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**U.S. House of Representatives**  
**Committee on Commerce**  
 Room 2125, Rayburn House Office Building  
 Washington, DC 20515-6115

September 26, 2000

JAMES E. DERDERIAN, CHIEF OF STAFF

The Honorable William E. Kennard  
 Chairman  
 Federal Communications Commission  
 445 12<sup>th</sup> Street, S.W.  
 Washington, D.C. 20554

Dear Chairman Kennard:

The proposed merger of America Online ("AOL"), the world's largest Internet service provider, and Time Warner, the second largest cable television company in the United States, represents the largest corporate fusion in U.S. history. If approved, the merger could undoubtedly change the way that millions of Americans receive information in the future. According to the Federal Trade Commission ("FTC"), the combined company would control 40 percent of the Internet access market and reach 20 percent of cable-equipped homes.

While the Federal Communications Commission ("FCC") has the authority to review the AOL-Time Warner merger as it pertains to the transfer of Time Warner's broadcast licenses, the FCC appears prepared to consider aspects of the merger that may exceed its authority. This raises serious questions regarding the scope of the FCC's statutory authority, primarily as it bears on the issue of open access to cable systems.

In this regard, I was troubled to learn the details of the FCC's draft order from press reports this week, in particular the September 21, 2000 Washington Post article. These reports indicate that your staff is recommending that the FCC mandate open access to the AOL-Time Warner cable television systems as a condition of approving the merger. As you are well aware, the issue of open access to cable lines remains an important, yet unsettled area of debate before Congress, the FCC and within the industry, including serious questions about the constitutionality of imposing such conditions.

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Moreover, I find the FCC's apparent plan of action on the open access issue troubling for two additional reasons. First, as you are aware, last December, you publicly stated that the open access issue should be decided by the marketplace as opposed to a regulatory approach. Specifically, you stated that, "[p]eople of good faith believe sincerely that the best way to advance broadband for consumers is to mandate access . . . I respectfully disagree." Yet, contrary to your public statements, the FCC appears poised to impose those very conditions that you have previously have said should not be imposed by regulatory mandate.

Second, I do not believe the merger review process is the appropriate forum to address an issue of this magnitude. I am particularly alarmed by this plan of action given that the FCC has delayed opening up an official inquiry into the broad array of issues surrounding open access to cable systems. If the FCC were to impose open access standards as a condition for its approval of this merger, the FCC may well set a *de facto* industry-wide open access standard without the benefit of thoroughly considering the nationwide implications of imposing such conditions. If the FCC decides to pursue this course of action, I believe that it should first address this issue through a rulemaking proceeding.

In order to fully understand the issues at hand, I am requesting that you provide the Committee with a copy of the FCC's draft order reported in the press by the close of business Thursday, September 28, 2000. I also would like to learn more about the authority the FCC plans to rely upon to impose these significant open access conditions as a part of this merger. Accordingly, pursuant to Rules X and XI of the U.S. House of Representatives, please provide responses to the following questions and requests for information by October 6, 2000:

1. Do you believe that the imposition of open access provisions to the proposed merger between AOL and Time Warner could violate the First Amendment of the U.S. Constitution? Has the FCC analyzed this issue in connection with its review of this merger? Please provide all records relating to the issue of whether imposing open access provisions violates the First Amendment.
2. On what statutory authority would the FCC be relying if it were to mandate open access as a condition of approving the AOL-Time Warner merger? Please provide all records relating to the FCC's authority to mandate open access, including but not limited to any legal analyses of this issue.
3. Please describe the nature of the relationship between the FTC and the FCC during the pendency of this particular merger. Specifically, please explain the different roles played by the FCC and FTC, the degree of interaction between the FTC and FCC, the mutual and separate issues being worked on by the FTC and FCC, the type of information that has been and continues to be shared between the FTC and FCC, and, whether there will be a joint FTC/FCC decision. Please provide all records relating to: (1) all advice provided to the FCC by the FTC regarding the issue of open access; (2) the role of the FCC and FTC relating to this merger; and (3) the degree of cooperation and information being shared between the FCC and FTC.

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- 4. In the past, the Commission has stated that it is encouraged that, as the demand for broadband capability increases, methods for delivering digital information at high speeds to consumers will emerge in virtually all segments of the communications industry, i.e., wireline, wireless, satellite, and cable. Please describe how the Commission is considering the alternative methods of high-speed Internet access.

Further, I request that the appropriate FCC staff provide a briefing to Committee staff to address the issues outlined above, no later than October 3, 2000.

*Tues*

Please contact Ms. Linda Bloss-Baum or Ms. Julie Corcoran of the Committee staff at (202) 226-2424 if you have any questions regarding this request and to make arrangements for this briefing. For purposes of responding to the information and records requested in this letter, please refer to the attachment. Thank you for your cooperation and assistance.

Sincerely,

*- ex-parte*

*Tom Bliley*  
 Tom Bliley  
 Chairman

Attachment

- cc: The Honorable John D. Dingell, Ranking Minority Member  
 The Honorable W.J. "Billy" Tauzin, Chairman,  
 Telecommunications, Trade, and Consumer Protection Subcommittee
- The Honorable Edward J. Markey, Ranking Member,  
 Telecommunications, Trade, and Consumer Protection Subcommittee
- The Honorable Susan Ness, Commissioner, Federal Communications Commission
- The Honorable Harold Furchtgott-Roth, Commissioner, Federal Communications Commission
- The Honorable Michael Powell, Commissioner, Federal Communications Commission
- The Honorable Gloria Tristani, Commissioner, Federal Communications Commission

TJB:lb

**ATTACHMENT**

1. The term "records" is to be construed in the broadest sense and shall mean any written or graphic material, however produced or reproduced, of any kind or description, consisting of the original and any non-identical copy (whether different from the original because of notes made on or attached to such copy or otherwise) and drafts and both sides thereof, whether printed or recorded electronically or magnetically or stored in any type of data bank, including, but not limited to, the following: correspondence, memoranda, records, summaries of personal conversations or interviews, minutes or records of meetings or conferences, opinions or reports of consultants, projections, statistical statements, drafts, contracts, agreements, purchase orders, invoices, confirmations, telegraphs, telexes, agendas, books, notes, pamphlets, periodicals, reports, studies, evaluations, opinions, logs, diaries, desk calendars, appointment books, tape recordings, video recordings, e-mails, voice mails, computer tapes, or other computer stored matter, magnetic tapes, microfilm, microfiche, punch cards, all other records kept by electronic, photographic, or mechanical means, charts, photographs, notebooks, drawings, plans, inter-office communications, intra-office and intra-departmental communications, transcripts, checks and canceled checks, bank statements, ledgers, books, records or statements of accounts, and papers and things similar to any of the foregoing, however denominated.
2. The terms "relating," "relate," or "regarding" as to any given subject means anything that constitutes, contains, embodies, identifies, deals with, or is in any manner whatsoever pertinent to that subject, including but not limited to records concerning the preparation of other records.