SEPARATE STATEMENT OF COMMISSIONER GLORIA TRISTANI

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., Transferee

I voted to approve the license transfers involved in the AOL and Time Warner merger because the conditions imposed to serve the public interest were the best that could be achieved under the circumstances, and tipped the balance narrowly in favor of approval. I urged my colleagues to adopt open-code interoperability as a fundamental component of the public interest in the Internet communications era. I believe that interest compelled the merged company to achieve, and publish, interoperability protocols by a date certain.[1] I write separately to distinguish the outcome for which I cast my vote, from the policy of Internet openness I urged.

I. FRAMING THE INTERNET OPENNESS PROBLEM PRESENTED BY THIS CASE

> But if I bought a radio and found that it accessed only certain stations and not others, I'd be upset. I suppose I could have a half dozen radios, one for each set of stations. It makes no more sense to have a half dozen computers or different operating systems or browsers for Web access. This is not just impractical; it fragments the Web, making it cease to be universal.[2]

What began as an inquiry into the blocking of text-based instant messages[3] ("IM") sent to AOL customers, became instead an inquiry into whether the migration of this business practice, and the proprietary code upon which it depends, to Time Warner's cable platform, would contravene the public interest in an open, interoperable Internet. We concluded the evidence in the record demonstrated AOL's business practice of controlling the flow of information to and from its customers would create unacceptable bottlenecks in the broadband world of high speed, interactive communications services.

AOL's use of proprietary code to filter out both unwanted incoming and outgoing messages confronted this agency with a new digital-era problem: communications infrastructure control that is no longer limited to opening or closing access to physical networks. The marriage of cable network hardware with the proprietary protocols necessary to access the virtual network of listeners and speakers using the Internet provides the possibility of complete control over a consumer's incoming receipt of

[1] I believe the record demonstrates this condition should have been mandatory. *See Report and Order* at Paras.169-70; 192 (identifying open protocol approach to achieving interoperability).

[2] Tim Berners-Lee, WEAVING THE WEB, at 132 (Harper Business Books 1999).

[3] *See Report and Order* at Paras. 10; 134-35 (describing markets, defining IM services and NPD).

content and outgoing speech. Because the record disclosed this code is an essential input for the future development of many, if not most, new IM-based services, and these new services will require cable modem access to the broadband pipe provided by the Time Warner network, the extent of the *future* threat was readily cognizable.[4] This Commission has not previously confronted a situation where a corporate consolidation squarely presented a commercial party's refusal to allow its system to interoperate with its competitors thereby distorting a worldwide pathway of communication.

A. Factual Background of the Parties' Physical and Virtual Networks

1. *The Physical Network Assets*[5]

Time Warner, the second largest cable provider in the country, serves 12.7 million subscribers through cable systems that pass approximately 21 million homes and serves approximately 18.9 % of the 67 million cable subscribers nationwide. Time Warner also offers Internet access over its cable systems through Road Runner, a joint venture that provides high-speed Internet access and content optimized for broadband networks to more than 1.1 million subscribers. Time Warner serves businesses through Time Warner Telecom, Inc. ("TWT"), a facilities-based communications provider serving large businesses. TWT offers businesses "last mile" broadband connections for data, high-speed Internet, local voice and long-distance services. TWT is certified to offer telecommunications services in 21 metropolitan areas in 12 states.

2. *The Virtual Network Assets*[6]

AOL is the world's largest Internet Service Provider ("ISP"), and serves about five times as many narrowband subscribers as its nearest competitor. AOL's large subscriber base and its ability to attract and hold its members to the services and information provided by AOL itself, as opposed to having them go to other sites on the World Wide Web, is highly valued.[7]

Instant messaging, in its current form, enables the almost instantaneous exchange of short, private, individualized text messages over the Internet between two users each of whom is on the other's "buddy list." AOL has an estimated 150 million users worldwide on its IM services.[8] More than 30 million individuals use IM at least once a month, and AOL transmits almost five times as many IMs a day as it does e-mails.[9]

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[4] *See Report and Order* at Paras. 176-81; *see also Steadman v. SEC*, 450 U.S. 91 (1981) (affirming agency action on a preponderance of the evidence standard).

[5] *See Report and Order* at Paras. 27-46 (Time Warner and AOL assets).

[6] *See Report and Order at* Paras 27-46 (assets); 128-45 (defining and describing instant messaging; advanced IM-based high speed services; Names and Presence database).

[7] *See Report and Order at* Para. 8, n.12.

