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August 30, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.—The Portals
TW-B204
Washington, D.C. 20554

Re: America Online, Inc. and Time Warner Inc.
Notice of *Ex Parte* Presentation
Applications of America Online, Inc. and Time Warner Inc.
for Transfers of Control, CS Docket No. 00-30

Dear Ms. Salas:

On behalf of America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") (collectively, the "Applicants"), submitted herewith pursuant to Section 1.1206(b)(2) of the Commission's rules are an original and one copy of this notice regarding a permitted *ex parte* presentation in the above-referenced proceeding. On August 29, 2000, representatives of AOL and Time Warner met with members of the Commission's staff to discuss the attached materials concerning Commission precedent on issues relevant to the AOL Time Warner merger.

Attending the meeting on behalf of AOL were Steven N. Teplitz, Vice President, Telecommunications Policy; and the undersigned. Representing Time Warner were Catherine R. Nolan, Vice President, Law & Public Policy, Time Warner; and Arthur Harding of Fleischman and Walsh, L.L.P. The FCC personnel attending the meeting were Christopher Wright, General Counsel of the Federal Communications Commission; James Bird, Assistant General Counsel; and Susan Aaron and Joel Rabinovitz of the Office of General Counsel.

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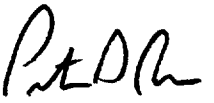
Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,



Peter D. Ross

cc: Christopher Wright, General Counsel
James Bird, FCC Assistant General Counsel
Susan Aaron, Office of General Counsel
Joel Rabinovitz, Office of General Counsel
Royce Dickens, Deputy Chief, Policy and Rules Division, Cable Services Bureau
Linda Senecal, Cable Services Bureau
International Transcription Services, Inc.

# THIS COMMISSION HAS RULED:

| COMMENTER CONCERNS | PREVIOUSLY ADDRESSED BY FCC IN AT&T MERGERS (AND ELSEWHERE)? | COMMISSION RULING |
|---|---|---|
| Open Access To The Cable Broadband Platform | ✓ | Competition resolves any concern; leave to marketplace. |
| Cable Control of Multichannel Video Distribution | ✓ | Compliance with horizontal ownership cap resolves any concern. |
| Cable Bottleneck Control of Broadband Platform | ✓ | Competition and compliance with horizontal ownership cap resolves any concern. |
| Discrimination in Broadband Applications and Software | ✓ | Competition resolves any concern; and ISP features are unregulated information services. |
| Discrimination against Unaffiliated Broadband Content Providers | ✓ | Competition and compliance with horizontal ownership cap resolves any concern. |
| Discrimination Against Unaffiliated EPGs Or Interactive Television Services And Content | ✓ | Competition, compliance with horizontal ownership cap, and commercial availability of navigation devices resolve any concern. |
| Pass-Through Of Digital Broadcast Signal In Full | ✓ | Merger is wrong forum for requested relief. |
| Discrimination Through Caching and Other Technological Means | ✓ | Competition resolves any concern. |
| Extension of Cable Regulation To The Internet | ✓ | No statutory authority for requested relief. |
| Restrictions on Exclusive Distribution and Expansion of Program Access | ✓ | No statutory authority for requested relief; and merger is wrong forum for requested relief. |
| Anticompetitive Bundling of Services | ✓ | Competition resolves any concern; and merger is wrong forum for requested relief. |
| AT&T Interrelationships | ✓ | Compliance with horizontal ownership cap and DoJ consent decree resolves any concern. |
| Additional Policy Debates And Private Disputes Not Specific To The Merger | ✓ | Merger is wrong forum for requested relief. |

# THIS COMMISSION RECENTLY RULED IN THE AT&T MERGERS AND ELSEWHERE . . .

## ON OPEN ACCESS TO THE CABLE BROADBAND PLATFORM:

- "[T]he record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers. On this basis, we see no reason to take action on the [open access] issue at this time." (First Advanced Services Report, ¶ 101)

- "[T]here are a large number of firms providing Internet access services in nearly all geographic markets . . . and **these markets are quite competitive today.**" (*AT&T/TCI*, ¶ 93)

