

Complaint

IN THE MATTER OF

AMERICA ONLINE, INC. AND TIME WARNER INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 7 OF THE CLAYTON ACT AND SEC. 5 OF THE
FEDERAL TRADE COMMISSION ACT

Docket C-3989; File No. 0010105
Complaint, December 14, 2000--Decision, April 17, 2001

This consent order addresses the merger of Respondent America Online, Inc. ("AOL") -- the world's leading internet service provider ("ISP"), with more than 27 million members -- and Respondent Time Warner Inc. (Time Warner"), the nation's second largest cable television distributor; a leading cable television network provider; the owner of a number of leading cable television networks, such as Home Box Office and CNN; and the Cartoon Network; and the owner of a wide variety of entertainment and media businesses, including leading magazine franchises and established record labels. The order, among other things, requires the respondents -- before they can make AOL's broadband ISP service available in certain Identified Cable Divisions representing over 70 percent of Time Warner's cable customers -- first to make available cable broadband service offered by Earthlink, Inc., pursuant to an agreement (approved by the Commission) between Time Warner and Earthlink. The order also prohibits the respondents from beginning to advertise or promote AOL's broadband ISP service to subscribers in a cable division until Earthlink's competing ISP service is available to subscribers in that cable division -- or Earthlink advertises or promotes its service in that cable division -- whichever occurs first. In addition, the order requires the respondents -- within 90 days after making AOL's broadband ISP service available to subscribers -- to enter into agreements (approved by the Commission) (1) to carry at least two other non-affiliated broadband ISPs to provide cable broadband ISP services in the Identified Cable Divisions, and (2) to carry at least three other non-affiliated ISPs to provide cable broadband ISP services in its other cable divisions. The order also requires the respondents to negotiate and enter into arms' length, commercial agreements with any other non-affiliated ISP that seeks to provide cable broadband ISP service on Time Warner's cable system. An accompanying Order to Hold Separate requires the respondents to hold AOL and Road Runner separate in each Identified Cable Division until they have made an affiliated ISP available to broadband customers in that Identified Cable Division.

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Participants

For the Commission: *Jill M. Frumin, Anthony Joseph, Kent Cox, Patricia Stephenson, Michele Arington, Barbara Shapiro, Valicia Spriggs, Katherine Siefert, Michaelynn Ware, Nidhi Kumar, Katie Siefert, Catharine M. Moscatelli, Phillip L. Broyles, Naomi Licker, Daniel P. Ducore, Debra Holt, and Malcolm Coate.*

For the Respondents: *Paul Cappuccio, Randy Boe, and Laura E. Jehl, America Online, Joe Sims, Jones, Day, Reavis & Pogue, Ronald A. Klain, O'Melveny & Myers, Christopher Bogart, Time Warner Inc., Robert D. Joffe and Katherine Forrest, Cravath, Swaine & Moore, George Cary, Cleary, Gottlieb, Hamilton & Steen, and Marc Apfelbaum and Edward Weiss, Time Warner Cable.*

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and of the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission (the "Commission"), having reason to believe that respondents America Online, Inc. ("AOL"), a corporation, and Time Warner Inc. ("Time Warner"), a corporation, both subject to the jurisdiction of the Commission, have agreed to merge, in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its Complaint, stating its charges as follows:

I. Respondent America Online, Inc.

1. Respondent AOL is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 22000 AOL Way, Dulles, Virginia. AOL operates two internet service providers ("ISPs"): AOL, the nation's

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leading ISP, and CompuServe. In addition, AOL operates such internet brands as Digital City, Inc.; ICQ; the Netscape Netcenter and AOL.com internet portals; the Netscape Communicator client software, including the Netscape Navigator browser; AOL MovieFone, the nation's top movie listing guide and ticketing service; and Nullsoft, Inc., developer of the Spinner, Winamp, and SHOUTcast brands.

2. Respondent AOL is, and at all times relevant herein has been, engaged in commerce, or in activities affecting commerce, within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

II. Respondent Time Warner Inc.

3. Respondent Time Warner is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York. Time Warner operates a variety of businesses, including cable television systems; cable television networks, such as HBO, Cinemax, CNN, TNT, and TBS Superstation; magazine franchises, including Time, People, and Sports Illustrated; copyrighted music that is produced and distributed by record labels such as Warner Bros. Records, Atlantic Records, Elektra Entertainment, and Warner Music International; and film, television, and animation libraries owned or managed by Warner Bros. and New Line Cinema. Some of Time Warner's cable systems, HBO, Cinemax, and Warner Bros.' filmed entertainment business belong to Time Warner Entertainment Company, L.P. ("TWE"), a limited partnership. Time Warner owns general and limited partnership interests in TWE consisting of 74.49% of the pro rata priority capital and residual equity capital and 100% of the junior priority capital.
4. Respondent Time Warner is, and at all times relevant herein has been, engaged in commerce, or in activities affecting

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commerce, within the meaning of Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. The Merger

5. On or about January 10, 2000, Respondents AOL and Time Warner entered into an Agreement and Plan of Merger regarding the proposed transaction. Under the proposed transaction, common stockholders of Time Warner will receive 1.5 shares of AOL Time Warner Inc. ("AOL/Time Warner") common stock for each share of Time Warner common stock they hold, and common stockholders of AOL will receive one share of common stock of AOL/Time Warner for each share of AOL common stock they hold.

IV. Trade and Commerce*A. Broadband Internet Access Service:*

6. Internet access is an important service demanded by an increasing number of Americans. The vast majority of residential users currently access the internet via dial-up modems: their computers use standard telephone lines to connect to an ISP, which in turn connects the user to the internet. This service is referred to as "narrowband" access.
7. A rapidly growing number of residential users access the internet through "broadband" networks and transmission facilities. Broadband internet access allows users to send and receive data at rates substantially faster than is possible using narrowband access.
8. Time Warner provides broadband internet access service to customers in areas served by its cable television systems through a controlling interest in its partially-owned Road Runner subsidiary. Road Runner is the only ISP available on Time Warner's cable systems, and is a significant competitor in

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each of those areas. AOL provides broadband internet access service over non-cable broadband transmission facilities, including areas served by Time Warner's cable television systems. AOL is the leading provider of narrowband internet access, with a share of approximately 50 percent of narrowband subscribers. AOL is positioned and likely to become the leading provider of broadband internet access as well.

B. Broadband Internet Transport Service:

9. In order to provide broadband internet access service, an ISP must have access to broadband transmission facilities that can carry data at high speeds between the ISP's facilities and the homes of individual subscribers. The two principal types of transmission facilities that provide broadband access to residential users today are (a) cable television systems; and (b) local telephone company networks.
10. Cable television companies originally designed their systems to transmit information (i.e., video programming) one way to customers' homes. Many cable companies have upgraded their cable systems to provide a larger number of video programming networks. The expanded cable capacity enables the cable system to provide the two-way data transmission necessary for residential broadband service. Cable subscribers can access the internet over computers connected to a cable modem. Time Warner operates cable systems that provide broadband internet transport services.
11. Telephone companies are upgrading their residential telephone lines and central offices to use digital subscriber line ("DSL") technology to connect a user to the internet. DSL service requires a DSL modem connecting the telephone lines to the personal computer. Local telephone companies, or other firms that contract with the local telephone company for the use of its telephone lines, may provide DSL service. DSL service is available only to a

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portion of residences that have local telephone service, primarily because of technical constraints.

12. Satellite and fixed wireless technologies also can provide broadband transmission to residential users. However, these technologies have a much smaller share of the broadband internet transport market than cable modems or DSL, and consumers are unlikely to perceive them as adequate substitutes for cable modems or DSL in the next few years.
13. Most residential broadband subscribers access the internet over cable. DSL services are the second most frequently used. Though the number of DSL users is growing rapidly, DSL still lags substantially behind cable modem service in market penetration and acceptance.
14. AOL's principal means of providing broadband internet services is through DSL. AOL broadband subscribers on DSL frequently represent lost revenue opportunities for cable broadband transport services. AOL will have less incentive to promote DSL as a transport medium in TW cable areas after the merger.

C. Interactive Television Service:

15. Because of the rapid growth in the number of residential broadband subscribers and the expectation that there will soon be very large numbers of such subscribers, many firms are developing content that may be particularly attractive to residential broadband consumers. Residential broadband transmission capacity allows customers to access content that contains larger quantities of data, such as high-quality streaming video and various forms of interactive entertainment, including enhanced programming that enables the viewer to interact with the programming. Narrowband connections cannot take advantage of much of this broadband content because it takes much longer to receive the requested content and the slower speeds of

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narrowband adversely affect the quality of the received pictures and video.

16. Interactive Television (“ITV”) combines television programming and internet functionality, and requires special hardware and software to blend data with video signals for display on a television screen. The first-generation technology, which is now on the market, uses a separate set-top box that sits between the cable set-top box and the television and contains a modem for connection to the internet by telephone.
17. AOL recently launched AOL-TV, a first-generation ITV product, and is well positioned to become a leading provider of ITV services.
18. The next generation of ITV likely will have a broadband internet connection. Cable has distinct advantages over alternative ITV transport and connection methods. The television signal is already transmitted over cable, which makes synchronizing viewer interaction with the programming easier. Neither satellite nor DSL connections can integrate the cable video programming and the interactive functionality as smoothly as cable. Local cable companies will play the key role in enabling the delivery of ITV services.
19. As a cable operator, Time Warner can control the interactive signals, triggers, and content that can be delivered over its cable systems.

V. Anticompetitive Effects

**COUNT I: LOSS OF COMPETITION IN
BROADBAND INTERNET ACCESS SERVICE**

20. Paragraphs 1-19 are incorporated by reference as if fully set forth herein.

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A. Relevant Product Market

21. The relevant product market in which to assess the effects of the proposed merger is the provision of residential broadband internet access service.

B. Relevant Geographic Markets

22. The relevant geographic markets in which to assess the effects of the proposed merger are Time Warner cable service areas and the United States.

C. Concentration

23. The relevant markets are, or are likely to become, highly concentrated and the proposed merger, if consummated, will substantially increase that concentration.

D. Conditions of Entry

24. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects of the merger.

