

UNLEASHING “INSTANT MESSAGING” FROM REGULATORY OVERSIGHT*

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I. INTRODUCTION

{1} America Online, Inc. (“AOL”) and Time Warner Inc. announced their intention to merge on January 10, 2000.¹ At that time, there was a great deal of excitement about combining these two companies and harnessing the power of an increasingly broadband Internet. In addition to the Federal Trade Commission (“FTC”) and Federal Communications Commission (“FCC”), more than one thousand local communities conducted their own reviews of the merger.² The FTC identified “open access” to the Time Warner Cable platform as an issue meriting specific relief.³

{2} The FCC, for its part, specifically identified “instant messaging” (“IM”) as an issue to be addressed by means of a merger condition.⁴ The FCC restricted the merged company’s ability to offer advanced interactive high-speed IM services over its facilities (the “IM condition”) in connection with its approval of the merger.⁵ This article reviews the genesis of the IM condition and AOL Time Warner’s (“Time Warner” or “AOL Time Warner”)⁶ successful effort to have the condition lifted. Part II explains the FCC’s rationale for imposing the IM condition. Part III describes Time Warner’s arguments in support of lifting the IM condition. Part IV describes the FCC’s decision to lift the IM condition, and Part V sets forth additional reasons why the IM condition should have been lifted. A brief conclusion follows.

II. THE FCC REGULATES INSTANT MESSAGING

{3} Instant messaging enables “the almost instantaneous exchange of short, private, individualized text messages over the Internet between two users who are online simultaneously”⁷ IM is a tool that allows users to detect the presence of their online “buddies.”⁸ This is made possible by the provider’s directory of user names and presences, or so-called “NPD.”⁹ The NPD enables users to determine when others are online or available.¹⁰ The actual NPD consists of (1) a database of the user’s unique IM names and addresses and (2) a “presence detection” function that informs users that others are online and available to engage in instant messaging.¹¹ After its invention and popularization by AOL, IM became popular in the late 1990s, as hundreds of millions of Internet users discovered how its features could make communication easier and more efficient.¹²

{4} The IM condition was premised on the FCC’s assumption that AOL was “dominant” in the provision of text-based IM services and that this “dominance” would not only persist but grow.¹³ Specifically, the FCC feared that AOL would be able to leverage its position in an anti-competitive manner into so-called “advanced interactive high speed” IM services (or “AIHS”).¹⁴ In particular, the FCC predicted that (1) this new category of services would emerge¹⁵ and (2) those services would build upon existing text-based IM offerings – and, more specifically, their NPDs.¹⁶ These assumptions, combined with the conclusion that “NPD services exhibit strong network effects,”¹⁷ placed critical significance on AOL’s share of text-based IM at that time.¹⁸

{5} During the merger review proceeding, AOL’s IM rivals claimed that AOL enjoyed an 80-90% share of IM users.¹⁹ AOL submitted data showing its share of IM users was approximately 65%.²⁰ Without relying on any specific data or methodology, the FCC concluded that “AOL, by any measure described in the record, is the *dominant* IM provider in America.”²¹ It also found that “the IM business is not competitive”²² and that AOL would dominate NPD-based services for the foreseeable future.²³

{6} Based on these assumptions, the FCC concluded that AOL’s NPD would “further swell” while its competitors’ would “shrink.”²⁴ This prediction served as the very foundation of the IM condition:

The Majority essentially employs a market “tipping” analysis in an effort to make this case, attempting to demonstrate that the IM market has nearly tipped, or will tip when AOL combines with Time Warner. The Majority avers, however, that it expresses no opinion on whether its conclusions can be read as a finding the market has tipped *Whatever the semantics of its conclusions, the Majority’s market tipping analysis is a critical analytical underpinning for the IM condition.*²⁵

In other words, the FCC concluded that AOL was the largest IM provider and that NPDs exhibit strong network effects.²⁶ This led the FCC to make two predictions.

{7} First, the FCC predicted that network effects would enable AOL to enjoy an enormous advantage over actual or potential rival AIHS providers absent interoperability.²⁷ In other words, a “typical new user”²⁸ would choose AOL – the service with the largest NPD – simply because it had the largest NPD and without regard to other indicia of product quality. Second, the FCC predicted that AOL’s then “dominant” and likely growing share of text-based IM services would confer on AOL a “first mover advantage” in streaming video AIHS.²⁹ Thus – simply because AOL had generated the largest NPD with its text-based IM services – AOL would be the unrivaled leader in deciding which AIHS to roll out and when.

{8} The IM condition was therefore premised upon an interrelated chain of conclusions and predictions: first, that AOL was the dominant provider of IM services and, absent interoperability, the “strong ‘network effects’” associated with IM would cause AOL’s unassailable lead in text-based IM to “swell” over time; second, that AOL’s dominance in text-based IM would afford the merged company an anti-competitive first-mover advantage in streaming video AIHS, creating barriers to entry and foreclosing competition; and third, that a sizeable NPD is an “essential input” for AIHS, and that no other competitor could attract a sufficiently large NPD so as to provide competition to AOL in the anticipated marketplace for AIHS.

{9} This reasoning also reflected a great deal of speculation about how text-based IM services – and yet-to-be implemented AIHS services – would develop in the future.³⁰ Relying on these predictions, the FCC concluded that AOL would have the incentive and ability to stifle competition and innovation in future streaming video AIHS applications.³¹ The IM condition was imposed to prevent the merger from causing or contributing to these outcomes.³²

III. AOL TIME WARNER PETITIONS FOR RELIEF

{10} On April 2, 2003, AOL Time Warner filed a petition seeking relief from the IM condition.³³ The petition argued that there was clear and convincing evidence that maintaining the restrictions on the merged company no longer served the “public interest, convenience and necessity,” as follows:

- Based on share data, share trends and other competitive conditions, AOL was not

dominant in the provision of IM services and there was no danger of “network effects” causing AOL’s share to “swell;”

- As Microsoft and Yahoo! each independently introduced streaming video AIHS, AOL could not have – or obtain – a “first mover” advantage in this area; and
- By bundling Windows Messenger and Passport into Windows XP, in addition to offering its popular stand-alone MSN Messenger service, Microsoft has on its own become a significant competitor in IM- and presence-enabled services.³⁴

