November 14, 2000

Deborah Lathen
Chief, Cable Services Bureau
Federal Communications Commission
Room 3-C7 40
445 12th Street, SW
Washington, DC 20554

Re: CS Docket No. 00-30 [AOL-Time Warner Merger]
CS Docket No. 99-251 [AT&T-MediaOne Merger]

Dear Ms. Lathen:

Consumers Union, Consumer Federation of America, the Center for Media Education, and the Media Access Project (collectively "CU, *et al.*") respectfully submit this statement in response to written *ex parte* presentations submitted filed in this docket by America Online, Inc. ("AOL") and Time Warner, Inc. ("Time Warner") on October 5, 2000 and October 13, 2000.[1]

Among other things, CU, *et al.* have objected that grant of the pending applications in this case is contrary to the public interest because of the fact that Time Warner and AT&T share ownership of the Time Warner Entertainment Co., LLP partnership ("TWE"), and that the addition of AOL's vast content libraries to this combination exacerbates the anti-competitive threat posed by this common ownership.[2]

In the new written submissions, AOL and Time Warner contend that because the Commission recently acquiesced in AT&T's acquisition of MediaOne (the original TWE partner), AT&T's ownership of TWE raises "no legitimate concern" with respect to the pending AOL/Time Warner merger. *AOL-Time Warner October 5, 2000 Ex Parte Submission* at 3-4. They argue that "this merger warrants no re-examination of these conclusions." *Id.*

The very premise of this claim is unfounded. Even were the AT&T/MediaOne decision final,[3] there is no legal basis for the implication that the Commission is somehow barred from consideration

---

[1]CU, *et al.* have today submitted to the Commission *a Supplement* to their pending *Petition for Reconsideration* in Docket 99-251. In the *Supplement*, CU, *et al.* demonstrate why the recent flurry of filings by AT&T, and AOL/Time Warner requires the Commission to grant the pending *Petition for Reconsideration* and reopen the AT&T/MediaOne proceeding so that the two matters may be considered in tandem.

[2]CU, *et al.* have consistently argued throughout this proceeding that the addition of AOL to this emerging cable/broadband cartel will further aggravate the anti-competitive effects of permitting the existing link between AT&T and Time Warner to persist.

[3]A timely-filed reconsideration petition challenging the MediaOne decision remains pending before the Commission.

of any aspect of the ownership of applicants before them on the basis of some implicit doctrine of *res judicata*. To the contrary, the Communications Act requires the Commission to consider the facts of each case which comes before it. *See* 47 U.S.C. §309(a).

Nor is it the case that, in granting the AT&T/MediaOne application, the Commission ruled upon the ownership structure now before it. Time Warner owns 74.5% of TWE, while AT&T (through its MediaOne purchase) now owns the remaining 25.5%. The Commission did not rule on this issue in approving the AT&T/MediaOne Merger. *See AT&T/MediaOne Merger Order*, 15 FCCRcd 9816 (2000). While it is true that, long before AT&T raised this issue on October 3, 2000, CU, *et al.* had petitioned to deny the MediaOne acquisition on this basis, the Commission declined to consider the impact on an AOL/Time Warner merger. *Id.,* 15 FCCRcd 9892-94.

As CU, *et al.* has repeatedly shown, the Commission should not have permitted AT&T to obtain MediaOne's TWE interest. *See, e.g., Petition for Reconsideration of AT&T/MediaOne Merger*, filed July 6, 2000 ("*Petition for Reconsideration*"). While the Commission ultimately did allow AT&T to acquire MediaOne, it nonetheless agreed with CU, *et al.* that AT&T's acquisition of MediaOne's ownership interest was contrary to the public Interest. *Merger Order*, 15 FCCRcd at 9844-9846. The Commission held that the merger would satisfy the public interest *only* if AT&T agreed to sell certain assets. *Id.* at 9849. Divestiture of TWE was one of the three options that AT&T was given to bring its merger into compliance with the Commission's rules. *Id*. It is simply inaccurate to claim, as do AOL and Time Warner, that the Commission found that AT&T's ownership of TWE raises no public interest concerns.

The anti-competitive effects of AT&T's ownership interest in TWE are aggravated by the addition of AOL into the mix. As demonstrated in CU, *et al.*'s *Petition to Deny Application of AOL and Time Warner*, this joint interest gives AOL/Time Warner and AT&T the capacity as well as a strong incentive to collude anti-competitively in numerous interrelated markets.

