

CONCURRING STATEMENT OF COMMISSIONER MOZELLE W. THOMPSON**America Online, Inc./Time Warner Inc.****Docket No. C-3989**

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 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, final.

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.