[8] Some observers put the total number of registered IM service users under AOL's control at over 150 million. Tribal Voice Comments at 1-2 (120 million); Julia Angwin, *Instant Messaging*

An essential input[10] to an IM service is the provider's Names and Presence Database or "NPD."[11] The names and presence detection information enables users to know other users are online or available and permits messages to be addressed and delivered. The actual NPD consists of two parts. First, it is a database of the users' unique IM names and addresses and, second, it has a "presence detection" function. Presence detection is the IM provider's knowledge, and its ability to inform others, that a particular user is online and the bandwidth capacity of that user. This also signals that the user is available to engage in instant information exchange.

The NPD is the asset that allows a virtual communications network for persons who have requested participation in the network to exchange communications in real time with other users. Use of an NPD, together with the high bandwidth infrastructure provided by the cable network, will transform the Internet experience by replacing today's static pages of information with dynamic and interactive content.[12] The Report and Order characterized these new applications and services as advanced IM-based high-speed services ("AIHS").[13] It is these services that were the focus of the interoperability condition.

Services at AOL Quietly Linked, WALL ST. J., Oct. 26, 2000, at B-1, B-4 (138 million); Jim Lynch, *Instant Messaging Roundup*, MSNBC Technology, Aug. 18, 2000, at http://www.msnbc.com/news/447786.asp (visited Aug. 28, 2000) (more than 150 million users); Nick Wingfield, *Changing Chat*, WALL ST. J., Sept. 18, 2000, at R-28 (154 million registered users).

[9] *IM Interoperability: The Need for Minimum Safeguards* at 2, White Paper filed herein ("First IM White Paper") under Letter from Ross Bagully, President and CEO, Tribal Voice, and Margaret Heffernan, President and CEO, iCast, to Magalie Roman Salas, Secretary, FCC, dated Sept. 5, 2000 ("Tribal Voice and iCast Sept. 5 Ex Parte"); Nick Wingfield, *Changing Chat*, WALL ST. J., Sept. 18, 2000, at R-28.

[10] *See Report and Order* at n.376 (defining "essential input").

[11] *See, e.g.*, Letter from Karen B. Possner, Vice President – Strategic Policy, BellSouth Corp., to Magalie Roman Salas, Secretary, FCC, dated Oct. 10, 2000, Attachment (BellSouth's Views on the Effect of the Proposed America Online-Time Warner Merger on Instant Messaging and Related Capabilities) at 1.

[12] *See, e.g.*, George Gilder, TELECOSM: HOW INFINITE BANDWIDTH WILL REVOLUTIONIZE OUR WORLD 252 (2000); Francois Bar et al., *Access and Innovation Policy for the Third-Generation Internet*, TELECOMMUNICATIONS POLICY, July-Aug. 2000, at 7.

[13] IM-based services are relatively new but have shown enormous growth in popularity in recent years. Their key characteristics are the capabilities to detect whether other users of the system (whose names are kept in a Names and Presence Database) are present online and to exchange messages with them in real time. These features are predicted to have vast potential as a "platform" for the development of additional applications in the future, particularly as users obtain high-speed Internet access.

B. The Instant Messaging Market has "Tipped" Towards an AOL Monopoly

The market in text-based instant messaging is characterized by strong "network effects," *i.e.*, a service's value increases substantially with the addition of new users with whom other users can communicate. AOL, by any measure described in the record, is the dominant IM provider in America. It was also uncontested that AOL has consistently resisted interoperability with other non-licensed IM providers.[14] AOL's market dominance in text-based messaging, coupled with the network effects and its resistance to interoperability, has established a very high barrier to entry for competitors that contravenes the public interest in open and interoperable communications systems.

Recent literature suggests that near monopoly outcomes in markets exhibiting strong network effects are "tipped markets."[15] Here, we declined to opine "whether the factual conclusions [regarding text-based instant messaging] in this *Order* can be characterized as amounting to a tipped market or not."[16] However, in 1999, various non-AOL IM providers repeatedly attempted to gain access to AOL's NPD in order to pass messages between customers of AOL and other services. AOL blocked these attempts.[17] At the *en banc* hearing in this proceeding in July 2000, AOL's representatives said that protocols that allowed the messages to flow freely could not be achieved until July 2001 at the earliest.[18] AOL's competitors contended AOL could have ceased blocking competitor's messages immediately and achieved open protocols for interoperability in less time.[19] AOL's stark refusal to interoperate with its competitors, and the timeline for achieving interoperability cited at the *en banc* hearing, represented an apparent change in strategy.[20] The most reasonable inference was *AOL's strategy switch from openness to blocking was a business decision rather than one based on technical concerns*.[21]

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[14] *See Report and Order* at para. 170. AOL contends it currently cannot adequately protect its customers' privacy and security.

