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

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

MEMORANDUM OPINION AND ORDER

Adopted: November 13, 2002 **Released: November 14, 2002**

By the Commission: Chairman Powell issuing a statement; Commissioner Copps dissenting and issuing a statement.

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I. INTRODUCTION

1. In this Order, we consider the joint application ("Application")[1] filed by Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") (collectively, "Applicants") for approval to transfer control of certain licenses and authorizations to AT&T Comcast Corporation, a newly created company, pursuant to sections 214(a) and 310(d) of the Communications Act of 1934, as amended

[1] Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp. to AT&T Comcast Corporation, MB Docket No. 02-70 (filed Feb. 28, 2002).

("Communications Act").[2] To obtain Commission approval, Applicants must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity.[3] In this regard, we have traditionally weighed the potential public interest harms of the proposed merger against the potential public interest benefits to ensure that Applicants have shown that, on balance, the benefits outweigh the harms.[4]

2. We consider this merger against the backdrop of litigation that resulted in judicial remand of the Commission's cable horizontal ownership limit, which prohibits any cable operator from owning attributable interests in systems serving more than 30% of the nation's multichannel video programming distributor ("MVPD") subscribers. AT&T's acquisition of MediaOne in 2000 violated this limit as a result of MediaOne's attributable interest in Time Warner Entertainment, L.P. ("TWE"). The Commission conditioned its approval of the associated license transfer on AT&T's divestiture of TWE. Shortly before the compliance deadline, the U.S. Court of Appeals for the District of Columbia Circuit held the Commission had failed to justify its ownership cap and remanded the matter to the Commission. The Commission subsequently initiated a rulemaking proceeding to consider the ownership rule in light of the remand. That rulemaking is pending.

3. The proposed merger would combine the nation's largest cable operator, AT&T, with the nation's third largest cable operator, Comcast, to create a new entity, AT&T Comcast, which would serve approximately 27.02 million subscribers, or 28.9% of all U.S. MVPD subscribers.[5] In addition, upon closing of the merger, AT&T Comcast would acquire AT&T's 27.64% interest in the nation's second largest cable operator, TWE.[6] The TWE cable systems serve approximately 12.8 million subscribers.[7] Including the subscribers served by TWE, the merged firm would have attributable ownership interests in cable systems serving approximately 38.34 million subscribers, or 41% of all nationwide MVPD subscribers.[8]

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[2] 47 U.S.C. §§ 214(a), 310(d).

[3] *Id*. *See also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp.*, *Transferee*, 15 FCC Rcd 9816, 9817 ¶ 1 (2000) ("*AT&T-MediaOne Order*"); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp.*, *Transferee*, 14 FCC Rcd 3160, 3168 ¶ 13 (1999) ("*AT&T-TCI Order*").

[4] *AT&T-MediaOne Order*, 15 FCC Rcd at 9817 ¶ 1.

[5] As of June 30, 2002, AT&T had approximately 18.51 million total subscribers and Comcast had approximately 8.51 million total subscribers. *See* Letter from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Sept. 20, 2002) ("Applicants' Sept. 20, 2002, Ex Parte").

[6] Some of TWE's cable systems are managed by Time Warner Cable, Inc. ("TWI"). For ease of reference, TWE and TWI will be jointly referred to herein as TWE.

[7] This figure includes the 1.48 million subscribers served by Texas Cable Partners and Kansas City Cable Partners, systems that are owned jointly by AT&T and TWE. *See* note 14, *infra*. In order to avoid double-counting when combining the total subscribers of AT&T and TWE, we include the 1.48 million subscribers in AT&T's total subscriber count of 18.51 million subscribers, but we subtract them from TWE's total subscriber count of 12.8 million.

[8] The cable ownership attribution rules, 47 C.F.R. § 76.503 n.2, determine whether the size or type of an entity's ownership interest in a cable system is such that it confers on the entity the ability to influence or control the operations of the cable system or creates economic incentives to take actions that concern the Commission. *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 14 FCC Rcd 19014, 19016 ¶ 1 (1999) ("*Attribution Order*"). As noted above, to avoid double-counting of subscribers served by AT&T's two partnerships with TWE, these subscribers are subtracted from TWE's total subscriber count for purposes of calculating the combined subscriber reach of AT&T Comcast and TWE.

4. Applicants have asked us to approve the combination with the TWE interest appropriately insulated and placed in trust for divestiture. In their Application, Applicants stated that as of the merger's closing, they will have no attributable interest in TWE. Subsequently, Applicants specified the mechanism by which they would accomplish this result, pledging to place TWE and any successor interests in a trust upon the merger's closing and to fully divest themselves of any interest in TWE within five-and-a-half years after the merger's closing. Therefore, we condition our decision on the TWE interest being appropriately insulated and placed in trust for divesture. As such, our analysis of the public interest harms and benefits below examines only the combined AT&T and Comcast cable systems and their programming interests, and does not consider those interests that are attributable only through AT&T's interest in TWE. As discussed below, we find that the proposed trust adequately insulates the TWE interest from attribution to the merged firm. Accordingly, in the analysis below, the terms "AT&T Comcast," "the merged firm," and "the merged entity" refer to the combined company *without* an attributable interest in TWE.

5. Commenters express concern that AT&T Comcast's vertical interests, particularly in regional and local programming, combined with increased clustering in major markets, will give the firm enhanced incentive and ability to discriminate against its competitors. They believe that AT&T Comcast's increased market share may make it easier for the firm to deliver its affiliated regional and local programming terrestrially, placing it beyond the scope of the Commission's program access rules. Commenters also believe the merger may increase the firm's incentive and ability to secure exclusive distribution agreements with programmers that are not affiliated with any cable operator and therefore are not subject to the program access rules. Those rules, which were adopted to implement section 628 of the Communications Act, apply only to satellite-delivered programming in which a cable operator has an attributable ownership interest. We conclude that the merger is not likely to result in the alleged harms, and we decline to impose conditions regarding the use of exclusive contracts.

6. In addition, we examine allegations made by commenters with respect to both Applicants' business practices, in particular, targeted discounts and marketing strategies. Although we believe that such practices may be designed and employed to achieve anticompetitive results, we are unable to link such practices to the merger.

7. Finally, we address potential harms regarding high-speed Internet service, telephony, set-top boxes, and interactive television ("ITV"). As discussed below, we conclude that some of these potential harms are not merger-specific; that is, if they exist, they are not an outgrowth of the merger. With respect to other potential harms, we find that the record does not demonstrate that such harms are likely to materialize.

8. With respect to potential public interest benefits, Applicants contend that the proposed merger will accelerate the development and deployment of facilities-based high-speed Internet access services, digital video, and other advanced services such as high definition television ("HDTV"), video on demand ("VOD"), and ITV. Applicants also assert that the merger will allow them to provide facilities-based local telephone competition to incumbent local telephone exchange carriers ("incumbent LECs"), particularly by leveraging AT&T's expertise and experience in this market. Applicants further contend that the merger will increase the supply of local and regional programming, and will permit the merged company to compete more effectively in the selling of national, regional, and local advertising.

9. We find that the merger is likely to result in some public interest benefits associated with accelerated deployment of broadband services. Because of the significant technical and operational uncertainties that remain in the commercial deployment of Internet protocol ("IP") telephony, however, we give minimal weight to Applicants' claim that the proposed transaction would accelerate deployment of cable telephony.

10. After reviewing the record in this proceeding, we conclude that the potential public

interest benefits, on balance, outweigh the potential public interest harms of the merger. Accordingly, subject to certain conditions, we conclude that approval of the Application to transfer control of Commission licenses and authorizations from AT&T and Comcast to AT&T Comcast will serve the public interest, convenience, and necessity.

II. BACKGROUND

A. The Applicants

1. AT&T.

11. *Cable and MVPD Services.* AT&T is the nation's largest cable operator.[9] AT&T has attributable interests in systems serving approximately 18.51 million subscribers.[10] AT&T offers its subscribers traditional video products, including local broadcast stations, national, regional, and local cable networks, premium movie channels, and pay-per-view services. As of December 31, 2001, approximately 76% of AT&T's cable plant had been upgraded to at least 550 MHz, and 59% had been upgraded to at least 750 MHz.[11]

12. AT&T generally divides its interests in cable systems into three categories: (1) owned and operated systems, in which it has a 100% ownership interest; (2) consolidated systems, in which it has an interest greater than 50%, but less than 100%; and (3) non-consolidated systems, in which it has an interest of 50% or less.[12] As of June 30, 2002, AT&T had 13.13 million subscribers in its owned and operated systems, 130,000 subscribers in its in its only consolidated system, Mile Hi Cable Partners, L.P, and 5.25 million subscribers in its non-consolidated systems, excluding TWE.[13] AT&T's non-consolidated cable systems include investments in companies, joint ventures, and partnerships that provide cable, video programming, telephony, and high-speed Internet services. These non-consolidated interests include AT&T's interest in TWE, which owns both cable systems and video programming services. TWE serves approximately 12.8 million subscribers and is the nation's second largest cable operator.[14] AT&T's non-consolidated interests also include Insight Midwest, a Delaware limited partnership which owns and operates cable systems in Indiana, and serves approximately 1.3 million subscribers. As general partner, Insight Communications manages the business of the partnership, although certain matters require the approval of AT&T.[15] Another AT&T non-consolidated interest is Texas Cable Partners ("TCP"), a Delaware limited partnership that owns and operates cable systems in Texas, and serves approximately 1.12 million customers. The remaining 50% partnership interest is owned by Time Warner Entertainment-Advance/Newhouse Partnership, approximately two-thirds of which is owned by TWE. The general manager of Texas Cable Partners is TWE, although certain governance matters require approval of a management committee, on which AT&T and Time Warner

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[9] AT&T Broadband is a wholly-owned subsidiary of AT&T Corp. Through the merger, AT&T Comcast will acquire only those assets of and services provided by AT&T Broadband. In this order, AT&T Corp. and AT&T Broadband Corp. will be referred to as "AT&T."

[10] *See* Applicants' Sept. 20, 2002, Ex Parte.

[11] Application at 18.

[12] *Id.*

[13] *See* Applicants' Sept. 20, 2002, Ex Parte.

[14] *Id.*; Application at 51. TWE's 12.8 million subscribers include 1.48 million subscribers served by two cable systems, Texas Cable Partners and Kansas City Cable Partners, that are owned jointly by AT&T and TWE. *See* discussion, *infra*. Their combined 1.48 million subscribers are included in AT&T's total subscriber count of 18.51 million subscribers. *See* note 7, *supra*.

[15] Application at 19.

Entertainment-Advance/Newhouse Partnership have equal representation.[16] AT&T also owns a 50% interest in Kansas City Cable Partners ("KCCP") --with the remaining 50% interest being owned by TWE -- serving approximately 310,000 customers in Kansas and Missouri.[17]

13. *Video Programming Networks.* AT&T states that it has dramatically reduced its ownership of video programming services.[18] On August 10, 2001, AT&T completed a tax-free spin-off of Liberty Media Corporation, which owns all of the assets attributed to the Liberty Group, including interests in a large number of video programming services. Liberty Media Corporation is now an independent, publicly traded company, which is separate from AT&T and no longer attributable to AT&T under the Commission's rules.[19] AT&T also recently reduced its voting interest in Cablevision Systems Corp. ("Cablevision") to 4.98% and irrevocably waived its right to nominate two directors to the Cablevision board of directors, making its Cablevision interest no longer attributable to AT&T.[20] Cablevision owns 77.1% of Rainbow Media Holdings, Inc. ("Rainbow"), which owns interests in a number of national and regional programming services.[21] Additionally, last year, AT&T sold all of its interests in the Food Network, The Outdoor Life Network, Speed Channel, and The Sunshine Network.[22]

14. AT&T currently owns attributable interests in three national video programming services: (1) E! Entertainment (10%); (2) style (10%); and (3) iNDEMAND (44%); and five regional services: (1) Fox Sports New England (50%); (2) New England Cable News (50%); (3) Pittsburgh Cable News Channel (30%); (4) Empire Sports Network, L.P. (33.33%); and (5) AT&T3 (100%).[23] Through its ownership interest in TWE, AT&T also has an interest in certain programming services owned by TWE, including HBO, Cinemax, Comedy Central, and Court TV.

15. *Internet Services.* AT&T has over 1.5 million high-speed Internet service customers. AT&T's Internet service is available to almost 15 million households, or approximately 61% of homes passed by AT&T cable systems.[24] Through its ownership of TWE, AT&T has an indirect interest in Road

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[16] *Id.*

[17] Other AT&T non-consolidated systems include Parnassos Communications, L.P., serving approximately 464,000 customers; CC VIII, L.L.C., serving approximately 903,000 customers; US Cable of Coastal - Texas, L.P., serving approximately 144,000 customers; Midcontinent Communications, serving approximately 200,000 customers; and Century-TCI California Communications, L.P., serving approximately 767,000 customers. *See* Applicants' Sept. 20, 2002, Ex Parte, Appendix.

[18] Application at 24.

[19] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 17 FCC Rcd 8985, 8986 ¶ 3 (2002).

[20] Application at 20-21.

[21] NBC owns the other 22.9% of Rainbow. Rainbow's national program services include American Movie Classics, Bravo, Independent Film Channel, Mag Rack, MuchMusic USA, and Women's Entertainment. Rainbow's regional program services include the Fox Sports Net services, MSG MetroGuide, MSG Metro Learning Channel, MSG Network, MSG Traffic and Weather, and News 12 Networks. *See id.* at 20.

[22] *Id*. at 24. Comcast now owns 100% of The Outdoor Life Network.

[23] *Id.* at 25; Letter from Douglas G. Garrett, Vice President Law, AT&T Corp., to Marlene H. Dortch, Secretary, FCC (Oct. 3, 2002) ("Applicants' Oct. 3, 2002, Ex Parte"); Letter from Michael Hammer, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC (Oct. 16, 2002). Comcast also owns interests in E! Entertainment, style, and iNDEMAND.

[24] Application at 22-23. Prior to its bankruptcy, Excite@Home maintained and operated many of the facilities that connected AT&T's headend equipment to the public Internet. In connection with the bankruptcy and shutdown of the Excite@Home network, AT&T built a replacement network to service AT&T customers. *Id.* at 23. AT&T is consolidating customers currently on the network built by the former "Road Runner" partnership onto the new AT&T network.

Runner, which TWE owns.[25] AT&T further states that it plans to take a number of steps to enhance the attractiveness of its high-speed Internet service offerings, including the addition of features such as home networking and remote e-mail access.[26]

16. *Local Telephone Service.* AT&T currently markets cable telephony service to approximately seven million households in 16 markets and serves more than 1.5 million lines.[27] In the past year, AT&T added almost one-half million new cable telephony customers.[28] Currently, AT&T offers cable telephony services in Atlanta, Boston, San Francisco, Chicago, Dallas, Denver, Hartford, Jacksonville, Pittsburgh, Portland (Oregon), Richmond, Seattle, Salt Lake City, St. Louis, southern California, and Minneapolis-St. Paul. AT&T states that it offers consumers a variety of options and calling plans with various price points, ranging from basic single line service to multiple lines with full feature functionality.[29]

2. Comcast.

17. *Cable and MVPD Services.* Comcast is the nation's third largest cable operator. As of December 31, 2001, Comcast's wholly-owned cable systems served 8.51 million customers in 26 states and passed approximately 13.8 million homes.[30] Comcast offers its customers traditional video products, including local broadcast stations; national, regional, and local cable programming channels; premium movie channels; and pay-per-view services. Due to recent plant upgrades, 95% of Comcast's subscribers are now served by systems that provide a bandwidth of 550 MHz or higher, and over 80% of its subscribers are served by systems that provide a bandwidth of 750 MHz or higher.[31] By the end of 2001, Comcast provided digital cable service to 2.3 million subscribers, or 27% of its total subscriber base. As of February 2002, Comcast's digital cable service was available to nearly 99% of its subscribers.[32]

18. Certain Comcast MVPD service offerings have interactive features, including an electronic program guide ("EPG") with enhanced functionality and parental controls.[33] As of February 2002, Comcast offered VOD service to cable systems passing over three million homes in 16 markets. Comcast's VOD service offers subscribers functionalities similar to those available on videocassette and digital video disc ("DVD") players, *i.e*., stop, pause, rewind, and fast-forward.[34] Comcast also has conducted ITV trials in selected markets with Wink Interactive Television and Liberate Interactive Television, allowing subscribers to access program-related information such as weather, sports, and trivia; to play two-way games; to make purchases; and to change the language of a program's audio

[25] *AT&T-MediaOne Order*, 15 FCC Rcd at 9863 ¶ 107. Pursuant to its consent decree with the DOJ, AT&T has divested its directly held interest in Road Runner, which it acquired as a result of the AT&T-MediaOne merger. Application at 23 n.36.

[26] Application at 23.

[27] *Id.* at 3, 23.

[28] *Id*. at 23.

[29] *Id*. at 24.

[30] *Id*. at 10. *See also* Applicants' Sept. 20, 2002, Ex Parte. In addition to its wholly-owned systems, Comcast has a 30% general partnership interest in Clearview Partners, which operates cable systems in Maryland and Pennsylvania, serving a total of approximately 11,000 subscribers. Application at 10-11.

[31] Application at 10.

[32] *Id*.

[33] *Id*. at 11.

[34] *Id*.

component.[35]

19. *Video Programming Networks.* Comcast has attributable interests in four regional programming networks: (1) cn8, The Comcast Network (100% ownership interest), which provides news, public affairs, and sports programming to viewers in Pennsylvania, New Jersey, Delaware, and Maryland; (2) Comcast SportsNet (78% ownership interest), a regional sports network serving the Philadelphia area; (3) Comcast SportsNet-MidAtlantic (100% ownership interest), a regional sports network serving the geographic area from Baltimore to portions of North Carolina; and (4) Comcast Sports Southeast (72% ownership interest), a regional sports network serving Alabama, Arkansas, Florida, Georgia, Kentucky, Louisiana, Mississippi, North Carolina, South Carolina, and Tennessee.[36]

20. Additionally, Comcast has attributable interests in eight national programming networks: (1) QVC (58%); (2) the Discovery Health Channel (20%); (3) E! Entertainment (40%); (4) The Golf Channel (91%); (5) iNDEMAND (11%); (6) The Outdoor Life Network (100%); (7) style (40%); and (8) The G4 Network (94%).[37] Comcast also produces two short-form news and public affairs programs, Comcast Newsmakers and Comcast Local Edition, that appear twice hourly on the channel carrying CNN Headline News and are available to Comcast subscribers in portions of Connecticut, Delaware, Maryland, Michigan, New Jersey, Pennsylvania, and the Washington, D.C. metropolitan area.[38]

21. *Internet Services.* Comcast offers high-speed Internet access service to 10.4 million households, or approximately 75% of the homes that Comcast cable systems pass.[39] As of December 31, 2001, Comcast had over 948,000 high-speed Internet service customers.[40]

22. *Local Telephone Service.* Comcast provides telephone service, including long distance service, to approximately 41,500 customers in Maryland, Virginia, and Michigan.[41] In addition, Comcast Business Communications ("CBC"), a wholly owned subsidiary of Comcast, offers integrated broadband communications services to over 4,000 business and governmental customers in Pennsylvania, New Jersey, Delaware, Maryland, and Michigan.[42] CBC's services include exchange access, private line, and long distance services. CBC also provides competitive local exchange service to several dozen small and medium-sized business customers.[43]

23. *Other Holdings.* Comcast has a majority interest in two major-league sports franchises, the Philadelphia Flyers National Hockey League franchise and the Philadelphia 76ers National Basketball Association franchise; Philadelphia's two major indoor sports arenas; and several minor league baseball and hockey teams.[44] Comcast also has a majority interest in Broadnet, which offers high-speed Internet

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[35] *Id*. at 12.

[36] *Id*. at 14-15.

[37] *Id*. at 15. AT&T also owns interests in E! Entertainment, style, and iNDEMAND.

[38] *Id*. at 15; 42-44.

[39] *Id*. at 12.

[40] *Id*. Comcast's Internet service was previously provided in partnership with Excite@Home, which had contractual responsibility for the maintenance and operation of many of the facilities that connected Comcast's headend equipment to the Internet. As a result of Excite@Home's recent bankruptcy, Comcast transferred all of its Internet subscribers to a network that it owns and manages. *Id*. at 12-13.

[41] *Id.* at 13.

[42] *Id*.

[43] *Id*. at 13-14.

[44] *Id*. at 15-16.

access and e-business services in Europe.[45] Comcast is a limited partner in Comcast Interactive Capital, a venture capital fund that invests in companies focused on interactive, infrastructure, and Internet technologies and applications.[46]

B. The Merger Transaction and the Application to Transfer Licenses

24. *Proposed Transaction*. On December 19, 2001, Comcast and AT&T entered into an Agreement and Plan of Merger (the "Merger Agreement").[47] Under the Merger Agreement, AT&T Broadband Corp., a holding company for AT&T's broadband division, will be spun-off to AT&T's shareholders. Upon completion of the spin-off, both Comcast and AT&T Broadband will merge with and become wholly-owned subsidiaries of AT&T Comcast Corporation.[48] Upon completion of these mergers, Comcast shareholders will receive one share of the corresponding class of AT&T Comcast stock for each of their shares of Comcast stock, and AT&T shareholders will receive in the aggregate for their shares of AT&T Broadband common stock 1.235 billion shares of AT&T Comcast Class A stock.[49] Prior to the merger's closing, Applicants will place AT&T's interest in TWE in trust and will divest the interest pursuant to the terms of a trust agreement that insulates the interest from attribution.[50]

25. *Department of Justice and Local Franchising Authority Review*.[51] In addition to Commission review, the proposed merger is subject to review by the Department of Justice ("DOJ") and the various franchising authorities that have local jurisdiction in the areas where Applicants provide service. Applicants have completed initial regulatory filings for license transfers in connection with the proposed merger with 1,791 local franchising authorities.[52] As of November 13, 2002, 1,765 of the franchising authorities have either consented to the transfers or allowed the 120 day review period to elapse without objection.[53] Of Comcast's 660 local franchising authorities, 658 have consented or not objected to the transfer, and of AT&T's 1,131 local franchising authorities, 1,107 have consented or not objected to the transfer.[54] Applicants are continuing to pursue approval from the remaining local franchising authorities.[55] Following the Commission's announcement of its ruling in the proceeding, DOJ announced that it had closed its investigation of the merger and would not challenge it.[56]

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[45] *Id*. at 16.

[46] *Id*.

[47] *Id*. at 1.

[48] *Id*.

[49] *Id*.

[50] *See* Section IV.A.2.c., *infra*.

[51] Pursuant to section 617 of the Communications Act, local franchising authorities with jurisdiction to review such transfers or sales of cable systems have 120 days from the date of Applicants' request for a franchise transfer to render a decision. *See* 47 U.S.C. § 537; 47 C.F.R. § 76.502.

[52] *See* Letter from A. Renee Callahan, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, FCC (Nov. 13, 2002) ("Applicants' LFA Ex Parte"). A cable operator must obtain local franchising authority approval for the transfer or sale of its cable system only if the franchise agreement so requires. 47 U.S.C. § 537.

[53] Applicants state this figure in a percentage, 98.55%. Applicants' LFA Ex Parte at 1.

[54] Applicants also state these figures in percentages, 99.7% and 97.9% respectively. *Id*.

[55] *Id.* The twenty-six local franchising authorities that have not consented to the transfers are listed in an Attachment to Applicants' LFA Ex Parte.

[56] DOJ, *Justice Department Will Not Challenge Merger of Comcast and AT&T Broadband* (press release), November 13, 2002.

III. STANDARD OF REVIEW AND PUBLIC INTEREST FRAMEWORK

26. Pursuant to sections 214(a) and 310(d) of the Act, the Commission must determine whether Applicants have demonstrated that the proposed transfer of control of AT&T's and Comcast's licenses and authorizations will serve the public interest, convenience and necessity.[57] In making this determination, we first must determine whether the proposed transaction complies with the specific provisions of the Act,[58] other applicable statutes, and the Commission's rules. The public interest standards of sections 214(a) and 310(d) involve a balancing process that weighs the potential public interest harms of the proposed transaction against the potential public interest benefits.[59] Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transaction, on balance, serves the public interest.[60] If we are unable to find that the proposed transaction serves the public interest for any reason, or if the record presents a substantial and material question of fact, section 309(e) of the Act requires that we designate the application for hearing.[61]

27. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act,"[62] which includes, among other things, preserving and enhancing competition in relevant markets, ensuring that a diversity of voices is made available to the public, and accelerating private sector deployment of advanced services.[63] The Supreme Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[64] Our public interest analysis may also entail assessing whether the merger will affect the quality of communications services or will result in the provision of new or additional services to consumers.[65] In conducting this analysis, the Commission may consider technological and market changes, and the nature, complexity, and speed of change, as well as trends within the communications industry.[66]

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[57] 47 U.S.C. §§ 214(a), 310(d).

[58] Section 310(d) requires that we consider the applications as if the proposed transferee were applying for the licenses directly under section 308 of the Act. 47 U.S.C. § 310(d). Thus, we must examine AT&T Comcast's qualifications to hold licenses. *See* 47 U.S.C. § 308.

[59] *See, e.g., Applications of VoiceStream Wireless Corp., Powertel, Inc. and Deutsche Telekom AG,* 16 FCC Rcd 9779, 9789 ¶ 17 (2001) ("*DT-VoiceStream*"); *AT&T Corp., British Telecommunications, plc, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Limited Applications For Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection with the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc*, 14 FCC Rcd 19140, 19146-47 ¶¶ 13-15 (1999).

[60] *See, e.g., AT&T-TCI Order*, 14 FCC Rcd at 3169 ¶ 15.

[61] 47 U.S.C. §309(e). Section 309(e)'s requirement applies only to those applications to which Title III of the Act applies, *i.e.*, radio station licenses. We are not required to designate for hearing applications for the transfer or assignment of Title II authorizations when we are unable to find that the public interest would be served by granting the applications, *see ITT World Communications, Inc. v. FCC*, 595 F.2d 897, 900-01 (2d Cir. 1979), but of course we may do so if we find that a hearing would be in the public interest.

[62] *AT&T-MediaOne Order,* 15 FCC Rcd at 9821 ¶ 10; *AT&T-TCI Order,* 14 FCC Rcd at 3168-69 ¶ 14.

[63] *See* 47 U.S.C. § 157; Telecommunications Act of 1996, Pub. L. No. 104-104, Preamble, 110 Stat. 56; *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 11; *cf.* 47 U.S.C. §§ 521(4), 532(a).

[64] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

[65] *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 11.

[66] *Id*.

28. In determining the competitive effects of the merger, our analysis is not limited by traditional antitrust principles.[67] The Commission has independent authority to examine communications mergers, and the standards governing the Commission's review differ from those of antitrust enforcement authorities.[68] The DOJ and the Federal Trade Commission ("FTC") review mergers pursuant to section 7 of the Clayton Act, which prohibits mergers that are likely to substantially lessen competition in any line of commerce.[69] The Commission, on the other hand, is charged with determining whether the transfer of licenses serves the broader public interest. In the communications and video programming industries, competition is shaped not only by antitrust rules, but also by the regulatory policies that govern the interactions of industry players.[70] In addition to considering whether the merger will reduce existing competition, therefore, we also must focus on whether the merger will accelerate the decline of market power by dominant firms in the relevant communications markets.[71] We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged entity to reduce transaction costs and offer new products, but it may also create market power, create or enhance barriers to entry by potential competitors, and create opportunities to disadvantage rivals in anticompetitive ways.[72]

IV. POTENTIAL PUBLIC INTEREST HARMS

A. Video Programming Services

29. In this section, we consider potential public interest harms of the proposed merger on video programming. As discussed in greater detail below, there are two general categories of harms to video programming that commenters allege might result from the merger. First, the merger may harm the upstream market for the production and packaging of video programming. In addition, the merger may harm competition among MVPDs in the market for distribution of video programming.

30. With respect to harms to the production and packaging of video programming, section 613(f)(2)(A) of the Communications Act provides that the Commission shall "ensure that no cable operator or group of cable operators can unfairly impede . . . the flow of programming from the video programmer to the consumer."[73] Pursuant to this directive, we found in the *Horizontal Third Report and Order* that a cable operator's ownership of systems serving more than 30% of MVPD subscribers nationwide would likely harm diversity and competition by enabling two large multiple system operators ("MSOs") acting in concert or in parallel to determine, by their program carriage decisions, which programmers will be able to survive in the marketplace.[74] We find that the post-merger subscriber reach

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[67] *See Satellite Business Systems,* 62 FCC 2d 997, 1088 (1977), *aff'd, sub nom United States v. FCC*, 652 F.2d 72 (DC Cir. 1980) (*en banc*); *Northeast Utilities Service Co. v. FERC*, 993 F.2d 937, 947 (1st Cir. 1993) (public interest standard does not require agencies "to analyze proposed mergers under the same standards that the Department of Justice . . . must apply").

[68] *AT&T-TCI Order*, 14 FCC Rcd at 3168-69 ¶ 14.

[69] 15 U.S.C. § 18.

[70] *AT&T-Media One Order*, 15 FCC Rcd at 9821 ¶ 10-11.

[71] *Id*.

[72] *See, e.g., Applications for Consent to the Transfer of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee*, 16 FCC Rcd 6547, 6553 ¶ 16 (2001) ("*AOL Time Warner Order*"), *Applications of NYNEX Corp. and Bell Atlantic Corp. for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19985, 20035 (1997) ("*Bell Atlantic-NYNEX Order*").

[73] See 47 U.S.C. § 533 (f).

[74] *See generally Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992,* 14 FCC Rcd 19098 (1999) (*"Horizontal Third Report and Order"*).

is not likely to augment Applicants' bargaining power to the extent that the merger will impair the quality or quantity or programming available to consumers. We also find that the merger's effects on national and regional horizontal reach are not likely to enable AT&T Comcast to foreclose unaffiliated programmers. Accordingly, we conclude that the merger is not likely to harm the public interest with respect to competition in the programming market. Because we are conditioning our approval on the insulation and divestiture of AT&T's interest in TWE, we need not determine here whether or to what extent the combination with TWE would produce public interest harms absent the conditions. To the extent commenters raise concerns regarding an industry-wide trend toward clustering of cable systems, we conclude that the appropriate forum to consider such issues is a rulemaking of general applicability, such as the Commission's pending rulemaking on cable horizontal ownership.

31. The merger's potential harm to rival MVPDs derives chiefly from the possibility that the merger could enhance AT&T Comcast's incentive and ability to foreclose MVPD rivals from access to affiliated and unaffiliated programming.[75] We find that the merger's effects on regional concentration are not likely to result in the terrestrial delivery of affiliated programming and that the merger therefore is not likely to enable AT&T Comcast to harm its MVPD rivals by entering into otherwise prohibited exclusive contracts for the distribution of such programming. With respect to the distribution of programming sold by vendors that are not affiliated with any cable operator, we find that the merger is not likely to alter materially each Applicant's existing incentive and ability to deny MVPD competitors access to such programming and that the merger itself therefore is not likely to harm competition in this respect. Accordingly, we conclude that the merger is unlikely to harm the public interest with respect to the distribution of programming by rival MVPDs. We therefore decline to impose conditions restricting the use of exclusive contracts that are otherwise permitted by the Commission's program access rules.[76] The Commission's pending rulemaking on cable horizontal ownership is the more appropriate forum for consideration of the potential effects of industry-wide clustering on the distribution of programming by MVPDs to consumers.

32. We begin this section with some background on the production, packaging and distribution of video programming and with a discussion AT&T's interest in TWE. We then consider potential harms in the upstream markets for the production and packaging of video programming. Finally, we consider whether the merger may adversely affect competition among MVPDs in the market for the distribution of video programming.

1. Background

a. Production, Packaging, and Distribution of Video Programming

33. Our analysis of the potential harms of the proposed merger depends on the relative bargaining power of video programming networks and MVPDs. Video programming is sold by video programming networks to MVPDs, who then deliver the programming to consumers. In addition to large cable MSOs, MVPDs include direct broadcast satellite ("DBS") providers and cable "overbuilders." Overbuilders compete against cable incumbents in local franchise areas and may include a second cable operator, delivering MVPD services over a separate cable plant; multi-channel multipoint distribution

[75] The merged entity will have interests in the following national and regional programming networks: cn8 – The Comcast Network; Comcast SportsNet (Philadelphia); Comcast SportsNet – MidAtlantic; Comcast Sports Southeast; QVC; Discovery Health Channel; E! Entertainment; The Golf Channel; iNDEMAND; The Outdoor Life Network; style; G4 Network; Fox Sports New England; New England Cable News; AT&T3; Pittsburgh Cable News Channel.

[76] The Commission's program access rules prevent cable operators from entering into exclusive contracts with programmers that are affiliated with a cable operator and whose service is delivered via satellite. 47 C.F.R. §76.1000 *et seq.*

services ("MMDS" or wireless cable); or satellite master antenna television ("SMATV") providers. These MVPDs bundle programming networks into groups of channels or "tiers" and sell this programming to consumers, deriving revenues from subscription fees and the sale of advertising time that they receive through their carriage agreements. MVPDs sometimes seek exclusive access to certain programming to ensure that their direct competitors are unable to offer it to their subscribers.

34. Companies that own programming networks produce their own programming and/or acquire programming produced by others, then package this programming for sale to MVPDs. Generally, programming networks seek to reach the widest range of subscribers for their type of programming on a regional or national basis, to increase the value of their programming to advertisers, and to build brand recognition that will spur other MVPDs to carry their programming. Because programmers incur high fixed costs associated with the development of programming, programming networks must have access to a critical number of viewers to avoid a financial loss.

35. Video programming networks sell programming to MVPDs based on contracts generally lasting a term of several years.[77] Some programming networks depend on a large, nationwide audience for profitability. Other programming networks do not seek a national audience but are regional or even local in scope, including regional sports and news networks. Some programming networks likely can survive with distribution to a few million subscribers within a certain region, while others may need nationwide distribution to a large percentage of MVPD homes in order to remain viable.[78]

36. MVPDs can negotiate substantial discounts based on the number of subscribers to which the network will be transmitted, as well as other factors such as the network's placement on a particular tier.[79] Ultimately, the more concentration among buyers, the more likely buyers will possess some market power over programming.

37. Although some programming networks are vertically integrated with MVPDs, many are unaffiliated with any MVPD. The Commission has recently recognized that regional programming services, the majority of which are satellite delivered, are significantly more vertically integrated than national programming services.[80] For example, 86% of "must have" regional sports programming is vertically integrated.[81]

b. AT&T's Interest in Time Warner Entertainment

38. Through its wholly-owned subsidiaries, AT&T owns a limited partnership interest of 27.64% in TWE (the "TWE Interest"). Subsidiaries of AOL Time Warner, Inc. ("AOL Time Warner") hold the remaining 72.36% of TWE. TWE was formed in 1992 to own and operate substantially all of the business of Warner Bros., Inc., HBO, and the cable television businesses owned and operated by Time Warner, Inc. ("TWI") prior to that time. TWE owns cable systems serving 11.32 million subscribers and manages systems owned by AOL Time Warner outside of TWE that serve an additional 1.48 million

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[77] *Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992,* 16 FCC Rcd 17312, 17322 ¶ 11(2001) ("*Further Notice*").

[78] *Id.* at 17322 ¶ 12.

[79] This issue, and its effects on competition among MVPDs of varying size, will be discussed in further detail below.

[80] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992*, 17 FCC Rcd 12124, 12131-32 ¶¶ 18-19 (2002) (noting that 35 percent of national programming services are vertically integrated while 59 percent of regional programming services are vertically integrated).

[81] *Id.* at 17 FCC Rcd at 12145 ¶ 49.

subscribers.[82] TWE is the second largest MVPD after AT&T. AT&T acquired the TWE Interest through its acquisition of MediaOne Group, Inc. TWE is governed by a Board of Representatives (the "TWE Board") and is operated by a management committee. AT&T has exercised its right to appoint two directors to the TWE Board, but as a result of its merger with MediaOne, has no representation on the management committee.[83]

39. In *AT&T-MediaOne*, the Commission found that TWE would be attributable to AT&T, and that, as a result, the merged firm would reach 41.8% of U.S. MVPD subscribers. Thus, AT&T's acquisition of MediaOne violated our cable horizontal ownership cap, which prohibits any cable operator from serving more than 30% of all U.S. MVPD subscribers.[84] Accordingly, the Commission approved the license transfer application subject to the condition that AT&T, by May 19, 2001, either (a) divest the TWE Interest, (b) terminate its involvement in TWE's video programming activities, or (c) divest its interests in other cable systems, such that it would have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide.[85] The Commission also imposed interim safeguards that were intended to protect against potential harms to competition in the video programming market by limiting the merged firm's ability to exert influence or control over TWE during the period between merger closing and completion of the required divestiture.[86] The conditions fell short of establishing AT&T's non-involvement in TWE's video programming activities through exceptions to our cable ownership attribution rules, but the conditions were sufficient to limit the merged firm's involvement in TWE's video programming activities for the limited period of time until the merged firm could be brought into compliance with our ownership cap.[87]

40. On March 2, 2001, the United States Court of Appeals for the D.C. Circuit released its *Time Warner* decision, in which it reversed and remanded our horizontal ownership limit,[88] and vacated the "no sale" element of the insulated limited partner ("ILP") exemption[89] to our attribution rules.[90] In

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[82] TWE also manages TCP, which is jointly owned by AT&T Broadband and Time Warner-Advance/Newhouse Partnership, and KCCP, which is owned by AT&T Broadband and TWE.

[83] Application at 57-59. According to the Applicants, the TWE Board has never met. *Id.*

[84] *AT&T-MediaOne Order*, 15 FCC Rcd at 9836 ¶ 40; 47 C.F.R. § 76.503.

[85] *Id.* The order was released on June 6, 2000, so the divestiture period was approximately 11 months long.

[86] *Id.* at 9849 ¶ 72 and 9898 Appendix B. The conditions provide that AT&T and TWE cannot share officers or directors, and bar AT&T from appointing AT&T employees with video programming oversight to the TWE Board. AT&T officers, directors, and employees are not permitted to "influence, attempt to influence, or otherwise participate in" the management or operation of the video programming activities of TWE. The conditions also provide that AT&T and TWE cannot share information concerning the price, terms, and conditions they negotiate for carriage of video programming on their respective cable systems. In addition, AT&T and TWE are barred from negotiating volume discounts or other favorable terms from video programming vendors based on their joint subscriber reach. *Id.* We also imposed several conditions governing AT&T's sale of programming to TWE through its programming affiliates. *Id.*

[87] *Id.* at 9849 ¶ 72.

[88] *Time Warner Entertainment Co. v. FCC,* 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner*"). The D.C. Circuit found that the Commission's horizontal rule restricts cable operators' ability to reach viewers and that the vertical rule curtails their exercise of editorial control over a portion of their channels. The court held that the Commission did not establish record evidence to support the limits, did not draw the necessary connection between the limits established and the alleged harms of concentration and integration the limits were designed to address, and did not take into account the changing industry market conditions. Accordingly, the court reversed and remanded the limits.

[89] *See* note 217, *infra* (discussing ILP criteria).

light of the D.C. Circuit's ruling, we suspended the *AT&T-MediaOne* compliance deadlines pending further review of the relationship, if any, between the *Time Warner* decision and the conditions in the *AT&T-MediaOne Order*.[91] We upheld this suspension on reconsideration in November 2001, concluding that it was appropriate to continue the suspension of the deadlines pending resolution of the issues on remand.[92] The Commission's cable ownership cap and the no sale rule are being evaluated as part of a rulemaking proceeding commenced in September 2001.[93] The *AT&T-MediaOne* compliance deadlines remain suspended.

2. Potential Harms to the Production and Packaging of Video Programming

41. In general, competition depends on having choices between products that are fairly good substitutes for each other. If consumers have such choices, a single provider cannot raise its prices above the "competitive" level because consumers will switch to a substitute. The level of competition depends on what products are substitutes (product market), where these substitute products are available (geographic market), what firms produce them (market participants), and what other firms might be able to produce substitutes if the price were to rise (market entry). To evaluate the impact of a merger on competition, we examine the characteristics of competition in the markets of the merging firms and determine the impact of the merger on these characteristics. Mergers raise competitive concerns when they reduce the availability of substitute choices (market concentration) to the point that the merged firm has a significant incentive and ability to engage in anticompetitive actions (such as raising prices or reducing output) either by itself, or in coordination with other firms. Economic theory describes both how such anticompetitive actions can harm consumers and how the magnitude of the harm can be measured.

a. Relevant Markets and Market Participants

42. In evaluating the potential competitive effects of a merger, it is necessary to first delineate the relevant product and geographic markets.[94] In this case, however, we note that a wide variety of firms produce and/or package video programming, which they then license to video programming distributors, including MVPDs. Thus, for example, there are national cable networks, such as QVC or the Discovery Channel; providers of premium programming channels, such as HBO; and regional programming networks, such as New England Cable News or the Fox Sports services.[95] The

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[90] *Time Warner,* 240 F.3d. at 1143. Although the court states that it is vacating the no-sale rule at the outset of the *Time Warner* decision, the court also suggests at another point that it is merely reversing and remanding the rule. *Id.* at 1144.

[91] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 16 FCC Rcd 5835 (2001).

[92] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 16 FCC Rcd 5610 (2001).

