Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application of America Online, Inc.	)	CS 00-30
and	)	
Time Warner, Inc.	)	
For transfers of Control	)	

PETITION TO DENY
of
THOMAS LEWIS BONGE

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Petitioner

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To The Honorable Commissioners:

Petitioner Thomas Lewis Bonge joins the plethora of business concerns and private individuals who are opposing the merger of Time Warner Communications and AOL. Petitioner joins in for the same reasons expressed by the majority of opposing entities; both corporations, but especially Time-Warner Communications, have exhibited a total contempt of all principles of free speech and free exchange of information upon which the internet is based. Both companies, but especially Time-Warner, routinely terminate customers due to the content of their speech. Both companies, but especially Time-Warner, ignore their contractual obligations, whether the contract is with a private individual, a commercial concern, or a major city. To allow these companies to dramatically increase their market presence may well doom the internet as a public mechanism of communications, at least in the United States.

Petitioner owns no company. Petitioner has no web site. Petitioner has no financial interest in the internet, or any "dot com" company. Nevertheless, petitioner occupies the

position of the most important component of the internet; the average citizen user, who spends the money which all the other commercial and financial interests are bitterly fighting over. In short, petitioner is that often forgotten person, the individual who is ultimately affected by the ruling of this commission; the person whom everyone else claims to represent[1] and who is gratified to discover that all parties are fighting among themselves for the right to protect; the person whose freedom of speech, if the opposing parties are to be believed, will ultimately be infringed. As such petitioner implores this commission to give great thought to the situation of the man on the bottom, from whom all the benefits to the more powerful interests ultimately stem.

I. Summary

In this pleading, Petitioner examines the submissions from all other parties and contributors in this action from the standpoint of the consumer rather than the commercial concerns. Petitioner observes that all contributors express the fear that in the event the application is granted without limitations, applicants will have the power, and will in fact, limit the content of the upstream data of the consumers the applicants unilaterally determine to be controversial or offensive, or other "content" deemed by applicants to be unsuitable for dissemination, by deleting the data, terminating the consumer's account, or both. Petitioner further observes that several contributor present evidence that this practice is routinely utilized by applicants, but such examples are buried within the submissions and may well be overlooked. Petitioner extracts them and presents them herein.

Petitioner presents a concrete example of such discrimination actually occurring to himself by Road Runner and Time Warner Communications, and points out that the

[1] From Petition To Deny Of Consumers Union, Consumer Federation Of America, Media Access Project, And Center For Media Education, April 26, 2000, Page 3; "Petitioners appear in this proceeding on behalf of their members and others who watch television, subscribe to cable services, and use the Internet. Those citizens have First Amendment protected rights to speak, to be heard, and to receive information through access to cable television and broadband telecommunications."

example presented has resulted in a Federal Court action being filed, which is presently being litigated in the United States District Court, Middle District of Florida, at Orlando, Florida.

Petitioner also points out that many ISP's, including Time Warner and Road Runner, engage in unfair business practices in relation to the product sold compared to the product actually delivered by them to the consumer. Road Runner, as well as many other ISP's including AOL and @Home advertise "unlimited service" but then limit the service if it is used more frequently, or to transmit more data, that the ISP unilaterally finds acceptable, in some cases actually terminating the "undesirable" customer without notice for violations of a unilaterally established "Acceptable Use" policy.

Petitioner submits that, due to the nature of the internet, all end users are both "customers" of the ISP and "content suppliers." As such, in evaluating the submissions in this action, this commission must consider them to request the extension of all arguments and requests for relief contained therein to the end users. This commission must therefore include the end user in any ruling which this commission may make applying to commercial concerns seeking access to the system. It is Petitioner's contention that every end user and consumer should be specifically granted all rights, protections, and right of action before this commission or the courts which this commission may require granted to commercial concerns as a condition of approval of the application of AOL and Time Warner Communications. As such, the buzz words "Open Access" refer not only to the right of commercial content suppliers to use the system to supply content to the consumers, but also the right of any consumer to supply any content not otherwise a violation of the law to all users of the internet without discrimination based on the content or quantity of the posts by the consumer's ISP.

Petitioner herein specifically alleges and proves that the actions of Road Runner, Time Warner Communications, AOL, and in fact, other ISP's not a party to this proceeding

have threatened to and in fact have begin to convert the internet from a medium which is "the most participatory marketplace of mass speech that this country--and indeed the world--has yet seen… [where] individual citizens of limited means can speak to a worldwide audience on issues of concern to them"[2] to a commercial marketplace, a shopping center where the end user has the right to purchase "content" but no other right.

In view of these concerns, Petitioner suggests that this commission take the following actions:

1. Deny the applications of AOL and Time Warner Communications

2. In the alternative, require the following:

    A. Specifically define the end user as a "Content Provider."

    B. Implement the general protections requested by others in opposition to the transfer, but include specific language extending all rights and protections to the end user as a "content provider".

    C. Specifically require as a condition of transfer that AOL, Time Warner Communications, and any other telecommunications service in which they possess an interest (I.E. Road Runner and DirecPC) may take no action of any nature, including, but not limited to, deleting any content from the system or terminating the account of any customer, based on either the quantity or content of any otherwise legal material posted to the internet.

    D. Require that the terms and conditions of access be clearly disclosed and specifically enforceable by the end user. This should specifically include the requirement that, if the ISP chooses to sell "unlimited access" this

[2] Richards v. Cable News Network Inc., No. 98-3165 (E.D.Pa. 1998)

access be truly unlimited and not be subject to limitations of access or speed not generally applied to all customers, based on "excessive usage" of the system, or the quantity or content of any material posted to the system by the end user.

E. Require that, in extending "open access" to other ISP's, the applicants be prohibited from exercising "veto power" over the sale of service to any customer, even if that customer has been denied service by the applicants on their ISP.

F. Specifically prohibit the practice of including by reference as a part of the contract an "Acceptable Use Policy" which may be unilaterally modified by the ISP.

II. The FCC Has On Obligation to Consider Whether the Public Interest Will Be Served in Evaluating Whether a Particular Merger Should Be Allowed.

The FCC cannot authorize the transfer of control of Time Warner's CARs licenses to AOL unless such a transfer would serve the "the public interest, convenience and necessity."[3] The "public interest" standard of Section 310(d) "is a flexible one that encompasses the broad aims of the Communications Act."[4] These broad aims include "enhancing access to advanced telecommunications and information services in all regions of the Nation."[5]

The Commission has repeatedly imposed remedial conditions on transfers of control of licenses where it has found that such conditions were reasonable and necessary to render

[3] 47 U.s.c. § 310(d).

