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

In the Matter of	)	
	)	
Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee	)	CS Docket No. 00-30

MEMORANDUM OPINION AND ORDER

Adopted: January 11, 2001 **Released: January 22, 2001***

By the Commission: Chairman Kennard, Commissioners Ness and Tristani issuing separate statements; Commissioners Furchtgott-Roth and Powell concurring in part, dissenting in part, and issuing separate statements.

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I. INTRODUCTION

1. In this *Order*, we consider the joint application ("Application")[1] filed by America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") (collectively the "Applicants") for approval to transfer control of certain licenses and authorizations to AOL Time Warner Inc., a newly created company, pursuant to Sections 214(a) and 310(d) of the Communications Act of 1934, as amended ("Communications Act").[2] The licenses to be transferred include the cable television relay service ("CARS") licenses that are essential to the operation of the cable systems currently owned by Time Warner, which are in several respects the critical asset involved in the combination of the two firms. To

* The Commission on January 19, 2001 approved the final version of this Memorandum Opinion and Order.

[1] Applications for Consent to the Transfer of Control of Licenses and Section 214 Licenses Time Warner Inc. and America Online, Inc., Transferors to AOL Time Warner Inc. ,Transferee, CS Docket No. 00-30 (filed Feb. 11, 2000) ("Application").

[2] 47 U.S.C. §§ 214(a), 310(d). AOL and Time Warner now independently control the licenses and authorizations at issue.

obtain approval, the Applicants must demonstrate that their proposed transaction will serve the public interest, convenience, and necessity.[3] In this regard, we must weigh the potential public interest harms of the proposed merger against the potential public interest benefits to ensure that the Applicants have shown that, on balance, the benefits outweigh the harms.[4]

2. The proposed merger of AOL and Time Warner was, at the time of its announcement, the largest corporate merger in history.[5] The combination is remarkable not only for its size, but also for the nature of the companies and the assets they control. The proposed merger has attracted substantial public interest and has come under scrutiny by several bodies other than this Commission, including the U.S. Congress, the Federal Trade Commission ("FTC"), and the European Commission. The unprecedented nature of the merger creates more than the normal potential for controversy and confusion both about the merits and about the role of the Commission's review.

3. To minimize potential confusion, we begin with a summary overview of the foundation and context of our decision. We first describe the scope of the Commission's inquiry and its specific focus on potential consequences of approving the proposed transfers on the rules, policies and objectives of the Communications Act, and note several pervasive issues about whether and how those potential consequences should be addressed by this Commission in the context of reviewing license transfer applications. We then briefly note from the standpoint of the Communications Act the most significant aspects of the companies and assets that will combine if the transfers are approved. Having established this context, we describe the major issues that have been identified and will be discussed in the course of the decision.

4. As the Commission has explained in prior merger orders, this Commission and the Federal Trade Commission each have independent authority to examine communications mergers, but the standards governing the Commission's review differ from the FTC's standards.[6] The FTC must examine

[3] *See* 47 U.S.C. §§ 214(a), 310(d). *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*, CS Docket No. 99-251, Memorandum Option and Order (*"AT&T-MediaOne Order"*), 15 FCC Rcd 9816, 9817 ¶ 1 (2000); *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules*, CC Docket No. 98-141, Memorandum Opinion and Order ("*SBC-Ameritech Order*"), 14 FCC Rcd 14712, 14736 ¶ 46 (1999), *rev'd in part on other grounds sub nom.* Assoc. of Communications Enterprises v. FCC, No. 99-1441, 2001 WL 20519 (D.C. Cir. Jan. 9, 2001); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order ("*WorldCom-MCI Order*"), 13 FCC Rcd 18025, 18026-27, 18030-32 ¶¶ 1, 8-10 (1998); *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order ("*Bell Atlantic-NYNEX Order*"), 12 FCC Rcd 19985, 19987, 20000-04 ¶¶ 2, 29-32 (1997).

[4] *SBC-Ameritech Order*, 14 FCC Rcd at 14736 ¶ 46; *WorldCom-MCI Order*, 13 FCC Rcd at 18031-32 ¶ 10.

[5] *See, e.g., AOL and Time Warner In Record $350 Billion Merger*, COMM. DAILY, Jan. 11, 2000, at 1; Steven Burke, *AOL, Time Warner Merger: A New Model For Partnerships*, CMP'S TECHWEB, Jan. 10, 2000, at http://www.techweb.com/wire/finance/story/INV2000010S0008; Paul Kagan Assoc., Inc., *AOL: You've Got Time Warner*, Kagan, BROADBAND, Jan. 10, 2000.

[6] *Cf. AT&T-MediaOne Order*, 15 FCC Rcd at 9811 ¶ 10 (comparing FCC standards to those employed by Department of Justice); *Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control of Tele-Communications, Inc. to AT&T Corp.*, CC Docket No. 98-178, Memorandum Opinion and Order ("*AT&T-TCI Order*"), 14 FCC Rcd 3160, 3168-69 ¶ 14 (1999) (same).

whether a merger will harm competition.[7] The Commission's review encompasses an examination of anticompetitive effects but also evaluates, as explained in more detail below, the potential impact of the proposed transaction on the rules, policies and objectives of the Communications Act. [8] Transactions that would violate the Act will be rejected. Transactions that would violate the Commission's rules may be allowed only if the Commission waives the rules in question. Transactions that do not violate the Act or the Commission's rules are examined to determine whether they would otherwise substantially impair or frustrate the enforcement of the Act or the objectives of the Act and whether the transaction would produce potential public interest benefits in furtherance of Communications Act policies. Among the major policies and objectives that may be affected by significant mergers are preserving and enhancing competition in related markets, ensuring a diversity of voices, and providing advanced telecommunications services to all Americans as quickly as possible. To gain approval, an applicant bears the burden of establishing that the potential for benefits to the public interest outweighs the potential for harms.

5. The balancing of potential harms and benefits to the public interest is particularly appropriate in the context of reviewing license transfer applications that are associated with significant mergers because such mergers are likely to create potential for both good and ill. For example, the same concentration of assets that may support technological innovation by providing sufficient capital to take the necessary risks or by reducing transaction costs may also allow the merged entity to create or enhance barriers to entry by its competitors. As a result of this ambiguity, the outcome most favorable to the public interest, in terms of the policies and objectives of the Communications Act, is often best achieved by allowing the transfers, and thus the associated merger, to proceed (thus obtaining the positive benefits of the combination), but only subject to certain conditions, either voluntarily agreed to or imposed by the Commission under its statutory authority, designed to minimize the potential harms or increase the potential benefits.

6. It is important to emphasize that the Commission's review focuses on the potential for harms and benefits to the policies and objectives of the Communications Act that flow from the proposed transaction — i.e., harms and benefits that are "merger-specific." The Commission recognizes and discourages the temptation and tendency for parties to use the license transfer review proceeding as a forum to address or influence various disputes with one or the other of the applicants that have little if any relationship to the transaction or to the policies and objectives of the Communications Act.

7. License transfer applications, even those associated with significant mergers, are adjudications focused on particular parties. Some have argued that the Commission should avoid in such proceedings addressing significant issues that also apply to parties in the same industry other than the applicants, and should deal with such industry-wide issues exclusively in rulemakings.[9] They point out the potential unfairness of subjecting the license transfer applicants to a different standard that is not applicable to their competitors and contend that rulemakings may offer a better opportunity for public comment focused on the adoption of an industry-wide policy rather than on the facts of a particular merger. While recognizing the relative advantages of rulemakings in many circumstances, the Commission also recognizes the well-established principle that administrative agencies have discretion to proceed by either adjudication or rulemaking to decide such issues, and that the Commission must fulfill

[7] *See* 15 U.S.C. § 18.

[8] *See* Section II, *infra* (Public Interest Framework).

[9] *See* Applicants' Reply Comments at 53.

its responsibility in an adjudication to decide the issues presented by that case.[10] In this case, the Commission is required to balance these considerations and resolve them with respect to several of the major issues presented by the facts, including one issue that is currently the subject of a notice of inquiry that may lead to a rulemaking proceeding.

8. The proposed merger has been touted as a productive marriage of a new media giant with a traditional media giant. AOL has become one of the most significant forces in the Internet environment. It is the nation's and the world's largest Internet Service Provider ("ISP"), and serves about five times as many narrowband subscribers as its nearest competitor.[11] AOL initially created and provided an online service, separate and apart from the Internet, which was designed to provide the benefits of connecting to a network of computers, including those of other AOL members and those of AOL itself, that provided collections of information on various subjects. AOL's online service was distinguished both by its emphasis on creating a format that was "user friendly" to persons not otherwise familiar with computer networking and by its aggressive marketing programs, which educated the general public as to the benefits and relative ease of connecting to a computer network. The development and increasing popularity of the World Wide Web eventually led AOL to adapt its service to include access to the broader Internet, transforming AOL into an ISP, and to allow access to AOL's online service over the Internet to persons who used other ISPs. At the same time, AOL has continued as an online service provider ("OSP") to provide a number of resources and services to members who pay a monthly fee. As the use of the Internet has grown in popularity, AOL has continued to attract the largest share of users. Moreover, as the commercial potential of the Internet has been recognized, the value of AOL's large subscriber base has been recognized, as has the value of AOL's ability to attract and hold its members to the services and information provided by AOL itself, as opposed to having them go to other sites on the World Wide Web.[12] AOL's abilities to attract a large number of subscribers, to keep them primarily "inside" its own services, and to negotiate contracts with other businesses that take advantage of these abilities have provided a basis for a profitable business enterprise.

9. Prior to the announcement of the proposed merger with Time Warner, AOL faced a threat to its continued success in the Internet environment as a narrowband ISP and OSP, posed by the anticipated migration of Internet users from narrowband access over ordinary telephone lines to high-speed access. The early leaders in providing high-speed Internet access have been cable television operators which, unlike telephone companies, are not common carriers. High-speed ISP service over cable systems is provided on an exclusive basis by companies owned in large part by the cable companies, and AOL had been unable to negotiate access to the cable systems on terms satisfactory to it. In response, AOL developed relationships with alternative providers of high-speed access, including high-speed Digital Subscriber Line ("DSL") service provided over telephone lines and satellite broadcasting service. In

[10] *See Policies and Rules for Alternative Incentive Based Regulation of Comsat Corp.*, IB Docket No. 98-60, Report and Order, 14 FCC Rcd 3065, 3079 ¶ 38 (1999) (citing *SEC v. Chenery Corp.*, 332 U.S. 194, 201-03 (1947)).

[11] "Narrowband" Internet service is provided over modems that connect computers to the Internet over traditional telephone lines, which currently allow the transfer of data at speeds of up to 56 kbps.

[12] Some have referred to the effect of AOL's techniques to keep its subscribers within its own services as a "walled garden." AOL's subscribers spend approximately 85% of their time within this walled garden rather than leaving to explore the remainder of the Internet. *See* Holly Becker, *America Online*, Lehman Brothers, June 29, 2000 at 35 ("Lehman Brothers June 29 Report"), cited by Ex Parte Comments of Disney at 14-15, transmitted by letter from Lawrence R. Sidman, Verner, Lipfert, Berhard, McPherson & Hand, to Magalie Roman Salas, Secretary, FCC, dated July 25, 2000.

addition, AOL became the leading voice in a movement led by narrowband ISPs to compel cable operators to allow competing ISPs to provide high-speed access to the Internet over their cable systems.[13]

10. AOL also has the largest share of subscribers to services known as instant messaging ("IM"), which allows subscribers to detect whether other identified subscribers are currently on-line (presence detection), and to send and receive messages to other subscribers in essentially "real" time. There are competing versions of instant messaging software and most, including those controlled by AOL, are offered without charge. It is anticipated that IM will become a significant platform for launching and supporting other applications that take advantage of the tools for presence detection and real-time communication. At present, with a few exceptions, the competing IM systems do not interoperate with one another—*i.e.*, a member of one such system cannot detect the presence of or send messages to a member of a competing system. Competing systems have attempted to interoperate with AOL's system without AOL's consent. While stating its commitment to the principle of interoperability, AOL has blocked these unauthorized efforts, citing concerns for security, privacy and performance of its own system. Finally, AOL has recently begun to provide interactive television services ("ITV") that combine traditional video programming features with web-based and other interactive features, viewed and used by consumers through their television sets.

11. Time Warner is a conglomerate of many of the most successful traditional media companies. It holds one of the world's largest content libraries, comprised of innumerable print, film, television programming, and music interests. Time Warner delivers this content through magazines, records and its cable holdings, the second largest in the nation. In recent years, Time Warner leaped into the new media world by creating, with other cable companies, Road Runner, the nation's second largest broadband ISP, which Time Warner controls. Most of Time Warner's cable systems are owned and operated by Time Warner Entertainment ("TWE"), a partnership in which Time Warner has a 75% stake. As a result of the merger of AT&T Corp. ("AT&T") and MediaOne, AT&T owns the remaining 25%. Thus Time Warner already represents a vertical integration of substantial programming (content) and distribution (conduit) assets.

12. This proposed merger at this particular point raises a number of issues with respect to the policies of the Communications Act that have generated intense public comment. The Internet is widely recognized as a major source of innovation and economic growth in recent years. The conditions which allowed that explosive growth and innovation to occur included substantial initial public investment and an architecture that encouraged innovation by reducing barriers to entry and ensuring competition on the merits. Competition among narrowband ISPs has been open because of the common carrier telephone network over which they offer their services. As already noted, the proposed merger has been motivated in large part by the anticipated migration of ISPs' customers from the regulated common carrier telephone network to broadband conduits, primarily cable systems, which are not common carriers. The policies of the Communications Act that are potentially implicated by this shift, and by this proposed merger, include the preference for competitive telecommunications markets, the existence of diverse platforms and providers, the promotion of innovation, and rapid deployment of advanced telecommunications services.

13. From a competition standpoint, vertical integration can create potential problems when the integrated company has market power at one or more of the levels of integration. Concerns about the

[13] *See In the Matter of Application for Consent to the Transfer of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, AOL Comments at 12-17; *In the Matter of Application for Consent to the Transfer of Licenses and Section 214 Authorizations from Tele-Communications, Inc, Transferor, to AT&T Corp., Transferee*, CS Docket No. 98-178, AOL Comments at 30-39.

integration of video programming content and the cable conduit are addressed in statutory provisions and Commission rules, such as the horizontal ownership cap and the channel occupancy rules.[14] These provisions, however, do not necessarily apply to or resolve the similar concerns raised by the proposed merger with respect to the integration of the existing Time Warner combination of content and conduit with AOL's online services in the residential market. As Congress and this Commission have recognized, market power exists on the Time Warner side in the cable assets. On the AOL side, market power arguably exists both in AOL's position as the leading narrowband ISP and in AOL's instant messaging network.

14. A number of the comments reflect fears of the potential anticompetitive impacts that could flow from the unprecedented combination of assets that the merger represents. Our task in evaluating the comments is more difficult because of the rapid development of the technologies and products involved and the ambiguous nature of some of the merger's predicted impacts. For instance, several of the most controversial issues relating to the proposed merger involve products and markets that have only recently developed or that are only anticipated—and yet commenters urge that if some conditions are not placed on the merger at this point, harms will occur so rapidly that much more onerous intervention will be required to cure them later.

15. We recognize that there is a difference between intervention to preserve a level of competition that will allow a market to operate effectively and the kind of substantial regulatory intervention that is required to compensate in markets where sufficient competition is lacking. The 1996 Act reflects a clear preference that competitive markets, as opposed to regulated monopolies, be created and preserved as the mechanism for economic decision making. Mergers can reflect the healthy operation of competition, creating more efficient collections of assets; but they can also threaten its continued existence, eliminating competitors or creating opportunities to disadvantage rivals in anticompetitive ways. We are guided both by the desire to avoid intervention and the realization that some degree of timely intervention to preserve competition may avoid a later need for more onerous intervention to either regulate where competition has disappeared or to attempt to reintroduce competition once it has been eliminated.

16. 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 firm to reduce transaction costs and offer new products; but if the merged firm has market power, these advantages may operate to consolidate that power.

17. In its review of the instant merger, the FTC found that the merger would harm competition in the residential Internet access marketplace and imposed conditions on the merging parties requiring them to afford access to Time Warner's cable plant to unaffiliated ISPs, requiring them not to discriminate against unaffiliated content under certain circumstances, requiring AOL Time Warner to market AOL's DSL services in the same manner and at the same retail price in Time Warner cable areas as in other areas, and to hold separate Road Runner, a cable ISP, from AOL's ISP service until AOL Time Warner offers an unaffiliated ISP on all AOL Time Warner cable systems.[15]

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[14] *See, e.g.*, 47 U.S.C. §§ 533(f), 548; 47 C.F.R. §§ 76.503, 76.504, 76.1000-76.1004; *AT&T-MediaOne Order*, 15 FCC Rcd at 9835 ¶ 38.

[15] *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 (FTC) (proposed Dec. 14, 2000) ("FTC Consent Agreement").

18. After reviewing the comments filed in this proceeding,[16] we find that, subject to certain conditions designed to mitigate merger-specific harms, and in light of the terms of the FTC Consent Agreement, the public interest benefits of the proposed merger outweigh the public interest harms. Among many issues raised by commenters, we focus particularly on four potential harms. First, we find that the proposed merger would give AOL Time Warner the ability and incentive to harm consumers in the residential high-speed Internet access services market by blocking unaffiliated ISPs' access to Time Warner cable facilities and by otherwise discriminating against unaffiliated ISPs in the rates, terms and conditions of access. To remedy this harm, this *Order* conditions approval of the merger on certain conditions relating to AOL Time Warner's contracts and negotiations with unaffiliated ISPs. Second, we find that the merger would make it more likely that AOL Time Warner would be able to solidify its dominance in the high-speed access market by obtaining preferential carriage rights for AOL on the facilities of other cable operators. We particularly find that the merger would harm the public interest by allowing for greater coordinated action between AOL Time Warner and AT&T in the provision of residential high-speed Internet access services. To remedy these harms, we impose a condition forbidding the merged firm from entering into contracts with AT&T that would give AOL exclusive carriage or preferential terms, conditions and prices. Third, we find that the proposed merger would enable AOL Time Warner to dominate the next generation of advanced IM-based applications. To remedy this harm, we impose a condition requiring AOL Time Warner, before it may offer an advanced IM-based application that includes streaming video, to provide interoperability between its NPD-based applications and those of other providers, or to show by clear and convincing evidence that circumstances have changed such that the public interest will no longer be served by an interoperability condition. Fourth, although we have concerns that the merger may give AOL Time Warner the ability and the incentive to discriminate against the interactive television ("ITV") services of unaffiliated video programming networks, we find that the terms of the FTC Consent Agreement will adequately protect the public interest by prohibiting certain types of discrimination and that it is not necessary for us to impose further conditions in this proceeding; however, we have initiated a Notice of Inquiry ("*ITV NOI*") to explore ITV issues in the market generally.[17] Subject to the conditions described above, we find that the proposed merger will serve the public interest.

II. PUBLIC INTEREST FRAMEWORK

19. Sections 214(a) and 310(d) of the Communications Act require the Commission to determine whether the Applicants have demonstrated that the public interest would be served by transferring control of AOL's and Time Warner's Commission license authorizations to AOL Time Warner.[18] Our statutory mandate, confirmed by our precedent, requires that we weigh the potential public interest harms of the proposed transaction against the potential public interest benefits to ensure that the Applicants have demonstrated that, on balance, the merger serves the public interest and convenience.[19] The Applicants bear the burden of proving that the transfer will advance the public interest.[20]

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[16] *See* Appendix A for a list of commenters in this proceeding.

[17] *See Nondiscrimination in the Distribution of Interactive Television Services Over Cable*, CS Docket No. 01-7, Notice of Inquiry ("*ITV NOI*"), FCC 01-15 (rel. Jan. 19, 2001).

[18] 47 U.S.C. §§ 214(a), 303(r), 310(d). *See WorldCom-MCI Order*, 13 FCC Rcd at 18030 ¶ 8 (1998); *Bell Atlantic-NYNEX* Order, 12 FCC Rcd at 20000 ¶ 29.

[19] *SBC-Ameritech Order*, 14 FCC Rcd at 14736 ¶ 46; *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 10.

[20] *AT&T-TCI Order*, 14 FCC Rcd at 3169-70 ¶ 15 (1999); *WorldCom-MCI Order*, 13 FCC Rcd at 18031 ¶ 10 n.33 (citing 47 U.S.C. §309(e) (burdens of proceeding and proof rest with the applicant.)).

20. In conducting its public interest inquiry, the Commission examines four overriding questions: (1) whether the transaction would result in a violation of the Communications Act or any other applicable statutory provision;[21] (2) whether the transaction would result in a violation of the Commission's rules;[22] (3) whether the transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act and/or other related statutes, or would interfere with the objectives of the Communications Act and/or other related statutes;[23] and (4) whether the transaction promises to yield affirmative public interest benefits.[24]

21. The Commission's analysis of public interest benefits and harms includes, but is not limited to, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust principles.[25] While an antitrust analysis, such as that undertaken by the Department of Justice or, in this case, the Federal Trade Commission, focuses solely on whether the effect of a proposed merger "may be substantially to lessen competition,"[26] the Communications Act requires the Commission to make an independent public interest determination, which includes evaluating public interest benefits or harms of the merger's likely effect on future competition.[27] To find that a merger is in the public interest, therefore, the Commission must "be convinced that it will enhance competition."[28]

22. Our public interest evaluation necessarily encompasses the "broad aims of the Communications Act."[29] These broad aims include, among other things, ensuring the existence of a nationwide communications service, available to everyone; implementation of Congress's pro-competitive, deregulatory national policy framework designed to open all telecommunications markets to competition; the preservation and advancement of universal service; and the acceleration of private sector

[21] *AT&T-MediaOne Order*, 15 FCC Rcd at 9820-21 ¶ 9; *SBC-Ameritech Order*, 14 FCC Rcd at 14737 ¶ 48.

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] Although the Commission's analysis of competitive effects is informed by antitrust principles and judicial standards of evidence, it is not governed by them, which allows the Commission to arrive at a different assessment of likely competitive benefits or harms than antitrust agencies may find based solely on antitrust laws. *See FCC v. RCA Communications*, 346 U.S. 86, 96-97 (1953) ("To restrict the Commission's action to cases in which tangible evidence appropriate for judicial determination is available would disregard a major reason for the creation of administrative agencies, better equipped as they are for weighing intangibles by specialization, by insight gained through experience, and by more flexible procedure.") *See also WorldCom-MCI Order*, 13 FCC Rcd at 18034 ¶ 13 (*citing RCA Communications*, 346 U.S. at 94; *United States v. FCC*, 653 F.2d 72, 81082 (D.C. Cir. 1980) (*en banc*) (The Commission's "determination about the proper role of competitive forces in an industry must therefore be based, not exclusively on the letter of the antitrust laws, but also on the 'special considerations' of the particular industry."); *Teleprompter-Group W*, 87 FCC 2d 531 (1981), *aff'd on recon.*, 89 FCC 2d 417 (1982) (Commission independently reviewed the competitive effects of a proposed merger); *Equipment Distributors' Coalition, Inc., v. FCC*, 824 F.2d 937, 947-48 (1st Cir. 1993) (public interest standard does not require agency to "analyze proposed mergers under the same standards that the Department of Justice . . . must apply.).

[26] 15 U.S.C. § 18.

[27] *See WorldCom-MCI Order*, 13 FCC Rcd at 18032-33 ¶¶ 12-13; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19987 ¶ 2.

[28] *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19987 ¶ 2.

[29] *AT&T-TCI Order*, 14 FCC Rcd at 3168-69 ¶ 14; *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9.

deployment of advanced services.[30] Our public interest analysis may also entail assessing whether the merger will affect the quality of telecommunications services or will result in the provision of new or additional services to consumers.[31] Thus, apart from traditional antitrust concerns, we are required to consider, among other things, whether the proposed merger will further the statutory goals of "assur[ing] that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,"[32] and "promot[ing] competition in the delivery of diverse sources of video programming . . ."[33]

23. The Supreme Court has found that decentralization of information production serves values that are central to the First Amendment. Indeed, the 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."[34] Accordingly, the Court had "no difficulty" in concluding that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest."[35]

24. Following passage of the 1996 Act, local telecommunications markets have been undergoing a transition to competitive markets. Therefore, a transaction may have predictable yet dramatic consequences for competition over time even if the immediate effect is more modest.[36] When a transaction is likely to affect local communications markets, our statutory obligation requires us to assess future as well as current market conditions. In doing so, the Commission may rely on its specialized judgment and expertise to render informed predictions about future market conditions and the likelihood of success of individual market participants.[37]

25. Where necessary, the Commission can attach conditions to a transfer of licenses and authorizations in order to ensure that the public interest is served by the transaction.[38] Section 214(c) of

[30] *WorldCom-MCI Order*, 13 FCC Rcd at 1830-31¶ 9.

[31] *See, e.g., id.*

[32] 47 U.S.C. § 521(4).

[33] 47 U.S.C. § 523(a).

[34] *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)).

[35] *Turner Broadcasting*, 512 U.S. at 663. *See also Review of the Commission's Regulations Governing Television Broadcasting: Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903, 12910-12916 (1999). *See also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself of a private licensee."); *Turner Broadcasting*, 512 U.S. at 657 ("[T]he potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

[36] *WorldCom-MCI Order*, 15 FCC Rcd at 9822 ¶ 12; *SBC-Ameritech Order*, 14 FCC Rcd at 3170 ¶ 51.

[37] *Id.*

[38] *See* 47 C.F.R. § 1.10; *WorldCom-MCI Order*, 13 FCC Rcd at 18031-32 ¶ 10.

the Communications Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience may require."[39] Similarly, section 303(r) of the Communications Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.[40] Indeed, unlike the role of antitrust enforcement agencies, the Commission's public interest authority enables it to impose and enforce certain types of conditions that result in a merger yielding overall positive public interest benefits.[41]

26. Where a license transfer applications shows that the merger would yield affirmative public interest benefits and would not violate the Communications Act or Commission rules, nor frustrate or undermine policies and enforcement of the Communications Act, there is no need for extensive review and expenditure of considerable resources by the Commission and interested parties.[42] This is not the case with regard to this proposed transaction. We analyze the potential public interest harms and benefits of this proposed merger, absent conditions, in the next sections.

III. BACKGROUND

A. The Applicants

27. ***AOL.*** AOL is divided into four operating groups, the Interactive Services Group, the Interactive Properties Group, the AOL International Group, and the Enterprise Solutions Group.[43] These groups provide interactive service, Web brands, Internet technologies and electronic commerce ('e-commerce') services.[44] For the twelve months ending June 30, 2000, AOL earned $6.9 billion in revenues. Subscription services accounted for $4.4 billion, advertising, commerce and other related services accounted for just under $2 billion, and "Enterprise Solutions" accounted for the remaining $500 million in revenues. AOL's net income for this period totaled $1.2 billion. For the first quarter of its fiscal year 2001, AOL reported $2.0 billion in revenue.[45]

28. *Interactive Services.* The Interactive Services Group operates branded interactive services such as AOL's flagship ISP AOL Internet service. This fee-based service provides Internet access and

[39] 47 U.S.C. § 214(c). *See WorldCom-MCI Order*, 13 FCC Rcd at 18031-32 ¶ 10; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20002 ¶ 30 n.59 (*citing Atlantic Tele-Network, Inc. v. FCC*, 59 F.3d 1384, 1389-90 (D.C. Cir. 1995).

[40] 47 U.S.C. § 303(5). *See WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 n.36 (*citing FCC v. Nat'l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (broadcast-newspaper cross-ownership rules properly adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (section 303(r) powers permit Commission to order cable company not to carry broadcast signal beyond station's primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (syndicated exclusivity rules adopted pursuant to section 303(r) authority).

[41] *See WorldCom-MCI Order*, 13 FCC Rcd at 18034-35 ¶ 14.

[42] *AT&T-TCI Order*, 14 FCC Rcd at 3170 ¶ 16.

[43] *See* Supplemental Information to Applications filed by AOL and Time Warner on Mar. 21, 2000 ("Applicants' March 21 Supplemental Information") at 8; *see also* America Online, Inc., *Form 10-Q For the Quarterly Period Ended Mar. 31, 2000*, at 4.

[44] Application at 2.

[45] America Online, Inc., *America Online Reports Record-Breaking Results For FY2001 First Quarter In Net Income, Total Revenues, Ad/Commerce And Membership* (press release), Oct. 18, 2000.

specialized content to more than 26 million subscribers.[46] AOL's ISP content includes news, entertainment, health, travel, sports, and finance information organized into "channels" from which subscribers can choose.[47] Included among AOL's numerous corporate partners that provide it with content and advertising are American Airlines, Budget Rent-a-Car, Sesame Street, Toys-R-Us, Barnes and Noble, Amazon.com, Godiva Chocolatier, JC Penney, Wal-Mart, Coca Cola, Proctor and Gamble, Avon, and CBS News.[48] A non-exhaustive list of additional features that the AOL service affords members includes e-mail, public bulletin boards, and the "Buddy List" feature (allowing members to discern whether fellow members are online simultaneously).[49] The AOL ISP service also includes AOL Plus, AOL's broadband Internet access service and enhanced content. AOL also offers the CompuServe ISP service, which has 2.8 million subscribers worldwide.[50]

29. An additional feature offered by AOL to its subscribers is IM.[51] In its simplest form, IM enables the almost instantaneous exchange of short text messages over the Internet between a person ("the sender") and another person ("the recipient") chosen by the sender. AOL also offers IM software, known as AOL Instant Messenger ("AIM") to non-AOL subscribers free of charge.[52] AOL has AIM co-branding arrangements with numerous companies, including Apple, BellSouth Mobility, DigitalWork.com, EarthLink Communications, Juno, IBM, Lycos, Motorola, Net2Phone, Nokia, Oxygen Media, RealNetworks, and TV Guide.[53] AOL also owns another IM service, ICQ.[54] AOL is, by far, the largest provider of IM.[55]

30. The Interactive Services Group also oversees AOLTV, an advanced interactive television service. AOLTV enables subscribers to access AOL features, such as chat rooms, e-mail, and IM through an interface overlaid on their television screens.[56] In addition, AOLTV offers interactive content and information tailored to the specific video programming being viewed.[57] Selected retailers started selling AOLTV set-top boxes in June 2000.[58] The boxes retail for $200-300. In addition, consumers must pay a

[46] America Online, Inc., *AOL Membership Surpasses 26 Million Milestone* (press release), Dec. 12, 2000.

[47] Applicants' March 21 Supplemental Information at 4.

[48] *See* America Online, Inc., *Who We Are*, at http://corp.aol.com/whoweare/partners.html (visited Nov. 28, 2000).

[49] America Online, Inc., *Form 10-K for Year Ended June 30, 1999*, at 3 ("AOL 1999 10-K").

[50] America Online, Inc., *AOL Gears Up For Holiday Shopping Blitz With Best Partners, Most Convenient Tools, And Industry's Leading E-Commerce Performance* (press release), Nov. 15, 2000.

[51] AOL 1999 10-K, at 3.

[52] The Interactive Services Group also houses AOL's Netscape Netcenter Web portal, and the AOL.com Web Portal, both of which are available to non-AOL members. *Id.*

[53] America Online, Inc., *America Online And Satyam Infoway Enter Into Agreement To Offer Co-Branded Version Of AOL Instant Messenger Service* (press release), July 12, 2000.

[54] AOL obtained ICQ when it bought Mirabilis for $287 million in June, 1998. *See* Bernhard Warner, *I Seek Revenue ? Chat App Goes Portal*, THE STANDARD, Feb. 22, 1999, at http://www.industrystandard.net/article/display/0%2C1151%2C3586%2C00.html (visited Aug. 24, 2000).

[55] *See* Section IV.B, *infra*. (Instant Messaging and Advanced IM-Based High-Speed Services)

[56] Applicants' March 21 Supplemental Information at 5.

[57] *Id.*

[58] America Online, Inc., *America Online Launches AOL-TV – The First Interactive Television Service for the Mass Market* (press release), June 19, 2000.

monthly subscription fee to receive the service.[59] AOLTV services can also be purchased directly from AOLTV's website.[60] AOL has plans to develop an AOLTV integrated cable set-top box,[61] as well as an integrated DirecTV set-top box.[62]

31. *Interactive Properties Group.* The Interactive Properties Group includes Digital City, MovieFone, Spinner, WINamp, and ICQ. Digital City provides Internet local content and community guides that include news, sports, weather and entertainment information, as well as an interactive forum.[63] Digital City provides this information for 200 markets.[64] According to AOL, Digital City averages 40 million page views a week, and has 2,000 interactive marketing partners.[65] AOL MovieFone is a movie guide and ticketing service customers can access either through a toll-free number or the MovieFone.com web site. Prior to the merger, AOL MovieFone had entered into advertising agreements with Time Warner film companies, Warner Bros. and New Line Cinema.[66] Spinner is a web site that allows users to listen to music organized into channels, and to purchase the music directly through the web site.[67] WINamp is a branded MP3 player that allows users to listen to and download music.[68] The WINamp web site also hosts numerous Internet radio stations.[69]

32. *AOL International Group.* The AOL International Group oversees the AOL and CompuServe services outside the United States.[70] AOL and CompuServe offer their branded services through joint ventures or distribution arrangements in Australia, Austria, Canada, France, Germany, Japan, the Netherlands, Sweden, Switzerland, and the United Kingdom.[71] America Online Latin America, Inc. is a leading Latin American Internet and interactive service provider.[72] AOL owns approximately 80% of America Online Latin America.[73]

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[59] AOL Members pay $14.95 per month for service, while non-members must pay $24.95 monthly. *See* America Online, Inc., at http://www.aoltv.com (visited Nov. 28, 2000).

[60] *See* America Online, Inc., at http://store.aolshopdirect.com (visited Nov. 28, 2000).

[61] Reshma Kapadia, *AOLTV To Take to the Air Monday*, ZDNET, June 16, 2000, at http://www.zdnet.com/zdnn/stories/news/0,4586,2589185,00.html (visited Aug. 21, 2000).

[62] America Online, Inc., *America Online, Inc., Announces Key AOL TV Partnerships* (press release), May 11, 1999.

[63] AOL 1999 10-K at 4.

[64] America Online, Inc., *AOL's Digital City Personalized E-Letter Hits 1 Million Mark* (press release), Sept. 6, 2000.

[65] America Online, Inc., *AOL Digital City Kicks Off Major Expansion to Widen Lead in Fast-Growing Local Online Market* (press release), Mar. 21, 2000.

[66] AOL Time Warner Inc., *Form S-4 Registration Statement* (filed Feb. 11, 2000) at 125.

[67] AOL 1999 10-K at 4.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] America Online, Inc., *AOL Latin America Information: Frequently Asked Questions*, at http://corp.aol.com/ir/aol&latin-faq.html? (visited Aug. 24, 2000).

[73] *Id.*

33. *Enterprise Solutions Business Products and Services.* The Netscape Enterprise Group is the primary product group in AOL's Enterprise Solutions division.[74] The Netscape Enterprise Group develops, markets, sells and supports a broad suite of enterprise software that consists of electronic commerce infrastructure and electronic commerce applications targeted primarily at corporate intranets and extranets, as well as the Internet.[75] In November 1998, AOL entered into a strategic electronic commerce alliance with Sun MicroSystems, which is now referred to as the Sun-Netscape Alliance. The alliance builds and markets on a collaborative basis end-to-end electronic commerce solutions to help business partners and other companies put their businesses online.[76]

34. *Ownership Interest in General Motors Corporation-Hughes Electronics Corporation.* In 1999, AOL invested $1.5 billion in General Motors Corporation ("GM"), the parent company of Hughes Electronics Corporation ("Hughes"), to "accelerate the development of" Direct Broadcast Satellite ("DBS") "as a platform for the next generation of Internet services."[77] This investment is in the form of GM's "Series H 6.25% Automatically Convertible Preference Stock."[78] Hughes is the parent company of DirecTV, the country's largest DBS provider, and DirectPC, a high-speed satellite ISP.[79]

35. *Telephony.* AOL has ownership stakes in two companies that offer telephony services, Talk.Com, Inc. and Net2Phone, Inc.[80] AOL owns 6.26% of Talk.com.[81] Talk.com offers local telecommunications services, including outbound long-distance service, local service, inbound toll-free service, and dedicated data line services.[82] Among its calling plans is AOL Long Distance, a plan offered exclusively to AOL members.[83] AOL also owns 4.63% of Net2Phone's capital stock.[84] AOL's ownership of this stock gives it 5.14% of the total voting power of the company.[85] Net2Phone provides

[74] AOL 1999 10-K at 5.

[75] AOL 1999 10-K at 5.

[76] *Id.*

[77] Applicants' March 21 Supplemental Information at 11.

[78] Applicants' March 21 Supplemental Information at 12. *See General Motors Corporation, SEC Form 8-K* (filed Aug. 23, 1999) at Appendix D at Section 3(j).

[79] DBS operators provide programming via satellite to subscribers that own or lease small-diameter receiving dishes.

[80] *Response to June 9, 2000, Request for Further Information In the Matter of Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control, CS Docket No. 00-30,* Attachment (June 26, 2000) ("Applicants' First Response") at 27, transmitted by letter from Peter Ross, Esq., Wiley, Rein and Fielding, Counsel for AOL, and Arthur Harding, Esq., Fleischman and Walsh, L.L.P., Counsel for Time Warner, to Royce Dickens, Deputy Chief, Policy and Rules Division, FCC Cable Services Bureau, dated June 26, 2000.

[81] *Id.*

[82] *Id.*

[83] Talk.Com, Inc., at http://www.talk.com/ (visited Aug. 23, 2000).

[84] Applicants' First Response at 30.

[85] Applicants' First Response at 31. As of August 11, 2000, AT&T had a 32% economic interest in Net2Phone, and a 39% voting stake in the company. *See* Net2Phone, Inc., *AT&T Completes Net2Phone Investment* (press release), Aug. 11, 2000.

Internet telephony, a service that allows users to make low-cost telephone calls over the Internet.[86] It also provides technology to integrate live voice capabilities into the Web.[87]

36. ***Time Warner.*** Time Warner is a worldwide media and entertainment company. It creates and distributes branded content through the business interests described in detail in this section. Time Warner reported overall 1999 revenues of $27.3 billion, and operating income of $7.3 billion.[88]

37. *Cable Systems and MVPD Services.* Time Warner, the second largest cable provider in the country, serves 12.7 million subscribers through cable systems that pass approximately 21 million homes.[89] Time Warner cable systems serve approximately 18.9 % of the 67 million cable subscribers nationwide and 15.4% of the 82 million subscribers to multichannel video programming distribution ("MVPD") systems nationwide.[90]

38. Time Warner's cable systems are held through three entities managed by Time Warner Cable: Time Warner Entertainment ("TWE"), Time Warner Entertainment – Advance/Newhouse Partnership ("TWE-A/N"), and TWI Cable, Inc. ("TWI Cable").[91] TWE is a limited partnership; Time Warner owns 74.5% of TWE. The remaining 25.5% is owned by AT&T as a result of its purchase of MediaOne Group, Inc.[92] TWE serves approximately 4.2 million basic cable subscribers.[93] TWI Cable, which serves approximately 1.8 million subscribers, is an indirect wholly-owned subsidiary of Time Warner.[94] TWE-A/N is a general partnership owned by TWE, TWI Cable, and Advance/Newhouse Partnership.[95] TWE-

[86] Applicants' First Response at 30.

[87] *Id.*

[88] *See* Time Warner Inc., *Time Warner Businesses Report Record 1999 and Fourth Quarter Results* (press release), Feb. 2, 2000.

[89] Applicants' March 21 Supplemental Information at 8.

[90] MVPDs include cable, DBS, multichannel multipoint distribution services ("MMDS"), and satellite master antenna television ("SMATV") providers. *See Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CS Docket No. 99-230, Sixth Annual Report ("*1999 Competition Report*"), 15 FCC Rcd 978, 980 ¶ 3 (generally describing the various types of MVPDs). MMDS providers offer programming via microwave facilities (the service is often referred to as "wireless cable service"). SMATV operators, also known as "private cable operators," also frequently use microwave facilities to transmit programming to subscribers without crossing rights-of-way. SMATV subscribers usually reside in multiple dwelling units ("MDUs"). *1999 Competition Report*, 15 FCC Rcd at 1090 Tbl. C-1.

[91] Applicants' March 21 Supplemental Information at 28.

[92] Paul Kagan Assoc., Inc., *10-Year Cable TV Industry Projections*, Cable TV Investor, June 19, 2000, at 15; *see also AT&T-MediaOne Order*, 15 FCC Rcd at 9816 ¶ 4. As a non-severable condition of the Commission's grant of AT&T's acquisition of MediaOne, AT&T must either a) divest its interest in TWE; b) terminate its involvement in TWE's video programming activities; or c) divest its interests in other cable systems, such that it will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide by May 19, 2001. *Id.* On December 15, 2000, AT&T notified the Commission of its intention to divest either its programming assets or its interest in TWE. For a further discussion of AT&T's compliance election, *see* Section IV.F., *infra*, (Coordination with AT&T).

[93] *Id.* at 8.

[94] Applicants' March 21 Supplemental Information at 9.

[95] *Id.* at 9.

A/N serves approximately 6.7 cable million subscribers.[96] Time Warner's partnership interest in TWE-A/N, held through TWE and TWI Cable, totals approximately 67%.[97]

39. *Internet Services.* Time Warner controls Road Runner, a joint venture that provides high-speed Internet access and content optimized for broadband networks to more than 1.1 million subscribers,[98] of whom more than 719,000 are served by Timer Warner Cable systems.[99] Road Runner is available in cable systems passing more than 19.5 million homes.[100] As of December 31, 1999, after conversion of all preferred interests, Road Runner was owned 8.6% by TWI Cable, 20% by TWE, 26.3% by TWE-A/N, 25.1% by AT&T, and 10% each by Microsoft and Compaq.[101] Pursuant to a consent decree with the United States Department of Justice ("DOJ"), entered into as a condition of the AT&T-MediaOne merger,[102] AT&T must divest its direct interest in Road Runner no later than December 31, 2001. Time Warner and AT&T recently announced a restructuring of Road Runner that is the first step in AT&T's divestiture of its interest in Road Runner in compliance with the DOJ Consent Decree. The restructuring is anticipated to be completed by April 2001.[103]

40. *Video Programming Networks.* Time Warner holds interests in numerous national, international and regional programming networks.[104] These interests are divided into three entities: TBS Entertainment, CNN News Group, and Home Box Office ("HBO"). TBS Entertainment and CNN News Group are each indirectly wholly owned by Time Warner. CNN News Group includes CNN, CNN Headline News, CNN/SI, and CNNfn.[105] CNN, a 24-hour per day cable television news service, is available to more than 77 million U.S. MVPD subscribers.[106] In 1999, CNN had nine of the ten highest-rated regularly scheduled basic cable news programs.[107] TBS Entertainment includes TBS, TNT, Turner Classic Movies, Cartoon Network and Turner South.[108] Three of TBS Entertainment's stations were among the five top-rated basic cable networks in 1999.[109] TBS and TNT each are available to over 75

[96] *Id.* at 8.

[97] *Id.* at 9.

[98] Road Runner Corp., *Road Runner Sets Record Third Quarter* (press release), Oct. 16, 2000.

[99] Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://CableDatacomNews.com/cmic/cmic16.html (visited Dec. 28, 2000).

[100] Road Runner Corp., *Road Runner Sets Record Third Quarter* (press release), Oct. 16, 2000.

[101] Time Warner Inc., *Filing 10-K for the Year Ended Dec. 31, 1999* (Mar. 30, 1999) ("Time Warner 1999 10-K") at I-19. AT&T acquired its 25.1% interest in Road Runner when it merged with MediaOne. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9819-20 ¶ 5.

[102] *See United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, Complaint and Proposed Final Judgment (D.D.C., filed May 25, 2000) ("DOJ Consent Decree"). The DOJ Consent Decree does not affect AT&T's indirect interest in Road Runner through its ownership in TWE.

[103] AT&T Corp., *Road Runner Joint Venture To Be Dissolved* (press release), Dec. 18, 2000. *See also* Time Warner Inc., *Time Warner To Increase Road Runner Ownership and Manage Its Operations* (press release), Dec. 18, 2000.

[104] Application at 4.

[105] Applicants' March 21 Supplemental Information at 9.

[106] Time Warner 1999 10-K at I-4.

[107] Time Warner Inc., *Cable Networks*, at http://www.timewarner.com/about/cablenets (visited Aug. 18, 2000).

[108] *Id.*

[109] *See* Time Warner Inc., *Cable Networks*, at http://www.timewarner.com/about/cablenets/turnerent/index.html (continued...)

million subscribers.[110] Additionally, through wholly owned subsidiaries of TBS, Time Warner owns three Atlanta-based sports franchises: the Atlanta Braves of Major League Baseball, the Atlanta Hawks of the National Basketball Association, and the Atlanta Thrashers of the National Hockey League.[111] HBO is wholly owned by TWE.[112] HBO offers premium programming channels such as Home Box Office and Cinemax. These channels had almost 36 million subscribers in 1999.[113] In addition, Time Warner Cable operates 24-hour local news channels in New York City; Tampa Bay; Orlando; Rochester, New York; and Austin, Texas.[114]

41. *Publishing Interests.* Time Warner's publishing division includes magazines, book publishing, book-of-the-month clubs, and interactive media sites. Time, Inc. publishes 36 magazines that reach approximately 200 million readers.[115] These magazines include *Time*, *People*, *Sports Illustrated*, *Money*, and *Fortune*.[116] Each of these magazines also has an affiliated website.[117] In 1999, Time Warner magazines accounted for 22.6% of total advertising revenue in consumer magazines, as measured by the Publishers Information Bureau.[118]

42. *Music.* Time Warner's music division, Warner Music Group ("WMG"), consists of interests in recorded music and music publishing.[119] WMG includes record labels such as Atlantic, Elektra, Rhino, Sire, Warner Bros. Records, and Warner Music International.[120] The Applicants have worked together to cross-promote WMG properties. A WMG subsidiary and AOL's Spinner.com, an Internet streaming music service, cross-promoted a recording earlier this year, and cross-promoted musicians on one of Spinner.com's channels.[121] Maverick Recording Co., another WMG record label, and AOL have

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(visited Aug. 18, 2000).

[110] Time Warner 1999 10-K at I-3.

[111] Time Warner 1999 10-K at I-6.

[112] Applicants' March 21 Supplemental Information at 9.

[113] *See* Time Warner Inc., *Cable Networks*, at http://www.timewarner.com/about/cablenets/hbo/index.html (visited Aug. 18, 2000). HBO also owns a 50% interest in Comedy Central, a basic cable television service, available in 62 million homes, and, through TWE, Time Warner also has a 50% interest in Court TV, which is available in approximately 37.5 million homes.[113]

[114] Time Warner 1999 10-K at I-20.

[115] *Id.*

[116] *See* Time Warner Inc., *Publishing: Time, Inc.*, at http://www.timewarner.com/corp/about/publishing/timeinc/compbrandprod.html (visited Aug. 18, 2000).

[117] *See* Time Warner Inc., *Public Archive*, at http://www.timewarner.com/corp/about/pubarchive/websites.html#publishing (visited Aug. 21, 2000).

[118] Time Warner 1999 10-K at I-7.

[119] Applicants' March 21 Supplemental Information at 8.

[120] *Id.*

[121] America Online, Inc., *Warner Bros. Records and AOL's Spinner.com Present Faith Hill Live Online!* (press release), Mar. 2, 2000.

partnered to provide music and premiere recordings on AOL's Entertainment Channel and Spinner.com.[122]

43. *Filmed Entertainment.* Time Warner's filmed entertainment businesses primarily consist of the production and distribution of films and television programming.[123] Its component companies include Warner Bros. Pictures, New Line Cinema, Castle Rock, Warner Home Video, and Telepictures Productions. During 1999, Warner Bros. Pictures released 25 motion pictures for theatrical distribution.[124] Through its other film lines, Time Warner released more than 20 additional films in 1999.[125] Time Warner's television programming interests include ownership of a library containing 5,700 feature films, 32,000 television titles, 12,000 animated titles, and 1,500 animated shorts.[126] Warner Bros. Television ("WBTV") produces various primetime dramatic and comedy programming for major networks.[127]

44. *The WB Television Network.* Time Warner is the majority owner of The WB Television Network ("The WB").[128] The WB is a broadcast network that reaches 83% of all U.S. households.[129] The WB broadcasts 13 hours of series programming per week; its children's network, Kids' WB!, airs 19 hours of programming per week.[130]

45. *Telephony.* Time Warner provides both residential and business telephony services. Time Warner residential telephony service is offered by Time Warner Cable ("TWC"). TWC has offered circuit-switched service in Rochester, New York since 1994. TWC also provides residential telephony service in Portland, Maine to a limited number of its cable customers in that market.[131] In February 1999, eleven months prior to the announcement of the intended AOL and Time Warner merger, Time Warner and AT&T signed a preliminary letter of intent for a cable telephony joint venture. While the joint venture has not yet been launched, Time Warner and AT&T continue to have ongoing discussions regarding the provision of residential telephony to Time Warner's cable subscribers.[132] Time Warner and AT&T have also signed joint marketing agreements to provide incentives to individuals in Albany and Syracuse, New York to subscribe to both Time Warner cable service and AT&T long distance service.[133]

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[122] America Online, Inc., *Alanis Morissette Sets Precedent With Worldwide Debut of New Video Exclusively Online* (press release), June 25, 1999; America Online, Inc., *AOL, Inc.'s Spinner.com Announces World Premiere of Maverick Records' Meshell Ndegocello's Latest Single* (press release), Aug. 11, 1999.

[123] Applicants' March 21 Supplemental Information at 8.

[124] Time Warner 1999 10-K at I-13.

[125] *Id.* at I-13.

[126] *Id.* at I-13.

[127] *Id.* at I-14.

[128] *Id.* at I-16. Tribune Broadcasting holds a 22.25% interest in The WB, and key employees of The WB hold an 11% interest in the network.

[129] *Id.* at I-15.

[130] *Id.* at I-15-16.

[131] Applicants' First Response at 22.

[132] *Id.*

[133] *Id.* at 14. *See also* Time Warner Inc., *AT&T and Time Warner Cable Announce Joint Marketing Agreement* (press release), Mar. 8, 2000.

According to Time Warner, "AT&T and Time Warner Cable will offer other long distance and cable television incentives and will engage in [additional] joint telemarketing efforts."[134] Finally, Time Warner, through its subsidiary Time Warner Connect, has received certification as a competitive local exchange carrier ("LEC"), allowing it to offer residential telephony in California, Florida, Ohio and Texas.[135]

46. Time Warner serves businesses through Time Warner Telecom, Inc. ("TWT"), a facilities-based communications provider serving large businesses.[136] TWT offers businesses "last mile" broadband connections for data, high-speed Internet, local voice and long-distance services.[137] TWT is certified to offer telecommunications services in 21 metropolitan areas in 12 states.[138] As of December 31, 1999, TWT's network included almost 8,900 route miles, 333,00 fiber miles and offered service to 5,566 buildings.[139] During 1999, TWT's investment in its communications networks exceeded $556 million.[140] TWT anticipated that it would commit approximately $350 million in 2000 to fund its capital expenditures for current operating areas its expansion plans.[141]

B. Other Proceedings Relevant to the Application to Transfer Licenses.

47. *Federal Trade Commission Review.* In addition to Commission review, the proposed merger is subject to review by the FTC. The FTC recently approved the merger, subject to certain conditions.[142] The FTC Consent Agreement requires, among other provisions discussed below: (1) that AOL Time Warner make available to subscribers at least one unaffiliated ISP on Time Warner's cable systems before AOL itself begins offering service; that AOL Time Warner allow two other unaffiliated ISPs onto its cable systems within 90 days after AOL's commencement of service; and that AOL Time Warner negotiate in good faith for non-discriminatory access to its cable systems with any ISPs requesting such access; (2) that AOL Time Warner not interfere with content passed along the bandwidth contracted for by unaffiliated ISPs, or discriminate on the basis of affiliation in the transmission of content that AOL Time Warner has contracted to deliver to subscribers over their cable systems; and (3) that AOL Time Warner market and offer AOL's DSL services in the same manner and at the same retail price in Time Warner cable areas where affiliated cable-based Internet access service *is* available, as in those areas where affiliated cable-based Internet access service is *not* available.[143] The FTC also required, in a separate order, that AOL Time Warner hold separate Road Runner and AOL until such time that it offers over all of its cable properties an unaffiliated ISP.[144]

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[134] *Id.*

[135] *Id.*

[136] Applicants' First Response at 23. Time Warner owns 47.85% of the equity in TWT, and 66.86% of TWT's voting power. *See id.* at 23, 26.

[137] Applicants' First Response at 23.

[138] *Id.* at 26.

[139] *Id.* at 24.

[140] *Id.* at 24.

[141] *Id.*

[142] *See* FTC Consent Agreement and Federal Trade Commission Office of Public Affairs, *FTC Approves AOL/Time Warner Merger with Conditions* (press release), Dec. 14, 2000 (describing FTC action). (FTC Press Release)

[143] *Id.* at 2.

[144] Federal Trade Commission, *Order To Hold Separate in the Matter of America Online, Inc., and Time Warner* (continued...)

48. *European Commission Review.* On October 11, 2000, the European Commission (the "EC") granted conditional approval to the Applicants' proposed merger.[145] The EC's approval was conditioned upon AOL's agreement to sever all structural links between itself and the German multi-media company Bertelsmann AG.[146] The EC did not address concerns with respect to the European market for residential high-speed Internet access, stating that the Applicants do not have a "broadband infrastructure in Europe."[147]

49. *Local Franchising Authority Review.* As of September 14, 2000, Applicants had completed initial regulatory filings with approximately 1,150 local franchising authorities.[148] Pursuant to Section 617 of the Communications Act, local franchising authorities with jurisdiction to review transfers or sales of cable systems have 120 days from the date of Applicants' request for a franchise transfer to render a decision.[149] As of September 14, the Applicants had received approval from, or did not need to receive approval from, communities covering approximately 99.63% of total subscribers served by Time Warner Cable.[150] Three communities denied the request to transfer.[151] Subsequently, one of these communities reconsidered and granted approval.[152]

C. The Merger Transaction and the Application to Transfer Licenses

50. *Proposed Transaction.* On January 10, 2000, AOL and Time Warner agreed to merge in a stock-for-stock transaction whereby each will become a wholly owned subsidiary of AOL Time Warner.[153] Under the merger agreement, Time Warner and AOL stock will be converted into AOL Time Warner stock at fixed exchange ratios: Time Warner shareholders will receive 45% of the new corporation, and AOL shareholders will receive 55%, each on a fully diluted basis.[154] Upon the merger's completion, ownership and control of all entities holding FCC licenses are to be transferred from Time Warner and AOL individually to the newly formed AOL Time Warner.[155] Currently, Time Warner holds

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Inc., Docket No. C-3989, rel. Dec. 14, 2000.

[145] European Commission, *Commission Gives Conditional Approval to AOL/Time Warner Merger* (press release), Oct. 11, 2000.

[146] *Id.*

[147] *Id.*

[148] Letter from Arthur Harding, Wiley, Rein and Fielding, Counsel for Time Warner Inc., to Magalie Roman Salas, Secretary, FCC, dated Sept. 14, 2000 ("Harding Sept. 14 Letter").

[149] 47 U.S.C. § 537; 47 C.F.R. § 76.502.

[150] Harding Sept. 14 Letter.

[151] *Id.*

[152] Letter from Arthur Harding, Wiley, Rein and Fielding, Counsel for Time Warner Inc., to Magalie Roman Salas, Secretary, FCC, dated Dec. 5, 2000 ("Harding Dec. 5 Letter"). Cary, North Carolina and Biddeford, Maine are the communities that denied the transfer. *Id.* In addition, one community that had not granted approval as of Sept. 14, 2000 subsequently granted its consent. *Id.*

[153] Time Warner Inc., *America Online and Time Warner Will Merge* (press release), Jan. 10, 2000; *see also* Application at 4-5.

[154] Application at 5.

[155] Application at 4-5. *See* Application at Attachment 1, for a full listing of licenses held by AOL and Time Warner.

numerous Commission licenses associated with its cable television systems, broadcast stations, and telephony ventures.[156]

51. The merger would join the nation's largest ISP, AOL, with the nation's second largest cable operator, Time Warner. The Applicants believe that the combined company will spur the development of residential broadband service, and bring next-generation multimedia content and powerful e-commerce applications to consumers.[157] The Applicants also contend that their combination will create new opportunities for interactive entertainment, news, online services, music, publishing, and film distribution.[158] The Applicants aver that their merger will lead to a solution to the "cable access" issue, and to the provision of multiple ISPs over the cable platform.[159] In particular, AOL and Time Warner point to their Memorandum of Understanding Regarding Open Access Business Platforms (the "MOU"), into which the Applicants entered shortly after agreeing to merge, as a "turning point" in the effort to promote a "vigorously competitive marketplace for broadband Internet services."[160]

IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

52. Parties opposing the merger have alleged that the combination of AOL and Time Warner will harm the public interest with respect to the provision of various services. We address below the effects of the merger on only those services that may be affected adversely by the merger, based on commenters' allegations and our own analysis. Specifically, we examine the merger's potential effects on (1) high-speed Internet access services, (2) services based on instant messaging, (3) interactive television services, (4) electronic programming guides, (5) carriage of television broadcast signals, (6) increased concentration among MVPDs, and (7) competition among MVPDs. In addition, we examine the merger's potential public interest harms in light of AOL Time Warner's ownership and contractual relationships with AT&T Corp.[161]

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[156] Time Warner's cable systems hold more than 150 Cable Television Relay Service (CARS) Licenses. *See* Application at Appendix 1. CARS licenses are used "for the transmission of television and related audio signals . . . and cablecasting from the point of reception to a terminal point from which the signals are distributed to the public by cable." *See* 47 C.F.R. § 78.1. Thus, CARS licenses can be an integral part of a cable system's plant, allowing the cable system to distribute cable programming to its entire service regardless of certain physical obstacles to transmission. Time Warner subsidiaries also hold six licenses under section 214 of the Communications Act. The licenses permit the holders to provide "common carrier services between the United States . . . and a foreign point." *See* 47 C.F.R. § 63.18. AOL holds five land mobile wireless licenses. Application at Attachment 1.

[157] Application at 9.

[158] *Id.* at 11.

[159] *Id.* at 14.

[160] Applicants' March 21 Supplemental Information at 23.

[161] The City of Daytona Beach raises certain concerns about local franchise matters that we do not address because they are not merger-specific. *See* Letter from Richard F. Quigley, Assistant Manager for Support/Technology Services, City of Daytona Beach, to Magalie Roman Salas, Secretary, FCC, dated Aug. 18, 2000 ("Daytona Beach Aug. 18 Ex Parte"), at 7 (advocating a merger condition requiring AOL Time Warner to set aside channel capacity and facilities for public access, educational and government ("PEG") channels).

A. High-Speed Internet Access Services

53. In this section, we examine the effects of the proposed merger on competition in residential high-speed Internet access services.[162] We again confront in the merger context whether to impose some conditions regarding access to the cable platform for unaffiliated ISPs seeking to provide these services. The Applicants have argued that (i) this case is indistinguishable from prior cases such as *AT&T-MediaOne* in which the Commission declined to require AT&T to open its cable networks to unaffiliated ISPs, and (ii) imposing an access condition here is inconsistent with the Commission's pending *Notice of Inquiry* on high-speed Internet access ("*Cable Access NOI*"),[163] which explores the need for rules of general applicability. We disagree.

54. We find that the circumstances presented by these applications are dramatically different from those presented in our former cases, and compel a different result. AOL is by far the largest narrowband ISP and has been the leading advocate and supporter of the "open access" movement. The proposed merger represents a substantial shift in strategy for AOL and a dramatic change in the ISP/cable system landscape. AOL seeks to purchase the second largest cable system in the country and would obtain in the transaction programming assets that could give it even greater bargaining power to negotiate access to other cable systems. After the merger, AOL would have a unique concentration of assets (vast narrowband membership and the product that has created it, access to Time Warner cable systems, and extensive Time Warner content assets) that could well give it sufficient power to bargain its way onto all other platforms (indeed at preferential terms) without any change in government regulation.

55. None of the prior mergers involved a comparable combination of assets or a comparable potential impact on competition among broadband ISPs. Moreover, while the access issue affects the whole industry, as our *Cable Access NOI* indicates, this merger would place AOL Time Warner in a unique position that may justify conditions inapplicable to others.

56. As further elaborated below, we find that, absent mitigating conditions, the proposed merger would undermine competition in the provision of residential high-speed Internet access services. We find in particular that these services constitute a relevant product market distinguishable from residential narrowband Internet access services. We also find that the proposed merger would give AOL Time Warner both the ability and the incentive to discriminate against unaffiliated ISPs and alternative (non-cable) high-speed platforms within Time Warner cable territories, and to obtain exclusive or preferential carriage for its own Internet access services from other cable providers. As a result, the proposed merger would frustrate statutory goals and Commission policies designed to ensure that the American public has access to a diversity of information sources and to widely available advanced services.

57. We conclude, however, that these potential harms will be substantially averted by the terms of the FTC Consent Agreement.[164] The FTC Consent Agreement requires, among other provisions discussed below, (1) that AOL Time Warner make available to subscribers at least one unaffiliated ISP on Time Warner's cable systems before AOL itself begins offering service; that AOL Time Warner allow two other unaffiliated ISPs onto its cable systems within 90 days after AOL's commencement of service; and that AOL Time Warner negotiate in good faith for non-discriminatory access to its cable systems with

[162] We describe these services more fully below.

[163] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Notice of Inquiry ("*Cable Access Notice of Inquiry*" or "*Cable Access NOI*"), FCC 00-355 (rel. Sept. 28, 2000).

[164] *See* FTC Consent Agreement; FTC Press Release.

any ISPs requesting such access; (2) that AOL Time Warner not interfere with content passed along the bandwidth contracted for by unaffiliated ISPs, or discriminate on the basis of affiliation in the transmission of content that AOL Time Warner has contracted to deliver to subscribers over their cable systems; and (3) that AOL Time Warner market and offer AOL's DSL services in the same manner and at the same retail price in Time Warner cable areas where affiliated, cable-based Internet access service *is* available as in those areas where affiliated, cable-based Internet access service is *not* available.[165] Because we conclude that the FTC Consent Agreement will not avert all the potential harms to the public interest that would result from the proposed merger, we impose certain additional conditions to ensure that AOL Time Warner does not disadvantage unaffiliated ISPs on its cable systems through several indirect means not squarely addressed by the FTC Consent Agreement.

58. The decisions we make in this proceeding do not necessarily portend any specific policy determinations in future proceedings, such as the *Cable Access NOI* or the *ITV NOI*,[166] which will be based on the record in those proceedings. If the Commission were to determine in the context of those proceedings that rules of general applicability were warranted, this Order does not determine or prejudge whether the conditions we adopt here should apply industry-wide. The assessment of what types of generally applicable rules, if any, would be appropriate will flow from the record developed in those proceedings. Should those proceedings ultimately result in rules of general applicability or yield any findings on market definition contrary to our finding here, the Commission may revisit the merger conditions imposed in this section, either on its own motion or upon the Applicants' request.

59. Our authority to address the merger's impact on competition for high-speed Internet access services derives from our statutory duty to ensure that the proposed transaction serves the public interest.[167] As discussed in Section II above, we conduct our public interest inquiry by determining, among other things, whether the proposed transaction would substantially frustrate or impair the Commission's implementation or enforcement of the Communications Act, or would interfere with the objectives of the Act or of other statutes.[168] Several such objectives are relevant to our analysis here. First, in adopting the 1996 Act, Congress established a clear national policy to "promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation."[169] Concurrently, Congress charged the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[170] The principal purpose of such capability is to facilitate the use of advanced services, of which residential high-

[165] FTC Press Release at 2.

[166] *See* Section IV.D, *infra* (Interactive Television Services).

[167] 47 U.S.C. § 214(a), § 310(d); *see also id.* § 303(r).

[168] *AT&T-MediaOne Order*, 15 FCC Rcd at 9820-21 ¶ 9. In conducting our public interest inquiry, we also examine whether the proposed transaction would result in a violation of the Communications Act or any other applicable statutory provision, and whether it would result in a violation of the Commission's rules. *Id.* The record does not indicate that the proposed transaction would result in any such violations with respect to residential high speed Internet access services.

[169] 47 U.S.C. § 230(b)(1)-(2).

[170] *Id.* § 157 nt.; *see also id.* § 1 (FCC was created "so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"). Congress defined "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability." 47 U.S.C. § 157 nt.

speed Internet access services are one kind.[171] Finally, "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."[172] This national policy to promote the public's access to a diversity of viewpoints from a multiplicity of sources finds expression in statutory law as well as in previous decisions of this Commission.[173]

60. Our authority to review the impact of the proposed transaction on the public interest goes hand in hand with broad authority to attach conditions to the proposed transfer of lines and licenses to ensure that the transfer actually serves the public interest. Section 303(r) of the Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.[174] Similarly, Section 214(c) of the Communications Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[175]

61. We find that, absent mitigating conditions, the proposed transaction would interfere with each of the objectives discussed above. The merger would imperil the continued existence of a vibrant and competitive free market for development of the Internet because AOL Time Warner would have the ability and the incentive to discriminate against unaffiliated ISPs on its own cable platform, and to obtain exclusive carriage for its Internet access services on the networks of other cable providers.[176] These outcomes would also thwart the deployment of advanced telecommunications capability to all Americans by limiting choice in the realm of residential high-speed Internet access services and, potentially, by threatening the survival of ISPs unaffiliated with AOL Time Warner as consumers migrate from

[171] *See, e.g., Second Inquiry Concerning the Deployment of Advanced Telecommunications Capability Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) at ¶ 3 ("*Second 706 Report*") (noting that "[w]ith advanced telecommunications capability consumers can take advantage of advanced services that allow residential and business consumers to create and access content, sophisticated applications, and high-bandwidth services").

[172] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (internal quotation marks omitted).

