AOL service via the phone companies' DSL offerings. As AOL President and Chief Operating Officer Robert W. Pittman has stated, "AOL is strongly committed to finding new ways to offer our members added access to high-speed options. By partnering with telecommunications leaders like [SBC], and exploring all means of access, we are delivering on the promise of the interactive medium and helping to make broadband access a reality for the mass market consumer."[31]

Wireless. AOL recently announced non-exclusive agreements with Sprint PCS, Nokia, Motorola, Research in Motion, BellSouth, and Arch Communications to make the AOL service one of the choices that will be accessible via wireless devices (including wireless phones). These wireless announcements are a major step forward for the AOL Anywhere strategy—making it possible for consumers to access the AOL service anywhere, any time.[32]

Cable. Stephen Case, AOL Chairman and CEO, noted in his recent testimony before the Senate Commerce Committee that AOL "from day one" has pursued the goal of consumer choice from among multiple ISPs over broadband cable systems. And irrespective of the Time Warner merger, AOL will continue to seek the ability to serve customers passed by the broadband facilities of other cable operators.

C. The Merger In No Way Alters The Platform-Agnostic Foundation Of The "AOL Anywhere" Strategy—Including Within Time Warner's Local Cable Franchise Areas

AOL's commitment to a multitude of broadband delivery options—including within Time Warner's cable service areas—is in no way diminished by this merger. Indeed, AOL must

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[31] "Ameritech, America Online Ink Pact for High-Speed DSL Access," America Online, Press Release, July 21, 1999.

continue to pursue as many broadband delivery options as possible in order to reach every potential customer, both inside and outside of Time Warner's local cable franchise areas. Within Time Warner's local franchise areas, a substantial percentage of consumers do not subscribe to cable and thus are perhaps less likely to subscribe to cable modem service on a stand-alone basis. Further, Time Warner's cable systems reach less than 20 percent of the nation's homes passed by cable. And nationwide, one of every three consumers do not now subscribe to cable—a figure that does not take into account the fact that many cable subscribers may wish to obtain broadband Internet services over facilities other than cable. AOL thus does, and will continue to, rely upon a multiplicity of other providers—including DSL, satellite, wireless, and other cable operators.

Moreover, while AOL Time Warner is encouraged by AT&T's pledge to provide consumers with a choice among multiple ISPs and hopes that other cable companies will join in providing such consumer choice, AOL nevertheless remains committed to a diversity of delivery options. Consequently, the possibility of future deals with other cable operators has no effect upon AOL's continuing commitments to satellite, wireless, and DSL.

For all of these reasons, AOL Time Warner remains committed to making the AOL service available via the broadest range of technologies possible. AOL Time Warner thus will continue to provide the AOL service over alternative facilities, both beyond and within its own cable service areas. AOL's strategy is to deliver on what consumers want—and that means giving consumers choices in terms of how and where they connect. Limiting distribution of the

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[32] "America Online Goes Wireless," America Online, Press Release, Feb. 28, 2000.

AOL service would undermine the long-standing "AOL Anywhere" strategy and be a poor business decision.

IV. ADDITIONAL DATA AND ANALYSIS CONFIRM THAT THE PROPOSED MERGER WILL SERVE THE PUBLIC INTEREST BY BRINGING CONSUMER CHOICE, INNOVATION, AND MOMENTUM TO BROADBAND AND NEXT-GENERATION SERVICES

The goal of this merger is not simply to market existing AOL and Time Warner products and services under one corporate banner. Rather, AOL and Time Warner have committed to this merger because their shared vision for serving consumers in the coming Internet Age calls for more than simple cooperation on a specific product or service offering. Maximizing the potential of each company requires fully integrating both into a single, transformed enterprise. As Gerald Levin, Time Warner Chairman and CEO, testified before the Senate Commerce Committee, the leaders of AOL and Time Warner saw the merged entity as something much bigger than the sum of its parts:

> [we] saw that the company of the future—a company with the creative infrastructure to provide a constant stream of quality content plus a genetic appreciation of how to form web communities and how to serve them easily and conveniently—had yet to come into existence. The solution to that puzzle was quickly obvious to both of us: by putting together AOL and Time Warner, we could create the first enterprise not only fully prepared to compete on the Internet—a prototype for the 21st century—but a company that could be a decisive spur to bringing consumers the speed and immediacy of broadband across all delivery platforms, wired or wireless, thus unlocking the fullest possibilities of interactivity.[33]

In the same vein, Steve Case, Chairman and CEO of AOL, told investors, "[M]ake no mistake: This merger is not just about putting different forms of media together. It is about creating

[33] *See* Levin Testimony (Commerce Committee) (Tab 5).

something new and powerful—a truly mass-market interactive company providing services on a global level that will become even more central to people's lives."[34]

As AOL and Time Warner explained in their Public Interest Statement, the merger promises (and has already begun) to deliver substantial benefits to consumers and competition.[35] These benefits—whether in the form of more consumer choice among Internet services delivered via cable or more advanced products and services reaching the marketplace—will help drive the next generation of information, entertainment, communications, and e-commerce opportunities for consumers.

