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November 9, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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. 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 November 8, 2000, representatives of AOL and Time Warner met with members of the Commission's staff to discuss issues relating to AT&T's interest in Time Warner Entertainment Company, L.P. ("TWE"), including the means by which AT&T may divest itself of its interest in TWE. Applicants' positions on these subjects are set forth in two ex parte submissions -- one to Ms. Lathen dated October 5, 2000 and one to Ms. Brown dated October 13, 2000. The October 13, 2000 ex parte, which was discussed most directly, is attached.

Attending the meeting on behalf of Time Warner were Robert Marcus, Vice President, Business Development, Time Warner Digital Media; and Catherine R. Nolan, Vice President, Law & Public Policy, Time Warner Inc. Representing AOL were George Vradenburg, III, Senior Vice President, AOL Global and Strategic Policy; Steven N. Teplitz, Vice President, Telecommunications Policy; and the undersigned. The FCC personnel attending the meeting were Kathryn C. Brown, FCC Chief of Staff; William J. Friedman, IV, Senior Legal Assistant to Commissioner Tristani; Deborah Lathen, Sherille Ismail, Royce Dickens and Darryl Cooper of the Cable Services Bureau; and James Bird, Joel Rabinovitz, and Pieter van Leeuwen 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

Attachment

cc: Kathryn C. Brown
William J. Friedman, IV
Deborah Lathen
Darryl Cooper
Sherille Ismail
Pieter van Leeuwen
Joel Rabinovitz
James Bird
Royce Dickens
Linda Senecal
International Transcription Services, Inc.

TIME WARNER

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OCT 13 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Catherine R. Nolan
Vice President-Law
and Public Policy

October 13, 2000

Ms. Kathryn C. Brown
Chief of Staff
Office of Chairman Kennard
Federal Communications Commission
445 Twelfth Street, S.W.
8-B201
Washington, D.C. 20554

**Re: Applications of America Online, Inc. and Time Warner Inc.
CS Docket No. 00-30**

Dear Ms. Brown:

This is in response to the ex parte notice submitted on October 4, 2000 by James W. Cicconi, General Counsel and Executive Vice President of AT&T. AT&T's letter claims that under the terms of the Time Warner Entertainment Company, L.P. ("TWE") Agreement of Limited Partnership ("TWE Agreement"),[1] "AT&T may not unilaterally dispose of its interest in [TWE] except through a registration rights process that could not commence until approximately January 1, 2001." That claim is simply untrue. Contrary to AT&T's assertions, the TWE Agreement provides several options for a timely exit by AT&T: 1) AT&T could sell to a third party, 2) AT&T could sell to Time Warner, or 3) AT&T could cause TWE to be reconstituted as a corporation, and dispose of its stock publicly through the registration rights process.[2] These are the exit mechanisms that AT&T agreed to when it voluntarily acquired MediaOne's interest in TWE, and no Commission action is necessary for AT&T to effectuate any of these options to achieve timely compliance with the AT&T/MediaOne Order.[3]

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[1]The TWE Agreement was submitted to the FCC by Time Warner Inc. on September 6, 2000

[2]And, of course, AT&T has alternative means to cure its cable horizontal cap violation other than exiting TWE, either by divesting its interests in entities that provide video programming to TWE or divesting sufficient other cable system interests to achieve cable cap compliance.

[3]Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee, CS Docket No. 99-251, FCC 00-202 (rel. June 6, 2000) ("AT&T/MediaOne Order").

Pursuant to Article XI of the TWE Agreement, AT&T has the unilateral right to sell its limited partnership interest to a third party (TWE Agreement, §11.2(b)). Should AT&T choose to sell 50% or more of its interest to a third party, Time Warner is entitled to a right of first refusal (TWE Agreement, §11.3). If Time Warner declined to match the price offered by the third party within 60 days, however, the sale could proceed. Thus, to the extent that AT&T believes that Time Warner is unwilling to pay the price demanded by AT&T for its interest, AT&T is free to seek a better price from a third party, and AT&T would be entitled to receive any such better price from that third party or from Time Warner, if Time Warner elects to exercise its right of first refusal.

