¶ 6.

188 *See id.* ¶ 7.

189 *Id.;* Braden Declaration ¶ 29.

190 *See* Application at 87. In particular, the obligation to use Microsoft middleware is dependent upon successful trial results and other significant conditions. Additionally, Comcast will not have any obligation to deploy Microsoft's middleware commercially unless the deployment *either* meets Comcast Cable's reasonable business objectives *or* Comcast Cable deploys an alternative middleware solution for the current generation of set-top boxes. In either case Microsoft's product must be competitive with alternative

alternative set-top box middleware, and has not – and will not – allow Microsoft to control Comcast's decision-making concerning the optimal middleware solution for current or future set-top boxes.

2. Microsoft and CableLabs

SBC claims that Microsoft may use its influence with AT&T Comcast to control or improperly influence CableLabs, a cable industry consortium dedicated to facilitating the development of new technologies for the cable industry.[191] This claim is plainly not merger specific for the same reason discussed above: Microsoft is not making any additional investment, but merely converting an existing investment. In addition, there is no reason to believe that Microsoft will be able to influence CableLabs improperly.

Among other things, CableLabs works "to develop common specifications for cable-related hardware and software so that these products can be sold to consumers across the United States and used on different cable systems."[192] Further, every major cable company (with the exception of Cablevision) is represented on the board of CableLabs.[193] Even assuming *arguendo* that the merger would somehow give Microsoft the ability to control AT&T Comcast – which it will not – the merger would still not give Microsoft the ability to control CableLabs because "[a]s a practical matter all major

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middleware solutions. Moreover, Comcast Cable does not have any obligation to deploy Microsoft middleware in more than 25% of its newly installed middleware customer base, and the agreement does not apply to future generations of set-top boxes and middleware. Coblitz Declaration ¶ 8.

191 *See* SBC Comments at 24-25.

192 Coblitz Declaration ¶ 10.

193 *Id.*

CableLabs decisions are arrived at by consensus."[194] As Mr. Coblitz explains, this consensus approach is used "because the basic purpose of CableLabs would be undermined if its members adopted different technical specifications for their individual systems."[195]

Ironically, the August 18, 2000 e-mail from Bill Gates quoted by SBC actually undermines SBC's argument that Microsoft will be able to dominate CableLabs and supports the opposite conclusion.[196] The e-mail states that Bill Gates understood that he "had convinced Comcast, AT&T and others to make it clear that all CableLabs should do is OS [operating system] interop [interoperability]," and notes that he would be "stunned if this is going the other way without my hearing about it."[197] SBC ignores, however, the fact that CableLabs *rejected* Microsoft's position. Instead, CableLabs, with the support of AT&T Broadband and Comcast, adopted "a technical standard for set-top box software that will allow both the operating system software and the middleware to be interoperable with alternative software combinations."[198] The key element of this approach to set-top box software was "the adoption of common application program interfaces ("APIs") that allow any software company to write software that will function with different operating systems or middleware."[199] In fact, this "modular approach" to

194 *Id.* ¶ 11.

195 *Id.*

196 *See* SBC Comments at 25.

197 *See id.* (citation omitted).

198 Coblitz Declaration ¶ 12.

199 *Id.*

operating systems and middleware was adopted for the express purpose of fostering competition among software companies and avoiding the risk of creating a monopoly for operating systems or middleware.[200]

Moreover, the specifications that CableLabs has promulgated for the next generation of set-top boxes (advanced set-top boxes) "will require middleware vendors to incorporate Java software code into their middleware."[201] Java is produced by Sun Microsystems, which is one of Microsoft's most vigorous competitors. Significantly, as Mr. Coblitz notes, "CableLabs considered, but rejected, Microsoft's alternative solution."[202] Accordingly, there is no basis whatsoever to conclude that, as a result of this merger or otherwise, Microsoft will gain improper influence over CableLabs.[203]

3. Microsoft and DSL

SBC also suggests that Microsoft may take various steps to benefit AT&T Comcast against DSL competitors, such as designing set-top box operating software "to

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200 *Id.*

201 *Id.* ¶ 13.

202 *Id.*

203 SBC's discussion of Microsoft's "investment" in Time Warner only serves to illustrate the speculative and fallacious nature of SBC's argument concerning Microsoft. SBC Comments at 24. First, SBC's argument is factually inaccurate. While Microsoft invested approximately $212 million in Time Warner's Road Runner service, AOL Time Warner repurchased this investment from Microsoft after the AOL-Time Warner merger. *See Time Warner Chases Road Runner*, InternetNews.com/ISP News (Dec. 18, 2000), *available at:* <http://www.internetnews.com/isp-news/article/0,,8_538241,00.html> (discussing Time Warner's decision to buy out Microsoft's interest in Road Runner following the approval of the AOL-Time Warner merger). Second, AOL Time Warner and Microsoft are vigorous competitors, and Microsoft clearly does not control AOL Time Warner's decision-making process. Since AOL Time Warner will be the second largest cable company after the merger, SBC's argument concerning Time Warner only serves to highlight the fact that AOL Time Warner would be an effective counterweight to any influence that Microsoft could theoretically exert over CableLabs.

advantage cable operators at the expense of DSL."[204] This claim is implausible. SBC never even attempts to explain why the merger would make Microsoft more likely to engage in this type of conduct. In any event, it is clear that – just as AT&T Comcast and CableLabs will continue to have a powerful interest in avoiding dependence on a single vendor for software – Microsoft will have an equally powerful incentive to look after its own self interest and not to favor cable Internet service over DSL. Put another way, Microsoft's primary interest will clearly be to disseminate its own software as widely as possible to both cable Internet subscribers *and* DSL subscribers.[205]

Similarly, to the extent that Microsoft becomes heavily involved in the creation of broadband content, it would not have an incentive to favor one technology over another by, for example, making interactive triggers that can only be used by cable Internet subscribers. To the contrary, Microsoft will have an incentive to make its broadband content as accessible as possible to both cable Internet subscribers and DSL subscribers in order to maximize the distribution of its broadband content.

SBC's argument that Microsoft may attempt to disadvantage DSL also ignores Microsoft's actual behavior. Significantly, despite Microsoft's investments in various cable companies, Microsoft's ISP service (MSN) currently promotes DSL service to

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204 SBC Comments at 25.

205 Mr. Gates frequently makes clear Microsoft's intention to be "agnostic," supplying tools that are equally useful regardless of hardware or distribution technology. *See, e.g.,* Keynote Presentation by Bill Gates, CEO Summit (May 23, 2001), *available at:* <http://www.microsoft.com/billgates/speeches/2001/05-23ceosummit.asp>. Microsoft's behavior does not reflect favoritism of cable Internet services over DSL. *See, e.g.,* Press Release, *Microsoft and Qwest Communications Form Strategic Alliance To Deliver Broadband Content, Services to Mainstream Consumers And Accelerate Deployment of DSL* (Apr. 26, 2001), *available at:* <http://www.microsoft.com/PressPass/press/2001/Apr01/04-26QwestPR.asp>.

subscribers who are interested in broadband and does not promote cable Internet service.[206] Clearly, if Microsoft were intent on using its services to disadvantage DSL providers, it would not be featuring DSL as a broadband solution on MSN.

4. Set-Top Box Development

SBC contends that set-top boxes that permit the integration of video and broadband services "are less likely to get developed if the cable companies persuade the leading manufacturers not to produce DSL-compatible boxes in exchange for cable companies' business."[207] This argument is flawed for several reasons.

First, SBC's argument does not relate to the merger. AT&T Comcast will need to purchase set-top boxes for the same share of MVPD subscribers as AT&T Broadband and Comcast would purchase in the absence of the merger.

Second, SBC's argument incorrectly assumes that the major cable companies could lock up all of the production capacity of the companies that are capable of producing set-top boxes. For the reasons explained in the Application, this would not be possible.[208] There is nothing inherently special about set-top boxes as opposed to other types of consumer electronic equipment. They can be produced in the United States, Japan, Taiwan, Europe and other places and shipped to the United States or elsewhere. The market for set-top boxes, like the market for cable modems and other types of consumer electronics, is truly global, and AT&T Comcast purchases will only account for a small fraction of this global marketplace. Accordingly, AT&T Comcast – with or

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206 *See* MSN Resource Center: Broadband (last visited May 19, 2002), *available at:* <http://resourcecenter.msn.com/access/broadband/default.asp>.

207 SBC Comments at 26.

208 Application at 78-81.

without the rest of the U.S. cable industry – would not be able to deprive DSL providers of access to DSL compatible set-top boxes by locking up their potential sources of supply.

Third, point of deployment ("POD") technology that has already been developed "permits the function of controlling access to premium cable services to be separated from the remaining functionality of the set-top box."[209] A manufacturer could make a set-top box that uses POD technology to access video programming and uses DSL technology for broadband services.[210]

5. Retail Sales of Set-Top Boxes

CFA suggests that the merger might impact the developing retail market for set-top boxes.[211] In fact, there is no reason to believe that the merger will have any impact at all on the development of a retail market for set-top boxes. Instead, AT&T Comcast (along with the entire cable industry) will continue to have a compelling incentive to encourage the retail sale of set-top boxes. This is so because, as Mr. Coblitz observes, "DBS is well established in the retail set-top box market and currently captures the vast majority of new subscribers interested in purchasing their set-top box equipment."[212] After the merger, AT&T Comcast would have the same interest that AT&T Broadband and Comcast currently have in fostering the development of a retail market for set-top boxes to compete with DBS.

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209 Coblitz Declaration ¶ 14.

210 *Id.*

211 CFA Comments at 25-26.

212 Coblitz Declaration ¶ 15.

Indeed, as explained in the Application, AT&T Broadband, Comcast and the other members of CableLabs have actively supported retail sales of set-top boxes by promulgating the OpenCable Application Platform ("OCAP") standards.[213] As Mr. Coblitz notes, "[e]quipment manufacturers are currently developing set-top boxes that can comply with OCAP specifications. These set-top boxes will be able to be either rented to subscribers or sold at retail (using POD technology)."[214] Moreover, television manufacturers are currently exploring the possibility of integrating set-top box functionality into televisions themselves, which promises to create "a whole new dimension of competition in retail set-top box sales."[215] The parties expect that these promising developments will continue after the merger is consummated.

D. The Merger Will Not Harm Competition In The Provision Of Broadband Internet Services

Various commenters contend that the proposed merger will adversely affect competition in the ill-defined "broadband market" or the "broadband mass market."[216] These claims are entirely speculative and baseless. Starting in the mid-1990s, AT&T Broadband and Comcast invested enormous sums and took substantial risks in order to create an entirely new product – cable Internet service – that gave consumers a high-speed alternative to the dial-up Internet services offered over the facilities of incumbent

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213 Application at 82-83.

214 Coblitz Declaration ¶ 16.

215 *Id.* Television manufacturers currently offer television sets with DirecTV already integrated.

216 *See, e.g.*, SBC Comments at 15 (alternatively referring to the "mass market for broadband services," the "broadband market," and the "mass market for broadband Internet access").

local telephone companies. The deployment of cable Internet services spurred the incumbent LECs to accelerate their deployment of DSL-based high-speed alternatives. The result was an explosion of competition and creativity that benefited consumers and the national economy.[217] The proposed merger will permit these pro-competitive developments to continue by facilitating the continued roll-out of broadband services to consumers.[218] Moreover, as explained below, the merger will not provide any incentive or ability for AT&T Broadband and Comcast to impede competition in the provision of any Internet or broadband services.

1. Factual Background

The commenters' theories of competitive harm relating to Internet issues are, in most cases, completely speculative and lack any empirical basis. Before examining these theories in detail, the parties would like to set the record straight about the Internet services they offer subscribers.

AT&T Broadband and Comcast Have Not Limited the Distribution of Internet Content to Rival Platforms. As set forth in the Coblitz Declaration, the arrangements between content providers on the one hand and cable Internet operators (like Comcast and AT&T Broadband) on the other have been essentially distribution and marketing arrangements.[219] The cable operator agrees with the content owner to display the content (or a link to it) on its web site, where it is likely to be seen by web users.[220] Comcast and

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217 *See supra* note 34.

218 *See* Application at 29-35.

219 Coblitz Declaration ¶ 23.

220 *Id.*

AT&T Broadband have not foreclosed consumers who subscribe to competing ISP services from access to this content. Customers of competing ISPs can easily access the "home page" portals of AT&T Broadband and Comcast and view the content displayed there simply by typing the URL for those portals (www.comcast.net for Comcast or www.attworldnet.com for AT&T Broadband).[221] Alternatively, these consumers can simply go directly to the content owners' own websites.

AT&T Broadband and Comcast Customers May Access All Internet Content. Consumers who subscribe to the high-speed cable Internet services offered by Comcast and AT&T Broadband are able to access any content they wish on the Internet, and there are strong market incentives to continue this policy.[222] Indeed, subscribers can even select an alternative homepage (such as Yahoo or AOL) and never view the content offered by Comcast or AT&T Broadband at all. Even if customers keep the AT&T Broadband or Comcast portal as a home page, they can simply type in an alternative URL and go to that location on the Internet (or save it in their "favorites" folder and return there with one click). Neither Comcast nor AT&T Broadband impose any time limits on streaming videos.[223] Accordingly, SBC is simply wrong and reckless in claiming that

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221 *Id.* ¶ 26.

222 *Id.* ¶ 27.

223 *See id.*; *see also* Comcast Acceptable Use Policy (last visited May 11, 2002), *available at:* <http://comcast.comcastonline.com/memberservices/aup/default.asp>; AT&T Broadband Terms & Conditions (last visited May 11, 2002), *available at:* <http://www.attbi.com/general-info/policies.html>. At an earlier point in the development of cable modem technology, At Home announced a 10-minute limit on streaming video for the entirely legitimate reason of bandwidth management. *See* Declaration of Milo Medin ¶ 22 (Sept. 17, 1999) (attached as Appendix K to Reply Comments of AT&T Corp. and MediaOne Group, CS Docket No. 99-251) ("Video 'streaming' traffic is notorious for causing congestion on the Internet. Limitations on video streaming make perfect sense in light of the bandwidth-intensive characteristics of

AT&T Broadband and Comcast have a "demonstrated proclivity to discriminate in favor of their own Internet content."[224]

AT&T Broadband and Comcast Have Virtually No Interests in "Broadband Content." Some commenters allege that AT&T Comcast will "foreclose" competitors from access to "broadband content" that is critical to them.[225] Yet AT&T Broadband has no investments in companies that create or license broadband content and Comcast has truly minor "broadband content" investments. (Comcast owns a 3% interest in a start-up Internet Video-on-Demand company called Intertainer, which could arguably be said to provide "broadband content."[226])

Most subscribers to AT&T Broadband and Comcast's cable ISP services use these services to access traditional "narrowband" content – such as news, stock quotes, chat rooms, and the like – not content that is customized in any way for "broadband."[227] AT&T Broadband and Comcast obtain the portal content from widely known Internet

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such traffic because they help ensure the ability of Excite@Home and its cable partners to manage bandwidth use."). As noted, AT&T Broadband and Comcast have not adopted any such limit.