[93] *Further Notice*, 16 FCC Rcd 17312. The Further Notice also addresses the Commission's channel occupancy rule, or vertical ownership limit, as well as the single majority shareholder exemption to our cable and broadcast attribution rules.

[94] *Application of EchoStar Communications Corporation (a Nevada Corporation), General Motors Corporation, and Hughes Electronics Corporation (Delaware Corporations), Transferors, and EchoStar Communications Corporation (a Delaware Corporation), Transferee*, FCC 02-284 (rel. Oct. 18, 2002) at ¶ 105 ("*EchoStar-DirecTV Order").*

[95] There are also national broadcast networks, such as NBC, ABC, CBS and Fox; and local television stations, most of which are affiliated with a national television network. However, we are not evaluating possible effects regarding

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record in this proceeding is insufficient for us to determine whether particular types of video programming, such as a regional sports service or home improvement network, fall within the same relevant product market. As discussed below, however, it is unnecessary to conduct such a rigorous market definition in order to analyze the potential competitive effects on these markets.[96] For purposes of analyzing possible anticompetitive effects on the production and packaging of video programming, therefore, we can consider the admittedly overly-broad market of all video programming distributed by MVPDs.

43. Because video programming today is transmitted in the form of digital bits that can be transported long distances at little cost, buyers can seek geographically distant sellers, and sellers can seek geographically distant buyers. Applicants assert that "[t]he relevant geographic market for the purchase and sale of video programming is quite broad and, for many types of programming, international in scope."[97] We find that the relevant geographic market is at least national in scope. We recognize, however, that the demand for different types of programming may vary from region to region. Thus, for example, a New England sports network is likely to be more popular in New England than in the Southwest United States. This does not affect the definition of the relevant geographic market, however. Rather, it is simply the differences in the product characteristics of particular video programming packages that cause them to have different demands in different geographic areas, which suggests that particular types of programming may be in different relevant *product* markets. As discussed below, however, these differences in demand among geographic regions are critical in analyzing the potential competitive effects of the merger.

b. Monopsony Power and Rent Shifting

44. Some commenters argue that programming and MVPD competition will be harmed by Applicants' increased subscriber reach, which will give the merged firm monopsony power (*i.e.*, significant bargaining power) in negotiations with programmers.[98] They allege that the merged firm's receipt of deep programming discounts would impair the ability of programmers to produce or acquire high-quality programming and would force programmers to lower the overall quality of their offerings, or exit the market altogether.[99] The commenters argue that these discounts are greater than what would be expected from any transactions cost efficiencies that may result from the merger (*e.g.*, reductions in marketing, distribution, sales, administration, and legal expenses), and higher discounts would thereby result in fewer program development costs being recovered from the merged firm than from Applicants separately.[100] Commenters also allege that such actions would harm MVPD competition by raising rivals' costs if programmers shift cost recovery to the merged firm's competitors, or if exclusive contracts

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broadcast programming. Our analysis is properly limited to the relationship between the merged entity and the programmers selling to them and other MVPDs.

[96] As Applicants assert, defining the relevant product market "is complex because video programming producers have many distribution outlets and the importance of those outlets may vary from one type of programming to another." Application at 68.

[97] *Id*. Commenters have not directly addressed this issue.

[98] CFA Comments at 10-11, 13-15; Qwest Comments at 6-9, citing Haring et al. Decl. ("Haring Decl.") at 8, 19; SBC Comments at 12-13, Gertner Decl. ¶ 20; Verizon Comments at 11. Monopsony power is the inverse of monopoly power. In a pure monopoly, there are several buyers with only one seller; in a pure monopsony, there are several sellers with only one buyer.

[99] Implicitly, these commenters assume that the quality of programming is positively related to the cost of producing the programming.

[100] Qwest Comments at 6-9; SBC Comments at 12-13; Verizon Comments at 11.

preclude rivals from obtaining programming.[101] By raising rivals' costs of programming, commenters argue, the merger may lessen competition and the ability for the MVPD marketplace to constrain cable prices.[102]

45. Applicants reply that volume discounts are not proof that the merged firm will have the ability to control the price of programming.[103] Applicants broadly estimate that the merged firm should save between $250 and $450 million a year on license fees negotiated with programming networks.[104] Applicants state that the merged firm's increased bargaining power will result only in a reduction of the rate of increase each firm would pay for programming costs, and in programmers taking a lower, yet still positive, profit.[105] Applicants assert that the merged firm would not have excessive bargaining power because programmers have alternative distribution outlets enabling them to reach more than 70% of the MVPD market, including DBS and other MVPDs.[106] Applicants also assert that the merger does not risk raising rival MVPDs' costs of programming, arguing that if programmers could receive higher programming rents from other MVPDs, they would already be doing so.[107]

46. Some commenters argue that unaffiliated programmers will be harmed by the merged firm's vertical integration.[108] They believe the merged entity may have the incentive and ability to foreclose access to its cable systems by unaffiliated programming packagers or producers, particularly if the merged firm has sufficient market power in the distribution of programming that it can profitably refuse to carry programming its customers desire.[109]

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[101] *Id.* We discuss the effects of exclusive contracts in the programming market in further detail below.

[102] SBC states that a program supplier may react to a reduction in price by seeking higher prices from other MVPDs. SBC Comments, Gertner Decl. ¶ 25. If it is unable to obtain higher prices, it may exit the market, thereby harming consumers by reducing the amount and diversity of programming. *Id.* If MVPDs pay the higher prices and pass them through to consumers, consumers will be harmed. *Id.* ¶ 26.

[103] Applicants' Reply Comments at 39-40.

[104] Application at 32 n.51; Application, Pick Decl. ¶ 21. Applicants admit that this estimate is based on several assumptions, including "the actual terms of specific programming contracts, broader trends in programming prices, and the dynamics of individual negotiations between AT&T Comcast and the sellers of video programming." *Id.* Applicants believe that these savings will result from obtaining the highest price discount that applies currently to either AT&T or Comcast, and negotiating higher volume discounts on new contracts given the combined subscriber base of the merged firm. Application, Pick Decl. ¶ 19; Applicants' Reply Comments at 39-40. Applicants also believe that some of the savings will result from transactions cost efficiencies from programming networks' ability to deal with a single large buyer instead of two buyers. Applicants' Reply Comments at 39-40, Shelanski Decl. ¶ 48. SBC counters that the programming cost savings would derive from the exercise of market power, not transactions cost savings. SBC Comments, Gertner Decl. ¶ 40.

[105] Application, Pick Decl. ¶ 20; Applicants' Reply Comments, Shelanski Decl. ¶ 46. Applicants state that video programming costs are the largest single expense item, and "have increased at a substantially higher rate than inflation for many years." Application, Pick Decl. ¶ 18. Applicants claim that the merged entity's larger subscriber base may provide leverage to resist "supra-competitive" rate increases by video programming suppliers. Application, Pick Decl. ¶ 20; Applicants' Reply Comments at 38.

[106]Applicant's Reply Comments at 37.

[107] Applicants' Reply Comments, Ordover Decl. ¶ 39; Letter from David L. Lawson, Sidley, Austin, Brown & Wood, LLP, to Marlene H. Dortch, Secretary, FCC (Aug. 9, 2002), at 4.

[108] CFA Comments at 10, 15-16; Qwest Comments at 14-15; SBC Comments at 6-7, 9-10; Verizon Comments at 13; Minority TV Comments at 4, 20.

[109] *Id.* This issue is also raised in the context of Internet programming content. For a discussion of how market share relates to the incentives of a vertically integrated MVPD to discriminate against non-affiliated programming content, see Rubinfeld, Daniel L. and Hal L. Singer, *Vertical Foreclosure in Broadband Access?*, 49 J. Ind. Econ. 299 (2001).

47. Applicants reply that foreclosure of unaffiliated programmers "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."[110] Applicants state that the Commission has 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.[111] Applicants also state that the merged firm will own very little programming that could benefit from a foreclosure attempt, and will own many cable systems that would be harmed by a reduction in their supply of quality unaffiliated programming.[112]

48. *Discussion*. Section 613(f)(2)(A) of the Communications Act directs the Commission to set a horizontal ownership limit which ensures that no cable operator can unfairly impede the flow of video programming from the programmer to the consumer. Our 30% horizontal ownership rule is currently under review as part of a rulemaking proceeding commenced in September 2001, in response to the court's remand of the rule in *Time Warner*.[113] Despite the pendency of our horizontal ownership proceeding, Applicants have noted that their combined subscriber totals, excluding the TWE and TWI subscribers to be divested, are 27.02 million, which is 28.9% of the nation's 93.4 million MVPD subscribers.[114] Applicants therefore urge that the proposed merger will not violate our remanded horizontal ownership rule.[115] Applicants further assert that they will "take all steps necessary to comply with any new cable horizontal ownership limit that may be adopted in connection with the pending Horizontal Ownership FNPRM proceeding."[116]

49. Although our horizontal ownership cap has been reversed and remanded, and we have not yet determined what rules will best effectuate Congress' intent in enacting section 613(f) of the Communications Act, we remain obligated to ensure that the merged firm's national subscriber reach does not result in the harms to competition and consumers that the horizontal cap is intended to prevent (*i.e*., ensuring that no cable operator can unfairly impede the flow of video programming from the programmer to the consumer). Further, while the *Time Warner* court vacated one of the two bases upon which we attributed TWE to AT&T in the *AT&T-MediaOne Order*, the remaining basis for attribution of TWE to AT&T—our prohibition on the sharing or appointment of officers and directors—remains intact.[117] But for Applicants' proposal to insulate and divest TWE, AT&T's right to appoint directors to the TWE Board of Representatives, which will inure to AT&T Comcast upon closing of the merger, means that TWE would remain attributable to AT&T Comcast absent a waiver of the officers/directors rule. Because Applicants have proposed to insulate the TWE Interest upon the merger's closing and to divest it thereafter, we evaluate the potential harms arising from increased subscriber reach without reference to TWE.

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[110] Applicants' Reply Comments at 44, citing Ordover Decl. ¶ 52.

[111] *Id*. (citing *Horizontal Ownership Order* ¶¶ 5, 53).

[112] *See id*.

[113] *See generally Further Notice.*

[114] *See* Applicants Sept. 20, 2002, Ex Parte. As noted above, AT&T has 18.51 million total subscribers and Comcast has 8.51 million total subscribers. As of July 31, 2002, there were 93.4 million total MVPD subscribers nationwide. *See Kagan Media Money*, Aug. 27, 2002, at 7. The percentage of nationwide MVPD subscribers the merged firm would serve is calculated as follows: 27.02 million divided by 93.4 million, equaling 28.9%.

[115] Application at 50.

[116] *Id*. at 49.

[117] 47 C.F.R. § 76.503 n.2(c). See para. 84, *infra* (discussing basis of attribution of TWE in the *AT&T-MediaOne Order*).

50. *Monopsony Power*. We seek to determine whether the proposed merger would confer on the merged firm a degree of bargaining power that would enable it to dictate the terms and conditions of sale of programming and thereby impair programmers' ability to recover their costs without either reducing the quality or quantity of programming or shifting those costs to other MVPDs. In this endeavor, we turn to economic theory and available empirical evidence.

51. The relevant economic literature suggests that the outcome of merger activity, as it relates to bargaining position, depends on the relationship between firm size and bargaining power.[118] This may reduce the quality of programming produced by the programmer, or it could cause the programmer to exit the market if it is unable to cover its fixed costs.[119]

52. In addition to economic theory, the record in this proceeding includes some empirical analysis. In their experimental economics study, Bykowsky, Kwasnica, and Sharkey (2002) examine how changes in horizontal concentration in the cable television industry may affect the flow of programming to consumers.[120] Employing laboratory methods, the authors created an experimental market that attempts to simulate a market in which national programming networks and MVPDs negotiate affiliate fees.[121] The study examined markets at three different concentration levels and incorporated a channel carriage constraint and the existence of "most favored nation" ("MFN")[122] terms as variables. The study does not provide any basis to conclude that a market in which the largest cable operator serves 29% of the MVPD subscribers would result in a reduction in the flow of programming to consumers.[123]

53. The record and some of the theoretical studies reviewed reflect the possibility that a large

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[118] *See and compare* Chipty, Tanseem and Christopher Snyder, The Role of Firm Size in Bilateral Bargaining: A Study of the Cable Television Industry, *The Review of Economics and Statistics*, May, 1999, 81(2), 326-340 ("Chipty and Snyder"); *and* Raskovich, Alexander, Pivotal Buyers and Bargaining Position, Economic Analysis Group Discussion Paper 00-9, United States Department of Justice, Antitrust Division, October, 2001 ("Raskovich"); *with* Adilov, Nodir and Peter J. Alexander, Asymmetric Bargaining Power and Pivotal Buyers, Working Paper, Department of Economics, Cornell University, and the Federal Communications Commission, Media Bureau, September, 2002 ("Adilov and Alexander"). Chipty and Snyder and Raskovich construct bargaining models based on the assumption of an *equal* division of profits between program producers (sellers) and program distributors (buyers), which generates a worsening of a buyer's bargaining position as it merges and grows in size. Adilov and Alexander, however, construct bargaining models based on the assumption of *unequal* divisions of profits, and conclude that large buyers enjoy greater gains from trade than smaller buyers.

[119] Another manifestation of MVPD bargaining power is the ability to demand that a programmer give the MVPD exclusive distribution rights as a condition of carriage. *But see* 47 C.F.R. § 76.1301(b), which prohibits MVPDs from demanding an exclusive contract from a programmer for carriage. A large MVPD may be able to pay the programmer a premium that represents the revenues the programmer will forego by excluding other distributors. An increased subscriber reach may facilitate either outcome. We discuss the potential harm resulting from exclusive contracting below.

[120] *See* Mark Bykowsky, Anthony M. Kwasnica and William Sharkey, Federal Communications Commission Office of Plans and Policy, OPP Working Paper No. 35, *Horizontal Concentration in the Cable Television Industry: An Experimental Analysis* (rel. June 3, 2002).

[121] Commenters criticized the study for its implementation, complexity, and lack of realism. *See generally* NCTA Comments, Shapiro, Carl, and John Woodbury, *Cable Television Subscriber Limits: A Critique*, July, 2002; AT&T Comments, Schotter Decl., July 2002; SBC Comments.

[122] MFN agreements between buyers and sellers of programming give the MFN buyer the right to purchase programming from the seller at terms at least equal to those of the buyer receiving the best deal.

[123] Completion of the study required establishing a set of parameter values that identify the key economic elements of the market participants' "business model." For programming networks, some of the key elements were the level of programming costs and expected national advertising revenue. These parameter values were based on a sample of programming networks whose desired audience is national in scope.

firm with increasing numbers of subscribers may obtain or eventually gain the ability to unduly influence the market for video programming.[124] Applicants and commenters addressing the issue generally agree that the merged firm likely will pay less for programming post-merger than the individual Applicants currently pay.[125] However, there is no currently available evidence that determines a unique point at which a firm's subscriber reach allows the firm to exercise monopsony power over programmers.[126]

54. As we discuss further below, we analyze the proposed merger under the presumption that the TWE interest would be insulated upon closing and thereafter divested. The merged firm would serve fewer than 30% of all U.S. MVPD subscribers. Indeed, the number of combined subscribers attributable to AT&T and Comcast, excluding TWE, will comply with our remanded horizontal ownership cap, and Applicants have pledged to comply with any new horizontal ownership limit the Commission may adopt.[127] Any augmented bargaining power resulting from the combination of AT&T and Comcast would be insufficient to create public interest harms.

55. *Foreclosure of Unaffiliated National Programming*. Qwest, SBC and Verizon assert that the merged firm will be able to use its size to eliminate competition from unaffiliated national programmers by refusing to carry them on AT&T Comcast cable systems.[128] Combining the subscriber reach and programming interests of two or more MVPDs may increase the likelihood that denial of carriage of a rival's programming on the merged firm's systems could induce an existing programmer to exit the market or possibly deter a potential entrant. That is, such a merger could increase the ability to foreclose. The economic incentive to foreclose, however, necessarily depends on weighing the costs and the benefits of foreclosure. A vertically integrated cable operator would have the incentive to foreclose rival programmers only if its gains from the sale of affiliated programming to other MVPDs would offset the losses in subscriber revenues that might result if subscribers terminate service because of the operator's failure to carry a particular unaffiliated programming service.

56. The merged firm would reach fewer than 30% of the nation's MVPD subscribers and own a modest array of programming networks. As noted above, AT&T no longer has an interest in Liberty Media Corporation, which owns a large number of video programming services.[129] AT&T has also reduced to a nonattributable level its interest in Cablevision, which owns programming services, and

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[124] *See* CFA Comments at 10-11, 13-15; Qwest Comments at 6-9, Haring Decl. at 8, 19; SBC Comments at 12-13, Gertner Decl. ¶ 20; Verizon Comments at 11; *see also* Adilov and Alexander.

[125] CFA Comments at 10-11, 13-15; Qwest Comments at 6-9, Haring Decl. at 8, 19; SBC Comments at 12-13, Gertner Decl. ¶ 20; Verizon Comments at 11; *see also* Applicants' Reply Comments at 39-40; Application at 32 n.51; Application, Pick Decl. ¶ 4; Applicants' Reply Comments, Shelanski Decl. ¶ 48.

[126] This may be due in part to the unique dynamics involved between buyers and sellers of video programming when engaged in contract negotiations, which often encompass long-term commitments and include variables such as MFNs and buyers assuming some of the risks and costs of production. These negotiations, and the final agreed prices for programming, often remain confidential.

[127] We note that while the Court of Appeals in *Time Warner* expressed concern that the Commission did not sufficiently justify why the ownership level should not be set at a number higher than 30%, it never suggested that the Commission failed to justify setting the number as high as 30%.

[128] Qwest Comments at 14-15; SBC Comments at 6-7, 9-10; Verizon Comments at 13. These commenters also assert that the purchasing power of the merged firm will allow it to choose a "winning' programmer, even if such programmer is unaffiliated with the merged firm, and then use its purchasing power to secure deep discounts or exclusive contracts. *Id.*

[129] *See* para. 13, *supra.* Among other programming networks, Liberty owns, in whole or in part, the Starz! movie channels, the various Encore channels (*e.g.*, Encore, Encore Action, Encore Mysteries), The Learning Channel, and the various Discovery channels (*e.g.*, Discovery Channel, Discovery Health, Discovery Kids, Discovery Science).

has sold all of its interests in four large programming networks.[130] AT&T has reduced its national programming ownership to three networks: E! Entertainment (10%), style (10%) and iNDEMAND (44%).[131] Comcast has ownership interests in eight national programming networks, three of which overlap with AT&T: E! Entertainment (40%, for a combined total of 50%), style (40%, for a combined total of 50%), iNDEMAND (11%, for a combined total of 55%), QVC (58%), the Discovery Health Channel (20%), the Golf Channel (91%), the Outdoor Life Network (100%), and the G4 Network (94%).[132] The total national networks owned would increase by only five.[133] Further, because the subscriber reach of the merged firm would be less than 30% of the national MVPD market, even with an attempted foreclosure strategy by the merged firm, more than 70% of the MVPD market would still be available to unaffiliated programmers.[134] Therefore, based on the limited number of programming services the merged firm would control after TWE is divested, and the national percentage of non-AT&T Comcast subscribers that could support unaffiliated programming, we find that the merger would not enable Applicants to successfully foreclose unaffiliated national programmers.

57. *Foreclosure of Unaffiliated Regional Programming.* We also examine the potential harm to unaffiliated programmers who seek access to distribution channels for programming targeted to regional or local audiences. CFA argues generally that allowing two monopolists to merge increases their dominance in regional distribution markets and could lead to higher prices, content discrimination and increased barriers to entry.[135] Applicants contend that foreclosure by an MVPD is competitively significant only if it lessens competition in some relevant market.[136]

58. For an MVPD to have the economic incentive and ability to foreclose unaffiliated regional programming several conditions must be met. First, the MVPD must have affiliated programming from which it could benefit by the reduction in programming competition. Second it must have the ability to foreclose. That is, it must have a large enough share of the relevant MVPD households that by choosing not to carry a competing programmer's offering, either a competing programmer would exit the market, or it would deter a potential entrant from entering. Finally the MVPD must have the economic incentive to do so. That is, any additional profits attained by the reduction of competition in the regional programming market must outweigh the lost earnings from carriage of the competing programming on the MVPD's own systems.

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[130] Qwest Comments at 14-15; SBC Comments at 6-7, 9-10; Verizon Comments at 13. Among other programming networks, Cablevision owns, in whole or in part, American Movie Classics, Bravo, the Independent Film Channel, and MuchMusic USA.

[131] *See* para. 14, *supra*.

[132] *See* para. 20, *supra*.

[133] QVC, the Discovery Health Channel, the Golf Channel, the Outdoor Life Network, and the G4 Network.

[134] The presence of competing MVPDs may further reduce a cable operator's incentive to choose programming for reasons other than consumer demand (*e.g.*, the operator's ownership of a programming network), because a cable operator that selects programming on some other basis risks subscriber loss if more desirable programming is available via an alternative MVPD.

[135] *See* CFA Comments at 14-16, incorporating by reference CFA's Comments in our Cable Horizontal Ownership Proceeding at 127-38 (stating that "programmers [have] difficulty gaining access to MSO distribution" and that "[p]owerful cable MSOs have been able to prevent, restrict, or restructure programming networks, diminishing competition, diversity, and innovation. . . . in both national and local cable programming marketplaces"); *see also* Statement of CFA et al. to Subcommittee on Antitrust, Business Rights and Competition, Senate Judiciary Committee, April 23, 2002 (appended to CFA Comments), at 10-12.

[136] Applicants' Reply at 43-44 (noting that the minimum requirements for competitive injury are (i) that access to the foreclosed portion of the market is essential to the economic viability of the excluded programmer; and (ii) that the foreclosing MVPD has significant programming interests to benefit from this foreclosure).

59. For the purpose of our analysis, we will define the MVPD's relevant market share by its share of MVPD households in the geographic footprint where the programming is delivered. A merger-specific issue will arise if the merger of AT&T and Comcast would result in a significant increase in the Applicants' post-merger market share above the threshold where foreclosure concerns arise.

60. The merged entity will have attributable interests in regional programming targeted to regions their cable systems serve. Currently, AT&T holds attributable interests in five regional programming networks: AT&T3: New England's TV Superstation (100% ownership interest), Empire Sports Network (33.33%), Fox Sports New England (50%), New England Cable News (50%), and Pittsburgh Cable News Channel (30%).[137] Comcast holds attributable interests in four regional programming networks: cn8, The Comcast Network (100%), which Applicants describe as one of the nation's largest regional cable networks; Comcast SportsNet (78%); Comcast SportsNet-MidAtlantic (100%); and Comcast Sports Southeast (72%).[138] In addition, the Applicants forecast that they will increase the production and delivery of local and regional programming, especially in former AT&T territories.[139] Within the distribution areas of these existing services either AT&T or Comcast already has significant concentrations of subscribers.

61. The proposed merger will create or enlarge ownership concentrations in several metropolitan areas. [**REDACTED**.][140] In addition, documents submitted by the Broadband Service Providers Association ("BSPA") suggest that, when AT&T's partnership interests are taken into account, additional concentration may result in at least six other areas: (in the Albuquerque-Santa Fe DMA, the Kansas City DMA, the Indianapolis DMA, the Flint-Saginaw DMA, the Savannah DMA, and the Charleston DMA.[141] Applicants generally dispute the claim that the merger will create the additional system concentration identified by BSPA.[142] Specifically, they argue that AT&T does not manage these

[137] Application at 25. Because AT&T's interest in Cablevision is no longer attributable, the regional programming networks—including Fox Sports Net services, MSG Networks and other MSG channels, and News 12 Networks—owned by Cablevision through its interest in Rainbow are also no longer attributable to AT&T. *See* para. 13, *supra*; Application at 20; Letter from Douglas G. Garrett, AT&T Broadband, to Marlene H. Dortch, Secretary, FCC (Oct. 3, 2002) (discussing Empire Sports Network, L.P.).

[138] Application at 14. Comcast also produces Comcast Newsmakers, Comcast Local Edition, and other short-form public affairs programs that appear twice hourly on channels carrying CNN Headline News. *Id.* at 15. *See also* Section II.A.2, *supra.*

[139] Application at 42; *see also* Section V.C., *infra*, (discussing the projected increase in supply of local and regional programming).

[140] *See* Letter from A. Renee Callahan, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, FCC, (July 2, 2002) ("Applicants' July 2, 2002, Response") at 5 and Attachment 3 (responding to Document and Information Request by the Chief, Industry Analysis Division, Media Bureau, FCC (June 11, 2002) ("June 11, 2002, Information Request")). The June 11, 2002, Information Request defined a cluster as "two or more cable systems which are close in geographic proximity and share personnel, management, marketing and/or technical facilities." *Id.* at 1 Q.B1. [**REDACTED.**] In this Order, "**REDACTED**" indicates confidential or proprietary information submitted pursuant to the protective order in this proceeding. *Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, DA 02-734 (rel. Mar. 29, 2002) ("*Protective Order*"). The unredacted text is included in the Confidential Appendix, which is available upon request only to those parties who have executed and filed with the Commission signed acknowledgements of the protective order. Qualified representatives who have not yet signed the required acknowledgement may do so in order to obtain the Confidential Appendix.

[141] *See* Letter from BSPA to Marlene H. Dortch, Secretary, FCC (Oct. 2, 2002) ("BSPA Oct. 2 Ex Parte") at Attachment A ("BSPA Map").

[142] *See* Letter from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Oct. 11, 2002).

non-consolidated systems, nor share personnel, management, marketing or technical facilities with those systems.[143] Applicants also claim that, with minor exceptions, Comcast's cable systems in Michigan, Indiana, New Mexico, Georgia, Florida, and Kansas do not serve the same geographic areas served by the AT&T non-consolidated systems.[144]

62. Although regional foreclosure is a novel issue in the merger context, in the rulemaking context, the Commission has balanced the benefits of clustering—such as regional programming, upgraded cable infrastructure and improved customer service—with the likelihood of anticompetitive harm.[145] In its orders on cable horizontal ownership, the Commission declined to adopt regional subscriber limits because the record in those proceedings did not establish that any anti-competitive effects of clustering outweighed its benefits.[146]

63. Based on the record before us, we conclude the merger is unlikely to result in public interest harms arising from foreclosure of regional programming. Both of the merging entities already have significant presence in various regions, including regions served by their programming affiliates. In all except one of the regions served by affiliated programmers, the merger's effect on the Applicants' subscriber share would be *de minimis*.[147] In the Southeast region, where post-merger concentration would increase more significantly, it would not exceed 25% of total subscribers in the relevant region.[148] To the extent subscriber concentration is materially increased in areas served by regional programmers, the merger, by combining AT&T's and Comcast's subscriber share and/or affiliated program services, could

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[143] *Id.*; *see also* Application at 18-21 (explaining that AT&T Broadband generally divides its interests in cable systems into owned and operated systems, consolidated systems (in which AT&T has a greater than 50% but less than 100% interest), and non-consolidated systems (in which AT&T has a 50% or less interest)).

[144] Letter from Michael H. Hammer, Willkie Farr and Gallagher, to Marlene H. Dortch, Secretary, FCC, (Nov. 1, 2002) ("Applicants' Nov. 1, 2002 Ex Parte").

[145] *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, 8572-73 ¶¶ 16-17 (1993) (confirming the Commission's authority to adopt regional subscriber limits and concluding that there was no basis in the record for imposing regional limits that could reduce investment in the development of regional programming, upgraded cable infrastructure and improved customer service).

[146] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, 14 FCC Rcd 19098, 19125 ¶ 63 (1999).

[147] *See* Letter from A. Renee Callahan, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, FCC, (Nov. 5, 2002) ("Applicants' Nov. 5, 2002, Ex Parte") at 2 (showing that increased subscriber shares in the regions served by Fox Sports New England, Comcast Sports Mid-Atlantic, and Comcast SportsNet (Philadelphia) would increase by no more than 3% over the pre-merger subscriber share of the Applicant that owns the programming interest); *see also* Applicants' July 2, 2002, Response at Comcast-FCC-B.1-0000001; BSPA Map (indicating that no additional concentration would result in the region served by Empire Sports); Letter from Douglas G. Garrett, AT&T Broadband, to Marlene H. Dortch, Secretary, FCC (Oct. 3, 2002) (providing information on Empire Sports Network, L.P.). The AT&T and Comcast systems that are within the footprint of Fox Sports New England are also in the area served by New England Cable News. *See NCTA's Cable Developments 2002*, at 186. Thus, the merger's effect on regional concentration in this area would be *de minimis*. The merger will not result in any additional concentration in the region served by Pittsburgh Cable News Channel. *See* Applicants' July 2, 2002, Response at Comcast-FCC-B.1-0000001; BSPA Map; Letter from Michael H. Hammer, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC (Nov. 8, 2002) ("Applicants' Nov. 8 Ex Parte"). The region served by cn8 is roughly contiguous with the area served by Comcast SportsNet (Philadelphia), except that cn8 also serves Maryland. Because AT&T has no subscribers in Maryland, the merger-related increase in subscriber concentration in this area also would be *de minimis*. *See* Letter from Michael H. Hammer, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC (Nov. 7, 2002) at 2 ("Applicants' Nov. 7, 2002, Ex Parte"); *See* Applicants' July 2, 2002, Response at Comcast-FCC-B.1-0000001; BSPA Map.

[148] *See* Applicants' Nov. 7, 2002, Ex Parte (showing post-merger subscriber shares for Comcast Sports Southeast).

increase their incentive and ability successfully to pursue foreclosure strategies. The record does not demonstrate, however, that the additional concentration created by the merger will materially alter the incentive and the ability of the merged entity to pursue foreclosure.[149] We cannot conclude, therefore, that the increased concentration levels are sufficiently large that profits from any reduction in competition likely would outweigh lost earnings. Nor does the record demonstrate that any foreclosure strategy AT&T Comcast may attempt would materially impair unaffiliated programmers' ability to compete. Moreover, the Commission's rules implementing section 616 of the 1992 Cable Act provide an avenue for aggrieved video programmers and MVPDs to obtain relief from discrimination on the basis of affiliation.[150]

64. In the Commission's recent *Program Access Order* extending the exclusivity prohibition on satellite cable programming, we noted that "system 'swaps' and purchases over the course of the last decade have dramatically changed the shape of the cable television industry in terms of local or regional market 'clusters,'" which we defined as "sets of commonly owned cable systems within contiguous geographic market areas."[151] To the extent that there are general concerns about the effect of an industry trend toward increased clustering, we have an ongoing rulemaking proceeding regarding cable ownership that may provide us with an appropriate vehicle to assess the potential benefits and harms of such regional concentration.[152] In that regard, we note that section 613(f)(2)(B) requires the Commission to ensure, among other public interest objectives, that cable operators affiliated with video programmers do not favor such programming in determining carriage on their cable systems.[153] In the ongoing proceeding, we can re-examine the extent to which clustering facilitates the creation of regional programming and the extent to which it increases the potential for foreclosure of unaffiliated regional programmers, as well as any other public interest benefits and harms.

65. *Conclusion*. We find that the merger, as proposed, will not enable AT&T Comcast to exercise monopsony power over programming markets or raise rival MVPDs' costs. We further find that the merger will not harm diversity or competition in the programming market by enabling AT&T Comcast to pick winners and losers in the programming market through foreclosure of programmers from carriage. Because we are relying on the proposed insulation and divestiture of TWE as a basis for our finding that the merger will not create harms in the video programming market, we are not attempting to determine the extent of potential harm that would result absent the insulation and divestiture of TWE.

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[149] No commenter has shown that this concentration level will enable AT&T Comcast to foreclose any particular regional programmer.

[150] Section 76.1301(c) of the Commission's rules prohibits the merged entity from "unreasonably restrain[ing] the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms or conditions for carriage of video programming provided by such vendors," while section 76.1302 authorizes video programming vendors and MVPDs to file program carriage complaints with the Commission. 47 C.F.R. § 76.1301(c) and § 76.1302; *see also Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992,* 9 FCC Rcd 2642 (1993). On reconsideration of this order, the Commission amended 47 C.F.R. § 76.1302 to specifically afford standing to MVPDs aggrieved by carriage agreements between other MVPDs and programming vendors that violate section 616 of the 1992 Cable Act and the Commission's rules. *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Memorandum Opinion and Order*, 9 FCC Rcd 4415, 4418-19 ¶ 24 (1994).

[151] *Program Access Order*, 17 FCC Rcd at 12133 ¶ 22.

[152] *Further Notice,* 16 FCC Rcd at 17322 ¶¶ 10-11. Our *Further Notice* on cable horizontal and vertical ownership limits distinguished between general entertainment programming and niche programming, such as regional sports programming, noting that such regional programming would have a much narrower geographic market, and generally sought comment on the Commission's conceptualization of the market structure as well as the regulatory implications that should follow. *Id.*

[153] 47 U.S.C. §613(f)(2)(B).

c. TWE Insulation and Divestiture Conditions

66. Absent insulation, the merged firm's interest in TWE would heighten the risk of harm to competition in the video programming market. Nevertheless, because we find that the proposal submitted by the Applicants (the "TWE Proposal") [154] sufficiently insulates the TWE Interest, we will not treat TWE as an attributable interest for purposes of our analysis of potential harms in this or other arenas, such as MVPD competition, Internet access, or ITV. Such analysis would have been required had the Applicants failed to advance an acceptable means of insulating the TWE Interest, and could be required in the future if the merged entity requests our approval to alter any element of the TWE Proposal or alter any of the conditions we impose herein.

(i) TWE Insulation and Divestiture Proposal

67. In the Public Interest Statement filed with the Application, the Applicants state that AT&T plans to divest the TWE Interest prior to the closing of the proposed merger.[155] The Applicants state that, alternatively, if AT&T is unable to divest its TWE Interest by the closing date of the merger, the TWE Interest will be insulated consistent with our attribution rules until the interest can be divested.[156] By letter dated August 8, 2002, the Applicants specified a proposed means of insulating the TWE Interest through a combination of safeguards and a divestiture trust.[157]

68. *Proposed Safeguards Relating to Video Programming.* Applicants propose that Paragraphs 3-5 of the *AT&T-MediaOne* Safeguards Relating to Video Programming continue to govern AT&T Comcast's relationship with TWE after the merger closes.[158] Modified to fit the present transaction, these safeguards (the "Modified TWE Safeguards") [159] are as follows:

> 1. No officer or director of AT&T Comcast[160] shall also be an officer or director of TWE.[161]
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> 2. No officer, director, or employee of AT&T Comcast shall, directly or indirectly, influence or attempt to influence, or otherwise participate in, the management or operation of the

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[154] *See* Letter from Betsy J. Brady, AT&T Corp. and James R. Coltharp, Comcast Corporation to W. Kenneth Ferree, Chief, Media Bureau (Aug. 8, 2002) ("TWE Proposal"). We sought comment on the TWE Proposal. *See Media Bureau Seeks Comment on Proposed Insulation and Divestiture of AT&T's Interest in Time Warner Entertainment, LP*, Public Notice, DA 02-1987 (rel. Aug. 9, 2002).

[155] Application at 4, 19, 53-64.

[156] Application at 4, 61.

[157] *See generally TWE Proposal.*

[158] *See* TWE Proposal at 1-2; Letter from Arthur R. Block, Senior Vice President & General Counsel, Comcast Corporation, and Mark C. Rosenblum, Vice President - Law, AT&T Corp., to Marlene H. Dortch, Secretary, FCC (Sept. 30, 2002).

[159] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9899, Appendix B.

[160] AT&T Comcast is defined as "AT&T Comcast, all of its wholly-owned subsidiaries, and any entities controlled by AT&T Comcast, but shall not include iNDEMAND." *See* Appendix B attached hereto.

[161] TWE is defined to include the TWE Interest and interests that AT&T Comcast will have in certain affiliates of AOL Time Warner upon the restructuring of TWE. *See* Appendix B attached hereto. Such interests are described in detail in our description of the trust proposal and TWE Restructuring Agreement below.

Video Programming[162] activities of TWE. In particular, no member of the TWE Board of Directors appointed by the Trustee shall be involved in the following matters:

a) the decisions of TWE regarding which Video Programming services are purchased for or carried on TWE's cable systems;
b) negotiation of the prices paid by TWE for Video Programming carried on TWE's cable systems;
c) setting the schedule for rollout of Video Programming by TWE's cable systems;
d) marketing by TWE of Video Programming carried on TWE's cable systems;
e) setting the budget for the Video Programming operations of TWE's cable systems (except that AT&T may be involved in setting the overall TWE budget for Video Programming operations provided that AT&T's access to TWE budget information does not include information concerning individual budget components of TWE's Video Programming operations, e.g., personnel, overhead, marketing, and program purchasing);
f) selecting the electronic programming guide used by TWE's cable systems;
g) the hiring, firing, or supervising of TWE employees directly involved in the Video Programming activities of TWE's cable systems; or
h) assessing the performance of any Video Programming service carried by TWE's cable systems.

3. AT&T Comcast may not, directly or indirectly, receive information from TWE regarding the price, terms, or conditions negotiated for the carriage of Video Programming on the TWE cable systems, nor provide information to TWE regarding the price, terms, and conditions negotiated for the carriage of Video Programming on AT&T Comcast cable systems. AT&T Comcast may not obtain from any Video Programming vendor a volume discount or other favorable terms and conditions as a result of TWE's purchase of Video Programming for, or carriage on, TWE's cable systems.[163]

69. Certain enforcement mechanisms, including regular reporting and the establishment of a compliance officer, were associated with the safeguards prescribed by the *AT&T-MediaOne Order*.[164] The Modified TWE Safeguards provide that AT&T Comcast will designate a senior manager to oversee compliance with the safeguards. Until the TWE Interest is divested, AT&T Comcast also will file compliance reports with the Media Bureau every six months.

70. *Trust Proposal.* AT&T proposes to place the TWE Interest in two trusts (the "Trusts"). Final drafts of the proposed trust agreements were filed with the Commission on October 25, 2002 (each a "Trust Agreement").[165] The Trust Agreement provides that if any additional direct or indirect interests in

[162] "Video Programming" means video programming as defined in 47 U.S.C. § 522(20) and the Commission's implementing regulations as of January 1, 2002. *See* Appendix B attached hereto.

[163] The Trust Agreement vests the responsibility to appoint members to the TWE Board of Representatives in the Trustee, subject to certain limitations which will be described further below in our discussion of the trust proposal.

[164] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9902-05.

[165] *See* Agreement and Declaration of Trust (filed Oct. 25, 2002). The Trust Agreement states that MediaOne of Colorado, Inc. ("MOC"), a wholly-owned subsidiary of AT&T Broadband, holds a 2.86% interest in TWE. MediaOne TWE Holdings ("MOTH"), a wholly-owned subsidiary of MOC, holds a 24.78% interest in TWE. Prior to the closing of the merger of AT&T and Comcast, the interest in TWE now held by MOC will be transferred to a

(continued....)

TWE are acquired by AT&T Comcast or any of its subsidiaries, such interests will be delivered to the Trustee and will become subject to the Trusts.[166] The Trusts will be materially identical in form. The purpose of the Trusts is to divest the TWE Interest over the term of the Trusts. A trustee (the "Trustee"), who will be the same for each of the Trusts, will have the exclusive power and authority to manage the trust assets and to exercise AT&T Comcast's rights relating to the TWE Interest, including all voting, director appointment, consent, and management rights under the TWE Partnership Agreement.[167] The Trustee will be appointed by AT&T Comcast after notice to and with the prior approval of the Media Bureau, and may not be an individual with a personal, familial or business relationship with AT&T Comcast or its affiliates, including its officers, directors, managers, agents or employees.[168] The Trustee may retain independent advisors provided that their fees are reasonable, and provided that they do not have business relationships with AOL Time Warner.[169] AT&T Comcast also may retain advisors, who shall not be the same advisors appointed by the Trustee, including accountants, attorneys, investment bankers, and managing underwriters, to assist the Trustee's advisors with the TWE divestiture.[170]

71. The Trust Agreement will prohibit communications between AT&T Comcast and the Trustee, with some exceptions. The Trustee will not be permitted to provide any information to AT&T Comcast concerning the operation or management of TWE or any cable system in which TWE has an interest, except for information needed to comply with Securities and Exchange Commission or Internal Revenue Service requirements.[171] The Trustee will have access to all of AT&T Comcast's personnel, books, records and facilities relating to the TWE Interest. The Trustee may communicate with AT&T Comcast "to facilitate divestiture" of the TWE Interest.[172] The Trustee also is required to provide periodic reports to AT&T Comcast, with a copy to the Media Bureau, describing the Trustee's efforts to

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newly formed Delaware limited liability company that is indirectly wholly-owned by MOC ("LLC1"). MOTH will be indirectly wholly-owned by MOC, and the interest in TWE then held by MOTH will be transferred to a newly formed Delaware limited liability company that is wholly-owned by MOTH ("LLC3"). At closing, LLC1 and LLC3 will each be converted into Delaware business trusts ("Trust I" and "Trust III", respectively). MOC, or a wholly-owned subsidiary of MOC, will be the grantor of the MOC Trust, and MOTH will be the grantor of the MOTH Trust. If the TWE Restructuring closes, Trust III will dissolve by merging into MOTH. Simultaneously with the dissolution of Trust III, a new trust will be formed immediately above MOTH in the corporate ownership chain by converting a Delaware limited liability company, indirectly wholly-owned by MOC, into a Delaware business trust ("Trust II"). The effect of the closing of the TWE Restructuring Transaction upon the trust structure set up at the closing of the merger will be to replace Trust III with Trust II. *Id*. at 1-5. The Applicants filed the agreements for Trusts II and III on Oct. 31, 2002. Copies of the executed trust agreements will be filed with the Commission no later than 14 days after the merger closing. *See* Letter from Michael H. Hammer, Willkie, Farr, & Gallagher, to Marlene H. Dortch, Secretary, FCC (Nov. 7, 2002).