AT&T's letter goes on to suggest that, if AT&T elects to pursue the registration rights process pursuant to Article XIII of the TWE Agreement, AT&T may be unable "to fully dispose of its 25.5% interest in TWE prior to May 19, 2001." Of course, there is no reason why a mutually agreeable sale to a third party or to Time Warner could not be completed prior to May 19, 2001. Contrary to the impression that might have been conveyed by AT&T's letter, negotiations with AT&T for such a purchase by Time Warner are ongoing and proceeding constructively.

Even if AT&T elects to pursue the registration rights process, nothing in the TWE Agreement precludes AT&T from timely compliance with the divestiture obligation imposed by the Commission. The TWE Agreement provides that the next opportunity for AT&T to invoke the registration process commences on January 1, 2001. The TWE Agreement also incorporates a process whereby certain steps must be taken prior to a public registration (TWE Agreement, §13.1). However, the TWE Agreement provides that such process be completed within approximately 75 days, <u>i.e.</u>, by on or about March 16, 2001.[4] Thus, there is nothing in the TWE Agreement that would prevent AT&T from completing a public sale of its interest in TWE through the registration rights process prior to May 19, 2001.

It is possible, of course, that completing such a public sale prior to May 19, 2001 may not be consistent with AT&T's desire to maximize its return on such a sale. However, as the Commission has recognized, at the time of their merger negotiations, AT&T and MediaOne "were on notice that they should not enter into any transaction that would be difficult for them to divest within 60 days after the stay [of the FCC cable horizontal ownership cap] was lifted, and they assumed the risk that they would be forced to divest within 60 days if and when the

[4]In the alternative, assuming AT&T delivers its registration rights demand notice on January 1, 2001, Time Warner could, by March 16, 2001, elect not to reconstitute TWE as a corporation. In such event, AT&T would have the right to put its Registerable Amount to TWE at appraised value by April 5, 2001, which in essence would require Time Warner to acquire such interest from AT&T.

stay is lifted."[5] Nevertheless, the Commission has provided AT&T with a mechanism specifically designed to deal with such a contingency. In the event AT&T is unable to complete its divestiture by May 19, 2001, it can place its interest in an irrevocable trust for orderly disposition by the trustee.[6]

Thus, assuming AT&T elects to pursue the registration rights process, there is no reason why it cannot comply with the "non-severable condition" imposed by the Commission in connection with its grant of the transfer of control of MediaOne to AT&T, and there is no reason why such divestiture would have to be conducted under "fire sale" conditions.

Finally, AT&T's letter suggests that the Commission should impose "an obligation on both parties to ensure the fair and timely termination of the [TWE] partnership." In a letter dated October 5, 2000, America Online, Inc. and Time Warner Inc. explained in great detail why any reexamination of the divestiture obligation imposed on AT&T in the AT&T/ MediaOne Order would appropriately be considered in the pending AT&T/MediaOne reconsideration proceeding - not in connection with the AOL/Time Warner merger. Similarly, AOL and Time Warner have explained that there is no basis in the record, or in law or equity, for the Commission to use the AOL/Time Warner proceeding rewrite the exit mechanisms in the TWE Agreement or otherwise to influence any private negotiations between AOL Time Warner and AT&T relating to AT&T's disposition of the passive TWE interest it knowingly and willingly purchased as part of its MediaOne acquisition. A copy of our October 5 letter is attached for your convenience.

We hope that the foregoing information helps to clarify the mechanics of AT&T's options with respect to disposition of its limited partnership interest in TWE. We would be pleased to provide any additional information on this matter at your request.

Very truly yours,

Catherine R. Nolan
Vice President
Law and Public Policy

Attachment
cc: Deborah Lathen
Michelle Ellison
Jim Bird

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[5]AT&T/MediaOne Order at ¶68.

[6]Id. at ¶71.

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OCT 5 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

October 5, 2000

Ms. Deborah Lathen
Chief, Cable Services Bureau
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: In the Matter of Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control (CS Docket No. 00-30) Written *Ex Parte* Presentation

Dear Ms. Lathen:

This letter summarizes and elaborates upon information previously submitted by America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner" and, together with AOL, the "Applicants") concerning issues raised in this proceeding regarding possible interrelationships between the merged company and AT&T. Such concerns arise in this proceeding largely as a result of dissatisfaction with the Commission's determination in *AT&T/MediaOne* that AT&T should have the option to retain MediaOne's interest in Time Warner Entertainment Company, L.P. ("TWE") if AT&T otherwise brings itself into compliance with the national cable ownership rules.[1] As reargued in this proceeding, these concerns again largely focus on the holdings and actions of AT&T; indeed, the record in this regard consists primarily of submissions from the AT&T/MediaOne proceeding that have been refiled essentially verbatim. This is not surprising, for the reasons explained below.

