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August 22, 2000

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

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

Dear Ms. Lathen:

This letter summarizes and elaborates upon the information submitted by AOL and Time Warner ("Applicants") supporting the substantial public benefits that will result from the merger of the two companies. As we have explained in our previous filings, our common goal in combining AOL and Time Warner is to go well beyond simply providing consumers new choices in a single or even a few existing products or services. Rather, our vision is to harness our complementary resources and expertise to create an entirely new type of company that can provide consumers with a wide array of new offerings that, in turn, will drive competition and help shape the next generation of the Internet. These innovative offerings—and the greater adoption and use of Internet products and services that they will spawn—will directly serve the Commission's fundamental mandate to promote the rapid spread of communications services to all citizens and its further obligation to encourage the deployment of advanced telecommunications services.[1]

Our merger is about enhancing competitive choices for consumers—because offering customers wide-ranging choice in content and service has been the basis of both companies' success. The new company expects to deliver on this promise in several respects. Specifically, the new AOL Time Warner will offer at least four separate, although intertwined, categories of benefits for U.S. consumers:

- **First**—A combined AOL Time Warner will be able to significantly enhance the separate companies' *existing* Internet offerings, bringing consumers a more competitive and diverse range of content and service choices both within the AOL service and to Internet users more generally. These enhancements will trigger a competitive response from our

[1] Communications Act of 1934 § 1, 47 U.S.C. § 151; Telecommunications Act of 1996 § 706, 47 U.S.C. § 157 nt.

rivals in the marketplace, thereby leading to even more consumer choice—and greater innovation—than would occur absent the transaction.

- **Second**—AOL and Time Warner will use their combined talents and resources to fuel the development of entirely *new* forms of interactive content, applications, and services. As will be the case with respect to enhancements to existing products that the merger will make possible, the innovative offerings that emanate from a combined AOL Time Warner will prompt our rivals to hasten their own efforts to develop and deliver additional next-generation offerings—thereby driving choice and competition in content, applications, and platforms alike.

- **Third**—The combination of AOL and Time Warner has led the companies to a common vision regarding the provision of multiple Internet Service Providers ("ISPs") over broadband cable that is articulated in the commitments made by the Applicants in their Memorandum of Understanding ("MOU"). Implementation of the MOU is already being reflected in Time Warner's recent agreement with Juno, an unaffiliated ISP; in the restructuring of the Road Runner partnership that is now underway; and in technical trials that Time Warner is conducting in Columbus, Ohio. That MOU ensures that consumers will have a real choice among a range of unaffiliated and affiliated ISPs on AOL Time Warner cable systems. Moreover, other large cable operators have now publicly stated that they too will work to implement open access. In short, this merger has demonstrably served to break open the log-jam in the open access policy debate, ensuring fulfillment of the FCC's vision for a market-driven resolution of this issue.

- **Fourth**—By developing exciting new interactive content and services and offering them over a wide range of broadband platforms and devices, AOL Time Warner will help spark consumer demand for high-speed services that will attract further investment in—and drive continued deployment of—competing broadband facilities. And by making open access a reality over broadband cable, AOL Time Warner will only boost the effect that the Commission has already observed as cable high-speed access offerings spur faster roll-out of high-speed capacity by other broadband platform providers.

As the Commission well understands, the Internet holds out the potential to transform the way people work, play, learn, and communicate; it also presents substantial business risks, known and unknown. Consequently, the development and deployment of advanced services has too often been marred by a "chicken or egg" problem, *i.e.*, the reluctance of providers of new interactive content and applications, on the one hand, and providers of new platforms, on the other, to make substantial investments without knowing that the other necessary component is in place. The proposed merger, by bringing together the disparate elements that play a role in the development and delivery of such advanced services, will set in motion an innovative and competitive dynamic that will help overcome this problem. The new AOL Time Warner will be well positioned to bring creative minds together from all divisions of the new company, including content creators, distribution network facilitators, and online experts, and enable them to jointly develop the breakthrough products and services that American consumers want and expect.[2] In short, none of the benefits that will flow from the merger would occur to the same degree, at the same speed, or with the same certainty absent the combination of AOL and Time Warner.

1. A merged AOL/Time Warner will improve and expand the content and services now available to consumers in the online world.

There is widespread agreement that AOL Time Warner will enhance both companies' ability to integrate what people think of as traditional and new media.[3] By using AOL technology, facilities, and online expertise, the newly merged entity plans to dramatically improve existing Time Warner web sites and to develop additional Time Warner Internet services, making Time Warner's array of highly regarded content more widely available to online consumers—and within a substantially shorter time frame than would otherwise be the case.[4]

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[2] Declaration of Barry Schuler, CS Docket No. 00-30, at ¶ 12, August 17, 2000 ("Schuler Declaration") (Attachment 1).

[3] *See, e.g.*, Morgan Stanley Dean Witter, America Online/Time Warner: How Big is Big? Big!, at 10, May 4, 2000 ("Morgan Stanley Dean Witter") ("AOL Time Warner, as we envision it, will be the foremost research laboratory in the world for the analysis of the interaction between old and new media, and context and content."); Salomon Smith Barney, AOL and Time Warner Link: The Dynamic Duo Form a Free Cash Flow Dynamo, at 1, March 22, 2000 ("Salomon Smith Barney"); American Online, Inc./Time Warner Inc. Supplemental Information, CS Docket No. 00-30, at 31 (filed Mar. 21, 2000) ("Supplemental Information") (Washington Post article noting that "[d]eals like AOL Time Warner will accelerate the creation of digital content not only at Time Warner, but also at other traditional media companies"). This benefit will directly advance the FCC's goal of fostering new and/or higher quality services for consumers. *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., to AT&T Corp.*, CS Docket No. 99-251, ¶ 11 (June 5, 2000) ("*AT&T/MediaOne Order*") (public interest analysis in the context of merger review includes "assessing whether the merger . . . will result in the provision of new or additional services to consumers").