224 SBC Comments at 17.

225 *See* CFA Comments at 1, 15-16; Verizon Comments at 4, 8-9; Qwest Comments at 14; SBC Comments at 15-16.

226 Coblitz Declaration ¶ 24. Qwest has also invested in Intertainer. For their part, the RBOCs have invested in developing their own broadband content. For example, "[t]hrough internal organization, partnerships, acquisitions and its subsidiaries, ... SBC is working to deliver a variety of applications and content to add value and new capabilities for businesses and consumers." *Data Capabilities* (last visited May 15, 2002), *available at:* <http://www.sbc.com/ data_capabilities/0,5931,1,00.html>.

227 Coblitz Declaration ¶ 25.

content aggregators (such as Screaming Media) on a non-exclusive basis.[228] A visit to Comcast's portal (www.comcast.net) or its local interest website (www.quickclicks.tv) will show that virtually no customized "broadband content" is available there. And AT&T Broadband currently uses the same portal (www.attworldnet.com) that AT&T Corp. makes available to its dial-up customers. Accordingly, the many references in the comments to the "broadband content market" are at best premature and misleading. The claim by SBC that "a combined AT&T/Comcast would have substantial interests in Internet content" is flatly wrong.[229]

DSL and Other High-Speed Services Are Growing Rapidly and Compete Fiercely With AT&T Broadband and Comcast. DSL and other broadband technologies, such as satellite and fixed wireless, continue to grow rapidly and compete vigorously with cable companies such as AT&T Broadband and Comcast in broadband deployment. One recent market survey concluded that for 2002, "[y]ear-to-year growth rates for cable and DSL were nearly identical, with cable showing a 78% growth in subscribers, and DSL growing by 79%."[230] First-quarter 2002 announcements from each of the RBOCs

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228 *Id.* This is in sharp contrast to the situation analyzed in the AOL-Time Warner merger. *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. to AOL Time Warner, Inc.,* 16 FCC Rcd 6547, ¶ 54 (2001) ("*AOL-TW Merger Order*") ("AOL would have a unique concentration of assets (vast narrowband membership and the product that has created it, access to Time Warner cable systems, and extensive Time Warner content assets) that could well give it sufficient power to bargain its way onto all other platforms (indeed at preferential terms) without any change in government regulation.").

229 *Compare* SBC Comments at 16, *with* Coblitz Declaration ¶ 24.

230 *See* Press Release, Leitchman Research Group, *Leading Broadband Internet Providers Reach Nearly 12 Million Subscribers in the U.S.* (May 3, 2002), *available at:* <http://www.leichtmanresearch.com/press/0503release.html>; *see also* Coblitz Declaration ¶ 22 (DSL providers are "tenacious competitors").

confirm this growth and belie claims that the broadband business is on the verge of "tipping" definitively to cable:

- Verizon announced "strong growth" in its DSL business in the first quarter of 2002, including an additional 150,000 new DSL lines in the first quarter, for a total of 1.35 million lines – an 88 percent year-over-year increase.[231]

- BellSouth announced that it had added 108,000 DSL customers in the first quarter of 2002, for a total of 729,000 DSL customers, an annual growth rate of 141 percent.[232]

- SBC announced that it had added 183,000 DSL subscribers in the first quarter of 2002, which was "SBC's strongest quarterly growth in the past 12 months" and brought SBC's total number of DSL lines to approximately 1.5 million DSL lines, up 59 percent from year-earlier levels.[233]

- Qwest announced that its total DSL customers, including in-region and out-of-region DSL customers, increased to 484,000 at the end of the first quarter 2002, a 58 percent increase from the same period of 2001.[234]

Moreover, broadband competitors continue to seek out alliances and partnerships with Internet content providers and each other. SBC, for example, has secured "Yahoo!'s commitment to DSL as its preferred broadband solution,"[235] announcing in November

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[231] *See* Press Release, *Verizon Reports Solid First-Quarter Adjusted EPS Of 72 Cents in Challenging Economic Environment – 2002 Outlook Updated* (Apr. 23, 2002), *available at:* <http://newscenter.verizon.com/proactive/newsroom/release.vtml?id=74354>.

[232] *See* Press Release, *BellSouth Reports First Quarter Earnings* (Apr. 19, 2002), *available at:* <http://bellsouthcorp.com/proactive/newsroom/release.vtml?id=40063>.

[233] *See* Press Release, *SBC First-Quarter Earnings of $0.51 Per Diluted Share at Top End of Target Range Provided by Company In January* (Apr. 18, 2002), *available at:* <http://www.sbc.com/press_room/1,5932,31,00.html?query=20020418-1>.

[234] *See* Press Release, *Qwest Communications Reports First Quarter 2002 Results* (Apr. 30, 2002), *available at:* <http://www.qwest.com/about/media/pressroom/1,1720, 984_archive,00.html>.

[235] SBC Investor Briefing at 5 (Apr. 18, 2002), *available at*: <http://www.sbc.com/ Investor/Financial/Earning_Info/docs/1Q_02_IB_FINAL.pdf> ("*SBC Investor Briefing*").

2001 a "strategic alliance" with Yahoo "[p]airing the strengths of the No. 1 global Internet destination with the nation's leading DSL Internet provider."[236] In April 2002, SBC announced a "strategic marketing alliance" with EchoStar to "combine EchoStar's DISH Network digital satellite television offerings with SBC's broadband DSL Internet access service to provide consumers with a convenient and competitively priced alternative to cable."[237] And by June 3, 2002, Qwest will migrate all of its DSL subscribers to MSN Broadband unless the subscribers affirmatively choose another ISP.[238]

To the extent that the ILECs lag cable in the broadband business, they have no one to blame but themselves. As the Commission staff has noted, the ILECs had DSL technology for nearly a decade, but did not roll out this technology until they faced competition from high-speed cable Internet service.[239]

2. Market Definition

Most of the comments appear to proceed upon the assumption that there are two Internet-related markets potentially affected by the transaction: (i) the "broadband access market" and (ii) the "broadband content market." The alleged broadband access market apparently includes those firms that provide consumers with a high-speed connection to

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236 *See* Press Release, *SBC, Yahoo! Announce Landmark Strategic Alliance* (Nov. 14, 2001), *available at:* <http://www.sbc.com/press_room/1,5932,31,00.html?query=20011114-1>.

237 *See* Press Release, *SBC, EchoStar Announce Strategic Marketing Alliance* (Apr. 17, 2002), *available at:* <http://www.sbc.com/press_room/1,5932,31,00.html?query=20020417-1>.

238 *See MSN Migration Schedule Update* (last visited May 15, 2002), *available at*: <http://www.qwest.net/nav4/msn/faq.html> ("*MSN Migration FAQ*").

239 *See supra* note 34.

the Internet, while the alleged broadband content market apparently includes suppliers of Internet content that is "customized" or "optimized" in some way for viewing over a broadband connection. None of the commenters present economic or other evidence to establish that these are relevant markets for any purposes. As explained below, there are good reasons to conclude that broadband access and broadband content are not relevant markets for the purposes of competitive effects analysis.

First, with respect to the so-called "broadband access market," the parties have previously stated that there is no separate market for high-speed Internet services and that broadband access providers compete with dial-up narrowband providers.[240] As explained in the Coblitz Declaration, Comcast views dial-up "narrowband" access providers as competitors and implements competitive strategies and programs (i) to persuade narrowband customers to switch to broadband and (ii) to convince broadband customers not to switch back to narrowband.[241] Nevertheless, as explained below, even assuming that "broadband access" (or "high-speed access") is a relevant market, the commenters advance no plausible theories of competitive harm in this market. Accordingly, the Commission need not, for the purposes of this proceeding, determine definitively whether broadband access and narrowband access are part of the same relevant market.

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240 Application at 91 & n.191. In connection with the AOL-Time Warner merger, the Commission concluded that there was a market for "high-speed Internet access services," as distinct from "narrowband" services. *See AOL-TW Merger Order* ¶ 69. The Commission also noted, however, that "we recognize that the exercise of defining relevant markets is inherently dynamic, reflecting ongoing changes in the costs of providing various services and in the tastes and preferences of consumers. It would be particularly appropriate to revisit issues of market definition in a period of rapid technological change and service convergence, as the factual predicates underlying a market definition in one proceeding may no longer be valid at the time of another proceeding." *Id.* ¶ 69 n.202.

241 Coblitz Declaration ¶ 21.

Second, the commenters also present no evidence to support the contention that there is a separate "broadband content" market. As noted above, there is precious little content available today that can be classified as broadband content.[242] While such content may emerge over time (and it is in the interest of AT&T Comcast for such content to emerge), it is unlikely that such a market exists today. In any event, as described below, the Commission need not determine whether such a market exists, because – even if such a market were found to exist – the commenters present no plausible theory of competitive harm in this market.[243]

It should also be noted that, irrespective of how the relevant markets are precisely defined, AT&T Broadband and Comcast do not compete in the provision of Internet services to consumers, so – as one of the commenters concedes – "the merger would eliminate little or no actual competition."[244] AT&T Broadband and Comcast also do not compete in the creation of broadband Internet "content." Instead, both companies obtain most of their Internet content (such as it is) from third-party aggregators. Accordingly, the merger raises no traditional horizontal competitive issues in the alleged markets for

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242 One of the commenter's economists concedes that "relatively little content designed specifically for residential broadband users exists today." *See* Gertner Declaration ¶ 15.

243 In fact, it is far from clear that broadband access and broadband content constitute separate product markets. The Commission, for example, has referred to cable Internet service (which the Commission chooses to call "cable modem service") as including "many and sometimes all of the functions made available through dial-up Internet access service, including content, e-mail accounts, access to news groups, the ability to create a personal web page, and the ability to retrieve information from the Internet, including access to the World Wide Web." *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, ¶ 10 (2002) (footnotes omitted) ("*Internet Over Cable Inquiry*"); *see id.* ¶ 11.

244 *See* SBC Comments at i; *see also* Carlton Declaration ¶ 4.

broadband Internet access or broadband content. The so-called "monopsony" and "foreclosure" claims are addressed below.

3. "Monopsony Power"

Several commenters argue that the merger will create "monopsony power" over broadband content providers because AT&T Comcast will control a dominant portion of the broadband access market.[245] Moreover, most of the other arguments concerning "foreclosure" and "exclusive dealing" rest upon the assumption that the merger will create such monopsony power. As noted, monopsony power can only arise if, at a minimum, a buyer controls a significant portion of all purchases and the product in question has a finite supply at any given price.[246] Claims that this merger raises monopsony concerns are wrong for a number of reasons.

First, as noted above, the very concept of a "market" for the purchase of "broadband content" is speculative. Very little "broadband content" exists and the parties do not purchase broadband content in any meaningful volume.

Second, to the extent that the parties may purchase broadband content *in the future*, Comcast and AT&T Broadband would not compete with each other in such purchasing, with or without a merger. This is because broadband content, like video programming,[247] is a non-rivalrous product – *i.e.*, a content supplier can sell its broadband content to as many buyers as it wishes without exhausting the product. Put another way, when a firm purchases broadband content, there is no less such content

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245 *See* Qwest Comments at 9; Declaration of Robert W. Crandall ¶ 11 (Appendix B to Verizon Comments) ("Crandall Declaration"); HRS Declaration at 14.

246 *See* Ordover Declaration ¶ 25.

247 *See supra* Section IV.A.1.

available for other firms to purchase.[248] Thus, buyers do not compete with each other to buy content, and the merger will not eliminate competition among such buyers. Because of this characteristic, there is no reason to believe that a larger buyer of broadband content would have any more "market power" than a smaller buyer of broadband content.[249]

Third, AT&T Comcast will lack any ability to exercise buyer power over broadband content suppliers because these suppliers will have many other outlets for their product.[250] As several commenters concede, Comcast and AT&T's combined share of the "broadband access market" (if there is such a market) is only approximately 22.7%[251] – significantly less than the companies' combined share of the MVPD business and far too low to raise any monopsony concerns.[252] The post-merger Herfindahl-Hirschman

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248 *See* Shelanski Declaration ¶¶ 35-36.

249 *Id.* ¶ 36; Ordover Declaration ¶¶ 14, 26.

250 In this regard, Yahoo and MSN have already entered into broadband content distribution agreements with SBC and Qwest, respectively. *See SBC Investor Briefing* at 5; *MSN Migration FAQ*. SBC intends to introduce Yahoo's broadband-optimized content in the third quarter of this year. *SBC Investor Briefing* at 5. As noted above, unless Qwest DSL subscribers opt-out and affirmatively choose another ISP, Qwest will migrate them to MSN Broadband on June 3, 2002. *MSN Migration FAQ*.

251 *See* Verizon Comments at 9.

252 *See* Horizontal Merger Guidelines § 2.211 (merger unlikely to facilitate exercise of unilateral market power if merged firm has less than 35% of relevant market). Perhaps recognizing this flaw, one commenter argues that "the high fixed costs" of broadband content make widespread carriage "even more important for broadband-specific content" than for other Internet content. *See* Gertner Declaration ¶ 17. There is no reason to conclude that broadband content suppliers necessarily face high fixed costs, however. For example, to the extent that such suppliers are already engaged in the distribution of other content (such as music, videos, or movies), they can redeploy these assets at relatively little additional cost. *See* Shelanski Declaration ¶ 17; *see also supra* Section IV.A (discussing why less than a 30% share of MVPD subscribers poses no competitive threat in the production and packaging of video programming).

Index ("HHI") for the broadband access "market" would be approximately 1100 – at the low end of the range for "moderately concentrated" industry used by the Federal Trade Commission and Antitrust Division of the Department of Justice.[253]

Most importantly, as noted above, broadband content suppliers need not deal with *any* broadband access providers in order to distribute their content.[254] Instead, they can simply post their content on the Internet, which can be accessed directly by consumers by typing in the supplier's URL (or saving it to their "favorites" links). As noted, subscribers to Comcast and AT&T Broadband's Internet services have always been able to access the full range of Internet content directly – and, because customers can and do switch providers, AT&T Comcast will have every incentive to continue this policy post-merger. In such a setting, the producer can have a direct relationship with the customer, with the latter making the buying decision without any intermediary.