The proposed merger of AOL and Time Warner has no effect on the limited existing relationships between AT&T and Time Warner just recently approved by the Commission (and antitrust regulators as well) in *AT&T/MediaOne*. And, as detailed herein, the presence of AOL does nothing to alter whatever marketplace incentives AT&T might have by virtue of its limited ownership interest in TWE. Thus, to the extent the Commission wishes to reexamine its decision in *AT&T/MediaOne*, the now pending *AT&T/MediaOne* reconsideration proceeding—and not this merger—is the appropriate forum for doing so.

Furthermore, neither through ownership nor contractual relations will this merger give rise to any "AT&T connection" that would harm competition in any relevant arena. Rather, Internet access

[1] *Applications for Consent to the transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, CS Docket No. 99-251, FCC 00-202 (rel. June 6, 2000) ("*AT&T/MediaOne*").

and cable telephony arrangements between AOL Time Warner and AT&T that have been widely hypothesized would serve the public interest by providing consumer choice in broadband Internet access and local telephony competition unavailable today.

Finally, there is no basis in the record, or in law or equity, for the Commission to use this proceeding to influence any private negotiations between AOL Time Warner and AT&T that may result from AT&T opting to cure its horizontal ownership cap violation by selling the limited TWE interest it knowingly and willingly purchased as part of its MediaOne acquisition.

I. THIS MERGER CREATES NO NEW AT&T LINK TO TIME WARNER, AND THE ADDITION OF AOL DOES NOTHING TO AFFECT THE PRE-EXISTING—AND FCC-APPROVED—AT&T OWNERSHIP INTERESTS IN TWE.

While some have raised concerns about a merged AOL Time Warner's possible relationship with AT&T, this combination has no effect on the nature of AT&T's limited ownership relationships with Time Warner—relationships that the Commission and antitrust regulators alike reviewed and approved only a few months ago when AT&T obtained approval to acquire MediaOne. A brief review of the relationships that will and will not exist between the Applicants and AT&T proves just that:

- Today, neither Time Warner nor AOL has any interest in AT&T. A combined AOL Time Warner likewise will have no interest in AT&T.

- Today, AT&T has no cognizable interest in Time Warner or AOL. With this merger, AT&T still will have no cognizable interest in a combined AOL Time Warner.[2]

- Today, neither Time Warner nor AOL has any interest in AT&T's affiliated ISP, Excite@Home. A combined AOL Time Warner likewise will have no interest in Excite@Home.

- Today, AT&T's interest in Road Runner, acquired through its acquisition of MediaOne, remains subject to divestiture under the Department of Justice consent decree with AT&T. With this merger, AT&T will remain subject to divestiture of

[2] AT&T, through its subsidiary Liberty Media Group, owns less than 1% of the voting rights in Time Warner Inc.—an interest the FCC has long determined non-attributable. *Applications of Turner Broadcasting System and Time Warner for Consent to Transfer of Control*, 11 FCC Rcd 19595, 19602-04 (1996). The only incremental effect of the AOL Time Warner merger on this interest will be to further dilute it.

its Road Runner interest.[3]

- Today, AT&T holds a 25.51% limited partnership interest in TWE, as expressly approved by the Commission just a few months ago in its *AT&T/MediaOne Order*.[4] With this merger, AT&T will (unless it chooses to divest its interest to achieve cable cap compliance) continue to own this limited interest, which carries with it no management rights and no meaningful role in the affairs of TWE.[5]

The only change that this merger brings about is that Time Warner, which already holds the majority interest and all management rights in TWE, will be controlled by the merged AOL Time Warner. But, as demonstrated below, there is no basis to conclude that the fact that AOL (with no cable facilities, no attributable video interests whatsoever, and a clear commitment to providing consumers with a choice of multiple ISPs) is merging with Time Warner does anything to change the preexisting positions or incentives of any of the parties to TWE, except (as explained below) to help drive pro-competitive results championed by the Commission.

