

support line sharing with voice services.<sup>56</sup> And AT&T never proves that there are only three DSL providers with whom it could partner in any event. *See id.* at 25. On the contrary, numerous DSL providers other than Covad, Rhythms, and NorthPoint, are rapidly expanding their operations across the country. *See Hazlett Reply Decl.* ¶ 16. As the Commission has found, “competition is emerging, rapid buildout of necessary infrastructure continues, and extensive investment is pouring into this segment of the economy.” *Second Advanced Services Report* ¶ 6.<sup>57</sup>

Fourth, even aside from the many other flaws in its argument, AT&T never proves that its ability to compete would be impaired if it had to deal with multiple DLECs rather than just one. *See AT&T* at 22-25. AT&T merely claims that “the costs of partnering with numerous DSL providers are prohibitive,” based on nothing more than an unsupported assertion by its own product manager. *Id.* at 22 & Att. A. ¶¶ 27-33. Yet, as described above, AT&T itself already has multiple partners and already operates its own vast broadband cable network (and fixed wireless network), which obviates the need for AT&T to deal with multiple data CLECs to provide nationwide broadband access and voice services. In contrast, if AT&T’s claims were credited, the effect would be to deny ISPs access to the national open broadband network that

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<sup>56</sup> *See, e.g., Deployment of Wireline Services Offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order in CC Docket No. 98-147, Fourth Report and Order in CC Docket No. 96-98, 14 FCC Rcd 20912, ¶ 34 (1999) (“The larger business market tends to favor robust, high-capacity, symmetrical forms of xDSL, such as SDSL. These types of xDSL are not compatible with voice service provided over the same line in a line sharing arrangement, because they utilize the whole loop frequency spectrum.”).

<sup>57</sup> *See also AT&T/MediaOne Order* ¶ 117 (“With regard to choice among broadband access providers, there is evidence that ILECs, CLECs, and other competitive providers are aggressively rolling out alternative broadband technologies, notwithstanding cable’s early lead in the nascent broadband area.”).

this transaction will help create, and to hamper their ability to compete with AT&T's closed cable systems. And that speaks volumes about AT&T's real motivations here.

4. *This transaction poses no risk of increased discrimination because of a so-called "spill-over" effect.* Again alone among the commenters, AT&T misapplies the Commission's so-called "spill-over" theory to argue that the merger, by giving Verizon an out-of-region DSL presence, will "increase Verizon's incentives to discriminate against rival advanced services providers" within Verizon's region. See AT&T at 29-31. Whatever the merits of this "spill-over" theory in the context of previous mergers, the Commission has made clear that it applies only where an incumbent LEC expands the footprint over which it operates as an *incumbent*. It does not apply where, as here, an ILEC expands its footprint by operating as a competitive entrant outside its traditional local service territory. See *US West/Qwest Order* ¶ 41.<sup>58</sup> In short, because this case "will not result in a larger footprint for [any] incumbent LEC," "the merged entity does not face the same increased incentives to discriminate" that would make the spill-over theory applicable. *Id.*

Moreover, while this transaction in no way increases Verizon's incentives to discriminate, the combination of NorthPoint's and Verizon's DSL businesses in a separate affiliate does, according to the Commission, help to protect against any risk of discrimination against competitive LECs that may already exist. See *id.* ¶ 42; *SBC/Ameritech Order* ¶ 211; *Bell Atlantic/GTE Order* ¶ 260. And here, the fact that the new NorthPoint will be even more separate than what the Commission has deemed sufficient can only further allay any concerns regarding discrimination.

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<sup>58</sup> *Qwest Communications International Inc. and US West, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application*

**B. The Transaction Poses No Vertical Concerns.**

Finally, because the new NorthPoint will continue to use an open DSL platform, which ensures even-handed treatment of ISPs, this combination creates no risk of harm to competition in any vertical markets. On the contrary, this open platform will become available to broader geographic areas and customer segments than either NorthPoint or Verizon alone presently serves. The transaction will therefore enhance ISPs' ability to serve their customers, and thereby benefit consumers.

Nonetheless, one commenter — CIX— asks the Commission to eliminate some of these competitive benefits, by requiring the new company to tariff all of its services and by prohibiting it from providing volume and term discounts to ISPs, which could in turn be passed on to consumers. *See* CIX at 9-12. It says these requirements are necessary to protect against the theoretical risk that the new company might discriminate in favor of one or more preferred ISPs.

As an initial matter, these claims have nothing to do with the transaction at issue here. If NorthPoint or Verizon had either the incentive or the ability to discriminate in favor of one or more particular ISPs, that would already be true today. This transaction does nothing to change that fact.

Moreover, as the Commission itself has recognized in analogous contexts, imposing a mandatory tariff requirement on the new NorthPoint for a service that the Commission has deemed competitive would affirmatively harm its ability to compete with closed cable systems.<sup>59</sup> And CIX itself readily concedes (at 10) that “volume discounts are an important and valuable

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*to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order, 15 FCC Rcd 5376 (2000) (“*US West/Qwest Order*”).

