Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications of America Online, Inc.	)	CS 00-30
and	)	
Time Warner, Inc. for Transfers of Control	)	
	)	

REPLY TO OPPOSITION TO PETITION TO DENY

of

CONSUMERS UNION

CONSUMER FEDERATION OF AMERICA

and

CENTER FOR MEDIA EDUCATION

Harold Feld
Andrew Jay Schwartzman
Cheryl A. Leanza

MEDIA ACCESS PROJECT
950 18th Street, NW
Suite 220
Washington, DC 20006
(202) 232-4300
Counsel for Petitioners

May 22, 2000

TABLE OF CONTENTS

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications of America Online, Inc.	)	CS 00-30
and Time Warner, Inc. for Transfers of Control	)	
	)	

To: The Commission

REPLY TO OPPOSITION TO PETITION TO DENY

Consumers Union, Consumer Federation of America, Media Access Project, and the Center for Media Education (collectively "CU, *et al.*") respectfully submit this reply to the opposition to CU, *et al.*'s *Petition to Deny* filed by America Online, Inc. ("AOL") and Time Warner, Inc. ("TW") (collectively "AOL/TW" or "Applicants").

INTRODUCTORY STATEMENT

AOL/Time Warner, the first mega-merger of the twenty-first century, may prove to be one of the most significant transactions ever to come before the Commission.

These may not be the largest companies ever to seek Commission merger approval. In fact, among cable system operators, Time Warner runs a distant second behind AT&T. Even so, the prospect of the joinder of these two vertically-integrated content giants may make this case a corporate template for the information age.

The breadth and nature of the opposition which has surfaced, as well as the superciliousness of the AOL/TWE response to those arguments, exemplifies the value of the Commission's exercise of separate public interest analysis of the activities of the nation's telecommunications industries. Traditional anti-trust analysis cannot address many of the dangers that might accompany the creation of this new combination. Absent suitable divestitures and safeguards, an AOL/Time Warner colossus

could impede free flow of political and commercial speech, and frustrate the most innovative entrants in the most innovative sector of our economy. The fact that younger, smaller competitors have stepped forward to object to this transaction is especially noteworthy as an indicator of the danger that the Time Warner local cable monopoly can be used to extend dominion over the new Internet-based markets.

In the face of these objections, AOL and Time Warner have largely ignored the main issues in this case. In addition, AOL/TW have refused to address the likelihood that the Commission is soon likely to approve, in some form, AT&T's purchase of MediaOne. This will create a major cross-ownership link among the two dominant cable operators in the nation. AOL/TW similarly pooh-pooh the relevance of AOL's massive share in the dial-up Internet market. And time after time, they boldly contradict AOL's own recent submissions to the Commission and the Courts to argue that industry self-regulation can somehow provide sufficient access to the nation's poor and disenfranchised.

SUMMARY

AOL and Time Warner point to the fact that some of their opponents agree that a heavily conditioned merger might be legally sustainable. The question before the Commission, however, is not whether the merger is "unthinkable." The Combination of an "old" cable MSO and a "new" content driven ISP may well create worthwhile public interest benefits. However, there are many anti-competitive threats to free expression from this deal in the form submitted. The Commission must take a hard look to determine whether the merger planned provides adequate benefit to the citizens of the United States to justify it going forward. Here, where the potential competitive harms far outweigh any possible public benefit, the Commission must either deny the application or condition the merger so as to eliminate the danger that the new AOL/TW will suppress diversity in

the marketplace of ideas or erect barriers to entry to block new commercial rivals.

Nor can "voluntary" commitments provide adequate safeguards. Unenforceable promises cannot provide adequate safeguards for an emerging industry. The interpretation of voluntary commitments inevitably changes over time, as corporate officers and directors change and market pressures move companies in new directions.

Indeed, the history of both AOL and Time Warner show precisely this pattern. Both companies have made "voluntary" pledges in the past to support diversity of viewpoint and competition, only to renege or reinterpret these pledges when market pressures dictated otherwise. Commentors documenting ongoing anti-competitive practices such as iCast, Gemstar, Disney, and others further undermine AOL/TW's credibility. The First Amendment's promise of a vibrant marketplace of ideas deserves better protection than a voluntary pledge, particularly in light of AOL/TW's track record.