A. The Parties' Unsurpassed And Demonstrated Commitment To Consumer Choice From Among Multiple ISPs Significantly Advances The Public Interest By Expediting The Resolution Of The Open Access Debate

Our Public Interest Statement asserted that the AOL Time Warner merger would likely hasten a marketplace solution to the open access issue. Less than three weeks after submitting our public interest showing, AOL and Time Warner took an important first step toward achieving this objective by entering into a Memorandum of Understanding setting out the framework under which AOL Time Warner will offer consumers a choice of ISPs on its broadband cable

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34 "Statement of Steven M. Case, Chairman and Chief Executive Officer, Concerning Q2 FY00 Quarterly Results," America Online Corporate Web Page, Jan. 19, 2000, <http://www.corp.aol.com/conffy00q2.html>.

35 While AOL and Time Warner are confident that their merger will produce substantial and widespread public interest benefits, Commission precedent does not require definitive quantification of the public interest effects in this case. Rather, as the FCC has plainly stated, it pursues a "sliding scale approach" in circumstances such as that presented by this proposed merger: "[W]here, as here, potential harms are unlikely, Applicants' demonstration of potential benefits need not be as certain." *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, 13 FCC Rcd 18025, 18137 (1998).

systems.[36] Through their commitments, the parties have demonstrated that this merger will promote the public interest by increasing consumer choice and, ultimately, accelerating broadband deployment.

1. AOL and Time Warner have committed to providing consumer choice among multiple ISPs on AOL Time Warner's cable systems

At the heart of the MOU is the parties' commitment to ensuring that consumers will be able to choose from among multiple ISPs for high-speed Internet service over AOL Time Warner's broadband cable systems. The details of the MOU confirm that this commitment is real and meaningful. Significantly, consumers will not be required to purchase service from an ISP that is affiliated with AOL Time Warner in order to enjoy broadband Internet service over AOL Time Warner cable systems.

The parties also have committed to offer a diversity of ISPs. AOL Time Warner will not place any fixed limit on the number of ISPs with which it will enter into commercial arrangements. Moreover, AOL Time Warner will offer those ISPs the choice to partner on a national (*i.e.*, on all AOL Time Warner cable systems), regional, or local basis, in order to facilitate consumer choice among ISPs of different size and scope.

Importantly, AOL Time Warner will not control the nature of the ISP's relationship with customers. Both the cable operator and the ISP will have the opportunity to have a direct relationship with the consumer. Accordingly, both the cable operator and the ISP will be allowed to market and sell broadband Internet service directly to customers. When an ISP sells broadband Internet service directly to a customer, it may, if it so chooses, bill and collect from

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36 *See* MOU (Tab 3).

the customer directly. The MOU also makes clear that AOL Time Warner will allow ISPs to provide video streaming.

The MOU is compelling evidence of AOL and Time Warner's joint commitment to the principle that providing consumer choice is integral to achieving the full potential of the merged company, as well as the Internet marketplace. While the MOU is subject to existing Time Warner obligations, AOL Time Warner is committed to providing a choice of ISPs as quickly as possible, and will work with its Road Runner partners to try to achieve that goal even before its current obligations expire.

2. The AOL Time Warner MOU represents tremendous marketplace progress in advancing open access

AOL and Time Warner view the principles embodied in the MOU as the foundation of their Internet access policy and believe that the resulting benefits to consumers will be profound. Industry observers agree—the MOU has been widely heralded as a turning point destined to resonate throughout the industry and drive the promotion of a vigorously competitive marketplace for broadband Internet services.

The merging parties themselves clearly appreciate the broad importance of their agreement. Steve Case described the MOU as a "significant step forward today toward making open access a reality for consumers in the marketplace" and "exactly what we believe our two companies can achieve when we work together: providing new choices for consumers and value in the marketplace." He continued:

> Choice, competition, and innovation have been the factors driving the Internet's explosive growth to date. Now, with this framework, we are poised to make it easier, more attractive, and more affordable than ever for consumers to sign up for high-speed,

> always-on Internet service, with all of the benefits that has to offer.[37]

Gerald Levin articulated this same vision:

> We know Time Warner consumers want choice and innovation in cable Internet service, and we are going to deliver it to them—access to AOL as well as to a variety of other ISPs . . . . Today's announcement is another step forward in delivering on the promise of the interactive medium and helping make broadband access a reality for every consumer.[38]

