Wiley, Rein & Fielding

1776 K Street, N.W.
Washington, D.C. 20006
(202) 719-7000

Peter D. Ross
(202) 719-4232
pross@wrf.com

Fax: (202) 719-7049
www.wrf.com

September 19, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, S.W.—The Portals
TW-B204
Washington, DC 20554

Re: America Online, Inc. and Time Warner Inc. Notice of *Ex Parte* Presentation
Applications of America Online, Inc. and Time Warner Inc.
for Transfers of Control, CS Docket No. 00-30

Dear Ms. Salas:

On behalf of America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner"), submitted herewith pursuant to Section 1.1206(b)(2) of the Commission's rules, are an original and one copy of this notice regarding a permitted oral ex parte presentation in the above-referenced proceeding. On September 18, 2000, George Vradenburg, III, Senior Vice President, AOL Global and Strategic Policy; Steven N. Teplitz, AOL Vice President—Telecommunications Policy; Peter D. Ross of this firm on behalf of AOL; and Catherine R. Nolan, Time Warner Inc., Vice President, Law & Public Policy, met with Deborah A. Lathen, Chief, Cable Services Bureau, Michele Ellison, Deputy General Counsel, and James Bird, Assistant General Counsel. The parties discussed a variety of issues raised in this proceeding, as reflected below.

The parties first addressed Internet services competition. As described below, the applicants discussed their commitment to providing consumers with access to multiple ISPs over Time Warner cable systems. The parties demonstrated that the Commission's policy and precedent in this area are, of course, clear. In light of growing actual and potential competition, the agency has consistently rejected calls to mandate open access. And while the Commission has come to embrace the goal of open access and thus determined to monitor industry developments closely, it nonetheless has made clear its position in both the AT&T/TCI and AT&T/Media One decisions that such openness is best achieved in the marketplace. Moreover, the FCC has reiterated that the merger context is not the appropriate forum in which to debate

an open access requirement, and now it stands ready to initiate a proceeding to consider a uniform national policy as to whether such a requirement is warranted.

As the FCC consistently has found, most recently in last month's report on advanced services, competition among broadband platforms and services is growing rapidly. Providers are deploying DSL at a rapid pace, and DSL subscribership is rising accordingly. Satellite and wireless technologies have made similar advances, and both services are expected to be widespread within the next few years. Indeed, there can be no question that the marketplace is considerably more competitive than when the FCC last assessed it in the AT&T-TCI and AT&T-MediaOne proceedings. As such, the record here presents no basis for the FCC to reverse its established cable Internet access policy.

Moreover, the merger of AOL and Time Warner will only further promote broadband platform competition and market-based open access. The parties' have committed in their MOU to provide consumers with a choice of multiple ISPs over Time Warner cable systems as soon as possible. With the Juno deal, a technical trial, and efforts to restructure Road Runner (and thereby expedite the demise of exclusivity), Time Warner is moving to make its joint commitment with AOL a reality. These concrete steps go far beyond the commitments found to be sufficient by the Commission in the AT&T/TCI and AT&T/MediaOne transactions. Moreover, AOL has demonstrated its continuing commitment to non-cable broadband platforms, and has explained the clear economic and practical rationale underlying this position. It is clear that the record here in no way warrants reversal of FCC policy in this area.

The parties also discussed the merged entities' relationship with AT&T. As reflected in its prior filings in this proceeding, this merger simply does not create any attributable cross-interest between AT&T and either AOL or Time Warner. Neither Time Warner nor AOL has, or through this merger would acquire, any interest in AT&T (or Excite@Home). AT&T's interest in TWE was created by AT&T's acquisition of MediaOne and affirmatively ruled permissible by the Commission just three months ago. (While AT&T may, consistent with the condition imposed by the Commission in its review of the AT&T/MediaOne transaction, choose to divest its interest in TWE in order to resolve *its* horizontal cap compliance issues, that decision has been left by the Commission to AT&T.)

This merger brings no new video interests into the mix. AOL owns no cable systems and has no attributable interest in any multichannel video programming distributor (or video programmer for that matter). Thus, the merged entity will remain precisely where it stood before the merger—well below the

30% horizontal ownership cap imposed by the Commission to ensure that the market for the distribution of video programming remains competitive.