<sup>59</sup> *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report and Order, 11 FCC Rcd 20730, ¶¶ 4, 23, 52 (1996) (holding that detariffing of domestic interexchange services will promote competition).

competitive pricing concept,” as the Commission itself has noted in the past.<sup>60</sup> Indeed, when CIX previously made the same claims that it repeats here with respect to the volume and term discounts in Verizon’s tariff, the Commission approved Verizon’s tariff without giving credence to CIX’s claims.<sup>61</sup>

In addition to the claims described above, several commenters raise various issues relating to Verizon’s conduct that have nothing to do with this transaction and that, for the most part, are the subject of other pending proceedings before the Commission. As the Commission has repeatedly held, proceedings on mergers that involve no anticompetitive harms are not the appropriate place to address such claims “because the public interest would be better served by addressing the matter in a broader proceeding of general applicability.” *AT&T/TCI Order* ¶ 43; *see also Bell Atlantic/NYNEX Order* ¶ 210. In any event, Attachment 3 contains specific rebuttals of these irrelevant claims.

### **III. THE NEW NORTHPOINT WILL COMPLY FULLY WITH SECTION 271.**

As explained in the Application, few changes to NorthPoint’s existing DSL service arrangements are required to ensure compliance with section 271 after the merger has been completed. *See* Pub. Int. Stmt. at 23. For the most part, NorthPoint’s node, its ISP partner’s point of presence, and the ISP’s end user customer today are all located in the same LATA. The Application also described specific existing arrangements that would require adjustment and explained in detail the manner in which they would be modified to comply with the restrictions of section 271. *See id.* at 23-24, 26-27; Hagmueller Decl. ¶¶ 4-6, 9-12.

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<sup>60</sup> *See, e.g., Bell Atlantic Tel. Cos. Transmittal Nos. 741, 786, Revisions to Tariff F.C.C. No. 10.* 11 FCC Rcd 2024, ¶ 44 (1995) (“Volume and term discounts are common business tools and generally recognized to be in the public interest.”).

<sup>61</sup> *See Bell Atlantic Revisions to Tariff F.C.C. No. 1, Order Terminating Investigation*, 14 FCC Rcd 20531 (1999).

AT&T, again alone among the commenting parties, advances a series of groundless allegations that NorthPoint's provision of DSL service post merger will violate section 271. Its arguments are meritless.

**A. New NorthPoint's Regional Connect Service Will Not Violate Section 271.**

AT&T's principal argument is that the Regional Connect service described in the Application will violate section 271 because it employs private lines terminating in New York to deliver traffic to ISPs located in that State. In reality, however, the service configuration described in the Application is permitted by the express terms of the 1996 Act.

The Regional Connect service that is the focus of AT&T's complaint is a private line service that NorthPoint sells to ISPs to transport traffic from an ISP's end-user customers in one LATA to the ISP's point of presence in another LATA. This arrangement allows ISPs to connect with NorthPoint at centralized locations, and serve customers across wider geographic areas without having to build facilities to reach every LATA. The Regional Connect service allows ISPs, and particularly smaller ISPs, quickly and efficiently to expand the reach of their services, and to provide consumers with a broader choice of ISPs than they would otherwise have.

In some instances, the new NorthPoint will sell its Regional Connect service to ISPs that interconnect with NorthPoint in a State where Verizon has authority to provide originating interLATA services, such as New York, but end-user customers of the ISPs may be located in an in-region State where Verizon has not received such authority, such as Pennsylvania. AT&T claims that this service arrangement violates section 271. Specifically, AT&T concedes that this service is governed by section 271(j), which expressly provides that "800 service" and "private line service" are treated as services that originate in a given in-region State if they both terminate in that State and allow the called party to determine the interLATA carrier. But it nonetheless

claims that section 271(j) “says nothing at all about where calls originate,” and merely establishes an additional prohibition that bars “some interLATA communications that *terminate* in-region.” AT&T at 14 (emphasis in original). Or to put it another way, AT&T would read section 271 to bar any 800 or private line services until interLATA authority is received on *both* ends of the service.

AT&T’s strained reading of section 271(j) flies in the face of the plain text of that provision. Contrary to AT&T’s claims, section 271(j) does not contain an additional prohibition. Rather, as the Application explained, that section is a definitional provision that prescribes the manner in which the private line and 800 services described in the statute are to be treated for purposes of applying the requirements of section 271. Indeed, by its express terms, section 271(j) states that private line services that terminate in a given in-region State are to be treated as in-region services specifically for purposes of applying section 271(b)(1). In the words of the 1996 Act, these services “shall be considered an in-region service subject to the requirements of subsection (b)(1).” The latter subsection, entitled “In-region Services,” is an affirmative description of the services that a BOC or its affiliate is *permitted* to provide in an in-region State once the BOC has received interLATA authority for that State:

A Bell operating company, or any affiliate of that Bell operating company, *may provide* interLATA services originating in any of its in-region States (as defined in subsection (i)) if the Commission approves the application of such company for such State under subsection (d)(3).

