provision of EPGs, has contracted with AT&T for provision of EPGs on AT&T cable systems.[505] Gemstar also has an agreement with AOL to provide electronic program guide functions for AOLTV.[506]

205. Gemstar argues that, although it has no complaint regarding AOL, Time Warner has engaged in anticompetitive conduct by blocking subscriber access to Gemstar's Guide Plus+ EPG.[507] The "Guide Plus+" EPG conveys programming information to consumers without a monthly service charge and without the need for set top boxes or other devices.[508] According to Gemstar, Guide Plus+ works only when the television can receive updated programming information transmitted via the vertical blanking interval of local television broadcast stations.[509] Gemstar states that Time Warner strips out the EPG data in the VBI, rendering Guide Plus+ useless to many potential consumers.[510] Prior to the start of this proceeding, Gemstar filed a petition for special relief with the Commission regarding Time Warner's actions.[511] Gemstar states that it is taking the additional step of filing in this proceeding because it believes Time Warner's past conduct with respect to Gemstar illustrates Time Warner's lack of commitment to open access for content, including EPGs.[512] As a result, Gemstar asks that the Commission impose conditions on the merger to ensure that Time Warner will keep its systems open to competitive content and service providers.[513]

206. In response to Gemstar's comments, the Applicants state that this merger is not the appropriate forum to litigate EPG issues.[514] The Applicants assert that the special relief proceeding initiated by Gemstar is the proper place to issue a determination on the EPG dispute.[515]

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[504] In addition, some ITV providers may provide interactive EPGs as part of their ITV service. EPG companies include Gemstar, WorldGate (who provides "TV Gateway" for WorldGate subscribers) and Liberate Tribune.

[505] We note that on July 11, 2000, Gemstar and TV Guide, Inc. announced the completion of their merger, in which TV Guide, Inc. will become a wholly owned subsidiary of Gemstar. TV Guide, Inc., *Gemstar International Group Limited and TV Guide, Inc. Announce Completion of Their Merger* (press release) July 11, 2000. In addition, in October 2000, News Corp. increased its ownership interest in Gemstar-TV Guide to 43% by acquiring AT&T's Liberty Media Group's 21% ownership interest. As part of this same transaction, AT&T's Liberty Media Group will increase its ownership interest in News Corp. to 18% from 8%. Ronald Grover, *What Does John Malone Really Want?*, BUSINESS WEEK, Oct. 9, 2000, at 1.

[506] TV Guide, Inc., *Gemstar International Group Limited and TV Guide, Inc. Announce Completion of Their Merger* (press release), July 11, 2000.

[507] Gemstar Comments at 3.

[508] *Id.*

[509] *Id.*

[510] *Id.* Time Warner stated recently that it has ceased this practice (*see* letter from Marc Apfelbaum, Senior Vice President and General Counsel, Time Warner Cable, to Stephen Weiswasser, Executive Vice President and General Counsel, Gemstar Development Corp, dated June 15, 2000). However, we note that Gemstar indicates that Time Warner's current decision to refrain from stripping EPG data does not alleviate its overall concerns, characterizing Time Warner's actions as "a temporary cease fire." *See* Letter from Gerald J. Waldron and Jennifer A. Johnson, Counsel for Gemstar-TV Guide International, Inc., to Magalie Roman Salas, Secretary, FCC, dated January 4, 2001.

[511] *See In re Petition for Special Relief of Gemstar*, CSR-5528-Z (filed Mar. 16, 2000).

[512] Gemstar Comments at 4.

[513] *Id.* at 7. *See also* NAB May 19 Ex Parte at 2-3; NAB Oct. 2 Ex Parte at 1-3.

[514] Applicants' Reply Comments at 52.

207. Gemstar has not shown that the merger is likely to create or exacerbate competitive harm. Its dispute with Time Warner predates the merger announcement. Moreover, Gemstar's arguments are being fully considered in the context of its petition for special relief asking that Time Warner cease stripping out the Guide Plus+ data, and we find that it would be inappropriate to address them here.[516] We therefore decline Gemstar's additional request for conditions on the proposed AOL Time Warner merger. Furthermore, we note that the Commission has committed to "monitor developments with respect to the availability of electronic programming guides to determine whether any action is appropriate in the future."[517] Finally, the Commission has requested comment in a pending rulemaking proceeding on "whether any rules are necessary to ensure fair competition between EPGs controlled by cable operators and those that are controlled by broadcasters."[518]

2. Broadcast Signal Carriage Issues

208. The National Association of Broadcasters ("NAB") and other broadcast groups are concerned about the impact of the proposed merger on Time Warner's carriage of analog and digital television signals.[519] Specifically, NAB urges the Commission to prohibit AOL Time Warner from blocking access to any part of a broadcast signal that consumers could receive free over-the-air, such as electronic program guide information.[520] NAB also requests that the Commission require AOL Time

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[515] *Id.* at 53. *See also* Letter from Daniel L. Brenner, National Cable Television Association ("NCTA") to William E. Kennard, Chairman, FCC, dated May 36, 2000 ("NCTA May 26 Ex Parte"), transmitted by letter from Daniel L. Brenner to Magalie Roman Salas, Secretary, FCC, dated May 26, 2000.

[516] *See In re Petition for Special Relief of Gemstar*, CSR-5528-Z (filed March 16, 2000). Gemstar states that it incorporates, by reference, its comments from the special relief proceeding regarding Time Warner's refusal to carry EPG-related data in the vertical blanking interval of a television broadcast signal. In that proceeding, Gemstar argued the following points: (1) Time Warner's actions violate the Commission's rules and policies requiring mandatory carriage of all program-related material accompanying a broadcast signal that has must carry rights; (2) Time Warner is impeding the retail availability of competing navigation devices; and (3) Time Warner's actions are contrary to other Commission rules and policies. The Commission is also currently engaged in a proceeding to review the effectiveness of the navigation devices rules and to consider whether any changes are necessary. *See Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Further Notice of Proposed Rulemaking and Declaratory Ruling, FCC 00-341 (rel. Sept. 18, 2000). *See also In re Carriage of the Transmission of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15129 ¶ 82 (1998).

[517] *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80, Report and Order ("*Navigation Devices Order*"), 13 FCC Rcd 14775, 14820 ¶ 116 (1998).

[518] *In re Carriage of the Transmission of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd. 15092, 15129 ¶ 82 (1998).

[519] *See* NAB May 19 Ex Parte at 1-6; MSTV Reply Comments at 1-2; Sinclair Comments; Disney Reply Comments at 18-19; Disney July 25 Ex Parte at 35-37; Freedom Broadcasting Reply Comments.

[520] NAB May 19 Ex Parte at 2; MSTV Reply Comments at 2; Disney Reply Comments at 18-19. We note that MSTV, Disney, and Sinclair have requested similar conditions as part of the merger approval process. *See* MSTV Reply Comments at 1 (requesting conditions that would prohibit AOL Time Warner from "discriminating against the programming, navigation devices and other services delivered through the broadcast signal for free"); Disney Reply Comments at 19 (requesting a condition that requires AOL Time Warner to "pass through unaltered all the free bits of broadcasters"); Sinclair Comments at 2 ("The Commission should prohibit AOL Time Warner from degrading or blocking subscriber access to any part of the digital broadcast signal that could be received free over-

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Warner to carry the digital broadcast signals of local television stations on its upgraded cable systems.[521] In response, the National Cable Television Association ("NCTA") asserts that the issues raised by NAB are not merger-specific, but rather apply to all cable operators.[522] Time Warner states that it has negotiated retransmission consent agreements providing for carriage of both analog and digital signals with each of the four major television networks (ABC, CBS, FOX, and NBC).[523] According to Time Warner, these agreements also serve as templates for stations affiliated with, but not owned by, any of the four television networks.[524]

209. The record does not indicate that the merger will create or enhance AOL Time Warner's ability or incentive to refuse carriage of broadcasters' signals. We cannot conclude, therefore, that the merger would create any public interest harm in this regard. Moreover, the issues raised by the broadcasters are already under consideration in pending Commission proceedings of general applicability. The conditional requirements suggested by NAB should be addressed in those proceedings, and not within the confines of the merger analysis. As NCTA points out, the issues raised by the broadcasters affect all cable operators and not only Time Warner. We arrived at a similar conclusion in the AT&T-TCI merger,[525] where NAB also requested digital broadcast signal carriage as a merger condition. We find no reason to depart from Commission precedent in this case. Insofar as NAB's concerns about the carriage of all components of the free analog broadcast signal are directed at EPG data carried on the broadcaster's VBI, we note that this particular matter will be addressed in the Gemstar special relief proceeding, where the issues have been fully briefed and discussed.[526] The carriage of digital broadcast signals by Time Warner and other cable operators is being considered in a pending rulemaking proceeding specifically addressing digital must-carry issues.[527] The conclusions we reach in that docket will, of course, apply to Time Warner as well as all other cable operators. Accordingly, we reject commenters' requests that we impose remedial conditions on AOL Time Warner in this proceeding.

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the-air.").

[521] NAB states that the Applicants' request for approval of the merger based on assertions that the combined entity will speed the construction of digital broadband platforms provides a separate basis for the Commission to require carriage of digital broadcast signals on its systems. *See* NAB May 19 Ex Parte at 5. *See also* MSTV Reply Comments at 6 ("specific and enforceable conditions must be placed on AOL Time Warner to protect the public's access to all of the digital offerings broadcast stations would deliver to consumers free of charge.").

[522] *See* NCTA May 26 Letter at 2.

[523] *See* Applicants' First Response at 6.

[524] Time Warner adds that, in fact, negotiations with other major television group owners are underway. *Id.*

[525] *See AT&T-TCI Order,* 15 FCC Rcd at 3183 ¶ 43.

[526] *See In re Petition for Special Relief of Gemstar*, CSR-5528-Z (filed March 16, 2000). *See also Navigation Devices Order*, 13 FCC Rcd at 14820 ¶ 116.

[527] *See In re Carriage of the Transmission of Digital Television Broadcast Stations*, CS Docket No. 98-120, Notice of Proposed Rulemaking, 13 FCC Rcd 15092, 15129 ¶ 82 (1998). We note that Sinclair also argues that the Commission should ensure that consumers have access to free over-the-air digital broadcast signals via antennas and that the Commission should adopt the COFDM digital broadcast standard. Sinclair Comments at 3. We find that these matters are not linked in any way to either the merger or the broadcast carriage issues generally presented by the parties. These matters are more appropriately dealt with in the Commission's periodic review of the digital television transition. *See In the Matter of Review of the Commission's Rules and Policies Affecting the Conversion to Digital Television*, Notice of Proposed Rulemaking, MM Docket No. 00-39, FCC 00-83 (rel. Mar. 8, 2000).

3. Cable Horizontal Ownership Rules

210. Commenters assert that AOL's indirect ownership interest in DirecTV, coupled with Time Warner's cable holdings, would give the merged entity excessive purchasing power in the video programming market such that it could harm video programmers and MVPD competitors.[528] We analyze below the potential harm that the merger may cause in the video programming market. We examine specifically the question whether the merger would violate the Commission's cable horizontal ownership rules,[529] which we adopted pursuant to a statutory directive.[530] We find that AOL's ownership interest in GM does not violate our horizontal ownership rules or the statute, nor does it frustrate the implementation of the Communications Act's goals.

211. In 1999, AOL made a $1.5 billion investment in General Motors Corporation ("GM") in exchange for 2,669,633 shares of a type of GM Preference Stock ("Preference Stock").[531] General Motors invested this money in its wholly owned subsidiary, Hughes Electronics Corporation ("Hughes"), which in turn wholly owns DirecTV, a direct broadcast satellite ("DBS") company that provides multichannel video programming to approximately 8.3 million consumers nationwide.[532] Several commenters argue that AOL's investment in GM gives AOL the ability to influence DirecTV and DirecTV's video programming purchasing decisions.[533] Given that Time Warner is the second largest cable operator in the nation, these commenters argue that the proposed merger would increase the merged firm's size as a multichannel video distribution provider ("MVPD"). Commenters contend that this larger, combined MVPD would have excessive purchasing power over suppliers of video programming, thereby harming suppliers of video programming and MVPD competitors of AOL Time Warner seeking access to the programming.[534] Accordingly, the commenters request that the Commission require AOL to divest its interest in GM as a merger condition.[535]

212. In Section 613(f)(1)(A) of the Communication Act, as amended, Congress directed the Commission to place limits on a cable operator's size.[536] Congress was concerned that concentration in the cable industry could pose "barriers to entry for new programmers and a reduction in the number of media voices to consumers."[537] Therefore, Congress directed the Commission to establish a horizontal ownership limit that would prevent a large cable operator from using its size to harm video programmers and MVPD competitors by virtue of its purchasing power.[538] Pursuant to this directive, the Commission

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[528] *See* ACA Comments at 1.

[529] 47 C.F.R. § 76.503.

[530] *See* Section 613(f)(1)(A) of the Communication Act of 1934, as amended; Cable Television Consumer Protection and Competition Act of 1992 § 11(c); 47 U.S.C. § 533(f)(1)(A).

[531] *See* Applicants' March 21 Supplemental Information at 11-12 n.15.

[532] *See Id.* at 10-11.

[533] *See, e.g.*, RCN Comments at 6-7.

[534] *See* RCN Comments at 6-8; ACA Comments at 13-14; Consumers Union Comments at 157.

[535] *See* ACA Comments at 13-14; Consumers Union Comments at 157; Consumers Union Reply Comments at 6.

[536] *See* 47 U.S.C. § 533(f)(1)(A).

[537] Cable Act § 2(a)(4); 47 U.S.C. § 521 note.

[538] *See* 47 U.S.C. § 533(f)(2)(A)&(B).

promulgated a rule limiting a cable operator to 30% of the nation's MVPD subscribers.[539] The 30% limit takes into account the ability of a cable operator "either because of its size . . . or because of joint actions by a group of operators of sufficient size" to unfairly impede the flow of programming from the video programmer to the consumer.[540]

213. The Commission established rules (the "attribution rules") that determine whether a cable operator has sufficient influence or control over an MVPD such that the MVPD's subscribers should count towards the cable operator's 30% limit.[541] Under these rules, AOL's Preference Stock is not attributable because nonvoting equity is not attributable unless the nonvoting equity is worth more than 33% of the total assets of the MVPD, which is not the case here.[542] The only possible attribution rule that could be invoked here is one that is triggered when a cable operator holds 5% or more of the MVPD's voting equity.[543] However, even if AOL's Preference Stock were converted to voting equity, it would constitute approximately 1.76% of GM's voting equity, well below the 5% voting equity threshold.[544] Thus, under our attribution rules, AOL does not have an interest in GM and its subsidiary DirecTV which would *de jure* deem AOL to have influence and control over DirecTV and its purchasing decisions.

214. Nevertheless, RCN argues that the Commission should examine the totality of the circumstances of the AOL and DirecTV relationship to determine whether AOL has the actual ability to influence or control DirecTV.[545] In our order establishing the attribution rules, we declined "to examine contract language on a case-by-case basis to determine whether the contract gives one of the parties thereto an attributable interest."[546] However, the Commission reserved discretion to review unique cases where "there is substantial evidence that the combined interests held are so extensive that they raise an issue of significant influence."[547] We do not find that this case presents unique facts that would merit such a review.