The MOU is thus significant not just for the choice of broadband Internet service it is bringing to subscribers of Time Warner's cable systems, but also because it creates an additional public interest benefit: momentum for similar action throughout the cable industry. Indeed, the merging parties have been outspoken about their expectation that other cable operators will follow their lead. When the MOU was announced, Mr. Levin said:

> I look forward to the rest of the cable industry following this same path of choice and innovation, which I believe will greatly accelerate consumer adoption of cable broadband services.[39]

Mr. Case expounded on this idea in recent testimony before the U.S. Senate:

> We have made real progress on this issue over the past year and a half, and I am proud of the role AOL has played in getting us to where we are today. AT&T and Time Warner, the two largest cable companies in the country, have committed to the principle of providing consumer choice on their systems. And with other cable companies considering following our lead, I believe

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[37] "America Online And Time Warner Announce Framework For Agreements To Offer AOL Service and Other ISPs On Time Warner Broadband Cable Systems," AOL - Time Warner Joint News Release, February 29, 2000.

[38] *Id.*

[39] *Id.*

> implementation of open access nationwide is no longer a question of whether, but of when.[40]

AOL and Time Warner are not alone in the view that the MOU is likely to spur other cable companies to achieve marketplace arrangements that facilitate consumer choice among multiple ISPs. Chairman Kennard called the MOU "a significant step in the right direction" of "find[ing] business solutions to consumer demand as an alternative to intervention by the government."[41] And the trade press recently reported that:

> Cable-industry sources said the AOL-Time Warner deal "turns the heat up" on Cox Communications Inc., Comcast Corp., Cablevision Systems Corp. and Charter Communications Inc. to join the open-access crusade.[42]

Independent financial analysts have reached the same conclusion regarding the widespread impact of the MOU. [43]

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40 Testimony of Steve Case, Chairman and CEO, America Online, Before the Committee on the Judiciary, United States Senate, February 29, 2000. Steve Case and Gerald Levin both spoke before the Senate Judiciary Committee, as well as before the Senate Commerce Subcommittee on Telecommunications on March 2, 2000. *See generally* "Case Testimony" (Tab 4), "Levin Testimony" (Tab 5).

41 Statement of FCC Chairman William E. Kennard on the MOU Between AOL and Time Warner, FCC News Release, February 29, 2000.

42 "Access Plan Turns Up Heat on MSOs," Multichannel News, March 6, 2000, at 75.

43 For instance, Merrill Lynch & Co. has predicted that

> AOL's ownership of one of the largest MSOs will help pave the way for commercial resolution of the so-called "open access" issue as opposed to regulatory intervention . . . . We would expect the merger to, in turn, push other major cable operators to consider establishing deals with AOL or other Internet service providers . . . .

Merrill Lynch, In-depth Report: AOL Time Warner, February 23, 2000 at 9, 15 ("Merrill

3. The AOL Time Warner merger and its commitment to providing consumers' choice among multiple ISPs will only enhance the marketplace pressure that the Commission has already found to be fueling competitive broadband deployment

By demonstrating the power of consumer choice to fuel demand for broadband Internet service, the AOL Time Warner merger also will heighten competitive pressure for deployment of broadband by all technologies. The inevitable consequence is that, in order to stay competitive, providers of alternative broadband platforms such as DSL,[44] satellite, and fixed wireless must accelerate their own development and deployment plans.

The Commission has recognized this pattern, understanding that competition among rival technologies is one of the primary forces that drives deployment of broadband services. As the FCC continues to observe, "it is widely believed that incumbent LECs' recent moves to offer

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Lynch") (Tab 7).

As reflected in this submission, Merrill Lynch and a number of other independent financial analysts who specialize in the media and Internet marketplaces have produced substantial and detailed studies of the proposed merger since the applications in this proceeding were filed. These analyses corroborate much of what the Applicants set forth in their Public Interest Statement. AOL and Time Warner understand that the Commission would find benefits in reviewing these analysts' insights and so, for the agency's convenience, copies of the full reports are attached as a courtesy. *See* Merrill Lynch (Tab 7); Goldman Sachs, Internet Media, AmericaOnline/TimeWarner: Perfect Time-ing, March 10, 2000 ("Goldman Sachs") (Tab 9); PaineWebber, Company Analysis, AOL Time Warner, March 1, 2000 ("PaineWebber") (Tab 8). Nevertheless, because these analyses were, of course, not subject to the editorial control of either Applicant, their submission should not be deemed to constitute endorsement or adoption by either AOL or Time Warner of the data and views therein.