[173] *See, e.g.*, 47 U.S.C. § 257(b) (noting that one of the "policies and purposes" of the Communications Act is to "favor[ ] diversity of media voices"); *id.* § 521 nt (codifying findings and policy underlying Cable Television Consumer Protection and Competition Act of 1992) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."); *AT&T-MediaOne Order*, 15 FCC Rcd at 9818-20 ¶¶ 3-5 (considering proposed merger's effects on "diversity and competition" in video programming and its effects on "openness and diversity of broadband Internet content"). We note that we are not here determining the proper legal classification of Internet services provided by cable operators. *See Cable Access NOI* (soliciting comments on proper legal classification of such services). Our determination not to address that issue in this proceeding is consistent with our determination not to do so in *AT&T-MediaOne*. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9872 ¶ 126.

[174] 47 U.S.C. § 303(r).

[175] *Id.* § 214(c).

[176] Discrimination by AOL Time Warner against unaffiliated ISPs on the merged company's cable platform could take the form of an outright refusal to carry such ISPs, or it might occur more subtly -- for example, by degrading unaffiliated ISPs' quality of service, limiting their features and functionalities, or discriminating against them in terms and conditions of access. AOL Time Warner could also facilitate discrimination against unaffiliated ISPs on the platforms of other cable operators by using its leverage over video programming to obtain (via explicit contract or tacit agreement) exclusive or preferential treatment for AOL Internet access services that would be denied to its competitors.

narrowband to high-speed services.[177] These outcomes would likewise diminish the public's ability to obtain information from diverse sources, as customers of the nation's second largest cable operator (AOL Time Warner) would have little choice but to access the Internet through service providers affiliated with that entity.[178] Furthermore, as we discuss below, discrimination by AOL Time Warner against unaffiliated ISPs in the market for residential high-speed Internet access services would facilitate discrimination by that company in favor of its own broadband content, a result that could constrain consumers' access to the "widest possible" array of information over high-speed technology.[179] If, in contrast, AOL Time Warner were obligated to carry multiple, unaffiliated ISPs over its network on non-discriminatory terms, those ISPs could serve as an alternative outlet for non-AOL Time Warner content, making it more likely that AOL Time Warner's affiliated ISPs would feature such content themselves to remain competitive. For all of these reasons, we conclude that our duty to ascertain that the proposed transaction serves the public interest requires us to condition our approval on the terms we describe below. We have narrowly tailored these terms to augment the terms in the FTC Consent Agreement, and to avoid duplication of those terms. Each of the conditions we impose is designed to ensure that the transaction does not interfere with the aforementioned statutory objectives.

1. Background

62. Internet access services consist principally of connectivity to the Internet provided to end users.[180] These end users may be residential consumers, businesses, content providers, or application providers. In this analysis, we focus on Internet access services provided to residential consumers.

63. The majority of residential and small business consumers who purchase Internet access services do so from ISPs offering relatively low-speed access (typically between 28 and 56 kilobits per second ("kbps")) over local telephony plant, otherwise known as "narrowband" (or "dial-up") service.[181] Customers of these ISPs typically pay $22 per month or less for unlimited usage.[182] Major nationwide

[177] *See* Letter from Stephen Heins, Director of Marketing, NorthNet, to Robert Pitofsky, Chairman, FTC, and William E. Kennard, Chairman, FCC, dated Oct. 10, 2000 ("NorthNet Oct. 10 Ex Parte") at 7 (noting that "[m]any independent ISPs have concluded that the[] terms [proposed by Time Warner] present no reasonable basis for independent ISPs to compete on a commercially viable basis," and concluding that "[b]y offering terms that are totally unacceptable, Time Warner keeps its network effectively closed"); Letter from Earl W. Comstock, Esq., Sher & Blackwell, Counsel for EarthLink, to Magalie Roman Salas, Secretary, FCC, dated Oct. 18, 2000 ("EarthLink Oct. 18 Ex Parte") at 1 (arguing that the terms of Time Warner's recent proposals "would make the arrangements economically infeasible for ISPs not affiliated by ownership with the applicants").

[178] More subtle discrimination by AOL Time Warner would also narrow the public's access to information from diverse sources, though in more subtle ways: AOL Time Warner's cable customers would have a "choice" between using affiliated ISPs on the one hand or unaffiliated ISPs relegated to offering an inferior product on the other.

[179] Discrimination by AOL Time Warner against unaffiliated ISPs with respect to carriage on the company's cable network would facilitate discrimination by AOL Time Warner in favor of its own broadband content by enabling the merged firm to exclude non-AOL Time Warner content from its Internet access services without facing competitive pressure from other ISPs on the same cable network who would presumably supply non-AOL Time Warner content.

[180] We refer to "Internet access services," in the plural, to reflect the fact that such services offer differing speeds of access; technical performance; price; availability of customer support; and extent of content. Our use of the term "Internet access services" is meant to encompass services provided not only by ISPs, but also by so-called online service providers ("OSPs"), such as AOL, which combine content with Internet access services.

[181] While the fastest of narrowband modems have the theoretical capability to support 56 kbps downstream, Commission regulations limit narrowband modems to 53 kbps.

[182] *See ISP Buyer's Guide: Dial-Up ISPs*, CNET INTERNET, at http://home.cnet.com/internet/0-3762-7- (continued...)

dial-up ISPs include AOL, AT&T's WorldNet, MSN, and EarthLink. LECs operating within their service territories, Erol's, and thousands of other ISPs offer service locally or regionally.[183] High-speed (or "broadband") Internet access is available through several different technologies, including cable, digital subscriber line ("DSL"),[184] fixed terrestrial wireless, and satellite.[185] In general, high-speed access enables consumers to communicate over the Internet at speeds that are many times faster than the speeds offered through dial-up telephone connections. With high-speed Internet access, consumers can send and view content with little or no transmission delay, utilize sophisticated "real-time" applications, and take advantage of other high-bandwidth services.

64. Cable operators that provide high-speed Internet access services to their subscribers often do so by purchasing some components of such services from another company. In particular, a cable operator typically contracts with an Internet connectivity provider (such as Road Runner, Excite@Home, or High-Speed Access Corporation)[186] to link its cable headend to the Internet, which entails providing routers, servers, and a dedicated Internet connection.[187] The cable operator, in turn, generally retains responsibility for installing the modems upon which end users rely, for upgrades to the cable system plant, and for marketing. The cable operator and the Internet connectivity provider often divide billing and technical support functions. From the perspective of the consumer, these services form one product -- residential high-speed Internet access service.

65. Presently, the majority of residential high-speed Internet users connect to the Internet via cable. The main competitor to cable in the market for residential high-speed Internet services is currently DSL, which LECs provide over existing telephone plant.[188] As of November 2000, there were

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(...continued from previous page)
2518427.html?tag=st.int.3762-7-2518426txt.3762-7-251842 (visited Dec. 5, 2000).

[183] NorthNet indicates that there are "7,000 or so ISP's throughout the United States." *See* NorthNet Oct. 10 Ex Parte at 1.

[184] Generally, unless we state otherwise, our references to "DSL" throughout this Order refer to asymmetric DSL ("aDSL"). Asymmetric DSL is the most common variant of DSL used by residential customers, and is available at various speeds ranging up to 6.1 mbps downstream and 640 kbps upstream. *See Second 706 Report*, FCC 00-290 at ¶ 36; *id.* at ¶ 47. Presently, at lowest cost, aDSL service usually provides transmission at 384-640 kbps downstream and 90-128 kbps upstream.

[185] The Commission's *Second 706 Report* contains a detailed description of high-speed Internet access *via* various technologies. The characteristics of the services offered via these respective technologies may vary. *See generally Second 706 Report*. The *Report* defines "high-speed" services as "those services with over 200 kbps capability in at least one direction." *Id.* at 8. It distinguishes such services from "advanced services," which it defines as the "subset" of high speed services "capable of 200 kbps or greater transmission in *both* directions." *Id.* (emphasis in original).

[186] We note that Excite@Home and Road Runner also function as high-speed ISPs.

[187] A cable headend is "the origination point for signals in the cable system. It has parabolic or other appropriately shaped antennas for receiving satellite-delivered program signals, high-gain directional antennas for receiving distant TV broadcast signals, directional antennas for receiving local signals, machines for playback of taped programming and commercial insertion, and studios for local origination and community access programming." Walter Ciciora et al., MODERN CABLE TELEVISION TECHNOLOGY 12 (1999). The headend also houses all equipment for connection of the cable system to the Internet. *Id.*

[188] With the addition of certain electronics to the telephone line, carriers can transform the copper loop that already provides voice service into a conduit for high-speed data traffic.

approximately 3 million customers in the United States accessing the Internet via cable[189] and more than 1.7 million accessing it via DSL lines.[190] Although DSL subscriptions appear to be growing at a faster rate than cable Internet subscriptions,[191] analysts differ as to whether and how quickly DSL will catch up with cable.[192] Excite@Home and Road Runner are the two largest high-speed ISPs, serving a majority of all high-speed subscribers.[193] The remaining subscribers are splintered among a handful of other cable operators that do not offer Internet access services through Road Runner or Excite@Home, and a number of DSL, fixed wireless, and direct broadcast satellite ("DBS") competitors.[194]

66. Residential high-speed Internet access services are also provided through satellite technology, which employs a radio relay station in orbit above the earth to receive, amplify, and redirect signals. Satellite-based Internet access services are offered by DBS providers such as DirecTV, and may be offered within the next several years by low earth orbit ("LEO") satellites deployed by firms such as Teledesic. At present, satellite-based Internet access services can supply high-speed transmission only in the "downstream" direction, that is, from the Internet to the end user's home; the end user must use narrowband telephone lines for the "upstream" transmission of data from the home to the Internet.[195] Although satellite providers are working to address this deficiency, two-way high-speed transmission facilitated by satellite may not be widely available for several years.[196] As of today, DBS providers

[189] Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://www.cabledatacomnews.com/cmic/cmic16.html (visited Nov. 14, 2000).

[190] TeleChoice, Inc., *TeleChoice DSL Deployment Summary – Updated 11/13/00*, at http://www.xdsl.com/content/resources/deployment_info.asp (visited Nov. 14, 2000). Of these customers, approximately 67%, or 1,160,000, are residential. We note that the Commission has undertaken a semi-annual data collection concerning high-speed Internet access subscribers. *See* Federal Communications Commission, *High-Speed Services for Internet Access: Subscribership as of June 30, 2000*, at http://www.fcc.gov/Bureaus/Common_Carrier/Reports/FCC-State_Link/IAD/hspd1000.pdf. The foregoing report found one million DSL subscribers and 2.2 million cable modem subscribers as of June 30, 2000. We use other publicly available sources here because they are more recent.

[191] *Second 706 Report*, FCC 00-290 at ¶¶ 191-96. In the past 18 months, numerous companies have made substantial investments in DSL. For example, SBC Corp. has announced plans to invest $6 billion in an infrastructure deployment throughout its 13-state region in order to make DSL available to nearly 77 million homes. *See* SBC Communications, Inc., *SBC Set to Trial DSL Neighborhood Broadband Gateways* (press release), Aug. 23, 2000; SBC Communications, Inc., *SBC Launches $6 billion Broadband Initiative* (press release), Oct. 18, 1999.

[192] *See* Confidential Appendix IV-A-1, Note 1.

[193] Excite@Home has approximately 1.7 million subscribers in the United States. *See* http://www.corporate-ir.net/ireye/ir_site.zhtml?ticker=ATHM&script=410&layout=-6&item_id=131059 (visited Nov. 14, 2000). RoadRunner has 1.1 million subscribers in the United States. *See* Road Runner Corp., *Road Runner Sets Record Third Quarter* (press release), Oct. 16, 2000.

[194] *See* Kinetic Strategies, Inc., *Commercial Cable Modem Launches in North America*, CABLE DATACOM NEWS, at http://CableDatacomNews.com/cmic/cmic7.html (visited Nov. 14, 2000) (listing cable high-speed Internet launch locations and ISPs). Examples of other ISPs serving cable subscribers include the ISP Channel and Adelphia PowerLink serving Adelphia customers, and High Speed Access serving Charter customers.

[195] One company, StarBand, in partnership with Microsoft and Gilat-to-Home, offers two-way satellite transmission for Internet access, but the speeds generally do not reach or exceed 200 kbps in both directions except during off-peak hours (midnight to six in the morning). Conversation with StarBand Customer Service, Dec. 4, 2000 at 1-877-827-4290; *see also* http://www.starband.com (visited Dec. 4, 2000).

[196] *But see* Peter S. Goodman, *Dishing Up a New Link to the Internet*, WASH. POST, Nov. 6, 2000, at A1 (reporting inception of two-way high-speed service by Starband/Gilat-to-Home).

offering the "one-way" technology have captured only a very small share of the market for residential high-speed Internet access services.[197]

67. Finally, residential high-speed Internet access services are also being offered -- albeit on a much smaller scale as yet -- through "fixed wireless" technologies, including local multipoint distribution systems ("LMDS") and multichannel multipoint distribution systems ("MMDS"). Fixed wireless technology typically employs microwave transmission facilities to transmit data to and from residential consumers. Although several firms have made significant investments to develop fixed wireless technology, high-speed Internet access services using such technology is not yet widely available to consumers, and may not be commercially deployed for use by residential consumers on a large scale in the immediate future.[198]

2. Discussion

a. Relevant Markets

68. The possibility that AOL Time Warner would engage in anticompetitive conduct must be evaluated in the context of relevant markets. A relevant market is the smallest market -- defined in terms of both the pertinent product and the pertinent geographical area -- for which the elasticity of demand is sufficiently low that a firm supplying the entire market could profitably reduce output and elevate its price substantially over a sustained period of time.[199] In defining the relevant market, it is useful to analyze whether the firm at issue could profitably impose a "small but significant and non-transitory" increase in price, *i.e.*, could raise prices without losing a significant portion of sales to competitors.[200]

69. We begin by addressing whether high-speed Internet access services, as distinct from narrowband services, constitute the relevant product market in determining the effects of the proposed merger on the public interest.[201] We conclude that they do.[202] We find particularly significant the fact

[197] *Second 706 Report*, FCC 00-290 at ¶ 111.

[198] The most significant firms in upperband fixed wireless services are Teligent, Inc. and Winstar Communications Inc., which target business (not residential) customers. The most significant firms in lowerband MMDS fixed wireless services are WorldCom and Sprint. *Second 706 Report*, FCC 00-290 at ¶¶ 42-55, 107-10.

[199] William M. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937 (1981).

[200] *See generally* Horizontal Merger Guidelines Issued by the U.S. Department of Justice and the Federal Trade Commission, 57 Fed. Reg. 41,552 (dated Apr. 2, 1992, as revised Apr. 8, 1997).

[201] Although the record in this proceeding does not reflect much debate over this question, it has engendered considerable disagreement in other recent proceedings before the Commission. *See, e.g.*, *AT&T-MediaOne Order*, 15 FCC Rcd at 9866 ¶ 116 (noting "rigorous debate on the record" regarding whether a separate market exists for residential high-speed Internet access service).

[202] As we explain further below, our finding in this proceeding that residential high-speed Internet access services constitute a product market distinct from narrowband services will not restrict the Commission's ability to consider market definition questions that may arise in the context of the *Notice of Inquiry* concerning high-speed Internet service or any other future Commission proceeding. As we have previously noted, "[a]n individual proceeding in which the Commission defines relevant product and geographic markets, such as a proposed license transfer, may present facts pointing to narrower or broader product markets" than those defined in a proceeding that does not focus on license transfers. *In the Matter of Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*, FCC 00-29 (Aug. 18, 2000) ("Fifth Annual CMRS Competition Report") at 3 n.4. Moreover, we recognize that the exercise of defining relevant markets is inherently dynamic, reflecting ongoing changes in the costs of providing various services and in the tastes and preferences of consumers. It would be particularly (continued...)

that high-speed Internet access services include features unavailable over narrowband, such as access to high-bandwidth content that is impractical over dial-up connections. Analysts agree that over time the Internet will become a more absorbing experience, in which dynamic content supplements and supplants static pages of information.[203] Even at present, the experience of "surfing" the Internet is more immediate and efficient over high-speed connections, at which users can move between texts as if they were flipping pages of a book. Increasingly the Internet is also becoming a multimedia experience, complete with film and audio clips as well as other high-bandwidth applications. Full-screen video is already commonly available over the Internet, and other applications, such as video-on-demand, telemedicine, full-featured software applications, and distance learning are available or under development.[204] Such applications so completely change the experience of using the Internet that the difference can be likened to the contrast between looking at a still photograph and watching a movie.[205] The existence of high-speed transmission is necessary to spur development of such applications, and consumers with narrowband connectivity are unable to experience (or in some instances even access) such content in the manner intended, *i.e.*, rapidly and in real-time.[206]

70. Another factor supporting our conclusion that high-speed Internet access services constitute a discrete market is the high consumer costs involved in switching to a high-speed platform. Consumers switching to high-speed service from dial-up (or between high-speed services) experience costs significantly higher than those involved in switching between dial-up providers. Switching between dial-up services typically entails a telephone call, a software download, and rarely, a one-time connection fee

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appropriate to revisit issues of market definition in a period of rapid technological change and service convergence, as the factual predicates underlying a market definition in one proceeding may no longer be valid at the time of another proceeding.

Separately, we note that the FTC, in its analysis of the proposed merger, concludes that a relevant input market consisting of ISP purchases of high-speed data transmission services also exists. *See* Federal Trade Commission, *In the Matter of America Online, Inc. and Time Warner Inc.*, Docket No. C-3989 ("FTC Complaint") at 3, 5, 6. We find that any concerns we share with respect to this market are adequately addressed in our analysis of the consumer market for high-speed Internet access services, which is usually supplied using these transmission services as an input.

[203] *See, e.g.*, George Gilder, TELECOSM: HOW INFINITE BANDWIDTH WILL REVOLUTIONIZE OUR WORLD 252 (2000); Francois Bar et al., *Access and Innovation Policy for the Third-Generation Internet*, TELECOMMUNICATIONS POLICY, July-Aug. 2000, at 7; Carol Wilson, *Broadband: Get Ready for the Gale*, ZDNN, June 26, 1999, at http://www.zdnet.com/zdnn/stories/news/0,4586,2281301,00.html (visited Nov. 14, 2000).

[204] *See* RealNetworks, Inc., *Full Screen Video with RealPlayer Plus 5.0, G2, 7, and 8*, at http://service.real.com/fullscreen/default.html (visited Nov. 14, 2000) (full screen video); Pixelon, Inc., at http://www.pixelon.com (visited Nov. 14, 2000) (same); Infovalue Computing, Inc., at http://www.infovalue.com (visited Nov. 14, 2000) (video-on-demand applications); University of Virginia, at http://www.telemed.virginia.edu/ (visited Nov. 14, 2000) (telemedicine); Arizona State University, *ASU Distance Learning Technology*, at http://www-distlearn.pp.asu.edu (visited Nov. 14, 2000) (distance learning).

[205] Indeed, narrowband users cannot watch television- or film-quality video clips via the Internet unless they download such clips in their entirety in advance before playing them, a process that is prohibitively time-consuming over narrowband connections for all but the shortest clips. Users with high-speed Internet access, in contrast, can obtain "streaming" software that enables them to view television- and film-quality video clips with little or no delay after clicking on an appropriate link.

[206] *See, e.g.*, Dain Rauscher Wessels, *Bullish on Broadband*, June 8, 2000, at 22; Kathy Kincade, *Top 10 Telemedicine Programs for 1999: Experience Pays Off*, TELEHEALTH MAGAZINE, at http://www/telehealthmedmag.com (visited May 19, 2000).

on the order of $25.[207] In contrast, switching from dial-up to high-speed service often entails several telephone calls, at least one installation visit from a high-speed service provider, and a fee on the order of several hundred dollars to cover the cost of the installation and a high-speed modem.[208] Furthermore, switching to high-speed service may also necessitate upgrading the end user's PC to one with the requisite microprocessing capacity and an Ethernet port for cable modem attachment; such an upgrade may increase the cost of switching by a thousand dollars or more.[209]

71. The record developed in *AT&T-MediaOne* also supports our definition of the relevant market for high-speed Internet access services. In that proceeding, numerous commenters raised the issue of market definition, and all who addressed the issue (other than AT&T and MediaOne) maintained that residential high-speed Internet access services constitute a market separate from narrowband services.[210] The commenters cited the following reasons (among others):

- High-speed Internet access services support all the content and applications that narrowband access services do, but also allow access to services that will never be technically feasible over narrowband.[211]

[207] *See,e.g.*, EarthLink, Inc., at http://www.earthlink.net/join (visited Nov. 14, 2000). EarthLink normally charges a $25 set-up fee, but that fee is waived if the customer signs up over the Internet.

[208] *See Second 706 Report*, FCC 00-290 at App. C., ¶ 10 & nn. 2, 8; *see also* Deja.com, Inc., *Bell South: User Reviews*, at http://www. deja.com/products/at_a_glance/glance.xp?PDID=8378 (visited Nov. 14, 2000) (describing difficulties such as numerous installation visits and customer service telephone calls, neither of which guaranteed full and successful installation); United States General Accounting Office, *Telecommunications: Technological and Regulatory Factors Affecting Consumer Choice of Internet Providers*, GAO-01-93, Oct. 2000, at 18 (indicating that both DSL and cable modem service require a higher price than dial-up Internet access service, and that DSL involves additional installation fees); Excite@Home, Inc., at http://www.home.com/xfooter/pricing.html (visited Dec. 4, 2000) (indicating that Excite@Home costs between $39.95 and $44.95 per month, dial-up costs between $14.95 and $21.95, and DSL costs between $39.95 and $189.96 (with additional ISP charges); but including the cost of a second phone line in calculating cost of dial-up service); Road Runner Corp., at http://rrcorp.central.rr.com/hso/explore_pricing.asp (visited Dec. 4, 2000) (indicating similar monthly fees); Verizon Communications, Inc., at http://www.bell-atl.com/infospeed/more_info/pricing.html (visited Dec. 4, 2000) (indicating that Verizon offers DSL service starting at $39.95 per month with no installation or equipment charges if the customer self-installs the service, and a $120.00 installation charge if a technician visit is required).

[209] *See* Walter S. Mossberg, *Those in the Market for a PC: Heed the Fall Buyer's Guide*, Oct. 19, 2000, at http://ptech.wsj.com./archive/ptech-20001019.html (visited Jan. 2, 2001) (noting that high-speed connections typically require an Ethernet port). Some consumers with older computers may need to upgrade their computers in order to meet the minimum technical requirements for high-speed access service. For instance, ZDNET reports that, "The basic requirements for a system to work with today's cable modems are either a PC with at least a 66 Mhz 486 processor or a Macintosh with at least a 68040 processor, and 16 Mb of memory. Of course performance will improve with faster processors and more RAM on either platform. The Road Runner service recommends 32 Mb of RAM and a 166 Mhz Pentium or 250 Mhz PowerMac." ZDNET, *What You Need and Getting Connected*, at http://www.zdnet.com/zdhelp/stories/main/0,5594,2278598-4,00.html (visited Dec. 4, 2000). Technical requirements for DSL are similar. *See id.*

[210] *Applications for Consent to Transfer of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CC Docket No. 99-251, Bell Atlantic Comments at 28-34; *id.*, GTE Comments at 14-29; *id.*, MCI Comments at 9; *id.*, U S West Comments at 14-15; *id.*, *Declaration of Rubinfield and Sidak* (Attachment to GTE Comments) at 11. *But see id.*, AT&T Reply Comments at 69, 71-75 (arguing that high-speed and narrowband Internet access services constitute part of the same market).

[211] *Id.*, Bell Atlantic Comments at 30; *id.*, GTE Comments at 14-18 & Appendix B at 11 (*Declaration of Rubinfeld and Sidak*); *id.*, U S West Comments at 14-15.

- High-speed access services are "always on," a feature currently unavailable over narrowband access services.[212]

- Preliminary quantitative studies indicate that narrowband and high-speed access services occupy separate markets.[213]

These reasons corroborate our finding in this proceeding that a separate market for high-speed Internet access services does exist.

72. We also find it noteworthy that AOL itself argued in the *AT&T-TCI* merger proceeding that high-speed Internet access services occupy a market separate from narrowband services, and that AOL does not contradict its earlier position here.[214] AOL's comments in *AT&T-TCI* did not include a formal market definition, but they referred repeatedly to the merged firm's potential position as the "dominant provider of . . . broadband data transport"[215] in the "nascent broadband marketplace."[216] While AOL and Time Warner do not maintain in this proceeding that there is a separate market for high-speed Internet access services, they do not deny the existence of such a market.[217]

73. Finally, we note that the Department of Justice ("DOJ"), analyzing the relevant market in the course of its review of the AT&T-MediaOne merger, found that high-speed Internet access services occupy a market separate from narrowband services. DOJ defined this separate market as one encompassing the "aggregation, promotion, and distribution of broadband" content and services;[218] under its analysis, the market includes the transmission facilities used for distribution of broadband content and services, as well as portals that aggregate and market that content.[219] DOJ further found that narrowband Internet service is not a substitute for broadband service, as "[m]uch of this broadband content will not be readily accessible or attractive to narrowband users, because of the much longer times that are needed to transmit the data through narrowband facilities."[220]

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[212] *Id.*, Bell Atlantic Comments at 30; *id.*, GTE Comments at 14.

[213] *Id.*, *Declaration of Rubinfeld and Sidak* (Attachment to GTE Comments) at 8 (citing *Declaration of Professor Jerry A. Hausman* at ¶¶ 4-10 (Attachment to Comments of America Online, Inc., *in Applications for Consent to the Transfer of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Dkt. No. 98-178)); *see also* Hal R. Varian, *Estimating the Demand for Bandwidth*, Aug. 1999, at http://www.sims.berkeley.edu/~hal/Papers /wtp/wtp.pdf.

[214] *Applications for Consent to the Transfer of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, Comments of America Online, *passim*.

[215] *Id.* at 16.

[216] *Id.* at 32.

[217] The Applicants contend that regardless whether the relevant market is defined to include narrowband and broadband Internet access services or broadband Internet access services alone, the proposed merger would not undermine competition. *See* Applicants' Reply Comments at 21-23.

[218] DOJ Consent Decree at ¶ 25 (Competitive Impact Statement).

[219] *Id.* at ¶¶ 25-27.

[220] *Id.* at ¶ 22.

74. The relevant geographic markets for residential high-speed Internet access services are local.[221] That is, a consumer's choices are limited to those companies that offer high-speed Internet access services in his or her area, and the only way to obtain different choices is to move. While high-speed ISPs other than cable operators may offer service over different local areas (*e.g.*, DSL or wireless), or may offer service over much wider areas, even nationally (*e.g.*, satellite), a consumer's choices are dictated by what is offered in his or her locality.

b. Applicants' Roles in the Relevant Market

75. AOL is the largest provider of narrowband Internet access services in the United States and worldwide. The Company's flagship AOL service provides Internet access to more than 26 million subscribers around the globe. AOL also owns another ISP, CompuServe (acquired in 1998), that serves more than 2.8 million customers.[222] AOL is the only narrowband ISP with a double digit worldwide market share, and boasts a customer base nearly five times larger than its nearest competitor, EarthLink.[223] Time Warner does not provide narrowband Internet service.

76. Time Warner owns the second largest cable network in the United States, one that serves approximately 13 million subscribers and passes nearly 21 million homes.[224] When the Application was filed, 85 percent of its network already supported high-speed Internet access services, and Time Warner claimed that the remainder would do so by the end of 2000.[225] Time Warner provides high-speed Internet access services to its cable customers through an exclusive contract with Road Runner, the nation's second largest provider of such services in the residential market.[226] That contract expires in December

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[221] We note that the FTC, in the complaint underlying its order approving the AOL-Time Warner merger, identified the relevant geographic markets as "Time Warner cable service areas and the United States." FTC Complaint at 5. We construe the FTC's reference to the "United States" to denote non-Time Warner, local cable service areas throughout the United States, and we therefore perceive no inconsistency between the FTC's delimitation of the relevant geographic markets and our own. We further note that both the FTC's definition of the relevant geographic markets and ours recognize that the competitive effects of the merger will differ between Time Warner cable service areas and other service areas.

[222] *See* America Online, Inc., *AOL Gears Up For Holiday Shopping Blitz With Best Partners, Most Convenient Tools, And Industry's Leading E-Commerce Performance* (press release), Nov. 15, 2000.

[223] *See* Internet.com Corporation, *Top US ISPs by Subscriber*, at http://www.isp-planet.com/research/rankings_usa.html (visited Nov. 15, 2000). We note that submissions of Disney and EarthLink contend that AOL's worldwide market share is as high as 50 percent. *See* Written Ex Parte Filing of The Walt Disney Company (July 25, 2000) ("Disney July 25 Ex Parte"), transmitted by letter from Lawrence R. Sidman et al., Esq., Verner, Liipfert, Bernhard, McPherson & Hand, Counsel for The Walt Disney Company, to Magalie Roman Salas, Secretary, FCC, dated July 25, 2000, at 15 (citing Yankee Group, *AOL Time Warner in the Context of Consumer Online Migration* (2000)); EarthLink Oct. 18 Ex Parte at 2. For an explanation of Disney's market share calculation, *see* Letter from Marsha J. McBride, Vice President Government Relations, The Walt Disney Company, to Magalie Roman Salas, Secretary, FCC, dated Nov. 27, 2000 ("Disney Nov. 27 Ex Parte") at 2.

[224] Applicants' March 21 Supplemental Information at 8.

[225] Time Warner Inc., *Time Warner Cable, Overview*, at http://www.timewarner.com/corp/about/cablesys/index.html (visited July 31, 2000).

[226] Road Runner is a joint venture among Time Warner, affiliates of MediaOne Group, Inc., Microsoft Corp., Compaq Corp. and the Advance/Newhouse Partnership. Time Warner currently holds a 40 percent ownership stake in Road Runner; however, in a press release issued on December 18, 2000, Time Warner announced that it would increase this stake and manage Road Runner's operations. *See* Time Warner Inc., *Time Warner To Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000 ("Time Warner Dec. 18 Press (continued...)

2001.[227] Road Runner currently serves more than 1.1 million cable modem customers[228] -- more than 26 percent of all residential high-speed Internet access subscribers -- of whom approximately 719,000, or 65 percent, reside in communities served by Time Warner cable systems.[229]

77. Although the vast majority of AOL subscribers access the Internet by means of dial-up connections, the company has sought to provide high-speed Internet access services across a variety of platforms.[230] AOL has agreements with several LECs to deliver its Internet service via DSL, and with DBS provider DirecTV to deliver its Internet service via DirecPC.[231] The record demonstrates that AOL's efforts to date to migrate consumers to its high-speed service have yielded only modest results.[232] AOL has previously been unsuccessful in gaining access to cable systems.[233] This merger, however, would give AOL direct ownership of a high-speed cable network. Upon acquiring Time Warner cable systems, AOL would be in a position to use its established brand name and proven marketing acumen to migrate many of its narrowband customers to high-speed service,[234] and to market AOL Internet access

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Release"). The restructuring is intended to satisfy the Consent Decree obtained by the United States Department of Justice against AT&T Corp., requiring that MediaOne (recently acquired by AT&T) divest its ownership interest in Road Runner on or before December 31, 2000. *See* DOJ Consent Decree; *see also* Time Warner Dec. 18 Press Release (noting that the "Road Runner restructuring . . . result[s] from a Consent Decree between AT&T and the Department of Justice in connection with AT&T's acquisition of MediaOne Group"). Time Warner's move to increase its ownership stake in Road Runner -- which will be completed by April 2001 -- will also end the arrangement providing Road Runner with exclusive carriage on Time Warner cable systems. *See* Time Dec. 18 Warner Press Release.

[227] As mentioned in the preceding note, however, Time Warner's announced restructuring of Road Runner would end the exclusive contract between the two entities by April, 2001. *See* Time Warner Press Release.

[228] Road Runner Corp., *Road Runner Sets Record Third Quarter* (press release), Oct. 16, 2000.

[229] *See* Kinetic Strategies, Inc., *Cable Modem Market States & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://cabledatacomnews.com/cmic/cmic16.html (visited Nov. 14, 2000).

[230] AOL has formed a "strategic alliance" with Hughes Electronic Corp. to make its high-speed Internet service ("AOL-Plus") available via the DirectPC satellite Internet network. In addition, AOL has formed such alliances with several DSL providers, including SBC Communications, Inc., Bell Atlantic (now called Verizon) and GTE (since acquired by Bell Atlantic and now part of Verizon). Finally, AOL has announced agreements with Sprint PCS, Nokia, Motorola, Research in Motion, BellSouth and Arch Communications to make AOL's Internet services available through wireless devices. Applicants' March 21 Supplemental Information at 17-18; *see also* Confidential Appendix IV-D-3.

[231] AOL's high-speed product is called "AOL Plus," and provides subscribers with enhanced content including video, games, music and online shopping features. *See* Applicants' March 21 Supplemental Information at Attachment 1.

[232] *See* Confidential Appendix IV-A-2, Note 1.

[233] *See id.* Note 2.

[234] *See, e.g.*, Sanford C. Bernstein & Co., Inc. and McKinsey & Co., Inc., *Broadband! A Joint Industry Study*, Jan. 2000, ("Bernstein and McKinsey -- Broadband!") at 24 ("AOL counts fully half of the current online subscribers as its customers, giving it the opportunity to shift many customers from slow- to high-speed service. This is particularly significant in light of our survey finding . . . that the heaviest users of the Internet are also the most interested in high-speed service. AOL's customers average nearly one hour a day online, twice as much as the average online household. This supports the AOL claim that AOL's dial-up subscribers can be easily migrated to a high-speed platform."); *see also* Confidential Appendix IV-A-2, Note 3.

services to Time Warner cable subscribers.[235] Thus, the merger would create the opportunity for AOL to use cross-promotional strategies and its control over Time Warner cable networks to add millions of subscribers to its high-speed service.[236]

78. In acquiring Time Warner, AOL would obtain not only a vast network of cable systems, but also an enormous library of multimedia content. Time Warner and its content affiliates comprise the largest traditional media company in the world.[237] This company owns four of the top fifteen video programming services (CNN, TNT, TBS, Cartoon Network) and the largest premium TV network (HBO).[238] Time Warner also operates a broadcast network (The WB)[239] and one of the largest movie and television studios (Warner Bros.).[240]

79. Similarly, AOL is more than just an ISP. AOL owns many leading Internet brands and applications, including:

- AOL Instant Messenger ("AIM") and AOL Buddy List services, and ICQ instant messaging service.[241]

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[235] An estimated 8 million Time Warner cable subscribers do not subscribe to AOL. Tom Wolzien and Ray Haddad, *AOL/Time Warner: Finding the First $1 billion or so in Synergies*, Bernstein Research, Apr. 2000, at 10. Bernstein also estimates that 85% of AOL subscribers are cable subscribers. *Id.* Other sources indicate that, as of November 2000, there were approximately 4.16 million residential high-speed Internet access services subscribers. (This figure includes only cable and DSL subscribers; the number of fixed wireless and satellite residential subscribers is quite small. All cable high-speed Internet service subscribers are treated as residential, but, following industry estimates, only 67% of DSL subscribers are counted as residential.) *See* Kinetic Strategies, Inc., *Cable Modem Market Stats and Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://CableDatacomNews.com/cmic/cmic16.html (visited Nov. 14, 2000) (providing cable subscription estimates); TeleChoice, Inc., *TeleChoice DSL Deployment Summary – Updated 11/13/00*, at http://www.xdsl.com/content/resources/deployment_info.asp (visited Nov. 14, 2000) (providing DSL subscription estimates).

[236] In addition, following the merger, AOL Time Warner would have access to 1.1 million Road Runner subscribers, which amounts to approximately 26% of the approximately 4.16 million residential high-speed Internet access services subscribers. *See* Road Runner Corp., *Road Runner Sets record Third Quarter* (press release), Oct. 16 2000. If AOL were to gain access to AT&T's high-speed subscribers, *see* Confidential Appendix IV-A-2, Note 4, its reach would increase to almost 48% of residential high-speed subscribers. *See* Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://www.cabledatacomnews.com/cmic/cmic16.html (visited Nov. 14, 2000). These numbers may actually understate AOL's post-merger market power, however, because the markets in question are local, not national. The record demonstrates that a very high percentage of homes passed by data-ready Time Warner cable systems do not also have access to DSL. *See* Confidential Appendix IV-A-1, Note 1.

[237] *See* Time Warner Inc., *Time Warner 1999 Fact Book*, at http://www.timewarner.com/corp/about/pubarchive/factbook/1999fb.pdf (visited July 31, 2000).

[238] *AOL Time Warner: World's First Internet-Age Media and Communications Company*, BUS. WIRE, Jan. 10, 2000.

[239] David Lieberman, *Inside the AOL Media Giant*, USA TODAY, Jan. 11, 2000, at 1A.

[240] *Media Owner's Index, Time Warner*, COLUMBIA JOURNALISM REV., at http://www.cjr.org/owners/time-warner.asp (visited July 31, 2000). Time Warner also owns significant print media, including Time Magazine, People, Sports Illustrated, Fortune and some twenty-eight other magazines. *See* Application at 4.

[241] See Section IV.B., *infra* (Instant Messaging and Advanced IM-Based High-Speed Services), for a detailed analysis of AOL's IM service.

- AOL.com and Netscape Netcenter, two leading Internet portals. AOL.com has nearly 32 million unique monthly visitors, while Netscape Netcenter has almost 20 million unique visitors.[242] In any given month, nearly 77 percent of all Internet subscribers will visit an AOL site,[243] with AOL members spending an average of 64 minutes per day online.[244]

- Spinner and WINamp, leading Internet music properties with 42 million customer relationships.[245]

- Digital City, the leading local online network, with more than five million unique visitors in May, 2000.[246]

- AOL MovieFone, the nation's largest online movie listing guide and ticketing service, which attracts 20 percent of all moviegoers.[247]

- MapQuest.com, which delivers more than 150 million maps and driving instructions each month.[248]

- Netscape Communicator client software, including the Netscape Navigator browser, claiming millions of users.

It has been asserted that through its family of brands, AOL "now has an unduplicated reach of roughly 80 percent of all Internet users in the United States, by far the greatest on the Web."[249]

c. Potential Public Interest Harms

80. Commenters raise a variety of competitive concerns stemming from the merged company's potential to control Internet transmission facilities, access, portals, content and applications. Generally speaking, these concerns may be summarized as follows: Unless appropriate restrictions are placed on the proposed merger, AOL Time Warner will have both the ability and the incentive to: (a) discriminate against unaffiliated ISPs on its own cable network;[250] (b) facilitate discrimination against unaffiliated ISPs

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[242] *AOL, Time Warner Merger – Road to Convergence*, BUS. WIRE, Jan. 10, 2000.

[243] Media Metrix, *Media Metrix Releases the Top 50 Web and Digital Media Properties For June 2000 and Reveals Number One Web Sites Within New Categories* (press release), July 20, 2000.

[244] America Online, Inc., *Data Points*, at http://www.corp.AOL.com/press/press_datapoints.html (visited Jan. 16, 2001).

[245] *Id.*.

[246] *Lehman Brothers June 29 Report* at 41.

[247] America Online, Inc., *Data Points*, at http://www.corp.AOL.com/press/press_datapoints.html (visited Jan. 16, 2001).

[248] *Lehman Brothers June 29 Report* at 45.

[249] *Lehman Brothers June 29 Report* at 22.

[250] *See, e.g.*, SBC Comments at 1, 19-22; Consumers Union Comments at 31-32; BellSouth Reply Comments at 14; EarthLink Oct. 18 Ex Parte at 1; Letter from Stephen Heins, Director of Marketing, NorthNet, to James Bird, Senior Counsel, FCC, dated Oct. 20, 2000 ("NorthNet Oct. 20 Ex Parte") at 2; NorthNet Oct. 10 Ex Parte at 3-5; Consumers Union Reply Comments at 8-12; Letter from David Gusky, Executive Vice President, Telecommunications Resellers Association, to William E. Kennard, Chairman, FCC, dated April 11, 2000 ("TRA (continued...)

on other cable operators' networks by leveraging control over Time Warner video programming to obtain exclusive or preferential carriage rights for AOL's high-speed Internet access service on those networks;[251] (c) limit consumers' access to the widest possible array of content on the Internet by denying unaffiliated content providers placement on AOL Time Warner's high-speed Internet access service and denying unaffiliated ISPs access to AOL Time Warner content;[252] and (d) discriminate against alternative high-speed platforms by withholding AOL Internet access service from high-speed platforms that compete with cable.[253] We address each of these concerns below.

81. As a threshold matter, we will address the argument that regardless of the magnitude of the harms, imposing conditions in this merger would be inconsistent with the Commission precedent in *AT&T-MediaOne* and the pending *Cable Access NOI*. The Applicants first contend that the Commission's merger review process is an inappropriate forum to determine whether AOL Time Warner should be required to negotiate non-discriminatory agreements with unaffiliated ISPs for access to its cable network.[254] Instead, the Applicants argue, the Commission should address that question through a rulemaking proceeding that would set "open access" policy for the entire cable industry.[255] We disagree. The Commission has a statutory duty to determine whether the proposed transaction would serve the public interest, and may not approve it absent such a finding.[256] We cannot abdicate this duty on the basis of speculation that a future proceeding might be able to remedy harms to the public interest that we believe would result from a proposed merger. As we explain below, the unconditioned merger of AOL and Time Warner would create a company with a unique incentive and ability to thwart competition in the market for residential high-speed Internet access services -- an outcome that would undermine important national policy objectives.[257]

82. Furthermore, we are not convinced that a proceeding resulting from the *Cable Access NOI* could adequately redress the public interest harms that would result from the proposed transaction. First,

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Apr. 11 Ex Parte") at 2.

[251] *See* ACA Comments at 4-5, 11-12.

[252] *See, e.g.*, Disney Reply Comments at 11-14; Letter from Lawrence R. Sidman, Esq., Verner, Liipfert, Bernhard, McPherson & Hand, Counsel for The Walt Disney Company, to Magalie Roman Salas, Secretary, FCC, dated July 11, 2000 ("Disney July 11 Ex Parte") at 1; BellSouth Reply Comments at 15; Consumers Union Comments at 31-32; Letter from Henry Bauman et al., Legal Department, National Association of Broadcasters, to William E. Kennard, Chairman, FCC, dated May 19, 2000 ("NAB May 11 Ex Parte") at 1-3; Letter from Sandra L. Wagner, Vice President, Federal Regulatory Affairs, SBC Telecommunications, Inc., to Magalie Roman Salas, Secretary, FCC, dated May 5, 2000 ("SBC May 5 Ex Parte") at 3.

[253] *See* SBC Comments at 19-22; *see also* Consumers Union Comments at 28-29 (arguing that proposed merger would lead AOL to withdraw support from DSL platform).

[254] *See, e.g.*, Letter from Peter D. Ross, Esq. Wiley, Rein & Fielding, Counsel for America Online, to Magalie Roman Salas, Secretary, FCC, dated Sept. 20, 2000 ("Applicants' Sept. 19 Ex Parte") at 1-2.

[255] *See, e.g., id.* As earlier mentioned, the Commission recently took the first step toward such a rulemaking proceeding when it issued its *Cable Access NOI*.

[256] *See* Section II, *supra* (Public Interest Framework); *see also* 47 U.S.C. § 214(a); *id.* § 310(d); *id.* § 303(r).

[257] These policy objectives include the promotion of a competitive free market for Internet services, *see* 47 U.S.C. § 230(b)(1)-(2), the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans, *see id.* § 157 nt., and the widest possible dissemination of information from diverse and antagonistic sources to the American public, *see Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994).

should it be a rulemaking proceeding, such a proceeding is designed to formulate rules of general applicability, and therefore would not necessarily produce requirements containing the level of specificity needed to resolve the unique concerns that arise from this proposed merger. The marriage of AOL and Time Warner would wed the nation's leading ISP with its second largest cable provider and would thereby yield a company with unprecedented potential to dominate the market for residential high-speed Internet access services.[258] The record demonstrates that the Applicants have already begun to contemplate using their combined potential in a manner that would render unaffiliated ISPs in that market unable to compete effectively.[259]

83. We believe that in order to prevent these trends from accelerating after the merger, we must impose specific conditions on our approval -- conditions that a rulemaking proceeding would be ill-suited to effectuate. Second, we believe that the conditions we impose must precede the merger itself in order to be effective. The record suggests that if AOL Time Warner were permitted to discriminate against unaffiliated ISPs in the terms and conditions of access to its cable network, many such ISPs would be unable to compete effectively, permitting the merged entity and its affiliated ISPs to attain a market-dominant position for residential high-speed Internet access services within one to two years.[260]

84. Moreover, our approval of the AT&T-MediaOne merger without any condition pertaining to Internet access services was predicated in part on our perception that alternative high-speed platforms -- especially DSL -- were rapidly gaining strength as viable competitors to cable, thereby mitigating the anticompetitive potential of the acquisition.[261] We reasoned that AOL's aggressive support of DSL would no doubt serve as a powerful impetus for incumbent LECs to deploy DSL technology in residential

[258] We note that this proposed merger would create a combined entity with both the incentive and the ability to quickly foreclose competition in the market for residential high-speed Internet access services by obtaining favorable treatment on cable systems owned by Time Warner, AT&T, and other cable operators. AOL's enormous base of existing narrowband customers and its proven marketing acumen would be combined with preferential access to Time Warner cable systems and, in all likelihood, to the facilities of AT&T and other cable operators. Such a combination would likely enable AOL to rapidly assemble a strong base of subscribers to its high-speed Internet access services. Although the AT&T-MediaOne merger presented the possibility that Excite@Home and Road Runner, the nation's two largest broadband ISPs, could theoretically foreclose competition for high-speed Internet access services through post-merger coordination, the DOJ Consent Decree required AT&T to divest its interest in Road Runner to prevent coordination between these two ISPs.

[259] *See* Confidential Appendix IV-A-2, Notes 5 and 6.

[260] *See id.*; *see also* NorthNet Oct. 10 Ex Parte at 7 ("There is no intention or possibility of allowing competitors onto [Time Warner cable networks] on [Time Warner's proposed] terms. By offering terms that are totally unacceptable, Time Warner keeps its network effectively closed."); EarthLink Oct. 18 Ex Parte at 1 (Time Warner's proposed conditions make interconnection "economically infeasible" for unaffiliated ISPs).

[261] *AT&T-MediaOne Order*, 15 FCC Rcd at 9866-68 ¶ 116-19; *id.* at 9871¶ 123. The Applicants raise this point in an October 5, 2000 *ex parte* letter, in which they point to Commission findings that there is significant actual and potential competition from alternative high-speed Internet access providers and unaffiliated ISPs, and that, in the AT&T-MediaOne merger, we relied on AT&T's and MediaOne's promise to open their platform. The Applicants further contend that competition in this market has increased, that AOL and Time Warner have committed to "open access" to Time Warner cable systems, and that the DOJ Consent Decree in *AT&T-MediaOne*, by requiring AT&T's divestiture of Road Runner, prevents a decrease in consumer choice of ISPs. *See* Letter from Peter D. Ross, Esq., Wiley, Rein & Fielding, Counsel for America Online, and Arthur H. Harding, Esq., Fleischman and Walsh, L.L.P., Counsel for Time Warner, to Deborah Lathen, Chief, Cable Services Bureau, FCC, dated Oct. 5, 2000 ("Applicants Oct. 5 Ex Parte"). As we explain in this section, we find that this merger presents fundamentally different issues and potential harms than those in *AT&T-MediaOne*.

markets.[262] By giving AOL access to Time Warner's cable facilities and enhancing its ability to gain access to the facilities of AT&T and other cable operators, the merger would diminish AOL's reliance on DSL as a means of reaching subscribers[263] and would give AOL Time Warner an incentive to steer subscribers away from DSL and toward cable in Time Warner service areas.[264] In addition, the record in this proceeding demonstrates that the availability of DSL in Time Warner service areas may not be sufficiently widespread to constrain the merged firm in the market for residential high-speed Internet access services, at least in the short term.[265] For these reasons we reject the arguments that the Commission may not redress potential harms in the market for residential high-speed Internet access services.

(i) Potential Discrimination Against Unaffiliated ISPs on AOL Time Warner's Cable Network

85. Several commenters contend that a combined AOL Time Warner would engage in anticompetitive behavior in an attempt to dominate the market for residential high-speed Internet access services.[266] In particular, commenters express concern that AOL Time Warner would discriminate against unaffiliated ISPs by refusing to carry them on its cable network; by offering them carriage on unfavorable terms that would render it impossible for them to remain in business; by limiting their online features and functionalities; and by degrading their quality of service.[267] Numerous parties to this proceeding advocate the imposition of an "open access" condition on the merging parties.[268] We note at

[262] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9867-68 ¶ 117 and accompanying notes.

[263] We recognize, however, that AOL will continue to have an incentive to market its service over DSL in pursuit of its AOL Anywhere strategy.

[264] *See* Section IV.A.2.c.(iv), *infra* (High-Speed Internet Access Services). Although the Commission's recently issued Second Annual Report on the Deployment of Advanced Services indicates that DSL subscribership has grown significantly in the past year and is likely to rival cable modem subscribership in the next three to five years, *see Second 706 Report*, FCC 00-290 at 79 ¶ 191, our analysis in this proceeding must take into account the likelihood that the proposed merger would catapult AOL into a dominant position in the market for residential high-speed Internet access services before DSL or other broadband alternatives are widely available to consumers. Although AOL cannot provide service on Time Warner's cable facilities until Time Warner's exclusive arrangement with Road Runner expires or terminates, a press release issued by Time Warner on December 18, 2000, indicates that Time Warner expects to terminate the exclusivity arrangement by April 2001. *See* Time Warner Inc., *Time Warner to Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000.

[265] Such detailed data were not available in the AT&T-MediaOne proceeding.

[266] *See, e.g.*, SBC Comments at 1, 19-22; Consumers Union Comments at 31-32; BellSouth Reply Comments at 14; EarthLink Oct. 18 Ex Parte at 1; NorthNet Oct. 20 Ex Parte at 2; NorthNet Oct. 10 Ex Parte at 3-5; Consumers Union Reply Comments at 8-12; TRA Apr. 11 Ex Parte at 2.

[267] *See, e.g.*, NorthNet Oct. 10 Ex Parte at 2-7; EarthLink Oct. 18 Ex Parte at 1.

[268] *See, e.g.*, Memphis Networx Comments at 7-9; SBC Comments at 35-36; Letter from Emy Tseng et al., on behalf of students from the Massachusetts Institute of Technology and Harvard University, to Magalie Roman Salas, Secretary, FCC, dated May 1, 2000 ("MIT-Harvard Students May 1 Ex Parte"), at 2-3; Letter from Elliot Noss, President and CEO, Tucows, Inc., to Magalie Roman Salas, Secretary, FCC, dated July 31, 2000, at 2; BellSouth Comments at 22-23; Letter from Rob Todd, Member, Houston City Council, to Magalie Roman Salas, Secretary, FCC, dated May 10, 2000 ("Houston City Council May 10 Ex Parte"), at 1; NorthNet Oct. 10 Ex Parte at 2-7; EarthLink Oct. 18 Ex Parte at 1; Daytona Beach Aug. 18 Ex Parte at 7; Letter from Douglas L. Young, Executive Director of Business Development, HJN Telecom, Inc., dated Nov. 22, 2000 ("HJN Nov. 22 Ex Parte"), at 3; Petition of City of Hawthorne, California et al., for Special Relief (Sept. 29, 2000) ("California Cities' Sept. 29 (continued...)

the outset that, judging from the record in this proceeding, these commenters' concerns are persuasive. We conclude, however, that they are substantially addressed by the terms of the FTC Consent Agreement. As the FTC Consent Agreement may not entirely mitigate AOL Time Warner's ability to discriminate against unaffiliated ISPs on its cable network through indirect means, we impose certain additional conditions on the proposed transaction to avert that result. We conclude that these conditions are necessary to ensure that the proposed merger does not result in harms to the public interest that would outweigh its potential public interest benefits.

86. Our conclusion that conduct restrictions are necessary to address the potential harms described above rests on two findings: (i) that the merged company would have the incentive to discriminate against unaffiliated ISPs on its cable network and (ii) that it would have ability to do so in a manner that would undermine competition in the relevant market. We begin by noting that AOL itself has argued in other contexts that a vertically integrated cable operator offering high-speed Internet access services would have precisely such incentive and ability.[269] Our findings, however, do not depend on AOL's prior observations. The record in this proceeding points to several factors that would give the merged firm an incentive to discriminate. AOL, with 26 million narrowband subscribers, has a manifest incentive to migrate those subscribers to high-speed Internet access services as an ever-greater proportion of Internet content falls into the "broadband" category.[270] AOL has a complementary incentive to ensure that as its subscribers switch to high-speed access services, they remain customers of AOL (or one of its affiliates) and do not select a competing high-speed ISP. Excluding unaffiliated ISPs from the merged company's cable network, or discriminating against them in more subtle ways, would help achieve that objective. AOL Time Warner would also have an incentive to discriminate against unaffiliated ISPs for an additional, independent reason: the natural inclination to maximize the value of its cable network by converting its captive base of Time Warner cable customers into customers of ISPs affiliated with the merged firm.[271] This objective, too, would be facilitated by discriminating against unaffiliated ISPs with respect to carriage on AOL Time Warner cable networks.[272]

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Petition") at 1-2, transmitted by letter from William M. Marticovena, Esq., Rutan & Tucker, to FCC, dated Sept. 28, 2000.

[269] *See Joint Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidiaries*, CS Docket No. 98-178 (October 29, 1998), Comments of America Online, Inc., *passim*.

[270] Virtually every projection for Internet access subscribers shows a decline in narrowband subscribership and growth in broadband subscribership over time. *See, e.g.*, Cable Services Bureau, *Broadband Today: A Staff Report to William E. Kennard, Chairman, Federal Communications Commission*, Oct. 1999 ("Broadband Today"), at Appendix A. Thus, AOL would have to increase its broadband presence as the number of its narrowband subscribers drops merely to maintain its current market position. Some of the potential implications of closed high-speed Internet access networks are discussed in Earl W. Comstock & John W. Butler, *Access Denied: The FCC's Failure to Implement Open Access to Cable As Required By the Communications Act*, 8 COMMLAW CONSPECTUS 5 (2000).

[271] As an initial matter, the merged company would have this incentive because it would receive two revenue streams (ISP service and transmission) from subscribers to its affiliated ISP service, but only one revenue stream (transmission) from subscribers to unaffiliated ISPs.

[272] *Cf. Time Warner Entertainment Co. v. United States*, 211 F.3d 1313, 1322 (D.C. Cir. 2000) (reasoning that Congress's concern that "cable operators have the incentive and ability to favor their affiliated programmers" is "well grounded in the evidence and a bit of economic common sense") (internal quotation marks and citation omitted).

87. We also find that AOL Time Warner would have the ability to discriminate against unaffiliated ISPs. This is well-documented in the record. As earlier mentioned, the proposed transaction would give the merged company ownership of the nation's second largest cable network. Such ownership would enable AOL Time Warner to deny unaffiliated ISPs carriage on this network at will.[273] Due to the size of the network and its dominance in the geographic areas to which it extends, AOL Time Warner's ownership rights would also empower the merged company to deal with unaffiliated ISPs requesting carriage by offering them "take it or leave it" agreements based on terms that would render it difficult if not impossible for these ISPs to provide service over cable profitably.[274] And of course, AOL Time Warner's physical control over the network would allow it to limit the online features and functionalities of unaffiliated ISPs or to degrade their quality of service, conceivably in ways that would escape easy detection.[275]

88. Finally, we note that the proposed merger would strengthen AOL Time Warner's ability to discriminate against unaffiliated ISPs on its cable network by bringing AOL and Road Runner under common ownership.[276] Road Runner is the nation's second largest high-speed ISP.[277] The elimination of

[273] At present, neither the 1996 Act nor Commission rules would prevent AOL Time Warner from denying unaffiliated ISPs carriage on its cable network at its discretion. As earlier mentioned, the Commission recently initiated a *Notice of Inquiry* inviting comment on, among other matters, whether cable operators should be obligated to provide "open access" to ISPs requesting interconnection with their cable networks. *See Cable Access NOI.*

[274] For further discussion, see Confidential Appendix IV-A-2, Notes 5 and 6. This problem is exacerbated by the fact that DSL, the primary competitor to cable for residential high-speed Internet access services, is not available to many households at present. One analyst estimates that less than 50% of households have access to DSL due to distance and network limitations. *See* Bernstein and McKinsey -- Broadband! at 9. Another analyst estimates that, "By year end 2000, we expect that total DSL service will be available to more than 50% of all telephone lines." Dain Rauscher Wessels, *Bullish on Broadband*, Jun. 8, 2000, at 59.

[275] Disney Reply Comments at 12-14. Disney further discussed and expanded upon this point in later ex parte filings, especially in regard to the return path for interactive television. *See* Supplemental Memorandum of The Walt Disney Company Prepared by Eric Haseltine, Ph.D. (Sept. 25., 2000), transmitted by letter from Marsha J. McBride, Vice President for Government Relations, The Walt Disney Company, to Magalie Roman Salas, Secretary, FCC, dated September 26, 2000 ("Disney Sept. 26 Ex Parte at Haseltine Memo"); Ex Parte Submission of The Walt Disney Company: Deployment of Interactive Television Technology and Return Path Discrimination (Oct. 25, 2000) ("Disney Oct. 25 Ex Parte") at 4-5, transmitted by letter from Lawrence R. Sidman et al., Esq., Verner, Liipfert, Bernhard, McPherson & Hand, Counsel for The Walt Disney Company, to FCC, dated Oct. 25, 2000. The Disney Oct. 25 Ex Parte filing indicates that cable modem equipment in the headend can be used to "delay or completely delete unaffiliated content" using capabilities included in the cable industry's DOCSIS 1.1 Specification. Disney Oct. 25 Ex Parte at 5. The filing quotes Cisco Systems, a supplier of such technology, as putting "absolute control" over the delivery of content in the hands of the cable operator. *Id.*, quoting *Cisco Systems White Paper, Controlling Your Network – A Must for Cable Operators* at 3 (1999); *see also* Consumers Union Comments at 105-07.

[276] *See* Confidential Appendix IV-A-2, Note 7. Under the terms of an Order to Hold Separate issued by the FTC in conjunction with the FTC Consent Agreement, the merged firm must operate AOL and Road Runner in a separate and independent manner until AOL itself gains access to Time Warner cable systems. *See* FTC Order to Hold Separate at 5. AOL, in turn, is barred by the FTC Consent Agreement itself from accessing Time Warner cable systems until EarthLink has obtained such access. *See* FTC Consent Agreement at II.A-B. The combined effect of the FTC Order to Hold Separate and the FTC Consent Agreement is to prevent the merged firm from integrating AOL and Road Runner until it has begun to open its cable systems to unaffiliated ISPs. Once it has done so, however, it is free to integrate the two ISPs.

[277] *See* Internet.com Corporation, *Top US ISPs by Subscriber*, at http://www.isp-planet.com/research/rankings_usa.html (visited Nov. 15, 2000). This web site contains a list of all ISPs in the country. Road Runner is (continued...)

potential competition between AOL and Road Runner in the market for residential high-speed Internet access services would significantly enhance AOL Time Warner's power in this market. And by adding to the merged firm's lead in subscribership for residential high-speed Internet access services, it would diminish AOL Time Warner's incentive to adopt an "open access" regime with respect to its cable network.[278]

89. The Applicants maintain that, far from having an incentive to discriminate against unaffiliated ISPs, a combined AOL Time Warner would have an incentive to permit these ISPs to interconnect with its cable network so as to encourage the adoption of "open access" policies by other cable providers.[279] AOL Time Warner would need to promote the adoption of such policies, the Applicants maintain, in order to ensure the availability of AOL Internet services on other cable platforms. Time Warner's cable network currently serves less than 20% of all cable subscribers nationwide -- a figure which, arguably, underscores how dependent AOL Time Warner would be on other cable providers for access rights.[280]

90. Notwithstanding the Applicants' reasoning, we are not convinced that AOL Time Warner would need to refrain from discriminating against unaffiliated ISPs on its own cable platform in order to secure carriage for AOL Internet services on the platforms of other cable providers. We find it implausible that AOL Time Warner -- with the leading brand among ISPs as well as the largest library of proprietary content in the world at its disposal -- would be unable to leverage these resources and others to obtain carriage for AOL Internet services on the facilities of unaffiliated cable operators. Despite AOL's previous difficulties in obtaining access to cable lines, the addition of Time Warner's content and other resources greatly increases the merged company's leverage in this area. And we are equally certain that the merged firm would be able to obtain such carriage regardless of whether it were to discriminate against unaffiliated ISPs on its own platform. Accordingly, we reject Applicants' contention that AOL Time Warner would not discriminate because of a putative need to support industry-wide "open access" policies.

91. The Applicants' primary response to commenters' contentions that the merged firm would discriminate against unaffiliated ISPs on its cable network is that AOL and Time Warner have issued a joint Memorandum of Understanding (the "MOU") voluntarily committing themselves to negotiate commercial agreements under which unaffiliated ISPs may connect with Time Warner's cable network on a non-discriminatory basis.[281] Applicants contend that adherence to the MOU should not become a

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the number two high-speed ISP listed (after Excite@Home), and ranks number thirteen overall. *See id.*

[278] To the extent AOL Time Warner would have any incentive to adopt an "open access" regime with respect to its cable network, such an incentive would be based on the merged firm's desire to attract the business of unaffiliated ISPs dominant in certain niches within the residential high-speed Internet access market. The greater AOL Time Warner's own dominance across those niches, the lesser its incentive to permit unaffiliated ISPs to interconnect with its network.

[279] *See* Applicants' March 21 Supplemental Information at 24; Applicants' Reply Comments at 5, 11.

[280] *See* Paul Kagan Assocs., Inc., *Top Cable System Operators as of March 2000*, Cable TV Investor, June 9, 2000, at 11.

[281] Memorandum of Understanding Between Time Warner Inc. and America Online, Inc. Regarding Open Access Business Practices (Feb. 29, 2000) ("MOU") at 1-2. The MOU expresses the Applicants' commitment to:

- Form an agreement "as quickly as possible" to provide high-speed AOL service on Time Warner cable systems; that agreement will be used as a model for agreements with other ISPs.

(continued...)

condition of merger approval.[282] They assert that a government mandate regarding ISP access would be wholly inappropriate and, in any event, should be considered (if at all) only in a proceeding of general applicability such as the *Cable Access NOI*.[283]

92. We find that if unaffiliated ISPs were permitted to offer their services over AOL Time Warner's cable network on non-discriminatory terms and conditions, the merger's potential to undermine competition in the relevant market would be mitigated.[284] Unaffiliated ISPs in areas served by AOL Time Warner's cable network would have the opportunity to compete fairly on price and quality, and residential consumers in these areas would be able to choose a high-speed ISP based on the best combination of those characteristics. Market forces, not control of a bottleneck facility, would determine the firms that would succeed in the relevant market, thereby enhancing efficiency and consumer welfare.

93. However, we are not convinced that the MOU alone will achieve these goals and mitigate the potential harms to competition that we have described. Broadly speaking, our concerns are twofold. First, even if it were legally enforceable, the MOU by itself would fail to offer unaffiliated ISPs adequate

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- Negotiate commercial agreements with unaffiliated ISPs so that consumers need not purchase service from affiliated ISPs. There will be no fixed limit on the number of ISPs using Time Warner cable systems; however, that number may be limited based on considerations of quality of service and technical limitations.
- Actively encourage other cable operators to provide consumers with a choice of high-speed ISPs.
- Not discriminate on the basis of whether an ISP is affiliated with AOL Time Warner. While the economic arrangements between Time Warner and connecting ISPs may differ depending on a number of factors (such as the speed, marketing commitments, and the nature and tier of service that unaffiliated ISPs may desire), variations in the economic arrangements (and in ISP traffic) will not be based on affiliation or non-affiliation.
- Not block or limit video streaming.
- Allow ISPs to connect to Time Warner cable systems without purchasing high-speed backbone transport from AOL Time Warner.
- Offer ISPs "the choice to partner with" AOL Time Warner on a national, regional or local basis, without "red-lining."
- Allow both the cable operator and the ISP the opportunity for a direct relationship with the consumer. Both the cable operator and the ISP will be allowed to market and sell high-speed service directly to customers; if the cable operator sells high-speed Internet access services to the customer, the cable operator will be responsible for billing and collection; if the ISP sells its service to the customer, the ISP will be responsible for billing and collection if the ISP so chooses.

Id.

[282] *See* Applicants' Reply Comments at 16-18, 29-30; Applicants' Sept. 19 Ex Parte at 1-2.

[283] *See* Applicants' Sept. 19 Ex Parte at 1-2.

[284] Such a non-discrimination requirement would not prevent AOL Time Warner from facilitating discrimination against unaffiliated ISPs on the networks of other cable operators by obtaining exclusive or preferential deals for access by its own Internet services to other operators' networks. We address this potential harm below.

protection against discrimination by a merged AOL Time Warner. Second, the MOU on its own is not legally enforceable, and reports regarding the terms of access that Time Warner has proposed to certain unaffiliated ISPs cast doubt on the company's commitment to implement the principles underlying the MOU in a manner that would avert the merger's potential deleterious effects on the relevant market. We discuss each of these concerns in turn.

94. Although the MOU represents a commendable statement of principles, it does not address several specific areas in which unaffiliated ISPs connecting to Time Warner cable networks could be treated less favorably than affiliated ISPs. For example, it seems likely that in many cases, Time Warner cable subscribers who desired cable-based high-speed Internet access services would call Time Warner with their initial inquiries. Such inquiries would give Time Warner the opportunity to steer prospective customers toward affiliated ISPs (such as AOL, CompuServe, or Road Runner), a practice the MOU does nothing to prohibit. The MOU also leaves unaffiliated ISPs vulnerable to discrimination by AOL Time Warner in other facets of their business. In particular, it does not prohibit AOL Time Warner from requiring unaffiliated ISPs to display an AOL Time Warner "brand" or "presence" on the customer's first screen as a condition of carriage; does not prohibit AOL Time Warner from disadvantaging unaffiliated ISPs by offering them logistically unfavorable connection points; and does not prohibit AOL Time Warner from restricting the features and functionalities available to unaffiliated ISPs in several technical areas (such as caching capability; multicasting; address management; and interaction with customer premises equipment). Perhaps most importantly in light of the subtle, technically sophisticated ways in which the merged entity might disfavor non-affiliates, the MOU does not provide a mechanism through which unaffiliated ISPs could verify that they were being treated in a non-discriminatory manner -- for example, a mechanism giving ISPs or a neutral arbitrator a right to review confidential agreements between AOL Time Warner and affiliated ISPs, as well as data on AOL Time Warner's actual network operations.