Moreover, as AOL has noted, this Commission has found that compliance with the horizontal ownership cap resolves concerns about competition in a variety of related arenas as well. In *AT&T/MediaOne*, the Commission concluded that cap compliance "will circumscribe AT&T's purported ability to harm unaffiliated content providers [defined in the order as both interactive services and content providers], unaffiliated EPGs, and other MVPDs . . .." Given that AT&T serves, and (even assuming a divestiture of cable system interests in order to achieve compliance with the cap) will continue to serve, a far larger portion of MVPD subscribers than will AOL Time Warner, the Commission cannot reasonably find otherwise here.

Similarly, with regard to ISP competition and broadband issues raised in this merger, neither AOL nor Time Warner hold any interest in Excite@Home. And, while AT&T acquired an interest in Road Runner as a result of its acquisition of MediaOne, AT&T has agreed to divest that interest pursuant to its consent decree with the Department of Justice. AT&T acquires no attributable interest in AOL through this merger. And so there will be no AT&T "connection" in ownership of any ISP.

As to potential contractual arrangements between the merged entity and AT&T, the parties noted they are not specific to this merger. In any event, the potential commercial relationships cited by commenters are in fact pro-consumer. The possibility that AT&T and AOL Time Warner might jointly offer telephony services over Time Warner cable systems would spur local exchange competition in the manner expressly hoped for by the Commission, not only in its horizontal ownership and cable attribution proceedings (which relaxed attribution rules expressly to further such a result), but also in its approval of the AT&T/TCI and AT&T/MediaOne mergers. Likewise, agreements that would allow AOL (along with other ISPs) to offer broadband Internet services over AT&T cable systems would only serve consumers and competition. And the Commission has already relied upon AT&T's commitment to multiple ISP choice—and here has been presented with AOL and Time Warner's already demonstrated commitment to their more comprehensive MOU—which preclude reciprocal exclusive arrangements.

Moreover, the FCC found no cause for concern over "preferential agreements" in *AT&T/MediaOne*. There, the Commission found that the "consent decree with AT&T, …. requiring it to divest its interest in Road Runner *and to obtain prior approval from the Justice Department before*

entering into certain agreements with Time Warner and AOL" would "assure that Road Runner and Excite@Home will not coordinate their actions to the detriment of consumers." (*AT&T/MediaOne* at ¶ ¶ 116, 122) (emphasis added**)**. In addition, in rejecting calls to consolidate review of the AT&T/MediaOne transaction and this merger, the Commission concluded that its *AT&T/MediaOne* decision fully "addressed the threat of anticompetitive action between [AT&T/MediaOne] and other large industry players in the MVPD industry in light of recent consolidation activities, as well as the recent trend toward both horizontal and vertical consolidation in the Internet and broadband services industry." (*AT&T/MediaOne* at ¶ 181).

AOL also discussed the importance of ensuring that, as the industry moves toward instant messaging ("IM") interoperability, consumers' privacy and security are protected. AOL reiterated its support for true server-to-server interoperability between IM providers that ensures IM's continued appeal as a secure, reliable, spam-free and popular feature of Internet service. Indeed, participants in the ongoing industry-based effort to develop IM interoperability are only considering server-to-server proposals, and the IETF working group's co-chair has noted that "building security and safety into the system from the beginning is crucial."

While the IETF's work is underway, some of AOL's competitors have gone outside the standards process to push their own "quick fix" interoperability plan. These competitors, without regard for the importance of the need to protect the privacy and security of IM users, are lobbying the government to craft instant messaging regulation in the context of this merger. This approach is designed not to help consumers, but to advantage specific competitors.

Because of the real-time, instantaneous character of instant messaging, it is critical that neither government nor those of us in the industry do anything to make this new communications feature vulnerable to the kind of spamming and hacking problems that are so troublesome today in email. If government chooses to require AOL or any other company to achieve interoperability in a manner which leaves instant messaging vulnerable to spam and hacking, consumers will be the ones to suffer.

The record demonstrates, in any event, that competition among IM providers is robust, innovation is abundant, and barriers to entry simply do not exist. Furthermore, FCC intervention of the sort that the IM competitors seek would constitute an unprecedented reversal of Commission policy against regulation of Internet services—the very policy that has helped to spur the tremendous expansion of the Internet to date.

Moreover, the Commission has long held that the merger review process is not the proper forum to address issues "which would remain equally meritorious (or non-meritorious) if the merger were not to occur." (*AT&T/TCI at ¶ 96*). If any FCC proceeding is the proper forum to address questions concerning the interoperability of instant messaging, clearly this merger review is not it.

Finally, the parties briefly discussed the Commission's factual findings and legal and policy analysis in recent proceedings that addressed these and other issues raised by commenters in this proceeding, as reflected in the attached document.