[4] Teleport Communications Group Inc., Transferor, and AT&T Corp. Transferee, For Consent to Transfer of Control of Corporations Holding Point-to-Point Microwave Licenses and Authorizations to Proviide Intcrnational Facilities-Based and Resold Communications Services, Memorandum Opinion and Order, 13 FCC Rcd 15,236, at para. 11 (1998).

[5] id

the proposed transfers consistent with the public interest. Courts have generally affirmed such exercises of the Commission's authority. [6]

The standard for Commission review of this merger is clear: it must serve "the public interest."[7] In applying the standard, the Commission has a broad charter to assure proposed mergers do not lessen the diversity of voices. "Assuring that the public has access to a multiplicity of information sources is a governmental purpose of the highest order, for it promotes values central to the First Amendment."

Here, Time Warner and AOL will establish, for all practical purposes, total gatekeeper control over the pipeline which the end user must utilize, not only to receive information from commercial concerns, but also to send information as is his constitutional right. As the Supreme Court recently reaffirmed, 'it has long been a basic tenet of national communications policy that the 'widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.[8]

In this action, numerous commercial concerns, government entities, and private individuals have come forward opposing the application. The oppositions reveal a common thread – the applicants, Time Warner and AOL, deal with all parties; their competitors, their business associates, their customers, and, indeed, even this commission[9] with total contempt. They have total disregard of the rights of any party.

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[6] See Western Union Tel. Co. v. FCC, 544 F.2d 346, 355 (3rd Cir. 1976), cert denied, 429 U.S. 1092 (1977)

[7] The Commission has unequivocally stated that it will approve the transfer of licenses and other authorizations underlying a merger between communications companies only if the transaction is in the "public interest, convenience and necessity." Applications of NYNEX Corporation and Bell Atlantic Corporation for Consent to Transfer Control of NYNEX Corporation and its Subsidiaries, File No. NSD-L-96-l0, Memorandum Opinion and Order, 12 FCC Red 19985,19987(1997) ("NYNEX/Bell Atlantic Order").

[8] Turner Broadcasting System, Inc. V. FCC. 512 U.S. 622,663 (1994)

[9] Petitioner particularly noticed the pedantic and insulting manner in which Applicants lectured this Committee on their duty to rubber-stamp their application in Applicants' Reply Memoranda.

Petitioner must confess that, while he has sympathy for the plight of the commercial concerns in opposition, their particular complaints are not his problem. However, these same arguments are equally applicable to what is his problem, which is applicants' routine censorship of the content of internet posts by end users, applicants' unfair business practices in speed-capping and denying access to the system after selling users "unlimited access," and applicants' violation of their own adhesive contracts with users by unilaterally terminating their access to the internet based on the content of their posts.

These are all matters which can and should be addressed in this commission's consideration of the application. Furthermore, the same arguments and remedies proposed by the commercial concerns in opposition may be simply applied to Petitioner's particular objections merely by granting the oppositions' petitions, and defining the end user as a "content provider."

III. The Specific Actions of Time Warner and Road Runner Resulting in This Petition.

As is the case in most, if not all, of the oppositions to the instant application, petitioner was not motivated in opposing the application by theoretical considerations. Petitioner submits this petition in response to the specific action of Road Runner terminating Petitioner's high-speed access on an allegation that Petitioner posted "Commercial off-topic USENET Spam" to a USENET newsgroup.

Road Runner gave Petitioner no hearing. Road Runner gave Petitioner no opportunity to show that the termination was unjustified. Road Runner did not even advise Petitioner what message he posted which was offensive, or how it was commercial, off-topic, or Spam.

In fact, not only was no such message posted by Petitioner, but the termination has resulted in a civil action being filed by Petitioner In the United Sates District Court

of the Middle District of Florida, Orlando, Florida, styled Thomas Lewis Bonge, et al., v. Time-Warner Entertainment Co., L.P., et al., Case No. 6:00 CV-1054-ORL-18-A.

Petitioner did post a message offensive to Applicants. That message merely called attention to an IRC channel, #MP3_Depot. The offensive message was posted to the USENET newsgroup alt.binaries.sounds.mp3.jazz!

Petitioner will repeat the offense and point out to this commission and any other reader that they may find this channel on the server irc.action-irc.net, and at this chat channel find good friends willing to discuss all genres of music. The channel is not commercial, sells no product, charges no fee for admission, and contains no advertising. It is merely a meeting place for people looking for friends and chat on a mutual interest. Although users may be willing to privately trade music files, the channel has neither the technological ability nor storage capacity to host any files, music or otherwise, and no product or service is available from the channel, other than the ability to chat with friends.[10]

After Petitioner filed his Federal Court complaint, Time Warner then took action of unprecedented viciousness, even for Time Warner.

Petitioner lives on the same property as his mother and Stepfather, Marie and William Andree, but in a different residence. Both residences, however, share a common post-office address, 951 Penelope Avenue, Palm Bay, Florida. William, but never Marie, had been a customer of Time-Warner Entertainment Co., L.P. for over 15 years. In addition, Mrs. Andree had her own computer connected to Road Runner. Unknown to Mr. & Mrs.

[10] This feature is shared by all IRC channels. By their nature, IRC channels cannot serve as a source or repository for files. The only technological capacity that the channels possess is the ability to establish a multiuser chat. The bandwidth does not exist for IRC to ever provide more than this service. Although individual members can, and do, set up direct computer to computer transfers with other users they happen to meet on this and other IRC channels, the IRC channel is not and cannot be a party to any such transfer.

Andree, or, indeed, to Petitioner, Time Warner had cancelled Mr. Andree's cable account when Plaintiff signed up for Road Runner and placed both accounts in Petitioner's name.

Naturally, Mrs. Andree wanted cable and Road Runner service back. Time-Warner scheduled an appointment to install her service.

Mrs. Andree is 86 years old; She has survived two separate bouts with cancer in the last five years. She is blind in one eye. She is diabetic. Mr. Andree is 81 years old, and retired from the military with 100% disability. He has congestive heart failure, with 5% heart function, and within the past year received an experimental aortic stent graft for an abdominal aneurysm because he would not have survived conventional surgery. He has 100% hearing loss in one ear and 95% in the other, a result of being wounded in combat in the Korean War. He may have the early symptoms of Alzheimer's.

On the day that Time Warner was to install her service, they telephoned her and informed her that due to her son's problem Time Warner would provide her neither Road Runner ***nor cable TV service***.

Mrs. Andree became extremely upset, but contracted for service from DISH network. Dish Network supplies television programming via satellite but has no internet service.