[44] *See, e.g.*, Seth Schiesel, *A Rush to Provide High-Speed Internet Access*, The New York Times, Jan. 12, 2000 ("Even as cable television companies across the nation are upgrading their systems to deliver advanced Internet services, local phone companies are racing to beat them to the punch using D.S.L., a technology that transmits huge volumes of digital data over standard phone lines.").

broadband to residential customers are primarily a reaction to other companies' entry into broadband."[45] Chairman Kennard elaborated on this point in a speech last September:

> And this pickup in growth [of DSL deployment] is a function of one thing: competition. The regional Bell companies know that for the first time in the history of this country they are facing a serious, facilities-based competitor in their backyard: the residential marketplace. And that is the cable television industry. And it is the prospect of that competition that is going to really jumpstart broadband deployment in this country.[46]

In the same vein, FCC Cable Bureau Chief Deborah Lathen recently stated that the "deployment of cable modems has spurred the deployment of DSL, and this competition has resulted in lower prices and greater choices for consumers."[47]

Industry observers likewise have noted that the merger will trigger a major step forward in the deployment and adoption of broadband. As one account stated it, the

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[45] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, at n. 624 (*Third Report and Order and Fourth Further Notice of Proposed Rulemaking*) (rel. Nov. 5, 1999); *see also AT&T/TCI Order,* at ¶ 94 (describing the "range of distribution technologies" for providing broadband Internet access that already were or would soon be available to the public).

[46] Chairman William E. Kennard, "Consumer Choice Through Competition," Remarks before the National Association of Telecommunications Officers and Advisors, Atlanta, GA, September 17, 1999, available at <http://www.fcc.gov/commissioners/kennard/speeches.html>; *see also* Chairman William E. Kennard, "The Unregulation of the Internet: Laying a Competitive Course for the Future," Remarks before the Federal Communications Bar, Northern California Chapter, San Francisco, CA, July 20, 1999, available at <http://www.fcc.gov /Commissioners/kennard/speeches.html> ("Where cable modem service has been introduced, DSL has followed.").

[47] Deborah A. Lathen, Chief, Cable Services Bureau, Remarks before the National Governors' Association, February 27, 2000, available at <http://www.fcc.gov/Speeches/ misc/spdal904.html>.

> deal may well set off a chain reaction among local phone companies, long-distance giants, other cable providers and wireless carriers to step up their high-speed Internet strategies.[48]

The financial community agrees. Merrill Lynch, for example, noted that "the merger will only help to accelerate cable's rollout of high speed data and new services . . . ."[49] The same is true for the deployment of other platforms. Analysts have concluded that 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."[50]

In addition, AOL and Time Warner believe that, in two related ways, their merger will help prompt the availability of broadband services to all Americans. First, the companies' commitments to this important social goal,[51] combined with Time Warner's ongoing comprehensive broadband deployment efforts and AOL's ability to make new technologies and services accessible and attractive to even the most inexperienced users, should greatly accelerate the adoption of broadband access across all segments of society. Second, the merged entity's introduction of widely appealing broadband offerings will help spur providers of other broadband

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48 Seth Schiesel, *A Rush to Provide High-Speed Internet Access*, The New York Times, Jan. 12, 2000. *See also id.* (quoting Daniel P. Reingold, chief telecommunications analyst for Credit Suisse First Boston, as stating that "[t]he race to provide broadband access will only accelerate from here").

49 Merrill Lynch, at 9 (Tab 7).

50 Merrill Lynch, at 28 (Tab 7).

51 As Mr. Case testified before the Senate Judiciary Committee, "Our spirit of innovation and creativity, our tradition of competition and cooperation, and our ideal of inclusion and equal opportunity are the driving force of the Internet—and they will be the guiding principles of AOL Time Warner." Case Testimony (Tab 4).

technologies and services to deploy and market their own services more widely in order to compete directly with AOL Time Warner.

In summary, the broadband access deployment benefits of the merger will be far-reaching, and the irreversible course of open competition fostered by this merger is—with the MOU—already underway. The continuing payoff for consumers lies in the actions that AOL Time Warner will spur among other ISPs and broadband providers as they seek to join in the emerging broadband marketplace boom.

B. This Merger Significantly Advances The Public Interest By Bringing Together Complementary Skills And Resources To More Rapidly And Effectively Offer Consumers The New Content, Products, And Services That Broadband Promises

As explained in the Public Interest Statement, combining AOL and Time Warner's resources will allow the new entity to spearhead the convergence of traditional media and online technologies. The two parties bring the experience, incentive, and resources necessary to develop together an array of new services and products in a marketplace that is filled with promise—but also with risk and unpredictability. Yet, as Goldman Sachs plainly states, "the risks of the combined company are lower than for the individual companies."[52] With this merger, consumers will more rapidly see products and services that range, as discussed below, from familiar information and entertainment content delivered in a new way to interactive or wholly new and innovative consumer offerings.

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[52] Goldman Sachs, at 2 (Tab 9).

