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PRESS STATEMENT OF COMMISSIONER MICHAEL POWELL ON THE APPROVAL OF AOL-TIME WARNER MERGER

This is unquestionably one of the most significant mergers in history and I am pleased to support it. It has presented challenging issues. The challenge is found in the fact that the merger's putative benefits and harms principally lie in the future and will be realized, if at all, only after combining unique assets and offering innovative services. Fascinating though the issues are, and as serious as they are, I believe the Majority has given in too much to their collective imaginations, rather than sound reasoning based on the record, in reaching some of the conditions on the merger.

Instant Messaging (IM)

I concede there are serious questions presented by AOL's dominance of current IM products. But, at the end of the day, I believe the record and the anticompetitive theory did not support mandating interoperability. The Majority, however, accepts a competitive analysis that I believe is flawed and undermined by the known evidence. No competent antitrust authority, to my mind, would conclude intervention was necessary, nor do I believe such an analysis would withstand judicial review. Indeed, the Federal Trade Commission (FTC) having reviewed the merger did not choose to condition IM, nor did the European Union merger authority. Yet according to the evolving analysis as it exists now, the FCC is undeterred and wherever the competitive analysis is obviously ailing, the holes are plugged by resorting to the venerable and amorphous public interest standard. Moreover, the Majority appears to proceed based on its own sweeping technical conclusion that IM is an essential facility for nearly all future real time, interactive Internet communications—A breathtaking prediction and conclusion by a regulatory agency.

Despite the Majority's analysis that purports to show a competitive problem in need of a remedy, the Majority (perhaps to its credit) does not mandate interoperability for current iterations of IM. Instead, it drives to condition a hypothesized product and a hypothesized market. By its action, the Commission mandates that AOL Time Warner must offer interoperability for a product that does not as yet exist—some sort of new-fangled video Instant Messaging product that it calls an Advanced IM-based High-Speed Service, or "AIHS." When a regulatory agency has to make up its own acronym to describe a product or service it intends to regulate, one should be concerned. ("Behold the Wizard of AIHS.")

The concern is the implication for Internet regulation. This *Order* makes clear that the FCC has jurisdiction to regulate virtually every Internet product, or service that facilitates communications under Title I of the Communications Act. But, imposing IM conditions under

that authority ignores the fact that the Commission, for decades now, has expressly *declined* to regulate similar computer, data processing and information services for the very reason that such interference would undermine the energy and drive toward innovation that characterizes these highly competitive markets. Based on the letter of the statute, this may be correct and FCC involvement in Internet communications services may be inevitable. Yet, the implications of that step are not fully considered here and that is why I am most hesitant (indeed unwilling) to make such a substantial leap in the context of an adjudicatory proceeding, without greater notice and a fuller and broader opportunity to comment that would result from an inquiry or rulemaking proceeding. Unlike traditional telecommunications infrastructure, like cable or DSL, that affect Internet transmission, IM is a software application born purely of the mother Internet. We accept this child with little appreciation of what the responsibility entails.

Cable High-Speed Internet Access

As for the conditions regarding high-speed Internet access, I would point out that we have, in our previous mergers, repeatedly declined to address the question of mandating open cable access because most of the questions raised were not merger-specific, and more rightly were a debate about the regulatory paradigm for these new services offered over cable infrastructure. Indeed, we have already initiated such a proceeding. I would not have abandoned this prudent policy, especially given that any concerns could easily be addressed in the open access NOI proceeding.

I agree that there are clearly enhanced dangers that result from the combination of these specific companies. AOL is by far, the largest ISP. Moreover, it is gaining ownership of the second largest cable system, as well as Time Warner's leading high speed Internet service provider and its very significant content. Thus, as a general matter, I would agree that there are merger-specific risks presented that should be addressed by government.

I believe, however, that the FTC consent decree substantially, if not fully, answers these issues, and can easily be read substantially to encompass even those specific conditions that we gratuitously pile on to the FTC's good works. I see no reason for these conditions here, notwithstanding my colleagues' suggestion that these are essentially only icing on the pro-competitive cake baked by the FTC. I would, however, support any decision by the Majority to state expressly that the conditions imposed in this merger do not prejudge the high-speed Internet access NOI, that the parties appear to have accepted such conditions in their agreements, and that these conditions provide substantial flexibility for parties to negotiate commercially reasonable terms and conditions. As a practical matter, I have no doubt that these conditions will distort discussion about what, if any, rules are necessary to promote the availability of multiple ISPs on cable or other broadband platforms.

Interactive Television

I am persuaded, with some reservations, that the Commission should begin to look more closely at interactive television (ITV) to see whether regulatory intervention is necessary and appropriate. This merger has highlighted the growing development of ITV and has identified specific potential obstacles to the development of a competitive landscape for such services. Yet, ITV remains (stubbornly) in its infancy, leaving us with an unfocused picture of what the products should be or of the contours of the market for such products. In sum, although it is surely possible to hypothesize public interest harms flowing from a cable operator's control of assets like those at issue in this merger, the market is too immature to conclude with any confidence whether such harms are sufficiently probable to warrant direct government intervention.

Nevertheless, the issues raised in this proceeding are not trivial, and clearly warrant fuller examination by the Commission. By our action, we initiate a proceeding to develop a thorough and comprehensive record to guide our future deliberations on this issue, to determine whether a set of generally applicable rules are warranted, and to flesh out what specifically those rules would need to address.