{11} Given these material changes, AOL Time Warner argued that there was clear and convincing evidence that the IM condition was no longer necessary to protect the public interest from the purported harms the *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner, Inc. and America Online, Inc. to AOL Time Warner, Inc.*, Transferee (“*Order*”) sought to address.³⁵ To the contrary, this restraint on AOL’s provision of streaming video AIHS now harmed the public interest by negatively affecting investment and innovation.³⁶ Continued application of the IM condition would serve only to deprive consumers of the benefits of competition – namely, increased innovation and choice. The petition argued that when a merger condition that was intended to protect competition instead turns out to burden innovation and reduce competition, it should be lifted.³⁷

A. The Facts Showed AOL Was Not “Dominant” in IM.

{12} The petition showed that AOL was not “dominant” in the delivery of IM under any measure. In the more than two years since the *Order* was adopted, IM services have continued to rapidly develop and become more competitive. In fact, the petition demonstrated how AOL’s “share” of IM users declined while its competitors’ shares have grown. As a result, and contrary to the FCC’s own predictions, AOL was not “dominant” in the provision of IM or any related NPD-based service when it filed its petition. Specifically, AOL faced increasingly stiff competition from Microsoft’s MSN Messenger, Yahoo! Messenger, and a number of smaller IM providers. The *Order* invited AOL, when petitioning to lift the IM condition, to provide evidence that it has not been a “dominant provider” of NPD-based services for four consecutive months.³⁸ To this end, data compiled by comScore Media Metrix (“Media Metrix”), the leading Internet audience measurement service in North America,³⁹ showed that AOL’s two major competitors, Microsoft and Yahoo!, had averaged 22.2% and 19.3%, respectively, of the share of IM users per month during the four months prior to the filing of the petition.⁴⁰ For its part, AOL had averaged 58.5% share of IM users each month during this time.⁴¹ In contrast, as recently as June 1999, AOL’s share of text-based IM was virtually 100%; is because AOL’s distinct products – AOL IM, AIM and ICQ – were the only significant IM offerings available at that time.⁴² The long term trends indicate healthy competition among IM providers.

{13} Media Metrix data also showed that AOL’s rivals have seen continued growth in the number of Unique Visitors to their IM services: MSN Messenger’s number of Unique Visitors increased from 17,640,000 in October 2002 to 19,410,000 in February 2003 (a 10% increase), while Yahoo! Messenger’s Unique Visitors increased from 16,138,000 to 16,802,000 (a 4% increase).⁴³ In comparison, AOL’s unduplicated Unique Visitors decreased from 52,120,000 in October 2002 to 50,965,000 in February 2003 (a 2% decrease).⁴⁴

B. There Was No Legal Basis For Finding AOL to be “Dominant” in IM.

{14} AOL’s declining share of IM and the existence of two strong competitors provided further support for concluding that it was not “dominant” in IM. Beginning in 1980 with *In re Policy and*

Rules Concerning Rates Competitive Common Carrier Services and Facilities Authorizations Therefor (“*Dominant/Non-Dominant First Report and Order*”),⁴⁵ “dominance” in communications markets has been directly equated with market power.⁴⁶ Market power, according to the FCC, is the ability to profitably set prices above competitive levels, effectively lower prices to forestall entry by new competitors or eliminate existing competitors.⁴⁷ The relevant indicia of market power (or the lack thereof) include the number and size of competing firms, the nature of barriers to entry, the availability of reasonably substitutable services, and the control of bottleneck facilities,⁴⁸ as well as elasticities of supply and demand.⁴⁹ A declining market share may also indicate the *absence* of market power.⁵⁰

{15} These “dominance” criteria were initially developed to determine which sectors of the telecommunications market were competitive and “non-dominant” and should therefore be deregulated.⁵¹ The dominant firms at that time included AT&T and its local telephone companies, as they “control[led] access to over 80% of the nation’s telephones” and thereby controlled a bottleneck facility essential to competitors.⁵² In contrast, the firms that the FCC found to be non-dominant included “specialized common carriers” (“SCCs”), such as MCI and Southern Pacific Communications Company (the forerunner to Sprint). SCCs were found to be non-dominant since they, unlike AT&T, “always face[d] a direct competitor that offer[ed] a readily substitutable service.”⁵³ Any attempt by a non-dominant firm to exercise market power would quickly be “frustrated” by its competitors.⁵⁴

{16} In 1995, the FCC applied these criteria to AT&T’s motion to be classified as non-dominant in the market for interexchange carrier (“IXC”) services.⁵⁵ The FCC found that AT&T was not a dominant firm with a 58.6% share of the IXC market⁵⁶ where supply and demand was sufficiently elastic to constrain AT&T’s ability to raise prices unilaterally.⁵⁷ The fact that AT&T’s market share had steadily declined from 90%, and that it faced competition from at least two strong competitors, confirmed that it lacked market power.⁵⁸ Applying these precedents, it was clear that AOL’s IM services were not “dominant.”

{17} First, Media Metrix share data showed that AOL was not dominant in IM.⁵⁹ In the AT&T proceeding, the FCC noted that in the ten-year period from 1984 to 1994, AT&T’s market share in long distance telephone service fell from 90% to 58.6%.⁶⁰ The FCC found that “the decline in AT&T’s market share suggests that AT&T no longer possesses market power.”⁶¹ Only two years after imposing the IM condition, the FCC was faced with even more compelling facts with respect to IM. Since June 1999, when AOL served 100% of IM users, AOL has confronted two major new IM entrants, Yahoo! and Microsoft, as well as numerous smaller entrants. As a result, AOL had experienced a substantial decline in its IM share. Its share of unduplicated all location users had fallen from 100% to 58.5% in just three and one-half years.⁶²

{18} These numbers provided significant evidence of “changed circumstances” with key implications for purposes of the FCC’s analysis of the petition.⁶³ First, AOL’s IM share had fallen more rapidly than did AT&T’s long-distance share during the period preceding the FCC’s determination that AT&T was non-dominant. At the time of its petition, AOL’s share in IM was approximately the same as AT&T’s share in long distance when the FCC determined that AT&T was not dominant.

{19} Second, high demand elasticity further showed that AOL was not dominant in IM. In the AT&T proceeding, the FCC found that demand for AT&T’s long distance service was extremely price elastic. As such, the FCC noted that there was reason to believe that many customers “will switch to or from AT&T in order to obtain price reductions.”⁶⁴ The FCC also noted that 20% of AT&T’s residential customers changed interexchange carriers at least once a year.⁶⁵ The two years preceding AOL’s

petition showed that IM providers face similarly high levels of demand elasticity because nothing prevents IM users from downloading and using multiple instant messenger clients, essentially without cost.⁶⁶ Over time, consumers’ propensity to choose alternative providers has been demonstrated by the growth of Microsoft and Yahoo! as IM providers and the new video AIHS services that are offered by both Microsoft and Yahoo!. The ability of consumers today to defeat an attempted price increase by easily shifting to established, branded, powerful rivals – such as Microsoft and Yahoo! – is no longer a theoretical possibility but is a materially changed circumstance that further confirms the lack of dominance by AOL.