1. The spectrum of new consumer offerings

Just how will AOL Time Warner advance the delivery of all the benefits that the broadband marketplace promises? Detailed business plans are still being developed, but what AOL and Time Warner together make possible is acceleration of the development and availability of (1) established media offerings made more widely available and accessible online; (2) new, interactive forms of media content more fully tailored to and enriched by the Internet; and (3) wholly new forms of information, entertainment, communications, and commerce. AOL Time Warner's development of these new content services, coupled with the merged company's strategy of making its offerings broadly available across multiple technologies, will add further depth and diversity to the already stunning chorus of "voices" to be heard via the Internet.[53]

Certainly the merged entity will be well placed to integrate traditional and new media. Observers have widely hailed the prospect of AOL using its demonstrated skills to enable technology-reluctant users to participate in the Internet revolution by ensuring that these consumers can easily find and enjoy the online versions of the many content offerings (magazines, books, video, etc.) that they already trust and value, including Time Warner's popular brands. Indeed, Time Warner has found that this transaction would "accelerate[ ] Time Warner's Internet distribution plan by several years."[54] But even beyond the existing Time

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[53] As noted in the Public Interest Statement, AOL and Time Warner intends to make the combined company's content and services available to consumers on a variety of devices through any and all means of access, including cable, DSL, satellite, and wireless. Nor will AOL Time Warner deny its own subscribers ready access to content from other providers—such an approach would be simply untenable in today's Internet environment. Public Interest Statement at 3.

[54] AOL Time Warner Inc., SEC Form S-4, Registration Statement, filed February 11, 2000 at 37 ("Proxy Statement") (Tab 6).

Warner library, commentators have applauded how the deal will promote generally the development of next-generation content: "Deals like AOL Time Warner will accelerate the creation of digital content not only at Time Warner, but also at other traditional media companies."[55]

Furthermore, the merged entity expects to infuse its traditional and trusted sources of information and entertainment with interactivity, thereby transforming the consumer experience. By internalizing under one roof their collective Internet know-how and media expertise, AOL Time Warner can bring consumers content that is not merely re-purposed for the Internet but rather is born of the online medium and its rich capacity for interactivity. In their merger-related filings with the Securities and Exchange Commission, moreover, the Applicants noted that one factor motivating the merger was the existence of "cost efficiencies in launching and operating interactive extensions of Time Warner brands."[56]

The merger will also help spur the development and delivery to the marketplace of next-generation products and services—wholly new content offerings specifically designed for delivery via broadband and supporting interactive components. As Goldman Sachs noted, the merged entity can quickly respond to and inspire "rapidly morphing user habits as users re-examine their daily activities through 'Internet-enabled glasses.'"[57] Similarly, Merrill Lynch, after examining the merger, concluded that one of the strengths of the combined entity will be its

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[55] Christopher Charron, *A Look at the AOL Deal; Cheered: Anything, Anywhere, for Anyone*, The Washington Post, Jan. 16, 2000.

[56] Proxy Statement, at 33 (Tab 6).

[57] Goldman Sachs, at 1 (Tab 9).

ability to develop and promote new interactive services: "[AOL Time Warner] is in a better position than either entity is separately to drive the evolution of interactive services to the next level—breaking the convergence logjams that, in many sectors of the media and communications industries, are inhibiting the growth of the medium."[58]

2. A compelling illustration: "The Online Music Revolution"

Among the examples of new products and services that the proposed merger should deliver quickly to consumers is Internet-delivered music. Hilary Rosen, President of the Recording Industry Association of America, has noted 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."[59] Indeed, many analysts believe that "the Internet revolution and its influence on e-commerce, marketing, digital delivery, and distribution will have a profound impact on the structure, growth, and traditional operating models of the music industry."[60]

In particular, independent observers widely agree that 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.[61] Or, as the *Washington Post* put it,

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[58] Merrill Lynch, at 11 (Tab 7); *see also id.* at 10 (discussing four possible views of the proposed merger and advising that its analysis suggests the merged entity is in a "great position" to become a "leading platform for and provider of consumer-oriented interactive services—services that we expect to evolve far beyond the rudimentary PC-based activities popular today"); *id.* at 14 (stating that the merger "should allow the new entity, over time, to introduce new products and services").

[59] David Segal, *Deal May Make Online Music Pay*, The Washington Post, January 12, 2000, at E1.

[60] *See* Goldman Sachs, at 13 (Tab 9).

[61] *See, e.g.,* Merrill Lynch, at 11 (Tab 7); PaineWebber, at 9 (Tab 8) ("As secure audio

> [t]he push toward digital music just got a shove. America Online Inc.'s proposed merger with Time Warner Inc. may vastly hasten the online music revolution, say record industry specialists, and could transform the race to find new ways to sell and distribute music over the Internet . . . . "This [the merger] will speed up how fast the digital music market emerges," said Andrea Fleming, a spokeswoman for Liquid Audio, referring to the AOL-Time Warner deal.[62]

Part of the reason that online music distribution has not yet achieved widespread availability is the lack of inter-industry standards on software and encoding. AOL Time Warner's combined expertise can help expedite the development of a technological platform which will permit consumers, legally and securely, to download music over the Internet. Together, AOL and Time Warner can build quickly on steps now underway to bring consumers a world in which music downloading is easy and convenient—allowing them to sample music before purchasing it, and to obtain news about musical releases that fit their personal interests.

