

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

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

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

<sup>633</sup> H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992).

<sup>634</sup> H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. (1992).

<sup>635</sup> See *DBS NPRM*, 13 FCC Rcd at 6938 ¶ 56.

<sup>636</sup> See *id.* at 6939 ¶ 58 n.132.

<sup>637</sup> See *id.* at 6939 ¶ 58.

<sup>638</sup> See Applicants’ March 21 Supplemental Information at 12-14.

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

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

## 2. Program Access Issues

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

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

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

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

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

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

<sup>643</sup> 47 U.S.C. § 548.

<sup>644</sup> 1992 Cable Act § 2(a)(5).

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

<sup>646</sup> 47 C.F.R. § 76.1002(a).

<sup>647</sup> 47 C.F.R. § 76.1002(b). This restriction is subject to certain limited exceptions. *Id.*

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

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

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

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

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<sup>649</sup> RCN Comments at 13.

<sup>650</sup> SBC Comments at 38.

<sup>651</sup> RCN Comments at 12.

<sup>652</sup> *Id.* at 13.

<sup>653</sup> SBC Comments at 38.

<sup>654</sup> RCN Comments at 13.

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

<sup>656</sup> Applicants' Reply Comments at 49.

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

<sup>658</sup> See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Petition for Rulemaking of Ameritech New Media, Inc. Regarding the Development of Competition and Diversity in Video Programming Distribution and Carriage*, CS Docket No. 97-248, Memorandum Opinion and Order and Notice of Proposed Rulemaking ("Program Access Order"), 12 FCC Rcd 22840, 22861 (1997). As we stated in the *Program Access Order*, there are no indications at this time that terrestrial delivery of programming formerly delivered by  
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RCN's proposal that we apply our program access rules to AOL Time Warner's dealings with unaffiliated programmers. Again, there is no evidence suggesting that the merged firm's incentive or ability to enter into exclusive contracts with unaffiliated video programmers would be greater than Time Warner's current ability to do so. While we are cognizant of the harm that exclusive contracts can cause overbuilders in local markets, we cannot conclude that the merger will harm competing MVPDs seeking to purchase non-Time Warner video programming.

## F. COORDINATION WITH AT&T

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

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

### 1. Background

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

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

<sup>659</sup> See Section IV.A., *supra*. (High-Speed Internet Access Services)

<sup>660</sup> See SBC Comments at 30-32; BellSouth Reply Comments at 18-19; Consumers Union Comments at 2-7; 157.

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

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

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

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

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

<sup>664</sup> See Patricia Fusco, *Top 12 ISPs by Subscriber*, INTERNETNEWS.COM, at [http://www.isp-planet.com/research/isp\\_071000.html](http://www.isp-planet.com/research/isp_071000.html) (no date). Both Road Runner and Excite@Home are, by contract, the exclusive ISPs of the cable operators they serve, until December, 2001, and June, 2002, respectively. See *AT&T-MediaOne*, 15 FCC Rcd at 9869 ¶ 120. Time Warner has announced, however, that its exclusivity with Road Runner will end in April 2001. See Time Warner Inc., *Time Warner to Increase Road Runner Ownership and Manage its Operations* (press release), Dec. 18, 2000.

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

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

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

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

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

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

<sup>668</sup> See *AT&T-MediaOne Order*, 15 FCC Rcd at 9831 ¶ 28.

<sup>669</sup> See *AT&T-MediaOne Order*, 15 FCC Rcd at 9836-37 ¶ 42 n.145.

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

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

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

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

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

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

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

<sup>674</sup> DOJ Consent Decree Section IV ¶¶ 30-34.

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

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

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

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

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

<sup>677</sup> *Id.*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(... continued from previous page)  
matters:

- a) the decisions of TWE regarding which Video Programming services are purchased for or carried on TWE's cable systems;
- b) negotiation of the prices paid by TWE for Video Programming carried on TWE's cable systems;
- c) setting the schedule for rollout of Video Programming by TWE's cable systems;
- d) marketing by TWE of Video Programming carried on TWE's cable systems;
- e) setting the budget for the Video Programming operations of TWE's cable systems (except that AT&T may be involved in setting the overall TWE budget for Video Programming operations provided that AT&T's access to TWE budget information does not include information concerning individual budget components of TWE's Video Programming operations, e.g., personnel, overhead, marketing, and program purchasing);
- f) selecting the electronic programming guide used by TWE's cable systems;
- g) the hiring, firing, or supervising of TWE employees directly involved in the Video Programming activities of TWE's cable systems; or
- h) assessing the performance of any Video Programming service carried by TWE's cable systems.

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

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

<sup>680</sup> See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Letter from James W. Cicconi, General Counsel, AT&T, to Deborah Lathen, Chief, Cable Services Bureau, dated Dec. 15, 2000. See also *id.* Letter from Deborah A. Lathen, Chief, Cable Services Bureau, FCC, to James W. Cicconi, General Counsel, AT&T, dated Dec. 18, 2000.

<sup>681</sup> See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Letter from James W. Cicconi, General Counsel, AT&T, to Deborah Lathen, Chief, Cable Services Bureau, dated Dec. 15, 2000 ("[i]f, however, AT&T is unable for any reason to achieve insulation of its TWE interests by May, 19, 2001 . . . AT&T hereby certifies that it will, by such date, either divest its ownership interest in TWE or place this interest in an irrevocable trust for purposes of sale."). If AT&T divests Liberty Media pursuant to its December 15 letter, it will also divest other programming interests. *Id.*

<sup>682</sup> See *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Letter from Deborah A. Lathen, Chief, Cable Services Bureau, FCC, to James W. Cicconi, General Counsel, AT&T, dated Dec. 18, 2000.

provisions of the *AT&T-MediaOne Order* that required AT&T to “unambiguously elect a single compliance option.”<sup>683</sup> In the *December 21 Order*, we ruled that it was “AT&T’s intent to elect . . . the divestiture of TWE . . .” and we determined to “treat AT&T’s election as choosing that option only.”<sup>684</sup>

## 2. Discussion

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

<sup>683</sup> *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor To AT&T Corp., Transferee*, CS Docket No. 99-251, Order, FCC No. 00-447 (rel. Dec. 21, 2000) (“*December 21 Order*”).

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

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

*December 21 Order* at ¶ 7.

<sup>685</sup> SBC Comments at 1; *see also* Consumers Union Comments at 4.

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

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

<sup>688</sup> *See* SBC Comments at 27-30; Schwartzman Nov. 14 Letter at 3.

<sup>689</sup> Schwartzman Nov. 14 Letter at 3.

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

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

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

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<sup>690</sup> *Id.* at 2-3.

<sup>691</sup> *Id.* at 3.

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

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

<sup>694</sup> See Disney Reply Comments at 9; see also Letter from the Senator Mike DeWine, Chairman, Subcommittee on Antitrust, Business Rights, and Competition, and Senator Herb Kohl, Ranking Member, Subcommittee on Antitrust Business Rights and Competition to William Kennard, Chairman, FCC, and Robert Pitofsky, Chairman, Federal Trade Commission, dated May 10, 1999 (citing a hypothetical example of possible discrimination against unaffiliated content providers: "Using this technology, it appears that it would be possible, for example, for the combined AOL Time Warner to slow down traffic to the [unaffiliated] ESPN web site while speeding it up to its own competing CNN/Sports Illustrated site."); see also SBC Comments at 31-32 (contending that risks of anticompetitive coordination also stem from contracts and "sweetheart deals").

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

<sup>696</sup> See Section V, *infra*. (Analysis of Potential Public Interest Benefits)

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

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

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

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<sup>697</sup> See SBC Comments at 22-29.

<sup>698</sup> See Section IV.A., *supra*. (High-Speed Internet Access Services)

<sup>699</sup> See para. 276, *infra*.

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

<sup>701</sup> See Ross-Harding Oct. 5 Letter ("... this combination has no effect on the nature of AT&T's limited ownership relationships with Time Warner—relationships that the Commission and antitrust regulators alike reviewed and approved only a few months ago when AT&T obtained approval to acquire MediaOne.").

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

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

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

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

<sup>703</sup> AT&T Nov. 28 Ex Parte at 2-4 (citing Consumers Union Comments).

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

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

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

<sup>707</sup> See AT&T Nov. 28 Ex Parte.

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

<sup>709</sup> See *AT&T-MediaOne Order*, 15 FCC Rcd at 9890 ¶ 173.

<sup>710</sup> See Confidential Appendix IV-F Note 1. As AOL Time Warner points out, "although Time Warner and AT&T have previously explored the possibility of AT&T providing telephony services over Time Warner cable systems (in discussions that long predated the announcement of this merger), no binding agreement has ever been reached . . ." Ross-Harding Oct. 5 Letter at 6; see also Confidential Appendix IV.F Note 2. As discussed below, we believe an agreement that would facilitate the provision of cable telephony and competition with the incumbent local exchange carriers would be pro-competitive.

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

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

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

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

<sup>712</sup> See Confidential Appendix IV-F Note. 3.

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

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

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

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

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

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<sup>715</sup> See SBC Comments at 30-32; BellSouth Reply Comments at 18-19.

<sup>716</sup> AT&T Nov. 28 Ex Parte at 1-3.

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

<sup>718</sup> AT&T Nov. 8 Ex Parte at 3.

<sup>719</sup> AT&T Nov. 28 Ex Parte.