Kindly direct any questions regarding this matter to the undersigned.

Respectfully submitted,

/s/ Peter D. Ross

Peter D. Ross
Counsel to America Online, Inc.

Attachment

cc: Deborah A. Lathen, Cable Services Bureau (w/ attachment)
Michelle Ellison, Deputy General Counsel (w/attachment)
James Bird, Assistant General Counsel (w/ attachment)
Royce Dickens, Cable Services Bureau (w/ attachment)
Linda Senecal, Cable Services Bureau (w/ attachment)
International Transcription Services, Inc. (w/ attachment)

THIS COMMISSION HAS RULED:

COMMENTER CONCERNS	PREVIOUSLY ADDRESSED BY FCC IN AT&T MERGERS (AND ELSEWHERE)?	COMMISSION RULING
Open Access To The Cable Broadband Platform	✓	Competition resolves any concern; leave to marketplace and merger is wrong forum.
Cable Control of Multichannel Video Distribution	✓	Compliance with horizontal ownership cap resolves any concern.
Cable Bottleneck Control of Broadband Platform	✓	Competition and compliance with horizontal ownership cap resolves any concern.
Discrimination in Broadband Applications and Software	✓	Competition resolves any concern; and ISP features are unregulated information services.
Discrimination against Unaffiliated Broadband Content Providers	✓	Competition and compliance with horizontal ownership cap resolves any concern.
Discrimination Against Unaffiliated EPGs Or Interactive Television Services And Content	✓	Competition, compliance with horizontal ownership cap, and commercial availability of navigation devices resolve any concern.
Pass-Through Of Digital Broadcast Signal In Full	✓	Merger is wrong forum for requested relief.
Discrimination Through Caching and Other Technological Means	✓	Competition resolves any concern.
Extension of Cable Regulation To The Internet	✓	No statutory authority for requested relief.
Restrictions on Exclusive Distribution and Expansion of Program Access	✓	No statutory authority for requested relief; and merger is wrong forum for requested relief.
Anticompetitive Bundling of Services	✓	Competition resolves any concern; and merger is wrong forum for requested relief.
AT&T Interrelationships	✓	Compliance with horizontal ownership cap and DoJ consent decree resolves any concern.
Additional Policy Debates And Private Disputes Not Specific To The Merger	✓	Merger is wrong forum for requested relief.

THIS COMMISSION RECENTLY RULED IN THE AT&T MERGERS AND ELSEWHERE . . .

ON OPEN ACCESS TO THE CABLE BROADBAND PLATFORM:

- "[T]he record, while sparse, suggests that multiple methods of increasing bandwidth are or soon will be made available to a broad range of customers. On this basis, we see no reason to take action on the [open access] issue at this time." (First Advanced Services Report, ¶ 101)

- "[T]here are a large number of firms providing Internet access services in nearly all geographic markets . . . and **these markets are quite competitive today.**" (*AT&T/TCI*, ¶ 93)

- "[Q]uite 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. . . . **[T]he merger does not eliminate scarce assets or capabilities**; in fact, a partnership between AT&T and TCI is precisely the kind of arrangement by which AT&T (and other ISPs) could be expected to provide higher-speed Internet access services." (*AT&T/TCI*, ¶ 94)

- "[S]ubscribers will be able to **access content** through @Home's interface or through Excite's portal – or **through any** other **interface** (Yahoo, Lycos, AOL, or others) they choose." (*AT&T/TCI*, ¶ 95)

- "[N]othing about the proposed merger would deny any customer (including AT&T-TCI customers) the **ability to access the Internet content or portal of his or her choice.**" (*AT&T/TCI*, ¶ 96)

- "[O]pen access issues would remain equally meritorious (or non-meritorious) if the merger were not to occur." (*AT&T/TCI*, ¶ 96)

- "**[Open] access issues . . . do not provide a basis for conditioning,** denying, or designating for hearing any of the requested transfers of licenses and authorizations." (*AT&T/TCI*, ¶ 96)

- "[W]e find that there is **significant actual and potential competition from both alternative broadband providers and from unaffiliated ISPs** that may gain access to the merged firm's cable systems." (*AT&T/MediaOne*, ¶ 116)

- "[H]arms will be avoided if: (a) consumers can choose among various alternative broadband access providers . . .; or (b) unaffiliated ISPs are permitted access to the merged firm's cable network." (*AT&T/MediaOne*, ¶ 116)