In addition, the most likely types of broadband content (*e.g.*, music, video, games) are currently distributed by a wide array of other media besides the Internet – including radio, television, video rental stores, and various other types of retail outlets. Accordingly, foreclosure of broadband Internet access would not necessarily result in foreclosure of broadband content. Put another way, the relevant market for the sale of broadband content is likely much broader than just Internet access providers.

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253 HHI is calculated by summing the squares of the individual market shares of all the participants in a given "relevant market." The FTC and the Antitrust Division divide the spectrum of market concentration as measured by HHI into three regions: (i) unconcentrated (HHI below 1000); (ii) moderately concentrated (HHI between 1000 and 1800); and highly concentrated (HHI above 1800). *See* Horizontal Merger Guidelines § 1.5.

254 In this regard, broadband content is "distinct from MVPD video content in that it can be sold directly to consumers and bypass the cable operator entirely." Shelanski Declaration ¶ 38.

Accordingly, it is difficult to see how AT&T Comcast will be able to "coerce" or "leverage" broadband content suppliers in any way.

Fourth, AT&T Comcast will have a significant incentive to encourage – not to suppress through the exercise of "monopsony power" – the development of broadband content. At present, the vast majority of Internet users subscribe to "narrowband" dial-up service as compared to high-speed broadband services.[255] The penetration rates for AT&T Broadband's and Comcast's broadband Internet services are quite modest (approximately 10% for AT&T Broadband and 9.2% for Comcast). In order to continue to drive this penetration rate up and persuade current narrowband consumers to switch to broadband, AT&T Comcast will want to encourage and facilitate the creation of diverse and compelling broadband content.[256] Indeed, if a supplier of broadband content were truly to develop a "killer app" – that is, a highly compelling application that would persuade many users to switch from narrowband to broadband – that supplier would have significant leverage over AT&T Comcast, not the other way around.[257]

For all of these reasons, the merger will not in any way create or facilitate the exercise of "monopsony power" by AT&T Comcast over broadband content suppliers.[258]

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[255] *See* Kinetic Resources, Cable Datacom News (last visited May 19, 2002), *available at:* <www.cabledatacomnews.com/cmic/cmic16.html> (estimating that there were 10.8 million residential broadband customers in the U.S. as of March 1, 2002).

[256] Coblitz Declaration ¶ 29.

[257] *See id.*; Shelanski Declaration ¶ 37 ("[A]ny broadband content so important as to drive Internet access providers to bargain to obtain it on specific terms, as opposed to simply letting customers find it on their own on the Internet, is likely to place the content owner in a very strong bargaining position.").

[258] SBC suggests that, if AT&T Comcast is able to obtain better prices for broadband content, broadband content suppliers would raise their prices to rival broadband platforms, like DSL – ostensibly to "recoup" the discounts given to AT&T Comcast. *See*

4. Content Foreclosure

Several commenters argue that the merger will increase the incentive and ability of the combined company to engage in "content foreclosure" – *i.e.*, to foreclose content competitors from access to AT&T Comcast's broadband network.[259] Content foreclosure can have anticompetitive consequences only if, at a minimum: (i) foreclosed content suppliers are unable to reach a sufficient number of customers to be economically viable, and (ii) the foreclosing party is vertically integrated and possesses affiliated content that would benefit from the foreclosure strategy. As explained below, the merger makes it no more likely that these conditions will be met. The Applicants possess virtually no "broadband content" and other content providers will have many other potential outlets for their content.[260]

Ability to Foreclose. As an initial matter, the merger will not provide AT&T Comcast with the ability to foreclose rival content providers for the same basic reasons that it will lack any "monopsony power" over such content suppliers. As noted by Professor Shelanski, the minimum viable scale for successful broadband content is most unlikely to be so large that broadband content suppliers will have their prospects for success in any way dimmed by the merger.[261] Indeed, if anything one would predict that the minimum viable scale for broadband content will be much smaller than that for

SBC Comments at 17. Aside from being completely speculative, this claim makes no economic sense. Broadband content suppliers will charge as much as they can to DSL providers, regardless of what they charge AT&T Comcast.

259 *See, e.g.*, SBC Comments at 18; Crandall Declaration ¶ 12.

260 *See* Shelanski Declaration ¶¶ 5-7.

261 *Id.* ¶ 36.

conventional video programming. AT&T Comcast will account for less than 23% of broadband subscribers – far too little to engage in effective foreclosure (even assuming that broadband access is a relevant market).[262] Moreover, AT&T Comcast customers would also be able to access broadband content directly. [263] As noted, neither AT&T Broadband nor Comcast have ever blocked subscribers from access to any Internet content and powerful market forces effectively require that policy.

In addition, AT&T Broadband and Comcast have now entered into agreements with independent ISPs pursuant to which these ISPs are offering high-speed Internet services to AT&T Broadband and Comcast customers. Accordingly, going forward, broadband Internet content suppliers will have an alternative method to access AT&T Comcast subscribers that AT&T Comcast may not "foreclose."[264]

Analysis of Incentives. The merger will also not give AT&T Comcast any incentive to engage in content foreclosure. The typical incentive cited for content foreclosure by a distributor is that such foreclosure would potentially benefit the distributor's affiliated content.[265] In this case, however, AT&T Broadband and Comcast

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[262] As noted in the Application, antitrust courts have consistently rejected foreclosure claims based upon such a small level of foreclosure. *See* Application at 76 n.153. As Deputy Assistant Attorney General William Kolasky recently noted, "[u]nder U.S. law, 35-40% share is typically the minimum threshold giving rise to foreclosure concerns." *See* Speech by William Kolasky, Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice, "Conglomerate Mergers and Range Effects: It's a Long Way from Chicago to Brussels" (Nov. 9, 2001), *citing Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984); *United States v. Microsoft*, 87 F. Supp. 2d 30, 53 (D.D.C. 2000).

[263] *See* Shelanski Declaration ¶ 38.

[264] *See id.* ¶ 19.

[265] *See, e.g.*, SBC Comments at 17-18; Crandall Declaration ¶ 18.

have virtually no affiliated broadband content to "benefit" through foreclosure. Given the absence of any affiliated broadband content, AT&T Comcast will lack any plausible incentive to engage in content foreclosure.

In addition, if AT&T Comcast were to block desirable broadband content from its subscribers, the company would be damaging its competitive position versus other broadband and narrowband competitors and would drive its customers into the hands of its competitors (or slow the switch from narrowband).[266] Such a result is quite likely: AT&T Broadband and Comcast Internet subscribers, like most Internet users, are accustomed to accessing whatever content they want. If AT&T Comcast were to begin to block or otherwise create impediments to desirable broadband content, "it would cause an uproar among its subscribers and damage its Internet business."[267] As noted above, instead of blocking content, AT&T Comcast will have an incentive to promote the development of a broad and diverse array of "broadband content" so as to encourage customers to convert from dial-up Internet service to broadband service.[268]

For all of these reasons, the commenters' various content foreclosure arguments should be rejected.

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266 *See* Shelanski Declaration ¶ 22. As explained by James S. Kahan, senior executive vice president-corporate development, SBC Communications, "[t]he winner of the broadband war will be the company that delivers the best broadband-powered content, communication services and features to its customers." *See* Press Release, *SBC, Yahoo! Announce Landmark Strategic Alliance* (Nov. 14, 2002), *available at:* <http://www.sbc.com/press_room/1,5932,31,00.html?query=20011114-1>.

267 Coblitz Declaration ¶ 28; *see also* Shelanski Declaration ¶ 20.

268 Coblitz Declaration ¶ 28.

5. Access Foreclosure

Several commenters argue that the merger will increase the incentive and ability of the combined company to engage in "access foreclosure," *i.e.*, foreclosing competing broadband access providers from access to affiliated broadband content.[269] Access foreclosure can have anticompetitive consequences only if, at a minimum, (i) the foreclosing party possesses significant "marquee" content for which there is no alternative source and without which a competitor would be unable viably to compete, and (ii) the foreclosing party could gain enough subscriber revenues from foreclosure to make up for lost content revenues.[270] As explained below, the merger makes it no more likely that these conditions will be met. AT&T Comcast will lack any significant broadband content with which to engage in foreclosure and, if AT&T Comcast develops any such content, it will have a strong incentive to distribute it as widely as possible.

Ability to Foreclose. The merger will not enhance AT&T Comcast's ability to foreclose rivals from access to its affiliated content. *First*, AT&T Comcast does not have anything close to sufficient affiliated content to engage in access foreclosure: AT&T Broadband and Comcast's affiliated Internet content is trivial and their broadband "portals" are small-scale operations, nowhere near the scale of better established portals like Yahoo.com, MSN.com, or AOL.com.[271] Recent data show that, among portals, Yahoo.com and AOL.com contained 136,000 and 97,000 pages respectively, while

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269 *See* Gertner Declaration ¶ 31 ("AT&T Comcast may also have an incentive to deny content to competing broadband technologies such as DSL . . .").

270 *See* Shelanski Declaration ¶¶ 5, 14.

271 *See id.* ¶ 6.

Comcast.net contained 52 pages.[272] If AT&T Comcast were to develop a substantial amount of new content to build its own portal, that of course would be pro-competitive and beneficial to consumers. It should provide no basis to oppose the transaction.

Second, broadband access rivals (such as DSL) will always have a wide array of alternatives for obtaining content, such as other major portals or media companies. Indeed, broadband access rivals like SBC have already begun to partner with major Internet content companies like Yahoo to offer "customized" content to their subscribers.[273] After the merger, the third and fourth largest broadband access providers will be RBOCs (Verizon and SBC) and other DSL providers (such as BellSouth and Qwest) will also have a significant number of subscribers. Broadband content suppliers will obviously be eager to seek out alliances and other contractual arrangements with these and other DSL companies. Any attempt by AT&T Comcast to limit the distribution of its affiliated content would simply create an opportunity for rival content providers to expand output and replace that content.[274]

Analysis of Incentives. AT&T Comcast will also lack any increased incentive to foreclose rival broadband providers from access to AT&T Comcast affiliated content. As

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[272] *Id.* Promotional sites operated by Comcast affiliates (such as QVC.com, eonline.com, the golfchannel.com, *etc.*) account for less than 3,000 pages in total. *Id.*

[273] *Id.* ¶ 11. As noted, in November 2001, SBC announced a "strategic alliance" with Yahoo. *See* Press Release, *SBC, Yahoo! Announce Landmark Strategic Alliance* (Nov. 14, 2002), *available at:* <http://www.sbc.com/press_room/1,5932,31,00.html?query=20011114-1>. The alliance "will include a suite of Yahoo! and SBC customized products and services, including many optimized for broadband." *Id.* According to SBC's chairman and CEO Edward E. Whitacre, Jr., "[t]his alliance gives both companies a competitive edge in delivering the best possible online experience for our customers and it strengthens both of our leadership positions in the broadband and Internet services market." *Id.*

[274] *See* Shelanski Declaration ¶ 12.

noted, AT&T Broadband and Comcast do not today control any broadband content and their Internet portals are insignificant. Accordingly, if AT&T Comcast were to restrict the distribution of its current content, it would simply limit further the revenue (if any) that this *de minimis* content generates.[275] Even if, hypothetically, the combined company were to develop "marquee" broadband content or portals in the future, there would still be significant costs to denying access to such content or portals to competing broadband providers. By limiting distribution, AT&T Comcast would be foregoing the revenues from a significant portion of the potential market for this content.[276] Accordingly, to the extent that it develops significant broadband content, AT&T Comcast will have a strong incentive to distribute this content as widely as possible.[277] The merger does nothing to reduce this incentive.

6. Exclusive Dealing

Some commenters argue that the merger will make it more likely that AT&T Comcast will use its "buyer power" over broadband content suppliers to induce such

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275 *See id.* ¶ 14.

276 *See id.*

277 As explained in the Shelanski Declaration, there may be pro-competitive reasons for a firm to limit the distribution of affiliated content in order to differentiate its product offering and enhance competition. *See id.* ¶ 14. Antitrust courts recognize that exclusive contracts and other similar vertical arrangements may be pro-competitive to the extent that they stimulate inter-brand competition, reduce free riding, or otherwise promote competition. *See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). Only if the content is somehow "essential" to the viability of other firms may a competition policy issue arise – and even in such a circumstance, antitrust courts recognize the right of a business to decide in its "independent discretion . . . with whom it will deal." *Colgate*, 250 U.S. at 307. The key point here is that the merger does not make such access foreclosure any more likely to happen.

suppliers into entering into exclusive deals to the detriment of competing broadband access providers.[278] This contention is without merit for a number of reasons.

First, as explained above, AT&T Comcast will have no enhanced leverage over broadband content suppliers. Instead, these suppliers will continue to have many potential outlets for their product – including other broadband access providers and other non-Internet media.

Second, there is no reason to believe that the merger will change the combined firm's incentives to sign exclusive deals with content suppliers. As explained by Professor Shelanski, content suppliers expect to be compensated for exclusivity agreements because, by entering into such agreements, they forego potential revenues from the "excluded" portion of the market. The merger will not, however, change the size of the "excluded" portion in any local markets in which AT&T Broadband and Comcast operate, because AT&T Broadband and Comcast do not serve the same geographic areas. Absent a change in the scope of an exclusivity agreement, there is no reason for the price of exclusivity to change as a result of the merger. For this reason, the merger should not affect the incentives of either AT&T Comcast or content suppliers to enter into exclusive deals.[279]

Third, as explained by Professor Shelanski, exclusivity agreements for content are often pro-competitive and are unlikely to harm competition unless at least two conditions (and perhaps others) are met: (i) the content must be sufficiently important that consumers will only subscribe to an access provider that has it, and (ii) no substitutes are

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278 *See, e.g.*, Verizon Comments at 23-24; Crandall Declaration ¶ 14.

279 *See* Shelanski Declaration ¶¶ 29-34.

available to the access provider's competitors from suppliers other than the foreclosing firm. The parties are aware of no such Internet content today and it is unlikely that such "indispensable" content will emerge any time soon. Even if such content were to emerge, rival access providers would be willing to invest substantial resources to obtain a substitute source for that content, thus inducing the competitive development of broadband content.[280]

For all of these reasons, there is no reason to believe that the merger will increase the incentives or ability of AT&T Comcast to enter into anticompetitive exclusive arrangements.

7. Video Distribution over the Internet

One commenter speculates that AT&T Comcast could use its control over a "significant number of broadband subscribers" to impede the development of the Internet as an alternative source of video programming. In particular, SBC suggests that AT&T Comcast could (i) create unidentified "technical impediments" to the distribution of video programming over the Internet; (ii) force broadband content providers to adopt a standard incompatible with DSL; or (iii) simply refuse to sell affiliated video programming to DSL providers.[281]

All of these theories are premised on the now refuted claim that the merger will create or enhance the "buyer power" of AT&T Comcast over broadband content suppliers or video programmers. As shown repeatedly above, however, AT&T Comcast will have no such power and so will not be able to cause anyone to adopt incompatible "standards"

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280 *Id.* ¶¶ 25-28.