<sup>720</sup> AT&T Nov. 28 Ex Parte at 3.

<sup>721</sup> AT&T Nov. 28 Ex Parte at 3.

<sup>722</sup> AT&T Nov. 28 Ex Parte at 2 (citing Schwartzman Nov. 14 Letter at 1-4).

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

### G. Other Potential Public Interest Harms

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

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

<sup>723</sup> See Media Access Project Ex Parte at 2. See also AT&T Nov. 28 Ex Parte at 9819 ¶ 4.

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

<sup>725</sup> Letter from Cong. Edward J. Markey to Chairman William E. Kennard at 1-2 (Dec. 13, 2000).

<sup>726</sup> *Id.* at 1.

<sup>727</sup> *Id.*

<sup>728</sup> *Id.* at 2.

<sup>729</sup> 47 U.S.C. § 551(a).

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

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

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

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

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

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

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

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

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

<sup>736</sup> *Id.*

## V. ANALYSIS OF POTENTIAL PUBLIC INTEREST BENEFITS

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

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

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

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

- access by unaffiliated ISPs to cable broadband networks (“cable access”);<sup>742</sup>
- accelerated deployment of broadband content and broadband technologies;<sup>743</sup>

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

<sup>738</sup> *AT&T-MediaOne Order*, 15 FCC Rcd at 9816 ¶ 154.

<sup>739</sup> *Id.*

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

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

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

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

- accelerated transformation of traditional media products to digital platforms;<sup>744</sup> and
- expedited development and deployment of new service offerings, some of which, the parties maintain, are yet to be developed.<sup>745</sup>

285. The Applicants have produced limited third-party documentation supporting these claims of affirmative public interest benefits.<sup>746</sup> For the most part, the Applicants have provided narrative descriptions and affidavits from business persons explaining the synergies likely to result from joining these two companies and the merged company's potential to provide affirmative public interest benefits.<sup>747</sup> The evidence offered by the Applicants is described below. Our findings follow.

#### A. The Evidence

286. *Cable Access.* As evidence of their commitment to a marketplace solution to cable access, the Applicants have submitted a Memorandum of Understanding ("MOU") between AOL and Time Warner.<sup>748</sup> As described in more detail in Section IV.A., above, the MOU provides that multiple ISPs would be permitted to serve consumers over Time Warner cable systems without consumers having to also purchase AOL Time Warner ISP services.<sup>749</sup> In addition, the MOU provides that there will be no fixed limit on the number of unaffiliated ISPs selected by Time Warner cable systems (except as

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<sup>744</sup> Application at 11; Applicants' March 21 Supplemental Information at 30; Applicants' Reply Comments at 1; Applicants' Aug. 22 Benefits Ex Parte at 3 (citing Mary Meeker, Richard Bilotti, Mark Mahaney, and Celeste Mellet, *America Online/Time Warner: How Big is Big? Big!*, Morgan Stanley Dean Witter, May 4, 2000, at 10 ("MSDW May 4 Report"); Lanny Baker, Jill Krutick, and Spencer Wang, *AOL and Time Warner Link The Dynamic Duo: Form a Free Cash Flow Dynamo*, Salomon Smith Barney, Mar. 22, 2000 at 1 ("Salomon Smith Barney Mar. 22 Report"); Bressler Decl. at 2-4 ("Applicants' Aug. 22 Benefits Ex Parte, Bressler Decl."); Levin En Banc Testimony, Tr. at 33-34.

<sup>745</sup> Application at 9-10; Applicants' March 21 Supplemental Information at 21, 29-35; Applicants' Reply Comments at 9-10, 43-44; Applicants' Aug. 22 Benefits Ex Parte at 1, 6, 7 (citing Salomon Smith Barney Mar. 22 Report at 31), 8 (citing Myers Group Report) 9, (citing Applicants' Aug. 22 Benefits Ex Parte, Bressler Decl. at ¶¶ 10-12); see also Applicants' Second Response at 16-23.

<sup>746</sup> See MOU; Henry Blodget, Jessica Reif Cohen, Virginia Syer, and Andrew Slabin, *AOL Time Warner - You've Got Upside!*, Merrill Lynch, Feb. 23, 2000 ("Merrill Lynch: Upside"); Christopher Dixon, Catherine Kim, *AOL Time Warner - A Merger that Defines the New Digital Age*, Paine Webber, Mar. 1, 2000 ("Paine Webber: Merger for a Digital Age"); Michael Parekh, Richard Simon, Richard Greenfield, Katherine Hays, and Christopher Cox, *America Online/Time Warner - Perfect Time-ing*, Goldman Sachs, Mar. 10, 2000 ("Goldman Sachs: Perfect Time-ing"); MSDW May 4 Report; Salomon Smith Barney Mar. 22 Report; First Union June 20 Report; *America Online Inc./Time Warner Inc.*, Credit Lyonnais Securities, Feb. 28, 2000, at 12 ("Credit Lyonnais Report").

<sup>747</sup> See generally Application; Applicants' March 21 Supplemental Information; Applicants' Reply Comments; Applicants' Aug. 22 Benefits Ex Parte, Britt Decl.; Applicants' Aug. 22 Benefits Ex Parte, Bressler Decl.; Applicants' Aug. 22 Benefits Ex Parte, Schuler Decl.; Applicants' Aug 14 Benefits Ex Parte; Case En Banc Testimony; Levin En Banc Testimony; Applicants' Second Response.

<sup>748</sup> See MOU.

<sup>749</sup> *Id.* at ¶ 2.

mandated by technical limitations),<sup>750</sup> and that AOL and Time Warner will consider ISPs of national, regional, and local scope.<sup>751</sup>

287. The Applicants assert that their MOU represents a shift within the industry towards a marketplace solution to cable access.<sup>752</sup> The Applicants believe the MOU is significant not only because compliance with its terms will bring choice to consumers where none existed before, but also because it creates momentum for similar action throughout the cable industry.<sup>753</sup> The Applicants cite Wall Street financial analysts that agree the MOU will encourage other major cable operators to open their networks to unaffiliated ISPs.<sup>754</sup>

288. *Accelerated Deployment of Broadband Technologies and Content.* The Applicants claim that the merger will accelerate the deployment of cable and alternative broadband technologies, as well as the development of broadband content. The Applicants assert that the development of broadband content and conduit are mutually reinforcing occurrences. They state that many potential content providers have hesitated to roll out broadband applications in the absence of assurance that a platform for their services would be available, while facilities providers have been similarly skeptical about the advantages of investing in broadband technology prior to the development of broadband content.<sup>755</sup>

289. The Applicants assert that the merger will accelerate the deployment of broadband technologies by several years.<sup>756</sup> First, the Applicants contend that the merger is likely to accelerate the pace of deployment of Time Warner's cable broadband Internet access services.<sup>757</sup> Time Warner submits that rolling out high-speed Internet services is more complex and requires a greater undertaking than the roll-out of other new services.<sup>758</sup> They believe that the merger will result in the deployment of more resources for marketing and consumer connection functions, thus hastening the ability of consumers to obtain high-speed Internet service.<sup>759</sup> As evidence, the Applicants have provided the Commission with

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<sup>750</sup> *Id.* at ¶ 4.

<sup>751</sup> *Id.* at ¶ 8.

<sup>752</sup> Applicants' March 21 Supplemental Information at 21-24 and 25 (citing Merrill Lynch: Upside at 9, 15); Applicants' Reply Comments at 11, 27; Applicants' Aug. 14 Benefits Ex Parte at 2; *see also* Applicants' Aug. 22 Benefits Ex Parte at 2, 13-15; Applicants' Second Response at 33.

<sup>753</sup> Applicants' March 21 Supplemental Information at 24; *see also* Applicants' Reply Comments at 5, 11; Applicants' Aug. 22 Benefits at 15 (citing Applicants' Aug. 22 Benefits Ex Parte, Britt Decl. at ¶13) ("[Our MOU] has already acted as a catalyst to encourage other cable operators to provide ISP choice to consumers. At least 7 of the 11 largest cable operators are looking at offering access to multiple ISPs on their high-speed broadband lines.") *See also* Applicants' Second Response at 33.

<sup>754</sup> Applicants' March 21 Supplemental Information at 25. Merrill Lynch notes that: "AOL's ownership of Time Warner will help pave the way for commercial resolution of the so-called "open access" issue. We would expect the merger to, in turn, push other cable operators to consider establishing deals with AOL or other Internet service providers . . ." Applicants' March 21 Supplemental Information at 25 (citing Merrill Lynch: Upside at 9, 15).

<sup>755</sup> Applicants' Aug. 22 Benefits Ex Parte at 2-3; *See also* Applicants' Second Response at 18.

<sup>756</sup> Applicants' March 21 Supplemental Information at 30 (citing AOL Time Warner Inc., *SEC Form S-4*, filed Feb. 11, 2000 at 37).

<sup>757</sup> Applicants' Second Response at 13.

<sup>758</sup> Applicants' Aug. 22 Benefits Ex Parte, Britt Decl. at 4.

