

**FEDERAL COMMUNICATIONS COMMISSION EN BANC HEARING ON THE
MERGER OF AMERICA ONLINE, INC. AND TIME-WARNER, INC.**

JULY 27, 2000

**STATEMENT OF DR. BARRY ORTON, PROFESSOR OF
TELECOMMUNICATIONS, UNIVERSITY OF WISCONSIN-MADISON**

I am Dr. Barry Orton, Professor of Telecommunications, University of Wisconsin-Madison. I am a veteran consultant to local cable television franchising authorities, and over the last 20 years have been involved in original franchise negotiations, renewals, rate and customer service regulations, franchising of competitive cable systems, and transfers of ownership procedures. I have worked on these issues for large cities such as Milwaukee and Chicago, states such as Wisconsin and Vermont, counties such as Alachua, Florida and Grundy, Illinois, and very small jurisdictions such as Barron, Beaver Dam, and Brown Deer, Wisconsin.

I was an original founder of the National Association of Telecommunications Officers and Advisors (NATOA), the professional organization of local telecommunications regulators, and am president of NATOA's Wisconsin chapter. I am on the Board of Contributors of the legal newsletter Cable TV and New Media Law and Finance and the Editorial Review Board of the Journal of Municipal Telecommunications.

Today, I am primarily representing the views of cable franchise authorities in eastern Wisconsin, having assisted the City of Milwaukee and 28 other area municipalities of the Regional Telecommunications Commission in the process of due diligence for local approval of the AOL Time Warner merger. These jurisdictions represent over 250,000 subscriber households.

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After favorably reviewing the technical, financial, and legal qualifications of AOL-Time Warner, and receiving assurances that existing franchise obligations will remain intact, the Milwaukee-area franchise authorities I serve all approved the transfer of control to AOL Time Warner last month. On my recommendation, they did not consider "open access" platform issues as part of the transfer process, and are convinced that this is a national issue that needs a solution in Congress or at the Commission rather than before local governing bodies. However, they are concerned about the local impacts of broadband "convergence" as reflected in this merger.

But first, some historical perspective on both Time Warner and America Online is necessary.

I have been involved in the regulation of Time Warner since the cable television franchise "gold rush" of the late 70's and early 80's. I assisted the City of Milwaukee with the negotiation of the original franchise with Warner Amex Cable in 1983 and helped plan the City's oversight of initial construction of the system. In 1984, Milwaukee and other jurisdictions renegotiated with Warner when we were told that the two-way "QUBE" system was economically unfeasible and the franchise negotiated a year before needed to be scaled down.

After cable grew to utility-like ubiquity in the 1990's, I assisted Warner's Milwaukee-area municipalities with rate regulation and the establishment of customer service standards pursuant to the Cable Television Consumer Protection and Competition Act of 1992. I have also been involved with the franchise renewal of a variety of Warner entities over the years.

From most communities' perspective, Warner has always been a relatively good cable operator and a responsible corporate citizen. They have been at the forefront of experimentation with two-way services and in the development of quality programming. Time Warner was one of the Social Contract cable operators and has long been supportive of local Public, Educational and Governmental (PEG) access activity and local educational efforts.

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The willingness of the Milwaukee-area municipalities which I represent to approve this merger largely stems from the fact that the Time Warner Cable entities holding their franchises remain in place and Time Warner has agreed to continue to abide by the provisions of the franchises. There is a level of trust that has been created from long-term service and from relationships with Time Warner's people. When problems have occurred, there has been a good faith effort to find solutions and make corrections.

America Online has a far different history, and does not enjoy the same level of trust. AOL's repeated failure to provide adequate service capacity to meet the demand its marketing generated is a track record that makes local officials very nervous.

To most professional users of the Internet, AOL has long been seen as the "sandbox" wherein new users play with Net tools before they graduate to a local or national ISP. AOL's policy of marketing to novice users who do not realize they are paying for less-than-robust services and features assures that having an AOL email address continues to be the equivalent of driving a car with a big "Student Driver" sign on the roof.

In some periods between 1996 and 1998, AOL's performance quality and level of customer service rivaled the worst cable operator before the cable industry's reregulation under the Cable Television Consumer Protection and Competition Act of 1992. If AOL had been selling hundreds of thousands of tickets to a Bruce Springsteen concert in a 5000-seat arena, and then made it difficult for frustrated customers to get refunds, it would have been indicted. Three successive Assurances of Voluntary Compliance (AVC) with multiple state attorneys general explicitly forced AOL to correct every part of its operation from the size of its modem pool to its refund policy, telephone support system, marketing materials, and server capacity.

Specifically, in 1996, a 20- state AVC required AOL to refund customers who tried and failed to cancel service after AOL abruptly switched to a \$19.95 flat monthly rate. In 1997, 36 attorneys general required AOL to stop advertising until it could provide reasonable modem access, allow easy cancellation and provide significant refunds. In 1998, a 44-state AVC forced AOL to clarify its free trial offers, disclose its premium surcharges, communications charges, and cancellation procedures, and reform its other business practices. As Ohio Attorney General Betty Montgomery said announcing the 1998 AVC, "The problem we're experiencing with America Online is similar to a parking attendant that sells too many monthly passes - when drivers show up at the garage, it's already full of cars."

The Commission should review all three Assurances of Voluntary Compliance and AOL's subsequent reports to the attorneys general on its compliance progress to get a full picture of how badly an Internet Service Provider can perform when left unchecked by government. The AVCs and the compliance reports also provide a strong explanation as to why regulatory tools are needed to prevent a repetition of AOL's history, particularly when AOL's top executives will have control over the multimedia colossus the FCC will be anointing with approval of this merger.

Many cable subscribers have been looking forward to the availability of cable modem service such as Time Warner's Roadrunner so they can work and play at home as fast as they now work and play in the office. Local officials from communities where cable modem service is already available know that when outages, data slowdowns, poor telephone response and inadequate technical support occur, consumers call village or city hall when they get frustrated with trying the cable company. Will franchise authorities have the regulatory tools they will need to assure high quality service?

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Regulations established by the FCC under 47 C.F.R. Section 76.309 pursuant to the Cable Television Consumer Protection and Competition Act of 1992 set minimum standards for telephone availability, installations, service calls, and outages. These standards can be implemented and enforced by local governments, and have been very effective in assuring adequate levels of customer service where they have been adopted.

There is a strong need for similar standards for cable modem services. Local governments will need to at least insure that subscribers don't have to pay for service that they did not get and that someone answers the phones, installs service on a timely basis, provides technical support and fixes the wires or modems when they break. Given AOL's track record and the growing importance of cable broadband in allowing residential customers access to high-speed data service, the Commission has adequate reason to extend the provisions of Section 76.309 to include cable modem service under the protection of its customer service standards.

While we all recognize that competition is the ultimate consumer protection mechanism, most communities do not yet have another provider of high-speed Internet access to residential customers. In the absence of real competition, the Commission should take the modest, but important step of extending its existing customer service standards for cable television service to cable modem service and allow local authorities the option of enforcing such standards. In addition, as with cable service, local franchising authorities should have the option of developing and enforcing more stringent and different standards where appropriate.

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