Rather than address the content diversity and competition concerns raised by CU, *et al.*, AOL/TW maintain that the Commission must address these in the course of proposed merger of AT&T and MediaOne. *See* Docket No. CS 99-251, *Application of AT&T Corp. and MediaOne Group, Inc.* ("AT&T/MediaOne"). Even if the Commission does not consolidate the two proceedings as CU, *et al.* have moved, the Commission cannot ignore the results of granting the AT&T/MediaOne merger when considering AOL/TW. The loss of speech diversity, the consolidation of content, and the anti-competitive effects on the market that flow from the AT&T/MediaOne merger will take place, and the Commission must take these into account when considering AOL/TW. The question is not what is "fair" to AOL Time Warner; the question is whether approval of the merger, given the existing set of mutual interests, corporate alliances, and concentration in the market, benefits the

public.

Finally, AOL/TW argue that the Commission should ignore the anti-competitive practices cited by such commentors as Tribal Village, Gemstar, and Disney as "commercial disputes" irrelevant to the merger. The Commission should ignore this attempt to trivialize this consistent pattern of leveraging monopoly power to repress diversity of speech and competition.

Rather, as AOL itself advocated in the AT&T/MediaOne merger, the Commission should look to the "mega-effects" of the merger and impose appropriate conditions to preserve innovation and a vibrant marketplace of ideas. The areas of abuse highlighted by these "commercial disputes," and the remedies these commenters propose, deserve consideration and implementation.

Finally, the Commission knows from long experience that parties with market power can leverage "commercial disputes" to create barriers to entry and intimidate potential rivals. The Commission's duty under the public interest to promote First Amendment diversity and competition should make it particularly sensitive to this. Accordingly, the Commission should ignore the blandishments of AOL/TW and should give the cited abuses and proposed solutions a "hard look."

ARGUMENT

I. AOL/TW FAIL TO ADDRESS ARGUMENTS THAT THE MERGER DOES NOT SATISFY THE PUBLIC INTEREST.

The question before the Commission is whether the proposed merger serves the public interest, convenience, and necessity. CU, *et al*. and others submitted extensive comments demonstrating that the merger does ***not*** serve the public interest.[1]

[1]AOL & Time Warner style their May 11, 2000 filing as *Reply of America Online and Time Warner*. Although the Commission's March 27, 2000 specified "Petitions/Comments" by April 26,

2000, and "Oppositions/Responses" by May 11, 2000, it did not provide a filing deadline for replies to oppositions. CU, *et al.* file this reply to AOL/TW's opposition pursuant to 47 CFR §78.22(b). CU, *et al.* have consistently objected to the Commission's misplaced effort to restrict citizen's rights to participating in agency proceedings by purporting to deny them reply rights in licensing proceedings. *See* Testimony of Andrew Jay Schwartzman in CS 99-251, February 4, 2000 at 4; *Reply of CU, et al. to Opposition To Petition to Dismiss or Deny Application of AT&T/MediaOne*, filed September 29, 1999, 1 n.1.

AOL/TW do not refute the extensive arguments raised by CU, *et al.* Rather, AOL/TW appear content to restate their litany of unsupported promises, and to gloat that many filing in opposition to the application agree that a merger might be permissible without addressing the significant reservations presented. In fact, these parties all call upon the Commission to impose substantial conditions on any merger.

CU, *et al.* demonstrated at length and with particularity -- both in their initial filing and in their April 11, 2000 motion to consolidate this docket with Docket No. CS 99-251, the proposed merger of AT&T and MediaOne -- the concentration of market power this merger would create. Unless the Commission imposes the requested conditions -- mandatory open access and non-discrimination conditions with a private right of enforcement, divestiture of MediaOne's interest in TWE, and divestiture of AOL's interest in DirecTV's ultimate parent GM -- Internet subscribers and commercial rivals will face a multimedia content behemoth capable of exploiting its broadband bottleneck access into the home.

II. AOL'S UNENFORCEABLE PROMISE OF "CONSUMER CHOICE" OF ISP DOES NOT SATISFY THE NEED FOR A MANDATORY ENFORCEABLE PRINCIPLE OF NON-DISCRIMINATION.

Although AOL/TW persist in arguing otherwise, cable broadband "open access" involves much more than a choice among ISPs. What AOL and Time Warner have offered in their MoU does not come close to true open access. Open access requires mandatory privately enforceable non-discrimination in access for users and content providers. AOL/TW's voluntary commitment in the MoU "to provide consumers with real choices among multiple ISPs," *AOL/TW Reply* at 10, falls far short of this.