II. THIS MERGER CREATES NO RELEVANT "AT&T CONNECTION" THAT WOULD HARM COMPETITION IN THE PROVISION OF VIDEO PROGRAMMING, TELEPHONY, OR BROADBAND INTERNET ACCESS.

This merger is, of course, not the first time that parties have expressed concerns about AT&T's interest in TWE.[6] These concerns were raised in the AT&T/MediaOne proceeding—the transaction that actually gave rise to that interest. In approving AT&T's acquisition of MediaOne only four months ago, the FCC expressly considered *and rejected* arguments that interrelationships between AT&T and Time Warner arising from that merger created a competitive concern warranting

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[3] Under the DOJ consent decree, AT&T's approximate 34.67% interest in the Road Runner joint venture must be divested by December 31, 2001.

[4] Prior to the acquisition of MediaOne by AT&T, MediaOne held certain co-management rights in TWE. However, those rights terminated pursuant to the TWE limited partnership agreement as a result of AT&T's decisions to acquire MediaOne and to terminate the non-competition provisions of that agreement.

[5] This interest, nevertheless currently remains attributable to AT&T for horizontal ownership cap purposes. *AT&T/MediaOne*, ¶ 26.

[6] *See, e.g., AT&T/MediaOne*, ¶ 2 ("[M]any commenters argue that the merger would create a web of relationships that will allow [AT&T/MediaOne] to dominate communications conduits through their cable infrastructure and dominate media content through their vertical integration with content providers.") (citations omitted).

Commission action. Indeed, the Commission explained the basis of its finding in several places in that decision:

- Rejecting calls to "require [AT&T/MediaOne] to divest TWE instead of permitting [AT&T/MediaOne] to choose alternative methods to comply with the horizontal rules,"[7] the Commission held that any harms to the diversity of video programming and competition from concentration among MVPDs were "*sufficiently mitigated* by compliance with the horizontal ownership rules."[8]

- "We 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."[9]

- The "nascency of broadband Internet services[,] ... growing competition from alternative broadband access providers, [AT&T/MediaOne's] commitment to give unaffiliated ISPs direct access to [its] cable systems, and the term of [AT&T/MediaOne's] consent decree" support a conclusion that it is "unlikely that the merged firm would be able to dominate and threaten the openness and diversity of the Internet."[10]

This merger warrants no re-examination of these conclusions. In fact, the factors that supported the Commission's decision in *AT&T/MediaOne* apply here with even greater force. As demonstrated below, the combination of AOL and Time Warner raises no new competitive or "AT&T connection" issues with respect to the provision of video programming, telephony, or broadband Internet access—and has only a positive effect in each arena:

- As to video programming, AOL brings no cable system, attributable MVPD, or video programming interests to the mix—and the merger is fostering the removal of restrictions on ISP video streaming.

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7 *Id.*, ¶56.

8 *Id.*, ¶ 59 (emphasis added).

9 *Id.*, ¶ 116 (emphasis added).

10 *Id.*, ¶ 5.

- As to telephony, any effect of this merger to facilitate cable telephony competition to incumbent local exchange carriers would only serve FCC goals.

- As to broadband Internet access services, the addition of AOL (driven by its quest for nationwide broadband access) into any AT&T/Time Warner relationships could only serve to expedite the demise of existing exclusive ISP arrangements and the advent of multiple ISP choice over Time Warner and, we hope, AT&T cable systems as well.

A. Video Programming

In *AT&T/MediaOne*, the Commission found that AT&T's compliance with the cable cap would resolve any potential harms to the diversity of video programming resulting from AT&T's acquisition of a limited stake in TWE.[11] It went on to find that "[the] divestiture requirement, together with other interim conditions and enforcement mechanisms discussed below, will mitigate sufficiently the merger's potential to frustrate or impair the Commission's implementation or enforcement of the Communications Act or its objectives."[12] As Chairman Kennard observed in his separate statement, commenters urging the FCC to require divestiture of the TWE interest had "*failed to identify specific harms* that would not be sufficiently mitigated by a strict application of our current rules given the state of the marketplace as it exists today."[13]

This conclusion indisputably remains no less valid here because AOL owns no cable systems and has no attributable interest in any multichannel video programming distributor (or video programmer, for that matter). Thus, the merged entity will remain precisely where it stood before the merger—well below the 30% horizontal ownership cap imposed by the Commission to ensure that video programming distribution remains competitive.[14]

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[11] *Id.*, ¶ 59.