- "[Q]uite 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. . . . **[T]he merger does not eliminate 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." (*AT&T/TCI*, ¶ 94)

- "[S]ubscribers will be able to **access content** through @Home's interface or through Excite's portal – or **through any** other **interface** (Yahoo, Lycos, AOL, or others) they choose." (*AT&T/TCI*, ¶ 95)

- "[N]othing about the proposed merger would deny any customer (including AT&T-TCI customers) the ability to access the Internet content or portal of his or her choice." (*AT&T/TCI*, ¶ 96)

- "[O]pen access issues would remain equally meritorious (or non-meritorious) if the merger were not to occur." (*AT&T/TCI*, ¶ 96)

- "**[Open] access issues . . . do not provide a basis for conditioning,** denying, or designating for hearing any of the requested transfers of licenses and authorizations." (*AT&T/TCI*, ¶ 96)

- "[W]e find that there is **significant actual and potential competition from both alternative broadband providers and from unaffiliated ISPs** that may gain access to the merged firm's cable systems." (*AT&T/MediaOne*, ¶ 116)

- "[H]arms will be avoided if: (a) consumers can choose among various alternative broadband access providers . . .; or (b) unaffiliated ISPs are permitted access to the merged firm's cable network." (*AT&T/MediaOne*, ¶ 116)

- **"Applicants have committed to open their cable modem platform to unaffiliated ISPs as soon as AT&T's exclusive contract with Excite@Home expires . . . and MediaOne's exclusive contract with Road Runner expires . . . ."** (*AT&T/MediaOne*, ¶¶ 120)

- "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 . . . to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree." (*AT&T/MediaOne*, ¶ 123)

- "[L]egal determinations [regarding open access] would have industry-wide application, as well as legal and practical implications that extend far beyond the contours of this particular merger. Our **review of this merger does not provide an appropriate forum** for a determination of the legal status of cable broadband Internet access services." (*AT&T/MediaOne*, ¶ 126)

- "We will initiate a proceeding on the issue of multiple Internet service providers' access to cable operators' infrastructure for delivery of advanced services. The purpose of the **new proceeding** will be **to establish the national policy** on this question and bring certainty to the marketplace." (Second Advanced Services Report, ¶ 267)

**ON CABLE CONTROL OF MULTICHANNEL VIDEO DISTRIBUTION:**

- **Compliance with the cable cap** "will circumscribe AT&T's purported ability to harm . . . other MVPDs" and "**will ensure** that the merger will not frustrate nor impair the Commission's implementation of the Communications Act and its objectives with regard to the promotion of **competition and diversity** in the provision of video programming." (*AT&T/MediaOne*, ¶¶ 90, 73)

- The cap "limits AT&T's size and ensures that other MVPDs will provide sufficient alternative outlets for unaffiliated content providers." (*AT&T/MediaOne*, ¶ 90)

- The **cable attribution standards identify** "a degree of ownership or other economic interest, or **influence or control** over an entity engaged in the provision of communications services such that the holders should be **subject to [the horizontal ownership limit].**" (Cable Attribution Order, ¶ 2)

- Voting stock interests of less than five percent and non-voting stock interests are non-attributable. (Cable Attribution Order, ¶ 3)

**ON CABLE BOTTLENECK CONTROL OF BROADBAND PLATFORM:**

- "In virtually every TCI franchise area, **an incumbent local exchange carrier, at least two wireless providers, and the local electric utility also have facilities that may prove to be viable platforms for residential broadband access. Should all these alternatives fail** – and AT&T thereby achieves both a monopoly and subscriptions to it from all within its service area – both **the Communications Act and the antitrust laws** should be able to prevent AT&T from extending a monopoly to other competitive services." (*AT&T/TCI*, ¶ 129)

- "**[C]ommenters** argue that the merger would create a **web of relationships** that will allow the Applicants to **dominate communications conduits** through their cable infrastructure and **dominate media content** through their vertical integration with content providers." (*AT&T/MediaOne*, ¶ 2)