[166] *Id.* § 2(d).

[167] Upon the closing of the AT&T Comcast merger, the directors appointed to the TWE board by AT&T will resign. The Trustee will then exercise any right to appoint replacement directors when, in the Trustee's sole judgment, doing so is necessary or required to protect the value of the interests held in the Trusts. Letter from Charles W. Logan, Lawler, Metzger & Milkman, to Marlene H. Dortch, Secretary, FCC (Aug. 28, 2002) at 3 ("Applicants' Aug. 28, 2002, Ex Parte"); Trust Agreement at § 4.

[168] Trust Agreement at § 8. AT&T Comcast may not remove or replace the Trustee at will, and the selection of a replacement Trustee also will be subject to the notice and approval process. *Id.* § 9.

[169] *Id.* § 10.

[170] Trust Agreement § 10 (b). The Trustee may use advisors who have previously served as advisors to AT&T Comcast. *Id*. at § 10(a).

[171] Trust Agreement § 12 (a)(i).

[172] Trust Agreement § 12 (b) and (d). Generally all material communications must be in writing, or, if oral, must be reduced to writing. *Id.* ¶ 12 (d).

divest the TWE Interest.[173] The Trusts also will permit communications between the Trustee and AT&T Comcast regarding the Trustee's fiduciary duty.[174] To ensure that advisors do not share information that AT&T Comcast and the Trustee are prohibited from communicating to each other directly, the advisors will be made aware of and will be subject to similar restrictions on communications.[175]

72. The Trust Agreement establishes an initial five-year period for divestiture of the TWE Interest.[176] During the five-year period, the Trustee will have the authority and will be directed to pursue such registration rights as are available in a manner intended to maximize the value received by AT&T Comcast (a "Public Sale").[177] At any point during the five-year period, AT&T Comcast may propose an "Alternate Disposition" of some or all of the TWE Interest to the Trustee.[178] An Alternate Disposition may result in: (1) cash consideration; (2) non-cash consideration, including "Restricted Consideration," which is an interest in AOL Time Warner or an entity in which AOL Time Warner has an attributable interest; and/or (3) a "Derivative Transaction" in which all or a portion of the economic interest in the TWE Interest is converted to cash, while the legal and record ownership such interest remains in the Trusts.[179] If an Alternate Disposition is proposed by AT&T Comcast, the Trustee is required to use its reasonable best efforts to effect the Alternate Disposition, which may include discontinuing efforts to effect a Public Sale for a period of time.[180] If an Alternate Disposition yields Restricted Consideration, the Restricted Consideration shall remain in and be subject to the Trusts.[181]

73. Soon after the Applicants submitted the TWE Proposal, the Applicants reached an agreement with AOL Time Warner (the "TWE Restructuring Agreement").[182] The Applicants have stated that the TWE Restructuring Agreement will facilitate their divestiture of the TWE Interest, but they do not request that we condition the merger on consummation of the TWE Restructuring Agreement.[183]

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[173] Trust Agreement § 12(b).

[174] Trust Agreement § 12(c).

[175] Trust Agreement § 10(c). Similarly, neither AT&T Comcast nor its affiliates may communicate directly or indirectly through their advisors regarding operation or management of TWE or any cable system in which TWE has an interest. *Id.* § 12(a).

[176] Trust Agreement § 5(b).

[177] Trust Agreement § 5. Other than in certain specified circumstances, the Public Sale is the only means by which the Trustee is permitted to dispose of the TWE Interest at any point during the five-year period. *Id*. § 5(b).

[178] Trust Agreement § 5(c).

[179] Trust Agreement § 5(c). If the Alternate Disposition is a Derivative Transaction, the Trustee cannot take any action during the five-year period to effect a Public Sale of the part of the TWE Interest which is subject of that transaction. *Id.* A derivative transaction is one where the TWE Interest will be "monetized" in a transaction or series of transactions which may be in a number of forms, including a forward sale, a repurchase agreement or a securitization of the interest. Whatever the form, essentially no less than 80% of the beneficial interest is transferred, for a fixed period of time, in return for cash.

[180] *Id.* at § 5(c).

[181] *Id.* at § 5(e).

[182] *See Restructuring Agreement by and Among AOL Time Warner, Inc., AT&T Corp. and Comcast Corporation*, dated as of August 20, 2002 ("TWE Restructuring Agreement"). The TWE Restructuring Agreement was filed with the Commission on August 23, 2002. Certain exhibits associated with the TWE Restructuring Agreement were filed with the Commission on September 13, 2002.

[183] *See* AT&T Corp. and Comcast Corporation, *AOL Time Warner, AT&T and Comcast Agree to Restructure Time Warner Entertainment Partnership* (press release), Aug. 21, 2002 ("TWE Restructuring Press Release"); Letter to W. Kenneth Ferree, Chief, Media Bureau from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation (Sept. 20, 2002) at 5.

Because the TWE Restructuring Agreement provides one possible example of the types of transactions that will be permitted under the Trust Agreement, we will briefly describe the TWE Restructuring Agreement here. However, we do not condition the merger on the execution of TWE Restructuring Agreement, but only the TWE Proposal itself.

74. The Applicants anticipate that the transactions related to the TWE restructuring (collectively, the "TWE Restructuring Transactions") may not close until 2003.[184] For purposes of the Trust Agreement, the TWE Restructuring Agreement would constitute an Alternate Disposition, which would result in AT&T Comcast's receipt of cash consideration, as well as Restricted Consideration, which shall remain subject to the Trusts. Under the TWE Restructuring Agreement, TWE would transfer to AOL Time Warner all of the TWE programming interests. In exchange, AOL Time Warner would transfer those cable assets currently held outside of TWE into a newly formed company, Time Warner Cable, Inc. ("TWC"). The parties to the TWE Restructuring Agreement contemplate that TWC will become a publicly traded company and, subject to market conditions, they plan to conduct an initial public offering ("IPO") soon after the restructuring.[185] TWC will have a wholly-owned subsidiary, to be called TWI Cable, Inc. ("TWIC"), and will own 95.3% of a restructured TWE ("TWE2").[186] AT&T Comcast will hold the remaining 4.7% interest in TWE2.[187] TWIC and TWE2 will have cable assets, but no programming assets. In exchange for its TWE Interest, AT&T Comcast would receive the following consideration: $1.5 billion of AOL Time Warner common stock; $2.1 billion in cash; a 17.9% interest in TWC, and a 4.7% interest in TWE2.[188] AT&T Comcast's ownership of AOL Time Warner common stock and its interests in TWC and TWE2 will be considered Restricted Consideration and will be subject to the Trusts.

75. If the TWE Restructuring Transactions close, AT&T Comcast's combined interests in TWC and TWE2 would give it a 21% interest in AOL Time Warner's cable assets.[189] The parties to the TWE Restructuring Agreement anticipate that TWC will have a six-member board of directors, and will have two classes of common stock—Class A shares and Class B shares.[190] Through one of the Trusts, AT&T Comcast will hold Class A shares.[191] For purposes of electing directors, Class A shareholders will be entitled to one vote per share, while Class B shareholders will be entitled to ten votes per share.[192] For purposes of all other matters, the shares of the Class A and Class B stock vote as a single class, with one vote per share.[193] AT&T Comcast will therefore have the right to elect directors, but the Trustee, pursuant to the terms of the Trusts, will exercise that right.[194] Subject to acting reasonably, AT&T

[184] AOL Time Warner, AOL Time Warner Announces Restructuring of Time Warner Entertainment Company (press release), Aug. 21, 2002 ("AOL TWE Release").

[185] AOL TWE Release. *See also* AOL Time Warner, *TWE Restructuring Summary* (slide presentation) Aug. 21, 2002, available at http:/aoltimewarner.com/investors/slides_twe_restruct/ (visited Sept. 4, 2002) ("TWE Restructuring Presentation").

[186] TWE Restructuring Presentation, Slide 4.

[187] *Id.*

[188] *Id.*

[189] TWE Restructuring Presentation, Slide 3.

[190] TWE Restructuring Presentation, Slide 6.

[191] *See* Letter from Charles W. Logan, Lawler, Metzger & Milkman, to Marlene H. Dortch, Secretary, FCC (Sept. 30, 2002) at 4. AOL Time Warner will control each class of TWC shares. TWE Restructuring Presentation, Slide 6.

[192] *See* Letter from Charles W. Logan, Lawler, Metzger & Milkman, to Marlene H. Dortch, Secretary, FCC (Sept. 30, 2002) at 4.

[193] *Id.*

[194] Applicants' Aug. 28, 2002, Ex Parte at 3.

Comcast also will have the right to approve 50% of the nominees for independent directors during the period after the restructuring and prior to any TWC IPO.[195] Again, pursuant to the terms of the Trusts, the Trustee will exercise this right.

76. Following an Alternate Disposition under the Trust Agreement, such as the TWE Restructuring Transactions, and for the remainder of the five-year period, the Trustee will retain the power to dispose of the restructured TWE Interest that is Restricted Consideration through a Public Sale.[196] Under the Trust Agreement, the Trustee may not initiate a Public Sale pending the closing of the TWE Restructuring Transactions (the "Restructuring Closing").[197] After the close of TWE Restructuring Transactions, the Trustee is directed to pursue a Public Sale, subject to the following conditions: (1) the Trustee may not take any action to dispose of the AOL Time Warner stock for a 90-day period following the Restructuring Closing; (2) the Trustee may not take any action to initiate a TWC IPO during the 180-day period following the Restructuring Closing; and (3) the Trustee may not effect a private sale of the TWE2 interest for at least three years, but may do so after such period has expired.[198]

77. If the TWE Interest and all Restricted Consideration is not fully divested at the end of the five-year period, the Trustee will thereafter have the authority and be directed to dispose of such remaining interest in any manner the Trustee chooses as quickly as possible, and in all events within six months thereafter.[199] The Trusts will terminate upon the occurrence of the first of: (i) divestiture of the TWE Interest and payment of all proceeds to AT&T Comcast; or (ii) AT&T Comcast ceasing to hold any beneficial interest in the assets held in the Trusts.[200] We analyze the TWE Proposal below.

(ii) Analysis of TWE Proposal

78. The application of conditions modeled on Paragraphs 3-5 of the AT&T-MediaOne video programming safeguards to AT&T Comcast's relationship with TWE, as well as its successor interests in TWC and its subsidiaries, will satisfactorily mitigate the risks of harm to the video programming market that may result from AT&T Comcast's TWE Interest.[201] For example, through the TWE partnership, the two cable operators (AT&T Comcast and Time Warner Cable) could share information about the prices, terms, and conditions of their respective programming contracts, providing each MSO with enhanced bargaining power over programmers. The operators also might attempt to negotiate programming contracts jointly to secure volume discounts based on their combined national subscribership, rather than their respective national subscriber shares. The conditions modeled on Paragraphs 3 and 4 will prohibit the merged firm from participating in TWE's video programming decisions, which significantly reduces the chance that the two MSOs will exchange the types of information or engage in the kinds of negotiations that would allow them increased bargaining power over programmers. In addition, the

[195] *Id.*

[196] Trust Agreement § 5(f).

[197] Trust Agreement § 5(g) (staying the registration rights process provided for in the TWE Limited Partnership Agreement between the merger closing and the closing of the TWE Restructuring Transactions).

[198] Specifically, the Trust Agreement permits the Trustee to effect a private sale of the TWE2 interest only after: (a) an initial two-year period has elapsed; and (b) AT&T Comcast has not instructed the Trustee to effect a Private Sale for a three-year period from the date of the Restructuring Closing.

[199] Trust Agreement § 5(i).

[200] Trust Agreement § 13. If any trust assets are not disposed of by the end of the six-month period following the five-year period, the Trusts will continue until the Commission either approves the dissolution of the Trusts or the remaining assets are sold. Trust Agreement § 13(a)(ii).

[201] As the Appendix specifies, these safeguards will apply to AT&T Comcast's relationship with TWE or any successor entity that is affiliated with AOL Time Warner.

condition modeled on Paragraph 5 directly prohibits AT&T from receiving information from TWE regarding the price, terms and conditions TWE negotiates for the carriage of video programming, and prohibits AT&T from providing such information to TWE. This prohibition also prevents AT&T from obtaining volume discounts or other favorable terms or conditions from any programmer as a result of TWE's purchase of video programming, or for carriage on TWE systems. We hold that application of these limitations to AT&T Comcast's relationship with TWE, combined with other elements of the TWE Proposal, will adequately protect against the harms described above. Accordingly, we will condition our approval of the Application on compliance with safeguards and related enforcement mechanisms modeled on those contained at Paragraphs 3-5 of Appendix B of the *AT&T-MediaOne Order*. These safeguards and enforcement mechanisms, modified to reflect the current transaction, are attached as Appendix B hereto.

79. As reflected in the Trust Agreement, we also will impose a condition that prohibits communications concerning the prices, terms, and conditions of carriage of video programming on the systems owned by KCCP and TCP. Application of these safeguards to KCCP and TCP, which are operated by TWE, will ensure that they are not vehicles for the prohibited exchange of information or for securing favorable terms and conditions from programmers. Under the Trust Agreement, these two partnerships will be subject to a prohibition similar to that in the safeguard modeled on Paragraph 5 of the *AT&T-Media One* conditions.[202]

80. We recognize that the proposed Trusts differ in certain respects from trusts we have previously found acceptable for purposes of insulating an otherwise attributable interest. For example, the Trust Agreement will permit the merged firm to play a role in negotiating with potential buyers, and allows AT&T Comcast to restrict the Trustee's ability to execute a Public Sale if its negotiations yield an opportunity for a private sale. The proposal also differs from divestiture trusts we have previously approved because it is more in the nature of a deferred divestiture trust, as the Trust Agreement allows for Derivative Transactions, which make it likely that full divestiture will not occur until the end of the five-year period.[203] By contrast, we normally require that the Trustee have complete control over the price, terms, and conditions of the sale of assets held in trust.[204] In addition, the length of time that the TWE Interest and successor interests will remain in the Trusts is longer than the time frame we typically allow in approving divestiture trusts involving wireless or broadcast licenses.[205] It is not, however, unprecedented.[206]

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[202] The Trust Agreement prohibits communication between AT&T Comcast and each partnership concerning the price, terms or conditions of carriage of video programming on the systems of the partnerships or AT&T Comcast. *See* Trust Agreement § 11.

[203] *See* note 179, *supra* (describing derivative transactions).

[204] *See 1998 Biennial Regulatory Review of Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 15 FCC Rcd 9219, 9269 ¶ 117 (1999) ("*1998 Biennial CMRS Review*"); *2000 Biennial Regulatory Review of Spectrum Aggregation Limits for Commercial Mobile Radio Services*, 16 FCC Rcd 22668, 22711 ¶ 95 (2001); 47 C.F.R. §§ 20.6(e)(4)(i). *See also Twentieth Holdings Corp. (Transferor) and Edward W. Brooke and Hugh L. Carey, Trustees (Transferee)*, 4 FCC Rcd 4052, 4054 ¶12 (1989) ("*Twentieth Holdings*") (requiring revisions to divestiture trust terms to remove beneficiary's right to approve of financial terms and conditions of sale of assets).

[205] In the broadcast and wireless contexts, the time period we permit for divestiture trusts is usually no more than six months. *See, e.g., Applications of AMFM, Inc., Transferor, and Clear Channel Inc., Transferee*, 15 FCC Rcd 16062, 16087 ¶ 26 (2000) (use of a divestiture trust to comply with local radio ownership rules for a limited six-month period); *1998 Biennial CMRS Review*, 15 FCC Rcd at 9269 ¶117 (1999) (use of six-month divestiture trusts to comply with CMRS cap).

[206] In *AT&T-TCI*, we mandated the divestiture of TCI's interest in Sprint PCS ("Sprint") as a condition of merger approval. *AT&T-TCI Order,* 14 FCC Rcd. at 3207-3213, ¶¶ 97-112. There, the Commission found that a five-year divestiture period was justified because it would avert potential harm to competition in the provision of wireless

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81. The Applicants contend that their proposed five-and-a-half-year divestiture period is consistent with Commission precedent, and that our approval of the term will serve the public interest.[207] We recognize that the nature of the TWE Interest, including its size,[208] its diverse assets,[209] and the limited governance and management rights associated with the interest,[210] makes divestiture of the TWE Interest more complex than some of the divestitures previously mandated by the Commission, especially in light of present marketplace conditions.[211] AT&T has faced significant challenges in attempting to dispose of the TWE Interest.[212] For the first time since we mandated AT&T's divestiture of TWE in June 2000, AT&T and AOL Time Warner have identified a mutually acceptable method by which AT&T ultimately will divest the TWE Interest. We have no interest in impeding, delaying, or otherwise adversely affecting AT&T's ability to dispose of the TWE Interest. We also do not want to establish a divestiture term that will curtail the Applicants' ability to realize value from the disposition of the TWE interest, because such a condition may reduce the likelihood that the merger will benefit the public.[213] We

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services. The Commission was concerned that requiring a prompt divestiture of the Sprint interest could dilute the value of Sprint's stock, which could impede Sprint's access to capital, and adversely affect its ability to build out its network. We found the potential for adverse effects on Sprint's deployment of service would harm competition. Applicants liken the unique circumstances presented by the TWE divestiture to those surrounding of the divestiture of Sprint PCS required in *AT&T-TCI*. *See* Letter from Betsy J. Brady, AT&T Corp. and James R. Coltharp, Comcast Corporation to W. Kenneth Ferree, Chief, Media Bureau (Sept. 20, 2002) at 2-3 ("Trust Term Letter"). We disagree with Applicants that the facts here conform to those surrounding the Sprint divestiture. However, for other reasons, we find that approval of the requested trust term will serve the public interest.

[207] *See* Trust Term Letter.

[208] Divestiture of the TWE Interest is unprecedented both in size and complexity when compared to other divestitures mandated by the Commission as a condition of merger approval. Applicants state that the value of the TWE Interest has been estimated at over $10 billion, which will make it the largest Commission-required divestiture by a factor of three. Trust Term Letter at 3-4 (citing analyst valuations of TWE Interest and comparing value of TWE Interest to value of assets required to divested in connection with the SBC-Ameritech ($3.27 billion), Vodafone-Bell Atlantic ($3 billion), Bell Atlantic-GTE (1.91 billion), and WorldCom-MCI (1.75 billion) mergers).

[209] The TWE Interest consists of a "diverse collection of assets" including cable facilities, programming networks, a broadcast network, and the Warner Bros. movie and programming studios. Trust Term Letter at 4.

[210] The partnership structure itself is complicated, and the TWE Interest carries no right to participate in the management or operation of TWE. Trust Term Letter at 4-5.

[211] Applicants assert that grant of a five-year term will allow for a "rational, efficient divestiture of the TWE Interest" and thereby avoid the adverse effects of attempting to sell the entire interest during today's difficult economic times. *Id*. at 6-7. In support, Applicants point to a "general slump in the market for equity securities," which has had a disproportionate effect on cable and other communications industry stocks. *Id*

[212] Well before agreement on the terms of the TWE Restructuring Transactions was reached, the Applicants asserted that they had a "strong business incentive" to divest TWE. Application at 58, n.114. Applicants state that AT&T's efforts to initiate a public sale of the TWE Interest began in February 2001, when AT&T exercised its registration rights under the TWE Partnership Agreement by submitting a request to TWE that it reconstitute itself as a corporation and register for sale in an IPO an amount of equity securities representing AT&T Broadband's converted partnership interest. *Id*. at 58-59. The next steps involved the selection of AT&T's and AOL Time Warner's respective investment bankers, as well as a third investment banker who was jointly selected to value the partnership interest, a process which took nearly a year. *Id* at 59. Applicants characterized the registration rights process as a "complex and difficult" one that was significantly affected by factors beyond AT&T's control, including prevailing market conditions and the actions of TWE and AOL Time Warner. *Id.* at 60.

[213] Applicants contend that disposition of the TWE Interest in the manner provided by the TWE Proposal and TWE Restructuring Agreement will ensure that the asset's sale will enhance, rather than impair, the financial health of AT&T Comcast. Trust Term Letter at 7. This, in turn, will enhance the merged entity's ability to bring the benefits of the merger to the public even more quickly. *Id.* at 7-8. Applicants assert that the ability of the merged entity to avoid losses associated with "dumping" the TWE Interest, and to achieve gains through monetization of the interest,
(continued....)

find that a five-and-a-half-year divestiture period will account for the complexity of divesting the TWE Interest and the difficulties presented by existing marketplace conditions, and will avoid harms to the merged entity's financial position that could prevent it from making upgrades and deploying new services.

82. We also conclude that, although we traditionally require insulation trusts to allow the Trustee full control over the disposition of the assets at issue, the unique circumstances of the instant case warrant our approval of those terms of the Trust Agreement that allow AT&T Comcast to negotiate Alternate Dispositions and direct the Trustee to suspend efforts to effect a Public Sale if such negotiations succeed. Given the complexity of the TWE Interest and the fact that the Applicants have better information about the TWE Interest than would any Trustee, the Applicants' involvement in negotiations is likely to facilitate and expedite the sale of the TWE Interest. For example, the TWE Restructuring Agreement is likely to make the TWE Interest more marketable.[214] It is not likely that any Trustee would have the information necessary to negotiate and execute such an agreement. The Trust Agreement's limits on communications between the grantor and Trustee will ensure that any further negotiations necessary for the performance of the TWE Restructuring Agreement, or other agreements, do not provide an avenue for influence or control over TWE. In addition, because AT&T Comcast's interest in TWE and any future interests in entities affiliated with AOL Time Warner will remain in the Trusts, the Trusts will protect against other potential avenues of AT&T Comcast's exercise of influence or control over TWE. In addition, this will ensure that the Trusts comply with our longstanding requirement that all of the interest in a licensee that is insulated pursuant to a trust be subject to that trust.[215] Because ownership of an interest in AOL Time Warner or its affiliates would give AT&T Comcast an indirect interest in TWC or TWE2, any interest in AOL Time Warner must remain in the Trusts to comply with our attribution rules.

83. We find that the establishment of the Trusts, when combined with the additional safeguards proposed by the Applicants, adequately addresses our concerns. AT&T Comcast's ability to influence TWE will be constrained by the safeguards described above, and we will oversee the Applicants' compliance with these safeguards through the enforcement mechanisms described in Appendix B. The insulation of the TWE Interest in the manner proposed by the Applicants removes AT&T Comcast's ability to influence or control TWE or any successor entities and is therefore sufficient to protect against the specific harms identified herein. Because we conclude that the TWE Proposal is an acceptable means of protecting against the potential harms that could result from AT&T Comcast's continued interest in TWE absent the insulation mechanisms provided by the proposal, we condition our approval of the merger on a requirement that, prior to consummation, AT&T transfer ownership of its TWE Interest into Trusts pursuant to the Trust Agreement, and that AT&T Comcast comply with the safeguards and related enforcement mechanisms contained in Appendix B attached hereto. Should AT&T Comcast fail to divest the TWE Interest and successor interests in any entities affiliated with AOL Time Warner by the end of the six-month period following the five-year deadline established in the Trusts, AT&T

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will yield more funds for AT&T system upgrades, deployment of local telephony, and deployment of digital video, high-speed Internet access, and other broadband services to millions of residential consumers. *Id*. (citing an analyst's conclusion that if TWE is sold "we would expect free cash flow to increase." Richard A. Bilotti *et al.,* Morgan Stanley Equity Research, *Analyzing the AT&T Broadband – Comcast Merger*, May 3, 2002 at 5).

[214] Trust Term Letter at 5.

[215] "An otherwise qualified trust will be ineffective to insulate the grantor or beneficiary from attribution with the trust's assets unless all voting stock interests held by the grantor or beneficiary in the relevant entity covered by this rule are subject to said trust." 47 C.F.R. 76.501 n.2(d).

Comcast will be subject to enforcement procedures.[216]

84. *Applicability of Remaining AT&T MediaOne Safeguards to AT&T Comcast.* In *AT&T-MediaOne*, the Commission concluded that TWE was attributable to the merged firm in two ways. First, under the cable ownership attribution rules, a company that appoints a director or officer to another company or partnership, or shares common directors or officers with another company or partnership, is deemed to have an attributable interest in that entity.[217] Second, the Commission deemed TWE attributable to the merged firm because it was a limited partnership interest that was not properly insulated.[218] The Commission considered whether AT&T's interest in TWE could be insulated in a manner consistent with our attribution rules, and held that, even if we waived attribution for TWE officers or directors appointed by or shared with the merged firm, AT&T did not conform to our ILP exemption.[219] One of the seven criteria of the ILP exemption provides that a limited partner may not perform any services for the partnership "materially relating to its video programming activities."[220] We interpreted this criterion to prohibit the sale of programming by an insulated limited partner to the partnership (the "no sale rule"). We found that AT&T and MediaOne held attributable interests "in numerous programming affiliates" that sold programming to TWE.[221] We concluded that the sale of programming to TWE through these affiliates was a service for TWE "materially relating to its video programming activities" that would afford the merged firm the incentive and ability to influence TWE's video programming choices.[222] We held that the sale of programming by AT&T's programming affiliates to TWE defeated the ability of the merged firm to insulate the TWE Interest.[223]

85. As a surrogate for compliance with the no sale rule, the Commission imposed merger conditions governing the relationships between AT&T and its programming affiliates. These affiliates included: Liberty Media Group ("Liberty") which would be wholly-owned by the merged AT&T-

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[216] *See, e.g.*, *SBC Communications, Inc.,* 17 FCC Rcd 1397 (2002) (finding SBC apparently liable for a six million dollar forfeiture for willful and repeated violations of a condition imposed in the SBC-Ameritech merger).

[217] 47 C.F.R. § 76.503 n.2(c).

[218] *See AT&T-MediaOne Order,* 15 FCC Rcd at 9837 ¶ 43 (citing *Attribution Order*, 14 FCC Rcd at 19039 ¶ 61). Our attribution rules presume that a limited partner may influence or control the operations of the partnership even if its equity interest is very small. This presumption is negated if the limited partner satisfies the criteria that form our insulated limited partner ("ILP") exemption. Under our ILP exemption, a limited partner may not: (1) act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video programming enterprises of the company; (2) serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video programming enterprises; (3) communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video programming business; (4) have the right to vote on the admission of additional general partners (unless that right is subject to the power of the general partner to veto any such admissions); (5) vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter; (6) perform any services for the partnership materially relating to its video programming activities, except that a limited partner may make loans to or act as a surety for the business; and (7) become actively involved in the management or operation of the video programming businesses of the partnership. *See* 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19040-41 ¶ 64.

[219] *See AT&T-MediaOne Order,* 15 FCC Rcd at 9840 ¶¶ 48-49.

[220] *Id.*

[221] *Id.*

[222] *See AT&T-MediaOne Order,* 15 FCC Rcd at 9840 ¶ 49 (citing 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19040-41¶ 64).

[223] *See AT&T-MediaOne Order,* 15 FCC Rcd at 9840 ¶ 49.

MediaOne;[224] Rainbow, a programming affiliate of Cablevision;[225] and iNDEMAND, in which the merged firm would have a 44% interest.[226] Because AT&T has fully divested Liberty and has divested Cablevision to a non-attributable level, we find that the Liberty and Cablevision safeguards are no longer applicable.[227] With respect to other programming affiliates, the Commission barred AT&T from involvement in the management or operation of iNDEMAND or any of the programming interests previously held by MediaOne.[228] The purpose of these safeguards was to limit AT&T's involvement in the management and operations of its programming affiliates and thereby constrain AT&T's ability to influence TWE's programming decisions through AT&T's ownership interests in programmers that sold programming to TWE.

86. To the extent any of these safeguards may be applicable to AT&T or AT&T Comcast, the Applicants request that we remove these requirements and urge us not to impose any new safeguards restricting AT&T Comcast's relationships with its programming affiliates.[229] Applicants contend that placement of the TWE Interest into a disposition trust constitutes compliance with the AT&T MediaOne Order's requirement that they divest the TWE Interest.[230] They assert that, by the terms of the AT&T-MediaOne Order, the interim safeguards will cease to apply when TWE is placed in trust.[231] They further state that because the D.C. Circuit remanded the cable horizontal ownership rule and vacated the no sale

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[224] At that time, Liberty's programming interests included a 100% interest in the Encore Media Group, which operates video programming networks such as Encore, MOVIEplex, and Starz!; a 49% interest in Discovery Communications, Inc., which operates cable networks such as the Discovery Channel, The Learning Channel, and Animal Planet; and minority interests in numerous other programmers. *AT&T-MediaOne Order,* 15 FCC Rcd at 9825 ¶ 19. Other Liberty programming interests included: USA Networks; Telemundo Network; Telemundo Station Group; BET Holdings II, Inc.; QVC, Inc.; Regional Programming Partners; Canales ñ; Court TV; MacNeil /Lehrer Productions; TV Guide, Inc.; E! Entertainment Television; style; Odyssey; International Channel; Sunshine Network; and Encore Media Group. *Id.*

[225] At the time of the *AT&T-MediaOne Order*, AT&T held a 33% equity and 8.9% voting interest in Cablevision, and had the right to appoint two directors to Cablevision's board. Cablevision in turn had a 75% ownership interest in Rainbow, which owned in seven national programming networks and, in partnership with FOX Sports Net New York, owned several regional sports networks. Rainbow's programming interests included American Movie Classics, Independent Film Channel, Bravo, and Much Music. Rainbow's programming interests in partnership with Fox include Madison Square Garden Network, Fox Sports Chicago, Fox Sports New England, and Madison Square Garden Metro Guide. *AT&T-MediaOne Order,* 15 FCC Rcd at 9826 ¶ 20.

[226] *AT&T-MediaOne Order,* 15 FCC Rcd at 9826, 9830-31, ¶¶ 20, 27.

[227] The Liberty safeguards provided that, if an officer or director of the merged firm served as an employee, officer or director of Liberty, that person could not participate in matters relating to the video programming activities of AT&T, including deciding what programming to carry, negotiating carriage prices, determining rollout schedules, marketing programming, or evaluating the performance of programming. We also required advance Bureau approval of officers or directors appointed to the Liberty board of directors by AT&T, and placed limitations on the ability of these officers and directors to communicate with AT&T. We required AT&T to ensure that any directors it appointed to the board of directors of Cablevision were recused from any and all involvement in the management or operation of Rainbow, and we barred AT&T from attempting to influence the management or operation of Rainbow. *AT&T-MediaOne Order,* 15 FCC Rcd at 9899-9901, Appendix B.

[228] *AT&T-MediaOne Order,* 15 FCC Rcd at 9899-9905, Appendix B. These included the following entities in which MediaOne had an attributable interest: E! (including style), Food Network - TVFN, Fox Sports New England, Music Choice, New England Cable News, Outdoor Life, Speedvision, and Sunshine Network.

[229] Letter from Betsy J. Brady, AT&T Corp. and James R. Coltharp, Comcast Corporation, to W. Kenneth Ferree, Chief, Media Bureau, FCC (Sept. 19, 2002) ("Request").

[230] *Id*. at 1-3.

[231] *Id*.

rule, there is no longer any rationale to impose the safeguards.[232] Finally, they contend that in light of "dramatic reductions" in AT&T's affiliated programming holdings, the Commission's driving concern in implementing the safeguards has been eliminated.[233]

87. By limiting AT&T's involvement in the sale of programming to TWE, the safeguards relating to AT&T's affiliated programming networks served as a surrogate for actual compliance with the no sale rule during the *AT&T-MediaOne* compliance period. Instead of imposing these safeguards, the Commission could have barred the sale of affiliated programming to TWE. As we explained above, our no sale rule has been vacated by the D.C. Circuit. In our cable horizontal ownership proceeding, we are determining whether and how the sale of programming should be considered in determining a limited partner's ability to influence a partnership. Absent a clear rule governing a partner's ability to remain insulated despite its sale of programming to the partnership, we have considered whether the sale of programming by AT&T Comcast to TWE will otherwise result in harm to the public interest, and whether such harms will be mitigated by the TWE Proposal. We conclude that the TWE Proposal will protect against potential harms that could result from AT&T Comcast's sale of programming to TWE.

88. The no sale rule is intended to determine whether a stakeholder has the ability to influence or control a licensee.[234] We find that, in this case, there already are a number of safeguards in place that will adequately protect against the exercise of such influence by AT&T Comcast—safeguards that were not present in the *AT&T-MediaOne* context.[235] Unlike AT&T-MediaOne, the merger of AT&T and Comcast will not close until the TWE Interest has been placed in trust.[236] The Trustee will have the exclusive power and authority to manage the trust assets and to exercise AT&T Comcast's rights relating to the TWE Interest, including all voting, director appointment, consent or management rights under the TWE Partnership Agreement, and any such rights that AT&T Comcast will have in successor entities following the TWE Restructuring. The Trust Agreement expressly limits the Trustee's ability to communicate with AT&T Comcast about the management or operations of TWE, or any entity affiliated with AOL Time Warner that succeeds the TWE Interest. Because these trust-related safeguards restrict AT&T Comcast's ability to influence TWE's programming decisions, these safeguards will equal, and possibly surpass, the programming affiliate safeguards imposed in *AT&T-MediaOne*. Accordingly, we hereby remove the safeguards relating to Liberty, Rainbow, iNDEMAND, and the programming networks previously held by MediaOne, and we will not impose new conditions on AT&T Comcast's relationships with its programming affiliates.

3. Potential Harms in the Distribution of Video Programming

a. Relevant Markets and Market Participants

89. Applicants claim that, in analyzing possible effects of the proposed merger on the

[232] *Id*. at 2.

[233] *Id*. at 2.

[234] Specifically, the no sale rule was intended to prevent an insulated limited partner from influencing the partnership's video programming choices. *AT&T-MediaOne Order,* 15 FCC Rcd at 9839-40 ¶¶ 46-49 (citing 47 C.F.R. § 76.503 n.2(b)(2); *Attribution Order*, 14 FCC Rcd at 19041 ¶ 64).

[235] In support of our imposition of these conditions in the *AT&T MediaOne Order*, we relied in part on our decision in *Twentieth Holdings*. *AT&T-MediaOne Order,* 15 FCC Rcd at 9840 ¶ 47 (citing *Twentieth Holdings*). In *Twentieth Holdings*, we held that a corporation's sale of network programming to a television broadcast station, which it sought to insulate using a trust mechanism, would defeat insulation. *Twentieth Holdings,* 4 FCC Rcd at 4054 ¶ 17. Given the facts of the instant transaction, we conclude that *Twentieth Holdings* does not require us to prohibit the sale of programming by AT&T Comcast to TWE.

[236] In addition, the Applicants no longer have attributable interests in Liberty or Cablevision. *See* Request at 2.

distribution of video programming, the relevant product market is all MVPD services. More specifically, they claim that video programming services offered by DBS, MMDS providers, SMATV providers, electric utilities, and cable overbuilders are all in the same relevant product market.[237] No commenter disputes these claims. Moreover, Applicants' position is consistent with the Commission's traditional delineation of the product market for cable services.[238] Therefore, based on the record before us and consistent with our precedent, we find that the relevant product market for evaluating mergers of cable operators is "multichannel video programming service" distributed by all MVPDs.[239]

90. Consistent with past practice, we also will treat the relevant geographic market, for purposes of evaluating possible horizontal effects, as local.[240] Consumers make decisions based on the MVPD choices available to them at their residences. Technically, the relevant geographic market, therefore, is the residence of each customer, since it would be prohibitively expensive for a customer to change his/her residence to avoid a "small but significant and nontransitory" increase in the price of MVPD service. Because it would be administratively impractical and inefficient to analyze a separate relevant geographic market for each individual customer, however, we will aggregate relevant geographic markets in which customers face similar competitive choices. We thus conclude that the relevant geographic market is the franchise area of a local cable operator.[241]

91. As discussed below, in most relevant geographic areas in which the Applicants provide service, there are two other competing MVPDs—DirecTV and EchoStar, both DBS providers. In addition, in limited areas, overbuilders, MMDS license holders,[242] and SMATV providers may also provide competing MVPD services. There is no evidence in the record that there are any "uncommitted entrants"—*i.e.,* firms that would likely enter a relevant geographic market within one year and without the expenditure of significant sunk costs in response to a "small but significant and nontransitory" price increase."[243]

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[237] Application at 66-67.

[238] *See Implementation of Section 19 of the Cable Television Consumer Protection and Competition Act of 1992*, Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, First Report, 9 FCC Rcd 7442, 7467 ¶¶ 49-50 (1994).

[239] *See AOL-Time Warner Order*, 16 FCC Rcd at 6647 ¶¶ 244-45; *AT&T-TCI Order*, 14 FCC Rcd at 3172 ¶ 21.

[240] *See, e.g., AT&T-TCI Order*, 14 FCC Rcd at 3172 ¶ 21.

[241] *See AOL-Time Warner Order*, 16 FCC Rcd at 6647 ¶ 244. We recognize that competitive choices may not be identical throughout the franchise area. For instance, the local cable operator may not offer service to all households. Moreover, cable overbuilders and SMATV providers may offer service only to selected areas within the local cable franchise area. Thus, to be rigorous we would need to define a separate and narrower relevant geographic market wherever cable does not actually provide service, and a separate relevant geographic market wherever other MVPDs do provide service. As a practical matter, however, we do not believe such precision is necessary for purposes of our analysis. There are only approximately 64 cable systems that have overbuilders and 129 cable systems that have a wireless cable provider out of a total of 9667 cable systems. Even in the few cable franchise areas where there is an overbuilder, that overbuilder will generally not serve the entire cable franchise area. Thus, although overbuilders provide significant and effective competition in those areas in which they operate, the scope of their operations is geographically limited and they are likely to provide limited competitive discipline on the market. *See EchoStar-DirecTV Order*, FCC 02-284 at ¶ 130.

[242] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, *Eighth Annual Report*, 17 FCC Rcd 1244, 1248-49 ¶ 11, 1278-79 ¶ 71 ("*Eighth Video Competition Report"*) (noting that MMDS operators compete with the cable industry in limited areas and recognizing that with the advent of digital MMDS and the Commission's authorization of two-way MMDS service, most MMDS spectrum eventually will be used to provide high-speed data services).

[243] *Horizontal Merger Guidelines* § 1.32.

b. Elimination of Potential Competition

92. CFA contends that the merger will eliminate current and future MVPD competition between AT&T and Comcast.[244] CFA argues that AT&T and Comcast might compete in each other's franchise areas.[245] Moreover, CFA argues, the merger would remove the most likely competitors in the relevant markets, in particular, in areas where the AT&T franchise areas and the Comcast franchise areas are located in close proximity to one another.[246]

93. Applicants counter that the proposed merger will not reduce competition in any of the relevant MVPD markets, because neither operator had pre-merger intentions to overbuild the other's cable systems.[247] Applicants also have confirmed that there are no current franchise overlaps or cable system overbuilds between Comcast and AT&T's owned and operated systems. Applicants admit that there are overbuilds with respect to AT&T's non-consolidated systems, but argue that these are insignificant because of the territory and number of households they cover.[248]

94. *Discussion.* CFA offers no evidence to suggest that AT&T and Comcast would overbuild each other's cable systems such that the proposed merger would diminish competition in these local franchise areas. Applicants deny having any intentions to overbuild, and confirm that they have not overbuilt in each other's franchise areas, with the exception of the few non-consolidated affiliate systems. Accordingly, we cannot conclude from the record that AT&T and Comcast had intentions of overbuilding each other's local markets, or that they were likely to do so.[249]

c. Access to Video Programming Supplied by Affiliated Programmers

95. Our program access rules were designed to prevent vertically integrated programming suppliers from favoring affiliated cable operators over unaffiliated MVPDs in the sale of satellite-delivered video programming.[250] The rules apply to programming supplied by vendors that are affiliated with cable operators, such as through common ownership, when the programming is delivered via satellite from a programming vendor to a cable operator.[251] The Commission adopted these rules pursuant to section 628 of the Communications Act,[252] and recently extended these rules for five years.[253]

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[244] CFA Comments at 19.

[245] *Id.* at 18-19.

[246] *Id.* at 19.

[247] Application at 66; Applicants' July 2, 2002, Response at 12.

[248] *See* Applicants' Reply at 54, n.153. Applicants report twelve instances in which Comcast and an AT&T non-consolidated affiliate hold franchises to serve the same geographic areas. In four of these instances, AT&T non-consolidated affiliates and Comcast have overbuilds. These overbuilds pass 700 homes in the aggregate.

[249] Applicants assert that the TWE Agreement contains a non-compete provision and a prohibition on over-building, and that the TCP and KCCP Partnership Agreements contain non-compete provisions. These provisions do not alter our conclusion that AT&T and Comcast are not potential competitors because (1) they do not govern relations between AT&T and Comcast prior to the merger, (2) in the absence of such provisions, AT&T and Comcast did not overbuild each other to any material extent, and (3) the provisions in the TWE Agreement are a historical legacy originally designed to govern relations between different parties with different incentives and abilities. We need not address the anticompetitive concerns raised by extending these provisions to the Comcast territories because the Applicants have committed not to enforce these provisions. Letter from Arthur S. Block, Senior Vice President, Comcast Corporation, to W. Kenneth Ferree, Chief, Media Bureau (Oct. 7, 2002).