<sup>759</sup> Letter from Art Harding, Attorney, Fleischman and Walsh, LLP, to Magalie Roman Salas, Secretary, FCC, dated (continued...)

confidential pre-and post-merger facilities deployment plans for Time Warner and information regarding potential operating synergies for both parties.<sup>760</sup> As further evidence, the Applicants note that the financial community believes the merger will accelerate cable broadband Internet access deployment.<sup>761</sup>

290. Second, the Applicants assert that the merger will serve to accelerate deployment of alternative broadband technologies. The Applicants note that AOL, in keeping with its "AOL Anywhere" business strategy, has sought, and will continue to seek, a nationwide footprint for its ISP services, utilizing multiple broadband technologies.<sup>762</sup> AOL asserts that to maximize revenues, it must continue to pursue as many broadband delivery options as possible to reach every potential customer, both within and outside Time Warner's local cable franchise areas.<sup>763</sup> As evidence of its commitment to further the development of a wide range of broadband technologies, AOL points to its \$1.5 billion investment in Hughes parent GM, and its numerous deals with DSL and wireless equipment manufacturers.<sup>764</sup> AOL does not claim that the merger is the only way to accomplish the goals of AOL Anywhere. However, AOL does indicate that after the merger, AOL will continue to pursue its AOL Anywhere strategy and that Time Warner will enable AOL to further these goals. Neither AOL nor Time Warner provide concrete examples of how the merger will serve to assist AOL in its AOL Anywhere strategy other than to say that a merger between Time Warner and AOL will enable AOL to provide its ISP service over cable.<sup>765</sup> AOL claims that this is particularly significant because prior to the proposed merger, AOL had been unable to strike an agreement with any cable operator.<sup>766</sup>

291. AOL also asserts that its commitment to the cable broadband platform in and of itself will spur development of competing platforms.<sup>767</sup> AOL asserts that the Commission itself has recognized this pattern, "understanding that competition among rival technologies is one of the primary focuses that drives deployment of broadband services."<sup>768</sup>

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(...continued from previous page)

July 12, 2000 ("Applicants' July 12 Benefits Ex Parte") at 2; *see also* Applicants' Aug. 22 Benefits Ex Parte, Britt Decl. at 4.

<sup>760</sup> *See* Applicants' First Response (Confidential Version) at 30, 35-36; *see generally* Applicants' Second Response (Confidential Supplemental Volumes: Benefits 1-7).

<sup>761</sup> Applicants' March 21 Supplemental Information at 28 (citing Merrill Lynch: Upside at 9) "the merger will only help to accelerate cable's rollout of high-speed data and new services." *Id.*; *see also* Applicants' Second Response at 13-14.

<sup>762</sup> Applicants' March 21 Supplemental Information at 10, 16-19; Applicants' Reply Comments at 23-26; *see also* Levin En Banc Testimony, Tr. at 26-27.

<sup>763</sup> Applicants' March 21 Supplemental Information at 19.

<sup>764</sup> *Id.* at 11 and 16-18.

<sup>765</sup> *See* Applicants' Second Response at 9 and 13.

<sup>766</sup> *Id.* at 13.

<sup>767</sup> Applicants' Aug. 22 Benefits Ex Parte at 16-17; *see also* Applicants' Second Response at 11. Applicants note that Merrill Lynch also believes the availability of AOL Time Warner's service on broadband cable "should also put pressure on local exchange carriers to become more aggressive in rolling out DSL." *See* Applicants' March 21 Supplemental Information at 26 (citing Merrill Lynch: Upside at 9).

<sup>768</sup> Applicants' March 21 Supplemental Information at 26-27.

292. Finally, the Applicants argue that their commitment to maximizing diversity of content and consumer choice on the Internet will further promote deployment of broadband conduit and vice versa.<sup>769</sup> The Applicants state that it is well understood that consumer interest in innovative and enticing online offerings will inevitably have a direct positive impact on broadband penetration and deployment across platforms.<sup>770</sup> They state that they intend to provide their customers the broadest possible array of appealing content, regardless of the source.<sup>771</sup> Furthermore, the Applicants argue that the merged entity's introduction of widely appealing broadband offerings will motivate providers of other broadband technologies and services to deploy and market their own content and services more widely in order to compete with the merged entity.<sup>772</sup>

293. *Accelerated Transition of Traditional Media Products to Digital Platforms.* The Applicants contend that the merged entity will accelerate the transition of established media offerings to digital platforms.<sup>773</sup> In their filings with the SEC, the Applicants note that one factor motivating the merger is the existence of "cost efficiencies in launching and operating interactive extensions of Time Warner brands."<sup>774</sup> They claim that the merged company will bring together experience, incentives, and resources that can help lead the integration of traditional media with online interactive media.<sup>775</sup> As evidence, the Applicants cite financial analyst reports asserting that the merged entity can quickly respond to and inspire "rapidly morphing user habits as users reexamine their daily activities through 'Internet-enabled glasses."<sup>776</sup>

294. *Accelerated Deployment of New Services:* The Applicants claim that a major benefit of the merger will be the merged entity's ability to develop and promote new interactive services. They maintain that this combination of complementary assets will create "the first company prepared to compete on the Internet," due to the lowered risk to the combined companies in deploying new products and services as well as increased operating efficiencies and complementary expertise.<sup>777</sup> New services to be offered include developing services such as video-on-demand, interactive television, video streaming, online music distribution and purchasing, IP telephony, and numerous yet-to-be developed services.<sup>778</sup>

<sup>769</sup> Application at 10, 13; Applicants' Aug. 14 Benefits Ex Parte at 2; Applicants' Aug. 22 Benefits Ex Parte at 15-19.

<sup>770</sup> *Id.*

<sup>771</sup> Application at 8.

<sup>772</sup> Applicants' March 21 Supplemental Information at 28-29.

<sup>773</sup> Application at 11; Applicants' March 21 Supplemental Information at 30; Applicants' Reply Comments at 1; Applicants' Aug. 22 Benefits Ex Parte at 3 (citing MSDW May 4 Report and Salomon Smith Barney Mar. 22 Report); Levin En Banc Testimony, Tr. at 33-34.

<sup>774</sup> Applicants' March 21 Supplemental Information at 31.

<sup>775</sup> Applicants' Reply Comments at 1. Applicants use the term "traditional media" to refer to print periodicals, books, video, and other popular Time Warner brands. See Applicants' March 21 Supplemental Information at 30.

<sup>776</sup> Applicants' March 21 Supplemental Information at 31 (citing Goldman Sachs: Perfect Time-ing at 1).

<sup>777</sup> See *Id.* at 29 and 31, and Testimony of Gerald M. Levin, Chairman and CEO, Time Warner Inc., Before the Senate Committee on the Judiciary, 106<sup>th</sup> Congress, Feb. 29, 2000 at 4; Applicants' Aug. 14 Benefits Ex Parte at 2; Applicants' Aug. 22 Benefits Ex Parte at 1, 12; see also Applicants' Second Response at 16-17.

<sup>778</sup> Applicants' March 21 Supplemental Information at 35 (citing Paine Webber: Merger for a Digital Age at 8); Applicants' Reply Comments at 44; Applicants' Aug. 22 Benefits Ex Parte at 7-12.

The Applicants state that while detailed business plans have not been finalized, plans are being developed in light of the merged entity's coordinated strengths and potential to offer such services.<sup>779</sup>

295. As evidence, the Applicants cite to financial community reports, stating that the merged company will be "well positioned to pursue and expedite personalized jukeboxes, news clipping services, voice activated web surfing, Internet enabled voice communications, downloadable music, personalized video services, and virtual communities centered around off-line magazines."<sup>780</sup> In addition, the same analyst notes that "the new company will be well-positioned to define and create yet-to-be imagined new businesses which [will] evolve as technologies are introduced and as the Internet continues to develop."<sup>781</sup>

296. As evidence of the merger's ability to hasten the online music revolution, Applicants cite to financial analyst and trade press recognition of the merged entity's ability and expertise.<sup>782</sup> While the Recording Industry Association of America ("RIAA") did not file comments in this proceeding, Applicants cite to a public statement made by RIAA President Hilary Rosen that the merger "brings together a tremendous wealth of music assets and a group of people who have mastered the art of making things simple on the Internet."<sup>783</sup> One financial analyst states, "AOL Time Warner is poised to have a substantial, positive effect on overcoming the technical and financial complexity that has hindered the development of downloadable music."<sup>784</sup>

297. In addition, the Applicants state that the unique combination of AOL and Time Warner assets could permit the merged firm to create a successful, robust ITV product where others have failed. According to the Applicants, "with the merger's promotion of competitive broadband development, the prospects for an enhanced, next-generation AOLTV that could even more seamlessly and robustly integrate Internet and video services become more foreseeable."<sup>785</sup> The Applicants state that a "merged AOL Time Warner will be able to significantly enhance the just-launched AOLTV service and thereby turbo-charge an entire industry" and that "[t]he new company can work to develop all facets of interactive television—including both the platform and new interactive content applications—with a breadth of common purpose unlikely to be matched even in the best joint venture."<sup>786</sup>

298. As evidence, the Applicants quote several industry analysts addressing AOL's expertise in the provisioning of Internet access services, and Time Warner's expertise in developing and distributing content, including a report stating that "one of the strengths of the combined entity will be its ability to develop and promote new interactive services."<sup>787</sup> Another analyst asserts that "[a]s the interrelationship between and the evolution of new media and old media is established in the form of AOLTV, we believe the wisdom of merging AOL and Time Warner will become increasingly evident and

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<sup>779</sup> See Applicants' March 21 Supplemental Information at 30.

<sup>780</sup> *Id.* at 35.

<sup>781</sup> *Id.* at 34 (citing Paine Webber: Merger for a Digital Age at 6).