{20} Third, high supply elasticity showed that AOL was not dominant in IM. In the AT&T non-dominance proceeding, the FCC found that “AT&T’s competitors have enough readily available excess capacity to constrain AT&T’s pricing behavior,”⁶⁷ meaning that “supply is sufficiently elastic to constrain AT&T’s unilateral pricing decisions.”⁶⁸ More than two years after the IM condition was imposed, it was clear that Microsoft and Yahoo! faced no capacity constraint that would prevent them from rapidly expanding their NPDs in response to increased customer demand for their services (or reduced willingness to pay for AOL’s). Nor was there any reason to believe that either of AOL’s major competitors would be unable to increase their server capacity or other IM infrastructure to support such surges in demand. These conclusions were consistent with the continued growth in the number of new users of Yahoo! Messenger and MSN Messenger, observed facts that have become clear since the *Order* was adopted.⁶⁹ According to Media Metrix data, from October 2002 to February 2003, MSN Messenger’s number of Unique Visitors grew by almost two million and Yahoo! Messenger’s Unique Visitors grew over the same period by more than half a million.⁷⁰ There is no evidence that suggests that either firm’s resources were threatened by these increases.

{21} Fourth, there was no evidence that Time Warner’s efficiency, financial strength or size would today or in the future convey upon it the ability to increase prices or reduce output in IM. In the AT&T proceedings, the FCC considered AT&T’s cost structure, size, and financial resources to determine whether or not these factors gave AT&T the ability to price anticompetitively. The FCC did not find that AT&T’s size or financial resources would allow it to unilaterally increase prices above competitive levels. There was likewise no reason to believe that AOL Time Warner was in any different situation or that it was financially stronger than its largest IM rival, Microsoft. There was also no reason to believe that Yahoo!, AOL’s next largest rival, lacked the resources necessary to compete effectively.

{22} In summary, although the Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier (“*AT&T Non-Dominance*”) proceeding and the current proceeding occurred at different times and involved different services, the criteria for a finding of dominance used by the FCC in its analysis of AT&T could be directly applied to AOL Time Warner. Those criteria indicate that – due to a series of material changes – there was no legal basis to conclude that AOL is dominant in IM or that it threatens to become so in the future.

C. There Was No Economic Basis for Concluding AOL Was “Dominant” in IM.

{23} Along with its petition, AOL Time Warner also submitted the expert affidavit of Professor William P. Rogerson which demonstrated that there is no economic basis to conclude that AOL is dominant in IM or that network effects have led or will lead IM to “tip” in AOL’s favor.⁷¹ To the contrary, Professor Rogerson concluded that there was “clear and convincing evidence that there are three strong and stable competitors” in IM and no “plausible reason to conclude either that AOL is dominant or that the market has ‘tipped’ or is in danger of ‘tipping’ to AOL.”⁷² Professor Rogerson based his conclusion on the fact that AOL’s share of IM has “continued to decline while the shares of

its two competitors, Microsoft and Yahoo!, have continued to grow.”⁷³ As Professor Rogerson pointed out, the evidence shows that “competition is strong and vibrant” in IM.⁷⁴

{24} Professor Rogerson made two compelling arguments to support his conclusion. First, he noted that AOL’s share of IM has been decreasing ever since Microsoft and Yahoo! began to compete with AOL. Professor Rogerson examined AOL’s chief competitors and found there was no reason to conclude they were weak or unstable or that their shares of IM were likely to decline. For these reasons, he concluded there was strong evidence that “the market has not ‘tipped’ [to AOL and that it] is in no danger of ‘tipping’ to AOL” in the future.⁷⁵ Second, Professor Rogerson found clear evidence of competition in IM. Specifically, he noted that competition has kept prices for these offerings at zero.⁷⁶ Professor Rogerson also pointed out that AOL does not enjoy any special advantages in IM due to the size of its NPD. Indeed, Microsoft and Yahoo! have each introduced streaming video AIHS services ahead of AOL. This provided independent evidence of these competitors’ viability.⁷⁷ Furthermore, to Professor Rogerson, there was no reason to believe that either of these competitors were capacity-constrained. Microsoft is pursuing a particularly vigorous strategy by bundling its IM offering with its monopoly operating system.⁷⁸ For all of these reasons, there was no economic basis to conclude that AOL is dominant in IM today or that IM is likely to “tip” to AOL in the future.

D. AOL’s Rivals had Significant and Growing NPDs.

{25} Whatever concerns existed more than two years ago about AOL’s “uniquely large” NPD, there was no basis for continued concern in this regard either. Microsoft and Yahoo! have each witnessed substantial growth in their IM user bases. Microsoft’s growth has not been surprising. In addition to marketing its stand-alone MSN Messenger service, Microsoft has bundled both Windows Messenger, its new and backward-compatible consumer IM service, and Microsoft .NET Passport (“Passport”) into Windows XP. In this manner, Microsoft has established its own IM and presence detection capabilities as the *de facto* standards for personal computer (“PC”) users. Published reports indicate that Windows Messenger, the streaming video AIHS-enabled IM client, “loads and runs every time Windows is booted.”⁷⁹ A Passport account, meanwhile, not only doubles as a user name for MSN Messenger, Windows Messenger, and Microsoft’s Hotmail e-mail service,⁸⁰ it is also “an online service that makes it possible for you to use your e-mail address and a single password to sign in to any .NET Passport-participating Web site or service.”⁸¹ As a result, Passport’s already substantial user base, which Microsoft started in March 2002 and included over 200 million users,⁸² now includes over 270 million users⁸³ and can be expected to enjoy continued growth.⁸⁴ Indeed, through new PC purchases (Windows XP is the default operating system on nearly all new Windows-based PCs) and upgrades, the majority of computer users can soon be expected to be Windows XP users.⁸⁵ This will provide clear incentives – to Microsoft, obviously, but more importantly, to third-party developers as well – to incorporate Microsoft’s IM and presence detection capabilities into future NPD-based services. Such an advantage will make it difficult for rival providers of such services to compete.⁸⁶ The bundling of Windows Messenger and Passport into Windows XP clearly demonstrates that Microsoft is capable of competing head-to-head with AOL in this evolving arena.