- **"Applicants have committed to open their cable modem platform to unaffiliated ISPs as soon as AT&T's exclusive contract with Excite@Home expires . . . and MediaOne's exclusive contract with Road Runner expires . . . ."** *(AT&T/MediaOne, ¶¶ 120)*

- "Given the nascent condition of the broadband industry and the foregoing promises of competition, we find it premature to conclude that the proposed merger poses a sufficient threat to competition and diversity in the provision of broadband Internet services . . . to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree." (*AT&T/MediaOne*, ¶ 123)

- "[L]egal determinations [regarding open access] would have industry-wide application, as well as legal and practical implications that extend far beyond the contours of this particular

merger. Our **review of this merger does not provide an appropriate forum** for a determination of the legal status of cable broadband Internet access services." (*AT&T/MediaOne*, ¶ 126)

- "We will initiate a proceeding on the issue of multiple Internet service providers' access to cable operators' infrastructure for delivery of advanced services. The purpose of the **new proceeding** will be **to establish the national policy** on this question and bring certainty to the marketplace." (Second Advanced Services Report, ¶ 267)

ON CABLE CONTROL OF MULTICHANNEL VIDEO DISTRIBUTION:

- **Compliance with the cable cap** "will circumscribe AT&T's purported ability to harm . . . other MVPDs" and "**will ensure** that the merger will not frustrate nor impair the Commission's implementation of the Communications Act and its objectives with regard to the promotion of **competition and diversity** in the provision of video programming." (*AT&T/MediaOne*, ¶¶ 90, 73)

- The cap "limits AT&T's size and ensures that other MVPDs will provide sufficient alternative outlets for unaffiliated content providers." (*AT&T/MediaOne*, ¶ 90)

- The **cable attribution standards identify** "a degree of ownership or other economic interest, or **influence or control** over an entity engaged in the provision of communications services such that the holders should be **subject to [the horizontal ownership limit].**" (Cable Attribution Order, ¶ 2)

- Voting stock interests of less than five percent and non-voting stock interests are non-attributable. (Cable Attribution Order, ¶ 3)

ON CABLE BOTTLENECK CONTROL OF BROADBAND PLATFORM:

- "In virtually every TCI franchise area, **an incumbent local exchange carrier, at least two wireless providers, and the local electric utility also have facilities that may prove to be viable platforms for residential broadband access**. **Should all these alternatives fail** – and AT&T thereby achieves both a monopoly and subscriptions to it from all within its service area – both **the Communications Act and the antitrust laws** should be able to prevent AT&T from extending a monopoly to other competitive services." (*AT&T/TCI*, ¶ 129)

- "**[C]ommenters** argue that the merger would create a **web of relationships** that will allow the Applicants to **dominate communications conduits** through their cable infrastructure and **dominate media content** through their vertical integration with content providers." (*AT&T/MediaOne*, ¶ 2)

- "**[G]rowing competition** from alternative broadband access providers, the Applicants' **commitment to give unaffiliated ISPs direct access** to Applicants' cable systems, and the **terms of Applicants' proposed consent decree** with the Department of Justice requiring divestiture of Road Runner **make it unlikely that the merged firm would be able to dominate and threaten the openness and diversity of the Internet.**" (*AT&T/MediaOne*, ¶ 5)

- "[T]he **merger will not violate any provision of the Communications Act or Commission rules as they may pertain to the provision of broadband Internet services** to residential

customers. . . . [T]he merger **will not frustrate** the implementation of the Communications Act and its goals as they pertain to the **promotion of competition and diversity** in the provision of these services." (*AT&T/MediaOne*, ¶ 102)

- "Given the nascent condition of the broadband industry and the foregoing promises of competition, we find it premature to conclude that the proposed merger poses a sufficient threat to **competition and diversity in the provision of broadband Internet services, content, applications, or architecture** to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree. . . . Although some possibility of harm may remain, we find that there is an equal or greater probability that growing competition from alternative access providers and unaffiliated ISPs will prevent such perceived harms." (*AT&T/MediaOne*, ¶ 123)

ON DISCRIMINATION IN BROADBAND APPLICATIONS AND SOFTWARE:

- "Given the nascent condition of the broadband industry and the foregoing promises of competition, we find it premature to conclude that the proposed merger poses a sufficient threat to competition and diversity in the provision of broadband Internet [ ] applications to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree. We find that the proposed consent decree adequately addresses commenters' concern that a combination of Excite@Home and Road Runner would have both the ability and the incentive . . . to leverage proprietary software protocols to favor networks owned by or affiliated with the merged entity. Although some possibility of harm may remain, we find that there is an equal or greater probability that **growing competition from alternative access providers and unaffiliated ISPs will prevent such perceived harms.**" (*AT&T/MediaOne*, ¶ 123)