<sup>782</sup> *Id.* at 32-34.

<sup>783</sup> *Id.* at 32 (citing David Segal, *Deal May Make Online Music Pay*, THE WASHINGTON POST, Jan. 12, 2000, at E1).

<sup>784</sup> *Id.* at 32 (citing Merrill Lynch: Upside at 11 and Paine Webber: Merger for a Digital Age at 9).

<sup>785</sup> Applicants' Aug. 22 Benefits Ex Parte at 7-8.

<sup>786</sup> *Id.*

<sup>787</sup> Applicants' March 21 Supplemental Information at 31-32 (citing Merrill Lynch: Upside at 11).

obvious.”<sup>788</sup> The Applicants further note that at least one analyst agrees that the merged entity “is in a better position than either entity separately to drive the revolution of interactive services to the next level – breaking the convergence logjams that, in many sectors of the media and communications industries, are inhibiting growth of the medium.”<sup>789</sup>

299. *Merger vs. Joint Ventures.* The Applicants contend that joint venture agreements and other contractual arrangements would not produce the same efficiencies as will the merger. The Applicants claim that a joint venture would be much less efficient than full integration and maintain that it is impractical and unprecedented for the parties to try to negotiate a series of joint ventures to cover the far-reaching scope of this merger.<sup>790</sup>

300. *Commenters’ Position on Merger Benefits.* According to the Applicants, commenters do not dispute that the merger will hasten the development of new broadband services,<sup>791</sup> and furthermore, some commenters concede that the merger provides “social benefits.”<sup>792</sup>

301. A review of the record reveals that while several commenters find certain public interest benefits possible, most believe these benefits would result only if the Commission conditions its approval of the license transfers on specific requirements. For example, Memphis Networx does not request a denial of the merger, but believes the Commission should require that the Applicants commit to taking a neutral stance with respect to the entry of facilities-based network providers in Time Warner service areas.<sup>793</sup> Such commitments, they say, would provide concrete support for a Commission finding that the proposed merger is consistent with the public interest.<sup>794</sup> In its initial comments, ACA expressed concern that the merged entity would require small cable operators to carry AOL service in order to receive Time Warner programming.<sup>795</sup> In its reply comments, ACA sought a commitment from the Applicants that they would not engage in such tactics, while at the same time recognizing the potential of the merger to create “boundless opportunities for new consumer services.”<sup>796</sup> After Time Warner representatives stated, at the Commission’s en banc hearing in this proceeding, that the merged entity would not tie or condition access to its programming on carriage of AOL service, ACA released a statement voicing its support for the merger.<sup>797</sup> BellSouth asserts that notwithstanding the anticompetitive potential, the merger could advance the public interest, provided the Commission implements certain safeguards.<sup>798</sup> Finally, Sinclair

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<sup>788</sup> Applicants’ Aug. 22 Benefits Ex Parte at 7-8 (quoting Salomon Smith Barney Mar. 22 Report, at 95).

<sup>789</sup> Applicants’ March 21 Supplemental Information at 32 (citing Merrill Lynch: Upside at 11).

<sup>790</sup> *Id.* at 38; Applicants’ Aug. 22 Benefits Ex Parte at 11 (citing Applicants’ Aug. 22 Benefits Ex Parte, Schuler Decl. at ¶¶ 21-22) and 12; *see also* Applicants’ Second Response at 21.

<sup>791</sup> Applicants’ Reply Comments at 1 and 12.

<sup>792</sup> *Id.* at 12.

<sup>793</sup> Memphis Networx Comments at 3.

<sup>794</sup> *Id.* at 7.

<sup>795</sup> *See generally* ACA Comments.

<sup>796</sup> ACA Reply Comments at 5 and 8.

<sup>797</sup> ACA, *American Cable Association Backs Time Warner/AOL Merger* (press release), July 27, 2000.

<sup>798</sup> BellSouth Reply Comments at 1.

Broadcasting argues that the merger has the potential to promote the development and delivery of new products and services, but not without the appropriate safeguards.<sup>799</sup>

## B. Discussion

302. *Cable Access.* The Applicants' MOU represents a commendable commitment to the principle of multiple access and offers a starting point from which a marketplace solution can proceed.<sup>800</sup> The Applicants have offered evidence that in the wake of their MOU, other cable operators are considering allowing multiple ISPs to provide service over their systems.<sup>801</sup> Nevertheless, as discussed in Section IV.A., *supra*, the MOU is not sufficient to avert the merger's potential deleterious effects. Moreover, we are not convinced that the MOU alone will induce other cable operators to open their networks in a manner that would meaningfully benefit the market for high-speed Internet services. The Applicants admit that there are significant details surrounding the implementation of a multiple ISP approach that are unresolved.<sup>802</sup> Although the FTC's Consent Agreement substantially mitigates these harms, we remain concerned that the merged firm could indirectly disadvantage unaffiliated ISPs, especially, local and regional ISPs, through means that are not squarely addressed by the Consent Agreement. Thus, while the terms of the Consent Agreement would clearly enhance the merger's potential public interest benefits, we cannot conclude that the merger will result in unqualified public interest benefits with respect to the provision of Internet access by multiple ISPs over cable facilities without imposing the conditions set forth in Section IV.A., *supra*.

303. *Accelerated Deployment of Broadband Technologies and Content.* We recognize that AOL currently has many agreements with non-cable broadband service providers. For example, AOL currently has non-exclusive strategic alliances with DSL providers SBC (including SBC-owned Ameritech), and with both components of the newly formed Verizon Communications, Bell Atlantic and GTE.<sup>803</sup> While AOL could, on its own, pursue a strategy of "AOL Anywhere," by independently advancing subscription to all broadband technologies, AOL's acquisition of Time Warner may aid Time Warner in the rollout of its high-speed Internet service offering by enabling Time Warner to more rapidly assemble the inputs it needs to increase the rate of deployment.<sup>804</sup> However, because Time Warner already offers high-speed Internet access in a significant number of its franchise areas, this presents only a modest potential public interest benefit.

<sup>799</sup> Sinclair Reply Comments at 1.

<sup>800</sup> Applicants' March 21 Supplemental Information at 23; *see also* Applicants' Aug. 22 Benefits Ex Parte at 13.

<sup>801</sup> Time Warner Inc., *America Online and Time Warner Announce Framework for Agreements to Offer AOL Service and Other ISPs on Time Warner Broadband Cable Systems* (press release), Feb. 29, 2000; Applicants' Reply Comments at 11 (citing *Leading Cable MSOs Quietly Shift Toward Open Access*, COMM. DAILY, Apr. 6, 2000 "(at least 7 of (the) 11 largest cable operators are looking at offering access to multiple ISPs on their high-speed broadband lines)").

<sup>802</sup> Application at 15.

<sup>803</sup> Applicants' March 21 Supplemental Information at 17-18.

<sup>804</sup> Applicants' July 12 Benefits Ex Parte at 2. Deployment of high-speed Internet services by cable operators is more complex than the deployment of video services. High-speed Internet service deployment requires the expenditure of additional capital for equipment such as high-speed routers, file servers, and cable modem termination systems. Additional personnel are needed for installation and customer care. New procedures must be established for billing, provisioning, customer maintenance, and marketing. A merger between AOL and Time Warner gives Time Warner access to AOL's capital, trained personnel, and Internet expertise in the areas of technical implementation, sales, marketing and customer care. *Id.*

304. To the extent that AOL's investment in cable broadband stimulates outside investment in alternative technologies, we acknowledge the potential for the merger to provide consumers the added benefit of expedited broadband rollout generally. Financial analysts agree that investment in one broadband technology tends to stimulate investment in competing technologies.<sup>805</sup> The Cable Services Bureau has also recognized this fact. At the request of the Commission Chairman, the Cable Services Bureau convened a series of meetings in 1999 to study the state of the broadband industry and identify any potential market failures. In its Report to the Chairman, the Bureau found that there was little disagreement among the panelists that cable investment inherently spurs investment in DSL and vice versa.<sup>806</sup> However, it is impossible for us to predict the magnitude of the potential impact.

305. Finally, to the extent that the merger advances alternative broadband technologies and thus broadband deployment generally, we would expect such a result to stimulate the development of broadband content. However, we cannot conclude that the merger will advance the quantity and quality of broadband content because, as we indicate in section IV.A. above, the merger itself threatens to reduce competition among high-speed ISPs.<sup>807</sup>

306. *Accelerated Transformation of Traditional Media Products to Digital Platforms.* We find that the merged entity will have the resources to implement its proposed plan for accelerating the transformation of traditional media products to digital platforms. AOL has proven successful at making online content appealing to consumers, especially those who are not computer experts. Time Warner, on the other hand, has been relatively unsuccessful at migrating its traditional media products to digital platforms. For example, Pathfinder was Time Warner's attempt to aggregate its name brand content into one, convenient Web portal. However, Time Warner later abandoned Pathfinder in hopes of finding a better strategy to market its traditional media products.<sup>808</sup> Similarly, Time Warner attempted in 1994 to launch an interactive television service called "Full Service Network" in Orlando, Florida. Because Full Service Network was too costly to maintain, Time Warner abandoned the project.<sup>809</sup> Given the histories of each of these companies independently, we find that the addition of AOL's expertise in making content commercially acceptable to consumers over the Internet could very well advance the migration of Time Warner's name brand content to digital interactive platforms.