281 SBC Comments at 22-26.

or technical "impediments" to the distribution of video programming over the Internet.[282] Instead, if AT&T Comcast somehow were to attempt to block the distribution of video programming to its broadband customers, this would only make DSL more attractive to consumers and drive subscribers away from AT&T Comcast's broadband service.

In addition, this theory of competitive harm is highly speculative. SBC never attempts to describe with any detail or specificity the "incompatible standards" or "technical impediments" that could be adopted. All that can be said is that AT&T Broadband and Comcast have not attempted to impose any such impediments to date and the merger will have no effect on whether such impediments might arise in the future.

8. Forced Access

Several commenters argue that the Commission should impose a so-called "open access" or "multiple ISP" condition on AT&T Comcast. Some contend that this is appropriate as a matter of public policy, while others base their claims on so-called "regulatory parity" arguments.[283] The Commission should reject these arguments.

As an initial matter, these arguments do not implicate concerns specific to this merger, but instead raise issues more properly addressed in the Commission's ongoing proceedings relating to the framework for regulating broadband services and whether

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282 *See supra* Sections IV.A; IV.D.3; IV.D.4.

283 *See, e.g.*, Qwest Comments at 15-20 (arguing for an end to "regulatory asymmetry"), 29-35 (arguing for a forced access condition); Verizon Comments at 25-29 (arguing for "deregulatory parity"); BellSouth Comments at 23 (asking the Commission to "eliminat[e] the disparities in regulation between cable modem services and DSL service"). SBC "reluctantly" goes even further and demands a wide array of onerous new regulations on the cable Internet business of AT&T Comcast, including "spectrum unbundling," the creation of an "advanced services affiliate" for this business, and "open access." SBC Comments at 33-40. SBC's plain goal is to use this proceeding either to shackle a vibrant competitor with needless regulations or to argue for regulatory "relief" in other proceedings. The Commission should reject this effort.

cable operators should be required to contract with unaffiliated ISPs.[284] Those proceedings, not the present license transfer proceedings, are the appropriate fora for arguments about so-called "open access" and "regulatory parity." As Chairman Powell previously has observed, the Commission has in past merger proceedings "repeatedly declined to address the question of mandating open cable access because most of the questions raised [are] not merger-specific, and more rightly [are] a debate about the regulatory paradigm for these new services offered over cable infrastructure."[285]

In any event, forced access is a bad policy for many reasons, a few of which the parties will briefly review here.[286] First, AT&T Broadband and Comcast have already entered into agreements with independent ISPs and the combined company will have ample incentives to expand these agreements in the future.[287] As noted earlier,

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284 *See Internet Over Cable Inquiry* ¶¶ 83-91 (seeking comment on issues related to forced access); *Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, 17 FCC Rcd 3019, ¶ 1 (2002) ("*Wireline Broadband Framework NPRM*") ("launch[ing] a thorough examination of the appropriate legal and policy framework . . . for broadband access to the Internet provided over domestic wireline facilities").

285 *AOL-TW Merger Order*, Press Statement of (then) Commissioner Powell at 2 (rel. Jan. 11, 2001); *see also id.*, Separate Statement of (then) Commissioner Powell at 1 n.1, 2 (objecting to the imposition of an open access condition in the AOL-Time Warner merger because it might "conflict with and prejudge issues in the *Notice of Inquiry* proceeding regarding broadband Internet access," and noting that the Commission should not use its merger review process to address issues that "should be entertained, if at all, in a broader-based proceeding").

286 For more extensive arguments against forced access, *see* AT&T Comments and Comcast Comments, GEN Docket No. 00-185 (filed Dec. 1, 2000); AT&T Reply Comments and Comcast Reply Comments, GEN Docket No. 00-185 (filed Jan. 10, 2001).

287 *See, e.g.*, Press Release, *Comcast and United Online to Offer NetZero and Juno High-Speed Internet Services* (Feb. 26, 2002), *available at* <http://www.comcast.com/defaultframe.asp?section=press_room>. Several commenters suggest that these agreements have only been executed as an expedient related to the regulatory review of

penetration rates for the broadband services offered by AT&T Broadband and Comcast are still relatively low and both companies face stiff competition from DSL and other emerging broadband platforms.[288] In this competitive environment, AT&T Comcast will have a strong incentive to contract with independent ISPs because these ISPs have the potential to attract new customers to AT&T Comcast's network. For example, independent ISPs can market broadband to their existing narrowband customers or develop new applications and content that will attract new customers to broadband. To the extent that these ISPs have commercial arrangements with AT&T Comcast, the company will share in some of the revenues generated by these new customers. Alternatively, if these ISPs affiliate with competitive broadband platforms, AT&T Comcast will miss the opportunity to gain new customers and revenues. For this simple reason, AT&T Comcast will have a significant incentive to continue to work with independent ISPs.[289]

Second, to date, the Commission has properly refrained from imposing a forced access requirement on cable companies. The result has been the rapid growth of high-

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the present transaction. As Comcast President Brian L. Roberts has explained, however, Comcast was only excused from its exclusivity obligation to At Home in late 2001, and it struck a deal with an independent ISP within a few months of the end of that obligation. *See id.* Likewise, AT&T entered into arrangements with independent ISPs within a few months of the end of its exclusivity obligation to At Home. *See* Konrad, *Excite@Home Pulls Plug on AT&T; More Could Go Dark*, CNET News.com (Dec. 1, 2001), *available at:* <http://news.com.com/2100-1033-276478.html>.

[288] Coblitz Declaration ¶¶ 20-21.

[289] *Id.* ¶¶ 31-32.

speed cable Internet services – from essentially zero subscribers in 1996 to almost 8 million today.[290] The marketplace is working.

Third, contrary to the claims of some commenters, this merger raises none of the concerns that led the Commission and the FTC to impose access conditions in connection with the AOL-Time Warner merger. That transaction combined the world's largest provider of Internet access with one of the world's largest media companies with a vast library of content. AT&T Broadband and Comcast, by contrast, together have less than one-tenth the number of on-line customers that AOL does and, as discussed above, extremely limited content interests.

V. THE REMAINING ALLEGATIONS AND PURPORTED GRIEVANCES ARE BASELESS

The commenters raise an assortment of other issues, most of which have no relationship whatever to the proposed merger and all of which are without merit. This hodge-podge of allegations and purported grievances ranges from program access disputes, to pleas by the RBOCs for "regulatory parity," to tort claims that are pending in state courts. Each of these allegations is addressed below.

With respect to claims that are unrelated to this merger, the Commission should apply its longstanding policy and reject efforts to inject such extraneous issues and disputes in this proceeding. The Commission has repeatedly held that it "will not consider arguments in [merger] proceeding[s] that are better addressed in other

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290 *See* Press Release, Leitchman Research Group, *Leading Broadband Internet Providers Reach Nearly 12 Million Subscribers in the U.S.* (May 3, 2002), *available at:* <http://www.leichtmanresearch.com/press/0503release.html>; *Internet Over Cable Inquiry* ¶ 90 nn.90, 94 (describing formation of Excite@Home and Road Runner).

Commission proceedings, or other legal fora, including the [courts] and the Congress."[291] This prohibition clearly applies to arguments involving rules or policies of general applicability, some of which are already the subject of pending rulemaking proceedings.[292] It also applies to extraneous disputes regarding compliance with particular Commission rules by parties to a merger.[293] And it applies to "disputes with one or other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act."[294] Failing to apply these established

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291 *Applications of Craig O. McCaw and American Tel. & Tel. Co.*, 9 FCC Rcd 5836, ¶ 123 (1994), *aff'd sub nom. SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995).

292 *See BA-NYNEX Merger Order* ¶¶ 210, 220-221; *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation to SBC Communications, Inc.*, 13 FCC Rcd 21292, ¶ 29 (1998); *Applications of Qwest Communications International, Inc. and U S WEST, Inc. to Transfer Control*, 15 FCC Rcd 53276, ¶ 28 (2000) ("*Qwest-USWC Merger Order*"); *Applications of Pacific Telesis Group and SBC Communications, Inc. for Consent to Transfer Control of Pacific Telesis Group and its Subsidiaries*, 12 FCC Rcd 2624, ¶ 38 (1997) ("*SBC-Telesis Merger Order*"); *Applications of Turner Broadcasting System, Inc.*, 11 FCC Rcd 19595, ¶ 33 (1996) ("*Turner Merger Order*"); *Bell Atlantic Mobile Systems, Inc. and NYNEX Mobile Communications Company Application for Transfer of Control of Eighty-two Cellular Radio Licenses to Cellco Partnership*, 10 FCC Rcd 13368, ¶ 37 (1995) ("*BA-NYNEX Mobile Merger Order*").

293 *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, ¶ 215 (1998) ("*MCI-WorldCom Merger Order*") ("[T]hese unadjudicated matters are not a sufficient basis to conclude that the merger is not in the public interest, and we decline to condition approval of the transfer of control applications on resolution of this dispute."); *see id.* at n.628 (noting that commenters could seek recourse from the Commission under Section 208 of the Act); *AT&T-MediaOne Merger Order* ¶ 81 n.255 (commenters could file a program access complaint under 47 C.F.R. § 76.1003); *SBC-Telesis Merger Order* ¶ 38 (refusing to consider extraneous allegations, preferring to rely on "the specific enforcement tools that Congress" had given the Commission and the tools available to state commissions).

294 *See AOL-TW Merger Order* ¶ 6; *see also Qwest-USWC Merger Order* ¶ 28; *SBC-Telesis Merger Order* ¶ 38; *BA-NYNEX Merger Order* ¶ 221; *Turner Merger Order* ¶ 33; *BA-NYNEX Mobile Merger Order* ¶ 37.

policies would only encourage parties to abuse the Commission's merger review process, as has become all too common in recent years. Ironically, SBC, one of the commenters that seeks to introduce unrelated issues in this proceeding, has previously described this unfortunate trend and the appropriate Commission response:

> As has become routine in transfer of control proceedings, competitors of [the merging entities] seize the opportunity to revisit every dispute anyone has ever had with the Applicants, in the marketplace, before state regulators, or before the Commission itself, whether of recent vintage or not. A few consumer groups, likewise, seek to use this proceeding to air old grievances that have been raised in other forums. These extraneous complaints provide no reason for disapproving or conditioning the merger. ... As the Commission has repeatedly held in past cases, these issues are not properly resolved in [a merger] proceeding, whatever their merit or lack thereof.[295]

A. Program Access Rules

As the Application indicates, AT&T Comcast will be in full compliance with the Commission's program access rules.[296] There are no program access complaints involving the Applicants currently pending before the Commission. Moreover, as discussed below, none of the comments or petitions filed in this proceeding identifies facts that, if properly raised in a formal complaint, would support a finding that AT&T Broadband or Comcast has violated the program access rules.[297]

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295 Joint Opposition of SBC Communications Inc. and Ameritech Corporation to Petitions to Deny and Reply to Comments, CC Docket No. 98-141, at 77 (filed Nov. 16, 1998) (citations omitted); *see also* Joint Reply of SBC and Ameritech, CC Docket No. 98-141, at 96-97 (filed Jul. 26, 1999) ("Many commenters also ask the Commission to impose conditions that are the subject of currently pending proceedings before the Commission or a state commission. This merger review is not an opportunity to supplant all pending state and other Commission proceedings, nor is it an omnibus proceeding to address issues wholly unrelated to the merger.") (footnotes omitted).

296 *See* Application at 52.

297 ACA has expressed concern about the continued availability of vertically integrated programming that is distributed terrestrially and by satellite to smaller cable

All of the program access issues raised by commenters, without exception, address situations that clearly are not merger-related and involve practices that the Commission repeatedly has deemed to be consistent with its program access rules. Indeed, virtually all of the commenters who raised these issues concede that the behavior in question does *not* violate the rules. Their objective is not to secure enforcement of the rules, but rather to persuade the Commission to attach conditions to its approval of the merger, applicable only to AT&T Comcast, that address perceived deficiencies in the existing rules, which they have been unable in the past to persuade the Commission to change.

For example, a number of commenting parties urge the Commission effectively to expand the program access rules, for AT&T Comcast alone, to encompass programming that is *not* delivered via satellite.[298] The Commission repeatedly has determined that it is unnecessary and inappropriate to expand the program access rules on an industry-wide basis to include terrestrially delivered programming.[299] The Commission also repeatedly

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operators serving rural areas. It has been the practice of AT&T Broadband and Comcast to make such programming available to such smaller rural cable operators. The parties intend to continue that practice and would extend that practice to any new programming services they may create.

298 *See, e.g.*, EchoStar Comments at 7 (urging the Commission to impose "a simple condition that AT&T Comcast no longer be allowed to invoke the terrestrial loophole"); Everest Comments at 5-6 (same); RCN Comments at 35 (urging imposition of conditions giving competitors access to all AT&T Comcast affiliated programming on non-discriminatory pricing and terms); SBC Comments at 32 (arguing that the Commission must "condition its approval of the merger on AT&T/Comcast's agreement to distribute its programming on a non-discriminatory basis regardless of the technology used to distribute its content at the wholesale level").

299 *See, e.g.*, *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*, 12 FCC Rcd 22840, ¶ 50 (1997); *DirecTV, Inc. v. Comcast*

has rejected requests to impose merger conditions that would expand program access obligations in this manner on a company-specific basis.[300]

There is no basis for the Commission to reach a different conclusion here. Indeed, as the Application indicated, AT&T Broadband has spun-off or sold a number of the programming interests it held at the time the Commission approved the AT&T-MediaOne merger, and AT&T Comcast will have a very limited set of post-merger programming interests, many of which are minority interests.[301] Accordingly, the

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Corp., 13 FCC Rcd 21822, ¶ 25 (1998) (holding that the program access provisions apply only to "satellite cable programming," and not to programming that was "previously" satellite delivered or the "equivalent" of satellite cable programming), *consolidated sub. nom. DirecTV, Inc. v. Comcast Corp. and EchoStar Communications Corp. v. Comcast Corp.*, 15 FCC Rcd 22802 (2000), *appeal pending sub nom. EchoStar Communications Corp. v. FCC*, No. 01-1032 (D.C. Cir., filed Jan. 19, 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*, 13 FCC Rcd 15822, ¶ 71 (1998) (concluding that there is no basis for extending the program access rules to terrestrially delivered services).

[300] For instance, in its 1999 *AT&T-TCI Merger Order* and in its 2000 *AT&T-MediaOne Merger Order*, the Commission declined to take such action in response to requests by commenters, which included several of the parties who have raised the issue once again in this proceeding. *See AT&T-TCI Merger Order* ¶ 37; *AT&T-MediaOne Merger Order* ¶ 80.