- "**[G]rowing competition** from alternative broadband access providers, the Applicants' **commitment to give unaffiliated ISPs direct access** to Applicants' cable systems, and the **terms of Applicants' proposed consent decree** with the Department of Justice requiring divestiture of Road Runner **make it unlikely that the merged firm would be able to dominate and threaten the openness and diversity of the Internet.**" (*AT&T/MediaOne*, ¶ 5)

- "[T]he **merger will not violate any provision of the Communications Act or Commission rules as they may pertain to the provision of broadband Internet services** to residential customers. . . . [T]he merger **will not frustrate** the implementation of the Communications Act and its goals as they pertain to the **promotion of competition and diversity** in the provision of these services." (*AT&T/MediaOne*, ¶ 102)

- "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. . . . Although some possibility of harm may remain, we find that there is an equal or greater probability that growing competition from alternative access providers and unaffiliated ISPs will prevent such perceived harms." (*AT&T/MediaOne*, ¶ 123)

**<u>ON DISCRIMINATION IN BROADBAND APPLICATIONS AND SOFTWARE:</u>**

- "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 [ ] applications to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree. We find that the proposed consent decree adequately addresses commenters' concern that a combination of Excite@Home and Road Runner would have both the ability and the incentive . . . to leverage proprietary software protocols to favor networks owned by or affiliated with the merged entity. Although some possibility of harm may remain, we find that there is an equal or greater probability that **growing competition from alternative access providers and unaffiliated ISPs will prevent such perceived harms.**" (*AT&T/MediaOne*, ¶ 123)

- "The evidence of growing competition from both alternative broadband providers and unaffiliated ISPs gaining access to cable and other broadband networks indicates that any **action taken by the merged firm to disfavor unaffiliated [ ] applications providers is likely to threaten the network's ability to attract and retain customers.**" (*AT&T/MediaOne*, ¶ 123)

- "Given the increasingly rapid deployment of alternative broadband technologies, . . . [w]ere the merged firm to attempt [to impose proprietary protocols], it is more likely than not that software developers could find **adequate outlets in alternative broadband providers** to discipline the merged firm's anti-competitive action." (*AT&T/MediaOne*, ¶ 125)

- "[B]y requiring MVPDs to grant all equipment manufacturers an opportunity to sell equipment to the MVPDs' subscribers, the **navigation devices rules limit MVPDs' ability to exercise excessive market power and dominate the equipment market.**" (*AT&T/MediaOne*, ¶ 100)

- "[I]t would be incorrect to conclude that Internet access providers offer subscribers separate services—electronic mail, Web browsing, and others—that should be deemed to have separate legal status . . . . The service that Internet access providers offer to members of the public is Internet access. That service gives users a variety of advanced capabilities [to]

exploit . . . through applications they install on their own computers." (Universal Service Report, ¶ 79)

- "The **provision of Internet access** service involves data transport elements . . . . But the provision of Internet access crucially involves information-processing elements as well; it **offers end users information-service capabilities inextricably intertwined with data transport.** As such, we conclude that **it is appropriately classed as an 'information service.'**" (Universal Service Report, ¶ 80)

- **Regulating "Internet access services as telecommunications services could have significant consequences for the global development of the Internet."** (Universal Service Report, ¶ 82)

## ON DISCRIMINATION AGAINST UNAFFILIATED BROADBAND CONTENT PROVIDERS:

- "[N]othing about the proposed merger would deny any customer (including AT&T-TCI customers) the **ability to access the Internet content or portal of his or her choice.**" (*AT&T/TCI*, ¶ 96)

- "Some commenters argue that the merged firm will control such a large portion of the broadband customer base that it could gain ***de facto*** **power to dictate what content, products, and services are available to broadband customers** generally, and at what price." (*AT&T/MediaOne*, ¶ 111)

- Compliance with the horizontal ownership rules "will circumscribe AT&T's purported ability to harm unaffiliated content providers [including interactive service providers]. . . ." Further, "**[t]o the extent that AT&T may steer its own subscribers away from unaffiliated content providers** via AT&T's own EPG, we note that **[the cable cap] ensures** that other MVPDs will provide **sufficient alternative outlets** for unaffiliated content providers." (*AT&T/MediaOne*, ¶ 90)