CU, *et al.* unsuccessfully sought consolidation of the AT&T/MediaOne and AOL/Time Warner proceedings.[4] Because the Commission denied that request, *see AT&T/ MediaOne Merger Order*, 15 FCCRcd at 9892-94, the Commission did not have the opportunity to consider the anti-competitive effects of creating an "aligning of interests," *see AT&T/MediaOne Merger Order* at 9837. The Commission must make a specific determination, upon the facts before it in ***this*** merger (which includes information gathered in both the AT&T/MediaOne and AOL/Time Warner dockets) whether transfer of Time Warner's licenses to AOL serves "the public interest, convenience, and necessity." 47 USC §310(d).

The public interest is clearly served by requiring AT&T and AOL/Time Warner to sever their joint interest in TWE, rather than allowing the formation of a broadband cartel between the dominant broadband and the dominant narrowband Internet provider.[5] AOL has approximately 25 million

[4]CU, *et al.* have sought reconsideration of the failure to consolidate.

[5]Indeed, it is inconceivable that the Commission would approve the formation of TWE if TWE did not exist today, and AOL-Time Warner and AT&T were hereafter to propose its formation. *A fortiori*, it cannot be in the public interest to permit the continued interrelationship between AT&T,

subscribers, and is the dominant provider of a number of Internet-related services. AT&T, on the other hand, is a leading provider to residential customers of broadband Internet access through its monopoly cable facilities. This is the vehicle through which AOL would provide its competing high speed Internet services and its announced interactive TV offering. Thus, it is vital to the public interest that these two companies not be able to enter into arrangements that facilitate their ability to preserve their dominant positions and impede competition from rivals.

The leverage the parties could exert over each other through TWE, and the prospect of TWE's function as a conduit of communication to facilitate market coordination, pose serious threats to the Commission's pro-competitive policies and to the public interest. For example, AOL/Time Warner would clearly have incentives to use its TWE relationship with AT&T to force AT&T to drop its efforts to push for compatibility/interoperability/access to AOL's IM customers. Similarly, AT&T would have incentive to favor AOL (as a portal) over rival portals such as Yahoo or give preferential treatment to AOL/ Time Warner's music distribution services. *See Written Ex Parte Presentation by AOL and Time Warner,* August 22, 2000, at 9-10. Given the network effects that are present in portals, such a strategy could irreversibly tip the market in AOL/Time Warner's favor.

The AOL/Time Warner merger is also likely to impede competition with regard to next-generation interactive TV offerings both AOL and AT&T say they are developing. Post merger, AOL and AT&T would have a powerful incentives to drop plans to compete head-to-head. Instead, AOL and AT&T would both benefit from developing a common interactive TV platform that advances their collective interests - not those of consumers or the public.

That AOL/Time Warner would use its dominant position to discriminate in favor of its own Internet content is not mere idle speculation. As the *Washington Post* has recently reported, AOL has routinely forced content providers that want access to its "walled garden" to agree to restrictions that impede the ability of AOL subscribers to reach competing content on the public Internet.[6]

Although AT&T has of late professed a desire to sell its TWE interest, there is no guarantee that this will happen. Indeed, in the same filings soliciting FCC assistance in directing a dissolution of the TWE partnership, AT&T indicated it would not sell its TWE assets without a direct Commission order. *Written Ex parte Presentation by AT&T,* November 9, 2000; *Notice of Oral Ex Parte Communication by James Cicconi, General Counsel and Executive Vice President Law & Government Affairs, AT&T Corp., to Kathryn C. Brown, Chief of Staff,* October 4, 2000. Furthermore, given the benefits of aligning with AOL, it is possible that AT&T will retain its TWE interest and select one of the other options listed in the *AT&T/MediaOne Merger Order* for compliance with the horizontal ownership limits -- i.e., selling Liberty or divesting other cable systems that it owns.

Thus, AT&T's mere compliance with the Commission's *Merger Order* and the horizontal ownership limits might not lead to breakup of the AOL/Time Warner/AT&T linkage. The Commission should not permit this relationship to continue. Rather, it should condition any grant of the AOL/Time Warner merger upon severance of structural ties with AT&T.

Time Warner and AOL in TWE after AOL owns Time Warner.

[6]*See* Alec Klein, *AOL Restrictions Alleged,* Washington Post, at E1 (Oct. 10, 2000)

Finally, AOL-Time Warner claim that "[t]here is no relief that could address these [public interest] issues in this proceeding." *See Written Ex Parte Communication by AOL and Time Warner*, October 4, 2000, at 12. This claim is nothing more than an argument that the Commission lacks authority to protect citizens from mergers which threaten diversity in the marketplace of ideas and impede competition. The suggestion is preposterous and should be rejected out of hand.