[250] 47 C.F.R. §§ 76.1000-76.1004.

[251] *Id.*

[252] 47 U.S.C. § 548.

Among other restrictions, the rules prohibit any cable operator that has an attributable interest in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including prices, terms, and conditions of sale or delivery, of satellite cable programming or satellite broadcast programming to any unaffiliated MVPD.[254] The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices, terms, and conditions of sale of satellite-delivered programming to cable operators and other MVPDs.[255] In addition, cable operators generally are prohibited from entering into exclusive distribution arrangements with vertically integrated programming vendors, *i.e.*, vendors that are affiliated with any cable operator.[256]

96. Commenters focus on possible harms concerning the distribution of regional programming, and claim that the merger will increase AT&T Comcast's incentive and ability to deliver certain regional and local programming terrestrially so that it may deny its MVPD competitors access to such programming without violating the program access rules. Several commenters argue that the Applicants have each attempted to evade the program access rules by using terrestrial infrastructure to deliver popular regional programming.[257] EchoStar complains that lack of access to regional sports programming in Philadelphia has made it difficult for DBS operators to compete with Comcast's cable offerings in the Philadelphia market.[258] RCN argues that it has had difficulties securing long-term access to local sports programming from Comcast in Philadelphia.[259] Both EchoStar and RCN argue that regional sports programming, in particular, is critical to competition in the distribution of video programming.[260] Braintree Electric Light Department ("BELD") argues that local news programming is similarly important in the regional market. BELD complains that it has been unable to secure a distribution agreement with the New England Cable News channel, which is affiliated with AT&T, because the service has been moved to terrestrial delivery.[261]

97. Commenters express concern that Applicants' past use of terrestrial delivery platforms for certain regional programming is an indication that AT&T Comcast plans to increase the use of terrestrial infrastructure for program delivery.[262] Several commenters argue that the merger – specifically, the merged entity's increased size - will increase the Applicants' incentive and ability to migrate local and regional programming to terrestrial infrastructure in order to deny competitors' access to such programming.[263] Commenters urge us to place a condition on the merger extending the program access rules to all affiliated programming, including programming delivered over terrestrial infrastructure.[264] RCN also argues that Comcast has imposed unfair terms and conditions in its Comcast SportsNet

(...continued from previous page)
[253] *See Program Access Order.*

[254] 47 C.F.R. § 76.1002(a).

[255] 47 C.F.R. § 76.1002(b).

[256] 47 C.F.R. § 76.1002(c).

[257] *See, e.g.,* EchoStar Comments at 7; Everest Comments at 5-6; RCN Comments at 35; SBC Comments at 32.

[258] EchoStar Comments at 4.

[259] RCN Comments at 19-20.

[260] EchoStar Comments at 4; RCN Comments at 19-20; *see also* Everest Comments at 5-6.

[261] BELD Comments at 2.

[262] BellSouth Comments at 29-30; EchoStar Comments at 2-4; Everest Comments at 5-6; RCN Comments at 19-20; SBC Comments at 31-32.

[263] EchoStar Comments at 5; RCN Comments at 20-21; SBC Comments at 32.

[264] EchoStar Comments at 6-7; RCN Comments at 12; SBC Comments at 32.

programming contracts[265] and that the Applicants should be required to provide access to all affiliated programming on reasonable terms and conditions.[266] Finally, Minority TV refers to a complaint by Seren Innovations alleging that AT&T colluded with partners to deny Seren access to the Bay TV programming service.[267] Minority TV urges us to deny the proposed transfer.[268]

98. Applicants oppose these proposals and dispute the proposition that the merger would enhance the Applicants' incentive and ability to impede rival MVPD competitors' access to programming.[269] First, Applicants argue, the merger will not consolidate the ownership of significant programming assets.[270] Applicants maintain that there are viable substitutes for their affiliated programming, and because of this, any refusal of access to MVPD competitors would only disadvantage their own programming affiliate by forcing the rival MVPDs to turn to unaffiliated substitute programming.[271] Applicants further explain that the national programming networks in which they hold interests all sell programming to overbuilders and DBS operators.[272] They claim that because AT&T Comcast will have only a fractional ownership interest in most of the networks in which it has interests, there would be additional checks on the merged entity's ability to engage in a refusal to deal that would benefit itself while harming the network at issue.[273] Applicants also object to the conditions proposed by several commenters that would require the merged entity to provide its MVPD competitors access to programming that is delivered using terrestrial infrastructure.[274] The proposal, they argue, would be tantamount to an expansion of the program access rules that the Commission refused to adopt on an industry-wide basis, or apply as a condition on previous mergers.[275]

99. Applicants further maintain that the proposed transaction will not result in a significant increase in the level of clustering between systems operated by AT&T and those operated by Comcast.[276] According to information produced by the Applicants, there are only four cases in which the proposed

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[265] RCN Comments at 19-20.

[266] RCN Comments at 35; *see also* ACA Comments at 12-13; EchoStar Comments at 6-7.

[267] Minority TV Comments at 4-5. According to that complaint, Bay TV was a joint venture between AT&T and the former licensee of KRON-TV, Channel 4, San Francisco, California. AT&T no longer owns any interest in Bay TV. See Linda Haugsted, *AT&T Pulls Plug on Bay TV News Network*, MULTICHANNEL NEWS, July 9, 2001 at 15; John Higgins and Steve McClellan, *Bay TV Blackout*, BROADCASTING AND CABLE (July 9, 2001) at 12.

[268] Minority TV Comments at 4-5.

[269] As discussed below in our evaluation of the alleged benefits of this merger, Applicants also argue that the merger will result in the development of new local and regional programming, building on Comcast's expertise and experience in the Philadelphia market. *See* Section V.C., *infra*.

[270] Applicants' Reply at 55; Applicants' Reply, Ordover Decl. at ¶ 83; Letter from Betsy J. Brady, Vice President, Government Affairs, AT&T Corp. and James R. Coltharp, Senior Director of Public Policy, Comcast Corp., to Marlene H. Dortch, Secretary, FCC, (Nov. 4, 2002) ("Applicants' Nov. 4, 2002 Ex Parte") at 1-2; Applicants' Nov. 5, 2002, Ex Parte at 2-3.

[271] Applicants argue that ESPN and Fox Sports Networks fall into the category of viable substitute programming. See Applicants' Reply, Ordover Decl. at ¶¶ 85-87; *see also* Applicants' Nov. 4, 2002, Ex Parte and Applicants' Nov. 8, 2002, Ex Parte.

[272] Applicants' Reply at 55.

[273] *Id.* at 56; *see also* generally Applicants' Nov. 5, 2002, Ex Parte.

[274] *Id.* at 98.

[275] *Id.*

[276] Applicants' July 2, 2002, Response at 5-6; Applicants' Nov. 4, 2002, Ex Parte at 3-4; Applicants' Nov. 5, 2002, Ex Parte at 2-3.

transaction may create or enlarge a cluster, or merge existing clusters.[277] BSPA argues that increases in clustering post-merger will be more significant if AT&T's non-consolidated affiliates are included in the assessment. BSPA urges us to include the non-consolidated affiliates in our analysis because AT&T's ownership in these systems is relevant to the evaluation of market power and potential strategic abuses flowing from the increased the regional consolidation and clustering.[278] According to BSPA's clustering data, many of BSPA's members operate or are licensed in areas where clustering will increase as a result of the merger.[279] Applicants contend that the non-consolidated systems are not relevant to our public interest analysis and that even if we include these systems, the incremental effects on regional concentration are *de minimis*.[280]

100. *Discussion.* With respect to nationally distributed programming, the record contains little evidence that the program access rules will be insufficient to ensure that competing MVPDs have access to important programming that is affiliated with a cable operator. To the extent that affiliated national programming is delivered via satellite, it is covered by our program access rules. Nothing in the record suggests that the merger would affect the cost of transmitting affiliated national programming over terrestrial infrastructure and thereby make it more cost-effective to deliver such programming in that manner. Nor is there any evidence in the record that Applicants intend to pursue such a strategy. For these reasons, we cannot conclude that the merger will harm the public interest with respect to exclusive distribution of affiliated, satellite-delivered national programming.

101. We recognize that access to certain local and regional programming can be important for alternative MVPDs to compete.[281] As we recently concluded in our *Program Access Order*, we believe cable operators that are affiliated with programmers generally have the incentive and ability to secure exclusive distribution rights that prevent their MVPD competitors from gaining access to popular programming in which the cable operator has an interest.[282] The program access rules prohibit such arrangements with respect to satellite-delivered programming, but not terrestrially-delivered programming. The Commission also stated "we believe that clustering, accompanied by an increase in vertically integrated regional networks affiliated with cable MSOs that control system clusters, will increase the incentive of cable operators to practice anticompetitive foreclosure of access to vertically integrated programming."[283]

102. A cable operator would be able to harm MVPD rivals by withholding affiliated programming only if the costs of doing so, including both the foregone license fees and advertising revenues and the additional costs of terrestrial delivery, were outweighed by the benefits (*i.e.*, the gain in revenues associated with subscribers' decision to choose the cable operator over a rival). Furthermore, the incentive and ability to deliver programming terrestrially depends on both the size of the region's footprint where the programming is consumed, and the merged entity's share of the MVPD households in the relevant region. We conclude that, in the relevant regional markets, the extent of additional concentration that will result from the merger is not sufficient to have a material effect on AT&T Comcast's incentive or ability to convert existing affiliated regional programming from satellite to

[277] Applicants' July 2, 2002, Response at 5.

[278] BSPA Oct. 2, 2002 Ex Parte.

[279] *Id.*

[280] Applicants' Nov. 4, 2002, Ex Parte at 4; Applicants' Nov. 5, 2002, Ex Parte at 2.

[281] Program Access Order, 17 FCC Rcd at 12132 ¶ 19.

[282] Program Access Order, 17 FCC Rcd at 12153 ¶ 65.

[283] *Program Access Order*, 17 FCC Rcd at 12145 ¶ 47.

terrestrial delivery.[284] Moreover, there is no evidence in the record that Applicants intend to pursue such a strategy with existing programming or that they have the incentive to pursue such a strategy with respect to as-yet-uncreated programming.[285] Thus, the merger is not likely to enable AT&T Comcast to enter exclusive contracts with affiliated programmers that would prevent MVPD competitors from distributing such programming. We therefore conclude that the merger will not harm the public interest with respect to distribution of affiliated, satellite-delivered local or regional programming. Accordingly, we decline to impose conditions restricting the use of exclusive contracts between AT&T Comcast and affiliated programmers.

103. To the extent that clustering raises concerns about a cable operator's ability to secure exclusive distribution rights for certain programming, such concerns would apply industry-wide.[286] Further, we conclude above that the merger does not present a public interest harm in this regard. The appropriate forum for the consideration of this issue, therefore, is a rulemaking of general applicability. We have initiated a rulemaking proceeding to establish limits on cable operators' horizontal reach pursuant to section 613 of the Communications Act, which directs the Commission to establish such limits to prevent cable operators, because of their subscriber reach, from unfairly impeding the flow of programming to consumers.[287] Because the issue of regional clustering is an industry-wide phenomenon, we will consider in our pending rulemaking proceeding the relative harms and benefits of clustering as it may affect the flow of local and regional programming to consumers.

104. We also dismiss Minority TV's petition to deny the transfer of control. Minority TV fails to meet the standard for petitions to deny as expressed in our rules. Its argument consists of an account of third party testimony alleging that AT&T colluded with partners to violate the program access rules. Minority TV makes no attempt to relate this allegation to the specific transaction at hand, or to substantiate any of the allegations with further factual material.[288] Disputes of this nature should be

[284] In three regions the merger will increase concentration by 3% or less. In the Southeast post-merger concentration will not exceed 25%. *See* para. 61, *supra*. In addition, AT&T's local news affiliate, New England Cable News, already is delivered terrestrially, as is AT&T3. *See* BELD Comments, Exhibit 2; Letter from Michael H. Hammer, Willkie Farr & Gallagher, to Marlene H. Dortch, Secretary, FCC, (Oct. 25, 2002) at 1. Comcast SportsNet (Philadelphia) also is delivered terrestrially. Applicants' Nov. 4, 2002, Ex Parte at 3.

[285] The merger would enhance Applicants' ability and incentive to harm MVPD rivals by creating and withholding new terrestrially delivered programming only to the extent such programming has wide consumer appeal, such that rivals' failure to carry the programming would shift sufficient subscriber-related revenues from the rival to AT&T. For a new programming service to have such competitive significance, it must feature marquee programming, such as popular sports events. Because such programming is generally delivered over a large region due to the cost of acquiring it, the feasibility of terrestrial delivery will depend largely on the size of the regional footprint and the concentration of affiliated cable systems within that footprint. *See* Applicants' Nov. 4 Ex Parte at 4 n.7. For this reason, most regional sports programming today is delivered via satellite. Applicants' Nov. 4 Ex Parte at 2-4. We have found above that the merger is not likely to increase regional concentration to a material extent. In addition, we find below in evaluating the potential public interest benefits of the merger that the merger is not necessary to enable Applicants to create new local or regional programming.

[286] Congress opted not to include terrestrially delivered and unaffiliated programming within the scope of the program access rules. For example, the Senate version of the program access provisions was drafted to apply to all "national and regional cable programmers who are affiliated with cable operators. . . ." Conf. Rep. 102-862 at 91. The House version of the provisions applied only to "satellite cable programming vendor[s] affiliated with a cable operator. . . ." *Id.* at 92. The Conference Report adopted the House version with amendments. *Id.* At 93. The Conference Agreement amended the House version to apply also to "satellite broadcast programming vendors." *Id.*

[287] *See generally Further Notice*, 16 FCC Rcd 19074 (2001); 47 USC § 613(f)(2). Under 47 USC § 613(f)(2), when adopting rules to implement 47 USC § 613(f)(1), the Commission is required to, among other things, ensure that cable operators affiliated with video programmers do not unreasonably restrict the flow of the video programming of such programmers to other video distributors.

[288] 47 U.S.C. § 309(d).

resolved using the processes set forth in the Commission's program access rules.

d. Access to Video Programming Supplied By Unaffiliated Video Programmers

105. Our program access rules also provide the framework for our analysis of exclusive programming contracts involving programmers that are not affiliated with any cable operator. Commenters focus on possible harms concerning the distribution of regional programming. A few commenters argue that AT&T Comcast's increased size will give it the ability to force unaffiliated programmers to enter into exclusive carriage agreements with AT&T Comcast, thereby denying competing MVPDs and their customers access to popular programming.[289] RCN urges us to place a condition on the grant of the applications that would prohibit the merged entity from entering into exclusive contracts with unaffiliated programming networks.[290]

106. Applicants oppose such a condition. They claim it would be inconsistent with a programmer's self interest to limit the availability of programming in the way that the commenters suggest.[291] Applicants contend that the only way a programmer would act in a manner inconsistent with this self interest is if the programmer believed AT&T Comcast might drop its programming unless it acceded to AT&T Comcast's terms.[292] Applicants claim that the merged entity is not sufficiently large to make a credible threat to drop popular programming if the programmer does not agree to an exclusive deal.[293] The lack of popular programming, they argue, would surely be exploited by their MVPD competitors.[294]

107. *Discussion.* Although commenters focused on potential harm concerning unaffiliated regional programming, our analysis also applies to potential harms concerning unaffiliated national programming. At the outset, we disagree with Applicants' description of the merged entity's bargaining power vis-à-vis programming networks. In particular, we do not agree that the only way an MVPD could obtain an exclusive arrangement with a programmer is by threatening not to carry the network's programming. We also disagree with Applicants' underlying assumption that it would always be contrary to the programmer's self interest to agree to an exclusive agreement with an MVPD. If, for example, the MVPD seeking an exclusive deal is sufficiently large and can compensate the programmer for the loss of any revenues that it otherwise would receive from competing MVPDs, the exclusive agreement would be consistent with the programmer's self interest.[295]

108. We are nonetheless unable to conclude that the merger is likely to increase the incentive and ability of the merged entity to secure exclusive programming contracts with programmers that are not affiliated with any cable operator. The record demonstrates that AT&T and Comcast individually already have sufficient presence in their respective franchise areas to secure exclusive contracts for unaffiliated national, local and regional programming.[296] The record does not demonstrate that programmers would

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[289] RCN Comments at 35; ACA Comments at 14.

[290] RCN Comments at 35.

[291] Applicants' Reply at 57.

[292] *Id.*

[293] *Id.*

[294] *Id.* at 57-58.

[295] *See* Applicants' Reply, Shelanski Decl. at ¶¶ 29-34 (discussing incentives of content providers in entering exclusive contracts).

[296] Applicants' July 2, 2002, Response at 8-9 and Attachments 9-25. These existing agreements generally prohibit distribution of programming to one or more classes of competitors within the areas served by the Applicants. *Id.*

be more likely after the merger than pre-merger to enter into exclusive agreements with AT&T Comcast. To the extent that a firm's regional concentration may increase its incentive or ability to obtain exclusive distribution rights for unaffiliated programming, we conclude that this transaction is not likely to affect pre-existing regional concentration levels to a degree that will enable AT&T Comcast to obtain exclusive rights that either Applicant could not have obtained pre-merger. AT&T's post-merger national subscriber reach will not exceed our horizontal limits, which are intended, in part, to protect against harms arising from exclusive distribution contracts between cable operators and unaffiliated programmers.[297] Likewise, post-merger regional concentration levels are not likely to exceed this level.[298] No commenter presented evidence or allegations regarding specific programming networks with which AT&T Comcast could obtain exclusive arrangements merely by virtue of the increase in subscriber share in the region served by the programmer. Thus, we find the merger is not likely to harm competition with respect to the distribution of unaffiliated programming to competing MVPDs.

109. As we have stated above in our discussion of access to affiliated regional programming, the Commission has previously rejected arguments that merger applicants should be required to abide by the program access restrictions with respect to their program carriage agreements with unaffiliated programming vendors.[299] In enacting Section 628, Congress did not apply the program access restrictions to programming sold by vendors that are not affiliated with any cable operator.[300] For the reasons stated above in our discussion of access affiliated programming, we conclude that our pending rulemaking proceeding on cable horizontal ownership limits is the more appropriate forum for consideration of the potential harms and benefits arising from regional clustering. Thus, we decline to impose any conditions on the merger Applicants that would extend the program access rules or similar restrictions to the Applicants' dealings with programming vendors that are not subject to the rules.

e. Access to Video Programming Aggregation Service

110. A few commenters suggest that AT&T Comcast might harm MVPD competitors by engaging in anticompetitive conduct with respect to video programming aggregation. Specifically, these commenters argue that AT&T Comcast may refuse to sell competing MVPDs the "Headend-in-the-Sky" ("HITS") digital video programming aggregation service offered by AT&T's wholly-owned subsidiary.[301] They argue that access to this service is essential to smaller cable operators and overbuilders that seek to compete with AT&T Comcast.

111. AT&T's HITS subsidiary obtains rights from programmers to compress, multiplex, and "uplink" content to leased satellite transponders.[302] HITS then aggregates and transmits digital video

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[297] *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, 14 FCC Rcd 19098, 19105-06 ¶ 16 (1999) ("The Commission specifically considered how the behavioral rules interact with the horizontal ownership rules when it adopted the rules in this proceeding. The limit is a structural complement to the other access provisions. Thus, for example, it was explained that the horizontal ownership rules limit the potential for anticompetitive abuses of purchasing power in areas outside of the core areas covered by the program access rules, such as programming contracts between cable operators and non-vertically integrated programmers . . .").

[298] *See* para. 61, *supra*; Applicants' Nov. 5, 2002, Ex Parte at 2-3; Applicants' Nov. 8, 2002, Ex Parte at 1.

[299] *See AT&T-MediaOne*, 15 FCC Rcd at 9854-55 ¶¶ 81-83; *AT&T-TCI*, 14 FCC Rcd at 3180 ¶ 38.

[300] The legislative history reveals that Congress was concerned that vendors that are affiliated with cable operators may have a particular incentive to discriminate in favor of cable operators to the detriment of their MVPD competitors. *See* Senate Report 102-92 at 25-26, 28.

[301] ACA Comments at 9-10; SBC Comments at 32-33.

[302] Applicants' Reply at 58; Applicants' Reply, Braden Decl. at ¶ 14.

programming to its customer MVPDs.[303] The MVPDs receive the digital transmission using a satellite receiver that is tuned to receive the signals from the HITS transponder.[304] They then transmit the video programming to their own subscribers. The MVPDs must still contract with each of the network owners for rights to distribute the programming to their customers.[305] ACA and SBC claim that the HITS service gives small MVPDs an inexpensive means of expanding their programming offerings using digital technology without having to upgrade their cable systems.[306]

112. ACA argues that access to HITS is essential for small cable systems because its use of digital compression and transmission has allowed them to expand their service offerings dramatically.[307] ACA claims that HITS allows small systems to offer viewers more programming options, and to generate greater revenues so that they may upgrade systems to provide other enhanced services, such as cable modem service.[308] ACA contends that a refusal to provide these systems with HITS services would undermine program diversity in smaller markets.[309] Accordingly, ACA's initial comments asked that the Applicants address whether they would continue to make HITS services available to smaller market cable systems "on reasonable prices, terms and conditions."[310] ACA also asked that Applicants "articulate their plans for protecting the public interest in this area."[311]

113. In their Reply Comments, Applicants respond to ACA's concerns about continued access to HITS. Applicants agree to: (i) provide HITS to small cable systems for the foreseeable future; (ii) honor all existing service contracts, and (iii) communicate in advance any substantial changes in the service relationship.[312] ACA subsequently submitted a letter in support of the merger, noting that Applicants satisfactorily addressed ACA's questions and concerns.[313]

114. SBC suggests that the Applicants may be able to raise rivals' costs by refusing to provide overbuilders access to HITS. SBC explains that it recently attempted to purchase HITS from WSNet, a reseller of HITS programming, and was denied service. SBC claims that this denial of service was based on the fact that SBC sought to use HITS programming to serve customers in one of AT&T's service areas.[314] SBC argues that AT&T Comcast could deny HITS service to any overbuilders in the combined company's larger geographic region.[315] Accordingly, SBC asks us to order AT&T Comcast to divest HITS as a condition to the merger.[316] Applicants oppose this condition, arguing that it is unrelated to the merger, and that overbuilders in both AT&T and Comcast territories will continue to be able to purchase

[303] Applicants' Reply at 58.

[304] Applicants' Reply, Braden Decl. at ¶ 17.

[305] Applicants' Reply at 58; Applicants' Reply, Braden Decl. at ¶ 14.

[306] ACA Comments at 10.

[307] *Id.* at 6.

[308] *Id.* at 7.

[309] *Id.* at 5-6.

[310] *Id.* at 10.

[311] *Id.* at 10.

[312] Applicants' Reply at 61-62.

[313] Letter from Matther M. Polka, President, American Cable Association, to Marlene H. Dortch, Secretary, FCC (May 21, 2002).

[314] SBC Comments at 13-14.

[315] *Id.* at 14.

[316] *Id.* at 32-33.

service directly from HITS.[317] ACA also opposes this condition, arguing that a divestiture would harm small cable operators and "impose substantial uncertainty on the future of HITS."[318]

115. As to SBC's specific claim of denial of service, Applicants explain that the resale limitation in WSNet's HITS contract only applies to pre-merger AT&T service areas, and only to non-multiple dwelling unit ("MDU") providers. Applicants claim further that SBC could have requested HITS service directly, rather than going through the WSNet contract.[319] More fundamentally, Applicants challenge SBC's assumption that HITS service is an "essential input."[320] Applicants point out that no proprietary equipment is used to provide or receive HITS services.[321] Applicants argue that most MVPDs obtain their digital programming directly from programmers via a direct feed.[322] Others lease their own satellite transponders to aggregate programming from various programmers.[323] Finally, Applicants contend that there are at least two video programming aggregators that currently provide similar services.[324]

116. *Discussion.* The record suggests that there are several alternative sources of packaged digital programming, including direct feed options from the programmers themselves. Thus, AT&T Comcast would not have the ability to prevent competing MVPDs from gaining access to other digital programming packages. Therefore it would have little or no incentive to deny them access to HITS. Moreover, AT&T Comcast has committed to continue to provide HITS services to small cable operators. For these reasons, we cannot conclude that competing MVPDs will suffer harm in this context. Accordingly, we decline to require AT&T Comcast to continue to offer HITS to small cable operators on "reasonable prices, terms and conditions." We also reject SBC's proposal to require divestiture of HITS as a condition to approval of the Application.

f. Targeted Pricing Discounts

117. RCN, Everest, and BSPA allege that the Applicants have engaged in some form of illegal price discrimination and marketing tactics and that the merger will exacerbate the effects of such tactics on competing MVPDs. Everest argues that KCCP, the incumbent cable operator in Kansas City, Missouri, which is owned jointly by TWE and AT&T, has engaged in price discrimination in violation of the Commission's uniform pricing rules.[325] Although Everest has filed a complaint before the Commission concerning this conduct, it also asks us to bar KCCP and Comcast from engaging in discount pricing in portions of a franchise area "until after they have received a determination that they are subject

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[317] Applicants' Reply at 59. Applicants also claim that AT&T has an existing contract with the National Cable Television Cooperative ("NCTC") that allows any NCTC member to obtain the HITS service, regardless of whether the member operates in an AT&T or Comcast service area. *Id.* at 59-60.

[318] ACA Reply Comments at 5.

[319] Applicants' Reply at 59.

[320] *Id.*

[321] *Id.* at 58.

[322] *Id.* at 60.

[323] *Id.*

[324] *Id.* at 61. Applicants allege that OlympuSAT and TVN offer a variety of digital programming packages to MVPDs. *See* Applicants' Reply, Braden Decl. at ¶ 18.

[325] Everest Comments at 1. Section 76.984 of the Commission's rules prohibit incumbent cable operators from engaging in geographic price discrimination with respect to programming in the basic tier, in the absence of effective competition.

to effective competition in the subject franchise area."[326]

118. RCN and BSPA argue that Comcast has specifically targeted marketing campaigns and price discounts to areas in which overbuilders have begun rolling out services.[327] In particular, RCN challenges Comcast's use of targeted marketing campaigns, in which discounts are offered only to customers of Starpower, RCN's affiliate, or residents of areas in which Starpower competes or has begun to deploy services. RCN alleges that Comcast offers large bonuses to sales representatives who "convert" RCN's subscribers to Comcast, and that the discounts are offered to other residents only if they know about and specifically request the offer.[328] RCN and BSPA contend that such discriminatory pricing strategies and anticompetitive marketing tactics could be exacerbated by the merger, as AT&T Comcast will have the incentive and ability to employ such tactics against overbuilders in any market.[329] RCN and BSPA likewise claim that the merger will make anticompetitive pricing strategies more viable, because the merged entity will have larger local footprints and greater reserves from which to spread the costs of targeted discounts. To remedy these concerns, RCN urges us to require AT&T Comcast to post on its website any promotions or discounts offered to any customer.[330] BSPA supports RCN's proposal.[331]

119. Applicants maintain that their pricing practices are not unfair, but competitive and consistent with the Communications Act and the Commission's rules.[332] Applicants argue that to the extent that a party believes either Applicant has violated the uniform rate provisions set forth in Section 623(d) of the Communications Act, the party should file the appropriate complaint, rather than make the claim an issue in the transfer review process. They argue that the uniform rate requirement does not preclude promotional rates or discounts.[333] Applicants also contend that their discounts are not "predatory" and that they do not contain customer-based or geographic restrictions because any customer in the franchise area *who learns of a discount* may receive it upon request.[334] Finally, Applicants argue that price competition between the incumbent cable operator and the new entrant benefits consumers.[335]

120. *Discussion.* Although the Applicants deny that they have engaged in predatory pricing behavior, their representations leave open the substantial possibility that the Applicants may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers. We also disagree with Applicants'

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[326] Everest Comments at 5.

[327] RCN Comments at 23.

[328] Letter from L. Elise Dieterich, to Marlene H. Dortch, Secretary, FCC, (Aug. 14, 2002) ("RCN Aug. 14, 2002 Ex Parte").

[329] RCN Comments at 34.

[330] Andrew Lipman, Jean Kidoo and L. Elise Dieterich, RCN Telecom Services, Inc., Counsel to RCN Telecom Services, Written Ex Parte Comments in Response to Comcast (Aug. 27, 2002) ("RCN Aug. 27, 2002 Ex Parte"). In its initial comments, RCN asked us to impose a uniform subscriber pricing requirement. RCN Comments at 35.

[331] Letter from Martin L. Stern, Preston Gates Ellis & Rouvelas Meeds, LLP, to Marlene H. Dortch, Secretary, FCC, (Sept. 19, 2002) ("BSPA Sept. 19, 2002 Ex Parte").

[332] Applicants' Reply at 113-14; *see also* Applicants' July 2, 2002, Response at 12-14.

[333] Applicants' Reply at 114.

[334] Letter from James H. Casserly, to Marlene H. Dortch, Secretary, FCC, (Aug. 19, 2002) ("Applicants' Aug. 19, 2002 Ex Parte"); Letter from James L. Casserly, to Marlene H. Dortch, Secretary, FCC, (Sept. 10, 2002) ("Applicants' Sept. 10, 2002 Ex Parte"). This argument, however, is questioned by RCN, which complains that Applicants have displayed a lack of candor in addressing predatory pricing issues in this proceeding. *See* RCN Aug. 27, 2002 Ex Parte at 1.

[335] Applicants' Reply at 114-15.

claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among established competitors of relatively equal market power may be procompetitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry.

121. Although we are concerned about the anticompetitive potential for incumbent cable operators to use targeted discounts in defense of their entrenched market positions, the record does not provide us with sufficient evidence to conclude that the merger itself would *increase* AT&T Comcast's incentive or ability to resort to such tactics. Notwithstanding the merger, AT&T and Comcast already have the incentive and ability to target pricing in an anticompetitive manner, as evidenced by the RCN's and BSPA's allegations and Applicants' responses to those allegations. We do not agree with the Applicants that targeted pricing enhances competition. To the contrary, targeted pricing may keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilder's inability to compete against an incumbent who uses such strategies. Thus, we believe that targeted pricing as described in this record could harm MVPD competition. Nevertheless, we are unable to conclude that this transaction will aggravate the problem. Accordingly, we decline to impose any conditions on the merger that would require the merged entity to post its rates and promotions on its website or otherwise facilitate the dissemination of pricing and discount information within local franchise areas.

122. Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggest, however, that regulatory intervention may be required either at the local, state, or federal level. We take cognizance of the fact that the DOJ may have begun an investigation into this behavior,[336] and that local franchise authorities have imposed requirements of the type RCN advocates to prevent such conduct.[337] The Media Bureau and Enforcement Bureau currently are reviewing complaints by overbuilders concerning these practices.[338] We will continue to monitor allegations of targeted pricing closely and address specific abuses on a case-by-case basis.

g. Additional Allegations of Anticompetitive Behavior

123. RCN claims that the merger will enable AT&T Comcast to engage in additional forms of anticompetitive behavior. Specifically, RCN alleges that Comcast has used the local franchise process to hinder competition in its local franchise areas. RCN argues that Comcast's interference with its local franchise negotiations in Prince George's County, Maryland, and in Philadelphia, Pennsylvania, kept RCN from securing a cable franchise.[339] In addition, both RCN and Everest allege that AT&T and Comcast have unfairly hindered them from competing for subscribers in MDUs. RCN argues that its affiliate, Starpower, has come across several buildings in which Comcast (and its predecessors) have received exclusive rights to serve the building and its tenants.[340] Everest also urges us to prohibit KCCP

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[336] *See* Warren's Cable Regulation Monitor, Capitol Hill (Sept. 30, 2002) (discussing congressional testimony with respect to cable pricing investigation.

[337] Letter from Elise Dieterich, to Marlene H. Dortch, Secretary, FCC, (Aug. 1, 2002) ("RCN Aug. 1, 2002 Ex Parte").

[338] The Commission's Media Bureau and Enforcement Bureau are currently reviewing complaints alleging this practice. *See Complaint of Altrio Communications Inc., Against Adelphia Communication Corporation For Discriminatory and Predatory Pricing of Cable Services,* CSR-5862-R (filed Mar. 1, 2002); *Complaint of WideOpenWest Holdings, LLC Against Comcast Corporation For Systemic Abuse of Customer Service Standards,* EB-02-MD-033 (filed Mar. 22, 2002).

[339] RCN Comments at 15-16.

[340] *Id.* at 22.

and Comcast from enforcing any exclusive agreements with MDU owners.[341]

124. RCN also argues that Comcast has interfered with RCN's hiring of contractors to construct and install its systems, and that a combined AT&T Comcast would deter contractors in more markets from doing work for overbuilders. RCN alleges that Comcast and its predecessor, Suburban Cable, have attempted to prevent contractors from doing business with RCN in Philadelphia by requiring them to sign non-compete clauses in their contracts and by threatening any contractors found working for RCN with reprisals.[342] RCN argues that this tactic has increased its costs, because contractors sometimes demand higher prices to do work for RCN, and has impeded its rollout when contractors are unavailable or abandon their work.[343] RCN alleges further that Comcast has begun to use these tactics in the Washington, D.C. area where RCN's affiliate, Starpower, is rolling out services.[344] RCN suggests that the merger will harm overbuilders because the combined entity will be likely to engage in these practices on a broader geographic scale.[345]

125. Applicants counter that the overbuilders' allegations of interference with the hiring of contractors, local franchise processes, and MDU access are baseless and that such allegations have nothing to do with the proposed transaction.[346] Applicants maintain that there are pro-competitive reasons for keeping contractors from working with competitors, such as to ensure that system design and upgrade plans are not disclosed to competitors.[347] Applicants further argue that RCN's suggestion that Comcast could employ all of the viable contractors in the Philadelphia area is "absurd."[348] Applicants suggest that RCN has had difficulties negotiating franchises with several franchising authorities, but that these difficulties stem from RCN's inability to raise capital, not from interference by Comcast.[349] With respect to the overbuilders' argument concerning MDU access, Applicants claim that new entrants actually have an advantage when it comes to securing exclusive rights with MDU owners, because they are able to provide voice, video and data services, in contrast to a cable incumbent's video-only offering.[350] Applicants maintain that they should not be barred from competing with overbuilders for exclusive rights from MDUs.[351] Finally, Applicants claim that none of overbuilders' allegations of prior anticompetitive action are relevant to the merger proceeding.[352]

126. *Discussion.* The record provides insufficient evidence for us to conclude that the merger will increase the incentive or ability of the Applicants to interfere with: (i) an overbuilder's employment of contractors, (ii) franchise negotiations between an overbuilder and a local franchise authority, and (iii) an overbuilder's access to MDUs. We do not discount the possibility that an incumbent could use its

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[341] Everest Comments at 5.

[342] RCN Comments at 16-18.

[343] *Id.* at 17-19.

[344] *Id.* at 19.

[345] *Id.* at 18.

[346] Applicants' Reply at 119-20.

[347] *Id.* at 119.

[348] *Id.* at 119-20.

[349] *Id.* at 116-17 (citing RCN's Form 10-K (Mar. 29, 2001).

[350] *Id.* at 119. Applicants seem to suggest that incumbent cable operators serving MDUs typically do not offer the full array of voice, video and data services that Applicants are already offering or plan to offer throughout their territories.

[351] *Id.*

[352] *Id.* at 118, 119.

relationships with installers and contractors in an anticompetitive manner that is specifically designed to hinder a new market entrant from rolling out services in its territory. Nor do we discount the possibility that an incumbent may attempt to make the franchising process difficult for new market entrants, and that such action may harm MVPD competition. Indeed, we are sympathetic to the burdens the franchising process imposes on overbuilders, but we are reluctant to interfere with the Applicants' participation in that process. Finally, the record does not support the allegation that the merger will increase the incentive or ability of the Applicants to hinder rival MVPDs through exclusive agreements with MDU owners. Moreover, the Commission is considering issues relating to MVPD competition in MDUs in a separate proceeding which is the more appropriate forum for resolution of non-merger-specific concerns regarding exclusive access to MDUs.[353] For these reasons, we decline to impose the requested conditions.

B. Internet-Related Effects

127. Commenters assert that the merged firm's ability to control high-speed Internet transmission facilities, content, and applications will result in a variety of Internet-related public interest harms.[354] They urge us to deny approval of the instant transaction, impose conditions, or take other steps to prevent the merged firm from: (a) discriminating against unaffiliated ISPs over its cable network; (b) impeding or preventing consumer access to the widest possible array of content by limiting unaffiliated content providers' access to its cable modem platform or by limiting other broadband providers' access to its affiliated content; and (c) using its size and its regulatory advantages over DSL to further entrench its market power in the delivery of high-speed Internet access. Commenters assert that in order to avert these potential harms, we should deny the merger, impose a requirement that the merged firm offer non-discriminatory access to its facilities, or establish regulatory parity for competing broadband access service offered by incumbent LECs.

1. Background

128. *Internet Access Service.* As of September 2001, 50.5% of U.S. households had Internet connections.[355] The vast majority of them subscribe to "narrowband" service provided over local telephone facilities.[356] Residential high-speed, or "broadband,"[357] Internet access service became available after narrowband Internet access service had achieved widespread popularity. Residential high-speed Internet access services are provided primarily over coaxial cable in the form of cable modem service offered by cable operators,[358] and over copper wires in the form of digital subscriber line ("DSL") services by local exchange carriers.[359] Industry analysts estimate that broadband Internet access service is

[353] *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).

[354] *See* Bellsouth Comments at 9-16; CFA Comments at 23-24; CFA Reply to Opposition at 12-18; CFA Supplemental Comments at 1, 4-6; EarthLink Reply Comments at 3, 10; EarthLink Supplemental Comments at 1; EchoStar Comments at 2; Qwest Comments at 9-10, 13-14; SBC Comments at 15-26; Verizon Comments at 15-24.

[355] *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798, 4802 ¶9 (2002) ("*Cable Modem NPRM*").

[356] We use the term "narrowband" here to refer to Internet access service that is designed to operate at speeds of less than 200 kilobits-per-second ("Kbps") in both directions. *See Cable Modem NPRM,* 17 FCC Rcd. 4802 ¶ 9 n.19. Narrowband Internet access service is most commonly provided over traditional telephone lines (also known as "dial-up"), which currently allows for the transfer of data at speeds up to 56 Kbps. *Id.*

[357] *See Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, *Universal Service Obligations of Broadband Providers*, 17 FCC Rcd 3019, 3021 ¶ 1 n.2 (2002) ("*Wireline Broadband NPRM"*).

[358] *See Cable Modem NPRM*, 17 FCC Rcd at 4803 ¶ 9.

[359] *Id.* The services also are provided over terrestrial wireless radio spectrum by mobile and fixed wireless providers and over satellite radio spectrum by satellite providers. *Id.*

now available to approximately 75% of all the homes in the United States, and approximately 11% of all households subscribe to these services today.[360] We have previously held residential high-speed Internet access constitutes a relevant product market in mergers involving cable operators,[361] and that the relevant geographic markets for residential high-speed Internet access services are local, because a consumer's choice of broadband Internet access provider is limited to those companies that offer high-speed Internet access services in his or her area.[362]

129. *Cable Modem NPRM*. The Commission initiated a rulemaking proceeding to address the complex and controversial issues surrounding access to cable systems by unaffiliated ISPs ("*Cable Modem NPRM")*.[363] That proceeding is still pending. That proceeding addresses, on an industry-wide basis and on the basis of a record developed in notice-and-comment rulemaking proceeding, fundamental questions of agency policy regarding whether and to what extent the agency should intervene in the negotiations between cable operators and unaffiliated ISPs with respect to the availability and conditions of access by unaffiliated ISPs to cable systems to their subscribers.

2. Unaffiliated ISP Access to AT&T Comcast Cable Modem Platform

130. *Applicants' Relationships with ISPs.* Each Applicant operates a proprietary broadband Internet access service.[364] In addition, Comcast has entered into an agreement with United Online, Inc ("United Online") pursuant to which United Online markets and sells a high-speed ISP service to residential customers using Comcast's cable modem platform.[365] AT&T has entered into similar agreements with EarthLink, Net1Plus, Internet Central[366] and Galaxy Internet Services.[367] EarthLink began offering such service over AT&T's systems in greater Seattle in July 2002, and in New England in October 2002.[368] In connection with the TWE Restructuring Agreement, the Applicants will enter into a "three-year non-exclusive agreement" with AOL Time Warner under which AOL high-speed broadband service would be made available on AT&T Comcast cable systems (the "AOL ISP Agreement").[369]

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[360] *See Cable Modem NPRM*, 17 FCC Rcd at 4803 ¶ 9.

[361] *AOL-Time Warner Order*, 16 FCC Rcd at 6568 ¶ 56.

[362] *Id*. at 6578 ¶ 74.

[363] *Cable Modem NPRM,* 17 FCC Rcd 4798.

[364] *See* Section II.A., *supra*.

[365] Applicants' July 2, 2002 Response at 19. In May 2002, United Online launched this service in two markets—Indianapolis, Indiana, and Nashville, Tennessee. *Id*. Comcast states that it expects to negotiate with United Online to expand this service to other markets, and expects to enter into similar agreements with other unaffiliated ISPs. *Id*.