E. Effects

25. The merger will eliminate existing and potential competition between AOL and Time Warner nationally and in Time Warner cable service areas, and will increase AOL/Time Warner's ability to exercise unilateral market power.

**COUNT II: LOSS OF COMPETITION
IN BROADBAND INTERNET TRANSPORT SERVICE**

26. Paragraphs 1-19 are incorporated by reference as if fully set forth herein.

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A. Relevant Product Market

27. The relevant product market in which to assess the effects of the proposed merger is the provision of broadband internet transport service.

B. Relevant Geographic Markets

28. The relevant geographic markets in which to assess the effects of the proposed merger are Time Warner cable service areas and the United States.

C. Concentration

29. The relevant markets are, or are likely to become, highly concentrated and the proposed merger, if consummated, will substantially increase that concentration.

D. Conditions of Entry

30. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects of the merger.

E. Effects

31. The merger will substantially lessen or reduce competition between cable television broadband transport service and DSL broadband transport service nationally and in Time Warner cable service areas, and increase AOL/Time Warner's ability to exercise unilateral market power.

**COUNT III: LOSS OF COMPETITION IN THE
PROVISION OF ITV SERVICE**

32. Paragraphs 1-19 are incorporated by reference as if fully set forth herein.

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A. Relevant Product Market

33. The relevant product market in which it is appropriate to assess the effects of the proposed merger is the provision of ITV service.

B. Relevant Geographic Markets

34. The relevant geographic markets in which it is appropriate to assess the effects of the proposed merger are the Time Warner cable service areas and the United States.

C. Concentration

35. The relevant markets are, or are likely to become, highly concentrated and the proposed merger, if consummated, will substantially increase that concentration.

D. Conditions of Entry

36. Entry into the relevant markets would not be timely, likely, or sufficient to prevent the anticompetitive effects of the merger.

E. Effects

37. The merger will increase barriers to entry and increase AOL/Time Warner's ability to exercise unilateral market power nationally and in Time Warner cable service areas.

VI. Violations Charged

38. The agreement entered into between Respondents AOL and Time Warner for their merger constitutes a violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45. Further, the agreement, if consummated, would be a violation of Section 5 of the

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Federal Trade Commission Act, as amended, 15 U.S.C.
§ 45, and Section 7 of the Clayton Act, as amended, 15
U.S.C. § 18.

WHEREFORE, THE PREMISES CONSIDERED, the Federal
Trade Commission on this fourteenth day of December, 2000,
issues its complaint against said Respondents.

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DECISION AND ORDER

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Respondent America Online, Inc. (“AOL”) and Respondent Time Warner Inc. (“Time Warner”), and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect and having thereupon issued its Complaint and its Order to Hold Separate, and having accepted the executed Consent Agreement and placed such Consent Agreement on the public record for a period of thirty (30) days for the receipt and consideration of public comments, and having duly considered the comments filed thereafter by interested persons pursuant to Rule 2.34 of its Rules (16 C.F.R. § 2.34), and having modified the Decision and Order (“Order”) in certain respects, now in further conformity with the procedure described in Commission Rule 2.34, the Commission hereby makes the following jurisdictional findings and issues the following Decision and Order:

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1. Respondent AOL is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 22000 AOL Way, Dulles, Virginia 20166.
2. Respondent Time Warner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York 10019.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of Respondents, and the proceeding is in the public interest.

I.

IT IS ORDERED that, as used in this Order, the following definitions shall apply:

- A. “AOL” means America Online, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by America Online, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. “Time Warner” means Time Warner Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions (including, but not limited to, Time Warner Entertainment Company, L.P.), groups and affiliates controlled by Time Warner Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. “Access” means the provision of a connection point at the connection points within each Cable Division where Respondents are providing connections for Respondents’ ISPs and where Respondents have provided all of the

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technology required to enable Non-affiliated ISPs to reach Subscribers over Respondents' Cable Holdings.

- D. "Adelphia" means Adelphia Communications Corporation, incorporated in Delaware, with its principal place of business located at One North Main Street, Coudersport, PA 16915-1141, and its subsidiaries, divisions, groups and affiliates controlled by Adelphia, and the successors and assigns of each.
- E. "Affiliated Cable Broadband ISP Service" means a Cable Broadband ISP Service Affiliated with Respondent, excluding Road Runner.
- F. "Affiliated" means having an attributable interest as defined in 47 C.F.R. § 76.501 (and accompanying notes), as that rule read on July 1, 1996.
- G. "Alternative Cable Broadband ISP Service Agreement" means an agreement between Respondents and a Non-affiliated ISP to provide Cable Broadband ISP Service on Respondents' Cable Holdings.
- H. "AT&T" means AT&T Corp., incorporated in New York, with its principal place of business located at 32 Avenue of the Americas, New York, New York 10013-2412 and its subsidiaries, divisions, groups and affiliates controlled by AT&T, and the successors and assigns of each.
- I. "Available" means ready for immediate use at the request of a Subscriber.
- J. "Bandwidth" means the measure, in bits per second, of the speed of data transmission.
- K. "Broadband" means Bandwidth designed to operate at rates greater than 128 kilobits per second.

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- L. "Cable Broadband ISP Service" means any ISP Service provided via Broadband over cable.
- M. "Cable Division" means each collection of localized communication networks, comprising one or more cable systems, that transmits multi-channel video, as well as other Content and services, by means of coaxial cables and/or fiber optics, that is located in the United States and is Controlled by Respondents.
- N. "Cablevision" means Cablevision Systems Corporation, incorporated in Delaware, with its principal place of business located at 1111 Stewart Avenue, Bethpage, NY 11714, and its subsidiaries, divisions, groups and affiliates controlled by Cablevision, and the successors and assigns of each.
- O. "Charter" means Charter Communications Holdings, LLC, incorporated in Delaware, with its principal place of business located at 12444 Powerscourt Drive, Suite 100, St. Louis, Missouri 63131, and its subsidiaries, divisions, groups and affiliates controlled by Charter, and the successors and assigns of each.
- P. "Comcast" means Comcast Cable Communications, Inc., incorporated in Delaware, with its principal place of business located at 1201 Market Street, Suite 2201, Wilmington, Delaware 19801 and its subsidiaries, divisions, groups and affiliates controlled by Comcast, and the successors and assigns of each.
- Q. "Commission" means the Federal Trade Commission.
- R. "Content" means data packets carrying information including, but not limited to, links, video, audio, text, e-mail, message, interactive signals, and interactive triggers.
- S. "Control" means (1) either (i) holding 50% or more of the outstanding voting securities of a Person or (ii) in the case

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of a Person that has no outstanding voting securities, having the right to 50% or more of the profits of the Person, or having the right in the event of dissolution to 50% or more of the assets of the Person or (2) having the contractual power presently to designate 50% or more of the directors of a Person that is a corporation, or in the case of unincorporated Persons, of individuals exercising similar functions.

- T. "Costs" means the prices charged (1) by a provider of DSL Services for access to a data line, including for any local data traffic aggregation, from a central office or remote terminal to a Subscriber's home, (2) by a provider of DSL Services or a third party for installation of DSL Services at a Subscriber's home, and (3) by a provider of DSL Services or a third party for customer premise equipment (such as a DSL modem) required to use such DSL Services by a Subscriber.
- U. "Cox" means Cox Communications, Inc., incorporated in Delaware, with its principal place of business located at 1400 Lake Hearn Drive, Atlanta, Georgia 30319 and its subsidiaries, divisions, groups and affiliates controlled by Cox, and the successors and assigns of each.
- V. "DSL" means a digital subscriber line or a modem technology that provides Broadband transport over telephone lines.
- W. "DSL Services" means Broadband ISP Services delivered via DSL.
- X. "Earthlink" means Earthlink, Inc., incorporated in Delaware, with its principal place of business located at 1430 West Peachtree Street, Suite 400, Atlanta, Georgia 30309 and its subsidiaries, divisions, groups and affiliates controlled by Earthlink, and the successors and assigns of each.

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- Y. "Earthlink Agreement" means the High-Speed Service Agreement effective as of November 18, 2000, between Earthlink, Inc., and Time Warner Entertainment Company, L.P.
- Z. "Identified Cable Division" means each of the Cable Divisions identified in Appendix A, as well as any other Cable Division with 300,000 Subscribers or more, that, after the date Respondents execute the Consent Agreement, is, through acquisition or otherwise, Controlled by Respondents.
- AA. "ILEC" means incumbent local exchange carrier, and has the same meaning specified in 47 U.S.C. § 251(h).
- BB. "ISP" means a provider of ISP Service.
- CC. "ISP Service" means the provision of connectivity to and services that enable the use of the Internet by an end-user.
- DD. "ITV" means interactive television.
- EE. "Merger" means the transaction contemplated by the Second Amended and Restated Agreement and Plan of Merger, dated as of January 10, 2000, among AOL Time Warner Inc., America Online, Inc., Time Warner Inc., America Online Merger Sub Inc., and Time Warner Merger Sub Inc.
- FF. "MSO" means a multiple system operator, which is a major cable television organization that has franchises in multiple locations.
- GG. "MSO Agreement" means an agreement between Respondents and any one of Adelphia, AT&T, Cablevision, Charter, Comcast, or Cox, pursuant to which Respondents provide Cable Broadband ISP Service over any of such MSO's cable systems.

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- HH. "Monitor Trustee" means any Person appointed by the Commission pursuant to Paragraph V. of this Order to monitor Respondents' compliance with their obligations pursuant to this Order and, if the Commission so determines, to monitor compliance with Respondents' obligations pursuant to the Order to Hold Separate issued in this matter.
- II. "Non-affiliated Cable Broadband ISP Service" means any Cable Broadband ISP Service that is not Affiliated with or Controlled by Respondents.
- JJ. "Non-affiliated ISP" means any ISP that is not Affiliated with or Controlled by Respondents.
- KK. "Offer" means in any way proffering, including, but not limited to, advertising, promoting, or announcing the current or future availability of service or its price.
- LL. "Person" means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- MM. Definition deleted.
- NN. Definition deleted.
- OO. "Respondents" means AOL and Time Warner.
- PP. "Respondents' Cable Holdings" means each and every Cable Division.
- QQ. "Respondents' ISP" means any ISP Controlled by or Affiliated with Respondents.
- RR. "Road Runner" means Road Runner LLC, organized in Delaware, with its principal place of business located at 13241 Woodland Park Road, Herndon, Virginia 20171, and any successor thereto.