Several days later the installer came install the service and discovered that the cable ***which had been installed by the builder of her house*** had been ripped out by Time Warner. They had trespassed on her property without her permission or knowledge, and cut the entire cable wiring system into to pieces. She immediately called Time Warner and asked them to replace what they had ripped out. She was told that the cable had not been installed by the builder, but by Time Warner and they had every right to enter her property and rip it out.

Mrs. Andree replied to Time Warner that for 15 years Mr. Andree had been complaining of bad reception and Time Warner had refused to repair the cable installation because it claimed that it had not been installed by Time Warner, but had been installed by the builder of the house.[11] Time-Warner replied that what Mr. Andree was told in the past was immaterial, that Time Warner's current position was that the cable had been installed by them and that gave them the right to enter her property and rip it out. Time Warner refused to take any action to correct their damage. She was forced to pay approximately $300 additional to re-wire two rooms only. The rest of the cable system, which she purchased with her home, is destroyed at this time.

There was absolutely no reason for this action. Time Warner did not salvage any materials - They merely destroyed them. There was no way that Mrs. Andree could have utilized the wiring to transmit Time Warner programming, because Time Warner also removed the drop, which was admittedly their installation. It merely became much more expensive to establish service with a competitor.[12]

In its attempt to damage Petitioner, and extract retribution for his filing a Federal action against it, Time Warner stooped to attacking his entire family and acted with pure unadulterated viciousness against two eighty-year-old disabled persons.

As a result of the termination of Petitioner's high-speed access, his business has failed.

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[11] Petitioner points out that it is immaterial who installed the cable. Once installed, it became a fixture, and her property. As a matter of fact, the DISH network installer had worked for Defendant Time-Warner as an installer for six years and is prepared to testify as an expert witness that he is familiar with both Time-Warner installations and builder installations, and from both the brand of the materials and the method of installation he can determine that the particular installation was not installed by Time-Warner. Furthermore he is prepared to testify that as part of his training from Time-Warner he was instructed that once an installation had been made it became the property of the homeowner and, upon disconnect, nothing except the cable drop from the pole or street could be removed by Time-Warner.

[12] As a result of these actions, both William and Marie Andree joined the Federal actions a plaintiffs, alleging trespass, theft, and malice on the part of Time Warner.

IV. The Historic Nature of the Internet.

1. The Concept of Delivering "Content" to Internet Users is a New Concept, Foreign to the Purpose of the Internet.

This is an extremely important point for this commission to keep in mind, not only in evaluation the instant petition, but also in considering the application under consideration and the oppositions to it. One is tempted to either ignore this fact, or to overlook its significance.

Its significance is that supplying "content" for a fee is not what the internet is about. The purpose of the internet is to allow any computer user in the world to instantly communicate with any other computer user.

Delivering "content" for a fee is obviously part of this definition. If this single facet of the net becomes the sole purpose, or even the primary purpose, the basic nature of the net will be changed, and will necessarily result in the death of the internet as we know it.

The net, at this point in time, may be compared to an ecosystem. It has a diverse and rich collection of "species" struggling for survival; they are called USENET, IRC, EMAIL, and FTP, with subspecies such as political dissent, and even some vicious predators such as child pornography, the black widows of the net. They to, unfortunately, have an important, if undesirable, purpose in the overall scheme.

But a new species has been artificially introduced - it is "content" for a fee. It is the rabbit of Australia, the runaway species threatening to overrun all others, and become the sole surviving life form on the net. As any ecologist well knows, an ecosystem cannot long survive with only one dominant species.

The companies supplying this "content" – the AOL's, the Road Runners, the Time Warners, are the new robber barons, the ecology-rapers, the clear-cut loggers, the strip-miners, the buffalo hunters of cyberspace, destroying its balance for their own private

gain, giving no thought to the common good, but keeping their eye on the bottom line, and the price of their stock today.

From Lawrence Lessig, Code and Other Laws of Cyberspace (1999)

> Relative anonymity, decentralized distribution, multiple points of access, no necessary tie to geography, no simple system to identify content, tools of encryption,—all these features and consequences of the Internet protocol make it difficult to control speech in cyberspace. The architecture of cyberspace is the real protector of speech there; it is the real "First Amendment in cyberspace," and this First Amendment is no local ordinance.
>
> We are enabling commerce in a way we did not before; we are contemplating the regulation of encryption; we are facilitating identity and content control. We are remaking the values of the Net, and the question is "Can we commit ourselves to neutrality in this reconstruction of the architecture of the Net?" I do not think we can. Or should. Or will. We can no more stand neutral on the question of whether the Net should enable centralized control of speech than Americans could stand neutral on the question of slavery in 1861. We should understand that we are part of a worldwide political battle; that we have views about what rights should be guaranteed to all humans, regardless of their nationality; and that we should be ready to press those views in this new political space opened up by the Net.
>
> The decision then is not about choosing between efficiency and something else, but about which values should be efficiently pursued. My claim in each of these cases is that to preserve the values we want, we must act against what cyberspace otherwise will become. The invisible hand, in other words, will produce a different world. And we should choose whether this world is one we want.

This particular action is a turning point for the internet. Although there have been a very few still small voices crying in the wilderness, this is the first action where it has been generally recognized that the future of the net, as we know it, is really at issue. This is the opening battle, and very possibly the decisive decision, which will determine the future of the internet in the foreseeable future.

2. Historically, the Value and Power of the Internet has Depended on Freedom of Access of All Users.

There is no doubt that the internet is intended to be a forum for free exchange of ideas. There is no doubt that the internet is generally perceived to be a forum for free exchange

of ideas. And there is absolutely no doubt that the courts are committed to insuring that the internet remains a forum where there is in fact a free exchange of ideas. From American Civil Liberties Union v. Reno in striking down COPA, the 2nd attempt of Congress to institute an "Internet Decency Act:"

> The First Amendment to the United States Constitution provides that "Congress shall make no law . . . abridging the freedom of speech." Although there is no complete consensus on the issue, most courts and commentators theorize that the importance of protecting freedom of speech is to foster the marketplace of ideas. If speech, even unconventional speech that some find lacking in substance or offensive, is allowed to compete unrestricted in the marketplace of ideas, truth will be discovered. Indeed, the First Amendment was designed to prevent the majority, through acts of Congress, from silencing those who would express unpopular or unconventional views.
>
> Despite the protection provided by the First Amendment, unconventional speakers are often limited in their ability to promote such speech in the marketplace by the costs or logistics of reaching the masses, hence, the adage that freedom of the press is limited to those who own one. In the medium of cyberspace, however, anyone can build a soap box out of web pages and speak her mind in the virtual village green to an audience larger and more diverse than any the Framers could have imagined. In many respects, unconventional messages compete equally with the speech of mainstream speakers in the marketplace of ideas that is the Internet, certainly more than in most other media.

