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March 21, 2000

Christopher J. Wright, Esq.
General Counsel
Federal Communications Commission
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

**Re: AOL/Time Warner Applications for Consent to Transfer of Control**
**CS Docket No. 00-30**

Dear Mr. Wright:

Enclosed is a copy of the Supplemental Information that America Online, Inc. and Time Warner Inc. (the "Applicants") are submitting in connection with your letter of March 6, 2000 concerning their Applications for Transfers of Control and associated Public Interest Statement, filed with the Commission on February 11, 2000. This submission is being filed concurrently in the above-referenced docket.

The Applicants' previously filed Public Interest Statement sets forth a description of the applicants and the proposed transaction, including the substantial public interest benefits of the merger and the lack of any resulting anticompetitive impact. Since February 11, additional information has been developed—by the Applicants, independent analysts, and press reports—which allows us to update the record and further address your inquiries in the Supplemental Information.

As your letter reflects, the Applicants already have submitted one significant update in this proceeding: the Memorandum of Understanding ("MOU"), which outlines their mutual commitment to providing consumers with choice from among multiple ISPs offering service on the merged entity's broadband cable systems. Additional materials appended to the enclosed document provide more detail about the Applicants' lines of business and position on the relevant issues, as well as data and analyses developed by independent sources that address the beneficial effects of the proposed transaction.

The Applicants believe that the enclosed document fully responds to the questions presented in your letter.

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Should you have further questions concerning the enclosure or other documents that the Applicants have filed in this proceeding, please contact the undersigned.

Respectfully submitted,

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

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| In the Matter of | ) | |
| | ) | |
| Applications of America Online, Inc. | ) | CS Docket No. 00-30 |
| and Time Warner Inc. for | ) | |
| Transfers of Control | ) | |

To: The Commission

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March 21, 2000

## TABLE OF CONTENTS

## INDEX OF ATTACHMENTS

**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
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| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Applications of America Online, Inc. | ) | CS Docket No. 00-30 |
| and Time Warner Inc. for | ) | |
| Transfers of Control | ) | |

To: The Commission

## SUPPLEMENTAL INFORMATION

America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") (collectively, the "Applicants") hereby provide this supplement to the information contained in their Applications for Transfers of Control and associated Public Interest Statement, which were filed with the Commission on February 11, 2000.[1]

## I. INTRODUCTION AND SUMMARY

The Applicants' Public Interest Statement provided information pertinent to Commission consideration of the proposed merger of AOL and Time Warner, including discussion of the transaction's public interest benefits and lack of any anticompetitive impact. Additional information has been developed since that initial filing—by the Applicants, by independent

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1 Time Warner Inc./AOL Time Warner Inc. Transfer of Control Applications and Public Interest Statement for Various Services including: Broadcast, Broadcast Auxiliary, Section 214 Authorizations, Domestic Fixed Satellite (Part 25), Low Power Television (Part 74), Aviation Services (Part 87), Cable Television Relay (Part 78), Private Land Mobile (Part 90) and Fixed Microwave (Part 101), filed February 11, 2000 ("Public Interest Statement").

analysts, and in press reports—that allows us to update the record in this proceeding and further address certain questions raised by the Commission's staff.[2]

The parties have, of course, already submitted one significant update: the Memorandum of Understanding ("MOU"),[3] which outlines their mutual commitment to provide consumers with choice from among multiple Internet service providers ("ISPs") via the merged entity's broadband cable systems. That document, entered into on February 29, 2000, and filed with the Commission the next day, is discussed further herein, as are other noteworthy data and developments. Specifically, this submission addresses the following topics:

- **Further details concerning the assets and lines of business of each of the Applicants**, including specific information relating to AOL's limited investment in General Motors Corporation (the ultimate parent of DirecTV). As reflected in the Public Interest Statement, a review of these assets and lines of businesses confirms that the Applicants operate in largely complementary, not overlapping, spheres—and that, therefore, the proposed merger does not present an anticompetitive combination.

- **Further details and analysis concerning the public interest benefits of the proposed merger.** As reflected initially in the Public Interest Statement, this information supports the Applicants' showing that Commission approval of the proposed transaction will serve the public interest by fostering more rapid development of broadband products and services, including facilitating the integration of traditional media and the Internet, and by leading the way to resolution of the "open access" issue in the marketplace. The Applicants' commitment to consumer choice from among multiple ISPs, as well as to vigorous development of alternative broadband platforms, significantly advances policymakers' goals.

