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

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

# MEMORANDUM OPINION AND ORDER

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

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

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## I. INTRODUCTION

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

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

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

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

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

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

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

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

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

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

[5] *See, e.g., AOL and Time Warner In Record $350 Billion Merger*, COMM. DAILY, Jan. 11, 2000, at 1; Steven Burke, *AOL, Time Warner Merger: A New Model For Partnerships*, CMP'S TECHWEB, Jan. 10, 2000, at http://www.techweb.com/wire/finance/story/INV20000010S0008; Paul Kagan Assoc., Inc., *AOL: You've Got Time Warner*, Kagan, BROADBAND, Jan. 10, 2000.

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

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

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

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

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

[7] *See* 15 U.S.C. § 18.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

16. We also recognize that the same consequences of a proposed merger that are beneficial in one sense may be harmful in another. For instance, combining assets may allow the merged firm to reduce transaction costs and offer new products; but if the merged firm has market power, these advantages may operate to consolidate that power.

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

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

[15] *In the Matter of America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 (FTC) (proposed Dec. 14, 2000) ("FTC Consent Agreement").

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

## II. PUBLIC INTEREST FRAMEWORK

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

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

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

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

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

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

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

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

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

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

[22] *Id.*

[23] *Id.*

[24] *Id.*

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

[26] 15 U.S.C. § 18.

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

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

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

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

23. The Supreme Court has found that decentralization of information production serves values that are central to the First Amendment. Indeed, the Court has repeatedly emphasized the Commission's duty and authority under the Communications Act to promote diversity and competition among media voices: It has long been a basic tenet of national communications policy that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[34] Accordingly, the Court had "no difficulty" in concluding that the Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest."[35]

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

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

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

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

[32] 47 U.S.C. § 521(4).

[33] 47 U.S.C. § 523(a).

[34] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

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

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

[37] *Id.*

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

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

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

## III. BACKGROUND

### A. The Applicants

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

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

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

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

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

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

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

[44] Application at 2.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[57] *Id.*

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

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

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

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

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

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

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

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

[63] AOL 1999 10-K at 4.

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

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

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

[67] AOL 1999 10-K at 4.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

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

[73] *Id.*

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

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

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

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[74] AOL 1999 10-K at 5.

[75] AOL 1999 10-K at 5.

[76] *Id.*

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

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

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

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

[81] *Id.*

[82] *Id.*

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

[84] Applicants' First Response at 30.

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

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

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

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

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

[86] Applicants' First Response at 30.

[87] *Id.*

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

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

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

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

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

[93] *Id.* at 8.

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

[95] *Id.* at 9.

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

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

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

[96] *Id.* at 8.

[97] *Id.* at 9.

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

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

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

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

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

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

[104] Application at 4.

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

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

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

[108] *Id.*

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

(continued...)

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

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

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

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(visited Aug. 18, 2000).

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

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

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

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

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

[115] *Id.*

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

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

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

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

[120] *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

[131] Applicants' First Response at 22.

[132] *Id.*

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

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

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

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

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

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[134] *Id.*

[135] *Id.*

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

[137] Applicants' First Response at 23.

[138] *Id.* at 26.

[139] *Id.* at 24.

[140] *Id.* at 24.

[141] *Id.*

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

[143] *Id.* at 2.

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

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

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

### C. The Merger Transaction and the Application to Transfer Licenses

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

(...continued from previous page)
*Inc.*, Docket No. C-3989, rel. Dec. 14, 2000.

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

[146] *Id.*

[147] *Id.*

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

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

[150] Harding Sept. 14 Letter.

[151] *Id.*

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

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

[154] Application at 5.

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

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

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

## IV. ANALYSIS OF POTENTIAL PUBLIC INTEREST HARMS

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

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

[157] Application at 9.

[158] *Id.* at 11.

[159] *Id.* at 14.

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

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

### A. High-Speed Internet Access Services

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

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

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

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

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

[162] We describe these services more fully below.

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

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