May 11, 2000

Chairman William E. Kennard
Commissioner Susan Ness
Commissioner Harold W. Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman and Commissioners:

As we said at the time of our merger announcement, we believe the merger of America Online and Time Warner will deliver tremendous benefits to consumers, bringing people around the world more choices and more convenience, and accelerating the development and deployment of exciting new broadband services.

Attached for your review are reply comments from AOL and Time Warner which we believe make that case in detail in response to a petition and several comments recently filed with your agency.

The key points in our filing are the same as those that have been made by AOL Chairman Steve Case and Time Warner Chairman Gerald Levin in Senate testimony and other forums since our merger was announced:

* *More Services for Consumers*: This merger will help lead the integration and transformation of traditional media and online services, bringing to consumers around the world a wide array of interactive services, with enriched multimedia content and e-commerce opportunities;

* *Important Progress on Open Access*: AOL and Time Warner have made a strong commitment to providing consumers a choice among multiple ISPs on Time Warner Cable systems, as embodied in our Memorandum of Understanding. Our landmark MOU has already led others in the cable industry to announce their own support for consumer choice and multiple ISPs, accelerating the adoption of open access in the marketplace;

* *Content Diversity*: AOL and Time Warner are committed to offering consumers a broad choice of the best content available, regardless of who produces it, and to distributing our own content as widely as possible, on as many platforms as possible, regardless of affiliation. This is the business practice of both companies today—

because it gives consumers what they want—and it will be the practice of the combined company as well.

We are also attaching two other items for you in light of Time Warner's dispute with Disney last week: a widely distributed newspaper ad in which Time Warner offered any consumer affected a two-day refund on their cable bill and one free month of a premium service, and a letter to members of Congress expressing the company's regret over the impact on consumers.

In that letter to members of Congress yesterday, Timothy Boggs, Time Warner Senior Vice President for Global Policy, wrote: "Time Warner deeply regrets the way our commercial dispute with Disney unfolded last week. There was a clear and honest disagreement between companies, but we at Time Warner are sorry we let it get to a point where consumers were put in the middle. We don't intend to let that happen again."

We are very excited about our merger and about all that it promises for consumers and the growth of the interactive medium. We believe the filing which you will find attached clearly demonstrates the benefits that a merged AOL Time Warner offers for the broadband future. As always, we look forward to answering any questions you may have.

Sincerely,

/s/ George Vradenburg, III
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Senior Vice President for Global and Strategic Policy
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/s/ Timothy A. Boggs
Timothy A. Boggs
Senior Vice President for Global Policy
Time Warner Inc.
800 Connecticut Avenue, N.W.
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Washington, D.C. 20006

Attachments

TIME WARNER CABLE IS GIVING OUR CUSTOMERS THE CREDIT

Time Warner is grateful for the patience and understanding our customers have shown us this week. We are deeply sorry for the inconvenience you experienced. And we regret that you, our valued customers, were caught in the middle of this corporate dispute.

Although we can't erase the frustration this week's events might have caused you, we wish to demonstrate our appreciation and reiterate our commitment to you. To thank you for your loyalty and to ensure your continued satisfaction, we are giving every customer —

- **a credit for two days of Basic Cable service, *plus***
- **one month FREE of a Premium Channel that you don't currently receive. (Check your bill beginning May 19th for details.)**

We know how much you enjoy ABC. And we are pleased that we were able to work with Disney to get ABC back on cable, where it belongs. As we head back to the negotiating table, we are eager to reach an agreement with Disney that eliminates any future uncertainty and keeps ABC for you for the long-term.

Time Warner realizes that you have a choice in cable service, and we value your business tremendously. As always, we are committed to customer service and to delivering the programming you want.

Again, we regret any inconvenience and thank you for being a Time Warner Cable customer.

May 10, 2000

Dear Congressman/Senator:

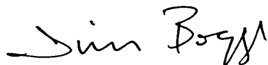
As we have said in our Senate testimony and in many other forums since our merger with AOL was announced, both Time Warner and AOL are committed to offering consumers a broad choice of the best content available, regardless of who is producing it and to distributing our own content as widely as possible, on as many platforms as possible, regardless of affiliation. This is the practice which guides each of our businesses today- because it delivers consumers what they want – and it will be the practice of the combined company as well.

Given that steadfast commitment, Time Warner deeply regrets the way our commercial dispute with Disney unfolded last week. There was a clear and honest disagreement between companies, but we at Time Warner are sorry we let it get to a point where consumers were put in the middle. We don't intend to let that happen again. This was a matter that should have been settled between the companies.

We have also conveyed our apologies to consumers who were affected through a widely distributed newspaper ad, and are offering anyone affected a two-day refund and one month of a free premium or digital service. A copy of the advertisement is attached.

We are pleased that we were able to act quickly to end this matter, and we are committed to negotiating a long-term resolution of this matter so that consumers are never again denied the programming they want.

Warm regards,



Timothy A. Boggs

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of America Online, Inc.	)	CS Docket No. 00-30
and Time Warner Inc. for	)	
Transfers of Control	)	

To: The Commission

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Dated: May 11, 2000

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of America Online, Inc.	)	CS Docket No. 00-30
and Time Warner Inc. for	)	
Transfers of Control	)	

To: The Commission

REPLY OF AMERICA ONLINE, INC. AND TIME WARNER INC.

America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") (collectively, the "Applicants") hereby submit their reply to the petition to deny and comments submitted in response to their pending Applications for Transfers of Control (collectively, the "Applications") in the above-referenced docket.

I. INTRODUCTION AND SUMMARY

The record in this proceeding substantiates the Applicants' showing that the public will benefit from this merger. Neither the petitioner nor commenters (collectively "commenters") dispute that the combination of AOL and Time Warner will hasten the development of exciting new broadband services. In particular, because the merged company will bring together experience, incentives, and resources that can help lead the integration and transformation of traditional media and online services, the Commission can well expect that AOL Time Warner will work to speed the delivery of enticing new content products and communications services to consumers. These advances, in turn, should prompt the merged company's many rivals to do the same.

In advancing this "intense—and intensifying—competitive struggle to provide consumers with the best the Internet has to offer," AOL and Time Warner "recognize that businesses that don't give consumers what they want will not survive."[1] In the plain words of AOL Chairman and CEO Steve Case, "If we limit content, if we do not promote a diversity of voices, if we do not maintain scrupulous journalistic standards, then consumers will waste no time migrating to other Internet and media services."[2] Accordingly, Mr. Case and Time Warner Chairman and CEO Gerald Levin responded forthrightly to recent questions concerning how AOL Time Warner will treat content offered by third parties, and how AOL Time Warner will treat content produced by its competitors:

> AOL and Time Warner are strongly committed to offering consumers a broad choice of the best content available, regardless of who is producing it, and to distributing our own content as widely as possible on a variety of platforms. This is the strategy which guides each of our businesses today, because it gives consumers what they want—and it will be the strategy of the merged company as well.[3]

These written assurances, delivered to leaders of the Senate Subcommittee on Antitrust, Business Rights and Competition, embody the Applicants' fundamental commitment to consumer choice—as does the Memorandum of Understanding[4] ("MOU") signed by AOL and Time Warner

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[1] Letter of Steve Case, Chairman and CEO, America Online, and Gerald M. Levin, Chairman and CEO, Time Warner, to the Hon. Mike DeWine, Chairman, Subcommittee on Antitrust, Business Rights and Competition, Senate Committee on the Judiciary, and the Hon. Herb Kohl, Member, Subcommittee on Antitrust, Business Rights and Competition, Senate Committee on the Judiciary, Apr. 5, 2000 ("Senate Antitrust Subcommittee Letter").

[2] Testimony of Steve Case, Chairman and CEO, America Online, United States Senate Commerce Committee, March 2, 2000 ("Case Testimony, Senate Commerce Committee").

[3] Senate Antitrust Subcommittee Letter at 1-2.

[4] Memorandum of Understanding Between Time Warner Inc. and America Online, Inc.

(Continued...)

in conjunction with their merger agreement. As the commenters largely concede, the MOU is a significant advancement with respect to providing consumer choice among Internet service providers ("ISPs"). By committing to afford consumers real ISP options on Time Warner cable systems—whether national, regional or local, and whether independent or affiliated—the Applicants are responding to the concerns underlying the "open access" issue.

No commenter seriously contests the Applicants' demonstration of these merger benefits. Rather, the collective attention of the commenters is directed toward:

- Calls for some form of merger-conditioned open access—an approach that the Commission squarely rejected in its *AT&T/TCI* decision.[5]

- Concern over AT&T's relationships with Time Warner—issues that are already before the Commission and appropriately poised for resolution in the pending AT&T/MediaOne proceeding.[6]

- Proposals that the FCC toss aside its firm commitment to an unregulated Internet and instead apply a full panoply of cable—and even some telecommunications—regulation directly to Internet services.

- A handful of business disputes that predate—and in no way relate to—this merger.

None of these arguments provides a basis for denying the Applications of AOL and Time Warner or imposing any condition upon the merged company.[7] With respect to open access, the

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(...Continued)
Regarding Open Access Business Practices, CS Docket No. 00-30, (filed February 29, 2000) ("MOU").

[5] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from TCI, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, ¶ 94 (Memorandum Opinion and Order, 1999) ("*AT&T/TCI Order*").

[6] *See, e.g.,* Petition to Deny of Consumers Union, Consumer Federation of America, Media Access Project and Center For Media Education, CS Docket No. 00-30, at 4-7, 21-27 (filed April 26, 2000) ("MAP Petition"); Comments of SBC Communications Inc., CS Docket No. 00-30, at 3, 9 (filed April 26, 2000) ("SBC Comments").

FCC is on record as having concluded that its broadband focus should be trained on promoting competition among broadband platforms—*i.e.*, among providers of cable, DSL, wireless, and satellite facilities—and encouraging marketplace, but not government, development of multiple ISP models over cable. The *AT&T/TCI Order* reflects the agency's determination that actual and emerging competition among Internet platforms in 1998-99 already was sufficiently vigorous to protect consumers' interests in obtaining diverse online services, including emerging broadband services, even in the presence of a seemingly irreversible cable commitment to provide consumers with only their affiliated ISP service.[8] The FCC ultimately decided that there was no open access "problem" requiring a solution and that, in any event, open access concerns were not specific to the merger before it.[9]

The same conclusions, as a matter of law and logic, apply perforce to this transaction. Moreover, because AOL and Time Warner have pledged to provide consumers with choice among multiple ISPs on the combined company's cable systems, this merger further advances consumer choice in Internet services beyond that set forth in the record in AT&T/TCI. FCC Commissioners and staff, while not finding it necessary as a legal or policy matter to mandate such a result, nevertheless have espoused their view that the multiple ISP approach now embodied

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(...Continued)
7 Accordingly, there are no "substantial and material issues of fact" that require a designation of the Applications at issue here for hearing under 47 U.S.C. § 309(e).

8 *See infra*, Section III.A.l.a.

9 *Id.*

in the MOU would serve consumers well. And, as the Applicants expected and predicted, other cable operators are indeed beginning to follow suit.[10]

With respect to those comments that seek to make an issue of the "AT&T connection," the FCC and the Department of Justice ("DOJ") already are reviewing that company's proposed acquisition of MediaOne's interests in Time Warner Entertainment Company, L.P. ("TWE") and Road Runner, and are expected to resolve the matter shortly. AOL/Time Warner is not the merger that would create or enhance an AT&T connection; AT&T/MediaOne is. Nor can this merger be characterized as "AOL/AT&T," "AOL/Excite@Home," or "AT&T/Anything Else." The only ownership links, if any, that would exist between AT&T and AOL Time Warner holdings would be those expressly authorized by the FCC (and DOJ) in the pending AT&T/MediaOne merger.[11] Furthermore, the record makes plain that any AT&T connection would not be reciprocal: no matter what interests the government permits AT&T to retain in TWE or Road Runner, neither Time Warner nor AOL has any financial interest in AT&T or Excite@Home. More to the point, this merger would not give rise to any new common ownership between AT&T and AOL Time Warner.

The two commenters here who submitted what might be deemed broad-based pleadings have themselves indicated that their concerns lie elsewhere. A recent Washington Post article confirms that the objections raised by SBC Communications Inc. ("SBC") lie more with

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[10] *See infra* Section II.A.