215. RCN argues that AOL's investment in GM has led to a high degree of cooperation, including the launch of AOLTV for DirecTV and an integrated AOLTV-DirecTV set-top box.[548] We also note that AOL and DirecTV have a number of other contracts relating to DirecTV, DirecPC and AOL's

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[539] *See* 47 C.F.R. § 76.503.

[540] *See In re Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992: Horizontal Ownership Limits*, MM Docket No. 92-264, Third Report and Order ("*Horizontal Third Report and Order*"), 14 FCC Rcd 19098, 19114-19116 ¶¶ 39-43 (1999).

[541] *See* 47 C.F.R. § 76.503 n.2.

[542] *See* 47 C.F.R. § 76.503 n.2; 47 C.F.R. § 76.501 n.2(i).

[543] *See* 47 C.F.R. § 76.503 n.2; 47 C.F.R. § 76.501 n.2(a).

[544] *See* Applicants' March 21 Supplemental Information at 14.

[545] RCN Comments at 7 n.25.

[546] *See In re Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Reform Act Provisions of the Telecommunications Act of 1996: Review of the Commission's Cable Attribution Rules*, CS Docket Nos. 98-82, 96-85, Report and Order ("*Attribution Order*"), 14 FCC Rcd 19014, 19050 ¶ 92 (1999) ("[A] bright-line . . . test is superior to a case-by-case analysis because it permits the planning of financial transactions and minimizes regulatory costs.").

[547] *Id.* at 19050-51 ¶ 92.

[548] RCN Comments at 6-7.

ISP services.[549] Nonetheless, our review of these contracts does not reveal that they confer on AOL significant influence over DirecTV's video programming activities. Therefore, we reject the arguments of commenters that AOL's ownership interest in GM will enable the merged firm to harm video program suppliers and MVPD competitors seeking access to these suppliers.

D. Interactive Television Services

216. In this section we consider whether the merger will harm consumers or competition with respect to the provision of interactive television ("ITV") services in Time Warner's cable system service areas. Two objectives of the Communications Act appear to be relevant to the provision of ITV services. First, the Commission has the responsibility to ensure that cable communications provide the "widest possible diversity of information sources and services to the public."[550] Second, the Commission is charged with ensuring the rapid, private deployment of advanced services.[551] As discussed in our analysis of public interest benefits,[552] AOL and Time Warner bring together assets that could engender a successful launch of ITV. AOL is the world's largest aggregator of Internet content and interactive services, and Time Warner is the nation's second largest cable operator and owner of a significant number of the nation's most popular cable programming networks.[553]

217. We examine below whether the merged entity will have the ability and the incentive to engage in behavior that would likely cause public interest harms with respect to ITV. We find that AOL Time Warner would have the potential ability to use its combined control of cable system facilities, video programming and the AOLTV service to discriminate against unaffiliated video programming networks in the provision of ITV services. We also find that AOL Time Warner may have incentives to engage in

[549] *See* Confidential Appendix at Section IV-C-1.

[550] *See* 47 U.S.C. § 521(4) (purpose of Title VI, "Cable Communications," of the Act is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"); 47 U.S.C. §§ 532(a), (g) ("diversity of information sources"); *see also 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)); *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, MM Docket No. 91-221, MM Docket No. 87-8, Report and Order, 14 FCC Rcd 12903, 12910-12916 (1999); *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 or a private licensee."); *Turner Broadcasting*, 512 U.S. at 657 (emphasizing that "[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."). We also note that IM Unified argues that the Commission has jurisdiction over ITV because it is a "cable service." *See* Tribal Voice and iCast Sept. 5 Letter at 31. Because we do not impose any conditions with regard to ITV, we need not resolve here the question of our authority to do so. However, we address this issue in our *ITV NOI* proceeding. *See ITV NOI*, FCC 01-15.

[551] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18030-3 ¶ 9; *see also* 47 U.S.C §§ 254; Telecommunications Act of 1996 ("1996 Act"), Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157; 1996 Act Preamble.

[552] *See* Section V, *infra*. (Analysis of Potential Public Interest Benefits).

[553] Time Warner owns three of the five most highly rated cable programming networks, as well as the largest news (CNN) and pay networks (HBO). Time Warner also has significant publishing, music, movie and broadcasting holdings.

such discriminatory behavior. Nevertheless, even if AOL Time Warner were to discriminate, it appears that the terms of the FTC Consent Agreement[554] will, at present, substantially address concerns about the availability of alternatives for the distribution of unaffiliated video programming networks' ITV services. Therefore, we conclude that discrimination by the merged entity is not likely to cause a public interest harm that warrants denial of the merger or the imposition of conditions that do not apply industry-wide. Though we are unpersuaded a case has been presented on this record of merger-specific harm, we do believe important questions have been raised that warrant further examination in a proceeding of general applicability. In the *ITV NOI*, we will consider whether industry-wide rules are needed to address any impediments to the development of ITV services and markets.[555]

1. Background

a. The Components of ITV Service

218. Given the infancy of this market and the limited record before us, it would be imprudent to endorse a comprehensive definition of ITV services. At present, however, such services appear to include EPGs,[556] content that permits the viewer to interact with the video signal ("interactive content"), time shifting, and the overlay of communications services (chat, e-mail and instant messaging) functionality onto video programming provided by a programming network (such as TBS or AMC).[557] Based on this record, it appears that three components[558] are necessary for the delivery of high-speed ITV services to consumers:

219. (1) a transmission system (preferably broadband) for the delivery of the video signal and interactive content ("transmission system"),

220. (2) an Internet connection with sufficient bandwidth to provide a suitable interactive experience, with limited latency and optimal synchroneity ("Internet connection"), and

221. (3) a processing capability (*e.g.*, a stand-alone set-top box ("ITV-STB"), such as those used by WebTV or AOLTV, or a box integrated with the cable or DBS set-top box, that can respond to interactive triggers, integrate video and enhanced content, and display the integrated product on a television screen.[559]

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[554] *See* FTC Consent Agreement.

[555] *See ITV NOI*, FCC 01-15.

[556] We discuss the provision of EPG services separately, above. Original-generation EPG are not interactive, but rather continually scroll programming listings. Newer, interactive EPGs, however, allow users to sort and search programming, give program descriptions, provide reminders of upcoming programming, and transport users to programming they select.

[557] The *ITV NOI* will explore ITV services in more detail. For purposes of this *Order*, we define ITV services to include all of these services.

[558] *The ITV NOI* will explore these components more closely.

[559] Cable operators and DBS providers traditionally have supplied set-top boxes to their subscribers, typically on a leased basis, in order that their subscribers may view video programming. A stand-alone ITV-STB will not, by itself, enable a cable subscriber to view video programming. As discussed below, the first deployment of AOLTV involves a stand-alone ITV-STB that must be connected to a cable or DBS set-top box in order to receive video programming. The ITV-STB then blends the video programming with interactive programming that the ITV-STB receives from a connection to the Internet, which is currently a narrowband dial-up connection. Next-generation

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222. *Transmission System.* It appears that cable facilities provide the optimal platform for the delivery of ITV services. The cable pipeline can permit interactive content to be delivered to the viewer with the video signal, thereby ensuring that the video programming and the interactive content achieve a high level of synchroneity when blended in the ITV-STB for television viewing.

223. A video programming network may send two types of interactive content with its video signal, the so-called "trigger" of interactive content and interactive content itself, both of which could be based on the ATVEF protocol or any other protocol.[560] The "trigger" can appear as an icon on a viewer's television screen and alerts the viewer to the availability of interactive content. When a viewer clicks on the trigger, the trigger requests the interactive content. When the interactive content is sent with the video signal, the trigger causes a compatible ITV set-top box to display the interactive content on the television set.[561]

224. A high level of synchroneity is necessary for certain forms of interactivity. For example, synchroneity would be important if secondary audio, such as a referee's voice, were to be delivered with the video signal to a viewer watching a sporting event. By sending the interactive content with the video signal of the television program, a cable operator ensures that the ITV set-top box is able to blend the television program and the interactive content seamlessly, without the level of latency associated with interactive content delivered via the Internet.

225. *Internet Connection.* Although synchroneity and latency difficulties can be avoided by sending some interactive content with the video signal, the amount of interactive content that may be delivered with the video signal might be limited by the video pipeline's bandwidth or capacity. Under these circumstances, where the interactive content requires a large amount of bandwidth (or subscriber-

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ITV-STB boxes, the focus of our analysis, will be integrated with the cable or DBS set-top box so that a consumer utilizes a single box to receive both video programming and interactive content, rather than two separate boxes.

[560] The Advanced Television Enhancement Forum ("ATVEF") has made significant progress in standardizing protocols for the delivery of ITV information via the video signal. When we refer to the ATVEF standard herein, we intend to include other such standards that may be used as ITV technology develops. The ATVEF Enhanced Content Specification is a standard that defines a common set of requirements for the creation, transport, and delivery of interactive television. ATVEF is a cross-industry group comprised of the major computer companies, television programmers, technical platform providers, broadcasters, and transport providers. *See* http:\\www.atvef.com. The ATVEF content specifications provide creators of enhanced television content with a mandatory minimum format that will be supported by ATVEF-compliant receivers such as televisions or set-top boxes. By conforming to the ATVEF specifications, a content provider will be able to provide enhanced television services to the maximum number of receivers. A content provider who chooses to create enhanced content that falls outside of the ATVEF specification must work in conjunction with the manufacturer of the target receiver to enable the additional enhancements. Some European countries have deployed DVB-MHP, another form of ITV. DVB (the umbrella organization of all companies taking part in the launching of digital TV in Europe) developed the "Multimedia Home Platform" (MHP). MHP defines a protocol that content providers can use to develop interactive applications. The protocol also gives manufacturers the ability to build a universal set-top-box that is compatible with a wide array of video interactive services.

For analog video signals, the ATVEF interactive content is transmitted in the VBI. For digital video signals, the ATVEF interactive content is transmitted in digital form in the MPEG digital video stream. MPEG will be discussed more fully in the *ITV NOI.*

[561] In the alternative, the interactive content might be stored on the Internet, in which case the trigger would direct the ITV set-top box to retrieve the content from the Internet and display it on the television set.

specific content), the ATVEF trigger carried with the video signal would direct the ITV-STB to obtain interactive content from the Internet. However, because the ATVEF (or similar) interactive content would be delivered via the Internet and not via the video signal, the video programming and the interactive content would have a lesser degree of synchroneity. Therefore, a high-speed two-way Internet connection, such as a DSL or cable Internet connection, appears necessary in order to provide large capacity interactive content to the viewer with minimum latency. While a narrowband Internet connection, *i.e.*, a dial-up telephone connection, could enable an interactive experience, it cannot currently provide the speed and bandwidth that broadband paths would provide.

226. *The ITV Set-Top Box.* An ITV set-top box is the third necessary component for ITV services. The ITV set-top box activates interactive content sent with the video signal and blends it with the video program signal for display on the television set. As noted above, an ITV subscriber may also direct the ITV set-top box to obtain additional interactive content (from the Internet) that is designed to accompany the television program viewed by the subscriber.

b. AOLTV

227. AOL offers ITV services via its AOLTV set-top boxes. The AOLTV service provides interactive television programming in conjunction with video programming to create interactive television channels. AOLTV services also currently include an EPG and most features of AOL's ISP service, such as limited Web browsing, e-mail, IM, and chat. AOL has deployed its AOLTV set-top boxes in several U.S. cities, including Phoenix, Sacramento and Baltimore, for sale through Circuit City and other retailers.[562] To receive the service, consumers in these cities must purchase an AOLTV set-top box and subscribe to AOLTV at a rate of $14.95 per month for current AOL ISP subscribers or $24.95 per month for AOLTV customers that do not subscribe to the AOL ISP service.[563] The subscriber need not purchase the AOL ISP service (or any ISP service) in order to receive AOLTV because the interactive set-top box interfaces with the Internet directly using standard Internet Protocol ("IP").

228. At present, the AOLTV service can be provided to both cable and DirecTV subscribers, but utilizes only a narrowband telephone connection to the Internet. The current AOLTV box is not integrated into a cable or DBS set-top box. Instead, the current AOLTV box receives video programming from a separate cable or DBS set-top box, and receives two-way narrowband interactive services via a telephone line. The AOLTV box then blends the interactive content and the video programming for viewing on the subscriber's television set. At this time, the interactive triggers, the customer's request for interactivity and further interactive content are transported to the subscriber's television through the AOLTV set-top box's connection to the Internet.

229. AOL intends to upgrade its AOLTV service to a high-speed Internet platform, using cable modems, DSL, and DBS.[564] As a preliminary step, AOL may continue to employ a stand-alone ITV-STB that connects to a cable or DBS set-top box that contains a high-speed cable modem, DSL line, or high speed DBS Internet connection.[565] AOL states that it will complete this upgrade by integrating

[562] America Online, Inc., *AOL Launches AOLTV* (press release), June 19, 2000, at 1.

[563] Mindy Charski, *AOL Announces Interactive TV for Eight Cities*, ZDNET NEWS, June 19, 2000 at http:\\www.zdnet.com (visited Oct. 2, 2000). The AOLTV set-top box retails for $249.00. *Id.*

[564] Applicants' Second Response at 5.

[565] *Id. See also* Ex Parte Comments of Applicants' (Aug. 25, 2000) ("Applicants' Aug. 25 Letter"), Attachment at 2, transmitted by letter from Peter D. Ross on behalf of AOL and Time Warner to Magalie Roman Salas, Secretary, FCC, dated Aug. 25, 2000.

AOLTV functionality into DBS set-top boxes that contain high-speed Internet connections.[566] AOL has had preliminary discussions to incorporate its AOLTV software into the Time Warner cable set-top box, and AOL and DirecTV have entered into an agreement in which Hughes will manufacture a set top box that integrates DirecTV and AOLTV.[567] In addition, the Applicants state that AOLTV will incorporate additional features such as personal video recording capability and more advanced interactive programming, including services that would enable video programmers to use and customize AOLTV features such as chat for special television events.[568]

c. Other ITV Services and ITV Companies

230. ITV services can be offered directly to consumers by the ITV service provider (such as AOLTV or WebTV) or through a partnership between a transport provider (such as a cable or DBS operator) and an ITV provider (such as WorldGate). When ITV services are offered directly to consumers, typically consumers must purchase a set-top box and then contract with an ITV provider for service. When ITV services are offered through partnerships between transport providers and ITV providers, often ITV components are integrated into the transport provider's set-top box, and the service is offered in addition to the transport provider's existing video services. These services are then marketed by the transport provider as a premium offering supplemental to its existing array of services. ITV providers may, in turn, rely on partnerships with other vendors for certain components of the ITV product. AOL, for example, contracts with Philips Electronics to build its ITV-STB and licenses software for the ITV-STB from Liberate.[569]

231. At this early and fluid stage of the ITV market, there are a growing number of firms that now provide or plan to provide ITV service. The types of ITV services offered and the business models used by these companies vary widely. For purposes of our analysis, it is useful to examine a non-exhaustive sampling of existing ITV services and business models.