47 U.S.C. § 271(b)(1) (emphasis added). The 1996 Act, therefore, expressly *permits* a BOC to provide 800 and private line services that terminate in an in-region State once it has interLATA relief in that State.

This, of course, comports fully with the statutory scheme. Section 271 generally prohibits a BOC from providing interLATA services that originate in an in-region State because, for most types of calls, it is the originating end where the customer selects an interLATA carrier and where any potential risk of unlawful discrimination arises. In the case of the specific 800 and private line services that are the subject of section 271(j), however, it is the terminating end where the customer selects the interLATA carrier and where any potential risk of discrimination arises. Consequently, for certain kinds of services, section 271(j) simply reverses the usual presumption of where interLATA traffic originates in order to correspond to the unique nature of these specific services.

Here, the Regional Connect services at issue fall squarely within the scope of section 271(j), and not even AT&T claims otherwise. Therefore, when an ISP selects the interLATA carrier for a DSL private line service that terminates at the ISP's point of presence in New York, section 271(j) deems that service to originate in New York for purposes of applying section 271(b)(1). Because the Commission has approved Verizon's application to provide interLATA services originating in the State of New York, section 271(b)(1) explicitly permits the new NorthPoint to provide its private line service to ISPs located there.

To put this in context, this is the same way that section 271(j) works in the case of 800 services. Usually, a call placed by an in-region end user to an interLATA destination is treated as originating at the end user's location for purposes of section 271. In the case of 800 services, as with private lines, section 271(j) reverses the usual rule and specifies that such calls should be deemed to originate at the location of the 800 customer to whom an end user places a call.

For example, if NorthPoint were to provide dial-up, 800 access service to an ISP located in New York, section 271(j) specifies that calls from end users in Pennsylvania to the 800 (ISP)

customer located in New York are to be treated as originating in New York where Verizon has received section 271 approval. Likewise, a private line service that transports traffic from an ISP's end user in Pennsylvania to its location in New York is deemed by the statute to originate in New York. The only difference is that one service provides a dedicated connection while the other provides a dial-up connection. And section 271(j) expressly requires that both service offerings be treated as originating in New York.

**B. New NorthPoint's Proposed GSP-Type Arrangement Is Consistent with the Commission's US West/Ameritech/Qwest Teaming Order.**

AT&T also challenges a second proposed service arrangement that would be employed in instances where ISPs interconnect with NorthPoint in a State in which Verizon is *not* authorized to provide originating interLATA services. In these circumstances, the ISP would be responsible for contracting with an interLATA carrier to transport traffic from the LATA where the end user is located to the NorthPoint node at which the ISP has located its point of presence. In short, the interLATA carrier would act as a Global Service or GSP, which the Commission has approved in prior orders.<sup>62</sup>

AT&T nonetheless claims (at 16) that the specific arrangement proposed here would constitute the provision of interLATA service by new NorthPoint because it "would for all intents and purposes be reselling the services of another carrier." Its claim, however, is based on a complete mischaracterization of the relationship between the ISP and the interLATA service provider in such an arrangement. Contrary to AT&T's speculation, the ISP would have a direct contractual arrangement with the interLATA service provider and, in fact, would have the

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<sup>62</sup> See, e.g., *Qwest Communications International Inc. and US West, Inc., Applications for Transfer of Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, Memorandum Opinion and Order ¶¶ 37-38, CC Docket No. 99-272 (rel. Jun. 26, 2000).



discretion to enter into a transport arrangement with its choice of carrier. Indeed, AT&T simply ignores the applicants' explicit declaration that, in these cases, "[t]he ISP would then contract with an interLATA provider to carry the traffic between the various NorthPoint nodes at which that ISP's traffic has been aggregated and the NorthPoint node where the ISP has located its point of presence." *See* Pub. Int. Stmt. at 26; Hagmueller Decl. ¶ 11.

Moreover, this arrangement will not run afoul of the Commission's *Qwest Teaming Order*.<sup>63</sup> In that order, the Commission identified certain factors that it would consider in determining whether a BOC or its affiliate engaged in the unlawful provision of interLATA services: (a) whether the BOC or its affiliate obtains material benefits associated with offering a long distance component in a combined service, such as the ability to become a "one-stop shopping entity" for local and long distance services; (b) whether the BOC affiliate is effectively holding itself out as a provider of long distance services by marketing and selling, under a single brand name, the long distance services of another carrier; and (c) whether the BOC or its affiliate performs functions typically performed by those who resell interLATA services, such as establishing the prices, terms, and conditions for the long distance services.