[4] Declaration of Richard J. Bressler, CS Docket No. 00-30, at ¶¶ 3-8, August 22, 2000 ("Bressler Declaration") (Attachment 2). *See also* Salomon Smith Barney at 9 ("[T]he pending merger with AOL would give Time Warner's online businesses a host of new distribution [and] infrastructure . . . opportunities.").

The expedited time frame will occur in part because AOL has a centralized and efficient cost structure for operating interactive sites, including larger web hosting facilities and internal Internet production and design operations, while Time Warner's more limited ventures in this area, such as Pathfinder, have been less successful.[5] Time Warner has come to the conclusion that the value added by AOL management and Internet experience, particularly its trusted brand, marketing savvy, and demonstrated ability to make the Internet experience consumer friendly, will provide the missing links necessary for Time Warner's media content to find new audiences online. For example, as we explained in our earlier submissions in this proceeding, the two companies are beginning to discuss ways to improve consumer satisfaction with the online adjuncts to Time Warner video programming services such as CNN and Cartoon Network, as well as how to make music, television programs, movies, cable programming, and magazine content more widely available to consumers—regardless of whether such content is created by Time Warner or others.[6]

Furthermore, because many of the merged company's new and/or improved offerings will be web-based, not within the AOL service, the expansion of our quality brands will benefit all Internet users. We also expect that new online offerings based on widely enjoyed offline products—such as popular Time Warner magazines—can serve to entice consumers who to date have shied away from the Internet to begin to explore all that the online world can offer them. The combination of Time Warner's mass market brands with AOL's proven ability to make online services inviting and easy to use will help make the Internet more and more a valuable part of everyday life for all Americans.[7]

Finally, we expect that our use of the merged company's synergies to enhance the way that the public enjoys and experiences Time Warner and AOL's content applications and services will draw a rapid competitive response from rival providers of content, applications, and

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[5] Schuler Declaration at ¶ 6; Bressler Declaration at ¶¶ 5-8. *See also* Salomon Smith Barney at 33 ("Prior to the merger, neither AOL nor Time Warner had each of its bases covered with all-star players all by itself . . . . Time Warner has been somewhat frustrated by its efforts to Internet-ize itself, with the Full Service Network in Orlando, Florida, and the Pathfinder content site being the two most obvious examples of Time Warner's Internet tribulations."); First Union Securities, AOL Time Warner, at 5, June 20, 2000 ("First Union Securities"); America Online, Inc./Time Warner Inc. Response to Document and Information Request of June 23, 2000, at 36-37 (filed July 17, 2000) ("Response to June 23 Information Request").

[6] Schuler Declaration at ¶¶ 5, 7. *See also* Supplemental Information at 30-31; Response to June 23 Information Request at 27; *see also* Credit Lyonnais Securities, America Online, Inc./Time Warner Inc., at 12, February 28, 2000 ("Credit Lyonnais Securities") ("Time Inc.'s magazines appear to offer exciting Internet potential that has not yet been realized.").

[7] Schuler Declaration at ¶ 8; Bressler Declaration at ¶¶ 7-12.

services, who clearly will make efforts to introduce their own offerings more quickly than they would absent the merger.[8] The end result, therefore, will be a marketplace that delivers even more choices—and benefits—for consumers.

2. A merged AOL/Time Warner will create entirely new content, services, and features.

AOL and Time Warner have consistently stressed that a key impetus for the proposed merger stems from our collective vision for the next generation of the online medium.[9] We plan to use our combined assets to develop and deliver to consumers innovative, easily accessible, and widely available interactive services that today are in their infancy or not yet on the drawing board.[10]

As we envision these activities, they will involve more than most traditional media's current approach to the Internet, which they have used principally as a means of promoting their non-Internet services. A combined AOL Time Warner will bring together the divergent resources able to not merely replicate Time Warner's music, video, and publishing content on the Internet, but to expand upon and enhance that content in ways unique to the online medium—ultimately transforming traditional media websites into entirely new forms of entertainment and information services.[11] For example, as *Time* magazine's website evolves from a computer

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[8] Schuler Declaration at ¶ 9; Bressler Declaration at ¶ 9.

[9] Schuler Declaration at ¶¶ 10, 11; Bressler Declaration at ¶¶ 10-12. *See also* Salomon Smith Barney at 32 ("Both AOL and Time Warner recognize that the Internet and interactivity are rapidly reshaping the media business, and amid that environment of change and growth, myriad new business opportunities are emerging every day. With that in mind, we believe that the merger of these two companies is about combining a vast array of assets and resources under one roof in order to facilitate and accelerate the development of new products, services and businesses.").