{26} In addition, Yahoo! has designed its network of Internet properties so that all of its eighty-six million active registered users⁸⁷ are potential members of its NPD. As Yahoo! notes, “[o]nce you establish a Yahoo! ID, you will have access to the entire Yahoo! network. You need only do this once – your ID will work for every service in Yahoo! [including Yahoo! Messenger].”⁸⁸ Clearly, the number of Yahoo!’s unique users should be more than sufficient to support its continued rollout of AIHS.

IV. THE COMMISSION’S DECISION

{27} In reviewing the petition, the FCC focused first on the “trend in . . . [IM] . . . shares,” which it found to be “inconsistent with the market ‘tipping’ concerns expressed in the *Order*.”⁸⁹ First, the FCC recognized that in a market “subject to tipping,” smaller firms would not continue to grow at the expense of the largest firm.⁹⁰ Second, the FCC viewed Microsoft and Yahoo! as “stable competitors . . . [and] an indication that the market is maturing and stabilizing.”⁹¹ As a result, the FCC found it unlikely that AOL would be able to “control entry or survival in the market.”⁹²

{28} Opponents of lifting the IM condition argued that the fact that many IM users relied on multiple IM platforms demonstrated that AOL had an effective lock on the market.⁹³ The FCC found to the contrary: “[I]n those markets . . . where tipping has occurred,” it noted that “consumer[s] typically purchase[] one product exclusively.”⁹⁴ The fact that “so many consumers are willing to use multiple platforms in this case suggests that consumer lock-in is not a concern here.”⁹⁵ As persuasive evidence that interoperability was not competitively necessary, the FCC also found the fact that Microsoft and Yahoo! “have chosen not to interoperate with each other.”⁹⁶ “These providers,” it noted, “must believe that the market is competitive and that their own market presence is strong enough for the market to remain competitive.”⁹⁷

{29} Finally, and importantly, the FCC recognized that lifting the IM condition would “likely provide public interest benefits.”⁹⁸ With the condition removed, AOL would be able to compete more effectively and offer consumers greater choices in the marketplace.⁹⁹ With more choices and more available functions in the various IM platforms, consumers will benefit, whereas with continued AOL regulation, consumers would not benefit.

V. DIFFICULTIES WITH MANDATORY STANDARD SETTING FOR INSTANT MESSAGING

{30} The IM condition can be seen as a form of mandatory standard-setting imposed by the government on a new and emerging market or application. Many markets exhibit what economists refer to as “network effects,” which means essentially that consumers derive more value from that product as more consumers purchase or use it.¹⁰⁰ In connection with IM, the “source” of any such effects is that people may attribute more value to the application when more people use it because more users allows each user to communicate with a larger group of people.

{31} Firms in markets with network effects may be able to make their products “compatible” in order to make it easier for consumers using two different products to share the network, thus enhancing the “value” of the products to their users. To be sure, there are gains when products like IM are made compatible. More users find a larger network more useful, and more applications become available for the installed base of users.¹⁰¹ The absence of compatibility may therefore be detrimental to consumers.¹⁰² It follows that the need to encourage compatibility was the animus behind the IM condition.

{32} Network effects, however, are not anti-competitive in and of themselves. Importantly, network effects may create or enhance market power – and thus harm consumers – when they reinforce *entry barriers*, thereby insulating existing networks from competition.¹⁰³ In the case of IM, for example, there is plainly no evidence of such barriers. Robust competitors to AOL have been able to increase their user shares and offer innovations on their own. None of the major IM providers have decided to interoperate with each other. Of course, there are perfectly legitimate reasons for this. It is simply not the case that all providers are better off interoperating if IM has not “tipped.”

{33} Industry standards might raise the costs of individual firms’ design decisions. Such standards may raise costs to some consumers – just as much or more than they may lower costs to others. Moreover, standards may dampen the incentive to innovate, as firms would be guaranteed mandatory access to an innovator’s improvements. Not only would market innovators see their potential benefits decline in such a market, they would be forced to give some of whatever benefits remain to their competitors. For these reasons, mandatory standards via government regulation may also harm consumers by dampening competition.¹⁰⁴ Indeed, enforcing standards adopted by government regulation potentially imposes even more costs. The facts plainly showed for IM that there was no need to impose mandatory compatibility. In the absence of evidence that the failure to interoperate is part of a concrete strategy to create or raise entry barriers, the burden should be on proponents of continued regulation to justify continued intervention.

VI. CONCLUSION

{34} The FCC has long recognized that competition stimulates investment and innovation, bringing increased choice, lower prices, improved service, and new product offerings.¹⁰⁵ Competition has the power to give choices to consumers, and “with more choices, consumers reap the benefits – better services, greater innovation, and higher technology.”¹⁰⁶ By empowering AOL to offer advanced IM services as well, the FCC acted to benefit consumers.¹⁰⁷

{35} At a minimum, unleashing AOL from unnecessary regulation promises to give consumers more choice with respect to the types of streaming video IM services available today.¹⁰⁸ More importantly, in order to attract users, AOL will have a stronger incentive to develop streaming video IM offerings that differentiate its products and services from those of its chief rivals. While it is premature to predict the form and direction of future innovation, consumers are likely to benefit much more in the absence of IM restrictions on AOL.

* The analysis set forth in this article was presented to the FCC in connection with a Petition on behalf of AOL Time Warner filed April 2, 2003. The Petition was co-authored by Steven Teplitz of AOL Time Warner. Thomas Krattenmaker, Howard Symons, Rob Kidwell, Susan McDonald and Andrew Long made important contributions to the Petition as well. Professor William Rogerson also submitted two expert affidavits in support of the Petition to the FCC. Any errors or omissions in this article are the author’s alone.

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¹ See Press Release, *AOL & Time Warner Will Merge To Create World’s First Internet-Age Media & Communications Company* (Jan. 10, 2000), at http://media.aoltimewarner.com/media/newmedia/cb_press_view.cfm?release_num=15100390.

² See, e.g., Ariana Eunjung Cha, *Holding Out for ‘Open Access’ to Cable: Florida Localities Pose Latest Problem for AOL, Time Warner by Refusing to Convey Franchises*, WASH. POST, Sept. 27, 2000, at E1 (indicating that 1,150 local franchising authorities reviewed the merger).

³ *In re America Online, Inc. & Time Warner Inc.*, No. C-3989, 2001 WL 410712 (F.T.C. Apr. 18, 2001).