Instead of addressing the omissions and shortcomings of their limited "open access" scheme,

AOL/TW reiterate their unenforceable pledge that "AOL Time Warner also intends -- and ... has every incentive -- to provide subscribers with unfettered access to the full range of diverse content available on the web." *Id.*

Prior to the proposed merger, AOL repeatedly had argued that such precatory assurances from AT&T and other cable operators would not be enough to insure the continued growth of broadband services and sustain the Internet as a vibrant and diverse marketplace of ideas. Indeed, contrary to its position here, AOL argued most effectively that cable providers have both the means and incentive to discriminate against rival providers and content at every level. Only mandatory non-discrimination, argued AOL, could provide true protection for the Internet.

AOL had it right the first time. Contrary to AOL/TW's *Reply*, the Commission's "watchful waiting" policy has yet to yield any tangible results. Despite vague pledges from some MSOs to consider allowing other ISPs on their systems, not a single significant multi-system operator has opened its system to a competing ISP, nor has any MSO offered equal opportunity for caching and other quality of service standards. DSL and other platforms have yet to challenge cable's dominance as the broadband delivery system of choice for residential subscribers. Indeed, the gap has widened, not narrowed. AOL's and Time Warner's threat that an enforceable principle of non-discrimination will delay roll out of broadband services deserve no credence, particularly in light of AOL's past statements before the Commission.

AOL's and Time Warner's past and present practices raise serious questions as to whether the companies will have the will to carry through even on their voluntary commitments to "real consumer choice of ISPs" in the face of pressures from Wall Street to leverage their proprietary standards and networks.

A. MANDATORY NON-DISCRIMINATION IS ABSOLUTELY NECESSARY TO MAINTAIN AN OPEN, VIBRANT INTERNET.

CU, *et al.* can think of no more eloquent statement of the inadequacy of "watchful waiting" and the need to impose mandatory non-discrimination conditions than what AOL itself said in opposing that very policy:

> The Commission could surely continue to "vigilantly monitor" the situation for some years. Then, long after cable has begun building its "electronic national gateway," perhaps a wrenching, court-ordered restructuring of the communications industry might be the answer. The alternative might be a massive re-regulation that swamps Congress, the FCC, the industry, and even consumers in its wake. In the interim, consumer choice would be diminished and broadband would fail to fulfill its potential. Instead, the Commission could take action now to lay out a pro-competitive access policy that responds to "consumers - the people who drive the market - [who] deserve and will demand an open platform."

Comments of America Online, Inc. in CS Docket No. 99-251, filed August 23, 1999, at 13 ("*AOL AT&T Comments*"). The Commission faces the same choices here, and should decide here (as well as in the pending CS 99-251) to "lay out a pro-competitive access policy."

1. AOL Has Already Retreated From Its Past Commitment to True Open Access.

Now that AOL has purchased entry into the "cable club," it has retreated from its previous commitment to mandatory open access. *See Who Do You Trust? AOL and AT&T When They Challenge The Cable Monopoly or AOL and AT&T When They Become the Cable Monopoly*, released by CU, *et al.* on February 28, 2000, http://www.consumerfed.org/internetaccess/trust.pdf.

Indeed, no sooner did AOL and Time Warner announce their plans to merge then it became clear the companies would retreat from AOL's previous commitment to mandatory open access and non-discrimination. At the press conference announcing the proposed merger, Time Warner Chairman Gerald Levin described the shift in policy:

> Essentially, what you're going to see is we're going to take the open access issue out of Washington and out of city hall and put it into the marketplace. .... Let's let the private marketplace work out the terms and conditions.

The Boston Globe, "Buyout Casts Shadow Over Nov. Open Access Vote," January 11, 2000.

This is a far cry from AOL's position prior to buying entry to cable broadband systems. Until announcement of the merger, AOL petitioned the Commission and local governments to impose mandatory open access. *Who Do You Trust* at 7-8.

Despite this clear reversal of policy, AOL insisted that its fundamental position had not changed. Indeed, AOL persists in its reply comments that its current support of "voluntary commitments" to "user choice of ISP" is no different than its forceful argument for mandatory non-discrimination made before the Commission and elsewhere.

This history of creative reinterpretation of past statements and commitments in light of its present interests greatly undermines AOL's credibility. Bluntly put, it shows that the Commission cannot trust AOL/TW to keep voluntary commitments, particularly in the absence of supporting details and enforcement mechanisms.

B. THE HISTORY AND PRESENT CONDUCT OF AOL AND TIME - WARNER RAISES DOUBTS THAT THEY WILL OPEN THEIR SYSTEMS WITHOUT A MANDATORY CONDITION.