[12] *Id.*, ¶ 40.

[13] *AT&T/MediaOne, Statement of Chairman Kennard* (emphasis added).

[14] Moreover, the Commission has found that compliance with the cap resolves concerns about competition in a variety of related arenas as well. In *AT&T/MediaOne*, the Commission concluded that cap compliance "will circumscribe AT&T's purported ability to harm unaffiliated content providers [including interactive service providers], unaffiliated EPGs, and other MVPDs ...." *Id.*, ¶ 90. Given that AT&T serves, and (even assuming a divestiture of cable system interests in order to achieve compliance with the cap) will continue to serve, a far larger portion of MVPD subscribers than will AOL Time Warner, the Commission cannot reasonably find otherwise here.

Indeed, by fostering the elimination of existing restrictions on video streaming, the merger of AOL and Time

B. Cable Telephony

Similarly, there is no prospect that any future decision by a merged AOL Time Warner to enter into any agreement with AT&T relating to telephony services will produce anything other than much anticipated competition in local exchange service.[15]

Not only has the Commission *not* been concerned about the prospect of a group of cable operators entering into agreements to provide telephony services, the Commission has *relaxed* its cable attribution rules with the specific intent of facilitating such cooperative arrangements: "In circumstances where programming is not affected, the current insulation criteria prevent investments between companies whose combination may bring benefits to the public, such as cable broadband and telephony services and competition to the incumbent local exchange carriers ...."[16] Indeed, in *AT&T/MediaOne*, the Commission looked with favor on the specific prospect of agreements between AT&T and Time Warner relating to the joint marketing of AT&T-branded telephony service and Time Warner's cable services, and the establishment of a joint venture to provide local telephony service using the Time Warner cable systems.[17]

Plainly then, the merger between AOL and Time Warner creates no competitive issues regarding cable telephony. The possibility that AT&T and AOL Time Warner might jointly offer telephony services over Time Warner cable systems would spur local exchange competition in the manner expressly hoped for by the Commission—as facilitated by its horizontal ownership and cable attribution proceedings, and as heralded in its approval of the AT&T/TCI and AT&T/MediaOne mergers.[18]

Warner will bring new competition—from multiple ISPs—to the video marketplace.

15 As the record in this proceeding demonstrates, although Time Warner and AT&T have previously explored the possibility of AT&T providing telephony services over Time Warner cable systems (in discussions that long predated the announcement of this merger), no binding agreement has ever been reached and the prospect of a possible telephony agreement is a matter of speculation.

16 *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992. Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Review of the Cable Attribution Rules*, CS Docket Nos. 98-82, 96-85, FCC 99-288, ¶ 63 (rel. Oct. 20, 1999) (Report and Order).

17 *AT&T/MediaOne*, ¶ 173. In recognition of the public interest benefits of such arrangements, the Commission went on to find that "[t]he foregoing contractual arrangements, which combine AT&T's telecommunications brand name and expertise with the cable operators' infrastructure, ... provide a model to facilitate AT&T's negotiation of contractual arrangements with other cable operators." *Id.*, ¶ 174.

18 *Applications of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control of Tele-Communications, Inc. to AT&T Corp.*, CC Docket No. 98-178, Memorandum Opinion and Order ("*AT&T-TCI Order*"), 14 FCC Rcd 3160, 3169-

C. Broadband Internet Access

The record in this merger provides no basis for departing from the Commission's express rulings in AT&T/MediaOne regarding broadband Internet access and AT&T - Time Warner relationships. There, the Commission found that:

(1) "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,"[19]

(2) "harms will be avoided if (a) consumers can choose among various alternative broadband access providers ... or (b) unaffiliated ISPs are permitted access to [AT&T/MediaOne's] cable network,"[20] and

(3) "[AT&T/MediaOne] have committed to open their cable modem platform to unaffiliated ISPs."[21]

Based on these findings—and noting further that AT&T's consent decree with the Justice Department requires it to divest Road Runner and seek prior approval before entering into certain agreements with AOL and Time Warner[22]—the Commission concluded that "it [is] unlikely that the merged firm would be able to dominate and threaten the openness and diversity of the Internet."[23] Further, the FCC found the 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"[24] and "will not frustrate the implementation of the Communications Act and its goals as they pertain to the promotion of

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70 (1999); *AT&T/MediaOne*, ¶ 48.