⁴ *In 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*, 16 F.C.C. Rcd. 6547, ¶ 132 (2001) [hereinafter *Order*]. The FCC’s ability to impose “conditions” on mergers stems from its authority to review and approve any applications for the assignment or transfer of control of licenses it has granted under the Communications Act. See 47 U.S.C. § 310(d) (2003). See generally Memorandum Opinion and Order, *In re General Motors Corp. and Hughes Corp., Transferors, and The News Corp. Ltd., Transferee*, MB 03-124 ¶ 15, (Jan. 14, 2004), available at <http://hraunfoss.fcc.gov/>

edocs_public/attachmatch/FCC-03-330A1.pdf (noting the Commission’s “public interest standard” involves balancing the potential public interest harms of the proposed transaction and the potential public interest benefits).

⁵ Specifically, the merged company was prevented from offering an advanced interactive high-speed application that includes the transmission and reception of names and presences directory over the Internet protocol path of AOL Time Warner broadband facilities, of one or two-way streaming video communication using new instant messaging protocols until and unless (1) AOL Time Warner shows it has implemented a standard for server-to-server interoperability of such services that has been promulgated by an industry body; (2) AOL shows that it has entered into a written contract providing for server-to-server interoperability with a significant, unaffiliated, actual or potential competing provider of such services to the public and enters promptly into two more such agreements; or (3) AOL Time Warner obtains relief from the condition by showing the FCC that the condition no longer serves the “public interest, convenience and necessity because there has been a material change in circumstance.” *Order* ¶ 325.

⁶ On October 16, 2003, AOL Time Warner changed its name to Time Warner Inc. Time Warner, *Frequently Asked Questions*, at http://www.aoltimewarner.com/investors/faq/faq_z_03_name_change.adp (last updated Oct. 13, 2003).

⁷ *Order* ¶ 134. The *Order* gives an extensive and more detailed description of instant messaging. *Id.* ¶¶ 134-37.

⁸ Bill Michael, *Hey, Buddy...* Communication Convergence.com (Nov. 5, 2000), at <http://www.cconvergence.com/shared/article/showarticle.jhtml?articleid=8700982>. (last visited February 23, 2004).

⁹ *Order* ¶ 138.

¹⁰ *Id.*

¹¹ *Id.*

¹² *Order* ¶ 137.

¹³ *Order* ¶¶ 129-30.

¹⁴ *Id.*

¹⁵ *See, e.g., Order* ¶ 140 (“Many new services and applications based on ‘simple text’ IM are being developed Many experienced industry observers believe that these services, including AIHS, will be popular.”) (citations omitted).

¹⁶ *See id.* ¶ 145 (“Despite the quantum leap that all these new services represent beyond IM, they are like IM in one respect. That is, a provider of AIHS depends on its NPD as much as a provider of IM does.” (citation omitted)). The Majority concluded that an NPD is an “essential input” for IM services. *Id.* ¶¶ 129, 138; *see also id.* ¶ 138 n.376 (“An essential input is a component of a service or product without which the service or product cannot be created and provided to others.”).

¹⁷ *Id.* ¶ 158.

¹⁸ Whether IM is a relevant antitrust “market” was neither the focus of the FCC’s inquiry nor of the Petition seeking relief.

¹⁹ Letter from Gerard J. Waldron, counsel for Microsoft, Covington & Burling, to Magalie Salas, Secretary, Federal Communications Commission (Oct. 13, 2000), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6511959809; *see also* Letter from Ross Bagully, President and CEO, Tribal Voice, to Magalie Salas, Secretary, Federal Communications Commission (July 21, 2000), at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6511458075 (stating in an attachment that AOL has “a commanding 90% share”).

²⁰ Letter from Peter D. Ross, Attorney, Wiley, Rein and Fielding, to Deborah Lathen, Chief, Cable Services Bureau, Federal Communications Commission (Dec. 9, 2000) at <http://www.fcc.gov/mb/aoltw/imletter.pdf>.

²¹ *Order* ¶ 129 (emphasis added).

²² *Id.* ¶ 149.

²³ *Id.* ¶ 155.

²⁴ *Id.*

²⁵ Memorandum Opinion and Order, Applications for Consent to the Transfer of Control of Licenses by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner, Inc., Transferee, No. 00-30, Statement of Commissioner Michael K. Powell at 4-5 (emphasis added) (on file with Richmond Journal of Law & Technology) [hereinafter Powell Separate Statement].

²⁶ *Order* ¶ 175.

²⁷ *Id.* ¶ 157.

²⁸ *Id.* ¶ 158.

²⁹ *Id.* ¶ 174. *See id.* ¶ 128 (“AIHS,” a term coined by the FCC, describes a potentially broad range of existing and future services. Streaming video AIHS, which is what the IM condition prohibits AOL Time Warner from offering over AOL Time Warner broadband facilities, comprises only a small subset of that broader category.).

³⁰ That the FCC was cognizant of the speculative and predictive nature underlying its action is evinced by the language used throughout its discussion and analysis of the Condition. For example, the *Order* notes that in an effort to promote the policies of the Communications Act, the Commission may “*plan in advance of foreseeable events* instead of waiting to react to them.” *Order* ¶ 150 (citation omitted) (emphasis added). Similarly, in failing to define with precision a relevant market for purposes of its IM analysis, the *Order* relied on the well-established precept that the Commission does not need “tangible evidence . . . but is permitted to rely on its expertise to make *predictive judgments*.” *Id.* ¶ 152 n.421 (internal quotations omitted) (emphasis added); *see also id.* ¶ 152 (“A more precise definition of the relevant market is not necessary here, where the Commission *can accurately assess the competitive impact* of the merger *without such a detailed analysis*.”) (emphasis added). The text of the *Order* is replete with examples highlighting the FCC’s tacit recognition that the IM condition was a “best guess” of highly uncertain future events. *See, for example, the Order*, which states:

IM-based services are relatively new but have shown enormous growth in popularity in recent years These features, besides being useful in their own right, *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.

Id. ¶ 129 n.366 (emphasis added); *see also, e.g., id.* ¶ 132 (“We then find that the proposed merger would give AOL Time Warner substantial, *and perhaps insurmountable*, advantages in providing advanced IM-based services over the high-speed Internet platform.”) (emphasis added); *id.* ¶ 130 (“Given these findings, the combination [of Time Warner and AOL] substantially *increases the probability* that AOL’s dominance in the narrowband text-messaging world will persist in the world of high-speed interactive services.”) (emphasis added); *id.* ¶ 188 (“AIHS are novel services, *but we and many others believe that they will be significant in the near future*.”) (emphasis added); *id.* ¶ 184 (“Seeing a *foreseeable and likely danger* to competition in AIHS, we can act promptly and with confidence.”) (emphasis added).