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SS. "Subscriber" means the end-user that has entered into an agreement for the provision of a service.

II.

IT IS FURTHER ORDERED that:

A. In each Identified Cable Division:

1. Respondents shall not make Available to any Subscriber any Affiliated Cable Broadband ISP Service until such time as Non-affiliated Cable Broadband ISP Service provided by Earthlink pursuant to the Earthlink Agreement (which agreement shall not vary from or contradict or be construed to vary from or contradict the terms of this Order) is Available to Subscribers in that Identified Cable Division. Respondents shall not Offer to any Subscriber in that Identified Cable Division any Affiliated Cable Broadband ISP Service until: (x) the Non-Affiliated Cable Broadband ISP Service provided by Earthlink is Available in that Identified Cable Division or (y) Earthlink Offers its Non-affiliated Cable Broadband ISP Service to Subscribers in that Identified Cable Division, whichever occurs earlier. For purposes of this Paragraph II.A.1., the terms "make Available" and "Offer" shall not include tests that (i) involve a limited number of Subscribers, (ii) are for a limited period of time, and (iii) are not for commercial purposes but are conducted only for technological and operational implementation purposes; ***provided, however***, that Respondents shall engage in no promotional activity in connection with such tests.
2. Within ninety (90) days after the date that Respondents make Available to any Subscriber an Affiliated Cable Broadband ISP Service, Respondents shall enter into Alternative Cable Broadband ISP Service Agreements that have received the prior approval of the Commission

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with at least two (2) Non-affiliated ISPs (other than the Non-affiliated ISP that is party to the Alternative Cable Broadband ISP Service Agreement approved by the Commission pursuant to Paragraph II.A.1. of this Order in that Identified Cable Division) that have received the prior approval of the Commission to make Available additional Non-affiliated Cable Broadband ISP Services to Subscribers in that Identified Cable Division.

3. If Respondents fail to enter into the Alternative Cable Broadband ISP Service Agreements required by Paragraph II.A.2 of this Order within the time required, then the Commission may appoint a trustee pursuant to Paragraph VI of this Order who, for an additional ninety-day (90-day) period, shall have the authority to enter into the Alternative Cable Broadband ISP Service Agreements required by Paragraph II.A.2. of this Order. Such agreements shall be subject to the prior approval of the Commission and entered into with Non-affiliated ISPs that receive the prior approval of the Commission. With respect to a specific Identified Cable Division, these agreements shall be (a) on terms that, taken as a whole, are comparable to either (i) the Earthlink Agreement or (ii) any MSO Agreement; and (b) in any event, on terms with respect to technological and operational implementation for the provision of service that could not reasonably be expected to adversely affect in any significant respect the Cable Broadband ISP Services or any other services provided by such Identified Cable Division. The trustee shall consult with Respondents during the course of negotiations relating to any Alternative Cable Broadband ISP Agreement and shall consider in good faith any business, technological or operational considerations expressed by Respondents relating to such negotiations.

- B. In each of Respondents' Cable Divisions, excluding the Identified Cable Divisions:

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1. Within ninety (90) days after the date that Respondents make Available to any Subscriber an Affiliated Cable Broadband ISP Service in that Cable Division, Respondents shall enter into Alternative Cable Broadband ISP Service Agreements that have received the prior approval of the Commission with at least three (3) Non-affiliated ISPs that have received the prior approval of the Commission to make Available Non-affiliated Cable Broadband ISP Services to Subscribers throughout that Cable Division. For purposes of this Paragraph II.B.1., the term "make Available" shall not include tests that (i) involve a limited number of Subscribers, (ii) are for a limited period of time, and (iii) are not for commercial purposes but are conducted only for technological and operational implementation purposes; ***provided, however***, that Respondents shall engage in no promotional activity in connection with such tests. For purposes of this Paragraph II.B.1., the Earthlink Agreement is an Alternative Cable Broadband ISP Service Agreement that has received the prior approval of the Commission, and Earthlink is a Non-affiliated ISP that has received the prior approval of the Commission.
2. If Respondents fail to enter into the Alternative Cable Broadband ISP Service Agreements required by Paragraph II.B.1. of this Order within the time required, then the Commission may appoint a trustee pursuant to Paragraph VI of this Order who, for an additional ninety-day (90-day) period, shall have the authority to enter into the Alternative Cable Broadband ISP Service Agreements required by Paragraph II.B.1. Such agreements shall be subject to the prior approval of the Commission and entered into with Non-affiliated ISPs that receive the prior approval of the Commission. These agreements shall be (a) on terms that, taken as a whole, are comparable to either (i) any other Alternative Cable Broadband ISP Service Agreement between Respondents and a Non-affiliated ISP to provide Cable

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Broadband ISP Service in any of Respondents' Cable Holdings, or (ii) any MSO Agreement; and (b) in any event, on terms with respect to technological and operational implementation for the provision of service that could not reasonably be expected to adversely affect in any significant respect the Cable Broadband ISP Services or any other services provided by such Cable Division. The trustee shall consult with Respondents during the course of negotiations relating to any Alternative Cable Broadband ISP Agreement and shall consider in good faith any business, technological or operational considerations expressed by Respondents relating to such negotiations.

- C. Respondents shall include in all Alternative Cable Broadband ISP Service Agreements submitted to the Commission for the Commission's approval pursuant to Paragraphs II.A. and II.B.:
1. a "most favored nation clause" requiring that, in the event that Respondents execute an MSO Agreement, Respondents shall: (1) within five (5) business days of execution of the MSO Agreement, notify the Monitor Trustee of the execution of the MSO Agreement and, at the same time, provide the Monitor Trustee with a copy of the MSO Agreement, (2) within five (5) business days of execution of the MSO Agreement, notify each Non-affiliated ISP that is party to an Alternative Cable Broadband ISP Service Agreement to provide Non-affiliated Cable Broadband ISP Service to Subscribers on any of Respondents' Cable Holdings that was approved by the Commission pursuant to this Order of the execution of the MSO Agreement, and (3) give such Non-affiliated ISPs, for a minimum of thirty (30) days from the day the Non-affiliated ISP is notified of the execution of the MSO Agreement, the ability to convert to all of the rates and terms in the MSO Agreement.

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2. a requirement that, if Respondents make available different levels of service (including, but not limited to, quality of service guarantees, maximum and minimum throughput capacity, and byte consumption per Subscriber) to Respondents' ISPs, Respondents shall make those levels of service available to Non-affiliated ISPs;
 3. a requirement that, if Respondents make any network flow monitoring data (regarding data transport between the ISP's connection point to the cable network and the Subscriber's location) or usage accounting available to any of Respondents' ISPs, then Respondents shall make that same data or accounting available to Non-affiliated ISPs; and
 4. at the option of the Non-affiliated ISP, a requirement that disputes in connection with compliance with any of the rates, terms, and conditions in the Alternative Cable Broadband ISP Service Agreement shall be submitted to binding arbitration; *provided, however*, that the arbitrator shall have no responsibility or authority to resolve issues concerning Respondents' compliance with this Order; and *provided, further, however*, that any non-monetary remedies granted by the arbitrator shall be subject to judicial review, and monetary remedies (including, but not limited to, the establishment of price terms for different levels of service and percentage splits) shall not be subject to judicial review.
- D. In the event that any one of the Alternative Cable Broadband ISP Service Agreements approved by the Commission pursuant to Paragraphs II.A. or II.B,
1. is for a term that terminates prior to expiration of this Order, then Respondents shall enter into an additional Alternative Cable Broadband ISP Service Agreement approved by the Commission, with a Non-affiliated ISP approved by the Commission, to provide Non-affiliated

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Cable Broadband ISP Service, as required by Paragraph II.A. or II.B. of this Order, as applicable, no later than ninety (90) days prior to termination of the original agreement, the term of which, if approved by the Commission, shall take effect immediately upon expiration of the original agreement; ***provided, however,*** that with respect to any such Alternative Cable Broadband ISP Service Agreement that is for a term that terminates prior to the expiration of this Order but is for a term of at least three (3) years, Respondents shall offer the Non-affiliated ISP that is party to such Alternative Cable Broadband ISP Service Agreement an option to renew such Alternative Cable Broadband ISP Service Agreement for at least two (2) years;

2. is terminated by Respondents prior to expiration of this Order, Respondents shall enter into an additional Alternative Cable Broadband ISP Service Agreement approved by the Commission, with a Non-affiliated ISP approved by the Commission, to provide Non-affiliated Cable Broadband ISP Service, as required by Paragraph II.A. or II.B. of this Order, as applicable, no later than ninety (90) days prior to termination of the original agreement, the term of which, if approved by the Commission, shall take effect immediately upon expiration of the original agreement; and
3. is terminated by the approved Non-affiliated ISP or the approved Non-affiliated ISP ceases to make its Non-affiliated Cable Broadband ISP Service Available to Subscribers in a particular Identified Cable Division, then Respondents shall enter into an additional Alternative Cable Broadband ISP Service Agreement, approved by the Commission, with a Non-affiliated ISP, approved by the Commission, as required by Paragraph II.A. or II.B. of this Order, as applicable, within ninety (90) days after the Non-affiliated Cable Broadband ISP Service is no longer Available to Subscribers in that Identified Cable Division.

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- E. Throughout Respondents' Cable Holdings, Respondents shall negotiate and enter into arms' length, commercial agreements with any Non-affiliated ISP (in addition to Non-affiliated ISPs approved by the Commission pursuant to Paragraphs II.A and II.B. of this Order) that seeks to provide Cable Broadband ISP Service; ***provided, however,*** that Respondents may (1) decline to negotiate or decline to enter into such agreements based on cable broadband capacity constraints, other cable broadband technical limitations, or cable broadband business considerations or (2) impose rates, terms, or conditions based on cable broadband capacity constraints, other cable broadband technical limitations, or cable broadband business considerations but, as to either subparagraph E.(1) or E.(2), only so long as such determinations are made without discrimination on the basis of affiliation with respect to all ISPs that enter into or seek to enter into or negotiate agreements with Respondents to provide Cable Broadband ISP Service to Subscribers on Respondents' Cable Holdings and are not based, in whole or in part, on the impact or potential impact on Respondents' ISPs (including but not limited to a decrease or potential decrease in Subscribers on Respondents' ISPs).
- F. The purpose of this Order is to ensure the provision and availability of a full range of Content and services by Non-affiliated ISPs; to prevent discrimination by Respondents as to Non-affiliated ISPs on the basis of affiliation, which would interfere with the ability of the Non-affiliated ISPs to provide a full range of Content and services; and to remedy the lessening of competition in the market for broadband ISP Service as alleged in the Commission's Complaint.