- "The evidence of growing competition from both alternative broadband providers and unaffiliated ISPs gaining access to cable and other broadband networks indicates that any **action taken by the merged firm to disfavor unaffiliated [ ] applications providers is likely to threaten the network's ability to attract and retain customers.**" (*AT&T/MediaOne*, ¶ 123)

- "Given the increasingly rapid deployment of alternative broadband technologies, . . . [w]ere the merged firm to attempt [to impose proprietary protocols], it is more likely than not that software developers could find **adequate outlets in alternative broadband providers** to discipline the merged firm's anti-competitive action." (*AT&T/MediaOne*, ¶ 125)

- "[B]y requiring MVPDs to grant all equipment manufacturers an opportunity to sell equipment to the MVPDs' subscribers, the **navigation devices rules limit MVPDs' ability to exercise excessive market power and dominate the equipment market.**" (*AT&T/MediaOne*, ¶ 100)

- "[I]t 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 . . . . The service that Internet access providers offer to members of the public is Internet access. That service gives users a variety of advanced capabilities [to] exploit . . . through applications they install on their own computers." (Universal Service Report, ¶ 79)

- "The **provision of Internet access** service involves data transport elements . . . . But the provision of Internet access crucially involves information-processing elements as well; it

offers end users information-service capabilities inextricably intertwined with data transport. As such, we conclude that **it is appropriately classed as an 'information service.'"** (Universal Service Report, ¶ 80)

- **Regulating "Internet access services as telecommunications services could have significant consequences for the global development of the Internet."** (Universal Service Report, ¶ 82)

ON DISCRIMINATION AGAINST UNAFFILIATED BROADBAND CONTENT PROVIDERS:

- "[N]othing about the proposed merger would deny any customer (including AT&T-TCI customers) the **ability to access the Internet content or portal of his or her choice**." (*AT&T/TCI*, ¶ 96)

- "Some commenters argue that the merged firm will control such a large portion of the broadband customer base that it could gain ***de facto* power to dictate what content, products, and services are available to broadband customers** generally, and at what price." (*AT&T/MediaOne*, ¶ 111)

- Compliance with the horizontal ownership rules "will circumscribe AT&T's purported ability to harm unaffiliated content providers [including interactive service providers]. . . ." Further, "**[t]o the extent that AT&T may steer its own subscribers away from unaffiliated content providers** via AT&T's own EPG, we note that **[the cable cap] ensures** that other MVPDs will provide **sufficient alternative outlets** for unaffiliated content providers." (*AT&T/MediaOne*, ¶ 90)

- "Given the nascent condition of the broadband industry and the foregoing promises of competition, we find it premature to conclude that the proposed merger poses a sufficient threat to competition and diversity in the provision of broadband Internet [ ]content . . . to justify denial of the merger or the imposition of conditions to supplement the Justice Department's proposed consent decree. . . . Although some possibility of harm may remain, we find that there is an equal or greater probability that **growing competition from alternative access providers and unaffiliated ISPs** will prevent such perceived harms." (*AT&T/MediaOne*, ¶ 123)

ON DISCRIMINATION AGAINST UNAFFILIATED EPG'S OR INTERACTIVE TELEVISION SERVICES AND CONTENT:

- **Cable cap compliance "will circumscribe AT&T's purported ability to harm unaffiliated [interactive service providers], unaffiliated EPGs . . . ."** (*AT&T/MediaOne*, ¶ 90)

- "With regard to unaffiliated EPG providers who would like access to AT&T's cable systems, . . . [b]ecause AT&T's horizontal size will be limited as a result of this Order, unaffiliated EPGs will have access to more MVPD subscribers that are not affiliated with AT&T." (*AT&T/MediaOne*, ¶ 91)

- "Interactive television services and content" involve the provision of Internet access, and "growing competition from both alternative broadband providers and unaffiliated ISPs gaining access to cable and other broadband networks indicates that any **action taken by the merged**

firm to disfavor unaffiliated broadband content and applications providers is likely to threaten the networks ability to attract and retain customers." (*AT&T/MediaOne*, ¶¶ 109, 123)

ON PASS-THROUGH OF DIGITAL BROADCAST SIGNAL IN FULL:

- Dismissing calls "to condition approval of the merger on the requirement that the merged entity carry all local digital broadcast signals to consumers' television sets without degradation," the FCC found that **"digital broadcast signal carriage requirements should be addressed in the Commission's pending [digital broadcast] proceeding and not here."** (*AT&T/TCI*, ¶¶ 41, 43)

ON DISCRIMINATION THROUGH CACHING AND OTHER TECHNOLOGICAL MEANS:

- Dismissing commenters' concerns that "the merged firm could use its control over . . . home pages and **caching technology** to discriminate against unaffiliated providers," and would have "the incentive and the ability to implement proprietary **network management** and software protocols," the FCC found "growing competition from both alternative broadband providers and unaffiliated ISPs gaining access to cable and other broadband networks indicates that **any action taken by the merged firm to disfavor unaffiliated content and applications providers is likely to threaten the network's ability to attract and retain customers.**" (*AT&T/MediaOne*, ¶¶ 112, 113, 123)

ON EXTENSION OF CABLE REGULATION TO THE INTERNET:

- The cable channel occupancy and program carriage agreement **rules "apply solely to the carriage of video programming" and "ISP Internet access services . . . do not constitute 'video programming'** as that term is defined in the statute and the Commission's rules and orders." (*AT&T/MediaOne*, ¶ 86)

- "[O]pen video systems provide an option . . . for the distribution of video programming to consumers other than as a traditional cable television system regulated under Title VI." (*Open Video Systems Third Report and Order and Second Order on Recon*, ¶ 2)

ON RESTRICTIONS ON EXCLUSIVE DISTRIBUTION AND EXPANSION OF PROGRAM ACCESS:

- As the FCC has repeatedly ruled before, "[w]e . . . **decline to condition the merger on the imposition of anti-exclusivity restrictions that are not required by the program access rules.**" (*AT&T/MediaOne*, ¶ 81; *see also AT&T/TCI*, ¶ 38)

- "[W]e decline to apply the program access rules or equivalent restrictions to terrestrially delivered programming . . . ." (*AT&T/MediaOne*, ¶ 80; *see also, AT&T/TCI*, ¶ 37)

ON ANTICOMPETITIVE BUNDLING OF SERVICES:

- "[W]e do not conduct a separate analysis of bundled services as a discrete product. Rather, our competitive analyses of how the merger will affect each component of a bundled offering will analyze the competitive effects of the bundle as well." (*AT&T/TCI*, ¶ 19)

- "[A] **blanket ban** on the bundling of services might well **prevent competitively harmless transactions.**" (*AT&T/TCI*, ¶ 125)

- "AT&T-TCI **could inflict competitive harm** by offering a package of bundled products only if rivals could not offer a similar package – that is **only if the merged firm enjoys a monopoly in one of the bundled services."** (*AT&T/TCI*, ¶ 126)

- "**[C]ustomers** in every TCI franchise area will **have alternative providers of [long distance voice, local voice, wireless and Internet]** services. This leaves only cable service as a service over which AT&T-TCI may well have market or monopoly power post-merger. Yet, if the merged firm will have market power as a cable operator, **TCI – and every other cable firm that is not subject to effective competition within its franchise area – already enjoys equivalent market power.** . . . Should the merged firm engage in anticompetitive tying of services to cable service, we will deal with that behavior forthrightly." (*AT&T/TCI*, ¶ 126)

- "As we stated in the *AT&T-TCI Order*, a blanket condition prohibiting bundling of any form could have the **unintended effect of denying consumers substantial benefits.**" (*AT&T/MediaOne*, ¶ 141; *see also AT&T/TCI*, ¶ 125)

- "T]he merger is not the cause of this alleged competitive threat [that Applicants will exploit their alleged dominance of local MVPD markets to pursue anticompetitive bundling strategies], and the **merger license transfer proceeding is not the appropriate forum** to address this issue. We will **continue to rely on competition or, in its absence, the antitrust laws,** to protect against this danger, just as we did before the merger." (*AT&T/MediaOne*, ¶ 143, *see also AT&T/TCI*, ¶ 126)

ON AT&T INTERRELATIONSHIPS:

- "**[C]ommenters** argue that the merger would create a **web of relationships** that will allow the Applicants to **dominate communications conduits** through their cable infrastructure and **dominate media content** through their vertical integration with content providers." (*AT&T/MediaOne*, ¶ 2)