[15] *See, e.g.,* Andrew Watson, *Predatory Pricing in the Software Industry*, 23 RUTGERS L. REC. 1 (1998) (*citing* David S. Evans and Richard Schmalensee, *A Guide to the Antitrust Economics of Networks*, 10 Spring ANTITRUST 36, 36-37 (1996)).

[16] *See Report and Order* at n.368.

[17] iCast Comments at 1; Disney July 25 Ex Parte at 27-28; Aaron Pressman, *Microsoft Messenger Finds Its Voice* at 2, THE STANDARD, July 20, 2000.

[18] FCC En Banc Hearing, CS Docket No. 00-30 (July 27, 2000), Tr. at 167-68.

[19] *See, e.g.*, Confidential Appendix IV-B-2, Note 5; Tribal Voice Aug. 8 Ex Parte at 1-2; *see also White Paper on Instant Messaging*, at 3 (Filed September 5, 2000).

[20] *White Paper on Instant Messaging*, at 11 (Filed September 5, 2000).

[21] *See Report and Order* at Paras. 168-70 (rejecting AOL contentions).

If AOL's competitors, taken together, represented marketshare close to AOL's size, an equilibrium would have existed that would have made interoperability the most effective business strategy for all competing services because interoperability would have provided access to the maximum number of people. Each service would thereby be more useful and valuable because its users could have accessed more people. However, if one of the interoperating providers wanted to dominate the market, it could close its network and adopt a strategy of refusing to interoperate. Such a business practice would seem to make its service less valuable and hurt its users by cutting them off from the bigger, interoperating network of users. But, if the provider refusing to interoperate had a big enough share of the market *prior* to refusing to interoperate, any loss in value or harm to its business would be relatively slight because its customers would still be able to reach most other users. And when it closed its network to the clients of the smaller providers, the refusal to interoperate would result in defections from the smaller services to the dominant one. This would further swell the dominant provider's NPD and shrink the smaller ones. Without interoperability no smaller provider could catch up to the largest one.

This is precisely the business strategy that a premerger AOL undertook. Under these conditions AOL's strategy of refusing to interoperate was profitable because the incentive to switch to the largest provider could hardly be resisted. The economic and antitrust literature generally acknowledge that the only motive for a provider to close its network and refuse to interoperate is to cause the market to tip in its favor. After the point of tipping has been passed, the largest network will continue to grow at the expense of the smaller networks until it is the dominant network, perhaps possessing monopoly control. From that point forward, the dominant network remains dominant, not necessarily because it charges the lowest prices, offers the best quality, or offers innovative features that customers want, but simply because in the past it gained the most users.[22]

This is not merely sharp business practice--it contravenes well-settled federal communications policy that is equally applicable to a *virtual* communications pathway as to a *physical* one. As the Supreme Court said many years ago,

> The First Amendment's command that government not impede the freedom of speech does not disable the government from taking steps to ensure that private interests not restrict, through physical control of a critical

[22] *But see Report and Order* at n.425: "Ultimately, new technology may overcome the dominant provider's power, as the telephone did to the telegraph and airplanes and automobiles did to railroads. Many years can pass, however, before a new technology appears with enough advantages to overcome the entrenched one. That technology, too, may be deployed by the dominant incumbent, who will deploy it slower than a new entrant would. Finally, some technologies persist for very long times, such as the QWERTY keyboard."

> pathway of communication, the free flow of information and ideas.[23]

A premerger AOL demonstrated both the ability and the economic incentive to exploit its proprietary protocols and its large subscriber base to position itself as an informational gatekeeper. Based on the foregoing, and in particular on AOL's change from a policy of interoperability and openness to blocking incoming and outgoing communications, I would have concluded the narrowband IM market had tipped.[24] Because the "tipped market" will more likely than not persist in the broadband space, the record called for a mandate compelling meaningful Internet openness in the broadband space by a date certain.[25] The principle of openness I urged here, has been elegantly expressed elsewhere:

> Competition should be the policy. And code that enables competition should be the rule.[26]

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[23] *See Associated Press v. United States*, 326 U.S. 1, 20 (1945); *see also Associated Press v. NLRB*, 301 U.S. 103, 128 (1937) (Noting that the A.P.'s activities "involve[d] the constant use of channels of interstate and foreign communication," and concluding its operations "amount[ed] to commercial intercourse, and such intercourse is commerce within the meaning of the Constitution.").