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III.**IT IS FURTHER ORDERED** that:

- A. Respondents shall not interfere in any way, directly or indirectly, with Content passed in either direction along the Bandwidth contracted for and being used by any Non-affiliated ISP in compliance with the Non-affiliated ISP's agreement with Respondents.
- B. For any Non-affiliated ISP offering Cable Broadband ISP Service to Subscribers on any of Respondents' Cable Divisions, Respondents shall, upon the request of the Non-affiliated ISP, provide Access.
- C. As to any of Respondents' Cable Holdings, Respondents shall not interfere with the ability of a Subscriber to use, in conjunction with ITV services provided by a Person that is not Affiliated with Respondent, interactive signals, triggers, or other Content that Respondents have agreed to carry.
- D. Respondents shall not discriminate on the basis of affiliation in the transmission or modification of Content that Respondents have contracted to deliver to Subscribers over their cable systems.
- E. Respondents shall not enter into any agreement with any MSO that would interfere with the ability of such MSO to enter into agreements with any other ISP or provider of ITV services.

IV.**IT IS FURTHER ORDERED** that within each separate geographic area served by an ILEC:

- A. Respondents shall offer DSL Services to Subscribers in those geographic areas in which any of Respondents' Cable Holdings are located and Affiliated Cable Broadband ISP

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Service or Road Runner is Available at retail pricing, terms, and conditions that are the same as or comparable to those at which Respondents offer DSL Services to Subscribers in those geographic areas in which neither Affiliated Cable Broadband ISP Service nor Road Runner is Available; ***provided, however***, that Respondents' pricing may reflect any actual differences in Costs to Respondents charged by the provider of DSL Services. To the extent that Respondents' pricing reflects differences in Costs, Respondents shall include a description of these Cost differences in the reports they are required to submit to the Commission (and the Monitor Trustee) pursuant to Paragraph VII. of this Order.

- B. Respondents shall market and promote DSL Services to Subscribers in those geographic areas in which any of Respondents' Cable Holdings are located and Affiliated Cable Broadband ISP Service or Road Runner is Available at the same or comparable level and in the same or comparable manner as Respondents market and promote DSL Services to Subscribers in those areas in which neither Affiliated Cable Broadband ISP Service nor Road Runner is Available.

V.

IT IS FURTHER ORDERED that, any time after Respondents execute the Consent Agreement, the Commission may appoint a Monitor Trustee to monitor Respondents' compliance with their obligations under this Order, which Monitor Trustee shall have the necessary rights, duties, and responsibilities as described below:

- A. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the

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identity of any proposed Monitor Trustee, Respondents shall be deemed to have consented to the selection of the proposed Monitor Trustee. Within ten (10) days after the appointment of the Monitor Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Monitor Trustee all the power and authority necessary to permit the Monitor Trustee to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order.

- B. The Monitor Trustee shall have the power and authority to monitor Respondents' compliance with the terms of this Order and shall exercise such power and authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order in consultation with the Commission.
- C. The Monitor Trustee shall have full and complete access to all personnel, books, records, documents and facilities of Respondents related to compliance with this Order or to any other relevant information, as the Monitor Trustee may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to Respondents' obligations under this Order. Respondents shall develop such financial or other information as such Monitor Trustee may reasonably request and shall cooperate with the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor Respondents' compliance with the Order.
- D. Respondents may require the Monitor Trustee or any of the Persons referred to in Paragraph V.E. to sign a confidentiality agreement prohibiting the disclosure of any information gained as a result of his or her role as Monitor Trustee to anyone other than the Commission.

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- E. The Monitor Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
- F. The Monitor Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the Monitor Trustee's experience and responsibilities. Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.
- G. The Monitor Trustee shall have no responsibility or obligation for the operation of Respondents' businesses.
- H. The Monitor Trustee shall serve for the duration of this Order.
- I. If the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor Trustee who shall have all the rights, duties, powers, authorities, and responsibilities described in this paragraph. The Commission shall select the substitute Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing,

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including the reasons for opposing, the selection of any proposed substitute Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor Trustee, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor Trustee. Within ten (10) days after the appointment of the substitute Monitor Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor Trustee all the power and authority necessary to permit the substitute Monitor Trustee to monitor Respondents' compliance with the terms of this Order in a manner consistent with the purposes of this Order.

- J. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order.
- K. The Monitor Trustee shall report in writing to the Commission concerning Respondents' compliance with this Order thirty days after execution of the trust agreement and every ninety days thereafter until the Order terminates.

VI.**IT IS FURTHER ORDERED** that:

- A. If Respondents have not entered into the Alternative Cable Broadband ISP Service Agreements as required by Paragraphs II.A.2. and II.B.1 of this Order in any Cable Division, the Commission may appoint a trustee (who may be the same individual named in Paragraph V of this Order), to enter into the Alternative Cable Broadband ISP Service Agreements as described in Paragraphs II.A.3. or II.B.2., as applicable to that Cable Division. In the event that the Commission or the Attorney General brings an action pursuant to § 5(l) of the Federal Trade Commission Act, 15

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U.S.C. § 45(*I*), or any other statute enforced by the Commission, Respondents shall consent to the appointment of a trustee in such action. Neither the appointment of a trustee nor a decision not to appoint a trustee under this Paragraph shall preclude the Commission or the Attorney General from seeking civil penalties or any other relief available to it, including a court-appointed trustee, pursuant to § 5(*I*) of the Federal Trade Commission Act, or any other statute enforced by the Commission, for any failure by the Respondents to comply with this Order.

- B. If a trustee is appointed by the Commission or a court pursuant to Paragraph VI.A. of this Order, Respondents shall consent to the following terms and conditions regarding the trustee's powers, duties, authority, and responsibilities:
1. The Commission shall select the trustee, subject to the consent of Respondents, which shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed trustee, Respondents shall be deemed to have consented to the selection of the proposed trustee.
 2. Within ten (10) days after appointment of the trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission and, in the case of a court-appointed trustee, of the court, transfers to the trustee all rights and powers necessary to permit the trustee to enter into the Alternative Cable Broadband ISP Service Agreements described by Paragraph II.A.3. and II.B.2 of this Order for the applicable Cable Division.
 3. Subject to the prior approval of the Commission, the trustee shall have the sole power and authority to enter into the Alternative Cable Broadband ISP Service Agreements as required by Paragraph II.A.2 and II.B.1.

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and as described in Paragraph II.A.3 and II.B.2 of this Order for the applicable Cable Division.

4. The trustee shall have an additional ninety days after the period allowed by Paragraphs II.A.2 or II.B.1. has expired in the applicable Cable Division to enter into the Alternative Cable Broadband ISP Services Agreements, required by Paragraphs II.A.2 or II.B.1, applicable to that Cable Division; the Non-affiliated ISP and the Alternative Cable Broadband ISP Services Agreement shall be subject to the applicable requirements of Paragraph II.A. and II.B., and shall be subject to the prior approval of the Commission.
5. The trustee shall have full and complete access to the personnel, books, records and facilities related to the Cable Broadband ISP Services Agreements required by Paragraph II. of this Order or to any other relevant information, as the trustee may request. Respondents shall develop such financial or other information as such trustee may reasonably request and shall cooperate with the trustee. Respondents shall take no action to interfere with or impede the trustee's ability to perform his or her responsibilities under this Order. Any delays caused by Respondents shall extend the time for entering into the Cable Broadband ISP Services Agreements as required by Paragraph II. of this Order in an amount equal to the delay, as determined by the Commission or, for a court-appointed trustee, by the court.
6. The trustee shall serve, without bond or other security, at the cost and expense of Respondents, on such reasonable and customary terms and conditions as the Commission or a court may set. The trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are necessary to carry out the trustee's duties and responsibilities. The trustee shall account for all expenses incurred, including fees for

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his or her services, subject to approval of the Commission.

7. Respondents shall indemnify the trustee and hold the trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the trustee.
8. If the trustee ceases to act or fails to act diligently, a substitute trustee shall be appointed in the same manner as provided in Paragraph VI.A. and VI.B.1. of this Order.
9. The Commission or, in the case of a court-appointed trustee, the court, may on its own initiative or at the request of the trustee issue such additional orders or directions as may be necessary or appropriate to accomplish the requirements of Paragraph II. of this Order.
10. The trustee shall report in writing to Respondents and the Commission every thirty (30) days concerning the trustee's efforts to accomplish the requirements of Paragraph II.

VII.

IT IS FURTHER ORDERED that

- A. Within thirty (30) days after the date Respondents execute the Consent Agreement, every thirty (30) days thereafter until Respondents have complied with their obligations pursuant to Paragraphs II.A. and II.B. of this Order, and every ninety (90) days thereafter until termination of this

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Order, Respondents shall submit to the Commission (with a copy to the Monitor Trustee) a verified written report setting forth in detail, the manner and form in which they intend to comply, are complying, and have complied with this Order. Respondents shall include in their compliance reports a full description of the efforts being made to comply with this Order, including, but not limited to:

- (1) a list by Cable Division of (i) all ISPs with whom Respondents have entered into a Cable Broadband ISP Service Agreement, including name of ISP and the telephone number of contact person, (ii) the date of execution of the agreement with the ISP, (iii) the date service is made Available to Subscribers by ISP, (iv) the date Respondents Offer Affiliated Cable Broadband ISP Service to Subscribers, (v) the identity of all ISPs with whom Respondents are negotiating Cable Broadband ISP Service Agreements, all who have expressed interest in negotiating Cable Broadband ISP Service Agreements with Respondents but with whom Respondents have refused to negotiate, including the reasons why Respondents have refused to negotiate, and all whom Respondents have contacted but have expressed no interest in negotiating or entering into a Cable Broadband ISP Service Agreement, (vi) the identity of all ISPs with whom Respondents have declined to negotiate or to enter into an agreement to provide Cable Broadband ISP Service, including the reasons why Respondents declined to do so;
- (2) a description of the negotiations with each ISP, including submission of the latest draft of any Cable Broadband ISP Service Agreement; and
- (3) copies of all agreements with ISPs to provide Cable Broadband ISP Service on Respondents' Cable Holdings (other than Cable Broadband ISP Service Agreements approved by the Commission pursuant to Paragraphs II.A. and II.B.).