Reality, however, is beginning to raise its ugly head. It may be true that in the medium of cyberspace anyone can build a soap box – if only they can get to cyberspace. The grim reality is that in order to get there they need either an Internet Service Provider or a direct connection to the internet – which costs more than a press – and it has, within the last couple of years become common practice for an ISP to ban from the internet the very speech which it was designed to foster, simply by denying access to the internet at all, on the theory that, as a private concern, the ISP is not subject to the limitations of the First Amendment. As the freedom of Press is often limited to those that own one, Freedom of the internet is becoming limited to those that own a direct connection. Freedom of speech on a public medium, where private concerns bar access to the medium, is no freedom at all.

Cable News Network, a division of Time-Warner, used this very argument of free and unfettered access to the internet, for commercial speech, exactly what they claim they have the right to prohibit their customers from posting, in a successful effort to beat down another small and insignificant player in the marketplace:[13]

> Richards and CNN do not share similar marketing and advertising. Unlike CNN, which reaches millions of homes across the world via cable television, Mr. Richards described himself as a "poor independent producer," who relies mainly on posters, newspapers, and radio to promote his goods. A close comparison of the parties' marketing and advertising illustrates that the two parties share only one medium in common, the Internet. There is little question that the Internet levels the playing field for commercially-contending Davids and Goliaths. It is no exaggeration to conclude that the Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country--and indeed the world--has yet seen… individual citizens of limited means can speak to a worldwide audience on issues of concern to them.

Now that very same company reverses itself, un-levels the playing field, and contends that, solely on the basis of the content of his speech, it has the right to exclude anyone whatsoever from that playing field.

V. The Concerns of Other Contributors

Most contributors to this proceeding are commercial concerns. They, like Petitioner herein, as might be expected, address the concerns of importance to themselves. These concerns fall into three major categories:

1. Anti-competitive practices of applicants, such as totally denying access to applicants' infrastructure.

2. Degradation of services by applicants, such as stripping out significant information from applicants' signals.

[13] Richards v. Cable News Network Inc., No. 98-3165 (E.D.Pa. 1998)

3. Contract violations of applicants, such as refusing to supply services specified in existing contracts between applicants and contributors.

In voicing their concerns, the commercial concerns understandably phrase their examples and arguments in terms of the inability of the commercial concern to sell a product to the consumer; see, e.g., Reply Comments of The Walt Disney Company, May 11, 2000:

> Time Warner is the nation's second largest cable systems operator, passing more than 20 million homes, and it owns many of the most important and popular cable networks, including CNN and HBO. Time Warner and AOL each provide Internet access services. Both Time Warner and AOL provide content over the Internet. And, AOL is the dominant provider of "sticky" online services such as chat and. instant messaging ("'IM"), commanding a 90 percent share of the IM market. Thus, the merged entity will not only own the only interactive television capable "broadband" pipeline into millions of American homes, but will also own highly significant content and thus, the merged entity will not only own the only interactive television capable "broadband" pipeline into millions of American homes, but will also own highly significant content and overlapping Internet services and applications traveling over that pipeline as well. This level of integration of control of content and broadband distribution will create undeniable economic incentives and opportunity for the merged entity to favor its own affiliated content and to discriminate against unaffiliated content providers, thereby limiting and skewing consumer choice. Moreover, the sheer power and sophistication of the technology which supports and enhances the broadband delivery system augments the capacity of its owner to discriminate against unaffiliated content providers. Allowing any entity to have this level of control over this country's broadband future raises issues of profound public interest concerns.
>
> In reviewing this merger, the Commission must be satisfied that the combination of Time Warner and AOL will do nothing to impede the free flow of news, information, entertainment, services, and commerce to consumers. Broadband must remain a highway on which all can travel and not become a proprietary cul-de-sac.

The arguments of the commercial concerns replying in this action are true as far as they go, but they put the cart before the horse.

The unique value of the telephone system is that it gives every citizen the ability and right to instantly communicate with any other person on earth. The right that this commission enforces in relation to the telephone system is not the right for any company to provide telephone service, or the right of any company to make a sales call, although this may

well be the means to the end. The right that an American citizen possesses is not the right to receive calls offering to sell him a product, but the right to call any person for any legal purpose whatsoever.

The unique value of the internet is the ability of any American citizen to simultaneously contact every person in the world. Similarly, the right which this commission must consider in the instant action is not the right of The Walt Disney Company to sell "content" to the internet – that right is a product of the more general right owned by every citizen – including The Walt Disney Company – and also the individual end user – to exercise his right of contact.

The commercial concerns often refer to the end-user's First Amendment rights to "receive information; see, e.g. Reply Comments of The Walt Disney Company, May 11, 2000, page 13:

> Caching discrimination also has fundamental implications for access to diverse sources of news and information so critical to the First Amendment rights of viewers... the right of citizens to receive timely and complete information could be seriously compromised. Unfettered and immediate access to 'rumple sources of news ensures the accuracy and integrity of information. The Commission has a special duty to ensure that the American public's current access to a diversity of news sources is not reduced.

The First Amendment, of course, guarantees the right of a citizen to speak, not to listen. However, the end user may well have such a right. If so, the actions of applicants totally abridge that right.

Petitioner wholeheartedly endorses the arguments made by the plethora pf commercial objectors to the instant application. Petitioner, however, requests this commission to structure its ruling in the proper manner; to guarantee equal and unfettered access to all users, without discrimination based on either quantity or content of the material submitted to the net, of which the commercial concerns selling access to "content" for a fee are only one class.

VI. The Applications of These Concerns to the Access Rights of the End User.

1. There is No Content Which Can Be Posted by Any Party Which is Not Offensive to Someone.

The ISP's, and in particular Time Warner and Road Runner, defend their actions by pious references to "Spam"[14] and "Offensive Posts." From Henry Geller,[15] *The FCC and Internet Acces*s, Electronic Media, Apr. 19, 1999, p. 15.