[24] This Agency has previously defined tipping as "the tendency for a [service] with an initial edge over incompatible, rival systems to become an industry standard and thus achieve market dominance." The service with the edge can attain a monopoly position, with its rivals relegated to a fringe position. *AT&T Corp., British Telecom.,PLC, VLT Co. L.L.C., Violet License Co. LLC, and TNV [Bahamas] Ltd., For Grant of Section 214 Authority, Modification of Authorizations and Assignment of Licenses in Connection With the Proposed Joint Venture Between AT&T Corp. and British Telecommunications, plc*, IB Docket No. 98-212, SES-ASG-19981110-01654 (30), SES-ASG-19981110-01655 (2), Memorandum Opinion and Order, 14 FCC Rcd 19140, 19167 ¶ 54 (1999) (footnote omitted); *see also* Stan J. Liebowitz and Stephen E. Margolis, WINNERS, LOSERS AND MICROSOFT at 138 (1999) ("Tipping occurs when a product subject to increasing returns generates sufficient momentum in market share that its domination of the market becomes inevitable.").

[25] *See, e.g., Report and Order* at n.368 (noting the majority expressed no opinion on "tipping"); *see also* Paras.175-176. Tipping has occurred before in the entertainment and communications markets. In the mid-1980s, the consumer videocassette recorder/player market tipped in favor of VHS and against Betamax. In the local telephone business, it appears that tipping occurred shortly before 1910, when the Bell companies and the independents with whom it interconnected attained a significantly larger number of telephone customers than the independent telephone companies with whom Bell companies refused to interconnect. In both cases, after tipping the market was dominated by one standard or network.

[26] *See* Lawrence Lessig, *Cable Blackmail*, The Standard, Nov. 14, 1999.

The new company's control over both the network served by Time Warner's cable plant and the code-based NPD applications of AOL, when combined with the aforementioned business practices, established it will possess *virtual and physical* bottlenecks in the new world of high speed services. New applications that require real time functionality will require an NPD to work, thus an NPD encased in a proprietary-code shell means the owner controls a virtual bottleneck analogous to the cable operator's control over its physical network. This Agency's history and Congressional directives in the 1996 Act compelled us to closely scrutinize and ultimately reject such an outcome.[27]

II. AN OPEN AND INTEROPERABLE INTERNET SERVES THE PUBLIC INTEREST

> Incompatibility between computers had always been a huge pain. . . . .the real world of high energy physics was one of incompatible networks, disk formats, data formats, and character-encoding schemes, which made any attempt to transfer information between computers generally impossible. The computers simply could not communicate with each other. The Web's existence would mark the end of an era of frustration.[28]

Widely regarded as the creator of the Internet, Tim Berners-Lee has repeatedly stressed the Internet's openness and interoperability as its principal feature and virtue. From its inception the Internet was designed to avoid the interoperability problem that we confronted in this case.[29] Like the legacy industry examples used by Mr. Berners-Lee, the Internet is a communications network; unlike the communications networks before it however, the Internet depends on both physical interconnection and code-based interoperability.

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[27] *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 §§ 1, 230 (b)(1, 2), 47 U.S.C. §§ 151, 230 (b)(1, 2). *See also WorldCom-MCI Order,* 13 FCC Rcd at 18103-04 ¶ 142 (reviewing competitive effects of merger on provision of Internet backbone services).

[28] *See Weaving the Web,* at 35*; see also id.* at 99 ("The international phone system offers a decent analogy. The reason we can plug in a telephone pretty much anywhere in the world is because industry agreed on certain standard interfaces. * * * The phone system defines what it has to, but then leaves how it is used up to the devices.").

[29] The Internet protocols necessary to achieve interoperability for such services as email, are called the Transmission Control Program/Internetworking Protocol ("TCP/IP"). These protocols are open and non-proprietary. The open protocols utilized on the Internet are routinely recognized as the historical key to its openness and rapid growth. Since commercialization of the Internet has begun in earnest, there is a threat that the Internet will fragment into a digital archipelago of closed networks the communications between which are controlled by private entities.