[301] *See* Application at 70-71 (noting that post-merger AT&T Comcast will have interests (including minority interests) in a total of 24 national and regional video programming networks, or 6.4% of the 374 total national and regional networks). The Application incorrectly indicated in footnote 20 that Comcast's 2% interest in Florida News Channel, L.L.C. ("FNC"), a regional programming service, is non-attributable. The Application also inadvertently omitted from AT&T Broadband's list of programming assets a small passive interest of 2% in FNC. Neither Comcast nor AT&T Broadband participate in FNC's management, and AT&T Broadband's interest may qualify for insulation under the Commission's attribution rules. However, assuming that FNC is attributable to AT&T Comcast post-merger by virtue of Comcast's interest, AT&T Comcast will have attributable ownership interests in a total of 25 video programming networks (as opposed to the 24 reported previously), or 6.6% (as opposed to the 6.4% previously reported) of the 374 total national and regional services listed in the Commission's *2001 Video Competition Report*. If regional and national services are

proposed merger does not raise competitive concerns sufficient to justify imposing expanded program access obligations on AT&T Comcast that would not apply to other media entities with far more significant programming interests.[302]

For similar reasons, the proposals advanced by several commenters seeking to impose more restrictive program licensing requirements on AT&T Comcast alone are inappropriate and should be rejected.[303] In the *AT&T-TCI Merger Order* and again in the *AT&T-MediaOne Merger Order*, the Commission specifically declined to adopt conditions requiring the merged entity to waive exclusivity rights or imposing anti-exclusivity restrictions that exceed those imposed generally in the program access rules.[304] In both orders, the Commission noted that "[i]f parties believe any existing

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considered separately, the combined shares are 5.8% for national (the same as previously reported) and 10% for regional (as compared to the 8.8% previously reported). In comparison, the Commission's *2000 Video Competition Report* attributed to AT&T Broadband (after its merger with MediaOne) ownership interests in 97 (or 27%) of the 356 national and regional programming services listed in that report. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, Seventh Annual Report*, 16 FCC Rcd 6005 (2001) ("*2000 Video Competition Report*").

302 This is especially true given that, as a result of system divestitures by AT&T Broadband and the growth in the total number of MVPD subscribers nationwide, AT&T Comcast will serve a percentage of MVPD subscribers nationwide comparable to the percentage served by the combined AT&T and MediaOne systems. *Compare* Application at 50 (AT&T Comcast will serve 29.87% of all MVPD subscribers excluding TWE and 42.3% including TWE), *with AT&T-MediaOne Merger Order* (describing a merged AT&T and MediaOne as serving a combined 28.2% of MVPD subscribers excluding TWE and 41.8% including TWE).

303 *See, e.g.*, RCN Comments at 35 (urging that conditions to Commission approval of transfers include provisions mandating "access for competitors to AT&T Comcast affiliated programming on non-discriminatory pricing and terms," as well as a prohibition on "exclusive arrangements between AT&T Comcast and third-party suppliers of programming").

304 *See AT&T-TCI Merger Order* ¶¶ 33, 38 (rejecting proposals to require TCI to waive existing exclusivity agreements with programmers or otherwise "condition the

exclusivity agreements violate the program access rules, the program access complaint process is the appropriate forum in which to resolve any such grievance."[305] Likewise, to the extent parties have concerns relating to the exclusivity rules themselves,[306] the instant proceeding clearly is not the proper forum in which to address such concerns, particularly given the pendency of the Commission's program exclusivity "sunset" proceeding.[307]

With respect to the specific program access allegations advanced by commenting parties, the Applicants respond as follows:

1. Comcast-Specific Allegations

RCN and EchoStar complain about Comcast's practices with regard to the licensing of programming. Their allegations are misleading in a number of respects and inaccurate in others. Comcast's practices do not violate the Commission's rules, are not anticompetitive, and provide no basis for concern about the proposed merger.

Despite RCN's efforts to portray a "problem" warranting the Commission's concern, the facts are that (1) RCN has been treated no differently than other affiliates of Comcast SportsNet (Philadelphia) ("CSN"), including Comcast's own cable operations, and (2) RCN has at all times had access to – and has continuously carried – CSN and

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merger on the imposition of anti-exclusivity restrictions that are not required by the program access rules"); *AT&T-MediaOne Merger Order* ¶ 81 (same).

305 *AT&T-MediaOne Merger Order* ¶ 81 (citing *AT&T-TCI Merger Order* ¶ 38). In the *AT&T-MediaOne Merger Order*, the Commission also concluded that the merger transfer proceeding did not provide any "basis for the Commission to declare unlawful AT&T's future exclusivity agreements to the extent they conform to current rules." *Id.*

306 *See* BellSouth Comments at 31.

307 *See 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*, 16 FCC Rcd 19074 (2001).

SportsNet-MidAtlantic. RCN alleges that Comcast "asserted that it is willing to execute a longer-term agreement" for RCN's carriage of CSN, but implies that Comcast has acted otherwise.[308] In fact, RCN was presented with a five-year agreement for CSN in October 2001 but has chosen not to sign it (though it continues to carry the network); approximately 12 other terrestrial MVPDs, by contrast, have executed this agreement. RCN admits that it has a contract to carry SportsNet-MidAtlantic through 2006.[309]

EchoStar seeks to use the merger proceeding to obtain what it is not entitled to under the program access law passed by Congress. The Commission has already thoroughly investigated complaints filed by EchoStar (as well as DirecTV) on this matter and found them to be without merit.[310] Although EchoStar (and DirecTV) appealed the Commission's decisions,[311] Comcast is confident that the Commission's decisions in both cases will be upheld.

Moreover, EchoStar claims that the "lack of regional sports available to DBS subscribers has undercut the DBS industry's ability to compete" and that "Philadelphia has by far the lowest DBS penetration rate of any major U.S. market."[312] Both of these

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[308] RCN Comments at 20 n.34.

[309] *Id.* at 19, 20 n.34.

[310] Specifically, the Commission found that CSN was a new network (not a network that had been "moved" from satellite) and that CSN (like many other local and regional networks) legitimately used terrestrial distribution to reach its customers because it was cheaper and more efficient than satellite distribution. *DirecTV, Inc. v. Comcast Corp.*, 15 FCC Rcd 22802 (2000); *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (1999) (subsequent history omitted).

[311] *See EchoStar Communications Corp. v. FCC*, Civ. Action No. 01-1032 (D.C. Cir., filed Jan. 19, 2002).

[312] EchoStar Comments at 4.

statements are false. First, DBS has abundant access to regional sports. DirecTV, a DBS company, carries more regional sports networks than any cable company, and has procured various packages from the sports leagues offering hundreds of games per league per season.[313] That this programming is available on DirecTV, but not EchoStar, reflects the different business plans of, and competition between, DirecTV and EchoStar, but it has nothing to do with Comcast, let alone the AT&T Comcast merger.[314] Second, DBS is an aggressive and successful MVPD competitor in the Philadelphia area. DirecTV has even targeted Philadelphia as a growth market, with one DirecTV official stating that it is among the "areas where we feel the market conditions are ripe to attract customers away from cable."[315] These clearly are not the words of a company that feels it is unable to compete.

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313 DirecTV offers 20 regional sports networks (*see Sports Networks* (last visited May 20, 2002), *available at:* <http://www.directv.com/DTVAPP/see/SportsPack.jsp>), in addition to the NFL Sunday Ticket, NBA League Pass, MLB Extra Innings, and NHL Center Ices packages, among others. *See Sports Subscriptions* (last visited May 20, 2002), *available at:* <http://www.directv.com/DTVAPP/see/SportsSubscriptions.jsp>.

314 In addition, until recently, EchoStar (like DirecTV) chose not to avail itself of the opportunity to carry additional sports programming that is readily available in Philadelphia. Several dozen games of the Phillies, Flyers, and Sixers are carried each year in Philadelphia on broadcast television, through the Philadelphia UPN affiliate, WPSG. DBS companies now have an absolute legal right to carry these stations, and one would think they would do so if regional sports are so essential to their ability to compete. And yet EchoStar (and DirecTV) have only recently added WPSG to their line-ups. Even then, WPSG apparently was only added in order to comply with the "carry-one-carry-all" requirement of Section 338 of the Communications Act, which went into effect on January 1, 2002. 47 U.S.C. § 338, as amended by the Satellite Home Viewer Improvement Act of 1999, Pub. L. No. 106-113, 113 Stat. 1501, 1501A-526 to 1501A-545 (Nov. 29, 1999) (requiring satellite carriers, by Jan. 1, 2002, to carry upon request all local television broadcast stations' signals in local markets in which the satellite carriers carry at least one television broadcast signal pursuant to the statutory copyright license and subject to other carriage provisions of the Act); s*ee also* Business News in Brief, *The Philadelphia Inquirer,* at D13 (Dec. 29, 2001).

315 Buffalo News, 2001 WL 6344851 (May 13, 2001).

Moreover, EchoStar is incorrect in asserting that DBS penetration in Philadelphia is "by far the lowest of any major U.S. market."[316] The Applicants are aware of data which show that (i) DBS penetration in Philadelphia is comparable to that in a number of other large markets, and (ii) the growth rate for DBS is exceptionally strong in Philadelphia. In particular, recent data from Nielsen Media Research and Forrester Research indicates that the actual DBS market penetration in the Philadelphia area is *not* 3.9%, as EchoStar claims, but in the range of 5.3% to 8.5%.[317] DBS penetration is comparable in San Diego (5.5% to 7.6%) and Boston (5.3% to 7.5%).[318] Further, DBS growth over the past two years is faster in Philadelphia (141%) than the average growth of every region of the country (two-year growth rates range from 88% in the Midwest to 121% in the Northeast), and exceeds the average two-year growth of all of the top 10 markets (120%).[319] The three-year growth rate from 1999 to 2002 for DBS penetration in Philadelphia (217%) is the third-highest growth rate among the top 39 DMAs.[320]

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316 EchoStar Comments at 4.

317 Nielsen Media Research, *DMA Household Universe Estimates: May 2002* (5.3%) ("*Nielsen Media Research*"); Forrester Research, *Technographics Survey & Data* (survey conducted March 2002) (8.5%) (for survey overview, *see* Forrester Research, *Technographics Survey and Data, available at:* <http://www.forrester.com/ER/Research/Survey/Excerpt/0,5449,285.00.html> (last viewed May 20, 2002) ("*Forrester Research*"). BellSouth claims the DBS penetration number is even lower (3.7%). BellSouth Comments at 29. The source cited by BellSouth, however, is from an article that is nearly a year old. The article does not present any underlying data or indicate what year the data covers.

318 *Nielsen Media Research* (5.5% and 5.3% for San Diego and Boston, respectively); *Forrester Research* (7.6% and 7.5% for San Diego and Boston, respectively).

319 *Nielsen Media Research; see also* Horizon Media, *Beam Me Down* (Feb. 2000), *available at:* <http://www.horizonmedia.net/news/prior_news/feb00.asp>.

320 *Forrester Research.*

EchoStar's interest in carrying Comcast's local programming channel, cn8, is also questionable, especially while EchoStar is litigating to avoid carrying local broadcast stations that have higher ratings than cn8.[321] Comcast has never denied EchoStar access to cn8. And even if EchoStar were interested in carrying localized community service programming, it has not explained why it needs to expropriate for its own use the new local programming that Comcast has not yet created, rather than creating its own rival programming. Obviously, the latter course of action would do more for competition and diversity.

2. AT&T-Specific Allegations

a. TV Land

ACA reiterates the same allegations it made in the Commission's pending program access exclusivity rulemaking, in which ACA asserted that its members "cannot obtain access to certain programming [*i.e.,* TV Land], reportedly due to exclusive contracts with AT&T."[322] Although AT&T has no such exclusive arrangement with TV Land[323] and the owner of TV Land, Viacom, who controls all distribution rights for the

321 cn8 is essentially a local origination channel with original programming, local news, weather and sports. Any other producer who has a true desire to serve the local community is equally free to establish local studios, hire local talent, send cameras and crews to cover local high school games, and so on.

322 ACA Comments at 14; *see also* ACA Comments CS Docket No. 01-290, at 15-16 (filed Dec. 3, 2001) (program exclusivity proceeding).

323 *See* AT&T Reply Comments, CS Docket No. 98-82, at 21 (filed Feb. 19, 2002), citing CFA Comments, CS Docket No. 98-82, at 128-29 (filed Jan. 4, 2002).

network, has previously stated that TV Land has not been offered on an exclusive basis since 1999,[324] the parties will investigate this matter further.

b. NECN

Similarly, the Braintree Electric Light Department ("BELD") is incorrect in asserting that its failure to gain carriage for New England Cable News ("NECN") violates the program access rules.[325] BELD raised the very same issue in its comments in the pending program access exclusivity rulemaking.[326] As AT&T pointed out in its reply in that proceeding, NECN received a Commission exemption from the exclusivity prohibition, which expired on June 1, 2001.[327] In addition, NECN has been delivered terrestrially since 1995, and is exempt from the prohibition on this basis as well.[328]

c. Bay TV

The Minority Television Project ("MTP") cites assertions made by Seren Innovations, Inc. ("Seren") in the AT&T-MediaOne merger proceeding,[329] alleging that Seren was denied carriage of Bay TV, a regional programming service in which AT&T Broadband had an interest. MTP's claim fails to show that AT&T Broadband has in any way violated the program access rules. In fact, in the testimony cited by MTP, Seren

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[324] *Id.* at 21-22, citing Viacom Reply Comments, CS Docket No. 01-290, at 4-5 (filed Jan. 7, 2002).

[325] *See* BELD Comments at 2.

[326] BELD Comments, CS Docket No. 01-290, at 3 (filed Dec. 3, 2001).

[327] AT&T Reply Comments, CS Docket No. 01-290, at 8 n.23 (filed Jan. 7, 2002).

[328] *Id.*

[329] *See* MTP Comments at 4, citing Testimony of Peter M. Glass, Vice President, Seren Innovations, Inc., Cable Services Bureau Forum on AT&T-MediaOne Merger Application (Feb. 4, 2000) ("*Seren Testimony*").

acknowledged that Bay TV was "delivered by terrestrial means."[330] Accordingly, Bay TV was not subject to the program access exclusivity prohibition. Moreover, in the *AT&T-MediaOne Merger Order,*[331] the Commission declined to adopt Seren's proposal that AT&T Broadband be "required to agree that the program access rules will be applicable to all of its programming contracts, whether or not with vertically integrated companies, and regardless of whether delivery was via satellite or terrestrial means."[332] Finally, in response to consumer preferences, AT&T recently discontinued its own carriage of Bay TV and replaced it with an unaffiliated programming service, The Food Network.[333]

B. Cable Rates and Predatory Pricing

Some commenters complain about the prices and pricing practices of Comcast, AT&T Broadband, or both. CFA generally complains that the prices for cable service are too high and that the merger will drive them higher still. RCN and Everest, by contrast, complain of having to compete against cable prices that are too low. Both of these opposing lines of argument rely on factual premises that are demonstrably false and neither provides any basis for the Commission to withhold its approval of, or place any conditions on, the proposed merger.