- **Further analysis concerning the appropriate analytical framework for considering competition issues in the Internet access marketplace.** This discussion details how the Commission's prior analysis and marketplace

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[2] *See* Letter from Christopher J. Wright, General Counsel, Federal Communications Commission, to Arthur H. Harding, Esq. and Peter D. Ross, Esq., Counsel for the Applicants, CS Docket No. 00-30 (filed March 9, 2000).

[3] Memorandum of Understanding Between Time Warner Inc. and America Online, Inc. Regarding Open Access Business Practices, February 29, 2000 ("MOU") (Tab 3).

developments together demonstrate that this merger will not reduce competition, but rather will enhance consumer choice in Internet access, however the market for such services might be defined.

## II. AS ORIGINALLY DESCRIBED AND FURTHER DETAILED HEREIN, THE PARTIES' ASSETS AND LINES OF BUSINESS ARE LARGELY COMPLEMENTARY AND PRESENT NO ANTICOMPETITIVE COMBINATION

As set forth in the Public Interest Statement, the proposed merger brings together two companies that have operated in largely separate and non-overlapping spheres.[4] While Time Warner's cable and broadcast interests historically have been subject to FCC regulation,[5] AOL's Internet-based business has operated essentially outside of the agency's regulatory ambit. It is not surprising, then, that this merger is fully consistent with Commission rules and policies and requires no rule waivers.[6]

As described more fully below, the complementary nature of the AOL and Time Warner lines of business ensures that the proposed merger will not negatively affect competition in any way. In particular, Section II.B below demonstrates the lack of anticompetitive effects in multichannel video programming distribution (where AOL has only a small indirect interest in DirecTV), while Section V shows the lack of anticompetitive effect with regard to the provision of Internet services.

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4 Public Interest Statement, at 1.

5 The Time Warner licenses at issue are those for its broadcast station and those ancillary to the operation of its cable systems.

6 Public Interest Statement, at 1.

The following information supplements that contained in the Public Interest Statement by providing a more detailed description of the lines of business of each of the merger parties, as well as a detailed discussion of the nature of AOL's limited, indirect interest in DirecTV.

### A. Additional Details Concerning The Parties' Assets And Businesses Confirm That The Two Companies Largely Operate In Different Spheres

#### 1. America Online, Inc.

A worldwide provider of interactive services, Web brands, Internet technologies, and electronic commerce services, AOL has two major lines of business: Interactive Online Services and Enterprise Solutions.[7] AOL's Interactive Online Services business is, in turn, comprised of the Interactive Services Group, the Interactive Properties Group, and the AOL International Group.

- **Interactive Services Group**—develops and operates branded interactive services:

  * The Company's flagship AOL service is an Internet online service serving more than 21 million members worldwide. In addition to access to all content available over the Internet, AOL members are provided with access to more than 15,000 chat rooms, up-to-the-minute news reports, and information concerning topics such as personal finance, health, travel, sports, and entertainment. The AOL service provides parents with a special "Kids Only" Feature that includes AOL's Parental Controls. AOL members also have access to other services, including e-mail, instant messaging, and keyword searching.

  * CompuServe, acquired by AOL in 1998, is an Internet online service designed for value-conscious adults who go online for the first time. CompuServe serves more than two million customers.

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7 A copy of AOL's most recent Annual Report is attached (Tab 1). AOL also has made strategic investments in a number of Internet-related companies. *See* "Summary of AOL Investments in Publicly Traded Companies" (Tab 1) for a list of public companies in which AOL has made investments that constitute an ownership interest of five percent or more. In addition, AOL's limited investment in the ultimate parent of DirecTV is discussed more fully below.

* AOL's Netscape Netcenter is an Internet portal serving 27 million registered users. Netscape Netcenter provides content, services, and search and directory tools, including MyNetscape, which allows users to customize their Internet start page; Internet Keywords searching capability; Netscape - AOL Instant Messenger, which allows users to exchange personal messages instantly and privately over the Internet; WebMail, a free, permanent e-mail account accessible from any Internet connection; calendar services; and Netscape Site Central, which allows users to create a website.

