FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON

OFFICE OF
THE CHAIRMAN

November 9, 2000

The Honorable Herb Kohl
Ranking Member
Subcommittee on Antitrust, Business Rights, and Competition
Committee on the Judiciary
United States Senate
330 Hart Senate Office Building
Washington, D.C. 20510

Dear Senator Kohl:

Thank you for your letter concerning the Commission's decision to "stop the clock" on consideration of the license transfer applications related to the proposed merger between America Online (AOL) and Time Warner. I welcome this opportunity to address your concerns and to explain why the decision to "stop the clock" on the Commission's review pending action by the Federal Trade Commission (FTC) was consistent both with the Commission's announced policies and with sensible and effective coordination between the FCC and the antitrust agencies.

The 180-day time clock is a tool to make the Commission's review of merger-related applications more transparent and predictable. As you note, the clock may be tolled for a limited number of reasons that reflect actions beyond the Commission's control which delay our review process, including delays in receiving requested information or to account for major revisions in the applications. From the beginning, the Commission has recognized that actions by other government agencies are a primary source of potential revisions. In addition, in the normal case, the antitrust agencies are subject to statutory deadlines that require them to complete their review expeditiously and that usually provide ample time for the Commission to take their action into account within the 180-day time frame. The merging parties, of course, may prolong the antitrust review period by the time they take to produce requested information or by agreeing to extend the statutory deadlines to negotiate revisions that they believe would obviate the need for protracted antitrust litigation.

While the discussions between the FTC and AOL/Time Warner are confidential, recent press reports indicate that the FTC and the merging parties are still negotiating significant issues that could have a substantial impact on the FCC's review. *See Cable-Line Accord Is Near in AOL Case*, Wall Street Journal, at A3; and *FTC Review of AOL Deal in Final Stage*, New York Times, at C1. It would be inconsistent with sound administrative procedure and unfair to the parties for the FCC to rush to a decision under these circumstances. For example, if AOL and Time Warner change their proposal with respect to the access issue in significant ways, it is not clear why it makes sense for the FCC to rule on whether their application, as it now stands, is in the public interest. Indeed, if the changes are so significant that they constitute a "substantial amendment" of an the application. Section 309(d)(1) of the Communications Act requires us to give parties 30 days to comment.

Accordingly, I do not believe that the Commission's decision to stop the clock under these circumstances undermines the purposes of the time clock or suggests the need for legislation that would remove the Commission's flexibility to coordinate the timing of its action with that of the antitrust agencies. Indeed, compelling the FCC to act on license transfers prior to action by the antitrust agencies could in many cases result in both waste and delay. The extended period of antitrust review in this case reflects not only the complexity of this particular merger, but also choices by the merging parties as to the best way to advance their case. The uncertainty as to the timing of agency action flows from those circumstances. As the Commission explained when it stopped the clock, we will minimize the degree of uncertainty by resetting the time clock promptly after the FTC has acted.

We appreciate very much your recognition of the Commission's efforts to make its review process more predictable, transparent, and efficient. Those efforts are ongoing and we look forward to working with you to achieve these goals.

Sincerely,

William E. Kennard
Chairman