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330 *Seren Testimony* at 4.

331 *See AT&T-MediaOne Merger Order* ¶¶ 80-81.

332 *Seren Testimony* at 5.

333 *See* AT&T Reply Comments, CS Docket No. 98-82, at 20 (filed Feb. 19, 2002). Indeed, Bay TV is no longer in existence.

1. Cable Prices

CFA is a stubborn critic of the cable industry, and seizes every conceivable opportunity to complain about the prices for cable services. These complaints are not only unfounded, but also unrelated to the proposed merger. CFA's sole attempt to make cable prices a merger-specific issue relies entirely on the premise that, "the larger the cable operators become and the more regional control they gain (by pulling cable systems into clusters), the higher are monthly prices."[334]

As an initial matter, CFA's premise that prices somehow are correlated with size is refuted by the fact that the prices of AT&T Broadband, the largest MSO, both its aggregate price adjustments and per-channel price adjustments, have been below the industry average.[335] Indeed, since its merger with MediaOne, AT&T Broadband's price increases have been considerably below the industry average. Thus, there is no rational theory to support CFA's arguments that the AT&T Comcast merger will result in higher cable prices simply because it will be the largest MSO.

Nor has CFA provided any empirical support for such an argument. It bases its claim on "the Commission['s] own analyses," and it cites to the cable pricing surveys for the past three years. Not one of these surveys actually says what CFA claims.

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334 CFA Comments at 13-14.

335 While the industry's average cable prices rose by 7.3% last year, *see Report on Cable Industry Prices*, 17 FCC Rcd 6301, ¶ 4 (2002) ("*2001 Price Survey*"), AT&T Broadband's prices for basic and enhanced basic services rose on average only 4.8%. AT&T Broadband's programming costs, which increased over 10%, accounted for more than two-thirds of the 2001 price increase. On a per-channel basis, AT&T Broadband's prices for basic and enhanced basic services increased only slightly last year, from an average of 52 cents in 2000 to 54 cents in 2001, again largely due to programming cost increases. These per-channel prices, for basic and enhanced services, are below the industry average. *See Id.* ¶ 26, Tables 4 and 5.

To be sure, the *2001 Price Survey* contains a statement that "the data suggest that, as the number of subscribers belonging to the MSO of which the operator is a part increases, the rates charged by that MSO also increase."[336] But the very same paragraph claims that this "suggest[ion]" is based on "limited data" and acknowledges that "it is unclear whether this effect is due to some exogenous factor not controlled for in our analysis."[337] Elsewhere, the report states explicitly that "[t]he variable for number of channels offered captured the full effects of size in our equation."[338] In other words, larger cable operators generally provide their customers with more channels than do smaller cable operators, and systems offering more channels tend to charge higher prices than do systems that offer fewer channels. Those who get more, pay more, and vice versa.[339]

The *2001 Price Survey* leaves no doubt that higher average prices are in fact correlated with expanded service offerings. On a *per-channel* basis, cable prices have remained essentially constant over the past three years.[340] In fact, while

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336 *Id.* ¶ 45.

337 *Id.*

338 *Id.* ¶ 36.

339 It also bears emphasis that the *2001 Price Survey* omits the statement from prior years about cable prices being higher in clustered systems, presumably because the Commission staff has recognized the serious methodological problems that infected the 1999 and 2000 analyses of this issue.

340 *See id.* ¶ 26, Tables 4 & 5 (for "competitive group," programming rate per satellite channel declined and programming rate per channel overall remained the same; for "noncompetitive group," programming rate per satellite channel rose $0.005 and programming rate per channel overall rose $0.009); *2000 Price Survey* (for "competitive group," programming rate per satellite channel declined and programming rate per channel overall remained the same; for "noncompetitive group," programming rate per satellite channel declined $0.01 and programming rate per channel overall rose $0.01);

"noncompetitive" cable operators were charging $0.95 per satellite channel in 1999,[341] the most recent survey reports that they were charging only $0.805 per satellite channel two years later.[342] That is hardly a sign of "relentlessly rais[ing] prices," as CFA would have it.[343]

The heart of CFA's problem is that it focuses solely on what certain consumers choose to pay, while ignoring what they receive and from whom they may receive it. The undeniable reality today is that cable companies' customers and potential customers do in fact have competitive alternatives for multichannel video services – two facilities-based satellite competitors with all-digital platforms competing in every market, plus cable overbuilders, MMDS providers, and SMATV systems in numerous local markets. This competition is forcing cable operators to engage in behavior that is distinctly different than one could expect of a monopolist. It was the spur of competition that forced cable companies to spend tens of billions of dollars to upgrade systems, improve quality of service, expand capacity, introduce new services, and provide customers with additional options.[344]

Report on Cable Industry Prices, 15 FCC Rcd 10927, 10937-38 ¶ 26 (2000) ("*1999 Price Survey*") (for "competitive group," programming rate per satellite channel declined $0.01 and programming rate per channel overall remained the same; for "noncompetitive group," programming rate per satellite channel and programming rate per channel both remained unchanged).

341 *See 1999 Price Survey* ¶ 26 (Table 6).

342 *See 2001 Price Survey* ¶ 26 (Table 5).

343 *See* CFA Comments at 15. A further limitation of the surveys is that they combine prices for the basic service tier and the main cable programming service tier (*see 2001 Price Survey* ¶ 16), and omit additional tiers and premium offerings.

344 Cable companies strive to provide a rich menu of services for which they hope consumers will be willing to pay, and they have enjoyed success in delivering new

CFA's attack on cable prices suffers from an even greater defect; it ignores the fundamental issue of costs. Although the Commission has repeatedly recognized that price increases for cable service are primarily attributable to increasing programming costs,[345] CFA never acknowledges cost as a factor in the equation. Increases in the prices for the two most widely subscribed tiers of cable service have generally been limited to 5-7% per year, but programming costs – the single biggest input to cable costs[346] – are rising at more than twice that rate, and the bulk of those increases affect programming on those widely subscribed tiers.[347] The single most telling statistic in the *2001 Price Survey*

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services to which increasing numbers of customers are eager to subscribe. *See 2001 Video Competition Report*, Appendix C (Table C-1) (cable subscribers rose by 4.83 million, from 64.1 million to 69 million, over the period from 1997 to 2001) (even as 11 million chose the alternative of DBS). Consumers who wish to procure a very limited menu of channels from a cable company – or a DBS competitor – can do just that, and many do. But consumer demand has been particularly strong for the new digital tiers, which provide viewers with additional choices. *See, e.g.*, Press Release, *Comcast Reports Strong First Quarter Results,* at 2 (May 1, 2002), *available at:* <http://www.cmcsk.com/news/20020501-79412.cfm?ReleaseID=79412> (pro forma trailing growth rate for cable subscribers overall was 0.9%, but pro forma growth rate for cable subscriptions was 51%). Moreover, in contrast to an approach that looks at prices but ignores value, real-world consumers who buy digital cable report higher levels of satisfaction than do analog-only subscribers, even though the digital cable subscribers pay an average of $16 per month *more*. *See Survey: Digital Helps with Satisfaction*, Multichannel News, at 8 (Apr. 29, 2002).

345 *See, e.g., 2001 Price Survey* ¶ 28 (Table 7).

346 For a cable operator, programming costs are typically twice the salaries of the entire company workforce, which may include tens of thousands of employees.

347 Cable operators' programming costs have risen much more than cable prices, especially for sports programming services. Programming costs (in terms of licensing fees paid for programming) for cable operators rose 16% from 1999 to 2000, from $5.5 billion to $6.4 billion. *See 2001 Video Competition Report* ¶ 22; *2000 Video Competition Report* ¶ 24. Investment in upgraded facilities also contributes to higher costs, but these expenditures benefit subscribers through better service quality and expanded channel capacity. Cable operators' investment in physical plant upgrades increased 45% from 1999 to 2000. *Id.* ¶ 32.

is the finding that, over the 12-month period ending July 1, 2001, "*[b]oth the competitive and noncompetitive groups increased their average monthly rate for programming and equipment by 7.5%.*"[348] Thus, it is clear that the same inflationary pressures that confront the cable operators that "merely" compete with two nationwide, all-digital DBS companies also confront those cable companies that are deemed to face "effective competition."[349]

Finally, CFA's allegations about the harms of clustering are simply irrelevant, because this merger will not lead to any significant increase in clustering.[350] The cable systems operated by AT&T Broadband and Comcast generally are not located in adjacent geographic territories that would enable the systems to be combined into a larger cluster.

2. Uniform Rate Rules

RCN and Everest accuse Comcast and AT&T Broadband of improper pricing practices and "predatory price reductions."[351] These commenters fail to explain why any

348 *See 2001 Price Survey* ¶ 6 (emphasis added).

349 Given that prices for sports programming are rising even faster than the costs of other programming, there have been suggestions that the solution lies in establishing separate tiers solely for sports. That suggestion has been rejected by the suppliers of sports programming (*e.g.*, YES Networks' response to offer from Cablevision). In any event, this "solution" overlooks that some of the major networks that offer substantial sports coverage (*e.g.*, TBS, TNT) also provide substantial non-sports programming.

350 *See also supra* note 339 (noting that the Commission's *2001 Price Survey* omits any suggestion that cable prices are higher in clustered systems).

351 *See* RCN Comments at 23; Everest Comments at 3-4. RCN complains of a promotional offering that discounts one service for only three months, and another for only two. RCN Comments at 23 n.45. The other promotion mentioned by RCN, involving a single community (Folcroft, PA) over two years ago, was available during a less-than-six-month period. *Id.* at 22-23. This offer, whose primary benefit was to postpone an otherwise scheduled price increase, was made available to *all* customers in the franchise area. Everest's claim regarding AT&T Broadband concerns the pricing practices of cable systems managed and operated by Time Warner Cable for the Kansas

of these practices, even if real and cognizable by the Commission, would be exacerbated by the proposed merger. Indeed, RCN goes so far as to complain about Time Warner's pricing practices in Manhattan.[352] Clearly this proceeding is not the appropriate forum for such unrelated and pre-existing grievances, real or perceived. To the extent that a party believes there has been a violation of the uniform rate provisions set forth in Section 623(d) of the Communications Act,[353] the proper procedure is to file a complaint with the Commission.[354] Everest, in fact, acknowledges in its comments that it already has presented its concerns in uniform rate complaints filed at the Commission.[355]

In any event, the price competition of which the commenters complain is consistent with the Communications Act and the Commission's rules and is precisely the kind of behavior that should be expected – and welcomed – in a market characterized by competition. Section 623(d) of the Communications Act states that "[a] cable operator shall have a rate structure, for the provision of cable service, that is uniform throughout

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City Cable Partners ("KCCP"). KCCP is owned 50% by TWE and 50% by AT&T Broadband.

352 RCN Comments at 22.

353 47 U.S.C. § 543(d).

354 *See* 47 C.F.R. § 76.7 ("General Special Relief, Waiver, Enforcement, Complaint, Show Cause, Forfeiture, and Declaratory Ruling Procedures") ("Part 76 complaint process").

355 The Commission dismissed the first of those complaints in 2001, based upon a finding of effective competition in Lenexa, Kansas, *see Kansas City Cable Partners*, 16 FCC Rcd 18751 (2001) ("*Kansas City Partners*"), and is now considering a second complaint relating to similar practices in metropolitan Kansas City. *See Complaint by Everest Midwest Licensee, LLC Against Kansas City Cable Partners,* CSR-5845 (filed Feb. 1, 2002).

the geographic area in which cable service is provided over its cable system."[356] As the result of the 1996 Act,[357] this provision, along with other provisions regulating cable rates, only applies to "basic" cable service.[358] The uniform rate requirement consequently does not apply to the pricing of analog cable programming service tiers, new digital tiers, high-speed cable Internet services, or services offered on a per-channel or per-program basis.[359] Moreover, the Commission has stated that the uniform rate provisions even as they apply to basic cable services do not preclude operators from offering introductory or promotional rates, or making reasonable distinctions between classes of customers and categories of services.[360]

Congress and the Commission have established policies to prevent predatory pricing practices while at the same time relying on competition to the greatest extent possible to discipline the rates charged by cable operators. The price competition with

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356 47 U.S.C. § 543(d), incorporated into the Commission's rules as 47 C.F.R. § 76.984.

357 The 1996 Act imposed a "sunset" upon regulation of cable programming service tiers, effective March 31, 1999. *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd 5296, ¶ 31 (1999) ("*Cable Reform Order*").

358 *See* H.R. Rep. No. 104-204, pt. 1, at 109 (1995) (A "cable operator must comply with the uniform rate structure requirement in section 623 (d) of the 1992 Cable Act *only with respect to regulated services*."). "Basic cable service" is defined in Section 602 of the Communications Act as "any service tier which includes the retransmission of local television broadcast signals." 47 U.S.C. § 522 (3); *see also id.* § 543 (b)(7)(A). Even basic service is not subject to rate regulation or the uniform rate requirement in markets that are subject to effective competition. *Id.* §§ 543 (a), (d).

359 *See Kansas City Partners* ¶ 10.

360 *Implementation of Section of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, Report and Order and Further Notice of Proposed Rulemaking*, 8 FCC Rcd 5631, ¶ 423 (1993) ("*Rate Regulation Order*"); *see* 47 C.F.R. § 76.923(j).

which RCN and Everest take issue complies with these policies, benefits consumers, and is precisely the kind of behavior that is expected in competitive markets.[361]

C. Regulatory Parity

All four of the RBOCs seek to use this proceeding as yet another vehicle to raise objections to various requirements or restrictions to which they are subject, including interLATA restrictions, collocation requirements, unbundling obligations, and so on.[362] These issues have no place in this proceeding. To the extent the RBOCs' quarrel is with provisions enacted by Congress, those issues should be (and are being) debated on Capitol Hill.[363] To the extent they seek "relief" from rules adopted by this Commission, there are numerous open proceedings in which these matters are already under active review.[364] The Shelanski Declaration and the discussion in Section IV.D above demonstrates that there is no basis for the assertions that AT&T Comcast – or even the cable industry as a whole – could control the market for broadband Internet access or content. The discussion above demonstrates that the RBOCs are falsely portraying DSL as a struggling service when in fact it is growing rapidly – and would be growing faster still but for the RBOCs' own unilateral decisions. And there would be no debate about

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361 *See Matsushita Electrical Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) ("cutting prices in order to increase business often is the very essence of competition").