* AOL.COM Web site is an Internet portal offering any Internet user content, features and tools, including AOL NetFind, an Internet search and rating tool, and the AOL Instant Messenger Service, which allows any Internet user to communicate in real-time with friends and family.

* Netscape Communicator client software, including the Netscape Navigator browser, allows consumers to search the Internet, and provides one-click access to music, shopping, and information gathering services. Netscape Communicator services include Netscape Messenger, which allows users to send and receive e-mail; Netscape Composer, used for Web-based word processing; and Netscape AOL Instant Messenger.

* AOLTV is a proposed interactive service designed to enhance the television viewing experience by not only bringing popular AOL features and services (such as e-mail, Instant Messaging, and chat) to consumers' TV sets, but also offering content and information tailored to the specific programming being viewed. AOLTV is expected to debut later this year.

- **Interactive Properties Group**—consists of an array of branded properties that operate across multiple services and platforms, including:[8]

    * Digital City, Inc., a local content network and community guide on the Internet. Digital City, which began providing local content regarding Washington, D.C. in 1995, now has a presence in more than 60 cities across the United States. Among the features provided are employment guides, dining guides, movie guides, real estate guides, auto shopping guides, and community event guides.

    * ICQ, a communications portal providing instant communications as well as chat technology. ICQ, which was acquired by AOL in 1998, is an innovator in providing real-time communications services over the Internet. Other services include ICQ Mail, ICQ Search, ICQ Now! (which offers a table of contents designed to help

[8] AOL has entered into a merger agreement with MapQuest.com, Inc., which provides online destination information solutions, pursuant to which MapQuest would become a wholly owned subsidiary of AOL.

navigate ICQ's member-created content), and ICQ Personal Assistant Tools (which provide users with reminders, "virtual" post-it notes, alarms, greeting cards, and a daily planner).

  * MovieFone, Inc., acquired by AOL in 1999, is a movie guide and ticketing service that is provided both online and through interactive telephony.

  * Internet music brands Spinner.com, Winamp, and SHOUTcast provide online music services. Spinner.com is an Internet music hub offering access to the Spinner Web-based player and Spinner Plus, a 1.3 megabyte downloadable player that works independently of a listener's Web-browser. Winamp is a music player for Windows, supporting all music formats, including MP3, CD, AudioSoft, Audio Explosion, MOD, and WAV. SHOUTcast is a Winamp-based distribution streaming audio system that enables users with the Winamp high-fidelity audio player and a dial-up Internet connection to provide or tune into Internet streaming audio.

- **AOL International Group**—oversees the AOL and CompuServe services and joint ventures outside the United States (including Australia, Austria, Brazil, Canada, France, Germany, Hong Kong, Japan, the Netherlands, Sweden, Switzerland, and the United Kingdom), as well as the Netscape Online service in the United Kingdom. Globally, members are able to access these services in more than 100 countries.[9]

- **Enterprise Solutions**—consists primarily of the Netscape Enterprise Group, which provides businesses with a range of software products, technical support, consulting, and training services designed to assist them in providing services to their customers in the electronic commerce markets. These products and services enable businesses and users to share information, manage networks, and facilitate electronic commerce. The software is based on industry-standard protocols that can be deployed across a variety of operating systems, platforms, and databases and be interconnected with traditional client/server applications. Netscape Enterprise Group provides services and features such as:

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[9] In Europe and Australia, AOL service is offered pursuant to a joint venture with Bertelsmann AG. Bertelsmann AG and AOL recently agreed to restructure their ownership interests in AOL Europe and AOL Australia; it is the parties' intention that AOL will purchase Bertelsmann AG's interest in the joint venture at some point during the next three years. The companies at the same time announced a new strategic global alliance under which AOL will distribute Bertelsmann's media content and e-commerce properties over AOL's services worldwide. *See* "Bertelsmann and America Online Announce $250-Million, Four-Year Alliance to Expand Distribution," America Online, Press Releases, March 17, 2000, available at <http://media.web.aol.com/media/press_view.cfm? release_num=25100413&title=BERTELSMANN%20AND%20AMERICA%20ONLINE%20%20ANNOUNCE>.