> [E]fforts to label service providers or customers who use the network in ways it does not approve of as "bandwidth hogs" suggests the appropriate social behaviors. Generally being a "hog" is not illegal or uneconomic, but it is frowned upon in our society. The network owner can place restrictions on how nonaffiliated service providers may use the network. As long as the network owner is also a direct competitor of the independent ISP, concerns about restrictions being imposed to gain competitive advantage will persist. Restrictions that are explained as necessary for network management may be viewed as driven by business motives, rather than technical considerations, by independent ISPs. These limitations can be applied to either service providers or consumers. The network owner may prevent independent ISPs from delivering services to consumers by restricting speed, duration of transmission, or other operational characteristics. In addition, the network owner may place limits on how customers use these networks. These practices are not merely a theoretical possibility. The exclusionary control of the network is already having an impact.

Of course, no one can reasonably object to the ISP "protecting" the public by prohibiting "spam", "bandwith hogs," pornography, hate posts, and other socially unacceptable behavior. We will all better off if the ISP assumes the duties of the arbitrator of public morals and decency, and assures that the tender sensibilities and feelings of its customers are not offended by the crude actions of its customers.

In 1973, the members of the Tourist Council of the State of Florida had occasion to watch a weather report. They were instantly and totally "offended" by the reporter's statement that the prediction was "partly cloudy." The implication that a cloud could appear in the

[14] See Generally, Industry White Paper On AOL's Submissions To The ITEF And The FCC, Final-July 21, 2000

[15] Henry Geller is former General Counsel at the FCC and presently Administrator of the National Telecommunications and Information Administration.

pristine Florida sky was an offense which needed to be immediately addressed. They succeeded in extracting a promise from all television and radio stations that, in the future, this condition would be reported as "partly sunny."[16]

The point here is not that it is obvious that this action was taken by the Tourist Council, not to protect the sensibilities of the public, or even its members but was in fact economically motivated, but it could be. The point is, there is no post, no message, no information, of any nature, not even a weather report, which is not offensive to someone, and which is of such a nature that there could not be some form of complaint concerning its existence. It is easy to see that, under the present conditions, any post whatsoever, even a comment about the weather, could be, and often is, used by the applicants as a reason to totally terminate a customer's access to the internet.

The long history of Freedom of Speech in the United States, which has been copied by every free nation in the world, is that commercial, political, even civic organizations, especially ones with a financial stake in the issue, cannot be trusted to police the public morals. This right is reserved to the Congress and this commission, and the courts, after considering the protections of the First Amendment and providing the appropriate balancing of the Constitution and the public good.

Time Warner, Road Runner, and AOL have assumed this position of censor, protector of the public good. This was innocuous when these concerns were a small and insignificant portion of the market. When they control the access of 80% of the citizens who subscribe to high-speed internet access, they cannot be permitted to act as a censor of the content of the net, no matter how important to public morals this may first appear to be.

It makes no difference that the ISP cloths its actions in ad hominum fashion, prohibiting "spam, "bandwith hogs," "pornography," "hate mail," and other "socially unacceptable"

[16] Some years later the State of California copied this policy. This may be the first recorded instance of a bizarre action originating in a state other than California and migrating there, rather than the reverse.

posts. The fact remains that this is flat-out, unmitigated censorship, and the applicants have abused any slight justification they may have had for such censorship to be ignored by using these virtuous motives as an excuse to mould the internet into their concept of its proper status, where it is converted from a medium of public exchange of information into a cash cow for their stockholders.

This principle has been recognized by all parties, and, interestingly enough, by Time Warner and AOL themselves. Steve Case, Chairman and CEO, America Online, stated;

> "If we limit content, if we do not promote a diversity of voices, if we do not maintain scrupulous journalistic standards, then consumers will waste no time migrating to other Internet and media services." [17]

The problem here is, as eloquently stated by others in opposition to the applications, there is no other high-speed internet service to which the customer may migrate. Applicants, not even counting DirecPC satellite service, control 80% of the total high-speed access and their market share is growing. In most geographical locations there is simply no other high-speed provider.

Time Warner, in its reply to the plethora of opposition to its application, stated;

> "the company cannot terminate unilaterally Road Runner's existing contractual relationships."[18]… "AOL Time Warner will have neither the ability nor the incentive to wield any kind of anti-competitive power over the delivery of online content… AOL Time Warner already has strong economic incentives to do independently what commenters (sic) ask the agency to impose via mandate." [19]

This is another example of Time Warner and AOL paying "lip service" to a laudable position but in practice acting the opposite, which has often been noted by oppositions to its application. This is simply not true, as the responses herein graphically illustrate.

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[17] Testimony of Steve Case, Chairman and CEO, America Online, United States Senate Commerce Committee, March 2, 2000 ("Case Testimony, Senate Commerce Committee").

[18] Reply Of America Online, Inc. and Time Warner Inc. Dated: May 11, 2000; Page 27

[19] Reply Of America Online, Inc. and Time Warner Inc. Dated: May 11, 2000; Page 30

Applicants routinely unilaterally terminate contractual relationships; as a matter of fact, as a business practice, it is their stock and trade. Road Runner in fact "terminate[d] unilaterally Road Runner's existing contractual relationship" with the petitioner. But possibly customers do not count. Their "contractual relationships" are not worthy of mention.

Whatever "strong economic incentives" the applicants may have concerning open access by other commercial concerns, which will pay them well for the privilege, the applicants have no such "strong economic incentives" in relation to the end users. The customers will pay their monthly bill regardless. Any post made by the customer will only use bandwith and storage not compensated by additional revenue, and may well generate complaints; in fact, if it is at all controversial it can be depended upon to generate complaints. The "strong economic incentive" of the applicants is to prohibit any upstream data whatsoever by its customers and limit the customer to the right to purchase downstream "content," such as cartoons, from the applicant. The result is that Road Runner and AOL have a history of terminating customers who "abuse" their access by posting upstream content rather than purchasing "programming" from applicants.

The customer must be regarded in the same light as a commercial content provider; indeed, the "content" provided by the end user is what the internet was invented to enable. The sale of additional "content" by "providers" is a corruption, although, possibly a useful corruption, of the true purpose of the net. This corruption can be allowed to exist, to the benefit of the commercial providers and the users, but cannot be allowed to become the totality of the information available on the net, to the exclusion of the upstream data posted by the customers themselves.

Applicant's vision of the internet is clearly stated by them:

> Indeed, the Time Warner family of brands has been built on a mass market strategy of making its content accessible to audiences everywhere… By the same token, the company

> has an established policy of providing its customers with a diversity of content sources… Likewise, AOL has an established strategy of making its products and services widely available[20]… Time Warner's business model for its cable networks is built on the foundation of making its programming available to as wide an audience as possible[21]… The Applicants are beginning to discuss ways to improve consumer satisfaction with the online versions of Time Warner video programming services such as CNN and the Cartoon Network. These discussions also have explored ideas generally on how to make Time Warner music, television programs and movies, cable programming, and magazine content more widely available to consumers.[22]

The end users do not need unfettered access to online versions of the cartoon network, no matter how much AOL and Time Warner wish to believe that they do. What the end users need is for the constitutional guarantees of Freedom of Speech to be extended to the internet, even if that access is through the AOL-Time Warner system.