19 *Id.*, ¶ 116.

20 *Id.*

21 *Id.*, ¶ 120.

22 *Id.*, ¶ 122.

23 *Id.*, ¶ 5.

24 *Id.*, ¶ 102.

competition and diversity in the provision of [Internet] services."[25]

These same factors apply even more strongly here.

First, competition in the provision of broadband access continues to grow at a rapid rate, and is much stronger today than it was when the Commission compiled its record in *AT&T/MediaOne*. The ILECs have stepped up their deployment of DSL services, CLECs continue to compete aggressively in the broadband space, and new wireless and satellite alternatives are being introduced almost continuously—as the Commission found only weeks ago in its *Second Report on Broadband Deployment*.[26]

The merger of AOL and Time Warner will do nothing to change this competitive dynamic. Indeed, unlike the early history of Excite@Home and Road Runner, AOL has never envisioned that it would provide broadband service only on a cable operator-specific, exclusive basis. Rather, driven by its core business as a national ISP, AOL consistently has sought to promote broadband across the entire range of technology platforms.[27] As the record demonstrates, this merger will help to advance that goal.

Second, AOL and Time Warner have committed to provide multiple ISPs over their cable systems—in an undertaking that is more definitive and detailed than the AT&T commitment relied upon by the FCC in *AT&T/MediaOne*. Thus, this merger is acting as a powerful catalyst toward the type of marketplace solution to open access that the Commission has clearly envisioned.

Third, this merger in no way diminishes consumer choice of ISPs. The Commission already has found that the Justice Department's consent decree resolved any competitive issues that might otherwise have been raised by AT&T's holding interests in both Excite@Home and Road Runner.[28] Neither AOL nor Time Warner has any interest in Excite@Home, and AT&T will be divesting its stake in Road Runner. Moreover, AT&T acquires no attributable interest in AOL through this merger. Accordingly, there will be no AT&T "connection" in ownership of any ISP.

As the foregoing discussion makes clear, there are no relevant "AT&T connection" issues of

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[25] *Id.*, ¶ 102.

[26] *See generally Deployment of Advanced Telecommunications Capability: Second Report*, ¶ 102 (rel. Aug. 2000).

[27] *Response to Document and Information Request of June 23, 2000*, at 12-13 (July 17, 2000).

[28] *AT&T/MediaOne*, ¶ 116.

ownership raised by the merger of AOL and Time Warner.

Where, then, is the hypothesized competitive concern regarding AT&T that would emanate from this merger? The only other conceivable source might be potential contractual relationships between AT&T and the merged company. But upon examination, these concerns are unwarranted as well.

As a threshold matter, any potential contractual arrangements between AOL Time Warner and AT&T are clearly not merger-specific.[29] The prospect of AT&T and Time Warner negotiations clearly exists without regard to this merger, and AOL—as the Commission knows—has been seeking carriage on AT&T cable systems since long before this merger was announced.

Even were there a nexus to the merger, however, there is no reasonable basis for concern. Possible reciprocally exclusive arrangements between AT&T and AOL Time Warner regarding broadband access are laid to rest by the fact that the Commission already has relied upon AT&T's commitment to multiple ISP choice and here has been presented with AOL and Time Warner's demonstrated commitment to their more comprehensive MOU. These preclude reciprocal exclusive arrangements.

Moreover, the Commission expressly found in *AT&T/MediaOne* that the "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" would "assure that Road Runner and Excite@Home will not coordinate their actions to the detriment of consumers."[30] AT&T will hold no cognizable interest in the AOL ISP service and that the existing DOJ prior approval requirements extend to AOL, the same conclusion holds with respect to any potential coordination between Excite@Home and AOL. Thus, there is no more cause for concern over

29 *See, e.g., AT&T/MediaOne*, ¶ 143 ("[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/TCI*, ¶ 96 ("[O]pen access issues would remain equally meritorious (or non-meritorious) if the merger were not to occur.").