- "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 [ ]content . . . to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree. . . . Although some possibility of harm may remain, we find that there is an equal or greater probability that **growing competition from alternative access providers and unaffiliated ISPs** will prevent such perceived harms." (*AT&T/MediaOne*, ¶ 123)

## ON DISCRIMINATION AGAINST UNAFFILIATED EPG'S OR INTERACTIVE TELEVISION SERVICES AND CONTENT:

- **Cable cap compliance "will circumscribe AT&T's purported ability to harm unaffiliated [interactive service providers], unaffiliated EPGs . . . ."** (*AT&T/MediaOne*, ¶ 90)

- "With regard to unaffiliated EPG providers who would like access to AT&T's cable systems, . . . [b]ecause AT&T's horizontal size will be limited as a result of this Order, unaffiliated

EPGs will have access to more MVPD subscribers that are not affiliated with AT&T." (*AT&T/MediaOne*, ¶ 91)

- "Interactive television services and content" involve the provision of Internet access, and "growing competition from both alternative broadband providers and unaffiliated ISPs gaining access to cable and other broadband networks indicates that any **action taken by the merged firm to disfavor unaffiliated broadband content and applications providers is likely to threaten the networks ability to attract and retain customers.**" (*AT&T/MediaOne*, ¶¶ 109, 123)

**ON PASS-THROUGH OF DIGITAL BROADCAST SIGNAL IN FULL:**

- Dismissing calls "to condition approval of the merger on the requirement that the merged entity carry all local digital broadcast signals to consumers' television sets without degradation," the FCC found that **"digital broadcast signal carriage requirements should be addressed in the Commission's pending [digital broadcast] proceeding and not here."** (*AT&T/TCI*, ¶¶ 41, 43)

**ON DISCRIMINATION THROUGH CACHING AND OTHER TECHNOLOGICAL MEANS:**

- Dismissing commenters' concerns that "the merged firm could use its control over . . . home pages and **caching technology** to discriminate against unaffiliated providers," and would have "the incentive and the ability to implement proprietary **network management** and software protocols," the FCC found "growing competition from both alternative broadband providers and unaffiliated ISPs gaining access to cable and other broadband networks indicates that **any action taken by the merged firm to disfavor unaffiliated content and applications providers is likely to threaten the network's ability to attract and retain customers.**" (*AT&T/MediaOne*, ¶¶ 112, 113, 123)

**ON EXTENSION OF CABLE REGULATION TO THE INTERNET:**

- The cable channel occupancy and program carriage agreement **rules "apply solely to the carriage of video programming" and "ISP Internet access services . . . do not constitute 'video programming'** as that term is defined in the statute and the Commission's rules and orders." (*AT&T/MediaOne*, ¶ 86)

- "[O]pen video systems provide an option . . . for the distribution of video programming to consumers other than as a traditional cable television system regulated under Title VI." (*Open Video Systems Third Report and Order and Second Order on Recon*, ¶ 2)

**ON RESTRICTIONS ON EXCLUSIVE DISTRIBUTION AND EXPANSION OF PROGRAM ACCESS:**

- "[W]e do not conduct a separate analysis of bundled services as a discrete product. Rather, our competitive analyses of how the merger will affect each component of a bundled offering will analyze the competitive effects of the bundle as well." (*AT&T/TCI*, ¶ 19)

- As the FCC has repeatedly ruled before, "[w]e . . . **decline to condition the merger on the imposition of anti-exclusivity restrictions that are not required by the program access rules.**" (*AT&T/MediaOne*, ¶ 81; *see also AT&T/TCI*, ¶ 38)

- "[W]e decline to apply the program access rules or equivalent restrictions to terrestrially delivered programming . . . ." (*AT&T/MediaOne*, ¶ 80; *see also*, *AT&T/TCI*, ¶ 37)

**ON ANTICOMPETITIVE BUNDLING OF SERVICES:**

- "[A] **blanket ban** on the bundling of services might well **prevent competitively harmless transactions.**" (*AT&T/TCI*, ¶ 125)