The fact that Time Warner has no interest in any service which does not directly generate revenue was made time after time by objectors, from private parties, to large corporations, to large city governments – see, e.g., Statement of Richard Quigley, Assistant City Manager, City of Daytona Beach, Florida: [23]

> Time Warner agreed to "respond to cable-related community needs with regard to public and community services and customer service consistent with the Cable Act" in the franchise renewal. Time Warner has consistently refused to comply with this requirement of the transfer consent agreement during the renewal negotiations. Among other things, Time Warner has refused to provide any access channel capacity for any of the five institutions of higher education in our area, including Daytona Beach Community College, a mainstay of the community. Even more surprising, Time Warner has consistently refused to provide the cities with access to emergency alert service despite the fact that serious emergency situations in our area are all too common (e.g., hurricanes, the uncontrollable fires of 1999)… Time Warner appears to believe that it is free to ignore with relative impunity the basic contractual responsibilities established in the transfer consent agreement.

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[20] Reply Of America Online, Inc. and Time Warner Inc., Dated: May 11, 2000 Page 37

[21] Reply Of America Online, Inc. and Time Warner Inc., Dated: May 11, 2000 Page 44

[22] Declaration of Barry Schuler Aug 24 2000

[23] Statement Of Richard F. Quigley, Assistant City Manager, Daytona Beach, Florida, Submitted To Federal Communications Commission In Connection With Its En Banc Hearing On Aug 1 7 2000, Page 4

If Time Warner cannot be depended upon to provide non-revenue-generating emergency notification capacity to a large city how can they be depended upon to provide upstream capability to their internet customers, if it does not generate revenue? If Time Warner flaunts its contract with the City of Daytona beach, what chance does an individual have?

2. The Content which Time Warner and Road Runner allege is Impermissible to be Posted by an End User.

When the Petitioner was terminated by Road Runner for the content of his posts, he had a conversation with Colette Lantelme, Security Administrator of Road Runner. This conversation took place on Monday, July 31, 2000.[24] In this conversation Ms. Lantelme asserted that all of the following activities are prohibited by either the contract or the "acceptable use" policy of Road Runner:

1. Posting a message on any "For Sale" message board.
2. Listing a product on any Ebay, Ubid, or similar service.
3. Announcing a job availability.
4. Replying to a job availability.
5. Mentioning that the user had tried any commercial product and found it satisfactory – or unsatisfactory.
6. Posting a message to any "personals" board.
7. Asking a user for a date. Plaintiff finds this last particularly ludicrous.
8. Calling attention to any commercial or non-commercial website, including personal websites provided as part of the purchase price of the service sold by Time-Warner.

[24] This conversation was memorialized in an affidavit filed in the Fedaral Court Action, Thomas Bonge et al v. Time-Warner Entertainment Co., L.P.et al., Case No. 6:00 CV-1054-ORL-18-A. From that affidavit: "Plaintiff replied that it appeared to him that anything he did was a violation of the contract. Ms. Lantelme replied, 'that's your interpretation.'" Neither Time Warner nor Road Runner have asserted that any of the stated activities are not a violation of the contract between themselves and their customers.

9. Calling attention to any IRC chat channel. This is what Plaintiff does not deny his messages did, and for which post his account was terminated by Road Runner.

Petitioner believes, and the facts seem to indicate, that applicants have an agenda. That agenda is a total revision of the nature of the internet, to convert it from a medium of public exchange of information to a medium whereby applicants may sell "content" to their subscribers; essentially, that the internet will no longer be a medium of communication, but will be transformed into an extension of and a clone of cable television service.

This revolution in the nature of the internet is already taking place. A user can be terminated, and is terminated, for normal political discussion, as evidenced by the submission in this file by James C. Russell, Ph.D.:

> This proposed merger is not only one of the largest in United States history but combines the control of conduit and content in an unprecedented fashion, , implicating issues that are at the core of our democracy. It raises the specter of barriers to the free flow of information and the marketplace of ideas.
>
> If the shelves in the marketplace of ideas are stocked by too few hands, a kind of digital imperialism may replace a well-informed citizenry....
>
> This warning is all the more pertinent in light of AOL's recent acts of censorship and threatened punishment of subscribers who dared to criticize the selection of Joseph Lieberman as the Democratic nominee for Vice President. In an industry news release dated August 9, 2000, the Associated Press reported:
>
> > AOL, which recorded more than 28,000 postings on Lieberman, said Wednesday it deleted an unspecified number for violating its policies against hate speech. CNN suspended about 10 users from its chat rooms....
> >
> > AOL spokesman Nicholas Graham said the postings were being investigated, and offenders could have their accounts canceled or suspended....
> >
> > CNN has software filters to automatically block profanity and hate words from chat rooms, and humans look for messages that slip through…
> >
> > An AOL subscriber can lose privileges simply because of a complaint from another user…

> Neither AOL or CNN have provided examples of the content they have deleted or for which their subscribers have been punished. It should be obvious that content which the ADL considers to be "anti-Semitic" may include critiques of current US Middle East foreign policy. AOL's submission to ADL pressure raises serious questions regarding a merged AOL/Time Warner to maintain freedom of expression and free interconnectivity of ISP's. The proposed merger of AOL and Time Warner - CNN constitutes the most serious threat to online free speech that has arisen since the birth of the Internet.

This letter is an indication that speech which is permitted under the law is prohibited by AOL-Time Warner, and, worse, it is not only deleted from the internet, the customer's account may be terminated.

Possibly this speech was offensive. Possibly it was hate speech. It may have even been illegal. But should the Internet Service Provider be the judge and jury? Should an American Citizen be excised from the internet because of the content of his speech, no matter how offensive it may be, without any hearing, or any recourse, or any right of appeal, solely upon the judgment of the ISP? If so, the Constitution stops at the door to cyberspace.

3. Road Runner Denies Access to Even Public Service Content.

One of the problems with addressing a Denial of Service problem with internet high speed access is that Applicants rarely, if ever, even disclose what particular offense was committed. Even in Petitioner's particular instance, where Road Runner clearly stated that Petitioner was being denied access for posting "Commercial off-topic USENET Spam" he was not provided a copy of the alleged offensive messages, merely notification that he had, in the opinion of Time Warner, posted them, nor was it explained how a single message posted to one USENET jazz music newsgroup announcing the availability of an IRC jazz music channel was commercial, off-topic, or spam.