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<sup>805</sup> Applicants' March 21 Supplemental Information at 28 (citing Merrill Lynch: Upside at 28).

<sup>806</sup> *Broadband Today*, at 33. See also Deborah A. Lathen, Chief, Cable Services Bureau, Federal Communications Commission, Remarks Before the National Governor's Association, Feb. 27, 2000 ("This deployment of cable modems has spurred the deployment of DSL, and this competition has resulted in lower prices and greater choices for consumers.").

<sup>807</sup> See also Section IV.F. *supra* (Coordination with AT&T), where we discuss the merged firm's incentive and ability to obtain preferential ISP access rights on AT&T's cable systems.

<sup>808</sup> See Communications Media Center at New York Law School, *Time Warner Will Shut Down Pathfinder Web-Site* (Bulletin), Apr. 26, 1999 at <http://www.cmcnyls.edu/bulletins/twsdpfws.html-ssi> (visited on Oct. 24, 2000); See also ZDNET UK, *Time Warner to Close Pathfinder*, ZDNN US, Apr. 27, 1999, at <http://www.zdnet.co.uk/news/1999/16/ns-7919.html> (visited Oct. 24, 2000); See also Jack Egan, *Pathfinder, Rest in Peace: Time Warner Pulls the Plug on the Site*, US NEWS ONLINE, May 10, 1999, at <http://www.usnews.com/usnews/issue/990510/10path.htm> (visited Oct. 24, 2000).

<sup>809</sup> Dan Trigoboff, *Full Service Network out of Service*, *Broadcasting & Cable*, May 5, 1997, at <http://www.ee.surrey.ac.uk/Contrib/Edupage/1997/05/15-05-1997.html> (visited Oct. 24, 2000). Industry observers also note that FSN's failure may have been due to a lack of content and consumer interest. "The technology was not there yet. And without the technology the content was not there. And it's clear that people don't want a lot of what's being offered." *Id.*

307. *Accelerated Deployment of New Services.* While we have no reason to doubt that the Applicants have every economic incentive to provide consumers with a wide array of new services, we also have no way of determining the level to which consumers will benefit in this regard because consumers have not yet had the opportunity to express demand for as-yet-unavailable products. In particular, we recognize the potential for the merged firm to expedite Time Warner's deployment of IP telephony and to allow Internet video streaming. With respect to IP telephony, we believe that Time Warner's technologically advanced cable systems and AOL's expertise in Internet-based applications, as well as AOL's investment in IP telephony provider Net2Phone, together provide promise for this developing technology.<sup>810</sup> With respect to Internet video streaming, we recognize that the Applicants have pledged to allow unaffiliated ISPs to "provide video streaming" to consumers over Time Warner cable systems.<sup>811</sup> Our assessment of these benefits is tempered, however, by the prospect that AOL's network effects advantage in the IM market will position the merged firm to foreclose competition, and thereby diminish innovation and consumer choice, with respect to real-time, interactive broadband services that rely on NPDs.<sup>812</sup> Thus, while we believe the merger would stimulate the development of such services and thereby produce some public interest benefit, we cannot conclude that it would stimulate competition or innovation with respect to such services.

308. We also recognize the potential for the merger to advance the deployment of new services such as online music distribution, ITV, and video-on-demand. For example, as we noted earlier, AOL and Time Warner bring together significant assets that the merged firm could use to launch a successful interactive television product.<sup>813</sup> The Applicants' unique combination of assets presents the possibility that the merged firm will successfully deploy a more comprehensive and highly-advanced ITV product to consumers than was offered in the past. The cable broadband platform in particular may offer ITV providers and consumers advantages over its DSL and satellite distribution networks.<sup>814</sup> AOLTV delivered over Time Warner's cable broadband pipeline could serve to ensure the success of a new generation of ITV services. Against a backdrop of limited ITV success, the deployment of this new product, if successful, could further the statutory goal of promoting the deployment of advanced services.<sup>815</sup> Moreover, provided the merged firm does not limit its distribution of unaffiliated interactive content for the purpose of favoring its own content, AOLTV could also benefit the public by giving viewers access to a greater diversity of information services.<sup>816</sup> While the parties could most certainly

<sup>810</sup> See Confidential Appendix V, Note 1.

<sup>811</sup> MOU at ¶ 6.

<sup>812</sup> As discussed in more detail in Section IV.B., *supra* (Instant Messaging and Advanced IM-Based High-Speed Services), we believe this represents a potential public interest harm that is likely to arise from the merger.

<sup>813</sup> See Section IV.A.D, *supra* (Interactive Television Services)

<sup>814</sup> This issue will be explored in our *ITV NOI*. See *ITV NOI*, FCC 01-15.

<sup>815</sup> See *AT&T-MediaOne Order*, 15 FCC Rcd at 9821 ¶ 11; *WorldCom-MCI Order*, 13 FCC Rcd at 18030-31 ¶ 9; see also 47 U.S.C. §§ 254; Telecommunications Act of 1996 ("1996 Act"), Pub.L. 104-104, Title VII, § 706, Feb. 8, 1996, 110 Stat. 153, reproduced in the notes under 47 U.S.C. § 157; 1996 Act Preamble.

<sup>816</sup> See 47 U.S.C. § 521(4) (purpose of Title VI, "Cable Communications," of the Act is to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"); 47 U.S.C. §§ 532(a), (g) ("diversity of information sources"); see also *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)); *Review of the Commission's Regulations Governing Television Broadcasting, Television Satellite Stations Review of Policy and Rules*, MM Docket No. 91-221, MM Docket No. 87-8, Report and Order, 14 FCC Rcd 12903, 12910-12916 (1999); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather

(continued...)

develop ITV and other new products on their own, the combination of differing areas of expertise and the diminished risks associated with a more broad-based merged entity will potentially allow these products to be more fully developed, and may allow ITV to reach the market sooner than would otherwise occur.

309. *Merger vs. Joint Ventures.* Having found that the combination of AOL's and Time Warner's assets will offer some public interest benefits, we next consider whether those benefits could be achieved through a series of joint ventures or other contractual arrangements. The Applicants enumerate, and we recognize, the difficulties involved in establishing a series of joint ventures to accomplish a diverse set of goals. Because the intent underlying the merger is not to develop or deploy a single product or service, we agree that it would be difficult for the parties to successfully negotiate a series of contracts or joint venture arrangements that would account for the series of multimedia ventures contemplated by the transaction. We agree with the Applicants that negotiating individual joint venture agreements for each separate endeavor would involve delays and inefficiencies inherent in establishing the formal relationship necessitated by agreements among independent, publicly traded companies. As we noted in *AT&T-MediaOne*: "the services to be covered by [a series of] joint venture[s], in light of dynamic and rapidly evolving technology and market developments, would make 'arms-length negotiations arduous.'"<sup>817</sup> We also note here that AOL's merger with Time Warner 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 new services.<sup>818</sup>

310. We agree with the Applicants that "because there is no way to predict precisely what technologies and services will develop and be demanded by consumers in the future, it would be difficult, if not impossible to forecast the appropriate parameters of a limited contractual relationship."<sup>819</sup> Furthermore, we agree that AOL and Time Warner offer complementary strengths. For example, we note that Time Warner's Pathfinder portal, which aggregated the company's numerous popular content brands, failed to achieve widespread commercial success. Time Warner's attempt to establish interactive television services was similarly unsuccessful. Conversely, we observe that AOL has unique expertise in content distribution, as evidenced by its successful distribution of its AOL ISP.

311. Finally, we agree with the Applicants that a merged entity with the resources of AOL and Time Warner would be able to take on substantial additional risk in the development and rollout of new services. AOL states that "a merger offer[s] the only way for AOL and Time Warner to fully integrate their operations and allow the merged entity to set aside considerations concerning individual lines of business to concentrate on the good of the whole."<sup>820</sup>

312. *Conclusion.* We recognize that were they not to merge, AOL and Time Warner acting independently or in contractual arrangements with each other or other service providers could likely

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(...continued from previous page)

than to countenance monopolization of that market, whether it be by the Government itself or a private licensee."); *Turner Broadcasting*, 512 U.S. at 657 (emphasizing that "[t]he potential for abuse of this private power over a central avenue of communication cannot be overlooked. The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical pathway of communication, the free flow of information and ideas.").

<sup>817</sup> *AT&T-MediaOne Order*, 15 FCC Rcd at 9891 ¶175.

<sup>818</sup> *Id.* at 15 FCC Rcd at 9891 ¶175.

<sup>819</sup> Applicants' March 21 Supplemental Information at 38.

<sup>820</sup> *Id.* at 38 (citing Goldman Sachs: Perfect Time-ing at 2).

achieve some of the same public benefits promised by the merger. We are not persuaded that the proposed merger is the only means to assure advancement of these benefits. Nevertheless, we recognize that this merger has the potential to further several of the Commission's goals and therefore produce some public interest benefits. Among them are the deployment of a wide range of broadband technologies to all consumers. As described above, we believe this merger allows for the direct stimulation of the cable broadband market and the probable indirect stimulation of investment in alternative broadband technologies. While it is impossible for us to predict the magnitude of the potential benefit the merger may bring to the deployment of alternative broadband platforms, we acknowledge that the merged entity will to some extent allow Time Warner to more rapidly complete its rollout of high-speed services, and in turn encourage competitors to do the same. We also recognize that the Applicants' MOU and the FTC Consent Agreement have given the industry a starting point by which to discuss the meaningful advancement of multiple ISP access. Additionally, we believe that the merger will accelerate the transformation of traditional media products to digital platforms, aiding the development of advanced services.