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- B. One (1) year from the date this Order becomes final, annually for the next succeeding four (4) years on the anniversary of the date this Order becomes final, and at other times as the Commission may require, Respondents shall either include in the report submitted pursuant to Paragraph VII.A. above or submit to the Commission (with a copy to the Monitor Trustee) an additional verified written report setting forth in detail a description of all complaints from any Non-affiliated Broadband ISP or television programmer made in writing to the General Counsel of Respondents relating to the failure of Respondents to make available content, or to carry interactive signals, triggers or content, including a copy of all such written complaints, the identification of the Non-affiliated Broadband ISP or television programmer, the name of a contact person from the Non-affiliated Broadband ISP or television programmer, a description of the original request if not contained in the written complaint, and Respondents' response to the original request.

VIII.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the corporate Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of the Order.

IX.

IT IS FURTHER ORDERED that, for the purpose of determining or securing compliance with this Order, and subject to any legally recognized privilege, upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

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- A. Access, during office hours upon reasonable notice and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order; and
- B. Upon five (5) business days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

X.

IT IS FURTHER ORDERED that:

- A. This Order shall terminate on April 17, 2006; ***provided, however,*** that if Respondents abandon their plans to consummate the proposed Merger and so notify the Commission, this Order shall terminate on the day after the date Respondents withdraw their respective Notification and Report Forms filed pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a, and the regulations promulgated thereunder, 16 C.F.R. §§ 800 *et seq.* in connection with the proposed Merger.
- B. Obligations in this Order applicable to any Cable Division shall terminate upon the disposition of Respondents' Control over such Cable Division.

By the Commission.

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Appendix A

IDENTIFIED CABLE DIVISIONS

1. New York City
2. Tampa Bay
3. Central Florida
4. Houston
5. Raleigh/Fayetteville
6. Western Ohio
7. Northeast Ohio
8. Charlotte
9. Los Angeles
10. Milwaukee
11. Greensboro
12. Hawaii
13. Cincinnati
14. San Antonio
15. Syracuse
16. Kansas City
17. South Carolina
18. Columbus
19. Rochester
20. Albany

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ORDER TO HOLD SEPARATE

The Federal Trade Commission (“Commission”) having initiated an investigation of the proposed merger of Respondent America Online, Inc. (“AOL”) and Respondent Time Warner Inc. (“Time Warner”), and Respondents having been furnished thereafter with a draft of Complaint that the Bureau of Competition proposed to present to the Commission for its consideration and which, if issued by the Commission, would charge Respondents with violations of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18; and

Respondents, their attorneys, and counsel for the Commission having thereafter executed an Agreement Containing Consent Orders (“Consent Agreement”), containing an admission by Respondents of all the jurisdictional facts set forth in the aforesaid draft of Complaint, a statement that the signing of said Consent Agreement is for settlement purposes only and does not constitute an admission by Respondents that the law has been violated as alleged in such Complaint, or that the facts as alleged in such Complaint, other than jurisdictional facts, are true, and waivers and other provisions as required by the Commission’s Rules; and

The Commission having thereafter considered the matter and having determined that it had reason to believe that Respondents have violated said Acts, and that a Complaint should issue stating its charges in that respect, and having accepted the executed Consent Agreement and placed such Consent Agreement and the draft of Complaint on the public record for a period of thirty (30) days for the receipt and consideration of public comments, now in further conformity with the procedure described in Commission Rule 2.34, 16 C.F.R. § 2.34, the Commission issues its Complaint, and hereby makes the following jurisdictional findings and issues this Order to Hold Separate:

1. Respondent AOL is a corporation organized, existing and doing business under and by virtue of the laws of the State

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of Delaware, with its office and principal place of business located at 22000 AOL Way, Dulles, Virginia 20166.

2. Respondent Time Warner is a corporation organized, existing and doing business under and by virtue of the laws of the State of Delaware, with its office and principal place of business located at 75 Rockefeller Plaza, New York, New York 10019.
3. The Federal Trade Commission has jurisdiction of the subject matter of this proceeding and of the Respondents, and the proceeding is in the public interest.

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II.

IT IS ORDERED that, as used in this Order to Hold Separate, the following definitions shall apply:

- A. "AOL" means America Online, Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions, groups and affiliates controlled by America Online, Inc., and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- B. "Time Warner" means Time Warner Inc., its directors, officers, employees, agents, representatives, successors, and assigns; its subsidiaries, divisions (including, but not limited to, Time Warner Entertainment Company, L.P.), groups and affiliates controlled by Time Warner Inc. and the respective directors, officers, employees, agents, representatives, successors, and assigns of each.
- C. "Affiliated Cable Broadband ISP Service" means a Cable Broadband ISP Service Affiliated with Respondent, excluding Road Runner.

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- D. "Affiliated" means having an attributable interest as defined in 47 C.F.R. § 76.501 (and accompanying notes), as that rule read on July 1, 1996.
- E. "Alternative Cable Broadband ISP Service Agreement" means an agreement between Respondents and a Non-affiliated ISP to provide Cable Broadband ISP Service on Respondents' Cable Holdings.
- F. "Available" means ready for immediate use at the request of a Subscriber.
- G. "Bandwidth" means the measure, in bits per second, of the speed of data transmission.
- H. "Broadband" means Bandwidth designed to operate at rates greater than 128 kilobits per second.
- I. "Cable Broadband ISP Service" means any ISP Service provided via Broadband over cable.
- J. "Cable Division" means each collection of localized communication networks, comprising one or more cable systems, that transmits multi-channel video, as well as other Content and services, by means of coaxial cables and/or fiber optics, that is located in the United States and is Controlled by Respondents.
- K. "Commission" means the Federal Trade Commission.
- L. "Consent Agreement" means the Agreement Containing Consent Orders executed by the Respondents in this matter.
- M. "Content" means data packets carrying information including, but not limited to, links, video, audio, text, e-mail, message, interactive signals, and interactive triggers.
- N. "Control" means (1) either (i) holding 50% or more of the outstanding voting securities of a Person or (ii) in the case

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of a Person that has no outstanding voting securities, having the right to 50% or more of the profits of the Person, or having the right in the event of dissolution to 50% or more of the assets of the Person or (2) having the contractual power presently to designate 50% or more of the directors of a Person that is a corporation, or in the case of unincorporated Persons, of individuals exercising similar functions.

- O. “Decision and Order” means the Decision and Order issued pursuant to the Consent Agreement, and all terms contained therein.
- P. “Earthlink” means Earthlink, Inc., incorporated in Delaware, with its principal place of business located at 1430 West Peachtree Street, Suite 400, Atlanta, Georgia 30309 and its subsidiaries, divisions, groups and affiliates controlled by Earthlink, and the successors and assigns of each.
- Q. “Earthlink Agreement” means the High-Speed Service Agreement effective as of November 18, 2000, between Earthlink, Inc., and Time Warner Entertainment Company, L.P.
- R. “Identified Cable Division” means each of the Cable Divisions identified in Appendix A of the Decision and Order, as well as any other Cable Division with 300,000 Subscribers or more, that, after the date Respondents execute the Consent Agreement, is, through acquisition or otherwise, Controlled by Respondents. Any Identified Cable Division shall cease to be an Identified Cable Division for purposes of this Order to Hold Separate upon disposition by Respondents of Respondents’ Control over such Identified Cable Division.
- S. “ISP” means a provider of ISP Service.

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- T. "ISP Service" means the provision of connectivity to and services that enable the use of the Internet by an end-user.
- U. "Merger" means the transaction contemplated by the Second Amended and Restated Agreement and Plan of Merger, dated as of January 10, 2000, among AOL Time Warner Inc., America Online, Inc., Time Warner Inc., America Online Merger Sub Inc., and Time Warner Merger Sub Inc.
- V. "Monitor Trustee" means any Person appointed by the Commission pursuant to Paragraph V. of the Decision and Order in this matter.
- W. "Non-affiliated Cable Broadband ISP Service" means any Cable Broadband ISP Service that is not Affiliated with or Controlled by Respondents.
- X. "Non-affiliated ISP" means any ISP that is not Affiliated with or Controlled by Respondents.
- Y. "Offer" or "Offering" means in any way proffering, including, but not limited to, advertising, promoting, or announcing the current or future availability of service or its price.
- Z. "Person" means any natural person, corporate entity, partnership, association, joint venture, government entity, or trust.
- AA. "Respondents" means Time Warner and AOL.
- BB. "Respondents' Cable Holdings" means each and every Cable Division.
- CC. "Road Runner" means Road Runner LLC, organized in Delaware, with its principal place of business located at 13241 Woodland Park Road, Herndon, Virginia 20171, and any successor thereto.

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III.