95. Even if the MOU did not contain these vulnerabilities, we would still be concerned about the proposed merger's potential to harm competition in the market for residential high-speed Internet access services. That is because the MOU is not legally enforceable, and reports regarding the terms of carriage that Time Warner has proposed to certain unaffiliated ISPs raise doubt regarding the company's commitment to implement the principles underlying the MOU on a voluntary basis and in a manner that would avert the merger's harmful effects. According to these reports, Time Warner's proposals to unaffiliated ISPs have conditioned access to Time Warner's cable network on (i) a co-branding presence on the top half of the ISP's home page featuring links to Time Warner content and services; (ii) Time Warner's right to terminate the ISP's carriage if the ISP fails to meet subscription targets set by Time Warner; (iii) Time Warner's right to set the total price for Internet access paid by the ISP's customer; and (iv) a fee consisting of 75 percent of the ISP's subscription revenues, 25 percent of the ISP's cable-access advertising, web-hosting, and e-commerce revenues, a $50,000 up-front deposit, and a minimum monthly payment of $30 for each customer that switches from an ISP affiliated with Time Warner to the unaffiliated ISP.[285] Time Warner contends that these conditions are not unreasonable and merely replicate the business model that governs its provision of cable service.[286] Time Warner points out, for

[285] *See* Letter from Stephen Heins, Director of Marketing, NorthNet, to Magalie Roman Salas, Secretary, FCC, dated Oct. 6, 2000 (containing Term Sheet proposal of Time Warner to NorthNet ("NorthNet Term Sheet")); Confidential Appendix IV-A-2, Notes 5 and 8; *see also* Brian Williams & Jim Wagner, *Cable Contracts Belie Time Warner Assurances*, INTERNETNEWS, Oct. 2, 2000; Cathy Yang, *ISPs to AOL Time Warner: You Call This Open Access?*, BUSINESS WEEK, Sept. 29, 2000.

[286] *See* Letter from Arthur H. Harding, Esq., Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Magalie Roman Salas, Secretary, FCC, dated Oct. 30, 2000 (Time Warner Oct. 30 Ex Parte) at 1-2.

example, that it already sets the price for video programming supplied to consumers even though much of the programming is supplied by unaffiliated entitities.[287] Likewise, it shares advertising revenues with video programmers in the form of local advertising "spots" that programmers reserve for Time Warner's use.[288] Notwithstanding Time Warner's explanation of these provisions, we believe that these conditions conflict with the principles of non-discrimination and "open access" underlying the MOU. Particularly troubling are the pricing conditions. As we discuss in the Confidential Appendix, these conditions may well prevent unaffiliated ISPs from profitably offering service over AOL Time Warner's systems.[289] To the extent that they do so, the conditions flatly contradict the most basic commitment of the MOU, namely that "Consumers will not be required to purchase service from an ISP that is affiliated with AOL Time Warner in order to enjoy high-speed Internet access services over AOL Time Warner cable systems."[290]

96. Although we conclude that the MOU by itself constitutes an insufficient safeguard against potential discrimination by AOL Time Warner against unaffiliated ISPs on its cable network, we believe that FTC Consent Agreement will substantially mitigate the risk of such discrimination. That decree requires, among other things, that AOL Time Warner open its cable systems on a non-discriminatory basis to at least three unaffiliated ISPs -- the first of which, EarthLink, must begin offering service on Time Warner's cable systems before AOL itself may do so; and the latter two, which remain as-yet undetermined, must have secured agreements to offer service on Time Warner's cable systems within 90 days of the time that AOL itself commences service on those systems.[291] The FTC Consent Agreement further stipulates that the FTC pre-approve the agreements between AOL Time Warner and each of the three unaffiliated ISPs to be granted immediate access to Time Warner cable systems, and that the agreements themselves include detailed safeguards protecting these ISPs against discrimination by AOL Time Warner on the basis of affiliation.[292] Additionally, the FTC Consent Agreement requires AOL Time Warner to negotiate in good faith, and enter into arms' length commercial agreements, with any other unaffiliated ISPs seeking access to its cable systems; and it forbids AOL Time Warner from declining to negotiate or enter such agreements, or from imposing terms and conditions in such agreements, based on ISPs' non-affiliation with the merged firm.[293] The FTC Consent Agreement also requires AOL Time Warner to provide any unaffiliated ISP on its cable system with the same point of connection to its cable network that the merged firm provides to affiliated ISPs, should an unaffiliated ISP request access to that connection point.[294]

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[287] *See id.*

[288] *See id.*

[289] *See* Confidential Appendix IV-A-2, Notes 5 & 6.

[290] MOU at 1 ¶ 2.

[291] FTC Consent Agreement at II.A-D; FTC Press Release at 2-3.

[292] In particular, the FTC Consent Agreement mandates that the agreements between AOL Time Warner and each of the three unaffiliated ISPs include a "most favored nation" clause requiring that if AOL executes an agreement with another cable provider for carriage of AOL, the unaffiliated ISP be given an opportunity to "opt in" to the same rates and terms secured by AOL in its agreement with the other cable provider. FTC Consent Agreement at II.C.1; FTC Press Release at 3. The FTC Consent Agreement also requires that the agreements between AOL Time Warner and each of the three unaffiliated ISPs include requirements that AOL Time Warner provide the same levels of service and network flow data to the unaffiliated ISPs as it does to its affiliated ISPs. FTC Consent Agreement at II.C.2-3.

[293] FTC Consent Agreement at II.E; FTC Press Release at 3.

[294] FTC Consent Agreement at III.B; FTC Press Release at 4.

97. We are convinced that the foregoing requirements will substantially ensure that unaffiliated ISPs are able to offer their services over AOL Time Warner's cable system on non-discriminatory terms and conditions. However, we are concerned that AOL Time Warner will have insufficient incentives to enter contracts with local or regional ISPs that are unaffiliated with the merged firm. We note that the FTC Consent Agreement requires AOL Time Warner to negotiate in good faith with any unaffiliated ISP seeking access to its cable systems. Therefore, we reiterate here that AOL Time Warner must engage with local and regional ISPs in a good faith, non-discriminatory manner.[295] The requirements we discuss below regarding choice of ISPs, first screen, billing, technical performance, and disclosure of contracts are particularly relevant to the ability of smaller ISPs to negotiate carriage arrangements on non-discriminatory terms, and we expect that AOL Time Warner will negotiate in good faith to reach contract provisions that are consistent with the commercial viability of these entities.

98. In addition, the record in this proceeding reveals several indirect means through which the merged firm could afford preferential treatment based on affiliation to ISPs on its cable systems that are not expressly proscribed by the FTC Consent Agreement. In particular, commenters have expressed concern that AOL Time Warner would condition access to its cable systems on an ISP's placement of Time Warner content on its first screen.[296] Commenters have also expressed concern that AOL Time Warner would preclude ISPs on its cable systems from establishing direct billing relationships with subscribers, even when those ISPs were responsible for acquiring the subscribers in the first place.[297] These measures, even if imposed in a facially neutral manner on affiliated and unaffiliated ISPs, would in fact disadvantage unaffiliated ISPs alone: affiliated ISPs would suffer neither from placement of Time Warner content on their first screen nor from the absence of a direct billing relationship with subscribers, as any revenue they "lost" from these measures would be made up by the parent company. Accordingly, we will impose narrowly tailored conditions, described below, to prevent AOL Time Warner from disadvantaging unaffiliated ISPs on its cable systems through such indirect means.

99. Commenters have also expressed concern that AOL Time Warner would discriminate against unaffiliated ISPs on its cable network in the technical performance it affords to these ISPs.[298] In

[295] *See* note 497, *infra*.

[296] *See, e.g.*, NorthNet Oct. 10 Ex Parte at 4; *see also* Disney Reply Comments at 14. *But see* Applicants' Responses to Written FCC Questions Dated August 25, 2000 Concerning the February 29, 2000 Memorandum of Understanding and Multiple ISP Access ("Applicants' Aug. 25 MOU Responses") at 13, transmitted by letter from Craig A. Gilley, Esq., Fleischman and Walsh, L.L.P., Counsel for Time Warner Inc., to Magalie Roman Salas, Secretary, FCC, dated Sept. 6., 2000.

[297] *See, e.g.*, EarthLink Oct. 18 Ex Parte at 2; *cf.* NorthNet Oct. 10 Ex Parte at 4 (discussing efforts by Time Warner cable to assert control over customer relationship in negotiations with unaffiliated ISPs for access to Time Warner cable systems). *But see* Applicants' Aug. 25 MOU Responses at 15 (promising that "each ISP offered on [Time Warner cable] systems will have the opportunity to establish direct billing relationships with customers").

[298] *See, e.g.*, Disney Reply Comments at 12-13; NorthNet Oct. 10 Ex Parte at 5-7; *see also* Letter from Richard Cotton, Executive Vice President and General Counsel, and Diane Zipursky, Vice President, Washington Law and Policy, National Broadcasting Company, Inc., to Magalie Roman Salas, Secretary, FCC, dated July 24, 2000 ("NBC July 24 Ex Parte") at 3-6 (discussing means of technological discrimination available to cable providers). One commenter also complains that installing AOL's software (versions 5.0 and 6.0) alters users' computer settings, preventing or impeding them from accessing other ISPs. Letter from Kenneth F. Yates, Esq., Yates and Schneider, to Magalie Roman Salas, Secretary, FCC, dated Dec. 26, 2000, at 1-2. Yates, writing on behalf of a class of competing ISPs that have filed a class-action law suit against AOL regarding this issue, claims that AOL is acting anticompetitively by writing its software in the aforementioned manner. Yates requests that we require AOL to modify its software to avoid automatically changing a user's default dial-up number. *See id.* at 3. However, Yates (continued...)

particular, commenters fear that AOL Time Warner would provide unaffiliated ISPs with inferior Quality of Service mechanisms, caching capability, technical support, multicasting capability, address management, and other technical functionality of the cable system that affects customers' experience with their ISP. Although we believe that the FTC Consent Agreement would prohibit AOL Time Warner from entering into contract terms that discriminated on the basis of affiliation with respect to technical performance, we note that the decree does not explicitly forbid AOL Time Warner from actually providing inferior technical performance to unaffiliated ISPs where no contract term governs. We are convinced that discrimination against unaffiliated ISPs with respect to technical performance would be sufficiently harmful to such ISPs that a remedy is warranted. Accordingly, we will impose a condition requiring AOL Time Warner, in all contracts with unaffiliated ISPs for access to its cable networks, to warrant that it will not discriminate on the basis of affiliation with respect to technical performance.

100. Finally, we also impose two additional conditions. First, we will prohibit AOL Time Warner from restricting the ability of current or prospective customers to select and initiate service from any unaffiliated ISP that has contracted for access to the merged firm's cable systems; and we will require AOL Time Warner to provide customers who contact Time Warner cable representatives seeking Internet access services with a neutral means of selecting an ISP (that is, a means that does not discriminate in favor of affiliated ISPs on the basis of affiliation). Second, we will prohibit AOL Time Warner from entering into any contract with an ISP for connection with AOL Time Warner's cable systems that prevents that ISP from disclosing the terms of the contract to the Commission under the Commission's confidentiality procedures. Both conditions, we conclude, are necessary to fully effectuate the commitment to non-discriminatory treatment of unaffiliated ISPs that the Applicants have undertaken in the MOU and that the FTC Consent Agreement substantially accomplishes.

(ii) Potential Discrimination Against Unaffiliated ISPs on non-AOL Time Warner Cable Networks

101. ACA, in its initial comments, expressed concern that the proposed merger would give AOL Time Warner the incentive and the ability to require other cable operators to carry AOL's Internet access services as a condition of obtaining Time Warner video programming.[299] ACA sought a commitment from the Applicants that they would not engage in such tactics.[300] Subsequently, Time Warner representatives stated at the Commission's en banc hearing in this proceeding that the merged firm would not condition access to its programming on carriage of AOL.[301] ACA then released a statement indicating its satisfaction with the Applicants' pledge.[302]

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does not allege that the proposed merger would affect in any way AOL's incentives with regard to how it writes its dial-up software. Additionally, as noted, the allegations regarding AOL's dial-up software are the subject of pending litigation. For these reasons, we do not believe that this proceeding is the appropriate forum to resolve concerns about AOL's dial-up service, and we decline to impose the requested merger condition.

[299] ACA Comments at 1-2.

[300] *Id.*; ACA Reply Comments at 5.

[301] *See* Testimony of Richard D. Parsons, President, Time Warner Inc., FCC En Banc Hearing, CS Docket No. 00-30 (July 27, 2000), Tr. at 178-79 ("Parsons En Banc Testimony"). In response to Commissioner Tristani's question as to whether AOL Time Warner would require carriage of AOL services as a condition of access to Time Warner programming, Mr. Parsons replied, "We will not. We will not tie them together in that way. We had thought . . . we were clear in our previous submissions. Obviously, we weren't. . . [but] we're being unequivocal now. We will not tie them." *Id.*; *see also* Applicants' Reply Comments at 44-46 (stating that it would not be in Time Warner's best
(continued...)

102. While we commend Time Warner for its representations at the en banc hearing, we remain concerned that the merger would give AOL Time Warner the incentive to seek exclusive or preferential carriage rights for AOL on non-Time Warner cable systems. The merged company would have an incentive to pursue such arrangements wherever preferential carriage rights were essential to the success of its entry strategy for AOL Plus, or wherever it encountered difficulty obtaining carriage rights altogether.[303] If the merged firm's efforts on behalf of AOL were to induce anticompetitive behavior by other cable operators regarding carriage of non-AOL Time Warner ISPs, the public interest would clearly be harmed.[304]

103. We find it unnecessary to address AOL Time Warner's ability to obtain exclusive or preferential carriage rights for AOL, however, because we are satisfied that the FTC Consent Agreement adequately addresses the potential harm with which we are concerned. In particular the decree prohibits AOL Time Warner from entering into any agreement with a cable provider that would interfere with the cable provider's ability to enter into an agreement with another ISP.[305] This provision will prevent AOL Time Warner from entering agreements with other cable providers that would restrict the rates, terms, or conditions of service that these providers could offer to ISPs competing with AOL.

(iii) Potential Harms to Diversity of Internet Content

104. Several commenters, notably Disney and NBC, argue that a merged AOL Time Warner could utilize its control over high-speed distribution to favor its affiliated content and to discriminate against unaffiliated content providers,[306] thus limiting the public's access to a diversity of information sources.[307] According to the commenters, such discrimination could be accomplished through router

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interest to limit the reach of its programming by tying it to carriage of AOL; other programming in the marketplace would then replace Time Warner's programming).

[302] ACA, *American Cable Association Backs Time Warner/AOL Merger* (press release), July 27, 2000.

[303] *Cf.* Confidential Appendix IV-A-1, Note 1; *id.* IV-A-2, Note 2.

[304] We are mindful that efforts by AOL Time Warner to obtain carriage for the merged company's ISP on the networks of other cable providers would not necessarily be harmful to the public interest. Indeed, such efforts could facilitate the deployment of advanced telecommunications capability to all Americans and promote the existence of a diversity of information sources in cyberspace. As such, these efforts could benefit the public interest, so long as they did not induce anticompetitive behavior by other cable providers.

[305] FTC Consent Agreement at III.E.

[306] By "unaffiliated content providers," we mean content providers in which the merged firm has no ownership interest or contractual relationship.

[307] Disney Reply Comments at 2; NBC July 24 Ex Parte at 5-6; Letter from Henry L. Bauman et al., Legal Department, National Association of Broadcasters, to William E. Kennard, Chairman, FCC, dated May 19, 2000 ("NAB May 19 Ex Parte"), at 2-3. On May 10, 2000, Senators Mike DeWine and Herb Kohl sent a letter to FCC Chairman William Kennard and FTC Chairman Robert Pitofsky expressing similar concerns. In addition, several individuals who use AOL and Road Runner filed comments objecting to alleged instances of censorship by these ISPs. *See* Petition To Deny of Thomas Lewis Bonge, dated Sept. 15, 2000 ("Bonge Petition"), at 10-13 (claiming that Road Runner deleted as unauthorized commercial speech petitioner's chat room posting referencing an Internet music site), transmitted by letter from Thomas Lewis Bonge to FCC, dated Sept. 15, 2000; Letter from James D. Russell, Ph.D., to Magalie Roman Salas, Secretary, FCC, dated Aug. 22, 2000 ("Russell Letter") at 1-2 (claiming that AOL deleted as hate speech certain postings concerning Vice Presidential candidate Joseph Lieberman); Letter from Frank Messman to Magalie Roman Salas, Secretary, FCC, dated Aug. 24, 2000 ("Messman Letter") at 1 (same). These commenters also allege that Road Runner and AOL have cancelled the accounts of users who posted
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technology in a way that would be undetectable to consumers. For example, routers could be programmed to provide high bit rates and superior customer performance for AOL Time Warner channels, programs and services, and slower bit rates and inferior customer performance for content provided by unaffiliated sources.[308] In addition, Disney asserts that AOL, as a condition for purchasing placement on the AOL website, requires that content providers disable hyperlinks to unaffiliated websites (including other areas of the content providers' own web sites), and requires a commitment that no more than a set percentage of traffic at a site within the AOL network can be "diverted," via links, to sites outside the AOL network.[309] If these claims are valid, the merger could harm consumers by enhancing AOL Time Warner's incentive and ability to limit access to Internet content not affiliated with the merged company.

105. The Applicants assert that their primary economic incentive is to increase subscribership by distributing the widest possible variety of content to the widest possible audience, and that therefore they have no incentive to discriminate against unaffiliated content providers.[310] With respect to Disney's argument in particular, the Applicants emphasize that AOL does not restrict a user's ability to reach any site on the World Wide Web by typing in a URL.[311]

106. The record in this proceeding provides some evidence that AOL already seeks to limit its members' access to unaffiliated content on the World Wide Web. For example, AOL requires that content appearing on AOL websites have only a limited number of hyperlinks to unaffiliated content.[312] Furthermore, while it is true that AOL users can access unaffiliated content by typing the URL for any site on the World Wide Web into the AOL browser, a user must know the correct URL in order to complete that operation, and must take the time to do so -- factors which, Disney and NBC maintain, make typing a URL an inadequate substitute for clicking a hyperlink.[313]

107. Nevertheless, we decline to impose the remedial conditions proposed by Disney and NBC, for two reasons. First, as we discuss below, we believe that if unaffiliated ISPs receive non-discriminatory access to Time Warner cable systems -- a result effectuated by the FTC Consent

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messages deemed unacceptable by the ISPs. *See* Bonge Petition at 11-12; Russell Letter at 1-2; Messman Letter at 1. They ask the Commission to prohibit AOL Time Warner from restricting ISP users' speech. While we recognize the importance of citizens' ability to freely communicate with each other, this proceeding is not the appropriate forum for the resolution of the complex legal and policy questions that these commenters present. The aforementioned commenters have not alleged that the merger will in any way affect AOL's or Road Runner's ability or incentive to regulate users' speech. Accordingly, we do not address these issues further in this proceeding, and we reject the aforementioned commenters' proposed merger conditions.

[308] *See* Disney Reply Comments at 12-14; Disney Oct. 25 Ex Parte at 4-5; Consumers Union Comments at 105-07.

[309] Disney July 25 Ex Parte at 19.

[310] Applicants' Reply Comments, *passim*.

[311] Applicants' Reply Comments at 2, 36-40.

[312] *See* Disney July 25 Ex Parte at 19. Disney states that "AOL consistently demands that companies purchasing space on the AOL website desist from including links to websites outside the walled garden . . . . At times, AOL requires a commitment that no more than a set percentage of traffic at a site within the AOL network can be 'diverted' from there via links to sites outside the AOL Network." *Id.*

[313] NBC contends that a merged company could steer consumers to affiliated content by "only providing direct links to affiliated programming, and even by downgrading the speed with which consumers can access certain web sites." NBC July 24 Ex Parte at 6; *see also* Disney July 25 Ex Parte at 19.

Agreement, and reinforced by certain conditions we impose in this proceeding -- the merged firm's incentive and ability to withhold unaffiliated content from its subscribers will be substantially mitigated. Second and relatedly, the FTC Consent Agreement explicitly forbids AOL Time Warner from interfering in any way with content passed through Time Warner cable conduits being used by unaffiliated ISPs that have contracted for access to them.[314] These provisions ensure that unaffiliated ISPs on Time Warner's cable systems will have unimpeded access to unaffiliated content should they choose to provide it -- thus effectively ensuring that Time Warner cable subscribers will have access to such content as well.

108. Other commenters, especially BellSouth and SBC, argue that a combined AOL Time Warner would have both the incentive and the ability to discriminate against alternative, non-cable platforms for high-speed Internet service (such as DSL) by withholding valuable affiliated content from ISPs that utilize these alternative platforms, especially in areas served by Time Warner cable systems.[315] Were the combined company to discriminate in this manner, these commenters allege, competing ISPs (as well as competing high-speed platforms) would be placed at a disadvantage, thereby limiting consumers' ability to choose among varied and diverse sources of broadband Internet content.[316]

109. The Applicants maintain in response that their commitment to maximizing subscribership means that AOL Time Warner would distribute its own affiliated content on all high-speed Internet platforms, including DSL, satellite, and wireless.[317]

110. The record in this proceeding demonstrates that the Applicants contemplate giving some popular Time Warner programming and content exclusive placement on AOL websites.[318] It further demonstrates that the Applicants contemplate moving certain Time Warner content from unaffiliated portals to AOL's portal.[319] The merger would certainly enhance AOL's ability to secure exclusive contracts for Time Warner content, and AOL would have an incentive to grant such exclusivity due to the competitive advantage it would gain by offering popular content on an exclusive basis. Although there are thousands of content sources on the World Wide Web, Internet users look to a relatively limited number of sources to access that content.[320] This proposition is demonstrated by the dominance of a small number of major portals (led by AOL) in terms of Internet traffic.[321]

111. Notwithstanding the likelihood that the proposed merger would lead to AOL's securing exclusive or preferential access to some Time Warner content, we find the record insufficient to justify a requirement of "equal access" to such content. In particular, we are not persuaded that AOL's ability to obtain exclusive or preferential access to such content in the wake of the merger would harm the public interest in a manner sufficiently grave to warrant the remedy commenters seek, which is far-reaching.

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[314] FTC Consent Agreement at III.A; FTC Press Release at 4.

[315] SBC Comments at 19-22; BellSouth Reply Comments at 14-18.

[316] SBC Comments at 19-22; BellSouth Reply Comments at 14-18.

[317] Applicants' Reply Comments, *passim*.

[318] *See* Confidential Appendix IV-A-2, Note 9.

[319] *Id.*

[320] BellSouth Reply Comments at 9.

[321] Internet traffic for the top 50 digital media and web properties, measured in terms of "unique visitors" per month, is tracked by Media Metrix at http://www.mediametrix.com/home.jsp?language=us.

112. Finally, we believe that the AOL Time Warner's incentive and ability to engage in Internet "content discrimination" will be largely mitigated if unaffiliated ISPs are given non-discriminatory access to Time Warner's cable systems, as the FTC Consent Agreement requires. Were AOL Time Warner to withhold desirable unaffiliated content from subscribers to its affiliated ISPs (as Disney and NBC fear), these subscribers would be able to select an alternative, unaffiliated ISP on Time Warner's cable network without incurring substantial switching costs. And were AOL Time Warner to withhold desirable affiliated content from subscribers to unaffiliated ISPs on competing platforms (as BellSouth and SBC fear), it would sacrifice a potentially significant source of revenue. Therefore, we find that commenters' concerns with respect to potential "content discrimination" are adequately addressed by the provisions in the FTC Consent Agreement and this Order ensuring that unaffiliated ISPs receive non-discriminatory access to Time Warner cable systems.

(iv) Potential Harms to Unaffiliated Broadband Platforms

113. Commenters claim that the proposed merger would impair the viability of DSL as a competitive alternative to cable for the delivery of residential high-speed Internet access services.[322] Based on the record in this proceeding, we do not believe that the merger would threaten the continued existence of DSL. We do find, however, that the merger could undermine the availability of residential high-speed Internet access services over DSL by creating an incentive for AOL Time Warner to steer cable customers seeking Internet access in Time Warner service areas to the cable platform. Nonetheless, we are satisfied that this outcome will be averted by the requirements of the FTC Consent Agreement.

114. Cable operators have been early leaders in deploying residential high-speed Internet access services. Cable's early rollout encouraged deployment of alternative platforms; as the Commission has observed, the expansion of DSL in the past two years by incumbent LECs "is primarily a reaction to other companies' entry into broadband."[323] As of November 2000, cable retained a substantial edge over DSL as measured by the number of residential subscribers to each platform.[324]

115. AOL currently markets its high-speed Internet access service ("AOL Plus") over DSL through non-exclusive strategic alliances with SBC (including Ameritech) as well as Bell Atlantic and GTE (both now components of Verizon Communications).[325] Taken together, AOL's agreements with these companies give it an almost nationwide DSL footprint.[326] AOL's effort to obtain such a nationwide

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[322] *See, e.g.*, SBC Comments at 21-22; BellSouth Reply Comments at 15, 21-22; Consumers Union Comments at 33.

[323] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No.-96-98, *Third Report and Order and Fourth Further Notice of Proposed Rulemaking*, 15 FCC Rcd at 3696, 3840 n.642 (1999). In the past two years, numerous companies have made substantial investments in DSL. For example, SBC Corp. has announced its intention to invest $6 billion in an infrastructure deployment throughout its 13 state region, in order to make DSL available to nearly 77 million homes. SBC Communications, Inc., *SBC Set to Trial DSL Neighborhood Broadband Gateways* (press release), Aug. 23, 2000; *see also* SBC Communications, Inc., *SBC Launches $6 billion Broadband Initiative* (press release), Oct. 18, 1999.

[324] As of November 2000, there were an estimated 3 million residential cable modem customers in the United States compared with approximately 1,160,000 residential DSL subscribers. *See* Kinetic Strategies, Inc., *Cable Modem Market Stats & Projections*, CABLE DATACOM NEWS, Nov. 8, 2000, at http://www.cabledatacomnews.com/cmic/cmic16.html (visited Nov. 14, 2000); *see also* TeleChoice, Inc., *TeleChoice DSL Deployment Summary – Updated 11/13/00*, at http://www.xdsl.com/content/resources/deployment_info.asp (visited Nov. 14, 2000).

[325] Applicants' March 21 Supplemental Information at 17.

[326] Applicants' Third Response at 11-12 & ex.3.16; *see also* Confidential Appendix IV-A-2, Notes 1 and 10.

DSL footprint has been credited with making DSL highly competitive with cable due to the attractiveness of AOL's content.[327]

116. Thus far, AOL has been unable to offer AOL Plus over cable, though the company has sought a presence on that platform through negotiations with cable companies and its past advocacy of "open access."[328] The merger would enable AOL to offer its high-speed Internet access services to Time Warner's nearly 13 million cable subscribers as soon as Time Warner's exclusive contract with Road Runner expires.[329] AOL's access to this customer base would not be significantly slowed by technical obstacles, as eighty-five percent of Time Warner's cable plant has already been upgraded to two-way, 750 MHz hybrid fiber/coaxial (HFC) networks.[330] AOL has indicated that it would offer AOL Plus to Time Warner cable customers at the earliest possible juncture.[331]

117. Because the proposed transaction would give AOL ownership of a cable network, the merged firm could maximize its profits by maximizing the number of Time Warner cable subscribers receiving AOL's residential high-speed Internet access services over Time Warner's cable facilities instead of DSL. This conclusion follows from the simple fact that customers in Time Warner service areas who received AOL's high-speed Internet access services over cable would pay the merged firm for Internet access, for content, and for transmission, whereas customers in the same service areas who received AOL's services over DSL would pay the merged firm only for the first two components.[332] Every customer in a Time Warner service area who elected to receive AOL's high-speed Internet access services over DSL instead of cable, in other words, would cost the merged firm one stream of revenue.

118. For this reason, commenters fear that AOL -- which played an important role in promoting DSL before the proposed merger -- would "withdraw support" from that platform post-merger and steer customers who could receive its high-speed Internet access services over either DSL or cable to

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[327] *See* Consumers Union Comments at 27-28 (citing Nico DeTourn, *Industry News: AT&T Reaches Out*, THE MOTLEY FOOL'S INTERNET REPORT, July 10, 1999, at 10). Additionally, in *AT&T-MediaOne*, we noted that ISPs lacking direct access to provide broadband services over cable systems were entering into alliances with alternative broadband providers, thereby accelerating the deployment of these technologies. *AT&T-MediaOne Order*, 15 FCC Rcd at 9867-68 ¶ 117.

[328] Applicants' March 21 Supplemental Information at 30 (citing AOL Time Warner Filing S-4, Feb. 11, 2000 at 37); *see also* Applicants' Second Response at 13; Kinetic Strategies, Inc., *America Online's Broadband Coup*, CABLE DATACOM NEWS, at http://www.cabledatacomnews.com/ best_of/bocdnl10.html (visited Aug. 14, 2000); Confidential Appendix IV-A-2, Note 2; *see also Applications for Consent to Transfer of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CC Docket No. 99-251, AOL Comments at 12-17 (comments of AOL in previous merger supporting government-mandated "open access" to cable systems); *Applications for Consent to the Transfer of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, CS Dkt. No. 98-178, AOL Comments at 30-39 (same).

[329] Kinetic Strategies, Inc., *America Online's Broadband Coup*, CABLE DATACOM NEWS, at http://www.cable datacomnews.com/best_of/bocdnl10.html (visited Aug. 14, 2000). According to a press release issued by Time Warner on December 18, 2000, the exclusivity arrangement between Time Warner and Road Runner will be terminated by April, 2001. *See* Time Warner Dec. 18 Press Release.

[330] Time Warner Inc., *Time Warner Cable, Overview*, at http://www.timewarner.com/corp/about/cablesys/index.html (visited July 31, 2000).

[331] *See* Confidential Appendix IV-A-2, Note 11.

[332] SBC Comments at 21.

the latter.[333] AOL could withdraw its support from DSL in a number of ways. Most dramatically, it could refuse to offer AOL Plus over DSL altogether. Alternatively, as SBC contends, AOL could restrict the availability of AOL Plus over DSL to geographic markets where that service could not be delivered over Time Warner's cable facilities.[334] If it sought a more subtle means to withdraw support from DSL, AOL could continue to offer its Internet access services over that platform, but do so at higher prices or on less favorable terms than would be available over Time Warner cable.

119. In response to commenters' concerns, AOL asserts that it intends to offer its residential high-speed Internet access services across all platforms, in keeping with its "AOL Anywhere" strategy.[335] AOL Chairman Steve Case stated at the en banc hearing in this proceeding that it is "in [AOL Time Warner's] interest to work as forcefully as we can to establish arrangements with all the cable companies to deploy cable broadband, as well as [with] all the DSL companies, satellite companies, [and] wireless companies, so we really have a national footprint, with a tapestry of broadband solutions."[336] AOL claims that it must provide its services over as many distribution platforms as possible in order to reach the greatest number of consumers;[337] maximizing the number of consumers that view AOL content, the company maintains, will increase subscription revenue, advertising revenue and revenue from e-commerce transactions.[338] AOL further contends that if it failed to offer AOL Plus on multiple broadband platforms within Time Warner service areas, consumers would likely subscribe to an ISP other than AOL in lieu of being forced onto cable.[339] The Applicants observe that within Time Warner franchise areas, "a substantial percentage of consumers" do not subscribe to cable, and that refusing to offer AOL Plus over alternative platforms could foreclose AOL from signing up these potential subscribers.[340]

120. Although the record supports AOL's general commitment to offering its services over DSL, we nonetheless conclude that the merged firm would have a clear economic incentive to favor cable as its platform of choice with respect to customers in Time Warner service areas who could obtain residential high-speed Internet access services over either conduit.[341] The record does not support a conclusion that AOL Time Warner would discriminate against DSL by refusing to offer high-speed Internet access services over that platform altogether. On the contrary, as the Applicants' aver, it would

[333] *Id.* at 20. SBC claims that the proposed merger would give AOL "a strong incentive generally to favor cable over DSL or satellite throughout the country"; it claims that "the incentive will be overwhelming in all geographic markets where AOL/Time Warner is itself the local provider of cable service." *Id.* at 20-21.

[334] *Id.*

[335] Applicants' March 21 Supplemental Information at 18.

[336] Testimony of Steve Case, Chairman and CEO, America Online, Inc., FCC En Banc Hearing, CS Docket No. 00-3- (July 27, 2000), Tr. at 43 ("Case En Banc Testimony").

[337] Applicants' Second Response at 10-11; *id.* at 13 ("A merged AOL Time Warner will continue the same strategy of seeking to make the AOL ISP service available over as many platforms as possible.").

[338] Applicants' March 21 Supplemental Information at 17; *see also* Jeff Camp et al., *The Broadband Report: Reaping What You Sow: ROI in the Broadband Market*, Morgan Stanley Dean Witter, May 2000, at 57 ("We expect that AOL Time Warner will offer to sell content over DSL and satellite systems, as well as cable.").

[339] Applicants' Second Response at 11.

[340] Applicants' March 21 Supplemental Information at 19.

[341] Should the Applicants enter into an agreement with AT&T to be the favored or exclusive ISP over AT&T cable systems, additional incentives would be created which could encourage the Applicants to steer customers to the cable platform rather than DSL. *See* Confidential Appendix IV-A-2, Note 4.

be consonant with AOL Time Warner's economic interest to offer such services over DSL in order to reach as many "eyeballs" as possible.[342] However, the merged firm's incentive to offer "AOL Anywhere" would not negate its incentive to steer customers to the platform the Applicants would own where customers could choose that platform.

121. If AOL Time Warner acted upon this latter incentive and withdrew its full-fledged support from the DSL platform in Time Warner cable service areas, the result would be to retard the growth of DSL as a competitor to cable.[343] We believe such a result would be against the public interest. Robust competition between cable and DSL platforms is important to "promote the continued development of the Internet,"[344] to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services,"[345] and to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[346] We are convinced that a decision by AOL Time Warner to withdraw support from DSL -- even if it were limited to Time Warner cable service areas, and even if its ultimate effect were only to slow DSL's continued growth -- would amount to a public interest harm.

122. Nonetheless, we are satisfied that this harm will be adequately ameliorated by the requirements in the FTC Consent Agreement. As earlier mentioned, these requirements, augmented by the conditions we impose in this proceeding, will allow unaffiliated ISPs to offer residential high-speed Internet access services over Time Warner cable on a non-discriminatory basis. With unaffiliated ISPs able to market their services over AOL Time Warner's cable platform as well as DSL, the merged firm will have an incentive to offer its Internet access services over DSL in order to provide prospective customers with the same range of conduit options its competitors do. AOL Time Warner will likewise have an incentive to offer its Internet access services over DSL in order to replace ISP customers lost to unaffiliated ISPs on its cable platform.

123. The FTC Consent Agreement also addresses the possibility that AOL Time Warner will withdraw support from DSL in Time Warner cable service areas more directly: by requiring the merged firm to market its Internet access service over DSL in the same manner and at the same retail price in Time Warner service areas where AOL or affiliated ISP service *is* available over cable as in Time Warner service areas where AOL or affiliated ISP service is *not* available over cable.[347] These requirements effectively forbid AOL Time Warner from steering customers toward the cable platform in Time Warner cable service areas, and ensure that the merged firm's support for DSL service will not vary where cable and DSL platforms compete head to head.

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[342] *See* Applicants Sept. 19 Ex Parte at 2.

[343] We do not find that this would cause a specifically quantifiable level of harm to DSL. As noted above, numerous incumbent and competitive LECs have invested heavily in DSL. These include companies with whom AOL has ongoing contracts to market high-speed service, and those without agreements with AOL, and it is not clear that these companies will pull back from aggressively promoting DSL. However, as we note, we do believe that by favoring the cable platform, AOL Time Warner could hinder DSL's growth to some extent.

[344] 47 U.S.C. § 230(b)(1).

[345] *Id.* § 230(b)(2).

[346] 47 U.S.C. § 157 nt.

[347] FTC Consent Agreement at IV.A-B; FTC Press Release at 4.

124. We are not persuaded that further requested remedies are appropriate. Memphis, Light, Gas and Water Division ("MLG&W") and Memphis Networx (jointly referred to as "Memphis Commenters") ask the Commission to condition its license transfer approval on the Applicants taking a "neutral stance to the entry of facilities-based network providers in areas in which Time Warner provides telecommunications and cable services."[348] MLG&W is a division of the City of Memphis, Tennessee, that supplies electricity, natural gas and water to approximately 400,000 customers.[349] Through a joint venture with a third party, MLG&W formed Memphis Networx to build a physical network that will provide, among other things, residential high-speed Internet access services.[350] The Memphis Commenters allege that Time Warner, which holds the cable franchise in Memphis, has sought to prevent Memphis Networx from building its competitive network, and has "gone to extraordinary lengths to protect its dominant position in the Memphis broadband market."[351] The Applicants respond that Time Warner's concerns about Memphis Networx's proposed network predate the proposed merger, and would be unaffected by a combination of the firms.[352] Time Warner also argues that its concerns about Memphis Networx's proposed network are legitimate, and that to the extent the Memphis Commenters object to the manner in which Time Warner has acted upon its concerns, such objections should be addressed to local decision-makers.[353]

125. MLG&W's undertaking may promote competition for high-speed Internet access services and facilitate the deployment of these services to under-served areas.[354] Nevertheless, the Memphis Commenters have not demonstrated that Time Warner's opposition to their plan is anticompetitive or unlawful. They have also failed to demonstrate that the proposed merger would increase the likelihood of anticompetitive or unlawful behavior by the Applicants. As we have previously noted, where a "merger is not the cause of . . . [a] competitive threat . . . the . . . license transfer proceeding is not the appropriate forum" to address the issue.[355]

3. Conditions

126. Commenters argue that the MOU is insufficient to prevent the proposed merger from harming the public interest because it is unenforceable and vague with respect to how the principle of non-discrimination will be implemented.[356] Although we commend the Applicants for proffering the MOU, as we have earlier explained we agree with the commenters that the MOU by itself affords insufficient protection against the potential harms to the public interest that could result from the proposed merger.[357] The FTC Consent Agreement, on the other hand, substantially addresses these

[348] Memphis Networx Comments at 7.

[349] MLG&W Comments at 3.

[350] *Id.* at 3.

[351] *Id.* at 3; *see also* Memphis Networx Comments at 3.

[352] Applicants' Reply Comments at 52.

[353] *Id.*

[354] In addition to creating an alternative platform, one of Memphis Networx's corporate goals is closing the digital divide by providing residential high-speed Internet access to under-served consumers, particularly in rural areas and central cities. MLG&W Comments at 5.

[355] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9878-79 ¶ 143.

[356] SBC Comments at 20; BellSouth Reply Comments at 22-23.

[357] At least one competitive ISP has claimed that the MOU is not being implemented as promised. A spokesman for (continued...)

harms, as we have already described. The conditions we impose below are narrowly tailored to augment that decree by preventing AOL Time Warner from utilizing certain indirect means to disadvantage unaffiliated ISPs on its cable systems due to their lack of affiliation.

A. *Choice of ISPs*: AOL Time Warner shall not restrict the ability of any current or prospective ISP customers to select and initiate service from any unaffiliated ISP which, pursuant to a contract with AOL Time Warner, has made its service available over AOL Time Warner's cable facilities ("Participating ISP"). AOL Time Warner shall allow customers to select a Participating ISP by a method that does not discriminate in favor of AOL Time Warner's affiliates on the basis of affiliation. At a minimum, AOL Time Warner shall allow customers to obtain a list of Participating ISPs by calling their local AOL Time Warner cable system and requesting such a list. Whenever a customer requests a listing of Participating ISPs, AOL Time Warner shall provide the list in a reasonable and timely manner.[358] Such list shall not discriminate in favor of AOL Time Warner's affiliates on the basis of affiliation. AOL Time Warner shall not prohibit ISPs from marketing their services to AOL Time Warner cable customers.[359]

B. *First Screen*: AOL Time Warner shall permit each Participating ISP to determine the contents of its subscribers' first screen and shall not require a Participating ISP to include any content as a condition of obtaining access to AOL Time Warner cable systems; provided that AOL Time Warner and any Participating ISP may agree that the ISP will include specified content or links on its first screen.[360] AOL Time Warner shall not require any high-speed Internet access cable customer to go through an affiliated ISP to reach any Participating ISP from which the customer purchases service.

C. *Billing*: AOL Time Warner shall permit each ISP to have a direct billing arrangement with those high-speed Internet access subscribers to whom the ISP sells service. AOL Time Warner may offer a billing service to any Participating ISP, but shall not require any ISP to purchase this service as a condition of obtaining access.

D. *Technical Performance*: All contracts between AOL Time Warner and unaffiliated ISPs for access to Time Warner's cable systems shall contain a clause warranting that, to the extent AOL Time Warner provides any Quality of Service mechanisms, caching services, technical support customer services, multicasting capabilities, address management and other technical functions of the cable system that affect customers' experience with their ISP, AOL Time Warner shall provide them in a manner that does not discriminate in favor of AOL Time Warner's affiliated ISPs on the basis of affiliation.

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EarthLink recently said that Time Warner has offered such unfriendly terms for access to its cable plant that it is "difficult, if not impossible" for competing ISPs to enter the cable access market. Specifically, EarthLink alleged that Time Warner requires unfair revenue sharing, requires a substantive presence on the ISP's start page, and does not allow unaffiliated ISPs full access to their customers for billing and other purposes. COMM. DAILY (Sept. 29, 2000). *See also* Aaron Pressman, *Lost Lessons at Time Warner*, THE STANDARD, Sept. 29, 2000, http://www.thestandard.com/article/display/0,1151,18993,00.html?nl=dnt (visited Sept., 2000). EarthLink has since entered an agreement with AOL Time Warner for access to the latter's cable networks.

[358] The use of "AOL Time Warner" in this sentence refers to the division of AOL Time Warner that operates its cable systems.

[359] This provision ("Choice of ISPs") is not intended to restrict AOL Time Warner's ability to market its own products to prospective or current ISP customers.

[360] For purposes of this paragraph, the "first screen" is the screen that comes up first when the user initiates interaction with his or her ISP, for example by clicking on the ISP's desktop icon or accessing the ISP via the World Wide Web.

E. *Rights to Disclose Contracts to the Commission*: AOL Time Warner shall not enter into any contract with any ISP for connection with AOL Time Warner's cable systems that prevents that ISP from disclosing the terms of the contract to the Commission under the Commission's confidentiality procedures.

F. *Enforcement*: With respect to any dispute concerning AOL Time Warner's compliance with these conditions, the following procedures shall apply. These procedures are designed to resolve any disputes within sixty (60) days of the filing of the Complaint and to have them resolved by the Chief, Cable Services Bureau ("Chief").

1. No less than ten (10) business days before filing a complaint with the Commission, the complainant shall notify AOL Time Warner of its intention to file the complaint. This is intended to afford the parties a final opportunity to resolve their dispute without resort to our processes.

2. Within twenty (20) days after public notice of the filing of the complaint, any interested party shall file an answer. Within ten (10) days after the filing of the answer, the complainant may file its reply. The complainant and AOL Time Warner shall each, with its first filing, furnish a detailed report, technical or otherwise, describing the conduct or events that are the subject of the filing. All filings shall be made with Commission Secretary and shall be concurrently served on the Chief.

3. In resolving these filings, the Chief shall apply the following principles: (a) The general pleading rules set forth in Parts 1 and 76 of our rules shall apply to the extent they are consistent with the specific requirements of the proceedings provided for herein;[361] (b) complaints of misconduct by AOL shall be filed within one year of the occurrence of the alleged misconduct; (c) discovery shall be at the discretion of the Chief and may be requested by a party in one of its filings provided for above; and (d) the complainant shall bear the burden of proof in the proceeding it commences.[362]

4. The Chief shall sustain or dismiss the complaint within sixty (60) days of the filing of the complaint.

127. We conclude that these requirements, in conjunction with the FTC Consent Agreement, adequately address the potential harms to the public interest raised by the proposed merger.[363] If and when the Commission adopts any rules of general applicability concerning ISPs' access to cable system facilities, any such rules will apply to AOL Time Warner to the extent they do not conflict with the conditions set forth herein.[364] AOL Time Warner may file a petition at any time after the issuance of such

[361] 47 C.F.R. pts. 1, 76.

[362] *See Implementation of the Satellite Home Viewer Improvement Act of 1999: Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, First Report and Order, 15 FCC Rcd 5445, 5477-83 (2000).

[363] In particular, we decline to mandate "open access" to AOL Time Warner's cable systems or to require that the merged firm divest itself of Road Runner, as requested by Consumers Union and other commenters. *See* Consumers Union Comments at 157; *see also* BellSouth Reply Comments at 22-23 (requesting that Commission condition merger approval on "open access" requirement); SBC Comments at 29, 32, 35-36 (requesting that Commission condition merger approval on "open access" requirement and divestiture of Road Runner).

[364] In the event of any conflict between these conditions and any rules of general applicability the Commission may (continued...)

rules, or after the issuance of any Commission finding on market definition that is contrary to the findings set forth herein, seeking modification or termination of these conditions. The Commission may, on its own motion, modify or terminate the conditions set forth above at any time if it finds such requirements are no longer necessary to mitigate or prevent potential public interest harms.[365]

B. Instant Messaging and Advanced IM-Based High-Speed Services.

128. In this section we analyze Instant Messaging ("IM"), new IM-based services, and advanced IM-based high-speed services ("AIHS")[366] from the perspective of our well-settled statutory obligations. Based on the following analysis, and to ensure the public interest as set forth in 47 U.S.C. §§ 230(b) and 157 and elsewhere in the Communications Act is protected, we impose conditions on the merged parties.

129. We conclude the market in text-based instant messaging is characterized by strong "network effects," *i.e.*, a service's value increases substantially with the addition of new users with whom other users can communicate, and that AOL, by any measure described in the record, is the dominant IM provider in America. We further find AOL has consistently resisted interoperability with other non-licensed IM providers.[367] AOL's market dominance in text-based messaging, coupled with the network effects and its resistance to interoperability, establishes a very high barrier to entry for competitors that contravenes the public interest in open and interoperable communications systems, the development of the Internet, consumer choice, competition and innovation.[368] We also find that a Names and Presence Database ("NPD") is currently an essential input for the development and deployment of many, if not most, future high-speed Internet-based services that rely on real-time delivery and interaction.

130. Given these findings, the combination of Time Warner's high-speed information transmission assets and its programming content with AOL's current IM market dominance, substantially increases the probability that AOL's dominance in the narrowband text-messaging world will persist in the world of high-speed interactive services. For these reasons, we impose conditions to ensure that the

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promulgate, these conditions will govern unless otherwise specified by the Commission.

[365] The conditions set forth above are not intended to require AOL Time Warner to offer any ISP connection to its cable systems, but instead to ensure that if and when the merged firm does agree to offer ISPs such connection, it does so in conformity with the requirements we delineate herein.

[366] IM-based services are relatively new but have shown enormous growth in popularity in recent years. Their key characteristics are the capabilities to detect whether other users of the system (whose names are kept in a Names and Presence Database) are present online and to exchange messages with them in real time. These features, besides being useful in their own right, are predicted to have vast potential as a "platform" for the development of additional applications in the future, particularly as users obtain high-speed Internet access.

[367] Users of AOL's IM service cannot currently send or receive messages to or from those who use other IM services -- *i.e.*, the services are not "interoperable." AOL contends its historical resistance to interoperability is rooted in its belief that it currently cannot adequately protect its customers' privacy and security. *See infra* para. 170.

[368] Recent literature suggests that near monopoly outcomes in markets exhibiting strong network effects are "tipped markets." *See, e.g.*, Andrew Watson, *Predatory Pricing in the Software Industry*, 23 RUTGERS L. REC. 1 (1998) (*citing* David S. Evans and Richard Schmalensee, *A Guide to the Antitrust Economics of Networks*, 10 Spring ANTITRUST 36, 36-37 (1996)). Because our public interest authority is informed by market analysis but not determined by it, we express no opinion whether the factual conclusions in this *Order* can be characterized as amounting to a tipped market or not.

factors described in paragraph 129 above regarding narrowband text-messaging will not be reproduced and compounded by this merger.

131. We find that the public interest is served by interoperability among NPD-based services, first and foremost because interoperability will bring concrete and significant improvements to all consumers. With interoperability, communication between users that was inconvenient becomes convenient, communication that was impossible becomes possible, and new entrants are enabled to bring their innovations and creativity promptly to the largest possible number of users. Interoperability of NPD-based services will open new possibilities for communication for persons who are deaf or hard of hearing, persons with speech and/or learning disabilities, persons with cognitive limitations, and others for whom voice communication is problematic – who may come to rely on IM as a basic means of communication. They will be able not only to use new services, but also to interact with the perhaps 150 million users of IM all over the world. These improvements, in turn, will make these services more valuable to previously uninterested persons, drawing them to become users.[369] As we explain in detail below, the network effects of the business, instead of entrenching the largest incumbent, will work to the benefit of all users. The rewards of success in the marketplace will go to the provider who offers the most value to consumers rather than automatically to the first provider who amassed a large body of users. Alternately, if a single provider achieves dominance by relying on network effects and refusing to interoperate, actual and potential competing providers will be driven from and kept out of the market, resulting in a loss in competition, innovation, and consumer welfare. Interoperability would also continue the long-standing tradition of the Internet being open and interoperable. In sum, interoperability will benefit consumers and be in the public interest because (i) it enables each user to communicate with the largest number of other users through one source, thus maximizing efficiency; (ii) it leads to more product and service choices and convenience for users; (iii) it leads to more competition, thus avoiding the need for regulation; and (iv) it leads to more innovation.

132. We begin with a description of current and anticipated Instant Messaging and NPD-based services and of our authority to examine the impact of the proposed merger on these services in reviewing the applications in this case. We then explain the "network effects" characteristics of these services, and the conditions under which an unregulated market is and is not likely to lead to interoperability among competing providers. We then find that the proposed merger would give AOL Time Warner substantial, and perhaps insurmountable, advantages in providing advanced IM-based services over the high-speed Internet platform.

133. While we recognize a number of factors that signal caution here, including the relative novelty of the services and the need to resolve security and privacy concerns, we must also weigh the danger of inaction where the window of opportunity to preserve competition and protect the other policies of the Communications Act may be narrow because the markets are changing rapidly. On balance, we find it appropriate to impose a narrow condition specifically tailored to address the potential harm to Communications Act objectives created by the combination of assets that will be permitted by granting the pending license transfer applications.

[369] *See* Jim Hu, *AOL's Lead in Instant Messaging Arena Dwindles*, CNET NEWS.COM, Nov. 16, 2000 ("Instant messaging proponents claim the technology could be as pervasive and influential as the telephone if a common communication standard is established."), attached to Letter from Peter D. Ross, Esq., Wiley, Rein & Fielding, Counsel for AOL, to Magalie Roman Salas, Secretary, FCC, dated Nov. 17, 2000 ("AOL Nov. 17 Ex Parte").

1. Background

134. IM, in its simplest form, enables the almost instantaneous exchange of short, private, individualized text messages over the Internet between two users who are online simultaneously and are either in a "chat room"[370] or on each other's "buddy lists."[371] Each Internet user may maintain a "buddy list" consisting of the IM names of the other users with whom he or she may wish to communicate via IM. A user may have several IM names or identities, such as one for work and another for business. Typically, when a user turns on her Internet access service, a box appears on the screen containing the names of those users who are on her buddy list and are also online.

135. A typical exchange begins when a user ("the sender") sees from her buddy list that another user ("the recipient") is online. The sender then brings up the IM box on her computer screen, types the recipient's IM name, types a message ("Hi, how are you this morning?"), and then clicks "Send" or an analogous command that sends the message to the recipient over the Internet. An instant later, the sender's IM name and message appear on the recipient's Internet screen and the recipient may reply. The general purpose and effect of IM is to allow almost instantaneous communication between two persons, each of whom sees the other's IM name on her screen and also sees that the other is online. IM enables them to communicate by exchanging personalized text messages privately and with a degree of informality and immediacy much like that of a face-to-face conversation or telephone call. Because IM messages are in text and are typically short, the speed (or "latency") demands of the service are relatively modest and well within the narrowband "best efforts" Internet of today.

136. IM is especially beneficial to persons who are deaf or hard of hearing, persons with speech and/or learning disabilities, persons with cognitive limitations, and persons for whom voice communication is otherwise problematic. As a mass medium for the almost instantaneous exchange of text messages, as opposed to voice messages, IM can be as useful to these persons as telephone service is to persons who do not have such limitations.[372]

137. Following AOL's pioneering efforts, IM became a mass market product in the late 1990s.[373] In the short time since then, IM has mushroomed into a highly popular service, with an estimated 150 million users worldwide on AOL's IM services alone.[374] More than 30 million individuals

[370] Typical "chat rooms" are groups of persons who have joined a group because of a common interest and who are online at the same time. Each person in a room may send a text message, which almost immediately appears on the screens of all persons in the room. Usually, ISPs limit the number of persons in a chat room at the same time in order to keep that chat manageable. IM, in the context of a chat room, occurs when one person in it wishes to exchange text messages with another person in it, but privately and without the others in the chat room.

[371] Tribal Voice Comments at 2.

[372] Testimony of Ross Bagully, President and CEO, Tribal Voice, FCC En Banc Hearing, CS Docket No. 00-30 (July 27, 2000) ("Bagully En Banc Testimony"), Tr. at 151 ("[T]here are 28 million deaf and hearing impaired American citizens who rely on instant messaging services, much like most of us use the telephone, . . ."); Letter from Nancy J. Bloch, Executive Director, National Association of the Deaf, to William E. Kennard, Chairman, FCC, dated July 26, 2000.

[373] Letter from George Vradenburg III, Senior Vice President, Global and Strategic Policy, AOL, to Deborah Lathen, Chief, Cable Services Bureau, FCC, dated Sept. 29, 2000, at 3 ("AOL Sept. 29 Ex Parte").

[374] Some observers put the total number of registered IM service users under AOL's control at over 150 million. Tribal Voice Comments at 1-2 (120 million); Julia Angwin, *Instant Messaging Services at AOL Quietly Linked*, WALL ST. J., Oct. 26, 2000, at B-1, B-4 (138 million); Jim Lynch, *Instant Messaging Roundup*, MSNBC Technology, Aug. 18, 2000, at http://www.msnbc.com/news/447786.asp (visited Aug. 28, 2000) (more than 150 (continued...)

use IM at least once a month, and AOL transmits almost five times as many IMs a day as it does e-mails.[375] From all appearances, the market is nowhere near saturation.

138. An essential input[376] to an IM service is the provider's NPD.[377] The names and presence indication, as displayed on the sender's and recipient's buddy lists and screens, enable each to know the other's IM name and when he or she is online or available. The actual NPD consists, first, of a database of the users' unique IM names and addresses and, second, of a "presence detection" function, which is the IM provider's knowledge, and its ability to inform others, that a certain user is online and therefore available to engage in instant messaging. The NPD is more than simply a customer list. It is a working part of an electronic communications network for persons who have requested participation in the network and actually use it to exchange communications in real time with other users.

139. Each IM provider has its own NPD, which constitutes the total universe of persons with whom that provider's users can engage in instant messaging. Until recently, IM providers did not share access to their NPDs with other providers. Some providers are starting to do so. Such sharing makes possible "interoperability," which is the ability of users of one IM service to engage in instant messaging with users of another IM service.

140. Many new services and applications based on "simple text" IM are being developed.[378] A few companies, including AOL, are already providing them to their IM users.[379] Many experienced industry observers believe that these new services, including AIHS, will be popular.[380]

141. The new IM-based services include sending, along with a text message, attachments such as documents; using IM as a way to access shopping, personal homepages, and calendars;[381] using

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million users); Nick Wingfield, *Changing Chat,* WALL ST. J., Sept. 18, 2000, at R-28 (154 million registered users).

[375] *IM Interoperability: The Need for Minimum Safeguards* at 2, White Paper filed herein ("First IM White Paper") under Letter from Ross Bagully, President and CEO, Tribal Voice, and Margaret Heffernan, President and CEO, iCast, to Magalie Roman Salas, Secretary, FCC, dated Sept. 5, 2000 ("Tribal Voice and iCast Sept. 5 Ex Parte"); Nick Wingfield, *Changing Chat,* WALL ST. J., Sept. 18, 2000, at R-28.

[376] An essential input is a component of a service or product without which the service or product cannot be created and provided to others. For example, a channel tuner is an essential input to a television set and a compressor is an essential input to a refrigerator.

[377] *See, e.g.*, Letter from Karen B. Possner, Vice President – Strategic Policy, BellSouth Corp., to Magalie Roman Salas, Secretary, FCC, dated Oct. 10, 2000, Attachment (BellSouth's Views on the Effect of the Proposed America Online-Time Warner Merger on Instant Messaging and Related Capabilities) at 1.

[378] Confidential Appendix IV-B-1, Note 1.

[379] AOL provides IM in basically three ways. First, it includes IM in its basic proprietary Internet access service. Second, AOL Instant Messenger, or "AIM," is available at no charge to subscribers to other Internet access services. Third, AOL acquired an IM company called ICQ, which it has kept separate from its other services. *See* Confidential Appendix IV-B-1, Note 2.

[380] *See* Jim Hu, *AOL's Lead in Instant Messaging Arena Dwindles*, CNET NEWS.COM, Nov. 16, 2000 ("Instant messaging proponents claim the technology could be as pervasive and influential as the telephone if a common communication standard is established."), attached to AOL Nov. 17 Ex Parte; Louise Rosen, *Why IM Matters So Much,* UPSIDE TODAY, Sept. 19, 2000, at http://www.upside.com/Ebiz/39c289380.html (visited Sept. 19, 2000) ("IM can drive up a site's traffic and brand awareness. It will be an important feature of interactive television; it . . . can add real-time customer services to a site."). *See* Confidential Appendix IV-B-1, Note 3.

presence detection as a trigger to perform "intelligent agent" functions such as selective message routing and instant alerts, automatic responses, filtering out unwanted messages,[382] sending individual users advertising, and time-sensitive personalized information such as news bulletins on pre-chosen subjects,[383] stock quotes, and travel arrangements;[384] and ordinary web surfing.[385] Some of these new services are appearing on wireless devices such as cellphones and Personal Digital Assistants such as "Palm Pilots" and "Pocket PCs."[386] These new services are also expected to be included in interactive television to allow, among other things, text chatting (for example, among faraway friends watching the same football game), obtaining information (for example, getting the statistics of a football player who has just come on the field) and shopping on the Internet (for example, for a team mascot or some other souvenir of a football game).[387]

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[381] iCast Comments n.5; Tribal Voice Comments at 2; Disney July 25 Ex Parte at 21-22; Ariane Eunjung Cha, *AOL Unmoved in Software Dispute*, WASH. POST, Aug. 24, 2000, at A-1, -14; Jim Lynch, *Instant Messaging Roundup*, MSNBC Technology, Aug. 18, 2000, at http://www.msnbc.com/news/447786.asp (visited Aug. 28, 2000).

[382] eWeek, Dennis Fisher, Small Talk Goes Big Bucks, ZDNet, at http://www.zdnet.com/eweek/stories/general/0,1101,2631584.00.html (visited Oct. 30, 2000).

[383] *See, e.g.*, Tribal Voice Comments at 6-7; iCast Comments at 8 and nn.17-18; America Online, Inc., *America Online and Time Warner Announce New Content and Promotional Agreements* (press release), Feb. 16, 2000 (visited Aug. 1, 2000) (ICQ and "CNN Interactive will develop a co-branded news offering to be distributed through . . . the ICQ client.").

[384] iCast Comments at 8 and nn.17-18. The presence detection aspect of IM would enable an IM provider, for example, to send the latest news to an IM user who has just come online or to advise a user with a ticket on a 7 o'clock flight that a seat on a 6 o'clock flight has just become available and can be reserved if the user replies within the next minute. *See, e.g.*, Randall E. Stross, *America's Bad Call: We're Way Behind Others When It Comes to Web Phones*, U.S. NEWS & WORLD REP., Sept. 4, 2000, at 2000 WL 7718658 ("Japanese 'Web phones,' like high-speed PCs, appear always on and offer a daily cartoon, weather reports, horoscopes, train schedules, bank account information, and stock quotes . . . . Japan Airlines already sells 20,000 tickets a month on the service, a feat enabled by designers who figured out ways to let users get to schedules in two clicks. By contrast, an American punching a Web phone needs seven [clicks] just to get a flight number").

[385] *See* Barbara Darrow, *Instant Messaging Market in Flux*, TECHWEB, Dec. 5, 2000, at http://www.techweb.com/wire/story/TWB20001204S0018 (visited Dec. 5, 2000) ("a group of buddies can cruise websites together"); William Whyman, *Instant Messaging: the Next Web Killer App?*, Precursor Group, July 31, 2000.

[386] *See, e.g.*, Irene M. Kunii, *Look Who's Going Courting in Japan*, BUSINESS WEEK, Aug. 7, 2000, at 2000 WL 24484561 ("The speculation is that AOL content could be available on i-mode phones if a deal is reached, possibly in August. . . . [AOL] sees wireless gadgets overtaking the PC as the most popular way to access the Net in the coming years. . . . AOL has developed unique services that could be transplanted to the wireless Net, such as instant messaging, which could be used as a locator device in the future. It could enable delivery of AOL's international content to i-mode users, ..."). In addition, IM will be available via wireless devices. *See, e.g.*, Neil Irwin, *AOL Debuts E-Mail/IM Pager*, WASHTECH.COM, Dec. 1, 2000, at http://washtech.com/news/media/5560-1.html (visited Dec. 1, 2000); *New Media*, COMM. DAILY, Oct. 20, 2000 ("Sprint PCS unveiled plans to make AOL Instant Messenger available on its Internet-enabled phones, providing text-to-text messaging service, nearly 2 days after AT&T Wireless announced similar plans for short-message service . . . Announcements mark first forays by U.S. carriers into instant text-messaging on wireless phones, service that has seen particularly rapid growth in Asia and Europe.").

[387] *See also* Letter from Margaret Heffernan, President and CEO, iCast, to Magalie Roman Salas, Secretary, FCC, dated Oct. 10, 2000 ("iCast Oct. 10 Ex Parte"), Attachment (Testimony of Ms. Heffernan before the House (continued...)

142. Some of these new IM-based services -- and perhaps the most important ones in the long term -- are bandwidth-intensive and therefore will work best with high-speed Internet access. These AIHS include time-sensitive, "latency-dependent" applications such as talking (*e.g.*, a Talk Feature that enables users to engage in live conversation online and is included in AIM 4.1), game-playing (*e.g.*, features in AOL's New Windows AIM 4.3,[388] buddies jointly 'playing along' with popular quiz shows such as Jeopardy! or Who Wants to Be a Millionaire?, or enacting their own versions of those shows online, independent of television broadcasts), and buddies sending each other brief music and video clips.

143. Even more bandwidth-intensive will be video conferencing via IM,[389] which at least one study group predicts will be a major success in the marketplace.[390] Also, many kinds of streaming video broadband content will likely be delivered via IM to both home and business users in forms such as long video entertainment and business documents in video form.[391] Finally, AIHS on interactive television

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Subcommittee on Telecommunications, Trade and Consumer Protection, Oct. 6, 2000) at 2 ("Heffernan House Testimony"); Letter from Margaret Heffernan, President and CEO, iCast, to Magalie Roman Salas, Secretary, FCC, dated Oct. 5, 2000 ("iCast Oct. 5 Ex Parte"), Attachment (Instant Messaging Is an Important Platform for Both Current and Next Generation Internet Applications) ("Instant Messaging Is an Important Platform") *passim*; Louise Rosen, *Why IM Matters So Much*, UPSIDE TODAY, Sept. 19, 2000, at http://www.upside.com/Ebiz/39c289380.html (visited Sept. 19, 2000); Holly Becker and Kevin Sullivan, *America Online*, Lehman Brothers June 29 Report, at 42.

[388] America Online, Inc., *AOL Instant Messenger, New Windows AIM 4.3 – Available Now*, at http://www.aol.com/aim/home.html, (visited Nov. 17, 2000) ("Play online games against your AIM Buddies"); Letter from Peter D. Ross, Esq., Wiley, Rein & Fielding, counsel for AOL, to Magalie Roman Salas, Secretary, FCC, dated Oct. 19, 2000 ("AOL Oct. 19 Ex Parte"), Attachment (Microsoft "Windows Me" web page ("With MSN Messenger Service in Windows Me, you can: . . . Invite a friend to play a DirectPlay® game directly from within MSN messenger Service.")).

[389] AOL Oct. 19 Ex Parte, Attachment (Microsoft "Windows Me" web page ("With MSN Messenger Service in Windows Me, you can: . . . Go instantly from a text chat to a video conversation with NewMeeting® 3.1.")); Stephanie Sanborn, *Novell Updates Instantme, Net Publisher*, INFOWORLD DAILY NEWS, Aug. 1, 2000, at 2000 WL 22975572 ("Available as a free download on Aug. 4, instantme 2.0 . . . includes the option of extending IM communications with audio and video IM technology from CuSeeMe Networks. . . . The inclusion of audio and video IM technology will give businesses users the chance to 'do a quick video conference' on a point-to-point basis, Gailey said."); *Instant Messaging Is an Important Platform* at 1 ("IM is a natural platform for . . . video-based conferencing . . ."), Attachment to iCast Oct. 5 Ex Parte. *See also* Kate Gerwig, *Akamai Targets Content Delivery At Business Users*, CMP TECHWEB, June 7, 2000, at 2000 WL 2666827 ("Akamai's conference casting pairs traditional telephony with Internet-based streaming media technology to deliver what is designed to be a more cost-effective way to provide audio and video conferencing. . . . The service also has features such as on-demand replay, instant messaging, and polling, which are not available in traditional audio or video conference calls."); Steve Gillmor and Jeff Angus, *Exchange 2000 Finally Delivers Collaboration*, INFORMATION WEEK, Dec. 13, 1999, at 1999 WL 21900099 ("The addition of a spectrum of collaborative features may be the most important change in the new Exchange. . . . Beta 3 has instant messaging and real-time data and video conferencing services that can be deployed across the intranet."); Instant Messaging Is an Important Platform at 2 ("Lotus and Novell . . . also plan to add . . . video . . . versions thereby allowing business to hold meetings with multiple people instant messaging each other."), Attachment to iCast Oct. 5 Ex Parte.

