

## STATEMENT OF CHAIRMAN MICHAEL K. POWELL

*Re: Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferree; CS Docket No. 00-30.*

Today we adopt an Order removing a condition, imposed pursuant to the Commission's approval of the AOL Time Warner merger, relating to the provision of advanced instant messaging-based high-speed video services ("AIHS") by AOL Time Warner. As I explained in my separate statement to the AOL Time Warner Order,<sup>1</sup> I disagreed with the decision to impose the condition at that time, and subsequent events have confirmed the analysis set forth in my statement. I therefore wholeheartedly support the decision to remove the AIHS condition.

In my separate statement to the AOL Time Warner Order, I wrote that the majority's decision to impose the condition was faulty for several reasons. That the Commission strayed out of its core competencies in its analysis of instant messaging should now be clear. As I noted in my statement, the Commission provided no clear market definition, used inconclusive market share data, and relied upon a flawed "tipping" analysis with respect to instant messaging.<sup>2</sup>

We now have two-and-one-half years of evidence that the market is not tipping. The fact that AOL Time Warner's market share is decreasing in a growing market, combined with the fact that two non-trivial competitors -- Microsoft and Yahoo -- have established stable and growing market shares, directly contravenes the theory that the market is tipping toward AOL Time Warner.<sup>3</sup> The Commission anticipated the possibility that its tipping analysis was flawed and included a provision for the company to petition the Commission to remove the condition.

I would underscore the procedural posture of the case. The Commission's fear in the AOL Time Warner Order was that the merged firm would dominate the broadband market through its AIHS application over broadband. Clearly that has not transpired. Yet the dissent stands for the proposition that broadband consumers still need the government to protect them from a company that is in a weaker competitive position today than when the condition was imposed.

Moreover, I would reject any suggestion in the dissent that the focus of today's Order is the possible public good inherent in interoperability for all IM providers. If IM interoperability is good public policy generally, it should be good for Yahoo, Microsoft, and other IM providers. Indeed the dissent exhibits a desire for a rule of general applicability when it calls for "an open Internet without bottleneck controls," yet as I have stated repeatedly, FCC merger conditions clearly demand specificity to

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<sup>1</sup> See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and American Online, Transferors, to AOL Time Warner, Inc., Transferree*, 16 FCC Rcd 6547, 6700-14 (2001) ("Order"), *Separate Statement of Commissioner Michael K. Powell*.

<sup>2</sup> The analysis of instant messaging can be found in the *Order*, 16 FCC Rcd at 6603-30 ¶¶ 128-200.

<sup>3</sup> Even stable market shares would disprove tipping, because tipping is characterized by rapid growth in the largest market share, and rapidly declining market share for others. As I noted in my statement, the analysis was already undermined by developments in the market as the *Order* was being written. Two competitors (Yahoo! and Microsoft) had already gained substantial market share and were growing at a substantial rate.

the transaction before us.<sup>4</sup> If a requirement is in the public interest generally, it should be required of all providers through a rulemaking. Regulators must resist using merger conditions to make policy that the agency is unable or unwilling to impose on the broader industry at large.

How much longer would the dissenters have us wait before agreeing that AOL Time Warner is not going to dominate AIHS?<sup>5</sup> For the past two and a half years, the United States government decided – in the name of consumer protection -- to completely preclude one company from competing in a fast-changing high tech market and bringing more choice and innovation to consumers. Instead of supporting today's pro-consumer decision, however, the dissenters would continue this misguided central planning policy for the high tech industry. I marvel at the willingness of my dissenting colleagues to use the powerful levers of government to manipulate market outcomes in the complete absence of any actual harm to consumers.

Second, the lack of participation by affected parties speaks volumes. Neither Yahoo! nor Microsoft, the supposed beneficiaries of the condition, has argued to keep the condition. Similarly, consumer advocates did not file to argue that this condition is necessary to protect consumers. This lack of participation suggests to me that continued imposition of the condition is regulation for the sake of regulation with no clear purpose or public interest value.

Third, although AOL Time Warner did not need to show affirmative public interest benefits, only changed conditions, the public clearly will benefit by lifting the condition. Removal of the condition will benefit consumers through the addition of a third significant competitor to the AIHS market, furthering the Commission's policy goal of promoting competition in communications services. The dissent dismisses this pro-competition claim partly because "we have no assurance that removal of the condition will actually make the IM market more competitive in the future."<sup>6</sup> While the future can never be predicted with "assurance," there can be little doubt that competition will be enhanced when AOL Time Warner begins offering AIHS service to consumers in competition with Microsoft and Yahoo.

With the removal of the instant messaging condition, AOL Time Warner will be able to offer new and innovative AIHS services and provide competitive choices to the marketplace. AOL's experience and history of innovation with instant messaging suggests that its own AIHS product could result in an offering with significant value for consumers. Such innovation very likely will stimulate competitive responses by Yahoo!, Microsoft, and other instant messaging providers, all to the benefit of consumers.

By increasing innovation in the AIHS market, removal of the condition will also stimulate broadband usage and deployment, another objective of the Communications Act and the Commission. Since video streaming AIHS services can be provided most effectively via broadband facilities, the

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<sup>4</sup> See, e.g., *Memorandum Opinion and Order, Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, For Consent to Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Section 214 and Section 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules (CC Docket No. 98-141)*(Statement of Commissioner Michael K. Powell, Concurring in Part and Dissenting in Part)("The conditions that are sought [in mergers] are more often surrogates for policies and rules of general, rather than merger-specific, applicability, but without the extensive deliberative process and the check of judicial review normally afforded a rulemaking.")

<sup>5</sup> Only two-and-one-half years are left before the condition expires on its own. Is it realistic to suppose that within that time a market will develop for AIHS, and AOL will still be able to use its vastly diminished position to dominate this market?

<sup>6</sup> Statement of Commissioners Michael J. Copps and Jonathan S. Adelstein, Dissenting, at 3.

provision of new AIHS services could contribute to consumer demand for broadband services, which may in turn strengthen incentives for companies to bring broadband services to all areas of the country. These public interest benefits are much more likely with AOL Time Warner as a competitor in AIHS service; removal of the condition eliminates an artificial barrier of entry and likely will improve the performance of whatever market may develop.

While neither company has achieved the goal and potential public interest benefit of the condition, instant messaging interoperability, MSN and Yahoo! are clearly making headway in garnering market share in the AIHS market. Meanwhile, AOL Time Warner is prohibited from providing a competitive response to consumers over its broadband facilities as a direct result of the condition, and the hypothesized competitive harms from the combination of AOL's Internet services and Time Warner's content and broadband facilities have not materialized.

As MSN and Yahoo! take the lead in providing these new services, there is little incentive for them to achieve instant messaging interoperability with AOL Time Warner, since to do so would allow AOL Time Warner to enter the AIHS market. Thus, the consumer benefits from keeping the condition are unprovable, while the harms from retaining it are, at least to the majority, painfully apparent. I therefore support the action taken today.