362 BellSouth Comments at 9-27; Qwest Comments at 15-20; SBC Comments at 18-22; Verizon Comments at 25-29.

363 *See, e.g.*, H.R. 1542, 107th Cong, 1st Sess. (Tauzin-Dingell bill); S. 1364, 107th Cong, 1st Sess. (Hollings bill); S. 2448, 107th Cong., 2nd Sess. (Hollings bill); S. 2430, 107th Cong., 2nd Sess. (Breaux bill).

364 *See, e.g.*, *Wireline Broadband Framework NPRM*; *Internet Over Cable Inquiry* ¶¶ 83-91.

whether and how the 1996 Telecommunications Act had benefited residential customers if the RBOCs could credibly demonstrate in their core voice telephony business even a small fraction of the actual competition and market share loss now faced by cable MSOs. Beyond that, the RBOCs' arguments regarding "regulatory parity" require no further response in this proceeding.

D. Franchise Disputes And Other Complaints Raised By Overbuilders

1. Comcast-Specific Allegations

RCN blames Comcast for RCN's inability to negotiate franchises in Prince George's County, Maryland, and in Philadelphia, Pennsylvania.[365] RCN also complains about its ability to access MDUs and hire contractors. Although these allegations are irrelevant to the issues pending before the Commission, nonetheless it is important to set the record straight.

a. Franchise Disputes

The fact is, RCN is having significant difficulties with *many* franchising authorities, not just the two mentioned in RCN's comments here.[366] These problems stem from its inability to raise capital. As the company explained recently to the SEC:

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[365] RCN Comments at 15-16. RCN complains of "interference with local franchise negotiations," as if it were somehow improper for Comcast to participate in public franchise hearings and proceedings. Such activity is protected by the First Amendment, *see Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), precisely as RCN's right to oppose this merger is protected by the First Amendment. Local municipalities are free to agree or disagree with the positions that Comcast advances in these proceedings.

[366] *See e.g., RCN Halts Chicago Buildout*, Cable World, at 5 (Mar. 18, 2002) (reporting that RCN is seeking relief from build-out commitments in Chicago, Boston, Washington, and San Francisco); *Effort To Build New L.A. Fiber-Optic Network Falters,* Los Angeles Business Journal, at 10 (Feb. 25, 2001) (difficulties in Los Angeles). RCN has also retreated in Broward and Dade Counties in Florida, and elsewhere.

> In light of current economic conditions in the communications industry and limitations on the Company's ability to raise capital, it is likely that the Company will decrease the amount it is spending on capital expenditures [from $1.3 billion in 2000 to $514 million in 2001 and $200 to $250 million in 2002]. As a result, it is probable that the Company will not be able to meet all of the construction and system build-out requirements contained in some of the cable franchises arrangements it has entered into with certain local governments . . . Several jurisdictions have threatened to seek damages or other remedies for our current or expected future non-compliance with construction and system build-out requirements.[367]

RCN's difficulties in this regard are not unusual; other overbuilders are facing similar problems.[368] But these difficulties cannot properly be attributed to Comcast.

In Philadelphia, RCN previously blamed the city government.[369] Its charge drew a public rebuke from the member of the City Council who chaired the public property committee that conducted a careful review of RCN's application. He informed the city's leading newspaper that RCN "clearly . . . withdrew from Philadelphia because of a lack of funding, not because of government delays."[370] He further explained that RCN's proposal raised two key issues: "How can we ensure that RCN will indeed follow through on its construction timetable, and why did it choose to compete in only certain wealthier neighborhoods?"[371]

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367 RCN Corp. Form 10-K, at 20 (Mar. 29, 2001), *available at:* <http://www.edgar-online.com/bin/edgardoc/finSys_main.asp?dcn=0000950123-02-003210>.

368 *See, e.g., Overbuilders' Plans Hit by Financing Problems,* Cable World, at 11 (Mar. 11, 2001) (noting problems of WINfirst, WideOpenWest).

369 *RCN Pulls Cable-TV Proposal*, Philadelphia Inquirer, at A1 (Feb.15, 2001) (RCN spokesman says "the City of Philadelphia, or at least some city politicians, just would prefer not to have competition").

370 *Letter to the Editor from James L. Kenney, Councilman-at-Large,* Philadelphia Inquirer (Feb. 21, 2001).

371 *Id.*

In Prince George's County, Maryland, RCN affiliate Starpower balked at the request of the County Executive to pay an up-front fee of $400,000, payable over four years, which would have been credited against the fees that Starpower would pay the County after it began providing service.[372] The County intended to use the fees to provide high-speed Internet service to government offices and schools. Starpower also cited "deteriorating market conditions in the high technology market sector" in its letter notifying the County that it had "decided to delay finalizing a cable franchise agreement with Prince George's County until [Starpower] can proceed in a more prudent manner."[373] Whatever the merits of Starpower's claims, they are not specific to this merger.

In short, neither of these two situations is the least bit relevant to the pending merger proceeding.

b. Other Complaints

Access to MDUs. RCN alleges that, in the Washington, D.C. area, "Starpower has encountered numerous instances in which the incumbents (Comcast and its predecessors) have received exclusive building rights."[374] It is true that Comcast has in some cases obtained the right to be the exclusive cable provider of an MDU. It is equally true that Comcast has encountered numerous instances in which *Starpower* has received

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[372] A. Dominello, *Starpower Halts Cable Plans*, Prince George's Journal (Aug. 28, 2001). By contrast, Comcast pays the County 10 times that much in a single year.

[373] Letter from Deborah M. Royster, Starpower, to Barbara L. Holz, Deputy Chief Administrative Officer, Prince George's County Government, at 2 (June 26, 2001).

[374] RCN Comments at 22.

exclusive building rights.[375] Indeed, until recently, RCN has had something of an advantage in securing these rights, since it was offering video, voice, and data services, delivered over an 860 MHz plant, in contrast to Comcast's video-only, 450 MHz offering. Surely RCN does not mean to suggest that Starpower should be allowed to secure exclusive building rights, while Comcast is enjoined from doing the same. In any event, this has nothing to do with the merger.

Employment of Contractors. RCN complains about Comcast "interfering with RCN's ability to hire the construction and installation contractors" that RCN needs to conduct its business.[376] Although the most dramatic charges pertain not to Comcast but to prior owners of certain cable systems,[377] RCN's basic point is both logically and factually flawed. As a logical matter, although RCN suggests that it is "anticompetitive" for a company not to want its contractors also to work for its competitors, there are in fact strong *pro-competitive* reasons why a company would wish to safeguard its competitively sensitive information such as system design maps and upgrade plans. As a factual matter, RCN cites no specific examples to buttress its claims, and it is simply absurd to suggest that Comcast could possibly employ "virtually all of the viable construction and

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375 Given its reference to CS Docket No. 95-184 (*see* RCN Comments at 22 n.41), RCN appears to be aware that any changes to building access rules should be addressed in a rulemaking of general applicability, not a merger proceeding.

376 RCN Comments at 16-19.

377 For example, the claim about having contractors followed in their trucks relates not to Comcast but to a company named Suburban Cable. *See* RCN Comments at 18. RCN seeks to attribute this behavior to Comcast by noting that some of these employees were *subsequently* hired by Comcast.

installation contractors in the [Philadelphia metropolitan] area."[378] And, in any event, this has nothing to do with the proposed merger.

2. AT&T-Specific Allegations

a. Franchise Disputes

CWA and a single local franchising authority (Sacramento Metropolitan Cable Television Commission) attempt to inject a number of local franchise disputes into this proceeding. They make no genuine effort to tie these issues to the merger, other than CWA's feeble contention that the local disputes reflect on AT&T Broadband's "credibility" and therefore undermine AT&T Broadband's statements regarding the public benefits of the merger.[379] These arguments should be summarily dismissed.

First, none is truly merger specific; ongoing local disputes are not generated or affected by a merger at the national level. The Commission has expressed the view that local franchise disputes need to be addressed locally.[380] That remains the controlling principle and requires the rejection of CWA's claim that local franchise issues are a basis for denying the proposed merger or placing conditions on the merger parties.

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378 RCN Comments at 17. One page later, RCN acknowledges that some of these contractors are currently working for RCN, not Comcast.

379 *See* Letter from Ron Cooper, Executive Director, Access Sacramento, to Robbie Waters, Chair, Sacramento Metropolitan Cable Television Commission, MB Docket No. 02-70 (filed Apr. 29, 2002); Letter from Richard E. Esposto, Executive Director, Sacramento Metropolitan Cable Television Commission, MB Docket No. 02-70 (Apr. 26, 2002); CWA Comments at 8.

380 *See Implementation of Section 8 of the Cable Television Consumer Protection and Competition Act of 1992, Consumer Protection and Customer Service*, 8 FCC Rcd 2892, ¶ 19 (1993) ("*Customer Service Order*") (finding that "it does not appear that Congress intended for the Commission to bear the responsibility of enforcing the new FCC [customer service] standards" and that "as a practical matter, customer service requirements can be enforced most efficiently and appropriately on a local level where such enforcement historically has occurred").

Second, CWA provided what it calls a "compendium" of AT&T Broadband's "current status of non-compliance" with local franchise requirements,[381] but the asserted compendium contains a total of only seven local franchise disputes; for perspective, AT&T Broadband holds *thousands* of franchises nationwide.

Third, CWA correctly observes that "resolution of these issues is the responsibility of local franchise authorities and not this Commission."[382] CWA's "compendium" expressly points out that the local franchising authorities have engaged in some sort of enforcement proceeding against AT&T Broadband and, in fact, resolution in at least some of the disputes resides in state courts, where litigation is pending.[383]

b. Other Complaints

The Commission should similarly dismiss Everest's proposal regarding AT&T Broadband contracts with operators of multiple dwelling units.[384] Again, Everest's allegations are not specific to this merger. Indeed, the Commission is already considering the issue of exclusive MDU contracts in a pending rulemaking.[385]

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381 *See* CWA Comments at 8.

382 *Id.*

383 *Id.* at 10-15.

384 *See* Everest Comments at 5.

385 *See Telecommunications Services Inside Wiring; Customer Premises Equipment; Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Cable Home Wiring*, 13 FCC Rcd 3659 (1997); *see also AT&T-TCI Merger Order* ¶ 28 (rejecting requests to impose greater MDU inside wiring obligations on the merged entity than would otherwise apply to cable operators generally).

E. Must Carry Arguments

KMTP/MTP, the licensee of a public television station in San Francisco, asserts that AT&T Broadband has improperly refused to carry its broadcast service. This is simply an effort to relitigate a must-carry dispute in this merger proceeding, this time under the guise of a lack of commitment to program diversity. KMTP/MTP has initiated two proceedings at the FCC – a must-carry complaint and a petition for forfeiture – based on precisely the same set of facts it now raises here. As AT&T Broadband has explained in these other proceedings, it carries KMTP on every system where KMTP meets its statutory obligation to deliver a good quality signal; KMTP in fact enjoys carriage on AT&T Broadband systems serving more than one million subscribers. In cases where KMTP does not meet its obligation to deliver a good quality signal, AT&T Broadband has acted fully within its rights to decline carriage.[386] The Commission certainly need not, and should not, adjudicate KMTP's claims in a *third* proceeding.[387]

F. Labor Disputes

CWA's allegations about AT&T Broadband's compliance with federal labor laws are similarly well beyond the scope of this proceeding and outside the Commission's jurisdiction.[388] The Commission has recognized that merger proceedings are not the

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386 *See* Opposition to Petition to Initiate a Forfeiture Proceeding, CSC-391 (filed March 28, 2002); Opposition to Complaint for Carriage, CSR-5513-M (filed June 14, 2000).

387 *See AOL-TW Merger Order* ¶ 207 (stating that it is inappropriate to address issues in a merger proceeding that were already raised in a petition for special relief).

388 *See* CWA Comments at 16-17 (noting that the National Labor Relations Board is considering these issues).

appropriate fora to resolve labor disputes.[389] Indeed, the Commission declined to consider similarly speculative, non-merger-specific employment-related issues in the *AT&T-TCI Merger Order*, and should take the same approach in this merger proceeding.[390] In any event, the Applicants have made clear that they will comply with all laws regarding the right of employees to self-organize and to bargain collectively through representatives of their own choosing.

G. Corporate Governance

CFA appears to argue that AT&T Comcast's corporate equity structure violates the public interest because it will somehow prevent the Commission from enforcing the Communications Act and its rules.[391] CFA, however, offers no logical theory, let alone facts, to support this claim. The aspects of AT&T Comcast's business that are covered by the Communications Act will obviously be subject to the Commission's regulations and oversight. In addition, CFA alleges that AT&T Comcast's corporate structure will enable management to avoid responsibility for unspecified misconduct. There is

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389 *See Qwest-USWC Merger Order* ¶ 63 n.178 (finding "labor concerns to be inappropriate for our review in this proceeding").

390 *See AT&T-TCI Merger Order* ¶ 141. The Commission in prior merger proceedings has summarily declined to consider similar labor-related claims where the asserted grounds for the allegations were as speculative as they are in this case. *See AT&T-TCI Merger Order* ¶ 141 n.406 (record did not support CWA's concerns); *MCI-WorldCom Merger Order* ¶ 213 (CWA's allegations were speculative); *see also Qwest-USWC Merger Order* ¶ 63 n.178 (declining "to review the unsubstantiated allegations made against Qwest").

391 CFA Comments at 27, 29; *see also* BEN Comments at 3.

absolutely no record evidence to support this claim either. The Commission should reject these baseless arguments.[392]

H. Customer Service

CWA asserts that AT&T Broadband's steps to consolidate and outsource certain customer care functions have impaired service quality, citing only a handful of specific local disputes.[393] CWA speculates that the merger will result in additional consolidation of the customer care functions that, in turn, will somehow lead to additional local controversies.[394] CWA offers a proposed condition to address these speculations, including national reporting requirements and penalties.

CWA's accusations are simply wrong. AT&T Broadband is committed to providing customers with easy-to-use services and quality customer care. CWA's claims regarding customer service appear to be based on a temporary, abnormal spike in the number of calls into AT&T Broadband's call centers that occurred in late 2001 and early 2002. AT&T Broadband reacted quickly to these events by taking a number of proactive steps, including significantly increasing its call center budget, adding 40% more personnel to its call center workforce, providing additional specialized training to call center staff to better and more quickly address customer inquiries, enhancing monitoring

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392 *See AT&T-TCI Merger Order* ¶ 143 (In rejecting conclusory, non-merger specific allegations that AT&T-TCI would not be a "responsible" corporation, the Commission stated, "The record in this case does not give the Commission concern that the merged company will be a poor corporate citizen.").