AOL-Time Warner assert that "[I] t is well-established that remedial measures are not to be directed against a party that had competitive concerns 'thrust upon it.'"[7] Even assuming this characterization of precedent were true, it supports, rather than rebuts, the need for Commission action: it is AOL's acquisition of Time Warner's TWE interest that, without a doubt, creates public interest harms. There is considerable precedent upholding the ability of federal authorities to dissolve joint ventures that, while raising no concern when they were created, raised competitive concerns because of subsequent interventions by third parties.[8] Thus, not only is there a "lawful basis to look

---

[7]*Id*. at 12 n.39 (citing *United States v. Alcoa*, 148 F.2d 416, 429(2d Cir. 1945); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 415 US 585 (1985)).

[8]See, e.g., In re Columbia/HCA Healthcare Corporation, 1995 WL 594849 (F.T.C. October 3, 1995) (consent decree resolving Columbia/HCA's ("C/HCA") acquisition of Healthtrust. Inc., by, inter alia, requiring dissolution of a joint venture between Healthtrust and Orlando Regional Healthcare System, ("ORHS") for the operation of South Seminole Hospital, a competitor of C/HCA, through acquisition by C/HCA of ORHS' interest or divestiture to a third party); *United States v E.I. du Pont de Nemours & Co., Inc.*, [1980-1988 Transfer Binder] Trade Reg. Rep.¶45,081 at 3,493 (D.D.C. Aug. 4,1981) (consent decree resolving concerns over du Pont's pending acquisition of Conoco by requiring du Pont to purchase Monsanto's interest in a joint venture between Conoco and Monsanto for petrochemicals production, given competition between du Pont and Monsanto in production of certain fibers using the petrochemicals subject to the joint venture, the acquisition would "enable du Pont to obtain competitively sensitive information and opportunities to affect Monsanto's [fibers] production . . . and for the exchange of information"); *In re Brunswick*, 96 F.T.C. 151(1980), *aff'd sub. nom. FTC v. Brunswick Corp.*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (ordering (i) dissolution of a joint venture between Yamaha and Brunswick for the production and marketing of a new outboard motor, given the elimination of potential competition in a highly concentrated market, and (ii) the sale by Brunswick to Yamaha of its 38% stockholding in Sapshin, a Japanese manufacturer of motors already 38% held by Yamaha, on the grounds that such holding "could enable Brunswick to hamper Sanshin's competitive efforts, making Sanshin a less effective competitor than it had been before the joint venture" and "would also provide Brunswick access to competitively sensitive information otherwise unavailable to competitors"); *U.S. v. Hercules, Inc*, 1973 Trade Cas. (CCH) ¶ 74,530 (D. Del, 1973) (ordering dissolution of a joint venture between Hercules and Mitsui Petrochemical Industries (U.S.A.), formed to manufacture and sell a form of plastics in the United States, and noting that "the terms and conditions for dissolution of such joint venture or partnership arrangement . . . may include the sale by one party to the other, or to a third party, of not less than its entire interest therein, or a winding up of the partnership and payment of its debts and distribution of its asset to the partners or sale of such assets to one or more purchasers which may include [the joint venture parents]"); *In re Phillips Petroleum Co.*, 70 F.T.C.456 (1966) (requiring the dissolution of three joint ventures between Phillips and National Distillers and Chemical Corp. found to have "created inducements and incentives for avoidance of competition

to the Applicants here to eliminate AT&T's interest in TWE," the public interest demands such Commission-ordered divestitures.

If AOL/Time Warner were correct that actions by third parties cannot render existing relationships anticompetitive or in violation of the public interest, neither the Department of Justice nor the Commission would have been able to order AT&T to divest the interest in Road Runner it gained through its acquisition of MediaOne. *AT&T/MediaOne Merger Order*, 15 FCCRcd at 9870-73. The Commission should likewise here prevent AT& T/AOL/Time Warner from establishing just such a relationship *via* TWE.

Sincerely,

Andrew Jay Schwartzman
Attorneys for CU, *et al*.

---

between them in the manufacturing and sale of propylene-based and ethylene-based products" to be accomplished by National selling its interest in one of the joint ventures to Phillips, and Phillips selling its interest in two other joint ventures to National). *See Also In re Zeneca Group PLC*, 64 Fed. Reg. 15166 (1999) (consent decree resolving concerns over Astra AB's proposed acquisition of Zeneca by requiring Zeneca to transfer all rights and assets relating to levobupivacaine, a long-acting local anesthetic, to Chiroscience, with which it had entered into agreements for the marketing and development of the drug, given Astra's leading position in the market for such drugs and Zeneca's role as an actual potential competitor, and also requiring the sale of Zeneca's 3% investment interest in Chiroscience.