[390] *Some 28 Pct of World Mobile Subscribers Seen Using 3G Services by 2010 – Study*, AFX NEWS, Oct. 11, 2000, ("[A]ccording to a study published online today by the UMTS Forum[,] . . . six service categories that will generate the majority of revenues in 3G's early years . . . include . . . access to multimedia instant messaging services . . . and 'rich voice' services such as video conferencing and voice over IP.").

[391] *See* Instant Messaging Is an Important Platform at 1 ("IM is a natural platform for . . . video-related services and applications . . ."), 2 ("as broadband technology is more widely deployed, 'video' services could also, in a (continued...)

could include IM chat buddies jointly seeing streaming video highlights of a football player's best plays.[392]

144. Quality of Service ("QoS") will be especially important for AIHS.[393] This is because delivering AIHS, compared to simple text IM, is relatively complicated and susceptible to degradation; and because slow or choppy delivery can degrade the value of an AIHS seriously or totally.

145. Despite the quantum leap that all these new services represent beyond IM, they are like IM in one respect. That is, a provider of AIHS depends on its NPD as much as a provider of IM does.[394] Absent interoperability, an AIHS provider's database of users' names is the total universe with whom one user can swap video clips, engage in video conferencing, and so on.

2. Discussion

146. *Authority. The Public Interest.* We are obligated under the Communications Act to ensure that the transfer of control of Time Warner's cable licenses serves the public interest.[395] We determine the public interest with reference to the policies and goals of the Communications Act and related statutes. Thus, as stated in Section II, Public Interest Framework, we examine whether a

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competitive market, be expected to be available over the IM platform." (footnote omitted)), Attachment to iCast Oct. 5 Ex Parte; Louise Rosen, *Why IM Matters So Much*, UPSIDE TODAY, Sept. 19, 2000, at http://www.upside.com/Ebiz/39c289380.html (visited Sept. 19, 2000) ("So what does the future hold for IM? . . . [S]treaming media . . . "); William Whyman, *Instant Messaging: the Next Web Killer App?*, Precursor Group, July 31, 2000 (IM "can support . . . the ability to drag and drop video . . . files"); First IM White Paper at 2, Attachment to Tribal Voice and iCast Sept. 5 Ex Parte; Letter from Johnny Scarborough, Jr., Vice President, Advanced Technology, iCast, to Magalie Roman Salas, Secretary, FCC, dated July 25, 2000, Untitled Attachment at 5 ("IM enables richer communication . . . video, file sharing") and 7 ("Tomorrow . . . Content licensing (music, news, video)") ("iCast July 25 Ex Parte").

[392] AOL itself is promoting many kinds of streaming video, especially on high-speed platforms (xDSL, high-speed cable modems, *etc.*), as part of its latest and upcoming offerings of Internet access. The offerings include IM, although AOL is not specifically touting streaming video in connection with it. *See, e.g., AOL and RealNetworks Announce Strategic Agreement to Deliver Streaming Digital Media Through AOL Services*, NEW MEDIAMUSIC.COM HEADLINES TODAY, July 13, 2000, at http://www.newmedia . . . 71300.html ("high-quality streaming digital media," "compelling audio and VHS video quality") (visited Dec. 27, 2000); John Townley, *AOL Plus Provides Enhanced Streaming Broadband*, INTERNETNEWS – ISP NEWS, April 4, 2000, at http://www.internetnews.com/isp-news/article/0,,8_333621,00.html (streaming video news coverage from Fox News and Sports, "streaming, dynamic mapping images from weather.com," streaming video sports highlights, "streaming market analysis and video wrap-ups") (visited Dec. 27, 2000); John Townley, *AOL to Deploy Akamai Servers*, INTERNETNEWS – STREAMING MEDIA NEWS, Feb. 16, 2000, at http://www.newmediamusic.com/ps/real_aol_71300.html ("large audio and video streaming events") (visited Dec. 7, 2000).

[393] "QoS" refers to all indicia of quality in interconnection and access arrangements, including: the good faith with which they are described, offered and made available by their possessor (in this case, AOL Time Warner); their technical capacity and functionality; their reliability; their performance characteristics, including security from any change in content or display; any price; and the promptness of their installation, maintenance, repair, and disconnection.

[394] An NPD used for AIHS could also perform functions not needed in IM, such as advising a user wanting a video conference with another user about the other user's video conferencing equipment and whether their equipment is compatible.

[395] 47 U.S.C. § 310(d).

transaction would substantially frustrate the Commission's implementation or enforcement of, or interfere with the objectives of, the Communications Act or related statutes. Accordingly, in conducting our public interest analysis, we do not examine those issues that are not communications-related.[396] But where an issue may be said to be fairly related to the policies and goals set forth in the Communications Act and related statutes, as is the effect of the merger of AOL and Time Warner on advanced IM services, we are required to satisfy ourselves that the public interest would be served by our approval of the transaction before us.

147. Our authority to examine the public interest effects associated with the combination of AOL's NPD and Time Warner's assets and to place any necessary conditions on our approval of the transfer of Time Warner's licenses rests on several statutory grounds. Sections 214(a) and 310(d) of the Communications Act require the Commission to determine whether the Applicants have demonstrated that the public interest would be served by transferring control over Time Warner's licenses and authorizations.[397] Further, we have broad authority to attach conditions to a transfer of lines and licenses to ensure that the public interest is served by the transaction. Section 303(r) of the Act authorizes the Commission to prescribe restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.[398] Similarly, Section 214(c) of the Communications Act authorizes the Commission to attach to the certificate "such terms and conditions as in its judgment the public convenience and necessity may require."[399]

148. Moreover, IM, new IM-based services (including AIHS in particular), and AOL's NPD are subject to our jurisdiction under Title I of the Communications Act.[400] Our jurisdiction flows from at least three sections of the Communications Act. Section 1 of the Communications Act established the Commission "[f]or the purpose of regulating interstate and foreign commerce in communication by wire and radio so as to make available, so far as possible, to all the people of the United States . . . adequate facilities at reasonable charges . . . ."[401] Similarly, Section 2 gives us jurisdiction over "all interstate and foreign communication by wire or radio" and "all persons engaged within the United States in such communication . . ."[402] Finally, Section 3 defines "communication by wire" and "communication by radio" as including "the transmission . . . of writing, signs, signals, pictures and sounds of all kinds . . . including all instrumentalities, facilities, apparatus, and services (among other things, the receipt, forwarding, and delivery of communications) incidental to such transmission."[403] We find that IM and AIHS fall well within Section 3's definitions of radio and wire communication, as does the NPD as an instrumentality, facility, apparatus, or service incidental to the IM and AIHS. Accordingly, the Commission has Title I jurisdiction over IM and AIHS services.[404] This being clear, we need not classify

[396] For example, while in a merger of two taxi companies, we might be required to approve the transfer of control of various radio licenses, in making our decision we would not examine the effect of the merger on taxi service to the public. That task is for others.

[397] 47 U.S.C. §§ 214(a) and 310(d).

[398] 47 U.S.C. § 303(r).

[399] 47 U.S.C. § 214(c).

[400] 47 U.S.C. §§ 151 *et seq.*

[401] 47 U.S.C. § 151.

[402] 47 U.S.C. § 152.

[403] 47 U.S.C. § 153.

[404] *Cf. Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the* (continued...)

IM and AIHS as information services, cable services, or telecommunications services (as some allege) – the Commission has subject matter jurisdiction over them.

149. While several commenters agree that the Commission has "clear jurisdiction" to impose conditions on IM here, citing, *inter alia*, Sections 1, 2, 230(b)(2), 310(d), and 256, and Title VI of the Communications Act,[405] AOL argues that there is no such jurisdictional nexus.[406] AOL's argument, despite its jurisdictional phraseology, amounts to a claim that its position on the merits is correct, namely that the IM business is competitive and the IM issues raised in this proceeding are not merger-specific. As we find below, however, the IM business is not competitive, and AOL's acquisition of Time Warner's content, cable assets and control of Road Runner will be contrary to the public interest.

150. In deciding whether the transfer of control of the licenses and authorizations at issue here is in the public interest, as discussed above in Section II, we consider, *inter alia*, whether the merger would interfere with the policies and objectives of the Communications Act. Several policies and objectives are implicated by this merger. First, in enacting the Telecommunications Act of 1996,[407] Congress established a clear national policy that competition leading to deregulation, rather than continued regulation of dominant firms, shall be the preferred means for protecting consumers.[408] Further, to promote the policies of the Communications Act, we may "plan in advance of foreseeable events instead of waiting to react to them."[409] We may therefore examine and place conditions on a merger to ensure that it will not impede the development of future competition but will, in fact, enhance competition.[410] Congress expressed its preference for similar policies with respect to the Internet. Section 230(b) of the Communications Act provides that it is a policy of the United States "to promote the continued development of the Internet and other interactive computer services and other interactive media" and "to preserve the vibrant and competitive free market that presently exists for Internet and other interactive computer services, unfettered by Federal or State regulation."[411] Finally, Congress has

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Telecommunications Act of 1996; Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities, WT Dkt. No. 96-198, Report and Order and Further Notice of Inquiry, FCC 99-181, ¶¶ 96-98 (rel. Sept. 29, 1999).

[405] *See, e.g.*, Tribal Voice and iCast Sept. 5 Ex Parte, at 22-27, 29-33; iCast Oct. 10 Ex Parte at 1-7. These commenters further claim that the Commission's ancillary jurisdiction authority also provides grounds for imposing a condition on IM interoperability. Tribal Voice and iCast Sept. 5 Ex Parte at 27-29.

[406] AOL Sept. 29 Ex Parte. iCast replies that AOL's submission, when read carefully, does not dispute the Commission's jurisdiction to impose IM-related conditions. Rather, according to iCast, AOL's arguments consist of reasons why the Commission should choose not to exercise such jurisdiction in this instance -- reasons that iCast strongly disputes. iCast Oct. 10 Ex Parte, at 1.

[407] Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[408] Joint Statement of Managers, S. Conf. Rep. No. 104-230 at 1 (1996).

[409] *See United States v. Southwestern Cable Co.*, 392 U.S. 157, 177 (1968), *quoting Amendment of Subpart L, Part 11 to Adopt Rules & Regulations to Govern the Grant of Authorizations in the Business Radio Service for Microwave Stations to Relay Television Signals to Community Antenna Systems*, First Report and Order, 38 FCC 683, 701 (1965).

[410] *See WorldCom-MCI Order*, 13 FCC Rcd at 18034-35 ¶ 14; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 19987 ¶2.

[411] 47 U.S.C. § 230(b)(1), (2). *See also Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16133 ¶ 344 (1997).

charged the Commission with "encouraging the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[412]

151. Several commenters argue that we may impose conditions on IM services to remedy anticompetitive harms, and that doing so would be consistent with our prior decision in *WorldCom-MCI*.[413] In *WorldCom-MCI*, we held that because the merger raised anticompetitive concerns regarding the Internet backbone service market, it was necessary for the Commission to review the applicants' proposed divestiture of one of their Internet backbone services to ensure that those anticompetitive concerns were met, even though the applicants did not need our "approval" to complete that divestiture.[414] AOL finds the analogy to Internet backbone service to be inapposite, claiming that IM is not a facility or transmission service that the Commission regulates, but an information service that the Commission has chosen not to regulate.[415] Those commenters who seek to impose a condition on IM or AIHS also cite Section 230(b) of the Communications Act as support.[416] We agree, in part because our decision in *WorldCom-MCI*[417] supports our examining this merger to ensure that it does not have an anticompetitive effect on the provision of AIHS. The fact that we have chosen not to subject IM and AIHS to traditional regulation does not mean that the merger's effects on these services escapes our inquiry.[418] In fact, exactly the opposite is true. Because we have jurisdiction over IM and AIHS but, mindful of Congress's intent, have chosen not to regulate them, it is all the more important that we ensure that this merger does not cause any anticompetitive harms with regard to these services. Only in this way can we "preserve the vibrant and competitive free market that presently exists for Internet and other interactive computer services" and ensure that competition, rather than regulation, protects consumers.

152. *Relevant Markets.* After reviewing all the parties' submissions and making our own analysis of the businesses in question and relevant economic principles, we find that the area of our concern is "NPD services" – interactive communication services which, as we described above, depend on an NPD for real time communication between and among users. Today, the principal services of this type are IM, the emerging new IM-based services, and AIHS in particular. In the following paragraphs, we find that the database of names and the presence detection ability of an NPD cause services that depend on an NPD to be characterized by strong network effects. These and other aspects of NPD services cause them to have few, if any, substitutes.[419] We further recognize that IM services are evolving rapidly, and we expect that this evolution will continue as more home users come to use high-speed

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[412] Section 706 of the Telecommunications Act of 1996, Pub. L. 104-104, Title VII, § 706, 110 Stat. 153, set forth at 47 U.S.C. § 157 nt.

[413] *WorldCom-MCI Order*, 13 FCC Rcd at 18103-04 ¶ 142.

[414] *Id.* at 18104 n.381.

[415] AOL Sept. 29 Ex Parte, at 16.

[416] Tribal Voice and iCast Sept. 5 Ex Parte at 29-33; iCast Oct. 10 Ex Parte at 5-6.

[417] *WorldCom-MCI Order*, 13 FCC Rcd at 18103-04 ¶ 142.

[418] By "traditional regulation," we mean ongoing scrutiny, intense in the case of dominant providers, of entry and exit, prices, and service offerings and quality.

[419] For example, in an IM chat in a Civil War chat room between "Johnny Reb" and "Yankee Doodle Dandy," those two individuals may not know each other's names and telephone numbers. Each may have come into contact with the other simply by being simultaneously in the Civil War chat room. Therefore, the "conversation" they conduct via instant messaging would probably not have occurred on the telephone network.

platforms for Internet access.[420] A more precise definition of the relevant market is not necessary here, where the Commission can accurately assess the competitive impact of the merger without such a detailed analysis.[421]

153. *General Characteristics of NPD Services. Network Effects.* Certain services, such as telephone services, become more attractive to customers as more customers use them, a phenomenon called "network effects." Network effects tend to be strongest in businesses whose main output or product is access to other persons, as is the case with telephone service.

154. Often, in businesses with strong network effects, each of several providers creates its own network that is potentially incompatible with the others'. If each of the networks is of roughly equal size, then no provider dominates the market and each has an incentive to interoperate -- to make its service compatible -- with the others. In such an equilibrium, interoperability gives each provider's users access to a larger universe of other users and that makes each service more valuable to its users.[422] This equilibrium leads to effective competition and benefits consumers.

155. A different outcome, and one less beneficial for consumers, can also occur in markets with strong network effects. If one provider achieves a larger market share, either through superior performance or a first mover advantage,[423] then it may not have an incentive to interoperate. If that provider wants to dominate the market, it can adopt a strategy of refusing to interoperate with the other, smaller providers. This, compared to a strategy of interoperation, will make its service less valuable and will hurt its users. But while these ill effects will be relatively slight, because the users will still be able to reach most other users, refusing to interoperate will hurt the smaller providers and their users greatly, because their users will not be able to reach most other users. The largest provider's refusal to interoperate will lead to users switching to it from the smaller providers, which will further swell the dominant provider's NPD and shrink the smaller ones'.[424] This will continue until the largest provider's

[420] Since the early 1980's at very least, economists and antitrust practitioners have recognized the existence of "innovation markets" in which identifiable firms engage in research and development on new products that are intended to appeal to the same buyers. It may even be that none of these emerging products have been created. *See, e.g.*, Daniel Rubinfeld, *Competition, Innovation, and Antitrust Enforcement in Dynamic Network Industries*, March 24, 1998, Speech at Software Publishers' Ass'n; Christine A. Varney, *Why Innovation Market Analysis Makes Sense*, March 15, 1995, Speech at Antitrust 1995 Conference, at 1995 WL 112078; Richard J. Gilbert and Steven C. Sunshine, *Incorporating Dynamic Efficiency Concerns in Merger Analysis: The Use of Innovation Markets*, 65 ANTITRUST L. J. 569 (1995).

[421] *See AT&T-TCI Order*, 14 FCC Rcd 3160, 3205 ¶ 92 (1999); *AT&T-MediaOne Order*, 15 FCC Rcd at 9866 ¶ 116. *See also* FCC v. RCA Commun. Inc., 346 U.S. 86, 96-97 (1953) (FCC not required to base its public interest analysis on the type of "tangible evidence appropriate for judicial determination," but is permitted to rely on its expertise to make predictive judgments).

[422] If any one provider decided not to interoperate, then its users would find themselves cut off from the majority of other users. They would quickly defect to another provider who did interoperate, thereby gaining access to all users other than those on the non-interoperating service. The holdout service would quickly lose all its users or be forced to change its decision and interoperate. Thus, in this situation it is not profitable for any provider to refuse to interoperate.

[423] A first mover advantage is an advantage that may accrue to the first firm to introduce a new service, such as low marketing costs resulting from a lack of rivals. Dennis W. Carlton and Jeffrey M. Perloff, MODERN INDUSTRIAL ORGANIZATION at 113 (1994).

[424] Of course, unique features that are especially attractive to small groups of users may win them away from the service that is most popular. For example, a small closed service may be preferable to users who desire greater

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network is the dominant one, perhaps yielding the provider monopoly control of the market. From that point onwards, the dominant network remains dominant, not necessarily because it charges the lowest prices, offers the best quality, or innovates fastest with the features that customers want most, but simply because in the past it gained the most users.[425]

156. Where there is no interoperability, the network effects of a service can be mitigated if competing providers or users of another service can provide an "adapter." An adapter is a facility or activity that enables users of one service to benefit, in full or in part, from the network effects of another.[426] The absence of an adapter can lead to inconvenience and inefficiency. For example, in the early 20th century, a telephone subscriber who wanted access to every other telephone subscriber had to establish accounts with several telephone companies, have several telephones and telephone directories, and perhaps consult the directories each time he wanted to call someone to find out which system(s) that person subscribed to. Most consumers preferred that all telephone systems be interconnected and unified.[427] These conditions led to monopoly and, ultimately, federal and state regulation.

157. The dominant provider of a service with network effects can exploit its dominant position as it offers new services that also have network effects. The provider can do so by making its new service compatible with its existing one ("backward compatibility"). This extends the network effects of the existing service into the new business and helps to migrate the provider's users from its existing service to the new one. Backward compatibility is efficient to the extent that it allows users to benefit from both the features of the new service and the network effects of the old service. If, however, it occurs where there is no interoperability, then backward compatibility can serve to lengthen and widen the dominant provider's power, to the harm of consumers and efficiency. The actual, or even potential, introduction of new backward compatible services by the largest provider can also stifle innovation, as potential entrants will be unlikely to invest in new services, knowing the disadvantage that they have in competing with the largest provider.

158. *Findings About NPD Services.* We find that NPD services exhibit strong network effects. Our first basis for this finding is simply that IM strongly fits the above definition of a business that is characterized by network effects. If an NPD service has only one user, the service is useless to her because she is the only user in the NPD and there is no one with whom to engage in instant messaging. When a second user joins the service, NPD grows and the IM service based on it becomes useful.[428] Each

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privacy and security. Other factors may also make other small services preferable to small groups of users.

[425] Ultimately, new technology may overcome the dominant provider's power, as the telephone did to the telegraph and airplanes and automobiles did to railroads. Many years can pass, however, before a new technology appears with enough advantages to overcome the entrenched one. That technology, too, may be deployed by the dominant incumbent, who will deploy it slower than a new entrant would. Finally, some technologies persist for very long times, such as the QWERTY keyboard.

1. [426] For example, when three different speeds were in use for phonographic records (33 1/3, 45, and 78 rpms), one adapter was a record player that could operate at all three speeds. Another was the small plastic disks that fitted in the wide holes at the center of 45 rpm records and made them useable on record players that had thin spindles.

[427] Milton Mueller, Jr., UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM at 134 ("More often than not, voters, city councils, and statewide referenda weighed in on the side of universal service and consolidation."), 136-45 (1997).

[428] IM, in this respect, is like the telephone, of which AT&T once said: "A telephone -- without a connection at the (continued...)

additional user makes the NPD larger and the IM service based on it more useful to both its existing users and to potential users. Most users of IM want to be able to compose their buddy lists from, and/or engage in IM with, the largest number of other users. Therefore, when choosing between rival IM services, a typical new user will place the greatest value on the service with the largest NPD (and therefore the most users) and will choose that service. In all these hypothetical situations, the underlying value (or lack of value) in an IM service resides in the NPD.

159. Second, many observers agree that IM services exhibit strong network effects.[429] Third, although AOL's filings before us almost deny that there are any network effects in IM, or that any such effects benefit only AOL,[430] its promotions attempt to attract new users by proclaiming how many millions of registered IM users it already has. Specifically, the top paragraph of its own web page for AIM 4.1 entices users with "[f]ind out what over 64 million people already know, . . ." (underlining in original).[431] Accordingly, we find that NPD services are characterized by strong network effects.

160. We find that AOL is by far the leading provider of IM today. Many commentators have concluded that it dominates IM.[432] AOL was the first company to successfully market IM to the mass market and thus gained a significant first mover advantage. According to all observers, AOL has a mass of users -- and, therefore, an NPD -- that is several times larger than any other provider's and is larger than all other providers' combined.[433] And AOL's presence in IM is still growing.[434] Furthermore, small IM providers have recently exited the market.[435]

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other end of the line – is not even a toy or a scientific instrument. It is one of the most useless things in the world. Its value depends on the connection with the other telephone – and increases with the number of connections." AT&T Corp., *Annual Report for the Year Ending Dec. 31, 1908*, at 21.

[429] E.S. Browning and Greg Ip, *Six Key Myths That Led the Boom In Tech Stocks*, ASIAN WALL ST. J., Oct. 17, 2000, at 2000 WL-WSJA 23750599; Dan Carney and Catherine Yang, *Is AOL's Instant Messaging an Unfair Advantage?*, BUSINESS WEEK, July 3, 2000, at 2000 WL 7827524; Matt Carolan, *IMUnified Good, Government Bad*, INTERACTIVE WEEK FROM ZDWIRE, July 25, 2000, at 2000 WL 4067383; Alan Murray, *Changing Code: For Policy Makers, Microsoft Suggests a Need to Recast Models*, WALL ST. J., June 9, 2000, at 2000 WL-WSJ 3032437; William Whyman, *Instant Messaging: the Next Web Killer App?*, Precursor Group, July 31, 2000 ("AOL's IM is a closed service using proprietary protocols. With dominant market share this creates huge network effects.").

[430] AOL Sept. 29 Ex Parte at 1.

[431] AOL, *New AIM 4.1 Available Now*, at http://www.aol.com/aim/ (visited Oct. 11, 2000). *See* Confidential Appendix IV-B-2, Note 1.

[432] *See, e.g.*, Julia Angwin, *Instant Messaging Services at AOL Quietly Linked*, WALL ST. J., Oct. 26, 2000, at B-1 (referring to "AOL's dominance of instant-messaging technology"); Louise Rosen, *Why IM Matters So Much*, UPSIDE TODAY, Sept. 19, 2000, at http://www.upside.com/Ebiz/39c289380.html (visited Sept. 19, 2000 (AOL "vastly outnumbering its competitors' numbers"); Nick Wingfield, *Changing Chat*, WALL ST. J., Sept. 18, 2000, at R-28 (in IM, AOL "has become the undisputed heavyweight"), B-38 (referring to "AOL's domination of the market" for IM); Prepared Testimony of Preston R. Padden, Executive Vice President of Government Relations, The Walt Disney Co., at 3 ("a near monopoly in Instant Messaging"), FCC En Banc Hearing, CS Docket No. 00-30 (July 27, 2000).

[433] *See, e.g.*, Letter from Peter D. Ross, Esq., Wiley Rein and Fielding, Counsel for AOL, to Ms. Deborah Lathen, Chief, Cable Services Bureau, FCC, dated Dec. 9, 2000, Attachments *passim*.

In a market characterized by strong network effects, a provider with a market share X times the size of another will, in fact, have more than X times the power of the other. In such markets, a participant's relative (continued...)

161. Independent companies have recognized the strength of AOL's IM by signing deals with AOL. These include both Sprint and AT&T agreeing to make AOL's IM available to their wireless customers[436] and Sears agreeing to use instant messaging to connect Sears customers with Sears customer service representatives.[437] EarthLink, a major direct competitor of AOL in the ISP business, has continued a licensing arrangement with AOL. EarthLink would be expected to compete with AOL in IM if that were possible. Finally, the continuing strength of AOL's IM has been recognized by a number of independent analysts.[438] All this evidence strengthens our conviction that AOL's possession of by far the largest NPD confers great power on it.

162. AOL disagrees with the commenters who contend that it dominates IM. For example, AOL points to entry into the IM business by other providers and appears to claim that it does not benefit from network effects.[439] We disagree. New entry may indicate competition, especially in a stable, mature business. IM is not such a business, however, and new entry into IM may also be explained by factors other than healthy competition. The smaller providers may be able to attract customers in a fast-growing market in which they offer extraordinary promotional inducements,[440] may plan to succeed by targeting niche groups[441] or may be concentrating on very sophisticated features and functions.[442]

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strength may be measured not so much by its market share (N) as by N^2 in the case of one-to-one messaging and by 2^N in the case of group communications such as chat rooms and IM groups.

[434] AOL Nov. 17 Ex Parte, Attachment (Growth in Unique Visitors to Instant Messaging Services 2000).

[435] Jim Hu, *AOL's Lead in Instant Messaging Arena Dwindles*, CNET NEWS.COM, Nov. 16, 2000 (describing "the now-defunct CMGI-owned companies iCast and Tribal Voice") (emphasis in original), attached to AOL Nov. 17 Ex Parte.

[436] *See, e.g.*, Irene M. Kunii, *Look Who's Going Courting in Japan*, BUSINESS WEEK, Aug. 7, 2000, at 2000 WL 24484561; Neil Irwin, *AOL Debuts E-Mail/IM Pager*, WASHTECH.COM, Dec. 1, 2000, at http://washtech.com/news/media/5560-1.html (visited Dec. 1, 2000); *New Media*, COMMUN. DAILY, Oct. 20, 2000. *See also* America Online, Inc., *Open IM Architecture Design*, at http://aim.aol.com/openim, visited June 19, 2000 (licensees of AOL include Lotus, Lycos, EarthLink, and other ISPs).

[437] *See, e.g.*, Michael Brick, *AOL, Sears Form Alliance*, THESTREET.COM, March 14, 2000, at http://www.thestreet.com/pf/brknews/internet/900219.html (visited Dec. 13, 2000). By contrast, Yahoo! has been able to interest relatively few wireless providers in adopting its IM. *See, e.g., New Interactive Wireless Service from Motient Fortified With Yahoo! Now Available to Consumers Nationwide Via www.elinkhere.com*, PR NEWSWIRE, Nov. 9, 2000.

[438] Julia Angwin, *Instant Messaging Services at AOL Quietly Linked, Linked*, WALL ST. J., Oct. 26, 2000, at B-1; Jim Lynch, *Instant Messaging Roundup*, MSNBC Technology, Aug. 18, 2000, at http://www.msnbc.com/news/447786.asp (visited Aug. 28, 2000); Nick Wingfield, *Changing Chat*, WALL ST. J., Sept. 18, 2000, at R-28; Louise Rosen, *Why IM Matters So Much*, UPSIDE TODAY, Sept. 19, 2000, at http://www.upside.com/Ebiz/39c289380.html (visited Sept. 19, 2000).

[439] AOL Sept. 29 Ex Parte at 1.

[440] *See* Letter from William L. Fishman, Esq., Swidler Berlin Shereff Friedman, LLP, counsel for RCN Telecom Services, Inc., to Magalie Roman Salas, Secretary, FCC, dated Dec. 21, 2000, at 3. See *also* Confidential Appendix IV-B-2, Note 2.

[441] Letter from Margaret Heffernan, President and CEO, iCast, and Shai Buber, President, Odigo Ltd., to Magalie Roman Salas, Secretary, FCC, dated Oct. 25, 2000, at n.2 ("iCast and Odigo Oct. 25 Ex Parte").

[442] *See* iCast Comments at 6; Tribal Voice Comments at 6-7 (alleging that services other than AOL's have better (continued...)

Because their offerings are unlikely to tempt a significant number of mass market users, however, they do not challenge AOL directly or significantly. Further, entry into IM may have been induced, despite network effects, by the prospect of interoperability with AOL. This prospect has been created by industry efforts; by expectations of governmental action by this Commission, the Federal Trade Commission, and/or Congress;[443] and by AOL's own public statements pledging to help achieve interoperability.[444] These factors may induce entry especially by those who believe that they will have advantages post-interoperability stemming from unique features and functions.

163. From among all entrants into the IM business, AOL points especially to Microsoft as a significant rival. AOL claims that Microsoft's presence, and especially its recent growth in the market, demonstrates that AOL does not dominates IM. AOL points to Microsoft integrating its IM product into its Windows desktop and to Microsoft's strength in desktop applications generally.[445] We note that Microsoft is a potentially formidable competitor. However, Microsoft has not always been able to leverage its control of the Windows desktop into dominance of other applications.[446] In addition, in IM today, AOL benefits from network effects and first mover advantages; and, as we discuss below, the proposed merger would give AOL significant, additional advantages over Microsoft, Yahoo!, and smaller IM providers. And even if Microsoft's NPD did grow to rival AOL's, the result would be merely a duopoly, not the healthy competition that exists today in electronic mail and that we hope will exist in new IM-based services and AIHS in particular.[447]

164. AOL also claims that any incompatibilities between its and other IM providers' NPDs are mitigated by an existing adapter for IM, namely that an IM user may use several IM services simultaneously,[448] and that millions of users do so.[449] AOL argues, therefore, that there are no barriers to entry into IM.[450] We disagree. We find the ability of users to use several IM services is not a substitute for interoperability. Using several IM services (and, therefore, several NPDs) entails much

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features and are more innovative). The President and CEO of iCast claims that an AOL employee told her that iCast's "application was really cool." Heffernan House Testimony at 2, Attachment to iCast Oct. 10 Ex Parte. *See also* Jim Lynch, *Instant Messaging Roundup*, MSNBC Technology, Aug. 18, 2000, at http://www.msnbc.com/news/447786.asp (visited Aug. 28, 2000), comparing several IM services based on their features, appearance, ease of use, and other aspects. *See* Confidential Appendix IV-B-2, Note 3.

[443] iCast and Odigo Oct. 25 Ex Parte at 2.

[444] Heffernan House Testimony at 2 ("we were hopeful that AOL would allow us to be interoperable . . ."), Attachment to iCast Oct. 10 Ex Parte.

[445] AOL Oct. 19 Ex Parte at 3.

[446] *See, e.g.*, Dean Takahashi, *Zap! Bop! It's Web Comics*, ASIAN WALL ST. J. at 24 (Apr. 28, 2000), available at 2000 WL-WSJA 2938872; Bob Trott, *Microsoft Views AOL-Time Warner Deal as Confirmation of Its Own Strategy*, NETWORK WORLD FUSION (Jan. 12, 2000); Steven Manes, *Information Isn't Everything*, INFORMATIONWEEK (May 26, 1997), available at 1997 WL 7602548.

[447] We find similarly unattractive the prospect of a tight oligopoly of three IM providers (AOL, Microsoft, and Yahoo!) predicted by AOL. *See* Oct. 19 Ex Parte and the Attachments thereto.

[448] AOL Sept. 29 Ex Parte at 3, 5-6.

[449] AOL Oct. 19 Ex Parte at 2-3 and attached charts and diagrams.

[450] *See, e.g.*, Letter, from Peter D. Ross, Esq., Wiley, Rein & Fielding, Counsel for AOL, to Magalie Roman Salas, Secretary, FCC, Sept. 19, 2000, at 4 ("barriers to entry simply do not exist') ("AOL Sept. 19 Ex Parte").

inconvenience. A user must download several kinds of IM software; must register and maintain accounts, unique names, and passwords with several IM providers; must use each one enough to become comfortable with its 'look and feel'; must keep several buddy lists and remember which buddies are on which IM service (and with what names); and must keep several IM sessions open simultaneously. Even then, three-way communications are impossible unless all participants use the same service. Indeed, in light of these inconveniences, the fact that millions of people use more than one IM service (especially AOL and one or more other services) indicates not easy adaptation but the great value that users put on being able to communicate with more, rather than fewer, people.[451] Maintaining multiple accounts, each with its own IM software, will be especially burdensome in hand-held devices. They have less storage capacity than desktop personal computers.[452] In addition, we understand that wireless carriers may choose one software (*e.g.*, AOL's) and make use of others impossible. Lack of choice of IM services in hand-held devices will particularly hurt persons with hearing, speech, and other disabilities, to whom IM via hand-held devices can be as important as telephones and face-to-face conversations are to persons who do not have hearing limitations. In sum, we find that the ability to use several IM services and NPDs does not effectively mitigate the network effects that favor AOL's NPD.

165. AOL further contends that it does not dominate IM because it is possible for users to move in a coordinated group from one IM service to another. We find this not only inconvenient, but in most cases impossible as a practical matter. Only if those who propose to move have precisely the same buddy lists is this solution possible. Most likely, one user's buddy list does not correspond perfectly with his or her buddies' lists, in which case moving requires that at least some of one's buddies be left behind.[453] Accordingly, we find that no adapter exists to mitigate the network effects of AOL's NPD.

166. AOL claims that entry into IM would be easy for any company with a customer list, especially a customer list as full as, for example, that of Sears or American Express. Again, we disagree. As we noted above, an NPD for IM must be a working part of an electronic communications network. Even the lengthy list of an interactive web service firm such as Amazon, E-Bay, Napster and Real Player would only be the starting raw material for entry into IM. Any of these would-be entrants would need to master a new business -- real-time, two-way, consumer-to-consumer interactive service. A would-be entrant would also need to launch a major marketing campaign to interest its customers in using its IM. Then millions of those customers would need to accept the invitation, download software into a personal computer or other interactive device, pick an IM name and find their buddies on the same service. From the entrant's original customer list, tens of millions of customers would need to finish all these steps for the resulting IM NPD to rival AOL's. We find that there are few companies that could seriously attempt such entry, and that even they would find many obstacles to successful entry.

167. Finally, it might be thought that in the rapidly changing technology of the Internet, even network effects and AOL's present position in the market would not prevent successful entry by IM providers other than AOL, that a new breakthrough technology might become available and would be superior enough to AOL's service to overcome the network effects flowing from its NPD, and cause users to shift *en masse* away from AOL. In some "serial monopoly" markets, one standard dominates a market

[451] *See* Letter from Erin M. Egan, Esq., Covington & Burling, Counsel for Microsoft Corp., to Magalie Roman Salas, Secretary, FCC, dated Nov. 20, 2000, at 1-2 ("Microsoft Nov. 20 Ex Parte").

[452] Letter from David Lawson, Esq., Counsel for AT&T, to Magalie Roman Salas, Secretary, FCC, dated Nov. 22, 2000, at 2 ("AT&T Nov. 22 Ex Parte").

[453] *See* Confidential Appendix IV-B-2, Note 4. *See also* AT&T Nov. 22 Ex Parte at 2.

for a time and is then overtaken by a new standard.[454] We see no evidence at this time, however, of such a new breakthrough technology strong enough to overtake AOL's NPD. AOL has pointed us to no such evidence. On the contrary, the evidence indicates that NPD technology is the best protocol for providing address and presence information for interactive services.

168. *AOL's Resistance to Interoperability.* AOL has consistently resisted interoperability of IM services. In 1999, various non-AOL IM providers repeatedly attempted to gain access to AOL's proprietary and/or AIM NPD in order to interoperate with AOL, and were blocked by AOL.[455]

169. AOL has stated that it will seek interoperability, but has participated little in industry consultations aimed at industry-wide interoperability.[456] According to several observers, AOL has dragged its feet in these consultations.[457] Objective evidence supports this view.[458] The body through which the consultations were occurring, the Internet Engineering Task Force (IETF), found that AOL's

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[454] *See, e.g.*, Stan J. Liebowitz and Stephen E. Margolis, WINNERS, LOSERS AND MICROSOFT at 10-11, 137 (1999).

[455] iCast Comments at 1; Disney July 25 Ex Parte at 27-28; Aaron Pressman, *Microsoft Messenger Finds Its Voice* at 2, THE STANDARD, July 20, 2000, at http://thestandard.com/article/display/0,1151,16984,00.html?nl+dnt (visited July 21, 2000). We know of no attempt to gain access to AOL's NPD for ICQ.

[456] *See* IMUnified, *Mission Statement*, at http://www.imunified.org/ (visited Aug. 11, 2000), concerning IMUnified, a recently formed coalition of technology and instant messaging companies. They plan to make each others' services interoperable and "will strive to implement open standards-based interoperability for instant messaging as these protocols emerge from the IETF standardization process." Founding members include AT&T, Excite@Home, iCast, Microsoft, Odigo, Tribal Voice and Yahoo!. They announced in late July that "we will publish specifications that will enable functional interoperability among IMUnified members' instant messaging services and that we will implement during the fall timeframe." IMUnified, *Roundtable Q&A: Industry Leaders Discuss Goals of New IMUnified Coalition*, at http://www.microsoft.com/presspass/features/2000/jul00/07-25imUnified.asp (visited Aug. 11, 2000). *See also* Ariana Eunjung Cha, *AOL Unmoved in Software Dispute*, WASH. POST, Aug. 24, 2000, at A-1, -14; Jim Lynch, *Instant Messaging Roundup*, MSNBC Technology, Aug. 18, 2000, at http://www.msnbc.com/news/447786.asp (visited Aug. 28, 2000).

[457] iCast Comments at 5, 10; Letter from Ross Bagully, President and CEO, Tribal Voice, to Magalie Roman Salas, Secretary, FCC, dated Aug. 8, 2000, at 1-2 ("Tribal Voice Aug. 8 Ex Parte"); Industry White Paper on AOL's Submissions to the IETF & the FCC ("Second IM White Paper") at 11 n.19, 14, Attachment to Letter from Ross Bagully, President and CEO, Tribal Voice, to Magalie Roman Salas, Secretary, FCC, dated July 21, 2000 ("Tribal Voice July 21 Ex Parte"). Several observers appear to find AOL's original participation in IETF less than enthusiastic. Carolyn Duffy Marsan, *AOL Out of Instant Messaging Standard Bake-Off*, Network World Fusion News, Aug. 7, 2000, at http://www.newfusion.com/cgi-bin/mailto/x.cgi (visited Aug. 15, 2000); Network World, Front News Briefs, *AOL Touts Instant Messaging Standard*, NETWORK WORLD, June 19, 2000, at 2000 WL 9435687 ("After a year of dragging its feet on instant messaging interoperability, AOL . . ."); Lawrence J, Magid, *Instant Messaging Users Victims as Giants Do Battle*, LOS ANGELES TIMES, Aug. 23, 1999, at C-1, at 1999 WL 2189129 ("IETF has yet to receive AOL's instant messaging protocols, said Vijay Saraswat, co-chair of the IETF's Instant Messaging and Presence Protocol committee. 'In terms of moving the whole process forward, it would be significantly helpful to have AOL's protocols published, but different companies choose to participate in different ways,' Saraswat said"); Charles Cooper, *The Messaging Muddle: End the Bickering*, ZDNET NEWS, AUG. 4, 1999, at 1999 WL 14537884 ("The IETF, which has been working towards hashing out a consensus on messaging protocols, received encouraging news last week when AOL said it would participate in a working group charged with drafting the outlines of a universal messaging protocol. . . . AOL could accelerate the process by next publishing its existing Instant Messaging protocols. That suggestion has so far gone nowhere, . . .").

[458] Between August 1999 and October 2000, industry members exchanged thousands of electronic mails about IM interoperability through the IETF. Only eight were by AOL. Heffernan House Testimony at 5, Attachment to iCast Oct. 10 Ex Parte.

proposal lacked specificity, and began pursuing several other proposals.[459] Recently, the IETF suspended its efforts, stating that no consensus about how to effect interoperability could be reached.[460] At the en banc hearing in this proceeding, AOL opined that interoperability could only be achieved after lengthy industry deliberations and has stated that a technical standard could be achieved by July 2001, after which testing would begin.[461] As noted below, we will require AOL to file a progress report with the Commission every 180 days with regard to the actions it has taken towards interoperability.

170. AOL claims that it has been stymied in its attempts to provide interoperability by its desire to protect the privacy and security of its customers.[462] Other IM providers allege that they already have security and privacy procedures that are at least as great as AOL's.[463] We find AOL's claim unconvincing. AOL has given us no details about its concerns, or how it currently protects its users. While it may be that AOL desires eventually to create an interoperable product that protects subscribers' privacy and security, privacy and security are matters that can be negotiated and resolved promptly, not pretexts for delaying interoperability unnecessarily.[464] Microsoft and Yahoo! express no such disabling anxieties about privacy and security, even though they, like AOL, have reputations, goodwill, and customer bases to protect, and the technical expertise to distinguish serious and real problems from imaginary and minor ones. Microsoft and Yahoo!, not to mention many other IM providers, have as much incentive as AOL to implement interoperability with adequate protections for users' privacy and security. Security concerns do not appear to be the only reason that AOL has resisted interoperability.

171. *AOL's Use of Backward Compatibility.* AOL's new IM-based services in AIM 4.1 include a Talk Feature. In introducing AIM 4.1, AOL is taking advantage of backward compatibility by

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[459] *See also* Carolyn Duffy Marsan, *AOL Out of Instant Messaging Standard Bake-Off*, Network World Fusion News, Aug. 7, 2000, at http://www.newfusion.com/cgi-bin/mailto/x.cgi (visited Aug. 15, 2000) ("AOL's last-minute submission was a general framework for instant messaging interoperability rather than a full-fledged protocol, so it was not chosen for further consideration.").

[460] Dennis Fisher, *A New Tack for IM Protocol*, EWEEK FROM ZDWIRE, Oct. 22, 2000, at 2000 WL 18179376. It is largely for this reason that we choose a remedy other than the ones, emphasizing industry standard setting through the IETF, advocated by IMUnified and its members. *See, e.g.*, Microsoft Nov. 20 Ex Parte at 2.

[461] FCC En Banc Hearing, CS Docket No. 00-30 (July 27, 2000), Tr. at 167-68: Chairman Kennard: ". . . You've said that you want [interoperability] to happen and that you can do it. Could you tell us for the record when it will get done?" Mr. Schuler: "Well, we can tell you for the record that there are two pieces to the puzzle. One piece of the puzzle is building the technology that will allow our servers to interoperate with other services and incorporate all the controls that allow us to protect our consumers. We think that's about a 12-month job. . . ." Chairman Kennard: "Twelve months from today." Mr. Schuler: "We are working at it right now. But there's another issue –" Chairman Kennard: "Is that a yes?" Mr. Schuler: Well, yes. Twelve months from today." Chairman Kennard: Twelve months from today." Mr. Schuler: "But let me clarify. That's 12 months to do the technology. There is another issue that's important, ... the hackers and spammers are out there figuring out how to break it. . . . [T]here has to be a period of quality assurance, a period of us testing the system and assuring that . . . . you've built the most unbreakable system possible." We do not necessarily agree with AOL that achieving interoperability will require such a lengthy time. *See also* Confidential Appendix IV-B-2, Note 5; Tribal Voice Aug. 8 Ex Parte at 1-2.

[462] *Compare* Case En Banc Testimony, Tr. at 29-30, *and* Schuler En Banc Testimony, Tr. at 164-65, *with* Bagully En Banc Testimony, Tr. at 154. *See also* AOL Sept. 19 Ex Parte at 4; American Online, Inc., *Open IM Architecture Design*, at http://aim.aol.com/openim, visited June 19, 2000 ("[W]e have resisted efforts by our competitors to impose a 'quick fix' system that would jeopardize our members' privacy and security.").

[463] iCast July 25 Ex Parte, Attachment at 11-13.

[464] *See* Tribal Voice July 21 Ex Parte, Attachment (Second IM White Paper) at 7-11.

making its new features compatible with its IM service.[465] AOL does this by using the same NPD, the one it originally built for IM, for these new features. In this way, a user of AIM 4.1 who has high-speed Internet access service is not only able to engage in AIHS exchanges with other users of AIM 4.1, but is also able to continue to engage in IM with the much larger body of AOL's IM users who continue to use narrowband Internet access service. AOL is also using its base of IM users as a springboard for launching its AIHS. Recently, in introducing AOL Instant Messenger 4.3, AOL's web page warns that "[i]n order to take advantage of some of the newest AIM features, both you and your buddies must upgrade to AIM 4.3. . . . If your buddy's software is older, they may not be able to talk, share files, or take advantage of other new features. Send an instant message to your buddies today to let them know about AIM 4.3."[466]

172. We find it likely that AOL will, when presented with other, similar opportunities, continue to take advantage of backward compatibility as it rolls out new AIHS. Users of its new high-speed services will be able to use AOL's IM to communicate with its existing customer base. In addition, narrowband IM users may be able to adopt these new high-speed services, which will enable them to communicate with their users, albeit with relatively low quality. The Talk Feature of AIM 4.1 is a good example of such a feature. It can be used by narrowband customers, but quality is higher for high-speed customers. This difference will be more evident for features that require yet more bandwidth, such as videoconferencing.

173. Backward compatibility will have at least two benefits for AOL. First, it will enable it to offer new services tailored to high-speed customers without losing the network effects of the NPD that it developed in narrowband IM services. That is, AOL will be able to take the value inherent in its IM NPD and leverage it into its new AIHS. For example, users of AOL's AIHS will, because of the availability of AOL's NPD, be able to send streaming video messages to more other users, and will be able to receive them from more other users, than users of any other AIHS. AOL users will be able to video chat with more buddies, will be able to go web surfing via streaming video with more other users, will be able to hold larger business meetings with documents displayed via streaming video, and will be more likely to quickly compose large groups for these and other uses of streaming video.

174. Second, the benefits of providing backward compatible AIHS may lead other actual or potential providers of competitive but incompatible AIHS to conclude that it will be difficult, if not impossible, to successfully compete with AOL for customers.[467] Thus, AOL's user base and NPD in IM gives it a unique first mover advantage into AIHS. We find that, with the advantages that backward compatibility will give it, AOL will be more able to dominate AIHS, or may be likely to dominate AIHS, not necessarily on the merits of its service, but because of the network effects inherited and leveraged from the NPD it built up in the IM business.

175. *Anticompetitive Effects of the Proposed Merger.* As already discussed, AOL is by far the largest IM provider, by virtue of its uniquely large NPD, and therefore has a strong incentive to resist and delay interoperating with other IM providers' NPDs. Without interoperability, users may choose AOL's

[465] *See* Bernstein and McKinsey -- Broadband! at 24 (". . . AOL counts fully half of the current online subscribers as its customers, giving it the opportunity to shift many customers from slow- to high-speed service. ").

[466] America Online, Inc., *AOL Instant Messenger 4.3*, at http://www.aol.com/aim40/html (visited Nov. 17, 2000). Slightly earlier, in announcing its AIM 4.1, AOL encouraged users to "[s]end an instant message to your buddies today to let them know about AIM 4.1!" America Online, Inc., *AOL Instant Messenger 4.1*, at http://www.aol.com/aim/aim40.html (visited Oct. 11, 2000).

[467] *See* AT&T Nov. 22 Ex Parte at 2-3.

IM simply because it has the largest NPD and not because it offers the best value or is most attractive for some other meritorious reason. This puts a damper on competition and innovation, whether or not the network effects are so strong that they cannot likely be overcome (*e.g.*, by a highly superior product offered by a competitor). AOL is in fact strongly resisting interoperability, thus taking advantage of the network effects of its NPD in competing with other providers. As a consequence, all consumers and the public interest are being disserved. Actual and potential competition among IM providers is hampered.

176. We conclude that AOL, through the proposed merger, will gain control over many significant assets owned by Time Warner and that these assets will make AOL Time Warner more able or more likely to dominate AIHS than it would otherwise be.[468] AOL Time Warner may well be in a position of unassailable dominance in AIHS as a result of the proposed merger.

177. One, but by no means the only, relevant asset is the cable television systems owned by Time Warner. These systems are now being used to provide high-speed Internet access. A second asset that AOL will acquire in the proposed merger is Time Warner's contractual relations with the approximately 13 million cable television households in this country that those systems serve.[469]

178. A third relevant Time Warner asset is Road Runner, a major high-speed ISP, and a fourth is Road Runner's contractual relations with its subscriber base, which recently passed 1.1 million.[470] Road Runner is now the exclusive high-speed ISP on Time Warner cable systems.[471] In addition, approximately 40 percent of Road Runner's customers are on cable television systems other than Time Warner's that have agreed to make Road Runner their exclusive high-speed ISP through 2001.[472] These latter cable television systems serve more than five million households.[473] Thus, by acquiring Time Warner, AOL has gained access to nearly 20 million households who are or will be enabled for residential high-speed Internet access and to whom AOL Time Warner may now market AIHS.[474] Road Runner

[468] We do not here challenge how AOL achieved its dominance of IM service, or its deployment of AIHS as stand-alone services. Indeed, we have engaged in numerous proceedings to encourage the deployment of new and innovative services to all Americans, and we welcome the introduction of AIHS and any increased demand for high-speed services and connections that may result from the introduction of AIHS.

[469] *Time Warner Cable Joins PowerUP to Provide High Speed Access to Bridge the Digital Divide: New Partnership Helps Underserved Youth Succeed in the Digital Age*, BUSINESS WIRE, Oct. 19, 2000.

[470] Road Runner Corp., *Road Runner Sets Record Third Quarter* (press release), Oct. 16, 2000.

[471] Time Warner has announced that this exclusivity will end in April 2001. AT&T Corp., *Road Runner Joint Venture To Be Dissolved* (press release), Dec. 18, 2000. *See also* Time Warner Inc., *Time Warner To Increase Road Runner Ownership and Manage Its Operations* (press release), Dec. 18, 2000.

[472] *See, e.g.*, Rebecca Cantwell, *DOJ Waves Road Runner Away From AT&T*, INTERACTIVE WEEK FROM ZDWIRE, June 5, 2000, at 2000 WL 4066715 (Road Runner is exclusive high-speed provider to Media One).

[473] Recently, MediaOne alone was estimated to have 5 million cable service customers. Kelly Pate, *CSG Systems Stock Dives Amid Dispute with AT&T*, DENVER POST, Sept. 29, 2000, at 2000 WL 25829548.

[474] *Road Runner Goal One Million*, TELEVISION DIGEST, March 13, 2000, at 2000 WL 8644906 (in March 2000, new Road Runner President's "plan calls for offering Road Runner to at least another 10 million cable homes this year, which would make it available in more than 25 million homes, over 80% of combined Time Warner-MediaOne universe.").

does not now include an IM service in its home page offering, but it is reasonable to expect it to have one and for that to be AOL's NPD.[475]

179. AOL will also acquire other relevant Time Warner assets, such as the significant content owned by Time Warner. This includes the stories and photographs in Time Warner's magazines, such as Time and Sports Illustrated; the news, sports programs and other information in video form available through CNN; and its extensive library of movies, television shows, popular music, and animated entertainment. This content will be useful to certain of AOL's new AIHS, in particular sending individual users television-based news stories on pre-selected subjects and allowing users to send each other Time Warner-owned animation, movie and television excerpts, and music. The video assets in particular are well suited for AIHS. AOL's ownership of Time Warner will allow it to make this mass of content available quickly to users of AOL's AIHS.[476] This content will have already been created, so the cost of providing a copy of it (*e.g.*, a video clip from CNN or a story from Time Magazine) to AOL will be, as a practical matter, zero. The savings resulting from this kind of vertical merger will thus be increased beyond their normal levels.[477]

180. The combination of these assets will likely give AOL Time Warner another first mover advantage in AIHS.[478] In contrast, other AIHS providers, if they have any access to Time Warner's systems, services, and content, will need to negotiate individual contracts for that access and will have to pay for it. They will need negotiations with, and payments to, other content owners, also, to bring comparable AIHS to their users. Given the size and scope of Time Warner's assets, many contracts and much time would be needed to make an equivalent AIHS offering.

181. In sum, although Time Warner's valuable content, conduits, prominent high-speed ISP, and ready-made customer base will enable the merged firm to provide more services to AOL's IM customers, this combination will also make it much easier for AOL Time Warner to leverage the network effects of AOL's NPD into AIHS. The Applicants appear to be pointing to this very phenomenon as a benefit of their proposed merger when they state that they "plan to create and deliver to consumers easily

[475] *See* Confidential Appendix IV-B-2, Note 6. The FTC's Order to Hold Separate will prevent such an offering until AOL Time Warner offers an unaffiliated ISP on each of its cable systems. *Order To Hold Separate.*

To the extent that the almost twenty million Time Warner and Road Runner households already subscribe to one of AOL's narrowband IM services, the backward compatibility of AOL Time Warner's AIHS can make the latter services' attractions apparent sooner than they otherwise would be.

[476] AT&T Nov. 22 Ex Parte at 2.

[477] See Letter from Dr. Frederick R. Warren-Boulton, Microeconomic Consulting and Research Assocs., Inc., consultant for AT&T, to Magalie Roman Salas, Secretary, FCC, dated Dec. 5, 2000, at 2. *See also* Michael H. Riordan and Steven C. Salop, *Evaluating Vertical Mergers: A Post-Chicago Approach*, 63 ANTITRUST L.J. 513, 526-27 (1995) ("Eliminating Double Markup of Costs. When both the input and output markets are imperfectly competitive, output prices are increased above the competitive level and possibly even above the monopoly level, as marginal input costs are marked up twice, once by the input supplier and once by the output producer. Under these circumstances, when the integrated firm can efficiently supply inputs to itself, a vertical merger of a firm with a supplier of a variable input can reduce output prices by eliminating one of the two markups.").

[478] AOL Time Warner's first mover advantage will make more difficult the task facing deployers of any new "breakthrough technology."

accessible interactive services – mixing and fusing content and communication elements – that today are only in their infancy or are not yet on the drawing board."[479]

182. The proposed merger will also give AOL the opportunity and incentive to impair the performance of its rivals' AIHS. Other AIHS providers will provide their services over Time Warner cable systems and Road Runner. The proposed merger will put AOL in control of those assets. The merger will thus give AOL the opportunity to control the quality of service that its competitors receive.[480] For example, AOL Time Warner will be able to make its own users' video conferencing transmissions quick and clear and those of competitors slow and choppy.[481] AOL Time Warner will have the incentive to engage in such conduct because it will discourage consumers from using competitors' AIHS and will draw them instead to AOL Time Warner's.[482] Such conduct would be particularly destructive to competition in AIHS because, as we have noted, QoS will be especially important in those services.

183. There is precedent for such misconduct. Companies in communications markets have been known to acquire scarce facilities that their competitors need and to deny the competitors equal or reasonable access to those facilities, and thus to give themselves anticompetitive advantages or monopolies.[483] AOL in particular has a history of denying its IM competitors *any* access to its NPD.

184. We find the situation in AIHS different from that which, in our ruling on the merger of AT&T and Media One, led us to conclude that concern for the future of competition in various broadband services would be premature and that it would be prudent to refrain from action.[484] There, we addressed

[479] Applicant's Second Response at 17.

[480] The existence of high-speed services that compete with cable-based high-speed services, such as xDSL, may not dissuade AOL from such conduct in IM. AOL's present position in IM and its likely dominance of AIHS derive in large part from its NPD and will be felt on all high-speed "last miles." xDSL and other high-speed alternatives to cable will not discipline, and may even extend, the anticompetitive potential of AOL's NPD.

[481] A promotional paper by Cisco Systems states that, with its network equipment, "[s]ervice providers can 'up the ante' by giving customers guaranteed and differentiated services through IP-based QoS product." Cisco Systems, *White Paper: Cisco's Packet over SONET/SDH (POS) Technology Support; Mission Accomplished* at 4, at http://www.cisco.com/warp/public/cc/pd/rt/12000/tech/posdh_wp.htm (visited Oct. 10, 2000).

[482] Because we expect the basic technology of AOL's new IM-based services to be similar to others', AOL Time Warner will likely have more of an incentive to discriminate against the latter than it would if their services were sharply differentiated and if each appealed to different customers. In the latter event, AOL Time Warner's incentive would more likely be to make all the differentiated services function well. *See* Confidential Appendix IV-B-2, Note 7.

[483] *See generally* United States v. AT&T, 524 F. Supp. 1336 (D.D.C. 1981) (detailing the discrimination of the Bell System local telephone companies against its competitors in terminal equipment, long distance, and other products and services for which access to local lines was necessary). Similar concerns also underlie the provisions concerning "program access" by cable television companies (Communications Act § 628, 47 U.S.C. § 548) and Bell re-entry into interexchange service (Communications Act §§ 271-72, 47 U.S.C. §§271-72). *See also* James W. Olson and Lawrence J. Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?*, 13 CARDOZO ARTS & ENT. L.J. 283 (1995).

[484] *AT&T-MediaOne Order*, 15 FCC Rcd at 9871 ¶ 123 ("Given the nascent condition of the broadband industry and the foregoing promises of competition, we find it premature to conclude that the proposed merger poses a sufficient threat to competition and diversity in the provision of broadband Internet services, content, applications, or architecture to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree.").

the entire residential high-speed Internet access business. Here, our attention has been sharply focused on AIHS, the NPD assets at its core, and the particular abilities and incentives in AIHS of the two specific parties to this proposed merger. Seeing a foreseeable and likely danger to competition in AIHS, we can act promptly and with confidence. This danger leads us to protect the possible emergence of a competitive market and not to wait for more traditional antitrust remedies, which may not be used until harm is done and may take years to undo.

185. With a dominant position in the AIHS business, AOL Time Warner would be likely to charge higher prices than it otherwise would to end users, content providers, and/or advertisers.[485] AOL's domination may also result in less innovation in new IM-based services, and AIHS in particular, than there otherwise would be. We find such harm both more likely as a result of the proposed merger than it would otherwise be, and contrary to the public interest. Accordingly, we find that the proposed merger will significantly enhance AOL Time Warner's ability and incentive to leverage the network effects of AOL's NPD, from its IM service, into new IM-based services including AIHS, thereby making it more able or likely to dominate those services and to effectively foreclose the emergence of a competitive market. We see no benefits from AOL Time Warner's domination that will outweigh these harms.

186. AOL implies that we should address these issues in a rulemaking that would apply to all providers of IM and new IM-based services.[486] The concerns we have described above flow, specifically and exclusively, from AOL's role, and not from any other company's, in services that depend on an NPD after the proposed merger. Further, our concerns are time-sensitive, focusing as they do on current events in the emerging business of new interactive services. By the time a rulemaking ended, the domination by AOL Time Warner that we today find likely might well have been achieved and be beyond correction by marketplace forces. Regulation of AOL Time Warner's offerings might be necessary. Too often in the history of communications, interoperation has required detailed government mandate and decades of supervision,[487] and dominant firms' entry into new markets has required case-by-case permission after

[485] *See, e.g.*, Heffernan House Testimony at 3 ("By declining to allow IM interoperability and allowing rival interactive TV providers to use AOL IM only upon payment of substantial license fees (or not licensed at all), AOL would substantially raise rival interactive TV providers' costs."), Attachment to iCast Oct. 10 Ex Parte.

[486] *See* AOL Sept. 19 Ex Parte at 5.

[487] *See, e.g.*, AT&T Corp., *Annual Report for the Year Ending Dec. 31, 1913*, at 24-26 (1914) (the "Kingsbury Commitment," in which AT&T committed to interconnect its long distance lines with independent telephone companies under certain conditions), *cited in* Milton Mueller, Jr., UNIVERSAL SERVICE: COMPETITION, INTERCONNECTION, AND MONOPOLY IN THE MAKING OF THE AMERICAN TELEPHONE SYSTEM at 130 n.1 (1997); *Bell System Tariff Offerings of Local Distribution Facilities for Use by Other Common Carriers; and Letter of Chief, Common Carrier Bureau, Dated October 19, 1973, to Laurence E. Harris, Vice President, MCI Telecommunications Corp.*, Docket No. 19896, Decision, 46 FCC2d 413 (1974), *affirmed, Bell Tel. Co. v. FCC*, 503 F.2d 1250 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) (regulating interconnection between dominant carriers and new entrant private line carriers); United States v. AT&T, 552 F. Supp. 131, 227 (D.D.C. 1982), *affirmed*, 460 U.S. 1001 (1983) (requiring Bell local companies to offer long distance carriers other than AT&T interconnection equal to that offered to AT&T); *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, CC Docket Nos. 94-54 and 95-185, Notice of Proposed Rulemaking, 11 FCC Rcd 5020 (1996) (one of many proceedings regulating interconnection of dominant wireline carriers and relatively small mobile wireless carriers); Communications Act § 251, 47 U.S.C. § 251 (detailed regulation of interconnection between dominant incumbent local exchange carriers and new entrant competitive local exchange carriers).

intense scrutiny.[488] We assiduously seek to avoid those outcomes here, and we earnestly hope that our light-handed, market-opening condition will lead to interoperability without further government action.

187. *Interoperability.* We find that the anticompetitive dangers discussed above would be mitigated if there were interoperability between AOL's new IM-based services and those of other companies. This would permit a user of an AOL service and a user of another service to talk, play games, engage in video conferencing, *etc.*, with each other as easily as each exchanges instant text messages today with other users of the service to which he or she subscribes. If there were interoperability of new IM-based services, AOL would be less able to leverage its leading position in IM services into those new services.

188. To prevent AOL Time Warner, as a result of the proposed merger, from becoming more able or likely to dominate AIHS, we impose a prophylactic condition. Because the domination that concerns us would be made likely by the combination of AOL's and Time Warner's assets, we reject AOL's argument that its dispute with other IM providers about interoperability preceded and is therefore immaterial to the proposed merger.[489] We have also considered carefully AOL's other cautions against intervention in the market, but we find them unconvincing. AIHS are novel services, but we and many others believe that they will be significant in the near future. If they are not, our intervention will cause little, if any, harm to consumers or efficiency. If, as AOL predicts, Microsoft and Yahoo! effectively challenge AOL in IM and/or AOL Time Warner in AIHS, then AOL will have an incentive to achieve interoperability and our condition will not come into operation. The risk of our not intervening now, however, is to risk the emergence of a significant new business needing regulation, a result we and Congress wish to avoid especially on the Internet and interactive services. For the reasons stated above, we cannot be certain that new entry, even by the likes of Microsoft and Yahoo!, will discipline AOL Time Warner in AIHS. Finally, we are not convinced that AOL's expressions of concern with security and privacy justify giving free rein to its resistance to interoperability.

189. Accordingly, we are imposing a condition that is precisely and narrowly aimed at preventing the specific harm that the proposed merger will cause. It is also directed at serving the broader public interest in encouraging entry, competition, innovation, the broader deployment of new services, the lowest possible transaction costs for consumers, and necessary protection of persons with disabilities. Our condition is balanced because it contains ways for AOL to show that, due to events we do not anticipate, the condition is no longer necessary. Our condition gives AOL incentives that it does not now have to interoperate and thus to benefit consumers, efficiency and the public interest. Our condition also gives other IM and AIHS providers incentives to enter and remain in the business that they do not now have.

190. As set forth below, our condition gives AOL an incentive to interoperate by forbidding it from providing streaming video AIHS applications until it interoperates. Our condition focuses on streaming video AIHS applications, for several reasons. First, AOL is not offering them as part of its IM today. Second, as we define them below, we believe that the scope of video AIHS applications is relatively clear. If our condition focused on AIHS applications that included "talking" or "game-playing,"

[488] Examples are wireline telephone companies' entry into cellular service (*see, e.g.*, Rogers Radio Commun. Serv., Inc. v. FCC, 593 F.2d 1225 (D.C.Cir. 1978); MCI Cellular Tel. Co. v. FCC, 738 F.2d 1322 (D.C. Cir. 1984)) and enhanced services (*see, e.g.*, California v. FCC, 905 F.2d 1217 (9th Cir. 1990), 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1090 (1995); and Bell incumbent local exchange carrier entry into in-region interexchange service (47 U.S.C. §§ 271-72).

[489] Applicants' Reply Comments at 47-49.

which AOL appears to be providing now to some extent, there might be difficulty in detecting when AOL had made an advancement with these services. Third, AOL will be able to provide streaming video AIHS applications for the first time on the facilities of Time Warner that are coming under AOL's control as a result of the proposed merger. We believe that it is in these applications that AOL would be positioned to gain the greatest anti-competitive advantage as a result of the proposed merger, by combining its NPD with the assets of Time Warner.

3. Condition

191. AOL Time Warner's likely domination of the potentially competitive business of new, IM-based services, especially AIHS applications such as videoconferencing, requires that we impose a condition to prevent that merger-specific harm.[490] AOL Time Warner may not offer an AIHS application that includes the transmission and reception, utilizing an NPD over the Internet Protocol path of AOL Time Warner broadband facilities, of one- or two-way streaming video communication using NPD protocols – including live images or tape – that are new features, functions, and enhancements beyond those offered in current offerings such as AIM 4.3 or ICQ 2000b,[491] unless and until AOL Time Warner has successfully demonstrated it has complied with one of the following grounds for relief.

192. *Grounds for Relief. Option One.* AOL Time Warner may file a petition demonstrating that it has implemented[492] a standard for server-to-server interoperability of NPD-based services[493] that has been promulgated by the IETF or a widely recognized standard-setting body that is recognized as complying with National Institute of Standards and Technology or International Organization for Standardization requirements for a standard setting body. At a minimum, AOL Time Warner must demonstrate that the adopted protocol makes available to another provider of NPD-based services such data in AOL Time Warner's NPD(s) as will enable the other provider's users to know the addresses of AOL Time Warner users and detect their presence online, to the same extent that AOL Time Warner's users know each others' addresses and detect each others' presence online. AOL Time Warner must also demonstrate that the protocol makes available to other IM providers any other information used by AOL Time Warner to implement and process transactions of AIHS services, to the extent allowed by law.[494] The adopted standard shall also ensure that AOL Time Warner shall afford the same quality and speed in processing transactions to and from the other provider as it affords to its own transactions of the same type.[495] Other than specifying server-to-server interoperability as described above, we do not set any technical criteria for interoperability.

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[490] In "AOL Time Warner," we include the separate pre-merger companies and the post-merger company.