³¹ *See Order* ¶ 130. The *Order* also states:

While the merger may well stimulate the development and deployment of new services, if the merger in fact diminishes competition and consumer choice with respect to advanced “IM-based” services . . . as we predict, then the merger’s potential stimulation of the development of new services will not guarantee that consumers will benefit from innovation, price competition, or diversity of choices with respect to these services.

Id. ¶ 313

³² *See id.* ¶ 188 (“To prevent AOL Time Warner, as a result of the proposed merger, from becoming more able or likely to dominate AIHS, we impose a prophylactic condition.”); *see also id.* ¶¶ 197, 327 (stating that in addition to the restriction on the delivery of streaming video AIHS, the FCC also required Time Warner to report regularly on the actions it has taken to achieve interoperability of its IM offerings and others’ offerings).

³³ See generally Petition in the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorization by Time Warner Inc. and American Online, Inc. Transferors, to AOL Time Warner, Inc., Transferee, at http://gullfoss2.fcc.gov/prod/ecfs/retrieve.cgi?native_or_pdf=pdf&id_document=6513982043 (Jan. 25, 2003).

³⁴ *Id.*

³⁵ *Id.*

³⁶ Powell Separate Statement, *supra* note 25, at 11. In his dissent to the Condition, then-Commissioner Powell noted that “[o]ur actions may very well affect innovation, by restricting AOL’s incentives to innovate, and by favoring competitors, who can innovate without interoperating with AOL, thus restricting AOL in a market for future services Rather than preserving a competitive market, we may do nothing more than tip the market to another player.” *Id.*

³⁷ See Order ¶ 195 (noting the Commission will remove merger condition if it is no longer necessary in the public interest); accord *In re* Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, 16 F.C.C. Rcd. 16915, 16918 ¶ 7 (2001) (noting the Commission will remove merger condition that forecloses competition); *In re* Application of Ameritech Corp., Transferor, and SBC Communications, Inc., Transferee, 15 F.C.C. Rcd. 17521, 17523 ¶ 21 (2000).

³⁸ Order ¶ 195. The Affidavit of Professor William P. Rogerson attached to the Petition took a longer term view. See Affidavit of William P. Rogerson (on file with Richmond Journal of Law & Technology) [hereinafter *Rogerson Affidavit*].

³⁹ Powell Separate Statement, *supra* note 25, at 4 (“The most objective data on the record is a study by Media Metrix, recognized as the world leader in the measurement of Internet and digital media use.”). The Media Metrix data relied upon herein only track usage of AOL IM, AIM, ICQ, MSN Messenger, and Yahoo! Messenger. If comparable data for other services were included, AOL’s share, however calculated, presumably would be even lower than the numbers presented below.

⁴⁰ Press Release, *Yahoo! Messenger and MSN Messenger Service Are Fastest Growing Instant-Messaging Applications in the U.S.*, (Nov. 16, 2000) (on file with Richmond Journal of Law & Technology).

⁴¹ See *id.* AOL’s share is based upon the unduplicated number of All Locations (*i.e.*, Home, Work and University) Unique Visitors within the following three Media Metrix measurement categories: (1) AOL Proprietary Instant Message (which measures IM usage within the AOL online service); (2) AOL Instant Messenger (“AIM”); and (3) ICQ. “Unduplicated” data ensures that an individual who uses more than one of AOL’s IM offerings (*e.g.*, the IM feature of the AOL online service at home and AIM at work, both AIM and ICQ at home, AIM at home and ICQ at work, etc.), but constitutes only one entry in AOL’s overall NPD, is in fact only counted once. The methodology employed by Media Metrix to measure IM usage has been refined since the *Order* was adopted, and is now specifically designed to eliminate “false positives” - *i.e.*, rather than counting as a Unique Visitor every user upon whose computer screen the IM client (or, in the case of the AOL service, the “Buddy List” and/or message windows) becomes the active window, it counts only those users who send or receive at least one instant message that month.

⁴² See Holly M. Sanders, *AOL Gets FCC Approval for Video on Instant Messenger*, BLOOMBERG NEWS, Aug. 21, 2003, at <http://www.detnews.com/2003/technology/0308/22/technology-249962.htm>. IM was invented by AOL in 1985 and first offered as a feature of the AOL online service in 1989. See Letter from Peter D. Ross, Esq., to Magalie Roman Salas, Sept. 29, 2000 (on file with Richmond Journal of Law & Technology). AOL has been issued United States Patent 6,449,344 covering innovations developed by ICQ. See United States Patent 6,449,344, at <http://www.jabber.org/im-patents/patent-6499344.html> (last visited Jan. 28, 2004).

⁴³ Petition of AOL Time Warner Inc. for Relief From the Condition Restricting Streaming Video AIHS, No. 00-30, Aug. 20, 2003, available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-03-193A1.doc.

⁴⁴ *Id.*

⁴⁵ *In re* Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, 85 F.C.C.2d 1 (1980).

⁴⁶ *Id.* ¶¶ 56-61.

⁴⁷ *Id.* ¶ 56. A firm that is not constrained by competition from a sufficient number of existing and potential competitors can profitably raise price above costs -- or prevent price from falling to costs -- by either directly restraining its own output or by restraining the output of its competitors. *See Rogerson Affidavit, supra* note 38, at 12.

⁴⁸ *Order* ¶¶ 57-58.

⁴⁹ *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 F.C.C. Rcd. 3271, 3304 ¶ 57 (1995) (citing William N. Landes & Richard A. Posner, *Market Power in Antitrust Cases*, 94 HARV L. REV. 937, 945-52 (1981)) [hereinafter referred to as *AT&T Non-Dominance Order*]; *see also Rogerson Affidavit, supra* note 38, at 13.

⁵⁰ *In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 95 F.C.C.2d 554, 562 n.19 (1983).

⁵¹ *See generally In re Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor*, 85 F.C.C.2d 1 (1980).

⁵² *Id.* ¶ 62.

⁵³ *Id.* ¶¶ 79-81.

⁵⁴ *Id.*

⁵⁵ *See AT&T Non-Dominance Order, supra* note 49; *see also Rogerson Affidavit, supra* note 38, at 11-12.