In some instances rather important public service activities are routinely terminated Applicants without any explanation whatsoever. From the communication by Stan Scarano in the instant file:[25]

> I am co-president of the National Coaltion for the Chemically Injured…I have had a Netscape webmail account for over a year. In February of this year, I became locked out of my account. The account is used primarily for NCCI correspondence with our member organizations and others concerning MOS and other environmental issues. I told the Netscape nectcenter4eedback personnel that I was disabled and that our organization works on behalf of a disabled community and asked them to restore access to the account as soon as possible…
>
> They have absolutely refused to restore access or answer my requests. I have emailed them almost daily. I even called their corporate legal department to tell them of my experience and that I was going to file an ADA complaint with the Justice Department…
>
> Their parent company is AOL who is currently going through a merger approval with your organization. I would vote against it because they are so callous to the disability community…
>
> [M]y appeal to their humanity have all been met with silence and inaction. That is NOT the kind of "Social Responsibility" that we expect from the "Corporate" community.

In this instance, many facts are unknown, apparently because applicants did not even inform their customer. One fact is clear, however; the customer was terminated - it was not a technical problem or mistake. The customer accelerated the complaint all the way to corporate management without restoration of the account.

It is difficult to imagine what offense a public non-profit corporation could commit which would justify termination, but it was very likely using the account for "commercial purposes." As Road Runner defined a reference to an IRC chat channel as "commercial," AOL likely defined a 501 (c)(3) non-profit corporation as "commercial" and terminated the account without notice, hearing, or recourse.

[25] Stan Scarano, sscarano@netkonnect.net To: <access@fcc.gov Date: 4/26/00 5:00PM Subject: Netscape discrimination against the disability community

This will not do. This is most definitely not in the public interest. The internet is not owned by the applicants – it is public property. In the event that applicants have the legal right to deny access to public property where they have monopoly control over the portal – which is not at all clear – this commission has both the right and the obligation to either deny the application outright based on the exercise of this right or to require applicants to give up that right as a requirement of granting their application.

VII. Remedy Requested

This present situation presents the classic clash of rights – there is no question that the applicants have private property rights in their infrastructure. On the other hand the users have First Amendment rights of freedom of speech.

Historically, the right of freedom of speech has not been applied to a customer's right to use the facilities of an internet provider. However, when viewed in the light that the internet provider actually controls not merely his infrastructure but also the gateway to public property – the internet – it is not at all clear that there is no First Amendment right.

This commission, however, need not be concerned with this clash. This commission has the right to deny the application outright. This commission also has the right to "trade" voluntary waiver of rights of the applicant for approval.[26]

Petitioner is cognizant that this places this commission in the position of selecting between two rather unpleasant choices. There is certain content which is indeed inappropriate to be generally available on the internet. Examples of this content would be hate posts which express threats of death or violence, child pornography, etc. The Congress attempted to address this problem on two different occasions. On both occasions its efforts were overruled by the courts.

[26] See Western Union Tel. Co. v. FCC, 544 F.2d 346, 355 (3rd Cir. 1976), cert denied, 429 U.S. 1092 (1977)

However, historically, offenses of this type have not been committed by end users, but by "content providers" who supply this material for a fee. Allowing the applicants to censor this material when posted by end users but prohibiting discriminatory action against commercial "content providers" will merely insure that the internet is converted from "the most participatory marketplace of mass speech that this country--and indeed the world--has yet seen… [where] individual citizens of limited means can speak to a worldwide audience on issues of concern to them"[27] into applicants' "business model" of the internet – a clone of cable television where the end user purchases "content" but has no right to utilize the net for the expression of ideas. Moreover, while the basic nature of the internet will be for all time corrupted, the problem of offensive material on it will not be addressed in the slightest.

Although, in the last two or three years commercial ISP's have, with great fanfare, concealed their attempts to reform the net with pompous portrayals of their policing the net for "offensive" materials posted by end users (and all the while selling access to a plethora of webcams and kiddie porn sites) the fact is that university and government organizations have been supplying uncensored access to end users for over 20 years without a major problem. If a major problem develops in the future concerning offensive material, it will be from the commercial concerns, not the end users.

Accordingly, Petitioner requests that this commission deny the applications of AOL and Time Warner Communications.

In the alternative, Petitioner requests that this commission require the following:

1. **Implement the general protections requested by others in opposition to the transfer, but include specific language extending all rights and protections to the end user as a "content provider".**

[27] Richards v. Cable News Network Inc., No. 98-3165 (E.D.Pa. 1998)

This is, in fact, the historic model of the net – where there are no "content providers," merely end users. The users are in fact the content providers, whether the particular "end user" happens to be a private citizen or the Walt Disney Corporation. By instituting this provision this commission will merely be returning the net to its original configuration, while recognizing the fact that in certain circumstances the "end user" may elect to limit access to its particular "content" to those who elect to pay for it.

2. **Specifically require as a condition of transfer that AOL, Time Warner Communications, and any other telecommunications service in which they possess an interest (I.E. Road Runner and DirecPC) may take no action of any nature, including, but not limited to, deleting any content from the system or terminating the account of any customer, based on either the quantity or content of any otherwise legal material posted to the internet.**

This is merely a codification of the first requirement. One of the major protections requested by the commercial "content providers" have requested is a guarantee that the applicants cannot censor their "content" in any manner, including stripping out any material or data or giving it less preferential treatment than applicant's "content."

Similarly, the applicants are free to structure their offering in any manner they see fit. They may elect to sell their product by the quantity of use, as in long distance telephone service, or may elect to bundle it into a bulk or unlimited offering. What they cannot do is sell one thing and deliver another by singling out certain users for discriminatory treatment. This is identical to the protections requested by the commercial concerns which replied in this action.

3. **Require that the terms and conditions of access be clearly disclosed and specifically enforceable by the end user. This should specifically include the requirement that, if the ISP chooses to sell "unlimited access" this access be truly unlimited and not be subject to limitations of access or speed not generally applied to all customers, based on "excessive usage" of the system, or the quantity or content of any material posted to the system by the end user.**

This is no more than a requirement that applicants deal fairly with their customers, fairly disclose what they are selling, and in fact deliver what they promise. This does not

mandate applicants delivering "unlimited access," merely that, if they choose to sell it, they must deliver it. Furthermore, it is not unreasonable to expect that if applicants do not deliver what they promise, that offense be actionable.