232. *ITV Providers.* Microsoft Corp. has approximately one million users subscribing to its WebTV product.[570] WebTV provides e-mail and Internet access, and also enables interactivity with certain television programs. At present, WebTV customers must buy a separate ITV-STB for use in conjunction with the box of their selected MVPD provider, though plans exist to integrate WebTV directly into MVPD set-top boxes. For example, EchoStar's Dish Network set-top boxes will include WebTV Plus, which will provide additional features such as on-line banking, shopping, and video programming storage.[571] In addition, Microsoft, Thompson RCA, and DirecTV announced plans to

[566] Applicants' Second Response at 5, 8. *See also* Ex Parte Comments of Applicants' (Aug. 22, 2000) ("Applicants' Aug. 22 Letter") at 8, transmitted by letter from Peter D. Ross on behalf of AOL and Time Warner to Magalie Roman Salas, Secretary, FCC, dated Aug. 22, 2000.

[567] Applicants' Second Response at 8; Bob Sullivan, *Broadband from the Sky Tries Again*, ZDNET NEWS, Aug. 26, 2000 at http://www.zdnet.com (visited Aug. 29, 2000). *See also* Confidential Appendix IV-C-1, Note 1.

[568] Applicants' Second Response at 5.

[569] Patricia Fusco, *AOL Gunning for WebTV*, INTERNET.COM, June 16, 2000, at http://www.internet.com (visited June 19, 2000).

[570] Ex Parte Comments of Disney, Attachment (Aug. 16, 2000) ("Myers Group Report") at ¶ 30, transmitted by letter from Preston R. Padden, Executive Vice President, Government Relations, Disney, to Magalie Roman Salas Secretary, FCC, dated Aug. 16, 2000.

[571] *Id.*

jointly create an integrated set top box and service that will combine DirecTV satellite service and a new version of WebTV called Ultimate TV.[572] The Ultimate TV product will include personal video recording, picture-in-picture viewing and the ability to watch one program while recording another.[573] Microsoft states that it will also offer two-way satellite service that allows downloading and uploading as rapidly as cable modems or DSL.[574]

233. As an ITV service provider, Microsoft has also established business relationships with several cable MSOs and interactive software providers. In 1997, Microsoft purchased an 11.5% interest in Comcast Communications,[575] and in 1999 it entered into an agreement to supply the software for 7.5 million of AT&T's planned 10 million ITV-STBs, although technical trials have since been delayed.[576] Microsoft recently acquired Peach Networks, Ltd., which manufactures software for cable headends that enables more advanced programming to run on existing set-top boxes.[577] Microsoft has also entered into a relationship with Wink Communications, a provider of interactivity with video programming and advertising.[578] Microsoft recently announced plans to incorporate its Microsoft TV software into Whistler, the next version of the Windows 2000 operating system.[579] Under the new plan, TV signals and interactive programming would be received via a personal computer that runs the Whistler operating system, using a television set as the monitor.[580]

234. WorldGate Communications provides ITV service through a cable set-top box,[581] and offers ITV subscribers access to the Internet, e-mail and other interactive services.[582] WorldGate serves

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[572] Stephanie Miles, *Microsoft Partners on Interactive TV Project*, CNET NEWS.COM, June 12, 2000, at http://www.news.cnet.com (visited Aug. 29, 2000).

[573] *Id.*

[574] Bob Sullivan, *Broadband from the Sky Tries Again*, ZDNET NEWS, Aug. 26, 2000, at http://www.zdnet.com (visited Aug. 29, 2000).

[575] Howard Wolinsky, *Interactive TV Revisited*, UPSIDE TODAY, July 25, 2000, at http://www.upside.com (visited July 26, 2000) ("Wolinsky Article").

[576] Technical trials of the AT&T ITV product have been postponed from the planned summer 2000 launch. No alternative date has been announced for the launch. *AT&T Considers MS Set-Top Alternatives*, ZDNET NEWS, Aug. 29, 2000, at http://www.zdnet.com (visited Aug. 29, 2000).

[577] Wolinsky Article; David Iler, *Interactive-TV Firms Play Merger Game*, MULTICHANNEL NEWS ONLINE, May 1, 2000, at http:\\www.multichannel.com (visited Sept. 29, 2000).

[578] Wolinsky Article.

[579] Stephanie Miles, *Will Microsoft's Next OS Run Your TV?*, CNET NEWS.COM, Sept. 5, 2000, at http://www.news.cnet.com (visited Sept. 6, 2000).

[580] *Id.*

[581] Myers Group Report at 31. Rebecca Cantwell, *Interactive TV Takes a Variety of Shapes*, ZDNET NEWS: INTER@CTIVE WEEK, July 9, 2000, at http://www.zdnet.com (visited Sept. 29, 2000)("Cantwell Article").

[582] WorldGate Communications, Inc., at http://www.wgate.com\how\how.html (visited Nov. 30, 2000). WorldGate Communications, Inc. announced plans to add RespondTV's enhanced television applications to the WorldGate ITV product. WorldGate Communications, Inc., *RespondTV to Support Enhanced Interactive Television Content Through WorldGate's Interactive TV Platform* (press release), Oct. 24, 2000.

homes using the facilities of several cable MVPDs, including AT&T, Comcast and Charter Communications.[583] As of summer 2000, 15,000 consumers subscribed to the WorldGate ITV service.[584]

235. *ITV Services Provided by MVPDs.* Cable and satellite MVPDs are also positioning themselves to introduce their own ITV services. Cox Communications has partnered with Excite@Home to launch a trial ITV product in San Diego in late 2000.[585] The Cox-branded service will provide video-on-demand, Web browsing and e-mail.[586] AT&T also plans to offer ITV in partnership with Excite@Home.[587] BellSouth announced in August that it would use Liberate to deliver ITV applications to some of its customers in the Southeast.[588]

236. *Other ITV Services.* The Applicants state that TiVo and RePLAY, providers of personal video recording service ("PVR"),[589] Wink and RespondTV (e-commerce providers), and EPG provider

[583] Cantwell Article; *see also* WorldGate Communications, Inc., *WorldGate Reports Record Third Quarter Results* (press release), Nov. 2, 2000; WorldGate Communications, Inc., *AT&T Broadband and WorldGate Announce Interactive Television Deployment in Three Cities* (press release), Nov. 6, 2000.

[584] Cantwell Article. WorldGate plans to offer service to 115,000 homes in Pennsylvania in 2001 through an agreement with cable operator Blue Ridge Communications. *Id.* In addition, in November 2000, AT&T Broadband and WorldGate announced that the companies began offering WorldGate's interactive television service in Cedar Falls and Waterloo, Iowa, and will next offer service in Tacoma, Washington. WorldGate Communications, Inc., *AT&T Broadband and WorldGate Announce Interactive Television Deployment in Three Cities* (press release), Nov. 6, 2000.

[585] Cantwell Article; AtHome Corp., *Cox Communications Signs Agreement With Excite@ Home For The Development of Advanced TV Services* (press release), Dec. 16, 1999.

[586] Cox Communications, Inc., *Cox Communications Updates Investors on Successful Delivery of Advanced Broadband Communications Services* (press release), June 1, 2000; Cantwell Article.

[587] In August 2000, AT&T announced that it will increase its economic interest in Excite@Home from 24% to 38%, and will increase its voting interest from 56% to 79%. *Excite@HomeAnnounces New Board and Completion of Partner Distribution Agreement, AT&T Assumes 74 Percent Voting Stake*, PR NEWSWIRE, Aug. 28, 2000, at http://www.prnewswire.com (visited Aug. 30, 2000); AT&T Corp., *AT&T Updates SEC Filing on* Excite@Home (press release), Jan. 12, 2001. Excite@Home and AT&T stated that they would work together "to deliver services to consumers via advanced TV." As noted above, AT&T entered into an agreement in June 2000 with Microsoft to provide interactive television software for 7.5 million of AT&T's planned 10 million Motorola-manufactured ITV set top boxes, though planned technical trials have since been delayed. In September 2000, AT&T announced it will use interactive television software from Liberate (also the software provider for AOLTV) for trials, planned for late 2000, of Motorola-manufactured ITV set-top boxes. *AT&T To Use Liberate Interactive TV Software*, ZDNET NEWS, Sept. 21, 2000, at http://www.zdnet.com (visited Sept. 24, 2000). Motorola has a 5.4% stake in OpenTV Corp., another interactive television software manufacturer. *Motorola Ups OpenTV Stake*, MULTICHANNEL NEWS ONLINE, Sept. 18, 2000, at http://www.multichannel.com (visited Sept. 24, 2000). OpenTV announced that TeleCruz Technology, Inc., will license OpenTV software for chips that can be integrated directly into television sets to enable browsing similar to WebTV; OpenTV also plans to make its software available for PCs and cellular phones. David Iler, *OpenTV Deal Bypasses Box*, MULTICHANNEL NEWS ONLINE, Sept. 11, 2000, at http://www.multichannel.com (visited Sept. 24, 2000).

[588] Jeff Baumgartner, *Liberate, OpenTV Could Make Gains on Microsoft's Turf*, MULTICHANNEL NEWS ONLINE, Sept. 4, 2000, at http://www.multichannel.com (visited Sept. 6, 2000).

[589] A PVR can pause, rewind, and perform slow motion and instant replay of a live program, thereby allowing a viewer to watch earlier portions of a program while later portions of the program are still being broadcast. A PVR can be used with a service that provides an onscreen programming guide service through a telephone connection. This technology can be used to create a personal menu that records in accordance with a viewer's television

(continued...)

Gemstar all offer elements of ITV service.[590] We note that AOL holds an ownership interest in TiVo, and Time Warner holds an interest in RePLAY, another PVR service.[591]

2. Discussion

a. Relevant Markets

237. At a global level, the developing ITV market appears to have two broad segments that may constitute separate markets. The first segment is ITV programming. The second is ITV distribution and retail. The ITV programming segment includes interactive content provided by video programming networks to accompany their video signals. ITV distribution involves the aggregation of interactive video content and other inputs in the provision of ITV services.[592] As discussed in greater detail above, AOL is an aggregator and distributor of ITV inputs, and has begun a nationwide rollout of its AOLTV product. Time Warner owns cable facilities that can be used to deliver advanced ITV services to consumers. AOL and Time Warner will become a vertically integrated provider of ITV services in Time Warner's cable territories.[593]

b. Harm to Competition

238. Commenters allege that the merged firm would have the ability to discriminate against unaffiliated programming networks.[594] AOL Time Warner could, according to commenters, discriminate against unaffiliated video programming networks by denying them access (or degrading their access vis-à-vis affiliated video programming networks) to one or all three delivery components of ITV: the cable video pipeline, the merged entity's ITV-STB, and the cable Internet connection.[595] We recognize the possibility of the alleged harm. However, we are of the view that a merger-specific condition is unwarranted given the terms of the FTC Consent Agreement and that any industry-wide intervention requires (1) a greater examination of the potentially conflicting incentives for favoring one's own programming to the detriment of competitors, and for offering as much interactive programming as possible; and (2) a fuller exploration of the technical ability and manner of potential discrimination.

(...continued from previous page)
preferences.

[590] Ex Parte Comments of Applicants' (Sept. 29, 2000) ("Applicants' Sept. 29 ITV Letter") at 3, transmitted by letter from Peter D. Ross on behalf of AOL and Time Warner to Magalie Roman Salas, Secretary, FCC, dated Sept. 29, 2000.

[591] Applicants' Second Response at 29. "On July 14, 2000, AOL and TiVo announced a three-year strategic agreement and equity investment whereby AOL acquired slightly over 1% interest in TiVo." *Id.* Time Warner Inc., *Form 10-K for the Year-ended 1999 (filed as amended Mar. 30, 2000)*, at I-26. "As of March 1, 2000, investments made by [Time Warner] in digital media include ... ReplayTV ..." *Id.*

[592] At this time, we do not find it necessary to further distinguish among these ITV inputs, aside from EPGs, which we discuss below in Section IV-C-1., *supra* (Electronic Programming Guides). In particular, we find no reason to distinguish between markets for aggregation of narrowband and broadband ITV content given overlaps in the range of services.

[593] The *ITV NOI* will explore further the geographic scope of the market for ITV services.

[594] Disney July 25 Ex Parte at 1-6, 61-71; NBC July 24 Ex Parte at 1-10.

[595] Disney Reply at 12-15; Ex Parte Comments of Disney, Attachment (Sept. 25, 2000), ("Disney Sept. 25 Memorandum") transmitted by letter from Marsha McBride, Vice-President, Government Relations, Disney, to Magalie Roman Salas, Secretary, FCC, dated Sept. 26, 2000.

239. Disney argues that conditions must be placed on Commission approval of the merger[596] to prevent AOL Time Warner from using its control over the cable video pipeline, the ITV-STB, and the broadband Internet connection to discriminate against the interactive content of unaffiliated video programming networks in the following ways:[597]

- excluding unaffiliated interactive content and services,[598]
- transmitting its affiliated content at faster rates,[599]
- manipulating communications between competing content providers and customers,
- limiting unaffiliated ITV services providers from caching data locally,[600]
- favoring its own content on navigation systems and links (with more convenient consumer interfaces for its own content),[601]
- building its own links to merchant Internet sites that conflict with an unaffiliated video programming network's advertisers,[602]

[596] Disney argues that the Commission should require AOL Time Warner to separate its content from distribution as a condition to approval of the merger. Disney July 25 Ex Parte at 6. Disney asserts that if the Commission does not require such separation, the Commission should, at a minimum, require enforceable, non-discriminatory treatment of unaffiliated content and interactive service providers. Disney Reply Comments at 15; Disney July 25 Ex Parte at 6. *See also* NAB May 19 Ex Parte at 2-4; NAB Oct. 2 Ex Parte at 2; Sinclair Reply Comments at 1 ("Sinclair urges the Commission to condition the AOL/Time Warner merger on the companies' divestiture of all content," or to impose nondiscrimination requirements that prohibit the merged company from "degrading or blocking customer access to any part of the digital broadcast signals carried on its infrastructure that could be received by its customers free over the air."); MSTV Reply Comments at 1 (the Commission should impose conditions that "strictly prohibit AOL Time Warner from discriminating against the programming, navigation devices and other services delivered through the broadcast signal for free."). In addition to a "catch-all" prohibition against discrimination, Disney argues that the Commission should impose a series of specific, but not exhaustive, prohibitions of practices that would otherwise allow AOLTV to discriminate against unaffiliated content providers. Disney states that these would include prohibitions against: refusals to deal; discrimination in prices, terms or conditions of carriage; discriminatory presentation of information or displays on navigational devices or electronic program guides for purposes of enabling subscribers to select program or content offerings; discrimination with respect to downstream traffic; discrimination on the return path for interactive television services; discrimination that undermines interactive advertising opportunities; discrimination in set-top box design and architecture that fills up memory with affiliated content before loading unaffiliated content; and discrimination in caching practices. Finally, Disney recommends that the Commission use arbitration procedures to enforce these safeguards. Disney July 25 Ex Parte at 82-85.

[597] We note that prior to the merger, Time Warner already had the ability to discriminate against unaffiliated video programming networks by not carrying their interactive content on the video pipeline or the broadband Internet connection. The merger does not alter Time Warner's ability in this regard. However, the merger might encourage Time Warner to carry unaffiliated video programming content to its new affiliated AOLTV because, as discussed below, it is arguable that AOLTV will need as much interactive content as possible to successfully launch its ITV product.

[598] Disney July 25 Ex Parte at 44.