[491] We explicitly exclude upgrades to AOL's current IM products that are not otherwise included in AIHS. We do not intend to include within AIHS streaming video communications not utilizing NPD protocols or applications that contain or are packaged with current IM.

[492] By "implemented," we mean both the creation and deployment of the interoperable application.

[493] "Server to server" interoperability is interoperability in which a client interacts with other NPD-based services through its own server. Each server establishes communication with other servers, including those controlled by other providers of NPD-based services, to exchange presence information and names.

[494] The other provider must afford the same capabilities to AOL.

[495] We do not require the AOL Time Warner software to read and interpret all the data it receives or to make that data comprehensible to its users.

193. *Option Two.* AOL may file a petition demonstrating that it has entered into written contracts providing for server-to-server interoperability with significant, unaffiliated, actual or potential competing providers of NPD-based services offered to the public.[496] AOL must execute the first such contract prior to offering the video AIHS service described above. After AOL Time Warner executes the first contract, an officer of AOL Time Warner shall certify to the Commission that it is prepared to promptly negotiate in good faith, with any other requesting provider of NPD-based services.[497]

194. Within 180 days of executing the first contract, AOL must demonstrate that it has entered into two additional contracts with significant, unaffiliated, actual or potential competing providers. The interoperability achieved under these contracts shall be identical to that described under Option One above with identical terms and conditions for technical interoperability. All parties to a contract shall agree not to alter the technical protocol without the consent of all parties providing interoperable IM services under these agreements. The contracts may contain different provisions for business considerations. AOL Time Warner must submit copies of these agreements for server-to-server interoperability into the record of this proceeding within 10 days of execution of such agreement. AOL Time Warner may redact any proprietary information or terms not related to technical interoperability.

195. *Option Three.* AOL Time Warner may seek relief from the condition on offering AIHS video services by filing a petition demonstrating that imposition of the condition no longer serves the public interest, convenience and necessity because there has been a material change in circumstance, including new evidence that renders the condition on offering AIHS video services no longer necessary in the public interest, convenience, and necessity. If AOL Time Warner proffers market share information as evidence that the condition no longer is necessary in the public interest, convenience, and necessity, AOL Time Warner must demonstrate that it has not been a dominant provider of NPD services for at least four (4) consecutive months.

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[496] A potential competitor is "an aggressive, well equipped and well financed company that is engaged in the same or related lines of commerce." *United States v. Falstaff Brewing Corp.*, 410 U.S. 526, 532 (1973). *See also United States v. Penn-Olin Chem. Co.*, 378 U.S. 158, 174 (1964). In this case, we expect that the potential provider would be a company that is capable of entering into an arms-length, commercially reasonable and mutually beneficial contract with AOL and is likely to become a significant competitor in the near term in providing NPD services.

[497] By "negotiate in good faith," we mean that AOL Time Warner: (1) may not refuse to negotiate with another IM provider regarding interoperability; (2) must appoint a negotiating representative with authority to bargain and conclude an agreement on interoperability; (3) must agree to meet at reasonable times and locations and may not act in a manner that would unduly delay the course of negotiations; (4) may not put forth a single, unilateral proposal that is not subject to negotiation; (5) in responding to an offer proposed by another IM provider, must provide considered reasons for rejecting any aspects of the other provider's offer or proposal; (6) may not enter into an agreement that requires the other IM provider to interoperate exclusively with AOL Time Warner or authorizes AOL Time Warner to deny interoperability to any other IM provider; and (7) must agree to execute a written agreement that sets forth the full agreement between AOL Time Warner and the other IM provider. We add the seventh requirement to ensure that there are no misunderstandings as to the obligations of the parties to the agreement. In addition, because good faith determinations must be grounded on particular facts, we will also examine whether, based on the totality of the circumstances, AOL Time Warner has bargained in good faith. If we find that AOL Time Warner has not bargained in good faith, we will instruct AOL Time Warner to restart negotiations with the aggrieved IM provider, but will not mandate that the parties reach agreement or enter into a contract on specific terms or conditions. *Cf. Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity*, CS Docket No. 99-363, First Report and Order, 15 FCC Rcd 5445 (2000).

196. *Procedure for Submission of Petition to the Commission.* To receive authorization to offer AIHS video services pursuant to Options One through Three above, AOL Time Warner shall submit a Petition to the Commission. The Petition shall be filed with the Secretary's office and shall contain the factual and legal bases demonstrating satisfaction of one of the three options set forth above. The Commission shall put the Petition out for Notice and Comment with a maximum of 30 days for receipt of such comments. Petitioner may submit a reply not more than 15 days after the closure of the comment period. Upon the timely filing of Petitioner's reply, the Petition, comments and reply shall be submitted to the Commission for disposition. The Commission shall issue its findings and conclusions not more than 60 days after receipt of the matter. This timeline may be altered at the discretion of the Commission upon a timely submitted request of the Petitioner. The findings of the Commission shall be made upon clear and convincing evidence, and in the absence of such an evidentiary showing, the condition shall not be eliminated.

197. *Reporting Requirement.* We also require that AOL Time Warner file a progress report with the Commission, 180 days after the release of this *Order* and every 180 days thereafter, describing in technical depth, the actions it has taken to achieve interoperability of its IM offerings[498] and others' IM offerings. Such reports will be placed on public notice for comment. Any confidential or proprietary information contained in the reports may be submitted to the Commission pursuant to the terms of the protective order in this proceeding.

198. *Enforcement.* The Commission shall retain jurisdiction over the licensees or their successors for the purpose of enforcing the terms of this condition, for a period not to exceed five years. The terms of this condition shall be enforced pursuant to the Commission's powers under the Communication Act. Any party to the *Order*, or their successor in interest, may petition this Commission at any time for relief from the condition on offering AIHS video services imposed pursuant to this *Order*.

199. In the event that any person wishes to bring to us a dispute about AOL's compliance with our condition, we shall require that the following procedures be followed. These procedures are designed to resolve any disputes within sixty (60) days of the first filing. Within twenty (20) days after public notice is given of either the filing of a complaint or a showing by AOL Time Warner, any interested party shall file a response (AOL Time Warner's answer to the complaint, another person's response to AOL Time Warner's alleged showing). Within ten (10) days after the filing of the responses, the party that made the first filing may file its reply.[499] The complainant and AOL Time Warner shall each, with its first filing, furnish a detailed report, technical or otherwise, describing the conduct or events that are the subject of the filing. All these filings shall be made with the Commission Secretary and shall be concurrently served on the Chief, Cable Services Bureau.[500] The complaint or showing, as the case may be, shall be dismissed or sustained within sixty (60) days of its filing.

200. *Sunset.* Five (5) years after the date of release of this *Order*, the condition set forth in the preceding paragraphs shall expire and shall not restrain AOL Time Warner from offering video AIHS.

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[498] Within "its IM offerings," we include the IM offered as part of AOL's basic proprietary Internet access service, AIM, ICQ, any IM that is sponsored by AOL Time Warner and is included in Road Runner, and any new IM-based service that uses the NPD that AOL uses for its IM.

[499] *Cf.* 47 C.F.R. § 76.7

[500] *See* para. 126F, *supra*.

C. Video Programming

201. In this section, we consider the proposed merger's impact on video programming sold by program networks to MVPDs, who then deliver the networks via their distribution systems to their subscribers' television sets. MVPDs include cable, DBS, multichannel multipoint distribution services ("MMDS"), and satellite master antenna television ("SMATV") providers.[501]

202. Companies that own programming networks produce their own programming and/or acquire programming produced by others, then package this programming for sale to MVPDs. As discussed above, Time Warner has ownership interests in a large number of programming networks, such as CNN, TBS, HBO, Comedy Central and Court TV, among others.

203. We examine below whether the merger will create public interest harms with respect to electronic programming guides ("EPGs"), the carriage of analog and digital video signals, or AOL Time Warner's post-merger ownership interest in DirecTV, the nation's largest DBS provider. We conclude that the merger will not result in a violation of the Communication's Act or Commission rules, nor will it interfere with our implementation of the Communications Act or the Commission's policy objectives. Accordingly, we reject commenters' requests that we impose conditions related to video programming.

1. Electronic Programming Guides

204. EPGs are on-screen directories of programming delivered through various means, including cable plant, telephone lines, and over-the-air broadcast signals. Original-generation EPGs are not interactive, but rather continually scroll programming listings. These EPGs are generally delivered as discrete video programming channels. Newer, interactive EPGs, however, allow users to sort and search programming, give program descriptions, provide reminders of upcoming programming, and take users to programming they select. Interactive EPGs can be transmitted via the Vertical Blanking Interval ("VBI")[502] of analog channels, or may be transmitted as standalone digital data streams. The purchasers of EPGs are MVPDs such as cable and DBS operators, and, potentially, through set-top boxes, individual consumers.[503] The sellers of EPGs are EPG companies.[504] Gemstar, the current market leader in the

[501] *See 1999 Competition Report*, 15 FCC Rcd at 980 ¶ 3 (generally describing the various types of MVPDs) (Section 628(g) of the Communications Act, 47 U.S.C. § 548(g), requires the Commission to report annually to Congress on the status of competition in markets for the delivery of video programming). DBS operators provide programming via satellite to subscribers that own or lease small-diameter receiving dishes. MMDS providers offer programming via microwave facilities (the service is often referred to as "wireless cable service"). SMATV operators, also known as "private cable operators," also frequently use microwave facilities to transmit programming to subscribers without crossing public rights-of-way. SMATV subscribers usually reside in multiple dwelling units ("MDUs").

[502] Newton's Telecom Dictionary (11th Ed. 1996) defines the VBI as:

> The interval between television frames in which the picture is blanked to enable the trace (which "paints" the screen) to return to the upper left hand corner of the screen, from where the trace starts, once again to paint a new screen.

This time period is the equivalent of 21 scanning lines. The VBI is used to transmit data to organize the television picture, as well as other data. Line 21 of the VBI is reserved for distribution of closed captioning information. *See Closed Captioning and Video Description of Video Programming, Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility*, Report, MM Docket No. 95-176, 11 FCC Rcd 19214 (1996).

[503] Some set-top boxes and television sets will have EPGs embedded within them.

provision of EPGs, has contracted with AT&T for provision of EPGs on AT&T cable systems.[505] Gemstar also has an agreement with AOL to provide electronic program guide functions for AOLTV.[506]

205. Gemstar argues that, although it has no complaint regarding AOL, Time Warner has engaged in anticompetitive conduct by blocking subscriber access to Gemstar's Guide Plus+ EPG.[507] The "Guide Plus+" EPG conveys programming information to consumers without a monthly service charge and without the need for set top boxes or other devices.[508] According to Gemstar, Guide Plus+ works only when the television can receive updated programming information transmitted via the vertical blanking interval of local television broadcast stations.[509] Gemstar states that Time Warner strips out the EPG data in the VBI, rendering Guide Plus+ useless to many potential consumers.[510] Prior to the start of this proceeding, Gemstar filed a petition for special relief with the Commission regarding Time Warner's actions.[511] Gemstar states that it is taking the additional step of filing in this proceeding because it believes Time Warner's past conduct with respect to Gemstar illustrates Time Warner's lack of commitment to open access for content, including EPGs.[512] As a result, Gemstar asks that the Commission impose conditions on the merger to ensure that Time Warner will keep its systems open to competitive content and service providers.[513]

206. In response to Gemstar's comments, the Applicants state that this merger is not the appropriate forum to litigate EPG issues.[514] The Applicants assert that the special relief proceeding initiated by Gemstar is the proper place to issue a determination on the EPG dispute.[515]

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[504] In addition, some ITV providers may provide interactive EPGs as part of their ITV service. EPG companies include Gemstar, WorldGate (who provides "TV Gateway" for WorldGate subscribers) and Liberate Tribune.

[505] We note that on July 11, 2000, Gemstar and TV Guide, Inc. announced the completion of their merger, in which TV Guide, Inc. will become a wholly owned subsidiary of Gemstar. TV Guide, Inc., *Gemstar International Group Limited and TV Guide, Inc. Announce Completion of Their Merger* (press release) July 11, 2000. In addition, in October 2000, News Corp. increased its ownership interest in Gemstar-TV Guide to 43% by acquiring AT&T's Liberty Media Group's 21% ownership interest. As part of this same transaction, AT&T's Liberty Media Group will increase its ownership interest in News Corp. to 18% from 8%. Ronald Grover, *What Does John Malone Really Want?*, BUSINESS WEEK, Oct. 9, 2000, at 1.

[506] TV Guide, Inc., *Gemstar International Group Limited and TV Guide, Inc. Announce Completion of Their Merger* (press release), July 11, 2000.

[507] Gemstar Comments at 3.

[508] *Id.*

[509] *Id.*

[510] *Id.* Time Warner stated recently that it has ceased this practice (*see* letter from Marc Apfelbaum, Senior Vice President and General Counsel, Time Warner Cable, to Stephen Weiswasser, Executive Vice President and General Counsel, Gemstar Development Corp, dated June 15, 2000). However, we note that Gemstar indicates that Time Warner's current decision to refrain from stripping EPG data does not alleviate its overall concerns, characterizing Time Warner's actions as "a temporary cease fire." *See* Letter from Gerald J. Waldron and Jennifer A. Johnson, Counsel for Gemstar-TV Guide International, Inc., to Magalie Roman Salas, Secretary, FCC, dated January 4, 2001.

[511] *See In re Petition for Special Relief of Gemstar*, CSR-5528-Z (filed Mar. 16, 2000).

[512] Gemstar Comments at 4.

[513] *Id.* at 7. *See also* NAB May 19 Ex Parte at 2-3; NAB Oct. 2 Ex Parte at 1-3.

[514] Applicants' Reply Comments at 52.

207. Gemstar has not shown that the merger is likely to create or exacerbate competitive harm. Its dispute with Time Warner predates the merger announcement. Moreover, Gemstar's arguments are being fully considered in the context of its petition for special relief asking that Time Warner cease stripping out the Guide Plus+ data, and we find that it would be inappropriate to address them here.[516] We therefore decline Gemstar's additional request for conditions on the proposed AOL Time Warner merger. Furthermore, we note that the Commission has committed to "monitor developments with respect to the availability of electronic programming guides to determine whether any action is appropriate in the future."[517] Finally, the Commission has requested comment in a pending rulemaking proceeding on "whether any rules are necessary to ensure fair competition between EPGs controlled by cable operators and those that are controlled by broadcasters."[518]

2. Broadcast Signal Carriage Issues

208. The National Association of Broadcasters ("NAB") and other broadcast groups are concerned about the impact of the proposed merger on Time Warner's carriage of analog and digital television signals.[519] Specifically, NAB urges the Commission to prohibit AOL Time Warner from blocking access to any part of a broadcast signal that consumers could receive free over-the-air, such as electronic program guide information.[520] NAB also requests that the Commission require AOL Time

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[515] *Id.* at 53. *See also* Letter from Daniel L. Brenner, National Cable Television Association ("NCTA") to William E. Kennard, Chairman, FCC, dated May 36, 2000 ("NCTA May 26 Ex Parte"), transmitted by letter from Daniel L. Brenner to Magalie Roman Salas, Secretary, FCC, dated May 26, 2000.

[516] *See In re Petition for Special Relief of Gemstar*, CSR-5528-Z (filed March 16, 2000). Gemstar states that it incorporates, by reference, its comments from the special relief proceeding regarding Time Warner's refusal to carry EPG-related data in the vertical blanking interval of a television broadcast signal. In that proceeding, Gemstar argued the following points: (1) Time Warner's actions violate the Commission's rules and policies requiring mandatory carriage of all program-related material accompanying a broadcast signal that has must carry rights; (2) Time Warner is impeding the retail availability of competing navigation devices; and (3) Time Warner's actions are contrary to other Commission rules and policies. The Commission is also currently engaged in a proceeding to review the effectiveness of the navigation devices rules and to consider whether any changes are necessary. *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling, FCC 00-341 (rel. Sept. 18, 2000). *See also In re Carriage of the Transmission of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15129 ¶ 82 (1998).

[517] *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order ("*Navigation Devices Order*"), 13 FCC Rcd 14775, 14820 ¶ 116 (1998).

[518] *In re Carriage of the Transmission of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd. 15092, 15129 ¶ 82 (1998).

[519] *See* NAB May 19 Ex Parte at 1-6; MSTV Reply Comments at 1-2; Sinclair Comments; Disney Reply Comments at 18-19; Disney July 25 Ex Parte at 35-37; Freedom Broadcasting Reply Comments.

[520] NAB May 19 Ex Parte at 2; MSTV Reply Comments at 2; Disney Reply Comments at 18-19. We note that MSTV, Disney, and Sinclair have requested similar conditions as part of the merger approval process. *See* MSTV Reply Comments at 1 (requesting conditions that would prohibit AOL Time Warner from "discriminating against the programming, navigation devices and other services delivered through the broadcast signal for free"); Disney Reply Comments at 19 (requesting a condition that requires AOL Time Warner to "pass through unaltered all the free bits of broadcasters"); Sinclair Comments at 2 ("The Commission should prohibit AOL Time Warner from degrading or blocking subscriber access to any part of the digital broadcast signal that could be received free over-

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Warner to carry the digital broadcast signals of local television stations on its upgraded cable systems.[521] In response, the National Cable Television Association ("NCTA") asserts that the issues raised by NAB are not merger-specific, but rather apply to all cable operators.[522] Time Warner states that it has negotiated retransmission consent agreements providing for carriage of both analog and digital signals with each of the four major television networks (ABC, CBS, FOX, and NBC).[523] According to Time Warner, these agreements also serve as templates for stations affiliated with, but not owned by, any of the four television networks.[524]

209. The record does not indicate that the merger will create or enhance AOL Time Warner's ability or incentive to refuse carriage of broadcasters' signals. We cannot conclude, therefore, that the merger would create any public interest harm in this regard. Moreover, the issues raised by the broadcasters are already under consideration in pending Commission proceedings of general applicability. The conditional requirements suggested by NAB should be addressed in those proceedings, and not within the confines of the merger analysis. As NCTA points out, the issues raised by the broadcasters affect all cable operators and not only Time Warner. We arrived at a similar conclusion in the AT&T-TCI merger,[525] where NAB also requested digital broadcast signal carriage as a merger condition. We find no reason to depart from Commission precedent in this case. Insofar as NAB's concerns about the carriage of all components of the free analog broadcast signal are directed at EPG data carried on the broadcaster's VBI, we note that this particular matter will be addressed in the Gemstar special relief proceeding, where the issues have been fully briefed and discussed.[526] The carriage of digital broadcast signals by Time Warner and other cable operators is being considered in a pending rulemaking proceeding specifically addressing digital must-carry issues.[527] The conclusions we reach in that docket will, of course, apply to Time Warner as well as all other cable operators. Accordingly, we reject commenters' requests that we impose remedial conditions on AOL Time Warner in this proceeding.

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the-air.").

[521] NAB states that the Applicants' request for approval of the merger based on assertions that the combined entity will speed the construction of digital broadband platforms provides a separate basis for the Commission to require carriage of digital broadcast signals on its systems. *See* NAB May 19 Ex Parte at 5. *See also* MSTV Reply Comments at 6 ("specific and enforceable conditions must be placed on AOL Time Warner to protect the public's access to all of the digital offerings broadcast stations would deliver to consumers free of charge.").

[522] *See* NCTA May 26 Letter at 2.

[523] *See* Applicants' First Response at 6.

[524] Time Warner adds that, in fact, negotiations with other major television group owners are underway. *Id.*

[525] *See AT&T-TCI Order*, 15 FCC Rcd at 3183 ¶ 43.

[526] *See In re Petition for Special Relief of Gemstar*, CSR-5528-Z (filed March 16, 2000). *See also Navigation Devices Order*, 13 FCC Rcd at 14820 ¶ 116.

[527] *See In re Carriage of the Transmission of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15129 ¶ 82 (1998). We note that Sinclair also argues that the Commission should ensure that consumers have access to free over-the-air digital broadcast signals via antennas and that the Commission should adopt the COFDM digital broadcast standard. Sinclair Comments at 3. We find that these matters are not linked in any way to either the merger or the broadcast carriage issues generally presented by the parties. These matters are more appropriately dealt with in the Commission's periodic review of the digital television transition. *See In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, MM Docket No. 00-39, FCC 00-83 (rel. Mar. 8, 2000).

3. Cable Horizontal Ownership Rules

210. Commenters assert that AOL's indirect ownership interest in DirecTV, coupled with Time Warner's cable holdings, would give the merged entity excessive purchasing power in the video programming market such that it could harm video programmers and MVPD competitors.[528] We analyze below the potential harm that the merger may cause in the video programming market. We examine specifically the question whether the merger would violate the Commission's cable horizontal ownership rules,[529] which we adopted pursuant to a statutory directive.[530] We find that AOL's ownership interest in GM does not violate our horizontal ownership rules or the statute, nor does it frustrate the implementation of the Communications Act's goals.

211. In 1999, AOL made a $1.5 billion investment in General Motors Corporation ("GM") in exchange for 2,669,633 shares of a type of GM Preference Stock ("Preference Stock").[531] General Motors invested this money in its wholly owned subsidiary, Hughes Electronics Corporation ("Hughes"), which in turn wholly owns DirecTV, a direct broadcast satellite ("DBS") company that provides multichannel video programming to approximately 8.3 million consumers nationwide.[532] Several commenters argue that AOL's investment in GM gives AOL the ability to influence DirecTV and DirecTV's video programming purchasing decisions.[533] Given that Time Warner is the second largest cable operator in the nation, these commenters argue that the proposed merger would increase the merged firm's size as a multichannel video distribution provider ("MVPD"). Commenters contend that this larger, combined MVPD would have excessive purchasing power over suppliers of video programming, thereby harming suppliers of video programming and MVPD competitors of AOL Time Warner seeking access to the programming.[534] Accordingly, the commenters request that the Commission require AOL to divest its interest in GM as a merger condition.[535]

212. In Section 613(f)(1)(A) of the Communication Act, as amended, Congress directed the Commission to place limits on a cable operator's size.[536] Congress was concerned that concentration in the cable industry could pose "barriers to entry for new programmers and a reduction in the number of media voices to consumers."[537] Therefore, Congress directed the Commission to establish a horizontal ownership limit that would prevent a large cable operator from using its size to harm video programmers and MVPD competitors by virtue of its purchasing power.[538] Pursuant to this directive, the Commission

[528] *See* ACA Comments at 1.

[529] 47 C.F.R. § 76.503.

[530] *See* Section 613(f)(1)(A) of the Communication Act of 1934, as amended; Cable Television Consumer Protection and Competition Act of 1992 § 11(c); 47 U.S.C. § 533(f)(1)(A).

[531] *See* Applicants' March 21 Supplemental Information at 11-12 n.15.

[532] *See Id.* at 10-11.

[533] *See, e.g.*, RCN Comments at 6-7.

[534] *See* RCN Comments at 6-8; ACA Comments at 13-14; Consumers Union Comments at 157.

[535] *See* ACA Comments at 13-14; Consumers Union Comments at 157; Consumers Union Reply Comments at 6.

[536] *See* 47 U.S.C. § 533(f)(1)(A).

[537] Cable Act § 2(a)(4); 47 U.S.C. § 521 note.

[538] *See* 47 U.S.C. § 533(f)(2)(A)&(B).

promulgated a rule limiting a cable operator to 30% of the nation's MVPD subscribers.[539] The 30% limit takes into account the ability of a cable operator "either because of its size . . . or because of joint actions by a group of operators of sufficient size" to unfairly impede the flow of programming from the video programmer to the consumer.[540]

213. The Commission established rules (the "attribution rules") that determine whether a cable operator has sufficient influence or control over an MVPD such that the MVPD's subscribers should count towards the cable operator's 30% limit.[541] Under these rules, AOL's Preference Stock is not attributable because nonvoting equity is not attributable unless the nonvoting equity is worth more than 33% of the total assets of the MVPD, which is not the case here.[542] The only possible attribution rule that could be invoked here is one that is triggered when a cable operator holds 5% or more of the MVPD's voting equity.[543] However, even if AOL's Preference Stock were converted to voting equity, it would constitute approximately 1.76% of GM's voting equity, well below the 5% voting equity threshold.[544] Thus, under our attribution rules, AOL does not have an interest in GM and its subsidiary DirecTV which would *de jure* deem AOL to have influence and control over DirecTV and its purchasing decisions.

214. Nevertheless, RCN argues that the Commission should examine the totality of the circumstances of the AOL and DirecTV relationship to determine whether AOL has the actual ability to influence or control DirecTV.[545] In our order establishing the attribution rules, we declined "to examine contract language on a case-by-case basis to determine whether the contract gives one of the parties thereto an attributable interest."[546] However, the Commission reserved discretion to review unique cases where "there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence."[547] We do not find that this case presents unique facts that would merit such a review.

215. RCN argues that AOL's investment in GM has led to a high degree of cooperation, including the launch of AOLTV for DirecTV and an integrated AOLTV-DirecTV set-top box.[548] We also note that AOL and DirecTV have a number of other contracts relating to DirecTV, DirecPC and AOL's

[539] *See* 47 C.F.R. § 76.503.

[540] *See In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits*, MM Docket No. 92-264, Third Report and Order ("*Horizontal Third Report and Order*"), 14 FCC Rcd 19098, 19114-19116 ¶¶ 39-43 (1999).

[541] *See* 47 C.F.R. § 76.503 n.2.

[542] *See* 47 C.F.R. § 76.503 n.2; 47 C.F.R. § 76.501 n.2(i).

[543] *See* 47 C.F.R. § 76.503 n.2; 47 C.F.R. § 76.501 n.2(a).

[544] *See* Applicants' March 21 Supplemental Information at 14.

[545] RCN Comments at 7 n.25.

[546] *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Reform Act Provisions of the Telecommunications Act of 1996: Review of the Commission's Cable Attribution Rules*, CS Docket Nos. 98-82, 96-85, Report and Order ("*Attribution Order*"), 14 FCC Rcd 19014, 19050 ¶ 92 (1999) ("[A] bright-line . . . test is superior to a case-by-case analysis because it permits the planning of financial transactions and minimizes regulatory costs.").

[547] *Id.* at 19050-51 ¶ 92.

[548] RCN Comments at 6-7.

ISP services.[549] Nonetheless, our review of these contracts does not reveal that they confer on AOL significant influence over DirecTV's video programming activities. Therefore, we reject the arguments of commenters that AOL's ownership interest in GM will enable the merged firm to harm video program suppliers and MVPD competitors seeking access to these suppliers.

D. Interactive Television Services

216. In this section we consider whether the merger will harm consumers or competition with respect to the provision of interactive television ("ITV") services in Time Warner's cable system service areas. Two objectives of the Communications Act appear to be relevant to the provision of ITV services. First, the Commission has the responsibility to ensure that cable communications provide the "widest possible diversity of information sources and services to the public."[550] Second, the Commission is charged with ensuring the rapid, private deployment of advanced services.[551] As discussed in our analysis of public interest benefits,[552] AOL and Time Warner bring together assets that could engender a successful launch of ITV. AOL is the world's largest aggregator of Internet content and interactive services, and Time Warner is the nation's second largest cable operator and owner of a significant number of the nation's most popular cable programming networks.[553]

217. We examine below whether the merged entity will have the ability and the incentive to engage in behavior that would likely cause public interest harms with respect to ITV. We find that AOL Time Warner would have the potential ability to use its combined control of cable system facilities, video programming and the AOLTV service to discriminate against unaffiliated video programming networks in the provision of ITV services. We also find that AOL Time Warner may have incentives to engage in

[549] *See* Confidential Appendix at Section IV-C-1.

[550] *See* 47 U.S.C. § 521(4) (purpose of Title VI, "Cable Communications," of the Act is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"); 47 U.S.C. §§ 532(a), (g) ("diversity of information sources"); *see also 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)); *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, MM Docket No. 91-221, MM Docket No. 87-8, Report and Order, 14 FCC Rcd 12903, 12910-12916 (1999); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); *Turner Broadcasting*, 512 U.S. at 657 (emphasizing that "[t]he potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas."). We also note that IM Unified argues that the Commission has jurisdiction over ITV because it is a "cable service." *See* Tribal Voice and iCast Sept. 5 Letter at 31. Because we do not impose any conditions with regard to ITV, we need not resolve here the question of our authority to do so. However, we address this issue in our *ITV NOI* proceeding. *See ITV NOI*, FCC 01-15.

[551] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18030-3 ¶ 9; *see also* 47 U.S.C §§ 254; Telecommunications Act of 1996 ("1996 Act"), Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157; 1996 Act Preamble.

[552] *See* Section V, *infra*. (Analysis of Potential Public Interest Benefits).

[553] Time Warner owns three of the five most highly rated cable programming networks, as well as the largest news (CNN) and pay networks (HBO). Time Warner also has significant publishing, music, movie and broadcasting holdings.

such discriminatory behavior. Nevertheless, even if AOL Time Warner were to discriminate, it appears that the terms of the FTC Consent Agreement[554] will, at present, substantially address concerns about the availability of alternatives for the distribution of unaffiliated video programming networks' ITV services. Therefore, we conclude that discrimination by the merged entity is not likely to cause a public interest harm that warrants denial of the merger or the imposition of conditions that do not apply industry-wide. Though we are unpersuaded a case has been presented on this record of merger-specific harm, we do believe important questions have been raised that warrant further examination in a proceeding of general applicability. In the *ITV NOI*, we will consider whether industry-wide rules are needed to address any impediments to the development of ITV services and markets.[555]

1. Background

a. The Components of ITV Service

218. Given the infancy of this market and the limited record before us, it would be imprudent to endorse a comprehensive definition of ITV services. At present, however, such services appear to include EPGs,[556] content that permits the viewer to interact with the video signal ("interactive content"), time shifting, and the overlay of communications services (chat, e-mail and instant messaging) functionality onto video programming provided by a programming network (such as TBS or AMC).[557] Based on this record, it appears that three components[558] are necessary for the delivery of high-speed ITV services to consumers:

219. (1) a transmission system (preferably broadband) for the delivery of the video signal and interactive content ("transmission system"),

220. (2) an Internet connection with sufficient bandwidth to provide a suitable interactive experience, with limited latency and optimal synchroneity ("Internet connection"), and

221. (3) a processing capability (*e.g.*, a stand-alone set-top box ("ITV-STB"), such as those used by WebTV or AOLTV, or a box integrated with the cable or DBS set-top box, that can respond to interactive triggers, integrate video and enhanced content, and display the integrated product on a television screen.[559]

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[554] *See* FTC Consent Agreement.

[555] *See ITV NOI*, FCC 01-15.

[556] We discuss the provision of EPG services separately, above. Original-generation EPG are not interactive, but rather continually scroll programming listings. Newer, interactive EPGs, however, allow users to sort and search programming, give program descriptions, provide reminders of upcoming programming, and transport users to programming they select.

[557] The *ITV NOI* will explore ITV services in more detail. For purposes of this *Order*, we define ITV services to include all of these services.

[558] *The ITV NOI* will explore these components more closely.

[559] Cable operators and DBS providers traditionally have supplied set-top boxes to their subscribers, typically on a leased basis, in order that their subscribers may view video programming. A stand-alone ITV-STB will not, by itself, enable a cable subscriber to view video programming. As discussed below, the first deployment of AOLTV involves a stand-alone ITV-STB that must be connected to a cable or DBS set-top box in order to receive video programming. The ITV-STB then blends the video programming with interactive programming that the ITV-STB receives from a connection to the Internet, which is currently a narrowband dial-up connection. Next-generation (continued...)

222. *Transmission System.* It appears that cable facilities provide the optimal platform for the delivery of ITV services. The cable pipeline can permit interactive content to be delivered to the viewer with the video signal, thereby ensuring that the video programming and the interactive content achieve a high level of synchroneity when blended in the ITV-STB for television viewing.

223. A video programming network may send two types of interactive content with its video signal, the so-called "trigger" of interactive content and interactive content itself, both of which could be based on the ATVEF protocol or any other protocol.[560] The "trigger" can appear as an icon on a viewer's television screen and alerts the viewer to the availability of interactive content. When a viewer clicks on the trigger, the trigger requests the interactive content. When the interactive content is sent with the video signal, the trigger causes a compatible ITV set-top box to display the interactive content on the television set.[561]

224. A high level of synchroneity is necessary for certain forms of interactivity. For example, synchroneity would be important if secondary audio, such as a referee's voice, were to be delivered with the video signal to a viewer watching a sporting event. By sending the interactive content with the video signal of the television program, a cable operator ensures that the ITV set-top box is able to blend the television program and the interactive content seamlessly, without the level of latency associated with interactive content delivered via the Internet.

225. *Internet Connection.* Although synchroneity and latency difficulties can be avoided by sending some interactive content with the video signal, the amount of interactive content that may be delivered with the video signal might be limited by the video pipeline's bandwidth or capacity. Under these circumstances, where the interactive content requires a large amount of bandwidth (or subscriber-

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ITV-STB boxes, the focus of our analysis, will be integrated with the cable or DBS set-top box so that a consumer utilizes a single box to receive both video programming and interactive content, rather than two separate boxes.

[560] The Advanced Television Enhancement Forum ("ATVEF") has made significant progress in standardizing protocols for the delivery of ITV information via the video signal. When we refer to the ATVEF standard herein, we intend to include other such standards that may be used as ITV technology develops. The ATVEF Enhanced Content Specification is a standard that defines a common set of requirements for the creation, transport, and delivery of interactive television. ATVEF is a cross-industry group comprised of the major computer companies, television programmers, technical platform providers, broadcasters, and transport providers. *See* http:\\www.atvef.com. The ATVEF content specifications provide creators of enhanced television content with a mandatory minimum format that will be supported by ATVEF-compliant receivers such as televisions or set-top boxes. By conforming to the ATVEF specifications, a content provider will be able to provide enhanced television services to the maximum number of receivers. A content provider who chooses to create enhanced content that falls outside of the ATVEF specification must work in conjunction with the manufacturer of the target receiver to enable the additional enhancements. Some European countries have deployed DVB-MHP, another form of ITV. DVB (the umbrella organization of all companies taking part in the launching of digital TV in Europe) developed the "Multimedia Home Platform" (MHP). MHP defines a protocol that content providers can use to develop interactive applications. The protocol also gives manufacturers the ability to build a universal set-top-box that is compatible with a wide array of video interactive services.

For analog video signals, the ATVEF interactive content is transmitted in the VBI. For digital video signals, the ATVEF interactive content is transmitted in digital form in the MPEG digital video stream. MPEG will be discussed more fully in the *ITV NOI*.

[561] In the alternative, the interactive content might be stored on the Internet, in which case the trigger would direct the ITV set-top box to retrieve the content from the Internet and display it on the television set.

specific content), the ATVEF trigger carried with the video signal would direct the ITV-STB to obtain interactive content from the Internet. However, because the ATVEF (or similar) interactive content would be delivered via the Internet and not via the video signal, the video programming and the interactive content would have a lesser degree of synchroneity. Therefore, a high-speed two-way Internet connection, such as a DSL or cable Internet connection, appears necessary in order to provide large capacity interactive content to the viewer with minimum latency. While a narrowband Internet connection, *i.e.*, a dial-up telephone connection, could enable an interactive experience, it cannot currently provide the speed and bandwidth that broadband paths would provide.

226. *The ITV Set-Top Box.* An ITV set-top box is the third necessary component for ITV services. The ITV set-top box activates interactive content sent with the video signal and blends it with the video program signal for display on the television set. As noted above, an ITV subscriber may also direct the ITV set-top box to obtain additional interactive content (from the Internet) that is designed to accompany the television program viewed by the subscriber.

b. AOLTV

227. AOL offers ITV services via its AOLTV set-top boxes. The AOLTV service provides interactive television programming in conjunction with video programming to create interactive television channels. AOLTV services also currently include an EPG and most features of AOL's ISP service, such as limited Web browsing, e-mail, IM, and chat. AOL has deployed its AOLTV set-top boxes in several U.S. cities, including Phoenix, Sacramento and Baltimore, for sale through Circuit City and other retailers.[562] To receive the service, consumers in these cities must purchase an AOLTV set-top box and subscribe to AOLTV at a rate of $14.95 per month for current AOL ISP subscribers or $24.95 per month for AOLTV customers that do not subscribe to the AOL ISP service.[563] The subscriber need not purchase the AOL ISP service (or any ISP service) in order to receive AOLTV because the interactive set-top box interfaces with the Internet directly using standard Internet Protocol ("IP").

228. At present, the AOLTV service can be provided to both cable and DirecTV subscribers, but utilizes only a narrowband telephone connection to the Internet. The current AOLTV box is not integrated into a cable or DBS set-top box. Instead, the current AOLTV box receives video programming from a separate cable or DBS set-top box, and receives two-way narrowband interactive services via a telephone line. The AOLTV box then blends the interactive content and the video programming for viewing on the subscriber's television set. At this time, the interactive triggers, the customer's request for interactivity and further interactive content are transported to the subscriber's television through the AOLTV set-top box's connection to the Internet.

229. AOL intends to upgrade its AOLTV service to a high-speed Internet platform, using cable modems, DSL, and DBS.[564] As a preliminary step, AOL may continue to employ a stand-alone ITV-STB that connects to a cable or DBS set-top box that contains a high-speed cable modem, DSL line, or high speed DBS Internet connection.[565] AOL states that it will complete this upgrade by integrating

[562] America Online, Inc., *AOL Launches AOLTV* (press release), June 19, 2000, at 1.

[563] Mindy Charski, *AOL Announces Interactive TV for Eight Cities*, ZDNET NEWS, June 19, 2000 at http:\\www.zdnet.com (visited Oct. 2, 2000). The AOLTV set-top box retails for $249.00. *Id.*

[564] Applicants' Second Response at 5.

[565] *Id. See also* Ex Parte Comments of Applicants' (Aug. 25, 2000) ("Applicants' Aug. 25 Letter"), Attachment at 2, transmitted by letter from Peter D. Ross on behalf of AOL and Time Warner to Magalie Roman Salas, Secretary, FCC, dated Aug. 25, 2000.

AOLTV functionality into DBS set-top boxes that contain high-speed Internet connections.[566] AOL has had preliminary discussions to incorporate its AOLTV software into the Time Warner cable set-top box, and AOL and DirecTV have entered into an agreement in which Hughes will manufacture a set top box that integrates DirecTV and AOLTV.[567] In addition, the Applicants state that AOLTV will incorporate additional features such as personal video recording capability and more advanced interactive programming, including services that would enable video programmers to use and customize AOLTV features such as chat for special television events.[568]

c. Other ITV Services and ITV Companies

230. ITV services can be offered directly to consumers by the ITV service provider (such as AOLTV or WebTV) or through a partnership between a transport provider (such as a cable or DBS operator) and an ITV provider (such as WorldGate). When ITV services are offered directly to consumers, typically consumers must purchase a set-top box and then contract with an ITV provider for service. When ITV services are offered through partnerships between transport providers and ITV providers, often ITV components are integrated into the transport provider's set-top box, and the service is offered in addition to the transport provider's existing video services. These services are then marketed by the transport provider as a premium offering supplemental to its existing array of services. ITV providers may, in turn, rely on partnerships with other vendors for certain components of the ITV product. AOL, for example, contracts with Philips Electronics to build its ITV-STB and licenses software for the ITV-STB from Liberate.[569]

231. At this early and fluid stage of the ITV market, there are a growing number of firms that now provide or plan to provide ITV service. The types of ITV services offered and the business models used by these companies vary widely. For purposes of our analysis, it is useful to examine a non-exhaustive sampling of existing ITV services and business models.

232. *ITV Providers.* Microsoft Corp. has approximately one million users subscribing to its WebTV product.[570] WebTV provides e-mail and Internet access, and also enables interactivity with certain television programs. At present, WebTV customers must buy a separate ITV-STB for use in conjunction with the box of their selected MVPD provider, though plans exist to integrate WebTV directly into MVPD set-top boxes. For example, EchoStar's Dish Network set-top boxes will include WebTV Plus, which will provide additional features such as on-line banking, shopping, and video programming storage.[571] In addition, Microsoft, Thompson RCA, and DirecTV announced plans to

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[566] Applicants' Second Response at 5, 8. *See also* Ex Parte Comments of Applicants' (Aug. 22, 2000) ("Applicants' Aug. 22 Letter") at 8, transmitted by letter from Peter D. Ross on behalf of AOL and Time Warner to Magalie Roman Salas, Secretary, FCC, dated Aug. 22, 2000.

[567] Applicants' Second Response at 8; Bob Sullivan, *Broadband from the Sky Tries Again*, ZDNET NEWS, Aug. 26, 2000 at http://www.zdnet.com (visited Aug. 29, 2000). *See also* Confidential Appendix IV-C-1, Note 1.

[568] Applicants' Second Response at 5.

[569] Patricia Fusco, *AOL Gunning for WebTV*, INTERNET.COM, June 16, 2000, at http://www.internet.com (visited June 19, 2000).

[570] Ex Parte Comments of Disney, Attachment (Aug. 16, 2000) ("Myers Group Report") at ¶ 30, transmitted by letter from Preston R. Padden, Executive Vice President, Government Relations, Disney, to Magalie Roman Salas Secretary, FCC, dated Aug. 16, 2000.

[571] *Id.*

jointly create an integrated set top box and service that will combine DirecTV satellite service and a new version of WebTV called Ultimate TV.[572] The Ultimate TV product will include personal video recording, picture-in-picture viewing and the ability to watch one program while recording another.[573] Microsoft states that it will also offer two-way satellite service that allows downloading and uploading as rapidly as cable modems or DSL.[574]

233. As an ITV service provider, Microsoft has also established business relationships with several cable MSOs and interactive software providers. In 1997, Microsoft purchased an 11.5% interest in Comcast Communications,[575] and in 1999 it entered into an agreement to supply the software for 7.5 million of AT&T's planned 10 million ITV-STBs, although technical trials have since been delayed.[576] Microsoft recently acquired Peach Networks, Ltd., which manufactures software for cable headends that enables more advanced programming to run on existing set-top boxes.[577] Microsoft has also entered into a relationship with Wink Communications, a provider of interactivity with video programming and advertising.[578] Microsoft recently announced plans to incorporate its Microsoft TV software into Whistler, the next version of the Windows 2000 operating system.[579] Under the new plan, TV signals and interactive programming would be received via a personal computer that runs the Whistler operating system, using a television set as the monitor.[580]

234. WorldGate Communications provides ITV service through a cable set-top box,[581] and offers ITV subscribers access to the Internet, e-mail and other interactive services.[582] WorldGate serves

[572] Stephanie Miles, *Microsoft Partners on Interactive TV Project*, CNET NEWS.COM, June 12, 2000, at http://www.news.cnet.com (visited Aug. 29, 2000).

[573] *Id.*

[574] Bob Sullivan, *Broadband from the Sky Tries Again*, ZDNET NEWS, Aug. 26, 2000, at http://www.zdnet.com (visited Aug. 29, 2000).

[575] Howard Wolinsky, *Interactive TV Revisited*, UPSIDE TODAY, July 25, 2000, at http://www.upside.com (visited July 26, 2000) ("Wolinsky Article").

[576] Technical trials of the AT&T ITV product have been postponed from the planned summer 2000 launch. No alternative date has been announced for the launch. *AT&T Considers MS Set-Top Alternatives*, ZDNET NEWS, Aug. 29, 2000, at http://www.zdnet.com (visited Aug. 29, 2000).

[577] Wolinsky Article; David Iler, *Interactive-TV Firms Play Merger Game*, MULTICHANNEL NEWS ONLINE, May 1, 2000, at http:\\www.multichannel.com (visited Sept. 29, 2000).

[578] Wolinsky Article.

[579] Stephanie Miles, *Will Microsoft's Next OS Run Your TV?*, CNET NEWS.COM, Sept. 5, 2000, at http://www.news.cnet.com (visited Sept. 6, 2000).

[580] *Id.*

[581] Myers Group Report at 31. Rebecca Cantwell, *Interactive TV Takes a Variety of Shapes*, ZDNET NEWS: INTER@CTIVE WEEK, July 9, 2000, at http://www.zdnet.com (visited Sept. 29, 2000)("Cantwell Article").

[582] WorldGate Communications, Inc., at http://www.wgate.com\how\how.html (visited Nov. 30, 2000). WorldGate Communications, Inc. announced plans to add RespondTV's enhanced television applications to the WorldGate ITV product. WorldGate Communications, Inc., *RespondTV to Support Enhanced Interactive Television Content Through WorldGate's Interactive TV Platform* (press release), Oct. 24, 2000.

homes using the facilities of several cable MVPDs, including AT&T, Comcast and Charter Communications.[583] As of summer 2000, 15,000 consumers subscribed to the WorldGate ITV service.[584]

235. *ITV Services Provided by MVPDs.* Cable and satellite MVPDs are also positioning themselves to introduce their own ITV services. Cox Communications has partnered with Excite@Home to launch a trial ITV product in San Diego in late 2000.[585] The Cox-branded service will provide video-on-demand, Web browsing and e-mail.[586] AT&T also plans to offer ITV in partnership with Excite@Home.[587] BellSouth announced in August that it would use Liberate to deliver ITV applications to some of its customers in the Southeast.[588]

236. *Other ITV Services.* The Applicants state that TiVo and RePLAY, providers of personal video recording service ("PVR"),[589] Wink and RespondTV (e-commerce providers), and EPG provider

[583] Cantwell Article; *see also* WorldGate Communications, Inc., *WorldGate Reports Record Third Quarter Results* (press release), Nov. 2, 2000; WorldGate Communications, Inc., *AT&T Broadband and WorldGate Announce Interactive Television Deployment in Three Cities* (press release), Nov. 6, 2000.

[584] Cantwell Article. WorldGate plans to offer service to 115,000 homes in Pennsylvania in 2001 through an agreement with cable operator Blue Ridge Communications. *Id.* In addition, in November 2000, AT&T Broadband and WorldGate announced that the companies began offering WorldGate's interactive television service in Cedar Falls and Waterloo, Iowa, and will next offer service in Tacoma, Washington. WorldGate Communications, Inc., *AT&T Broadband and WorldGate Announce Interactive Television Deployment in Three Cities* (press release), Nov. 6, 2000.

[585] Cantwell Article; AtHome Corp., *Cox Communications Signs Agreement With Excite@ Home For The Development of Advanced TV Services* (press release), Dec. 16, 1999.

[586] Cox Communications, Inc., *Cox Communications Updates Investors on Successful Delivery of Advanced Broadband Communications Services* (press release), June 1, 2000; Cantwell Article.

[587] In August 2000, AT&T announced that it will increase its economic interest in Excite@Home from 24% to 38%, and will increase its voting interest from 56% to 79%. *Excite@HomeAnnounces New Board and Completion of Partner Distribution Agreement, AT&T Assumes 74 Percent Voting Stake*, PR NEWSWIRE, Aug. 28, 2000, at http://www.prnewswire.com (visited Aug. 30, 2000); AT&T Corp., *AT&T Updates SEC Filing on* Excite@Home (press release), Jan. 12, 2001. Excite@Home and AT&T stated that they would work together "to deliver services to consumers via advanced TV." As noted above, AT&T entered into an agreement in June 2000 with Microsoft to provide interactive television software for 7.5 million of AT&T's planned 10 million Motorola-manufactured ITV set top boxes, though planned technical trials have since been delayed. In September 2000, AT&T announced it will use interactive television software from Liberate (also the software provider for AOLTV) for trials, planned for late 2000, of Motorola-manufactured ITV set-top boxes. *AT&T To Use Liberate Interactive TV Software*, ZDNET NEWS, Sept. 21, 2000, at http://www.zdnet.com (visited Sept. 24, 2000). Motorola has a 5.4% stake in OpenTV Corp., another interactive television software manufacturer. *Motorola Ups OpenTV Stake*, MULTICHANNEL NEWS ONLINE, Sept. 18, 2000, at http://www.multichannel.com (visited Sept. 24, 2000). OpenTV announced that TeleCruz Technology, Inc., will license OpenTV software for chips that can be integrated directly into television sets to enable browsing similar to WebTV; OpenTV also plans to make its software available for PCs and cellular phones. David Iler, *OpenTV Deal Bypasses Box*, MULTICHANNEL NEWS ONLINE, Sept. 11, 2000, at http://www.multichannel.com (visited Sept. 24, 2000).

[588] Jeff Baumgartner, *Liberate, OpenTV Could Make Gains on Microsoft's Turf*, MULTICHANNEL NEWS ONLINE, Sept. 4, 2000, at http://www.multichannel.com (visited Sept. 6, 2000).

[589] A PVR can pause, rewind, and perform slow motion and instant replay of a live program, thereby allowing a viewer to watch earlier portions of a program while later portions of the program are still being broadcast. A PVR can be used with a service that provides an onscreen programming guide service through a telephone connection. This technology can be used to create a personal menu that records in accordance with a viewer's television

(continued...)

Gemstar all offer elements of ITV service.[590] We note that AOL holds an ownership interest in TiVo, and Time Warner holds an interest in RePLAY, another PVR service.[591]

2. Discussion

a. Relevant Markets

237. At a global level, the developing ITV market appears to have two broad segments that may constitute separate markets. The first segment is ITV programming. The second is ITV distribution and retail. The ITV programming segment includes interactive content provided by video programming networks to accompany their video signals. ITV distribution involves the aggregation of interactive video content and other inputs in the provision of ITV services.[592] As discussed in greater detail above, AOL is an aggregator and distributor of ITV inputs, and has begun a nationwide rollout of its AOLTV product. Time Warner owns cable facilities that can be used to deliver advanced ITV services to consumers. AOL and Time Warner will become a vertically integrated provider of ITV services in Time Warner's cable territories.[593]

b. Harm to Competition

238. Commenters allege that the merged firm would have the ability to discriminate against unaffiliated programming networks.[594] AOL Time Warner could, according to commenters, discriminate against unaffiliated video programming networks by denying them access (or degrading their access vis-à-vis affiliated video programming networks) to one or all three delivery components of ITV: the cable video pipeline, the merged entity's ITV-STB, and the cable Internet connection.[595] We recognize the possibility of the alleged harm. However, we are of the view that a merger-specific condition is unwarranted given the terms of the FTC Consent Agreement and that any industry-wide intervention requires (1) a greater examination of the potentially conflicting incentives for favoring one's own programming to the detriment of competitors, and for offering as much interactive programming as possible; and (2) a fuller exploration of the technical ability and manner of potential discrimination.

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preferences.

[590] Ex Parte Comments of Applicants' (Sept. 29, 2000) ("Applicants' Sept. 29 ITV Letter") at 3, transmitted by letter from Peter D. Ross on behalf of AOL and Time Warner to Magalie Roman Salas, Secretary, FCC, dated Sept. 29, 2000.

[591] Applicants' Second Response at 29. "On July 14, 2000, AOL and TiVo announced a three-year strategic agreement and equity investment whereby AOL acquired slightly over 1% interest in TiVo." *Id.* Time Warner Inc., *Form 10-K for the Year-ended 1999 (filed as amended Mar. 30, 2000)*, at I-26. "As of March 1, 2000, investments made by [Time Warner] in digital media include ... ReplayTV ..." *Id.*

[592] At this time, we do not find it necessary to further distinguish among these ITV inputs, aside from EPGs, which we discuss below in Section IV-C-1., *supra* (Electronic Programming Guides). In particular, we find no reason to distinguish between markets for aggregation of narrowband and broadband ITV content given overlaps in the range of services.

[593] The *ITV NOI* will explore further the geographic scope of the market for ITV services.

[594] Disney July 25 Ex Parte at 1-6, 61-71; NBC July 24 Ex Parte at 1-10.

[595] Disney Reply at 12-15; Ex Parte Comments of Disney, Attachment (Sept. 25, 2000), ("Disney Sept. 25 Memorandum") transmitted by letter from Marsha McBride, Vice-President, Government Relations, Disney, to Magalie Roman Salas, Secretary, FCC, dated Sept. 26, 2000.

239. Disney argues that conditions must be placed on Commission approval of the merger[596] to prevent AOL Time Warner from using its control over the cable video pipeline, the ITV-STB, and the broadband Internet connection to discriminate against the interactive content of unaffiliated video programming networks in the following ways:[597]

- excluding unaffiliated interactive content and services,[598]
- transmitting its affiliated content at faster rates,[599]
- manipulating communications between competing content providers and customers,
- limiting unaffiliated ITV services providers from caching data locally,[600]
- favoring its own content on navigation systems and links (with more convenient consumer interfaces for its own content),[601]
- building its own links to merchant Internet sites that conflict with an unaffiliated video programming network's advertisers,[602]

[596] Disney argues that the Commission should require AOL Time Warner to separate its content from distribution as a condition to approval of the merger. Disney July 25 Ex Parte at 6. Disney asserts that if the Commission does not require such separation, the Commission should, at a minimum, require enforceable, non-discriminatory treatment of unaffiliated content and interactive service providers. Disney Reply Comments at 15; Disney July 25 Ex Parte at 6. *See also* NAB May 19 Ex Parte at 2-4; NAB Oct. 2 Ex Parte at 2; Sinclair Reply Comments at 1 ("Sinclair urges the Commission to condition the AOL/Time Warner merger on the companies' divestiture of all content," or to impose nondiscrimination requirements that prohibit the merged company from "degrading or blocking customer access to any part of the digital broadcast signals carried on its infrastructure that could be received by its customers free over the air."); MSTV Reply Comments at 1 (the Commission should impose conditions that "strictly prohibit AOL Time Warner from discriminating against the programming, navigation devices and other services delivered through the broadcast signal for free."). In addition to a "catch-all" prohibition against discrimination, Disney argues that the Commission should impose a series of specific, but not exhaustive, prohibitions of practices that would otherwise allow AOLTV to discriminate against unaffiliated content providers. Disney states that these would include prohibitions against: refusals to deal; discrimination in prices, terms or conditions of carriage; discriminatory presentation of information or displays on navigational devices or electronic program guides for purposes of enabling subscribers to select program or content offerings; discrimination with respect to downstream traffic; discrimination on the return path for interactive television services; discrimination that undermines interactive advertising opportunities; discrimination in set-top box design and architecture that fills up memory with affiliated content before loading unaffiliated content; and discrimination in caching practices. Finally, Disney recommends that the Commission use arbitration procedures to enforce these safeguards. Disney July 25 Ex Parte at 82-85.

[597] We note that prior to the merger, Time Warner already had the ability to discriminate against unaffiliated video programming networks by not carrying their interactive content on the video pipeline or the broadband Internet connection. The merger does not alter Time Warner's ability in this regard. However, the merger might encourage Time Warner to carry unaffiliated video programming content to its new affiliated AOLTV because, as discussed below, it is arguable that AOLTV will need as much interactive content as possible to successfully launch its ITV product.

[598] Disney July 25 Ex Parte at 44.

[599] *Id.*

[600] *Id.* "Caching" is the technique of storing frequently accessed content in fast memory (*e.g.*, RAM) in order to speed access to those files by eliminating delays and costs associated with reverting to the original source for the information. An ISP engages in caching when it downloads a copy of Internet content onto its own server, from which it can thereafter supply its subscribers' repeated demands for this content.

[601] *Id.*

[602] *Id.*

- making unaffiliated video programming less attractive and/or accessible to consumers,[603]
- imposing charges for each interactive commercial transaction,[604]
- restricting an unaffiliated video programming network's advertising on interactive channels so that it would not interfere with exclusive contracts that AOL Time Warner has with its advertisers,[605] and
- developing AOLTV controlled interactive advertising that undermines unaffiliated content providers' advertising.[606]

240. The record in this proceeding demonstrates that AOL Time Warner intends to integrate the cable set-top box with the AOLTV box and a high speed Internet connection and that AOL and Time Warner are well aware that control over the set-top box would enable the merged firm to favor its own content.[607] In addition, we agree with Dr. Haseltine's findings that AOL Time Warner could use equipment at the cable headend in order to discriminate.[608] While AOL and Time Warner do not dispute Disney's allegations that they have the technical ability to use the three components – Time Warner's video pipeline and broadband Internet connection and AOLTV's set-top box – in the manner alleged, they argue that they have no incentive to do so.[609] Based on this record, it appears that the merged entity would have conflicting incentives. Applicants assert that the merged entity has the incentive to carry as much interactive programming as possible so that AOLTV will be attractive to consumers.[610] AOL Time Warner states that its AOL ITV-STB will activate the ATVEF interactive content of unaffiliated video programming networks, without any agreement with or payment to AOL, so that AOLTV subscribers may view unaffiliated interactive content.[611]

241. However, the record also contains evidence that AOL has a history of negotiating exclusionary deals once it is in its economic interest to do so.[612] AOL may cease its current practice of carrying interactive content of unaffiliated programmers without AOLTV carriage agreements once it has achieved some level of success in the marketplace. We note that if AOLTV becomes successful, it may be less dependent on the interactive content of unaffiliated video programming networks and therefore

[603] Disney July 25 Ex Parte at 44; Ex Parte Comments of Disney, Attachment (Sept. 5, 2000) ("Disney Sept. 5 Memorandum") at 11, transmitted by letter from Marsha McBride, Vice-President, Government Relations, Disney, to Magalie Roman Salas, Secretary, FCC, dated Sept. 14, 2000; NBC July 24 Ex Parte at 5-6.

[604] Disney Sept. 5 Memorandum at 11.

[605] Disney July 25 Ex Parte at 44.

[606] *Id.*

[607] *See* Applicant's Second Response at 5, 8; Confidential App. IV-D-1, Note 1.

[608] Ex Parte Comments of Disney, Attachment (Oct. 25, 2000) ("Declaration of Eric C. Haseltine") at 1-2, transmitted by letter to Lawrence R. Sidman, Counsel for Disney, to Magalie Roman Salas, Secretary, FCC, dated Oct. 25, 2000.

[609] *See* Applicants' Sept. 29 ITV Letter.

[610] Applicants' Sept. 29 ITV Letter at 5 ("[t]here is no advantage in denying consumers access to a full array of content sources. AOL and Time Warner's surest route to failure in interactive television would be to restrict or degrade consumers' access to a true diversity of interactive content and service offerings.").

[611] Applicants' Sept. 29 ITV Letter at 5.

[612] *See* Confidential Appendix. IV-D-1, Notes 1 and 2.

may be in a position to discriminate against them in the terms, conditions and prices for carriage on AOLTV.[613] At the same time, unaffiliated video programming networks will likely become more dependent on interactive television commerce revenue. Some analysts predict that while video programmers' revenues from traditional advertising will decline over the next few years, lost revenue will be replaced by new revenue from interactive television commerce.[614] Moreover, AOL and Time Warner have stated that their MOU does not obligate them to provide access to the cable broadband platform for ITV uses.[615]

242. We believe that, at the present time, the terms of the FTC Consent Agreement will substantially mitigate any potential public interest harm that may arise from discrimination by AOL Time Warner with regard to ITV content or service. The FTC has ordered that AOL Time Warner not discriminate in the transmission and carriage of content[616] that it has agreed to carry, and has forbidden AOL Time Warner from blocking or otherwise interfering with interactive content transmitted by an unaffiliated ISP.[617] Thus, it would appear that unaffiliated video programming networks could utilize alternatives to AOLTV for distribution of their interactive content. For example, even if AOL Time Warner refused to carry an unaffiliated video programmer's interactive content with its video signal,[618] the video programmer could seek to deliver its interactive content via an unaffiliated ISP on AOL Time Warner's cable system. Further, the FTC Consent Agreement would prohibit AOL Time Warner from blocking subscribers' access to any interactive content that is carried on the AOL Time Warner facilities and thus would enable subscribers to access such content as part of an ITV service provided by an unaffiliated entity.[619] If unaffiliated video networks have alternatives to the video pipeline for the provision of competitive interactive services to consumers (comparable to a cable-affiliated ITV provider that has access to a video pipeline), then AOL Time Warner's refusal to carry interactive content with the video signal would not appear to harm the public interest. Therefore, in light of the FTC's actions, we

[613] NAB notes that in *Time Warner Entertainment Co., L.P. v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000), the court, when reviewing the channel occupancy limits of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (47 U.S.C. § 533(f)(1)(B)), stated that "[Time Warner] does not deny that a cable operator has an incentive to favor its affiliated programmers; where the two forces are in conflict, the operator may, as a rational profit-maximizer, compromise the consumers' interests." NAB Oct. 2 Ex Parte at 2.

[614] Disney Oct. 25 Ex Parte at n. 37; Myers Group Report at 13 (predicting that advertising revenues from interactive television, including e-commerce and subscription fees, will reach $20 billion by 2005).

[615] *See* Ex Parte Comments of Applicants (Sept. 6, 2000) ("Applicants' Sept. 6 Letter") at 12, transmitted by letter from Craig A. Gilley, Fleishman & Walsh, to Magalie Roman Salas, Secretary, FCC, dated Sept. 6, 2000. *See also* Confidential Appendix IV-D-1, Note 3.

[616] The *FTC Consent Agreement* construes the term "content" to include interactive signals and interactive triggers. *See FTC Consent Agreement* Section I.R. (defining content as "data packets carrying information including, but not limited to, links, video, audio, text, e-mail, message, interactive signals, and interactive triggers.").

[617] *See FTC Consent Agreement* Section III.A. ("Respondents shall not interfere . . . with Content passed in either direction along the Bandwidth contracted for and being used by any non-affiliated ISP in compliance with the Non-affiliated ISP's agreement with Respondents.").

[618] *See* Disney Sept. 25 Memorandum at 3-4; Ex Parte Comments of Disney (Sept. 14, 2000) ("Disney Sept. 14 Ex Parte") at 2-3, transmitted by letter from Marsha McBride, Vice-President, Government Relations, Disney, to Magalie Roman Salas, Secretary, FCC, dated Sept. 14, 2000.

[619] *FTC Consent Agreement* Section III.C. ("Respondents shall not interfere with the ability of a Subscriber to use, in conjunction with ITV services provided by a Person that is not Affiliated with Respondent, interactive signals, triggers, or other Content that Respondents have agreed to carry.").

disagree with Disney that the Commission should impose a merger condition with respect to unaffiliated video programming networks and interactive content providers that does not apply industry-wide.

243. We note that Disney has provided evidence that suggests that alternatives to the cable video path may not ultimately provide competitive outlets for the provision of ITV services.[620] We find that it is necessary to develop a more complete record in this regard to determine whether rules of general applicability are needed to promote competition and diversity in the provision of ITV services. Our *ITV NOI* will explore further what types of services should be defined as ITV, what types of ITV business models will prevail, how ITV services will be delivered, and whether there are competitive alternatives to a cable operator's affiliated ITV provider for the provision of ITV services.[621]

E. Multichannel Video Programming Distribution

244. In this section we examine the merger's potential effects on the video services provided by multichannel video programming distributors ("MVPDs").[622] MVPDs include cable operators, direct broadcast satellite providers ("DBS"), multichannel multipoint distribution services ("MMDS"), and satellite master antenna television ("SMATV") providers.[623] In *AT&T-TCI*, we concluded that the relevant geographic market for MVPD service is local.[624] One or more MVPD providers furnish MVPD services in local franchise areas. Only one cable operator serves most franchise areas. In a limited number of franchise areas, a second cable operator (an "overbuilder") or MMDS operator also offers service. SMATV providers generally offer service in any setting in which a public right-of-way is not crossed, but do not provide competition throughout a local franchise area. DBS providers also distribute MVPD services and are available nationwide to consumers with an unobstructed southern view.

245. Time Warner is the dominant provider of multichannel video programming services in those local markets in which it operates franchised cable systems. America Online does not directly operate any company providing MVPD service, but does have an ownership interest in DBS operator DirecTV's corporate parent, Hughes.

246. We examine below specific allegations of harm to MVPDs arising from the combination of Time Warner's cable systems with AOL's ownership interest in DirecTV, as well as concerns about

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[620] *See, e.g.*, Disney July 25 Ex Parte at 34-36; Disney Reply Comments at 8; Myers Group Report at 39. We note that the Applicants argue that existing broadband alternatives, such as DSL, are equivalent to a cable Internet connection. Applicants' Sept. 29 ITV Letter at 8. However, such alternatives may not currently be able to support ITV services comparable to those that can be provided using a cable Internet connection.

[621] *See ITV NOI*, FCC 01-15.

[622] *See* 47 U.S.C. § 522(13) (defining MVPD as "a person, such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming").

[623] *See AT&T-TCI Order*, 14 FCC Rcd at 3172-73 ¶ 21. DBS operators provide programming via satellite to subscribers that own or lease small-diameter receiving dishes. MMDS providers offer programming via microwave facilities (the service is often referred to as "wireless cable service"). SMATV operators, also known as 'private cable operators," also frequently use microwave facilities to transmit programming to subscribers. SMATV subscribers usually reside in multiple dwelling units. *Id.*

[624] *AT&T-TCI Order*, 14 FCC Rcd at 3172-73 ¶ 21.

MVPDs' access to Time Warner video programming post-merger.[625] We conclude that the merger will not present any public interest harms affecting MVPD services.

1. Common Ownership of DBS and Cable MVPDs

247. As discussed in Section IV.C.3 above, AOL paid GM $1.5 billion for 2,669,663 shares of non-voting GM Preference Stock that tracks the performance of Hughes, GM's wholly owned subsidiary.[626] If AOL converted its GM Preference stock into GM voting equity, AOL would hold approximately 1.76% of GM's voting equity.[627] GM's wholly owned subsidiary DirecTV, the nation's largest DBS provider, served 8.3 million MVPD customers nationwide as of March, 2000.[628] Commenters argue that the merged firm's ownership interests in both DirecTV and Time Warner will enable the merged firm to harm competition between DBS and cable MVPDs.[629] Consumers Union asserts that the merged firm will harm the ability of DirecTV to compete with cable.[630] Although the Commission does not have a rule barring cross-ownership of both a DBS and cable MVPD, RCN argues that the Commission has the discretion to address any competitive harms caused by such cross-ownership on a case by case basis.[631] Consumers Union and ACA request that the Commission order AOL to divest its interest in GM, DirecTV's parent, as a condition of the merger.[632]

248. With respect to the merged firm's ownership interest in GM, we find that the proposed merger will not violate the Communications Act or any Commission rules, nor will it frustrate the implementation of the Communications Act or its goals. We conclude that the merger will not result in public interest harms regarding competition between DBS and cable.