The Applicants fully expect the upshot to be not just a "music revolution" but also the advancement of the broadband revolution. Independent analysts agree that a burgeoning online music marketplace also will hasten the consumer transition to broadband Internet access.[63] In

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streaming standards are developed, we anticipate . . . lower[ed] risks associated with producing new artists.")

[62] David Segal, *Deal May Make Online Music Pay*, Washington Post, January 12, 2000, at E1.

[63] PaineWebber predicts that "as high-speed connections to the Internet proliferate, within seven years the Web will become a critical part of the music distribution chain—and that, accordingly, the merger will allow the new company to keep pace with this development." *See* PaineWebber, at 8 (Tab 8); *see also* Goldman Sachs, at 13 (Tab 9) (merger will help address issue of lack of demand to drive broadband facilities penetration).

order to download music faster and more efficiently, consumers will desire the greater bandwidth capacity which broadband access can provide.

3. Boundless possibilities for new consumer services

In addition to the prospects for online music, this merger holds promise for advancing the roll-out of ventures now in development, as well as those in the conceptual stages. As PaineWebber observed in its analysis of the transaction, 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."[64] For example, AOL is developing a new service called AOLTV which is intended to enhance the traditional television viewing experience by adding an exciting new element of interactivity. A leading attribute of this new offering will be its ability to extend and directly link the community aspects of AOL to video programming, thereby making television viewing more entertaining and useful for millions of viewers. Among other activities, subscribers will be able to join online chats with others watching the same television program or be able to simultaneously watch television programs and send instant messages. Moreover, AOLTV holds the promise of allowing subscribers to instantaneously obtain more information about the television programming they are watching with a simple click. A viewer could obtain the voting records of the candidates while watching a Presidential debate, to cite but one example. In short, AOLTV will give customers the capability to integrate Internet-enabled interactivity into their television viewing experience.

Even before this merger was proposed, the planned roll-out of AOLTV was viewed as a promising expansion of the "AOL Anywhere" initiative to make AOL services available over a

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[64] PaineWebber, at 6 (Tab 8).

broad range of devices. With the added expertise in television programming and distribution that Time Warner will bring to the table, AOLTV promises to be a service that is both highly appealing and useful to consumers. And with this 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 even more foreseeable.

Because of the AOL Time Warner merger, a host of other new products and services likewise can be expected to move more readily and promptly from drawing board to market. Of course, as PaineWebber points out in its analysis of the merger, "[t]oday it is difficult to see what the new digital world will look like."[65] Nevertheless, among the promising next-generation products that analysts suggest the merged company is well positioned to pursue and expedite are personalized jukeboxes and news clipping services; voice-activated web surfing; Internet-enabled voice communications; personalized video services; virtual communities centered around off-line magazines; and downloaded music. The companies welcome the challenge of bringing the future closer to consumers in a way that enriches their lives; once fused together, AOL Time Warner will be well-suited to deliver on that goal.

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In sum, the public interest benefits of the proposed merger are both tangible and significant. The discussion below makes clear that they would not occur as rapidly if AOL and Time Warner had not chosen to merge their operations into one, wholly new entity.

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[65] PaineWebber, at 6 (Tab 8).

4. These benefits will be delivered to consumers more quickly and efficiently through this merger

As explained in the Public Interest Statement, AOL and Time Warner—relying on their collective experience across the media and communications industries—concluded that a merger would efficiently and effectively enable the two entities to transform themselves to compete vigorously in the rapidly evolving media/communications/Internet marketplace. Specifically, both companies came to the conclusion that the merger is the best means to:

- create the first fully integrated media and communications company for the Internet age;[66]
- act as a catalyst both to accelerate the growth of each company's current businesses and to create new business opportunities;[67]
- bring compelling and attractive new offerings to consumers as quickly as possible.;[68] and
- fully realize the cost savings and efficiencies, as well as the growth potential, that would stem from mixing and transforming the resources and operations of both companies.[69]

For its own part, Time Warner concluded that the merger would be the best way to bring consumers enhanced access to a broad selection of the company's high quality content and

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[66] *See* Proxy Statement, at 31 (Tab 6); *id.* at 34-35 (Tab 6).

[67] *See* Proxy Statement, at 31-33 (Tab 6); *id.* at 35-36 (Tab 6).