[10] This benefit will directly advance the FCC's goal of fostering "the acceleration of private sector deployment of advanced services," which serves the "broad aims of the Communications Act." *AT&T/MediaOne Order* at ¶ 11. *See also Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans,* 14 FCC Rcd 2398, at ¶ 89 (1999) (*"Advanced Services Report"*) (cataloguing anticipated consumer demand for "new products that are especially tailored to the Internet and/or broadband"); FCC Cable Services Bureau, *Broadband Today*, Staff Report, at 15 (October 1999) (*"Broadband Today Report"*) ("Federal Policy is ... to promote the expeditious rollout of advanced services").

[11] *See* Salomon Smith Barney at 51 ("Suffice it to say that the upside to the AOL Time Warner merger, from a content perspective, will be constrained only by the creative imaginations of the company's content people, the technical capabilities of its software employees, and the

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screen version of the magazine to an interactive source of information tailored to the needs of the Internet "community" that AOL understands so well, other publications will inevitably seek to distinguish themselves by developing new ways of exploiting the technological capabilities of the online medium.

In determining that a merger is the necessary vehicle for making this vision come to fruition, AOL and Time Warner see three vital, consumer-driven dynamics at play in the marketplace—competition, innovation, and choice—that operate in an ongoing cycle, shaping our vision for our combined company and its promise for consumers. These dynamics are nothing new: today's Internet plainly is both a cause and effect of these forces. The more competition, the more innovation, and the more choices available to consumers, the more consumers have demanded. As that cycle continues, the Internet is becoming an increasingly essential part of people's lives. And as it does, the market will reward those companies that provide consumers products and services in the most convenient and beneficial ways. By giving consumers what they want, wherever and whenever they want it, AOL Time Warner aims to drive this next Internet revolution.[12]

Understanding the power of these dynamics means embracing not only the goal of expanding consumer choice, but also striving for constant innovation—innovation fueled by competition and propelled by technological advances. This cycle has brought both of our companies to where they are today, and it has always benefited consumers. Certainly Time Warner has a proven track record in this regard in the context of cable TV. In their early days, cable systems simply retransmitted the few broadcast choices available. But thanks to a few far-sighted innovators like Jerry Levin and Ted Turner, cable harnessed a technology breakthrough—satellite transmission of video signals—to offer a completely new type of video programming service. When HBO and CNN proved to be successful, competitors followed, which then led to more innovation—revolutionizing cable TV, vastly expanding the array of video programming channels, and ultimately launching new platforms such as DBS. The next

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limitations [of the] infrastructure of AOL and the Internet."); *see also* Credit Lyonnais Securities at 9 ("AOL Time Warner, either alone or in partnership with others, will create Internet-specific video and audio interactive product that is basically a new form of entertainment and information. These new 'killer apps' could drive consumers' embrace of the Internet.").

12 *See id.* at 11 ("We believe that a combined AOL Time Warner would have all the ingredients—people, content, technology, infrastructure, brands, audiences, distribution platforms, financial wherewithal—to produce new forms of content and new interactive services that can define and model what the future of media will look like.").

HBO, the next CNN, or even the next AOL are the kind of breakthrough innovations that we expect our merger to spur.[13] Our plans for such innovations include the following:

- **Interactive Television**—As discussed in more detail in our earlier submissions,[14] we believe our merger will spur innovation in the further development of interactive television, an advancement that has not yet become widely used. There is a real "chicken or egg" problem with new ventures such as interactive television: content providers are reluctant to spend the time and money necessary to develop compelling interactive content without knowing that a viable platform will be available, while at the same time platform providers are slow to invest until the content necessary to attract consumers is in place.

  A merged AOL Time Warner will be able to significantly enhance the just-launched AOLTV service and thereby turbo-charge an entire industry.[15] The new company can work to develop all facets of interactive television—including both the platform and new interactive content and applications—with a breadth of common purpose unlikely to be matched even in the best joint venture. For example, the merger presents an expanded opportunity for AOL to work with not only Time Warner's video programming properties, but also with Time Warner cable systems to create interactive video programming tailored to local communities.[16] The combined company's activities will thereby provide a model

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[13] *See* Salomon Smith Barney at 31 ("[T]he real source of long-term return and opportunity at AOL Time Warner is more likely to center around the combined company's ability to create whole new services, products, business lines, and even markets, few of which might have been accomplished by either company on its own."); Morgan Stanley Dean Witter at 5 ("AOL Time Warner will have a unique ability to pioneer the development of totally new businesses."); *see also* Credit Lyonnais Securities at 10.

[14] *See* Supplemental Information at 34-35; Response to the June 23 Information Request at 28-29.

[15] *See* First Union Securities at 5 (AOLTV interactive programming would "likely be much slower in coming if AOL had to rely on third-party suppliers."); *id.* at 7 ("AOL will now have the ability to accelerate the creation of interactive programming to improve the quality of AOLTV. The content would have followed eventually . . . but AOLTV will have the right kind of programming to help fuel demand."); Salomon Smith Barney at 95 ("As the interrelationship between and the evolution of new media and old media is established in the form of AOLTV, we believe that the wisdom of merging AOL and Time Warner will become increasingly evident and obvious.").

[16] Schuler Declaration at ¶¶ 14, 15; Declaration of Glenn Britt, CS Docket No. 00-30, at ¶
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for other cable operators or alternative video distributors to develop and market such community-oriented interactive TV services of their own.[17]

Through this kind of initiative, we expect to demonstrate the consumer appeal of the interactive offerings we create to accompany our own content, prompting other video programmers to do the same by using the open standards upon which AOLTV is built.[18] The result, for consumers, will be a wholly new service that offers integrated, interactive content—available from competing sources—linked to the video program services they already value. In turn, this long-awaited emergence of compelling interactive content from a rich diversity of established video programmers will allow other existing or new interactive television service providers to flourish—and thus the cycle of investment, innovation, competition, and still greater choice (long-stalled to date) will be unleashed.