⁵⁶ *AT&T Non-Dominance Order, supra* note 49, ¶ 67. For the last four months, AOL's share averaged 58.5%. *See Rogerson Affidavit, supra* note 38, at 3.

⁵⁷ *AT&T Non-Dominance Order, supra* note 49, ¶¶ 58, 63.

⁵⁸ *AT&T Non-Dominance Order, supra* note 49, ¶¶ 67-72.

⁵⁹ *See supra* notes 39-43 and accompanying text.

⁶⁰ *Id.* ¶ 67.

⁶¹ *AT&T Non-Dominance Order, supra* note 49, ¶ 72.

⁶² Press Release, *Yahoo! Messenger and MSN Messenger Service Are Fastest Growing Instant-Messaging Applications in the U.S.*, (Nov. 16, 2000) (on file with Richmond Journal of Law & Technology).

⁶³ The Commission did not state a basis for concluding that AOL was “dominant” in IM. *See Order* ¶ 129. In light of the *AT&T Non-Dominance Order*, however, it would be difficult to argue that the Commission believed AOL's share of IM was lower than AT&T's share when it was declared non-dominant (*viz.*, 58.5%). AOL's declining share since then provides clear and convincing evidence that it was not dominant in IM when the petition was filed and that there was no likelihood of anti-competitive “tipping” in AOL's favor. *See Rogerson Affidavit, supra* note 38, at 10-12.

⁶⁴ *See AT&T Non-Dominance Order, supra* note 49, ¶ 63; *see also Rogerson Affidavit, supra* note 38, at 11-12.

⁶⁵ *See AT&T Non-Dominance Order, supra* note 49, ¶ 63. The standard economic model of market power postulates that market power “is a function of both a firm's marginal cost and the supply and demand elasticities that it faces.” Frank P. Darr, *Converging Media Technologies and Standing at the Federal Communications Commission*, 7 HARV. J.L. & TECH. 1 (1993) (citing Herbert Hovenkamp, *Antitrust Analysis of Market Power, with Some Thoughts About Regulated Industries*, in TELECOMMUNICATIONS DEREGULATION: MARKET POWER AND COST ALLOCATION ISSUES 65, 71 (John R. Allison & Dennis L. Thomas eds., 1990); *see also* Thomas G. Krattenmaker et al., *Monopoly Power and Market Power in Antitrust Law*, 76 GEO. L.J. 241, 267 (1987) (discussing demand elasticity in terms of the Lerner Index). Elastic demand further constrains a

firm’s ability to profitably price above competitive levels. *See generally* Krattenmaker, *id.*

⁶⁶ Any provider deciding to charge a per use fee for using its IM service would likely rapidly lose a large number of customers and find demand to be highly price elastic. It is not necessary for all or most users to coordinate a switch to a less expensive IM network in order to deter AOL from even attempting to exercise market power. The downloading and storage involved in adopting a new IM service are virtually costless, and multiple IM services can be used simultaneously. And there is no reason that adoption of a new service must be carried out simultaneously by most or all customers on different buddy lists. As a result, that price increase would be unprofitable. *Accord* Powell Separate Statement, *supra* note 25, at 8 n.19; *see also* Rogerson Affidavit, *supra* note 38, at 13.

⁶⁷ *AT&T Non-Dominance Order*, *supra* note 49, ¶ 58 (quoting *In re Competition in the Interstate Interexchange Marketplace*, 6 F.C.C. Rcd. 5880, 5888 (1991)).

⁶⁸ *AT&T Non-Dominance Order*, *supra* note 49, ¶ 58. This criterion comports with basic economic principles. If rivals cannot increase their capacities in response to a price increase by a leading firm, then that firm has some unilateral ability to exercise market power.

⁶⁹ *See supra* notes 38-43 and accompanying text.

⁷⁰ *Id.*

⁷¹ *See Rogerson Affidavit*, *supra* note 38. Professor Rogerson also filed a Reply Affidavit in response to comments made on the record before the FCC.

⁷² *Rogerson Affidavit*, *supra* note 38, at 3.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ According to Professor Rogerson, a firm is capable of exercising market power if it can “increase its profits by raising price above the competitive price.” *Rogerson Affidavit*, *supra* note 38, at 13. Professor Rogerson does not believe AOL can do exercising market power because, “along with its two competitors, [AOL] makes its IM services available to consumers for free.” *Id.*

⁷⁷ *Rogerson Affidavit*, *supra* note 38, at 13-14.

⁷⁸ *Id.* at 14.

⁷⁹ Microsoft, *Using the Task Manager*, at <http://support.microsoft.com/default.aspx?scid=%2Fdirectory%2Fworldwide%2Fen-gb%2Ftask.asp> (last visited Jan. 29, 2004) (“There are the programs that make up Windows itself, as well as programs that start automatically when you turn on your PC, like Windows Messenger.”).

⁸⁰ *See* Microsoft, *.NET Passport Overview*, at http://www.microsoft.com/technet/treeview/default.asp?url=/TechNet/prodtechnol/winxpro/proddocs/passport_about.asp (last visited Jan. 26, 2004); Microsoft .NET Passport, *.NET Passport – Directory of Sites*, at <http://www.passport.net/directory/default.asp> (last visited Jan. 19, 2004).

⁸¹ Microsoft .NET Passport, *Microsoft .NET Passport Q&A*, at <http://www.passport.net/Consumer/ConsumerQA.asp> (last visited Jan. 19, 2004).

⁸² Microsoft, *Microsoft .NET Passport for Businesses* (Mar. 13, 2003), at <http://www.microsoft.com/net/services/passport/business.asp> (last visited Jan. 19, 2004).

⁸³ Cardshow.com, *iRevolution Joins Forces with RSA Security to Provide Secure Online Authentication to Microsoft .NET*

Fernando R. Laguarda- *Unleashing “Instant Messaging” From Regulatory Oversight Passport* (Oct. 11, 200), at http://cardshow.com/esmart/details_rubrique_articles.asp?article=355&rubrique=2.

⁸⁴ In fact, Bill Gates, Microsoft’s Chairman, stated, “it’s our goal to have virtually everybody who uses the Internet to have one of these Passport connections.” Dominic Gates, *Microsoft Could Hold Passport to Net*, INDUSTRY STANDARD.COM, July 3, 2001.