* Electronic Commerce Infrastructure, which provides a flexible, scalable foundation on which customers can build and manage their extranet or Internet applications or use Electronic Commerce Applications.

* Electronic Commerce Applications, which enable businesses to link and manage online trading communities of suppliers, distributors, and customers. They also enable organizations to create more secure Internet commerce sites and exchange information with trading partners.

* AOL also has entered into a number of ventures with other companies serving a broad range of Internet and related industries. For example, to accelerate the growth of electronic commerce, AOL entered into a strategic alliance with Sun Microsystems, Inc. to develop and market client software and network application and server software for electronic commerce, extended communities, and connectivity. The Netscape Enterprise Group operates the Company's part of the alliance. The products developed, which will be sold by the alliance under the brand name "iPlanet," include e-commerce infrastructure software such as messaging and calendar software; Web, application, and directory software; and security services such as certificate management, firewall, and remote access. Also offered are e-commerce applications for online business-to-business transactions, procurement, sales, and billing.

### 2. Time Warner Inc.

Time Warner is a worldwide media and entertainment company. Time Warner's principal business objective is to create and distribute information and entertainment throughout the world. Time Warner classifies its business interests into the following fundamental areas:[10]

- **Cable Networks**, consisting principally of interests in cable television programming, including TBS Superstation, TNT, Cartoon Network, CNN News Group, and Home Box Office;

- **Publishing**, consisting principally of interests in magazine and book publishing and direct marketing. Time Warner's magazines include Time, People, Fortune, Money, Entertainment Weekly, and Sports Illustrated. Time Warner's book and publishing operations include Warner Books, Little Brown, and Time Life Inc.;

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10 Time Warner also holds interests in certain Internet-related and digital media businesses, such as web sites Entertaindom.com, CNN.com, ALLPolitics.com, CNNfn.com, CNNSI.com, and CartoonNetwork.com.

- **Music**, consisting principally of interests in recorded music and music publishing, including Warner Music Group and its labels Atlantic, Elektra, Rhino, Sire, Warner Bros. Records, and Warner Music International;[11]

- **Filmed Entertainment**, consisting principally of interests in filmed entertainment production and distribution, television production, and television broadcasting, including Warner Bros., New Line Cinema, Castle Rock, Warner Home Video, Telepictures Productions, and the WB Network;

- **Cable**, consisting principally of interests in cable television systems which pass approximately 20,650,000 homes and serve approximately 12,630,000 subscribers.

Additional information regarding the various business activities of Time Warner is set forth in its most recent Annual Report.[12] Further details as to Time Warner's ownership interests in certain communications-related lines of business are set forth below:

* **Cable Systems**—Time Warner's cable system operations are held through three principal entities, each of which is managed by Time Warner Cable: Time Warner Entertainment Company, L.P. ("TWE"), Time Warner Entertainment - Advance/Newhouse Partnership ("TWE-A/N") and TWI Cable, Inc. ("TWI Cable"). The subscriber breakdown by entity is as follows:

| **Entity** | **Basic Subscribers** |
|---|---|
| TWE | 4,181,504[13] |
| TWE-A/N | 6,674,732 |
| TWI Cable | 1,794,797 |

TWE is a limited partnership of which approximately 74.49 percent of the residual equity is held indirectly by Time Warner. The remainder is held by MediaOne

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11 On January 24, 2000, Time Warner and EMI Group plc announced that they had signed definitive agreements to combine their recorded music and music publishing businesses into a global joint venture to be owned equally by Time Warner and EMI Group. The 11-member Warner EMI Music board of directors, controlled by Time Warner, will consist of six Time Warner designees and five EMI designees. The transaction is subject to certain conditions, including regulatory consents and EMI Group shareholder approval, and is expected to be completed by the end of 2000.

12 Time Warner 1998 Annual Report ("TW Annual Report") (Tab 2).

13 This includes certain cable systems managed, but not wholly owned, by TWE, such as Texas Cable Partners and Kansas City Cable Partners.

Group, Inc. in the form of a limited partnership interest. TWE-A/N is a general partnership owned by TWI Cable, TWE, and Advance/Newhouse Partnership. Time Warner's partnership interest in TWE-A/N, through TWE and TWI Cable, is approximately 67 percent. TWI Cable is an indirect wholly owned subsidiary of Time Warner.