- **Rejecting calls "to require the Applicants to divest TWE instead of permitting the Applicants to choose alternative methods to comply** with the horizontal rules," the FCC ruled that any harms to the diversity of video programming and competition from concentration in the MVPD market were "sufficiently mitigated by compliance with the horizontal ownership rules." (*AT&T/MediaOne*, ¶¶ 56, 59)

- "Applicants' **compliance with the . . . divestiture requirements also will ensure that the merger will not frustrate or impair the Commission's implementation of the Communications Act and its objectives** with regard to the promotion of competition and diversity in the provision of video programming." (*AT&T/MediaOne*, ¶ 73)

- "[W]e find that the Justice Department's proposed **consent decree** with AT&T, requiring it to divest its interest in Road Runner and to obtain prior approval from the Justice Department before entering into certain agreements with Time Warner and AOL, **already has addressed the potential harms from a combination of Road Runner and Excite@Home.**" (*AT&T/MediaOne*, ¶ 116)

- With requirement of cap compliance and recognition of competitive broadband marketplace, "**we have already addressed the threat of anticompetitive effects from coordinated action between the merged entity and other large industry players** in the MVPD industry in light of recent consolidation activities, **as well as the recent trend toward both horizontal and vertical consolidation in the Internet and broadband services industry.**" (*AT&T/MediaOne*, ¶ 181)

- **Non-attributable ties can offer public benefits** such as "cable broadband and telephony services and competition to the incumbent local exchange carriers or Internet." (Cable Attribution Order, ¶ 63)

ON ADDITIONAL POLICY DEBATES AND PRIVATE DISPUTES NOT SPECIFIC TO THE MERGER:

- "[T]he potential harm alleged by the commenters is not specific to the merger . . . . **[T]he merger is not the cause of this alleged competitive threat,** and the merger license transfer proceeding is **not the appropriate forum** to address this issue." (*AT&T/MediaOne*, ¶ 143)

- "[T]his is like other cases where the Commission has **declined to consider, in merger proceedings, matters that are the subject of rulemaking proceedings** before the Commission because **the public interest would be better served by addressing the matter in a broader proceeding of general applicability.**" (*AT&T/TCI*, ¶ 43)

- "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." (*Disney/ABC*, ¶ 22)

MOU

AOL and Time Warner already have made industry-leading strides to define and implement a multiple ISP access model. As the FCC has just found, the recent rapid growth and strength in the development of alternative broadband platforms is generating the competitive pressure that is leading us and others to move toward a cable open access model in the marketplace. Moreover, the Commission has now twice ruled that the open access issue was not merger-specific but rather an issue of industry-wide relevance, and now the agency stands ready to initiate just such a proceeding of general applicability. The record provides no basis for the FCC suddenly to reverse course here.

Billing. ISPs will have an opportunity to market and establish a direct billing relationship with their broadband Internet service subscribers.

First Screen. Broadband cable Internet customers will not go through AOL unless they choose AOL. Each ISP will determine the contents of its subscribers' first screen.

Interconnection. ISPs will be allowed to establish their connection at the headend or at any other point where an affiliated ISP is allowed to connect, and ISPs will be afforded the flexibility to serve consumers on a national, regional or local basis.

ISP Selection. ISPs will be allowed the opportunity to sign up customers directly. Customers also will be able to call TWC offices to select or change ISPs. TWC intends to provide a web site allowing easy selection among ISPs.

Customer Service. Agreements between TWC and ISPs will set forth clear customer service responsibilities for each party. Any QoS mechanisms, performance specifications, or other negotiated terms will be determined without regard to affiliation with AOL Time Warner. TWC will not restrict subscribers from contacting their ISP for customer service. TWC hopes to develop a "hot transfer" mechanism to allow customer service calls to be handed off immediately to either the ISP or TWC as warranted.

Miscellaneous Technical.

(a) **CPE/Installation.** TWC will provide installation services needed to permit consumers to subscribe to any ISPs.

(a) **IP Addressing.** While it is necessary for TWC to manage the IP address space for all devices that connect to the cable network (up to the point of interconnection), we expect to be able to offer ISPs the ability to choose how to allocate IP addresses to PCs or other devices connected to the cable modem: either an ISP can perform its own IP address allocation or else it can provide a routable IP address space for TWC to allocate on its behalf.

(a) **Caching.** Each ISP may determine its individual content caching strategies. To the extent TWC offers transparent caching on its own servers, it will offer to do so through arms length negotiations with individual ISPs and without regard to affiliation.