Moreover, the merger will speed the development of integrated Internet-enabling cable set-top boxes, thereby facilitating interactive TV and increasing Internet functionality. Finally, because AOLTV is based on open standards, it will allow *every* video programming service to create unique interactive content that can flourish on the AOLTV or competitive interactive TV platforms.[19]

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15, August 22, 2000 ("Britt Declaration") (Attachment 3).

[17] According to a recent independent analysts' report, in an earlier stage of interactive TV's development, "many observers believed—and competitors feared—that Microsoft was on its way toward dictating the future of ITV." The Myers Group, LLC and eMarketeer, Inc., Interactive Television Outlook 2000 at 19 (June 2000) ("ITV Outlook") (submitted as attachment to Letter of Preston R. Padden, Executive Vice President, The Walt Disney Company, to Magalie Roman Salas, Secretary, Federal Communications Commission, CS Docket No. 00-30 (Aug. 16, 2000)). Many analysts now, however, see the prospect of AOL Time Warner as a "driving force for interactive media" that could, in light of its "allegiance to open platforms," "spur ITV development by serving as a shepherd for the ITV flock" and also spark a competitive response from rival providers. *Id.*

[18] Schuler Declaration at ¶ 13.

[19] Schuler Declaration at ¶¶ 17, 18; Bressler Declaration at ¶ 12. As the independent analysts' report on interactive television—submitted by Disney in this docket—states:

> The number of ITV players will continue to expand and be joined by startups, traditional media players and online companies that are eager to serve the TV as well as the PC once greater broadband distribution rollouts are achieved. AOL

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- **Online Music Services**—Similarly, AOL Time Warner will aim to overcome existing obstacles to innovation in the online delivery of music services. By combining AOL's savvy at making interactive services easy and secure with Time Warner's skill at providing music attuned to consumer tastes, our new company can help tackle remaining industry challenges by helping to bridge the gap between online music providers and copyright holders—a gap which now poses serious risks to the future of commercial music. As a result, we expect our merger to speed the advent of digital downloading and personal online music libraries that serve all creators and distributors—and, ultimately, consumers.[20]

  The merger of AOL and Time Warner thus has the potential for being a watershed event in the Internet's evolution as a commercially viable means of distributing music. Without question, there is enormous interest in, and demand for, the distribution of music over the Internet. However, traditional sources of such intellectual property have had difficulty in developing easy, affordable and secure means of tapping this demand. As a result, unauthorized channels of distribution, which are anathema to the creators and owners of music, have developed to fill the void.[21]

  Combined into a single enterprise, AOL and Time Warner will be better positioned to develop and deploy the easy-to-use, affordable, and secure technologies needed to move online music distribution to the next level.[22] Given Time Warner's heritage as a nurturing home for creative artists, AOL Time Warner will be highly motivated to work with other affected industry participants

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> Time Warner will have a major impact on the shape of the market. Its developments will prompt activies by media allies as well as competitors, all of which will increase the level of ITV business strategy.

ITV Outlook at 26.

[20] Bressler Declaration at ¶ 12. *See also* Supplemental Information at 32-33 (Washington Post article noting that "America Online Inc.'s proposed merger with Time Warner Inc. may vastly hasten the online music revolution . . . and could transform the race to find new ways to sell and distribute music over the Internet").

[21] Bressler Declaration at ¶ 12.

[22] *See* First Union Securities at 7 ("[W]ith ownership of one of the largest music companies in the world, we suspect greater diligence will be made to push consumers to use a format that is more protective of copyrights.").

to create secure vehicles for online delivery of music services. The results of the merged company's efforts—the creation of sites that not only allow consumers to sample or preview music, but also to download it for their immediate enjoyment—will lead others to do the same. This development will benefit the public by allowing the Internet to fulfill its potential as a remarkable new forum for the creation and distribution of entertainment.

Similarly, a combined AOL Time Warner will be well-suited to develop the technologies that will bring consumers online digital distribution of other types of information and entertainment, such as books and video on demand, while at the same time providing a secure environment to ensure that copyright holders are fairly compensated.[23]

- **Enhanced Telephony Services**—Another arena that AOL and Time Warner expect to advance through our merger is enhanced telephony. Perhaps the most obvious possible avenue for the merged company to explore will be IP telephony, given the combination of Time Warner's expertise in, and access to, broadband cable system architecture and AOL's extensive Internet knowledge and experience. Our new company will be well positioned to offer a commercially viable IP telephony service far faster than either company could do alone. This presents a robust opportunity to provide additional competition to the services of incumbent local exchange carriers.[24]

The Applicants fully expect that once they bring to market innovative platforms such as those described above, they will set in motion a dynamic competitive cycle: new consumer choices introduced through such platforms will spark competitive entry, leading to even more choice for consumers, which in turn could spur the development of competing—or wholly new—platforms. We believe that the same dynamics are quite likely to be an important consideration for the next wave of online development and how AOL Time Warner will meet it.