[68] *See* Proxy Statement, at 32 (Tab 6); *id.* at 36 (Tab 6).

[69] AOL acknowledged the cost efficiencies that would stem from launching and operating interactive extensions of Time Warner brands. Proxy Statement, at 33 (Tab 6). Furthermore, Time Warner recognized that the combination of its strong international presence with AOL's global interactive services will further strengthen the combined companies' position in the international marketplace. *Id.* at 36 (Tab 6).

interactive services—and at a more accelerated pace than could otherwise be achieved.[70] Time Warner also concluded that uniting the creative and journalistic talents of its employees with the technological expertise in the AOL ranks would position the combined company to offer consumers products and services particularly suited to interactive media.[71]

Similarly, AOL concluded that, through a merger, Time Warner's resources would advance the development of next-generation broadband services and the "AOL Anywhere" strategy—both results a net plus for consumers.[72] In addition, AOL recognized that common ownership of Time Warner's cable systems will expand the broadband availability of AOL's own interactive and next-generation services.[73]

The magnitude of the proposal was not underestimated by either company. The merger's potential is much more than just providing consumers with a single defined product or service in a predictable business environment. Rather, AOL and Time Warner have made a considered, and indeed compelling, judgment that the type of sweeping innovation and transformation they wish to achieve requires the full integration embodied by this merger.

It certainly would be impractical for the parties to try to negotiate a series of contracts or joint venture arrangements to account for the far-reaching and unprecedented undertaking contemplated by this transaction. Furthermore, where two parties such as AOL and Time Warner are operating in an environment defined by ever-evolving technologies and services,

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70 *See* Proxy Statement, at 35 (Tab 6).

71 *See* Proxy Statement, at 36 (Tab 6).

72 *See* Proxy Statement, at 32 (Tab 6).

73 *See* Proxy Statement, at 32 (Tab 6).

individual contractual relationships would be especially difficult to negotiate and much less efficient than the full integration offered by a merger. 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. Thus, the most efficient option—and the one that holds the most promise for consumers in the shortest period of time—is for AOL and Time Warner to become one company with unified goals for meeting consumer demand and needs across every product and service they do or could potentially offer.

Independent analysts agree that, as AOL and Time Warner stated in their Public Interest Statement, a merger is the most reliable vehicle for these two companies to bring new services and products to consumers quickly in what all agree is a risky, albeit exciting, marketplace. Goldman Sachs observed that a merger offered 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 in order to concentrate on the good of the whole: "In the past, each company had self-interest at heart, arguing that its assets were more important to the equation. This often prevented either company from maximizing its growth. This limitation is no longer an issue."[74]

Moreover, analysts note that mergers are reliable vehicles for delivering new products and services to consumers as quickly as possible.[75] Here, the specific business arrangement—

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74 Goldman Sachs, at 2 (Tab 9).

75 "During 2000, given the near-year-end closing of the transaction, both companies should benefit due to their cooperative 'prenuptial' relationship. Business decisions that would have been stymied by 'who's getting the better end of the deal' mentality should progress with

i.e., the merger—to which AOL and Time Warner have committed will uniquely enable the combined entity to develop and offer a broad range of services to the public. As noted above, these services are not limited to the accelerated migration of Time Warner content onto the Internet, though that is a merger-specific benefit which will rapidly occur. Nor are these services limited to the development of interactive versions of that content, though one of AOL's strengths is its ability to create new and readily accessible content tailored to the online experience. Instead, the AOL Time Warner merger offers all of these benefits *plus* a wholly new and, by-definition, still-under-conception wave of broadband-enabled services that will revolutionize people's lives.

V. THE COMMISSION'S PAST RULINGS, COMBINED WITH THE PARTIES' COMMITMENT TO OPEN ACCESS, PRECLUDE ANY FINDING THAT THE PROPOSED MERGER COULD THWART—OR EVEN DAMPEN—INTERNET ACCESS SERVICES COMPETITION

As explained in our Public Interest Statement, the AOL Time Warner merger will produce no anticompetitive effects in the provision of Internet access services. However defined, Internet access is more competitive today than when the Commission last reviewed it, and it will become even more so as this merger facilitates consumer choice among multiple ISPs delivered over cable systems. Indeed, FCC Cable Bureau Chief Deborah Lathen recently stated, "We have not seen any signs of a market failure that would justify regulation at this point . . . . We see competition flourishing and thriving."[76]

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relatively little friction." Goldman Sachs, at 21 (Tab 9).

[76] "Open Access Rivals Debate Next Moves in Broadband Battle," Communications Daily, March 10, 2000, at 9.