In this case, application of those factors merely confirms that this arrangement will not involve the new NorthPoint in "providing" interLATA service. For example, new NorthPoint will derive no material benefit from the sale of interLATA services by the provider of those services to the ISP customer.<sup>64</sup> Further, since each ISP customer will be required to contract

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<sup>63</sup> *AT&T Corp., et al. v. Ameritech Corp., Qwest Communications Corp., AT&T Corp., et al. v. Qwest Communications Corp., US WEST Communications, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd 21438 (1998) ("*Qwest Teaming Order*"), *pet. for review denied*, 177 F.3d 1057 (D.C. Cir. 1999).

<sup>64</sup> Because the new NorthPoint's ISP customers will contract directly with the interLATA service provider, new NorthPoint will derive no direct financial benefit from the sale of these services. Moreover, new NorthPoint will not obtain any of the indirect benefits that raised

directly with an interLATA carrier, based on mutually agreeable terms, new NorthPoint will neither offer a “one-stop service,” nor hold itself out as a provider of interLATA services. Moreover, new NorthPoint will not have any control over the pricing, terms, or conditions of the interLATA provider’s service. In short, new NorthPoint’s provision of this GSP-type arrangement does not implicate any of the concerns that the Commission identified in the *Qwest Teaming Order*.

**C. AT&T’s Other Objections Based on Section 271 Are Without Merit.**

In addition to its substantive challenges to the transaction based on section 271, AT&T also advances two other baseless charges.

First, it claims (at 17) that the Application’s description of NorthPoint’s existing and proposed service arrangements is not sufficiently detailed to assess their compliance with section 271, and likens it to other initial showings that the Commission previously found to be inadequate. In reality, the Application here includes a sworn declaration that sets forth a detailed description and diagram of each of the DSL service arrangements that NorthPoint currently offers that may raise section 271 concerns, together with a description and diagram of the modifications that will be implemented prior to closing. In contrast, the Qwest/US West application that AT&T points to as an analogy simply asserted that the parties would take any actions necessary to bring the merged company into compliance with section 271 prior to closing. *See Merger of Qwest Communications International, Inc. and U S West, Inc.*, Applications for Transfer of Control at 13-14, CC Docket No. 99-272 (FCC filed Aug. 19, 1999). The Commission concluded in that case that greater specificity was needed before it could find

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concerns in the *Qwest Teaming Order*. *See Qwest Teaming Order* ¶ 38 (expressing concern about the opportunity of Ameritech and US WEST “to win back customers lost to intraLATA toll competitors, the opportunity to sell additional vertical features, and the opportunity to realize additional intraLATA toll and billing and collection revenue . . .”).

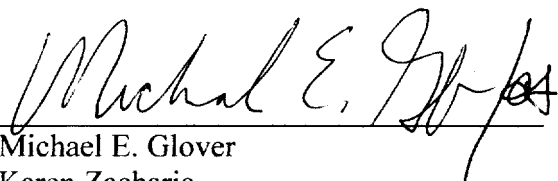
that the services that the merged company would offer were lawful under section 271. In this case, the applicants furnished in the Application all of the information that the Commission needs to make that determination. AT&T's assertions are utterly groundless.

Second, AT&T conjures up the fanciful speculation that this transaction is really an effort by Verizon to obtain control of a portion of the Genuity Internet backbone that Verizon divested in June. According to AT&T, NorthPoint's announcement of the rollout of its national ATM network to support the Regional Connect service (with Genuity as one of its vendors) on the same day that Verizon spun off Genuity is evidence of a grand scheme by Verizon to surreptitiously reacquire Genuity. This is nonsense. AT&T's suggestion that NorthPoint's ATM network was "ready-made" on the date of the announcement and had been built in "partnership[]" with Genuity omits a few critical facts. AT&T fails to mention that NorthPoint selected vendors to construct its ATM network through an RFP process. AT&T was specifically invited by NorthPoint to submit a bid, but failed to do so on a timely basis. Further, AT&T fails to mention that the press release cited in its petition states that NorthPoint's ATM network was built by Genuity and Global Crossing. Moreover, that network was not "ready-made" on the date of the press announcement, and in reality construction of the network is still not complete. In short, there is no grand scheme, and AT&T's spurious claims are utterly irrelevant.

## CONCLUSION

The Commission should promptly approve the requested license transfers.

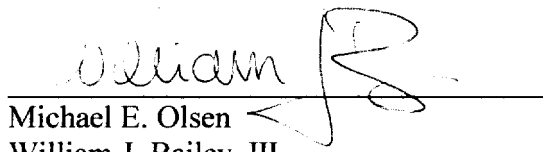
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**Before the  
Federal Communications Commission  
Washington, D.C. 20554**

In the Matter of

Joint Application of NorthPoint  
Communications, Inc. and Verizon  
Communications for Authority Pursuant to  
Section 214 of the Communications Act of  
1934, as Amended, To Transfer Control of  
Blanket Authorization To Provide Domestic  
Interstate Telecommunications Services as a  
Non-Dominant Carrier