249. Although legislation introduced in the Senate proposed a cable/DBS cross-ownership ban in the 1992 Cable Act, the House and Senate Conference decided that it was premature to adopt such a

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[625] We note that Everest Connections Corp. ("Everest"), a broadband cable overbuilder, in a late filed comment in this proceeding, states that leading set-top box and cable equipment manufacturers claim that they cannot provide their products to companies, like Everest, that intend to operate MVPD systems in competition with Time Warner cable systems. These manufacturers, according to Everest, will provide equipment to Everest only if it agrees that it will not use the equipment to compete with Time Warner. Everest Comments at 1-3. Everest asks that the Commission condition the merger on a requirement that Time Warner not prohibit equipment vendors from supplying equipment to Time Warner's MVPD competitors. Everest Comments at 5-7. If Everest's allegations are accurate, Time Warner's actions are disturbing because they apparently are impeding consumers' ability to purchase competing MVPD services. Nevertheless, Everest has not sufficiently established how the merger would affect Time Warner's behavior in this regard. Moreover, Everest does not allege that Time Warner is violating any Commission rule or provision of the Communications Act. Hence, we cannot conclude that Time Warner's alleged behavior constitutes a merger-specific public interest harm.

[626] *See* Applicants' March 21 Supplemental Information at 11-12 n.15.

[627] *Id.* at 14.

[628] *Id.* at 12

[629] Consumers Union Comments at 35; ACA Comments at 12-14.

[630] Consumers Union Comments at 35.

[631] RCN Comments at 6 (citing *In re Policies for the Direct Broadcast Satellite Service*, IB Docket No. 98-21, Notice of Proposed Rulemaking ("*DBS NPRM*"), 13 FCC Rcd 6907, 6939 ¶¶ 56, 58 (1998)).

[632] Consumers Union Comments at 157; ACA Comments at 13-14.

ban at that time.[633] The conferees stated that they expected "the Commission to exercise its existing authority to adopt such limitations should it be determined that such limitations would serve the public interest."[634] The Commission subsequently decided that "its authority to approve transfers of control of licenses would enable it to address any competitive concerns raised by subsequent proposals by cable affiliated entities to acquire DBS spectrum."[635] In 1998, the Commission initiated a rulemaking seeking comment whether the Commission should adopt DBS ownership rules, including DBS cross-ownership rules with cable operators.[636] This rulemaking is still pending. In the meantime, we examine "specific competition and public interest concerns related to DBS ownership on a case-by-case basis."[637]

250. In this case, we find that the merged entity's indirect interest in DirecTV does not rise to the level of ownership that ordinarily triggers scrutiny by the Commission. Therefore, we need not examine whether the common ownership of both a DBS and a cable MVPD provider raises public interest concerns. We agree with the Applicants that AOL does not have an interest in DirecTV's parent, GM, that confers on AOL the ability to influence or control DirecTV such that AOL should be deemed the "owner" of DirecTV for the purposes of a DBS/cable competitive analysis.[638] As noted above, the Commission does not have ownership or attribution rules that apply to satellite spectrum ownership. Under our various other ownership rules, the Commission has generally found that a voting equity interest of 5% or more is required to confer influence or control on the interest holder in order to deem the interest holder an "owner" for purposes of the applicable rule.[639] As discussed above, AOL holds nonvoting equity in DirecTV's parent that, if converted, would constitute less than 2% of the voting equity of GM. Thus, we would not treat AOL as an owner for purposes of our other ownership rules, and the commenters have made no credible arguments why AOL's less than 2% voting equity interest should be treated differently under these circumstances. Because the record does not demonstrate that AOL has the ability to influence or control DirecTV, we need not examine further whether this merger poses potential harms to competition between DBS and cable.

251. Nevertheless, if the merged firm increases its ownership interest in Hughes and/or GM, we reserve discretion to decide whether the increased ownership interest poses a threat to DBS/cable competition. Accordingly, as a condition of this merger, we will require the Applicants to notify the Commission in writing of any transactions that increase the Applicants ownership interest in Hughes and/or GM, within 30 days of the transaction.[640]

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[633] H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992).

[634] H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992).

[635] *See DBS NPRM*, 13 FCC Rcd at 6938 ¶ 56.

[636] *See id.* at 6939 ¶ 58 n.132.

[637] *See id.* at 6939 ¶ 58.

[638] *See* Applicants' March 21 Supplemental Information at 12-14.

[639] *See, e.g.*, 47 C.F.R. § 76.501 n.2(a) (cable/broadcast station cross-ownership rule); 47 C.F.R. 76.503 n.2 (cable horizontal ownership rule); 47 C.F.R. § 73.3555 n.2(a) (broadcast multiple ownership rules); 47 C.F.R. § 21.912 n.1(a) (cable/MMDS cross-ownership rule).

[640] *Cf. In re AMRC Application for Authority to Construct, Launch, and Operate*, File Nos. 72-SAT-AMEND-97, 10/11-DSS-P-9312/15/92, 26/27-DSS-LA-931/15/93, 83/84-SAT-AMEND-953/10/95, 72-SAT-AMEND-97, Order and Authorization, 13 FCC Rcd 8829, 8842 ¶ 27 (1997) (requiring WorldSpace to seek Commission approval prior to exercising options to purchase additional shares of ARMC); *In re KaStar*, File Nos. SAT-T/C-19990629-00071, SAT-T/C-19990629-00072, Memorandum Opinion and Order, 15 FCC Rcd 1615, 1620, 1622 ¶¶ 13, 21 (1999) (continued...)

2. Program Access Issues

252. Commenters allege that the merger would harm unaffiliated MVPDs, and assert that the Commission should remedy this potential harm by expanding the scope and application of its program access rules to cover terrestrially delivered video programming and contracts between cable operators and unaffiliated programmers.[641] These rules are designed to prevent vertically integrated programming suppliers from favoring affiliated cable operators over unaffiliated MVPDs in the sale of satellite-delivered programming. The record does not support a finding that the merger would enable or increase the likelihood of harm to competing MVPDs with respect to the sale of video programming. Accordingly, we find it unnecessary to impose remedial conditions.

253. The program access rules apply to cable operators and programming vendors affiliated with cable operators that deliver video programming via satellite to a cable operator.[642] The Commission adopted these rules pursuant to Section 628 of the Communications Act,[643] through which Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other MVPDs in the sale of satellite cable and satellite broadcast programming.[644] Among other restrictions, the rules prohibit any cable operator that has an attributable interest[645] 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.[646] The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices or terms and conditions of sale of satellite-delivered programming to cable operators and other MVPDs.[647] Additionally, cable operators generally are prohibited from entering into exclusive distribution arrangements with affiliated programming vendors.[648]

254. RCN contends that Time Warner has "migrated" affiliated programming from satellite to terrestrial delivery so that it will not be required to give competing MVPDs access to this programming. RCN argues that AOL Time Warner's ability to shield terrestrially delivered affiliated programming, such as local news or sports programming, from the program access rules will substantially impair its ability,

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(requiring licensee to notify the Commission of transactions involving the sale of its shares by certain parties).

[641] 47 C.F.R. §§ 76.1000-76.1004. The terms "terrestrially delivered" and "satellite delivered" refer to the delivery of programming to a cable system headend.

[642] 47 C.F.R. §§ 76.1000-76.1004; *see also AT&T-MediaOne Order*, 15 FCC Rcd at 9852-55 ¶¶ 77-83.

[643] 47 U.S.C. § 548.

[644] 1992 Cable Act § 2(a)(5).

[645] The attribution of corporate interests for purposes of the program access rules is determined under sections 76.501 and 76.1000(b) of the Commission's rules. *See* 47 C.F.R. §§ 76.501 n.2., 76.1000(b).

[646] 47 C.F.R. § 76.1002(a).

[647] 47 C.F.R. § 76.1002(b). This restriction is subject to certain limited exceptions. *Id.*

[648] 47 C.F.R. § 76.1002(c). Relief may be granted pursuant to a Commission determination that specific exclusive arrangements are in the public interest. 47 C.F.R. § 76.1002(c)(4). In addition, exclusive arrangements entered into prior to June 1, 1990, are "grandfathered," or exempt from the exclusivity prohibition, provided they were not extended or renewed after October 5, 1992. 47 C.F.R. § 76.1002(e).

and that of other MVPDs, to compete.[649] SBC echoes these sentiments in its comments.[650] RCN also expresses concern about the Applicants' potential power as a purchaser of video programming, and further suggests that the combined entity's forays into interactive TV, and its ownership stake in DirecTV's parent Hughes, would exacerbate its market power, allowing it to exercise substantial power in the programming marketplace.[651] RCN contends that this power, in turn, might lead unaffiliated programmers to discriminate against RCN and other overbuilders by offering the Applicants exclusive contracts or preferential treatment.

255. To remedy these alleged problems, RCN first proposes a merger condition that would require the Applicants to provide programming to other MVPD competitors "without reference to its mode of delivery."[652] Similarly, SBC asks that the Commission condition the merger on AOL Time Warner's agreement to comply with the program access rules, "regardless of the technology used to distribute its content at the wholesale level."[653] Second, RCN requests that we require AOL Time Warner to comply with the program access rules "without the requirement of vertical integration."[654] Such a condition would prevent the Applicants from entering into exclusive arrangements with unaffiliated programmers. Digital Access, another cable overbuilder, seeks the same condition, based on its inability to obtain sports programming from the Midwest Sports Channel, which has an exclusive contract with Time Warner Cable in the Milwaukee, Wisconsin market.[655] AOL and Time Warner oppose these conditions, arguing both that the proposed conditions are inconsistent with existing statutory language, and that they are unrelated to the merger.[656]

256. There is no record evidence suggesting that the merger would either create or enhance the ability or incentive of AOL Time Warner to prevent competing MVPDs from gaining access to Time Warner's video programming through the migration of such programming from satellite to terrestrial delivery.[657] Thus we cannot conclude that competing MVPDs will suffer any harm in this context. Accordingly, we decline these commenters' invitation to apply the program access rules or equivalent restrictions to terrestrially delivered programming distributed by the merged company.[658] We also reject

[649] RCN Comments at 13.

[650] SBC Comments at 38.

[651] RCN Comments at 12.

[652] *Id.* at 13.

[653] SBC Comments at 38.

[654] RCN Comments at 13.

[655] Letter from Samuel W. Morris, Jr., Senior Vice President – General Counsel, Digital Access, Inc. to Magalie Roman Salas, Secretary, FCC, dated October 17, 2000 at 1-2, transmitted by letter from William Fishman, Swidler Berlin Shereff Friedman, to Magalie Roman Salas, Secretary, FCC, dated Oct. 17, 2000.

[656] Applicants' Reply Comments at 49.

[657] In Section IV.A., *supra*, (High-Speed Internet Access Services) we address AOL Time Warner's potential ability and incentive to use its control of popular video programming networks to obtain favorable rights of access by AOL on the facilities of non-AOL Time Warner cable systems.

[658] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding the Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("*Program Access Order*"), 12 FCC Rcd 22840, 22861 (1997). As we stated in the *Program Access Order*, there are no indications at this time that terrestrial delivery of programming formerly delivered by (continued...)

RCN's proposal that we apply our program access rules to AOL Time Warner's dealings with unaffiliated programmers. Again, there is no evidence suggesting that the merged firm's incentive or ability to enter into exclusive contracts with unaffiliated video programmers would be greater than Time Warner's current ability to do so. While we are cognizant of the harm that exclusive contracts can cause overbuilders in local markets, we cannot conclude that the merger will harm competing MVPDs seeking to purchase non-Time Warner video programming.

F. COORDINATION WITH AT&T

257. In this section we consider whether the merger would increase the likelihood of coordinated action by AOL Time Warner and AT&T that would harm the public interest. We conclude that it would. We have already found that the merger would enable AOL Time Warner to obtain preferential access on both Time Warner and non-AOL Time Warner cable systems to provide AOL's residential high-speed Internet access services.[659] We find that among all non-AOL Time Warner cable operators, AT&T, the nation's largest cable operator, would be particularly likely to afford preferential access rights to AOL as a result of the merger. Because AT&T is the nation's largest cable operator, such preferential treatment for AOL would exacerbate the harms to competition for residential Internet access service that would result from the merger.

258. Although commenters request that in this proceeding we order AT&T's structural separation from Time Warner, we need not address this issue because AT&T has already elected to divest its interest in TWE.[660] Notwithstanding AT&T's withdrawal from TWE, there still exists the possibility of anticompetitive coordination between AT&T and AOL Time Warner. We conclude that the adverse effects of potential coordination between AT&T and AOL Time Warner as a result of the merger would be sufficiently mitigated by a condition that prohibits AOL Time Warner from entering into exclusive contracts with AT&T for access by AOL Time Warner's affiliated ISPs and that further prohibits AOL Time Warner from interfering with AT&T's ability to offer other ISPs any rates, terms, or conditions of service that AT&T and an ISP find mutually agreeable.

1. Background

259. AT&T holds attributable ownership interests in cable systems, including its interest in TWE, that serve approximately 51.3% of the nation's cable subscribers.[661] Through Liberty Media Group

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satellite is a significant competitive problem. See also *DirecTV, Inc. v. Comcast Corp., Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints*, Memorandum Opinion and Order, CSR 5244-P (rel. Nov. 20, 2000) ¶ 12.

[659] *See* Section IV.A., *supra*. (High-Speed Internet Access Services)

[660] *See* SBC Comments at 30-32; BellSouth Reply Comments at 18-19; Consumers Union Comments at 2-7; 157.

[661] These numbers are calculated according to our attribution rules. *See* 47 C.F.R. § 76.503 notes. *AT&T-MediaOne Order*, 15 FCC Rcd at 9819 ¶ 3. Absent TWE, AT&T serves 34.6% of the nation's cable subscribers and 26.5% of the nation's MVPD subscribers. 15 FCC Rcd at 9836-37 ¶ 42. TWE serves 18.9% of the nation's cables subscribers. To avoid double counting, this TWE subscriber figure does not include 1,416,000 subscribers that AT&T and TWE jointly serve through a joint partnership agreement. *See also AT&T-MediaOne Order* 15 FCC Rcd at 9823 ¶ 14 (stating that AT&T has 18,959,000 subscribers prior to its merger with MediaOne); *id.* at 15 FCC Rcd at 9824 ¶ 17 (stating that total U.S. subscribers equal 67.1 million; *id.* at 9829-30 ¶ 26 note 95 (stating that MediaOne had 5,000,000 subscribers prior to its merger with AT&T, and that Time Warner subscribers attributable to MediaOne include both TWE and Time Warner Inc. subscribers); *id.* at 9833 ¶ 32 (stating that AT&T will sell a (continued...)

("Liberty Media") and other holdings, AT&T also is a major supplier of video programming.[662] In addition, AT&T controls Excite@Home, the nation's largest broadband ISP.[663] Excite@Home serves approximately 1.15 million subscribers over both AT&T cable systems and over cable systems owned by other cable companies.[664] AT&T has an exclusive contract with Excite@Home that expires June 30, 2002. Once the contract expires, AT&T can choose whether to afford other ISPs access to its cable plant in competition with Excite@Home, as well as the terms and conditions of such access.[665] On October 25, 2000, AT&T announced that it would restructure each of its major units into four separate, publicly-held companies traded as a common stock or tracking stock.[666] AT&T Broadband, the unit responsible for broadband services, including MVPD, pay TV and high-speed Internet access services, will assume ownership of Excite@Home.[667] AT&T also offers local telephone service over its cable systems, and has sought to provide local telephone service over other cable systems. As a result of its merger with

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certain number of subscribers, later determined to be 750,000, to Comcast upon consummation of its merger with MediaOne). The cable horizontal ownership rule limits a cable operator to 30% of the nation's MVPD subscribers. *See* 47 C.F.R. § 76.503.

[662] Liberty Media also holds an ownership interest in Time Warner Inc. that amounts to approximately 9% of the non-voting equity and less than one percent of the voting equity in Time Warner Inc. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9825 ¶ 19.

[663] AT&T holds a 74% voting interest in Excite@Home. Other entities holding an ownership interest in Excite@Home include Comcast Corp., Cox Communications, Inc., Cablevision Systems Corp., and Shaw Cablesystems Ltd. *AT&T-MediaOne Order*, 15 FCC Rcd at 9826 ¶ 21 n.64.

[664] *See* Patricia Fusco, *Top 12 ISPs by Subscriber*, INTERNETNEWS.COM, at http://www.isp-planet.com/research/isp_071000.html (no date). Both Road Runner and Excite@Home are, by contract, the exclusive ISPs of the cable operators they serve, until December, 2001, and June, 2002, respectively. *See AT&T-MediaOne*, 15 FCC Rcd at 9869 ¶ 120. Time Warner has announced, however, that its exclusivity with Road Runner will end in April 2001. *See* Time Warner Inc., *Time Warner to Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000.

[665] For example, currently AT&T and its cable affiliates have an arrangement to feature the Excite@Home ISP on their cable Internet service exclusively until June 30, 2002, and on a preferred basis until 2008. *See* SBC Comments at 9; *AT&T-MediaOne Order*, 15 FCC Rcd at 9869 ¶ 120; *see also* AT&T Corp., *Eight ISPs Join AT&T Broadband Choice Trial* (press release), Nov. 1, 2000 (stating that AT&T has begun offering on a trial basis to a limited number of customers ISP choice for high-speed, always-on cable Internet service over a hybrid fiber-coaxial network); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp., CS Docket No. 99-251*, Letter from James W. Cicconi, General Counsel, AT&T, to William Kennard, Chairman, FCC, dated Dec. 6, 1999 (in which AT&T committed to provide unaffiliated ISPs access to its cable systems following the expiration of its exclusive arrangement with Excite@Home in 2002, and affirmed its commitment to "openness"), transmitted by letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Dec. 7, 1999.

[666] The four units will include AT&T Broadband, which operates AT&T's cable systems; AT&T Business, which provides business communications and networking services; AT&T Consumer, which provides pre-paid calling cards, "stand alone residential long distance," and residential dial-up Internet access service; and AT&T Wireless. Each of the four new companies will continue to bundle each other's services through inter-company agreements. AT&T Corp., *AT&T To Create Family of Four New Companies* (press release), Oct. 25, 2000.

[667] AT&T plans to conduct an initial public offering for stock that will track the performance of the Broadband unit during the summer of 2001. AT&T Corp., *AT&T To Create Family of Four New Companies* (press release), Oct. 25, 2000.

MediaOne, AT&T acquired a 34.67% direct interest in Road Runner, the nation's second largest broadband ISP, and a 25.5% interest in TWE.[668] Time Warner owns the remaining 74.49% of TWE.

260. TWE owns or operates Time Warner's cable systems, which serve approximately 12.7 million, or 18.9% of the nation's cable subscribers.[669] TWE is also a major producer of video programming and controls Road Runner.[670] Time Warner controls the day-to-day management of the TWE cable systems and the other TWE assets.[671] AT&T currently has no right to participate in day-to-day management of TWE.[672] According to AT&T, however, its ownership interest in TWE does confer rights to vote on specified "Participant Matters," and gives it veto power over, among other things, any merger involving TWE, the sale or transfer of more than ten percent of TWE's assets, the expansion of TWE into new lines of business and the transfer or sale of TWE assets.[673] Time Warner enjoys the same voting rights.

261. As a result of its acquisition of MediaOne and MediaOne's interest in Road Runner, AT&T presently is subject to a DOJ consent decree. In the complaint accompanying the Consent Decree,

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[668] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9831 ¶ 28.

[669] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9836-37 ¶ 42 n.145.

[670] AT&T therefore has both a direct and, through TWE, an indirect interest in Road Runner and in the production of video content.

[671] *See Applications for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Docket No. 99-251, Letter from Betsy J. Brady, Esq., Vice President Federal Government Affairs, AT&T to To-Quyen Truong, Associate Chief, Cable Services Bureau, dated Nov. 24, 1999, at 2, 9-15, *see also* Letter from Peter D. Ross, Counsel for America Online, Inc., and Arthur H. Harding, Counsel for Time Warner Inc., to Deborah Lathen, Chief Cable Services Bureau, FCC, dated Oct. 5, 2000 ("Ross-Harding Oct. 5 Letter") at 3.

[672] MediaOne's right to participate in the day-to-day management of TWE terminated in 1999 as a result of a non-compete provision in the TWE limited partnership agreement that prohibited MediaOne from competing in any lines of business with TWE. MediaOne had the right to unilaterally terminate the non-compete clause. Upon termination by MediaOne, Time Warner had the right to terminate entirely MediaOne's right to participate on the TWE cable management committee. *See Applications for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Docket No. 99-251, Letter from Betsy J. Brady, Esq., Vice President Federal Government Affairs, AT&T to To-Quyen Truong, Associate Chief, Cable Services Bureau, dated Nov. 24, 1999 at 2-3 n. 7; *see also* Letter from Betsy J. Brady, Vice President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, dated FCC, Nov. 28, 2000 (AT&T Nov. 28 Ex Parte) at 1.

[673] According to AT&T, these rights include: "veto rights over any merger involving Time Warner Entertainment; the sale or transfer of assets constituting more than 10% of Time Warner Entertainment Assets; the expansion of Time Warner Entertainment into new lines of business; the specified issuance of additional partnership interest; the indemnification of any partner or affiliate for liability in excess of $500,000; incurrance of debt for money borrowed above a defined ratio; the admission of a new general partner; certain acquisitions above the greater of $750,000 or 10% of Time Warner Entertainment's consolidated revenues for its most recent fiscal year; the dissolution of Time Warner Entertainment; the voluntary bankruptcy of Time Warner Entertainment; the amendment or modification of the Time Warner partnership agreement; and the transfer or sale of certain major interests in Time Warner or any sub-partnership thereof. *See Applications for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Docket No. 99-251, Letter from Betsy J. Brady, Esq., VP Federal Government Affairs, AT&T to To-Quyen Truong, Associate Chief, Cable Services Bureau, dated Nov. 24, 1999, at 10; *see also AT&T-MediaOne Order*, 15 FCC Rcd at 9830 ¶ 26 n.93. Time Warner does not agree with AT&T's characterization of AT&T's rights in TWE. *See* Letter from Catherine R. Nolan, VP, Law and Public Policy, to Kathryn C. Brown, Chief of Staff, Office of Chairman, FCC, dated Oct. 13, 2000 (Time Warner Oct. 13 Ex Parte) at 1 transmitted by Letter from Peter D. Ross, Counsel for Applicants, to Magalie Roman Salas, Secretary, FCC, dated Nov. 9, 2000.

DOJ alleged that the substantial ownership interest AT&T was acquiring in Road Runner would facilitate collusion and coordination between Excite@Home and Road Runner.[674] The DOJ Consent Decree therefore requires AT&T to divest its interest in Road Runner on or before December 31, 2001, restricts AT&T's role in the management and governance of Road Runner prior to divestiture, and prevents AT&T from entering into certain agreements with Time Warner (and AOL Time Warner after the merger) with regard to Residential Broadband Service without the approval of DOJ.[675]

262. On December 18, 2000, AT&T and Time Warner announced that they would dissolve the Road Runner joint venture as required by the DOJ Consent Decree, turning over operations of Road Runner to Time Warner (and America Online after the merger).[676] The restructuring of Road Runner also would end Road Runner exclusivity on Time Warner's cable platform, permitting further opportunity for consumer choice of ISPs on Time Warner's cable platform.[677]

263. AT&T is also subject to a "video condition," imposed as a condition of the Commission's approval of AT&T's merger with MediaOne, that AT&T either: (i) divest its ownership interest in TWE;

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[674] DOJ Consent Decree Section IV ¶¶ 30-34.

[675] *U.S. v. AT&T Corp. and MediaOne Group, Inc.*, Final Judgment, 2000 WL 782849. The DOJ Consent Decree reads, in part:

> Prior to the earlier of December 31, 2003 or two years after AT&T's and MediaOne's divestiture of [Road Runner], unless they obtain prior consent of [DOJ], AT&T, MediaOne, and their Affiliates shall not (1) enter into any contractual or other arrangement with Time Warner to jointly offer or provide any wholesale or retail Residential Broadband Service; (2) enter into any contractual or other arrangement with Time Warner that has the purpose or effect of preventing AT&T, MediaOne, their Affiliates or Time Warner from offering or of providing a wholesale or retail Residential Broadband Service in any geographic region or to any group of customers; or (3) enter into any contractual or other arrangement with Time Warner that has the purpose or effect of preventing (a) services, capabilities, or features in any wholesale or retail Cable Modem Service offered by AT&T, MediaOne, their Affiliates, or Time Warner; or (b) AT&T, MediaOne or their Affiliates from granting preferential treatment in any wholesale content, services, capabilities, or features offered by any person other than Time Warner, or Time Warner from granting preferential treatment in any wholesale or retail Cable Modem Service offered by Time Warner to content, services, capabilities, or features offered by any person other than AT&T, MediaOne or their Affiliates . . . (B) [DOJ] shall consent to a proposed contractual or other arrangement if it determines in its sole discretion that such arrangement will not substantially lessen competition in any market.

DOJ Consent Decree Section V(A), (B).

The Consent Decree further defines "Residential Broadband Service" to mean "...any service offered to residential customers in the United States of America that permits users to transmit and receive information using Internet protocols at speeds which may exceed 128 kilobits per second. The Consent Decree also defines "Time Warner" to include Time Warner, TWE, Road Runner, their successors and assigns, and their parents, divisions, groups, majority-owned subsidiaries, and any entity that has a merger agreement with Time Warner and that would be included in this definition when the merger is consummated. DOJ Consent Decree Section II(F), (H).

[676] AT&T Corp., *Road Runner Joint Venture to be Dissolved* (press release), Dec. 18, 2000; Time Warner Inc., *Time Warner to Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000. At the time of the announced restructuring of Road Runner, Microsoft Corporation and Compaq Computer Corporation owned a combined 20 percent interest in Road Runner, while Time Warner, AT&T Broadband, and Advance/Newhouse together owned an 80 percent fully diluted interest. Under the restructuring plan, the interests of Microsoft and Compaq would be redeemed and Road Runner would distribute substantially all of its assets to Time Warner and its affiliates, and to AT&T Broadband.

[677] *Id.*

(ii) divest or reduce its interest in Liberty Media and other video programming companies such that AT&T terminates its involvement in TWE's video programming activities pursuant to the limited partnership exemption[678] and the officers/directors attribution waiver provisions of the cable ownership attribution rules; or (iii) divest its ownership interest in certain non-TWE cable systems. AT&T was required to make an unambiguous election of one of the three options by December 15, 2000, six months after the consummation of the AT&T-MediaOne merger, and must comply with this election by May 19, 2001. We also stated that until AT&T complies with the divestiture condition, its participation in TWE is further limited by certain other Commission-imposed restrictions.[679]

[678] The Commission's cable ownership attribution rules provide that all partnership interests are attributable because, unlike a corporate shareholder, a limited partner may influence or control the operations of the partnership even if the percentage equity interest is small. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9837 ¶ 43; *see also In re Cable Reform Act Provisions of the Telecommunications Act of 1996: Review of the Commission's Cable Attribution* Rules CS Docket Nos. 98-82, 96-85, Report and Order ("*Attribution Order*"), 14 FCC Rcd 19014, 19039 ¶ 61 (1999). However, partnership interests may be rendered nonattributable, under the insulated limited partnership exemption ("ILP"), when a partner that "is not materially involved, directly or indirectly, in the management or operation of the video-programming related activities of the partnership and the relevant entity so certifies." *See Attribution Order*, 14 FCC Rcd at 19040 ¶ 64; 47 C.F.R. § 76.503 n.2(b)(1). In order to satisfy this standard, the limited partner may not engage in the following seven activities (the "ILP test"):

(1) The limited partner cannot 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) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video programming enterprises;

(3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video programming business;

(4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions;

(5) the limited partner may not 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) the limited partner may not 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) the limited partner may not become actively involved in the management or operation of the video programming businesses of the partnership. *Attribution Order*, 14 FCC Rcd at 19040-41 ¶ 64.

See also 47 C.F.R. § 76.503 n. 2(b)(2). To utilize the ILP exemption, the limited partner must file with the Commission a certification, with supporting facts, stating that it is not involved in these seven activities. ("[T]he certification must be accompanied by facts, *e.g.*, in the form of documents, affidavits or declarations, that demonstrate that these insulation criteria are met.") *Attribution Order*, 14 FCC Rcd at 19040-41, ¶ 64.

[679] We further required that AT&T abide by several interim conditions and their enforcement mechanisms until such time as AT&T has taken the required compliance action. The interim conditions provide that:

(1) No officer or director of AT&T shall also be an officer or director of TWE. AT&T may appoint an employee (who is not an officer or director of AT&T) to the TWE Board of Directors, provided that such employee is not involved in the Video Programming activities of AT&T.

(2) No officer, director, or employee of AT&T 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 AT&T shall be involved in the following

(continued...)

264. Pursuant to the *AT&T-MediaOne Order*, on December 15, 2000, AT&T notified the Commission that it would divest its interest in Liberty Media if it obtains a favorable tax ruling,[680] and that otherwise it would divest its interest in TWE.[681] On December 18, 2000, the Cable Services Bureau requested clarification of AT&T's December 15 letter which, by making the Liberty Media divestiture contingent upon a favorable tax ruling, did "not appear to make a single election" as required by the *AT&T-MediaOne Order*.[682] On December 21, 2000, after considering AT&T's response to the Bureau's request for clarification, the Commission issued an order ruling that AT&T had not complied with the

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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 may not receive information from TWE regarding the price, terms, and conditions which TWE negotiates for the carriage of Video Programming on the TWE cable systems, nor provide information to TWE regarding the price, terms, and conditions which AT&T negotiates for the carriage of Video Programming on the AT&T cable systems. AT&T 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.

AT&T-MediaOne Order, 15 FCC Rcd at 9899, Appendix B ¶¶ 3-5.

[680] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Letter from James W. Cicconi, General Counsel, AT&T, to Deborah Lathen, Chief, Cable Services Bureau, dated Dec. 15, 2000. *See also id.* Letter from Deborah A. Lathen, Chief, Cable Services Bureau, FCC, to James W. Cicconi, General Counsel, AT&T, dated Dec. 18, 2000.

[681] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Letter from James W. Cicconi, General Counsel, AT&T, to Deborah Lathen, Chief, Cable Services Bureau, dated Dec. 15, 2000 ("[i]f, however, AT&T is unable for any reason to achieve insulation of its TWE interests by May, 19, 2001 . . . AT&T hereby certifies that it will, by such date, either divest its ownership interest in TWE or place this interest in an irrevocable trust for purposes of sale."). If AT&T divests Liberty Media pursuant to its December 15 letter, it will also divest other programming interests. *Id.*

[682] *See In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Letter from Deborah A. Lathen, Chief, Cable Services Bureau, FCC, to James W. Cicconi, General Counsel, AT&T, dated Dec. 18, 2000.

provisions of the *AT&T-MediaOne Order* that required AT&T to "unambiguously elect a single compliance option."[683] In the *December 21 Order*, we ruled that it was "AT&T's intent to elect . . . the divestiture of TWE . . ." and we determined to "treat AT&T's election as choosing that option only."[684]

2. Discussion

265. Several commenters argue that the merger will create what one describes as a "sprawling conglomerate of interests"[685] between AT&T and AOL Time Warner that would confer upon the companies the ability and incentive to use their combined dominance in the Internet access market, and other unspecified product markets, to discriminate against unaffiliated companies.[686] Commenters also allege that AOL Time Warner would be able to leverage its power in video programming, broadband content and portal services to solidify this dominance.[687] They argue that AT&T's and AOL Time Warner's ownership interest in TWE will give AT&T and AOL Time Warner the incentive to refrain from competing with each other in areas of MVPD, Internet and IM services.[688] Consumers Union, for example, argues that "AOL Time Warner would clearly have the incentive to use its leverage to induce AT&T to drop its efforts to push for compatibility/interoperability/access to AOL's IM customers."[689] Similarly, Consumers Union believes "AOL could use TWE leverage to foreclose rival portals like

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[683] *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Order, FCC No. 00-447 (rel. Dec. 21, 2000) ("*December 21 Order*").

[684] *December 21 Order* at ¶¶ 4-5. We further stated that AT&T would be permitted until January 15, 2001 to seek a modification of the *December 21 Order*. The *December 21 Order* states:

> "IT IS FURTHER ORDERED . . . should AT&T seek to have the Commission consider a modification of this *Order* to allow it to elect Option (b) [the divestiture of Liberty Media Group and AT&T's other video programming interests], it must submit a written request by January 15, 2001 with an appropriate showing as to why such a modification would serve the public interest."

December 21 Order at ¶ 7.

[685] SBC Comments at 1; *see also* Consumers Union Comments at 4.

[686] Consumers Union broadly defines the competitive problem with respect to AT&T as involving barriers to entry, foreclosure of inputs and monopsony power. Consumers Union Comments at 37-49. SBC asserts that "[c]ollectively, AOL, Time Warner, and AT&T will be able to leverage their dominant position in the Internet access market to increase their power in the market for broadband portal and content services" while simultaneously leveraging their "combined dominance in the broadband portal and content markets to increase their market share for high-speed Internet access." SBC Comments at 7, 18-24; *see also* Disney Reply Comments at 5 ("Assuming approval of the [AT&T-MediaOne merger], Time Warner and AT&T/TCI/MediaOne would operate as an interconnected consortium passing 83 million U.S. homes—80% of all U.S. households . . .Taken together, the cross interests of AT&T and Time Warner are enormous in the broadband services market, including control of 69% of the high-speed residential Internet access market.").

[687] Commenters also believe AOL Time Warner could use its power as owner of Road Runner to discriminate against unaffiliated content providers, and could use its power as a large content provider to discriminate against competing broadband ISPs. *See* SBC Comments at 27; Letter from Andrew Jay Schwartzman, Counsel for Consumers Union, et. al., to Deborah Lathen, Chief, Cable Services Bureau, FCC, dated Nov. 14, 2000 ("Schwartzman Nov. 14 Letter") at 2-4. Even AT&T acknowledges that Time Warner could use its dominance over TWE to impede competition between AOL and AT&T. *See* AT&T Nov. 28 Ex Parte at 2-4 (summarizing Consumers Union arguments).

[688] *See* SBC Comments at 27-30; Schwartzman Nov. 14 Letter at 3.

[689] Schwartzman Nov. 14 Letter at 3.

Yahoo," encouraging AT&T to favor AOL as a portal over rivals, and adds that AOL would encourage AT&T to give preferential treatment to AOL Time Warner music distribution services.[690] Next, Consumers Union contends that "AOL could use the TWE leverage to impede 'head-to-head' competition between AT&T and AOL in, for example, the provision of interactive television offerings by agreeing to common platforms that further their collective interests.[691] To remedy the alleged harms, these commenters ask that we require AOL Time Warner to not discriminate against unaffiliated Internet access providers, to provide open access to its cable systems for unaffiliated ISPs, to sever its cross-ownership ties with AT&T through TWE and Time Warner Inc., and to sever all contractual ties and joint ventures with AT&T. [692]

266. We find that the merger increases the likelihood of coordinated action by AOL Time Warner and AT&T to discriminate in favor of AOL's ISP service. The proposed merger will increase AOL Time Warner's incentive and ability to obtain agreements with AT&T to favor AOL Time Warner's ISPs to the detriment of AOL Time Warner's competitors.[693] AT&T could give preferential treatment to AOL's ISP by refusing carriage to competing ISPs, by providing AOL better price or non-price terms of service if AT&T does carry competing ISPs, or by limiting the functionalities or features available to competing ISPs.[694] For example, AT&T could, as Consumers Union contends, circumscribe the availability of capacity or connection points for non-favored ISPs.[695]

267. Accordingly, because we conclude below that the benefits of the merger do not outweigh its harms,[696] we find it necessary to impose remedial conditions that will prevent the potential harm

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

[691] *Id.* at 3.

[692] *See* SBC Comments at 32; BellSouth Reply Comments at 19-20. BellSouth argues that "AT&T cannot, for example, be permitted to provide AOL access to AT&T customers on a preferential basis for ISP services in exchange for AT&T access, for telephony purposes, to the cable customers of Time Warner." BellSouth Reply Comments. at 20. *See also* Consumers Union Comments at 157; Schwartzman Nov. 14 Letter at 2-3. We note that in *AT&T-MediaOne*, we rejected Consumers Union's motion to consolidate that proceeding with this proceeding. Consumers Union filed its motion in the dockets of both proceedings. We once again reject the request for the reasons enumerated in *AT&T-MediaOne*. *See ATT-MediaOne Order*, 15 FCC Rcd at 9892-93 ¶ 179.

[693] We note that even AOL acknowledges that prior to the proposed merger, AOL was unable to strike an agreement with any cable operator. *See* Applicants Second Response at 13.

[694] *See* Disney Reply Comments at 9; *see also* Letter from the Senator Mike DeWine, Chairman, Subcommittee on Antitrust, Business Rights, and Competition, and Senator Herb Kohl, Ranking Member, Subcommittee on Antitrust Business Rights and Competition to William Kennard, Chairman, FCC, and Robert Pitofsky, Chairman, Federal Trade Commission, dated May10, 1999 (citing a hypothetical example of possible discrimination against unaffiliated content providers: "Using this technology, it appears that it would be possible, for example, for the combined AOL Time Warner to slow down traffic to the [unaffiliated] ESPN web site while speeding it up to its own competing CNN/Sports Illustrated site."); *see also* SBC Comments at 31-32 (contending that risks of anticompetitive coordination also stem from contracts and "sweetheart deals").

[695] Consumers Union points out that "[e]fforts to impose or obtain exclusive arrangements have become ever-present controversies in the [cable industry], including efforts to prevent competing technologies from obtaining programming, as well as to prevent competition from developing within the cable industry." Consumers Union Comments at 40. We believe that Consumers Union intends to suggest that similar preferential or exclusive arrangements may be implemented with respect to ISP services over cable platforms. *See* Schwartzman Nov. 14 Letter at 2-4.

[696] *See* Section V, *infra.* (Analysis of Potential Public Interest Benefits)

arising from possible post-merger coordination between AT&T and AOL Time Warner. This conduct remedy, in combination with our conditions prohibiting AOL Time Warner from discriminating against unaffiliated ISPs on its own cable systems, as well as the conditions we imposed in our *AT&T-MediaOne Order*, conditions imposed by DOJ in its AT&T-MediaOne Consent Decree, and existing antitrust laws, will prevent any public interest harms that might arise from coordination between AOL Time Warner and AT&T as a result of the merger.

268. We find that other alleged harms that might arise from the possibility of coordinated action between AT&T and AOL Time Warner, such as coordination in MVPD and video programming services and coordination between Excite@Home and Road Runner,[697] existed before the proposed merger, and there is insufficient evidence that the merger would increase the likelihood or magnitude of those harms. Moreover, those harms have already been addressed by the Commission and DOJ in their respective reviews of the AT&T-MediaOne merger.[698] Other harms, such as potential agreements not to compete in IM or ITV services, would be addressed by existing antitrust laws.[699] Thus, we do not believe any additional remedies are warranted.

269. We find that in three respects the merger will increase the likelihood of discrimination by AT&T in favor of AOL.[700] Although we agree with the Applicants that the merger of AOL and Time Warner creates no new corporate link between AT&T and Time Warner,[701] we nevertheless conclude that AT&T's existing ownership interests in TWE, and its rights afforded over "Participant Matters," such as any merger involving TWE, could be used as leverage to gain favorable ISP access.[702] For example, in exchange for voting with AT&T on a particular Participant Matter, AOL Time Warner could require AT&T to afford AOL preferential rights of access to AT&T's cable systems. In addition, as AT&T points out, because AOL Time Warner would retain veto rights over important TWE partnership decisions, AOL Time Warner could wield strategic influence over AT&T and use this power if AT&T

[697] *See* SBC Comments at 22-29.

[698] *See* Section IV.A., *supra*. (High-Speed Internet Access Services)

[699] *See* para. 276, *infra*.

[700] We are not persuaded by AOL Time Warner's argument that no conditions are required here because "the FCC found no cause for concern over 'preferential agreements' in *AT&T-MediaOne*." *See* Letter from Peter D. Ross, Counsel to America Online, to Magalie Roman Salas, Secretary, FCC, dated Sept. 19, 2000 ("Applicants' Sept. 19 Letter") at 3; Ross-Harding Oct. 5 Letter at 4-8, 12. In *AT&T-MediaOne*, we were not presented with facts that would lead to a concern about preferential treatment of AOL by AT&T. Nothing in the AT&T-MediaOne merger increased the likelihood of such a result. For the reasons explained above, this merger does increase the likelihood of preferential treatment of AOL by AT&T. Moreover, we expressly declined to consider in *AT&T-MediaOne* the facts of the instant merger, and as a consequence we denied a motion to consolidate the two proceedings. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9892-93 ¶ 179.

[701] *See* Ross-Harding Oct. 5 Letter (". . .this combination has no effect on the nature of AT&T's limited ownership relationships with Time Warner—relationships that the Commission and antitrust regulators alike reviewed and approved only a few months ago when AT&T obtained approval to acquire MediaOne.").

[702] *See, e.g.*, SBC Comments at 31-32 (contending that risks of anticompetitive coordination also stem from contracts and "sweetheart deals"); BellSouth Comments at 20. However, we disagree with commenters' apparent assertions that it is the mere existence of AT&T's cross ownership interest in TWE that results in merger-specific competitive harms. These cross ownership interests exist absent the merger. However, we do conclude that these ownership interests would serve to facilitate any anticompetitive incentives brought on as a result of the merger. *See* Consumers Union Comments at 4; *see also* AT&T Nov. 28 Ex Parte at 1-2.

deviated from any tacit or agreed upon preferential treatment for affiliated ISPs.[703] Thus, although we agree with the Applicants that these ownership interests existed pre-merger, we are persuaded that these corporate provisions could be used to enforce post-merger cooperation.[704] AT&T's election to divest TWE in compliance with the *AT&T-MediaOne Order* will, once it is effectuated, eliminate this possibility. We note, however, that AT&T is not required to divest TWE until May 19, 2001.[705] Our conduct remedy, which prohibits AOL Time Warner from seeking or accepting exclusive or preferential treatment from AT&T, will eliminate AOL Time Warner's incentive and ability to engage in any such conduct before AT&T divests TWE.[706]

270. Second, AOL Time Warner could delay or otherwise seek to frustrate AT&T's plans to sell its interest in TWE in connection with AT&T's election to divest TWE.[707] AT&T states that Time Warner is already effectively blocking AT&T's attempts to sell its TWE interest by refusing to provide AT&T with financial information AT&T deems necessary.[708] AOL Time Warner could use these or other tactics as leverage to gain preferential ISP access rights on AT&T's cable systems. Our conduct remedy will prevent this result.

271. Third, since at least February, 1999,[709] AT&T has sought access to Time Warner's cable systems to offer Time Warner's cable customers local telephone service, but has so far been unsuccessful in its negotiations with Time Warner.[710] As a result of the merger, however, we find that it is more likely

[703] AT&T Nov. 28 Ex Parte at 2-4 (citing Consumers Union Comments).

[704] Applicants' Sept. 19 Letter. AT&T's acquisition of MediaOne created AT&T's interest in TWE, and the Commission affirmatively ruled this ownership interest permissible in the AT&T-MediaOne merger, subject to AT&T's compliance with the conditions set forth in its order in that proceeding. *AT&T-MediaOne Order*, 15 FCC Rcd at 9866 ¶ 116.

[705] We also note that AT&T may, on or before January 15, 2001, seek a modification of the Commission's *December 21 Order* that determined it has elected to divest TWE. *December 21 Order* at ¶ 7. Any further argument with respect to the mandatory divestiture of AT&T's interest in TWE is being considered in the pending Petition for Reconsideration of *AT&T-MediaOne*.

[706] As noted in Section IV-A., *supra*, (High-Speed Internet Access Services) the FTC Consent Agreement forbids AOL Time Warner from entering agreements with other cable operators "that would interfere with the ability of any such [cable operator] to enter into agreements with any other ISP or provider of ITV services." FTC Consent Agreement Section III.E. While we believe the FTC provision would prohibit both exclusive and preferential agreements between AOL Time Warner and other cable operators, because of AT&T's particular incentive and ability to enter into such agreements with AOL Time Warner we find it necessary to impose a condition that explicitly addresses this potential public interest harm.

[707] *See* AT&T Nov. 28 Ex Parte.

[708] AT&T Nov. 28 Ex Parte at 2; Letter from James W. Cicconi, General Counsel and Executive Vice President, Law & Gov't. Affairs, AT&T, to Kathryn C. Brown, Chief of Staff, Office of the Chairman, FCC, dated Nov. 8, 2000 ("AT&T Nov. 8 Ex Parte") at 2, transmitted by Letter from Joan Marsh, Director, Federal Gov't Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Nov. 8, 2000.

[709] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9890 ¶ 173.

[710] *See* Confidential Appendix IV-F Note 1. As AOL Time Warner points out, "although Time Warner and AT&T have previously explored the possibility of AT&T providing telephony services over Time Warner cable systems (in discussions that long predated the announcement of this merger), no binding agreement has ever been reached . . ." Ross-Harding Oct. 5 Letter at 6; *see also* Confidential Appendix IV.F Note 2. As discussed below, we believe an agreement that would facilitate the provision of cable telephony and competition with the incumbent local exchange carriers would be pro-competitive.

that AT&T will obtain a telephony deal from the merged firm if it chooses to pursue this strategy. The merger will increase the incentive for AOL Time Warner to negotiate with AT&T because AT&T holds the key to AOL's access to the facilities of the nation's largest cable operator.[711] AOL clearly desires access to AT&T's cable systems in order to provide ISP service.[712] In exchange for giving AT&T telephony access to TWE cable systems, an outcome that may in fact benefit the public interest, AOL Time Warner could obtain preferential treatment for AOL's ISP service on AT&T's cable systems, an outcome that would harm the public interest. AT&T's divestiture of TWE will not forestall this outcome. Our conduct remedy is therefore necessary to prevent it.

272. Under the condition we are adopting to address the potential harm described above, AOL Time Warner shall be prohibited from entering into any agreement with AT&T that gives AOL or any other AOL Time Warner ISP exclusive carriage rights on AT&T's cable systems. Further, AOL Time Warner may not enter into any agreement with AT&T the purpose of which is to limit in any way AT&T's ability to enter agreements with a non-AOL Time Warner ISP.[713] For example, AOL Time Warner may not enter into an agreement with AT&T that would give AOL preferential rights to use a particular system resource, such that AT&T would not be free to offer the same rights to another ISP. AOL Time Warner, through its General Counsel, must certify upon the merger's closing and annually thereafter that it is in compliance with this condition.

273. In combination with the other conditions we adopt in this Order, the conditions we adopted in *AT&T-MediaOne*, the conditions adopted by the DOJ in its AT&T-MediaOne Consent Decree, and existing antitrust laws, the conduct remedy we adopt here will remedy any potential harm that might arise from the merger in the form of coordination between AT&T and AOL Time Warner. This conduct remedy will address in a direct manner any potential harm due to coordination between AT&T and AOL Time Warner that would affect competition for high-speed residential Internet access service. We conclude that this condition will prevent AOL Time Warner from using any leverage it might gain against AT&T as a result of the merger to induce AT&T to favor AOL and disfavor other ISPs seeking access to AT&T's cable systems. Thus, AOL Time Warner will not be permitted to use its control of TWE , or any other merger asset,[714] to induce AT&T to give AOL preferential carriage rights as a condition of AOL

[711] This result would arise from AOL's acquisition of the Time Warner cable systems, not from any TWE cross-ownership between AOL and AT&T.

[712] *See* Confidential Appendix IV-F Note. 3.

[713] We note that there may be unique assets that only one ISP can use. We do not intend to prohibit AT&T from entering into contracts with AOL that utilize these unique assets. Moreover, we do not believe that all agreements between AT&T and a merged AOL Time Warner would be contrary to the public interest. Although certain cable broadband arrangements, such as those described above, would result in discrimination against unaffiliated ISPs and therefore, would be contrary to the public interest, other agreements between AT&T and the merged entity would likely further important public interest goals. Efforts by AT&T to expand its cable telephony service over the Time Warner cable plant may in fact satisfy important Commission policy goals and fulfill the goals of the 1996 Act. Accordingly, we reaffirm the public interest benefits that we recognized would result from agreements between AT&T and Time Warner relating to local telephony services. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9890 ¶¶ 173-174; *see also* Ross-Harding Oct. 5 Letter at 6. Similarly, AOL's expansion of its service over AT&T's cable systems could also satisfy important Commission policy goals, provided the terms of AOL's access do not unfairly favor AOL over its competitors. We therefore do not wish to prohibit AT&T and AOL Time Warner from reaching what may be pro-competitive agreements.

[714] For example, as a result of this condition, AOL Time Warner would not be permitted to require AT&T to give preferential access rights to AOL as a condition of AT&T's access to AOL Time Warner video programming. *See* Section IV-A *supra*, (High-Speed Internet Access Services)..

Time Warner's agreement to vote in AT&T's favor on any TWE Participant Matter, to improve any offer to purchase AT&T's TWE interest, or to enter a telephony deal with AT&T. Nor may AOL Time Warner for any other reason or in any other manner enter into any agreement with AT&T that is designed to afford AOL preferential access to AT&T's cable systems or to otherwise disadvantage AOL's competitors with respect to access to AT&T's cable systems. Thus, the condition will also prevent any agreements between AOL Time Warner and AT&T that may arise as a result of the merger from any unforeseen motivation by AT&T to disfavor AOL's competitors.

274. Several commenters requested that we require AT&T and Time Warner to sever all corporate and contractual relationships, including AT&T's interest in TWE.[715] Because AT&T recently elected to divest TWE, effective May 19, 2001, in compliance with the Commission's order in *AT&T-MediaOne*, we need not address this issue. AT&T requests that we condition this merger by requiring AOL and Time Warner to submit to binding arbitration if AT&T and AOL Time Warner fail to reach agreement on the price for AT&T's interest in TWE.[716] AT&T argues that the Commission could provide the appropriate incentive to AOL Time Warner to complete AT&T's divestiture of the TWE partnership by requiring as a condition of its approval of the AOL-Time Warner merger that, in the event AT&T and AOL Time Warner fail to reach agreement on the price Time Warner will pay for AT&T's interest by a certain date, the matter will be submitted to binding arbitration pursuant to a customary appraisal process.[717] AT&T also requests that the Commission require that AOL Time Warner enter a "definitive agreement to effect disposition of AT&T's TWE interest at the arbitrated price, before the compliance date set" in the *AT&T-MediaOne Order*.[718]

275. AT&T contends that the imposition of arbitration requirements also would prevent the potential harms to competition that commenters have alleged. AT&T claims that "[i]f AOL and AT&T were to become partners in TWE, their shared ownership and incentives could . . . lead to unilateral conduct that would produce the same outcome that consumer advocates have suggested would result from joint action."[719] For example, apparently adopting Consumers Union's arguments, AT&T states that because of Time Warner's control over TWE, Time Warner "could use the TWE leverage to impede competition where AOL and AT&T compete 'head-to-head' or plan to do so."[720] For example, AT&T notes that "[p]ost-merger AOL could let AT&T know that a condition for agreeing to restructure TWE would be for AT&T to drop its rival interactive TV platform."[721] AT&T also argues that "AOL would clearly prefer less rather than more broadband competition from AT&T and, as a consequence of the merger with Time Warner, could gain the means to achieve that goal."[722]

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[715] *See* SBC Comments at 30-32; BellSouth Reply Comments at 18-19.

[716] AT&T Nov. 28 Ex Parte at 1-3.

[717] AT&T specified December 1, 2000, as the date after which the matter should be submitted to binding arbitration if by that date it had failed to reach agreement with Time Warner. *See* AT&T Nov. 8 Ex Parte at 3; *see also* AT&T Nov. 28 Ex Parte at 4.

[718] AT&T Nov. 8 Ex Parte at 3.

[719] AT&T Nov. 28 Ex Parte.

[720] AT&T Nov. 28 Ex Parte at 3.

[721] AT&T Nov. 28 Ex Parte at 3.

[722] AT&T Nov. 28 Ex Parte at 2 (citing Schwartzman Nov. 14 Letter at 1-4).

276. We find it disturbing that AT&T would recite a litany of anticompetitive actions it might pursue, including agreements not to compete, if the Commission fails to adopt a merger condition that would improve AT&T's prospects of obtaining a favorable price from Time Warner for the sale of the TWE assets AT&T has elected to divest to comply with our order in *AT&T-MediaOne*. We disagree with AT&T that the Commission should use this merger proceeding to facilitate AT&T's compliance with obligations the Commission imposed in a separate merger proceeding.[723] While we are concerned about the possibility that AT&T and AOL Time Warner would engage in collusive behavior as a result of this merger, we believe our conduct remedy will address any potential public interest harms that might arise from conduct that is not otherwise prohibited by law or that is not remedied by AT&T's divestiture of TWE pursuant to its December 15, 2000 election.[724]

G. Other Potential Public Interest Harms

277. *Protection of Subscriber Privacy.* Congressman Markey notes that privacy of personal information is increasingly becoming a concern of consumers using the Internet.[725] He states that cable operators, such as Time Warner, have a statutory obligation under Section 631 of the Communications Act to protect personal information gathered from subscribers.[726] He further states that the obligation applies not just to information obtained through a customer's use of a cable service, but to a customer's use of any wire or radio communications service provided using any of the cable system's facilities.[727] Congressman Markey asks that we assure ourselves that AOL Time Warner will comply with the requirements of Section 631 after the merger.[728]

278. Section 631 of the Communications Act provides that at the time a cable operator enters into an agreement to provide any cable service "or other service" to a subscriber, and annually thereafter, the cable operator shall inform the subscriber of, among other items, the nature of personally identifiable information the cable operator will be collecting, the nature of the use of the information, and the nature and purpose of any disclosures of that information.[729] The statute further provides that, with limited

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[723] *See* Media Access Project Ex Parte at 2. See *also* AT&T Nov. 28 Ex Parte at 9819 ¶ 4.

[724] We are not sympathetic to AT&T's argument that it may be induced by AOL Time Warner to refrain from competing with AOL Time Warner. We do not believe that it is likely that AT&T would unilaterally abandon its planned interactive TV offering, for example, on the mere supposition that AOL Time Warner would react favorably to such actions. Rather such conduct would more likely reflect an explicit agreement not to compete, which would be addressed by antitrust laws and the state and federal authorities charged with enforcing them. *Loraine Journal v. United States*, 342 U.S. 143 (1951); *Klors Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (firms induced others to boycott one's competitors); *United States v. Associated Patents*, 134 F. Supp. 74 (E.D. Mich 1955), *aff'd mem.*, 350 U.S. 960 (1956); *United States v. Topco Associates*, Inc., 405 U.S. 596 (1972). "The fact that the parties to an [unlawful] agreement did not have identical motives, or that one party to the agreement was coerced to participate, does not negate the finding of an agreement for purposes of [Sherman Act] Section 1 so long as the parties share a commitment to a common scheme that has an anticompetitive objective or effect." ABA, Antitrust Law Developments (Fourth) 4 (1997); *Rochez Brothers v. North American Salt Co.*, 1994-2 Trade Cas. (CCH) ¶ 70,804, at 73,441 (W.D. Pa. 1994).

[725] Letter from Cong. Edward J. Markey to Chairman William E. Kennard at 1-2 (Dec. 13, 2000).

[726] *Id.* at 1.

[727] *Id.*

[728] *Id.* at 2.

[729] 47 U.S.C. § 551(a).

exceptions, a cable operator may not use the cable system to collect personally identifiable information nor may the cable operator disclose personally identifiable information without the prior written or electronic consent of the subscriber.[730] As Congressman Markey notes, the statute defines "other service" to include any wire or radio communication service provided using any of the facilities of a cable operator that are used in the provision of cable service.

279. We agree with Congressman Markey that consumers have become increasingly concerned about the unauthorized use and disclosure of personal information gathered about them, especially with regard to information collected while they are using the Internet. By enacting Section 631, Congress directed cable operators, including affiliates,[731] to protect the privacy of their subscribers. Although Section 631's terms are enforced by the courts, and not by the Commission,[732] AOL Time Warner's future compliance with Section 631 is part of our examination of AOL Time Warner's qualifications to control the licenses at issue.[733] Accordingly, as a condition of our approval, we require AOL Time Warner, by its General Counsel, to certify to the Commission, by filing a copy of the certification with the Secretary's Office, on the merger's closing and annually thereafter, that AOL Time Warner is and will remain in compliance with Section 631 of the Communications Act.

280. *Premature Control by AOL.* RCN Telecom Services, Inc. ("RCN") requests that we delay approval of the merger to investigate whether AOL had assumed premature control of Time Warner.[734] RCN's request is based on a Washington Post article that reported that a senior AOL official had begun the process of "knitting together" AOL and Time Warner. AOL responds that RCN offers no evidence that an AOL official has assumed control over Time Warner's daily operations or policy determinations, or that an AOL official or any other AOL employee in any way dominates the management of Time Warner's corporate affairs and licensed facilities.[735] Rather, according to AOL, an AOL senior official "simply has participated, along with other AOL and Time Warner officials, in the parties' collective efforts -- wholly consistent with applicable law -- to achieve a smooth integration of the two companies after closing."[736] We find that the record is devoid of specific allegations of fact that establish a prima facie case of de facto transfer of control that would warrant delaying our approval of the merger with conditions or initiating an investigation. We therefore deny RCN's request.

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[730] 47 U.S.C. § 551(b), (c). The cable operator must also take actions necessary to prevent unauthorized disclosure. 47 U.S.C. § 551(b).

[731] The statute defines "cable operator" to include any company that is under common ownership or control with a cable operator and that provides any wire or radio communication service.

[732] *See* 47 U.S.C. § 551(f) (providing that any person aggrieved by the section may bring a civil action in a United States district court).

[733] Pursuant to Sections 308(b) and 310(d) of the Communications Act, 47 U.S.C. §§ 308(b), 310(d), as part of our public interest determination, we determine whether the person that will control the licenses being transferred is qualified to do so. *See Voicestream Wireless Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 3341, 3345-46 ¶¶ 10-11 (2000).

[734] Letter from William F. Fishman, counsel for RCS, to Deborah Lathen, Chief, FCC Cable Services Bureau (Dec. 15, 2000).

[735] Letter from Peter Ross, Counsel for AOL, and Arthur Harding, Counsel for Time Warner, to Deborah Lathen, Chief, FCC Cable Services Bureau (Dec. 29, 2000) at 2.

[736] *Id.*

V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

281. In addition to assessing the potential public interest harms of this merger, we must consider whether the merger will produce public interest benefits.[737] The proposed transaction is deemed in the public interest if the identifiable potential public interest benefits outweigh any potential public interest harms.[738]

282. Our analysis of public interest benefits focuses on demonstrable and verifiable benefits to consumers that could not be achieved but for the merger.[739] Merger-specific benefits may include beneficial conditions either proffered by the Applicants or imposed by the Commission.[740] At a minimum, our public interest test requires that the merger not interfere with the objectives of the Communications Act.[741]

283. We find that the Applicants have demonstrated that the merger will result in benefits, but the nature and degree of these benefits are not sufficient to outweigh the potential harms that would result from the merger absent conditions. The conditions we impose, in conjunction with those imposed by the FTC Consent Agreement, will mitigate the potential harms, and allow us to conclude that, on balance, the benefits will outweigh any remaining potential harms.

284. The Applicants claim the merger will produce affirmative public interest benefits in the following four areas:

- access by unaffiliated ISPs to cable broadband networks ("cable access");[742]
- accelerated deployment of broadband content and broadband technologies;[743]

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[737] *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157; *WorldCom-MCI Order*, 13 FCC Rcd at 18134-35 ¶ 194; *AT&T-TCI Order*, 14 FCC Rcd at 3168 ¶ 13; *AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154.

[738] *AT&T-MediaOne Order*, 15 FCC Rcd at 9816 ¶ 154.

[739] *Id.*

[740] *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157; *AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154.

[741] *Applications of Southern New England Telecommunications Corp. and SBC Communications, Inc. for Consent to Transfer of Control of Licenses and Section 214 Authorizations*, CC Docket 98-25, Memorandum Opinion and Order, ("*SBC-SNET Order*") 13 FCC Rcd 21292, 21298-99 ¶ 13 (1998); *WorldCom-MCI Order*, 13 FCC Rcd at 18134-35 ¶ 194; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157.

[742] Application at 15 and 17; Applicants' March 21 Supplemental Information at 21-26; Applicants' Reply Comments at 4-5, 9-11, 17, 27-29, 39, 45; MOU *generally*; Letter from Peter D. Ross, Attorney, Wiley, Rein & Fielding, to Magalie Roman Salas, Secretary, FCC, dated Aug. 14, 2000 ("Applicants' Aug. 14 Benefits Ex Parte") at 2; Ex Parte Comments of Applicants (Aug. 22, 2000) ("Applicant's Aug. 22 Benefits Ex Parte") at 2, 13-15, transmitted by letter from Arthur H. Harding, Counsel, Fleischman and Walsh, to Magalie Roman Salas, Secretary, FCC, dated Aug. 25, 2000; Case En Banc Testimony, Tr. at 28 and 41; Testimony of Gerald Levin, Chairman and CEO, Time Warner Inc., FCC En Banc Hearing, CS Docket No. 00-30 (July 27, 2000), Tr. at 34-37, 44 ("Levin En Banc Testimony"); *see also* Applicants' Second Response at 33.

[743] Application at 8, 10, 13, 15; Applicants' March 21 Supplemental Information at 10-11, 15-19, 22, 26-28, 30; Applicants' Reply Comments at 9, 23-27, 31, 36, 40, 43; Applicants' Aug. 14 Benefits Ex Parte at 2; Applicants' Aug. 22 Benefits Ex Parte at 3, 15-18; Case En Banc Testimony, Tr. at 26-27, 41; Levin En Banc Testimony, Tr. at 34-35, 42; *see also* Applicants' Second Response at 13-14, 18.

- accelerated transformation of traditional media products to digital platforms;[744] and
- expedited development and deployment of new service offerings, some of which, the parties maintain, are yet to be developed.[745]

285. The Applicants have produced limited third-party documentation supporting these claims of affirmative public interest benefits.[746] For the most part, the Applicants have provided narrative descriptions and affidavits from business persons explaining the synergies likely to result from joining these two companies and the merged company's potential to provide affirmative public interest benefits.[747] The evidence offered by the Applicants is described below. Our findings follow.

A. The Evidence

286. *Cable Access.* As evidence of their commitment to a marketplace solution to cable access, the Applicants have submitted a Memorandum of Understanding ("MOU") between AOL and Time Warner.[748] As described in more detail in Section IV.A., above, the MOU provides that multiple ISPs would be permitted to serve consumers over Time Warner cable systems without consumers having to also purchase AOL Time Warner ISP services.[749] In addition, the MOU provides that there will be no fixed limit on the number of unaffiliated ISPs selected by Time Warner cable systems (except as

[744] Application at 11; Applicants' March 21 Supplemental Information at 30; Applicants' Reply Comments at 1; Applicants' Aug. 22 Benefits Ex Parte at 3 (citing Mary Meeker, Richard Bilotti, Mark Mahaney, and Celeste Mellet, *America Online/Time Warner: How Big is Big? Big!*, Morgan Stanley Dean Witter, May 4, 2000, at 10 ("MSDW May 4 Report"); Lanny Baker, Jill Krutick, and Spencer Wang, *AOL and Time Warner Link The Dynamic Duo: Form a Free Cash Flow Dynamo,* Salomon Smith Barney, Mar. 22, 2000 at 1 ("Salomon Smith Barney Mar. 22 Report"); Bressler Decl. at 2-4 ("Applicants' Aug. 22 Benefits Ex Parte, Bressler Decl.")); Levin En Banc Testimony, Tr. at 33-34.

[745] Application at 9-10; Applicants' March 21 Supplemental Information at 21, 29-35; Applicants' Reply Comments at 9-10, 43-44; Applicants' Aug. 22 Benefits Ex Parte at 1, 6, 7 (citing Salomon Smith Barney Mar. 22 Report at 31), 8 (citing Myers Group Report) 9, (citing Applicants' Aug. 22 Benefits Ex Parte, Bressler Decl. at ¶¶ 10-12); *see also* Applicants' Second Response at 16-23.

[746] *See* MOU; Henry Blodget, Jessica Reif Cohen, Virgina Syer, and Andrew Slabin, *AOL Time Warner – You've Got Upside!*, Merrill Lynch, Feb. 23, 2000 ("Merrill Lynch: Upside"); Christopher Dixon, Catherine Kim, *AOL Time Warner - A Merger that Defines the New Digital Age*, Paine Webber, Mar. 1, 2000 ("Paine Webber: Merger for a Digital Age"); Michael Parekh, Richard Simon, Richard Greenfield, Katherine Hays, and Christopher Cox, *America Online/Time Warner – Perfect Time-ing*, Goldman Sachs, Mar. 10, 2000 ("Goldman Sachs: Perfect Time-ing"); MSDW May 4 Report; Salomon Smith Barney Mar. 22 Report; First Union June 20 Report; *America Online Inc./Time Warner Inc.*, Credit Lyonnais Securities, Feb. 28, 2000, at 12 ("Credit Lyonnais Report").

[747] *See generally* Application; Applicants' March 21 Supplemental Information; Applicants' Reply Comments; Applicants' Aug. 22 Benefits Ex Parte, Britt Decl.; Applicants' Aug. 22 Benefits Ex Parte, Bressler Decl.; Applicants' Aug. 22 Benefits Ex Parte, Schuler Decl.; Applicants' Aug 14 Benefits Ex Parte; Case En Banc Testimony; Levin En Banc Testimony; Applicants' Second Response.

[748] *See* MOU.

[749] *Id.* at ¶ 2.

mandated by technical limitations),[750] and that AOL and Time Warner will consider ISPs of national, regional, and local scope.[751]

287. The Applicants assert that their MOU represents a shift within the industry towards a marketplace solution to cable access.[752] The Applicants believe the MOU is significant not only because compliance with its terms will bring choice to consumers where none existed before, but also because it creates momentum for similar action throughout the cable industry.[753] The Applicants cite Wall Street financial analysts that agree the MOU will encourage other major cable operators to open their networks to unaffiliated ISPs.[754]

288. *Accelerated Deployment of Broadband Technologies and Content.* The Applicants claim that the merger will accelerate the deployment of cable and alternative broadband technologies, as well as the development of broadband content. The Applicants assert that the development of broadband content and conduit are mutually reinforcing occurrences. They state that many potential content providers have hesitated to roll out broadband applications in the absence of assurance that a platform for their services would be available, while facilities providers have been similarly skeptical about the advantages of investing in broadband technology prior to the development of broadband content.[755]

289. The Applicants assert that the merger will accelerate the deployment of broadband technologies by several years.[756] First, the Applicants contend that the merger is likely to accelerate the pace of deployment of Time Warner's cable broadband Internet access services.[757] Time Warner submits that rolling out high-speed Internet services is more complex and requires a greater undertaking than the roll-out of other new services.[758] They believe that the merger will result in the deployment of more resources for marketing and consumer connection functions, thus hastening the ability of consumers to obtain high-speed Internet service.[759] As evidence, the Applicants have provided the Commission with

[750] *Id.* at ¶ 4.