[11] Because nothing in the transaction at issue here creates any such new connections, SBC's concern regarding "sweetheart" deals between AT&T and AOL Time Warner is not appropriately decided here. *See* SBC Comments at 32. Were there any concreteness to those concerns (which there is not), they should be dealt with in the AT&T/MediaOne proceeding; as such concerns lack specificity, they plainly are not ripe for FCC consideration.

AT&T/MediaOne than with this merger: "[T]he company doesn't have any 'significant issues with [AOL and Time Warner] merging in and of itself.'"[12] For its part, the petition of Media Access Project, *et al.* ("MAP") largely consists of its little-altered submissions in the AT&T/MediaOne proceeding, including lengthy sections that scarcely mention either AOL or Time Warner.[13]

Beyond the open access and AT&T-specific issues, what remains of the opposing comments can be readily scrutinized and rejected. MAP and SBC call for grafting much of the 1992 Cable Act (and Title II common carrier regulation as well) onto Internet services. As the facts set forth in Section III below demonstrate, Internet users today enjoy so many routes to the web, and so many content choices once they get there, that there is no factual foundation for claims that consumers suffer from constraints on their ability to obtain access to a richly diverse array of online services and content. In addition, calls of this kind are inconsistent with the FCC's well-settled approach to "the unregulation of the Internet."

The remaining commenters attempt to use this merger review proceeding as a forum to litigate (or relitigate) various disputes that are unrelated to this merger:

- Comments regarding instant messaging ("IM") involve a debate in the marketplace that predates and is unrelated to this merger.
- One commenter's call for the extension of program access obligations long predates this merger—and the request already has been repeatedly rejected on the merits by the FCC.

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[12] Ariana Eunjung Cha, *Groups Oppose AOL Merger: Formal Petitions to FCC Readied*, The Washington Post, April 26, 2000, at E1, E3 (quoting SBC spokesman). *See also* SBC Comments at 3 ("AOL and Time Warner are parties to a briar patch of layered contracts and equity interests, most of which have never been reviewed by the Commission. AT&T stands at the center of the brambles.").

[13] *See, e.g.,* MAP Petition at 76-99, 100-127.

- The arguments of two Memphis-based commenters concern an isolated local dispute before local regulators. That matter should be resolved in that forum.

- Another commenter's contentions concerning a dispute over cable carriage of its electronic program guide ("EPG") data should be decided in the separate FCC proceeding that the commenter initiated.

Given the record before it, the FCC can and should confidently conclude that the combination of AOL and Time Warner will advance the public interest. Because there is a dearth of substantiated grounds for concern specific to this merger, the Commission should move promptly to permit the demonstrated benefits springing from a merged AOL Time Warner to come into being.

* * *

Since the filing of the Applicants' last submission in this proceeding, a good deal of public attention has been directed to the issue of Time Warner cable system carriage of Disney/ABC owned-and-operated local television stations. The Applicants respectfully submit that this issue—which involves a disagreement over the terms of a commercial transaction expressly provided for by statute—also lacks a merger-specific connection to this proceeding.[14] The Applicants very much regret that this commercial dispute between Time Warner Cable and The Walt Disney Company resulted in a brief disruption of service to subscribers.[15] We agree with Chairman

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[14] The FCC is already dealing with this dispute within the context of its existing rules. This isolated incident provides no support for those who would urge further government intervention. *See, e.g., Applications of Capital Cities/ABC, Inc. and The Walt Disney Company*, 11 FCC Rcd 5841, at ¶ 22 (1996) ("Nor can we conclude that a transfer proceeding is the proper forum in which to consider changes in the applicable program access or retransmission consent rules.").

[15] Congress designed this regulatory scheme under which all broadcasters may, if they so choose, opt for guaranteed cable carriage of their signals. Broadcasters who instead seek to charge cable companies for the carriage of the broadcasters' signal face, under the statutory terms and the FCC's implementing rules, the prospect of commercial negotiations which, if unsuccessful, would result in a cable company's inability to carry the broadcasters' signal. We

(Continued...)

Kennard that it is incumbent upon the parties to ensure that consumers never be held at the mercy of these disputes. Time Warner has apologized to its subscribers over that service disruption and has given its customers a credit on their future cable bills as a result.

We would urge the Commission, however, not to lose sight of the fact that this was a commercial dispute with (admittedly) very unfortunate consumer consequences. When subscribers voiced their displeasure with the loss of ABC programming, Time Warner Cable moved quickly to come to terms with ABC to restore carriage authority. That dispute does not evidence—and should not be taken as—any lack of resolve on the part of AOL or Time Warner to honor their commitment to content diversity or to implement their MOU commitment to provide their subscribers with multiple ISPs over their broadband cable systems. If anything, this event provides vivid evidence that consumer demand and the marketplace will ensure that consumers receive the content they seek. In any event, the retransmission consent issue has no effect on, and is not affected by, this merger.

II. THE APPLICANTS' SHOWING THAT THE MERGER WILL DELIVER REAL AND SIGNIFICANT BENEFITS TO CONSUMERS IS RECOGNIZED BY THOSE WHO OTHERWISE RAISE CONCERNS ABOUT THE TRANSACTION

The Applicants have demonstrated that the proposed merger offers real benefits which plainly outweigh any alleged harms raised by commenters. In particular, this merger stands to promote the benefits of broadband by both spurring the development of new broadband services and increasing consumer choice among ISPs over cable.

(...Continued)
note that the vast majority of such negotiations result in mutually acceptable contracts. Indeed, Time Warner is an industry leader in reaching voluntary agreements to carry broadcasters' digital signals. Steve McClellan, *Fox, TW strike retans deal*, Broadcasting & Cable, Jan. 3, 2000; *TW to CBS: Will Carry*, Broadcasting & Cable, Dec. 14, 1998.

A. The Merger Will Prompt The Brisk Roll-Out of New Internet Broadband Services

A merged AOL Time Warner will have the experience, the incentive, and the resources to develop a diversity of promising new services and products in a truly vibrant marketplace. As the Applicants explained in their Supplement, the merged company will be ideally suited to help lead the creation of new products and services for the next generation, media-enriched Internet. The range of broadband offerings by AOL Time Warner also will spur competition from other providers of Internet-related products and services.[16] The proposed merger will thus help propel broadband technology into an unparalleled source of communication, information, entertainment, and interactivity, as well as a user-friendly platform for electronic commerce and new competitive communications services. Beyond the new products and services (as discussed in our earlier submissions) that the merged company likely will offer to consumers in the near future, the proposed transaction also holds the promise of advancing the evolution of a host of new products and services that are still in the conceptual stages and what others have described as "yet-to-be imagined new businesses."[17] That is, the Applicants submit, the hallmark of a pro-competitive merger toward providing consumers with unprecedented choice.

B. The MOU Is A Major Step Forward—As Independently Confirmed By Continuing Marketplace Developments In Support of Consumer Choice Among Multiple ISPs

The MOU demonstrates that AOL and Time Warner intend voluntarily to foster an environment in which consumer choice, competition, and innovation will flourish. Key provisions

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[16] American Online, Inc./Time Warner Inc. Supplemental Information, CS Docket No. 00-30, at 28-29 (filed Mar. 21, 2000) ("Supplement") at 28-29.

[17] PaineWebber, AOL Time Warner: Defining the Digital Age, at 6, March 1, 2000.

in the MOU set forth the framework for implementing that plan. First, consumers will not be required to purchase service from an ISP that is affiliated with AOL Time Warner in order to receive broadband Internet services offered over AOL Time Warner cable systems.[18] Second, AOL Time Warner will not place any fixed limit on the number of ISPs with which it will enter into commercial agreements to provide broadband service, thus facilitating marketplace arrangements allowing consumers to choose among a diversity of ISPs with varying size, price, and service offerings.[19] Third, AOL Time Warner will not discriminate against unaffiliated ISPs on the basis of their affiliation or lack of affiliation.[20] In addition to this commitment to provide consumers with real choices among multiple ISPs, AOL Time Warner also intends—and (as explained below) has every incentive—to provide subscribers with unfettered access to the full range of diverse content available on the web.

As Applicants predicted in their Public Interest Statement and Supplement,[21] the MOU also has created a marketplace impetus for changing other cable operators' approach to the "open access" debate. For example, shortly after the release of the MOU, the trade press reported that

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18 MOU at ¶ 2.

19 MOU at ¶¶ 4, 8.

20 MOU at ¶¶ 5, 7. Among other things, this means that ISPs connecting with consumers via the merged company's broadband cable systems may do so without purchasing backbone transport from the company. Consequently, MAP's assertion that AOL Time Warner and AT&T will use their control over their cable systems to place demands on independent ISPs with respect to other business practices is unfounded as to AOL Time Warner. *See* MAP Petition at 53-54.

21 Applications for Consent to the Transfer of Control of Licenses, Applications and Public Interest Statement, CS Docket No. 00-30, at 14 (filed Feb. 11, 2000) ("Public Interest Statement"); Supplement at 26.

the deal "turns the heat up" on other cable operators "to join the open access crusade."[22] Within a few weeks, Comcast and Cox, the nation's third and fifth largest cable operators, restructured their relationship with partner AT&T in Excite@Home to permit them to terminate exclusive carriage of Excite@Home (and the partnership itself) as early as June 2001.[23] As part of this agreement, Comcast and Cox, as well as AT&T, pledged to offer subscribers a choice among competing ISPs.[24] Industry observers recently reported that "[a]t least 7 of [the] 11 largest cable operators are looking at offering access to multiple ISPs on their high-speed broadband lines" in the wake of the AOL Time Warner commitment.[25] Spurred by the Applicants' leadership, the market is indeed moving.

C. No Commenter Objects To The Applicants' Showing of Meaningful Consumer Benefits

No commenter has disputed the Applicants' explanation of the notable and concrete benefits that the merger will bring to consumers, and some acknowledge the important benefits of the transaction. For example, even while raising concerns over certain aspects of the merger, MAP concedes that the merger provides "social benefits." Indeed, MAP specifically recognizes the positive significance of the MOU—acknowledging that "the AOL Time Warner commitment

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[22] Ted Hearn, *Case, Levin offer D.C. A Very Open Access Plan*, Multichannel News, Mar. 6, 2000, at 75.

[23] *See Excite@Home Extends Cable Deals, Moves Closer to AT&T*, Washington Telecom Newswire, Mar. 29, 2000.

[24] *See AT&T, Comcast, Cox Extend Distribution Deals With Excite@Home*, Communications Daily, Mar. 30, 2000.

[25] *Leading Cable MSOs Quietly Shifting Toward Open Access*, Communications Daily , Apr. 6, 2000 (citing Cox Communications, Comcast Corporation, Charter Communications, Classic Communications, Insight Communications, Adelphia Communications, and Cablevision Systems).

goes beyond any made by other cable companies . . . ."[26] Other commenters similarly note the beneficial effects of the MOU for competition.[27]

The only issues in dispute here concern the commenters' claims of harm. As discussed in Section III below, these claims lack either the factual underpinning necessary for Commission acceptance of the commenters' theories or a credible nexus to this merger—or both. Accordingly, the balancing test the FCC employs in certain merger reviews would overwhelmingly support a prompt grant of the applications at issue here.[28]

III. THE HARMS ASSERTED IN THIS PROCEEDING ARE UNSUPPORTED BY THE FACTS OF THE COMPETITIVE MARKETPLACE, A SPECIFIC CONNECTION TO THIS MERGER, OR FCC POLICY

Commenters do not provide substantial evidence demonstrating that the merger will result in any harms to the competitive marketplace or, ultimately, to consumer welfare. As an initial matter, AOL and Time Warner note that the commenters do not refute the Applicants' showing

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[26] MAP Petition at 1, 141. *See also* Prepared Statement of Jerry Berman, Exec. Director of the Center for Democracy & Technology and John Morris, Director of the Broadband Access Project, Before the Senate Committee on Commerce, Science and Transportation Subcommittee on Communications, *Federal News Service* (Mar. 2, 2000) ("[T]he AOL Time Warner Memorandum of Understanding represents a very positive step towards open access.").

[27] *See, e.g.,* Petition of Gemstar to Impose Conditions on AOL/Time Warner, CS Docket No. 00-30, at 5-6 (filed April 26, 2000) ("Gemstar Petition"); MAP Petition at 141-42.