[599] *Id.*

[600] *Id.* "Caching" is the technique of storing frequently accessed content in fast memory (*e.g.*, RAM) in order to speed access to those files by eliminating delays and costs associated with reverting to the original source for the information. An ISP engages in caching when it downloads a copy of Internet content onto its own server, from which it can thereafter supply its subscribers' repeated demands for this content.

[601] *Id.*

[602] *Id.*

- making unaffiliated video programming less attractive and/or accessible to consumers,[603]
- imposing charges for each interactive commercial transaction,[604]
- restricting an unaffiliated video programming network's advertising on interactive channels so that it would not interfere with exclusive contracts that AOL Time Warner has with its advertisers,[605] and
- developing AOLTV controlled interactive advertising that undermines unaffiliated content providers' advertising.[606]

240. The record in this proceeding demonstrates that AOL Time Warner intends to integrate the cable set-top box with the AOLTV box and a high speed Internet connection and that AOL and Time Warner are well aware that control over the set-top box would enable the merged firm to favor its own content.[607] In addition, we agree with Dr. Haseltine's findings that AOL Time Warner could use equipment at the cable headend in order to discriminate.[608] While AOL and Time Warner do not dispute Disney's allegations that they have the technical ability to use the three components – Time Warner's video pipeline and broadband Internet connection and AOLTV's set-top box – in the manner alleged, they argue that they have no incentive to do so.[609] Based on this record, it appears that the merged entity would have conflicting incentives. Applicants assert that the merged entity has the incentive to carry as much interactive programming as possible so that AOLTV will be attractive to consumers.[610] AOL Time Warner states that its AOL ITV-STB will activate the ATVEF interactive content of unaffiliated video programming networks, without any agreement with or payment to AOL, so that AOLTV subscribers may view unaffiliated interactive content.[611]

241. However, the record also contains evidence that AOL has a history of negotiating exclusionary deals once it is in its economic interest to do so.[612] AOL may cease its current practice of carrying interactive content of unaffiliated programmers without AOLTV carriage agreements once it has achieved some level of success in the marketplace. We note that if AOLTV becomes successful, it may be less dependent on the interactive content of unaffiliated video programming networks and therefore

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[603] Disney July 25 Ex Parte at 44; Ex Parte Comments of Disney, Attachment (Sept. 5, 2000) ("Disney Sept. 5 Memorandum") at 11, transmitted by letter from Marsha McBride, Vice-President, Government Relations, Disney, to Magalie Roman Salas, Secretary, FCC, dated Sept. 14, 2000; NBC July 24 Ex Parte at 5-6.

[604] Disney Sept. 5 Memorandum at 11.

[605] Disney July 25 Ex Parte at 44.

[606] *Id.*

[607] *See* Applicant's Second Response at 5, 8; Confidential App. IV-D-1, Note 1.

[608] Ex Parte Comments of Disney, Attachment (Oct. 25, 2000) ("Declaration of Eric C. Haseltine") at 1-2, transmitted by letter to Lawrence R. Sidman, Counsel for Disney, to Magalie Roman Salas, Secretary, FCC, dated Oct. 25, 2000.

[609] *See* Applicants' Sept. 29 ITV Letter.

[610] Applicants' Sept. 29 ITV Letter at 5 ("[t]here is no advantage in denying consumers access to a full array of content sources. AOL and Time Warner's surest route to failure in interactive television would be to restrict or degrade consumers' access to a true diversity of interactive content and service offerings.").

[611] Applicants' Sept. 29 ITV Letter at 5.

[612] *See* Confidential Appendix. IV-D-1, Notes 1 and 2.

may be in a position to discriminate against them in the terms, conditions and prices for carriage on AOLTV.[613] At the same time, unaffiliated video programming networks will likely become more dependent on interactive television commerce revenue. Some analysts predict that while video programmers' revenues from traditional advertising will decline over the next few years, lost revenue will be replaced by new revenue from interactive television commerce.[614] Moreover, AOL and Time Warner have stated that their MOU does not obligate them to provide access to the cable broadband platform for ITV uses.[615]

242. We believe that, at the present time, the terms of the FTC Consent Agreement will substantially mitigate any potential public interest harm that may arise from discrimination by AOL Time Warner with regard to ITV content or service. The FTC has ordered that AOL Time Warner not discriminate in the transmission and carriage of content[616] that it has agreed to carry, and has forbidden AOL Time Warner from blocking or otherwise interfering with interactive content transmitted by an unaffiliated ISP.[617] Thus, it would appear that unaffiliated video programming networks could utilize alternatives to AOLTV for distribution of their interactive content. For example, even if AOL Time Warner refused to carry an unaffiliated video programmer's interactive content with its video signal,[618] the video programmer could seek to deliver its interactive content via an unaffiliated ISP on AOL Time Warner's cable system. Further, the FTC Consent Agreement would prohibit AOL Time Warner from blocking subscribers' access to any interactive content that is carried on the AOL Time Warner facilities and thus would enable subscribers to access such content as part of an ITV service provided by an unaffiliated entity.[619] If unaffiliated video networks have alternatives to the video pipeline for the provision of competitive interactive services to consumers (comparable to a cable-affiliated ITV provider that has access to a video pipeline), then AOL Time Warner's refusal to carry interactive content with the video signal would not appear to harm the public interest. Therefore, in light of the FTC's actions, we

[613] NAB notes that in *Time Warner Entertainment Co., L.P. v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000), the court, when reviewing the channel occupancy limits of the Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (47 U.S.C. § 533(f)(1)(B)), stated that "[Time Warner] does not deny that a cable operator has an incentive to favor its affiliated programmers; where the two forces are in conflict, the operator may, as a rational profit-maximizer, compromise the consumers' interests." NAB Oct. 2 Ex Parte at 2.

[614] Disney Oct. 25 Ex Parte at n. 37; Myers Group Report at 13 (predicting that advertising revenues from interactive television, including e-commerce and subscription fees, will reach $20 billion by 2005).

[615] *See* Ex Parte Comments of Applicants (Sept. 6, 2000) ("Applicants' Sept. 6 Letter") at 12, transmitted by letter from Craig A. Gilley, Fleishman & Walsh, to Magalie Roman Salas, Secretary, FCC, dated Sept. 6, 2000. *See also* Confidential Appendix IV-D-1, Note 3.

[616] The *FTC Consent Agreement* construes the term "content" to include interactive signals and interactive triggers. *See FTC Consent Agreement* Section I.R. (defining content as "data packets carrying information including, but not limited to, links, video, audio, text, e-mail, message, interactive signals, and interactive triggers.").

[617] *See FTC Consent Agreement* Section III.A. ("Respondents shall not interfere . . . with Content passed in either direction along the Bandwidth contracted for and being used by any non-affiliated ISP in compliance with the Non-affiliated ISP's agreement with Respondents.").

[618] *See* Disney Sept. 25 Memorandum at 3-4; Ex Parte Comments of Disney (Sept. 14, 2000) ("Disney Sept. 14 Ex Parte") at 2-3, transmitted by letter from Marsha McBride, Vice-President, Government Relations, Disney, to Magalie Roman Salas, Secretary, FCC, dated Sept. 14, 2000.

[619] *FTC Consent Agreement* Section III.C. ("Respondents shall not interfere with the ability of a Subscriber to use, in conjunction with ITV services provided by a Person that is not Affiliated with Respondent, interactive signals, triggers, or other Content that Respondents have agreed to carry.").

disagree with Disney that the Commission should impose a merger condition with respect to unaffiliated video programming networks and interactive content providers that does not apply industry-wide.

243. We note that Disney has provided evidence that suggests that alternatives to the cable video path may not ultimately provide competitive outlets for the provision of ITV services.[620] We find that it is necessary to develop a more complete record in this regard to determine whether rules of general applicability are needed to promote competition and diversity in the provision of ITV services. Our *ITV NOI* will explore further what types of services should be defined as ITV, what types of ITV business models will prevail, how ITV services will be delivered, and whether there are competitive alternatives to a cable operator's affiliated ITV provider for the provision of ITV services.[621]

E. Multichannel Video Programming Distribution

244. In this section we examine the merger's potential effects on the video services provided by multichannel video programming distributors ("MVPDs").[622] MVPDs include cable operators, direct broadcast satellite providers ("DBS"), multichannel multipoint distribution services ("MMDS"), and satellite master antenna television ("SMATV") providers.[623] In *AT&T-TCI*, we concluded that the relevant geographic market for MVPD service is local.[624] One or more MVPD providers furnish MVPD services in local franchise areas. Only one cable operator serves most franchise areas. In a limited number of franchise areas, a second cable operator (an "overbuilder") or MMDS operator also offers service. SMATV providers generally offer service in any setting in which a public right-of-way is not crossed, but do not provide competition throughout a local franchise area. DBS providers also distribute MVPD services and are available nationwide to consumers with an unobstructed southern view.

245. Time Warner is the dominant provider of multichannel video programming services in those local markets in which it operates franchised cable systems. America Online does not directly operate any company providing MVPD service, but does have an ownership interest in DBS operator DirecTV's corporate parent, Hughes.

246. We examine below specific allegations of harm to MVPDs arising from the combination of Time Warner's cable systems with AOL's ownership interest in DirecTV, as well as concerns about

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[620] *See, e.g.*, Disney July 25 Ex Parte at 34-36; Disney Reply Comments at 8; Myers Group Report at 39. We note that the Applicants argue that existing broadband alternatives, such as DSL, are equivalent to a cable Internet connection. Applicants' Sept. 29 ITV Letter at 8. However, such alternatives may not currently be able to support ITV services comparable to those that can be provided using a cable Internet connection.

[621] *See ITV NOI*, FCC 01-15.

[622] *See* 47 U.S.C. § 522(13) (defining MVPD as "a person, such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming").

[623] *See AT&T-TCI Order*, 14 FCC Rcd at 3172-73 ¶ 21. DBS operators provide programming via satellite to subscribers that own or lease small-diameter receiving dishes. 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. SMATV subscribers usually reside in multiple dwelling units. *Id.*

[624] *AT&T-TCI Order*, 14 FCC Rcd at 3172-73 ¶ 21.

MVPDs' access to Time Warner video programming post-merger.[625] We conclude that the merger will not present any public interest harms affecting MVPD services.

1. Common Ownership of DBS and Cable MVPDs

247. As discussed in Section IV.C.3 above, AOL paid GM $1.5 billion for 2,669,663 shares of non-voting GM Preference Stock that tracks the performance of Hughes, GM's wholly owned subsidiary.[626] If AOL converted its GM Preference stock into GM voting equity, AOL would hold approximately 1.76% of GM's voting equity.[627] GM's wholly owned subsidiary DirecTV, the nation's largest DBS provider, served 8.3 million MVPD customers nationwide as of March, 2000.[628] Commenters argue that the merged firm's ownership interests in both DirecTV and Time Warner will enable the merged firm to harm competition between DBS and cable MVPDs.[629] Consumers Union asserts that the merged firm will harm the ability of DirecTV to compete with cable.[630] Although the Commission does not have a rule barring cross-ownership of both a DBS and cable MVPD, RCN argues that the Commission has the discretion to address any competitive harms caused by such cross-ownership on a case by case basis.[631] Consumers Union and ACA request that the Commission order AOL to divest its interest in GM, DirecTV's parent, as a condition of the merger.[632]

248. With respect to the merged firm's ownership interest in GM, we find that the proposed merger will not violate the Communications Act or any Commission rules, nor will it frustrate the implementation of the Communications Act or its goals. We conclude that the merger will not result in public interest harms regarding competition between DBS and cable.

249. Although legislation introduced in the Senate proposed a cable/DBS cross-ownership ban in the 1992 Cable Act, the House and Senate Conference decided that it was premature to adopt such a

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[625] We note that Everest Connections Corp. ("Everest"), a broadband cable overbuilder, in a late filed comment in this proceeding, states that leading set-top box and cable equipment manufacturers claim that they cannot provide their products to companies, like Everest, that intend to operate MVPD systems in competition with Time Warner cable systems. These manufacturers, according to Everest, will provide equipment to Everest only if it agrees that it will not use the equipment to compete with Time Warner. Everest Comments at 1-3. Everest asks that the Commission condition the merger on a requirement that Time Warner not prohibit equipment vendors from supplying equipment to Time Warner's MVPD competitors. Everest Comments at 5-7. If Everest's allegations are accurate, Time Warner's actions are disturbing because they apparently are impeding consumers' ability to purchase competing MVPD services. Nevertheless, Everest has not sufficiently established how the merger would affect Time Warner's behavior in this regard. Moreover, Everest does not allege that Time Warner is violating any Commission rule or provision of the Communications Act. Hence, we cannot conclude that Time Warner's alleged behavior constitutes a merger-specific public interest harm.

[626] *See* Applicants' March 21 Supplemental Information at 11-12 n.15.

[627] *Id.* at 14.

[628] *Id.* at 12

[629] Consumers Union Comments at 35; ACA Comments at 12-14.

[630] Consumers Union Comments at 35.

[631] RCN Comments at 6 (citing *In re Policies for the Direct Broadcast Satellite Service*, IB Docket No. 98-21, Notice of Proposed Rulemaking ("*DBS NPRM*"), 13 FCC Rcd 6907, 6939 ¶¶ 56, 58 (1998)).

[632] Consumers Union Comments at 157; ACA Comments at 13-14.

ban at that time.[633] The conferees stated that they expected "the Commission to exercise its existing authority to adopt such limitations should it be determined that such limitations would serve the public interest."[634] The Commission subsequently decided that "its authority to approve transfers of control of licenses would enable it to address any competitive concerns raised by subsequent proposals by cable affiliated entities to acquire DBS spectrum."[635] In 1998, the Commission initiated a rulemaking seeking comment whether the Commission should adopt DBS ownership rules, including DBS cross-ownership rules with cable operators.[636] This rulemaking is still pending. In the meantime, we examine "specific competition and public interest concerns related to DBS ownership on a case-by-case basis."[637]

250. In this case, we find that the merged entity's indirect interest in DirecTV does not rise to the level of ownership that ordinarily triggers scrutiny by the Commission. Therefore, we need not examine whether the common ownership of both a DBS and a cable MVPD provider raises public interest concerns. We agree with the Applicants that AOL does not have an interest in DirecTV's parent, GM, that confers on AOL the ability to influence or control DirecTV such that AOL should be deemed the "owner" of DirecTV for the purposes of a DBS/cable competitive analysis.[638] As noted above, the Commission does not have ownership or attribution rules that apply to satellite spectrum ownership. Under our various other ownership rules, the Commission has generally found that a voting equity interest of 5% or more is required to confer influence or control on the interest holder in order to deem the interest holder an "owner" for purposes of the applicable rule.[639] As discussed above, AOL holds nonvoting equity in DirecTV's parent that, if converted, would constitute less than 2% of the voting equity of GM. Thus, we would not treat AOL as an owner for purposes of our other ownership rules, and the commenters have made no credible arguments why AOL's less than 2% voting equity interest should be treated differently under these circumstances. Because the record does not demonstrate that AOL has the ability to influence or control DirecTV, we need not examine further whether this merger poses potential harms to competition between DBS and cable.

251. Nevertheless, if the merged firm increases its ownership interest in Hughes and/or GM, we reserve discretion to decide whether the increased ownership interest poses a threat to DBS/cable competition. Accordingly, as a condition of this merger, we will require the Applicants to notify the Commission in writing of any transactions that increase the Applicants ownership interest in Hughes and/or GM, within 30 days of the transaction.[640]

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[633] H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992).