That wave, we believe, will center around helping consumers make sense of the dizzying complexity of technology and distinct communications offerings available to them. Both companies are finding that as the online experience is increasingly woven into our daily lives, people are expecting even more from it. Consumers want their televisions, telephones, CD players, and array of handheld devices to provide them with the same interactive power, the same range of choice, and the same convenience and control they can get on their PCs. At the same time, they want more and more from their PCs. And they want it all connected—each device to the other and all of them together—and then seamlessly integrated into their daily lives.

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[23] Bressler Declaration at ¶ 12.

[24] Schuler Declaration at ¶ 19; Bressler Declaration at ¶ 12; Britt Declaration at ¶ 16.

People shouldn't have to be systems integrators to make that happen. What consumers need and want is the simplicity and convenience that integration of services and connectivity of platforms will make possible. True convergence is not about the device, the location, or the provider. It's about consumers and their ability to make the connection they want through whatever device happens to be most handy at the moment. AOL Time Warner's long-range goal will be to help make this vision of convergence—full integration and connectivity—into a reality, not only by providing the separate pieces (both our own and others) but by connecting the dots for consumers in a simple, convenient way.[25]

In doing so, the new AOL Time Warner will draw on AOL's Internet know-how and Time Warner's content resources to bring consumers such fully integrated products and services in an accelerated time frame. Of course, the success of AOL Time Warner's new integrated services will depend on our ability to provide consumers with content and applications from a wide range of sources including, but not limited to, our own offerings.[26]

While AOL Time Warner certainly hopes to lead a whole new era of innovation in our industry, we have no illusion that we will be the only company on this quest—not in this time of historically distinct industries and players rushing to create so many new and compelling consumer products and services. We fully expect that our merger will prompt AOL Time Warner's many rivals to develop and deliver new and better offerings of their own.

The business environment in which we and our competitors operate has been tumultuous and will remain so. Against this background, both companies have independently determined that each could not, on its own, fulfill the full potential that the emerging online medium promises. Nor would it be feasible to negotiate a series of contracts that could cover this far-reaching and unprecedented undertaking.[27] Even negotiating individual contractual relationships

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[25] Schuler Declaration at ¶ 20; Britt Declaration at ¶ 14.

[26] As the parties repeatedly have explained, AOL Time Warner would needlessly drive away subscribers if it limited them to accessing only company-generated content. *See* Reply of America Online, Inc. and Time Warner Inc., CS Docket No. 00-30, at 36-37 (filed May 11, 2000) ("Reply Comments"); Salomon Smith Barney at 51 ("[A]lthough there is a risk that AOL Time Warner could unwisely favor its own content over potentially more popular content from outside sources, we believe the consumer market in which AOL Time Warner operates will exert its own corrective influences upon such a practice."); First Union Securities at 5 ("The company has made it very clear that Time Warner's content will not be available exclusively on AOL's service. To do so would harm the content, which needs to be available through as many distribution channels as possible."); Morgan Stanley Dean Witter at 12.

[27] Schuler Declaration at ¶¶ 21, 22. *See also* Salomon Smith Barney at 29 ("As separate companies, the process of mixing, commingling, and integrating one side's content with the other's technology requires detailed operating and financial negotiations at the outset and

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would be very difficult given the rapidly changing marketplace. As we noted in an earlier submission, the negotiation of individual joint venture agreements for each separate endeavor—or categories of endeavors—that AOL and Time Warner contemplate would involve delays and inefficiencies inherent in establishing the formal relationship necessitated by agreements among independent, publicly traded companies.[28] In particular, Time Warner has considerable first-hand experience with joint ventures and other enterprises involving investors with often conflicting objectives, including Turner (prior to its acquisition by Time Warner) and RoadRunner. Proceeding through joint ventures or individual contracts can lead to contentious governance disputes and inability to obtain the necessary consensus to react to a rapidly evolving marketplace.

Although the development of broadband products and services already is a consuming goal for scores of providers and would-be entrants, the risks in this new marketplace remain significant. No one can reliably predict what services or applications will succeed in the broadband future, but a merged AOL Time Warner—by internalizing the risks of trying to develop innovative products that consumers want—will enhance chances for success above those that either company would have alone.[29] By seeking to promote not just choice and innovation in content, services, and platforms, but also the connectivity that can bring it all together for the consumer, a combined AOL Time Warner expects to serve the public interest well.[30]

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ongoing adjustments. With AOL and Time Warner under one roof, we believe the two companies should be able to push forward new products and services with greater ease and speed, and less inter-company horse trading and dickering.").

[28] Response to the June 23 Information Request at 33-34; *see also* Supplemental Information at 37-39. The Commission recently acknowledged in its *AT&T/MediaOne Order* that, in the current dynamic marketplace, attempts to address the creation and offering of a wide range of services through a joint venture would make "arms-length negotiations arduous." *AT&T/MediaOne Order* at ¶ 175. The FCC also recognized that the merger there "will create an alignment of the parties' economic interests that will reduce the areas of friction between the two companies and facilitate the development of telephony solutions." *Id.* The Commission's finding squares with the observations of many market analysts and academics, who point out that joint ventures or even looser cooperative arrangements often founder as each participant seeks to shift risks to the other. *See, e.g.*, Supplemental Information at 38-39 (Goldman Sachs noting that "both companies should benefit due to their cooperative 'prenuptial' relationship and that "[b]usiness decisions that would have been stymied by 'who's getting the better end of the deal' mentality should progress with relatively little friction").

[29] Bressler Declaration at ¶¶ 13-14.

[30] The Commission anticipated that some of the same sort of benefit would occur by virtue
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3. AOL and Time Warner's commitment to a market-based open access model will afford consumers a choice among multiple ISPs available via cable broadband systems.