A. Interoperability Furthers Competition and is Consistent with Congressional Objectives of an Open and Vibrant Internet

Several extant congressional objectives support an open and vibrant Internet. First, Congress established a clear national policy to "promote the continued development of the Internet" and "to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation."[30] Concurrently, Congress charged the Commission with "encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans."[31] Deployment of such capability facilitates the use of advanced services, of which residential high-speed Internet access services are one kind.[32]

In addition to explicit provisions regarding high-speed services and the Internet, concerns about the integration of video programming content and the cable conduit are contained in statutory provisions and Commission rules, such as the horizontal ownership cap and the channel occupancy rules.[33] Thus, apart from a competition analysis, the public interest impact of combining AOL's virtual, code-based network assets as described above, with the extensive cable and content assets of Time Warner compels a policy that considers *inter alia,* "cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public,"[34] and "promot[ing] competition in the delivery of diverse sources of video programming."[35]

Finally, the Supreme Court has repeatedly emphasized the Commission's duty and authority to promote diversity and competition among media voices: "It has long been a basic tenet of national communications policy" that "the widest possible

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[30] 47 U.S.C. § 230(b)(1)-(2).

[31] 47 U.S.C. § 157; *see also id.* § 1 (FCC was created "so as to make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges"). Congress defined "advanced telecommunications capability" as "high-speed, switched, broadband telecommunications capability." 47 U.S.C. § 157.

[32] *See, e.g.*, *Second Inquiry Concerning the Deployment of Advanced Telecommunications Capability Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Second Report, FCC 00-290 (rel. Aug. 21, 2000) at ¶ 3 ("*Second 706 Report*") (noting that "[w]ith advanced telecommunications capability consumers can take advantage of advanced services that allow residential and business consumers to create and access content, sophisticated applications, and high-bandwidth services").

[33] *See, e.g.*, 47 U.S.C. §§ 533(f), 548; 47 C.F.R. §§ 76.503, 76.504, 76.1000-76.1004; *AT&T-MediaOne Order*, 15 FCC Rcd at 9835 ¶ 38.

[34] 47 U.S.C. § 521(4).

[35] 47 U.S.C. § 523(a).

dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[36] The Commission's interest in "promoting widespread dissemination of information from a multiplicity of sources" is "an important governmental interest."[37]

B. The Condition Imposed in this Case Seeks to Preserve Internet Openness and Serves the Policies Favoring Competition

The *Report and Order* bars the merged company from offering a new service that utilizes both AOL's NPD *and* Time Warner's cable assets until it has achieved interoperability with at least some of its competitors.[38] Thus, the outcome most threatening to the free flow of information and consumer choice, where the tipped market in the text based instant messaging world migrates to the broadband world of high-speed services, would appear to be mitigated if not avoided. But, the best public interest outcome, maintaining the openness that has characterized the Internet since its inception, was not guaranteed. The condition, rather than ensuring the best outcome, instead sought to avoid the worst. It is in this sense that my approach differed from my colleagues.

First, under the bar-the-worst-approach, the new company may decline to offer the new service that triggers the requirement that they achieve interoperability. Under this scenario there is no interoperability and little, if any, public interest benefit arising from the condition.

Second, if the merged company chooses to offer the new service, they may do so by entering into contracts with no less than three competitors who offer NPD-based services. This outcome achieves *contractual interoperability rather than code-based interoperability*. In other words, if the competitors agree to use the merged company's

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[36] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) (*quoting United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (1972)).

[37] *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994); *see also id.*, 512 U.S. at 657 ("[T]he potential for abuse of this private power over a central avenue of communication cannot be overlooked."); *Review of the Commission's Regulations Governing Television Broadcasting: Television Satellite Stations Review of Policy and Rules*, 14 FCC Rcd 12903, 12910-916 (1999); *see also Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself of a private licensee."); *see also, e.g.*, 47 U.S.C. § 257(b) (noting that one of the "policies and purposes" of the Communications Act is to "favor[] diversity of media voices"); *id.* § 601 (codifying findings and policy underlying Cable Television Consumer Protection and Competition Act of 1992) ("There is a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media."); *AT&T-MediaOne Order*, 15 FCC Rcd at 9818-20 Paras. 3-5 (considering proposed merger's effects on "diversity and competition" in video programming and its effects on "openness and diversity of broadband Internet content").