[28] When there is no sound evidence that a merger will harm the public interest, balancing the benefits of the proposed transaction against its potential harms is not a difficult task. For example, in its approval of the WorldCom/MCI merger, a transaction that—like that presented here—was "not likely to result in anticompetitive effects in any relevant market," the FCC explained that the "sliding scale approach" called for in *Applications of NYNEX Corporation and Bell Atlantic Corporation*, 12 FCC Rcd 19985 (1997) was easy to apply: "[W]here . . . potential harms are unlikely, Applicants' demonstration of potential benefits need not be as certain." *MCI/WorldCom Order* at ¶197. For the same reason, the Commission is not required to conduct an extensive harms/benefits balancing test in this case.

that the two companies currently operate in largely separate spheres—a point which negates many of the claims of possible harms to competition.[29] The discussion below sets forth the reasons and the supporting facts for rejecting commenters' specific claims and theories about alleged harms associated with this merger in those few service areas where AOL's and Time Warner's businesses may overlap.

A. This Merger Could Not Possibly Cause Any Competitive Harm In The Vibrant Internet Arena

Some commenters contend that the merger of AOL and Time Warner could result in harm to the provision of Internet access services, to the provision of Internet-delivered content services, or, through unexplained forms of leveraging, to both.[30] As demonstrated below, these claims do not withstand scrutiny. One key point about the Internet marketplace—and the common-sense basis for refuting all these assertions—is worth noting up front: neither U.S. regulators, nor American society generally, has ever before experienced the kind of dynamic and explosive growth, competition, and diversity that continues to characterize the new online medium.

In the not-so-distant past, the electronic mass media in United States meant, for most people, access to just three television stations affiliated with three national networks, plus PBS, and local radio stations. Consumer choice expanded dramatically with the rise of cable television (and then direct broadcast satellites) and the resulting multiplication of programming channels, along with the marketplace advances that allowed for the creation of more broadcast stations,

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[29] As already discussed, claims about possible effects of a purported "web of relationships" involving AOL, Time Warner and a merged AT&T/MediaOne are being addressed by the FCC in its consideration of the AT&T/MediaOne merger. *See* MAP Petition at 22-26, 38-41; RCN Petition at 3-4; SBC Comments at 1, 4-7.

[30] MAP Petition at 33-34; SBC Comments at 22-24.

more broadcast networks and hundreds of cable and satellite channels—together providing a diversity of video content unmatched anywhere in the world.

But even that degree of diversity in electronic communication outlets and content is old news today. The Internet has simply blown the numbers away—and, with them, the old media constructs of "scarcity" of outlets or a lack of media diversity. Consider:

- Five years ago, there were an estimated 44 million worldwide users of the new online medium.[31] Today the estimate stands at 349 million Internet users—an increase of 793 percent in only half a decade.[32] More than 40 percent of those users are in the United States.[33]

- In 1993, there were about 90 ISPs providing service to these users in the United States. Five years later, the number had grown exponentially to almost 5,000—and it now approaches 7,000.[34]

- The amount of web content, measured by web pages, available to these users is growing at the rate of 2 million pages *per day*. The total number of web pages available in 1999 was 1.5 billion—an 88 percent increase from 1998—and is expected to hit 8 billion in 2002. The number of unique web sites available to online users currently is more than 3.6 million.[35]

- With respect to the emergence of competing broadband platforms, analyst numbers indicate that the number of cable modem subscribers grew by about

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[31] Stacy Lawrence, *The Net World in Numbers*, Feb. 7, 2000, available at <http://www.thestandard.com/research/metrics/display/0,2799,10121,00.html>.

[32] *Id*.

[33] *US Slipping, Europe to the Front on Internet*, 2000 WL 2275470, Mar. 30, 2000.

[34] *See* Tom Abate, *The Fuzzy Future of ISPs*, San Francisco Chronicle, Aug. 20, 1997, at D1; Thomas Grillo, ISPs Survive, Thrive Amid Dire Forecasts, Boston Herald, Oct. 12, 1998, at 27 (in October 1998, there were 4,855 ISPs in the United States). Meanwhile, the number of ISPs worldwide has mushroomed to about 14,000 by the end of last year, with predictions that the global numbers will top 20,000 by the end of this year. I- Mei Low, *Intel Focuses on Next Generation ISP Market*, New Straits Times (Malaysia), Nov. 3, 1999, at 28.

[35] David Lake, *The Web: Growing by 2 Million Pages a Day*, Feb. 28, 2000, available at <http://www.thestandard.com/research/metrics/display/0,2799,12329,00.html>.

> 300 percent from 1998 to 1999, while the number of DSL subscribers grew by about 1500 percent during the same period.[36] In absolute numbers, cable modem subscriber numbers are expected by analysts to grow from 1.6 million in 1999 to 3.3 million in 2000, while DSL customer numbers will nearly triple from 500,000 in 1999 to 1.4 million in 2000.[37]

Against this factual backdrop, claims that AOL Time Warner would have undue market power in any segment of the Internet arena simply cannot withstand reasoned analysis. Concerns framed in generalized terms about the "fate of the Internet"[38] are belied by the unprecedented growth, competition, and diversity in Internet companies and content. Even in the narrow arena of broadband, the FCC has expressed confidence in the pace of competition across different wired and wireless platforms—platform competition that doesn't even exist in the current dial-up environment.[39] Consequently, there is remarkable competition and diversity in all of the potential arenas in which AOL and Time Warner participate—and that competition and diversity is only more intensifying.

1. This merger presents no basis for conditions relating to the provision of Internet access services

a. The FCC has already established its "open access" policy

The Commission has set a clear course for how it will address the issue of cable open

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36 *Compare* Steve Rosenbush, *AT&T Turns Up Internet Heat*, Money, June 26, 1999, at 4B (estimating 567,000 cable modem subscribers and 47,800 DSL subscribers in the United States in 1998) *with* R. Scott Raynovich, *Broadband: Battle of the Broadbands*, Feb. 2000, available at <http://www.redherring.com/mag/issue75/mag-broadbands-75.html> (estimating 1.6 million cable modem users and 700,000 DSL users in 1999).

37 Lawrence Aragon, *Market for Broadband is Fantastic*, July 29, 1999, available at <http://www.redherring.com/insider/1999/0729/vc-fantastic.html>.

38 *See, e.g.*, MAP Petition at 75-80, 92-98.

39 *AT&T/TCI Order* at ¶94.

access: it will rely on existing and growing competitive forces to fuel the rollout of broadband Internet platforms and access and to afford consumers a choice of broadband services from a variety of providers in a timely fashion.[40] In its February 1999 *AT&T/TCI Order*, the agency analyzed the landscape for broadband Internet access and found significant actual and potential competition affording consumers adequate choice across existing and emerging platforms:

> Currently, there are a large number of firms providing Internet access services in nearly all geographic markets in the United States, and *these markets are quite competitive today* …. Although AT&T-TCI together might be able more quickly to deploy high-speed Internet access services and win a significant number of residential Internet access customers, it appears that *quite a few other firms are beginning to deploy or are working to deploy high-speed Internet access services using a range of other distribution technologies.*[41]

As a result, the FCC concluded that the proposed merger would not threaten competition among Internet access services.[42] The Commission thus found no agency action was warranted,

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[40] See *Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, at ¶ 101 (1999) ("*Section 706 Report to Congress*"); *AT&T/TCI Order* at ¶ 92-94.

[41] *AT&T/TCI Order* at ¶ 93-94 (citing its own findings of ISP competition in *Section 706 Report to Congress* at ¶ 63) (emphasis added).

[42] *See* Separate Statement of Chairman William E. Kennard, *AT&T/TCI Order* (explaining that "given the early stage of deployment of cable's high speed Internet access services, it would be imprudent to act now."). The *AT&T/TCI Order* expressly noted that the merger was likely to further the Commission goal of "a quicker roll-out of high-speed Internet access services." *Id.* at ¶ 94 (citing its findings in ¶¶ 145-148). As Chairman Kennard has explained, "[w]e have taken a de-regulatory approach, an approach that will let this nascent industry flourish." Chairman William E. Kennard, "The Unregulation of the Internet: Laying a Competitive Course for the Future," Remarks before the Federal Communications Bar Northern California Chapter, San Francisco, CA, July 20, 1999 ("Chairman William E. Kennard, 'The Unregulation of the Internet'"). The FCC's Cable Services Bureau later observed:

> the Commission's policy of restraint on broadband regulation has helped to create a fertile environment for growth…. By forbearing

(Continued...)

explicitly rejecting calls by numerous parties, including AOL, to impose an open access condition on the AT&T/TCI merger.[43]

Commission members and staff have since expressed the view that the offering of multiple ISP choice over cable systems would provide even greater consumer welfare benefits than those that might be produced simply by competition among cable, DSL, satellite and wireless broadband platforms themselves. And the parties here, through their MOU, plan to bring that additional competition and diversity to the marketplace. Yet the agency has not strayed from its position that existing platform competition—including the historically regulated open platform afforded by DSL—provides sufficient consumer choice, and that market forces rather than government mandates are the best vehicle to further development and deployment of competitive broadband services.[44] Nothing in this record here permits Commission departure from its controlling policy and precedent.

b. Competition among Internet access services and broadband platforms has only increased since the *AT&T/TCI* decision

(...Continued)

> from imposing 'open access' regulations on cable operators, the Commission has fostered an environment that encourages investment not only in cable, but also in the alternative broadband technologies, such as wireless, satellite, and DSL.

FCC Cable Services Bureau, *Broadband Today*, Staff Report (October 1999) ("*Cable Bureau Report*"), at 49-50.

[43] *Id.*

[44] *AT&T/TCI Order* ¶ 96 (holding that "[open] access issues raised by parties to this proceeding do not provide a basis for conditioning, denying, or designating for hearing any of the requested transfers of licenses and authorizations.").

As the Applicants detailed in their Supplement,[45] competition in this arena, which the Commission regarded as decisive, has surged since the Commission's February 1998 *AT&T/TCI Order*—a fact which no commenter contests. There has been growth in DSL deployment,[46]as well as greater optimism about its future.[47] Similarly, advances have occurred as well in satellite

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45 *See* Supplement at 46-48.

46 *See* SBC Communications, *SBC Reports Strong First-Quarter Earning,* News Release April 25, 2000, available at <http://www.sbc.com/News_Center/Article.html?query_type=article &query=20000425-01> (SBC "has achieved No. 1 market share in five of its seven top markets in California and the Southwest, despite a head start by cable modem competitors."); SBC Communications, *SBC Launches $6 Billion Initiative*, News Release Oct. 18, 1999, available at <http://www.sbc.com/ News_Center/Article.html?query_type=article&query=19991018-01> (describing Project Pronto, "an unprecedented, $6 billion initiative designed to transform the company over the next three years into the largest single provider of advanced broadband services in America."). BellSouth, *BellSouth and Darwin Networks Partner to Deliver High-Speed Internet Access*, News Release, Jan. 11, 2000, available at <http://www.bellsouthcorp.com/proactive/documents/ render/31082.vtml> (BellSouth offers DSL in 30 Southeastern markets over 7 million lines); *U S West Nearly Doubles VDSL Subscribers to 31,000*, Communications Daily, May 1, 2000. Covad, *Covad Reaches 100,000 DSL Lines in Service Milestone*, News Release, April 19, 2000, available at <http://www.covad.com/pr/pr_2000/041900_press.cfm> (noting Covad's 1,000 percent growth rate over the last 12 months and a 75 percent growth since December 31); Covad, *Covad Extends its DSL Network to Pittsburgh Business and Home Users*, News Release, Feb. 15, 2000, available at <http://www.covad.com/pr/pr_2000/021500_press.cfm> (Covad's DSL services are provided by more than 250 ISPs in 62 of the top 100 MSAs).