CC Docket No. 00-157

**REPLY DECLARATION OF THOMAS W. HAZLETT, PH.D.**

1. My name is Thomas W. Hazlett. I am an economist and my Declaration, submitted earlier in this proceeding, contained a short biography.<sup>1</sup>

2. The purpose of this Reply Declaration is to respond to claims – principally made by AT&T – that this merger will not promote competition and that it will have anticompetitive effects. I conclude, as I did in my initial Declaration, that this merger will accelerate DSL deployment and therefore promote competition to cable’s dominance in broadband access. In doing so, the merger will provide Internet Service Providers (ISPs) with an alternative nationwide distribution system to closed cable systems. I also conclude that the merger will create a firm that is capable of challenging cable’s dominance in the video subscription business, which is even stronger than its dominance of the broadband access business. Finally, I conclude that the merger will offer these competitive benefits without posing any realistic threat of lessening competition since Verizon’s and NorthPoint’s broadband access businesses are highly

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<sup>1</sup> Declaration of Thomas W. Hazlett, PH.D., CC Docket No. 00-157 (Aug. 24, 2000) (“Hazlett Declaration”).

complementary, and since there are effective broadband access competitors for customers of these services.

### CHALLENGING THE DOMINANT CABLE SUPPLIER IN RESIDENTIAL BROADBAND

3. AT&T states that this merger will not promote broadband access competition because it does not create “any scale or scope economies that Verizon does not already enjoy today.”

AT&T Comments, p. 33.<sup>2</sup> It also claims that the merger is not necessary to promote competition for broadband access services because – as I demonstrated in my initial declaration – there are already numerous providers of these services. AT&T Comments, p. 34. AT&T is mistaken on both points.

4. First, this merger does create readily observable economies of scale and scope. *See* Hazlett Declaration, ¶¶ 5-10, 16-18. The merger gives NorthPoint – which is engaged in a massive undertaking to deploy nationwide digital subscriber line (DSL) facilities – much-needed access to capital on preferable terms.<sup>3</sup> Plummeting DSL shares over the past several months testify to the risks associated with building fixed infrastructure with very long payback periods. *See* Attachment 1. Financial consolidation allowing complementary suppliers to strengthen business models supports network formation. The merger also enables NorthPoint to immediately expand its product offerings, which is critical in order for NorthPoint to be a nationwide, one-stop supplier for ISPs. While NorthPoint offers a nationwide SDSL service

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<sup>2</sup> Petition of AT&T Corporation to Deny Joint Application, CC Docket No. 00-157 (Oct. 2, 2000) (“AT&T Comments”).

<sup>3</sup> AT&T argues that NorthPoint does not need the merger for this purpose: “NorthPoint, a leader with a market cap over a billion dollars in a rapidly growing business, could raise substantial sums...” AT&T Comments, p. 38. Even if true (which it is not; as of Oct. 12, 2000, NorthPoint’s market capitalization was under \$800 million – see Attachment I), it is irrelevant: The merger affords NorthPoint an opportunity to raise funds on *more favorable* terms – precisely why NorthPoint shareholders seek to consummate the proposed merger. To deny this opportunity would raise NorthPoint’s cost of capital and impose a tax on its infrastructure investment, discouraging network formation. That Covad recently turned to SBC to help fund its DSL network build-out suggests that similar

today, Verizon offers ADSL service, and the combination of these complementary businesses will enhance the scope and scale of services that the companies can efficiently provide.

5. The merger also yields Verizon instant national scale, as well as added technical sophistication and marketing skill that NorthPoint has accumulated as a pioneer of DSL services.<sup>4</sup> The merger therefore facilitates improved service provisioning wherever Verizon offers DSL, and enables quick out-of-region entry by Verizon, creating additional rivalry to other incumbent local exchange carriers such as SBC, BellSouth, and Qwest. *See* Hazlett Declaration, ¶6.

6. Second, AT&T's claim that this merger is not needed to promote competition because broadband access markets are already competitive defies economic logic. Although it is true that there are already numerous competitors providing broadband access services to consumers, cable is clearly dominant – with approximately 75 percent of all residential subscribers. *See* Attachment 2; *see also* Hazlett Declaration, ¶¶ 7-8 & Att. 3. Additional competition to cable is warranted both on general policy grounds (firms willing to invest capital to bring consumers additional choices should be free to do so) and to counter potential market power resulting from the current dominance enjoyed by incumbent cable TV monopolists.

7. AT&T claims that DSL is overtaking cable in the provision of broadband access. While DSL is growing at a faster rate, it is starting from a much lower base: from the first to second quarter of this year, net new residential subscribers to cable modems outnumbered their DSL counterparts by more than two to one. Overall, cable broadband service providers enjoy nearly *three times* the subscriber base of residential DSL. *See* Attachment 2. Further, DSL

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financing synergies may be in evidence elsewhere. *See* Chris Rugaber, "Telecom Competitors Strike DSL Deal," THE MOTLEY FOOL (Sept. 13, 2000), <http://www.fool.com/news/2000/sbc000913.htm>.