* **Cable Programming**: Time Warner's cable programming networks consist primarily of domestic and international basic cable networks and pay television programming services. Time Warner's cable programming operations are conducted through three principal divisions: Home Box Office ("HBO"), CNN News Group, and TBS Entertainment. HBO offers premium programming channels such as Home Box Office and Cinemax, and is wholly-owned by TWE. CNN News Group includes CNN, CNN Headline News, CNN/SI, CNNfn, and related services. TBS Entertainment includes TBS, TNT, Turner Classic Movies, Cartoon Network, and Turner South. CNN News Group and TBS Entertainment are indirectly wholly owned by Time Warner. In addition, Time Warner Cable operates, alone or in partnerships, 24-hour local news channels in New York City, Tampa Bay, Orlando, Rochester, and Austin.

* **WTBS(TV)**: Superstation, Inc., the licensee of WTBS(TV), is indirectly wholly owned by Time Warner. The ownership structure of Superstation, Inc. is set forth in greater detail in the FCC Form 315 filed with the Commission on February 11, 2000.

* **The WB Television Network**: The WB Television Network is a limited partnership whose managing general partner is WB Communications, a division of TWE, which holds approximately 66 percent of the partnership interest.

* **Road Runner**: Road Runner, which provides high-speed Internet access and content optimized for broadband networks, currently is available in cable systems passing over 13 million homes and has over 550,000 subscribers, of which 330,000 are in communities served by Time Warner Cable systems. Road Runner is a joint venture among Time Warner (through TWE, TWE-A/N, and TWI Cable), affiliates of Media One Group, Inc., Microsoft Corp., Compaq Corp., and Advance/Newhouse Partnership. Time Warner holds an indirect 40 percent ownership interest in Road Runner.

* **Time Warner Telecom**: Time Warner Telecom provides facilities-based competitive telecommunications services primarily to commercial/business customers. Time Warner indirectly holds 48 percent of the equity of Time Warner Telecom Inc., a publicly traded corporation that holds certificates to provide telecommunications services in 12 states.

### B. AOL's Non-Attributable Investment In The Ultimate Parent Of DirecTV Is Spurring The Development Of Broadband Services Delivered Via Satellite Without Posing Any Threat To The Multichannel Video Programming Distribution Marketplace

The merger of AOL and Time Warner will not adversely affect competition among multichannel video programming distributors ("MVPDs"). Time Warner, with attributable interests in cable systems serving approximately 13 million subscribers, is a significant MVPD. But AOL is not. This fact is in no way contradicted by AOL's small, non-voting interest in the General Motors Corporation ("GM"), which (through its subsidiary Hughes Electronics Corporation, "Hughes") controls a direct broadcast satellite service ("DBS") provider, DirecTV. As described below, this non-voting, attenuated, and insubstantial interest provides no opportunity for the merged entity to affect DirecTV's day-to-day operations, much less video programming competition generally. Analysis under relevant FCC rules confirms that AOL's investment does not constitute an attributable interest in DirecTV and gives no cause for concern. To the contrary, by helping to facilitate the development and deployment of new broadband services such as DirecPC high-speed Internet access, AOL's investment in GM promotes competition and the public interest.

#### 1. AOL invested in GM to advance its pro-consumer "AOL Anywhere" strategy by accelerating the development of satellites as a competitive broadband platform

AOL seeks to reach consumers utilizing multiple devices by any and all means: dial-up, xDSL, cable, wireless, and satellite. In pursuit of this goal of "AOL Anywhere," AOL and Hughes announced a strategic alliance in June 1999 to develop and market digital entertainment and Internet services nationwide via satellite.[14] As part of that agreement, AOL invested $1.5 billion in GM, the parent company of Hughes,[15] to accelerate the development of DBS as a platform for the next generation of Internet services.[16] The investment was not intended to, and does not, provide any opportunity for AOL or the merged entity to participate in DirecTV's video programming operations. AOL's investment is thus pro-competitive in two important ways. First, it promotes the development of the satellite broadband platform as an alternative to other technologies, a long-held goal of the Commission.[17] Second, it advances the development of a broadband platform with a nationwide footprint, thus promoting the potential for all Americans to gain access to the Internet no matter where they live.