(a) **Multicasting.** TWC is testing a routing approach that it expects will enable ISPs to multicast, and any ISP (affiliated or unaffiliated) will be free to implement its own multicast support solutions.

(a) **Traffic Discrimination.** TWC will not discriminate based on affiliation with AOL Time Warner in its handling of ISP traffic.

Good Faith. We commit to work in good faith to assure multiple ISP choice over AOL Time Warner cable systems, and we are prepared to negotiate with any ISP to that end.

Enforcement. No less than it did in AT&T's recent mergers, the Commission can again rely on the merging parties to faithfully honor their commitments. Consistent with market-based implementation of multiple ISP access, negotiated contract provisions such as "most favored nations", audit, and private arbitration clauses offer legal mechanisms for safeguarding parties' rights.

Permitted Ex Parte Presentation
CSB Docket No. 00-30

"AT&T Connection"

This merger simply does not create any attributable cross-interest between AT&T and either AOL or Time Warner. Neither Time Warner nor AOL has, or through this merger would acquire, any interest in AT&T (or @Home). AT&T's interest in TWE was created by AT&T's acquisition of MediaOne and affirmatively ruled permissible by this Commission just three months ago. This merger is not the place to revisit the AT&T/MediaOne decision (which is still before the agency on reconsideration).

This merger brings no increment to concentration in cable, MVPD, or video programming ownership—so there can be no video issue here. Indeed, AOL Time Warner's commitment not to limit video streaming pursuant to its multiple ISP model can only increase video competition.

AT&T's recently acquired interest in Road Runner is subject to divestiture, and this merger does not create any AT&T "attributable interest" in AOL. So neither is there any ISP cross-ownership issue here.

Assurances adequate to address concerns about anticompetitive coordinated action were implemented in the AT&T/MediaOne proceeding. There, the FCC held that it had "addressed the threat of anticompetitive effects from coordinated action between [AT&T/MediaOne] and other large industry players in the MVPD industry in light of recent consolidation activities, as well as the recent trend toward both horizontal and vertical consolidation in the Internet and broadband industry." The Commission expressly ruled that the DoJ consent decree's prior approval provisions regarding AT&T/Time Warner broadband agreements "assures[] that Road Runner and Excite@Home will not coordinate their actions to the detriment of consumers." (emphasis added.)

In any event, the prospective commercial arrangements which appear to raise concerns from commenters are in fact pro-consumer: the availability of AOL on AT&T cable systems would serve consumer choice and competition in Internet services; and the possibility of AT&T telephony over TW cable systems would promote the local exchange competition heralded by the FCC in both AT&T mergers.

The Commission has already relied upon AT&T's commitment, and here is fully invited to rely upon our commitment, to multiple ISP choice—answering any concern of reciprocal exclusive arrangements.

The Commission expressly relied on all these factors -- "the nascency of broadband Internet services, . . . growing competition from alternative broadband access providers, the Applicants' commitment to give unaffiliated ISPs direct access to [its] cable systems, and the terms of Applicants' [] consent decree" -- in broadly concluding it "unlikely that the merged firm would be able to dominate and threaten the openness and diversity of the Internet." All of these factors apply here -- with equal or greater force -- in this merger. To the extent the Commission questions the relevance of the AT&T consent decree obligations here, we note that those provisions expressly address AT&T arrangements with AOL and a merged AOL Time Warner.

Instant Messaging

The record on instant messaging fails to identify a market, barriers to entry, or a market failure of any kind in the vigorously competitive arena of instant messaging. With consumers able to download and use multiple IM services for free, new entry and innovation abound.

Multiple, competing, free IM systems are now available to all Internet users. Indeed, Microsoft is bundling its IM software in its operating system, which could ultimately lead every Internet user to use Microsoft's IM software. A single-company interoperability requirement imposed as part of this merger would simply be an arbitrary skewing of a competitive and dynamic arena.

Keeping pace with, much less regulating technology in, such a fast-moving marketplace is no small challenge. And, of course, this agency has never regulated Internet service provider offerings. Indeed, intervention of the sort requested by our IM competitors would constitute an unprecedented abandonment of FCC policy against regulating Internet services (or information services generally).

Moreover, IM interoperability concerns predate and are in no way caused by or specific to this merger—commenters' belated and fanciful theories of merger-specificity notwithstanding.

While AOL is indeed supportive of interoperability achieved the right way, this issue "would remain equally meritorious (or non-meritorious) if the merger were not to occur"—and thus is wholly inappropriate for resolution here.