30 *AT&T/MediaOne* ¶¶ 116, 122. The DOJ consent decree requires AT&T to divest its interest in Road Runner by December 31, 2001, and "requires the merged firm to obtain prior approval from the Justice Department before entering into certain types of agreements with Time Warner or with AOL .... That requirement, which would remain in place for two years after the merged firm exits Road Runner, would apply to any agreement that proposes joint provision of a residential broadband service or any agreement that would prevent either party from offering a residential broadband service to customers in any geographic region. It also would apply to agreements that would prevent the inclusion of any content in a cable modem service offered by either party, or that would prevent either party from providing preferential treatment to content provided by others." *AT&T/MediaOne*, ¶ 122.

"preferential agreements" between the parties arising here than there was in *AT&T/MediaOne*.

Nor can arguments that the AOL/Time Warner merger unduly increases the risk of collusion be credited. In rejecting calls to consolidate the AT&T/MediaOne review with the AOL/Time Warner merger also then before it, the Commission held that its *AT&T/MediaOne* decision fully "*addressed the threat of anticompetitive action between [AT&T/MediaOne] 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*."[31]

Even beyond this compelling precedent, the fact is that any arrangements between AOL Time Warner and AT&T would be pro-consumer in any event. AOL Time Warner will continue to seek carriage on AT&T's cable systems for the AOL service. If it succeeds in expediting such carriage, this result clearly would serve subscribers on AT&T's cable systems by affording them greater choice in ISPs.

Finally, the FCC's recent NOI on cable open access provides an existing, open forum for the Commission to examine this inherently industry-wide issue, as the agency determines "what regulatory treatment, if any, should be accorded to cable modem service and the cable modem platform used in providing this service."[32]

For these reasons, there is no cause for concern that any relationship between AT&T and a merged AOL Time Warner will impede the Commission's policy goals with respect to broadband Internet access. Rather, the merger unquestionably will advance those goals, and any hypothetical future relationship between AT&T and AOL Time Warner will further enhance the benefits to consumers.[33]

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31 *Id.*, ¶ 181 (emphasis added). Moreover, the Commission set its horizontal ownership limit at a level which the Commission said, "would ensure that 'no cable operator or *group of cable operators* can unfairly impede [competition], either because of the size of any individual operator or because of joint actions by *a group of operators* of sufficient size....' " *AT&T/MediaOne*, ¶ 53 (emphasis in original, quoting Section 613(f)(2)(A)). The record provides no evidence that any more restrictive cap is required to preclude foreclosure of ISPs, as opposed to video programmers, by a supposed coordinated group of MSOs.

32 *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, FCC 00-355 (rel. Sept. 28, 2000).

33 Given the lack of possible harms in video programming, cable telephony, or broadband Internet access resulting from AT&T's interest in TWE (or AOL Time Warner's possible acquisition of that interest), there is no risk of harm in the provision of bundled services. As the Commission has stated on several occasions, if the elements of a bundle are competitive, there is no need to be concerned about a merged company's ability to provide that bundle. *See, e.g.*, *AT&T/TCI*, ¶ 126; *AT&T/MediaOne*, ¶ 141. In fact, precluding such bundling "might well prevent competitively harmless

III. THIS MERGER WILL HAVE NO INCREMENTAL EFFECT ON ANY COMMERCIAL NEGOTIATIONS BETWEEN AOL TIME WARNER AND AT&T REGARDING AT&T'S STAKE IN TWE.

As demonstrated above, this merger does nothing to affect the public interest analysis of AT&T's FCC-granted right to retain its limited interest in TWE (subject to cable cap compliance). In turn, this merger does nothing to alter the public interest analysis of a possible AT&T determination to divest that TWE interest. Indeed, as demonstrated below, the relative strengths and weaknesses of AT&T and AOL Time Warner should AT&T decide to divest its interest in TWE are: (1) strictly a product of the specific contractual terms of AT&T's limited interest in TWE understood by AT&T when it willingly acquired it; (2) wholly unaffected by this merger; and (3) in any case, a private negotiation matter of no public concern. As such, the merger of AOL and Time Warner will have no anticompetitive impact on any potential private transaction between the parties and raises no issues of possible concern to the Commission.

As an initial matter, this merger does nothing to affect the nature or value of AT&T's interest in TWE, which it acquired through its purchase of MediaOne. AT&T knew that the interest in TWE it was obtaining would be devoid of management rights. Under the clear terms of the TWE partnership agreement, AT&T's acquisition resulted in the forfeiture of MediaOne' pre-existing management rights in TWE's cable division. AT&T's acquisition thus surely diminished the value of the preexisting MediaOne interest in TWE, but, just as surely, this fact was considered by AT&T and MediaOne in setting the terms of their merger.