393 CWA Comments at 21-22.

394 While CWA claims that the merger parties have announced additional consolidation in customer care functions, in fact, the parties have not made any specific decisions in this regard. In any event, consolidation of these functions to date has permitted more, not less, efficient and effective operations, to the benefit of AT&T Broadband's customers.

capabilities for real-time feedback to call center representatives on customer interactions, and modifying automatic routing instructions on toll-free customer service numbers in order to free call center representatives to focus on service-related (non-billing) calls.

The results have been extremely positive. For example, since November 2001, AT&T Broadband has achieved a 51% decline in the average handle time for calls into its customer service centers. Because of these reduced call handle times, representatives can now take more calls each day. This means that fewer calls wait in queue, and on average calls are answered more quickly. The average time in which a call is answered has improved 96% over this same time period, and most customers are now on hold for only a matter of seconds before speaking to a representative. More than 90% of calls are answered within 30 seconds. Similarly, far fewer callers receive a busy signal when they call AT&T Broadband's customer service number. In fact, the percentage of callers receiving a busy signal has been at or near 0% in recent months.

In any event, CWA's request for merger conditions imposing federal reporting requirements and penalties for customer service is flatly at odds with prior Commission rulings. In implementing the national customer service standards in 1993, the Commission expressly ruled that "Section 632(b), in delineating the FCC's involvement in establishing customer service standards, provides this Commission with no specific enforcement role."[395] Moreover, the Commission specifically rejected proposals that it adopt either national reporting requirements or penalties for customer service, because there was no evidence that state and local authorities would be unable to handle

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[395] *Customer Service Order* ¶ 19.

enforcement matters.[396] To the contrary, the Commission expressed the view that national efforts could actually "*hamper* effective local enforcement of customer service requirements."[397] CWA offers absolutely no argument as to why this ruling and its underlying rationales do not apply with equal force here.

Finally, as noted above, the Commission has consistently rejected the imposition of merger conditions that would more appropriately be applied, if necessary at all, on an industry-wide basis.[398] The Commission should follow the same policy here, all the more so because it has previously found that the customer service conditions proposed by CWA are not only unnecessary, but would "hamper" effective enforcement of customer service standards.

I. Programming Diversity And Sales Of Systems To Minority Entities

A very small number of commenters inaccurately, and without support of any kind, attack AT&T Broadband on the grounds that it has treated minority groups unfairly.[399] These unsubstantiated attempts to exploit this merger proceeding in order to

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[396] *Id.* ¶ 21.

[397] *Id.* (emphasis added).

[398] *SBC-Ameritech Merger Order*, Separate Statement of (then) Commissioner Powell at 1 (noting that proposed merger conditions "are more often surrogates for policies and rules of general, rather than merger-specific, applicability, but without the extensive deliberative process and the check of judicial review normally afforded a rulemaking"); *AT&T-TCI Merger Order* ¶ 43 ("We find that digital broadcast signal carriage requirements should be addressed in the Commission's pending rulemaking proceeding and not here. . . . [T]his is like other cases where the Commission has declined to consider, in merger proceedings, matters that are subject of rulemaking proceedings before the Commission because the public interest would be better served by addressing the matter in a broader proceeding of general applicability.") (citations omitted).

[399] *See* KMTP Comments at 3; BEN Comments at 1-3; Kelly Comments at ii-iii, 2.

seek private gain in commercial or litigation contexts occurring far outside the parameters of this proceeding should be given no credence.

AT&T Broadband and its corporate parent, AT&T, have longstanding reputations as excellent corporate citizens.[400] AT&T has built a tradition of investing in local communities through its ongoing support for education, civic and community services, the environment, public policy, and the arts. The AT&T Foundation, just one vehicle by which AT&T meets its social responsibilities, supports initiatives that focus on technology and innovation to improve the quality of life in communities served by AT&T. It is one of the largest endowed corporate foundations in the world and in 2000 alone contributed $43.5 million to more than 1,000 nonprofit organizations. Among other work, the AT&T Foundation provides grants to help bring digital services to the African American community by supporting the NAACP's creation of Family Technology Centers. The first of these centers opened in Baltimore County in 2000 with assistance from the Alliance for Black Telecommunications Employees.

AT&T also has a long history of focusing on minority suppliers and actively supports hundreds of thousands of minority, women, and veteran-owned business enterprises through its Supplier Diversity Program.[401]

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400 *See AT&T-TCI Merger Order* ¶ 143 ("The record significantly demonstrates that AT&T has a good record of corporate responsibility and service, and we have no reason to believe that the merged company will reverse this record") (citations omitted).

401 This record of excellence has been widely recognized. For example, on May 7, 2002, AT&T received the Corporate 2002 Excellence in Diversity and Environmental Stewardship Award from the Environmental Careers Organization for its commitment to diversity and the environment. In 2000, AT&T received the Pioneer Award from the U.S. Department of Commerce for innovations in implementing large transactions with minority- and women-owned businesses. The Women's Business Enterprise Council also recognized AT&T as one of America's top corporations for women's business enterprises in 2001.

Black Education Network ("BEN") asserts, without any effort to substantiate its claim, that AT&T Broadband has discriminated in its carriage of minority programming.[402] As an initial matter, it would be bad business for AT&T Broadband or any other program distributor to ignore the substantial minority portion of the market. The total minority population in the United States is more than 80 million people, projected to grow dramatically in the next twenty years to 141 million, or 40% of the total U.S. population.[403] Cable penetration among African American, Hispanic, and Asian American families has grown significantly over the past five years.[404] And unquestionably, these households represent highly desirable demographics for advertisers.[405] No business could afford to ignore this crucial segment of its market.

Moreover, BEN's claim that AT&T Broadband discriminates in carriage in minority programming is false. To the contrary, AT&T Broadband is a leader in distributing and developing minority programming. AT&T Broadband cable systems carry the wide variety of "household name" programmers targeted to African American audiences, including Black Entertainment Television ("BET"), BET Gospel, BET on

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402 BEN Comments at 2.

403 *See generally*, Cabletelevision Advertising Bureau, *Multicultural Marketing Resource Center* (last visited May 10, 2002) *available at*: <http://www.cabletvadbureau.com/MMRC/why.html>.

404 In 1997, 65% of African American television households subscribed to cable; in 2001, the figure grew to 75%. Among Hispanic television households, penetration has risen from 57% to 62%. Press Release, Cabletelevision Advertising Bureau, *Cable Penetration Continues to Grow in Multichannel Households* (Feb. 25, 2002), *available at:* <http://www.cabletvadbureau.com/02PressReleases/020225.htm>.

405 *See* Cabletelevision Advertising Bureau, *Information, Insight, and Strategies to Achieve Greater Advertising Efficiencies in Today's Diverse Markets* (last visited May 10, 2002), *available at:* <http://www.cabletvadbureau.com/MMRC>.

Jazz, Black Starz, VH1 Soul, etc. Further, AT&T Broadband carries all of the major independent networks focused on African American affairs, family entertainment, and spiritual programming, including The Word Network, the New Urban Entertainment Network, and Major Broadcasting Cable Network. AT&T Broadband and these networks have been working together to find ways to increase their audience reach.

AT&T Broadband distributes many other types of minority programming, as well. Its cable systems carry more than 50 minority programming networks, reflecting a diverse range of ethnic interests including Arabic, Korean, Chinese, Russian, and Hindi. AT&T Broadband constantly monitors its cable systems to ensure that the local demand for ethnic programming in each area is being met. For example, AT&T Broadband offers its Miami-area subscribers seven Spanish language broadcast services; three Spanish language cable services on its basic tier, and a special digital tier package, "AT&T Espanol," that includes nine Spanish-language services.

The specific allegations related to BEN's programming are also flatly inaccurate. AT&T Broadband has an affiliation agreement with BEN that contains terms identical to many of AT&T Broadband's affiliation agreements with other programmers. At no time during carriage negotiations with BEN did AT&T Broadband "renege" on any terms and conditions offered. Put bluntly, the reason why AT&T Broadband cable systems do not carry BEN's programming is because its product quality is inferior to other services preferred by AT&T Broadband customers. In any event, BEN's particularized complaint over carriage has no bearing whatsoever on the Commission's consideration of the merger.[406]

BEN also argues that AT&T will not sell cable systems to minority owners. This is simply false. AT&T Broadband sells cable systems in a manner that maximizes shareholder value, and accordingly makes its sales decisions by seeking out and contracting with the best and highest bidder independent of race or other affiliation. BEN, a disappointed bidder in two auctions conducted by AT&T Broadband for the sale of multi-billion dollar cable properties, has chosen to express its disappointment in this proceeding by leveling reckless, unsubstantiated accusations of racial bias. These claims are completely false and should be summarily dismissed.

J. Malicious Prosecution

The issues raised in the Kelly Comments filed on behalf of several individuals should be rejected as well. This pleading revisits claims already filed in a Georgia state court alleging malicious prosecution against several AT&T Broadband affiliates by individuals who were arrested for theft of cable television services under a Georgia theft-of-service statute. AT&T Broadband's affiliates are vigorously defending that case.

The claims have no bearing upon the merger proceeding. First, the claims of malicious prosecution raised by Mr. Kelly are the subject of litigation in Georgia state court and should be resolved in that forum, not at the Commission. The AT&T Broadband entities sued deny these claims and will defend themselves accordingly in

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406 *See, e.g., AT&T-TCI Merger Order* ¶ 38 (merger proceeding is not the appropriate forum in which to resolve specific grievances); *AT&T-MediaOne Merger Order* ¶ 81.

state court.[407] Second, Mr. Kelly's attempts to connect this issue to the merger, by arguing that there is a "pattern" of racial animus by AT&T Broadband, are offensive and baseless. Indeed, the charge of racial discrimination appears to have been made only as an afterthought in order to find some arguable relevance to this proceeding. The private suit filed in state court by these same individuals only a few months ago makes absolutely no charge whatsoever against AT&T Broadband on grounds of racial discrimination; *indeed, it never mentions race at all.*[408] In any event, AT&T Broadband categorically denies any racial motivation whatsoever involved in this controversy. Since the Kelly Comments do not and cannot attempt to substantiate the claim now made before the Commission, they cannot form any legitimate basis for the Commission to deny the merger based on character qualification. The Commission should dismiss the pleading.[409]

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[407] Indeed, prior to each of the arrests, a law enforcement officer obtained an arrest warrant from a neutral and detached magistrate, based on probable cause.

[408] The complaint, as amended, alleges only two counts: malicious prosecution and a conspiracy to engage in malicious prosecution.

[409] The Commission's Character Qualification Policy Statement prohibits licensing decisions "based on mere allegations of ... non-FCC misconduct." *Policy Regarding Character Qualifications in Broadcast Licensing*, 5 FCC Rcd 3252, ¶ 7 (1990).

Only one other commenter raises the issue of character qualification. Blawnox, Pennsylvania argues that AT&T filed a change in an ownership report, pursuant to Commission rules, that was "intentionally false." Blawnox Comments at 5. Yet Blawnox offers no support for this argument. For example, it offers no explanation as to how AT&T Broadband or Comcast could possibly gain any advantage from the alleged fraud before the Commission. Blawnox omits to inform the Commission that it is engaged in active litigation with the merger parties, which it commenced, and that the litigation is premised on the *accuracy* of AT&T's ownership report. *Borough of Blawnox, Pennsylvania v. Comcast Cablevision of The South, Inc.,* Civil Action No. 01-678 (W.D. Pa. Apr. 13, 2001). Blawnox's filing before the Commission is simply an effort to gain leverage in a litigation matter pending in another forum, and accordingly should be ignored.

K. Equipment Averaging

CFA asserts that "AT&T uses an analog set-top leasing scheme to subsidize its digital set-top box," which it claims gives AT&T "a powerful interest to ensure that [the set-top box] market remains closed."[410] This allegation is not merger specific, but merely repeats unfounded claims regarding the cable industry practice of "equipment averaging" that already have been advanced in the Commission's pending "commercial availability" rulemaking proceeding.

As the Commission knows, Congress in the 1996 Act explicitly authorized the practice of equipment averaging.[411] Moreover, equipment averaging is *not* an unfair "subsidy," but merely allows AT&T Broadband and other cable operators to pool their costs for set-top boxes and recover those costs through a single lease rate for all devices in the pool. As the legislative history of the 1996 Act makes clear, Congress authorized equipment averaging to "promote the development of a broadband, two-way telecommunications infrastructure" and to "enable cable operators to reduce the monthly charges to consumers that often are associated with the introduction of new technology."[412] Indeed, the Commission itself has confirmed that the equipment averaging provision authorizes cable operators to aggregate the costs of equipment into "broad categories" (with a single "category" potentially including both analog and digital set-top boxes) regardless of the varying levels of functionality of the equipment within

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410 CFA Comments at 2, 24.

411 *See* 47 U.S.C. § 543(a).

412 H.R. Rep. No. 104-204, at 107 (1995), *reprinted in* 1996 U.S.C.C.A.N. 10, 74-75.

each such broad category.[413] Through the use of equipment averaging, AT&T Broadband and other cable operators have made it easier for consumers to obtain the benefits of new advanced digital service offerings, just as Congress intended.

The cable industry's use of its equipment averaging authority granted by Congress in no way diminishes the powerful incentives that AT&T Broadband, Comcast, and other cable operators have to support the commercial availability of set-top boxes and other navigation devices (*e.g.*, cable modems) from sources other than the operator. Cable's core business is the sale of *services*, not the sale or lease of set-top boxes or other cable customer *equipment*. Given the increasingly vigorous competition cable operators face from DBS and other alternative service providers, AT&T Broadband and Comcast have (and will continue to have post-merger) every incentive to maximize the range of equipment options and distribution outlets for set-top boxes and other equipment that enables consumers to obtain and use operator-provided services.

In any event, since the "subsidy" claims made by CFA are not merger specific and merely parrot the unfounded allegations that have been raised and are currently under review in the pending "commercial availability" rulemaking proceeding,[414] it is neither necessary nor appropriate for the Commission to address this industry-wide issue in the context of this merger proceeding.

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413 *Implementation of Section 301(j) of the Telecommunications Act of 1996: Aggregation of Equipment Costs by Cable Operators*, 11 FCC Rcd 6778, ¶ 1 (1996), quoting 47 U.S.C. § 543(a)(7).

414 *See generally*, *Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices*, CS Docket No. 97-80.

V. CONCLUSION

For the foregoing reasons, the Applicants respectfully request that the Commission grant the pending applications promptly and unconditionally.

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I, Denise Owusu, hereby certify that on this 21st day of May 2002, I caused a copy of the attached Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control to be hand delivered or mailed to the following:

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