[751] *Id.* at ¶ 8.

[752] Applicants' March 21 Supplemental Information at 21-24 and 25 (citing Merrill Lynch: Upside at 9, 15); Applicants' Reply Comments at 11, 27; Applicants' Aug. 14 Benefits Ex Parte at 2; *see also* Applicants' Aug. 22 Benefits Ex Parte at 2, 13-15; Applicants' Second Response at 33.

[753] Applicants' March 21 Supplemental Information at 24; *see also* Applicants' Reply Comments at 5, 11; Applicants' Aug. 22 Benefits at 15 (citing Applicants' Aug. 22 Benefits Ex Parte, Britt Decl. at ¶13) ("[Our MOU] has already acted as a catalyst to encourage other cable operators to provide ISP choice to consumers. At least 7 of the 11 largest cable operators are looking at offering access to multiple ISPs on their high- speed broadband lines.") *See also* Applicants' Second Response at 33.

[754] Applicants' March 21 Supplemental Information at 25. Merrill Lynch notes that: "AOL's ownership of Time Warner will help pave the way for commercial resolution of the so-called "open access" issue. We would expect the merger to, in turn, push other cable operators to consider establishing deals with AOL or other Internet service providers . . . " Applicants' March 21 Supplemental Information at 25 (citing Merrill Lynch: Upside at 9, 15).

[755] Applicants' Aug. 22 Benefits Ex Parte at 2-3; *See also* Applicants' Second Response at 18.

[756] Applicants' March 21 Supplemental Information at 30 (citing AOL Time Warner Inc., *SEC Form S-4,* filed Feb. 11, 2000 at 37).

[757] Applicants' Second Response at 13.

[758] Applicants' Aug. 22 Benefits Ex Parte, Britt Decl. at 4.

[759] Letter from Art Harding, Attorney, Fleischman and Walsh, LLP, to Magalie Roman Salas, Secretary, FCC, dated (continued...)

confidential pre-and post-merger facilities deployment plans for Time Warner and information regarding potential operating synergies for both parties.[760] As further evidence, the Applicants note that the financial community believes the merger will accelerate cable broadband Internet access deployment.[761]

290. Second, the Applicants assert that the merger will serve to accelerate deployment of alternative broadband technologies. The Applicants note that AOL, in keeping with its "AOL Anywhere" business strategy, has sought, and will continue to seek, a nationwide footprint for its ISP services, utilizing multiple broadband technologies.[762] AOL asserts that to maximize revenues, it must continue to pursue as many broadband delivery options as possible to reach every potential customer, both within and outside Time Warner's local cable franchise areas.[763] As evidence of its commitment to further the development of a wide range of broadband technologies, AOL points to its $1.5 billion investment in Hughes parent GM, and its numerous deals with DSL and wireless equipment manufacturers.[764] AOL does not claim that the merger is the only way to accomplish the goals of AOL Anywhere. However, AOL does indicate that after the merger, AOL will continue to pursue its AOL Anywhere strategy and that Time Warner will enable AOL to further these goals. Neither AOL nor Time Warner provide concrete examples of how the merger will serve to assist AOL in its AOL Anywhere strategy other than to say that a merger between Time Warner and AOL will enable AOL to provide its ISP service over cable.[765] AOL claims that this is particularly significant because prior to the proposed merger, AOL had been unable to strike an agreement with any cable operator.[766]

291. AOL also asserts that its commitment to the cable broadband platform in and of itself will spur development of competing platforms.[767] AOL asserts that the Commission itself has recognized this pattern, "understanding that competition among rival technologies is one of the primary focuses that drives deployment of broadband services."[768]

(...continued from previous page)
July 12, 2000 ("Applicants' July 12 Benefits Ex Parte") at 2; *see also* Applicants' Aug. 22 Benefits Ex Parte, Britt Decl. at 4.

[760] *See* Applicants' First Response (Confidential Version) at 30, 35-36; *see generally* Applicants' Second Response (Confidential Supplemental Volumes: Benefits 1-7).

[761] Applicants' March 21 Supplemental Information at 28 (citing Merrill Lynch: Upside at 9) "the merger will only help to accelerate cable's rollout of high-speed data and new services." *Id; see also* Applicants' Second Response at 13-14.

[762] Applicants' March 21 Supplemental Information at 10, 16-19; Applicants' Reply Comments at 23-26; *see also* Levin En Banc Testimony, Tr. at 26-27.

[763] Applicants' March 21 Supplemental Information at 19.

[764] *Id.* at 11 and 16-18.

[765] *See* Applicants' Second Response at 9 and 13.

[766] *Id.* at 13.

[767] Applicants' Aug. 22 Benefits Ex Parte at 16-17; *see also* Applicants' Second Response at 11. Applicants note that Merrill Lynch also believes the availability of AOL Time Warner's service on broadband cable "should also put pressure on local exchange carriers to become more aggressive in rolling out DSL." *See* Applicants' March 21 Supplemental Information at 26 (citing Merrill Lynch: Upside at 9).

[768] Applicants' March 21 Supplemental Information at 26-27.

292. Finally, the Applicants argue that their commitment to maximizing diversity of content and consumer choice on the Internet will further promote deployment of broadband conduit and vice versa.[769] The Applicants state that it is well understood that consumer interest in innovative and enticing online offerings will inevitably have a direct positive impact on broadband penetration and deployment across platforms.[770] They state that they intend to provide their customers the broadest possible array of appealing content, regardless of the source.[771] Furthermore, the Applicants argue that the merged entity's introduction of widely appealing broadband offerings will motivate providers of other broadband technologies and services to deploy and market their own content and services more widely in order to compete with the merged entity.[772]

293. *Accelerated Transition of Traditional Media Products to Digital Platforms.* The Applicants contend that the merged entity will accelerate the transition of established media offerings to digital platforms.[773] In their filings with the SEC, the Applicants note that one factor motivating the merger is the existence of "cost efficiencies in launching and operating interactive extensions of Time Warner brands."[774] They claim that the merged company will bring together experience, incentives, and resources that can help lead the integration of traditional media with online interactive media.[775] As evidence, the Applicants cite financial analyst reports asserting that the merged entity can quickly respond to and inspire "rapidly morphing user habits as users reexamine their daily activities through 'Internet-enabled glasses."[776]

294. *Accelerated Deployment of New Services*: The Applicants claim that a major benefit of the merger will be the merged entity's ability to develop and promote new interactive services. They maintain that this combination of complementary assets will create "the first company prepared to compete on the Internet," due to the lowered risk to the combined companies in deploying new products and services as well as increased operating efficiencies and complementary expertise.[777] New services to be offered include developing services such as video-on-demand, interactive television, video streaming, online music distribution and purchasing, IP telephony, and numerous yet-to-be developed services.[778]

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[769] Application at 10, 13; Applicants' Aug. 14 Benefits Ex Parte at 2; Applicants' Aug. 22 Benefits Ex Parte at 15-19.

[770] *Id.*

[771] Application at 8.

[772] Applicants' March 21 Supplemental Information at 28-29.

[773] Application at 11; Applicants' March 21 Supplemental Information at 30; Applicants' Reply Comments at 1; Applicants' Aug. 22 Benefits Ex Parte at 3 (citing MSDW May 4 Report and Salomon Smith Barney Mar. 22 Report); Levin En Banc Testimony, Tr. at 33-34.

[774] Applicants' March 21 Supplemental Information at 31.

[775] Applicants' Reply Comments at 1. Applicants use the term "traditional media" to refer to print periodicals, books, video, and other popular Time Warner brands. *See* Applicants' March 21 Supplemental Information at 30.

[776] Applicants' March 21 Supplemental Information at 31 (citing Goldman Sachs: Perfect Time-ing at 1).

[777] *See Id.* at 29 and 31, and Testimony of Gerald M. Levin, Chairman and CEO, Time Warner Inc., Before the Senate Committee on the Judiciary, 106th Congress, Feb. 29, 2000 at 4; Applicants' Aug. 14 Benefits Ex Parte at 2; Applicants' Aug. 22 Benefits Ex Parte at 1, 12; *see also* Applicants' Second Response at 16-17.

[778] Applicants' March 21 Supplemental Information at 35 (citing Paine Webber: Merger for a Digital Age at 8); Applicants' Reply Comments at 44; Applicants' Aug. 22 Benefits Ex Parte at 7-12.

The Applicants state that while detailed business plans have not been finalized, plans are being developed in light of the merged entity's coordinated strengths and potential to offer such services.[779]

295. As evidence, the Applicants cite to financial community reports, stating that the merged company will be "well positioned to pursue and expedite personalized jukeboxes, news clipping services, voice activated web surfing, Internet enabled voice communications, downloadable music, personalized video services, and virtual communities centered around off-line magazines."[780] In addition, the same analyst notes that "the new company will be well-positioned to define and create yet-to-be imagined new businesses which [will] evolve as technologies are introduced and as the Internet continues to develop."[781]

296. As evidence of the merger's ability to hasten the online music revolution, Applicants cite to financial analyst and trade press recognition of the merged entity's ability and expertise.[782] While the Recording Industry Association of America ("RIAA") did not file comments in this proceeding, Applicants cite to a public statement made by RIAA President Hilary Rosen that the merger "brings together a tremendous wealth of music assets and a group of people who have mastered the art of making things simple on the Internet."[783] One financial analyst states, "AOL Time Warner is poised to have a substantial, positive effect on overcoming the technical and financial complexity that has hindered the development of downloadable music."[784]

297. In addition, the Applicants state that the unique combination of AOL and Time Warner assets could permit the merged firm to create a successful, robust ITV product where others have failed. According to the Applicants, "with the merger's promotion of competitive broadband development, the prospects for an enhanced, next-generation AOLTV that could even more seamlessly and robustly integrate Internet and video services become more foreseeable."[785] The Applicants state that a "merged AOL Time Warner will be able to significantly enhance the just-launched AOLTV service and thereby turbo-charge an entire industry" and that "[t]he new company can work to develop all facets of interactive television—including both the platform and new interactive content applications—with a breadth of common purpose unlikely to be matched even in the best joint venture."[786]

298. As evidence, the Applicants quote several industry analysts addressing AOL's expertise in the provisioning of Internet access services, and Time Warner's expertise in developing and distributing content, including a report stating that "one of the strengths of the combined entity will be its ability to develop and promote new interactive services."[787] Another analyst asserts that "[a]s the interrelationship between and the evolution of new media and old media is established in the form of AOLTV, we believe the wisdom of merging AOL and Time Warner will become increasingly evident and

[779] *See* Applicants' March 21 Supplemental Information at 30.

[780] *Id.* at 35.

[781] *Id.* at 34 (citing Paine Webber: Merger for a Digital Age at 6).

[782] *Id.* at 32-34.

[783] *Id.* at 32 (citing David Segal, *Deal May Make Online Music Pay*, THE WASHINGTON POST, Jan. 12, 2000, at E1).

[784] *Id.* at 32 (citing Merrill Lynch: Upside at 11 and Paine Webber: Merger for a Digital Age at 9).

[785] Applicants' Aug. 22 Benefits Ex Parte at 7-8.

[786] *Id.*

[787] Applicants' March 21 Supplemental Information at 31-32 (citing Merrill Lynch: Upside at 11).

obvious."[788] The Applicants further note that at least one analyst agrees that the merged entity "is in a better position than either entity separately to drive the revolution of interactive services to the next level – breaking the convergence logjams that, in many sectors of the media and communications industries, are inhibiting growth of the medium."[789]

299. *Merger vs. Joint Ventures.* The Applicants contend that joint venture agreements and other contractual arrangements would not produce the same efficiencies as will the merger. The Applicants claim that a joint venture would be much less efficient than full integration and maintain that it is impractical and unprecedented for the parties to try to negotiate a series of joint ventures to cover the far-reaching scope of this merger.[790]

300. *Commenters' Position on Merger Benefits.* According to the Applicants, commenters do not dispute that the merger will hasten the development of new broadband services,[791] and furthermore, some commenters concede that the merger provides "social benefits."[792]

301. A review of the record reveals that while several commenters find certain public interest benefits possible, most believe these benefits would result only if the Commission conditions its approval of the license transfers on specific requirements. For example, Memphis Networx does not request a denial of the merger, but believes the Commission should require that the Applicants commit to taking a neutral stance with respect to the entry of facilities-based network providers in Time Warner service areas.[793] Such commitments, they say, would provide concrete support for a Commission finding that the proposed merger is consistent with the public interest.[794] In its initial comments, ACA expressed concern that the merged entity would require small cable operators to carry AOL service in order to receive Time Warner programming.[795] In its reply comments, ACA sought a commitment from the Applicants that they would not engage in such tactics, while at the same time recognizing the potential of the merger to create "boundless opportunities for new consumer services."[796] After Time Warner representatives stated, at the Commission's en banc hearing in this proceeding, that the merged entity would not tie or condition access to its programming on carriage of AOL service, ACA released a statement voicing its support for the merger.[797] BellSouth asserts that notwithstanding the anticompetitive potential, the merger could advance the public interest, provided the Commission implements certain safeguards.[798] Finally, Sinclair

[788] Applicants' Aug..22 Benefits Ex Parte at 7-8 (quoting Salomon Smith Barney Mar. 22 Report, at 95).

[789] Applicants' March 21 Supplemental Information at 32 (citing Merrill Lynch: Upside at 11).

[790] *Id.* at 38; Applicants' Aug. 22 Benefits Ex Parte at 11 (citing Applicants' Aug 22 Benefits Ex Parte, Schuler Decl. at ¶¶ 21-22) and 12; *see also* Applicants' Second Response at 21.

[791] Applicants' Reply Comments at 1 and 12.

[792] *Id.* at 12.

[793] Memphis Networx Comments at 3.

[794] *Id.* at 7.

[795] *See generally* ACA Comments.

[796] ACA Reply Comments at 5 and 8.

[797] ACA, *American Cable Association Backs Time Warner/AOL Merger* (press release), July 27, 2000.

[798] BellSouth Reply Comments at 1.

Broadcasting argues that the merger has the potential to promote the development and delivery of new products and services, but not without the appropriate safeguards.[799]

B. Discussion

302. *Cable Access.* The Applicants' MOU represents a commendable commitment to the principle of multiple access and offers a starting point from which a marketplace solution can proceed.[800] The Applicants have offered evidence that in the wake of their MOU, other cable operators are considering allowing multiple ISPs to provide service over their systems.[801] Nevertheless, as discussed in Section IV.A., *supra*, the MOU is not sufficient to avert the merger's potential deleterious effects. Moreover, we are not convinced that the MOU alone will induce other cable operators to open their networks in a manner that would meaningfully benefit the market for high-speed Internet services. The Applicants admit that there are significant details surrounding the implementation of a multiple ISP approach that are unresolved.[802] Although the FTC's Consent Agreement substantially mitigates these harms, we remain concerned that the merged firm could indirectly disadvantage unaffiliated ISPs, especially, local and regional ISPs, through means that are not squarely addressed by the Consent Agreement. Thus, while the terms of the Consent Agreement would clearly enhance the merger's potential public interest benefits, we cannot conclude that the merger will result in unqualified public interest benefits with respect to the provision of Internet access by multiple ISPs over cable facilities without imposing the conditions set forth in Section IV.A., *supra*..

303. *Accelerated Deployment of Broadband Technologies and Content.* We recognize that AOL currently has many agreements with non-cable broadband service providers. For example, AOL currently has non-exclusive strategic alliances with DSL providers SBC (including SBC-owned Ameritech), and with both components of the newly formed Verizon Communications, Bell Atlantic and GTE.[803] While AOL could, on its own, pursue a strategy of "AOL Anywhere," by independently advancing subscription to all broadband technologies, AOL's acquisition of Time Warner may aid Time Warner in the rollout of its high-speed Internet service offering by enabling Time Warner to more rapidly assemble the inputs it needs to increase the rate of deployment.[804] However, because Time Warner already offers high-speed Internet access in a significant number of its franchise areas, this presents only a modest potential public interest benefit.

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[799] Sinclair Reply Comments at 1.

[800] Applicants' March 21 Supplemental Information at 23; *see also* Applicants' Aug. 22 Benefits Ex Parte at 13.

[801] Time Warner Inc., *America Online and Time Warner Announce Framework for Agreements to Offer AOL Service and Other ISPs on Time Warner Broadband Cable Systems* (press release), Feb. 29, 2000; Applicants' Reply Comments at 11 (citing *Leading Cable MSOs Quietly Shift Toward Open Access*, COMM. DAILY, Apr. 6, 2000 "(a)t least 7 of (the) 11 largest cable operators are looking at offering access to multiple ISPs on their high-speed broadband lines").

[802] Application at 15.

[803] Applicants' March 21 Supplemental Information at 17-18.

[804] Applicants' July 12 Benefits Ex Parte at 2. Deployment of high-speed Internet services by cable operators is more complex than the deployment of video services. High-speed Internet service deployment requires the expenditure of additional capital for equipment such as high-speed routers, file servers, and cable modem termination systems. Additional personnel are needed for installation and customer care. New procedures must be established for billing, provisioning, customer maintenance, and marketing. A merger between AOL and Time Warner gives Time Warner access to AOL's capital, trained personnel, and Internet expertise in the areas of technical implementation, sales, marketing and customer care. *Id.*

304. To the extent that AOL's investment in cable broadband stimulates outside investment in alternative technologies, we acknowledge the potential for the merger to provide consumers the added benefit of expedited broadband rollout generally. Financial analysts agree that investment in one broadband technology tends to stimulate investment in competing technologies.[805] The Cable Services Bureau has also recognized this fact. At the request of the Commission Chairman, the Cable Services Bureau convened a series of meetings in 1999 to study the state of the broadband industry and identify any potential market failures. In its Report to the Chairman, the Bureau found that there was little disagreement among the panelists that cable investment inherently spurs investment in DSL and vice versa.[806] However, it is impossible for us to predict the magnitude of the potential impact.

305. Finally, to the extent that the merger advances alternative broadband technologies and thus broadband deployment generally, we would expect such a result to stimulate the development of broadband content. However, we cannot conclude that the merger will advance the quantity and quality of broadband content because, as we indicate in section IV.A. above, the merger itself threatens to reduce competition among high-speed ISPs.[807]

306. *Accelerated Transformation of Traditional Media Products to Digital Platforms.* We find that the merged entity will have the resources to implement its proposed plan for accelerating the transformation of traditional media products to digital platforms. AOL has proven successful at making online content appealing to consumers, especially those who are not computer experts. Time Warner, on the other hand, has been relatively unsuccessful at migrating its traditional media products to digital platforms. For example, Pathfinder was Time Warner's attempt to aggregate its name brand content into one, convenient Web portal. However, Time Warner later abandoned Pathfinder in hopes of finding a better strategy to market its traditional media products.[808] Similarly, Time Warner attempted in 1994 to launch an interactive television service called "Full Service Network" in Orlando, Florida. Because Full Service Network was too costly to maintain, Time Warner abandoned the project.[809] Given the histories of each of these companies independently, we find that the addition of AOL's expertise in making content commercially acceptable to consumers over the Internet could very well advance the migration of Time Warner's name brand content to digital interactive platforms.

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[805] Applicants' March 21 Supplemental Information at 28 (citing Merrill Lynch: Upside at 28).

[806] *Broadband Today*, at 33. *See also* Deborah A. Lathen, Chief, Cable Services Bureau, Federal Communications Commission, Remarks Before the National Governor's Association, Feb. 27, 2000 ("This deployment of cable modems has spurred the deployment of DSL, and this competition has resulted in lower prices and greater choices for consumers.").

[807] *See also* Section IV.F. *supra* (Coordination with AT&T), where we discuss the merged firm's incentive and ability to obtain preferential ISP access rights on AT&T's cable systems.

[808] *See* Communications Media Center at New York Law School, *Time Warner Will Shut Down Pathfinder Web-Site* (Bulletin), Apr. 26, 1999 at http://www.cmcnyls.edu/bulletins/twsdpfws.html-ssi (visited on Oct. 24, 2000); *See also* ZDNET UK, *Time Warner to Close Pathfinder*, ZDNN US, Apr. 27, 1999, at http://www.zdnet.co.uk/news/1999/16/ns-7919.html (visited Oct. 24, 2000); *See also* Jack Egan, *Pathfinder, Rest in Peace: Time Warner Pulls the Plug on the Site*, US NEWS ONLINE, May 10, 1999, at http://www.usnews.com/usnews/issue/990510/10path.htm (visited Oct. 24, 2000).

[809] Dan Trigoboff, *Full Service Network out of Service*, Broadcasting & Cable, May 5, 1997, at http://www.ee.surrey.ac.uk/Contrib/Edupage/1997/05/15-05-1997.html (visited Oct. 24, 2000). Industry observers also note that FSN's failure may have been due to a lack of content and consumer interest. "The technology was not there yet. And without the technology the content was not there. And it's clear that people don't want a lot of what's being offered." *Id.*

307. *Accelerated Deployment of New Services.* While we have no reason to doubt that the Applicants have every economic incentive to provide consumers with a wide array of new services, we also have no way of determining the level to which consumers will benefit in this regard because consumers have not yet had the opportunity to express demand for as-yet-unavailable products. In particular, we recognize the potential for the merged firm to expedite Time Warner's deployment of IP telephony and to allow Internet video streaming. With respect to IP telephony, we believe that Time Warner's technologically advanced cable systems and AOL's expertise in Internet-based applications, as well as AOL's investment in IP telephony provider Net2Phone, together provide promise for this developing technology.[810] With respect to Internet video streaming, we recognize that the Applicants have pledged to allow unaffiliated ISPs to "provide video streaming" to consumers over Time Warner cable systems.[811] Our assessment of these benefits is tempered, however, by the prospect that AOL's network effects advantage in the IM market will position the merged firm to foreclose competition, and thereby diminish innovation and consumer choice, with respect to real-time, interactive broadband services that rely on NPDs.[812] Thus, while we believe the merger would stimulate the development of such services and thereby produce some public interest benefit, we cannot conclude that it would stimulate competition or innovation with respect to such services.

308. We also recognize the potential for the merger to advance the deployment of new services such as online music distribution, ITV, and video-on-demand. For example, as we noted earlier, AOL and Time Warner bring together significant assets that the merged firm could use to launch a successful interactive television product.[813] The Applicants' unique combination of assets presents the possibility that the merged firm will successfully deploy a more comprehensive and highly-advanced ITV product to consumers than was offered in the past. The cable broadband platform in particular may offer ITV providers and consumers advantages over its DSL and satellite distribution networks.[814] AOLTV delivered over Time Warner's cable broadband pipeline could serve to ensure the success of a new generation of ITV services. Against a backdrop of limited ITV success, the deployment of this new product, if successful, could further the statutory goal of promoting the deployment of advanced services.[815] Moreover, provided the merged firm does not limit its distribution of unaffiliated interactive content for the purpose of favoring its own content, AOLTV could also benefit the public by giving viewers access to a greater diversity of information services.[816] While the parties could most certainly

[810] *See* Confidential Appendix V, Note 1.

[811] MOU at ¶ 6.

[812] As discussed in more detail in Section IV.B., *supra* (Instant Messaging and Advanced IM-Based High-Speed Services), we believe this represents a potential public interest harm that is likely to arise from the merger.

[813] *See* Section IV.A.D, *supra.* (Interactive Television Services)

[814] This issue will be explored in our *ITV NOI.*. *See ITV NOI*, FCC 01-15.

[815] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 11; *WorldCom- MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9; *see also* 47 U.S.C §§ 254; Telecommunications Act of 1996 ("1996 Act"), Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157; 1996 Act Preamble.

[816] *See* 47 U.S.C. § 521(4) (purpose of Title VI, "Cable Communications," of the Act is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"); 47 U.S.C. §§ 532(a), (g) ("diversity of information sources"); *see also* 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)); Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules, MM Docket No. 91-221, MM Docket No. 87-8, Report and Order, 14 FCC Rcd 12903, 12910-12916 (1999); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather

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develop ITV and other new products on their own, the combination of differing areas of expertise and the diminished risks associated with a more broad-based merged entity will potentially allow these products to be more fully developed, and may allow ITV to reach the market sooner than would otherwise occur.

309. *Merger vs. Joint Ventures.* Having found that the combination of AOL's and Time Warner's assets will offer some public interest benefits, we next consider whether those benefits could be achieved through a series of joint ventures or other contractual arrangements. The Applicants enumerate, and we recognize, the difficulties involved in establishing a series of joint ventures to accomplish a diverse set of goals. Because the intent underlying the merger is not to develop or deploy a single product or service, we agree that it would be difficult for the parties to successfully negotiate a series of contracts or joint venture arrangements that would account for the series of multimedia ventures contemplated by the transaction. We agree with the Applicants that negotiating individual joint venture agreements for each separate endeavor would involve delays and inefficiencies inherent in establishing the formal relationship necessitated by agreements among independent, publicly traded companies. As we noted in *AT&T-MediaOne*: "the services to be covered by [a series of] joint venture[s], in light of dynamic and rapidly evolving technology and market developments, would make 'arms-length negotiations arduous.'"[817] We also note here that AOL's merger with Time Warner will create an alignment of the parties' economic interests that will reduce the areas of friction between the two companies and facilitate the development of new services.[818]

310. We agree with the Applicants that "because there is no way to predict precisely what technologies and services will develop and be demanded by consumers in the future, it would be difficult, if not impossible to forecast the appropriate parameters of a limited contractual relationship."[819] Furthermore, we agree that AOL and Time Warner offer complementary strengths. For example, we note that Time Warner's Pathfinder portal, which aggregated the company's numerous popular content brands, failed to achieve widespread commercial success. Time Warner's attempt to establish interactive television services was similarly unsuccessful. Conversely, we observe that AOL has unique expertise in content distribution, as evidenced by its successful distribution of its AOL ISP.

311. Finally, we agree with the Applicants that a merged entity with the resources of AOL and Time Warner would be able to take on substantial additional risk in the development and rollout of new services. AOL states that "a merger offer[s] the only way for AOL and Time Warner to fully integrate their operations and allow the merged entity to set aside considerations concerning individual lines of business to concentrate on the good of the whole."[820]

312. *Conclusion.* We recognize that were they not to merge, AOL and Time Warner acting independently or in contractual arrangements with each other or other service providers could likely

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than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); Turner Broadcasting, 512 U.S. at 657 (emphasizing that "[t]he potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

[817] *AT&T-MediaOne Order*, 15 FCC Rcd at 9891 ¶175.

[818] *Id.* at 15 FCC Rcd at 9891 ¶175.

[819] Applicants' March 21 Supplemental Information at 38.

[820] *Id.* at 38 (citing Goldman Sachs: Perfect Time-ing at 2).

achieve some of the same public benefits promised by the merger. We are not persuaded that the proposed merger is the only means to assure advancement of these benefits. Nevertheless, we recognize that this merger has the potential to further several of the Commission's goals and therefore produce some public interest benefits. Among them are the deployment of a wide range of broadband technologies to all consumers. As described above, we believe this merger allows for the direct stimulation of the cable broadband market and the probable indirect stimulation of investment in alternative broadband technologies. While it is impossible for us to predict the magnitude of the potential benefit the merger may bring to the deployment of alternative broadband platforms, we acknowledge that the merged entity will to some extent allow Time Warner to more rapidly complete its rollout of high-speed services, and in turn encourage competitors to do the same. We also recognize that the Applicants' MOU and the FTC Consent Agreement have given the industry a starting point by which to discuss the meaningful advancement of multiple ISP access. Additionally, we believe that the merger will accelerate the transformation of traditional media products to digital platforms, aiding the development of advanced services.

313. These potential public interest benefits, however, do not outweigh the serious potential public interest harms we have identified above. For example, while the merger may well stimulate the development and deployment of new services, if the merger in fact diminishes competition and consumer choice with respect to advanced "IM-based" services and residential high-speed Internet access service, as we predict, then the merger's potential stimulation of the development of new services will not guarantee that consumers will benefit from innovation, price competition, or diversity of choices with respect to these services. Finally, these potential harms threaten to diminish consumers' access to the widest possible array of information and information sources.

314. Accordingly, we find it necessary to impose remedial conditions to mitigate the merger's potential harms and in order to ensure that consumers enjoy the benefits the merger promises to offer. The conditions we are imposing to mitigate the merger's potential harms enable us to conclude that, on balance, the potential public interest benefits offered by the merger will outweigh the merger's potential public interest harms.

VI. CONCLUSION

315. Given the conditions we are imposing to mitigate the merger's potential harms, together with the conditions imposed by the FTC in its Consent Agreement and Order To Hold Separate, we conclude that, on balance, the potential public benefits offered by the merger outweigh any harms that would not be remedied by these conditions. Accordingly, we find that approval of the license transfer applications subject to the conditions discussed herein will serve the public interest, convenience, and necessity.

VII. ORDERING CLAUSES

316. Accordingly, having reviewed the Application and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (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 America Online, Inc. and Time Warner Inc., Inc. IS GRANTED subject to the conditions stated below.[821]

[821] A list of the licenses and authorizations that have been approved for transfer pursuant to the terms of this *Order* is set forth in Appendix C hereto.

317. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (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 AOL Time Warner Inc. to acquire control of:

a) any authorization issued to Time Warner, its subsidiaries, or its 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.

318. IT IS FURTHER ORDERED that AOL Time Warner shall not restrict the ability of any current or prospective ISP customers to select and initiate service from any unaffiliated ISP which, pursuant to a contract with AOL Time Warner, has made its service available over AOL Time Warner's cable facilities ("Participating ISP").

319. IT IS FURTHER ORDERED that AOL Time Warner shall allow customers to select a Participating ISP by a method that does not discriminate in favor of AOL Time Warner's affiliates on the basis of affiliation. At a minimum, AOL Time Warner shall allow customers to obtain a list of Participating ISPs by calling their local AOL Time Warner cable system and requesting such a list. Whenever a customer requests a listing of Participating ISPs, AOL Time Warner[822] shall provide the list in a reasonable and timely manner. Such list shall not discriminate in favor of AOL Time Warner's affiliates on the basis of affiliation. AOL Time Warner shall not prohibit ISPs from marketing their services to AOL Time Warner cable customers.[823]

320. IT IS FURTHER ORDERED that AOL Time Warner shall permit each Participating ISP to determine the contents of its subscribers' first screen[824] and shall not require a Participating ISP to include any content as a condition of obtaining access to AOL Time Warner cable systems; provided that AOL Time Warner and any Participating ISP may agree that the ISP will include specified content or links on its first screen. AOL Time Warner shall not require any high-speed Internet access cable customer to go through an affiliated ISP to reach any Participating ISP from which the customer purchases service.

321. IT IS FURTHER ORDERED that AOL Time Warner shall permit each ISP to have a direct billing arrangement with those high-speed Internet access subscribers to whom the ISP sells service. AOL Time Warner may offer a billing service to any Participating ISP, but shall not require any ISP to purchase this service as a condition of obtaining access.

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[822] The term AOL Time Warner as used in this sentence refers to the division of AOL Time Warner that operates its cable systems.

[823] This provision is not intended to restrict AOL Time Warner's ability to market its own products to prospective or current ISP customers.

[824] The term "first screen" shall have the meaning ascribed to it in Section IV.A, *supra*.

322. IT IS FURTHER ORDERED that all contracts between AOL Time Warner and unaffiliated ISPs for access to Time Warner's cable systems shall contain a clause warranting that, to the extent AOL Time Warner provides any Quality of Service mechanisms, caching services, technical support customer services, multicasting capabilities, address management and other technical functions of the cable system that affect customers' experience with their ISP, AOL Time Warner shall provide them in a manner that does not discriminate in favor of AOL Time Warner's affiliated ISPs on the basis of affiliation.

323. IT IS FURTHER ORDERED that AOL Time Warner shall not enter into any contract with any ISP for connection with AOL Time Warner's cable systems that prevents that ISP from disclosing the terms of the contract to the Commission under the Commission's confidentiality procedures.

324. IT IS FURTHER ORDERED that complaints or petitions regarding conditions regarding high-speed Internet services shall be filed and adjudicated pursuant to the provisions of Section IV.A of this *Order*.

325. IT IS FURTHER ORDERED that AOL Time Warner[825] shall not offer an AIHS application that includes the transmission and reception, utilizing an NPD over the Internet Protocol path of AOL Time Warner broadband facilities, of one- or two-way streaming video communication using IM protocols – including live images, tape or animation – that are new features, functions, and enhancements beyond those offered in AIM 4.3 or ICQ 2000b.[826] until AOL Time Warner satisfies one of three options (the "IM condition").[827] The three options are: (1) AOL Time Warner may show that it has implemented a standard for server-to-server interoperability of NPD-based services that has been promulgated by the IETF or a widely recognized standard-setting body; (2) AOL may show that it has entered into a written contract providing for server-to-server interoperability with a significant, unaffiliated, actual or potential competing provider of NPD-based services offered to the public; after AOL Time Warner has entered this contract, an officer of AOL Time Warner shall certify to the Commission that it is prepared to promptly enter into negotiations, in good faith, with any other requesting provider of NPD-based services; within 180 days after entering this first contract, AOL Time Warner must enter two additional contracts with significant, unaffiliated, actual or potential competing providers of NPD-based services offered to the public; (3) AOL Time Warner may seek relief from this condition by showing that the imposition of the condition no longer serves the public interest, convenience or necessity because there has been a material change in circumstance.

326. IT IS FURTHER ORDERED that if AOL Time Warner seeks relief from the IM condition pursuant to one of the three options listed in the preceding paragraph, it shall submit a petition to the Commission seeking findings and conclusions that one of the three options has been met.[828] The findings of the Commission shall be made upon clear and convincing evidence, and in the absence of such

[825] In "AOL Time Warner," we include the separate pre-merger companies and the post-merger company.

[826] We explicitly exclude upgrades to AOL's current IM products that are not otherwise included in AIHS.

[827] The condition and the three options are set forth more fully in Section IV.B., *supra*. (Instant Messaging and Advanced IM-Based High-Speed Services)

[828] The procedures for submission of petitions are set forth more fully in Section IV.B, *supra*. (Instant Messaging and Advanced IM-Based High-Speed Services)

an evidentiary showing, the condition shall not be eliminated. If the Commission finds that one of the three options has been met, then AOL Time Warner may offer video AIHS services.

327. IT IS FURTHER ORDERED that AOL Time Warner shall file a progress report with the Commission, 180 days after the release of this *Order* and every 180 days thereafter, describing in technical depth, the actions it has taken to achieve interoperability of its IM offerings and others' offerings. Such reports will be placed on public notice for comment.

328. IT IS FURTHER ORDERED that complaints or petitions regarding the IM condition shall be filed and adjudicated pursuant to the provisions of Section IV.B of this *Order*.

329. IT IS FURTHER ORDERED that five (5) years after the date of release of this *Order*, the condition set forth in the preceding paragraphs 325 through 328 shall expire and shall not restrain AOL Time Warner from offering video AIHS.

330. IT IS FURTHER ORDERED that the Applicants shall notify the Chiefs of the Commission's Cable Services Bureau and International Bureau, in writing, of any transactions that increase the Applicants' ownership interest in General Motors Corporation and/or Hughes Electronics Corporation, no later than 30 days after the transaction.

331. IT IS FURTHER ORDERED that AOL Time Warner shall be prohibited from entering into any agreement with AT&T Corp., tacit or otherwise, that gives any AOL Time Warner ISP exclusive access to any AT&T cable system for the purpose of offering high-speed Internet access service.

332. IT IS FURTHER ORDERED that AOL Time Warner shall be prohibited from entering into any agreement with AT&T, tacit or otherwise, that affects AT&T's ability to offer any rates, terms or conditions of access to ISPs that are not affiliated with AOL Time Warner.

333. IT IS FURTHER ORDERED that AOL Time Warner, by its General Counsel, shall certify to the Commission upon the merger's closing and annually thereafter that it is in compliance with the foregoing provisions in paragraphs 331 and 332 above.

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

335. IT IS FURTHER ORDERED that all references to AOL, Time Warner, and AOL Time Warner 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, except as otherwise noted.

336. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (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 filed by the Consumers Union, Consumer Federation of America, Media Access Project and Center for Media Education, the Petition to Deny of Thomas Lewis Bonge, the Petitions to Condition filed by RCN Telecom Services and Gemstar, and all similar petitions ARE DENIED.

337. IT IS FURTHER ORDERED that the motion to consolidate filed by the Consumers Union, Consumer Federation of America, and Center for Media Education, IS DENIED.

338. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE on January 11, 2001,[829] in accordance with Section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[829] On January 11, 2001, the Commission released a public notice announcing the Commission's adoption of this *Order*. Public Notice, "Subject to Conditions, Commission Approves Merger Between America Online, Inc. and Time Warner Inc.," CS Docket No. 00-30, FCC 01-11 (rel. Jan. 11, 2001).

APPENDIX A

List of Timely Filed Comments

• Denotes that the commenter filed a Petition To Deny

INITIAL COMMENTS

American Cable Association ("ACA")
• Consumers Union, Consumer Federation of America, Media Access Project, and Center for Media Education ("Consumers Union")
Gemstar International Group, Ltd. and Gemstar Development Corp. ("Gemstar")
City of Houston City Council Members: Bert Keller, John E. Castillo, Annise D. Parker, Carroll G. Robinson, Rob Todd ("Houston City Council Members")
iCAST Corporation ("iCast")
Memphis Light, Gas & Water Division ("MLG&W")
Memphis Networx, LLC ("Memphis Networx")
SBC Communications ("SBC")
RCN Telecom ("RCN")
Tribal Voice ("Tribal Voice")

REPLY COMMENTS

America Online, Inc. and Time Warner Inc. ("Applicants")
American Cable Association ("ACA")
Association for Maximum Service Television, Inc. ("MSTV")
BellSouth Corporation ("BellSouth")
Freedom Broadcasting, Inc. ("Freedom")
iCAST Corporation and Tribal Voice ("iCast and Tribal Voice")
Emy Tseng, Kamal Latham, Chen Hao, and Armand Ciccarelli ("MIT/Harvard Students")
RCN Telecom ("RCN")
Sinclair Broadcast Group, Inc. ("Sinclair")
State of Connecticut, Office of the Attorney General ("Connecticut Attorney General")
Town of Cary, North Carolina ("Town of Cary")
The Walt Disney Company ("Disney")

APPENDIX B

CONFIDENTIAL APPENDIX

CONFIDENTIAL AND UNDER SEAL

SUBJECT TO PROTECTIVE ORDER

IN CS DOCKET NO. 00-30

APPENDIX C

339. List of Authorizations and Licenses

The approval for transfer of control of Time Warner's and AOL's authorizations and licenses to AOL Time Warner includes the Commission authorizations and licenses listed below. Additional applications may have been filed during the pendency of the applications for transfer of control that may be the subject of future public notices. Further, AOL and Time Warner have acquired or disposed of licenses during the pendency of this proceeding. Applications for transfer of these licenses will also be addressed in future public notices. The call signs of the stations involved are included below for reference only.

Domestic Fixed Satellite Service (Part 25)

Cable News Network LP, LLLP
SES-T/C-20000211-00219
E2001
E890835
E861053
E880870
E890577
E890834
E890836
E900975
E930204
E940420
E940421
E940422
E950363
E970490
E990281
E990282

Turner Teleport, Inc.
SES-T/C-20000211-00225
KA58

Time Warner Entertainment-Advance/Newhouse Partnership
SES-T/C-20000211-00226
E990035
E990041

Turner Broadcasting System, Inc.
SES-T/C-20000211-00228
E920013
E980173
E980181

Time Warner Entertainment Company, L.P.
SES-T/C-20000211-00229
E4063

E910207
E930421
E930422

International Section 214 (Part 63)

ITC-T/C-2000211-00069	Time Warner Telecom Inc.
ITC-T/C-20000211-00230	Time Warner Connect of San Antonio, Inc.

Television Broadcast Station (Part 73)

BTCCT-200211AAD	WTBS(TV) CH. 17 FAC ID 64033	SuperStation, Inc. Atlanta, GA

Low Power Television (Part 74)

BTCTTL-20000211AAE	W34AX FAC ID 64636	Time Warner Entertainment- Advance/Newhouse Partnership Henderson, NC

Cable Television Relay Services (Part 78)

Cablevision Industries, Inc.		
CAR-50596-09	WHZ-685	Fishkill, NY
CAR-50597-09	WHZ-239	Lloyd, NY
CAR-50598-09	WHZ-502	West Point, NY
CAR-50599-09	WAD-241	Wurtsboro, NY
Century Venture Corporation		
CAR-50600-09	WHZ-810	Brunswick, GA
CAR-50601-09	WLY-436	Jekyll Island, GA
CAR-50602-09	WHZ-971	Owensboro, KY
CAR-50603-09	WAW-505	Brookfield, WI
CAR-50604-09	WGZ-277	Wauwatosa, WI
CNN America, Inc.		
CAR-50605-09	WHZ-931	Oakland, CA
Florida Cablevision Management Corp.		
CAR-50606-09	WLY-604	Golden Gate, FL
Kansas City Cable Partners		
CAR-50607-09	WLY-353	Ft. Leavenworth, KS
CAR-50608-09	WHZ-921	Leavenworth, KS
CAR-50609-09	WGW-207	Independence, MO
CAR-50610-09	WAE-602	Kansas City, MO
CAR-50611-09	WGW-219	Kansas City, MO
CAR-50612-09	WGW-220	Kansas City, MO

KBL Cablesystems of Minneapolis, Inc.		
CAR-50613-09	WHZ-238	Eden Prairie, MN
KBL Cablesystems of the Southwest, Inc.		
CAR-50614-09	WHZ-244	Minneapolis, MN
Massachusetts Cablevision Systems Limited Partnership		
CAR-50615-09	WAL-427	Bellevue, OH
CAR-50616-09	WAY-894	Galion, OH
CAR-50617-09	WBB-813	Upper Sandusky, OH
Paragon Communications		
CAR-50618-09	WHZ-373	Carson, CA
CAR-50619-09	WGZ-435	Mars Hill, ME
CAR-50620-09	WGV-525	Fishkill, NY
CAR-50621-09	KN-5098	Manhattan, NY
CAR-50622-09	WHW-60	Manhattan, NY
CAR-50623-09	WAF-665	New Windsor, NY
Staten Island Cable, LLC		
CAR-50624-09	WHZ-455	Elizabeth, NJ
Texas Cable Partners, L.P.		
CAR-50625-09	WHZ-504	Alton, TX
CAR-50626-09	KYZ-22	Bandera, TX
CAR-50627-09	WMC-696	Beaumont, TX
CAR-50628-09	WHZ-677	Commerce, TX
CAR-50629-09	WGI-758	Eagle Pass, TX
CAR-50630-09	WHZ-780	El Paso, TX
CAR-50631-09	WJI-36	El Paso, TX
CAR-50632-09	WLY-483	Ft. Bliss, TX
CAR-50633-09	WGI-756	Farias Ranch, TX
CAR-50634-09	KOD-36	Harlingen, TX
CAR-50635-09	KA-80625	Houston, TX
CAR-50636-09	KYX-62	Loma Vista, TX
CAR-50637-09	WGI-757	Moore, TX
CAR-50638-09	WHZ-869	One North, TX
CAR-50639-09	KYX-61	Pearsall, TX
CAR-50640-09	KOD-31	Pharr, TX
CAR-50641-09	WAF-861	Port Isabel, TX
CAR-50642-09	WBH-846	Port Neches, TX
CAR-50643-09	KOD-35	Weslaco, TX
CAR-50644-09	WGI-755	Winter Haven, TX
Time Warner Cable of Southeastern Wisconsin, L.P.		
CAR-50645-09	WLY-245	Brown Deer, WI
CAR-50646-09	WHZ-447	Milwaukee, WI
CAR-50647-09	WGZ-421	S. Milwaukee, WI

Time Warner Entertainment Company L.P.

CAR-50648-09	WBM-740	EMS-Lanai, HI
CAR-50649-09	WAE-470	Glenwood, HI
CAR-50650-09	WAX-743	Glenwood, HI
CAR-50651-09	WAB-577	Haleakala Mtn., HI
CAR-50652-09	WHZ-819	Hana, HI
CAR-50653-09	WLY-683	Hawaii Kai, HI
CAR-50654-09	WLY-240	Hawaii Kai, HI
CAR-50655-09	WAE-478	Hilo, HI
CAR-50656-09	WBM-744	Hilo, HI
CAR-50657-09	KA-80614	Honolulu, HI
CAR-50658-09	WGV-848	Kahului, HI
CAR-50659-09	WHZ-876	Kahului, HI
CAR-50660-09	WAV-644	Kaupulehu, HI
CAR-50661-09	WAN-954	Kaupulehu Lava Flow, HI
CAR-50662-09	WLY-248	Kihei, HI
CAR-50663-09	WLY-713	Lahaina, HI
CAR-50664-09	WLY-684	Lanai City, HI
CAR-50665-09	WAN-953	Mahukona, HI
CAR-50666-09	WBD-613	Mauna Kapu Peak, HI
CAR-50667-09	KA-80615	Mauna Kapu Peak, HI
CAR-50668-09	WAB-578	Maunaka Mtn., HI
CAR-50669-09	WLY-402	Meyers Ranch, HI
CAR-50670-09	WLY-415	Mililani, HI
CAR-50671-09	WLY-409	Olinda, HI
CAR-50672-09	WLY-678	Puu Kolii, HI
CAR-50673-09	WLY-685	Puu Nana, HI
CAR-50674-09	WBM-738	Puu Nana, HI
CAR-50675-09	WBM-742	Puu Nianiau, HI
CAR-50676-09	WHZ-617	Waimalu, HI
CAR-50677-09	WBD-612	Waipahu, HI
CAR-50678-09	WHZ-728	Brazil, IN
CAR-50679-09	WRC-25	Chanute, KS
CAR-50680-09	WRC-23	Garnett, KS
CAR-50681-09	WLY-703	Independence, KS
CAR-50682-09	WRC-24	Iola, KS
CAR-50683-09	KZW-67	Neodesha, KS
CAR-50684-09	WBL-521	Thrall, KS
CAR-50685-09	WBK-510	Saco, ME
CAR-50686-09	WAS-288	Sanford, ME
CAR-50687-09	WLY-479	Columbus, NE
CAR-50688-09	WAB-572	Wynantskill, NY
CAR-50689-09	WHZ-633	Bazetta, OH
CAR-50690-09	WAY-890	Columbus, OH
CAR-50691-09	WHZ-408	Lima, OH
CAR-50692-09	WHZ-587	Marysville, OH
CAR-50693-09	WAY-903	New Albany, OH
CAR-50694-09	WHZ-437	Ottawa, OH
CAR-50695-09	WHZ-406	Richwood, OH
CAR-50696-09	WHZ-545	Troy, OH

CAR-50697-09	WLY-471	Youngstown, OH
CAR-50698-09	WGK-594	Burlington, WI

Time Warner Entertainment-Advance/Newhouse Partnership

CAR-50699-09	WHZ-982	Clearwater, FL
CAR-50700-09	KA-80616	Clearwater, FL
CAR-50701-09	WLY-462	Deland, FL
CAR-50702-09	WHZ-784	Lakeland, FL
CAR-50703-09	WHZ-785	Lakeland, FL
CAR-50704-09	KD-55011	Orlando, FL
CAR-50705-09	WHZ-396	Palm Harbor, FL
CAR-50706-09	WGZ-487	Pinellas Park, FL
CAR-50707-09	WHZ-652	St. Petersburg, FL
CAR-50708-09	KD-55009	Tampa, FL
CAR-50709-09	WLY-330	Barada, NE
CAR-50710-09	WLY-331	Octavia, NE
CAR-50711-09	WHZ-882	Camden, NY
CAR-50712-09	WLY-554	Crown Point, NY
CAR-50713-09	WGK-590	Glens Falls, NY
CAR-50714-09	WAN-337	Lake George, NY
CAR-50715-09	KB-60127	Rochester, NY
CAR-50716-09	KD-55003	Rochester, NY
CAR-50717-09	WAF-786	Sidney, NY
CAR-50718-09	WLY-235	Atlantic, NC
CAR-50719-09	WLY-509	Beaufort, NC
CAR-50720-09	WBF-574	Burgaw, NC
CAR-50721-09	WGJ-890	Butner, NC
CAR-50722-09	WAJ-761	Fayetteville, NC
CAR-50723-09	WLY-333	Fayetteville, NC
CAR-50724-09	WLY-246	Garner, NC
CAR-50725-09	WHZ-394	Havelock, NC
CAR-50726-09	WHZ-430	Lizard Lick, NC
CAR-50727-09	WHZ-395	Morehead City, NC
CAR-50728-09	WLY-646	Pembroke, NC
CAR-50729-09	WLY-429	Raleigh, NC
CAR-50730-09	WAX-279	Red Springs, NC
CAR-50731-09	WAE-564	Supply, NC
CAR-50732-09	WHZ-774	Wilmington, NC
CAR-50733-09	WDH-701	Florence, SC
CAR-50734-09	WGV-822	Sumter, SC
CAR-50735-09	KA-80624	Austin, TX
CAR-50736-09	KD-55017	Austin, TX
CAR-50737-09	WBY-600	Austin, TX
CAR-50738-09	WAH-212	Bluegrove, TX
CAR-50739-09	WAH-213	Crafton, TX
CAR-50740-09	WLY-367	Elroy, TX
CAR-50741-09	WSV-58	Flat, TX
CAR-50742-09	WHZ-585	Grenada Hills, TX
CAR-50743-09	WHZ-339	Lukenbach, TX
CAR-50744-09	WSV-56	McGregor, TX

CAR-50745-09	WAH-228	Vashti, TX
CAR-50746-09	WCJ-907	West Lake Hills, TX
TWI Cable Inc.		
CAR-50747-09	WGV-526	New Riegel, OH
TWI Summit Cable, Inc.		
CAR-50748-09	WHZ-548	Banning, CA
CAR-50749-09	WLY-451	Beaumont, CA
CAR-50750-09	WLY-306	Cathedral City, CA
CAR-50751-09	KD-55002	Palm Desert, CA
CAR-50752- 09	WLY-449	Whitewater, CA
CAR-50753-09	WHZ-547	Whitewater, CA
CAR-50754-09	WGZ-470	Palm Desert, CA

CARS Transfers to be effected in the future (pending application and public notice)

Time Warner Entertainment Company, LP		
	WLY-720	Mauna Lani, HI
	WLY-726	Wailuku, HI
	WAB-572	Wynantskill, NY
Texas Cable Partners, LP		
	WGZ-450	Escobas, TX
	WGZ-451	Horseshoe Ranch, TX
	WGZ-452	Benavides, TX
	WGZ-264	Realitos, TX
	WJT-43	Corpus Christi, TX

The Wireless Telecommunications Bureau is processing 41 applications to transfer control of approximately 400 licenses:

Private Land Mobile Radio Services (Part 90)

	File #	Lead Call Sign
Alert Cable TV Inc	0000302063	KYK615
Alert Cable TV of Oklahoma Inc	0000302074	KWS691
Alert Cable TV of South Carolina Inc	0000302077	KFI554
America Online, Inc.	0000302103	KNNW816
American Television and Communications Corporation	0000302198	KXL770
Cablevision Industries Inc	0000302444	KNGX578
Cablevision Industries, Limited Partnership	0000302460	KNHJ962
Cablevision Industries of Alabama Inc	0000302488	KYD420
CAT Holdings LLC	0000301862	KRU795
Century Venture Corporation	0000302539	KZE460
Community CATV Corp	0000303479	WRJ952
Dorchester Cablevision Inc	0000303483	WSK244
Erie Telecommunications, Inc	0000303486	KNCA620

Fairclark Cable TV Inc	0000303492	KQI872
Florida Cablevision Management Corp	0000303506	KNDR433
Home Box Office	0000303522	KB51583
HBO Studio Productions	0000303600	WPLP425
Kansas City Cable Partners	0000304203	WRU681
KBL Multnomah Cablesystems LP	0000304757	WNLJ857
KBL Portland Cablesystems LP	0000305899	WYJ623
Massachusetts Cablevision Industries Inc	0000305900	WNZV590
Massachusetts Cablevision Systems LP	0000305901	KYC473
Paragon Communications	0000305902	KBE579
Texas Cable Partners, LP	0000305904	KTF476
Time Warner Cable of Avalon LP	0000305908	WPMF361
Time Warner Entertainment Company LP	0000301876	KEA342
Time Warner Entertainment-Advance/Newhouse Partnership	0000301895	KFM714
Time Warner Entertainment-Advance/Newhouse Partnership	0000301830	WPFZ212
Time Warner Inc.	0000305897	KNAX816
Turner Broadcasting System Inc.	0000305909	WNXV224
TWFanch-one Co.	0000301815	WQP536
TWI Cable Inc	0000305910	KNHA621
TWI Summit Cable Inc	0000305911	WNDP983
Warner Bros	0000305912	WPLD733
West Valley Cablevision Industries, Inc	0000305913	WNSH254

Fixed Microwave Services (Part 101)

Private Operational Fixed Point-to-Point Microwave

	File #	Lead Call Sign
CNN America Inc	0000084755	WNES530
Superstation Inc	0000084751	WNEL539
Texas Cable Partners, LP	0000084765	WNEW367
Time Warner Entertainment-Advance/Newhouse Partnership	0000084762	WNER856

Common Carrier Fixed Point to Point Microwave

	File #	Lead Call Sign
American Television and Communications Corporation	0000084776	KPR32
Texas Cable Partners, LP	0000084753	KLH77

NEWS

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This is an unofficial announcement of Commission action. Release of the full text of a Commission order constitutes official action. See MCI v. FCC. 515 F 2d 385 (D.C. Circ 1974).

STATEMENT OF FCC CHAIRMAN WILLIAM E. KENNARD ON CONDITIONED APPROVAL OF AOL TIME WARNER MERGER

Our conditioned approval of the AOL Time Warner merger is significant not only for the size of the merger we approve today, but also for its scope. AOL Time Warner is a marriage of old media and new media, content and conduit, 20th century know-how and 21st century vision. In a phrase, it's "Convergence Illustrated."

I took a hard, careful look at this merger to make sure that this historic marriage would benefit consumers. I balanced the need to protect the public from the danger that any one company will be able to dominate the marketplace against the need to guard against intrusive regulation that could stifle investment and innovation.

The conditions we impose today are forward-looking and fair. They preserve the openness of the Internet. They protect consumers and avoid heavy-handed regulation by using a narrowly-tailored market opening approach. And they ensure that neither AOL Time Warner nor a government agency will pick winners and losers in this dynamic marketplace.

I have long been concerned about bottlenecks—bottlenecks that could stifle competition and innovation. So in reviewing this merger, I was particularly concerned about the future of the instant messaging platform, the ability of competing broadband ISPs to access Time Warner's cable systems, and the potential for discrimination in the interactive television space.

We don't rely on good intentions. We require AOL to interoperate with competing instant messaging (IM) providers before it can offer videoconferencing and other streaming video over IM. This condition guards against AOL's ability to leverage its existing dominance in current IM into the broadband IM marketplace. In order to ensure fair and open access to Time Warner's cable system, we augment the FTC conditions by imposing specific protections against discrimination—protections that will be particularly critical for smaller ISPs. We also hold AT&T to its commitment to divest its interest in Time Warner Entertainment and impose additional conduct restrictions to protect consumers. Finally, the potential for discrimination in the interactive television marketplace bears watching and we have begun a proceeding to explore the need for the FCC's involvement in promoting competition in this developing service.

When I look at this merger, the potential benefits I see are the ability to roll out technologies faster and farther, the potential for significant innovation in new services and technologies. But, those benefits could be the proverbial silver lining. AOL and Time Warner each possess significant market power in their respective spheres. AOL is the leading Internet service provider with over 26 million members worldwide, and it continues to grow. In fact,

AOL has gained almost six million members in just the last year. Time Warner is the nation's second largest cable television company with ties to AT&T, the nation's largest cable operator and owns one of the most popular video content libraries in the world.

The power of these players is immense and so is the potential for anti-competitive behavior. Therefore, I only voted to approve this merger because of the conditions we impose.

With the merger of AOL and Time Warner, we are seeing the creation of a new platform for communications based on the Internet. Our challenge is to make sure that consumers get the full benefits of this new world technology without importing the dangers of monopoly and bottlenecks from the old world. We have met this challenge.

SEPARATE STATEMENT OF COMMISSIONER SUSAN NESS

Re: Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee

The marriage of America Online (AOL), the world's largest Internet service provider (ISP), and Time Warner, the second largest American cable operator and a global content provider, creates not only the largest merger in U.S. history, but also one of the most novel and complex this agency has ever faced. It represents the convergence of old and new media. The energy and synergy derived from this combination have the potential to provide consumers with a wealth of innovative new products and services. If unchecked, however, this corporate union also has the potential to exploit its considerable market power to stymie competition by restricting the flow of competing goods and services over its broadband facilities. For this reason, I voted to approve the transfer of Time Warner's communications licenses with conditions. I would not have supported it otherwise.

The merger presents several novel issues for FCC consideration. Four such issues were raised in challenges to the grant of the transfer of control of applications filed by AOL and Time Warner. Commenters urged us to:

- Intervene to require AOL, the dominant provider of instant messaging (IM), to make its IM service interoperable with competing IM offerings;

- Examine whether the vertical combination of a major cable operator with the largest ISP necessitated our intervention to pry open the Time Warner systems to other ISPs, even though we had rejected such remedies;[1]

- Intervene to protect competing content providers wishing to offer interactive television services over Time Warner cable facilities – novel services that are still nascent and not commercially available; and, finally,

- Reexamine whether the joint ownership of Time Warner Entertainment by AOL Time Warner and AT&T poses an unacceptable risk that the two joint venture partners would conspire to discriminate against other programming and service providers.

While we believe that we have jurisdiction to explore each of these matters, we limited our actions to address specific harms caused or exacerbated by the merger of the

[1] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order, 15 FCC Rcd 9816 (2000); *Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control of Tele-Communications, Inc. to AT&T Corp.*, CC Docket No. 98-178, Memorandum Opinion and Order, 14 FCC Rcd 3160 (1999).

applicants. Moreover, we crafted remedies that were merger-specific -- designed to address only merger-related harms.

Instant Messaging

Instant messaging is a relatively new, Internet-based service that provides presence detection and real-time communication capabilities to subscribers. I believe consumers overwhelmingly want competing IM services to be interoperable. I do, too. The Internet has thrived upon principles of openness and connectivity. With interoperability, consumers would have real-time access to more individuals and to competitive services. Thus, I have strongly and repeatedly encouraged AOL and the other industry players to work together to achieve interoperability as expeditiously as possible.

There is abundant evidence on the record that AOL, which developed the IM product, is the dominant provider of that service. In my view, however, it has earned that position for dial-up service through innovation and hard work. And most significantly for the purposes of this proceeding, regardless of the public interest in interoperability, it earned that position outside of the context of this merger.

There are other major players competing aggressively against AOL to attract IM customers. These competitors include Microsoft, which has bundled its IM service with its operating system. There is even disputed evidence in the record that Microsoft and others recently have *gained*, not *lost*, market share in their pursuit of IM subscribers. Moreover, users of IM represent a small percentage of online consumers, suggesting that the market is far from saturated. There is nothing to prevent large user groups, such as employment-based entities, from switching *en masse* from one IM provider to another if more attractive terms are offered. Thus, while our decision concludes that AOL is a dominant provider, it appropriately stops short of finding that the market has "tipped" in AOL's favor.[2] We need not find that the market has tipped, however, in order to address potential harm to consumers that could result from the merger of AOL's dominant IM presence with Time Warner's assets.

AOL claims that it seeks interoperability, yet it appears to have resisted efforts to create an industry-wide standard. Indeed, its contributions to an industry-wide standards body were disappointing at best. At our *en banc* hearing on the merger, however, AOL reaffirmed its commitment to interoperability, and testified that it expected to have a workable technical standard by July 2001, and the standard then would have to be tested.

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[2] The service benefits from what is called "network effects." At its core is a directory of names and presence detection capability. Each new person who joins an IM directory database adds value to the service for every other subscriber in that database. If interoperability exists among competing IM services, then all subscribers benefit from the enlarged database. But if a provider does not permit others to access the database, then prospective subscribers are more likely to choose the service provider that has access to the greatest number of people they wish to contact. In antitrust terms, a market characterized by network effects is deemed to have "tipped" when subscribers to a competing service increasingly switch to the dominant provider to gain access to the larger number of users on the closed system. Generally, in a tipping scenario, competing providers show a net loss of customers in favor of the dominant provider.

It explained that any standard must take into account AOL's need to protect the security of its network and the privacy of its subscribers.

I take AOL at its word that it will have a standard ready by July -- presumably one that addresses its privacy and security concerns. Thus, I supported a requirement that AOL submit a detailed report to the Commission every six months on the actions it has taken to achieve interoperability in IM. By AOL's own testimony, the first interoperability report to be submitted under this Order should include a technologically detailed description of a successful IM interoperability protocol or standard. The Internet and technology community at large will be able to evaluate the accuracy and thoroughness of AOL Time Warner's assertions when the report is placed on public notice. Should we conclude that AOL is not moving expeditiously toward interoperability, we then can decide whether further steps in a proceeding of general applicability are warranted.

While I do not believe that AOL has moved as rapidly as it could to resolve its privacy and security concerns, I do not discredit these issues entirely. It is reasonable for a company that features itself as a protected community to be cautious about outside contamination. AOL Chairman Steve Case correctly observes that the e-mail system is riddled with security and privacy problems. Nevertheless, it has been alleged that AOL's IM products also suffer from security and privacy problems today.

We wisely decline to require interoperability on AOL's existing dial-up IM service because such relief would not be merger specific. Without interoperability, however, AOL should not be allowed to leverage its market power in the dial-up IM market into the broadband market using Time Warner's content and facilities. Our restriction is based upon combining AOL's names and presence database (NPD) with Time Warner's broadband facilities. Thus, if AOL wishes to offer streaming video through IM using its NPD, it first will have to open that database to other IM providers.

Many argue that NPD is at the heart of future real-time broadband services, such as streaming video and video conferencing. Assertions by several Internet and technology companies led me to conclude that the development of communications services within the FCC's jurisdiction would be affected by the combination of the NPD and broadband infrastructure.

Given the potential for abuse of market power and the importance of the services at issue, I supported imposing conditions if they were merger specific and minimally intrusive to achieve the public interest goal of interoperability. The conditions meet those requirements. They are incentive based. We do not reach into AOL's current IM offerings or establish through the heavy hand of regulation an interoperability protocol. Rather, we create an incentive for AOL to achieve interoperability on its own terms. By allowing AOL to meet this condition by entering into interoperability agreements with three significant providers, we have enabled AOL contractually to address its privacy and security concerns.

In addition, our condition reflects an understanding that technology is constantly evolving. The Commission cannot presume to know what will come next. A popular service or technology today, such as IM, may become irrelevant tomorrow, if another technology captures the hearts and minds of the Internet public. Thus, we permit AOL to avoid mandatory interoperability if it can demonstrate that the market has changed dramatically and the NPD no longer is at the core of new services.

I am realistic about the scope of our narrowly tailored conditions on AOL Time Warner, and recognize that the restriction may be of limited consequence. The triggering factor may never be deployed. Nonetheless, our message is clear and I fully expect the merged company to live up to its representations to allow other providers to interoperate with its IM product.

Our actions to address the IM interoperability concerns raised by members of the Internet and information services community likely will be cited in the future whenever the Commission is called upon to consider Internet service offerings. I caution advocates against using this decision to justify invasive regulation of the Internet. Far from opening a Pandora's box of "information service" regulation, our action establishes that the Commission will act in a merger only when essential to preserve the openness and connectivity of the Internet and only when the issue is merger specific. Moreover, in the rare instance where intervention is necessary, the narrow scope of our conditions demonstrates that such action must be minimally intrusive, technologically neutral, and market-based.

Cable Internet Access

The combination of AOL's dominant narrowband ISP service with the second largest cable operator in the nation presented the clearest threat to competitive markets posed by this merger. Our sister agency, the Federal Trade Commission (FTC), took sweeping action to open AOL Time Warner's cable infrastructure to competing Internet service providers.[3] I am pleased that the actions taken by the FTC and this Commission were complementary and avoided inconsistent requirements. I have long supported inter-agency coordination as a way to expedite merger review.

The FTC used its antitrust and enforcement expertise to devise restrictions that address broad, anti-competitive behavior. We used our technological expertise to address specific concerns created by the merger combination, including first screen access and quality of service issues. We also require AOL Time Warner to negotiate in good faith with local and regional ISPs so that a diversity of ISPs might have an opportunity to serve cable subscribers. These conditions operate in concert with those imposed by the FTC.

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[3] *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 (FTC) (proposed Dec. 14, 2000); Federal Trade Commission, *Order to Hold Separate in the Matter of America Online, Inc., and Time Warner Inc.*, Docket No. C-3989, rel. Dec. 14, 2000.

Our conditions are appropriately merger specific. I agree with recent industry assessments[4] that the uniqueness of this transaction counsels against importing our analysis and conclusions in this proceeding into our separate Notice of Inquiry on cable access.[5]

Interactive Television

Many content providers urged this agency to impose conditions on AOL Time Warner to prevent it from exercising its control over the cable infrastructure to impair competing interactive television services. The advent of these services is still hypothetical and we were called upon to make assumptions about where the market is heading. We wisely declined to take action in this Order, recognizing that the issues raised have implications for the industry as a whole and are more appropriately explored in a Notice of Inquiry. While the Commission and the public should remain watchful as these issues develop, we must tread cautiously and not leave the impression that we are on the verge of pouncing on a nascent industry by imposing a detailed regulatory regime.