47 *See, e.g.*, *Earthlink to Sell High-Speed Access With MCI WorldCom*, *Bloomberg News*, July 14, 1999 ("DSL subscribers should increase to more than 4 million by 2003 from 25,000 in 1998, according to estimates from the Yankee Group, a technology research company."); Corey Grice, *Excite@Home gets into the DSL rhythm*, April 11, 2000, available at <http://www.news.cnet.com/news/0-1004-200-1679552.html?tag=st.cn.1> ("Analysts believe use of DSL will grow rapidly in the next several years, perhaps outpacing the adoption of competing cable modems."); Paul Kagan Associates, *Cable TV Technology*, March 28, 2000 (estimating that by year-end 2003, the household penetration rate of DSL and wireless will be virtually identical to that of cable modems (20 percent and 21 percent, respectively), and in subsequent years, DSL and wireless will begin outpacing cable modem subscriber penetration).

and wireless technology, transforming these platforms from "potential" into "actual" competitive reality.[48]

The FCC has taken note of this increased competition. Its Cable Services Bureau found rising competition last October, citing "a number of existing and potential competitors … rushing to provide broadband services to the home."[49] Similarly, in its recent Second NOI on advanced telecommunications capability, the Commission observed that, since the beginning of 1999, "deployment has increased substantially and now high-speed services are used by more than a million residential subscribers."[50]

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48 Microsoft, AT&T, Sprint, Sony, and MCI WorldCom have invested heavily in wireless and satellite technology, confident that they will soon appeal to consumers on a widespread basis. *See, e.g.*, *Sprint Launches Fixed-Wireless Service To Compete With Speedy Internet Lines*, The Wall Street Journal, May 9, 2000, at B2 (describing Sprint's plans to expand to 15 markets this year); John Borland, *Sony edges toward broadband wireless*, April 11, 2000, available at <http://home.cnet.com/news/0-1004-200-1681945.html?tag=st>; James Niccolai, *Sony teams up with high-speed wireless Internet firm*, Apr. 12, 2000, available at <http://www. infoworld.com/articles/en/xml/00/04/11/000411ensony.xml> (describing Sony's investment in wireless start-up ArrayComm in order to accelerate deployment of the technology, which it plans to use to offer high-speed wireless access to its library of music, videos and computer games); Scott Herhold, *Trio of companies is poised for wireless broadband*, Mercury News, April 10, 2000 (describing advances in wireless technology by Digital Microwave Corp. , Netro Corp., and Teligent); *Juno to offer high-speed wireless Net services*, April 10, 2000, Bloomberg News, (describing Juno's use of high-speed wireless network being built by Metricom); Todd Wallack, *The Need for Speed: Betting on broadband, companies race to wire America*, San Francisco Chronicle, March 28, 2000, at C1 (describing large investments in satellite and wireless broadband access providers). *See also* Comments of GTE Service Corporation, CC Docket No. 98-146 (*Inquiry Concerning Deployment of Advanced Telecommunications Capability*), at 17-18 (filed Mar. 20, 2000) ("Teligent offers broadband service using fixed wireless technology in 34 of the largest markets in the country, which cover 522 towns and cities and reach 93 million people. Winstar provides similar service…. Teledesic anticipates offering broadband coverage to 95 percent of the earth's landmass and 100 percent of the global population…by 2004.").

49 FCC Cable Services Bureau, *Broadband Today,* Staff Report, at 50 (October 1999).

50 *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398,
(Continued...)

Against this policy and marketplace backdrop generally, and the parties' commitments in their MOU specifically, this merger presents no basis for the FCC to reverse its policy of reliance on market forces to afford consumer choice across broadband platforms.

c. Analysis of this merger's impact on the Internet marketplace reveals that the merger would not harm competition in the provision of Internet access

While MAP and SBC suggest the possibility of anticompetitive effects, their arguments largely fail to address the specific merger at hand. They inappropriately focus instead on combinations which this merger does *not* create:

- **This merger is not "AT&T/AOL Time Warner."** Neither AOL nor Time Warner has any ownership interest in AT&T. To the extent AT&T's acquisition of interests in Time Warner-related holdings presents a concern, that is the subject of the AT&T/MediaOne proceeding; it is nothing created by, or in any way specific to, this merger.[51]

- **This merger is not "Excite@Home/Road Runner."** Neither Time Warner nor AOL has any ownership interest in @Home. Any ownership link between @Home and Road Runner is part of the FCC and DOJ pending review of the AT&T/MediaOne merger. Such a combination would not be created by, nor be in any way specific to, this merger.

- **This merger is not even "AOL/Road Runner."** Road Runner is not a Time Warner subsidiary.[52] But, as explained below, even if it were analyzed as such,

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¶ 3 ("Advanced Telecommunications Capability NOI") (footnote omitted).

[51] Moreover, contrary to RCN's conclusions (RCN Comments at 3), AT&T's current indirect (through Liberty Media), non-cognizable 9 percent interest in Time Warner Inc. ("TWI"), will convert into a mere 4.05 percent interest in AOL Time Warner post-merger. (This occurs as the current 9 percent interest is multiplied by the 45 percent interest that existing TWI shareholders will hold in AOL Time Warner.) Thus, an interest that already has been found by the Commission to be non-attributable (and which carries extremely limited voting rights) will be reduced by more than half—and will not, as claimed, leave AT&T as the largest shareholder in AOL Time Warner.

[52] Time Warner shares ownership of Road Runner with MediaOne, Microsoft, Compaq, and Advance/Newhouse.

> no party has shown how this merger would harm competition in any putative market.

The merger that is before the Commission now, of course, is that of AOL and Time Warner. When this point is recognized, the relatively few additional claims of harm in Internet access—however analyzed—can be addressed.

If narrowband and broadband Internet access services are deemed to be in the same market, this merger clearly will not cause anticompetitive effects. No commenter claims that a market recognized as including all Internet access services could be negatively affected by the combination of AOL's and Time Warner's assets. The FCC, in finding "a large number of firms providing Internet access services in nearly all geographic markets in the United States," has held that

> these markets are quite competitive today. Accordingly, if all Internet access services were included in the market definition, we would conclude that the merger is unlikely to adversely affect the public interest in competitive markets for Internet access services.[53]

The sheer number of readily accessible providers—now including *free* providers—that offer Internet access, and the lack of entry barriers to future providers, simply prevents any exercise of market power. Even if this were a merger of AOL and Road Runner, which it is not, the addition of Road Runner's limited subscriber base to that of AOL would represent a wholly inconsequential increase in concentration among all providers of Internet access services.[54]

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[53] *AT&T/TCI Order* at ¶ 93 (citations omitted).

[54] Road Runner has approximately 730,000 subscribers nationally. *See*, Road Runner, *Road Runner Announces Strong First Quarter*, News Release, April 12, 2000, available at <http://www.roadrunner.com>.

Even were broadband Internet access services viewed as a separate market, the record reveals that AOL Time Warner would have no ability to harm competition. Stripped of concerns relating to other combinations not created by this merger, the comments offer no evidence to substantiate this argument. First, under this analysis, AOL's narrowband subscribership would be, by definition, outside the relevant market.[55] Second, competitive trends in broadband Internet access are consistent with the FCC's assessments in early 1999, when the Commission decided *AT&T/TCI*:

> [I]t appears that quite a few other firms [in addition to AT&T/TCI] are beginning to deploy or are working to deploy high-speed Internet access services using a range of other distribution technologies. Moreover, … AT&T is not a more likely entrant than … other leading ISPs (including the incumbent LECs, which have facilities of their own) that are currently providing services using narrowband transmission.[56]

With DSL continuing to provide multiple ISP access and cable operators moving to do so as well, no party presents any relevant evidence to contradict these findings.

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[55] MAP and SBC attempt to derive worrisome market share numbers by combining AOL's position in narrowband with Road Runner's position in broadband (as well as @Home's position in broadband, although no party here holds any such interest). This calculation fails to yield any data relevant to a separate broadband market analysis. *See* SBC Comments at 9-12; MAP Petition at 7.

[56] *AT&T/TCI Order* at ¶ 94 (citations omitted). Even if this were a merger between Road Runner and AOL, which it is *not*, the loss of AOL as a potential competitor would be without competitive significance in a separate broadband market. As SBC concedes, AOL is a newcomer in broadband Internet access. *See* SBC Comments at 12, 14. Moreover, the already emerging or likely potential entrants into broadband services include numerous other ISPs, such as MSN and the ISP Channel, and providers of broadband facilities, such as Covad, Northpoint, and other CLECs.

This merger will not harm competition simply by adding cable to AOL's multiplicity of broadband platforms. Based on certain commenters' dire predictions of bottlenecks,[57] one might think this is a merger of broadband platforms. It is not. Commenters claiming that an independent AOL would have fueled competition to cable broadband incorrectly assume that AOL intended to offer Internet access using all broadband technologies *except* cable, and thus would attract its customers *exclusively* to non-cable platforms.[58] To the contrary, AOL has always intended to strike agreements with all forms of broadband providers, including cable operators, DSL, satellite, and wireless providers, in order to offer consumers access to its service over as many alternative platforms as possible.[59]

AOL Time Warner will not have the ability to harm competition among alternative broadband facilities. Commenters' further predictions that the merger would enable AOL Time Warner to threaten the competitive viability of non-cable broadband platforms are likewise unsupported.[60] AOL Time Warner would not be able to forestall competition from non-cable technologies even if it had the incentives commenters attribute to it.[61] DSL, wireless, and satellite providers have committed significant sums of money to technology development and the deployment of their broadband infrastructure, and they would be unlikely to abandon these

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57 *See, e.g.*, MAP Petition at 8, 17.

58 *See*, *e.g., Id.* at 22.

59 *See*, *e.g.*, *AOL Partners with DirecTV for Development of New TV Service*, Communications Daily, May 12, 1999.

60 *See* SBC Comments at 7, 23; MAP Petition at 28-29.

61 *See* MAP Petition at 49-53; SBC Comments at 20-21.

investments and assets even were AOL not seeking to offer its service over their facilities.[62] Moreover, because these infrastructure costs are sunk,[63] these providers face little incremental cost in offering broadband service—and thus will have the ability and every incentive to attract the same ISP and individual customers that cable operators target.[64]

AOL Time Warner will not have the incentive to rebuff alternative broadband technologies. AOL plainly seeks this merger to increase, not restrict, its broadband reach. Yet commenters suggest that AOL Time Warner would deny itself the benefit of distributing the AOL Internet access service over alternative broadband platforms.[65] These commenters simply cannot substantiate their theory that the incentives that have long motivated AOL to pursue every available means of distribution—the desire to maximize current subscription, advertising, and commerce revenue by increasing its penetration—will now be subverted by an overriding quest to obtain broadband transport rents in some distant, speculative future.

Notwithstanding assertions to the contrary, Time Warner's cable systems reach only about 20 percent of homes nationwide.[66] As Commenters purely recognize, AOL Time Warner will

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[62] Committed investment by DSL providers including SBC Communications, Bell Atlantic, U S West, Northpoint Communications, Level 3 Communications, Intermedia, Covad, and Rhythms NetConnections already exceed billions of dollars. *See also supra* n. 48 (describing significant investments in wireless and satellite technology).

[63] Because broadband transport assets are not used exclusively for data, these providers' cost of deployment are also shared with other uses, such as MVPD offerings and telephony.

[64] The FCC has recognized that DSL, in particular, will pose strong competition in the coming years. *Advanced Telecommunications Capability NOI*, Appendix A at 4. *See also supra* n. 43.

[65] *See* SBC Comments at 7; MAP Petition at 8-9.

[66] SBC suggests a higher number by adding the reach of AT&T and MediaOne, which is not attributable to Time Warner under any scenario. *See* SBC Comments at 7.

need to strike agreements with other broadband providers in order to offer its Internet access service throughout the country.[67] As a result, in order to ensure national coverage of its own services, AOL Time Warner inevitably must help to foster broadband technologies that compete with cable.[68] Moreover, alternative broadband platforms—both within and outside Time Warner cable service areas—may offer transport features, coverage areas or costs distinct from those of cable. This, too, provides AOL Time Warner compelling incentives to make AOL available over every platform, lest it simply cede to all of its ISP competitors every consumer who prefers a non-cable platform. In the end, AOL Time Warner has the incentive to promote the development of, and to deploy its services over, all broadband platforms.[69]

As evidence of its lack of incentive to harm non-cable platforms, and consistent with the growing competition among these services, AOL Time Warner has committed to maximizing the number of technologies over which it offers its Internet access service. Because AOL Time Warner will have no reason to pursue a contrary course, there is no justification for attempts to discredit AOL Time Warner's clear commitment to a multiple-platform business strategy. Critics who claim that AOL Time Warner will desert non-cable

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[67] Even Commenters would concede that these agreements necessarily would cover areas adjacent to Time Warner cable service areas. Inevitably, these alternative providers' territories will overlap with those of Time Warner. This situation is most clear with respect to agreements with DBS providers, in which the overlap in territories is total.

[68] Other providers are recognizing the wisdom of AOL's policy of providing consumers with Internet access service via any means—dial-up, DSL, cable, satellite. Most notably, Excite@Home, the largest cable Internet service provider, recently decided to offer its service over DSL, and executives said they would consider deals with fixed wireless and satellite providers as well. Corey Grice, *Excite@Home gets into the DSL rhythm*, April 11, 2000, available at <http://www.news.cnet.com/news/0-1004-200-1679552.html?tag=st.cn.1>.