The following discussion reviews the Commission's analysis of this marketplace in its *AT&T/TCI Order*; applies the agency's findings and reasoning to the AOL Time Warner merger; and demonstrates that the proposed merger will indeed promote consumer choice in Internet access services, whether the relevant market is broadly or narrowly defined. As discussed below, the Commission rejected any potential concerns about Internet access competition (including those of AOL) raised in the AT&T/TCI merger. In that proceeding, the FCC found that the highly competitive Internet access marketplace would not be harmed by AT&T's acquisition of TCI's cable systems—even though those merging parties had in place contractual provisions affording exclusivity to their affiliated broadband Internet provider, @Home. The Commission, finding abundant competition no matter how the market was viewed, essentially dismissed as academic the debate among commenting parties over how to define the precise market at issue.

A fortiori, the AOL Time Warner merger cannot reasonably be found to cause any anticompetitive effect on Internet access—and the need for any specific market definition is thus even more academic. By offering multiple, unaffiliated ISPs over its cable systems, AOL Time Warner will empower Internet users to choose among a wider variety of products and providers. Accordingly, the Commission, by its own reasoning, now faces a merger that will render a marketplace already found abundantly competitive to be even more so—and so the agency again has no need to adopt a precise market definition:

- If broadband and narrowband Internet access services are understood as being part of the *same* product market, there are countless firms in that market, barriers to entry are low; market concentration will not be significantly increased; and the merger will not have any significant anticompetitive effect.
- If broadband and narrowband Internet access services are viewed as *separate* product markets, this merger will not eliminate any significant existing competition; market concentration will not be significantly increased; and consumer choice among ISPs will be promoted.

A. The FCC's Analysis and Conclusions in *AT&T/TCI* Belie any Need to Rule on a Precise Market Definition in Order to Find this Merger in the Public Interest

In approving the AT&T/TCI merger—and rejecting efforts to define the precise market at issue—the Commission found competition among existing Internet access providers so vigorous as to be not threatened even by the merged company's exclusive arrangements with its affiliated Internet provider. A review of the underlying facts of the AT&T/TCI merger, the FCC's lines of analysis, and the agency's ultimate findings leaves no room for a contrary Commission ruling on this merger.

The previous merger presented the FCC with a major facilities-based communications/ Internet company (AT&T) proposing to acquire control of the nation's largest cable operator (TCI) and its affiliated broadband Internet provider (@Home). AT&T had a significant narrowband ISP (WorldNet) and pre-existing plans to offer facilities-based Internet access service using an alternative (fixed wireless) technology. TCI offered broadband Internet access over its cable systems subject to an exclusive agreement with @Home. Notably, the merging parties there did not commit to offer consumers a choice of unaffiliated ISPs over their cable systems.

Faced with these facts, the FCC concluded that—no matter how the relevant market was defined—the merger would engender no adverse effects in the competitive Internet access marketplace that warranted any agency action. The Commission's own words best reveal its findings and reasoning:

- "*Effect on Competition*. To address the specific issues raised by parties opposing the merger or seeking conditions, we must first consider whether the merger is likely to produce any adverse competitive effects in residential markets for Internet access services."[77]

- *"Market Definition.* **We do not need to determine at this time whether narrowband and broadband Internet access services provided to residential and small business customers are sufficiently different to support the conclusion that they are in separate markets**. As we explain in the following paragraphs, even if we were to assume that they are in separate markets, we would reach the same conclusion concerning the issues raised by parties opposing and commenting on the proposed merger."[78]

- One Market Analysis: "Currently, there are **a large number of firms providing Internet access services in nearly all geographic markets** in the United States, and **these markets are quite competitive today**. Accordingly, if all Internet access services were included in the market definition, we would conclude that the **merger is unlikely to adversely affect the public interest in competitive markets for Internet access services**."[79]

- Separate Market Analysis: "**Even if we were to consider a market defined to include only high-speed Internet access services, we would still conclude that the merger is unlikely to adversely affect the public interest in a competitive market.** Although AT&T/TCI together might be able more quickly to deploy high-speed Internet access services and win a significant number of residential Internet access customers, it appears that quite a few other firms are beginning to deploy or are working to deploy high-speed Internet access services using a range of other distribution technologies. Moreover, even if broadband Internet access services were deemed to constitute a separate market from dial-up Internet access services, AT&T is not a more likely entrant than AOL or other leading ISPs (including the incumbent LECs, which have facilities of their own) that are currently providing services using narrowband transmission. Accordingly, **the merger does not eliminate any scarce assets or capabilities**; in fact, a partnership between AT&T and TCI is precisely the kind of arrangement by which AT&T (and other ISPs) could be expected to provide higher-speed Internet access services."[80]

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[77] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor to AT&T Corp., Transferee,* 14 FCC Rcd 3160, 3205-06 (1999) (*"AT&T/TCI Order"*).

[78] *Id.*

[79] *Id.* (citations omitted, emphasis added).

[80] *Id.* at 3206 (citations omitted, emphasis added).