Time Warner Entertainment and AT&T

While we are concerned about the potential for abuse by the partnership of the first and second largest cable MSOs in Time Warner Entertainment, we decline to take action in this merger review to require AOL Time Warner to resolve its divestiture discussions with AT&T. I therefore urge Time Warner to negotiate in good faith in any discussions with AT&T regarding the latter's disposition of its 25% minority stake in TWE.

Privacy

While occupying only a few short paragraphs of our 150-page Order, consumer privacy is an issue that increasingly concerns me. I wish to emphasize the importance I attach to this aspect of our Order. We require AOL Time Warner to regularly certify to the Commission its compliance with the Communications Act's cable subscriber privacy provision.[6] While this section by its own terms is enforceable in federal district court, rather than at the Commission, we should regard it as an expression of Congressional concern for cable subscribers' privacy. Under this provision, cable operators must give a subscriber adequate notice that her personally identifiable information is being used,[7] and secure her consent for such use.[8]

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[4] *See, e.g., Response of NCTA President & CEO Robert Sachs to FTC Approval of AOL/Time Warner Merger.* December 14, 2000 (on file with the National Cable Television Association) ("the anti-trust safeguards imposed by the FTC are unique to AOL's substantial Internet position and are not a precedent for broader government regulation").

[5] *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities.* GN Docket No. 00-185, Notice of Inquiry, FCC 00-355 (rel. Sept. 28, 2000).

[6] 47 U.S.C. 551.

[7] 47 U.S.C. 551(a)(1).

[8] 47 U.S.C. 551(b)(1).

AOL itself raised privacy concerns with respect to IM interoperability. AOL Time Warner is well situated to be at the forefront of protecting consumer privacy as we enter a new era of communications. I hope this will be reflected in its section 631 certifications.

Conclusion

Media convergence – long awaited – clearly has arrived with the approval of the AOL Time Warner merger. From many quarters of industry and the public, we heard concerns regarding the ability, the incentive, and the propensity of this powerful combination to thwart competition. Our response in this merger has been limited, yet purposeful. The ball now is in AOL Time Warner's court to demonstrate by its actions its willingness to allow all to compete fully and fairly in the broadband marketplace for the benefit of the American consumer.

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FURCHTGOTT-ROTH SUPPORTS MERGER, BUT DECRIES REVIEW PROCESS AS "BROKEN"

Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part

In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, Memorandum Opinion and Order

Because the proposed transfer of radio licenses from Time Warner to the new, combined entity does not raise any compliance issues under any relevant statutory provisions or our numerous regulations, I find the transfer clearly to be in the public interest. I therefore concur in the grant of the license transfer applications.

I cannot subscribe to any of the other aspects of this Order, however. My general views on the proper scope of the Federal Communications Commission's role in the mergers of communications entities are well documented.[1] To summarize, I believe that our job under the plain language of the Communications Act is to approve the transfer of radio licenses, not to pass on mergers. The approval of such transfers should depend upon compliance with extant regulations and applicable statutory provisions, not open-ended analysis of the entities' businesses.

Unfortunately, the Commission in this Order continues to engage in just this sort of "merger" review. The overwhelming bulk of this document has little, if anything, to do with the proposed transferee's use of the CARS licenses that are the jurisdictional object of this proceeding. Instead, the Order focuses on the transferee's various lines of internet business, including instant messaging and interactive television. And it analyzes those business activities to see whether the entities' future conduct might "impair or frustrate the objectives" of the Act. At the end of the day, the Commission has speculated about as yet undeveloped facts that are only tangentially related to license usage, and then applied to that conjecture a standard of review that is virtually unknowable *ex ante*. As I have said before,[2] this approach is fundamentally flawed.

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[1] Applications for Consent to the Transfer of Control of Licenses and 214 Authorizations From MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, 15 FCC Rcd 9816 (2000); Applications of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, for Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules, 14 FCC Rcd. 14712 (1999); Application of WorldCom, Inc., and MCI Communications Corporation to WorldCom, Inc., 13 FCC Rcd 18025 (1998); Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp., Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries, 12 FCC Rcd 19985 (1997).

[2] *See supra* note 1.

I am also troubled by a particular aspect of this proceeding: the coordination of efforts by this agency and the Federal Trade Commission (FTC). To be sure, federal agencies may -- indeed, sometimes should -- communicate with each other about official government business. What it should not do, however, is to engage in such communication in a way that is not transparent and predictable.

Apparently, the FCC and the FTC shared deliberative documents with each other -- presumably for the purpose of coordinating their efforts -- throughout the course of each agencies' proceedings. This interaction was not made public, which makes it difficult for interested commenters and even the parties themselves to track important developments in the decisionmaking process. Furthermore, at the outset of this adjudication, the applicants had no notice of the extent or nature of the intergovernmental coordination that ultimately ensued. That is because we lack consistent, predictable procedures for working with other agencies on mergers; such work is done on a purely *ad hoc* basis, depending on the personal inclination of individual officials. The approval process would be more fair to the applicants, and also more efficient for the FCC staff, if the scope of the working relationships between this agency and other relevant entities were defined in advance.

Of course, if this Commission had not tied its review to that of the FTC's in the first place, no such coordination would ever have been necessary. That is to say, if our review of the license transfer applications were limited to compliance with extant FCC regulations and the Communications Act, there would be no problem of duplication with the FTC, since it has no jurisdiction over those provisions of the law. We would be free to process applications in a timely fashion, fully independent of any action taken by the FTC.

For the foregoing reasons, I concur in the grant of the applications, but dissent from the remainder of the Order, including the conditions imposed upon its approval.

# # #

For more information regarding this release please contact Bryan Tramont, Press Liaison, Office of Commissioner Furchtgott-Roth at 202-418-2000.

STATEMENT OF COMMISSIONER MICHAEL K. POWELL, CONCURRING IN PART AND DISSENTING IN PART

Re: *Memorandum Opinion and Order, Applications for Consent to the Transfer of Control of Licenses by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee (CS Docket No. 00-30)*

The merger before us is one of the most significant in history. It promises to open a new chapter in communications, combining a host of assets and expertise that will likely bring new products and services to consumers. As one would expect, the very same things that engender excitement and promise with this combination also raise anxiety and trepidation among competitors that the market will be dominated by this new entity, to the detriment of competition and consumers.

The merger is also unique because it is difficult to review using traditional metrics. The greatest public benefits as well as the putative harms lie principally in the future, thus making any analysis somewhat speculative and amorphous. Our challenge is to base a decision soundly on evidence that presently exists, on an understanding of the business dynamics of an Internet-centered market, on a grasp of past experiences and on reasonable (and carefully limited) assumptions about the future. This is no easy task, but the key is not to let our imaginations run away with us, given the absence of strong evidentiary moorings.

Unfortunately, in this *Order*, we do take excessive counsel of our fears, or, more accurately, the fears of AOL Time Warner's competitors. Therefore, I concur in approval of this merger but dissent in several respects.[1] I write separately to underscore the following points: (1) that our license transfer process continues to pull the Commission away from its core responsibilities and competencies; (2) that the anticompetitive analysis used to support the Instant Messaging (IM) condition is flawed; and (3) that the sweeping declaration that IM interoperability is somehow intrinsic to the public interest is not based soundly on the record, but is simply the sentiment of the Majority. Such a far-reaching judgment, if merited at all, should be reached only through a more comprehensive regulatory proceeding with the notice and comment procedures set out in the Administrative Procedures Act.

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[1] In addition to dissenting from the Majority's Instant Messaging condition, I object to the Majority's decision to impose broadband open access conditions that may conflict with and prejudge issues in the *Notice of Inquiry* proceeding regarding broadband Internet access. *See* In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, GEN Docket No. 00-185, FCC 00-185, *Notice of Inquiry* ¶¶ 25-42 (rel. Sept. 28, 2000) (examining potential definitional, policy and regulatory cable open access issues). I concur in the conditions regarding Time Warner's relationship with AT&T, though I believe our concerns were substantially addressed by the Department of Justice consent decrees involving AT&T and MediaOne and the Federal Trade Commission consent decree involving AOL and Time Warner. *See United States v. AT&T Corp.*, 2000 WL 1752108, *3 (D.D.C. 2000); *see also In the Matter of America Online and Time Warner*, 2000 WL 1843019 (F.T.C. Dec. 14, 2000).

I. THE LICENSE TRANSFER PROCESS IS STRAYING FROM THE COMMISSION'S MISSION.

I have had many previous occasions to discuss our approach to license transfers (*i.e.*, mergers) and have expressed some concerns about it, focusing primarily on our tendency to adopt conditions that were divorced from the perceived harms.[2] In contrast, I would like to compliment the drafters of this *Order* (primarily, our hardworking Cable Services Bureau staff) for making a valiant attempt to identify specific harms and crafting conditions in response to them. Regrettably, in places, the final product strays considerably from this limited approach.

Our review process has two fundamental problems. *First*, it is increasingly morphing the FCC into an antitrust authority, duplicating the analysis of other more competent authorities. Of course, we have independent authority to review these combinations, but we have wide latitude to decide how searching and how broad such a review need be and I believe we have moved much too far into the domain of other government institutions, namely the Antitrust Division of the Department of Justice and the Federal Trade Commission.

Second, we increasingly use these reviews as substitutes for regulatory process. I believe we are losing focus on our institutional charge. I am of the view that the FCC's focus should be on compliance with the current regulatory regime and a forward-looking focus on the appropriate regulatory treatment of the industry *as a whole*. In contrast, the antitrust authorities' focus is squarely on the merger-specific anticompetitive harms of a given combination and not on regulation. Increasingly, this distinction is blurring. I find that the Commission is willing to pursue broad-reaching industry-wide regulatory questions in the context of an adjudicatory proceeding, the record of which is limited to the facts solely involving the applicants. Our merger "conditions" more often look like rules, reflecting judgments that, if true, affect the entire industry and not just the parties. As such, they should be entertained, if at all, in a broader-based proceeding. The IM condition imposed in this order is an ideal example of this drift.

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[2] *See, e.g.*, In the Matter of Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and Section 310 (d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission Rules, CC Docket No. 98-141, FCC 99-279, *Memorandum Opinion and Order*, 14 FCC Rcd 14712, 15197 (1999) (Separate Statement of Michael K. Powell, Commissioner, Federal Communications Commission) [available on the World Wide Web at <http://www.fcc.gov/commissioners/powell>]; Statement Of Michael K. Powell, Commissioner, Federal Communications Commission, Before The Subcommittee On Telecommunications, Trade And Consumer Protection Of The House Committee On Commerce On "The Telecommunications Merger Act Of 2000" (Mar. 14, 2000) (expressing personal discomfort with "a standard that places harms on one side of a scale and then collects and places any hodgepodge of conditions—no matter how ill-suited to remedying the identified infirmities—on the other side of the scale).

II. THE MAJORITY'S ANTICOMPETITIVE ANALYSIS FOR INSTANT MESSAGING IS FLAWED.

The discussion supporting the IM condition, which would require interoperability if the applicants provide video-oriented advanced, IM-based, high-speed services ("video AIHS"), reveals what a melange our review has become. On the one hand, it is a classic (though flawed) anticompetitive analysis, in which the Commission justifies an IM condition based on AOL's dominance in the IM market. Yet the analysis frequently wobbles, trying to cure shortcomings by resorting to grand declarations that IM interoperability is somehow intrinsic to the public interest—a breathtakingly broad pronouncement that crashes through the confines of this particular merger, with broad implications for all communications and Internet services.

The decision to impose an IM condition rests, in part, on the conclusion that AOL enjoys virtually insurmountable market power in the existing IM market and will leverage that power into the next generation of IM-based products. I find the anticompetitive analysis on which this conclusion based unpersuasive and, indeed, flawed.

A. No Traditional Indicia of Market Power

1. No Clear Market Definition

It is the elemental step in a competitive merger review to define the market—both in terms of the product and the geographic scope. Defining the scope of the market is essential for measuring market power. It is the metric used for determining the number of competitors and is the denominator used for calculating the merging parties' share of the market and subsequently its market power. It is the foundation of a well-grounded analysis.

With respect to IM, however, the *Order* does not cleanly define the market, presumably because the analysis vainly tries to anticipate harms relating to a loose collection of largely hypothetical, not-yet-existent services. Indeed, it eschews the need to define the market with any precision.[3] A sound competitive analysis cannot proceed without some attempt to pin down the market, even where, or perhaps especially where, services are new and novel and share characteristics with many other products and services. This foundational discussion is absent from this *Order*, and would likely prove fatal if an antitrust authority tried to bring such a case in court.

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[3] *Order* ¶ 151 ("[W]e find that the area of our concern is 'NPD [Names and Presence Directory] services' – interactive communication services which . . . depend on an NPD for real-time communication between and among users. . . . A more precise definition of the relevant market is not necessary here, where the Commission can accurately assess the competitive impact of the merger without such a detailed analysis.").

2. Inconclusive Market Share Data

Admittedly, the *Order* tosses around some impressive market-share numbers in an attempt to demonstrate, or at least to give a feel for the idea, that AOL is dominant. The *Order* concedes, however, that there is no solid accepted basis for measuring IM users. It is difficult to compare one company's market share to another's given the lack of uniform criteria. The numbers cited are largely those proffered by the proponents of a condition mandating interoperability for text-based IM—a condition that even the Majority is unwilling to impose.

The most objective data on the record is a study by Media Metrix, recognized as the world leader in the measurement of Internet and digital media use.[4] Tellingly, the study shows very substantial growth by the two largest competitors of AOL (*i.e.*, Microsoft and Yahoo!) as compared to slowing growth for the AOL service. Moreover, the study reports that, combined, Microsoft and Yahoo! have nearly the same market share as AOL. This study, though arguably the best objective evidence of market share, market trends and market power is barely mentioned in the *Order*.[5]

B. Classic Tipping is Unsubstantiated

In the absence of sound market definitions and market data, the Majority turns to a more theoretical construct to show that AOL may be in a position of "unassailable dominance."[6] The Majority essentially employs a market "tipping" analysis in an effort to make this case, attempting to demonstrate that the IM market has nearly tipped, or will tip when AOL combines with Time Warner. The Majority avers, however, that it expresses no opinion on whether its conclusions can be read as a finding the market has tipped. Tipping analysis is emerging as a tool to examine markets that exhibit strong network effects and can be employed to consider the anticompetitive dangers with respect to IM. However, theory is only predictive and must yield when the facts stubbornly belie the theory. That is the case with IM.

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[4] Media Metrix, a widely regarded Internet traffic measurement consultancy, reported in a November 2000 press release that although AOL Instant Messenger is still the dominant IM application in the Internet space, "Yahoo! Messenger and MSN Messenger Service each have accumulated approximately half the number of users as AOL Instant Messenger and have become the fastest growing instant-messaging applications in terms of overall users." *See* Press Release, Media Metrix, *Yahoo! Messenger and MSN Messenger Service Are Fastest Growing Instant-Messaging Applications In The U.S.* (Nov. 16, 2000) [available on the World Wide Web at <http://us.mediametrix.com/press/releases/20001116.jsp>]. AOL Instant Messenger had accummulated 21.5 million unique users by August 2000; for their part, Yahoo! and MSN, respectively, had grown their services to 10.6 million unique users and 10.3 million unique users. Equally interesting, to my mind, Media Metrix noted that approximately one-third of AOL Instant Messenger residential users also used at least one other competing IM application. *See id.*

[5] Microsoft, one of the two significant IM competitors, "dismissed" the Media Metrix IM findings. *See FTC Prepares Vote On AOL-TW Deal, Critics Seek More Conditions*, Communications Daily, Dec. 12, 2000.

[6] *Order* ¶ 175.

A market is said to tip when consumers find the largest provider of the real or virtual network so much more valuable that consumers increasingly select that provider and increasingly abandon all other providers.[7] Thus, in theory, tipped markets can lead to one provider rapidly surfing these network effects to a point that competitors are unable, no matter how efficient or innovative, to compete effectively with the market leader. Under these circumstances, the benefits to consumers of joining or not leaving the dominant provider's network so far outweigh the benefits of using rival networks that consumers increasingly choose the dominant provider and increasingly avoid rival providers. Not all markets exhibiting strong network effects will tip, however.[8]

Had the Majority persuasively demonstrated that the IM market had tipped, and that AOL Time Warner would assuredly dominate the market for any future IM-based services, an IM condition might be warranted. Instead, the Majority takes a middling course—using tipping analysis to find that AOL Time Warner may well be in a position of "unassailable dominance,"[9] while trying to avoid concluding the market has in fact "tipped."[10] Whatever the semantics of its conclusions, the Majority's market tipping analysis is a critical analytical underpinning for the IM condition.[11] Thus, I believe it worth some extended discussion.

Tipping is a very interesting theoretical phenomenon regarding network markets and has been the source of much discussion in antitrust literature. Despite its appeal, however, there is little consensus on how to measure when a market has tipped, and at what point government intervention is warranted. Tipping theory is at once seductive and elegant, perhaps too much so. My concern here is that it can be used to justify premature, unwarranted government intervention, even where there are counter-indications that the market will remain competitive on its own, as I believe is the case here.[12]

Many of the accepted indicia of a tipped market—and, indeed, of market power generally—are just not present in the IM market, despite AOL's large market-share. I

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7 *See* Carl Shapiro & Hal R. Varian, *Information Rules: A Strategic Guide to the Network Economy* 174-76 (1999).

8 *Id.* at 187; *see also* William J. Kolasky, *Network Effects: A Contrarian View*, 7 Geo. Mason L. Rev. 577, 577 (1999).

9 *Order* ¶ 175.

10 To be clear, I do not dispute that the IM market could tip at some undetermined point in the future. But as I describe in greater detail, the underlying facts are inconclusive as to whether tipping has occurred, particularly with respect to the future hypothetical services contemplated by the Majority's IM condition.

11 Presumably, no IM condition would be needed if it is demonstrated, as I do below, that it is still quite possible that market forces will enable some competing firm to prevent AOL from becoming a dominant provider of the advanced IM services contemplated by the majority's condition.

12 Kolasky at 577.

detail some of these factors to underscore the weakness of the Majority's market assessment:

No sign of competitor collapse. Network effects can be both positive and negative. That is, while a company might grow subscribers, market share, and market leadership quickly, network effects can also combine to destroy other companies just as rapidly. In fact, if a market has tipped one would normally expect to see exponential growth by the leader and a precipitous fall off by its competitors.[13] Here, we see the opposite: although AOL's customer base has continued to grow, AOL's competitors have been growing at a much faster rate.[14] Indeed, although AOL essentially created the market for IM only a few years ago, competitors have garnered a sizeable portion of the market in considerably less time.[15] Many of AOL's competitors have surpassed AOL with respect to IM innovation and have joined the battle by bringing their own unique assets to bear.[16] Microsoft is integrating its product into the world's leading browser as well as its successful Hotmail e-mail service. Yahoo! has created an applet called Yahoo! Companion that attaches to the browser and has made it a part of its My Yahoo! services, the leading Internet portal with a very substantial subscriber base.

Very low barriers to entry. The *Order* takes the view that AOL's Names and Presence Directory (NPD) technology is an essential input and that AOL has an insurmountable lead by virtue of its large NPD. While I agree an NPD is an essential input (indeed, this may be nothing more than another way to describe what IM is), I am at a loss to see why AOL has an insurmountable advantage, seeing that other providers can easily develop or acquire the key assets. Names and Presence Directory technology is not particularly sophisticated to develop or acquire. The record does not suggest the technology is difficult to reproduce or that AOL has any control of the technology through intellectual property rights. Many competitors seem to be able to develop and employ products using the technology without much trouble.

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13 Shapiro & Varian at 174-77.

14 *See* Press Release, Media Metrix, *Yahoo! Messenger and MSN Messenger Service Are Fastest Growing Instant-Messaging Applications In The U.S.* (Nov. 16, 2000) (Launched in 1999, both Yahoo!'s and MSN's IM product offerings have become the "fastest growing instant-messaging applications in terms of overall users" over the period of August 1999 to August 2000) [available on the World Wide Web at <http://us.mediametrix.com/press/releases/20001116.jsp>].

15 *Id.*

16 *See, e.g., Yahoo! Companion* (on-line description of Yahoo! content and feature on browser) (visited Jan. 11, 2001) [available on the World Wide Web at <http://edit.yahoo.com/config/download_companion>]; *Yahoo! Messenger* (on-line description of Yahoo! IM capability and integrated functionality like free Internet phone calls, Yahoo! Chat client, alerts for your stocks and Yahoo! Mail, news, weather, stock quotes, etc.) (visited Jan. 11, 2001) [available on the World Wide Web at <http://messenger.yahoo.com/>]; *MSN Messenger Service* (same) (visited Jan. 11, 2001) [available on the World Wide Web at <http://messenger.msn.com/>]; Press Release, Microsoft Corporation, *MSN Reviewers Guide, January 2000* (visited Jan. 11, 2001) [available on the World Wide Web at <http://www.microsoft.com/presspass/newsroom/msn/guide/0100guide.asp>].

The *Order* essentially argues that the NPD is not simply a database of users. Yet if the presence detection functionality is easily acquired, then the only missing ingredient is simply a large user base to take advantage of the network effects. Many Internet providers have access to large databases. Microsoft and Yahoo! have very large subscriber bases, as does Citibank and Amazon.com, among others. I see no reason, for example, why Citibank could not offer IM services to all its customers to have real-time customer support for its members. Or, why Amazon could not offer an IM product to its base of users to facilitate discussions with fans of Robert Ludlum's books. Or, why an IM provider could not market its products to distinct communities of users, such as colleges and universities. The IM product has any number of creative and innovative uses, depending on what network, base of users, or communities you attach it to.

Underlying the Majority's analysis is the clear view that IM is the new phone system—that it will be a mass market, public network (like the public switched telephone network), allowing anyone to talk to anyone. I am not convinced that this is the proper conception of the service, as IM's most compelling and sustained use may be to serve as a tool for intimate communications with a well-defined, limited community (rather than with everyone in the world), or as an adjunct to some other product or service. Further, unlike the Majority, I find it cavalier to conclude or even suggest that IM is *the* essential platform for real-time interactive services. There are many technologies vying as solutions for real-time interactive service and our endorsement of one is naïve. Sure, it could turn out that the Majority has guessed correctly, but I would remind them that even the surest bets for the "next big thing" (*i.e.*, the technology that will be most popular) have missed the mark.[17]

Nascent Market. AOL created this market and, until recently, has had it to itself. Other providers have only entered in the last year. There remains huge growth potential for the entire market. AOL does not have a high percentage of a mature market, it just has the most customers in a new and growing market. Depending on the size that the IM market ultimately becomes, AOL could be overtaken, without any competitor winning a substantial portion of existing AOL customers. Indeed, the fervor with which AOL's competitors have pursued the imposition of IM conditions would seem to suggest a very large and lucrative market for IM, rather than one whose growth stagnates at or near the size of AOL's current customer base. Moreover, there is great potential for competitors to add features and functions to compete with AOL and win these customers. The network effects, which are not isolated to AOL Time Warner, provide the possibility for strong competitive growth as well if a competitor can put together a base of users.

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[17] I am fond of recording bold technology predictions about the various industries over which the Commission has jurisdiction that, over time, proved generally overstated or absolutely incorrect and off the mark. For example, the New York Times, on the occasion of the 1939 World's Fair and the introduction of the black-and-white television, predicted that television "will never be a serious competitor for radio because people must sit and keep their eyes glued on a screen; the average American family hasn't time for it." And, in 1876, a Western Union internal memorandum forecasted that "[t]his 'telephone' has too many shortcomings to be seriously considered as a means of communication. The device is inherently of no value to us." Many of these failed technology predictions are now compiled in *The Experts Speak*. *See* Christopher Cerf & Victor Navasky, in *The Experts Speak: The Definitive Compendium of Authoritative Misinformation* 225-231 (Villard 1998).

Consumers not locked-in. Usually, with markets that are believed to have tipped, you find a lock-in of subscribers. That is, it is very difficult to get them to switch to competing services. Here, however, one finds very few of the traditional lock-in problems:

No cost to acquisition. If a consumer invests a substantial amount of money in a product or service, he may be unwilling to abandon that investment lightly. Similarly, if the process of acquiring a product or service is laborious or costly in terms of time, a consumer may be less willing to go through the same process to switch products or providers. IM costs nothing and is easily downloaded onto any computer with an Internet connection. Virtually no investment in time or money is required to acquire IM from any provider.

No learning curve. Another lock-in effect is present when a user must invest a lot of time in learning how to use a product. A consumer is not easily convinced to switch to another product if he must start over and learn a new system. Economists sometimes call this "path dependence." [18] The classic example is the "QWERTY" standard typewriter keyboard. This keyboard was reportedly designed purposely to be inefficient in order to prevent users from typing so rapidly that they jammed the typing mechanism. Having learned to use this "inefficient" keyboard, however, few people want to learn to type again, in an entirely new way. Thus, they are "locked in" to using the keyboard they have already learned to use. Here, despite the *Order's* suggestions to the contrary, there is no real dispute that any of the IM products can be downloaded and used within a matter of minutes, without any significant training. Thus, this ease of access and mastery ensures that users are not locked in to any given IM product based on any steep learning curve.

No incompatibility. A customer might not wish to switch to a competitor's product if it would be incompatible with her system. For example, one who owned a Microsoft Windows-based PC, could not switch to an Apple operating system without purchasing an entirely new computer, because of the incompatibility. Here, all IM products can be run on the same machine, and at the same time. Users can run both products and talk quite easily with two networks of people. Perhaps a teenager speaks with her close friends on one service and her soccer teammates on another, and her parents on still another. Indeed, there is evidence that people use multiple IM services purposely and see benefit in operating in this fashion, rather than insisting that IM work like a telephone, that allows anyone to call into you using one platform.[19]

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[18] Kolasky at 579.

[19] According to Media Metrix, over 30% of both AIM and ICQ users already use at least one other IM or chat application. *See* Press Release, Media Metrix, *Yahoo! Messenger and MSN Messenger Service Are Fastest Growing Instant-Messaging Applications In The U.S.* (Nov. 16, 2000). *See also id* ("Instant-messaging applications are proving to be very popular with consumers . . . But their different features and lack of interoperability cause users, especially heavy users, to adopt more than one brand in order to keep in touch with all their friend and colleagues."). If the costs or difficulties of using multiple IM services were truly significant, presumably people would have begun to focus on only one IM provider, rather than continuing to use more than one.

Losing your buddies. The theory of tipping in the *Order* makes much of the fact that a user would have to re-enter his buddy lists and get his buddies to change products in order to switch services. Specifically, the *Order* hypothesizes that the burden of switching IM services will be insurmountable because that would require a user to get his AOL buddies to switch to the new service, even though those buddies may have their own unique buddies that also currently use AOL. This is true, but I find the onerousness of this exaggerated. Fundamentally, I do not accept that IM is necessarily the equivalent of the public switched telephone network and that a user is compelled to stay with the network that has the most users. I think IM is more of an intimate communications tool, in which people maintain fairly discrete lists of buddies to whom they wish to speak. The record contains no evidence that the average user possesses buddy lists so large it would be prohibitive to move them or re-enter their names. A simple message from a user to her friends, imploring them to change, may be relatively easy and effective.

C. The Majority's Novel Behavioral Theory

The Majority's behavioral theory is a vain and circular attempt to compensate for the weak evidence to support their IM condition. Undeterred that traditional tipping analysis is undermined by the factual record, the Majority conjures up a new behavioral theory, that rests entirely on the supposition that because AOL has not, to date, been willing to interoperate with its competitors, that itself is proof that AOL has nearly insurmountable market power. A carrier it seems should always prefer to interoperate with other providers in order to extend its reach and increase the value of its network. If a provider refuses to interoperate, the theory goes, the *only* explanation is that the provider believes that the market has tipped in its favor and that it need not interoperate with other providers. Therefore, since AOL has yet to interoperate, one can conclude that it believes the market has tipped (or is impermissibly dominated by AOL). Besides this theory having the leathery taste of bootstrap, it is undermined by the record:

First, it is an over-statement to say AOL has refused to interoperate. It has maintained both publicly and in this proceeding that it wishes to and will interoperate once it can tackle a number of concerns in developing a standard.[20] I recognize that such a statement could be self-serving, and the Commission is entitled not to credit AOL's sincerity. But I have problems with a theory that rests so heavily on a leading provider's refusal to interoperate as a basis for concluding the market has nearly tipped or is dominated by that provider, where the provider is not, in fact, refusing to interoperate under any circumstances. I am not prepared to read so much into AOL's less than fulsome participation in the Internet Engineering Task Force (IETF) for the relatively short period that effort has been underway, nor can I place that much weight on AOL blocking companies that entered their servers without consent or negotiation.

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[20] *See, e.g.*, Ex Parte Letter to Deborah Lathen, Chief, Cable Services Bureau, Federal Communications Commission, from George Vradenburg III, Senior Vice President, Global and Strategic Policy, America Online, Inc. (Sept. 29, 2000) at 1, 7-8 ("AOL is committed to pursuing industry-wide IM interoperability for the benefit of consumers, not competitors.")

Second, the behavioral theory assumes that market dominance is the sole reason a provider would not interoperate with its competitors. A provider may be able, however, to enhance the value of its network in other ways than by granting non-subscribers access to its network. Moreover, a provider may not be able to afford the cost of expansion or maintenance of a larger network. Its business plan may call for a more private or intimate network, with higher quality, reliability and privacy and not a mass market telephone-like model. Who knows? But it is hard to accept the notion that market tipping is the primary reason that AOL would decide not to interoperate.

Indeed, AOL itself proffers a different reason for why it has yet to interoperate with other providers and that is privacy and security concerns.[21] AOL has a business model according to which it sells "community." In facilitating that community, it places a premium on protecting the consumer's experience and privacy.[22] Surely, increasing unwanted exposure of its subscribers to unwanted IM contact from others is not necessarily nefarious. Additionally, it does appear that some security issues do in fact presently exist, which is one reason the Commission was not comfortable with mandating immediate interoperability with other providers.[23] Lending some support to AOL's argument that it does not interoperate with other providers for reasons other than its desire to maintain market dominance over its competitors is the fact that AOL has not integrated its own IM product (AIM) with ICQ, so that they could interoperate.

Third, the behavioral theory also assumes that all the non-dominant providers will wish to interoperate. We have gotten ever-changing representations of the degree to which such providers do interoperate, but it is clear that for a substantial part of the relevant period, AOL's competitors have not interoperated themselves and, to this day, the two largest competing IM services, Microsoft and Yahoo!, do not interoperate, nor do some other members of the IM Unified coalition. This suggests there are issues to be worked out before they interconnect, and/or that the Majority's behavioral theory is less than perfect in its predictive value.

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21 *Id.* at 7-8.

22 *See, e.g., Unsolicited Bulk E-mail* (on-line statement of AOL's anti-spamming policy) (visited Jan. 11, 2001) [available on the World Wide Web at <http://www.aol.com/info/bulkemail.html>]; *AOL's Privacy Policy* (on-line statement of AOL's privacy policy) (visited Jan. 11, 2001) [available on the World Wide Web at <http://www.aol.com/info/privacy.html>].

23 For example, my discussion with my colleagues leads me to conclude that even the Majority would acknowledge there would have been many security problems associated with mandating immediate interoperability for text-based IM. For example, if AOL had to publish its operating protocols and accept and deliver all outside IM messages, hackers and users of unscrupulous IM providers would be able to masquerade as other users. AOL IM users would receive messages from people that they think are their buddies, but in fact are advertisements, spam, or possibly even messages from predators. Also, AOL users could find that hackers have been sending false messages in their names, creating its own set of problems. AOL today deals with these issues chiefly by using live monitors, to whom its users can report problems. It is not clear that AOL would be able to do this with messages that come from outside its system.

In sum, though creative, the behavioral theory espoused here does not explain away the tangible evidence, discussed above, that contravenes the conclusions reached in the *Order*.

E. The IM Condition Itself

The IM condition is minor and not fairly derived from the analysis. The Majority has chosen to require interoperability of some future IM video product. The only problem is that these products, in large measure, do not yet exist, and thus there is not a market, let alone a market monopolist. Without a clear product, we cannot define a product market, nor can we assess the competitiveness of that market. Moreover, this product may or may not develop in the marketplace. The product may or may not be developed by AOL. I believe in innovation markets and sometimes cautiously accept protecting such markets through government intervention. In this case, however, I lack any confidence that we know how IM will evolve, or if identifiable harm will result.

It is no answer to say that our action does no harm and may do good. Our actions may very well affect innovation, by restricting AOL's incentives to innovate, and by favoring competitors, who can innovate without interoperating with AOL, thus restricting AOL in a market for future services. Under the Majority's hasty establishment of interoperability as being in the public interest for AOL alone, other players can develop new products without any regulatory restraints, while an effective competitor remains shackled. Rather than preserving a competitive market, we may do nothing more than tip the market to another player. To impose a condition at this stage without incurring these risks would take a wizard—I guess a Wizard of AIHS!

I believe video AIHS has been crafted by the Majority in an attempt to manufacture merger specificity where there is none. The anticompetitive analysis runs to the existing IM product. AOL alone operates IM and it did so when Time Warner was just a glint in its eye. Normally, what this should mean is that a condition on the merger is unwarranted. Undeterred, the Majority proceeds with a condition by inventing a product that requires assets from both the merging parties. Video AIHS, a product baked with ingredients from Time Warner – a little content, a little cable broadband – and presto you have a heretofore unseen IM Video product and your merger specificity problem is solved. "Behold, the great and powerful AIHS! "

III. IT IS INAPPROPRIATE TO ESTABLISH INTEROPERABILITY AS A REGULATORY PARADIGM IN THIS PROCEEDING.

A. A Misguided Regulatory Leap Into the Internet Space

This *Order* bends over backwards to give the impression that we are not regulating the Internet by imposing a condition on IM. Even more clever, it asserts that this condition will avert the need to regulate, because it purportedly will kick open a

robust competitive landscape and thereby avoid intervention later to tackle the effects of a dominant provider.

Perhaps. But all the qualifications in the world cannot escape the fact that this agency is asserting and *exercising* jurisdiction over a service and product that springs directly from the Internet, and the imposition of a condition, no matter how modest, is a regulatory act.

The *Order* asserts that the Commission has jurisdiction under Title I of the Communications Act. That Title does give this agency very broad authority over communications services, which easily encompasses much of the activity that takes place on the Internet. Indeed, without more, Title I could be interpreted as empowering the Commission to regulate chat rooms, e-mail services, peer-to-peer services such as Napster, and even the Internet browser market.

With regard to Internet-like services, the fact that we have always had Title I authority has not meant it was prudent to exercise it. Indeed, from the earliest days, the Commission has carefully drawn a distinction between communications services that it defined as "basic" or "telecommunication services" and "enhanced" or "information services."[24] The distinction was made as a matter of policy, not power, to limit or avoid regulation and to rely on competition for innovative information services, while regulating as common carriers the providers of basic or telecommunications services. This distinction took on greater import with the rise of the Internet, which was seen as the mother of all "information services." In addition, this distinction is the basis for a parade of pronouncements by members of this very Commission, that we do not, will not and shall not regulate the Internet.[25]

I have long been of the view that the telecommunications/information services distinction is, in the long run, untenable.[26] Digital, packet-based technologies will

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[24] *See* In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC 2d 384, 428-40 (1980) (*Computer II*).

[25] *See, e.g.*, Remarks of William E. Kennard, Chairman, Federal Communications Commission Before the Summer 2000 Session of the National Association of Regulatory Utility Commissioners (July 24, 2000) ("[p]erhaps the FCC's most important decision—we decided to leave the Internet unregulated"); Remarks of Chairman Kennard Before the National Press Club, *Telecommunications @ the Millennium: The Telecom Act At Four* (Feb. 8, 2000) ("The Commission wisely withheld regulation of most advanced services. Similarly, we refused to apply legacy-style regulations to the new service of cable access to the Internet, relying instead on market incentives to keep multiple paths open to the Internet."); Remarks of Susan Ness, Commissioner, Federal Communications Commission Before the IRTS, *The Net Effects on Communications Policy (or how the Internet and Convergence are Revamping Regulatory Regimes)* (June 7, 2000) (in reference to technological developments, "[t]he FCC's policies of fostering competition, while taking a hands-off approach to the Internet and information services, have facilitated many of these changes").

[26] In the Matter of Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 98-67, *Report to Congress* (rel. Apr. 10, 1998) (Statement of Michael K. Powell, Commissioner, Federal Communications, concurring) [available on the World Wide Web at <http://www.fcc.gov/commissioners/powell/statements].

increasingly blur and obliterate the ability to make any rational distinction between the transmission of information and the information itself. Therefore, I am not critical of looking for ways to step beyond the distinction. I do, however, criticize the Majority for taking that step and thereby walking away from decades-long policies of declining to regulate services in this jurisdictional category, without any meaningful explanation, or even consideration of this significant turnabout. Rather, the Majority asserts that IM fits within a category under our jurisdiction, and lightly dismisses the need to discuss the nature of the service without conceding the traditional deregulatory implication of this categorization. The result is a regulatory foray across a border consistently held to be inviolate. This step is a very big one and should not be made in such a breezy manner and in the context of an adjudication, particularly to impose such a minor and questionable condition that rests on such a questionable evidentiary basis.

Taking the analysis and the remedy together, it is evident that the real driving force behind this condition is a preference by the Majority for interoperability as the market paradigm for IM services, indeed, perhaps for all Internet-based communications. The Majority declares that the public interest standard somehow compels interoperability, yet have no basis for that finding in the statute or the record. More startling, the Commission, with no particular technical, or business competence declares that elements of IM make up an "essential input for the development and deployment of many, if not most, future high-speed internet-based services that rely on real-time delivery and interaction."[27]

There may be a case for asserting our jurisdiction over IM services, and then finding that they must interoperate as a matter of law, though I doubt it. But such a grand conclusion should only be reached after very careful and thoughtful deliberations and full comment by a wide range of interested parties, which can only be achieved in a rulemaking proceeding. The record here and the limited comment are woefully insufficient for considering and anticipating the reverberations of our conclusions. This merger, involving only two members of the industry is not an appropriate vehicle for taking our authority where the Majority does today.

B. Achieving Interoperability Through Market Forces

Even assuming the merits of interoperability, which may be substantial, there is still a very central question: whether interoperability can only be achieved by government-intervention, or whether market forces will produce the desired result. I am concerned that in new and innovative markets, the government will be too easily seduced to intervene prematurely, given the initial excitement and promise (if not hype) of innovative offerings, the rapid pace of change in the market, and competitors' natural anxiety (if not panic).

Increasingly, the variables of digitalization, broadband and the Internet are combining to spurn entirely new products and services for communications. These

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[27] *Order* ¶ 128.

innovation markets are marked by the fact that they are in their infancy and present challenges to understanding them. For example, there is usually scant experience with the new markets that these forces are just now spawning. The products in these markets may be technically novel, making it difficult to comprehend, and easy to exaggerate, or underestimate, their significance or the ability to offer competing services. And business models, business relationships and terms and conditions for the market have yet to form fully. In short, there is typically a period of extensive experimentation in developing markets. During this period, the lucky innovator will always be racing to take advantage of having created the market and to gain and maintain market leadership. Competitors, likewise, often will be struggling to respond to a new threat. Increasingly, one of their responses, even in the largely unregulated Internet realm, is to seek the assistance of the government either to intervene directly and impede the market leader, or to use the threat of regulation as business leverage with that player.

Given the infancy and necessarily speculative nature of these markets, it is easy to be seduced into believing that an ounce of early government intervention will prevent these markets from catching an anticompetitive cold. This view emphasizes how quickly a provider can gain market share and market dominance. Yet it is often overlooked that in the network effect, innovation environment players often fall and die a fiery death just as easily as they ascend (see the 2000 NASDAQ market), and the government should be careful not to let its imagination run away with it.

That said, the more important question, even when there is some general agreement about an operating or market paradigm such as interoperability or open standards, is whether the terms and conditions for those regimes are better developed in the market through negotiation and market responses, or by a regulator. Given the experience of "regulatorily-derived" terms and conditions (its plodding process, its high regulatory costs, its risk of distorting efficient development, its political compromises), rarely should we leap to regulatory approaches without compelling circumstances and strong confidence that the conditions are clearly absent for market resolution through competition, business negotiation and innovation. Moreover, it is hubris to believe that regulators can (better than businesses) craft the optimal terms and conditions to govern the fundamental rules for market operation, particularly where innovation is at a premium and new and novel technologies are at stake. The beauty of market mechanisms has always been that the give and take among competitors and consumers produces an optimal set of terms and conditions. To say that these mechanisms will not work with respect to video AIHS before we even know what these services will comprise seems to indulge regulators' fears, not to mention our eagerness to "look tough" at the expense of sober reflection on the inconclusive record before us.

The concern with premature intervention is also great where viable business models are still being explored. The Internet is a wonderful space, but producers are still struggling mightily to find services and approaches that will allow them to prosper. I am concerned about the government labeling aspects of market activity as anticompetitive before we even have a fix on the elements of a viable business. Notions such as proprietary assets and exclusivity can surely rise to anticompetitive levels, but they also

are often the keys to profitability and viable business that allow producers to serve consumers effectively. The struggle for brand protection and strong copyright protections in the Internet space by established businesses is animated by that very same sort of concern.

Regulatory intervention can also divert companies from efforts in the marketplace to battles in the halls of government. When the government appoints itself referee, it provides a venue to which competitors can run to gain market leverage, and to appeal even the most minor market disputes. This puts the government in the game on an ongoing basis. I think companies and regulators delude themselves into believing a regulator can act surgically—a sharp quick cut—and then stay out. One searches past experiences in vain for such an example, and I am skeptical of our skill with the knife.

For these many reasons, I cannot support the Majority's decision to impose an IM condition based on this record.

SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

Re: Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee

I voted to approve the license transfers involved in the AOL and Time Warner merger because the conditions imposed to serve the public interest were the best that could be achieved under the circumstances, and tipped the balance narrowly in favor of approval. I urged my colleagues to adopt open-code interoperability as a fundamental component of the public interest in the Internet communications era. I believe that interest compelled the merged company to achieve, and publish, interoperability protocols by a date certain.[1] I write separately to distinguish the outcome for which I cast my vote, from the policy of Internet openness I urged.

I. FRAMING THE INTERNET OPENNESS PROBLEM PRESENTED BY THIS CASE

> But if I bought a radio and found that it accessed only certain stations and not others, I'd be upset. I suppose I could have a half dozen radios, one for each set of stations. It makes no more sense to have a half dozen computers or different operating systems or browsers for Web access. This is not just impractical; it fragments the Web, making it cease to be universal.[2]

What began as an inquiry into the blocking of text-based instant messages[3] ("IM") sent to AOL customers, became instead an inquiry into whether the migration of this business practice, and the proprietary code upon which it depends, to Time Warner's cable platform, would contravene the public interest in an open, interoperable Internet. We concluded the evidence in the record demonstrated AOL's business practice of controlling the flow of information to and from its customers would create unacceptable bottlenecks in the broadband world of high speed, interactive communications services.

AOL's use of proprietary code to filter out both unwanted incoming and outgoing messages confronted this agency with a new digital-era problem: communications infrastructure control that is no longer limited to opening or closing access to physical networks. The marriage of cable network hardware with the proprietary protocols necessary to access the virtual network of listeners and speakers using the Internet provides the possibility of complete control over a consumer's incoming receipt of

[1] I believe the record demonstrates this condition should have been mandatory. *See Report and Order* at Paras.169-70; 192 (identifying open protocol approach to achieving interoperability).

[2] Tim Berners-Lee, WEAVING THE WEB, at 132 (Harper Business Books 1999).

[3] *See Report and Order* at Paras. 10; 134-35 (describing markets, defining IM services and NPD).

content and outgoing speech. Because the record disclosed this code is an essential input for the future development of many, if not most, new IM-based services, and these new services will require cable modem access to the broadband pipe provided by the Time Warner network, the extent of the *future* threat was readily cognizable.[4] This Commission has not previously confronted a situation where a corporate consolidation squarely presented a commercial party's refusal to allow its system to interoperate with its competitors thereby distorting a worldwide pathway of communication.

A. Factual Background of the Parties' Physical and Virtual Networks

1. *The Physical Network Assets*[5]

Time Warner, the second largest cable provider in the country, serves 12.7 million subscribers through cable systems that pass approximately 21 million homes and serves approximately 18.9 % of the 67 million cable subscribers nationwide. Time Warner also offers Internet access over its cable systems through Road Runner, a joint venture that provides high-speed Internet access and content optimized for broadband networks to more than 1.1 million subscribers. Time Warner serves businesses through Time Warner Telecom, Inc. ("TWT"), a facilities-based communications provider serving large businesses. TWT offers businesses "last mile" broadband connections for data, high-speed Internet, local voice and long-distance services. TWT is certified to offer telecommunications services in 21 metropolitan areas in 12 states.

2. *The Virtual Network Assets*[6]

AOL is the world's largest Internet Service Provider ("ISP"), and serves about five times as many narrowband subscribers as its nearest competitor. AOL's large subscriber base and its ability to attract and hold its members to the services and information provided by AOL itself, as opposed to having them go to other sites on the World Wide Web, is highly valued.[7]

Instant messaging, in its current form, enables the almost instantaneous exchange of short, private, individualized text messages over the Internet between two users each of whom is on the other's "buddy list." AOL has an estimated 150 million users worldwide on its IM services.[8] More than 30 million individuals use IM at least once a month, and AOL transmits almost five times as many IMs a day as it does e-mails.[9]

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[4] *See Report and Order* at Paras. 176-81; *see also Steadman v. SEC*, 450 U.S. 91 (1981) (affirming agency action on a preponderance of the evidence standard).

[5] *See Report and Order* at Paras. 27-46 (Time Warner and AOL assets).

[6] *See Report and Order at* Paras 27-46 (assets); 128-45 (defining and describing instant messaging; advanced IM-based high speed services; Names and Presence database).

[7] *See Report and Order at* Para. 8, n.12.

[8] Some observers put the total number of registered IM service users under AOL's control at over 150 million. Tribal Voice Comments at 1-2 (120 million); Julia Angwin, *Instant Messaging*

An essential input[10] to an IM service is the provider's Names and Presence Database or "NPD."[11] The names and presence detection information enables users to know other users are online or available and permits messages to be addressed and delivered. The actual NPD consists of two parts. First, it is a database of the users' unique IM names and addresses and, second, it has a "presence detection" function. Presence detection is the IM provider's knowledge, and its ability to inform others, that a particular user is online and the bandwidth capacity of that user. This also signals that the user is available to engage in instant information exchange.

The NPD is the asset that allows a virtual communications network for persons who have requested participation in the network to exchange communications in real time with other users. Use of an NPD, together with the high bandwidth infrastructure provided by the cable network, will transform the Internet experience by replacing today's static pages of information with dynamic and interactive content.[12] The Report and Order characterized these new applications and services as advanced IM-based high-speed services ("AIHS").[13] It is these services that were the focus of the interoperability condition.

Services at AOL Quietly Linked, WALL ST. J., Oct. 26, 2000, at B-1, B-4 (138 million); Jim Lynch, *Instant Messaging Roundup*, MSNBC Technology, Aug. 18, 2000, at http://www.msnbc.com/news/447786.asp (visited Aug. 28, 2000) (more than 150 million users); Nick Wingfield, *Changing Chat*, WALL ST. J., Sept. 18, 2000, at R-28 (154 million registered users).

[9] *IM Interoperability: The Need for Minimum Safeguards* at 2, White Paper filed herein ("First IM White Paper") under Letter from Ross Bagully, President and CEO, Tribal Voice, and Margaret Heffernan, President and CEO, iCast, to Magalie Roman Salas, Secretary, FCC, dated Sept. 5, 2000 ("Tribal Voice and iCast Sept. 5 Ex Parte"); Nick Wingfield, *Changing Chat*, WALL ST. J., Sept. 18, 2000, at R-28.

[10] *See Report and Order* at n.376 (defining "essential input").

[11] *See, e.g.*, Letter from Karen B. Possner, Vice President – Strategic Policy, BellSouth Corp., to Magalie Roman Salas, Secretary, FCC, dated Oct. 10, 2000, Attachment (BellSouth's Views on the Effect of the Proposed America Online-Time Warner Merger on Instant Messaging and Related Capabilities) at 1.

[12] *See, e.g.*, George Gilder, TELECOSM: HOW INFINITE BANDWIDTH WILL REVOLUTIONIZE OUR WORLD 252 (2000); Francois Bar et al., *Access and Innovation Policy for the Third-Generation Internet*, TELECOMMUNICATIONS POLICY, July-Aug. 2000, at 7.

[13] IM-based services are relatively new but have shown enormous growth in popularity in recent years. Their key characteristics are the capabilities to detect whether other users of the system (whose names are kept in a Names and Presence Database) are present online and to exchange messages with them in real time. These features are predicted to have vast potential as a "platform" for the development of additional applications in the future, particularly as users obtain high-speed Internet access.

B. The Instant Messaging Market has "Tipped" Towards an AOL Monopoly

The market in text-based instant messaging is characterized by strong "network effects," *i.e.*, a service's value increases substantially with the addition of new users with whom other users can communicate. AOL, by any measure described in the record, is the dominant IM provider in America. It was also uncontested that AOL has consistently resisted interoperability with other non-licensed IM providers.[14] AOL's market dominance in text-based messaging, coupled with the network effects and its resistance to interoperability, has established a very high barrier to entry for competitors that contravenes the public interest in open and interoperable communications systems.

Recent literature suggests that near monopoly outcomes in markets exhibiting strong network effects are "tipped markets."[15] Here, we declined to opine "whether the factual conclusions [regarding text-based instant messaging] in this *Order* can be characterized as amounting to a tipped market or not."[16] However, in 1999, various non-AOL IM providers repeatedly attempted to gain access to AOL's NPD in order to pass messages between customers of AOL and other services. AOL blocked these attempts.[17] At the *en banc* hearing in this proceeding in July 2000, AOL's representatives said that protocols that allowed the messages to flow freely could not be achieved until July 2001 at the earliest.[18] AOL's competitors contended AOL could have ceased blocking competitor's messages immediately and achieved open protocols for interoperability in less time.[19] AOL's stark refusal to interoperate with its competitors, and the timeline for achieving interoperability cited at the *en banc* hearing, represented an apparent change in strategy.[20] The most reasonable inference was *AOL's strategy switch from openness to blocking was a business decision rather than one based on technical concerns.*[21]

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[14] *See Report and Order* at para. 170. AOL contends it currently cannot adequately protect its customers' privacy and security.

[15] *See, e.g.*, Andrew Watson, *Predatory Pricing in the Software Industry*, 23 RUTGERS L. REC. 1 (1998) (*citing* David S. Evans and Richard Schmalensee, *A Guide to the Antitrust Economics of Networks*, 10 Spring ANTITRUST 36, 36-37 (1996)).

[16] *See Report and Order* at n.368.

[17] iCast Comments at 1; Disney July 25 Ex Parte at 27-28; Aaron Pressman, *Microsoft Messenger Finds Its Voice* at 2, THE STANDARD, July 20, 2000.

[18] FCC En Banc Hearing, CS Docket No. 00-30 (July 27, 2000), Tr. at 167-68.

[19] *See, e.g.*, Confidential Appendix IV-B-2, Note 5; Tribal Voice Aug. 8 Ex Parte at 1-2; *see also White Paper on Instant Messaging*, at 3 (Filed September 5, 2000).

[20] *White Paper on Instant Messaging*, at 11 (Filed September 5, 2000).

[21] *See Report and Order* at Paras. 168-70 (rejecting AOL contentions).

If AOL's competitors, taken together, represented marketshare close to AOL's size, an equilibrium would have existed that would have made interoperability the most effective business strategy for all competing services because interoperability would have provided access to the maximum number of people. Each service would thereby be more useful and valuable because its users could have accessed more people. However, if one of the interoperating providers wanted to dominate the market, it could close its network and adopt a strategy of refusing to interoperate. Such a business practice would seem to make its service less valuable and hurt its users by cutting them off from the bigger, interoperating network of users. But, if the provider refusing to interoperate had a big enough share of the market *prior* to refusing to interoperate, any loss in value or harm to its business would be relatively slight because its customers would still be able to reach most other users. And when it closed its network to the clients of the smaller providers, the refusal to interoperate would result in defections from the smaller services to the dominant one. This would further swell the dominant provider's NPD and shrink the smaller ones. Without interoperability no smaller provider could catch up to the largest one.

This is precisely the business strategy that a premerger AOL undertook. Under these conditions AOL's strategy of refusing to interoperate was profitable because the incentive to switch to the largest provider could hardly be resisted. The economic and antitrust literature generally acknowledge that the only motive for a provider to close its network and refuse to interoperate is to cause the market to tip in its favor. After the point of tipping has been passed, the largest network will continue to grow at the expense of the smaller networks until it is the dominant network, perhaps possessing monopoly control. From that point forward, the dominant network remains dominant, not necessarily because it charges the lowest prices, offers the best quality, or offers innovative features that customers want, but simply because in the past it gained the most users.[22]

This is not merely sharp business practice--it contravenes well-settled federal communications policy that is equally applicable to a *virtual* communications pathway as to a *physical* one. As the Supreme Court said many years ago,

> The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical

[22] *But see Report and Order* at n.425: "Ultimately, new technology may overcome the dominant provider's power, as the telephone did to the telegraph and airplanes and automobiles did to railroads. Many years can pass, however, before a new technology appears with enough advantages to overcome the entrenched one. That technology, too, may be deployed by the dominant incumbent, who will deploy it slower than a new entrant would. Finally, some technologies persist for very long times, such as the QWERTY keyboard."

> pathway of communication, the free flow of information and ideas.[23]

A premerger AOL demonstrated both the ability and the economic incentive to exploit its proprietary protocols and its large subscriber base to position itself as an informational gatekeeper. Based on the foregoing, and in particular on AOL's change from a policy of interoperability and openness to blocking incoming and outgoing communications, I would have concluded the narrowband IM market had tipped.[24] Because the "tipped market" will more likely than not persist in the broadband space, the record called for a mandate compelling meaningful Internet openness in the broadband space by a date certain.[25] The principle of openness I urged here, has been elegantly expressed elsewhere:

> Competition should be the policy. And code that enables competition should be the rule.[26]

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[23] *See Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see also Associated Press v. NLRB*, 301 U.S. 103, 128 (1937) (Noting that the A.P.'s activities "involve[d] the constant use of channels of interstate and foreign communication," and concluding its operations "amount[ed] to commercial intercourse, and such intercourse is commerce within the meaning of the Constitution.").

[24] This Agency has previously defined tipping as "the tendency for a [service] with an initial edge over incompatible, rival systems to become an industry standard and thus achieve market dominance." The service with the edge can attain a monopoly position, with its rivals relegated to a fringe position. *AT&T Corp., British Telecom.,PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Ltd., 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*, IB Docket No. 98-212, SES-ASG-19981110-01654 (30), SES-ASG-19981110-01655 (2), Memorandum Opinion and Order, 14 FCC Rcd 19140, 19167 ¶ 54 (1999) (footnote omitted); *see also* Stan J. Liebowitz and Stephen E. Margolis, WINNERS, LOSERS AND MICROSOFT at 138 (1999) ("Tipping occurs when a product subject to increasing returns generates sufficient momentum in market share that its domination of the market becomes inevitable.").

[25] *See, e.g., Report and Order* at n.368 (noting the majority expressed no opinion on "tipping"); *see also* Paras.175-176. Tipping has occurred before in the entertainment and communications markets. In the mid-1980s, the consumer videocassette recorder/player market tipped in favor of VHS and against Betamax. In the local telephone business, it appears that tipping occurred shortly before 1910, when the Bell companies and the independents with whom it interconnected attained a significantly larger number of telephone customers than the independent telephone companies with whom Bell companies refused to interconnect. In both cases, after tipping the market was dominated by one standard or network.

[26] *See* Lawrence Lessig, *Cable Blackmail*, The Standard, Nov. 14, 1999.

The new company's control over both the network served by Time Warner's cable plant and the code-based NPD applications of AOL, when combined with the aforementioned business practices, established it will possess *virtual and physical* bottlenecks in the new world of high speed services. New applications that require real time functionality will require an NPD to work, thus an NPD encased in a proprietary-code shell means the owner controls a virtual bottleneck analogous to the cable operator's control over its physical network. This Agency's history and Congressional directives in the 1996 Act compelled us to closely scrutinize and ultimately reject such an outcome.[27]

II. AN OPEN AND INTEROPERABLE INTERNET SERVES THE PUBLIC INTEREST

> Incompatibility between computers had always been a huge pain. . . . .the real world of high energy physics was one of incompatible networks, disk formats, data formats, and character-encoding schemes, which made any attempt to transfer information between computers generally impossible. The computers simply could not communicate with each other. The Web's existence would mark the end of an era of frustration.[28]

Widely regarded as the creator of the Internet, Tim Berners-Lee has repeatedly stressed the Internet's openness and interoperability as its principal feature and virtue. From its inception the Internet was designed to avoid the interoperability problem that we confronted in this case.[29] Like the legacy industry examples used by Mr. Berners-Lee, the Internet is a communications network; unlike the communications networks before it however, the Internet depends on both physical interconnection and code-based interoperability.

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[27] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 §§ 1, 230 (b)(1, 2), 47 U.S.C. §§ 151, 230 (b)(1, 2). *See also WorldCom-MCI Order,* 13 FCC Rcd at 18103-04 ¶ 142 (reviewing competitive effects of merger on provision of Internet backbone services).

[28] *See Weaving the Web,* at 35; *see also id.* at 99 ("The international phone system offers a decent analogy. The reason we can plug in a telephone pretty much anywhere in the world is because industry agreed on certain standard interfaces. * * * The phone system defines what it has to, but then leaves how it is used up to the devices.").

[29] The Internet protocols necessary to achieve interoperability for such services as email, are called the Transmission Control Program/Internetworking Protocol ("TCP/IP"). These protocols are open and non-proprietary. The open protocols utilized on the Internet are routinely recognized as the historical key to its openness and rapid growth. Since commercialization of the Internet has begun in earnest, there is a threat that the Internet will fragment into a digital archipelago of closed networks the communications between which are controlled by private entities.

A. Interoperability Furthers Competition and is Consistent with Congressional Objectives of an Open and Vibrant Internet

Several extant congressional objectives support an open and vibrant Internet. First, Congress established a clear national policy to "promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation."[30] Concurrently, Congress charged the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[31] Deployment of such capability facilitates the use of advanced services, of which residential high-speed Internet access services are one kind.[32]

In addition to explicit provisions regarding high-speed services and the Internet, concerns about the integration of video programming content and the cable conduit are contained in statutory provisions and Commission rules, such as the horizontal ownership cap and the channel occupancy rules.[33] Thus, apart from a competition analysis, the public interest impact of combining AOL's virtual, code-based network assets as described above, with the extensive cable and content assets of Time Warner compels a policy that considers *inter alia,* "cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,"[34] and "promot[ing] competition in the delivery of diverse sources of video programming."[35]

Finally, the Supreme Court has repeatedly emphasized the Commission's duty and authority to promote diversity and competition among media voices: "It has long been a basic tenet of national communications policy" that "the widest possible

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[30] 47 U.S.C. § 230(b)(1)-(2).

[31] 47 U.S.C. § 157; *see also id.* § 1 (FCC was created "so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"). Congress defined "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability." 47 U.S.C. § 157.

[32] *See, e.g., Second Inquiry Concerning the Deployment of Advanced Telecommunications Capability Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) at ¶ 3 ("*Second 706 Report*") (noting that "[w]ith advanced telecommunications capability consumers can take advantage of advanced services that allow residential and business consumers to create and access content, sophisticated applications, and high-bandwidth services").

[33] *See, e.g.*, 47 U.S.C. §§ 533(f), 548; 47 C.F.R. §§ 76.503, 76.504, 76.1000-76.1004; *AT&T-MediaOne Order*, 15 FCC Rcd at 9835 ¶ 38.

[34] 47 U.S.C. § 521(4).

[35] 47 U.S.C. § 523(a).

dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[36] The Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest."[37]

B. The Condition Imposed in this Case Seeks to Preserve Internet Openness and Serves the Policies Favoring Competition

The *Report and Order* bars the merged company from offering a new service that utilizes both AOL's NPD *and* Time Warner's cable assets until it has achieved interoperability with at least some of its competitors.[38] Thus, the outcome most threatening to the free flow of information and consumer choice, where the tipped market in the text based instant messaging world migrates to the broadband world of high-speed services, would appear to be mitigated if not avoided. But, the best public interest outcome, maintaining the openness that has characterized the Internet since its inception, was not guaranteed. The condition, rather than ensuring the best outcome, instead sought to avoid the worst. It is in this sense that my approach differed from my colleagues.

First, under the bar-the-worst-approach, the new company may decline to offer the new service that triggers the requirement that they achieve interoperability. Under this scenario there is no interoperability and little, if any, public interest benefit arising from the condition.

Second, if the merged company chooses to offer the new service, they may do so by entering into contracts with no less than three competitors who offer NPD-based services. This outcome achieves *contractual interoperability rather than code-based interoperability*. In other words, if the competitors agree to use the merged company's

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[36] *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)).

[37] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994); *see also id.*, 512 U.S. at 657 ("[T]he potential for abuse of this private power over a central avenue of communication cannot be overlooked."); *Review of the Commission's Regulations Governing Television Broadcasting: Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903, 12910-916 (1999); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself of a private licensee."); *see also, e.g.*, 47 U.S.C. § 257(b) (noting that one of the "policies and purposes" of the Communications Act is to "favor[] diversity of media voices"); *id.* § 601 (codifying findings and policy underlying Cable Television Consumer Protection and Competition Act of 1992) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."); *AT&T-MediaOne Order*, 15 FCC Rcd at 9818-20 Paras. 3-5 (considering proposed merger's effects on "diversity and competition" in video programming and its effects on "openness and diversity of broadband Internet content").

[38] *See Report and Order*, at Paras. 191-95.

proprietary code, they actually expand the market-domination of this code rather than *interoperate* with that code. This is not open interoperability like that which makes email work today. To the extent applications running on AOL's proprietary protocols proliferate, the applications consumers desire will likely be bound in some way to AOL and its contractors. If these protocols are proprietary and closed, the competitive landscape of the Internet world might soon look like the competitive landscape of the software operating system world.[39] Because the Internet is a critical pathway for information dissemination, this outcome would foreshadow precisely the kind of improper private control of communications infrastructure the Supreme Court has repeatedly rejected.[40]

Third, the merged company may offer the new, high-speed service using its combined assets if it achieves server to server interoperability using a public, published protocol that bears the approval of appropriate international standard setting bodies. This is the outcome that best serves the public interest in open communications systems, provides consumers with the maximum number of choices and most completely deconstructs the "tipped market" that favors anti-competitive business practices. It is the only outcome in the *Order* that ensures interoperability based on open, non-proprietary code.

I supported the overall scheme adopted in the *Report and Order*, in part, because it also set forth several policy features applicable in future mergers. First, we soundly rejected private, corporate control of the Internet protocol pathway. Second, we rejected the facile assumption that business practices based on proprietary code that create informational bottlenecks on the Internet somehow serve the public interest. Third, the merged company must achieve interoperability at the time it seeks to utilize its combined assets, and not before. This avoided a ham-handed result (not unknown in general rulemakings in the world of converged technologies) that would be inconsistent with our obligation to carefully tie the condition to the facts of the case.[41] Fourth, if the commercial realities in the converging broadband space discussed in this record have

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[39] *See e.g United States v. Microsoft,* 87 F.Supp.2d 30 (D.C.)

[40] *See infra nn.36-37; see also, e.g., United States v. AT&T,* 524 F. Supp. 1336 (D.D.C. 1981) (detailing the discrimination of the Bell System local telephone companies against their competitors in terminal equipment, long distance, and other products and services for which access to local lines was necessary). Similar concerns also underlie the provisions concerning "program access" by cable television companies (Communications Act § 628, 47 U.S.C. § 548) and Bell re-entry into interexchange service (Communications Act §§ 271-72, 47 U.S.C. §§271-72). *See also* James W. Olson and Lawrence J. Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?*, 13 CARDOZO ARTS & ENT. L.J. 283 (1995).

[41] *See, e.g., Report and Order* at Para. 186. To continue Congress' goal of achieving vibrant competition in high speed services, we avoided the calls for a one size fits all traditional rulemaking on interoperable Internet communications networks. If the Commission had allowed the inevitable time delay that arises in a general rulemaking, the outcome would have come so late in the day as to be meaningless.

materially changed, and clear and convincing evidence establishes the public interest in maintaining the bar on the new service offering has thereby dissipated, relief from the terms of the Order is a fair outcome for consumers and the parties.

III. CONCLUSION

Ensuring the continued viability of an open, interoperable Internet does not constitute "regulation" in the traditional sense.[42] Ensuring interoperability, far from regulating the Internet, actually blocks *de facto* regulation of the Internet by a private corporation through a combination of a cable bottleneck, proprietary code, network effects and the high consumer cost of switching to a competing service. Interoperability combats centralized control of speech and ultimately, severely restricts both government and corporate power to control the speech transmitted on the Internet. Arguing against interoperability in this case is akin to arguing against the pro-competitive, interconnection policies the FCC has historically pursued and that are present in the requirements in the 1996 Act.[43]

The rise of the commercial Internet, as this case demonstrates, does not confound application of the existing federal policies that require interconnection and interoperability of communications systems. In fact, ensuring code-based interoperability goes hand in hand with the Commission's fundamental obligation to ensure that our communications infrastructure serves the public interest, assists the development of the Internet, and sparks competition and innovation. The mandate that such systems serve the public interest, in the context of this case, compelled action to ensure that the Internet remains open and vibrant. Here, we took the initial steps towards preserving that openness. Only time will tell whether these efforts will be sufficient.

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[42] *Compare* Dissenting Statement of Commissioner M. Powell at 13.

[43] *See, e.g.,* Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (1986) (Report and Order)(requiring AT&T, the long-distance monopolist, to open its basic network facilities to enhanced service providers); *See also id.* at 1006(mandating an "Open Network Architecture" that would "permit all users of the basic network ... to interconnect to specific basic network functions and interfaces on an unbundled and 'equal access' basis."); Amendment of Sections 64.702 of the Commissions Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 1022 (1986) (Report and Order)(noting the Open Network Architecture would permit the agency to "rely on interconnective technology, rather than external regulations, to minimize the competitive and efficiency dangers of bottleneck control.")