[634] H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992).

[635] *See DBS NPRM*, 13 FCC Rcd at 6938 ¶ 56.

[636] *See id.* at 6939 ¶ 58 n.132.

[637] *See id.* at 6939 ¶ 58.

[638] *See* Applicants' March 21 Supplemental Information at 12-14.

[639] *See, e.g.*, 47 C.F.R. § 76.501 n.2(a) (cable/broadcast station cross-ownership rule); 47 C.F.R. 76.503 n.2 (cable horizontal ownership rule); 47 C.F.R. § 73.3555 n.2(a) (broadcast multiple ownership rules); 47 C.F.R. § 21.912 n.1(a) (cable/MMDS cross-ownership rule).

[640] *Cf. In re AMRC Application for Authority to Construct, Launch, and Operate*, File Nos. 72-SAT-AMEND-97, 10/11-DSS-P-9312/15/92, 26/27-DSS-LA-931/15/93, 83/84-SAT-AMEND-953/10/95, 72-SAT-AMEND-97, Order and Authorization, 13 FCC Rcd 8829, 8842 ¶ 27 (1997) (requiring WorldSpace to seek Commission approval prior to exercising options to purchase additional shares of ARMC); *In re KaStar*, File Nos. SAT-T/C-19990629-00071, SAT-T/C-19990629-00072, Memorandum Opinion and Order, 15 FCC Rcd 1615, 1620, 1622 ¶¶ 13, 21 (1999) (continued...)

2. Program Access Issues

252. Commenters allege that the merger would harm unaffiliated MVPDs, and assert that the Commission should remedy this potential harm by expanding the scope and application of its program access rules to cover terrestrially delivered video programming and contracts between cable operators and unaffiliated programmers.[641] These rules are designed to prevent vertically integrated programming suppliers from favoring affiliated cable operators over unaffiliated MVPDs in the sale of satellite-delivered programming. The record does not support a finding that the merger would enable or increase the likelihood of harm to competing MVPDs with respect to the sale of video programming. Accordingly, we find it unnecessary to impose remedial conditions.

253. The program access rules apply to cable operators and programming vendors affiliated with cable operators that deliver video programming via satellite to a cable operator.[642] The Commission adopted these rules pursuant to Section 628 of the Communications Act,[643] through which Congress sought to minimize the incentive and ability of vertically integrated programming suppliers to favor affiliated cable operators over nonaffiliated cable operators or other MVPDs in the sale of satellite cable and satellite broadcast programming.[644] Among other restrictions, the rules prohibit any cable operator that has an attributable interest[645] in a satellite cable programming vendor from improperly influencing the decisions of the vendor with respect to the sale or delivery, including prices, terms, and conditions of sale or delivery, of satellite cable programming or satellite broadcast programming to any unaffiliated MVPD.[646] The rules also prohibit vertically integrated satellite programming distributors from discriminating in the prices or terms and conditions of sale of satellite-delivered programming to cable operators and other MVPDs.[647] Additionally, cable operators generally are prohibited from entering into exclusive distribution arrangements with affiliated programming vendors.[648]

254. RCN contends that Time Warner has "migrated" affiliated programming from satellite to terrestrial delivery so that it will not be required to give competing MVPDs access to this programming. RCN argues that AOL Time Warner's ability to shield terrestrially delivered affiliated programming, such as local news or sports programming, from the program access rules will substantially impair its ability,

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(requiring licensee to notify the Commission of transactions involving the sale of its shares by certain parties).

[641] 47 C.F.R. §§ 76.1000-76.1004. The terms "terrestrially delivered" and "satellite delivered" refer to the delivery of programming to a cable system headend.

[642] 47 C.F.R. §§ 76.1000-76.1004; *see also AT&T-MediaOne Order*, 15 FCC Rcd at 9852-55 ¶¶ 77-83.

[643] 47 U.S.C. § 548.

[644] 1992 Cable Act § 2(a)(5).

[645] The attribution of corporate interests for purposes of the program access rules is determined under sections 76.501 and 76.1000(b) of the Commission's rules. *See* 47 C.F.R. §§ 76.501 n.2., 76.1000(b).

[646] 47 C.F.R. § 76.1002(a).

[647] 47 C.F.R. § 76.1002(b). This restriction is subject to certain limited exceptions. *Id.*

[648] 47 C.F.R. § 76.1002(c). Relief may be granted pursuant to a Commission determination that specific exclusive arrangements are in the public interest. 47 C.F.R. § 76.1002(c)(4). In addition, exclusive arrangements entered into prior to June 1, 1990, are "grandfathered," or exempt from the exclusivity prohibition, provided they were not extended or renewed after October 5, 1992. 47 C.F.R. § 76.1002(e).

and that of other MVPDs, to compete.[649] SBC echoes these sentiments in its comments.[650] RCN also expresses concern about the Applicants' potential power as a purchaser of video programming, and further suggests that the combined entity's forays into interactive TV, and its ownership stake in DirecTV's parent Hughes, would exacerbate its market power, allowing it to exercise substantial power in the programming marketplace.[651] RCN contends that this power, in turn, might lead unaffiliated programmers to discriminate against RCN and other overbuilders by offering the Applicants exclusive contracts or preferential treatment.

255. To remedy these alleged problems, RCN first proposes a merger condition that would require the Applicants to provide programming to other MVPD competitors "without reference to its mode of delivery."[652] Similarly, SBC asks that the Commission condition the merger on AOL Time Warner's agreement to comply with the program access rules, "regardless of the technology used to distribute its content at the wholesale level."[653] Second, RCN requests that we require AOL Time Warner to comply with the program access rules "without the requirement of vertical integration."[654] Such a condition would prevent the Applicants from entering into exclusive arrangements with unaffiliated programmers. Digital Access, another cable overbuilder, seeks the same condition, based on its inability to obtain sports programming from the Midwest Sports Channel, which has an exclusive contract with Time Warner Cable in the Milwaukee, Wisconsin market.[655] AOL and Time Warner oppose these conditions, arguing both that the proposed conditions are inconsistent with existing statutory language, and that they are unrelated to the merger.[656]

256. There is no record evidence suggesting that the merger would either create or enhance the ability or incentive of AOL Time Warner to prevent competing MVPDs from gaining access to Time Warner's video programming through the migration of such programming from satellite to terrestrial delivery.[657] Thus we cannot conclude that competing MVPDs will suffer any harm in this context. Accordingly, we decline these commenters' invitation to apply the program access rules or equivalent restrictions to terrestrially delivered programming distributed by the merged company.[658] We also reject

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[649] RCN Comments at 13.

[650] SBC Comments at 38.

[651] RCN Comments at 12.

[652] *Id.* at 13.

[653] SBC Comments at 38.

[654] RCN Comments at 13.

[655] Letter from Samuel W. Morris, Jr., Senior Vice President – General Counsel, Digital Access, Inc. to Magalie Roman Salas, Secretary, FCC, dated October 17, 2000 at 1-2, transmitted by letter from William Fishman, Swidler Berlin Shereff Friedman, to Magalie Roman Salas, Secretary, FCC, dated Oct. 17, 2000.

[656] Applicants' Reply Comments at 49.

[657] In Section IV.A., *supra*, (High-Speed Internet Access Services) we address AOL Time Warner's potential ability and incentive to use its control of popular video programming networks to obtain favorable rights of access by AOL on the facilities of non-AOL Time Warner cable systems.

[658] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding the Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("*Program Access Order*"), 12 FCC Rcd 22840, 22861 (1997). As we stated in the *Program Access Order*, there are no indications at this time that terrestrial delivery of programming formerly delivered by (continued...)

RCN's proposal that we apply our program access rules to AOL Time Warner's dealings with unaffiliated programmers. Again, there is no evidence suggesting that the merged firm's incentive or ability to enter into exclusive contracts with unaffiliated video programmers would be greater than Time Warner's current ability to do so. While we are cognizant of the harm that exclusive contracts can cause overbuilders in local markets, we cannot conclude that the merger will harm competing MVPDs seeking to purchase non-Time Warner video programming.

F. COORDINATION WITH AT&T

257. In this section we consider whether the merger would increase the likelihood of coordinated action by AOL Time Warner and AT&T that would harm the public interest. We conclude that it would. We have already found that the merger would enable AOL Time Warner to obtain preferential access on both Time Warner and non-AOL Time Warner cable systems to provide AOL's residential high-speed Internet access services.[659] We find that among all non-AOL Time Warner cable operators, AT&T, the nation's largest cable operator, would be particularly likely to afford preferential access rights to AOL as a result of the merger. Because AT&T is the nation's largest cable operator, such preferential treatment for AOL would exacerbate the harms to competition for residential Internet access service that would result from the merger.

258. Although commenters request that in this proceeding we order AT&T's structural separation from Time Warner, we need not address this issue because AT&T has already elected to divest its interest in TWE.[660] Notwithstanding AT&T's withdrawal from TWE, there still exists the possibility of anticompetitive coordination between AT&T and AOL Time Warner. We conclude that the adverse effects of potential coordination between AT&T and AOL Time Warner as a result of the merger would be sufficiently mitigated by a condition that prohibits AOL Time Warner from entering into exclusive contracts with AT&T for access by AOL Time Warner's affiliated ISPs and that further prohibits AOL Time Warner from interfering with AT&T's ability to offer other ISPs any rates, terms, or conditions of service that AT&T and an ISP find mutually agreeable.

1. Background

259. AT&T holds attributable ownership interests in cable systems, including its interest in TWE, that serve approximately 51.3% of the nation's cable subscribers.[661] Through Liberty Media Group

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satellite is a significant competitive problem. See also *DirecTV, Inc. v. Comcast Corp., Application for Review of Orders of the Cable Services Bureau Denying Program Access Complaints*, Memorandum Opinion and Order, CSR 5244-P (rel. Nov. 20, 2000) ¶ 12.

[659] *See* Section IV.A., *supra*. (High-Speed Internet Access Services)

[660] *See* SBC Comments at 30-32; BellSouth Reply Comments at 18-19; Consumers Union Comments at 2-7; 157.

[661] These numbers are calculated according to our attribution rules. *See* 47 C.F.R. § 76.503 notes. *AT&T-MediaOne Order*, 15 FCC Rcd at 9819 ¶ 3. Absent TWE, AT&T serves 34.6% of the nation's cable subscribers and 26.5% of the nation's MVPD subscribers. 15 FCC Rcd at 9836-37 ¶ 42. TWE serves 18.9% of the nation's cables subscribers. To avoid double counting, this TWE subscriber figure does not include 1,416,000 subscribers that AT&T and TWE jointly serve through a joint partnership agreement. *See also AT&T-MediaOne Order* 15 FCC Rcd at 9823 ¶ 14 (stating that AT&T has 18,959,000 subscribers prior to its merger with MediaOne); *id.* at 15 FCC Rcd at 9824 ¶ 17 (stating that total U.S. subscribers equal 67.1 million; *id.* at 9829-30 ¶ 26 note 95 (stating that MediaOne had 5,000,000 subscribers prior to its merger with AT&T, and that Time Warner subscribers attributable to MediaOne include both TWE and Time Warner Inc. subscribers); *id.* at 9833 ¶ 32 (stating that AT&T will sell a
(continued...)

("Liberty Media") and other holdings, AT&T also is a major supplier of video programming.[662] In addition, AT&T controls Excite@Home, the nation's largest broadband ISP.[663] Excite@Home serves approximately 1.15 million subscribers over both AT&T cable systems and over cable systems owned by other cable companies.[664] AT&T has an exclusive contract with Excite@Home that expires June 30, 2002. Once the contract expires, AT&T can choose whether to afford other ISPs access to its cable plant in competition with Excite@Home, as well as the terms and conditions of such access.[665] On October 25, 2000, AT&T announced that it would restructure each of its major units into four separate, publicly-held companies traded as a common stock or tracking stock.[666] AT&T Broadband, the unit responsible for broadband services, including MVPD, pay TV and high-speed Internet access services, will assume ownership of Excite@Home.[667] AT&T also offers local telephone service over its cable systems, and has sought to provide local telephone service over other cable systems. As a result of its merger with

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certain number of subscribers, later determined to be 750,000, to Comcast upon consummation of its merger with MediaOne). The cable horizontal ownership rule limits a cable operator to 30% of the nation's MVPD subscribers. *See* 47 C.F.R. § 76.503.

[662] Liberty Media also holds an ownership interest in Time Warner Inc. that amounts to approximately 9% of the non-voting equity and less than one percent of the voting equity in Time Warner Inc. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9825 ¶ 19.

[663] AT&T holds a 74% voting interest in Excite@Home. Other entities holding an ownership interest in Excite@Home include Comcast Corp., Cox Communications, Inc., Cablevision Systems Corp., and Shaw Cablesystems Ltd. *AT&T-MediaOne Order*, 15 FCC Rcd at 9826 ¶ 21 n.64.

[664] *See* Patricia Fusco, *Top 12 ISPs by Subscriber*, INTERNETNEWS.COM, at http://www.isp-planet.com/research/isp_071000.html (no date). Both Road Runner and Excite@Home are, by contract, the exclusive ISPs of the cable operators they serve, until December, 2001, and June, 2002, respectively. *See AT&T-MediaOne*, 15 FCC Rcd at 9869 ¶ 120. Time Warner has announced, however, that its exclusivity with Road Runner will end in April 2001. *See* Time Warner Inc., *Time Warner to Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000.

[665] For example, currently AT&T and its cable affiliates have an arrangement to feature the Excite@Home ISP on their cable Internet service exclusively until June 30, 2002, and on a preferred basis until 2008. *See* SBC Comments at 9; *AT&T-MediaOne Order*, 15 FCC Rcd at 9869 ¶ 120; *see also* AT&T Corp., *Eight ISPs Join AT&T Broadband Choice Trial* (press release), Nov. 1, 2000 (stating that AT&T has begun offering on a trial basis to a limited number of customers ISP choice for high-speed, always-on cable Internet service over a hybrid fiber-coaxial network); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp., CS Docket No. 99-251*, Letter from James W. Cicconi, General Counsel, AT&T, to William Kennard, Chairman, FCC, dated Dec. 6, 1999 (in which AT&T committed to provide unaffiliated ISPs access to its cable systems following the expiration of its exclusive arrangement with Excite@Home in 2002, and affirmed its commitment to "openness"), transmitted by letter from Joan Marsh, Director, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Dec. 7, 1999.

[666] The four units will include AT&T Broadband, which operates AT&T's cable systems; AT&T Business, which provides business communications and networking services; AT&T Consumer, which provides pre-paid calling cards, "stand alone residential long distance," and residential dial-up Internet access service; and AT&T Wireless. Each of the four new companies will continue to bundle each other's services through inter-company agreements. AT&T Corp., *AT&T To Create Family of Four New Companies* (press release), Oct. 25, 2000.

[667] AT&T plans to conduct an initial public offering for stock that will track the performance of the Broadband unit during the summer of 2001. AT&T Corp., *AT&T To Create Family of Four New Companies* (press release), Oct. 25, 2000.

MediaOne, AT&T acquired a 34.67% direct interest in Road Runner, the nation's second largest broadband ISP, and a 25.5% interest in TWE.[668] Time Warner owns the remaining 74.49% of TWE.