[69] For the same reason, AOL is seeking to offer its services over wireless and satellite platforms as well.

broadband platforms are simply wrong. As detailed in the Applicants' Supplement, there is uncontroverted evidence in the record that AOL has signed deals with DSL, wireless, and satellite providers. AOL Time Warner fully intends to carry out these agreements, as well as to continue to seek new opportunities to provide its services as broadly as possible. AOL Chairman and CEO Steve Case has stated to financial analysts, "[e]ven in markets where we have cable distribution, we'll continue to work with other companies of other technologies and give consumers as many choices as possible."[70]

d. The Applicants' MOU promoting multiple ISP choice extends the benefits of relying on marketplace forces to provide consumer benefits

Beyond the absence of any harm, this merger has given rise to bold, affirmative action to promote the public interest by committing to providing consumers with the choice of multiple ISPs over cable systems. The MOU therefore is a giant leap forward.

Contrary to criticism from some commenters, the MOU goes beyond merely asserting that AOL Time Warner will offer consumers some type of choice in the distant future.[71] Through the MOU, AOL and Time Warner have established a framework whereby marketplace forces will promote multiple ISP choice for consumers no later than the end of next year. The company intends to negotiate with ISPs of all size serving small or large markets. Notwithstanding MAP's implications,[72] AOL Time Warner will not place an artificial number on the ISPs with which it will negotiate. Nor will it require the subscribers of those ISPs to "go through" an AOL Time Warner

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[70] AOL conference with financial analysts, January 19, 2000 (emphasis added).

[71] *Compare* MAP Petition at 141-142; SBC Comments at 20 *with* Public Interest Statement at 16; Supplement at 22-23.

[72] *See* MAP Petition at 13.

"first screen." The merged company also will enable ISPs to bill their consumers directly, thus giving them the ability to create their own customer relationships. It will not tie access to the purchase of backbone services or the purchase of AOL Time Warner services or content. Finally, AOL Time Warner will make this choice a reality as soon as possible.[73]

The above commitments address the concern expressed in the May 10, 2000 letter from Senators Mike DeWine and Herb Kohl to FCC Chairman William Kennard and Federal Trade Commission Chairman Robert Pitofsky regarding the possible use of certain technology to give preferential treatment to affiliated content on the combined AOL Time Warner cable systems.[74] As AOL Chairman Steve Case and Time Warner Chairman Gerry Levin expressly stated:

> we believe that full implementation of our MOU addresses the issue [raised by Senators Dewine and Kohl] head-on by prohibiting discrimination in the handling of ISP traffic based on affiliation with AOL Time Warner, thereby ensuring our cable customers a range of ISPs who will, in turn, provide access to the full diversity of content that the Internet can offer.[75]

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[73] SBC admits as much. *See* SBC Comments at n. 88. As explained in the Supplement at 23, the company cannot terminate unilaterally Road Runner's existing contractual relationships. Nevertheless, AOL Time Warner will work to persuade its partners—as well as the MSOs with which Road Runner has contracted—to agree to end the exclusivity provision of these contracts, before they expire at the end of next year. *See* America Online, *AOL & Time Warner Announce Framework for Agreements to Offer AOL Service & Other ISPs on Time Warner Broadband Cable Systems*, Press Release, February 29, 2000, available at <http://media.web.aol.com/media/press_view.cfm?release_num=25100400&title=Memorandum%20of%20Understanding%20Between%20Time%20Warner%2C%20Inc%2E%20and%20America%20Online%2C%20Inc%2E>.

[74] *See* Letter dated May 10, 2000, from the Honorable Mike DeWine and the Honorable Herb Kohl, U.S. Senate, to Chairman William Kennard, Federal Communications Commission, and Chairman Robert Pitofsky, Federal Trade Commission, at 2 ("DeWine and Kohl Letter to FCC and FTC").

[75] Senate Antitrust Subcommittee Letter.

Senators DeWine and Kohl characterized this as an "important commitment[]" and "a step towards ensuring nondiscrimination."[76]

From the beginning, the Applicants have recognized the MOU—"the foundation of their Internet access policy"[77]—as a set of pro-competitive principles that will guide their ongoing steps to flesh out the details through arms-length negotiations. As stated in the MOU itself, AOL and Time Warner acknowledge that this document is not the finish line.[78] The principles of the MOU provide a template for negotiations with ISPs seeking to affiliate with AOL Time Warner cable systems.[79] The same principles also directly advance the Commission's policy of promoting consumer choice among Internet access services to a degree well beyond the competitive forces that the agency already has found sufficient to protect the public interest.

Granting any of the commenters demands for conditions regarding Internet access,[80] in light of the Commission's decision in the *AT&T/TCI Order* and the subsequent developments

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[76] DeWine and Kohl Letter to FCC and FTC at 2.

[77] Supplement at 23.

[78] MOU at ¶ 10 (AOL and Time Warner intend "to continue to refine those particulars in a manner that is responsive to, and consistent with, the desire of consumers to have a choice among multiple ISPs offering broadband service and the still-evolving nature of the cable infrastructure.").

[79] *Case Foresees Cable-Access Deal Soon*, Multichannel News, April 24, 2000 at 55.

[80] *See, e.g.*, MAP Petition at 9, SBC Comments at 35, Telecommunications Resellers Association Letter, CS Docket No. 00-30, at 2 (filed April 11, 2000) ("TRA Letter"). *See* Gemstar Petition at 5-6. *See also* MAP Petition at 141-42 and SBC Comments at 3. *See*, *e.g.*, TRA Letter at 2 (calling for regulation of cable operational management of its broadband systems, cable technical management of its broadband systems, and cable and ISP marketing of Internet services; required unbundling; and what would amount to elimination of AOL Time Warner's property interest in its facilities); SBC Comments at 22-24, 32-34 (calling for, *inter alia*, biannual audits of nondiscrimination and a prohibition of leveraging its conduit); MAP Petition at 86, 89-90, 94, 98-99, 148, 152, 157 (calling for, *inter alia*, a right to injunctive relief from discrimination
(Continued...)

enumerated above, would be wholly unjustified. Conditioning this merger would discourage other market participants who, like AOL Time Warner, voluntarily commit to pro-competitive practices. And burdening AOL Time Warner alone with an open access condition would hinder its ability to negotiate with other cable operators to encourage them to follow suit. The Commission should reject all such conditions as unneeded, and unwise.[81]

(...Continued)

in the provision of access, and non-disclosure agreements providing broadband service profers with confidential treatment of information). As the Commission explained in rejecting common carrier conditions in the AT&T/TCI merger:

> [c]ommenters advocating such a condition rely on the open access rules applicable to common carriers and seek to expand those requirements beyond traditional common carrier functions. We continue to recognize and adhere to the distinctions Congress drew between cable and common carrier regulation. Under present law, neither cable operators nor common carriers providing cable service, other than on a common carrier basis, are subject to common carrier regulations under Title II of the communications Act.

AT&T/TCI Order at ¶ 29 (footnote omitted). MAP calls for divestiture of Time Warner's interest in Road Runner. *See* MAP Petition at 157. SBC calls for a blanket divestiture of interests co-owned with AT&T as well as a prohibition against any "sweetheart deals." *See* SBC Comments at 30-32. As explained *supra*, these commenters did not—indeed cannot—demonstrate that *this merger* would cause a significant increase in concentration or other anticompetitive effects in the provision of Internet services (however the relevant market might be defined), and thus offer no grounds for concluding that the extreme step of divestiture is required.

[81] Notably, the co-sponsors of a draft "Internet Freedom Act" have dropped an open access provision from the proposed bill—explaining that "[p]rivate commitments are being made and appropriate space should be provided for these commitments to mature." "On the Hill," *CableFax Daily*, Vol. 11, Iss. 89, at 2 (May 5, 2000). The report quotes Rep. Rick Boucher, who (with Rep. Bob Goodlatte) is co-sponsor of proposed H.R. 1686.

2. Given the vibrant and ever expanding choices in Internet content available to consumers, there is no reason for the FCC to reverse its settled precedent against intervening in the area of Internet services and content more generally

The Applicants have noted above the abundance of ISPs providing links to the Internet, the countless and ever expanding number of web sites and web pages available on the Internet, and the growing competition among rival Internet broadband services and platform providers. By virtue of these facts, AOL Time Warner will have neither the ability nor the incentive to wield any kind of anti-competitive power over the delivery of online content that draws users to the new medium. Rather, as noted above and addressed at length in the Applicants' previous filings, this merger will provide content benefits—particularly by hastening faster development of innovative broadband services to attract even more users to the web.[82]

Nevertheless, SBC and MAP contend that AOL Time Warner would hold dominant positions both among broadband Internet content providers and in the Internet access arena, and would thereby be able to "aggressively leverag[e] in both directions."[83] The only solution, they claim, is for the Commission to police the delivery of Internet content and services, thereby pushing the agency to a level of Internet regulation far beyond that which it already has flatly rejected.

As demonstrated below, commenters' apprehensions about the merged company's ability to "dominate" Internet content do not withstand analysis. AOL Time Warner already has strong economic incentives to do independently what commenters ask the agency to impose via mandate: to distribute its content via other platforms and to carry content created by other providers.

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82 *See, e.g.,* Supplement at 29-32.

83 SBC Comments at 7, 18; *see* MAP Petition at 32-33.

These incentives are backed up by Applicants' existing practices and the on-the-record assurances the Applicants have made to the agency, to Congress, and to consumers.

a. The requests for online content regulation are directly contrary to the FCC's market-oriented approach toward the Internet

In addition to calling for regulation of the Internet access infrastructure, commenters go so far as to ask for the Commission to supervise the activities of, and content offered by, individual ISPs. SBC models its request for detailed mandates on the Cable Television Consumer Protection and Competition Act of 1992, effectively calling for imposition of the program access and carriage agreement rules on the Applicants' provision of both content and access services on the Internet.[84] Similarly, MAP asks the agency to closely monitor the merged company's provision of online content in a thinly veiled bid for the imposition of Title VI—or perhaps even Title II—mandates onto AOL Time Warner's ISP services and content offerings.[85]

These calls for regulating the provision of Internet content services are contrary to the agency's long-standing policy position that market forces, rather than regulation, should steer the development of the Internet generally. In its Report to Congress on the deployment of advanced services, for example, the agency reaffirmed that "[i]n no respect [was it] considering regulating the Internet."[86] Since that time, Chairman Kennard repeatedly has championed the benefits of

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84 SBC Comments at 33-34.

85 MAP Petition at 8-9, 151, 153.

86 Advanced Telecommunications Capability NOI, 14 FCC Rcd 2398, 2405; *see also id.* at 2464 (Separate Statement by Commissioner Susan Ness). In addition, the FCC's practice of allowing market forces to govern the Internet is consistent with congressional policy. *See, e.g.,* 47 U.S.C. § 230(b)(2) ("It is the policy of the United States to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.").

letting market forces set the course for Internet services: "Unless a compelling case can be made for government action—a failure of the market to maximize consumer welfare—then we should give the marketplace a chance to work."[87]

As demonstrated below, there is no factual basis for the Commission to reverse course now and become entangled in the oversight of Internet content providers.[88] Certainly the Commission has never claimed the legal authority to assert jurisdiction over Internet content. In the *WorldCom/MCI Order*, while the agency concluded that telecommunications transmission capacity used for Internet service fell within its purview, it explicitly disclaimed any effort to regulate access to the Internet content services carried over such transmission facilities.[89] In the

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[87] Chairman William E. Kennard, *Broadband Cable: Next Steps*, Remarks before the Western Show, California Cable Television Association, Los Angeles, CA, December 16, 1999.

[88] To the degree that Commenters suggest or imply that the Commission has authority to regulate the editorial choices made by speakers using the diverse, competitive medium of the Internet, that suggestion is constitutionally untenable. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844 (1997) (invalidating an act of Congress and finding "no basis for qualifying the level of First Amendment scrutiny that should be applied" to the Internet). Even in the context of traditional broadcast service, where the Supreme Court has validated some degree of FCC regulatory power over speech, *see Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969), the agency itself has determined that it is wisest to refrain from intruding into content decisions. *See, e.g., Complaint of Syracuse Peace Council against Television Station WTVY Syracuse, New York*, 2 FCC Rcd 5043, ¶ 94 (1987) (constitutional rights and statutory objectives best served "by proscribing governmental regulation of speech"), aff'd, 867 F.2d 654 (D.C. Cir. 1989), cert. denied, 493 U.S. 1019 (1990). If both law and policy dictate that course in the context of broadcasting, there is no sustainable justification for government intrusion into the editorial decisions that shape Internet-delivered content.