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[14] "America Online and Hughes Electronics Form Strategic Alliance to Market Unparalleled Digital Entertainment and Internet Services," America Online, Press Release, June 21, 1999.

[15] *See id.* ("Under the agreement, [AOL] will make a $1.5 billion, strategic investment in a General Motors equity security . . . . GM will immediately invest the $1.5 billion in a security of Hughes under similar terms where it will be employed to implement the strategic alliance . . . ."). GM has a current market capitalization in excess of 50 billion dollars.

[16] Hughes is also the parent company of DirecPC, a service that provides Internet access via satellite at downstream speeds up to 400 kilobits per second (with telco return). One of the goals of the strategic alliance is to provide AOL's high-speed Internet service, "AOL-Plus," via DirecPC. *Id.*

[17] *See, e.g., Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996,* 14 FCC Rcd 2398, at 2401 (1999) ("As Congress directed, we intend to ensure that broadband capability is being deployed on a reasonable and timely basis to all Americans. We are encouraged that, as the demand for broadband capability increases, methods for delivering this digital information at high speeds to consumers are emerging in virtually all segments of the communications industry—wireline telephone, land-based ('terrestrial') and satellite wireless, and cable, to name a few.").

### 2. AOL's investment in GM produces these pro-competitive broadband benefits without raising any offsetting concerns for the video marketplace

AOL's non-attributable investment in GM does not implicate any of the Commission's concerns regarding MVPD competition. As discussed more fully below, AOL's investment is presently in the form of a preference stock of GM which (absent very limited circumstances) provides AOL with no voting rights. Second, even after AOL's preference stock would convert to a class of GM stock with voting rights, its voting interest in GM would be well below any threshold for attribution. Therefore, any concerns over horizontal concentration and the ability of the merged entity to use the DirecTV interest to impede competition in the MVPD marketplace are not credibly triggered by AOL's investment.

#### a. AOL's current interest provides it with no voting rights in GM

AOL's non-voting, indirect interest in DirecTV is of no consequence under FCC rules. AOL's investment in GM is currently in the form of GM's "Series H 6.25% Automatically Convertible Preference Stock" (the "Preference Stock"), which, as the name implies, pays annual dividends at a rate of 6.25 percent.[18] The Preference Stock does not, however, provide its holder with voting rights in GM, except in the most limited circumstances.[19] On this basis alone, then, AOL's current interest is clearly non-attributable.[20]

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18 *See* General Motors Corporation, SEC Form 8-K, Appendix D at Section 3(i) (filed August 24, 1999) ("GM, SEC 8-K, Appendix D"). ("Holders of outstanding Series H Preference Shares will be entitled to receive, subject to the rights of holders of Preferred Stock of the Corporation and of holders of . . . Preference Stock or other class of stock of the Corporation or series thereof ranking senior to the Series H Preference Shares in respect of dividends and distributions, . . . cumulative cash dividends at the per share annual rate of 6.25% of the per share stated value . . . .").

19 Holders of Series H Preference Shares are entitled to vote in the following limited

### b. Even upon conversion to a form of GM stock with voting rights, AOL's interest in GM would be well below any relevant attribution threshold and would remain non-attributable

Even when converted, AOL's interest would not be attributable under any potentially relevant Commission attribution rule. The Preference Stock is convertible into shares of GM's Class H common ("GMH") stock.[21] GMH stock is a publicly held tracking stock, the outstanding shares of which track the economic performance of Hughes. In the aggregate, the publicly held shares track approximately 35 percent of the economic value of Hughes. The remainder of that value is retained by GM. Holders of GMH stock have no direct rights in the equity and assets of Hughes, but rather have rights in the equity and assets of GM.[22] Neither GMH shareholders in general, nor AOL in particular, has the ability to appoint any board

situations: (1) where the corporation proposes to "amend, alter, or repeal any of the provisions of its Certificate of Incorporation or [the Certificate of Designations of Series H 6.25% Automatically Convertible Preference Stock] so as to alter or change the powers, preferences or special rights of the Series H Preference Shares so as to affect them adversely;" and (2) where the Corporation has "failed to declare and pay or set apart for payment in full the Preferential Dividends accumulated on the outstanding Series H Preference Shares for any six quarterly dividend payment periods, whether or not consecutive, and all such accumulated preferential dividends remain unpaid." *Id.* at Section 5.