260. TWE owns or operates Time Warner's cable systems, which serve approximately 12.7 million, or 18.9% of the nation's cable subscribers.[669] TWE is also a major producer of video programming and controls Road Runner.[670] Time Warner controls the day-to-day management of the TWE cable systems and the other TWE assets.[671] AT&T currently has no right to participate in day-to-day management of TWE.[672] According to AT&T, however, its ownership interest in TWE does confer rights to vote on specified "Participant Matters," and gives it veto power over, among other things, any merger involving TWE, the sale or transfer of more than ten percent of TWE's assets, the expansion of TWE into new lines of business and the transfer or sale of TWE assets.[673] Time Warner enjoys the same voting rights.

261. As a result of its acquisition of MediaOne and MediaOne's interest in Road Runner, AT&T presently is subject to a DOJ consent decree. In the complaint accompanying the Consent Decree,

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[668] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9831 ¶ 28.

[669] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9836-37 ¶ 42 n.145.

[670] AT&T therefore has both a direct and, through TWE, an indirect interest in Road Runner and in the production of video content.

[671] *See Applications for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Docket No. 99-251, Letter from Betsy J. Brady, Esq., Vice President Federal Government Affairs, AT&T to To-Quyen Truong, Associate Chief, Cable Services Bureau, dated Nov. 24, 1999, at 2, 9-15, *see also* Letter from Peter D. Ross, Counsel for America Online, Inc., and Arthur H. Harding, Counsel for Time Warner Inc., to Deborah Lathen, Chief Cable Services Bureau, FCC, dated Oct. 5, 2000 ("Ross-Harding Oct. 5 Letter") at 3.

[672] MediaOne's right to participate in the day-to-day management of TWE terminated in 1999 as a result of a non-compete provision in the TWE limited partnership agreement that prohibited MediaOne from competing in any lines of business with TWE. MediaOne had the right to unilaterally terminate the non-compete clause. Upon termination by MediaOne, Time Warner had the right to terminate entirely MediaOne's right to participate on the TWE cable management committee. *See Applications for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Docket No. 99-251, Letter from Betsy J. Brady, Esq., Vice President Federal Government Affairs, AT&T to To-Quyen Truong, Associate Chief, Cable Services Bureau, dated Nov. 24, 1999 at 2-3 n. 7; *see also* Letter from Betsy J. Brady, Vice President, Federal Government Affairs, AT&T, to Magalie Roman Salas, Secretary, dated FCC, Nov. 28, 2000 (AT&T Nov. 28 Ex Parte) at 1.

[673] According to AT&T, these rights include: "veto rights over any merger involving Time Warner Entertainment; the sale or transfer of assets constituting more than 10% of Time Warner Entertainment Assets; the expansion of Time Warner Entertainment into new lines of business; the specified issuance of additional partnership interest; the indemnification of any partner or affiliate for liability in excess of $500,000; incurrance of debt for money borrowed above a defined ratio; the admission of a new general partner; certain acquisitions above the greater of $750,000 or 10% of Time Warner Entertainment's consolidated revenues for its most recent fiscal year; the dissolution of Time Warner Entertainment; the voluntary bankruptcy of Time Warner Entertainment; the amendment or modification of the Time Warner partnership agreement; and the transfer or sale of certain major interests in Time Warner or any sub-partnership thereof. *See Applications for Consent to the Transfer of Control of Licenses from MediaOne Group, Inc. to AT&T Corp.*, CS Docket No. 99-251, Letter from Betsy J. Brady, Esq., VP Federal Government Affairs, AT&T to To-Quyen Truong, Associate Chief, Cable Services Bureau, dated Nov. 24, 1999, at 10; *see also AT&T-MediaOne Order*, 15 FCC Rcd at 9830 ¶ 26 n.93. Time Warner does not agree with AT&T's characterization of AT&T's rights in TWE. *See* Letter from Catherine R. Nolan, VP, Law and Public Policy, to Kathryn C. Brown, Chief of Staff, Office of Chairman, FCC, dated Oct. 13, 2000 (Time Warner Oct. 13 Ex Parte) at 1 transmitted by Letter from Peter D. Ross, Counsel for Applicants, to Magalie Roman Salas, Secretary, FCC, dated Nov. 9, 2000.

DOJ alleged that the substantial ownership interest AT&T was acquiring in Road Runner would facilitate collusion and coordination between Excite@Home and Road Runner.[674] The DOJ Consent Decree therefore requires AT&T to divest its interest in Road Runner on or before December 31, 2001, restricts AT&T's role in the management and governance of Road Runner prior to divestiture, and prevents AT&T from entering into certain agreements with Time Warner (and AOL Time Warner after the merger) with regard to Residential Broadband Service without the approval of DOJ.[675]

262. On December 18, 2000, AT&T and Time Warner announced that they would dissolve the Road Runner joint venture as required by the DOJ Consent Decree, turning over operations of Road Runner to Time Warner (and America Online after the merger).[676] The restructuring of Road Runner also would end Road Runner exclusivity on Time Warner's cable platform, permitting further opportunity for consumer choice of ISPs on Time Warner's cable platform.[677]

263. AT&T is also subject to a "video condition," imposed as a condition of the Commission's approval of AT&T's merger with MediaOne, that AT&T either: (i) divest its ownership interest in TWE;

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[674] DOJ Consent Decree Section IV ¶¶ 30-34.

[675] *U.S. v. AT&T Corp. and MediaOne Group, Inc.*, Final Judgment, 2000 WL 782849. The DOJ Consent Decree reads, in part:

> Prior to the earlier of December 31, 2003 or two years after AT&T's and MediaOne's divestiture of [Road Runner], unless they obtain prior consent of [DOJ], AT&T, MediaOne, and their Affiliates shall not (1) enter into any contractual or other arrangement with Time Warner to jointly offer or provide any wholesale or retail Residential Broadband Service; (2) enter into any contractual or other arrangement with Time Warner that has the purpose or effect of preventing AT&T, MediaOne, their Affiliates or Time Warner from offering or of providing a wholesale or retail Residential Broadband Service in any geographic region or to any group of customers; or (3) enter into any contractual or other arrangement with Time Warner that has the purpose or effect of preventing (a) services, capabilities, or features in any wholesale or retail Cable Modem Service offered by AT&T, MediaOne, their Affiliates, or Time Warner; or (b) AT&T, MediaOne or their Affiliates from granting preferential treatment in any wholesale content, services, capabilities, or features offered by any person other than Time Warner, or Time Warner from granting preferential treatment in any wholesale or retail Cable Modem Service offered by Time Warner to content, services, capabilities, or features offered by any person other than AT&T, MediaOne or their Affiliates . . . (B) [DOJ] shall consent to a proposed contractual or other arrangement if it determines in its sole discretion that such arrangement will not substantially lessen competition in any market.

DOJ Consent Decree Section V(A), (B).

The Consent Decree further defines "Residential Broadband Service" to mean "...any service offered to residential customers in the United States of America that permits users to transmit and receive information using Internet protocols at speeds which may exceed 128 kilobits per second. The Consent Decree also defines "Time Warner" to include Time Warner, TWE, Road Runner, their successors and assigns, and their parents, divisions, groups, majority-owned subsidiaries, and any entity that has a merger agreement with Time Warner and that would be included in this definition when the merger is consummated. DOJ Consent Decree Section II(F), (H).

[676] AT&T Corp., *Road Runner Joint Venture to be Dissolved* (press release), Dec. 18, 2000; Time Warner Inc., *Time Warner to Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000. At the time of the announced restructuring of Road Runner, Microsoft Corporation and Compaq Computer Corporation owned a combined 20 percent interest in Road Runner, while Time Warner, AT&T Broadband, and Advance/Newhouse together owned an 80 percent fully diluted interest. Under the restructuring plan, the interests of Microsoft and Compaq would be redeemed and Road Runner would distribute substantially all of its assets to Time Warner and its affiliates, and to AT&T Broadband.

[677] *Id.*

(ii) divest or reduce its interest in Liberty Media and other video programming companies such that AT&T terminates its involvement in TWE's video programming activities pursuant to the limited partnership exemption[678] and the officers/directors attribution waiver provisions of the cable ownership attribution rules; or (iii) divest its ownership interest in certain non-TWE cable systems. AT&T was required to make an unambiguous election of one of the three options by December 15, 2000, six months after the consummation of the AT&T-MediaOne merger, and must comply with this election by May 19, 2001. We also stated that until AT&T complies with the divestiture condition, its participation in TWE is further limited by certain other Commission-imposed restrictions.[679]

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[678] The Commission's cable ownership attribution rules provide that all partnership interests are attributable because, unlike a corporate shareholder, a limited partner may influence or control the operations of the partnership even if the percentage equity interest is small. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9837 ¶ 43; *see also In re Cable Reform Act Provisions of the Telecommunications Act of 1996: Review of the Commission's Cable Attribution* Rules CS Docket Nos. 98-82, 96-85, Report and Order ("*Attribution Order*"), 14 FCC Rcd 19014, 19039 ¶ 61 (1999). However, partnership interests may be rendered nonattributable, under the insulated limited partnership exemption ("ILP"), when a partner that "is not materially involved, directly or indirectly, in the management or operation of the video-programming related activities of the partnership and the relevant entity so certifies." *See Attribution Order*, 14 FCC Rcd at 19040 ¶ 64; 47 C.F.R. § 76.503 n.2(b)(1). In order to satisfy this standard, the limited partner may not engage in the following seven activities (the "ILP test"):

(1) The limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video programming enterprises of the company;

(2) the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video programming enterprises;

(3) the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video programming business;

(4) the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions;

(5) the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter;

(6) the limited partner may not perform any services for the partnership materially relating to its video programming activities, except that a limited partner may make loans to or act as a surety for the business; and

(7) the limited partner may not become actively involved in the management or operation of the video programming businesses of the partnership. *Attribution Order*, 14 FCC Rcd at 19040-41 ¶ 64.

See also 47 C.F.R. § 76.503 n. 2(b)(2). To utilize the ILP exemption, the limited partner must file with the Commission a certification, with supporting facts, stating that it is not involved in these seven activities. ("[T]he certification must be accompanied by facts, *e.g.*, in the form of documents, affidavits or declarations, that demonstrate that these insulation criteria are met.") *Attribution Order*, 14 FCC Rcd at 19040-41, ¶ 64.

[679] We further required that AT&T abide by several interim conditions and their enforcement mechanisms until such time as AT&T has taken the required compliance action. The interim conditions provide that:

(1) No officer or director of AT&T shall also be an officer or director of TWE. AT&T may appoint an employee (who is not an officer or director of AT&T) to the TWE Board of Directors, provided that such employee is not involved in the Video Programming activities of AT&T.

(2) No officer, director, or employee of AT&T shall, directly or indirectly, influence or attempt to influence, or otherwise participate in, the management or operation of the Video Programming activities of TWE. In particular, no member of the TWE Board of Directors appointed by AT&T shall be involved in the following

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264. Pursuant to the *AT&T-MediaOne Order*, on December 15, 2000, AT&T notified the Commission that it would divest its interest in Liberty Media if it obtains a favorable tax ruling,[680] and that otherwise it would divest its interest in TWE.[681] On December 18, 2000, the Cable Services Bureau requested clarification of AT&T's December 15 letter which, by making the Liberty Media divestiture contingent upon a favorable tax ruling, did "not appear to make a single election" as required by the *AT&T-MediaOne Order*.[682] On December 21, 2000, after considering AT&T's response to the Bureau's request for clarification, the Commission issued an order ruling that AT&T had not complied with the

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matters:

a) the decisions of TWE regarding which Video Programming services are purchased for or carried on TWE's cable systems;

b) negotiation of the prices paid by TWE for Video Programming carried on TWE's cable systems;

c) setting the schedule for rollout of Video Programming by TWE's cable systems;

d) marketing by TWE of Video Programming carried on TWE's cable systems;

e) setting the budget for the Video Programming operations of TWE's cable systems (except that AT&T may be involved in setting the overall TWE budget for Video Programming operations provided that AT&T's access to TWE budget information does not include information concerning individual budget components of TWE's Video Programming operations, *e.g.*, personnel, overhead, marketing, and program purchasing);

f) selecting the electronic programming guide used by TWE's cable systems;

g) the hiring, firing, or supervising of TWE employees directly involved in the Video Programming activities of TWE's cable systems; or

h) assessing the performance of any Video Programming service carried by TWE's cable systems.

(3) AT&T may not receive information from TWE regarding the price, terms, and conditions which TWE negotiates for the carriage of Video Programming on the TWE cable systems, nor provide information to TWE regarding the price, terms, and conditions which AT&T negotiates for the carriage of Video Programming on the AT&T cable systems. AT&T may not obtain from any Video Programming vendor a volume discount or other favorable terms and conditions as a result of TWE's purchase of Video Programming for, or carriage on, TWE's cable systems.

AT&T-MediaOne Order, 15 FCC Rcd at 9899, Appendix B ¶¶ 3-5.

[680] *See In the Matter of 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, Letter from James W. Cicconi, General Counsel, AT&T, to Deborah Lathen, Chief, Cable Services Bureau, dated Dec. 15, 2000. *See also id.* Letter from Deborah A. Lathen, Chief, Cable Services Bureau, FCC, to James W. Cicconi, General Counsel, AT&T, dated Dec. 18, 2000.

[681] *See In the Matter of 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, Letter from James W. Cicconi, General Counsel, AT&T, to Deborah Lathen, Chief, Cable Services Bureau, dated Dec. 15, 2000 ("[i]f, however, AT&T is unable for any reason to achieve insulation of its TWE interests by May, 19, 2001 . . . AT&T hereby certifies that it will, by such date, either divest its ownership interest in TWE or place this interest in an irrevocable trust for purposes of sale."). If AT&T divests Liberty Media pursuant to its December 15 letter, it will also divest other programming interests. *Id.*

[682] *See In the Matter of 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, Letter from Deborah A. Lathen, Chief, Cable Services Bureau, FCC, to James W. Cicconi, General Counsel, AT&T, dated Dec. 18, 2000.

provisions of the *AT&T-MediaOne Order* that required AT&T to "unambiguously elect a single compliance option."[683] In the *December 21 Order*, we ruled that it was "AT&T's intent to elect . . . the divestiture of TWE . . ." and we determined to "treat AT&T's election as choosing that option only."[684]

2. Discussion

265. Several commenters argue that the merger will create what one describes as a "sprawling conglomerate of interests"[685] between AT&T and AOL Time Warner that would confer upon the companies the ability and incentive to use their combined dominance in the Internet access market, and other unspecified product markets, to discriminate against unaffiliated companies.[686] Commenters also allege that AOL Time Warner would be able to leverage its power in video programming, broadband content and portal services to solidify this dominance.[687] They argue that AT&T's and AOL Time Warner's ownership interest in TWE will give AT&T and AOL Time Warner the incentive to refrain from competing with each other in areas of MVPD, Internet and IM services.[688] Consumers Union, for example, argues that "AOL Time Warner would clearly have the incentive to use its leverage to induce AT&T to drop its efforts to push for compatibility/interoperability/access to AOL's IM customers."[689] Similarly, Consumers Union believes "AOL could use TWE leverage to foreclose rival portals like

[683] *In the Matter of 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, Order, FCC No. 00-447 (rel. Dec. 21, 2000) ("*December 21 Order*").