313. These potential public interest benefits, however, do not outweigh the serious potential public interest harms we have identified above. For example, while the merger may well stimulate the development and deployment of new services, if the merger in fact diminishes competition and consumer choice with respect to advanced "IM-based" services and residential high-speed Internet access service, as we predict, then the merger's potential stimulation of the development of new services will not guarantee that consumers will benefit from innovation, price competition, or diversity of choices with respect to these services. Finally, these potential harms threaten to diminish consumers' access to the widest possible array of information and information sources.

314. Accordingly, we find it necessary to impose remedial conditions to mitigate the merger's potential harms and in order to ensure that consumers enjoy the benefits the merger promises to offer. The conditions we are imposing to mitigate the merger's potential harms enable us to conclude that, on balance, the potential public interest benefits offered by the merger will outweigh the merger's potential public interest harms.

## VI. CONCLUSION

315. Given the conditions we are imposing to mitigate the merger's potential harms, together with the conditions imposed by the FTC in its Consent Agreement and Order To Hold Separate, we conclude that, on balance, the potential public benefits offered by the merger outweigh any harms that would not be remedied by these conditions. Accordingly, we find that approval of the license transfer applications subject to the conditions discussed herein will serve the public interest, convenience, and necessity.

## VII. ORDERING CLAUSES

316. Accordingly, having reviewed the Application and the record in this matter, IT IS ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Application filed by America Online, Inc. and Time Warner Inc., Inc. IS GRANTED subject to the conditions stated below.<sup>821</sup>

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<sup>821</sup> A list of the licenses and authorizations that have been approved for transfer pursuant to the terms of this Order is set forth in Appendix C hereto.

317. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the above grant shall include authority for AOL Time Warner Inc. to acquire control of:

- a) any authorization issued to Time Warner, its subsidiaries, or its affiliates during the Commission's consideration of the Application and the period required for consummation of the merger transaction following approval;
- b) construction permits held by licensees involved in this transfer that matured into licenses during the Commission's consideration of the Application or that mature into licenses after closing of the merger transaction and that may have been omitted from the transfer of control Application; and
- c) applications filed by such licensees and that are pending at the time of consummation of the proposed transfer of control.

318. IT IS FURTHER ORDERED that AOL Time Warner shall not restrict the ability of any current or prospective ISP customers to select and initiate service from any unaffiliated ISP which, pursuant to a contract with AOL Time Warner, has made its service available over AOL Time Warner's cable facilities ("Participating ISP").

319. IT IS FURTHER ORDERED that AOL Time Warner shall allow customers to select a Participating ISP by a method that does not discriminate in favor of AOL Time Warner's affiliates on the basis of affiliation. At a minimum, AOL Time Warner shall allow customers to obtain a list of Participating ISPs by calling their local AOL Time Warner cable system and requesting such a list. Whenever a customer requests a listing of Participating ISPs, AOL Time Warner<sup>822</sup> shall provide the list in a reasonable and timely manner. Such list shall not discriminate in favor of AOL Time Warner's affiliates on the basis of affiliation. AOL Time Warner shall not prohibit ISPs from marketing their services to AOL Time Warner cable customers.<sup>823</sup>

320. IT IS FURTHER ORDERED that AOL Time Warner shall permit each Participating ISP to determine the contents of its subscribers' first screen<sup>824</sup> and shall not require a Participating ISP to include any content as a condition of obtaining access to AOL Time Warner cable systems; provided that AOL Time Warner and any Participating ISP may agree that the ISP will include specified content or links on its first screen. AOL Time Warner shall not require any high-speed Internet access cable customer to go through an affiliated ISP to reach any Participating ISP from which the customer purchases service.

321. IT IS FURTHER ORDERED that AOL Time Warner shall permit each ISP to have a direct billing arrangement with those high-speed Internet access subscribers to whom the ISP sells service. AOL Time Warner may offer a billing service to any Participating ISP, but shall not require any ISP to purchase this service as a condition of obtaining access.

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<sup>822</sup> The term AOL Time Warner as used in this sentence refers to the division of AOL Time Warner that operates its cable systems.

<sup>823</sup> This provision is not intended to restrict AOL Time Warner's ability to market its own products to prospective or current ISP customers.

<sup>824</sup> The term "first screen" shall have the meaning ascribed to it in Section IV.A, *supra*.

322. IT IS FURTHER ORDERED that all contracts between AOL Time Warner and unaffiliated ISPs for access to Time Warner's cable systems shall contain a clause warranting that, to the extent AOL Time Warner provides any Quality of Service mechanisms, caching services, technical support customer services, multicasting capabilities, address management and other technical functions of the cable system that affect customers' experience with their ISP, AOL Time Warner shall provide them in a manner that does not discriminate in favor of AOL Time Warner's affiliated ISPs on the basis of affiliation.

323. IT IS FURTHER ORDERED that AOL Time Warner shall not enter into any contract with any ISP for connection with AOL Time Warner's cable systems that prevents that ISP from disclosing the terms of the contract to the Commission under the Commission's confidentiality procedures.

324. IT IS FURTHER ORDERED that complaints or petitions regarding conditions regarding high-speed Internet services shall be filed and adjudicated pursuant to the provisions of Section IV.A of this *Order*.

325. IT IS FURTHER ORDERED that AOL Time Warner<sup>825</sup> shall not offer an AIHS application that includes the transmission and reception, utilizing an NPD over the Internet Protocol path of AOL Time Warner broadband facilities, of one- or two-way streaming video communication using IM protocols – including live images, tape or animation – that are new features, functions, and enhancements beyond those offered in AIM 4.3 or ICQ 2000b,<sup>826</sup> until AOL Time Warner satisfies one of three options (the "IM condition").<sup>827</sup> The three options are: (1) AOL Time Warner may show that it has implemented a standard for server-to-server interoperability of NPD-based services that has been promulgated by the IETF or a widely recognized standard-setting body; (2) AOL may show that it has entered into a written contract providing for server-to-server interoperability with a significant, unaffiliated, actual or potential competing provider of NPD-based services offered to the public; after AOL Time Warner has entered this contract, an officer of AOL Time Warner shall certify to the Commission that it is prepared to promptly enter into negotiations, in good faith, with any other requesting provider of NPD-based services; within 180 days after entering this first contract, AOL Time Warner must enter two additional contracts with significant, unaffiliated, actual or potential competing providers of NPD-based services offered to the public; (3) AOL Time Warner may seek relief from this condition by showing that the imposition of the condition no longer serves the public interest, convenience or necessity because there has been a material change in circumstance.

326. IT IS FURTHER ORDERED that if AOL Time Warner seeks relief from the IM condition pursuant to one of the three options listed in the preceding paragraph, it shall submit a petition to the Commission seeking findings and conclusions that one of the three options has been met.<sup>828</sup> The findings of the Commission shall be made upon clear and convincing evidence, and in the absence of such

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<sup>825</sup> In "AOL Time Warner," we include the separate pre-merger companies and the post-merger company.

<sup>826</sup> We explicitly exclude upgrades to AOL's current IM products that are not otherwise included in AIHS.

<sup>827</sup> The condition and the three options are set forth more fully in Section IV.B., *supra*. (Instant Messaging and Advanced IM-Based High-Speed Services)

<sup>828</sup> The procedures for submission of petitions are set forth more fully in Section IV.B, *supra*. (Instant Messaging and Advanced IM-Based High-Speed Services)

an evidentiary showing, the condition shall not be eliminated. If the Commission finds that one of the three options has been met, then AOL Time Warner may offer video AIHS services.

327. IT IS FURTHER ORDERED that AOL Time Warner shall file a progress report with the Commission, 180 days after the release of this *Order* and every 180 days thereafter, describing in technical depth, the actions it has taken to achieve interoperability of its IM offerings and others' offerings. Such reports will be placed on public notice for comment.

328. IT IS FURTHER ORDERED that complaints or petitions regarding the IM condition shall be filed and adjudicated pursuant to the provisions of Section IV.B of this *Order*.

329. IT IS FURTHER ORDERED that five (5) years after the date of release of this *Order*, the condition set forth in the preceding paragraphs 325 through 328 shall expire and shall not restrain AOL Time Warner from offering video AIHS.

330. IT IS FURTHER ORDERED that the Applicants shall notify the Chiefs of the Commission's Cable Services Bureau and International Bureau, in writing, of any transactions that increase the Applicants' ownership interest in General Motors Corporation and/or Hughes Electronics Corporation, no later than 30 days after the transaction.

331. IT IS FURTHER ORDERED that AOL Time Warner shall be prohibited from entering into any agreement with AT&T Corp., tacit or otherwise, that gives any AOL Time Warner ISP exclusive access to any AT&T cable system for the purpose of offering high-speed Internet access service.

332. IT IS FURTHER ORDERED that AOL Time Warner shall be prohibited from entering into any agreement with AT&T, tacit or otherwise, that affects AT&T's ability to offer any rates, terms or conditions of access to ISPs that are not affiliated with AOL Time Warner.

333. IT IS FURTHER ORDERED that AOL Time Warner, by its General Counsel, shall certify to the Commission upon the merger's closing and annually thereafter that it is in compliance with the foregoing provisions in paragraphs 331 and 332 above.