[366] Applicants' July 2, 2002 Response at 19-20 (stating that EarthLink will offer broadband Internet services over AT&T's cable modem platform in the greater Boston and Seattle areas, NET1Plus will offer services in Boston, and Internet Central will offer services in Seattle).

[367] Letter from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corporation, to Marlene H. Dortch, Secretary, FCC (Nov. 6, 2002) ("Applicants' Nov. 6 Ex Parte"); AT&T Broadband, *Galaxy Internet Services and AT&T Broadband Reach ISP Choice Agreement* (press release), Nov. 6, 2002 (stating that Galaxy Internet will offer services over AT&T's systems "throughout the Massachusetts market").

[368] *See also* EarthLink, *EarthLink Offers New England High-Speed Cable Internet Service Via AT&T Broadband Network* (press release), Oct. 16, 2002 (announcing launch of EarthLink broadband Internet access service on AT&T systems in Massachusetts, New Hampshire and Maine); EarthLink, *EarthLink Offers Seattle Consumers Choice of High-Speed Cable Internet Over AT&T Broadband Network* (press release), July 15, 2002 (announcing launch of EarthLink broadband Internet access service on AT&T systems in greater Seattle).

[369] *See* TWE Restructuring Press Release. An officer of AT&T has certified that the AOL ISP Agreement "does not give AOL exclusive rights to provide Internet service over any AT&T Comcast cable system, nor does it constrain AT&T Comcast's ability to negotiate and reach agreements with other ISPs in the future." *See* Letter from Mark C.

(continued....)

Finally, Comcast, AT&T, and AT&T Comcast have entered into an agreement with Microsoft,[370] which provides that, for a specified period of time, if AT&T Comcast offers a high-speed Internet service agreement to any third party on any of its cable systems, AT&T Comcast will be obligated to offer an Internet service agreement on non-discriminatory terms with respect to the same cable systems to Microsoft's ISP, The Microsoft Network ("MSN").[371]

131. Several commenters are concerned about the ability of unaffiliated ISPs to access the merged firm's facilities, a concern the Commission has addressed in prior cable mergers, and is addressing in our *Cable Modem NPRM*.[372] These commenters urge us to deny the merger, or, at a minimum, to condition the merger on a requirement that the merged firm offer unaffiliated ISPs nondiscriminatory access to their cable modem platform.[373] Some commenters offer the AOL-Time Warner ISP access conditions as a model.[374] CFA contends that agreements with one or two unaffiliated ISPs do not alleviate harms that will result from the merger.[375] CFA also suspects that the agreements will impose restrictions on the products that independent ISPs can offer to the public, limitations on the independent ISPs' relationships with customers, uneconomic costs for access to the merged firm's facilities, and unreasonably short contract terms.[376] SBC contends that the anticompetitive consequences of cable operators' refusal to offer ISP choice will be worsened by the merger, because it increases the number of households a single firm can foreclose.[377] SBC asserts that, absent an access requirement, the merged firm will not provide meaningful access to its broadband platform.[378]

132. Commenters state that their concerns about unaffiliated ISP access are exacerbated by the merged firm's relationships with Microsoft and AOL. Commenters contend that Microsoft's stake in the

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Rosenblum, Vice President – Law, AT&T Corp., to Marlene H. Dortch, FCC Secretary (Oct. 2, 2002).

[370] Comcast, AT&T, and AT&T Comcast have entered into a Quarterly Income Preferred Securities ("QUIPS") exchange agreement with Microsoft, pursuant to which, at the time of the AT&T Broadband spin-off, Microsoft will exchange the QUIPS for a number of shares of AT&T Broadband common stock that will be converted in the merger into 115 million shares of AT&T Comcast common stock (the "QUIPS Agreement"). Application at 8 n.9.

[371] *See* QUIPS Agreement § 2.02. This obligation applies for a period of five years following the spin-off of AT&T Broadband. Application at 8 n.9. In connection with the QUIPS Agreement, Applicants and Microsoft also agreed to a term sheet providing for a trial of an ITV platform including set-top box middleware ("Set-Top Term Sheet"). *Id.*

[372] *See generally* CFA Comments at 12-15, CFA Reply to Opposition at 12-14, EarthLink Reply Comments at 3, Qwest Comments at 9-10, 13-14, SBC Comments at 17.

[373] EarthLink Reply Comments at 2-9; SBC Comments at 39; Qwest Comments at 29-35.

[374] EarthLink Reply Comments at 7-8, SBC Comments at 39-40, Qwest Comments at 34-35.

[375] CFA Reply to Opposition at 13. CFA states that the merger will exacerbate the problems faced by unaffiliated ISPs "because one large closed system is worse than two smaller closed systems." CFA contends that by allowing one entity that is opposed to unaffiliated ISP access to control a greater share of the broadband access market, the merger will reduce incentives to grant access to unaffiliated ISPs. CFA Comments at 24.

[376] CFA Comments at 23-24; CFA Reply to Opposition at 13-14; Dr. Mark Cooper, *Failure of Intermodal Competition in Cable and Communications Markets* at 36-38 ("*CFA Intermodal Study*"). *See also* SBC Comments at 39-40; Qwest Comments at 33-34. CFA asserts that to secure access to AT&T Comcast's cable modem platform, AOL capitulated to AT&T Comcast's "superior market power" by agreeing to "highly unprofitable terms." Motion of CFA to Require AT&T and Comcast to Provide Information Material to Consideration of Application to Transfer Control of Licenses (filed Sept. 5, 2002) ("CFA Motion") at 8.

[377] SBC Comments at 39.

[378] SBC Comments at 40. *See also* EarthLink Reply Comments at 3-5; Qwest Comments at 29-30.

merged firm is intended to secure access to AT&T Comcast's broadband platform,[379] and that the Microsoft relationship will allow AT&T Comcast to steer personal computer buyers away from DSL.[380] Some commenters posit that the AOL ISP Agreement is "highly restrictive and exclusionary" and may pose significant impediments to broadband deployment.[381] EarthLink asserts that the AOL ISP Agreement will create the problems deemed unacceptable in the context of the AOL-Time Warner merger, but "on a much larger scale."[382] Instead of AOL gaining access to just Time Warner cable systems, EarthLink notes, AOL will obtain access to the far larger AT&T Comcast array of systems.[383] According to EarthLink, because the Applicants rarely enter into agreements with unaffiliated ISPs, AOL may become the only ISP available on AT&T Comcast systems.[384] CFA and EarthLink filed motions urging us to require the Applicants to enter the AOL ISP Agreement into the record in this proceeding, claiming that we cannot evaluate the public interest harms posed by the merger without reviewing and considering public comment on the agreement.[385] EarthLink requests that all of the exhibits to the TWE Restructuring Agreement be entered into the record.[386]

133. Applicants counter that the issue of ISP access is not merger-specific, and object that their opponents' claims are counter-factual given that they already have granted access to unaffiliated ISPs and they face competition from DSL and other broadband service providers.[387] Applicants cite their existing relationships with independent ISPs as evidence of their commitment to independent ISP access, and assert that the merged firm will have "ample incentives to expand these agreements in the future."[388] Applicants assert that penetration rates for broadband services offered by each applicant still are relatively low, and that the merged firm will face stiff competition from DSL and other broadband platforms. Applicants assert that agreements with unaffiliated ISPs may attract new customers to the merged firm's network and will allow AT&T Comcast to share in a portion of the revenue derived from this increased subscribership. Alternatively, if ISPs affiliate with competing broadband platforms, AT&T Comcast will

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[379] CFA Reply to Opposition at 17.

[380] SBC Comments at 25. SBC posits that Microsoft and AT&T Comcast could use a screen during the computer setup and software installation process to market the merged firm's cable modem service. *Id*.

[381] *See* CFA Supplemental Comments at 1-2. *See also* EarthLink Supplemental Comments at 2, 4-5; CFA Motion at 2; Motion of EarthLink, Inc., for Order Requiring Submission of Additional Information, Providing for Supplemental Comment, and Suspending the 180-Day Review Period (filed Sept. 5, 2002) ("EarthLink Motion") at 2. *See also Memorandum in Response to Questions Propounded by Office of General Counsel Submitted on Behalf of CFA, et al.* at 9-14 (filed Oct. 28, 2002).

[382] EarthLink Supplemental Comments at 3-4.

[383] *Id.*at 4.

[384] *Id.*

[385] EarthLink and CFA filed motions urging the Commission to: (a) compel the Applicants to file some or all of the exhibits to the TWE Restructuring Agreement; (b) initiate a pleading cycle seeking comment on the exhibits; and (c) stop the 180-day review period that governs this proceeding pending receipt of the exhibits and the close of the proposed comment cycle. *See EarthLink Motion, CFA Motion.* In a prior order, these motions were denied or dismissed as moot to the extent that they requested documents that have already been filed by the Applicants. *See Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, FCC 02-301 (rel. Nov. 6, 2002) ("*ISP Order"*).

[386] *See generally* EarthLink Motion.

[387] Application at 93; Applicants' Reply at 92-93.

[388] Applicants' Reply at 93. *See also* Applicants' July 2, 2002 Response at 19-20; Applicants' July 2, 2002 Response at Comcast-FCC-E2 0000037-38 (Statement of Brian Roberts during Comcast United Online Press Conference Call on Feb. 26, 2002).

lose the opportunity to gain the new revenue generated by such new customers.[389]

134. Applicants view the AOL ISP Agreement as further evidence of their commitment to offering consumers a choice of ISP.[390] Applicants state that, far from harming consumers, the AOL ISP Agreement will increase consumer ISP choice and enhance competition among ISPs.[391] They state that as a result, AT&T Comcast subscribers will be able to obtain broadband Internet access service from a host of ISPs, including an AT&T Comcast affiliated ISP, as well as EarthLink, United Online, Net1Plus, Internet Central, MSN, AOL, and any other ISP that successfully negotiates a mutually satisfactory agreement in the future.[392] Applicants state that the AOL ISP Agreement is not exclusive, and could not be exclusive because of each Applicant's existing agreements with other unaffiliated ISPs.[393] Applicants state that the AOL ISP Agreement is not relevant to our review of the proposed merger because the agreement is not contingent on the merger.[394] Applicants dismiss commenters' claims concerning the merged entity's relationship with Microsoft as lacking merger specificity, because Microsoft is not making any additional investment in connection with the merger.[395] Applicants assert that Microsoft has no incentive to disadvantage DSL, and contend that Microsoft's actual behavior contradicts commenters' allegations.[396]

135. *Discussion.* Commenters' reliance on the *AOL-Time Warner Order* as authority for the imposition of an ISP access condition is misplaced. We have never mandated, as a merger condition or in any other context, that any cable operator provide access to its systems to unaffiliated ISPs.[397] In *AOL-Time Warner*, we supplemented an unaffiliated ISP access condition imposed by the FTC by requiring that, if AOL Time Warner provided such access voluntarily or otherwise, it must do so on

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[389] Applicants' Reply at 94.

[390] *See generally* Joint Opposition of Comcast Corporation and AT&T Corp. (filed Sept. 13, 2002) ("Applicants' Joint Opposition").

[391] Applicants' Joint Opposition at 6.

[392] *Id.* at 10-11.

[393] *Id.* at 8.

[394] In support of this, they cite a provision of the TWE Restructuring Agreement that states that if the merger has not closed by March 1, 2003, AT&T and AOL Time Warner will enter into an agreement substantially identical to the AOL ISP Agreement. Applicants' Joint Opposition at 6-7. The Applicants also have certified in the record that this agreement is identical in all material respects to the agreement involving AT&T Comcast systems, except with regard to the cities in which the agreement will be implemented. *See* Letter from Mark C. Rosenblum, Vice President-Law, AT&T Corp. and Arthur R. Block, Senior Vice President and General Counsel, Comcast, to Marlene H. Dortch, FCC Secretary (Oct. 28, 2002). Our own staff review confirms this certification. *See ISP Order,* FCC 02-301 at ¶ 11.

[395] Applicants' Reply at 63. Applicants state that although Microsoft will have a 5% equity interest in AT&T Comcast, it will have less than 5% of AT&T Comcast's voting power. *Id*.

[396] Applicants' Reply at 68-69. Applicants assert that Microsoft promotes DSL—not cable modem service—to its customers who are interested in broadband. *Id*.

[397] With one limited exception, we have consistently refused to intervene in marketplace decisions concerning ISP access to cable facilities or the terms and conditions of such access, despite requests for such intervention by other parties. *See AT&T-TCI Order*, 14 FCC Rcd at 3207 ¶ 96 (1999); *AT&T-MediaOne Order*, 15 FCC Rcd at 9870 ¶ 121 (2000). *But see AOL-Time Warner Order*, 16 FCC Rcd at 6600-03 ¶¶ 126-127 (requiring that, to the extent AOL Time Warner provided access to its cable system to unaffiliated ISPs, all ISPs would receive such access on nondiscriminatory terms).

nondiscriminatory terms.[398] These conditions were imposed in light of the fact that the merger of AOL and Time Warner would combine the largest ISP, which itself owned many leading Internet brands and applications, with the second largest cable operator in the nation, which already held an enormous library of multimedia content.[399] This unique combination of services, facilities, and content raised competitive concerns that are not presented by the instant merger, even in light of the merged entity's relationships with Microsoft and AOL. Microsoft's 5% equity interest in AT&T Comcast, even combined with its agreements with Applicants, is not comparable to the degree of control AOL attained through its acquisition of Time Warner. There also is no evidence that the merger will give MSN the ability or incentive to discriminate against other broadband platforms. To the contrary, MSN is aggressively promoting its "MSN Broadband" product, which is a high-speed Internet access service delivered over DSL.[400] The merged entity's relationship with AOL Time Warner also does not present a risk of potential harm comparable to that presented by the merger of AOL and Time Warner. Although the AOL ISP Agreement provides AOL access to AT&T Comcast systems, such an agreement is clearly distinguishable from AOL's *acquisition* of such systems. In addition, like MSN, AOL actively promotes its proprietary broadband Internet access service over DSL as well as cable.[401]

136. Having evaluated, as we have in prior license transfer proceedings, the Applicants' pre-merger and post-merger incentive and ability to deny unaffiliated ISPs access to their cable systems, we conclude that the merger is not likely to reduce unaffiliated ISP access to the Applicants' cable systems. Therefore we will not condition the merger on such access or deny the merger on these grounds. First, contrary to the claims of some commenters, the AOL ISP Agreement is not—and cannot be—exclusive.[402] As Applicants note, they each have entered into other agreements with unaffiliated ISPs, and Comcast has agreed to honor all pre-merger third-party ISP agreements entered into by AT&T.[403] AT&T Comcast also is obligated by the QUIPS Agreement to offer an ISP agreement to MSN if AT&T Comcast enters into an ISP agreement with any other party, an obligation that could not be satisfied if the AOL ISP Agreement were exclusive. An officer of AT&T has certified that the AOL ISP Agreement "does not give AOL exclusive rights to provide Internet service over any AT&T Comcast cable system, nor does it constrain AT&T Comcast's ability to negotiate and reach agreements with other ISPs in the future."[404] Our staff review of the AOL ISP Agreement at the DOJ confirms this certification.[405]

137. We do not agree with CFA that the sheer size of the merged firm will make AT&T

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[398] *AOL-Time Warner Order*, 16 FCC Rcd at 6600-03 ¶¶ 126-127. We also prohibited AOL Time Warner from entering into exclusive agreements for access to AT&T's cable systems. *AOL-Time Warner Order*, 16 FCC Rcd 6547, 6662 ¶ 272.

[399] *AOL-Time Warner Order*, 16 FCC Rcd at 6580 ¶ 78.

[400] *See* MSN, *MSN 8 Broadband: A High-Speed Connection Powered by Microsoft Technology*, at http://resourcecenter.msn.com/access/broadband/default.asp (visited Aug. 31, 2002).

[401] AOL Broadband offers consumers a choice of cable or DSL. *See Only on AOL Broadband* at http://free.aol.com/tryaolfree/index.adp?promo=342565&service=aolhsb& (viewed Nov. 6, 2002).

[402] For the agreement to be exclusive, the Applicants would have to breach their agreements with several other ISPs, and AOL Time Warner would have to violate the terms of its Consent Agreement with the FTC. The Consent Agreement provides that AOL Time Warner "shall not enter into any agreement with any MSO that would interfere with the ability of such MSO to enter into agreements with any other ISP." *See In the Matter of America Online, Inc. and Time Warner Inc.*¸ FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 at Section III.E. (FTC) (proposed Dec. 14, 2000) ("Consent Agreement").

[403] *See* Applicants' Nov. 6 Ex Parte.

[404] *See* Letter from Mark C. Rosenblum, Vice President – Law, AT&T Corp., to Marlene H. Dortch, Secretary, FCC (Oct. 2, 2002).

[405] *See ISP Order*, FCC 02-301 at ¶ 13.

Comcast less likely to develop relationships with unaffiliated ISPs. Even if the merger increases the number of subscribers that a single entity can foreclose, SBC has not shown that the Applicants' pre-merger incentives to discriminate against unaffiliated ISPs are any different from their post-merger incentives to discriminate against such ISPs. The Applicants' existing agreements with seven unaffiliated ISPs and Comcast's decision to honor AT&T's pre-merger agreements with unaffiliated ISPs evidence an incentive to offer access to the merged entity's system, and refute commenters' claims. To the extent that we have addressed ISP access issues in prior cable mergers, we have primarily relied on merger applicants' commitments to enter into agreements with unaffiliated ISPs in the future.[406] Here, the Applicants have not only stated a commitment to ISP choice, but already have executed several agreements, and are currently offering a choice of ISP in a combined total of four markets.[407] Applicants' existing relationships with unaffiliated ISPs go a step beyond the commitments to ISP choice that we have previously found adequate to protect the public interest in factually similar cable mergers.

138. Commenters raise concerns about the prices charged to unaffiliated ISPs by the merged entity for access to its facilities, and limitations on the services or packages of services that the unaffiliated ISPs may offer. The record, however, does not support a finding of a merger-specific harm. Rather, these concerns are industry-wide in nature; therefore, it is more appropriate to consider them in our *Cable Modem NPRM*, which will address whether the Commission should regulate the prices cable operators can charge unaffiliated ISPs or prohibit cable operators from limiting the services offered by unaffiliated ISPs.[408]

139. The concerns raised by commenters are not specific to AT&T Comcast's agreements with unaffiliated ISPs, but relate to the business relationships between all cable operators and all unaffiliated ISPs. The question of whether government intervention is necessary or appropriate to ensure that unaffiliated ISPs have access to cable systems built with private capital is squarely at issue in our *Cable Modem NPRM*, as are the terms and conditions of such access. We conclude that the merger is not likely to create a public interest harm with regard to unaffiliated ISP access to AT&T Comcast systems.

3. Quantity, Quality, and Diversity of Internet Content

140. Some commenters assert that the merger would present harms affecting Internet content. Specifically, they allege that: (1) the merged firm will have the incentive and ability to favor affiliated broadband content and discriminate against unaffiliated content;[409] (2) the merged firm will limit access to its affiliated content, which would reduce the amount of content available to subscribers of competing

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[406] *See AT&T-TCI Order*, 14 FCC Rcd at 3206-07 ¶¶ 95-96 (1999); *AT&T-MediaOne Order*, 15 FCC Rcd at 9869-70 ¶¶ 120-121 (2000).

[407] *See* para. 130*, supra.*

[408] Moreover, even if we find as part of our rulemaking proceeding that limitations on services are harmful, and even if such limitations were among terms of the AOL ISP Agreement, such limitations in the AOL ISP Agreement still would not present a merger-specific harm because the AOL ISP Agreement for AT&T Comcast systems is identical to that for AT&T systems only. *See ISP Order*, FCC 02-301 at ¶ 11.

[409] Some commenters claim that the merged firm will have the incentive and ability to favor affiliated Internet content by giving it preferential placement or preferential caching, and to discriminate against unaffiliated content, either by limiting its cable modem subscribers' access to unaffiliated content or by degrading the quality of delivery of such content. See Verizon Comments, Crandall Decl. ¶ 13; SBC Comments at 16-18; SBC Comments, Gertner Decl. ¶¶ 18-29; CFA Comments at 15-16. Qwest asserts that the merged firm will have the incentive and ability to engage in vertical foreclosure, for example by extracting monopoly rents for affiliated content provided to other broadband ISPs. Qwest Comments 14-15; Qwest Comments, Haring Decl. at 14-15. Verizon asserts that the because the merger will expand the distribution footprint available to each Applicant's affiliated broadband content, it will enhance the merged firm's incentive and ability to favor its own content and discriminate against unaffiliated content. Verizon Comments, Crandall Decl. ¶ 12.

broadband access services and harm competing providers of such services;[410] and (3) the merged firm will have monopsony power in the market for the purchase of broadband content.[411] Commenters claim that these concerns are particularly acute with regard to the delivery of video programming over the Internet, an offering that would compete not only with the merged firm's affiliated broadband content, but also with its core multichannel video programming business.[412] We conclude that the merger is not likely to result in harms to the quantity, quality, or diversity of Internet content, and we decline to impose conditions or reject the merger on the basis of alleged harms to Internet content.

141. *Discrimination Against Unaffiliated Content/Favoring Affiliated Content.* We find that the alleged potential harm to unaffiliated broadband content producers arising from the merged firm's potential foreclosure, degradation, or restriction of access to unaffiliated content is not a merger-specific issue. Applicants have very limited interests in Internet content, making it unlikely that they would achieve any benefit from discriminating against unaffiliated content.[413] Further, the merger will not give the Applicants greater incentive or ability to discriminate against unaffiliated content. Commenter concerns about harm to consumers or broadband content producers from content discrimination are therefore not sufficiently merger-specific to justify denial of or the imposition of conditions on the requested license transfers.

142. *Refusal of Access to Affiliated Content*. We find that the merger is unlikely to result in harm to consumers or competition from the merged firm's refusal to provide other broadband Internet service providers with access to affiliated content. Applicants have very little affiliated Internet content, and that which they have is far from the kind of unique, highly popular content that might raise competitive concerns.[414] For example, the Applicants cite data showing that Yahoo.com contains 136,000 pages of content, that AOL.com contains 97,000 pages of content, and that Comcast.net contains only 52 pages of content.[415] Although it is certainly possible that the merged firm will add new, compelling Internet content to its portal or establish entirely new sites with compelling Internet content, the Applicants assert that such a development is more likely to benefit consumers than to harm consumers or competition in the broadband Internet access market.[416] We agree. Even if the merged firm entered into a joint venture or other strategic relationship with a highly popular, content-rich portal or other service, it is

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[410] Qwest Comments at 15; Verizon Comments, Crandall Decl. ¶¶ 12-18. Verizon claims that the merged firm's combined purchasing power will allow it to demand equity interests or exclusive distribution rights from start-up broadband Internet content providers who need access to the merged firm's cable modem customers. Verizon Comments at 22 n.69; Verizon Comments, Crandall Decl. ¶ 13. Verizon claims that AT&T Comcast could then refuse to supply affiliated content to rival conduits such as DSL or create content in a format that is compatible only with cable modem service. Verizon Comments, Crandall Decl. ¶ 14.

[411] Qwest Comments at 9-10; Qwest Comments, Haring Decl. at 14-15; Verizon Comments, Crandall Decl. ¶ 11; CFA Comments at 15-16. In light of the relatively small number of current broadband subscribers, commenters posit that a broadband content provider may need to reach an even higher percentage of the total broadband audience in order to "break even" than would a cable programmer. Qwest Comments at 9; SBC Comments, Gertner Decl. at ¶¶17, 28.

[412] *See* Verizon Comments at 15-23; Verizon Comments, Crandall Decl. ¶ 22.

[413] Applicants assert that AT&T Comcast will be unable to engage in foreclosure of unaffiliated content because its share of the broadband Internet access market will be too small to effectively foreclose any content provider, and because the merged firm's subscribers will be free to access any broadband content they desire. Applicants' Reply at 84-85. Applicants state that they have never blocked subscribers' access to any Internet content. *Id.*; *see also* Applicants' Reply, Coblitz Decl. at ¶ 28.

[414] Applicants' Reply at 87. Applicants state that their limited content holdings can be accessed by all Internet users and are not offered exclusively to either Applicant's cable modem subscribers. *Id*. at 85-86.

[415] *Id*. at 87-88.

[416] *Id*. at 88.

not clear from the record that the merged firm would be likely to withhold access to its affiliated content.[417]

143. *Monopsony Power.* We have previously concluded that there are two separate product markets for residential Internet access service – high-speed Internet access service and narrowband service.[418] Among the facts we cited as evidence of this market distinction is that certain content is accessible only to consumers with a high-speed connection to the Internet.[419] However, we have not previously determined whether there is a market for the purchase of broadband content that is distinct from the market for the purchase of Internet content in general. We need not do so here. There is no convincing evidence the merged entity actually would have market power with respect to any Internet content, or that it would have the ability or incentive to exercise such market power if it did.[420]

144. *Video Over Internet Harms.* Commenters assert that because an Internet video offering would compete with multichannel video programming, the merged firm will have the incentive to engage in anticompetitive conduct that will impede the development of this offering. Applicants counter that such claims are "highly speculative" and state that AT&T Comcast will not have the incentive or ability to force anyone to adopt cable-only standards, establish technical impediments, or withhold access to affiliated programming.[421] They further state that if the merged firm somehow attempted to block the distribution of video programming to its broadband customers, this would only drive consumers to DSL and cause AT&T Comcast to lose subscribers.[422] We have no reason to believe that the merger makes such conduct any more likely than it would be absent the merger. Therefore, the merger is not likely to create public interest harms in this regard.

145. In our *Cable Modem NPRM*, we invited comment on several questions concerning Internet content, including whether cable modem access providers are presently denying or degrading access to unaffiliated Internet content or services,[423] whether the threat that subscriber access to Internet content or services could be blocked or impaired is sufficient to justify some form of regulatory intervention at this time,[424] and whether a finding of such blocking or impairment in the future should trigger regulatory intervention.[425] We are presently reviewing comments on these and other issues as part of that proceeding, which is the best forum in which to evaluate issues pertaining to cable operators' discrimination against unaffiliated content, cable modem subscribers' access to unaffiliated content, and monopsony concerns.

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[417] *Id*. at 89. According to Applicants, any attempt to limit distribution of affiliated content would allow a rival content provider to expand output and replace that content. *Id* at 88.

[418] *AOL-Time Warner Order*, 16 FCC Rcd at 6574-78 ¶¶ 68-74.

[419] *Id*. at 6576-77, ¶ 71.

[420] Applicants contend that there is no "broadband content" market, because there is very little content that is created exclusively for broadband platforms. Applicants' Reply at 80. Applicants also note that the most likely types of broadband content—music, video, and games—also can be distributed through non-Internet means, such as retail sales and rentals. *Id.* at 82-83. Applicants contend that even if the market for the purchase of broadband content is confined to broadband Internet access providers, AT&T Comcast's 22.7% share of the residential broadband Internet access market is too low to raise any monopsony concerns. *Id.* at 81-82.

[421] Applicants' Reply at 92.

[422] *Id*. at 92.

[423] *Cable Modem NPRM*, 17 FCC Rcd. at 4845 ¶¶ 86-87.

[424] *Id.* at 4845 ¶ 87.

[425] *Id.* at 4846 ¶ 92.

4. Other Effects on Competing Broadband Platforms.

146. Several commenters assert that because the merged firm will enjoy an unprecedented share of the broadband Internet access market, the merger should be denied or conditioned on establishment of regulatory parity for incumbent LECs, either by relaxing or removing regulations applicable to incumbent LECs or by imposing requirements on the merged firm to make its regulatory status more similar to that of incumbent LECs.[426] These commenters state that the merged firm will have roughly twice the broadband subscriber base of its largest DSL competitors,[427] and claim that DSL is not "growing at a rate which could close the gap" between cable and DSL market shares.[428] Qwest asserts that the merger increases the risk that the market will tip permanently to cable modem services, foreclosing the possibility of vibrant long-term competition between cable operators and telephone companies in the provision of broadband Internet access and services.[429]

147. The incumbent LECs propose several different approaches to establishing the regulatory parity they seek. Verizon urges us to deny the merger application unless we first grant regulatory relief to incumbent LECs.[430] The proposed approaches include: conditioning the merger on the establishment of regulatory parity through action in other open rulemaking proceedings;[431] imposing spectrum unbundling or unaffiliated ISP access requirements on the merged firm to make its regulatory status comparable to that of incumbent LECs;[432] and/or denying the merger application.[433]

148. *Discussion.* We decline to relax or remove regulations applicable to incumbent LECs in the context of this proceeding, to condition our approval of the merger on actions that we may or may not take in the context of other proceedings, or to impose new requirements on the merged firm in order to give the merged firm a regulatory status of an incumbent LEC. We do not agree with incumbent LECs that the merged entity's size poses a risk of harm to DSL service, and we will not reject the merger on these grounds. As we stated previously, the geographic market relevant to broadband Internet access is local.[434] The merger will not change the size of the competitor that incumbent LECs face in the individual markets where they offer DSL service, and incumbent LECs have not shown that the merged firm's share of broadband Internet access subscribers nationally will result in competitive harms. Finally, incumbent LECs' efforts to secure changes to the regulations applicable to their services in the context of this proceeding are misdirected. The instant proceeding is not an appropriate forum for consideration of changes to rules of broad applicability, including the rules applicable to certain incumbent LEC offerings. In short, none of the regulatory parity issues raised are specific to this merger.

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[426] *See generally* BellSouth Comments at 23-27; Qwest Comments at 15-18, 35; SBC Comments at 33-35; Verizon Comments at 25-29.

[427] Verizon Comments at 23.

[428] Qwest Comments at 13-14. *See also* Verizon Comments at 5-7; BellSouth Comments at 17.

[429] Qwest Comments at 14.

[430] Verizon Comments at 25-29.

[431] BellSouth Comments at 24-27. Specifically, BellSouth asks that, in our Wireline Broadband Proceeding, we forbear from enforcing the following with regard to incumbent LEC broadband services: 1) price cap regulations; 2) the requirement to file tariffs on more than one day notice with cost support; 3) restrictions on contract carriage; and 4) any dominant carrier section 214 requirements that might apply. BellSouth also asserts that the Commission should remove UNEs related to broadband services from the UNE list.

[432] SBC Comments at 35-36; Qwest Comments at 29-35.

[433] Qwest Comments at 29-36.

[434] *See* note 362, *supra*.

149. CFA asserts that AT&T and Comcast already possess market shares "approaching monopoly levels" in the high-speed Internet access market, which justifies denying approval of the merger or imposing remedies[435] to prevent the accumulation of market power.[436] The study cited by CFA in support, however, does not specify what market shares AT&T or Comcast possess in any market in which they offer high-speed Internet access, nor does it explain what share of the market would approach the monopoly level. Instead, CFA's study cites data reported by the Commission based on responses to our Form 477 which shows, among other things, that approximately one-fifth of the country has only one choice of broadband service provider. The fact that the merged firm may be the sole provider of residential high-speed Internet access in any of the markets it serves does not demonstrate that the merger is decreasing competition in the market for residential high-speed Internet access. Because the relevant geographic market for the provision of broadband Internet access is local, and because AT&T and Comcast do not compete against each other for residential high-speed Internet access consumers in their respective local markets, the merger will not reduce competition or otherwise harm this market. We therefore decline to impose conditions or deny the Application on these grounds.

150. EchoStar asserts that each Applicant enjoys a "lion's share" of the market for high-speed Internet access in its respective territories, and that its proposed merger with DirecTV should be approved in order to create a more viable competitor to the merged firm's broadband offering.[437] EchoStar's comments are misplaced here, as its proposed merger is the subject of a separate proceeding.[438]

5. Conclusion

151. We conclude that the merger is not likely to reduce unaffiliated ISP access to cable facilities, impede or prevent consumers' access to Internet content, or allow Applicants to dominate the broadband Internet access market. Accordingly, we will not deny or impose conditions on our approval of the Application as requested by commenters.

C. Telecommunications Services

152. Comcast provides residential cable telephony services to approximately 46,000 lines in certain of its franchise areas in Maryland, Virginia, and Michigan.[439] In addition, Comcast, through certain subsidiary corporations, provides a variety of communications services to over 4,000 business and governmental customers primarily in Pennsylvania, New Jersey, Delaware, Maryland, and Michigan.[440] AT&T Broadband provides residential cable telephony services to over one million customers in 16 markets.[441] No commenter alleges that the proposed transaction would result in telephony-related public interest harms.

153. We conclude that the proposed transaction would not harm competition in any relevant

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[435] CFA Comments at 15. CFA does not specify what remedies would be appropriate.

[436] CFA Comments at 15-16; *CFA Intermodal Study* at 47-49.

[437] EchoStar Comments at 9.

[438] *EchoStar-DirecTV Order*, FCC 02-284.

[439] Application at 13.

[440] *Id.*

[441] These markets are: Atlanta, Boston, San Francisco, Chicago, Dallas, Denver, Hartford, Jacksonville, Pittsburgh, Portland (Oregon), Richmond, Seattle, Salt Lake City, St. Louis, southern California, and Minneapolis-St. Paul. *Id.* at 23-24.

telecommunications market. Comcast and AT&T Broadband largely compete in separate geographic markets, and, to the extent their service areas overlap, we find no material increase in concentration that would raise the potential of competitive harm. In addition, we find that AT&T Comcast will not be, nor will it be affiliated with, a carrier that possesses market power on the foreign end of any U.S. international route.[442] Although certain Comcast subsidiaries own or control fixed wireless broadband companies in foreign markets, there is no basis in the record to conclude that any of these companies possesses market power in the provision of facilities or services that are necessary for the provision of U.S. international service.[443] The proposed transaction, therefore, does not raise concerns with respect to potential leveraging of foreign market power into the U.S. international services market or require that we condition the international section 214 authorizations being transferred on compliance with our international dominant carrier safeguards.[444]

D. Set-Top Box Issues

154. Some commenters claim the proposed merger will negatively impact the development of a retail consumer market for set-top boxes, *i.e.,* the equipment consumers use to access the services offered over cable systems. For many cable systems, subscribers must lease a set-top box from their cable operator to view scrambled programming and access advanced services such as the digital program tier and impulse pay-per-view. Section 629 of the Communications Act instructs the Commission to adopt regulations that allow manufactures and retailers to develop equipment incorporating set-top box functionality for consumer retail purchase.[445] Its purpose is to provide consumers with the benefits of competition in the manufacture and sale of these devices. Section 629 further directs the Commission not to prescribe regulations that would jeopardize the security of the cable system. We find that the merger will not foreclose the development of consumer choices for equipment.

155. In the *Navigation Devices Order*, we adopted rules to implement section 629.[446] Cable operators must separate out conditional access or security functions from other functions of the set-top box and make available modular security components, also called Point of Deployment modules or "PODs."[447] The cable industry, through its research and development consortium CableLabs, formed the OpenCable project to develop interface specifications for connecting a POD to set-top box purchased at retail.[448] According to CableLabs, the OpenCable specifications will allow equipment sold at retail to be portable across cable systems. We are monitoring the development of the commercial availability of set-top boxes and other navigation devices and have commenced a proceeding to review the effectiveness of

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[442] *See* 47 C.F.R. § 63.09(e) (defining "affiliated" for purposes of the Commission's Part 63 rules that apply to international section 214 authorizations). *See also AT&T International Section 214 Application* at 7; *Comcast International Section 214 Application* at 4.

[443] *See Comcast International Section 214 Application* at 4.

[444] *See Rules and Policies on Foreign Participation in the U.S. Telecommunications Market,* 12 FCC Rcd 23891, 23987, 23991-99 ¶¶215, 221-239 (1997); Order on Reconsideration, 15 FCC Rcd 18158 (2000).

[445] 47 U.S.C. § 549(a).

[446] *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices*, 13 FCC Rcd 14775 (1998) ("*Navigation Devices Order*").

[447] 47 C.F.R. § 76.1204.

[448] Cable Television Laboratories, Inc., or CableLabs, is a "non-profit research and development consortium that is dedicated to pursuing new cable telecommunications technologies and to helping its cable operator members integrate those technical advancements into their business objectives." *See http://www.cablelabs.com/about/* (visited Oct. 24, 2002).

our rules.[449]

156. CFA argues that Comcast President Brian Roberts' role as the vice-chair of CableLabs will allow him to influence CableLabs in the development of industry standards.[450] CFA further contends that AT&T uses its analog set-top box leasing program to subsidize its digital set-top boxes and has an interest in ensuring that the equipment market remains closed.[451] CFA contends that AT&T provides Microsoft preferential treatment for set-top box operating software.[452] CEA contends that the merger would create "potentially insurmountable obstacles" to the development of a retail market for set-top boxes, and urges the Commission to condition the merger on the Applicants' pledge to comply with the same set-top box standards as those set for competitors.[453] Applicants reply that the merger will have no adverse effect on any equipment market.[454] Applicants contend that the market for MVPD equipment and related software is global and that the merged entity will account for "a small fraction" of all purchases of navigation devices.[455] In addition, AT&T maintains that CableLabs' decisions are reached by consensus, precluding the ability of any particular entity to influence CableLabs' improperly.[456] With regard to their relationship with Microsoft, Applicants state that Comcast has reached an agreement to run a limited trial of Microsoft ITV set-top box software ("Set-Top Term Sheet").[457] Applicants submit that the agreement does not obligate it to a commercial deployment of the software unless several conditions are met.[458] Even if those conditions are met, they assert, Comcast will not have any obligation to deploy the software to more than 25% of its customer base using this functionality.[459] They further assert that the Set-Top Term Sheet does not apply beyond the current generation of set-top boxes.[460] Applicants state that they have an incentive to avoid becoming dependent upon a single set-top box software vendor.

157. *Discussion.* Commenters have not raised any merger-specific concerns regarding harm to the market for set-top boxes. General claims regarding the development of a consumer retail set-top market will be addressed in the navigation devices proceeding. We have rules in place aimed at achieving a retail set-top box market and, as stated above, we continue to monitor developments to evaluate whether progress is being made toward the goal of consumer choice in navigation devices. Accordingly, we need

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[449] *Implementation of Section 304 of the Telecommunications Act of 1996 – Commercial Availability of Navigation Devices,* 15 FCC Rcd 18199 (2000) ("*Navigation Devices Further Notice*").

[450] CFA Comments, Appendix B at 5; *see also,* SBC Comments at 23-25 (asserting that the merged entity's relationship to Microsoft will allow it to "dictate the terms on which set-top boxes will operate").

[451] CFA Comments at 24.

[452] *Id.* at 25.

[453] CEA Reply to Opposition at 2. CEA submits that the Applicants also should be required to: 1) pledge to investigate manufacturers' complaints concerning the current CableLabs certification process and work expeditiously to enable self-certification; and 2) disavow those aspects of the POD-Host Interface License Agreement ("PHILA license") that enable cable operators to disable high-definition outputs, home network connections, and recordable interfaces. *Id.*; *see also* Statement of Robert A. Perry, Vice President, Mitsubishi Digital Electronics America before the Subcommittee on Antitrust, Business Rights and Competition, Senate Judiciary Committee, April 23, 2002 (appended to CEA Reply).

[454] Applicants' Reply at 62.

[455] *Id.*

[456] *Id.* at 65.

[457] Application at 86; *see also* note 371, *supra*.

[458] Applicants' Reply, Coblitz Decl. at ¶ 8.

[459] *Id.*

[460] *Id.*

not address this issue in the context of this merger.

158. Finally, we find nothing to link the relationship between the Applicants and Microsoft to any impairment to the development of a consumer set-top box market. Cable operators generally may make agreements regarding the technology contained in the set-top boxes they provide to subscribers as long as such agreements do not compromise support of the open cable standards. Applicants have preserved their ability to use other set-top box in the Set-Top Term Sheet. Accordingly, we decline to condition approval of this merger upon any facet of Applicants' compliance with section 629.

E. Interactive Television

159. The Commission has not previously defined ITV, although it has characterized ITV as a service that supports subscriber-initiated choices or actions that are related to one or more video programming streams.[461] ITV is evolving rapidly, and the services it provides may enable increased viewer control of the television viewing experience by permitting the integration of video and data services – including Internet content - and by allowing real-time interaction with other viewers.[462] In connection with its review of the AOL Time Warner merger, the Commission issued a *Notice of Inquiry* to consider whether industry-wide rules were needed to address any impediments to the development of ITV services and markets.[463] The NOI sought to gather a more complete record on the ITV industry generally and the deployment of ITV services by cable operators, in particular.

160. Commenters are concerned that Applicants will be able to shape the evolution of ITV services or deny competitors access to those services through the use of exclusive agreements. We find these claimed harms speculative and conclude that the merger is not likely to produce public interest harms related to ITV.

161. CFA states that Applicants will be able to determine how competitive and non-discriminatory the market for ITV services will be through Comcast Interactive Capital, a venture capital fund with widespread investments in broadband services, telecommunications, electronic commerce, and entertainment.[464] Additionally, CFA asserts that Comcast has ordered 300,000 Pace 700 series set-top boxes with integrated cable modems that can support multiple middleware applications. Also, CFA submits that Comcast has an advantage in the emerging VOD marketplace because of its ownership interest in iNDEMAND, a VOD service provider.[465] This interest, CFA continues, has allowed Applicants to make "substantial inroads" with content suppliers.[466] CFA suggests that the merger will remove AT&T as an alternative deployment avenue for competitors of iNDEMAND.[467] In this regard it states that a competitor to iNDEMAND, Diva, has been able to secure VOD deployments with AT&T and suggests that this will no longer be possible after the merger.[468] RCN complains that Comcast is limiting competitive access to some VOD technologies, such as Worldgate's TV Gateway product, in which

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[461] *Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, 16 FCC Rcd 1321, 1323 ¶ 6 (2001) ("*ITV Proceeding*").