[20] Under the Commission's general attribution standard, non-voting stock interests are not attributable. *See, e.g., Review of the Commission's Cable Attribution Rules*, CS Dockets No. 98-82 and 96-85, FCC 99-288, at ¶ 3 (rel. Oct. 20, 1999). Similarly, convertible interests are not deemed attributable until converted. *See, e.g.,* 47 C.F.R. § 76.501, Note 2(h).

[21] AOL's 2,669,633 shares of preference stock would automatically convert to GMH stock on June 24, 2002. The exact conversion rate in June 2002 would be determined by the price of GMH stock at that time. *See* GM, SEC 8-K, Appendix D at Section 6. AOL also can elect to convert its shares prior to that date. Based on the current price of GMH stock, AOL's Preference Stock would (in June 2002 as today) convert to GMH stock at a ratio of 8.0645:1. GM, SEC 8-K, Appendix D at Section 5.

[22] *See* General Motors Corporation, 2000 SEC Form 10-K, Item 8, at Note 18 (filed March 13, 2000).

members to GM, Hughes, or DirecTV. Rather, Hughes remains a wholly owned subsidiary of GM and is subject entirely to GM's operational control. Each share of GMH stock provides its holder with a voting interest equivalent to 0.6 of a vote of a share of GM Common Stock.[23] Accordingly, upon conversion to GMH stock, AOL's voting interest in GM would be approximately 1.76 percent,[24] an interest too insubstantial to be deemed cognizable under any arguably relevant FCC attribution rule.[25]

### 3. Even if AOL's investment in GM led to the unprecedented conclusion that DirecTV should be attributed to the merged entity, AOL Time Warner still would not breach the Commission's still stayed horizontal ownership rules

As detailed above, AOL's investment in GM is in no way cognizable under any pertinent FCC rules, and thus it cannot reasonably be found to pose any cause for concern.[26] Moreover, even assuming that this interest were somehow considered attributable, the total number of

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[23] Note that, under the rules adopted by the Commission for competitive bidding in the DBS service, only a "voting stock interest amounting to 5% or more of the outstanding voting stock of a corporate DBS licensee or permittee will be cognizable." *Revision of Rules and Policies for the DBS Service*, 11 FCC Rcd 9712, 9800 (1995). Thus, under the only attribution standard ever employed by the FCC specifically for DBS interests, AOL's indirect interest in DirecTV would likewise not be treated as cognizable.

[24] The votes of the 156,667,112 outstanding shares of GMH stock combined with the votes of the 640,208,136 shares of GM Common Stock would produce a total of 734,208,403 votes. Based on the conversion factor discussed above, AOL's 21,529,255 shares, converted at the .6 ratio, would thus constitute a voting interest of less than 2 percent of the total votes in GM.

[25] *See, e.g.*, 47 CFR § 76.501, Note 2.

[26] Applicants acknowledge that, in 1998, the Commission initiated a proceeding considering the potential adoption of a DBS/cable cross-ownership rule. *In the Matter of Policies and Rules for the Direct Broadcast Satellite Service*, IB Docket No. 98-21, 13 FCC Rcd 6907 (Feb. 26, 1998).

MVPD subscribers served by the merged entity *plus DirecTV* would not breach the 30 percent limit set forth in the Commission's (stayed) horizontal ownership rules.[27]

Time Warner serves approximately 13 million subscribers. DirecTV, meanwhile, serves 8.2 million subscribers.[28] The combined total number of subscribers served by these two separate entities, 21.2 million subscribers, constitutes approximately 25 percent of the total number of MVPD subscribers nationwide.[29] Thus, even if DirecTV's subscribers are inappropriately attributed to the merged entity, AOL Time Warner would still be well within the 30 percent ownership cap.