- "AT&T-TCI **could inflict competitive harm** by offering a package of bundled products only if rivals could not offer a similar package – that is **only if the merged firm enjoys a monopoly in one of the bundled services.**" (*AT&T/TCI*, ¶ 126)

- "**[C]ustomers** in every TCI franchise area will **have alternative providers of [long distance voice, local voice, wireless and Internet]** services. This leaves only cable service as a service over which AT&T-TCI may well have market or monopoly power post-merger. Yet, if the merged firm will have market power as a cable operator, **TCI – and every other cable firm that is not subject to effective competition within its franchise area – already enjoys equivalent market power.** . . . Should the merged firm engage in anticompetitive tying of services to cable service, we will deal with that behavior forthrightly." (*AT&T/TCI*, ¶ 126)

- "As we stated in the *AT&T-TCI Order*, a blanket condition prohibiting bundling of any form could have the **unintended effect of denying consumers substantial benefits.**" (*AT&T/MediaOne*, ¶ 141; *see also AT&T/TCI*, ¶ 125)

- "T]he merger is not the cause of this alleged competitive threat [that Applicants will exploit their alleged dominance of local MVPD markets to pursue anticompetitive bundling strategies], and the **merger license transfer proceeding is not the appropriate forum** to address this issue. We will **continue to rely on competition or, in its absence, the antitrust laws,** to protect against this danger, just as we did before the merger." (*AT&T/MediaOne*, ¶ 143, *see also AT&T/TCI*, ¶ 126)

**ON AT&T INTERRELATIONSHIPS:**

- "**[C]ommenters** argue that the merger would create a **web of relationships** that will allow the Applicants to **dominate communications conduits** through their cable infrastructure and **dominate media content** through their vertical integration with content providers." (*AT&T/MediaOne*, ¶ 2)

- **Rejecting calls "to require the Applicants to divest TWE instead of permitting the Applicants to choose alternative methods to comply** with the horizontal rules," the FCC ruled that any harms to the diversity of video programming and competition from concentration in the MVPD market were "sufficiently mitigated by compliance with the horizontal ownership rules." (*AT&T/MediaOne*, ¶¶ 56, 59)

- "Applicants' **compliance with the . . . divestiture requirements also will ensure that the merger will not frustrate or impair the Commission's implementation of the Communications Act and its objectives** with regard to the promotion of competition and diversity in the provision of video programming." (*AT&T/MediaOne*, ¶ 73)

- "[W]e find that the Justice Department's proposed **consent decree** with AT&T, requiring it to divest its interest in Road Runner and to obtain prior approval from the Justice Department before entering into certain agreements with Time Warner and AOL, **already has addressed the potential harms from a combination of Road Runner and Excite@Home.**" (*AT&T/MediaOne*, ¶ 116)

- With requirement of cap compliance and recognition of competitive broadband marketplace, "**we have already addressed the threat of anticompetitive effects from coordinated action between the merged entity and other large industry players** in the MVPD industry in light of recent consolidation activities, **as well as the recent trend toward both horizontal and vertical consolidation in the Internet and broadband services industry.**" (*AT&T/MediaOne*, ¶ 181)

- **Non-attributable ties can offer public benefits** such as "cable broadband and telephony services and competition to the incumbent local exchange carriers or Internet." (Cable Attribution Order, ¶ 63)

## ON ADDITIONAL POLICY DEBATES AND PRIVATE DISPUTES NOT SPECIFIC TO THE MERGER:

- "[T]he potential harm alleged by the commenters is not specific to the merger . . . . **[T]he merger is not the cause of this alleged competitive threat,** and the merger license transfer proceeding is **not the appropriate forum** to address this issue." (*AT&T/MediaOne*, ¶ 143)

- "[T]his is like other cases where the Commission has **declined to consider, in merger proceedings, matters that are the subject of rulemaking proceedings** before the Commission because **the public interest would be better served by addressing the matter in a broader proceeding of general applicability.**" (*AT&T/TCI*, ¶ 43)

- "Nor can we conclude that a transfer proceeding is the proper forum in which to consider changes in the applicable program access or retransmission consent rules." (*Disney/ABC*, ¶ 22)