IT IS FURTHER ORDERED that:

- A. Until such time as Respondents have made Available an Affiliated Cable Broadband ISP Service in each Identified Cable Division, and regardless of whether Respondents have consummated the proposed Merger, Respondents shall:
1. hold Road Runner and all of its businesses separate and apart from AOL and all of its businesses;
 2. operate the businesses of Road Runner independently of the businesses of AOL; and
 3. operate the businesses of AOL independently of the businesses of Road Runner.
- B. In holding Road Runner separate and apart from AOL and in operating the businesses of each separately from the other, Respondents shall take no steps to use, and shall not, in any way directly or indirectly, use Road Runner and its businesses to increase or otherwise advantage AOL and its businesses (as each of Road Runner and AOL is constituted at the time Respondents execute the Consent Agreement), or to use AOL and its businesses to increase or otherwise advantage Road Runner and its businesses; among other things, Respondents shall:
1. comply with the requirements of Paragraph II.A.1. of the Decision and Order; and
 2. refrain from:
 - a. engaging in cross-promotional or marketing activities between AOL's services and Road Runner's services;

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- b. Offering or making Available cross links to AOL's services from Road Runner's services or to Road Runner's services from AOL's services;
- c. engaging in joint or cooperative advertising of AOL's services and Road Runner's services;
- d. Offering or making Available AOL's services on Road Runner's services or Offering or making Available Road Runner's services on AOL's services;
- e. making references to or about AOL or AOL's services on Road Runner's services or making references to or about Road Runner or its services on AOL's services;
- f. using lists of Road Runner subscribers or potential subscribers as a means to Offer, promote, advertise, market, or otherwise make references to or about AOL or AOL's services;
- g. using lists of AOL subscribers or potential subscribers as a means to Offer, promote, advertise, market, or otherwise make references to or about Road Runner or Road Runner's services;
- h. Offering or making Available formats, designs, and products for use on or with AOL's services that are similar to those of Road Runner;
- i. Offering or making Available formats, designs, and products for use on or with Road Runner's services that are similar to those of AOL;
- j. Offering or making Available a look or feel similar to AOL or its services for use on Road Runner's services;
- k. Offering or making Available a look or feel similar to Road Runner or its services for use on AOL's services;

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- l. taking any steps to transform or transforming Road Runner business into AOL business;
- m. causing or permitting Road Runner to hire AOL employees; and
- n. causing or permitting AOL to hire Road Runner employees.

IV.

IT IS FURTHER ORDERED that, any time after Respondents execute the Consent Agreement, the Commission may appoint a Monitor Trustee to monitor Respondents' compliance with their obligations under this Order to Hold Separate, which Monitor Trustee shall have the necessary rights, duties, and responsibilities as described below:

- A. The Commission shall select the Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed Monitor Trustee, Respondents shall be deemed to have consented to the selection of the proposed Monitor Trustee. Within ten (10) days after the appointment of the Monitor Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the Monitor Trustee all the power and authority necessary to permit the Monitor Trustee to monitor Respondents' compliance with the terms of this Order to Hold Separate in a manner consistent with the purposes of this Order to Hold Separate.
- B. The Monitor Trustee shall have the power and authority to monitor Respondent's compliance with the terms of this Order to Hold Separate and shall exercise such power and

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authority and carry out the duties and responsibilities of the Monitor Trustee in a manner consistent with the purposes of this Order to Hold Separate in consultation with the Commission.

- C. The Monitor Trustee shall have full and complete access to all personnel, books, records, documents and facilities of Respondents related to compliance with this Order to Hold Separate or to any other relevant information, as the Monitor Trustee may reasonably request, including but not limited to all documents and records kept in the normal course of business that relate to Respondents' obligations under this Order to Hold Separate. Respondents shall develop such financial or other information as such Monitor Trustee may reasonably request and shall cooperate with the Monitor Trustee. Respondents shall take no action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor Respondents' compliance with this Order to Hold Separate.
- D. Respondents may require the Monitor Trustee or any of the Persons referred to in Paragraph IV.E. to sign a confidentiality agreement prohibiting the disclosure of any information gained as a result of his or her role as Monitor Trustee to anyone other than the Commission.
- E. The Monitor Trustee shall have the authority to employ, at the cost and expense of Respondents, such consultants, accountants, attorneys, and other representatives and assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Monitor Trustee shall account for all expenses incurred, including fees for his or her services, subject to the approval of the Commission.
- F. The Monitor Trustee shall serve, without bond or other security, at the cost and expense of Respondents, on reasonable and customary terms commensurate with the Monitor Trustee's experience and responsibilities.

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Respondents shall indemnify the Monitor Trustee and hold the Monitor Trustee harmless against any losses, claims, damages, liabilities, or expenses arising out of, or in connection with, the performance of the Monitor Trustee's duties, including all reasonable fees of counsel and other expenses incurred in connection with the preparation for, or defense of any claim, whether or not resulting in any liability, except to the extent that such liabilities, losses, damages, claims, or expenses result from misfeasance, gross negligence, willful or wanton acts, or bad faith by the Monitor Trustee.

- G. The Monitor Trustee shall have no responsibility or obligation for the operation of Respondents' businesses.
- H. The Monitor Trustee shall serve until such time as Respondents have complied with their obligations pursuant to this Order to Hold Separate.
- I. If the Commission determines that the Monitor Trustee has ceased to act or failed to act diligently, the Commission may appoint a substitute Monitor Trustee who shall have all the rights, duties, powers, authorities, and responsibilities described in this paragraph. The Commission shall select the substitute Monitor Trustee, subject to the consent of Respondents, which consent shall not be unreasonably withheld. If Respondents have not opposed, in writing, including the reasons for opposing, the selection of any proposed substitute Monitor Trustee within ten (10) days after notice by the staff of the Commission to Respondents of the identity of any proposed substitute Monitor Trustee, Respondents shall be deemed to have consented to the selection of the proposed substitute Monitor Trustee. Within ten (10) days after the appointment of the substitute Monitor Trustee, Respondents shall execute a trust agreement that, subject to the prior approval of the Commission, confers on the substitute Monitor Trustee all the power and authority necessary to permit the substitute Monitor Trustee to monitor Respondents' compliance with

Order

the terms of this Order to Hold Separate in a manner consistent with the purposes of this Order to Hold Separate.

- J. The Commission may on its own initiative or at the request of the Monitor Trustee issue such additional orders or directions as may be necessary or appropriate to assure compliance with the requirements of this Order to Hold Separate.
- K. The Monitor Trustee shall report in writing to the Commission concerning Respondents' compliance with this Order to Hold Separate thirty days after execution of the trust agreement and every ninety days thereafter until this Order to Hold Separate terminates.

V.

IT IS FURTHER ORDERED that Respondents shall, within ten (10) days of the date this Order to Hold Separate is final, circulate to all of Respondents' employees a copy of this Order to Hold Separate and shall post a notice accessible to all employees informing employees of Respondents' obligations pursuant to this Order to Hold Separate.

VI.

IT IS FURTHER ORDERED that Respondents shall notify the Commission at least thirty (30) days prior to any proposed change in the Respondents such as dissolution, assignment, sale resulting in the emergence of a successor corporation or company, or the creation or dissolution of subsidiaries or any other change in the corporation that may affect compliance obligations arising out of this Order to Hold Separate.

VII.

IT IS FURTHER ORDERED that for the purposes of determining or securing compliance with this Order to Hold Separate, and subject to any legally recognized privilege, and

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upon written request with reasonable notice to Respondents, Respondents shall permit any duly authorized representatives of the Commission:

- A. Access, during office hours of Respondents upon reasonable notice and in the presence of counsel, to inspect and copy all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of Respondents relating to any matters contained in this Order to Hold Separate; and
- B. Upon five (5) business days' notice to Respondents and without restraint or interference from Respondents, to interview officers, directors, or employees of Respondents, who may have counsel present, regarding such matters.

VIII.

IT IS FURTHER ORDERED that this Order to Hold Separate shall terminate on the earlier of:

- A. The day after the Commission withdraws its acceptance of the Consent Agreement pursuant to the provisions of Commission Rule 2.34, 16 C.F.R. §§ 2.34;
- B. The day after Respondents, in accordance with the requirements of Paragraph II. of the Decision and Order, have made Available Affiliated Cable Broadband ISP Service throughout all of the Identified Cable Divisions; ***provided, however,*** that Respondents' obligations pursuant to Paragraph II. of this Order to Hold Separate in a particular Cable Division shall terminate on the day after Respondents have made Available Affiliated Cable Broadband ISP Service throughout that Cable Division so long as the termination of Respondents' obligations pursuant to Paragraph II. of this Order to Hold Separate in that Cable Division does not affect, in any way, directly or indirectly, Respondents' compliance with Paragraph II of

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this Order to Hold Separate throughout the remainder of Respondents' Cable Holdings;

C. In the event that Respondents abandon their plans to consummate the proposed Merger and so notify the Commission, on the day after the date they withdraw their respective Notification and Report Forms filed pursuant to Section 7A of the Clayton Act, 15 U.S.C. § 18a, and the regulations promulgated thereunder, 16 C.F.R. §§ 800 *et seq.* in connection with the proposed Merger; or

D. On the date the Decision and Order terminates.

By the Commission.

Analysis

Analysis of Proposed Consent Order to Aid Public Comment

Issued when the Commission tentatively approved a proposed consent order on December 14, 2000

I. Introduction

The Federal Trade Commission (“Commission”) has accepted for public comment from America Online, Inc. (“AOL”) and Time Warner Inc. (Time Warner”) (collectively “Proposed Respondents”) an Agreement Containing Consent Orders (“Proposed Consent Agreement”), including the Decision and Order (“Proposed Order”). The Proposed Respondents have also reviewed a draft complaint. The Commission has now issued the complaint and an Order to Hold Separate (“Hold Separate Order”). The Proposed Consent Agreement intends to remedy the likely anticompetitive effects arising from the merger of AOL and Time Warner.

II. The Parties and the Transaction

AOL is the world's leading internet service provider (“ISP”), providing access to the internet for consumers and businesses. AOL operates two ISPs: America Online, with more than 25 million members; and CompuServe, with more than 2.8 million members. AOL also owns several leading Internet products including AOL Instant Messenger, ICQ, Digital City, MapQuest, and MoviePhone; the AOL.com and Netscape.com portals; the Netscape 6, Netscape Navigator and Communicator browsers; and Spinner.com and NullSoft’s Winamp, leaders in Internet music.

Time Warner is the nation’s second largest cable television distributor, and one of the leading cable television network providers. Time Warner’s cable systems pass approximately 20.9 million homes and serve approximately 12.6 million cable television subscribers, or approximately 20% of U.S. cable television households. Time Warner, or its principally owned subsidiaries, owns leading cable television networks, such as HBO, Cinemax, CNN, TNT, TBS Superstation, Turner Classic Movies and Cartoon Network.