334. IT IS FURTHER ORDERED that compliance with all conditions imposed herein is a non-severable condition of the grant of the Application.

335. IT IS FURTHER ORDERED that all references to AOL, Time Warner, and AOL Time Warner in this *Order* shall also refer to their respective officers, directors, and employees, as well as to any affiliated companies, and their officers, directors, and employees, except as otherwise noted.

336. IT IS FURTHER ORDERED, pursuant to Sections 4(i) and (j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Petition to Deny filed by the Consumers Union, Consumer Federation of America, Media Access Project and Center for Media Education, the Petition to Deny of Thomas Lewis Bonge, the Petitions to Condition filed by RCN Telecom Services and Gemstar, and all similar petitions ARE DENIED.

337. IT IS FURTHER ORDERED that the motion to consolidate filed by the Consumers Union, Consumer Federation of America, and Center for Media Education, IS DENIED.

338. IT IS FURTHER ORDERED that this Memorandum Opinion and Order SHALL BE EFFECTIVE on January 11, 2001,<sup>829</sup> in accordance with Section 1.103 of the Commission's rules, 47 C.F.R. § 1.103.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas  
Secretary

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<sup>829</sup> On January 11, 2001, the Commission released a public notice announcing the Commission's adoption of this Order. Public Notice, "Subject to Conditions, Commission Approves Merger Between America Online, Inc. and Time Warner Inc.," CS Docket No. 00-30, FCC 01-11 (rel. Jan. 11, 2001).

**APPENDIX A****List of Timely Filed Comments**

\* Denotes that the commenter filed a Petition To Deny

**INITIAL COMMENTS**

American Cable Association ("ACA")

\* Consumers Union, Consumer Federation of America, Media Access Project, and Center for Media Education ("Consumers Union")

Gemstar International Group, Ltd. and Gemstar Development Corp. ("Gemstar")

City of Houston City Council Members: Bert Keller, John E. Castillo, Annise D. Parker, Carroll G. Robinson, Rob Todd ("Houston City Council Members")

iCAST Corporation ("iCast")

Memphis Light, Gas & Water Division ("MLG&W")

Memphis Network, LLC ("Memphis Network")

SBC Communications ("SBC")

RCN Telecom ("RCN")

Tribal Voice ("Tribal Voice")

**REPLY COMMENTS**

America Online, Inc. and Time Warner Inc. ("Applicants")

American Cable Association ("ACA")

Association for Maximum Service Television, Inc. ("MSTV")

BellSouth Corporation ("BellSouth")

Freedom Broadcasting, Inc. ("Freedom")

iCAST Corporation and Tribal Voice ("iCast and Tribal Voice")

Emy Tseng, Kamal Latham, Chen Hao, and Armand Ciccarelli ("MIT/Harvard Students")

RCN Telecom ("RCN")

Sinclair Broadcast Group, Inc. ("Sinclair")

State of Connecticut, Office of the Attorney General ("Connecticut Attorney General")

Town of Cary, North Carolina ("Town of Cary")

The Walt Disney Company ("Disney")

**APPENDIX B**

**CONFIDENTIAL APPENDIX**

**CONFIDENTIAL AND UNDER SEAL**

**SUBJECT TO PROTECTIVE ORDER**

**IN CS DOCKET NO. 00-30**

## APPENDIX C

## 339. List of Authorizations and Licenses

The approval for transfer of control of Time Warner's and AOL's authorizations and licenses to AOL Time Warner includes the Commission authorizations and licenses listed below. Additional applications may have been filed during the pendency of the applications for transfer of control that may be the subject of future public notices. Further, AOL and Time Warner have acquired or disposed of licenses during the pendency of this proceeding. Applications for transfer of these licenses will also be addressed in future public notices. The call signs of the stations involved are included below for reference only.

**Domestic Fixed Satellite Service (Part 25)**

Cable News Network LP, LLLP

SES-T/C-20000211-00219

E2001

E890835

E861053

E880870

E890577

E890834

E890836

E900975

E930204

E940420

E940421

E940422

E950363

E970490

E990281

E990282

Turner Teleport, Inc.

SES-T/C-20000211-00225

KA58

Time Warner Entertainment-Advance/Newhouse Partnership

SES-T/C-20000211-00226

E990035

E990041

Turner Broadcasting System, Inc.

SES-T/C-20000211-00228

E920013

E980173

E980181

Time Warner Entertainment Company, L.P.

SES-T/C-20000211-00229

E4063

E910207  
E930421  
E930422

**International Section 214 (Part 63)**

ITC-T/C-2000211-00069  
ITC-T/C-20000211-00230

Time Warner Telecom Inc.  
Time Warner Connect of San Antonio, Inc.

**Television Broadcast Station (Part 73)**

BTCCT-200211AAD            WTBS(TV)  
   CH. 17  
   FAC ID 64033

SuperStation, Inc.  
Atlanta, GA

**Low Power Television (Part 74)**

BTCTTL-20000211AAE        W34AX  
   FAC ID 64636

Time Warner Entertainment-  
Advance/Newhouse Partnership  
Henderson, NC

**Cable Television Relay Services (Part 78)**

**Cablevision Industries, Inc.**

CAR-50596-09	WHZ-685	Fishkill, NY
CAR-50597-09	WHZ-239	Lloyd, NY
CAR-50598-09	WHZ-502	West Point, NY
CAR-50599-09	WAD-241	Wurtsboro, NY

**Century Venture Corporation**

CAR-50600-09	WHZ-810	Brunswick, GA
CAR-50601-09	WLY-436	Jekyll Island, GA
CAR-50602-09	WHZ-971	Owensboro, KY
CAR-50603-09	WAW-505	Brookfield, WI
CAR-50604-09	WGZ-277	Wauwatosa, WI

**CNN America, Inc.**

CAR-50605-09	WHZ-931	Oakland, CA
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**Florida Cablevision Management Corp.**

CAR-50606-09	WLY-604	Golden Gate, FL
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**Kansas City Cable Partners**

CAR-50607-09	WLY-353	Ft. Leavenworth, KS
CAR-50608-09	WHZ-921	Leavenworth, KS
CAR-50609-09	WGW-207	Independence, MO
CAR-50610-09	WAE-602	Kansas City, MO
CAR-50611-09	WGW-219	Kansas City, MO
CAR-50612-09	WGW-220	Kansas City, MO

<b>KBL Cablesystems of Minneapolis, Inc.</b>		
CAR-50613-09	WHZ-238	Eden Prairie, MN
<b>KBL Cablesystems of the Southwest, Inc.</b>		
CAR-50614-09	WHZ-244	Minneapolis, MN
<b>Massachusetts Cablevision Systems Limited Partnership</b>		
CAR-50615-09	WAL-427	Bellevue, OH
CAR-50616-09	WAY-894	Galion, OH
CAR-50617-09	WBB-813	Upper Sandusky, OH
<b>Paragon Communications</b>		
CAR-50618-09	WHZ-373	Carson, CA
CAR-50619-09	WGZ-435	Mars Hill, ME
CAR-50620-09	WGV-525	Fishkill, NY
CAR-50621-09	KN-5098	Manhattan, NY
CAR-50622-09	WHW-60	Manhattan, NY
CAR-50623-09	WAF-665	New Windsor, NY
<b>Staten Island Cable, LLC</b>		
CAR-50624-09	WHZ-455	Elizabeth, NJ
<b>Texas Cable Partners, L.P.</b>		
CAR-50625-09	WHZ-504	Alton, TX
CAR-50626-09	KYZ-22	Bandera, TX
CAR-50627-09	WMC-696	Beaumont, TX
CAR-50628-09	WHZ-677	Commerce, TX
CAR-50629-09	WGI-758	Eagle Pass, TX
CAR-50630-09	WHZ-780	El Paso, TX
CAR-50631-09	WJI-36	El Paso, TX
CAR-50632-09	WLY-483	Ft. Bliss, TX
CAR-50633-09	WGI-756	Farias Ranch, TX
CAR-50634-09	KOD-36	Harlingen, TX
CAR-50635-09	KA-80625	Houston, TX
CAR-50636-09	KYX-62	Loma Vista, TX
CAR-50637-09	WGI-757	Moore, TX
CAR-50638-09	WHZ-869	One North, TX
CAR-50639-09	KYX-61	Pearsall, TX
CAR-50640-09	KOD-31	Pharr, TX
CAR-50641-09	WAF-861	Port Isabel, TX
CAR-50642-09	WBH-846	Port Neches, TX
CAR-50643-09	KOD-35	Weslaco, TX
CAR-50644-09	WGI-755	Winter Haven, TX
<b>Time Warner Cable of Southeastern Wisconsin, L.P.</b>		
CAR-50645-09	WLY-245	Brown Deer, WI
CAR-50646-09	WHZ-447	Milwaukee, WI
CAR-50647-09	WGZ-421	S. Milwaukee, WI