[38] *See Report and Order*, at Paras. 191-95.

proprietary code, they actually expand the market-domination of this code rather than *interoperate* with that code. This is not open interoperability like that which makes email work today. To the extent applications running on AOL's proprietary protocols proliferate, the applications consumers desire will likely be bound in some way to AOL and its contractors. If these protocols are proprietary and closed, the competitive landscape of the Internet world might soon look like the competitive landscape of the software operating system world.[39] Because the Internet is a critical pathway for information dissemination, this outcome would foreshadow precisely the kind of improper private control of communications infrastructure the Supreme Court has repeatedly rejected.[40]

Third, the merged company may offer the new, high-speed service using its combined assets if it achieves server to server interoperability using a public, published protocol that bears the approval of appropriate international standard setting bodies. This is the outcome that best serves the public interest in open communications systems, provides consumers with the maximum number of choices and most completely deconstructs the "tipped market" that favors anti-competitive business practices. It is the only outcome in the *Order* that ensures interoperability based on open, non-proprietary code.

I supported the overall scheme adopted in the *Report and Order*, in part, because it also set forth several policy features applicable in future mergers. First, we soundly rejected private, corporate control of the Internet protocol pathway. Second, we rejected the facile assumption that business practices based on proprietary code that create informational bottlenecks on the Internet somehow serve the public interest. Third, the merged company must achieve interoperability at the time it seeks to utilize its combined assets, and not before. This avoided a ham-handed result (not unknown in general rulemakings in the world of converged technologies) that would be inconsistent with our obligation to carefully tie the condition to the facts of the case.[41] Fourth, if the commercial realities in the converging broadband space discussed in this record have

[39] *See e.g United States v. Microsoft*, 87 F.Supp.2d 30 (D.C.)

[40] *See infra nn.36-37; see also, e.g., United States v. AT&T*, 524 F. Supp. 1336 (D.D.C. 1981) (detailing the discrimination of the Bell System local telephone companies against their competitors in terminal equipment, long distance, and other products and services for which access to local lines was necessary). Similar concerns also underlie the provisions concerning "program access" by cable television companies (Communications Act § 628, 47 U.S.C. § 548) and Bell re-entry into interexchange service (Communications Act §§ 271-72, 47 U.S.C. §§271-72). *See also* James W. Olson and Lawrence J. Spiwak, *Can Short-Term Limits on Strategic Vertical Restraints Improve Long-Term Cable Industry Market Performance?*, 13 CARDOZO ARTS & ENT. L.J. 283 (1995).

[41] *See, e.g., Report and Order* at Para. 186. To continue Congress' goal of achieving vibrant competition in high speed services, we avoided the calls for a one size fits all traditional rulemaking on interoperable Internet communications networks. If the Commission had allowed the inevitable time delay that arises in a general rulemaking, the outcome would have come so late in the day as to be meaningless.

materially changed, and clear and convincing evidence establishes the public interest in maintaining the bar on the new service offering has thereby dissipated, relief from the terms of the Order is a fair outcome for consumers and the parties.

III. CONCLUSION

Ensuring the continued viability of an open, interoperable Internet does not constitute "regulation" in the traditional sense.[42] Ensuring interoperability, far from regulating the Internet, actually blocks *de facto* regulation of the Internet by a private corporation through a combination of a cable bottleneck, proprietary code, network effects and the high consumer cost of switching to a competing service. Interoperability combats centralized control of speech and ultimately, severely restricts both government and corporate power to control the speech transmitted on the Internet. Arguing against interoperability in this case is akin to arguing against the pro-competitive, interconnection policies the FCC has historically pursued and that are present in the requirements in the 1996 Act.[43]

The rise of the commercial Internet, as this case demonstrates, does not confound application of the existing federal policies that require interconnection and interoperability of communications systems. In fact, ensuring code-based interoperability goes hand in hand with the Commission's fundamental obligation to ensure that our communications infrastructure serves the public interest, assists the development of the Internet, and sparks competition and innovation. The mandate that such systems serve the public interest, in the context of this case, compelled action to ensure that the Internet remains open and vibrant. Here, we took the initial steps towards preserving that openness. Only time will tell whether these efforts will be sufficient.

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[42] *Compare* Dissenting Statement of Commissioner M. Powell at 13.

[43] *See, e.g.*, Amendment of Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958 (1986) (Report and Order)(requiring AT&T, the long-distance monopolist, to open its basic network facilities to enhanced service providers); *See also id.* at 1006(mandating an "Open Network Architecture" that would "permit all users of the basic network ... to interconnect to specific basic network functions and interfaces on an unbundled and 'equal access' basis."); Amendment of Sections 64.702 of the Commissions Rules and Regulations (Third Computer Inquiry), 104 F.C.C.2d 958, 1022 (1986) (Report and Order)(noting the Open Network Architecture would permit the agency to "rely on interconnective technology, rather than external regulations, to minimize the competitive and efficiency dangers of bottleneck control.")