<sup>4</sup> Even assuming such gains could eventually be internally generated by Verizon with the requisite investment, the merger allows Verizon to utilize these assets more quickly and at lower cost.



subscribership is divided between a number of competitors in each area, both before and after the proposed merger, while cable's share of broadband access customers is almost entirely attributable to cable franchise monopolies. These local monopolies generally restrict their high-speed ISP service to just two cable-owned affiliates. AT&T, through Excite@Home, serves over five times the residential subscribers as NorthPoint and Verizon combined. *See* Hazlett Decl., Att. 3.

8. AT&T argues that cable's advantage in broadband access subscribership is fast dissolving, as "DSL sales are soaring and growing much faster than cable modem services. Analysts expect DSL to have *more* subscribers than cable in the very near future."<sup>5</sup> What constitutes the "very near future" is subject to interpretation; the Commission projects that cable's high speed access subscribership will exceed DSL's aggregate total until 2007.<sup>6</sup> Yet, the marketplace dynamics emphasized in AT&T's appraisal – cable's growth lagging relative to DSL – are partly explained by the market power enjoyed by cable. DSL is expanding in a more aggressive manner because it is in the more competitive position. IDC analyst Kimberly Funasaki recently noted: "When it comes to price, cable is slightly more expensive than ADSL, because cable providers face less competition." In contrast, the analyst noted, "ADSL is a very competitive market."<sup>7</sup>

9. The creation of the new NorthPoint will be a particularly effective competitor to cable because the DSL platform is open to competitive ISPs. This contrasts with the closed, or proprietary, business model chosen by most cable modem providers. The DSL marketplace will

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<sup>5</sup> AT&T Comments, p. 32 (emphasis in original).

<sup>6</sup> D. Lathen, Bureau Chief, Cable Services Bureau, *Broadband Today, A Staff Report to William E. Kennard, Chairman Federal Communications Commission on Industry Monitoring Sessions Convened by Cable Services Bureau* (Oct. 1999), p. 27.

<sup>7</sup> Sarah Deveaux, "Cable, DSL Will Coexist," PCWORLD.COM (July 12, 2000), [www.pcworld.com/resource/printable/article.asp?aid=17605](http://www.pcworld.com/resource/printable/article.asp?aid=17605).

provide viable alternative access to broadband customers, leaving cable modem providers less control over vertical supply lines. This diversity in market structure will offer important protections for consumers no matter what forms of “open access” (if any) are ultimately adopted by Excite@Home, RoadRunner, or the Commission.

#### ENHANCING COMPETITION IN VIDEO SUBSCRIBER SERVICES

10. The combination of Verizon and NorthPoint facilitates competition in subscription video services in at least two important respects. First, the merged firm will be better equipped to exploit the benefits of NorthPoint’s Blast! technology. This delivery system enables real time video streaming over the Internet, meaning that a customer with a DSL connection may view video programming much as a cable TV subscriber. AT&T argues that my Declaration contradicted NorthPoint’s and Verizon’s claim that NorthPoint controls “unique” technology by “conced[ing] that NorthPoint’s ‘Blast!’ service is in fact ‘similar to Qwest’s.’” AT&T Comments, p. 39. Of course, there is no contradiction, as distinct “technologies” may deliver a “similar service.” Just so here, where AT&T lists a number of competing “content delivery service” methods developing in the marketplace, including those provided by Akamai, Digital Island, Sun Microsystems, Inktomi, Digital Island, Mirror Image, Xcelera.com and Adero.<sup>8</sup> In fact, AT&T notes that many of these companies have high market capitalizations, suggesting that customers appear to want such products and are anticipated to pay generous prices to get them. The market evidence suggests that bolstering NorthPoint’s ability to aggressively develop and deploy Blast! will create important competitive benefits.

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<sup>8</sup> Ibid., pp. 39-40. It could also have listed Axient, Cidera, iBeam and Covad Communications. See Corey Grice, “Akamai To Face New Rival in Start-up Axient,” CNET NEWS.COM (Aug. 2, 2000), <http://news.cnet.com/news/0-1004-200-2417540>.

11. Second, the merger gives the new NorthPoint the necessary scale to attract content on favorable terms. A larger customer base allows content creators and program packagers better opportunity to amortize fixed costs. Attaining these economies is especially important in stimulating the development of new media, such as streaming video, which may be customized to the attributes of new delivery systems. Successful innovation in content will, in turn, stimulate demand for new network infrastructure. (As when the “killer app” drives consumers to invest in new technology.) Importantly, the rationale for limiting national aggregation in cable television, as was done under the 1992 Cable Act, is that excessive concentration will deny competitors the opportunity to achieve critical mass. Policy makers have already established that barring entrants in program distribution from achieving critical mass in audience share imposes a barrier to entry.<sup>9</sup>