[684] *December 21 Order* at ¶¶ 4-5. We further stated that AT&T would be permitted until January 15, 2001 to seek a modification of the *December 21 Order*. The *December 21 Order* states:

> "IT IS FURTHER ORDERED . . . should AT&T seek to have the Commission consider a modification of this *Order* to allow it to elect Option (b) [the divestiture of Liberty Media Group and AT&T's other video programming interests], it must submit a written request by January 15, 2001 with an appropriate showing as to why such a modification would serve the public interest."

December 21 Order at ¶ 7.

[685] SBC Comments at 1; *see also* Consumers Union Comments at 4.

[686] Consumers Union broadly defines the competitive problem with respect to AT&T as involving barriers to entry, foreclosure of inputs and monopsony power. Consumers Union Comments at 37-49. SBC asserts that "[c]ollectively, AOL, Time Warner, and AT&T will be able to leverage their dominant position in the Internet access market to increase their power in the market for broadband portal and content services" while simultaneously leveraging their "combined dominance in the broadband portal and content markets to increase their market share for high-speed Internet access." SBC Comments at 7, 18-24; *see also* Disney Reply Comments at 5 ("Assuming approval of the [AT&T-MediaOne merger], Time Warner and AT&T/TCI/MediaOne would operate as an interconnected consortium passing 83 million U.S. homes—80% of all U.S. households . . .Taken together, the cross interests of AT&T and Time Warner are enormous in the broadband services market, including control of 69% of the high-speed residential Internet access market.").

[687] Commenters also believe AOL Time Warner could use its power as owner of Road Runner to discriminate against unaffiliated content providers, and could use its power as a large content provider to discriminate against competing broadband ISPs. *See* SBC Comments at 27; Letter from Andrew Jay Schwartzman, Counsel for Consumers Union, et. al., to Deborah Lathen, Chief, Cable Services Bureau, FCC, dated Nov. 14, 2000 ("Schwartzman Nov. 14 Letter") at 2-4. Even AT&T acknowledges that Time Warner could use its dominance over TWE to impede competition between AOL and AT&T. *See* AT&T Nov. 28 Ex Parte at 2-4 (summarizing Consumers Union arguments).

[688] *See* SBC Comments at 27-30; Schwartzman Nov. 14 Letter at 3.

[689] Schwartzman Nov. 14 Letter at 3.

Yahoo," encouraging AT&T to favor AOL as a portal over rivals, and adds that AOL would encourage AT&T to give preferential treatment to AOL Time Warner music distribution services.[690] Next, Consumers Union contends that "AOL could use the TWE leverage to impede 'head-to-head' competition between AT&T and AOL in, for example, the provision of interactive television offerings by agreeing to common platforms that further their collective interests.[691] To remedy the alleged harms, these commenters ask that we require AOL Time Warner to not discriminate against unaffiliated Internet access providers, to provide open access to its cable systems for unaffiliated ISPs, to sever its cross-ownership ties with AT&T through TWE and Time Warner Inc., and to sever all contractual ties and joint ventures with AT&T. [692]

266. We find that the merger increases the likelihood of coordinated action by AOL Time Warner and AT&T to discriminate in favor of AOL's ISP service. The proposed merger will increase AOL Time Warner's incentive and ability to obtain agreements with AT&T to favor AOL Time Warner's ISPs to the detriment of AOL Time Warner's competitors.[693] AT&T could give preferential treatment to AOL's ISP by refusing carriage to competing ISPs, by providing AOL better price or non-price terms of service if AT&T does carry competing ISPs, or by limiting the functionalities or features available to competing ISPs.[694] For example, AT&T could, as Consumers Union contends, circumscribe the availability of capacity or connection points for non-favored ISPs.[695]

267. Accordingly, because we conclude below that the benefits of the merger do not outweigh its harms,[696] we find it necessary to impose remedial conditions that will prevent the potential harm

[690] *Id.* at 2-3.

[691] *Id.* at 3.

[692] *See* SBC Comments at 32; BellSouth Reply Comments at 19-20. BellSouth argues that "AT&T cannot, for example, be permitted to provide AOL access to AT&T customers on a preferential basis for ISP services in exchange for AT&T access, for telephony purposes, to the cable customers of Time Warner." BellSouth Reply Comments. at 20. *See also* Consumers Union Comments at 157; Schwartzman Nov. 14 Letter at 2-3. We note that in *AT&T-MediaOne*, we rejected Consumers Union's motion to consolidate that proceeding with this proceeding. Consumers Union filed its motion in the dockets of both proceedings. We once again reject the request for the reasons enumerated in *AT&T-MediaOne*. *See ATT-MediaOne Order*, 15 FCC Rcd at 9892-93 ¶ 179.

[693] We note that even AOL acknowledges that prior to the proposed merger, AOL was unable to strike an agreement with any cable operator. *See* Applicants Second Response at 13.

[694] *See* Disney Reply Comments at 9; *see also* Letter from the Senator Mike DeWine, Chairman, Subcommittee on Antitrust, Business Rights, and Competition, and Senator Herb Kohl, Ranking Member, Subcommittee on Antitrust Business Rights and Competition to William Kennard, Chairman, FCC, and Robert Pitofsky, Chairman, Federal Trade Commission, dated May10, 1999 (citing a hypothetical example of possible discrimination against unaffiliated content providers: "Using this technology, it appears that it would be possible, for example, for the combined AOL Time Warner to slow down traffic to the [unaffiliated] ESPN web site while speeding it up to its own competing CNN/Sports Illustrated site."); *see also* SBC Comments at 31-32 (contending that risks of anticompetitive coordination also stem from contracts and "sweetheart deals").

[695] Consumers Union points out that "[e]fforts to impose or obtain exclusive arrangements have become ever-present controversies in the [cable industry], including efforts to prevent competing technologies from obtaining programming, as well as to prevent competition from developing within the cable industry." Consumers Union Comments at 40. We believe that Consumers Union intends to suggest that similar preferential or exclusive arrangements may be implemented with respect to ISP services over cable platforms. *See* Schwartzman Nov. 14 Letter at 2-4.

[696] *See* Section V, *infra*. (Analysis of Potential Public Interest Benefits)

arising from possible post-merger coordination between AT&T and AOL Time Warner. This conduct remedy, in combination with our conditions prohibiting AOL Time Warner from discriminating against unaffiliated ISPs on its own cable systems, as well as the conditions we imposed in our *AT&T-MediaOne Order*, conditions imposed by DOJ in its AT&T-MediaOne Consent Decree, and existing antitrust laws, will prevent any public interest harms that might arise from coordination between AOL Time Warner and AT&T as a result of the merger.

268. We find that other alleged harms that might arise from the possibility of coordinated action between AT&T and AOL Time Warner, such as coordination in MVPD and video programming services and coordination between Excite@Home and Road Runner,[697] existed before the proposed merger, and there is insufficient evidence that the merger would increase the likelihood or magnitude of those harms. Moreover, those harms have already been addressed by the Commission and DOJ in their respective reviews of the AT&T-MediaOne merger.[698] Other harms, such as potential agreements not to compete in IM or ITV services, would be addressed by existing antitrust laws.[699] Thus, we do not believe any additional remedies are warranted.

269. We find that in three respects the merger will increase the likelihood of discrimination by AT&T in favor of AOL.[700] Although we agree with the Applicants that the merger of AOL and Time Warner creates no new corporate link between AT&T and Time Warner,[701] we nevertheless conclude that AT&T's existing ownership interests in TWE, and its rights afforded over "Participant Matters," such as any merger involving TWE, could be used as leverage to gain favorable ISP access.[702] For example, in exchange for voting with AT&T on a particular Participant Matter, AOL Time Warner could require AT&T to afford AOL preferential rights of access to AT&T's cable systems. In addition, as AT&T points out, because AOL Time Warner would retain veto rights over important TWE partnership decisions, AOL Time Warner could wield strategic influence over AT&T and use this power if AT&T

[697] *See* SBC Comments at 22-29.

[698] *See* Section IV.A., *supra*. (High-Speed Internet Access Services)

[699] *See* para. 276, *infra*.

[700] We are not persuaded by AOL Time Warner's argument that no conditions are required here because "the FCC found no cause for concern over 'preferential agreements' in *AT&T-MediaOne*." *See* Letter from Peter D. Ross, Counsel to America Online, to Magalie Roman Salas, Secretary, FCC, dated Sept. 19, 2000 ("Applicants' Sept. 19 Letter") at 3; Ross-Harding Oct. 5 Letter at 4-8, 12. In *AT&T-MediaOne*, we were not presented with facts that would lead to a concern about preferential treatment of AOL by AT&T. Nothing in the AT&T-MediaOne merger increased the likelihood of such a result. For the reasons explained above, this merger does increase the likelihood of preferential treatment of AOL by AT&T. Moreover, we expressly declined to consider in *AT&T-MediaOne* the facts of the instant merger, and as a consequence we denied a motion to consolidate the two proceedings. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9892-93 ¶ 179.

[701] *See* Ross-Harding Oct. 5 Letter (". . .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.").

[702] *See, e.g.*, SBC Comments at 31-32 (contending that risks of anticompetitive coordination also stem from contracts and "sweetheart deals"); BellSouth Comments at 20. However, we disagree with commenters' apparent assertions that it is the mere existence of AT&T's cross ownership interest in TWE that results in merger-specific competitive harms. These cross ownership interests exist absent the merger. However, we do conclude that these ownership interests would serve to facilitate any anticompetitive incentives brought on as a result of the merger. *See* Consumers Union Comments at 4; *see also* AT&T Nov. 28 Ex Parte at 1-2.

deviated from any tacit or agreed upon preferential treatment for affiliated ISPs.[703] Thus, although we agree with the Applicants that these ownership interests existed pre-merger, we are persuaded that these corporate provisions could be used to enforce post-merger cooperation.[704] AT&T's election to divest TWE in compliance with the *AT&T-MediaOne Order* will, once it is effectuated, eliminate this possibility. We note, however, that AT&T is not required to divest TWE until May 19, 2001.[705] Our conduct remedy, which prohibits AOL Time Warner from seeking or accepting exclusive or preferential treatment from AT&T, will eliminate AOL Time Warner's incentive and ability to engage in any such conduct before AT&T divests TWE.[706]

270. Second, AOL Time Warner could delay or otherwise seek to frustrate AT&T's plans to sell its interest in TWE in connection with AT&T's election to divest TWE.[707] AT&T states that Time Warner is already effectively blocking AT&T's attempts to sell its TWE interest by refusing to provide AT&T with financial information AT&T deems necessary.[708] AOL Time Warner could use these or other tactics as leverage to gain preferential ISP access rights on AT&T's cable systems. Our conduct remedy will prevent this result.

271. Third, since at least February, 1999,[709] AT&T has sought access to Time Warner's cable systems to offer Time Warner's cable customers local telephone service, but has so far been unsuccessful in its negotiations with Time Warner.[710] As a result of the merger, however, we find that it is more likely

[703] AT&T Nov. 28 Ex Parte at 2-4 (citing Consumers Union Comments).

[704] Applicants' Sept. 19 Letter. AT&T's acquisition of MediaOne created AT&T's interest in TWE, and the Commission affirmatively ruled this ownership interest permissible in the AT&T-MediaOne merger, subject to AT&T's compliance with the conditions set forth in its order in that proceeding. *AT&T-MediaOne Order*, 15 FCC Rcd at 9866 ¶ 116.

[705] We also note that AT&T may, on or before January 15, 2001, seek a modification of the Commission's *December 21 Order* that determined it has elected to divest TWE. *December 21 Order* at ¶ 7. Any further argument with respect to the mandatory divestiture of AT&T's interest in TWE is being considered in the pending Petition for Reconsideration of *AT&T-MediaOne*.

[706] As noted in Section IV-A., *supra*, (High-Speed Internet Access Services) the FTC Consent Agreement forbids AOL Time Warner from entering agreements with other cable operators "that would interfere with the ability of any such [cable operator] to enter into agreements with any other ISP or provider of ITV services." FTC Consent Agreement Section III.E. While we believe the FTC provision would prohibit both exclusive and preferential agreements between AOL Time Warner and other cable operators, because of AT&T's particular incentive and ability to enter into such agreements with AOL Time Warner we find it necessary to impose a condition that explicitly addresses this potential public interest harm.

[707] *See* AT&T Nov. 28 Ex Parte.

[708] AT&T Nov. 28 Ex Parte at 2; Letter from James W. Cicconi, General Counsel and Executive Vice President, Law & Gov't. Affairs, AT&T, to Kathryn C. Brown, Chief of Staff, Office of the Chairman, FCC, dated Nov. 8, 2000 ("AT&T Nov. 8 Ex Parte") at 2, transmitted by Letter from Joan Marsh, Director, Federal Gov't Affairs, AT&T, to Magalie Roman Salas, Secretary, FCC, dated Nov. 8, 2000.

[709] *See AT&T-MediaOne Order*, 15 FCC Rcd at 9890 ¶ 173.

[710] *See* Confidential Appendix IV-F Note 1. As AOL Time Warner points out, "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 . . ." Ross-Harding Oct. 5 Letter at 6; *see also* Confidential Appendix IV.F Note 2. As discussed below, we believe an agreement that would facilitate the provision of cable telephony and competition with the incumbent local exchange carriers would be pro-competitive.

that AT&T will obtain a telephony deal from the merged firm if it chooses to pursue this strategy. The merger will increase the incentive for AOL Time Warner to negotiate with AT&T because AT&T holds the key to AOL's access to the facilities of the nation's largest cable operator.[711] AOL clearly desires access to AT&T's cable systems in order to provide ISP service.[712] In exchange for giving AT&T telephony access to TWE cable systems, an outcome that may in fact benefit the public interest, AOL Time Warner could obtain preferential treatment for AOL's ISP service on AT&T's cable systems, an outcome that would harm the public interest. AT&T's divestiture of TWE will not forestall this outcome. Our conduct remedy is therefore necessary to prevent it.

272. Under the condition we are adopting to address the potential harm described above, AOL Time Warner shall be prohibited from entering into any agreement with AT&T that gives AOL or any other AOL Time Warner ISP exclusive carriage rights on AT&T's cable systems. Further, AOL Time Warner may not enter into any agreement with AT&T the purpose of which is to limit in any way AT&T's ability to enter agreements with a non-AOL Time Warner ISP.[713] For example, AOL Time Warner may not enter into an agreement with AT&T that would give AOL preferential rights to use a particular system resource, such that AT&T would not be free to offer the same rights to another ISP. AOL Time Warner, through its General Counsel, must certify upon the merger's closing and annually thereafter that it is in compliance with this condition.

273. In combination with the other conditions we adopt in this Order, the conditions we adopted in *AT&T-MediaOne*, the conditions adopted by the DOJ in its AT&T-MediaOne Consent Decree, and existing antitrust laws, the conduct remedy we adopt here will remedy any potential harm that might arise from the merger in the form of coordination between AT&T and AOL Time Warner. This conduct remedy will address in a direct manner any potential harm due to coordination between AT&T and AOL Time Warner that would affect competition for high-speed residential Internet access service. We conclude that this condition will prevent AOL Time Warner from using any leverage it might gain against AT&T as a result of the merger to induce AT&T to favor AOL and disfavor other ISPs seeking access to AT&T's cable systems. Thus, AOL Time Warner will not be permitted to use its control of TWE , or any other merger asset,[714] to induce AT&T to give AOL preferential carriage rights as a condition of AOL

[711] This result would arise from AOL's acquisition of the Time Warner cable systems, not from any TWE cross-ownership between AOL and AT&T.