[462] *Id.* at 1322 ¶ 1.

[463] *Id.*

[464] CFA Comments, Appendix B at 5.

[465] CFA Comments, Appendix B at 6.

[466] *Id.*

[467] *Id.* at 7.

[468] *Id.* at 7.

Comcast has a financial interest.[469] RCN proffers that if the ability of the largest incumbent cable operators to negotiate exclusive arrangements is not constrained, and if that ability were to be exercised with multiple vendors in multiple markets, RCN could "effectively" be "locked out" of the market for new ITV technologies.[470]

162. CFA believes that relationships between Applicants and others such as MetaTV and Microsoft may impede competition in the ITV market, especially with regard to extent to which competing middleware will be able to utilize the merged firm's platform.[471] In addition, CFA states that both AOL Time Warner and AT&T principally use Gemstar's EPG to guide subscribers in the channel selection process.[472] CFA contends that AOL Time Warner and AT&T Comcast may, through their joint interest in TWE, stifle competition by limiting subscriber access to EPG services other than those offered by Gemstar.[473]

163. Applicants state that the merger will not harm competitors or consumers with respect to the provision of ITV services.[474] Applicants explain that Comcast currently offers VOD services over a number of its digital cable systems, and both Comcast and AT&T offer their digital cable customers EPGs. Applicants state that they cannot engage in unfair competition in the provision of ITV services because the combined entity will have less than a 30% share of the U.S. MVPD subscriber base, and it therefore will lack market power in this area.[475] Applicants also state that since Comcast and AT&T do not compete with each other in the provision of ITV services, the merger will have no adverse effect on competition in this business.[476] Applicants further state that they have entered into arrangements with a number of unaffiliated ITV providers despite Comcast having a financial interest in certain ITV companies.[477] These facts, they argue, demonstrate that they are not inclined to discriminate against non-affiliated ITV service providers.

164. In response to concerns about the effects of the merged entity's relationship with Microsoft on ITV services, Applicants assert that their Set-Top Term Sheet with Microsoft is in the public interest because it will result in a new and better product that would reduce the costs and increase the variety of applications software for set top boxes.[478] Applicants state that Comcast is under no obligation to deploy the Microsoft ITV platform or middleware unless certain technical, competitive and reasonable business objectives are met. Moreover, under any or all circumstances, Applicants will remain free to test and deploy alternative set top box platforms and middleware.[479]

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[469] RCN Comments at 32-33.

[470] *Id.*

[471] CFA Comments at 25, Appendix B at 6.

[472] *See* CFA Comments, Appendix B at 6.

[473] *Id.*

[474] Application at 84.

[475] Application at 85. The Applicants argue that DBS, LECs, and terrestrial broadcast television now offer or will offer ITV applications in competition with cable operators. *Id.*

[476] Application at 84.

[477] Application at 88 and n.182. Applicants note that Comcast has launched interactive services using Wink, despite having invested in RespondTV, and it has entered into a strategic volume purchase agreement for video-on demand systems from Concurrent, notwithstanding Comcast's equity stake in Concurrent's rival, SeaChange. *Id.*

[478] *Id.*

[479] *Id.* at 88.

165. *Discussion*. The record does not indicate that the merger will create or enhance Applicants' incentive or ability to impede technological developments in the emerging ITV market. We therefore conclude that the merger would not create any public interest harm in this particular line of business. As Applicants note, the merged entity will serve fewer than 30% of MVPD subscribers. We agree with Applicants that this would be too small a share to enable the merged entity to exercise market power in any ITV market and, contrary to RCN's speculation, circumscribes its ability to negotiate exclusive arrangements with multiple vendors in multiple markets effectively locking out competitors. Also, Comcast's agreement with Microsoft obligates Comcast to deploy Microsoft middleware in no more than 25 % of current generation set-top boxes and, even then, only if several conditions precedent are met.[480] Moreover, the legal and technical issues involved in the delivery of cable ITV services are being considered in a proceeding of general applicability, now pending before the Commission.[481] Competitive concerns regarding the deployment of ITV, particularly VOD and EPGs, by the cable industry are more suited for resolution in that proceeding. Finally, we cannot agree with CFA that the merger will be responsible for foreclosing AT&T as a deployment platform for VOD providers that compete with iNDEMAND. AT&T is already the 44 % owner of iNDEMAND[482] and Comcast is an 11 % owner.[483] Whatever incentives or disincentives the Applicants have to carry VOD competitors to iNDEMAND already exist and should not be altered by the merger. Accordingly, this asserted harm is both speculative and not merger-specific.

F. Cross-Ownership Rules

1. Cable/SMATV Cross-Ownership

166. Our rules provide that "[n]o cable operator shall offer satellite master antenna television service ("SMATV"), as that service is defined in § 76.5(a)(2), separate and apart from any franchised cable service in any portion of the franchise area served by that cable operator's cable system, either directly or indirectly through an affiliate owned, operated, controlled, or under common control with the cable operator."[484] Applicants state that neither AT&T nor Comcast expects to own any attributable interest in a broadcast radio or television station, MMDS system, or SMATV system that would implicate the Commission's cable-broadcast cross-ownership or multiple broadcast ownership restrictions or the cable-MMDS or cable-SMATV cross-ownership restrictions.[485]

167. Although AT&T owns six SMATV systems, it states that none of these will create a cross-ownership issue for the merged entity. Comcast states that it owns one SMATV system in the Hartford, Connecticut, area where an AT&T cable system provides cable service. Also, Comcast states that it owns one SMATV system in Lions Creek, Indiana, which is located in the franchise area of an AT&T non-consolidated cable system. Applicants state, however, that "promptly after closing, these SMATV systems will either be sold or integrated into the existing cable franchise (so that they are no longer operated 'separate and apart' from the franchised cable service in that area)."[486] Applicants also state that "although Comcast owns a small number of SMATV systems in territories served by TWE cable systems . . . the Applicants intend to have no attributable interest in TWE at and after the closing of

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[480] Applicants' Reply, Coblitz Decl. at ¶ 8.

[481] *See ITV Proceeding,* 16 FCC Rcd 1321.

[482] Application at 25.

[483] *Id*. at 15.

[484] 47 CFR § 76.501(d).

[485] Application at 51.

[486] Application at 51-52, n.97.

their merger."[487] Based on Applicants' assertions, and the lack of adverse comments on this issue in the record, we find that Applicants can comply with § 76.501(d), if the above-noted steps are taken. We therefore condition our grant to require that, within 60 days after closing, AT&T Comcast shall comply with our cable/SMATV cross-ownership rule.

2. Section 652 - Cable-Telco Buyout Prohibition

168. Our rules provide that "[n]o cable operator or affiliate of a cable operator that is owned by, operated by, controlled by, or under common ownership with such cable operator may purchase or otherwise acquire, directly or indirectly, more than a 10 % financial interest, or any management interest, in any local exchange carrier providing telephone exchange service within such cable operator's franchise area."[488] Applicants state in that neither AT&T nor Comcast "provides telephone exchange service outside of its respective cable franchise area."[489] Applicants also state that neither AT&T nor Comcast "is affiliated with, or has a management interest in, a LEC providing telephone exchange service within the few areas where the two companies have overlapping cable franchises."[490] No commenter has challenged these assertions. On this record, we conclude that the proposed merger will not violate section 652.

G. Other Potential Public Interest Harms

169. Prime Communications, Inc. ("Prime") argues that the proposed transaction would result in harm to local automobile advertising markets.[491] According to Prime, it is "an independent advertising agency that competes directly with AT&T Media Services" in producing cable advertising and purchasing advertising time on cable.[492] Prime's customers are "mainly automobile dealers in the Boston" area, and Prime's web portal service, CableCars.com, competes against AT&T's service, Vehix.com, for web-based automobile advertising.[493] Prime alleges that AT&T is using its "monopoly position" in cable to attempt to eliminate competition in "ancillary business" such as "the provision of local car web sites."[494] Specifically, Prime alleges that AT&T – after a failed attempt to purchase Prime IQ, a web-based tool for determining the effectiveness of different types of advertising – has refused to allow Prime to purchase cable television advertising, which, according to Prime, places it at a competitive disadvantage.[495] In addition, Prime asserts that AT&T has engaged in a number of other allegedly anticompetitive activities, including (1) unlawfully bundling the Vehix.com service with cable advertising, (2) engaging in an illegal price squeeze by "offering Prime's customers discriminatory below-cost discounts," (3) leveraging its monopoly power to subsidize the Vehix.com service, and (4) violating the "essential facilities doctrine" by precluding Prime from making direct purchases of cable advertising.[496]

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[487] *Id*. at 52, n.97.

[488] 47 U.S.C. § 572(b).

[489] Applicants' June 28, 2002 Response to Document and Information Request at 2.

[490] *Id*.

[491] Prime Reply at 2.

[492] *Id.* at 3.

[493] *Id.* According to Prime, AT&T owns 49% of Vehix.com. Letter from John F. Kamp, Wiley, Rein & Fielding, LLP, to Marlene H. Dortch, Secretary, FCC (Jul. 23, 2002) ("Prime Presentation").

[494] *Id.*

[495] *Id.*

[496] Letter from John F. Kamp, Wiley, Rein & Fielding, LLP, to Marlene H. Dortch, Secretary, FCC (Aug. 23, 2002) ("Prime Aug. 23, 2002, Ex Parte Letter"), at 3-4. Prime also submitted an economic analysis prepared by Dr.

(continued....)

170. Prime argues that, if the proposed transaction is consummated, AT&T's allegedly anticompetitive actions "will be expanded into new markets in Comcast's territory."[497] Asserting that the market here is characterized by "network effects[,] wherein a service's value increases substantially with the addition of new users," Prime argues that the merged entity will be able use its position in the cable market to achieve a dominant position in the Internet automobile advertising market, thereby "magnify[ing] those network effects."[498] Prime urges us to condition the proposed transaction by requiring AT&T to permit all independent advertising agencies to purchase cable advertising on a direct and nondiscriminatory basis, and to unbundle its Vehix.com service from its cable advertising.[499]

171. AT&T responds that Prime's allegations are the subject of pending litigation in federal court and that they should be resolved there.[500] AT&T also asserts that Prime can and has purchased cable advertising on AT&T's systems through third parties.[501] AT&T claims that "there is no relevant 'cable advertising' market" for it to dominate because cable competes with other media for advertising dollars.[502] Further, AT&T states that Internet-based automobile advertising is sufficiently competitive to preclude Vehix.com from driving out competition.[503] Finally, AT&T argues that the harms alleged by Prime are unrelated to the proposed transaction and should accordingly be dismissed.[504]

172. Even assuming Prime's alleged harms are merger-specific,[505] we decline to impose the conditions that Prime requests. Although Prime asserts that the on-line automobile advertising market is a "network industry" susceptible to "tipping,"[506] Prime admits that Vehix.com currently is not the largest

(...continued from previous page)
Michael A. Turner in which opines that AT&T has acted "anticompetitive[ly] and . . . abuse[d] its monopoly power." *See* Prime Aug. 23, 2002, Ex Parte Letter, Attachment ("Turner Analysis") at 4.

[497] Prime Aug. 23, 2002, Ex Parte Letter at 5.

[498] *Id.*

[499] *See* Prime Presentation; Prime Aug. 23, 2002, Ex Parte Letter at 7.

[500] Letter from David L. Lawson, Sidley, Austin, Brown & Wood, LLP, to Marlene H. Dortch, Secretary, FCC (Aug. 9, 2002) at 1.

[501] *Id.* at 2.

[502] *Id.*

[503] *Id.* at 2-3.

[504] *Id.* at 3.

[505] Prime's economic analysis suggests that AT&T's incentive to engage in alleged anticompetitive conduct arises from its 49% interest in Vehix.com. *See* Turner Analysis at 42. Because the merged entity presumably would have the same ownership interest in Vehix.com and therefore the same economic incentives as AT&T with respect to this service, the proposed transaction could create an incentive to spread the alleged anticompetitive conduct to new markets. Prime admits, however, that Comcast also currently bundles its cable advertising with the Vehix.com service, which is one of the allegedly anticompetitive practices that Prime claims occurs in the Boston market. *See* Prime Presentation. Accordingly, the proposed transaction may have no effect on the potential for such conduct in Comcast service areas.

[506] Tipping can occur in markets that experience network effects. In that type of market, a service provider's value to its customers is based on the number of customers it has. If a service provider has enough customers, other potential service providers may find it difficult to attract a sufficient number of customers to provide a comparable or even an attractive service. At that point, the market is said to have "tipped" in favor of the dominant provider. *See generally AOL-Time Warner Order*, 16 FCC Rcd at 6613-19 ¶¶ 153-67.

or even the second largest web-based automobile advertiser in the nation.[507] Prime also indicates that Vehix.com has become a significant national player in the on-line automobile advertising market only within the past two years.[508] Thus, we would expect that the merged entity may undertake various legitimate means, consistent with the antitrust laws, to promote the Vehix.com service. Prime does not allege that AT&T has engaged in a *per se* violation of the antitrust laws, and the record in this proceeding does not support a finding that the relevant product and geographic market is "cable advertising" or that the conduct complained of would in fact constitute an anticompetitive practice in violation of the federal antitrust laws.[509] Accordingly, we conclude that the merger is not likely to harm the public interest as alleged by Prime, and we reject Prime's proposed conditions.

V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

173. In addition to assessing the potential public interest harms of this merger, we must consider whether the merger is likely to produce public interest benefits.[510] We also consider whether those benefits are merger-specific and verifiable,[511] and we evaluate those benefits on a sliding scale: as the likelihood and magnitude of the potential harm increases, Applicants will be required to demonstrate that the claimed benefits are commensurately likely and substantial.[512]

174. Applicants claim that the proposed transaction will produce the following public interest benefits:[513]

- Accelerated deployment of facilities-based high-speed Internet service, digital video, and other broadband services, particularly to residential consumers.
- Accelerated deployment of facilities-based local telephone competition, particularly to residential consumers.
- An increased supply of local and regional programming.
- Greater competition in the markets for local, regional, and national advertising.

We examine each in turn.

A. Accelerated Deployment of Broadband Services

175. *Background*. Applicants assert that the proposed transaction will allow for the provision

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[507] *See* Prime Presentation; Turner Analysis at 43, 57. Contrary to Prime's contentions (*see* Prime Aug. 23, 2002, Ex Parte Letter at 5 n.7), this distinguishes Vehix.com from AOL's instant messaging service at issue in the *AOL-Time Warner Order*. *See* 16 FCC Rcd at 6615 ¶¶ 160.

[508] *See* Turner Analysis at 43 (indicating two year growth period of Vehix.com service); Prime Presentation (same).

[509] We expect that the pending federal court litigation between Prime and AT&T will determine whether AT&T's alleged conduct in the Boston market is unlawful.

[510] *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157; *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd at 18025, 18134-35 ¶ 94 ("*WorldCom-MCI Order*"); *AT&T-TCI Order*, 14 FCC Rcd at 3168 ¶ 13; *AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154; *AOL-Time Warner Order*, 16 FCC Rcd at 6666 ¶ 281.

[511] *See Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶¶ 157-58.

[512] *See SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 256.

[513] Application at 2-4.

of high-speed Internet access, digital video, and other advanced services to more consumers, sooner, and at increased levels of efficiency.[514] They state that such deployment will serve the public interest by offering consumers new or expanded service offerings, as well as stimulating competition and innovation for new advanced services and features.[515]

176. Applicants contend that these benefits will be achieved through an enhanced ability to finance capital expenditures as well as through efficiencies and synergies that can be realized only by merger.[516] With respect to increased financial resources, Applicants state that Comcast has a proven ability to manage an accelerated upgrade plan while maintaining its operating margins.[517] They also note that Comcast currently is generating high "free cash flow" from its operations, providing a significant non-debt source of funding for capital expenditures.[518] Applicants further state that Comcast possesses a balance sheet significantly stronger than that of AT&T. Comcast's ratio of debt to operating cash flow was less than 4 to 1 in 2001, while AT&T's debt-to-operating cash flow ratio was more than 8 to 1.[519] Applicants estimate that the combined company will have a first year combined debt-to-operating cash flow ratio of less than 5 to 1.[520]

177. Applicants also assert that the proposed transaction will produce certain efficiencies. These include operating efficiencies generated by eliminating duplicate costs and improving the operations of AT&T's cable systems. Based on past experience, Applicants claim that management could raise the price-to-cost margins on the AT&T systems to be comparable to the average for the Comcast systems.[521] Applicants also claim that the proposed transaction would enable more efficient use of infrastructure as well as more efficient provisioning, repair, and maintenance.[522] In addition, Applicants state that the proposed transaction will enable the merged entity to obtain volume discounts in the purchase of Internet backbone services used to transport Internet traffic, and to consolidate call centers and other centralized functions of these operations.[523] Overall, Applicants estimate that increased operating efficiencies would generate an additional $200 to $300 million per year in earnings before interest, taxes, depreciation, and amortization ("EBITDA") after three years.[524] Applicants also expect the merged entity to achieve lower prices on capital items of approximately $200 to $300 million per

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[514] *Id.* at 29-30. Some commenters agree that the merger will accelerate deployment of facilities-based high-speed Internet access service, digital video, and other advanced services. *See generally* PFF Comments; CapNet Comments. The Applicants also state that the merged firm will have a strong incentive to pass cost savings and other efficiencies through to consumers in the form of reduced cable prices. Applicants' Reply, Shelanski Decl. at ¶¶40-45.

[515] Application at 28-29.

[516] *Id*. at 47; Applicants' Reply at 19-20.

[517] More than 95% of Comcast's customers are served by systems with a capacity of at least 550 MHz, and over 80% are served by systems with a capacity of 750 MHz or greater. Because of these upgrades, Comcast's high-speed Internet access service is available to the vast majority of the homes passed by its systems. Application at 30.

[518] *Id.* at 31.

[519] *Id.*

[520] *Id.*

[521] Application, Pick Decl. at ¶ 26. Comcast's operating margin in year 2001 was more than 40%, in contrast to AT&T's margin of approximately 25%. *Id.*

[522] Application at 33.

[523] *Id.* at 33-34.

[524] Application at 33 n.50, Pick Decl. at ¶¶ 25-28.

year.[525]

178. Applicants also state that the merger would allow for programming cost savings resulting from volume economies in purchasing. With respect to most programming, Applicants assert that the merged entity would obtain the best rate currently received by either AT&T or Comcast.[526] Applicants anticipate that as programming contracts expire, the merged entity may be able to further reduce programming costs, because a higher volume discount would apply to the combined AT&T Comcast subscriber base.[527] In addition, they claim that the merged entity's larger subscriber base may provide leverage to resist "supra-competitive" rate increases by video programming suppliers.[528] The Applicants estimate that the merger would reduce programming expense by $250 to $450 million per year.[529]

179. In total, Applicants estimate that within five years, the merger will result in synergies and efficiencies worth approximately $1.25 to $1.95 billion per year in increased EBITDA.[530] Applicants assert that some of these savings can be used to upgrade AT&T cable systems that have not yet been upgraded.[531] According to Applicants, AT&T has experienced deployment delays due to rising capital costs and significant budget constraints related to a heavy debt load. As a result, Applicants argue that substantial additional investment is needed to complete upgrades to AT&T's systems and to deploy new services to consumers.

180. Applicants also anticipate that the merger will provide national scale that will allow the merged firm to more efficiently defray the research, development, and testing costs associated with the rollout of new services and features.[532] Such economies are particularly critical, they say, to deployment of ITV, voice-enhanced data, home networking and security, and other new untested broadband services.[533] They note that the merged firm will create a larger player whose commitment to such services is more likely to drive needed investment and research by equipment manufacturers, software developers, and others that are critical to the successful development and deployment of such services.[534] In addition, Applicants assert that the combined company will benefit from each company's complementary expertise gained from offering certain services or conducting trials of new services. As examples, Applicants cite AT&T's greater expertise in the provision of electronic commerce service, Comcast's valuable experience in customer care through its QVC operations, and Comcast's trials of a new cable-based home security service.[535]

181. Many commenters opposing or seeking conditions on the proposed transaction concede that it may produce broadband service deployment benefits, but argue that the potential harms to competition in the provision of new broadband services, or to competition in the market for the purchase

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[525] Application at 32-33, Pick Decl. at ¶¶ 22-24.

[526] Application at 32 n.51; Pick Decl. at ¶¶ 18-21.

[527] *Id.*

[528] *Id.*

[529] Application at 32 n.51.

[530] *Id.* at 31.

[531] *Id.* at 30.

[532] *Id.* at 33.

[533] *Id.*

[534] *Id.*

[535] *Id.* at 34-35.

of video programming, outweigh those benefits.[536] CFA contends that the broadband deployment benefits described by Applicants can be achieved absent the merger, noting that several small cable operators already have successfully completed upgrades.[537] In its comments, CWA asserts that the financial structure of the transaction raises questions about the merged entity's ability to deliver on promises to speed deployment of new broadband services.[538] CWA also notes that analysts downgraded AT&T's debt rating when the merger was announced, demonstrating that the merged AT&T Comcast will not have increased access to capital, but higher capital costs.[539] After submitting its comments, CWA issued a statement in support of the proposed transaction.[540]

182. *Discussion*. Based on our review of the record, we find that the proposed transaction is likely to result in synergies and efficiencies resulting in significant cost savings. The Applicants have submitted evidence to support their claim, and the comments do not seriously contest this point. The more difficult question before us is whether these synergies and efficiencies are likely to translate into accelerated deployment of broadband services and other new services to consumers. Market conditions and consumer demand are likely to have a significant influence on rate of deployment of these nascent and still-evolving services. As CFA indicates, moreover, broadband deployment is occurring on an industry-wide basis.[541] These factors add to the difficulty of determining whether the proposed transaction will further accelerate that trend. Nevertheless, after examining the record, we conclude that the proposed transaction is likely to have a positive impact on deployment of broadband services.

183. We agree with Applicants that the merged entity is likely to accelerate the deployment of broadband services in AT&T service areas. Although most cable providers are deploying broadband, AT&T has experienced particular difficulty in meeting its deployment plans even though it has "expended significant resources to upgrade" its cable network.[542] Despite the economies that AT&T could have achieved as the nation's largest MSO, as of December 31, 2001, AT&T had upgraded only 59% of its cable plant to 750 MHz capability.[543] In contrast, Comcast, AOL Time Warner, Cablevision, Cox, Charter, and Insight have upgraded at least 70% and as much as 94% of their cable plants to 750 MHz.[544] As the Applicants admit, moreover, Comcast has been able to upgrade its plant more quickly than AT&T while maintaining operating margins and a debt-to-cash flow ratio that is superior to AT&T's.[545] Thus, Comcast appears to have a greater "ability to manage an accelerated program for upgrading its plant while maintaining its operating margins."[546] We believe that applying this expertise to the AT&T cable systems

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[536] BellSouth Comments at 10-11; CFA Comments at 20; RCN Comments at 6; Qwest Comments, Haring Decl. at 8, 19; SBC Comments at 26, Gertner Decl. at ¶ 26.

[537] CFA Comments at 22.

[538] *Id.* at 17-19.

[539] *Id.* at 19.

[540] On June 14, 2002, CWA announced that it supports the proposed transaction because it would expand access to high-speed Internet services, lead to the creation of quality jobs, and improve labor relations. *See* CWA, *CWA Backs AT&T Broadband-Comcast Merger* (press release), Jun. 13, 2002.

[541] CFA Comments at 22.

[542] *See* Application at 30.

[543] *Id.* at 18.

[544] The approximate figures for each MSO are: Comcast (80%), AOL Time Warner (92%), Cablevision (84%), Cox (81%), Charter (70.7%), and Insight (94%). See Application at 10 for the Comcast figures; other figures are based on each company's Form 10-K (*i.e.*, an annual report or, in the case of AOL Time Warner, a transition report) filed with the Securities and Exchange Commission.

[545] Application at 31; Application, Pick Decl. ¶ 26.

[546] Application at 30-31.

is likely to have a positive impact on the deployment of broadband to AT&T subscribers that currently do not have access to those services.

184. We also agree with the Applicants that the greater scale and scope of the merged entity is likely to spur new investment. The development and deployment of new technologies often entails a significant up-front, fixed investment. The merged company should have a greater ability to spread those fixed costs across a larger customer base, which should in turn foster incentives for investment by the merged entity, as well as other businesses that seek to sell equipment, technology, and services to the merged entity. Finally, to the extent Comcast and AT&T each have particular expertise in electronic commerce and customer care that they can bring to the merged entity, that also should contribute positively to consumer experience.[547]

185. We find nothing in the record that detracts from these positive benefits. CWA's claims concerning the merged entity's debt ratio were based on an erroneous assumption that AT&T Corp. contributed capital to AT&T Broadband. In fact, contributions from AT&T Broadband are in the form of debt that must be repaid.[548] Although CFA argues that larger and more regionally concentrated cable companies charge higher prices, CFA does not provide sufficient evidence to support its argument that size or clustering cause higher prices. Accordingly, on this record, we reject CFA's argument.

B. Accelerated Deployment of Cable Telephony

186. *Background*. Applicants assert that the proposed transaction will "further accelerate the deployment of facilities-based local telephone competition, creating substantial public interest benefits."[549] They assert that AT&T Comcast will have a "stronger financial footing"[550] and within five years, it will "generate an additional $600 to $800 million in EBITDA annually by providing cable telephony to Comcast's former service areas."[551] Applicants also assert that the Comcast systems will benefit from AT&T's "technical and operational expertise in launching and providing cable telephony" and from access to AT&T's "back office systems," such as order processing, customer care, billing, and market research.[552]

187. Several commenters dispute Applicants' argument that the proposed transaction would promote the deployment of cable telephony.[553] Qwest and SBC argue that AT&T has not "delivered" on

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[547] The Applicants state that they have complementary expertise in certain areas, which they can share to improve existing services and deploy new services. As examples, they cite AT&T's greater expertise in the provision of electronic commerce service, Comcast's valuable experience in customer care through its QVC operations, and Comcast's trials of a new cable-based home security service. Application at 34-35.

[548] The Applicants respond that AT&T Corp. does not contribute capital to AT&T Broadband, and that any AT&T Corp. contributions to AT&T Broadband are loans like any other debt. Applicants' Reply at 21. In response to CWA's allegations that the merged entity would be less able to secure debt, the Applicants state that AT&T Comcast recently secured $12.8 billion in credit agreements in order to finance the merger and post-merger capital expenditures. *Id.* at 21-22.

[549] Application at 36.

[550] *Id.* at 38.

[551] Application, Pick Decl. ¶ 12; *see also* Application at 38.

[552] Application at 40-42.

[553] CWA Comments at 3; CFA Comments at 20-21; *see also* CFA Reply to Opposition at 18-19. In contrast, CapNet supports Applicants' arguments that the proposed transaction will promote deployment of cable telephony. CapNet Comments at 3-4.

its "promise[]" to deploy cable telephony after it acquired the TCI and MediaOne cable systems,[554] and that, at current deployment rates, AT&T Comcast is unlikely to offer cable telephony to all of the homes passed by the merged entity's cable systems for at least several years.[555] They also contend that the proposed transaction will reduce the incentive to deploy cable telephony because it will separate AT&T's long distance business from its cable assets[556] and because Comcast historically has been skeptical about investing in cable telephony.[557] Qwest argues that Applicants' statements about deployment are "conditional" on business factors and economic trends and therefore should be discounted.[558] SBC argues that the proposed benefit is not merger-specific because a limited joint venture would suffice to permit AT&T to "serve the customers in question."[559] SBC also argues that Applicants' assertions about planned cable telephony investment in Philadelphia and Detroit are "limited" because AT&T currently has switching infrastructure in those cities.[560]

188. Applicants respond that AT&T has successfully deployed cable telephony in many markets, substantially meeting the projections it submitted in connection with its acquisition of TCI.[561] Applicants' assert that Comcast "has devoted significant resources to develop cable-delivered IP telephony."[562] Although Comcast has "acknowledged that [it] has been slow to deploy cable telephony," Applicants assert that the merged company will be able to "take advantage" of AT&T's investment to provide greater telephony competition to residential consumers.[563] Applicants argue that the merged entity will have an economic incentive to deploy cable telephony to recover the costs of the merger and to compete with DBS service.[564] Applicants also note that AT&T has "cable telephony expertise and infrastructure" and that the viability of cable telephony does not depend on AT&T's long distance business.[565] Finally, Applicants assert that the claimed benefits cannot be achieved by a joint venture because of complex technical problems that would be difficult to resolve through contracts and the "rapid pace of technological evolution and convergence."[566]

189. *Discussion*. Although no party disputes that accelerated deployment of cable telephony

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[554] Qwest Comments at 21; *see also* SBC Comments at 27 n.72.

[555] Qwest Comments at 26.

[556] If the proposed transaction is consummated, AT&T Comcast would hold the AT&T Broadband cable assets, while AT&T's long distance business would remain with AT&T Corp. *See generally* AT&T Corp., *AT&T to Create Family of Four New Companies; Company to Offer to Exchange AT&T Common Stock for AT&T Wireless Stock* (press release), Oct. 25, 2000.

[557] Qwest Comments at 21, 23, 26-27; SBC Comments at 28.

[558] Qwest Comments at 28.

[559] SBC Comments at 30.

[560] *Id.* at 29. SBC also asserts that the Commission should prohibit AT&T Comcast, and those entities with which it has a joint marketing arrangement, from "rel[ying] on the UNE-P in any areas where it has cable facilities." *Id.* at 42-43. "UNE-P" refers to an "unbundled network element platform" consisting of the combination of loop, switching, and transport network elements provided by incumbent LECs to competitive LECs. *See Presubscribed Interexchange Carrier Charges*, 17 FCC Rcd 5568, 5577 ¶ 20 n.52 (2002).

[561] Applicants' Reply at 9-11 & n.15.

[562] *Id.* at 12.

[563] *Id.* at 12-13.

[564] *Id.* at 14-15.

[565] *Id.* at 16.

[566] *Id.* at 17-20.

services is a public interest benefit,[567] several commenters question whether the proposed transaction would produce that benefit. In weighing the competing arguments, we recognize the inherent difficulty in making judgments about the future deployment of new technologies.[568] It is therefore important that we be convinced that the projected benefit is reasonably certain to be realized as we make our public interest evaluation.[569] Here, IP telephony, which the record indicates is the technology on which the merged entity will focus for new telephony deployments in Comcast service areas, contains too many uncertainties for us to make that determination.

190. We agree with Applicants' premise: with AT&T's cable telephony resources, the merged company is likely to be more adept at deploying cable telephony in Comcast service areas than Comcast would be if it were to develop the expertise and the back office systems by itself. Developing the expertise and systems needed to offer a commercial cable telephony service involves a significant commitment of resources.[570] Engineers and technicians who understand the technical steps that need to be made to offer reliable telephony services must be hired and trained. Systems must be developed to ensure proper call management and adequate quality of service, and interconnection agreements must be negotiated with incumbent LECs. New billing, marketing, and customer care systems must be developed and implemented. In addition, attention must be given to ensure compliance with federal, state, and local regulatory requirements, if any, that may apply to IP telephony. As the nation's largest cable telephony provider, AT&T has developed the expertise and the systems necessary to deploy and market cable telephony on a wide scale.[571] We have recognized in prior decisions that expertise and developed systems can provide certain advantages with respect to market entry,[572] and we see no reason on this record to conclude otherwise.[573]

191. Here, however, the record indicates that the speed with which the merged entity will deploy cable telephony in Comcast service areas depends primarily on the successful development of commercially feasible primary-line[574] cable VoIP technology.[575] Although Comcast currently operates

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[567] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9892 ¶ 178; *AT&T-TCI Order*, 14 FCC Rcd at 3228 ¶ 147.

[568] *See Policies and Rules for the Direct Broadcast Satellite Service*, 17 FCC Rcd 11331, 11365 ¶ 67 (2002).

[569] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063-64 ¶ 158; *see also SBC-Ameritech Order*, 14 FCC Rcd at 14825 ¶ 255.

[570] *See*, *e.g.*, Richard Bilotti, Benjamin Swinburne, and Megan Lynch, *IP Telephony: Leveraging the Cable Network to Profitability in Voice*, Morgan Stanley Dean Witter, Feb. 14, 2001, at 18 ("*Profitability in Voice*").

[571] *See* Letter from David L. Lawson, Sidley, Austin, Brown & Wood, LLP, to Marlene H. Dortch, Secretary, FCC (Jun. 7, 2002) at 1-2 ("AT&T June 7, 2002, Ex Parte").

[572] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9886-89 ¶¶ 161-69; *AT&T-TCI Order*, 14 FCC Rcd at 3229-31 ¶¶ 147-48.

[573] We disagree with CFA that recognizing these advantages here is inconsistent with the Commission's prior decisions approving certain mergers between Regional Bell Operating Companies ("RBOCs"). *See* CFA Comments at 20-21. Consistent with our reasoning today, the Commission in the RBOC orders recognized that the RBOCs had expertise in providing local telephony. There, that expertise resulted in a potential *harm* because the Commission found that they helped make the merging RBOCs significant potential competitors in each other's incumbent regions. *See*, *e.g.*, *SBC-Ameritech Order*, 14 FCC Rcd at 14752-53 ¶¶ 84-85; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20040-41 ¶ 107.

[574] As used here, the term "primary-line" refers to services that provide customers the features, functions, and service quality customarily associated with plain old telephone service ("POTS"). The term thus excludes so-called "secondary-line" services, such as those that that do not guarantee the ability to make and receive calls using back-up power during a general power failure or blackout. *See* D.R. Evans, Digital Telephony over Cable: The PacketCable Network 506-507 (2001) ("*Digital Telephony over Cable*").

circuit-switched cable telephony systems that it acquired in connection with certain cable system acquisitions,[576] it generally has chosen to await further development of VoIP technology before investing in wide scale deployment of cable telephony.[577] We see little evidence that the merged entity would adopt a different philosophy concerning cable telephony deployment in Comcast service areas.[578] According to Applicants, the merged company "intends to begin to deploy telephony service" to about one million homes in the Philadelphia and Detroit markets.[579] In both markets, IP technology will be deployed.[580]

192. Were primary-line cable VoIP a proven technology, we could be more confident that AT&T's expertise and existing systems would spur the merged entity's investment of cable telephony in Comcast service areas. Cable VoIP, however, is still nascent; although the concept has existed for several years, no cable operator in the United States has yet deployed the technology on a wide-scale commercial basis.[581] This creates a high level of uncertainty surrounding the pace of cable telephony deployment that "makes the claimed benefits speculative at best and, therefore, difficult to evaluate."[582] Applicants appear to realize that the future of cable VoIP deployment remains uncertain; their deployment of cable telephony in Detroit and Philadelphia is subject to the "operational performance [and] financial performance of cable telephony service in the marketplace."[583]

193. Applicants contend, nevertheless, that several technical and operational advances have occurred that eliminate technological and operational impediments to primary-line cable VoIP deployment. The "most critical" of these developments, they assert, is the development of Data Over Cable System Interface Specification 1.1 ("DOCSIS 1.1").[584] Among other things, DOCSIS 1.1 provides

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(...continued from previous page)

[575] Cable VoIP technology refers to an IP-based system in which the telephony signal generated by the caller is converted into many "packets" of information, which are then transmitted over shared capacity through the cable network to the headend. *See Profitability in Voice* at 23. This differs from "traditional" circuit-switched telephony, in which a unique transmission path, or circuit, is dedicated to each call. *Id.* at 22.

[576] *See* Application, Pick Decl. ¶ 10.

[577] *See Eighth Video Competition Report*, 17 FCC Rcd at 1248 ¶ 10.

[578] If the proposed transaction is consummated, Comcast's President, Brian L. Roberts, will become Chief Executive Officer and President of AT&T Comcast, and would select the other members of senior management in consultation with C. Michael Armstrong, current Chairman of the Board and Chief Executive Officer of AT&T and designated Chairman of the Board of AT&T Comcast. AT&T Comcast Corporation, Amendment No. 3 to Form S-4, Registration Statement under the Securities Act of 1933, filed with the Securities and Exchange Commission on May 14, 2002, at I-13. Mr. Roberts cannot be removed from his position until 2010 unless 75% of the board of AT&T Comcast agrees. *Id.* at I-33.

[579] Application at 38.

[580] In Detroit, Comcast is implementing a hybrid IP-circuit switched approach. In this approach, IP technology is used in the connection between the customer's home and the headend, after which the signal is converted and processed through Comcast's existing switch. *See* Letter from James L. Casserly, Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C., to Marlene H. Dortch, Secretary, FCC (Aug. 20, 2002).

[581] *See Eighth Video Competition Report*, 17 FCC Rcd at 1248 ¶ 10.

[582] *Application of GTE Corporation, Transferor, and Bell Atlantic Corporation, Transferee, for Consent to Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application to Transfer Control of a Submarine Cable Landing License*, 15 FCC Rcd 14032, 14132 ¶ 214 (2000); *see also SBC-Ameritech Order*, 14 FCC Rcd at 14843 ¶ 306.

[583] Applicants' July 2, 2002 Response at 45; *see also* Application, Pick Decl. ¶ 8.

[584] Applicants' July 2, 2002 Response at 48.

quality of service and call security specifications that are intended to make cable VoIP calls parallel the quality, reliability, and privacy of a traditional POTS call.[585] According to Applicants, media terminal adapters ("MTAs")[586] and "carrier class" cable modem termination servers ("CMTSs")[587] (*i.e.*, CMTSs that can maintain a call even if one of its components fails) that are CableLabs Certified as DOCSIS 1.1-compliant are only recently "beginning to become available."[588] Applicants further argue that cable VoIP has been delayed because "no IP phone solution has to date been fully compliant with PacketCable specifications."[589] According to Applicants, now "there are a number of solutions that appear to be very close to being PacketCable compliant."[590] In addition, although "the technological impediments to IP phone service have nearly been overcome," Applicants assert that "various technical issues will arise and need to be addressed as the system is increased in scale" to serve a large number of users.[591] At an operational level, cable VoIP requires, according to Applicants, an automated provision process, which they assert "is only now being developed."[592]

194. Although we recognize that much progress has been made toward developing a commercially viable cable VoIP service, we cannot ignore the significant uncertainty that remains. Applicants admit that "various technical issues will arise" as the technology is deployed on a wide scale.[593] They also recognized that no VoIP phone solutions are yet PacketCable compliant,[594] and software to manage automatic provision "is only now being developed."[595] AT&T, moreover, has "no firm plans for the deployment of IP cable phone service," even though it "has planned to use IP phone service in new deployments when the necessary equipment, systems, and processes become commercially available and economically viable."[596] Given the current state of the technology and its deployment, we cannot be certain of what technical, operational, or cost issues will arise as cable VoIP advances toward full-scale commercial operation. If any of these issues causes a significant delay in commercial deployment, it would considerably attenuate any benefit that the proposed transaction could otherwise have achieved.

195. Moreover, the proposed transaction would eliminate an incentive that AT&T currently

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[585] *See id.*; CableLabs, *CableModem FAQ*, http://www.cablemodem.com/faq/#FAQ17 (visited Aug. 2, 2002); Rouzbeh Yassini, *DOCSIS Overview for DOCSIS Community Q3 2001*, at 12, at http://www.cablemodem.com/downloads/010719website.ppt (visited Aug. 2, 2002).

[586] An MTA enables communication between the cable modem and standard analog telephones and other customer premises equipment by converting signals from one into a form that the other can understand. *See Digital Telephony over Cable* at 16-17.

[587] A CMTS is located at the headend and manages the IP traffic over the cable plant. *Id.* at 17; *see also Profitability in Voice* at 13. The CMTS can manage both voice and data traffic, which can result in a significant cost savings for cable operators that provide both services. *See id.* at 16.

[588] Applicants' July 2, 2002 Response at 48.

[589] *Id.* at 50. PacketCable is a platform designed to work "on top of" DOCSIS 1.1 to "deliver advanced real-time multimedia services [such as VoIP] over two-way cable plant." Cable Labs, *Project Primer: PacketCable*, at 1, at http://www.packetcable.com/downloads/PacketCable.pdf (visited Aug. 8, 2002).

[590] Applicants' July 2, 2002 Response at 50.

[591] *Id.*

[592] *Id.*

[593] *Id.* at 50.

[594] *Id.* (stating that a number of solutions are "very close to being PacketCable compliant").