[89] *WorldCom/MCI Order* at ¶ 142 ("We seek not to regulate the Internet, but rather to ensure that Internet services which rely on telecommunications transmission capacity remain competitive, accessible and devoid of entry barriers.").

In the FCC's only merger analysis directly touching on the content aspect of the Internet, the agency concluded that "nothing about the proposed merger would deny any customer (including AT&T/TCI customers) the ability to access the Internet content or portal services of his or her choice." *Id*. *AT&T/TCI Order* at ¶ 96.

same vein, the Commission recently found certain Title VI regulation inapplicable to ISP offerings, even when the Internet services at issue include streaming video content.[90]

b. The facts make plain that there is robust diversity and competition in Internet content

As discussed above, there can be no rational dispute that a remarkable degree of diversity and competition exists among Internet content providers.[91] In this thriving arena, Internet users have options among thousands of ISPs providing routes to the web. Once on the Internet, users have access to millions of web pages with various sources of content. Consumer choice is now augmented, in the broadband context, by competition among alternative platform providers. It therefore is not possible, as a factual matter, for AOL Time Warner to harm competition in this robust marketplace.

Moreover, Internet content providers compete not just with other web sites, but also with offline information and entertainment. It is not surprising, then, that the FCC has never deemed Internet "content," whether narrowband, broadband, or combined, to be a separate product "market," let alone one warranting regulation. The amorphous nature of the content flowing across the Web defies policymakers' efforts to define it.[92]

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[90] In *Internet Ventures, Inc.*, the FCC determined that ISPs were not entitled to commercial leased access to cable facilities under Section 612 of the Communications Act because the varied content services delivered by ISPs did not strictly consist of "video programming," the only type of service falling under that provision of the statute. *Internet Ventures, Inc.*, CSR-5407-L (Memorandum Opinion and Order, February 18, 2000).

[91] *See supra* notes 29-35 and accompanying text.

[92] "Internet content" is, of course, essentially the same content often distributed through other channels. Such content generally competes for consumers' attention with a broad array of content distributed by other media, most of which serve as a ready substitute with respect to the information or entertainment conveyed.

Perhaps these same reasons explain why commenters here offer little in the way of facts to buttress their market definition and competitive effects claims. Assuming *arguendo* that any rational case for a *broadband* online content market could be constructed, efforts to demonstrate that AOL Time Warner would hold a dominant position in such a market fall well short of the mark. To bolster its horizontal impact claims, for example, SBC appears to imply that the two Applicants' online content assets directly overlap.[93] This implication is incorrect. Although Time Warner is a significant generator of traditional media content (including, to a much lesser extent, online forms), AOL is not. Rather, AOL's focus is on aggregating and packaging in user-friendly ways online content produced by other entities. Consequently, the combination of the two companies will not significantly consolidate original creators of content.[94]

Commenters also do not demonstrate that the AOL Time Warner merger will have any adverse vertical effects.[95] As explained above in Section III.A.1.(c), AOL Time Warner will not

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[93] *See* SBC Comments at 13.

[94] In the same vein, attempts to rely on narrowband statistics to cast AOL as a dominant player in a purported broadband marketplace are simply inapposite. *See* SBC Comments at 13. Just as there is no showing of a "market" with respect to content, there also is no showing of a market "share." Use of data indicating that "77 percent of all Internet subscribers" visit an AOL site each month is irrelevant for calculating any market share, even with respect to the narrowband arena. *See id*. According to the same source that SBC relies on for this statistic, 63 percent of Internet subscribers visit Yahoo! sites each month, 61 percent visit Microsoft sites, and 43 percent visit Lycos sites. *See id*. All of these numbers, as interesting as they might be, have no bearing on market definition or whether the proposed merger will have any horizontal impact on the provision of online content.

[95] The commenters have made vague and passing comments about how this merger might threaten competition through bundling of various services despite the consumer benefits that can flow from the ability to purchase a bundle of services from a single source. *See, e.g.,* MAP Petition at 18, 123-124, 153; SBC Comments at 8, 32. As demonstrated above, each of the separate services that AOL Time Warner might offer is available on a competitive basis, thus eliminating any potential negative competitive consequences from bundling.

have market power in any access "relevant market" given actual and potential broadband platforms; and therefore, since Internet content providers have access to alternative platforms, the merged entity could not "leverage" itself into dominating broadband Internet content. Similarly, because AOL Time Warner will have no undue power among the countless and vastly diverse providers of Internet content, it could not "leverage" itself into dominating broadband Internet access.[96]

c. A unified AOL Time Warner will continue to have strong incentives to promote the widest possible dissemination of content

The merged company will be highly motivated both to (1) offer a diversity of content sources on its own broadband services, and (2) make its content available on a broad range of other transmission systems. First, because the merged company will not own anything approaching the bulk of desired content on the web, AOL Time Warner would needlessly drive away subscribers if it limited them to accessing only company-generated content. AOL Chairman and CEO Steve Case explained this straightforward incentive during his recent testimony before the Senate Committee on the Judiciary:

> [L]et me be clear: *AOL Time Warner will never limit content diversity on any of our systems*. If we limit content, if we do not promote a diversity of voices, if we do not maintain scrupulous

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[96] Even if the merger were thought to increase AOL's ability to harm ISP rivals by denying access to Time Warner content, the company would have little incentive to engage in this practice. AOL would benefit from this strategy only to the extent that it would gain subscribers as a result. Any increase in subscribers is likely to be insignificant, however, because of the availability of close substitutes for Time Warner content. Moreover, any limited gains to AOL would likely be outweighed by more substantial losses to Time Warner because restricting the availability of Time Warner content would translate into lower advertising and e-commerce revenues.

> journalistic standards, then consumers will waste no time migrating to other Internet and media services.[97]

With respect to making AOL Time Warner content available through non-company-owned delivery systems, no commenter demonstrates that it would serve the merged company to preclude itself from profitable opportunities to distribute its content through alternative Internet providers. With the prolific and diverse sources of entertainment and information available on the Internet, no content provider is indispensable; if AOL Time Warner restricted the availability of its content, an array of competitors could immediately provide attractive alternatives.[98] The Applicants are well aware that the merged entity would gain nothing by curtailing its content distribution opportunities. Time Warner Chairman Gerald Levin recently explained in his congressional testimony that the parties "stipulate[d] up front" that "this merger is not about the exclusive co-opting of Time Warner's content on AOL" because such a tactic would be contrary to the companies' ultimate goal of "getting the most creative material and delivering consumer choice."[99]

These straightforward commitments are consistent with each party's practice of providing consumers with broad access to diverse content. The widest possible distribution brings

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[97] Testimony of Steve Case, Chairman and CEO, America Online, United States Senate Commerce Committee, March 2, 2000 ("Case Testimony, Senate Commerce Committee").

[98] Examples drawn from Time Warner's experience in more traditional media prove the same point. For example, although *Time* magazine provides attractive, high quality news and current affairs reporting, audiences deprived of its content would be able to choose such competing sources as *Newsweek*, *U.S. News*, or *The Economist*. Similarly, *MSNBC* and *Fox News Channel* provide competitive alternatives to CNN.

[99] Testimony of Gerald Levin, Chairman and CEO, Time Warner Inc., United States Senate Judiciary Committee, February 29, 2000. Mr. Levin further stated in his testimony: "[T]he material coming from Time Warner will not be exclusively available through AOL." Rather, "[t]he content, the heritage of Time, Inc. and Time Warner is going to find multiple expression."

profitability in the face of intense competition. Indeed, the Time Warner family of brands has been built on a mass market strategy of making its content accessible to audiences everywhere—even when the distribution facilities are controlled by competitors.[100] By the same token, the company has an established policy of providing its customers with a diversity of content sources. Likewise, AOL has an established strategy of making its products and services widely available—including to non-subscribers.[101]

In addition, the merging parties have demonstrated through the MOU and their additional statements that they are in fact taking steps to promote consumer choice and content diversity. For example, the AOL service will not feature only Time Warner content.[102] Of course, AOL subscribers always have, and will continue to have, immediate access to any content on the Web by typing the URL of the desired site at the top of the AOL front screen and via links throughout

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100 Thus, Time Warner's popular programming networks are available to DBS and other MVPD operations that compete with Time Warner's cable systems. For example, the various news and information networks of Time Warner's CNN are available on DBS systems and other MVPDs. Moreover, CNN content is sold to over-the-air broadcast stations—even though news broadcasts incorporating these materials may draw viewers away from CNN's own channels. Similarly, other Time Warner business groups that produce entertainment or information products have consistently made such content available via competing distribution channels owned by other companies. For example, although Time Warner has an interest in The WB Network, its Warner Bros. Television operation continues to produce top-rated shows for competing networks, such *ER* and *Friends* on NBC, as well as *The Drew Carey Show* on ABC.

101 Through its "AOL Anywhere" strategy, AOL has sought to make the full range of its interactive brands, services, and features available to consumers across a range of devices and platforms. To carry out this initiative, AOL has been actively pursuing non-exclusive agreements with DSL, wireless, satellite, and cable providers, despite the fact that its service already was available via dial-up connections nationwide. In addition, AOL makes a variety of news, entertainment, and other types of information freely accessible to non-subscribers on its AOL.com portal.

102 Senate Committee on the Judiciary, AOL Time Warner Hearings, February 29, 2000, (transcription by Multivision Media Monitoring) at 27-29.

the service.[103] Consistent with the goals of the MOU, those consumers choosing an ISP not affiliated with AOL Time Warner also will be able to access any content on the Internet without being forced to go through the AOL service first. As Steve Case has stated, "[b]roadband consumers will not go through AOL unless they choose AOL. If they choose another Internet Service Provider, they will not see AOL or its front screen. And they will not be blocked from any content they wish to see."[104] Plainly, AOL Time Warner's commitments to openness will further spur competition among ISPs, leading to an even greater richness of Internet content and services.

In light of both market conditions and the two merger partners' long-standing strategic goals, suggestions that the merged entity will manipulate its content or facilities to unfairly compete for subscribers are not valid.[105] Given the vast and diverse availability of content choices, the economic incentives for a mass media company clearly militate for the widest possible distribution to the largest audience obtainable—everywhere and anywhere.

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The record in this docket demonstrates that the combined company has the incentives to make good on its stated plans to pursue the widest possible distribution of content to the largest audience possible. There simply is no cause or basis for the FCC to adopt regulations that would place the FCC in the role of monitoring the Internet content arena.

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[103] *Id.*

[104] Testimony of Steve Case, Chairman and CEO, America Online, United States Senate Commerce Committee, March 2, 2000.

[105] *See, e.g.,* SBC Comments at 18.

B. Neither AOL's Indirect Interest In DirecTV Nor Anything Specific To This Merger Will Harm Competition Among Multichannel Video Programming Distributors

As described in the Applicants' earlier submissions in this docket, the proposed merger will in no way diminish competition among multichannel video programming distributors ("MVPDs"). While Time Warner is an MVPD, AOL is not. And, apart from this merger, AOL had no intent to become an MVPD. Rather, the AOL interest here at issue—its investment in General Motors ("GM"), the ultimate parent company of DirecTV—is tailored to accelerate the deployment of broadband services delivered via satellite. As demonstrated more fully below, allegations by certain commenters that the merger will somehow produce heightened concentration among MVPDs or otherwise reduce potential competition in this arena are without merit.