* * *

In sum, AOL's non-attributable investment in GM—designed to promote the development of broadband Internet services delivered via satellite—is procompetitive. Moreover, the level of AOL's interest, which currently is in the form of a non-cognizable, non-voting preference stock, would be far too insignificant—even upon conversion—to be deemed attributable under the (stayed) cable ownership cap or any other set of rules applied in the cable context. Accordingly, there is simply no risk that AOL's limited interest in GM, even after the proposed merger, could adversely affect consumers.

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[27] Both the statutory horizontal ownership provision and the Commission's implementing regulations remain the subject of judicial review. *See Daniels Cablevision, Inc. v. United States*, 835 F.Supp. 1 (D.D.C. 1993), *appeal pending sub nom. Time Warner Entertainment Co. v. FCC*, No. 96-5272 (D.C. Cir.) and *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (1996), *reh'g en banc denied*, 105 F.2d 923 (D.C. Cir. 1997).

[28] "DirecTV Announces Record February Customer Growth," DirecTV, Press Release, March 7, 2000, available at <http://www.directv.com/press/pressdel/0,1112,300,00.html>.

[29] *See* The Kagan Media Index, February 25, 2000 at 8 (concluding that there are 82.6 million MVPD subscribers nationwide).

## III. THIS MERGER ADVANCES AOL'S LONG-STANDING COMMITMENT TO THE DISTRIBUTION OF ITS ONLINE SERVICE USING A WIDE RANGE OF TECHNOLOGIES

This merger advances AOL's long-standing commitment to employing the full range of available platforms for the delivery of the AOL service. Even before its merger with Time Warner was announced, AOL was actively pursuing non-exclusive agreements with digital subscriber line ("DSL"), wireless, satellite, and cable providers, despite the fact that its service is already available via dial-up connection nationwide. The merged AOL Time Warner looks forward to offering the AOL service over its broadband cable systems, as quickly as possible, subject to existing contractual commitments. This will move AOL further toward its goal of being available across all technologies and to as many consumers as possible, where, when, and how they want to be reached. These systems, however, pass only approximately 20 percent of homes nationwide. Accordingly, AOL Time Warner will continue to strive to make the AOL service available on as many different facilities as possible—including alternative broadband facilities within Time Warner's local cable franchise areas.

### A. The Success Of The "AOL Anywhere" Strategy Depends On The Availability Of The AOL Service Wherever And However Consumers Might Wish To Obtain It

AOL's corporate strategy is to offer "AOL Anywhere." AOL has sought to make the full range of its interactive brands, services and features available to consumers *across a range of products and devices*. Through "AOL Anywhere," AOL's members, online consumers of its other Web brands, and millions of other consumers will be able to access popular AOL features *whenever and wherever they need them*—from the Web and when using their television, Internet-ready phones, handheld computers, and other personal wireless devices.

A key focus of this strategy—and, indeed, of AOL's overall business strategy—is the ability to reach as many consumers as possible, in as many ways as possible. Subscriber revenues, obviously, are a function of the number of customers. Similarly, advertising revenues are linked to the number of "eyeballs" that advertisers' messages will reach. And e-commerce revenues are derived on a per-transaction basis. Thus, for a whole host of reasons, the economic model upon which AOL's corporate success is based depends upon widespread distribution of the AOL service.

### B. In Recognition Of These Business Imperatives, AOL Has Long Committed Itself To A Broad Diversity Of Platforms

Consistent with the goal of "AOL Anywhere," AOL has entered into non-exclusive agreements with providers using a broad range of facilities in order to ensure that all consumers who want to access its service—no matter where they live, no matter what device they use to access the Internet, and no matter what access platform they employ—will be able to do so. AOL's purpose for negotiating these agreements is to create a "broadband tapestry" capable of delivering AOL's service through a range of technologies. To that end, AOL has entered into a broad range of non-exclusive agreements, including:

**Satellite.** As described in greater detail above, AOL has formed a strategic alliance with Hughes Electronics Corporation to make its high-speed Internet service, "AOL-Plus," available nationwide via the DirecPC satellite Internet network, on a non-exclusive basis.[30]

**DSL.** AOL has formed non-exclusive strategic alliances with SBC Communications Inc. (including the former Ameritech), Bell Atlantic, and GTE to provide broadband access to the

[30] "America Online and Hughes Electronics Form Strategic Alliance to Market Unparalleled Digital Entertainment and Internet Services," America Online, Press Release, June 21, 1999.