[712] *See* Confidential Appendix IV-F Note. 3.

[713] We note that there may be unique assets that only one ISP can use. We do not intend to prohibit AT&T from entering into contracts with AOL that utilize these unique assets. Moreover, we do not believe that all agreements between AT&T and a merged AOL Time Warner would be contrary to the public interest. Although certain cable broadband arrangements, such as those described above, would result in discrimination against unaffiliated ISPs and therefore, would be contrary to the public interest, other agreements between AT&T and the merged entity would likely further important public interest goals. Efforts by AT&T to expand its cable telephony service over the Time Warner cable plant may in fact satisfy important Commission policy goals and fulfill the goals of the 1996 Act. Accordingly, we reaffirm the public interest benefits that we recognized would result from agreements between AT&T and Time Warner relating to local telephony services. *See AT&T-MediaOne Order*, 15 FCC Rcd at 9890 ¶¶ 173-174; *see also* Ross-Harding Oct. 5 Letter at 6. Similarly, AOL's expansion of its service over AT&T's cable systems could also satisfy important Commission policy goals, provided the terms of AOL's access do not unfairly favor AOL over its competitors. We therefore do not wish to prohibit AT&T and AOL Time Warner from reaching what may be pro-competitive agreements.

[714] For example, as a result of this condition, AOL Time Warner would not be permitted to require AT&T to give preferential access rights to AOL as a condition of AT&T's access to AOL Time Warner video programming. *See* Section IV-A *supra*, (High-Speed Internet Access Services)..

Time Warner's agreement to vote in AT&T's favor on any TWE Participant Matter, to improve any offer to purchase AT&T's TWE interest, or to enter a telephony deal with AT&T. Nor may AOL Time Warner for any other reason or in any other manner enter into any agreement with AT&T that is designed to afford AOL preferential access to AT&T's cable systems or to otherwise disadvantage AOL's competitors with respect to access to AT&T's cable systems. Thus, the condition will also prevent any agreements between AOL Time Warner and AT&T that may arise as a result of the merger from any unforeseen motivation by AT&T to disfavor AOL's competitors.

274. Several commenters requested that we require AT&T and Time Warner to sever all corporate and contractual relationships, including AT&T's interest in TWE.[715] Because AT&T recently elected to divest TWE, effective May 19, 2001, in compliance with the Commission's order in *AT&T-MediaOne*, we need not address this issue. AT&T requests that we condition this merger by requiring AOL and Time Warner to submit to binding arbitration if AT&T and AOL Time Warner fail to reach agreement on the price for AT&T's interest in TWE.[716] AT&T argues that the Commission could provide the appropriate incentive to AOL Time Warner to complete AT&T's divestiture of the TWE partnership by requiring as a condition of its approval of the AOL-Time Warner merger that, in the event AT&T and AOL Time Warner fail to reach agreement on the price Time Warner will pay for AT&T's interest by a certain date, the matter will be submitted to binding arbitration pursuant to a customary appraisal process.[717] AT&T also requests that the Commission require that AOL Time Warner enter a "definitive agreement to effect disposition of AT&T's TWE interest at the arbitrated price, before the compliance date set" in the *AT&T-MediaOne Order*.[718]

275. AT&T contends that the imposition of arbitration requirements also would prevent the potential harms to competition that commenters have alleged. AT&T claims that "[i]f AOL and AT&T were to become partners in TWE, their shared ownership and incentives could . . . lead to unilateral conduct that would produce the same outcome that consumer advocates have suggested would result from joint action."[719] For example, apparently adopting Consumers Union's arguments, AT&T states that because of Time Warner's control over TWE, Time Warner "could use the TWE leverage to impede competition where AOL and AT&T compete 'head-to-head' or plan to do so."[720] For example, AT&T notes that "[p]ost-merger AOL could let AT&T know that a condition for agreeing to restructure TWE would be for AT&T to drop its rival interactive TV platform."[721] AT&T also argues that "AOL would clearly prefer less rather than more broadband competition from AT&T and, as a consequence of the merger with Time Warner, could gain the means to achieve that goal."[722]

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[715] *See* SBC Comments at 30-32; BellSouth Reply Comments at 18-19.

[716] AT&T Nov. 28 Ex Parte at 1-3.

[717] AT&T specified December 1, 2000, as the date after which the matter should be submitted to binding arbitration if by that date it had failed to reach agreement with Time Warner. *See* AT&T Nov. 8 Ex Parte at 3; *see also* AT&T Nov. 28 Ex Parte at 4.

[718] AT&T Nov. 8 Ex Parte at 3.

[719] AT&T Nov. 28 Ex Parte.

[720] AT&T Nov. 28 Ex Parte at 3.

[721] AT&T Nov. 28 Ex Parte at 3.

[722] AT&T Nov. 28 Ex Parte at 2 (citing Schwartzman Nov. 14 Letter at 1-4).

276. We find it disturbing that AT&T would recite a litany of anticompetitive actions it might pursue, including agreements not to compete, if the Commission fails to adopt a merger condition that would improve AT&T's prospects of obtaining a favorable price from Time Warner for the sale of the TWE assets AT&T has elected to divest to comply with our order in *AT&T-MediaOne*. We disagree with AT&T that the Commission should use this merger proceeding to facilitate AT&T's compliance with obligations the Commission imposed in a separate merger proceeding.[723] While we are concerned about the possibility that AT&T and AOL Time Warner would engage in collusive behavior as a result of this merger, we believe our conduct remedy will address any potential public interest harms that might arise from conduct that is not otherwise prohibited by law or that is not remedied by AT&T's divestiture of TWE pursuant to its December 15, 2000 election.[724]

G. Other Potential Public Interest Harms

277. *Protection of Subscriber Privacy.* Congressman Markey notes that privacy of personal information is increasingly becoming a concern of consumers using the Internet.[725] He states that cable operators, such as Time Warner, have a statutory obligation under Section 631 of the Communications Act to protect personal information gathered from subscribers.[726] He further states that the obligation applies not just to information obtained through a customer's use of a cable service, but to a customer's use of any wire or radio communications service provided using any of the cable system's facilities.[727] Congressman Markey asks that we assure ourselves that AOL Time Warner will comply with the requirements of Section 631 after the merger.[728]

278. Section 631 of the Communications Act provides that at the time a cable operator enters into an agreement to provide any cable service "or other service" to a subscriber, and annually thereafter, the cable operator shall inform the subscriber of, among other items, the nature of personally identifiable information the cable operator will be collecting, the nature of the use of the information, and the nature and purpose of any disclosures of that information.[729] The statute further provides that, with limited

[723] *See* Media Access Project Ex Parte at 2. See *also* AT&T Nov. 28 Ex Parte at 9819 ¶ 4.

[724] We are not sympathetic to AT&T's argument that it may be induced by AOL Time Warner to refrain from competing with AOL Time Warner. We do not believe that it is likely that AT&T would unilaterally abandon its planned interactive TV offering, for example, on the mere supposition that AOL Time Warner would react favorably to such actions. Rather such conduct would more likely reflect an explicit agreement not to compete, which would be addressed by antitrust laws and the state and federal authorities charged with enforcing them. *Loraine Journal v. United States*, 342 U.S. 143 (1951); *Klors Inc. v. Broadway-Hale Stores*, 359 U.S. 207 (1959) (firms induced others to boycott one's competitors); *United States v. Associated Patents*, 134 F. Supp. 74 (E.D. Mich 1955), *aff'd mem.*, 350 U.S. 960 (1956); *United States v. Topco Associates*, Inc., 405 U.S. 596 (1972). "The fact that the parties to an [unlawful] agreement did not have identical motives, or that one party to the agreement was coerced to participate, does not negate the finding of an agreement for purposes of [Sherman Act] Section 1 so long as the parties share a commitment to a common scheme that has an anticompetitive objective or effect." ABA, Antitrust Law Developments (Fourth) 4 (1997); *Rochez Brothers v. North American Salt Co.*, 1994-2 Trade Cas. (CCH) ¶ 70,804, at 73,441 (W.D. Pa. 1994).

[725] Letter from Cong. Edward J. Markey to Chairman William E. Kennard at 1-2 (Dec. 13, 2000).

[726] *Id.* at 1.

[727] *Id.*

[728] *Id.* at 2.

[729] 47 U.S.C. § 551(a).

exceptions, a cable operator may not use the cable system to collect personally identifiable information nor may the cable operator disclose personally identifiable information without the prior written or electronic consent of the subscriber.[730] As Congressman Markey notes, the statute defines "other service" to include any wire or radio communication service provided using any of the facilities of a cable operator that are used in the provision of cable service.

279. We agree with Congressman Markey that consumers have become increasingly concerned about the unauthorized use and disclosure of personal information gathered about them, especially with regard to information collected while they are using the Internet. By enacting Section 631, Congress directed cable operators, including affiliates,[731] to protect the privacy of their subscribers. Although Section 631's terms are enforced by the courts, and not by the Commission,[732] AOL Time Warner's future compliance with Section 631 is part of our examination of AOL Time Warner's qualifications to control the licenses at issue.[733] Accordingly, as a condition of our approval, we require AOL Time Warner, by its General Counsel, to certify to the Commission, by filing a copy of the certification with the Secretary's Office, on the merger's closing and annually thereafter, that AOL Time Warner is and will remain in compliance with Section 631 of the Communications Act.

280. *Premature Control by AOL.* RCN Telecom Services, Inc. ("RCN") requests that we delay approval of the merger to investigate whether AOL had assumed premature control of Time Warner.[734] RCN's request is based on a Washington Post article that reported that a senior AOL official had begun the process of "knitting together" AOL and Time Warner. AOL responds that RCN offers no evidence that an AOL official has assumed control over Time Warner's daily operations or policy determinations, or that an AOL official or any other AOL employee in any way dominates the management of Time Warner's corporate affairs and licensed facilities.[735] Rather, according to AOL, an AOL senior official "simply has participated, along with other AOL and Time Warner officials, in the parties' collective efforts -- wholly consistent with applicable law -- to achieve a smooth integration of the two companies after closing."[736] We find that the record is devoid of specific allegations of fact that establish a prima facie case of de facto transfer of control that would warrant delaying our approval of the merger with conditions or initiating an investigation. We therefore deny RCN's request.

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[730] 47 U.S.C. § 551(b), (c). The cable operator must also take actions necessary to prevent unauthorized disclosure. 47 U.S.C. § 551(b).

[731] The statute defines "cable operator" to include any company that is under common ownership or control with a cable operator and that provides any wire or radio communication service.

[732] *See* 47 U.S.C. § 551(f) (providing that any person aggrieved by the section may bring a civil action in a United States district court).

[733] Pursuant to Sections 308(b) and 310(d) of the Communications Act, 47 U.S.C. §§ 308(b), 310(d), as part of our public interest determination, we determine whether the person that will control the licenses being transferred is qualified to do so. *See Voicestream Wireless Corp.*, Memorandum Opinion and Order, 15 FCC Rcd 3341, 3345-46 ¶¶ 10-11 (2000).

[734] Letter from William F. Fishman, counsel for RCS, to Deborah Lathen, Chief, FCC Cable Services Bureau (Dec. 15, 2000).

[735] Letter from Peter Ross, Counsel for AOL, and Arthur Harding, Counsel for Time Warner, to Deborah Lathen, Chief, FCC Cable Services Bureau (Dec. 29, 2000) at 2.

[736] *Id.*

V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

281. In addition to assessing the potential public interest harms of this merger, we must consider whether the merger will produce public interest benefits.[737] The proposed transaction is deemed in the public interest if the identifiable potential public interest benefits outweigh any potential public interest harms.[738]

282. Our analysis of public interest benefits focuses on demonstrable and verifiable benefits to consumers that could not be achieved but for the merger.[739] Merger-specific benefits may include beneficial conditions either proffered by the Applicants or imposed by the Commission.[740] At a minimum, our public interest test requires that the merger not interfere with the objectives of the Communications Act.[741]

283. We find that the Applicants have demonstrated that the merger will result in benefits, but the nature and degree of these benefits are not sufficient to outweigh the potential harms that would result from the merger absent conditions. The conditions we impose, in conjunction with those imposed by the FTC Consent Agreement, will mitigate the potential harms, and allow us to conclude that, on balance, the benefits will outweigh any remaining potential harms.

284. The Applicants claim the merger will produce affirmative public interest benefits in the following four areas:

- access by unaffiliated ISPs to cable broadband networks ("cable access");[742]
- accelerated deployment of broadband content and broadband technologies;[743]

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[737] *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157; *WorldCom-MCI Order*, 13 FCC Rcd at 18134-35 ¶ 194; *AT&T-TCI Order*, 14 FCC Rcd at 3168 ¶ 13; *AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154.

[738] *AT&T-MediaOne Order*, 15 FCC Rcd at 9816 ¶ 154.

[739] *Id.*

[740] *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157; *AT&T-MediaOne Order*, 15 FCC Rcd at 9883 ¶ 154.

[741] *Applications of Southern New England Telecommunications Corp. and SBC Communications, Inc. for Consent to Transfer of Control of Licenses and Section 214 Authorizations*, CC Docket 98-25, Memorandum Opinion and Order, ("*SBC-SNET Order*") 13 FCC Rcd 21292, 21298-99 ¶ 13 (1998); *WorldCom-MCI Order*, 13 FCC Rcd at 18134-35 ¶ 194; *Bell Atlantic-NYNEX Order*, 12 FCC Rcd at 20063 ¶ 157.

[742] Application at 15 and 17; Applicants' March 21 Supplemental Information at 21-26; Applicants' Reply Comments at 4-5, 9-11, 17, 27-29, 39, 45; MOU *generally*; Letter from Peter D. Ross, Attorney, Wiley, Rein & Fielding, to Magalie Roman Salas, Secretary, FCC, dated Aug. 14, 2000 ("Applicants' Aug. 14 Benefits Ex Parte") at 2; Ex Parte Comments of Applicants (Aug. 22, 2000) ("Applicant's Aug. 22 Benefits Ex Parte") at 2, 13-15, transmitted by letter from Arthur H. Harding, Counsel, Fleischman and Walsh, to Magalie Roman Salas, Secretary, FCC, dated Aug. 25, 2000; Case En Banc Testimony, Tr. at 28 and 41; Testimony of Gerald Levin, Chairman and CEO, Time Warner Inc., FCC En Banc Hearing, CS Docket No. 00-30 (July 27, 2000), Tr. at 34-37, 44 ("Levin En Banc Testimony"); *see also* Applicants' Second Response at 33.

[743] Application at 8, 10, 13, 15; Applicants' March 21 Supplemental Information at 10-11, 15-19, 22, 26-28, 30; Applicants' Reply Comments at 9, 23-27, 31, 36, 40, 43; Applicants' Aug. 14 Benefits Ex Parte at 2; Applicants' Aug. 22 Benefits Ex Parte at 3, 15-18; Case En Banc Testimony, Tr. at 26-27, 41; Levin En Banc Testimony, Tr. at 34-35, 42; *see also* Applicants' Second Response at 13-14, 18.