[595] *Id.*

[596] *Id.* at 42.

has to deploy cable telephony: to develop an alternative telecommunications network that can compete against the incumbent LECs' network,[597] particularly as RBOCs obtain authority under section 271 of the Communications Act to provide in-region long distance services.[598] Since acquiring TCI and MediaOne, AT&T has pursued a relatively aggressive cable telephony deployment strategy, electing to deploy circuit-switched technology to build market share rather than awaiting the further development of cable VoIP as many other MSOs have done.[599] Since AT&T Comcast will be predominantly a cable company and not a telecommunications company, it will not have the same incentive to protect its core business by deploying cable telephony.[600]

196. Applicants maintain that the merged entity will have several other incentives to deploy cable telephony. They contend that it will need to deploy cable telephony to recoup the cost of the proposed transaction.[601] We cannot agree. Accelerated deployment of cable telephony does not appear to have been a significant factor in Comcast's initial decision to seek a merger with AT&T Broadband.[602] Nor can we conclude that the success or failure of the proposed transaction hinges on the successful deployment of new cable telephony services. To the contrary, analyst reports indicate that the "company believes additional telephony spending is not a priority in the near-term and the company will be focused on improving the AT&T Broadband video business, as a major focus."[603] Applicants' own estimate of $600-800 million in annual EBITDA from new cable telephony deployment would not be realized until five years after the merger closes,[604] while the transaction's other "synergies and efficiencies" would be realized immediately or generally within three years.[605] We therefore discount the significance of Applicants' projected revenue from new cable telephony deployment to account for the different time frames involved.

197. Applicants also claim that the merged entity has an incentive to deploy cable telephony in Comcast service areas to "continue to grow and meet investor expectations," and to compete more

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[597] *See* AT&T Corp., *AT&T and TCI Complete Merger* (press release), Mar. 9, 1999 (noting that the company would "offer any-distance, wire-line communications services").

[598] *See* 47 U.S.C. § 271.

[599] *See*, *e.g.*, Jeff Halpern *et al.*, *Circuit-Switched Cable Telephony: Why It Makes Sense for AT&T*, Bernstein Research (Apr. 6, 2001).

[600] *See* Qwest Comments at 21, 23, 26-27; SBC Comments at 28.

[601] Applicants' Reply at 14 (citing *AT&T-MediaOne Order*, 15 FCC Rcd at 9892 ¶ 178 and *AT&T-TCI Order*, 14 FCC Rcd at 3230-31 ¶ 148).

[602] Comcast acknowledges that its current plans to deploy cable telephony resulted from its discussions with AT&T in negotiating the proposed transaction. *See* Application at 38-39 n.69; Application, Pick Decl. ¶ 12; *see also* Applicants' Reply at 12; Comcast, *Comcast President Brian L. Roberts Testifies about Benefits of Comcast-AT&T Broadband Merger Before U.S. Senate Subcommittee* (press release), Apr. 23, 2002.

[603] Aryeh B. Bourkoff, UBS Warburg, High Yield Cable & Telecommunications (Sept. 20, 2002), at 2.

[604] Application, Pick Decl. ¶ 12.

[605] *Id.* ¶ 17 (estimating annual EBITDA from development of new products of $100 million to $200 million within three years); *id.* ¶¶ 19-21 (estimating annual savings from programming cost reductions of $250 million to $450 million achieved immediately and as programming contracts are renewed); *id.* ¶ 24 (estimating annual savings from reductions in capital expenditures of $200 million to $300 million achieved "over the next four years"); *id.* ¶ 28 (estimating annual EBITDA impact from increased operating efficiencies of $200 million to $300 million after one to three years); *id.* ¶ 31 (estimating annual EBITDA increase from sale of national advertising of $100 million to $200 million after one to three years). Except potentially for the development of new products, none of these projected savings or new revenue streams requires a significant commitment of new capital expenditures and the consequent risk of loss of that sunk investment.

effectively against DBS service.[606] These incentives may well exist, but they are neither created nor enhanced by the proposed transaction.[607] Even if AT&T Broadband and Comcast were not to merge, each would still have an incentive to grow, to meet investor expectations, and to respond to any competitive threats they perceive. Significantly, only a few cable MSOs have commercially deployed cable telephony despite these incentives.

198. Finally, Applicants' suggest that the proposed transaction would accelerate deployment of cable telephony in AT&T service areas because the merged entity will have a greater ability to upgrade AT&T's cable systems, which is a necessary prerequisite to providing cable telephony service.[608] In the previous section, we find that AT&T's cable systems are likely to be upgraded more quickly as a result of the proposed transaction.[609] Whether that would accelerate the post-upgrade deployment of cable telephony is unclear. The commercial feasibility of cable VoIP when the upgrade is complete, the proximity of a newly upgraded cable system to another cable system that is telephony-ready, and the merged entity's priorities for deploying new services, among other things, are likely to influence telephony deployment schedules.

199. We conclude that acceleration of cable telephony deployment is a public interest benefit. Although the transaction creates the potential to produce that benefit, we find that this potential is likely to be realized only if cable VoIP technology is proven to be commercially feasible in a timely manner. The technology, however, is too novel for us to make that determination with confidence. Accordingly, we give minimal weight to Applicants' argument that the proposed transaction will accelerate the deployment of cable telephony.[610]

C. Increase in Supply of Local and Regional Programming

200. Applicants state that the merger will stimulate the production and delivery of local and regional programming, and extend to customers currently served by AT&T "the kinds of community-oriented coverage that Comcast already provides today to many of its customers."[611] Applicants cite Comcast's success in developing and distributing "cn8, The Comcast Network," which provides locally-focused call-in programs, regional sports coverage, including high school football games, and family entertainment. Applicants state that "cn8 is one of the nation's largest regional cable networks, serving 3.9 million homes in Pennsylvania, New Jersey, Delaware and Maryland."[612] cn8 provides 24-hour programming, including "cn8 News," offering two hours of nightly news and discussions of regional issues.[613]

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[606] Applicants' Reply at 14-15.

[607] Although announcement of the proposed transaction could have affected "investor expectations" regarding the merged entity's earnings, including earnings from cable telephony, we believe this is unlikely for substantially the same reasons specified in the previous paragraph.

[608] *See* Application at 38; *see also* AT&T June 7, 2002, Ex Parte at 2.

[609] *See* Section V.A., *supra.*

[610] We reject SBC's proposal to "encourage" cable telephony deployment by prohibiting the merged entity from obtaining UNE-P in areas where it has cable facilities. *See* SBC Comments at 42-43; *supra* note 560. As suggested elsewhere in this order, proposals of this sort are more appropriately raised in the context of a rulemaking proceeding.

[611] Application at 42.

[612] *Id*. at 43.

[613] *Id.*

201. Applicants also cite Comcast's production and delivery in the Washington, D.C. area of "Comcast Local Edition," a five-minute program delivered every half hour (at :25 and :55) which "includes interviews with local government officials, discussions of local and regional issues, and promotion of charitable endeavors."[614] These short programs, entitled "Comcast Newsmakers" on Comcast systems in Pennsylvania, New Jersey, Maryland, Delaware, Michigan, and Connecticut, appear on the Comcast channel carrying CNN Headline News. Applicants state that these programs can be "highly localized," showing an interview with a local official in Washington, D.C. to the D.C. audience, while the audience in neighboring Arlington, Virginia will see an interview with one of their local officials.[615]

202. Applicants state that the merger will make it possible to expand the areas in which Comcast's local and regional programming will be made available.[616] Applicants further state that, based on Comcast's experience, advertising revenue will increase to reflect the greater number of viewers, justifying additional investment.[617] Applicants also state that because these successful programs are designed as part of Comcast's "branding strategy," they cannot feasibly be deployed in areas where Comcast does not provide cable service.[618]

203. *Discussion.* The production and delivery of new sources of local and regional programming is a public interest benefit. The record indicates that Comcast has been particularly successful at bringing this programming to its subscribers and that the merged entity will likely extend this practice to AT&T service areas. We cannot find, however, that the proposed transaction is necessary to bring these benefits to subscribers of AT&T's cable systems. Because this programming can be "highly localized,"[619] we are not persuaded that the proposed transaction would generate efficiencies in program production that potentially could spur increased investment in local and regional programming. For example, Applicants have not claimed that any additional clustering created by the merger would facilitate or be a prerequisite to the development of new local or regional programming. Nor have Applicants shown that developing the type of regional and local programming that Comcast has developed requires such specialized expertise that AT&T could not easily duplicate these benefits absent the proposed transaction.[620] Accordingly, we conclude that Applicants have not demonstrated that an increase in the supply of local and regional programming is a benefit that is specific to the proposed transaction.

D. Ability to Compete in the Local, Regional, and National Advertising Market

204. Applicants state that the merger would create the first cable company with the geographic reach to sell advertising on a national scale. The merged firm would have a presence in 8 of the 10 largest Designated Market Areas ("DMAs") and would pass 38 million homes nationwide.[621] Applicants project that this would allow the merged entity to compete more effectively against broadcast television, DBS,

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[614] *Id.* at 43-44.

[615] *Id.* at 44.

[616] *Id.*

[617] *Id.* at 44-45

[618] *Id.* at 45

[619] *Id.* at 44.

[620] At most, the record indicates that Comcast merely has made a different business judgment than AT&T about the value of developing local and regional programming.

[621] Application at 45, Pick Decl. at ¶ 29.

and cable networks in the national advertising market.[622] Applicants state that Comcast's excess capacity to sell advertising time will facilitate this new business opportunity.[623] Advertisers paid the broadcasting industry $15 billion for national advertising in 2001,[624] and Applicants calculate that capturing 1% to 2% of this market would generate $100 to $200 million per year in EBITDA within one to three years.[625] Applicants also state that through their national footprint, advertisers' could reduce the transaction costs of negotiating with many cable systems, and thereby have a more efficient advertising outlet. Applicants contend that by providing a new, more efficient national advertising outlet, their merger will enhance competition in this market and provide a public interest benefit.

205. Some commenters, however, suggest that Applicants' entry into the national advertising market would harm programming networks and advertising agencies, particularly since the merged firm will have a significant market presence in 8 of the top 10 DMAs.[626] Qwest argues that the location and concentration of the merged firm's cable customers, with 70% of its subscribers in the top 20 DMAs, will allow it to significantly impair a programming network's ability to advertise nationally. Because a significant portion of each network's revenues comes from advertising sales, Qwest argues that the quantity and quality of network programming will be reduced.[627]

206. *Discussion*. Typically, advertising revenue for cable systems is a function of carriage contracts with programming networks. Cable systems negotiate with cable networks for time slots to sell local advertising, and they typically receive a share of national advertising revenue from programming networks. By greater scale of operation, Applicants could conceivably negotiate more favorable contracts with programming networks, permitting them to sell national advertising directly and potentially increasing advertising revenue per subscriber that the merged entity would receive. Nevertheless, we find no evidence beyond bare assertions that the relevant product market is television advertising, the market that Applicants seem to use. Nor do Applicants show how the merged entity's market presence will improve its share of any relevant advertising market. Applicants also make no attempt to calculate the extent of the claimed benefit in those markets, and they do not explain how the merged entity's alleged improved position in national, regional, or local advertising markets would benefit the public. Based on the thinness of this record, we decline to give this claimed benefit significant weight.

VI. QUALIFICATIONS AND CHARACTER ISSUES

207. Section 310(d) of the Communications Act provides that no station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the "public interest, convenience and necessity will be served thereby."[628] Among the factors that the Commission considers as part of its public interest inquiry is whether the applicant for a license has the requisite "citizenship, character, financial, technical, and other qualifications."[629] The Commission has previously determined that, in deciding character issues, it will consider certain forms of adjudicated,

[622] Application, Pick Decl. at ¶ 30.

[623] *Id*. at ¶ 31.

[624] *Id*. at ¶ 31.

[625] Application at 46-47, Pick Decl. at ¶ 31.

[626] Qwest at 11; Prime Communications Presentation.

[627] Qwest at 11.

[628] 47 U.S.C. § 310(d).

[629] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Southern New England Telecommunications Corporation, Transferor, to SBC Communications, Inc.; Transferee,* 13 FCC Rcd 21292, 21305 ¶ 26 (1998) ("*SBC-SNET Order*").

non-FCC-related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition.[630] With respect to FCC related conduct, the Commission has stated that it would treat any violation of any provision of the Act, or of the Commission's rules or polices, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications.[631] The Commission has used its character policy in the broadcast area as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings.[632]

208. CWA comments that AT&T has a record of non-compliance regarding its local franchise obligations, in particular, its adherence to locally-imposed customer service standards.[633] The Sacramento Metropolitan Cable TV Commission ("SMCTC") has also expressed concern about AT&T's failure to honor its local customer service commitments.[634] SMCTC has cited several consumer complaints documenting, among other things, poor telephone response time at AT&T's customer service center and incorrect billing on customer statements.[635]

209. Aside from customer service issues, other parties question whether Applicants are fit to hold a government license. For example, the Borough of Blawnox, Pennsylvania ("Blawnox"), alleges that AT&T, with the complicity of Comcast, filed an intentionally false ownership document with the Commission regarding the identity of the cable operator. Blawnox states that AT&T filed such document in order to conceal Comcast's ownership of the cable system in Blawnox Borough and argues that filing a false document with the government is evidence that AT&T and Comcast are not qualified to hold licenses issued by the Commission.[636] In addition, a citizen's coalition from Marietta, Georgia ("Marietta Coalition"), asserts that AT&T filed unsubstantiated criminal reports resulting in the arrest of several low-income minority citizens of Marietta, Georgia for cable theft.[637] Because AT&T failed to investigate whether the affected parties were lawfully receiving cable before filing such reports, and because AT&T

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[630] *See Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20092-93 (1998).

[631] *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179, 1209-10 (1986), modified, 5 FCC Rcd 3252 (1990), recon. granted in part, 6 FCC Rcd 3448 (1991), modified in part, 7 FCC Rcd 6564 (1992) (hereinafter, "*Character Policy Statement*"). Allegations that an applicant has engaged in unreasonable or anticompetitive conduct are relevant to the public interest analysis. *SBC-SNET Order,* 13 FCC Rcd at 21306-07 ¶¶ 29-30.

[632] *See, e.g.*, *EchoStar-DirecTV Order*, FCC 02-284 at ¶ 28; *SBC-SNET Order,* 13 FCC Rcd at 21305 ¶ 26.

[633] CWA comments at 3, 21-22. The New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate") believes that Applicants will consolidate customer care and provisioning, maintenance, and repair centers once the merger is complete. It argues that this development will result in a "serious decline in service quality." Ratepayer Advocate states that decreased efficiency at the call centers due to employee unfamiliarity with the local cable territory, as well as increased difficulty of the local franchising authorities to monitor and enforce cable companies' compliance with customer service performance standards, can reasonably be foreseen. Ratepayer Advocate Reply Comments at 4 (*citing* CWA comments at 21-22).

[634] *See* Letter from Rich Esposto, Executive Director, Sacramento Metropolitan Cable Television Commission (filed Apr. 29, 2002).

[635] Sacramento Community Cable Program Providers ("SCCPP") has urged the SMCTC to condition its approval of the AT&T-Comcast merger on compliance with certain terms agreed to by AT&T when it acquired local systems. SCCPP is concerned that the merged entity does not intend to satisfy the public, educational and governmental ("PEG") access terms or other conditions agreed to by AT&T when it acquired the systems two years earlier. *See* Letter from Ron Cooper, Executive Director, Access Sacramento, to Robbie Waters, Chair, Sacramento Metropolitan Cable Television Commission (filed Apr. 29, 2002).

[636] Blawnox Comments at 5.

[637] Marietta Coalition Comments, *passim.*

allegedly targeted these consumers based on their race and income, Marietta Coalition argues that AT&T does not meet the Commission's character qualifications. Also, James J. Clancy ("Clancy") urges us to deny the Application on grounds that AT&T has, over a 23-month period from October 20, 2000, through October 2, 2002, repeatedly distributed obscene material and subliminal messages over its cable system serving La Tuna Canyon, California.[638]

210. Additionally, Minority TV, licensee of KMPT(TV), Channel 32, San Francisco, California, a noncommercial public television station, urges us to deny the Application on grounds that AT&T has improperly refused to carry its broadcast signal on certain cable systems. Minority TV claims that AT&T is acting in a discriminatory manner, and in violation of the Commission's must carry rules, for refusing to carry the station's foreign language programming.[639]

211. Applicants assert that many of the commenters' criticisms are groundless and beyond the scope of the Commission's merger analysis. With regard to the issue of customer service and compliance with franchising requirements, Applicants assert that local disputes are not generated or affected by a merger at the national level.[640] Moreover, Applicants assert that AT&T is committed to providing customers with quality customer care and has committed resources to better address customer complaints.[641] Applicants argue that allegations of malicious prosecution should have no bearing upon the merger proceeding.[642] Since Marietta Coalition cannot substantiate the claim, Applicants argue that it cannot form any legitimate basis for the Commission to deny the merger based on character qualification.[643] Applicants also assert that Blawnox's filing is baseless and is simply an effort to gain leverage in a litigation matter pending in a federal district court.[644] With respect to the Minority TV complaint, Applicants argue that the station is attempting to re-litigate a broadcast signal carriage dispute in this merger proceeding, this time under the "guise of a lack of commitment to program diversity."[645] Applicants state that AT&T carries KMPT on every cable system where KMPT meets its statutory obligation to deliver a good quality signal. In cases where the station does not provide a good quality signal, AT&T asserts that it has acted fully within its rights to decline carriage.

212. *Discussion.* The parties raising issues of character and legal non-compliance have failed to convince us that we should deny the merger based on the allegations. As for Marietta Coalition and Blawnox's claims, the record evidence does not persuade us that Applicants have actually violated any Federal, state, or local law. Specifically, the parties do not raise material questions of fact regarding whether AT&T, or Comcast for that matter, has engaged in any conduct unbecoming a Commission licensee. Further, it appears that the complaining parties appropriately have resorted to other fora to resolve their disputes with Applicants. The arguments presented, therefore, do not form any legitimate basis for the Commission to deny the merger based on character qualification.[646] With respect to the

[638] *See* Ex Parte Petition of James J. Clancy to Deny Applications and Revoke Licenses (filed Nov. 3, 2002).

[639] *See* Minority TV Comments, *passim.*

[640] *See* Applicants' Reply at 120.

[641] *Id.* at 124.

[642] *Id.* at 130. Applicants note that there are ongoing legal proceedings in the state of Georgia regarding the claims raised by Marietta Coalition.

[643] *Id.* at 131.

[644] *Id*. at 131, n.409.

[645] Applicants' Reply at 122.

[646] The Commission's Character Qualification Policy Statement prohibits licensing decisions "based on mere allegations of . . . . non-FCC misconduct." *See Character Qualifications in Broadcast Licensing,* 5 FCC Rcd 3252, 3252 ¶ 7 (1990) (citing *Character Policy Statement*, 102 FCC 2d at 1204-05 (1986)).

charges of CWA and SMCTC, there is no precedent to support the claim that customer service violations are to be considered in the character qualification analysis.[647]

213. We deny Clancy's late-filed[648] petition to deny the Application. Clancy does not offer any evidence that a court has adjudged that any programming distributed by AT&T is or was obscene, nor any other evidence to support his allegations.[649] To the extent that the petition describes programming that might be considered indecent, we note that the services provided by AT&T are not broadcast services, but subscription-based services, which do not call into play the issue of indecency.[650] Clancy's allegations do not justify action on the petition in the context of this proceeding.[651] We will, however, refer Clancy's petition to the Commission's Enforcement Bureau for any further action it deems appropriate. In addition, we note that the petition was extremely untimely, having been filed 189 days after the date for the filing of such petitions and only nine days before the Commission's adoption of its *Order* in this proceeding.

214. Finally, we note that Minority TV has initiated two proceedings at the Commission, a must carry complaint and a petition for forfeiture, precisely on the same facts the station now raises in this proceeding.[652] Its carriage complaint and petition for forfeiture have been resolved.[653] The Media Bureau found that Minority TV's station is entitled to carriage on certain of AT&T's cable systems but that it was not entitled to have AT&T's Mt. Sutro facility designated as AT&T's principal headend for the San Francisco television market. Additionally, the Bureau denied Minority TV's Petition to Initiate a Forfeiture Proceeding. Given that the issues stemming from Minority TV's complaints have been fully considered and that the record does not support the allegation of a character defect warranting denial of the application before us, we reject Minority TV's petition to deny.

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[647] Recent reports suggest that local franchising authorities are capable of addressing customer service issues involving AT&T. *See* Linda Haugsted, *Miami Approves AT&T-Comcast Transfer*, MULTICHANNEL NEWS, (Aug. 26, 2002) (in approving the franchise transfer, AT&T, Comcast, and the City of Miami agreed "to work together" to halt customer complaints. The company will pay a $72,000 penalty to resolve existing customer care lapses, will designate one technical liaison and one management liaison to the city to handle the most difficult complaints, and will meet quarterly with the city to report on service issues.).

[648] The petition was filed on November 3, 2002, more than six months after the April 29, 2002 deadline for filing or petitions to deny the Application. *AT&T Corp. and Comcast Corp. Seek FCC Consent for a Proposed Transfer of Control*, MB Docket No. 02-70, Public Notice, 17 FCC Rcd 5907 (2002) (establishing a deadline of April 29, 2002 for filing of comments or petitions to deny the Application); *see also* 1.939(a)(2)(providing that petitions to deny may be filed no later than 30 days from the date of public notice listing an application as accepted for filing).

[649] Clancy's petition references several exhibits and attachments that, at the time of adoption, still had not been received by staff reviewing the transaction.

[650] *See Harriscope of Chicago, Inc., et al.,* 3 FCC Rcd 757, 760 n.2 (1988). *Cf. Enforcement Policies Regarding Broadcast Indecency*, 16 FCC Rcd 7999, 8000 and n.9 (2001) (noting that courts have recognized that the "special justifications" for regulating the broadcast of indecent material—its history of pervasive regulation, the scarcity of broadcast frequencies and broadcast's "invasive" nature—do not apply to other speakers).

[651] *See Litigation Recovery Trust Petition for a Determination Whether Comsat Corp. Has Violated the Public Interest Standard of the Communications Satellite Act,* FCC 02-279 (rel. Oct. 28, 2002) (holding that an allegation of obscenity unsupported by a court finding did not warrant requested relief).

[652] *See* KMPT Complaint for Carriage, CSR-5513-M (filed Jun. 14, 2000) and KMPT Petition to Initiate a Forfeiture Proceeding, CSC-391 (filed Mar. 28, 2002).

[653] *See Minority Television Project Inc., KMTP(TV), Channel 32 v. AT&T Broadband, LLC,* DA-02-3130 (MB rel. Nov. 12, 2002).

VII. BALANCING PUBLIC INTEREST HARMS AND BENEFITS

215. Having evaluated the potential public interest harms and benefits of the proposed transaction, we weigh the potential harms against the potential benefits to determine if, on balance, the transfers of control at issue serve the public interest, convenience, and necessity.[654] As explained above, the first step in undertaking this balancing is to consider the public interest harms that may result from the proposed transaction. Several parties also have alleged that the proposed transaction would harm competition in various markets because of the size or market power of the merged entity. These allegations involve competition in the packaging and sale of video programming, MVPD competition, broadband Internet access, broadband content production, Internet video distribution, set-top boxes, ITV, and Internet automobile advertising. After examining the record, we cannot conclude that the merged entity's size or market presence would harm competition in these areas.

216. In the programming market in particular, the combination of AT&T and Comcast, together with AT&T's interest in TWE, could create a potential public interest harm by giving the merged entity monopsony power. However, the Applicants have proposed to insulate and divest the merged entity's interest in TWE. We find that the insulation and divestiture will adequately address any potential harm that the proposed transaction would create in the programming market, and we need not examine this issue in any greater detail. Accordingly, we condition our approval of the proposed transfer to require AT&T Comcast to insulate and divest its interest in TWE.

217. Having examined and addressed the potential harms of the proposed transaction, we consider its benefits. We give little weight to Applicants' argument that the proposed transaction will accelerate the deployment of cable telephony. Although we find cable telephony deployment to be a public interest benefit, we cannot conclude with sufficient confidence that cable VoIP technology will be commercially feasible in a time frame that permits us to give weight to the Applicants' claims. We also conclude that the record is inadequate to support a finding that the proposed transaction will promote competition in the national, regional, or local advertising markets, and we have no evidence showing how the merged entity's position in the advertising market will benefit the public. We conclude, however, that the proposed transaction is likely to accelerate the deployment of broadband services in AT&T service areas. The evidence indicates that the merger is not necessary to enable AT&T to generate more local and regional programming in its service areas.

218. As noted above, in balancing the public interest harms and benefits, we employ a sliding scale approach. Under that approach, we examine the likelihood and the magnitude of the potential public interest harms. Here, we find that any potential public interest harms that might result from the proposed transaction are mitigated by the conditions we adopt in this Order, and that no unmitigated public interest harms remain. We also find that the proposed transaction is likely to result in modest public interest benefits by accelerating deployment of broadband services. Accordingly, after reviewing the record and weighing the potential harms against the potential benefits, we conclude that, on balance, the transfers of control at issue would serve the public interest, convenience, and necessity.

VIII. PROCEDURAL MATTERS

219. On November 7, 2002, CFA filed an Emergency Motion for Suspension of Proceeding (the "CFA Emergency Motion")[655] in which it asks the Commission to suspend action on the Application until the completion of judicial review of the Commission's order (the "ISP Order") denying CFA's

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[654] *See, e.g., DT- VoiceStream*, 16 FCC Rcd at 9789 ¶ 17 (2001).

[655] *See* Emergency Motion for Suspension of Proceeding of Consumer Federation of America, Consumers Union and the Center for Digital Democracy (filed Nov. 7, 2002).

motion to compel production of the AOL ISP Agreement (the "ISP Motion").[656] CFA also filed a Petition for Review of the ISP Order with the United States Court of Appeals for the District of Columbia Circuit.[657] CFA asserts that although it does not seek a stay of a Commission order or rule, it meets the legal standard for such a stay, because it is likely to prevail on the merits, and because suspending the instant proceeding will not substantially harm parties to the proceeding.[658]

220. CFA states that the Commission failed to discuss "even one of the cases" CFA cited in support of its ISP Motion. To the contrary, the ISP Order cites several of the cases relied upon by CFA in support of its ISP Motion; we do not, however, interpret these cases as CFA does.[659] In any event, the Commission has concluded that it can make its public interest determination without reference to the AOL ISP Agreement and that, indeed, the AOL ISP Agreement is not of decisional significance. Accordingly, CFA's Emergency Motion is denied.

IX. ADMINISTRATIVE MATTER

221. Accessible formats (computer diskettes, large print, audio recording and Braille) are available to persons with disabilities by contacting Brian Millin, of the Consumer & Governmental Affairs Bureau, at (202) 418-7426, TTY (202) 418-7365, or at bmillin@fcc.gov.

X. CONCLUSION

222. We conclude that the positive public interest benefits promised by this merger are sufficient to support the Commission's approval of AT&T's and Comcast's Application, under the public interest balancing test of sections 214(a) and 310(d) of the Communications Act, subject to the conditions specified in this Order. To avoid potential harm to competition and diversity in video programming in particular, and as a non-severable condition of our approval of the Application, the Applicants must insulate and divest AT&T's interest in TWE, and any interests in successor firms, in accordance with the conditions set forth in Section IV.A.2. and Appendix B. The specific license and authorization transfers granted by this Order are set forth in Appendix D.

XI. ORDERING CLAUSES

223. Accordingly, having reviewed the Application and the record in this matter, IT IS ORDERED, pursuant to sections 4(i), 4 (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Application filed by AT&T Corp. and Comcast Corporation IS GRANTED subject to the conditions stated below.

224. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for AT&T Comcast to acquire control of:

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[656] *See ISP Order*, FCC 02-301.

[657] CFA Emergency Motion at 2.

[658] *Id.* at 2-3.

[659] *See ISP Order,* FCC 02-301 (citing *AT&T-TCI Order, AT&T-MediaOne Order, AOL-Time Warner Order*, *SBC Communications Inc. v. FCC,* 56 F.3d 1484 (D.C. Cir. 1995); *United States v. FCC*, 652 F.2d 72 (D.C. Cir. 1980)). Each of these cases was relied upon by CFA in support of its Motion. The CFA Emergency Motion particularly complains that we did "reconcile" the ISP Order with our decision in *Application of LUJ, Inc. (Assignee), and Long Nine, Inc. (Assignor) For Assignment of License of Station WYVR(FM)*, FCC 02-235 (rel. Aug. 22, 2002) ("*LUJ*"). CFA Emergency Motion at 2. In *LUJ*, we concluded that contract submission requirements should be relaxed to exclude non-material contract attachments. Thus, if anything, *LUJ* supports, rather than undermines, the ISP Order.

a) any authorization issued to AT&T Corp. or Comcast Corporation, their subsidiaries, or their affiliates during the Commission's consideration of the Application and the period required for consummation of the merger transaction following approval;

b) construction permits held by licensees involved in this transfer that matured into licenses during the Commission's consideration of the Application or that mature into licenses after closing of the merger transaction and that may have been omitted from the transfer of control Application; and

c) applications filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.[660]

225. IT IS FURTHER ORDERED that this grant IS CONDITIONED on our requirement (the "TWE Condition") that the Applicants, (a) prior to merger closing, place in trust AT&T's interest in TWE, (b) upon consummation of any restructuring of TWE, place resulting non-cash assets in trust, (c) divest their interests in TWE, and (d) abide by restrictions set forth in Appendix B regarding their involvement in the day-to-day management or operations of TWE or successor firms, their exercise of any governance rights in TWE or any successor firms, and their communications with TWE or any successor firms.

226. IT IS FURTHER ORDERED that this grant IS CONDITIONED on our requirement that AT&T Comcast shall file with the Media Bureau, within 60 days of the eventual sale of the TWE attributable interest, a written document evidencing the sale.

227. IT IS FURTHER ORDERED that this grant IS CONDITIONED on our requirement that, within 60 days after closing, AT&T Comcast shall comply with our cable/SMATV cross-ownership rule, 47 C.F.R. § 76.501(d).

228. IT IS FURTHER ORDERED that this grant IS CONDITIONED on our requirement pursuant to section 25.119(f) of our rules, 47 C.F.R. § 119(f), that AT&T Comcast shall complete this transaction within 60 days from the date of this authorization, and file with the Commission, within 30 days of consummation, notification by letter of the date of consummation and amend all pending earth station applications to reflect the new ownership structure approved in this Order.

229. IT IS FURTHER ORDERED that compliance with all conditions imposed herein is a non-severable condition of the grant of the Application.

230. IT IS FURTHER ORDERED that all references to AT&T Corp. and Comcast Corporation in this Order shall also refer to their respective officers, directors, and employees, as well as to any affiliated companies, and their officers, directors, and employees.

231. IT IS FURTHER ORDERED, pursuant to sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petition to Deny of the Borough of Blawnox, Pennsylvania; the Petition to Deny of Lisa Burton, et al.; the Petition to Deny of Consumer Federation of America, et al.; the Petition to Deny of Minority Television Project, Inc.; the Petition to Deny Applications or Condition Consent of RCN Telecom Services, Inc.; the Petition to Deny of Verizon Telephone Companies and Verizon Internet Solutions; the Ex Parte Petition of James J. Clancy to Deny Applications and Revoke Licenses; and the

[660] *See WorldCom-MCI Order*, 13 FCC Rcd at 18153 ¶ 226(c).

requests of any party seeking similar relief, are DENIED.

232. IT IS FURTHER ORDERED, that the Emergency Motion for Suspension of Proceeding of Consumer Federation of America, Consumers Union, and the Center for Digital Democracy is DENIED.

233. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE upon release, in accordance with section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

APPENDICES

APPENDIX A - LIST OF COMMENTERS

APPENDIX B - MERGER CONDITIONS

APPENDIX C - CONFIDENTIAL APPENDIX

APPENDIX D - LIST OF LICENSES AND AUTHORIZATIONS

APPENDIX A
LIST OF COMMENTERS

Comments[661]
American Cable Association ("ACA")
BellSouth Corporation ("BellSouth")
BEN Asset Group, Inc. ("BEN Asset")
Braintree Electric Light Department ("BELD")
CapNet ("CapNet")
Communications Workers of America ("CWA")
Contra Costa Cable TV Assessment Task Force ("Contra Costa Cable")
EchoStar Satellite Corporation ("EchoStar")
Everest Midwest Licensee, LLC ("Everest")
Progress & Freedom Foundation ("PFF")
Qwest Communications International, Inc. ("Qwest")
Sacramento Community Cable Program Providers ("SCCPP")
Sacramento Metropolitan Cable TV Commission ("SMCTC")
SBC Communications, Inc. ("SBC")

Petitions to Deny
Borough of Blawnox, Pennsylvania ("Borough of Blawnox")
Burton, Lisa, et al. ("Marietta Coalition")
Clancy, James J. ("Clancy") (*Late Filed*)
Consumer Federation of America, et al. ("CFA")
Minority Television Project, Inc. ("Minority TV")
RCN Telecom Services, Inc. ("RCN")
Verizon Telephone Companies and Verizon Internet Solutions ("Verizon")

Reply Comments[662]
American Cable Association ("ACA")
Broadband Service Providers Association ("BSPA")
Comcast Corporation and AT&T Corp. ("Applicants")
EarthLink, Inc. ("EarthLink")
Kansas City Cable Partners ("KCCP")
New Jersey Division of the Ratepayer Advocate ("Ratepayer Advocate")
Prime Communications, Inc. ("Prime")
RCN Telecom Services ("RCN")

Replies to Opposition[663]
BEN Asset Group, Inc. ("BEN Asset")
Burton, Lisa, et al. ("Marietta Coalition")
Consumer Electronics Association ("CEA")
Consumer Federation of America, et al. ("CFA")
RCN Telecom Services, Inc. ("RCN")

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[661] Comments and Petitions to Deny were filed on or before April 29, 2002, unless otherwise indicated.

[662] Reply Comments were filed on or before May 21, 2002, unless otherwise indicated.

[663] Replies to Oppositions were filed on or before June 5, 2002.

APPENDIX B
MERGER CONDITIONS

I. DEFINITIONS

1. For purposes of Appendix B, the following definitions shall apply:

a) **"AT&T Comcast"** means AT&T Comcast Corporation and its subsidiaries, excluding iNDEMAND.
b) **"TWE Restructuring Agreement"** means the restructuring agreement by and among AOL Time Warner, Inc., AT&T Corp., Comcast Corporation and others, dated as of August 20, 2002.
c) **"Divestiture Period"** means the period of time commencing on the Merger Closing Date and continuing until AT&T Comcast no longer has any interest in TWE, AOL Time Warner, or any entity in which AOL Time Warner has an attributable interest.
d) "**Corporate Compliance Officer"** means an employee of AT&T Comcast who shall be responsible for overseeing AT&T Comcast's compliance with these safeguards.
e) **"Merger Closing Date"** means the day on which, pursuant to their merger agreement, AT&T Comcast and Comcast cause a certificate of merger to be filed with the appropriate state(s).
f) **"Order"** means the Commission order to which this Appendix is attached.
g) **"Trustee"** means the person named by AT&T Comcast to oversee the Trusts as such Trusts are defined in the Order.
h) **"Trust Agreements"** means the Agreements and Declarations of Trust as such agreements are defined in the Order.
i) "**TWE**" means Time Warner Entertainment Company, L.P. and, upon the closing of the TWE Restructuring Agreement, Time Warner Cable, Inc. and entities controlled by Time Warner Cable, Inc.
j) **"Video Programming"** means video programming as defined in 47 U.S.C. § 522(20) and the Commission's implementing regulations as of January 1, 2002.
k) "**TWE Board**" means the Board of Representatives of Time Warner Entertainment Company, L.P. and, upon the closing of the TWE Restructuring Agreement, the Board of Directors of Time Warner Cable, Inc. and the Board of Representatives of the entities controlled by Time Warner Cable, Inc.

II. SAFEGUARDS RELATING TO VIDEO PROGRAMMING

A. SAFEGUARDS RELATING TO TWE

As a condition of exercising the grant of the merger application, AT&T Comcast shall comply with the following enumerated safeguards relating to TWE. These safeguards shall become effective at the Merger Closing Date. The safeguards shall be null and void if AT&T Broadband and Comcast do not merge and there is no Merger Closing Date. These safeguards supercede those contained in the *AT&T Media One Order*, and, if AT&T Broadband and Comcast do not merge and there is no Merger Closing Date, the safeguards contained in the *AT&T Media One Order* remain in effect.

1. No officer or director of AT&T Comcast shall also be an officer or director of TWE.

2. No officer, director, or employee of AT&T Comcast shall, directly or indirectly, influence or attempt to influence, or otherwise participate in, the management or operation of the

Video Programming activities of TWE. In particular, no member of the TWE Board of Directors appointed by the Trustee shall be involved in the following matters:

a) the decisions of TWE regarding which Video Programming services are purchased for or carried on TWE's cable systems;
b) the prices, terms, and conditions negotiated for carriage of Video Programming on TWE's cable systems;
c) setting the schedule for rollout of Video Programming by TWE's cable systems;
d) marketing by TWE of Video Programming carried on TWE's cable systems;
e) setting the budget for the Video Programming operations of TWE's cable systems (except that the Trustee may be involved in setting the overall TWE budget for Video Programming operations provided that the Trustee's access to TWE budget information does not include information concerning individual budget components of TWE's Video Programming operations, e.g., personnel, overhead, marketing, and program purchasing);
f) selecting the electronic programming guide used by TWE's cable systems;
g) the hiring, firing, or supervising of TWE employees directly involved in the Video Programming activities of TWE's cable systems; or
h) assessing the performance of any Video Programming service carried by TWE's cable systems.

3. AT&T Comcast may not, directly or indirectly, receive information from TWE regarding the price, terms, or conditions negotiated for the carriage of Video Programming on the TWE cable systems, nor provide information to TWE regarding the price, terms, and conditions negotiated for the carriage of Video Programming on AT&T Comcast cable systems. AT&T Comcast may not obtain from any Video Programming vendor a volume discount or other favorable terms and conditions as a result of TWE's purchase of Video Programming for, or carriage on, TWE's cable systems.

B. SAFEGUARDS RELATING TO TEXAS CABLE PARTNERS AND KANSAS CITY CABLE PARTNERS

As a condition of exercising the grant of the merger application, AT&T Comcast shall comply with the following enumerated safeguards relating to Kansas City Cable Partners ("KCCP") and Texas Cable Partners ("TCP"). These safeguards shall become effective at the Merger Closing Date, and shall remain in effect throughout the term of the Trust Agreement. The safeguards shall be null and void if AT&T Broadband and Comcast do not merge and there is no Merger Closing Date.

1. AT&T Comcast may not, directly or indirectly, receive information from KCCP regarding the prices, terms, or conditions negotiated for the carriage of Video Programming on KCCP's cable systems, nor provide information to KCCP regarding the price, terms, and conditions negotiated for the carriage of Video Programming on the AT&T Comcast cable systems.

2. AT&T Comcast may not, directly or indirectly, receive information from TCP regarding the prices, terms, or conditions negotiated for the carriage of Video Programming on TCP's cable systems, nor provide information to TCP regarding the price, terms, and conditions negotiated for the carriage of Video Programming on the AT&T Comcast cable systems.

C. COMPLIANCE WITH SAFEGUARDS

1. AT&T Comcast shall appoint a Corporate Compliance Officer to oversee AT&T Comcast's implementation of and compliance with these safeguards; to monitor AT&T Comcast's compliance program; and to consult with the Chief of the Media Bureau and other appropriate individuals as necessary on an on-going basis regarding AT&T Comcast's compliance with these safeguards. The requirements of this subparagraph shall remain in effect until all other safeguards set out herein have expired or terminated.

2. The Corporate Compliance Officer shall notify the Chief of the Media Bureau immediately upon discovering a material failure on the part of AT&T Comcast to comply with any of the safeguards described herein.

3. Not later than 60 days after the Merger Closing Date, AT&T Comcast shall submit to the Media Bureau a plan for compliance with these safeguards. The compliance plan shall be afforded confidential treatment in accordance with the Commission's normal processes and procedures. A letter providing notice of the filing shall be filed the same day with the Secretary of the Commission for the public record.

4. The Corporate Compliance Officer shall file a report regarding AT&T Comcast's compliance with the safeguards described herein every 6 months from the Merger Closing Date until the end of the Divestiture Period.

5. The Corporate Compliance Officer may verify AT&T Comcast's compliance with these safeguards through contacts with the Commission, with TWE, or with providers of Video Programming.

6. The Corporate Compliance Officer's reports shall include a discussion of the scope of the work conducted, a statement regarding AT&T Comcast's compliance or non-compliance with these safeguards, and a description of any limitations imposed on the Corporate Compliance Officer in the course of its review by AT&T Comcast, or other circumstances that might affect the Corporate Compliance Officer's opinion. The reports shall be made publicly available, except for any confidential material they may include.

7. For 6 months following submission of the final compliance report, the Commission shall have access to the working papers and supporting materials of the Corporate Compliance Officer at a location in Washington, D.C. that is selected by AT&T Comcast. Copying of the working papers and supporting materials by the Media Bureau shall be allowed but shall be limited to copies required to verify compliance with and to enforce these safeguards. Any copies made by the Media Bureau shall be returned to AT&T Comcast by the Media Bureau no later than 12 months after the submission of the final compliance report. The Media Bureau's review and/or copying of the working papers and supporting materials shall be kept confidential pursuant to the Commission's rules and procedures.

III. TRUST AGREEMENTS

As a condition of exercising the grant of the merger application, AT&T Comcast shall, on or prior to the Merger Closing Date, place AT&T's interest in TWE in Trusts as provided by the Trust Agreements in the form reviewed and approved by Commission. This requirement shall be null and void if AT&T Broadband and Comcast do not merge and there is no Merger Closing Date.