12. Although AT&T is correct to point out that new competition is coming to the video subscription marketplace, this welcome development has not eliminated the market power of cable television systems, which still serve about 80% of MVPD subscribers.<sup>10</sup> As the FCC recently stated: “The market for the delivery of video programming to households continues to be highly concentrated and characterized by substantial barriers to entry.”<sup>11</sup> It went on to report that, “While competitive alternatives... are developing...., most consumers have limited choice

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<sup>9</sup> AT&T argues: “If cable operators were in a position to demand unreasonable terms from video programmers, then those programmers would be delighted to bypass cable operators by distributing programming via the Internet. In other words, if programmers had no alternative distribution networks, DSL providers would, regardless of their size, have no problems securing video programming because programmers would be anxious to play DSL providers off against cable operators and thereby obtain more favorable carriage agreements.” AT&T Comments, pp. 42-43. Because small cable competitors (“of whatever size”) have always existed, access to programming cannot have ever been a real or even potential problem. Not only is this factually incorrect, it denies the basis of long-standing regulatory concern over cable’s market power in video program distribution.

<sup>10</sup> As of June 1999, incumbent cable systems accounted for 82% of MVPD subscribers. Federal Communications Commission, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming: Sixth Annual Report*, CS Docket No. 99-230 (Jan. 14, 2000), ¶5.

<sup>11</sup> *Id.*, ¶140.

among video programming distributors.”<sup>12</sup> Only 157 of the 33,000 local cable TV franchise areas in the U.S. were certified as having “effective competition” by the FCC as of June 1999.<sup>13</sup>

13. Not only do cable television incumbents continue to enjoy market power, the measurable level of market power is rising. Economic rent per subscriber appears to have doubled since 1994, when the Commission found that the then-prevailing  $q$  ratios were indicators of monopoly power. *See* Hazlett Declaration, ¶¶ 19-20. The emergence and rapid growth of cable modem subscription revenues has sent cable television system values substantially higher.

14. The rising profitability of dominant cable television operators, combined with the emergence of many small-scale competitors, makes a powerful case for the merger. A stronger rival to cable monopolists is created, one that may begin approaching critical audience mass, enhancing prospects for content creation. This content will be optimized for distribution over the DSL platform, making this network less dependent on the standards, formats, or specific applications created primarily for distribution over rival cable television delivery systems.<sup>14</sup>

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<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> “Does the idea of video e-mail or video e-greeting cards sound like the kind of futuristic content idea that Internet users are salivating for? Well, Excite@Home thinks it is and the company rolled out the capability on Monday. Excite@Home expanded its video broadband applications by launching its My Videos service with the help of new partner VideoShare. Users of the @Home service will now have the capability of sending personalized video messages on the Excite Inbox and at Bluemountain.com, Excite's e-greeting card web site. Through both web sites, users will be able to download the Video Producer program that will allow them to import video from a webcam, camcorder or other digital files and store them in a personalized folder. Users that don't have ability to create their own video can choose from a variety of stock video cards or messages. ‘We are always looking for new products that will provide our users with a unique experience,’ Mark Rinella, general manager of Excite's Bluemountain.com, said in a statement.” @Home is actively involved in the promotion of video products for distribution over cable modems. Evan Blackwell, “@Home users getting more video content,” TelecomClick (Oct. 9)

## NO ANTICOMPETITIVE EFFECTS

15. AT&T argues that the merger will reduce the number of national data CLECs from three to two. AT&T Comments, pp. 25-26. This is incorrect. Verizon's combination with NorthPoint does not reduce the number of rivals as NorthPoint will continue to exist after the merger. Indeed, the new NorthPoint will be a more effective competitor after the merger, which is likely to intensify the rivalry against dominant cable operators, data CLECs, and other broadband access providers.

16. Moreover, ISPs and voice-based CLECs like AT&T have much greater choice of data CLEC partners than indicated by AT&T's allegation that only three national networks exist. A large number of data CLECs have successfully established service territories that can be utilized to compete with the national systems. Included in this list would be such firms as Vitts, Jato, Broadview Networks, ConnectSouth, Log On America, Edge Connections, Highspeed, IP Communications, New Edge Networks, Pathnet, and Picus.<sup>15</sup> Numerous ISPs have formed national deals with DSL providers other than Covad, NorthPoint, and Rhythms.

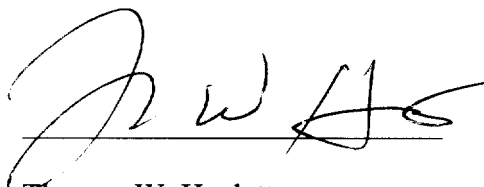
17. AT&T argues that regional or local DSL networks are not truly competitive with companies having national footprints, as "cobbling together" patchwork national coverage is inefficient. *See* AT&T Comments, p. 25. If true, then the economic justification for the proposed merger is even stronger, as it testifies to the added costs that would be incurred if Verizon were to attempt to build-out or otherwise "cobble together" a national DSL network. Blocking the proposed merger would then force ISPs to incur higher costs "cobbling together" national distribution networks, making them less effective competitors to closed cable systems.