A third public interest benefit the merger of AOL and Time Warner is our companies' joint and already demonstrable role in transforming the cable access issue from a subject of policy and legal debate into an imminent marketplace reality. The AOL/Time Warner merger has broken the log-jam on this contentious policy issue—and done so in precisely the market-driven manner that the Commission has long advocated.[31]

Absent the proposed combination of our companies, the resulting MOU and its profound reverberations in the marketplace would not have emerged nearly so swiftly and certainly and the commitment to a multiple ISP model would not be as urgently implemented.[32] The impending merger produced a new model for more effectively addressing the complicated issues involved in resolving the open access debate. This cooperative approach led to the rational, marketplace-driven commitments embodied in the MOU.[33] That document, in turn, led to the recently announced Time Warner-Juno agreement—the first binding agreement between a major cable

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of a successful AT&T/MediaOne roll-out of new cable-based telephony services, which the agency found potentially could serve as a "model" that could make it easier for AT&T to negotiate joint ventures and other contractual arrangements with third parties in the future. *AT&T/MediaOne Order* at ¶ 175.

31 *See, e.g., id.* at ¶¶ 123-128. This benefit of the merger will directly advance the Commission's "belie[f] that market forces, coupled with ongoing Commission monitoring of the marketplace, are the best hope for creating an open network architecture and discouraging the formation of a closed proprietary architecture." *Broadband Today Report* at 42. This benefit also substantiates the FCC's recognition of a key marketplace reality: openness and choice is so integral to the online experience that any facilities provider pursuing the opposite course "is likely to threaten [its own] ability to attract and retain customers." *See AT&T/MediaOne Order* at ¶123.

32 Schuler Declaration at ¶¶ 23, 24; Britt Declaration at ¶¶ 3, 6, 13. *See also* Salomon Smith Barney at 43 ("Without the companies' pending combination, we doubt that [the MOU] could have been reached as swiftly. In our view, this pact will likely be a harbinger of similar agreements, which will quickly and confidently address such perpetually thorny questions as content versus distribution, ISP versus cable, and manufacturer versus distributor."); First Union Securities at 5.

33 *See* Supplemental Information at 22-23; *id.* at Attachment 3 (appending MOU).

operator and an unaffiliated ISP that will allow consumers to subscribe to Juno's high-speed Internet access service over Time Warner's broadband cable networks.[34]

Indeed, in praising these efforts to develop a multiple ISP environment, a recent *Washington Post* editorial described how the Time Warner/Juno deal will result in competition that "should help keep Internet subscription rates down while increasing AOL's incentive to offer the widest possible variety of content, lest it lose customers. Open access in the Internet service market thus promotes open access to the Net for rival media companies."[35]

Other key developments already underway in the Applicants' expedited implementation of open access in the marketplace include the following:

- Time Warner has commenced discussions with its partners regarding the restructuring of the Road Runner partnership agreement consistent with the Justice Department order that AT&T divest its interest. The Applicants hope that such a restructuring will lead to an early termination of restrictions that currently limit the ability of Time Warner Cable to provide consumers with a choice among ISPs.[36]

- Time Warner Cable has begun a technical and operational trial of multiple ISP offerings in Columbus, Ohio. In addition to AOL and CompuServe, other ISPs—including Juno—have been invited to participate. This trial will include the testing of the first generation of a super intelligent router that is needed to ensure that packets of information from the customer are routed back to the appropriate ISP, and the development of new operational systems support and software to facilitate a multiple ISP environment.[37]

- Time Warner is continuing its discussions with AOL and numerous other ISPs and hopes soon to have additional commercially negotiated agreements to announce.[38]

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[34] Britt Declaration at ¶ 10.

[35] "Opening Cable," *The Washington Post*, Aug. 8, 2000, at A24. This *Post* editorial, acknowledging the AOL/Time Warner commitment to multiple ISP access, advocated regulatory restraint in light of the companies' demonstrated commitment to the principles enunciated in the MOU. *Id.*

[36] Britt Declaration at ¶ ¶ 5, 12.

[37] Britt Declaration at ¶ 11.

[38] Britt Declaration at ¶ 10.

Through this demonstrated leadership, AOL and Time Warner are fostering a marketplace solution to the open access debate. Indeed, we believe that the commitment that a combined AOL Time Warner will move aggressively to implement its open access approach—together with the steps being taken to carry out that commitment—already has acted as a catalyst to encourage *other* cable operators to provide ISP choice to consumers. Shortly after the MOU was made public, trade press reports stated that "at least seven of [the] 11 largest cable operators," in addition to Time Warner and AT&T—specifically, Cox Communications, Comcast Corporation, Charter Communications, Classic Communications, Insight Communications, Adelphia Communications, and Cablevision Systems—"are looking at offering access to multiple ISPs on their high-speed broadband lines" in the wake of the AOL/Time Warner commitment.[39] And as the ripple effect of the AOL Time Warner commitment to a multiple ISP approach spreads, other cable operators also are now engaged in efforts to address technical and operational issues associated with implementing open access.

We know that the Commission will initiate a proceeding to consider regulatory issues associated with cable modem service. Although it is far too early to tell what regulatory action, if any, might result from that effort, AOL and Time Warner—by agreeing to unite and immediately work to resolve the issue through marketplace efforts—clearly are advancing the date by which consumers will be able to use cable broadband to exercise a real choice among rival ISPs.