## Time Warner Entertainment Company L.P.

CAR-50648-09	WBM-740	EMS-Lanai, HI
CAR-50649-09	WAE-470	Glenwood, HI
CAR-50650-09	WAX-743	Glenwood, HI
CAR-50651-09	WAB-577	Haleakala Mtn., HI
CAR-50652-09	WHZ-819	Hana, HI
CAR-50653-09	WLY-683	Hawaii Kai, HI
CAR-50654-09	WLY-240	Hawaii Kai, HI
CAR-50655-09	WAE-478	Hilo, HI
CAR-50656-09	WBM-744	Hilo, HI
CAR-50657-09	KA-80614	Honolulu, HI
CAR-50658-09	WGV-848	Kahului, HI
CAR-50659-09	WHZ-876	Kahului, HI
CAR-50660-09	WAV-644	Kaupulehu, HI
CAR-50661-09	WAN-954	Kaupulehu Lava Flow, HI
CAR-50662-09	WLY-248	Kihei, HI
CAR-50663-09	WLY-713	Lahaina, HI
CAR-50664-09	WLY-684	Lanai City, HI
CAR-50665-09	WAN-953	Mahukona, HI
CAR-50666-09	WBD-613	Mauna Kapu Peak, HI
CAR-50667-09	KA-80615	Mauna Kapu Peak, HI
CAR-50668-09	WAB-578	Maunaka Mtn., HI
CAR-50669-09	WLY-402	Meyers Ranch, HI
CAR-50670-09	WLY-415	Mililani, HI
CAR-50671-09	WLY-409	Olinda, HI
CAR-50672-09	WLY-678	Puu Koli, HI
CAR-50673-09	WLY-685	Puu Nana, HI
CAR-50674-09	WBM-738	Puu Nana, HI
CAR-50675-09	WBM-742	Puu Niania, HI
CAR-50676-09	WHZ-617	Waimalu, HI
CAR-50677-09	WBD-612	Waipahu, HI
CAR-50678-09	WHZ-728	Brazil, IN
CAR-50679-09	WRC-25	Chanute, KS
CAR-50680-09	WRC-23	Garnett, KS
CAR-50681-09	WLY-703	Independence, KS
CAR-50682-09	WRC-24	Iola, KS
CAR-50683-09	KZW-67	Neodesha, KS
CAR-50684-09	WBL-521	Thrall, KS
CAR-50685-09	WBK-510	Saco, ME
CAR-50686-09	WAS-288	Sanford, ME
CAR-50687-09	WLY-479	Columbus, NE
CAR-50688-09	WAB-572	Wynantskill, NY
CAR-50689-09	WHZ-633	Bazetta, OH
CAR-50690-09	WAY-890	Columbus, OH
CAR-50691-09	WHZ-408	Lima, OH
CAR-50692-09	WHZ-587	Marysville, OH
CAR-50693-09	WAY-903	New Albany, OH
CAR-50694-09	WHZ-437	Ottawa, OH
CAR-50695-09	WHZ-406	Richwood, OH
CAR-50696-09	WHZ-545	Troy, OH

CAR-50697-09	WLY-471	Youngstown, OH
CAR-50698-09	WGK-594	Burlington, WI

## Time Warner Entertainment-Advance/Newhouse Partnership

CAR-50699-09	WHZ-982	Clearwater, FL
CAR-50700-09	KA-80616	Clearwater, FL
CAR-50701-09	WLY-462	Deland, FL
CAR-50702-09	WHZ-784	Lakeland, FL
CAR-50703-09	WHZ-785	Lakeland, FL
CAR-50704-09	KD-55011	Orlando, FL
CAR-50705-09	WHZ-396	Palm Harbor, FL
CAR-50706-09	WGZ-487	Pinellas Park, FL
CAR-50707-09	WHZ-652	St. Petersburg, FL
CAR-50708-09	KD-55009	Tampa, FL
CAR-50709-09	WLY-330	Barada, NE
CAR-50710-09	WLY-331	Octavia, NE
CAR-50711-09	WHZ-882	Camden, NY
CAR-50712-09	WLY-554	Crown Point, NY
CAR-50713-09	WGK-590	Glens Falls, NY
CAR-50714-09	WAN-337	Lake George, NY
CAR-50715-09	KB-60127	Rochester, NY
CAR-50716-09	KD-55003	Rochester, NY
CAR-50717-09	WAF-786	Sidney, NY
CAR-50718-09	WLY-235	Atlantic, NC
CAR-50719-09	WLY-509	Beaufort, NC
CAR-50720-09	WBF-574	Burgaw, NC
CAR-50721-09	WGJ-890	Butner, NC
CAR-50722-09	WAJ-761	Fayetteville, NC
CAR-50723-09	WLY-333	Fayetteville, NC
CAR-50724-09	WLY-246	Garner, NC
CAR-50725-09	WHZ-394	Havelock, NC
CAR-50726-09	WHZ-430	Lizard Lick, NC
CAR-50727-09	WHZ-395	Morehead City, NC
CAR-50728-09	WLY-646	Pembroke, NC
CAR-50729-09	WLY-429	Raleigh, NC
CAR-50730-09	WAX-279	Red Springs, NC
CAR-50731-09	WAE-564	Supply, NC
CAR-50732-09	WHZ-774	Wilmington, NC
CAR-50733-09	WDH-701	Florence, SC
CAR-50734-09	WGV-822	Sumter, SC
CAR-50735-09	KA-80624	Austin, TX
CAR-50736-09	KD-55017	Austin, TX
CAR-50737-09	WBY-600	Austin, TX
CAR-50738-09	WAH-212	Bluegrove, TX
CAR-50739-09	WAH-213	Crafton, TX
CAR-50740-09	WLY-367	Elroy, TX
CAR-50741-09	WSV-58	Flat, TX
CAR-50742-09	WHZ-585	Grenada Hills, TX
CAR-50743-09	WHZ-339	Lukenbach, TX
CAR-50744-09	WSV-56	McGregor, TX

CAR-50745-09	WAH-228	Vashti, TX
CAR-50746-09	WCJ-907	West Lake Hills, TX
TWI Cable Inc.		
CAR-50747-09	WGV-526	New Riegel, OH
TWI Summit Cable, Inc.		
CAR-50748-09	WHZ-548	Banning, CA
CAR-50749-09	WLY-451	Beaumont, CA
CAR-50750-09	WLY-306	Cathedral City, CA
CAR-50751-09	KD-55002	Palm Desert, CA
CAR-50752-09	WLY-449	Whitewater, CA
CAR-50753-09	WHZ-547	Whitewater, CA
CAR-50754-09	WGZ-470	Palm Desert, CA

CARS Transfers to be effected in the future (pending application and public notice)

Time Warner Entertainment Company, LP		
WLY-720		Mauna Lani, HI
WLY-726		Wailuku, HI
WAB-572		Wynantskill, NY
Texas Cable Partners, LP		
WGZ-450		Escobas, TX
WGZ-451		Horseshoe Ranch, TX
WGZ-452		Benavides, TX
WGZ-264		Realitos, TX
WJT-43		Corpus Christi, TX

The Wireless Telecommunications Bureau is processing 41 applications to transfer control of approximately 400 licenses:

**Private Land Mobile Radio Services (Part 90)**

	File #	Lead Call Sign
Alert Cable TV Inc	0000302063	KYK615
Alert Cable TV of Oklahoma Inc	0000302074	KWS691
Alert Cable TV of South Carolina Inc	0000302077	KFI554
America Online, Inc.	0000302103	KNNW816
American Television and Communications Corporation	0000302198	KXL770
Cablevision Industries Inc	0000302444	KNGX578
Cablevision Industries, Limited Partnership	0000302460	KNHJ962
Cablevision Industries of Alabama Inc	0000302488	KYD420
CAT Holdings LLC	0000301862	KRU795
Century Venture Corporation	0000302539	KZE460
Community CATV Corp	0000303479	WRJ952
Dorchester Cablevision Inc	0000303483	WSK244
Erie Telecommunications, Inc	0000303486	KNCA620

Fairclark Cable TV Inc	0000303492	KQI872
Florida Cablevision Management Corp	0000303506	KNDR433
Home Box Office	0000303522	KB51583
HBO Studio Productions	0000303600	WPLP425
Kansas City Cable Partners	0000304203	WRU681
KBL Multnomah Cablesystems LP	0000304757	WNLJ857
KBL Portland Cablesystems LP	0000305899	WYJ623
Massachusetts Cablevision Industries Inc	0000305900	WNZV590
Massachusetts Cablevision Systems LP	0000305901	KYC473
Paragon Communications	0000305902	KBES79
Texas Cable Partners, LP	0000305904	KTF476
Time Warner Cable of Avalon LP	0000305908	WPMF361
Time Warner Entertainment Company LP	0000301876	KEA342
Time Warner Entertainment- Advance/Newhouse Partnership	0000301895	KFM714
Time Warner Entertainment- Advance/Newhouse Partnership	0000301830	WPFZ212
Time Warner Inc.	0000305897	KNAX816
Turner Broadcasting System Inc.	0000305909	WNXV224
TWFanch-one Co.	0000301815	WQP536
TWI Cable Inc	0000305910	KNHA621
TWI Summit Cable Inc	0000305911	WNDP983
Warner Bros	0000305912	WPLD733
West Valley Cablevision Industries, Inc	0000305913	WNSH254

**Fixed Microwave Services (Part 101)****Private Operational Fixed Point-to-Point Microwave**

	File #	Lead Call Sign
CNN America Inc	0000084755	WNES530
Superstation Inc	0000084751	WNEL539
Texas Cable Partners, LP	0000084765	WNEW367
Time Warner Entertainment- Advance/Newhouse Partnership	0000084762	WNER856

**Common Carrier Fixed Point to Point Microwave**

	File #	Lead Call Sign
American Television and Communications Corporation	0000084776	KPR32
Texas Cable Partners, LP	0000084753	KLH77