1. The calls of MAP and the American Cable Association for AOL to divest its non-attributable investment in General Motors, the ultimate parent of DirecTV, are inconsistent with the FCC's goals and policies

The Applicants have demonstrated that AOL's indirect interest in DirecTV affords AOL no ability to influence the video programming decisions of the direct broadcast satellite ("DBS") operator.[106] Beyond this limited interest which, in fact, is premised upon DirecTV's role as a satellite broadband provider rather than as a video programming distributor, AOL has no other ownership interest in any MVPD. Consequently, the merger of AOL and Time Warner does not

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[106] *See generally* Supplement at 10-15. To recap briefly, AOL's investment is in GM, the ultimate parent company (through its ownership of Hughes Electronics Corporation ("Hughes")) of DirecTV, not the DBS provider itself. The investment is currently in the form of a preference stock, which provides no voting rights except in the most limited circumstances. Even after conversion to a GM common stock that tracks the economic performance of Hughes, AOL's interest would still not be attributable under any even potentially relevant FCC attribution rule; for example, AOL's voting interest would be significantly below the 5 percent threshold for attribution under the horizontal ownership provision. *See* 47 C.F.R. § 76.503.

implicate any of the Commission's MVPD or video programming-related concerns. Although no commenter seriously questions the conclusion that this interest would not be attributed to the merged company, the American Cable Association ("ACA") and MAP nevertheless call for the Commission to require AOL to divest this interest as a condition on approval of the merger.[107]

Neither MAP nor ACA provides any specific explanation, much less justification, for their divestiture proposals. To the extent that they say anything at all, they raise conflicting concerns. On the one hand, ACA claims that, "[a]ttribution standards aside,"[108] AOL Time Warner will somehow use its non-attributable interest to grow DirecTV's customer base "at the expense of smaller cable businesses."[109] By contrast, MAP asserts that the merger will "harm" the ability of DBS to compete with cable.[110]

AOL's investment in General Motors provides it with no opportunity to exert influence over DirecTV or its day-to-day operations, much less video programming competition generally. Indeed, the Applicants demonstrated in their Supplement that AOL's attenuated interest in

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[107] *See* Comments of the American Cable Association, CS Docket No. 00-30, at 13-14 (filed April 25, 2000) ("ACA Comments"); MAP Petition at 157. Although RCN notes that the Commission has retained the "flexibility of addressing [DBS cross-ownership] on a case by case basis," it does not request that the Commission take any such action here. RCN Petition at 6.

[108] ACA Comments at 13.

[109] *Id*. Although it is not entirely clear, ACA seems to base its call for divestiture on concerns over increased competition from DirecTV as both a multichannel video programming distributor and high-speed Internet access competitor to ACA's member cable system operators. Yet, ACA itself acknowledges that DirecTV is *already* its "members' principal competitor." *Id*. Thus, ACA's concerns appear to be neither merger-specific nor consistent with the Commission's clearly stated goal of promoting DBS competition to cable.

[110] *See* MAP Petition at 35. Despite calling for divestiture, MAP's entire discussion of the DirecTV interest is limited to describing it as "inappropriate." *Id*. Judging from the remainder of its filing, however, MAP appears to base its conclusion on AT&T-related concerns not specific to this proceeding. *See generally* Section I, *supra*.

DirecTV is not attributable to AOL under any potentially relevant FCC standard.[111] No party presents evidence to the contrary.[112] As a result, and given that AOL does not hold other MVPD interests, this merger will have no impact on the degree of concentration among multichannel video programming distributors.

Rather, these calls for divestiture themselves risk harm to the public interest. As the Applicants have demonstrated, AOL's investment in GM provides two significant benefits. First, it is designed to accelerate the development of satellite as a viable alternative broadband platform—a goal shared by the Commission.[113] Second, it contributes to the creation of a nationwide broadband footprint, thereby helping to make advanced services available to all Americans—a result mandated by Congress through the enactment of Section 706.[114] For these

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[111] Supplement at 13-14.

[112] RCN concedes that AOL's investment "fall[s] below the attribution rules' radar," RCN Petition at 7, yet inexplicably proceeds to aggregate the MVPD subscribers served by DirecTV with those of Time Warner. As demonstrated above and in the Supplement, however, there is no basis under the horizontal ownership rules to do so. Moreover, RCN's attempt to aggregate the subscribers of AT&T, MediaOne, and Cablevision with those of Time Warner is all the more misleading. *Id*. at 8. As discussed above, *see generally* Section I, *supra*, any concerns arising from AT&T's acquisition of an ownership interest in TWE are already being addressed in the ongoing review of the AT&T/MediaOne merger; furthermore, neither AOL nor Time Warner hold any ownership interest in AT&T, MediaOne, or Cablevision. RCN thus provides absolutely no basis for its allegations of an increase in concentration among MVPDs as a result of *this* merger, which adds only AOL's non-attributable interest in the parent company of DirecTV to the interests currently held by Time Warner.

[113] *See, e.g.*, *Section 706 Report to Congress* at ¶ 4 ("We are encouraged that, as the demand for broadband capability increases, methods for delivering this digital information at high speeds to consumers are emerging in virtually all segments of the communications industry—wireline telephone, land-based ('terrestrial') and satellite wireless, and cable, to name a few.").

[114] *See also* 47 U.S.C. § 157 ("It shall be the policy of the United States to encourage the provision of new technologies and services to the public.").

reasons as well, the Commission should reject commenters' unsupported calls for divesture of AOL's procompetitive investment in GM.

2. There is no basis for concerns that the merger will harm MVPD competition by eliminating AOL or the Internet itself as a potential competitor

SBC and MAP contend that the merger will adversely affect competition among MVPDs by eliminating AOL, or even the Internet itself, as a potential competitor. Unsupported references to "lost incentives" aside,[115] the fact is that this merger—and the MOU to which it has given rise—will promote the deployment of Internet streaming video and thus video competition.

First, notwithstanding claims to the contrary, AOL had no pre-merger plans to compete as an MVPD. Second, commenters incorrectly claim that the merger will harm the development of Internet-delivered video, in part by eliminating AOL's incentive to promote it. Yet AOL and Time Warner have, in fact, pledged to allow unaffiliated ISPs "to provide video streaming" to consumers over the Time Warner cable systems.[116] As a result, the merger plainly will promote the development and competitive provision of that offering. Furthermore, given that the Applicants will allow unaffiliated ISPs to offer video streaming over AOL Time Warner cable systems, the merged company's incentives to compete virtually compel it to develop and promote its own video streaming capabilities.[117] Thus, although AOL is not—and had no pre-merger plans

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115 *See, e.g.*, SBC Comments at 28.

116 MOU at ¶ 6 ("AOL Time Warner recognizes that some consumers desire video streaming, and AOL Time Warner will not block or limit it.").

117 Even in the absence of the Applicants' commitment to allow video streaming by unaffiliated ISPs, the merged company would still have ample incentive to provide Internet video in order to compete with the offerings of broadband service providers utilizing other platforms, such as xDSL.

to become—a competitor in the MVPD arena, the merger's positive impact on the development of streaming video demonstrates how the proposed transaction will serve the public interest.[118]

3. While advocating consumer choice among ISPs over unaffiliated cable systems, AOL Time Warner will not—as ACA suggests—provide its cable networks only to those cable operators which adopt such a policy

ACA appears to argue against the cause of multiple ISP access, memorialized in the MOU.[119] AOL and Time Warner are indeed committed to demonstrating to the rest of the cable industry the wisdom of multiple ISP choice through the success of its own policy. However, ACA goes on to speculate that AOL Time Warner might attempt to further this goal by conditioning carriage of its popular cable networks upon carriage of the AOL service. This suggestion is inconsistent with the merged company's economic best interest. Indeed, ACA itself concedes that "Time Warner and Turner programming affiliates have dealt fairly with smaller cable businesses and their buying group, the National Cable Television Co-op."[120]

Because affording subscribers a choice among ISPs is the right thing to do, from both a

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[118] There is no merit to the claim that AT&T/MediaOne and AOL Time Warner "will be in a position to pick a single winning streaming video software vendor and to make sure that its product is optimized to their technology." SBC Comments at 23-24. In fact, sites that offer streaming media frequently provide a choice of formats, including Microsoft Windows Media Player, Apple QuickTime, and RealNetworks RealPlayer. For example, Time Warner makes its video clips available in both RealPlayer and Windows Media Player formats. *See, e.g.*, <http://www.entertaindom.com/pages/ hipclips/home.jsp>.

[119] *See* MOU at ¶ 2 ("AOL Time Warner intends to encourage actively other cable operators similarly to provide consumers with a choice of broadband ISP offerings."); *see also* ACA Comments at 11-12 ("The parties make clear their expectation of access to other delivery platforms, including unaffiliated cable systems, on 'a commercially reasonable basis' and through 'marketplace forces.'"). Commercially reasonable terms negotiated in the marketplace, however, can hardly be regarded as inconsistent with FCC policy.

[120] ACA Comments at ii.

business and consumer standpoint, AOL Time Warner intends to use its standing within the cable industry to make the case for voluntary changes in MSO policies. But from a business standpoint, artificially limiting the reach of Time Warner's cable networks by conditioning their carriage upon carriage of the AOL service would be counterproductive. As discussed earlier, Time Warner's business model for its cable networks is built on the foundation of making its programming available to as wide an audience as possible—and therefore to as many MVPDs as possible. The type of practices ACA imagines, furthermore, could not be sustained in the marketplace because there are too many diverse, competing programming networks to step into the void if AOL Time Warner in any way limited access to its programming. After the merger, all MVPDs, regardless of size, will continue to have access to AOL Time Warner affiliated programming. Not only is this required by the Commission's program access rules,[121] but, as explained above, this has always been Time Warner's policy in the past—and it will continue to be AOL Time Warner's policy in the future.

[121] 47 C.F.R. §76.1000 *et seq.* *See also* SBC Comments at 33 (alleging that the merged company will "requir[e] independent distributors to purchase unreasonably large bundles of AOL/Time Warner content"). Applicants also note that the Commission dismissed similar claims by ACA (then known as the Small Cable Business Association) in its review of the Capital Cities/ABC/Disney merger. In that proceeding, ACA claimed that "CC/ABC stations have unfairly required carriage of ESPN2 as a condition of retransmission consent." *Applications of Capital Cities/ABC, Inc. and The Walt Disney Company*, 11 FCC Rcd 5841, at ¶ 19 (1996) ("*ABC/Walt Disney Order*"). In response, the Commission stated the following: "Nor can we conclude that a transfer proceeding is the proper forum in which to consider changes in the applicable program access or retransmission consent rules." *Id.* at ¶ 22. Thus, to the extent that Commenters' contentions in the instant proceeding relate to conduct covered by the program access rules, such conduct is already prohibited. To the extent that they seek an expansion of the program access rules in the context of the Commission's review of this merger, however, they have opted for the wrong forum.

C. Various Private Commercial Disputes Raised By Other Commenters Are Not Properly Considered In The Context Of This Merger

The Commission has remained firm in its policy of limiting the focus of its merger review proceedings to issues causally linked to the specific transaction itself.[122] Below the Applicants briefly address a number of unrelated disputes raised by commenters that are appropriately addressed, if at all, in other fora.[123]

1. Comments regarding instant messaging involve a pre-existing dispute between rival service providers

The comments filed by Tribal Voice and iCast concern an important debate in the marketplace—but one that predates, and is unrelated to, this merger. At issue are instant messaging ("IM") services, which both of these commenters—like AOL—provide. AOL, for its part, offers its AOL Instant Messenger ("AIM") service for free to any Internet user, whether an AOL subscriber or not. AOL also licenses its technology to many other IM providers. Because of the free distribution of its product and its generous licensing policies, IM services have rapidly grown in popularity and usage. AOL has, however, sought to protect the security and privacy of its customers from being jeopardized by services that seek AOL member passwords and that seek

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[122] *See, e.g.*, *AT&T/TCI Order* at ¶ 96 ("We further conclude that the open access issues would remain equally meritorious (or non-meritorious) if the merger were not to occur."); *id*. at ¶¶ 37-39 (noting that "parties have not demonstrated that the merger provides a basis for imposing restrictions"); *ABC/Walt Disney Order* at ¶ 27 (1996) ("The Commission's transfer and assignment process is not the appropriate forum to consider changes in its rules.").

[123] Several of these comments were not properly served on AOL and Time Warner as required under the Commission's rules. Because commenters American Cable Association; Memphis Networx, LLC; Memphis Light, Gas and Water Division; iCast; and Tribal Voice failed to serve the Applicants, their submissions must be treated as informal objections. *See* 47 C.F.R. §§ 1.47(a), (e); 76.7(b)(1). The few other informal objections, submitted to the Commission via e-mail by certain consumers and one municipality, are likewise not merger specific (and generally raise claims already addressed herein).

unauthorized access to its IM servers.[124] These two IM competitors, which have sought such unauthorized access, now wish to entangle the FCC in a matter that remains the subject of ongoing industry dialogue.