⁸⁵ Indeed, in its first twelve months of sales alone, consumers purchased over sixty-seven million copies of Windows XP as the original operating system on new PCs. PR Newswire, *Microsoft Announces Record First Quarter Revenue* (Oct. 17, 2002), at <http://www.prnewswire.com/cgi-bin/stories.pl?ACCT=105&STORY=/www/story/10-12-2002/0001821989>. It can be safely assumed that this number has grown since October 2002, the last period for which data are available, and that consumer purchases of Windows XP upgrade software for existing PCs further increase the installed base of Windows XP.

⁸⁶ Indeed, for these reasons, some experts predict that Microsoft’s IM share will eclipse AOL’s within the next few years. Kristi Heim, *Microsoft to Push Instant Messaging for Business*, SAN JOSE MERCURY NEWS (Mar. 7, 2003), available at http://www.siliconvalley.com/mld/siliconvalley/business/special_packages/ms_antitrust/5335953.htm.

⁸⁷ Yahoo!, *Yahoo! Facts & Figures*, at http://solutions.yahoo.com/advertiser_center/research/figuresQ4.pdf. (last visited Jan. 19, 2004).

⁸⁸ Yahoo!, *What is a Yahoo! ID or Yahoo! Account?*, at <http://help.yahoo.com/help/us/sbc/mesg/mesg-04.html> (last visited Jan. 19, 2004).

⁸⁹ *In 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; Petition of AOL Time Warner Inc. for Relief From the Condition Restricting Streaming Video AIHS*, 18 F.C.C. Rcd. 16835 ¶ 6 (2003) [hereinafter *Relief Order*].

⁹⁰ *Id.*

⁹¹ *Id.* ¶ 8.

⁹² *Id.*

⁹³ *Id.* ¶ 10.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ *Relief Order*, *supra* note 89, ¶ 11.

⁹⁷ *Id.*

⁹⁸ *Id.* ¶ 12.

⁹⁹ *Id.*

¹⁰⁰ In communications networks, these effects come from interconnection or interoperability. For example, a telephone is more valuable to me if everyone else has a phone that I can access from my phone. See generally A. Douglas Melamed, Network Industries and Antitrust, Address Before The Federalist Society Symposium on Law and Public Policy: Competition, Free Markets and the Law, at <http://www.usdoj.gov/atr/public/speeches/2428.htm> (Apr. 10, 1999). In other instances, network effects arise because, as the number of users of a product or service increases, there is an increase in the number of complements available in the market for that product or service. See generally Michael L. Katz & Carl Shapiro, *Systems Competition and Network Effects*, 8 J. ECON. PERSP. 93 (1994). For example, a video game player is more valuable to a user when it is in a widely used format for which, because it is widely used, a large number of games are produced.

¹⁰¹ See *supra* note 100 and accompanying text.

¹⁰² Network effects can increase “the incentive for, and thus the likelihood of, anticompetitive conduct. The very demand-side economies of scale that induce the formation of a network in the first place can serve as barriers to competition against the network, even by those who might offer a superior alternative.” Melamed, *supra* note 100, at Part III.A. Indeed, proponents of the IM condition apparently believed that the absence of compatibility in any “market” with potential for network effects could be *per se* evidence of market tipping. See Gerald Faulhaber, *Network Effects and Merger Analysis: Instant Messaging and the AOL-Time Warner Case*, 26 TELECOMM. POL’Y 311333 (2002).

¹⁰³ See Melamed, *supra* note 100, at Part III. Competition policy should be concerned about entry barriers because they “increase the likely duration, and thus the value, of market power or monopoly power and thus reduce efficiency.” *Id.* at Part III.A; see also PHILLIP E. AREEDA ET AL., ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES & THEIR APPLICATION ¶ 420 (2d ed. 2002) (defining an “entry barrier,” in the conventional antitrust sense, as “any factor that permits firms already in the market to earn returns above the competitive level while deterring outsiders from entering”).

¹⁰⁴ See Constance K. Robinson, *Network Effects in Telecommunications Mergers*, Address Before the Practicing Law Institute, at <http://www.usdoj.gov/atr/public/speeches/3889.htm> (Aug. 23, 1999) (“[I]nterconnection or compatibility is not always the best or the least costly way to achieve network efficiencies.”).

¹⁰⁵ See, e.g., *In re* Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 18 F.C.C. Rcd. 14783, ¶ 13 (rel. Jul. 14, 2003) (noting that enhanced competition benefits consumers directly with increased choice, innovative service, and new technologies); *In re* National Systems & Research Co., 17 F.C.C. Rcd. 12011, ¶ 1 (rel. Jun. 28, 2002) (stating that the benefits of competition for consumers include lower prices, innovation, and additional service options).

¹⁰⁶ *Health of the Telecommunications Sector: A Perspective from the Commissioners of the Federal Communications Commission Before The Subcommittee On Telecommunications and The Internet of the House Committee On Energy And Commerce*, 107th Cong. (2003) (statement of Michael J. Copps, Commissioner, Federal Communications Commission) at <http://www.fcc.gov/headlines2003.html>; see also *Health of the Telecommunications Sector: A Perspective from the Commissioners of the Federal Communications Commission Before The Subcommittee On Telecommunications and The Internet of the House Committee On Energy And Commerce*, 107th Cong. (2003) (written statement of The Honorable Jonathan S. Adelstein, Commissioner, Federal Communications Commission) at <http://www.fcc.gov/headlines2003.html> (“[C]ompetition can provide strong competitive pressures that will drive down prices, improve services[,] and offer consumers more choices.”).

¹⁰⁷ The introduction of a third competitor to a market with two existing competitors can have significant benefits for consumers. See, e.g., *In re* Amendment of the Commission’s Space Station Licensing Rules and Policies; Mitigation of Orbital Debris, 18 F.C.C. Rcd. 10760, ¶ 64 (rel. May 19, 2003) (discussing benefits of a 3-firm market and presumption against 3-2 mergers); *In re* Implementation of Section 6002(B) of the Omnibus Budget Reconciliation Act of 1993: Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services, 18 F.C.C. Rcd. 14783 (rel. Jul. 14, 2003) (separate statement of Chairman Michael K. Powell) (noting that with “three or more choices” in wireless providers, consumers benefit from “lower . . . prices and more innovative services”).

¹⁰⁸ As mentioned above, choice for consumers is the ultimate benefit of competition. See William Kennard, Chairman, Federal Communications Commission, Remarks to the Practicing Law Institute, at <http://www.fcc.gov/Speeches/Kennard/spwek702.html> (Dec. 11, 1997) (“Our job at the FCC is to break down barriers to choice.”).