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<sup>15</sup> These are data CLECs that, according to their company Web sites, provide broadband access service to residential customers.

18. Yet, as I demonstrated in my initial Declaration, there are effective competitors to the new NorthPoint already providing broadband service to both residential and business customers. Cable modem services dominate residential broadband service, and there are also other alternatives such as data CLECs, the Big Three IXCs, out of region ILECs, MMDS providers, and satellite operators. *See* Hazlett Declaration, ¶¶ 23-24. For business broadband service, DSL entry has been particularly robust, and a wealth of other high-speed competitors – cable, fixed wireless, IXCs, and incumbent LECs – now provide service in business districts all across the country. *See id.*, ¶¶ 25-33. In this competitive maelstrom, the new NorthPoint could not realistically profit from output restriction, but must strive to efficiently produce and market DSL services in the race for bandwidth now underway.

I declare, under penalty of perjury, that the foregoing is true and correct.



Thomas W. Hazlett

Executed on: October 17, 2000

**Attachment 1. Recent Equity Returns for DSL Providers**

<i>DSL supplier</i>	<i>Market Cap (10-12-00)</i>	<i>Equity Returns through Oct. 12, 2000 from close:</i>		
		<i>12/31/99</i>	<i>3/10/00</i>	<i>7/12/00</i>
NorthPoint	\$798.2 mil.	-75.0%	-79.7%	-56.8%
Covad	\$1.39 bil.	-83.9%	-90.7%	-53.8%
Rhythms	\$316.0 mil.	-87.1%	-90.0%	-73.9%
Network Access	\$143.0 mil.	-90.8%	-90.5%	-72.4%
Mpower	\$328.3 mil.	-88.4%	-91.4%	-90.1%
Log on America	\$20.3 mil.	-88.6%	-83.8%	-58.0%
<b>Mean (unweighted)</b>	<b>--</b>	<b>-85.6%</b>	<b>-87.7%</b>	<b>-67.5%</b>

Source: YAHOO!FINANCE, www.finance.yahoo.com (Oct. 13, 2000).

## Attachment 2. Cable Modem and Residential DSL Subscribership

	<i>1<sup>st</sup> Qtr. 2000</i>	<i>2<sup>nd</sup> Quarter 2000</i>	<i>New subs</i>	<i>% growth</i>
Cable Modem	1,854,000	2,270,000	416,000	22.4%
DSL	578,600	776,949	198,348	34.3%

Sources: **First Quarter.** Bell Atlantic News Release, Bell Atlantic First-Quarter Revenues Jump 7.1%, Adjusted Net Income Rises 10% (Apr. 25, 2000); GTE News Release, GTE Delivers Strong First Quarter Revenue Growth of 10 (Apr. 27, 2000); SBC News Release, SBC Reports Strong First-Quarter Earnings (Apr. 25, 2000); U S WEST News Release, U S WEST Reports Record Revenue Growth in First Quarter as Data, Wireless Sales Climb (Apr. 28, 2000); BellSouth News Release, BellSouth Reports 13% Growth in Normalized EPS (Apr. 20, 2000); Covad Press Release, Covad Reaches 100,000 DSL Lines in Service Milestone (Apr. 19, 2000); NorthPoint Press Release, NorthPoint Communications Announces Strong First-Quarter Results (Apr. 26, 2000); Rhythms NetConnections Press Release, Rhythms NetConnections Announces First Quarter Results (Apr. 27, 2000); xDSL.com, TeleChoice DSL Deployment Summary (May 5, 2000), [http://www.xdsl.com/content/resources/deployment\\_info.asp](http://www.xdsl.com/content/resources/deployment_info.asp); Warren's Cable Regulation Monitor (Aug. 7, 2000). **Second Quarter.** Verizon Press Release, Verizon Communications Announces Second Quarter Results (Aug. 8, 2000); NorthPoint Press Release, NorthPoint Reports Second-Quarter Results (Aug. 8, 2000); SBC Communications, Investor Briefing (July 20, 2000), [http://www.sbc.com/Investor/Financial/Earning\\_Info/docs/2QIB.pdf](http://www.sbc.com/Investor/Financial/Earning_Info/docs/2QIB.pdf); Qwest Press Release, Qwest Communications Reports Strong Revenue and EBITDA for Second Quarter 2000 (July 19, 2000); BellSouth Press Release, BellSouth Second Quarter EPS Increases 9.8% (July 20, 2000); Covad Press Release, Covad Communications Announces Record Second Quarter Results (July 26, 2000); Rhythms Press Release, Rhythms NetConnections Announces Second Quarter Results (July 25, 2000); xDSL.com, TeleChoice DSL Deployment Summary (Aug. 9, 2000), [http://www.xdsl.com/content/resources/deployment\\_info.asp](http://www.xdsl.com/content/resources/deployment_info.asp); Warren's Cable Regulation Monitor (Aug. 7, 2000).