The Applicants respectfully submit that this dispute is properly left to the marketplace. This would be in keeping with Commission policy, for the FCC has long refrained from involvement in ISP services.[125] In addition, the Commission has determined to abstain from engaging in the separate regulatory classification of particular ISP service offerings (*e.g.*, e-mail), much less the imposition of regulation upon such services.[126] This regulatory restraint has allowed competition to drive the growth rate of the Internet to levels that could not otherwise have been achieved.

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[124] Although AOL blocks the unauthorized "hacking" into its servers by other IM providers, it does not in any way prevent its subscribers from using competing IM services.

[125] This policy dates back some 30 years to the *Computer Inquiry* proceedings that the Commission initiated to address the convergence and interdependence of communications and data processing technologies. *See, e.g.*, *Regulatory and Policy Problems Presented by the Independence of Computer and Communications Services Presented by the Independence of Computer and Communications Services and Facilities, Tentative Decision*, 28 FCC 2d 291, 295 (1970); *Final Decision and Order*, 28 FCC 2d 226 (1971), *aff'd in part sub nom. GTE Serv. Corp. v. FCC*, 474 F. 2d 724 (2d Cir.), *decision on remand* 40 FCC 2d 293 (1973).

[126] *See Federal-State Joint Board on Universal Service*, 13 FCC Rcd 11501, ¶ 79 (1998) (Report to Congress) ("More generally, though, it would be incorrect to conclude that Internet access providers offer subscribers separate services—electronic mail, Web browsing, and others—that should be deemed to have separate legal status, so that, for example, we might deem electronic mail to be a 'telecommunications service,' and Web hosting to be an 'information service.' The service that Internet access providers offer to members of the public is Internet access."). As is the case with e-mail, IM constitutes a functional component of an information service offered by an ISP, and therefore properly falls outside the scope of FCC telecommunications service regulation.

Tribal Voice and iCast's ongoing business dispute with AOL cannot justify departing from this unquestionably successful approach. Competition among IM services is thriving.[127] As these two commenters themselves point out, this rivalry has led to the development of a wide range of IM innovations as providers strive to differentiate themselves to consumers.[128] AOL vigorously supports the continued growth and competitive availability of IM services. In addition to making its AOL Instant Messenger available as a free software download to the entire Internet community, AOL has, to date, negotiated licensing agreements with more than a dozen companies to customize and integrate AOL IM technology into their products.[129] AOL Time Warner will continue to enter such licensing agreements. In any event, the marketplace can and should resolve these issues.

2. RCN's proposed program access conditions present policy proposals that are unrelated to this merger and have been repeatedly rejected by the Commission

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[127] Tribal Voice and iCast provide no basis for their claim that there is a distinct IM product market separate and apart from all other forms of instant or other communications services. In any event, in addition to AOL and the commenters themselves, the rapidly expanding list of IM providers includes such major industry players as Microsoft, Yahoo!, and Excite. Other IM providers include Odigo, ScreenFIRE, PeopleLink, Joe GALAXY, Ding!, and Netpopup, just to name a few. Moreover, anyone can create and market an instant messaging product using the common open Internet infrastructure. For example, Jabber, Inc. is developing an open source, XML-based instant messaging platform. *See generally* <http://www.jabber. com/>.

[128] *See, e.g.*, Comments of Tribal Voice, CS Docket No. 00-30, at 6-7 (filed Apr. 25, 2000) ("[I]n the last year, there have been a number of exciting innovations in IM functions. These include voice communications, group browsing, detection of others who are browsing the same web page, detection of people actively receiving information about your presence, improved security and privacy methods, the addition of real-time alerts from other information sources and many other enhancements too numerous to mention here."); Comments of iCast, CS Docket No. 00-30, at 6 (filed Apr. 25, 2000) (noting that IM providers offer "a number of different choices in terms of functionality").

[129] This list of licensees already includes, among others, IBM, Novell, Lycos, EarthLink, Apple, and Juno.

RCN's Petition for Conditions again revisits issues upon which the Commission has previously ruled. RCN admits that the expansion of program access rules which it seeks as a condition on this merger is inconsistent with "the existing language in the [Communications] Act, the [FCC's] rules and Commission precedent."[130] The Applicants agree,[131] but submit that, in any event, the petition has nothing to do with this merger.

The FCC has repeatedly rejected demands that it expand the scope of the program access rules in the manner advocated by RCN.[132] The Commission not only has denied these requests as a general matter,[133] and in response to specific program access complaints,[134] but also has rejected

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[130] RCN Petition at 13. *See also id*. at 14 ("RCN understands that its proposed condition goes beyond the scope of Section 628 of the Act and the Commission's implementing rules as they have been previously interpreted by the Commission."). RCN's recent program access complaint against Cablevision Systems was denied on the grounds that the programming at issue was not satellite-delivered. *RCN Telecom Services of New York v. Cablevision Systems Corp.*, 14 FCC Rcd 17093 (1999). Nonetheless, RCN now asks the Commission to condition the merger upon an expansion of the program access rules so that, with respect to AOL Time Warner, any entity in which AOL Time Warner has an "affiliated interest," or any entity with an "affiliated interest" in AOL Time Warner, the rules would also apply to terrestrially-delivered programming and non-vertically integrated programming. RCN Comments at 13.

[131] According to RCN, the Commission has the authority to impose the conditions requested in its Petition under Section 628 and Sections 4(i) and 303(r) of the Communications Act. RCN Petition at App. C at 15-16. As discussed herein, the FCC need not address the scope of its authority in order to dispose of RCN's Petition. Nevertheless, for the record, AOL Time Warner notes its disagreement with RCN's claim that the Commission has the authority to restrain AOL Time Warner from entering into business relationships that have been expressly left unregulated by the Cable Act.

[132] *See, e.g.*, n. 123, *supra* (discussing the Commission's refusal to revise its program access and retransmission consent rules as part of its review of the Capital Cities/ABC/Disney merger).

[133] The Commission has considered and rejected demands for an expansion of the scope of the program access rules in each of its annual video competition reports dating back to 1994. *See Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming* ("*Annual Assessment*"), First Report, 9 FCC Rcd 7442, ¶¶ 174-186 (1994); *Annual Assessment*, Second Annual Report, 11 FCC Rcd 2060, ¶ 169 (1996); *Annual Assessment*, Third Annual Report, 12 FCC Rcd 4358, ¶ 154; *Annual Assessment*, Fourth Annual (Continued...)

calls to impose conditions virtually identical to those sought by RCN here in connection with the agency's review of the AT&T/TCI merger.[135] Indeed, every time it has considered the issue, the Commission has rejected demands that it extend the scope of the program access regime beyond the boundaries clearly established by Congress. RCN has not offered any factual evidence, new policy arguments, or nexus of any sort that would provide a basis for the FCC to depart from this long-standing position here. As a result, and consistent with past practice, the Commission should reject RCN's calls to impose program access conditions on this merger.

3. The Memphis Commenters seek to raise local disputes that have no nexus to the AOL Time Warner merger or this proceeding

The Memphis Light, Gas and Water Division and Memphis Networx (collectively the "Memphis Commenters"), partners in a broadband venture that competes with Time Warner in the Memphis, Tennessee area, have raised non-merger-specific issues involving an isolated local dispute before local regulators.[136] The Memphis Commenters are upset because Time Warner,

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(...Continued)
Report, 13 FCC Rcd 1034 (1998); *Annual Assessment*, Fifth Annual Report, 13 FCC Rcd 24284 (1998); *Annual Assessment*, Sixth Annual Report, 15 FCC Rcd 978 (2000). *See also Report and Order* in CS Docket No. 97-248, 13 FCC Rcd 15822 (1998).

[134] *See, e.g., RCN Telecom Services of New York v. Cablevision Systems Corp.*, *supra*; *DirecTV, Inc. v. Comcast Corp.*, 13 FCC Rcd 21822 (1998); *EchoStar Communications Corp. v. Comcast Corp.*, 14 FCC Rcd 2089 (1999); *Dakota Telecom, Inc. v. CBS Broadcasting Inc.*, 14 FCC Rcd 10500 (1999).

[135] *See AT&T/TCI Order,* at 3179-80 ("We decline to apply the program access rules or equivalent restrictions to terrestrially delivered programming distributed by the merged company, in conformance with our recent decision in the program access order.") (emphasis omitted); s*ee also ABC Walt Disney Order* at ¶ 22-25 (1996); *Applications of Turner Broadcasting System, Inc., and Time Warner Inc.*, 11 FCC Rcd 19595, ¶ 33-35 (1996) ("*Turner/Time Warner Order*").

[136] Memphis Light, Gas and Water Division Comments, CS Docket No. 00-30, at 4 (filed Mar. 26, 2000) ("Memphis Light Comments") and Memphis Networx Comments, CS Docket No. 00-30, at 5 (filed Mar. 26, 2000).

along with NEXTLINK, BellSouth, and the Tennessee Cable Television Association, has repeatedly expressed concerns to local regulators and officials over the involvement of Memphis Light, Gas and Water Division, a publicly owned municipal utility that controls city easements, poles, and rights of way, in a joint venture that will directly compete with private firms (such as Time Warner) that need access to these public easements, poles, and rights of way.[137] Not only could the joint venture limit its competitors' access to these facilities, but there are serious unresolved questions under state law involving the propriety of this publicly funded monopoly utility competing head-to-head in other lines of business against private enterprises. This dispute, and the substantive issues involved, obviously have no nexus to the AOL Time Warner merger or this proceeding.[138]

Furthermore, setting aside the issue of the appropriate forum, there has been nothing inappropriate in the manner in which Time Warner has exercised its right to express its valid concerns to local government authorities. Far from the Memphis Commenters' allegation that Time Warner has been improperly motivated by anti-competitive animus, the company was completely within its rights to ensure that fairness issues involving this new venture were considered by local decision makers. The Commission therefore should reject the Memphis

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[137] *See* "Potential Competitors Challenge LGW Cable," The Commercial Appeal (Memphis, TN), Feb. 22, 2000, at B5.

[138] Memphis Light Gas and Water Division's allegation that Time Warner Cable "focuses" on particular classes of customers and willfully underserves others is utterly without merit. Memphis Light Comments at 5. Everywhere Time Warner Cable operates, including in the Memphis area, it offers nondiscriminatory cable service throughout its franchise areas, and has never selected, targeted, or focused on any one neighborhood, income level, or any other demographic in the provision of cable service or the roll-out of new services.

Commenters' attempts to curtail AOL Time Warner's future ability to raise legitimate issues in proper fora before local decision-makers.

4. This merger is not the appropriate forum to litigate Gemstar's electronic program guide complaint

Gemstar also seeks to employ this transfer of control proceeding to raise issues involving an entirely unrelated business dispute. As noted above, the Commission has repeatedly held that a transfer of control proceeding is not the appropriate forum for the resolution of such disputes.[139] The Commission's policy in that regard is particularly applicable here given that the electronic program guide ("EPG") issue Gemstar raises is, as it readily concedes, already the subject of a Petition for Special Relief pending before the agency.[140] That proceeding, not this one, is the proper forum for the Commission to issue a determination based on a full briefing by all affected parties.[141]

CONCLUSION

In sum, the record before the Commission demonstrates that the merger of AOL and Time Warner will deliver significant benefits to consumers in the form of enhanced broadband content, services, and choice. AOL Time Warner has strong incentives to offer a diversity of content

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[139] *See, e.g., AT&T/TCI Order* at ¶¶ 35-37; *ABC/Walt Disney Order* at ¶ 22; *Turner/Time Warner Order* at ¶ 33.

[140] Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission's Must-Carry Rules, Cable Services Bureau, CSR-5528-Z (filed March 16, 2000).

[141] The Applicants will not burden the record in this unrelated proceeding with a detailed recitation of the complex issues raised in the Gemstar Special Relief matter. Suffice it to say, Gemstar concedes that it has entered into commercial arrangements with numerous alternative distribution technologies to obtain authority for retransmission of the Gemstar EPG data, including telephone lines, wireless technologies, DBS and broadcast. Time Warner is entirely willing to enter into a similar commercial arrangement with Gemstar, but Gemstar has refused.

sources on its own broadband services, to make its content available on a broad range of other transmission systems, and to enhance competition in broadband services by offering multiple ISPs on its cable broadband facilities. And, as both companies have stated

plainly to Congress, the FCC, and the public, AOL Time Warner will act upon those incentives.

The Commission therefore should promptly grant the merger applications.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of May, 2000, I caused copies of the foregoing Reply of America Online, Inc. and Time Warner Inc. to be mailed via first-class postage prepaid mail to the following:

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