Analysis

Time Warner also owns, directly or through affiliated businesses, a wide conglomeration of entertainment or media businesses. Time Warner's holdings include leading magazine franchises, such as Time, People and Sports Illustrated; copyrighted music from many of the world's leading recording artists that it produces and distributes through a family of established record labels, such as Warner Bros. Records, Atlantic Records, Elektra Entertainment and Warner Music International; the unique and extensive film and animation libraries owned or managed by Warner Bros. and New Line Cinema; and trademarks, such as the Looney Tunes characters, Batman and The Flintstones; the WB Network, a national broadcasting network; and Internet websites, such as CNN.com. Time Warner is the majority owner of Road Runner (the trade name of ServiceCo, LLC), the second largest provider of cable broadband ISP service in the U.S., serving more than 1.1 million subscribers. Road Runner has an exclusive contract to provide cable broadband ISP service via Time Warner's cable systems through December 2001.

On January 10, 2000, AOL and Time Warner entered into an Agreement and Plan of Merger (the "merger"), pursuant to which Time Warner common stockholders will receive 1.5 shares of the combined AOL Time Warner ("combined company," or "AOL Time Warner") for each share of Time Warner common stock they hold. AOL common stockholders will receive one share of common stock of AOL Time Warner for each share of AOL common stock they hold.

III. The Proposed Complaint

According to the complaint the Commission intends to issue, AOL's merger with Time Warner will have anticompetitive effects in three relevant product markets: (1) the market for broadband Internet access; (2) the market for residential broadband Internet transport services, or last mile access; and (3) the market for interactive television ("ITV") services.

Analysis

AOL is the dominant narrowband ISP. Its narrowband customer base positions AOL to become a significant broadband ISP competitor as well. Time Warner provides broadband Internet access through Road Runner, a partially owned subsidiary in which it has a controlling interest. AOL and Road Runner are two of the most significant broadband ISP competitors in Time Warner cable areas. According to the Commission's draft complaint, the relevant broadband ISP markets are or are likely to become highly concentrated as a result of the merger, and the merger will increase the ability of the combined firm to unilaterally exercise market power in Time Warner cable areas and throughout the United States. Moreover, new entry is not likely to be timely or sufficient to prevent the combined firm from exercising market power.

In the market for broadband Internet transport services, the Commission's complaint alleges that cable television lines and digital subscriber lines ("DSL") are the two principal means of providing last mile access for broadband ISPs to the customers. Satellite and fixed wireless technologies also provide last mile access, but consumers do not view them as viable alternatives for DSL or cable broadband access. Currently, AOL's principal means of providing broadband access to its subscribers is through DSL, and every broadband subscriber it signs represents a lost revenue opportunity for cable broadband providers. AOL's merger with Time Warner will reduce its incentives to promote and market broadband access through DSL in Time Warner cable areas, adversely affecting DSL rollout in those areas and nationally, and will increase AOL Time Warner's ability to exercise unilateral market power in those areas.

According to the Commission's complaint, ITV combines television programming with Internet functionality. Cable television lines have distinct competitive advantages over DSL in providing ITV services to broadband customers. AOL recently launched AOL TV, a first generation ITV service, and is well positioned to become the leading ITV provider. Local cable companies will play the key role in enabling the delivery of ITV

Analysis

services. After the merger, AOL Time Warner will have incentives to prevent or deter rival ITV providers from competing with AOL's ITV service. Thus, the merger could enable AOL to exercise unilateral market power in the market for ITV services in Time Warner cable areas, which also affects the ability of ITV providers to compete nationally.

IV. Terms of the Proposed Order

The Proposed Order is effective for a term of five years and resolves the Commission's antitrust concerns with the merger as discussed below.

A. Broadband Internet Access Services

Under the terms of the Proposed Order, before Time Warner can make AOL's broadband ISP service available in certain identified cable divisions representing over 70 percent of Time Warner's cable customers ("Identified Cable Divisions"),¹ Time Warner must first make available cable broadband service offered by Earthlink, Inc. pursuant to an agreement between Time Warner and Earthlink that the Commission has evaluated and approved.

In addition, Respondents cannot begin to advertise or promote AOL's broadband ISP service to subscribers in a cable division until Earthlink's competing ISP service is available to subscribers in that cable division or Earthlink advertises or promotes its service in that cable division, whichever occurs first. These provisions ensure that a competing ISP service, which is not

¹ The identified cable divisions to which this provision applies are: New York City, Tampa Bay, Central Florida, Houston, Raleigh/Fayetteville, Western Ohio, Northern Ohio, Charlotte, Los Angeles, Milwaukee, Greensboro, Hawaii, Cincinnati, San Antonio, Syracuse, Kansas City, South Carolina, Columbus, Rochester, Albany, and any other cable division with 300,000 subscribers or more that is controlled by Respondents.

Analysis

affiliated with AOL Time Warner, is available to subscribers in most Time Warner cable areas at the same time that AOL introduces its cable broadband ISP service. It does not prevent Time Warner from conducting tests involving a limited number of subscribers that are purely for technological and operational implementation purposes, rather than for commercial purposes.

Within 90 days of making AOL's broadband ISP service available to subscribers, Time Warner must enter into agreements to carry at least two other non-affiliated broadband ISPs to provide cable broadband ISP services in the Identified Cable Divisions. The non-affiliated ISPs, and Time Warner's agreements with them, must receive the prior approval of the Commission. If Time Warner fails to enter into such agreements within this time period, the Commission may appoint a trustee who will have the authority to enter into such agreements on Time Warner's behalf. These agreements must also receive the prior approval of the Commission. These agreements must be on terms comparable to either the Earthlink agreement, or any agreement between AOL and another cable system to provide AOL's cable broadband ISP service over that cable system.²

In Time Warner's other cable divisions, Time Warner must enter into cable broadband ISP service agreements that have received the prior approval of the Commission with at least three other non-affiliated ISPs that have received the prior approval of the Commission within 90 days of making AOL's cable broadband ISP service available in each such division. If Time Warner fails to enter into such agreements within this time period, the Commission may appoint a trustee who will have the authority to enter into such agreements, which will be subject to the prior approval of the Commission. These agreements must be on terms comparable to either another alternative cable broadband ISP service agreement between a broadband ISP and the Proposed

² This provision applies to the following cable systems: Adelphia, AT&T, Cablevision, Charter, Comcast, and Cox.

Analysis

Respondents approved by the Commission, or any agreement between AOL and another cable system to provide AOL's cable broadband ISP service over that cable company's system.

The Proposed Order requires Time Warner to include several provisions in the agreements it negotiates with the non-affiliated ISPs. Specifically:

- Time Warner must include a most favored nation ("MFN") clause in all alternative cable broadband ISP service agreements submitted to the Commission for approval. The MFN must provide that if AOL executes a cable broadband ISP service agreement with another cable system operator, Respondents must provide a copy of the agreement with that cable system operator to a Monitor Trustee appointed by the Commission; give notice of the execution of the agreement to each non-affiliated ISPs that is a party to an alternative cable broadband ISP service agreement approved by the Commission; and give the non-affiliated ISPs the ability to convert to all of the rates and terms in the cable system operator's agreement;
- Time Warner must also include in all alternative cable broadband ISP service agreements submitted to the Commission for approval a requirement that if Proposed Respondents makes available different levels of service to their affiliated ISPs, they must make those levels of service available to non-affiliated ISPs;
- Time Warner must also include in all alternative cable broadband ISP service agreements submitted to the Commission for approval a requirement that if Proposed Respondents make available any network flow monitoring data or usage accounting to any of their affiliated ISPs, they must make that same data or accounting available to non-affiliated ISPs;

Analysis

- Time Warner must also include in all alternative cable broadband ISP service agreements, at the option of the non-affiliated ISP, a requirement that disputes concerning compliance with the rates, terms, and conditions of that agreement shall be submitted to binding arbitration; and
- If requested by a non-affiliated ISP, Time Warner must provide the non-affiliated ISPs with the same point of connection within Time Warner's cable divisions that Time Warner provides to affiliated ISPs. This provision is intended to ensure that Time Warner may not discriminate against non-affiliated ISPs by providing them with a less-advantageous connection point to its network than it provides to AOL.

If any of the alternative cable broadband ISP service agreements approved by the Commission is for a term that terminates prior to expiration of the Proposed Order (*i.e.*, five years from the date the Proposed Order becomes final), the Proposed Order requires Time Warner to enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, that must take effect immediately upon the expiration of the original agreement. If the original alternative cable broadband ISP service agreement is for a term of at least three years, Time Warner must offer the non-affiliated ISP that is a party to that agreement an option to renew the agreement for at least two years.

If Time Warner terminates any of the alternative cable broadband ISP service agreements approved by the Commission before the expiration of the Proposed Order, the Proposed Order requires Time Warner to enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, which must take effect immediately upon the expiration of the original agreement.

Analysis

If any non-affiliated ISP terminates its alternative cable broadband ISP service agreement approved by the Commission before the expiration of the Proposed Order, or if the non-affiliated ISP ceases to make its ISP service available to subscribers in a particular identified cable division, Time Warner must enter into an additional alternative cable broadband ISP service agreement with a non-affiliated ISP, subject to the Commission's approval, within 90 days after the original non-affiliated cable broadband ISP service is no longer available to subscribers.

In addition to the broadband ISP service agreements described above, the Proposed Order also requires Time Warner to negotiate and enter into arms' length, commercial agreements with any other non-affiliated ISP that seeks to provide cable broadband ISP service on Time Warner's cable system. Time Warner may decline to enter into such negotiations or agreements or impose rates, terms, or conditions based on cable broadband capacity constraints, other cable broadband technical limitations, or cable broadband business considerations, but only so long as it makes such determinations without discrimination on the basis of affiliation and not on the basis of the impact on Proposed Respondents' ISPs (including, but not limited to a decrease in subscribers of Proposed Respondents' ISPs).

The purpose of these provisions is to ensure that a full range of content and services from non-affiliated ISPs is available to subscribers; prevent discrimination by Proposed Respondents as to non-affiliated ISPs on the basis of affiliation, which would interfere with the ability of the non-affiliated ISP to provide a full range of content and services; and remedy the lessening of competition in the market for broadband ISP service as alleged in the Commission's complaint.