APPENDIX C

CONFIDENTIAL APPENDIX

The Confidential Appendix is available upon request only to those parties who have executed and filed with the Commission signed acknowledgements of the protective order adopted in this proceeding. Qualified representatives who have not yet signed the required acknowledgement may do so in order to obtain the Confidential Appendix.

APPENDIX D

LICENSES AND AUTHORIZATIONS TO BE TRANSFERRED

Part 78 – Cable Television Relay Service (CARS)

Licensee	File Number	Call Sign	Location
COMCAST CABLEVISION CORPORATION OF CALIFORNIA	20020312AD-09	WGZ-467	Dover Township, NJ
	20020312BZ-09	WLY-731	Los Alamos, NM
COMCAST CABLEVISION OF ALABAMA, INC.	20020312AJ-09	KD-55012	Mobile, AL
COMCAST CABLEVISION OF ARIZONA, INC.	20020312BK-09	WHZ-572	Pima, AZ
COMCAST CABLEVISION OF CENTRAL NEW JERSEY, INC.	20020312BE-09	WGZ-416	East Windsor, NJ
COMCAST CABLEVISION OF DETROIT	20020312BJ-09	WHZ-473	Detroit, MI
COMCAST CABLEVISION OF EASTERN SHORE, INC.	20020312BB-09	WGV-980	Thoreau, NM
	20020312CB-09	WSV-48	Near Berlin, MD
COMCAST CABLEVISION OF GARDEN STATE, L.P.	20020312BD-09	WGZ-295	Springfield Twp., NJ
COMCAST CABLEVISION OF HUNTSVILLE, INC.	20020312AQ-09	WAK-823	Morgan City, AL
	20020312AT-09	WBG-892	Huntsville, AL
COMCAST CABLEVISION OF LOMPOC, LLC	20020312AV-09	WCH-466	Broadcast Peak, CA
COMCAST CABLEVISION OF MICHIGAN, LLC	20020312BT-09	WHZ-919	Algonac, MI
COMCAST CABLEVISION OF NEW MEXICO/PENNSYLVANIA, INC.	20020312BM-09	WHZ-704	Twin Buttes, NM
	20020312BU-09	WIZ-51	Las Cruces, NM
COMCAST CABLEVISION OF NEW MEXICO, INC.	20020312BX-09	WLY-298	Albuquerque, NM
COMCAST CABLEVISION OF SANTA MARIA, LLC	20020312AO-09	KHS-76	Santa Maria, CA
	20020312BO-09	WHZ-741	Santa Maria, CA
COMCAST CABLEVISION OF TAYLOR, INC.	20020312BP-09	WHZ-792	Taylor, MI
COMCAST CABLEVISION OF THE DISTRICT, LLC	20020312BL-09	WHZ-681	Washington, DC
COMCAST CABLEVISION OF THE SOUTH	20020312BA-09	WGV-594	Glade Springs, VA
	20020312BN-09	WHZ-719	Sharps Ridge, TN
COMCAST CABLEVISION OF THE SOUTH, INC.	20020312AH-09	KD-55006	Naples, FL
	20020312BC-09	WGZ-255	Lodi Twp., MI
	20020312BQ-09	WHZ-798	Commerce Twp., MI
	20020312CA-09	WMC-693	Manahawkin, NJ
	20020312BI-09	WHZ-431	Chatsworth, NJ

Licensee	File Number	Call Sign	Location
	20020312BR-09	WHZ-799	Pontiac, MI
COMCAST CABLEVISION OF VIRGINIA, INC.	20020312BW-09	WLY-264	Mars Sugarloaf Hill, VA
COMCAST CABLEVISION OF WILDWOOD, INC.	20020312AW-09	WGF-91	Wildwood, NJ
	20020312AX-09	WGF-92	Middle Twp., NJ
	20020312AY-09	WGI-21	Weymouth Twp., NJ
	20020312BG-09	WHU-32	Vineland, NJ
COMCAST RAPID, LLC	20020312BS-09	WHZ-875	Burrville, TN
	20020312BV-09	WLY-227	Wartburg, TN
COMCAST SCH HOLDINGS, INC.	20020312BY-09	WLY-373	Leesburg, FL
AT&T BROADBAND H/ICI, LLC	20020314AC-09	WSH-25	South Bend, IN
AT&T BROADBAND OCNI, LLC	20020314EF-09	WLY-230	Parks Township, , PA
AT&T BROADBAND OF SOUTHERN CALIFORNIA, INC.	20020314CB-09	WGS-890	Near Chico-Forest, CA
	20020314CN-09	WGV-956	Chico, CA
AT&T CSC, INC.	20020314AZ-09	WAK-498	Fitchburg, MA
	20020314BM-09	WCE-572	Near Gardner, MA
CABLE TV OF PUGET SOUND, INC.	20020314BG-09	WBG-426	Near Bremerton, WA
	20020314FD-09	WSJ-21	South Tacoma, WA
COMMUNICATIONS SERVICES, INC.	20020314CO-09	WGV-990	Wylie, TX
	20020314DQ-09	WHZ-677	Commerce, TX
	20020314FA-09	WLY-761	Algonquin, IL
HARBOR COMMUNICATIONS JOINT VENTURE	20020314BB-09	WAN-201	Aberdeen, WA
H C G CABLEVISION, INC.	20020314AO-09	KMA-56	Geyser Peak, CA
	20020314DZ-09	WHZ-979	Healdsburg, CA
INTERMEDIA PARTNERS SOUTHEAST	20020314EY-09	WLY-664	Tv Mountain, MT
KING VIDEOCABLE COMPANY	20020314AL-09	KB-60123	Near Elsinore Peak, CA
	20020314AX-09	WAG-469	San Andreas, CA
	20020314BX-09	WGK-480	Placerville, CA
	20020314DE-09	WHZ-424	Lake Elsinore, CA
	20020314DF-09	WHZ-425	Elsinore Peak, CA
	20020314DP-09	WHZ-666	Sutter Hill, CA
	20020314EK-09	WLY-340	San Andreas, CA
	20020314EU-09	WLY-523	Sutter Hill, CA
LASALLE TELECOMMUNICATIONS, INC.	20020314DG-09	WHZ-458	Chicago A4, IL
	20020314EA-09	WHZ-984	Chicago, IL
MEDIAONE ACQUISITIONS OF NORTHERN ILLINOIS, INC.	20020314AD-09	KA-80609	Elmhurst, IL
	20020314CL-09	WGV-952	Homewood, IL

Licensee	File Number	Call Sign	Location
MEDIAONE OF CALIFORNIA, INC.	20020314FC-09	WSH-22	Livermore, CA
MEDIAONE OF FRESNO, INC.	20020314BN-09	WCK-816	Near Livermore, CA
	20020314BO-09	WCK-817	Madera, CA
	20020314BP-09	WCK-818	Cressy, CA
	20020314CA-09	WGK-632	Fresno, CA
MEDIAONE OF GREATER FLORIDA, INC.	20020314CJ-09	WGV-910	Jacksonville, FL
MEDIAONE OF LOS ANGELES, INC.	20020314CQ-09	WGZ-256	Los Angeles, CA
	20020314DR-09	WHZ-678	Los Angeles, CA
	20020314DS-09	WHZ-684	Los Angeles, CA
	20020314DX-09	WHZ-843	City Hall, CA
	20020314DY-09	WHZ-851	Los Angeles, CA
	20020314EM-09	WLY-348	Ka Studio, CA
	20020314ER-09	WLY-501	Compton, CA
	20020314ET-09	WLY-522	Whittier, CA
MEDIAONE OF NORTHERN CALIFORNIA, INC.	20020314AH-09	KA-80638	Marysville & Yuba Cy, CA
MEDIAONE OF SIERRA VALLEYS, INC.	20020314CF-09	WGV-515	Reedley, CA
	20020314CI-09	WGV-843	Mendota, CA
MEDIAONE OF ST. PAUL, INC.	20020314AK-09	KB-60119	Near St. Paul, MN
	20020314DU-09	WHZ-714	Minneapolis, MN
	20020314EG-09	WLY-233	Saint Paul, MN
SAN LEANDRO CABLE TELEVISION, INC.	20020314AJ-09	KB-60117	Dublin, CA
SOUTH CHICAGO CABLE, INC.	20020314DH-09	WHZ-466	Chicago A5, IL
TCI AMERICAN CABLE HOLDINGS, L.P.	20020314AE-09	KA-80619	Near Spokane, WA
	20020314AG-09	KA-80635	Near Spokane, WA
	20020314DI-09	WHZ-528	Spokane, WA
TCI CABLE PARTNERS OF ST. LOUIS, L.P.	20020314EZ-09	WLY-757	Devils Peak, CA
TCI CABLEVISION OF CALIFORNIA, INC.	20020314BA-09	WAL-205	Carmen Valley Vil., CA
	20020314CD-09	WGU-387	Monterey, CA
	20020314CK-09	WGV-948	Santa Clara, CA
	20020314CM-09	WGV-955	Loma Prieta Mountain, CA
TCI CABLEVISION OF DALLAS, INC.	20020314AF-09	KA-80623	Near Dallas, TX
TCI CABLEVISION OF GEORGIA, INC.	20020314EI-09	WLY-293	Los Trancos Woods, CA
TCI CABLEVISION OF GREAT FALLS, INC.	20020314CX-09	WGZ-362	Chester, MT
TCI CABLEVISION OF MONTANA, INC.	20020314AT-09	WAD-901	Polson, MT
	20020314AU-09	WAD-953	Point Six, MT
	20020314BR-09	WDC-319	Missoula, MT

Licensee	File Number	Call Sign	Location
	20020314CV-09	WGZ-359	East Glacier, MT
	20020314CW-09	WGZ-361	Libby, MT
	20020314CY-09	WGZ-363	Kalispell, MT
	20020314DW-09	WHZ-748	Harlem, MT
	20020314EJ-09	WLY-332	Hogback Mountain, MT
	20020314ES-09	WLY-505	Blacktail Mountain, MT
	20020314EV-09	WLY-533	Choteau, MT
TCI CABLEVISION OF OREGON, INC.	20020314AQ-09	WAA-813	Mary's Peak, OR
	20020314BH-09	WBH-335	Lebanon, OR
TCI CABLEVISION OF PASCO COUNTY	20020314CP-09	WGV-992	Hickory Hills, IL
TCI CABLEVISION OF TWIN CITIES, INC.	20020314CS-09	WGZ-298	Capitol Peak, WA
TCI CABLEVISION OF UTAH, INC.	20020314CC-09	WGU-383	Pix Peak, UT
	20020314CE-09	WGV-509	Salt Lake City, UT
	20020314EH-09	WLY-250	Clarkston, UT
TCI CABLEVISION OF WASHINGTON, INC.	20020314AY-09	WAJ-770	Seattle, WA
	20020314BJ-09	WBJ-751	Atop Capitol Peak, WA
	20020314CT-09	WGZ-318	Seattle, WA
	20020314CU-09	WGZ-319	Seattle, WA
	20020314ED-09	WKZ-30	Seattle, WA
	20020314EE-09	WLY-215	Bremerton, WA
TCI CABLEVISION OF WYOMING, INC.	20020314AW-09	WAG-468	Cheyenne, WY
TCI MICROWAVE, INC.	20020314DM-09	WHZ-634	Little Rock, MT
	20020314DN-09	WHZ-648	Hinsdale, MT
	20020314DO-09	WHZ-654	Great Falls, MT
	20020314EO-09	WLY-492	North Poplar, MT
	20020314EP-09	WLY-493	Deadman Butte, MT
	20020314EX-09	WLY-624	Great Falls, MT
TCI OF EAST SAN FERNANDO VALLEY, L.P.	20020314BY-09	WGK-610	Petaluma, CA
	20020314CG-09	WGV-813	Rohnert Park, CA
TCI OF GREENSBURG	20020314AN-09	KDJ-43	Hempfield Township, PA
TCI OF NORTHERN NEW JERSEY, INC.	20020314AR-09	WAB-570	Glenwood Springs, CO
	20020314DD-09	WHZ-363	Aspen, CO
	20020314EL-09	WLY-343	Sebastian, FL
TCI OF PENNSYLVANIA, INC.	20020314EN-09	WLY-482	Tuolumne, CA
TCI OF SOUTHERN WASHINGTON	20020314BV-09	WGI-775	Green Mountain, WA
	20020314DA-09	WHZ-245	Boistfort Peak, WA
TCI OF TACOMA, INC.	20020314BK-09	WBL-526	Tacoma, WA
TCI TKR OF CENTRAL FLORIDA, INC.	20020314BI-09	WBH-637	Banner, WY

Licensee	File Number	Call Sign	Location
	20020314EW-09	WLY-563	Bosin Rock, WY
TELEVENTS OF SAN JOAQUIN, INC.	20020314BC-09	WAN-800	Orestimba Hills, CA
	20020314BS-09	WDX-656	Los Banos, CA
	20020314EB-09	WJA-72	Mt. Oso, CA
	20020314FB-09	WOX-20	Lafayette, CA
TELEVENTS, INC.	20020314BU-09	WGH-81	Martinez, CA
	20020314DC-09	WHZ-346	Danville, CA
TELE-VUE SYSTEMS, INC.	20020314AS-09	WAB-896	Salem, OR
	20020314AV-09	WAF-565	Marysville, CA
	20020314BF-09	WAY-486	Oroville, CA
	20020314EQ-09	WLY-497	Petaluma, CA
UACC MIDWEST, INC.	20020314BZ-09	WGK-618	Hayward, CA
	20020314DT-09	WHZ-692	Patterson Pass, CA
	20020314EC-09	WJN-31	Modesto, CA
UNITED CABLE TELEVISION OF COLORADO, INC.	20020314BT-09	WGH-335	Jarre Canyon, CO
UNITED CABLE TELEVISION SERVICES CORPORATION	20020314AP-09	KV-3813	Bristol, CT
	20020314BD-09	WAQ-364	Asonia, CT
	20020314DK-09[664]	WHZ-573	Farmington, CT
	20020314DV-09	WHZ-733	Bristol, CT
WENTRONICS, LLC	20020314AM-09	KCS-54	Saddleback Mountain, WY
	20020314BL-09	WCC-381	Casper, WY
NEW ENGLAND CABLE NEWS	20020314FG-09	KD-55008	Boston, MA
INSIGHT COMMUNICATIONS MIDWEST, LLC	20020314FH-09	KKK-46	Boonville, IN
(*Pro Forma*)	20020314FI-09	KYX-60	Louisiana, MO
	20020314FJ-09	KYX-69	Hannibal, MO
	20020314FK-09	WAJ-459	Shoals, IN
	20020314FL-09	WCF-542	Oregon, IL
	20020314FM-09	WGF-97	Jasper, IN
	20020314FN-09	WHZ-840	Danville, IL
	20020314FO-09	WPN-34	Belvidere, IL
MIDCONTINENT COMMUNICATIONS	20020314FP-09	WLY-345	Custer, SD
(*Pro Forma*)	20020314FQ-09	WHZ-358	Ft. Pierre, SD
	20020314FS-09	WGV-524	Bison, SD
	20020314FT-09	WAM-446	Sisseton, SD
	20020314FU-09	WPW-40	Rugby, ND
	20020314FV-09	WHZ-333	Reliance, SD
	20020314FW-09	WBB-708	Grafton, ND
	20020314FX-09	WBB-709	Grand Forks, ND

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Licensee	File Number	Call Sign	Location
	20020314FY-09	WBB-710	Cavalier, ND
	20020314FZ-09	WLY-763	Stephan, SD
PARNASSOS, LP	20020314GA-09	KW-4396	Lackawanna, NY
(*Pro Forma*)	20020314GB-09	WAC-525	Conneaut, OH
	20020314GC-09	WBD-866	Tonawanda, NY
	20020314GD-09	WBJ-250	Lackawanna, NY
	20020314GE-09	WGH-439	West Seneca, NY
	20020314GF-09	WGZ-314	Mentor On The Lake, OH
	20020314GG-09	WGZ-328	Kirtland, OH
	20020314GH-09	WGZ-329	Geneva, OH
	20020314GI-09	WGZ-331	Chardon, OH
	20020314GJ-09	WGZ-332	Ashtabula, OH
	20020314GK-09	WGZ-354	Harbor Creek Twp., PA
	20020314GL-09	WGZ-397	Lackawanna, NY
	20020314GM-09	WGZ-407	Painesville Twp., OH
	20020314GN-09	WLY-536	Fredonia, NY
WESTERN NY CABLEVISION, LP (*Pro Forma*)	20020314GO-09	WGT-752	Buffalo, NY
KANSAS CITY CABLE PARTNERS	20020318AA-09	WAE-602	Kansas City, KS
(*Pro Forma*)	20020318AB-09	WLY-353	Ft. Leavenworth, KS
	20020318AC-09	WHZ-921	Leavenworth, KS
	20020318AD-09	WGW-207	Independence, MO
	20020318AE-09	WGW-219	Kansas City, MO
	20020318AF-09	WGW-220	Kansas City, MO
TEXAS CABLE PARTNERS, L.P.	20020318AG-09	WJT-43	Corpus Christi, TX
(*Pro Forma*)	20020318AH-09	WGZ-452	Benavides, TX
	20020318AI-09	WGI-758	Eagle Pass, TX
	20020318AJ-09	WGZ-450	Escobas, TX
	20020318AK-09	WHZ-780	El Paso, TX
	20020318AL-09	WLY-483	Ft. Bliss, TX
	20020318AM-09	WJI-36	El Paso, TX
	20020318AO-09	WGZ-451	Horseshoe Ranch, TX
	20020318AP-09	KA-80625	Houston, TX
	20020318AQ-09	KYX-62	Lomas Vista, TX
	20020318AR-09	WGI-757	Moore, TX
	20020318AS-09	WHZ-869	One North, TX
	20020318AT-09	KYX-61	Pearsall, TX
	20020318AV-09	WAF-861	Port Isabel, TX
	20020318AW-09	WGZ-464	Realitos, TX
	20020318AX-09	WLY-742	Uvalde, TX

KING VIDEO CABLE COMPANY	20021105AB-09	NEW	Logtown, CA
	20021105AC-09	NEW	Georgetown, CA
	20021105AD-09	NEW	Placerville, CA

Part 25 – Satellite Communications, Satellite Earth Stations

Licensee	Call Signs
National Digital Television Center, Inc.	E5027, E930170, E930171, E930172, E930368, E930370, E930429, E930430, E930431, E930432, E930489, E940005, E940006, E940007, E940283, E940284, E940445, E950003, E950028, E950115, E950172, E950173, E950410, E95412, E9600046, E960598, E970005, E980252, E980304
TGC, Inc.	E940479
Comcast Cablevision of the South, Inc.	E000125
QVC, Inc.	E880105, E872076
Comcast Cablevision of New Jersey, Inc.	E000360, E000423, E020281*
QVC Local, Inc.	E940271
New England Cable News Network	E970108, E940292

Part 90 – Land Mobile Radio Services

Licensee Name	ULS File No.	Lead Call Sign
AMERICAN MICROWAVE COMMUNICATIONS, INC.	0000787728	WLR248
AT&T BROADBAND CABLEVISION OF SACRAMENTO I, LLC	0000773316	WPCG511
AT&T BROADBAND CTSI, LLC	0000774418	KWR244
AT&T BROADBAND H/ICI, LLC	0000776315	KVM632
AT&T BROADBAND HCI, LLC	0000776365	KNIL687
AT&T BROADBAND HC OF COLORADO, LLC	0000776348	WNUX414
AT&T BROADBAND OF ARLINGTON, LLC	0000776393	KNAW439
AT&T BROADBAND OF COLORADO, LLC	0000776476	WQI666
AT&T BROADBAND OF OHIO, LLC	0000776490	KNCB227
AT&T BROADBAND OF SOUTHERN CAL., INC.	0000776511	KNHJ516
AT&T BROADBAND TELENOIS, LLC	0000776540	WNSK595
AT&T BROADBAND, LLC	0000776666	KAU887
AT&T CSC, INC.	0000787648	KAD462
INSIGHT COMMUNICATIONS MIDWEST, LLC (*Pro Forma*)	0000790382	KSW543
KANSAS CITY CABLE PARTNERS (*Pro Forma*)	0000809193	KTL731
KING VIDEOCABLE COMPANY	0000777113	WXR661

Licensee Name	ULS File No.	Lead Call Sign
LASALLE TELECOMMUNICATIONS, INC.	0000777155	WNGX941
MEDIAONE ENTERPRISES, INC.	0000788371	WQA655
MEDIAONE OF EASTERN MICHIGAN, INC.	0000779628	WNCY842
MEDIAONE OF LOS ANGELES, INC.	0000777992	WPGA736
MEDIAONE OF MASSACHUSETTS, INC.	0000778180	WPMU989
MEDIAONE OF MICHIGAN, INC.	0000774132	KYT935
MEDIAONE OF NEW YORK, INC.	0000774194	WNPW378
MEDIAONE OF NORTHERN ILLINOIS, INC.	0000774236	KNEM221
MEDIAONE OF OHIO, INC.	0000774305	WSU819
MEDIAONE OF SOUTH CENTRAL LOS ANGELES, INC.	0000776125	WNLX546
MEDIAONE OF ST. PAUL, INC.	0000778147	KD30230
MEDIAONE OF VIRGINIA, INC.	0000776126	WNVU458
MEDIAONE OF WESTERN NEW ENGLAND, INC.	0000776148	KWG883
MIDCONTINENT COMMUNICATIONS (*Pro Forma*)	0000790558	WPUE975
NATIONAL DIGITAL TELEVISION CENTER, INC.	0000788740	WPPW219
PARNASSOS, LP (*Pro Forma*)	0000790431	WNKE706
TCI AMERICAN CABLE HOLDINGS II, L.P.	0000776223	KNCD489
TCI AMERICAN CABLE HOLDINGS, L.P.	0000776263	KRU929
TCI CABLE PARTNERS OF ST. LOUIS, L.P.	0000776319	WRM569
TCI CABLEVISION OF CALIFORNIA, INC.	0000776353	KRB770
TCI CABLEVISION OF MISSOURI, INC.	0000776452	KNBC240
TCI CABLEVISION OF MONTANA, INC.	0000776483	KTT663
TCI CABLEVISION OF OREGON, INC.	0000776654	KLP512
TCI CABLEVISION OF PASCO COUNTY	0000776803	WQZ709
TCI CABLEVISION OF TEXAS, INC. (TX)	0000790497	WPFB856
TCI CABLEVISION OF WASHINGTON, INC.	0000776963	WNJK833
TCI CABLEVISION OF WYOMING, INC.	0000777101	WSV483
TCI MICROWAVE, INC.	0000805584[665]	WNKK403
TCI OF DAYTON, INC.	0000787697	WPNU432
TCI OF GREENSBURG	0000777291	KUT866
TCI OF ILLINOIS, INC.	0000777313	WNYE223
TCI OF NORTHERN CALIFORNIA, INC.	0000777345	KQV943
TCI OF NORTHERN NEW JERSEY, INC.	0000777400	KTV310
TCI OF PENNSYLVANIA, INC.	0000777490	WII930
TCI OF PLANO, INC.	0000777549	KNJE619
TCI OF RICHARDSON, INC.	0000777523	KNHC697
TCI OF TUALATIN VALLEY, INC.	0000777587	WPDK581
TCI PACIFIC COMMUNICATIONS, INC.	0000777641	KA96057
TCI TKR OF CENTRAL FLORIDA, INC.	0000777713	KLN765

[665] This ULS application was originally submitted under file number 0000777246. In addition, this application was inadvertently listed as accepted for filing in a public notice released March 27, 2002. *See* Wireless Telecommunications Bureau Assignment of Authorization and Transfer of Control Applications Accepted for Filing, Report No. 1137, *Public Notice* (WTB rel. March 27, 2002).

Licensee Name	ULS File No.	Lead Call Sign
TCI TKR OF SOUTH DADE, INC.	0000777762	KNHQ725
TELEVENTS, INC.	0000777827	KNIH332
TELEVISION SIGNAL CORPORATION	0000777866	WNXZ871
TELE-VUE SYSTEMS, INC.	0000777145	WQP480
TEXAS CABLE PARTNERS, LP (*Pro Forma*)	0000809160	KTF476
UACC MIDWEST, INC.	0000777223	KWB699
UNITED CABLE TELEVISION CORPORATION	0000777271	KIJ389
UNITED CABLE TELEVISION OF COLORADO, INC.	0000777508	KNJH331
UNITED CABLE TELEVISION OF MID-MICHIGAN, INC.	0000777546	KWD757
UNITED CABLE TELEVISION OF WESTERN COLORADO, INC.	0000777598	KSK560
UNITED CABLE TELEVISION SERVICES CORPORATION	0000777712	KKL952
UNITED CATV, INC.	0000777804	WQP395
W.A.V., INC.	0000777895	WNZI680
WENTRONICS, LLC	0000777956	WNQK680
WESTERN NY CABLEVISION, LP (*Pro Forma*)	0000790632	KVG330
WESTMARC DEVELOPMENT JOINT VENTURE	0000815155	KGY635
COMCAST CABLE COMMUNICATIONS, INC.	0000783028	WPPH898
COMCAST CABLE COMMUNICATIONS, INC.	0000789537	WNJB477
COMCAST CABLE INVESTORS, INC.	0000769054	WSB400
COMCAST CABLEVISION OF ALABAMA, INC.	0000769605	KBZ579
COMCAST CABLEVISION OF ARIZONA, INC.	0000774292	WPML491
COMCAST CABLEVISION CORPORATION OF CALIFORNIA	0000769535	WSU488
COMCAST CABLEVISION OF CAROLINA, INC.	0000770198	WNDY299
COMCAST CABLEVISION OF CENTRAL NEW JERSEY, INC.	0000771925	WID480
COMCAST CABLEVISION OF CHESTERFIELD COUNTY, INC.	0000775492	WPDH267
COMCAST CABLEVISION OF DELMARVA, INC.	0000771994	KJA623
COMCAST CABLEVISION OF EASTERN SHORE, INC.	0000769619	KNIE387
COMCAST CABLEVISION OF ELKTON, INC.	0000774327	WNHV741
COMCAST CABLEVISION OF FLINT, INC.	0000772550	KZD514
COMCAST CABLEVISION OF FORT WAYNE, LP	0000772532	KYM975
COMCAST CABLEVISION OF GARDEN STATE, LP	0000774364	KNS487
COMCAST CABLEVISION OF GASDEN, INC.	0000772183	KSX724
COMCAST CABLEVISION OF GROTON, INC.	0000772538	KNFB681
COMCAST CABLEVISION OF HARFORD COUNTY, INC.	0000772601	KR3872
COMCAST CABLEVISION OF INDIANAPOLIS, INC.	0000773235	WPQG298
COMCAST CABLEVISION OF LEVITTOWN, INC.	0000772570	WPCM561
COMCAST CABLE OF MARYLAND, INC.	0000771273	WNNJ721
COMCAST CABLEVISION OF MARYLAND, INC.	0000771290	WPHX754
COMCAST CABLEVISION OF MERCER COUNTY, INC.	0000771473	KLY633
COMCAST CABLEVISION OF MERIDIAN, INC.	0000771485	KFM892
COMCAST CABLEVISION OF MICHIGAN, LLC	0000775554	KNER225
COMCAST CABLEVISION OF MIDDLETOWN, INC.	0000772483	WCY268
COMCAST CABLEVISION OF MONMOUTH COUNTY, INC.	0000773388	WPEY229
COMCAST CABLEVISION OF MUNCIE, LP	0000773411	KAS630
COMCAST CABLEVISION OF NASHVILLE I, LLC	0000773451	WPKA423

Licensee Name	ULS File No.	Lead Call Sign
COMCAST CABLEVISION OF NASHVILLE II, LLC	0000772346	WNHX372
COMCAST CABLEVISION OF NEW HAVEN, INC.	0000772299	KNCK779
COMCAST CABLEVISION OF NEW JERSEY, INC.	0000773516	KNBT323
COMCAST CABLEVISION OF NEW MEXICO, INC.	0000773529	WNYH320
COMCAST CABLEVISION OF NEW MEXICO/PENNSYLVANIA,	0000774113	KGV581
COMCAST CABLEVISION OF PADUCAH, INC.	0000772137	KKO683
COMCAST CABLEVISION OF PLAINFIELD, INC.	0000771921	KVJ232
COMCAST CABLEVISION OF SANTA MARIA, LLC	0000771852	KGQ782
COMCAST CABLEVISION OF SOUTHEAST PENNSYLVANIA,	0000775513	KNDJ922
COMCAST CABLEVISION OF THE SOUTH	0000785175	WPRH715
COMCAST CABLEVISION OF THE SOUTH, INC.	0000775548	KGB807
COMCAST CABLEVISION OF THE DISTRICT, LLC	0000774440	WNNL379
COMCAST CABLEVISION OF TUPELO, INC.	0000774328	WNQA277
COMCAST CABLEVISION OF VIRGINIA, INC.	0000771223	WNVX206
COMCAST CABLEVISION OF WEST FLORIDA, INC.	0000771133	KB62673
COMCAST CABLEVISION OF WILDWOOD, INC.	0000770170	KFA322
COMCAST RAPID, LLC	0000770671	WNPK799
COMCAST SCH HOLDINGS, INC.	0000770948	WNWK279
OUTDOOR LIFE NETWORK	0000786355	WPTR291
QVC, INC.	0000777254	WPOB999

Part 101 – Common Carrier Point-to-Point Microwave Service

Licensee Name	ULS File No.	Lead Call Sign
AMERICAN MICROWAVE COMMUNICATIONS, INC.	0000787728	WLR248
MIDCONTINENT COMMUNICATIONS (*Pro Forma*)	0000790558	WLW452
TEXAS CABLE PARTNERS, LP (*Pro Forma*)	0000809160	KLH77
TCI MICROWAVE, INC.	0000805584	KPC72
COMCAST 38 GHZ, INC.	0000775477	WMW543
FIRST TELEVISION CORP.	0000772615	KGN76
LENFEST MCN, INC.	0000772603	KEM55
NEW ENGLAND MICROWAVE, INC.	0000774291	WBA962

Part 101 – Private Point-to-Point Microwave Service

Licensee Name	ULS File No.	Lead Call Sign
AMERICAN MICROWAVE COMMUNICATIONS, INC.	0000787728	KX8883
AT&T BROADBAND CABLEVISION OF SACRAMENTO I, LLC	0000773316	WNES942
AT&T BROADBAND OF COLORADO, LLC	0000776476	WPQT477
BILLINGS TELE-COMMUNICATIONS, INC.	0000776707	WPAT302
COMMUNITY CABLE TELEVISION	0000776856	WPJA237
LASALLE TELECOMMUNICATIONS, INC.	0000777155	WNTD934
MEDIAONE OF COLORADO, INC.	0000773528	WNES554
MEDIAONE OF LAKEWOOD, INC.	0000774012	WNEE392
MEDIAONE OF LOS ANGELES, INC.	0000777992	WNTD907
NATIONAL DIGITAL TELEVISION CENTER, INC.	0000788740	WPNJ714
SAN LEANDRO CABLE TELEVISION, INC.	0000776161	WNEW767
SPORTSCHANNEL NEW ENGLAND, LP	0000790640	WNES356
TCI CABLEVISION OF CALIFORNIA, INC.	0000776353	WPNE658
TCI ILLINOIS HOLDINGS, L.P.	0000777213	WNER273
TCI TECHNOLOGY MANAGEMENT, LLC	0000788221	WPQY480
TCI TECHNOLOGY VENTURES, INC.	0000788210	WPNC289
TELEVISION SIGNAL CORPORATION	0000777866	WNER551
TELE-VUE SYSTEMS, INC.	0000777145	WNEH782
TEXAS CABLE PARTNERS, LP (*Pro Forma*)	0000809160	WNEW367
UACC MIDWEST, INC.	0000777223	WNTJ918
UNITED CABLE TELEVISION CORPORATION	0000777271	WNTE488
UNITED CABLE TELEVISION OF ALAMEDA, INC.	0000777341	WHK239
UNITED MICROWAVE CORPORATION	0000777867	WDU645
COMCAST CABLEVISION OF ARIZONA, INC.	0000774292	WNTR598
COMCAST CABLEVISION OF DANBURY, INC.	0000785269	WPRQ981
COMCAST CABLEVISION OF DETROIT, INC.	0000774306	WNEU603
COMCAST CABLEVISION OF EASTERN SHORE, INC.	0000769619	WNTL349
COMCAST CABLE OF MARYLAND, INC.	0000771273	WPOU371
COMCAST CABLEVISION OF MARYLAND, INC.	0000771290	WPNM496
COMCAST CABLEVISION OF MARYLAND, LP	0000771329	WPNG203

Licensee Name	ULS File No.	Lead Call Sign
COMCAST CABLEVISION OF PHILADELPHIA, INC.	0000774182	WNTP962
COMCAST CABLEVISION OF PHILADELPHIA, AREA I, INC.	0000774201	WNTA467

Part 27 – Wireless Communications Service

Licensee Name	ULS File No.	Lead Call Sign
COMCAST WCS COMMUNICATIONS, INC.	0000773242	KNLB289
COMCAST WCS ME02, INC.	0000773370	KNLB204
COMCAST WCS ME04, INC.	0000773397	KNLB275
COMCAST WCS ME05, INC.	0000773449	KNLB276
COMCAST WCS ME16, INC.	0000773534	KNLB278
COMCAST WCS ME19, INC.	0000774090	KNLB280
COMCAST WCS ME22, INC.	0000774158	KNLB282
COMCAST WCS ME26, INC.	0000774192	KNLB283
COMCAST WCS ME28, INC.	0000774277	KNLB284

Part 74 - Broadcast Auxiliary Service

Licensee Name	ULS File No.	Lead Call Sign
QVC, INC.	0000777254	BLP01502

Part 22 – Paging & Radiotelephone Stations

Licensee Name	ULS File No.	Lead Call Sign
MIDCONTINENT COMMUNICATION (*Pro Forma*)	0000790558	KDS478

Part 63 – Domestic Section 214 Authorization (47 C.F.R. § 63.01)

The Commission has authorized the transfer of control of AT&T Corp. and Comcast Corporation to AT&T Comcast Corporation. The proposed transaction includes the following companies that are authorized to provide domestic telecommunications services pursuant to section 214 of the Communications Act. Comcast Business Communications, Inc. and its affiliates, Comcast Telecommunications of Michigan, LLC; Jones Cable Holdings, Inc., and MH Lightnet, Inc., as well as the following operating subsidiaries of AT&T Corp.: AT&T Broadband Phone, LLC; AT&T Broadband Phone of Arizona, LLC; AT&T Broadband Phone of California, LLC; AT&T Broadband Phone of Colorado, LLC; AT&T Broadband Phone of Connecticut, Inc.; AT&T Broadband Phone of DC, LLC; AT&T Broadband Phone of Florida, LLC; AT&T Broadband Phone of Georgia, LLC; AT&T Broadband Phone of Illinois, LLC; AT&T Broadband Phone of Indiana, LLC; AT&T Broadband Phone of Kentucky, LLC; AT&T Broadband Phone of Maryland, LLC; AT&T Broadband Phone of Massachusetts, LLC; AT&T Broadband Phone of Missouri, LLC; AT&T Broadband Phone of Minnesota, Inc.; AT&T Broadband Phone of New Hampshire, LLC; AT&T Broadband Phone of New Jersey, LLC; AT&T Broadband Phone of New York, LLC; AT&T Broadband Phone of Ohio, LLC; AT&T Broadband Phone of Oregon, LLC; AT&T Broadband Phone of Pennsylvania, LLC; AT&T Broadband Phone of Texas, LLC; AT&T Broadband Phone of Utah, LLC; AT&T Broadband Phone of Washington, LLC; AT&T Broadband Phone of West Virginia, LLC; and MediaOne Telecommunications of Virginia, Inc.

Part 63 – International Service (47 C.F.R. § 63.18)

ITC-T/C-20020308-00127	Comcast Business Communications, Inc.
ITC-T/C-20020308-00128	Jones Cable Holdings, Inc.
ITC-T/C-20020228-00137	AT&T Broadband Phone of California, LLC
ITC-T/C-20020228-00138	AT&T Broadband Phone of Connecticut, Inc.
ITC-T/C-20020228-00139	AT&T Broadband Phone of Texas, LLC
ITC-T/C-20020228-00140	AT&T Broadband Phone of Illinois, LLC
ITC-T/C-20020228-00141	MediaOne Telecommunications Corp. and MediaOne Business Services, Inc.
ITC-T/C-20020228-00142	MediaOne Telecommunications Corp. and MediaOne Business Services, Inc.

SEPARATE STATEMENT
CHAIRMAN MICHAEL K. POWELL

Re: In the Matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee

Today the Commission has approved the transfer of certain licenses from Comcast Corporation and AT&T Corp., Transferors ("AT&T"), to AT&T Comcast Corporation, Transferee ("AT&T Comcast"). The benefits of this transaction are considerable; the potential harms negligible. We therefore conclude that the merger serves the public interest, convenience, and necessity.

The Commission has conditioned its approval on the sale of AT&T Comcast's 27.64% ownership interest in Time Warner Entertainment, L.P. ("TWE"). This is the most significant public interest benefit of the transaction. By the action we take today, the Commission finally severs a complex relationship of intertwining programming and distribution assets that has plagued the Commission for years. The placement of the TWE interest in a disposition trust on the day the merger closes ensures a result that is definite, immediate and final.

DISSENTING STATEMENT
OF COMMISSIONER MICHAEL J. COPPS

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

The sheer economic power created by this mega-combination, and the opportunities for abuse that would accompany it, outweigh the very limited public interest benefits that either the Applicants or the majority find here. The more I review the issues at stake in this proposal, the more I am persuaded it should not go forward. I therefore dissent from this transfer of control.

Let me state at the outset that I see no malevolent objectives or intent to do harm on the part of the Applicants, and my concerns should in no way be read to impugn their character or the many contributions these companies have individually made to our nation's commercial, and its social, development. Nor do I argue that all of the potential harms posited in the Commission's order will necessarily come to pass. Additionally, I commend applicants for an admirable job in presenting their case with both comprehensiveness and candor, convinced in their minds of the soundness of their agreement. But when all is said and done, any public interest benefits that may potentially issue from this huge consolidation of commercial power are vastly outweighed by the potential for significant harm to consumers, the industry, and the country.

The Applicants point to four major public interest benefits of the proposed merger: (1) accelerated deployment of facilities-based high-speed internet service, digital video, and other broadband services; (2) accelerated deployment of facilities-based local telephone competition; (3) an increased supply of local and regional programming; and (4) greater competition in markets for local, regional and national advertising. Yet, of those four benefits, the majority finds the latter three to be less than compelling based on the record before it. And the Applicants themselves admit that consumers should not anticipate lower cable prices as a result of the merger, but only that the expected size of cable price increases would be reduced by the merger. Economic efficiencies that Applicants claim would be derived from this consolidation should allow more than that when it comes to disciplining cable rates. Yet rates continue to climb, undisciplined by either the cable industry or, in fact, by satellite providers, who some thought would provide an external brake on rising cable rates.

The *Order* is telling in its handling of potential harms that could attend this combination. Time and again it cites such potentials only to conclude that there is insufficient evidence in the record to make a specific finding that harm would occur. Here are just two examples:

- While recognizing that access to particular popular programming can be important for MVPDs to compete, and that cable operators have incentive to secure exclusive programming contracts which could be used to deny competing MVPDs and their customers access to such programming, the *Order* declines to impose a condition on the merged entity's ability to do so, noting that, even without merging, the Applicants individually already have sufficient presence in their respective franchise areas to secure such exclusive contracts.

- The *Order* also notes the substantial possibility that the Applicants may have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition, and acknowledges that such practices may harm consumers. Here again, the *Order* states, based on the record presented, that, even without merging, the Applicants individually already have the incentive and ability to target pricing in an anticompetitive manner.

Because the majority finds insufficient evidence to conclude that these types of harms will be exacerbated by the merger, it declines to impose any conditions that might alleviate the possibility of such harm in the future. Indeed, the absence of such conditions only enlarges the potential for such abuse in the new combined company. A viable public interest finding demands more rigor than this.

I am particularly concerned about the anticompetitive effects of this combination on programming. Although there is general agreement among interested parties that the TWE Divestiture Trust alleviates concerns about the merger's potential for anticompetitive impact on video programming markets, there is nothing in place to preclude the merged entity from investing in other programming interests in the future. Indeed, the whole dynamic of the industry will – in fact, must – pull the combined company in that direction. Its expanded control over the channels of program distribution could afford it the ability not only to influence but perhaps to determine on its own what programming will be produced and offered to the consuming public, and at what cost. That is just too much raw commercial power.

Applicants cite economic efficiencies that will result from their agreement and how these will benefit the combined company's ability to do business. Undoubtedly, there are some such efficiencies. Yet, while Comcast talks about the need to upgrade and modernize AT&T's broadband deployment, one wonders why this corporate resuscitation is better achieved by conglomeration and $30 billion of additional debt rather than through competition in the marketplace.

As I've said before, mergers and acquisitions are not inherently bad. However, it strikes me as bedrock that our review of proposed consolidations must venture beyond economic efficiencies if we are to ensure that combinations serve the public interest. I believe that each proposed combination needs to be looked at on its own merits within its own individual set of circumstances. I also believe that the public interest test must be rigorously applied to each proposed transaction. This is what I have attempted to do here. Unfortunately, I do not find that the transaction at issue passes this test. I therefore respectfully dissent.