4. A merged AOL/Time Warner's offering of new content and services and multiple ISP choice will combine to drive both consumer demand for and competitive roll-out of multiple broadband platforms—and thereby help speed the deployment of advanced services.

Congress and the Commission have recognized that the widespread and rapid deployment of advanced telecommunications service is an important policy objective, and that it is best served by promotion of a deregulated, competitive marketplace environment.[40] AOL and Time Warner expect our merger to help meet that goal in two ways. First, the innovative and enticing interactive services our new company will create and offer on all broadband platforms—and the competing new online offerings that our rivals will create in direct response—will spur greater consumer interest in Internet services generally and broadband offerings in particular. Second,

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[39] Britt Declaration at ¶ 13. *See also* Reply Comments at 11 (citing "Leading Cable MSOs Quietly Shifting Toward Open Access," *Communications Daily*, Apr. 6, 2000).

[40] *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*, Notice of Inquiry, 13 FCC Rcd 15280 at ¶ 59 (1998).

by implementing multiple ISP choice on AOL Time Warner cable systems and focusing more attention on optimizing Time Warner Cable systems for online services, our new company will drive other facility providers and ISPs to step up their efforts to attract consumers seeking broadband services.[41]

The emergence of a combined AOL Time Warner thus will encourage our competitors to invest more resources in high-speed services and transmission systems and also help to ensure that capital is available to fund those efforts.[42] This dynamic cycle will be moving on three interrelated tracks: (1) providers of competing transmission facilities, including DSL, satellite, and wireless, will have available new AOL Time Warner services to market to their users; (2) providers of those competing distribution platforms will speed up their deployment plans to avoid being left behind each other; and (3) providers of service, applications, and content will roll-out broadband offerings as quickly as possible—both to protect competitive positions and because the pace of broadband platform availability will become less of an obstacle. By fueling this cycle, AOL Time Warner will help to eliminate the need for regulatory intervention by the Commission to promote broadband deployment and the availability of advanced services.

Certainly the impact of new and desirable electronic communications services on facilities deployment is sufficiently well established for the Commission to take cognizance of it here.[43] In the just-released Second "706" Report, the FCC plainly states that "the speed and ubiquity of advanced telecommunications capability deployment will depend in large measure on consumers' demand for content and services that require this capability."[44] The agency likewise has previously recognized that the combination of consumer demand for new services and the spur created by rival facility providers' plans to capture that demand is a major force behind the "aggressive" roll-out of competing broadband systems: "[w]e 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

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41 Schuler Declaration at ¶¶ 27, 30; Britt Declaration at ¶ 8.

42 This benefit directly will advance the FCC's goal of relying on marketplace forces in fulfilling its mandate under Section 706 of the Telecommunications Act of 1996 to "encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans." 47 U.S.C. 157 nt; *see also Advanced Services Report* at ¶ 97 ("We expect consumers to demand, and the market to deliver, much more in the coming years" with respect to broadband). *See also, e.g., Broadband Today Report* at 39 ("Government can promote a competitive market by encouraging innovation, investment, and infrastructure buildout").

43 *See, e.g., Advanced Services Report* at ¶¶ 89, 97; *AT&T/MediaOne Order* at ¶ 117.

44 Federal Communications Commission, *Deployment of Advanced Telecommunications Capability: Second Report*, CC Docket No. 98-146, FCC 00-290, at 5 (rel. Aug. 21, 2000).

industry—wireline, telephone, land-based ("terrestrial") and satellite wireless, and cable, to name a few."[45]

As for competition with other facility providers, AOL and Time Warner intend to make the new company's systems even more attractive to consumers who seek upgraded Internet connections. In doing so, our merged company will spur competition among all broadband facilities and thereby produce better value and more choice for consumers. Implementing our MOU will play a significant part in that effort; affording consumers a real choice among ISPs is a significant advantage to Time Warner cable systems in competing for Internet users who are accustomed to having such choices in the dial-up context and therefore continue to demand it. In addition, as a unified company, AOL and Time Warner will work to make the Time Warner systems Internet-centric more quickly than the facilities would be absent the merger.[46]

We anticipate that these enhancements will prompt our rival facility providers to respond competitively—as the marketplace already has seen them do. Just days ago, it was reported that "broadband competition is emerging quickly this year as telephone companies aggressively roll out DSL products and chop monthly service prices to match their cable rivals."[47] And, as with the Commission's recognition of the impact of the demand for new services on broadband deployment, the agency also is well aware of the impact of intermodal competition on historically distinct facility providers.[48] As Chairman Kennard recently noted in Congressional testimony,

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[45] *AT&T/MediaOne Order* at ¶ 117; *Advanced Services Report* at ¶ 4.

[46] Schuler Declaration at ¶¶ 28, 29. Although Time Warner already has made significant strides in upgrading its cable systems with broadband architecture, the company's plans for the upgraded facilities have to date focused more heavily on traditional video services (and, to a lesser degree, on telephony) than they have on two-way data services such as Internet access. The roll-out of high-speed Internet services requires additional investments in capital equipment and manpower, including the installation of new servers and routers, billing software, and cable modems. AOL, as an established ISP, will bring considerable insights—as well as incentives—to these tasks. Britt Declaration at ¶ 7.