A. Interactive Television and Other Internet Services

Section III of the Proposed Order prohibits Time Warner from interfering in any way with content passed along the bandwidth

Analysis

contracted for and being used by non-affiliated ISPs in compliance with their agreements with Proposed Respondents. The Proposed Order also prohibits Time Warner from discriminating on the basis of affiliation in the transmission or modification of content that Time Warner has contracted to deliver to subscribers over its cable systems. The Proposed Order specifically prohibits Time Warner from interfering with the ability of a subscriber to use, in conjunction with ITV services provided by a non-affiliated entity, interactive signals, triggers, or other content that the Proposed Respondents have agreed to carry. If Time Warner has agreed to transmit ITV signals or interactive triggers that AOL subscribers can use, it cannot block transmission of such ITV signals or triggers to subscribers using a competing ITV service. In addition, the Proposed Order prohibits the Proposed Respondents from entering into any agreement with any other cable system that would interfere with the ability of the other cable system to enter into agreements with non-affiliated ISPs or ITV providers.

The Proposed Order also requires the Proposed Respondents to provide the Commission with all complaints from any non-affiliated broadband ISP relating to the failure of the Proposed Respondents to make content available. The Proposed Order also requires the Proposed Respondents to notify the Commission whenever a television programmer complains that the Proposed Respondents have failed to carry interactive triggers, signals or content through its cable systems.

B. Broadband Transport Services

Section IV of the Proposed Order requires AOL to charge the same or comparable price for its DSL service to subscribers in Time Warner cable areas where AOL cable broadband ISP service or Road Runner is available as AOL charges for its DSL service in areas in which neither AOL cable broadband ISP service nor Road Runner is available. However, AOL may charge different prices for its DSL service to the extent such pricing differences reflect any actual cost differences for DSL transmission services. The Proposed Respondents must include a description of these cost

Analysis

differences in the reports they are required to submit to the Commission.

The Proposed Order also requires AOL to market and promote its DSL services to subscribers in Time Warner cable areas where AOL cable broadband ISP service or Road Runner is available at the same or comparable level and in the same or comparable manner as it markets and promotes DSL services to subscribers in areas in which neither AOL cable broadband ISP service nor Road Runner is available.

C. Monitor Trustee Provisions

The Proposed Consent Order authorizes the Commission to appoint a Monitor Trustee to monitor compliance with the Order at any time after the Proposed Respondents sign the Consent Agreement. The Proposed Consent Order provides the Monitor Trustee with the power and authority to monitor the Proposed Respondents' compliance with the terms of the Proposed Consent Order, and full and complete access to personnel, books, records, documents, and facilities of the Proposed Respondents to fulfill that responsibility. In addition, the Monitor Trustee may request any other relevant information that relate to the Proposed Respondents' obligations under the Proposed Consent Order. The Proposed Consent Order precludes Proposed Respondents from taking any action to interfere with or impede the Monitor Trustee's ability to perform his or her responsibilities or to monitor compliance with the Proposed Consent Order.

The Monitor Trustee may hire such consultants, accountants, attorneys, and other assistants as are reasonably necessary to carry out the Monitor Trustee's duties and responsibilities. The Proposed Consent Order requires the Proposed Respondents to bear the cost and expense of hiring these assistants.

D. Trustee Provisions

Analysis

The Proposed Consent Order provides that the Commission may appoint a trustee to enter into broadband agreements with non-affiliated ISPs in two instances. First, if the Proposed Respondents have failed to enter into agreements with two additional ISPs in the Identified Cable Divisions within 90 days of making an affiliated ISP available to subscribers, the Commission may appoint a trustee to enter into an agreements, subject to the prior approval of the Commission. The trustee shall, for an additional 90 days, offer to enter into agreements with non-affiliated ISPs that are comparable, taken as a whole, to (1) the Earthlink agreement; or (2) any broadband agreement AOL enters into with any other cable system operator. The trustee's obligation is to ensure that at least two non-affiliated ISPs are available on the Time Warner system in these divisions in addition to Earthlink.

The Commission may also appoint a trustee to enter into agreements in other Time Warner cable divisions if the Proposed Respondents fail to enter into agreements with at least three non-affiliated ISPs that the Commission approves within 90 days of making any affiliated ISP available. The trustee shall, for an additional 90 days, offer to enter into agreements with non-affiliated ISPs that are comparable, taken as a whole, to (1) any other broadband agreement with a non-affiliated ISP for carriage on any Time Warner cable system; or (2) any broadband agreement AOL enters into with any other cable system operator. The trustee's obligation is to ensure that at least three non-affiliated ISPs are available on the Time Warner cable systems in these divisions.

E. Order to Hold Separate

In addition to the Proposed Order, the Commission also issued an Order to Hold Separate ("Hold Separate Order"). The purpose of the Hold Separate Order is to prevent interim harm to competition and to prevent AOL from gaining a competitive first mover advantage through a relationship with Road Runner.

Analysis

The Hold Separate Order requires the Proposed Respondents to hold AOL and Road Runner separate in each Identified Cable Division until they have made an affiliated ISP available to broadband customers in that Identified Cable Division. The Hold Separate Order expressly prohibits AOL and Road Runner from, among other things, cross or joint promotional activities, joint or cooperative advertising, and any steps to benefit, directly or indirectly, from each other's business activities.

The Commission may appoint a trustee to monitor compliance with the terms of the Hold Separate Order.

X. Opportunity for Public Comment

The Proposed Consent Agreement has been placed on the public record for 30 days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty days, the Commission will again review the Proposed Consent Agreement and the comments received and will decide whether or not to make the Proposed Order final.

By accepting the Proposed Agreement subject to final approval, the Commission anticipates that the competitive problems alleged in the complaint will be resolved. The purpose of this analysis is to invite public comment on the Proposed Consent Agreement, to aid the Commission in its determination of whether it should make final the Proposed Order contained in the agreement. This analysis is not intended to constitute an official interpretation of the Proposed Order, nor is it intended to modify the terms of the Proposed Order in any way.

Statement

**Concurring Statement of Commissioner
Mozelle W. Thompson**

The Commission has determined to issue, with certain modifications, a final consent order in connection with the merger of America Online, Inc. and Time Warner Inc. This merger marks the first, and potentially most significant convergence of an Internet giant with a media, entertainment and cable conglomerate. Because it will form a broadband Internet powerhouse spanning the three market tiers of content, consumer interface, and broadband conduit, it may also shape the very contours of the market for high speed Internet. In reviewing the merger, I have been concerned that without relief, the transaction would have threatened the significant open market environment that high technology and Internet companies, innovators, and consumers enjoy. I voted to accept the settlement, however, because the consent will not only provide a means to address these concerns, but will also send an important message to the market that high speed Internet should continue to provide consumers with choice of service and diversity of content.

It is important to note that our remedy does give me pause for several reasons. First, the remedy – as some might observe – appears to be an unusually regulatory solution for a merger order. I generally prefer the divestiture of an ongoing business – *i.e.*, structural relief – to restore lost competition, a policy that the Commission has increasingly favored when settling merger cases.¹ Moreover, it is difficult to determine whether the order's five-year duration is too limited to accomplish the full goal of the relief.

Second, I am concerned that the Commission's open access relief might not preclude the possibility of harm from the merged

¹ In matters such as this one, where the parties repeatedly failed to articulate how the merger would benefit consumers, I tend to believe that structural relief – or outright challenge of the merger – is even more warranted to preserve the public interest.

Statement

entity's control of AOL and Time Warner content along with the Time Warner cable systems. The settlement nonetheless marks an important first step for future open competition on cable for Internet service providers and content providers. The relief provides that the Commission will supervise AOL Time Warner's conduct for five years; however, it tells the market to continue to demand openness and competition in this important area. I note also that the negotiated relief was improved from the companies' earliest proposals.

That being said, I also hope that the public does not over-interpret today's decision; despite the fact that this merger has been allowed to proceed without challenge, I expect that the Commission will scrutinize future Internet mergers as it does any merger – on a case-by-case basis. Moreover, the Commission will continue to exercise its antitrust responsibilities by taking appropriate action against anti-competitive behavior. Finally, though many interested parties will, no doubt, scrutinize the terms of the ordered ISP access agreements, these should not necessarily be seen as a template for future Internet access, but should instead be regarded as examples of how the public should share the benefits provided by the principles of Internet openness and diversity.

For those reasons, I concur with issuing the consent order, as modified.

Complaint

IN THE MATTER OF

ALASKA HEALTHCARE NETWORK, INC.

CONSENT ORDER, ETC., IN REGARD TO ALLEGED VIOLATIONS OF
SEC. 5 OF THE FEDERAL TRADE COMMISSION ACT

Docket C-4007; File No. 9910103
Complaint, April 25, 2001--Decision, April 25, 2001

This consent order addresses practices used by Respondent Alaska Healthcare Network, Inc. -- a non-profit corporation composed of more than 60 percent of the physicians with active medical staff privileges at Fairbanks Memorial Hospital in Alaska -- with respect to the prices and other terms of trade on which its members deal with payors. The order, among other things, prohibits the respondent from entering into or facilitating any agreement (1) to negotiate on behalf of any physicians with any payor or provider; (2) to deal or refuse to deal with any payor or provider; (3) regarding any term on which any physicians deal, or are willing to deal, with any payor or provider; or (4) to restrict the ability of any physician to deal with any payor or provider on an individual basis or through any other arrangement. The order also prohibits the respondent from exchanging or facilitating the exchange of information among Fairbanks area physicians concerning (1) negotiation with any payor or provider regarding reimbursement terms; or (2) any physician's intentions or decisions with respect to any dealings with any payor or provider. In addition, the order prohibits the respondent from encouraging, advising, or pressuring any person, other than the government, to engage in any action prohibited by the order. The order also provides that, for five years, if the respondent offers the services of its physicians through any other arrangement, its participating physicians must constitute no more than 50 percent of Fairbanks physicians in any of those specialties.

Participants

For the Commission: *Paul J. Nolan, Judith A. Moreland, Shane Woods, David R. Pender, Richard A. Feinstein, Joseph Eckhaus, Roberta S. Baruch, Jane E. Ruseski, Louis Silvia, and Gregory Vistnes.*

For the Respondent: *Douglas Ross, Davis Wright Tremaine, LLP.*