4. **Require that, in extending "open access" to other ISP's, the applicants be prohibited from exercising "veto power" over the sale of service to any customer, even if that customer has been denied service by the applicants on their ISP.**

This is merely what every contributor to this process has requested; a separation of the content and the conduit.

Both the Department of Justice and the Ninth Circuit decision in AT&T v. City of Portland draw a sharp and important distinction between the content of information transported over the communications network and the conduit through which that information flows. The Ninth Circuit makes clear that the Commission has the authority to prevent this abuse by making a clear distinction between content and conduit:

> Like other ISPs, @Home consists of two elements: a pipeline (cable broadband instead of telephone lines), and the Internet service transmitted through that pipeline. However, unlike other ISPs, @Home controls all of the transmission facilities between its subscribers and the Internet. To the extent @Rome is a conventional ISP, its activities are one of an information service. However, to the extent that ®Home provides its subscribers Internet transmission over its cable broadband facility, it is providing a telecommunications service as defined in the Communications Act.[28]

This provision merely totally severs the relationship between content and the conduit and codifies that each ISP utilizing applicants' infrastructure has the right to choose its own customers without interference from the applicants.

5. **Specifically prohibit the practice of including by reference as a part of the contract an "Acceptable Use may be Policy" which unilaterally modified by the ISP.**

This is merely an action by this commission to correct an abuse which, sooner or later, will be outlawed by court action in any event – as it has been outlawed in relation to the

[28] AT&T v. City of Portland, (Slip Opinion) Case No.99-35609, Decided June 22, 2000.

banking and credit card industry. Applicants present a contract of adhesion which by its terms reference another document which is not even disclosed to the user at the time the contract is signed, and may be unilaterally modified by the applicants, but not by the end user. This is on its face an unfair trade practice. If applicants wish to sell their service subject to certain terms and conditions, these conditions can and should be clearly disclosed in the contract itself. Furthermore, the customers should have the right to depend on the contract they sign, and not be subject to the uncertainty of a unilateral modification by applicants at any time without notice.

VIII. Conclusion

Petitioner has carefully read every page included in the voluminous file of the instant action. One submission stands head and shoulders above the rest in the eloquent plea that this commission consider the issue of freedom of speech, and of access, of the little guy, the end user of the internet. This is the submission of Seth R. Klein, Assistant Attorney General of the State of Connecticut. Since, as a conclusion to the petition submitted herein, Petitioner cannot possibly improve upon this submission, Petitioner presents it in major portion as his conclusion.

> As Attorney General for the State of Connecticut, I write regarding the proposed merger of America Online and Time Warner. Specifically, and in light of the comments already submitted, I write in order to emphasize certain public policy considerations implicated by the merger plan. The issues raised by the proposed merger are obviously national in scope, and will greatly affect consumers in Connecticut, as they affect consumers across the country, in the coming years. Accordingly, I urge the Commission to carefully and rigorously maintain its focus on the needs of the public at large in conducting its review of the merger application.
>
> In this regard, I begin by noting that the internet, as it currently exists in the United States, is a tremendously democratic medium of mass discourse. Much of the public already uses the internet to exchange information and ideas at low cost. President Clinton's recent initiative to promote universal access, across class and geographic boundaries, will only heighten the day-to-day significance of the internet as a primary and universal communication tool. Moreover, with traditional media, such as newspapers, television, or radio, the means of access to a widespread audience is within the hands of a relative few.

With the internet, by contrast, present barriers to publication and dissemination are low. If the internet develops as promised, every individual has, or soon will have, a realistic opportunity to communicate his or her ideas to a national, or even global, audience, whether through a web page, a Usenet newsgroup, or a variety of other available routes.

The comments already submitted to the FCC, however, amply set forth a range of important concerns which threaten the foregoing ideal and which require in-depth analysis and consideration. Among many other issues, it is clear that the questions of open access; of development of competing access technologies; and of retaining a diverse and competitive marketplace plainly need to be thoroughly evaluated by the Commission before the proposed merger moves forward. It is critical that the Commission give these arguments careful attention and analysis. Indeed, the Communications Act of 1934 makes plain that, in order for the merger to be approved, America Online and Time Warner must demonstrate that the merger will serve the public interest and necessity…

In terms of the ability of consumers both to receive and to publish substantive content, the risks posed by the existence of a single, dominant internet access provider ("IAP") are also clear.

The risk arises because an IAP, as a private company, may generally set its own policies as to what content it allows. For example, as reported on CNET.com on April 24, 2000, America Online has established "youth filters" which are designed to allow parents to limit the access of their children to inappropriate web sites. If the filter is set to "kids only," however, CNET reports that children can access the Republican National Committee homepage, but not the Democratic National Committee site. Similarly, the "young teens" setting reportedly allows access to the Colt, Browning, and National Rifle Association homepages, but denies access to various gun safety organizations. America Online, in its Rules of User conduct, also reserves to itself the blanket right at its "sole discretion to remove any content" published by users "that, in America Online's judgment is . . .18... harmful, objectionable, or inaccurate."…

The problem arises, however, when content policies at an IAP are, in effect, imposed on everyone due to the IAP's overwhelmingly dominant position in the marketplace... if America Online has no serious or readily accessible competitors, Internet speech no longer embodies the free exchange of ideas. Instead, it embodies the principles and ideals of the dominant IAP, ideals with which many may not agree. Accordingly, when one private company is allowed to make judgment calls as to the propriety or legality of particular content, with no effective competition or choice for those consumers who may disagree with those judgments, the potential for abuse, and for stifling important speech, is apparent…

[T]he Commission must carefully evaluate any anti-competitive elements of the America Online - Time Warner merger plan… Accordingly, I urge the Commission to be careful not

to act to undermine the current plurality of the internet, in light of how difficult it may be to open it up again.

In sum, the current strength of the internet lies in its pluralistic nature. A multiplicity of voices speak and are heard; a number of IAPs and technologies, in competing with each other, ensure that each of those voices has a fair opportunity to participate. Accordingly, society in general, and the FCC in particular, must consider very carefully the potential impact the Time Warner - America Online merger will have, not just on open competition as an abstract ideal, but upon the open and democratic nature of the internet as a critical tool of communication in the twenty-first century.

Respectfully Submitted, this 15th day of September, 2000.

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Thomas Lewis Bonge, Petitioner

CERTIFICATE OF SERVICE

I, Thomas Lewis Bonge, do hereby certify that I caused one copy of the attached *Petition to Deny* to be served via pre-paid, first class U.S. mail upon the parties listed below.

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Executed this 15th day of September, 2000 at Palm Bay, Florida.

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Thomas Lewis Bonge, Petitioner