[47] "Cable Modems Retain Market Lead but DSL is Growing Faster," *Communications Daily*, Aug. 2, 2000 at 3 (noting that during the second quarter of 2000, the "DSL growth rate far exceeded that for cable modems"). *See also* Britt Declaration at ¶ 8.

[48] *See, e.g., Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd. 3696, n. 624 (1999) ("[I]t is widely believed that incumbent LECs' recent moves to offer broadband to residential customers are primarily a reaction to other companies' entry into broadband."); Chairman William E. Kennard, "The Unregulation of the Internet: Laying a Competitive Course for the Future," Remarks before the Federal

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> The DSL business is growing so fast that the BOCs are struggling to keep up with demand . . . [and t]hese trends show no sign of slowing down. . . . The vision of the [Telecommunications] Act and the vision shared by the FCC—that consumers will have a choice of providers offering a choice of pipes into the home or workplace—is being realized.[49]

AOL and Time Warner have consistently stated that our own business plan rests on the expectation that broadband deployment—by our new company and other platform providers—will intensify as AOL Time Warner and its competitors bring additional attractive high-speed services to consumers.[50] For example, interactive television offerings such as AOLTV will have even more to offer consumers once it becomes available over broadband.

The merged company's effect on broadband deployment, moreover, will be enhanced by our continued commitment to the "AOL Anywhere" strategy—the multi-platform distribution plan to which AOL Time Warner will remain committed.[51] As the Applicants have explained in our Supplemental Information and other submissions in this docket, AOL Anywhere is a consumer-centric plan to extend AOL's hallmark convenience and ease-of-use to consumers through every possible platform.[52] AOL Time Warner believes that the next wave of online development will come as a result of meeting consumer demand for seamless and easy connectivity that connects the dots between the dizzying array of new communications services and devices. Making these connections plainly requires that the new AOL Time Warner seek

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Communications Bar, Northern California Chapter, San Francisco, CA, July 20, 1999, available at http.//www.fcc.gov/Commissioners/kennard/speeches.html>, ("[W]here cable modem service has been introduced, DSL has followed."); Deborah A. Lathen, Chief, Cable Services Bureau, Remarks before the National Governors' Association, February 27, 2000, available at <http://ww.fcc.gov/Speeches/misc/spdal904.html>, ("[D]eployment of cable modems has spurred the deployment of DSL, and this competition has resulted in lower prices and greater choices for consumers.").

[49] Testimony of William E. Kennard, Chairman, Federal Communications Commission, Committee on the Judiciary, United States House of Representatives, July 18, 2000 (noting that "[a]nalysts project that deployment of DSL will increase by 300 to 500 percent over the next year"); *see also AT&T/MediaOne Order* at ¶ 117.

[50] *See, e.g.*, Supplemental Information at 16-20; Response to June 23 Information Request at 27-28.

[51] Schuler Declaration at ¶ 31.

[52] *See, e.g.*, Supplemental Information at 16.

even more opportunities to distribute the merged company's content and communications services on multiple platforms nationwide. Accordingly, we will have every incentive to promote the development of, and to deploy our services over, all broadband platforms (as well as narrowband and new mobile platforms), whether AOL Time Warner owns them or not.

For all of these reasons, and as to the facilities of both Time Warner and its broadband competitors alike, AOL and Time Warner clearly envision that together they will spur the deployment and penetration of broadband facilities and services at a pace significantly faster than would be the case absent the merger. The accelerated growth of AOL Time Warner as a "next generation" Internet company will be dependent on the new company's introduction of new products and services of ever-increasing value to consumers; absent such innovation, the rate of growth of AOL and Time Warner combined could not justify the company's expectations. Given the Commission's findings to date, the agency also will surely recognize how the collective attraction of new interactive products and services offered by AOL Time Warner and its competitors—offered via an array of available ISPs—will increase the speed with which consumers will enjoy the availability of advanced telecommunications capabilities.[53]

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[53] In granting the AT&T/MediaOne merger just three months ago, the FCC determined that increased competition among broadband providers has succeeded in spurring faster deployment of these services across a range of platforms. *See, e.g., MediaOne/AT&T Order* at ¶117 (noting that "there is evidence that ILECs, CLECs, and other competitive providers are aggressively rolling out alternative broadband technologies" and explaining that "[l]argely in response to cable modem rollout, the Bell Operating Companies ... and GTE have launched major initiatives to accelerate their deployment of DSL"). Recent developments in the marketplace include considerable investment and deployment in DSL technology by SBC ($6 billion committed), Verizon, Covad, US West, NorthPoint Communications, and GTE; investment in satellites by DirecTV, Hughes Network Systems and Juno, Teledesic, Microsoft, Lockheed Martin, and TRW; and investment in fixed wireless by Sony, AT&T, Sprint, and MCI WorldCom. *See* Supplemental Information at 46-47; Reply Comments at 18-20, 24.

As detailed above, the merger of AOL and Time Warner will deliver tangible and significant benefits to consumers. The two companies share a common vision for the development of enticing new interactive products and services which will draw more consumers to the online medium. By doing so—and thereby unleashing a new wave of innovation and increased choice as our competitors seek to keep pace—we expect that our merger also will step up the pace of broadband deployment to support the increasing consumer demand. And by making use itself of all possible platforms, AOL Time Warner will be helping to develop a next-generation Internet that functions as a truly global medium crossing all boundaries between people. In sum, our proposed merger will deliver substantial, clear, and compelling benefits squarely advancing fundamental Commission policy objectives and directly serving U.S. consumers.

Respectfully submitted,

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