As to the potential need for AT&T to divest its interest in TWE, this too is a product of AT&T's own knowing actions. Because the acquisition of MediaOne (and the attributable interest in TWE that came with it) placed AT&T in violation of the horizontal ownership rules, the Commission—as a condition for granting its consent to that transaction—required AT&T to come into compliance with the agency's horizontal ownership rules. In so doing, the Commission provided AT&T with three separate options to achieve compliance—thereby granting AT&T the flexibility it expressly sought.[34] Of course, when AT&T consented to these conditions, it knew that it would face a compliance deadline.[35] Therefore, as AT&T said publicly and as was widely reported, the

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transactions," *AT&T/TCI* at ¶ 125, and "could have the unintended effect of denying consumers substantial benefits." *AT&T/MediaOne* at ¶ 141.

[34] *See, e.g., Ex Parte Letter to Deborah Lathen from AT&T*, CS Docket No. 99-251, May 24, 2000.

[35] In fact, AT&T convinced the Commission to give it a significantly greater period of time to achieve compliance than the 60 days originally contemplated when the Commission stayed the enforcement of the horizontal ownership rules.

Commission's decision "granted both of AT&T's requests—to have [the] 'full range of options' and [the] 'necessary time' to implement them."[36]

In any event, the effect of AT&T's acquisition of MediaOne both on the valuation of the minority TWE interest and on the need for AT&T to take actions to come into compliance with the horizontal ownership cap is absolutely irrelevant to the Commission's deliberations in this proceeding. Rather, any negotiations between AOL Time Warner and AT&T that might result from AT&T's decision to divest the TWE interest will entail consensual marketplace discussions. Absent some demonstrable impact on matters of legitimate concern to the Commission—and, as discussed above, there is none—the agency has no interest that warrants injecting itself into (much less attempting to influence) private, commercial negotiations.[37]

That any private negotiations regarding the sale of AT&T's interest in TWE are entirely unrelated to the Commission's public interest analysis in this proceeding is only to the good. There is no relief that could address these issues in this proceeding. AT&T may choose to divest its stake in TWE, but there is no way for either Time Warner or AOL to force AT&T to do so. Commission precedent clearly mandates that divestitures necessary to achieve compliance with FCC rules are properly the responsibility of the party causing the violation.[38] Here, of course, it is AT&T—not Time Warner or a merged AOL Time Warner—that has been found to be in violation of the cable horizontal ownership cap. It is appropriate, therefore, for the Commission to look to AT&T to cure that violation. Indeed, there would be no lawful basis to look to the Applicants here to eliminate AT&T's interest in TWE.[39]

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36 *See, e.g., FCC Approves AT&T-MediaOne Deal With Conditions*, Communications Daily, June 6, 2000.

37 Even if the bargaining strength of AOL Time Warner *vis-a-vis* AT&T were of some relevance to the Commission, the combination of AOL and Time Warner in no way enhances Time Warner's preexisting position in any negotiations over TWE. Thus, as the Commission repeatedly has recognized, the lack of merger-specific effects compels a determination that conditions are inappropriate and unwarranted. *AT&T/MediaOne*, ¶ 143.

38 In cases involving enforcement of its media ownership rules, for example, the Commission consistently focuses its enforcement actions on the entity holding the interest that violates the rules. *See, e.g., Mario Gabelli*, 7 FCC Rcd. 5594 (1992); *Baltimore Broadcasting Corp.*, 1 RR 2d 798 (1963).

39 It is well-established law that remedial measures are not to be directed against a party that has had competitive concerns "thrust upon it." *U.S. v. Alcoa*, 148 F.2d 416, 429 (2d Cir. 1945); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985). Any curative measures therefore must properly be directed exclusively against AT&T. For the Commission to do otherwise, particularly given the Commission's ruling in *AT&T/MediaOne*, would, at a minimum, constitute an arbitrary and capricious act under the Administrative Procedures Act.

For the foregoing reasons, the record provides no basis for Commission concern—much less Commission action—as to possible inter-relationships between AT&T and AOL Time Warner. Please feel free to contact us if you have any further questions in this regard.

Respectfully submitted,

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