The cable television industry generally has an unfortunate history when it comes to voluntary commitments and leveraging monopoly power. The Commission knows from experience that cable MSOs have a long and consistent history of paying lip service to competition and innovation while zealously guarding market dominance. Nor should the Commission put credence in AOL/TW's argument that the technical aspects of the Internet or its current rapid pace of expansion make the Internet immune to anti-competitive restraints on unaffiliated programmers analogous to historic

cable industry treatment of video markets. As the Microsoft trial has shown, high-tech and Internet industries are no more immune to the temptation to protect market dominance and stifle innovations that challenge it, while telling regulators and courts that rational market theory will create competition and innovation better than government "interference."

The history of AOL and Time Warner demonstrates that they have proved no better at resisting temptation than Microsoft. The Comments of iCast and Tribal Village make clear that AOL has not ***yet*** followed through on the voluntary commitment it made last July to opening its instant messaging (IM) standards to facilitate interoperability with rivals. With Wall St. analysts making it clear they expect the AOL Time Warner to leverage its content and network monopolies to erect barriers to entry and force out rivals,[2] it will take more than voluntary commitments to keep AOL Time Warner from succumbing to temptation.

AOL failed a similar test of its resolve in the "browser wars," and failed to live up to its commitments in the face of competitive pressure. In exchange for prominent placement on Microsoft's Windows desktop, AOL agreed to a variety of anti-competitive terms designed to

[2] *See, e.g.*, Fortune, "Dumb and Dumber: Who Wants To Be Seen As A Bullying Monopolist?," by Marc Gunther, May 17, 2000, http://www.fortune.com:80/fortune/2000/05/29/tim.html (last visited May 17, 2000) ("Dumb and Dumber"); Sanford C. Bernstein & McKinsey & Co., *Broadband!*, January 2000 at 21, 64 ("Bernstein"); Merrill Lynch, *AOL Time Warner*, February 23, 2000 at 10-11. *See also* Paine Webber, *AOL Time Warner: Among the World's Most Valuable Brands*, March 1, 2000; Goldman Sachs, *America Online/Time Warner: Perfect Time-ing*, March 10, 2000.

promote Microsoft's browser, Internet Explorer (IE) and limit access by AOL subscribers to Netscape while not appearing, on the surface, to compromise AOL's commitment to make its services available through any browser. *See United States v. Microsoft*, Docket No. 98-1232 at ¶¶288-95 (corrected version released Dec. 21, 1999). Even after AOL purchased Netscape, and therefore theoretically had an incentive to promote Netscape over IE, AOL renewed its agreement with Microsoft to promote IE over Netscape. *Id.* at ¶¶299-302. The lure of placement on Microsoft's desktop, with its concomitant commercial advantages, proved stronger than AOL's commitment to Netscape or its customers. Similarly, the lure of leveraging its own content and services, at the expense of its commercial rivals, may prove equally strong, overwhelming the voluntary commitments made here.

AOL's conduct in the instant messaging (IM) market is even more disturbing. When Microsoft and other companies found a means to circumvent AOL's proprietary IM software, AOL moved swiftly to block outside access. After days of techno-sparring, AOL publicly committed to a voluntary standards process that would lead to interoperability among competing messaging systems. In other words, AOL made the same public, voluntary commitment to open instant messaging as it has to open access. It also made the same argument that allowing its customers access to the rest of the world was both good business and in keeping with AOL's philosophy, and that the world could therefore trust AOL in the absence of any enforcement mechanism or details.

As the comments of Tribal Voice and iCast demonstrate, however, AOL has not followed through on its voluntary commitment. Instead, it has bowed to market pressures and a perception of its short term best interest and sought to maintain its market dominance by freezing out rivals.

The cable industry's past and present conduct also raises serious doubts as to its willingness to follow through on voluntary commitments. As the second largest cable MSO, Time Warner

participated in the standard cable industry practice of leveraging monopoly systems and proprietary content to squeeze out competition and extract ever increasing rates from subscribers. *See, e.g.*, Cable Television Consumer Protection and Competition Act of 1992, §§2(a)(1)-(5); 138 Cong. Rec. S.408-09 (January 27, 1992); S. Rep. 102-92, 102d Cong., 1st Sess. 3-18, 24-27, 32-34 (1991); H.R. 102-628, 102d Cong., 2d. Sess., 30-34, 40-47(1992). As a partner in the cable industry's Primestar DBS plan, Time Warner acted in concert with other major MSOs to neutralize the threat posed by News Corp.'s proposed DBS service, joining the industry boycott of News Corp.'s cable networks until News Corp agreed to abandon its DBS plan. *See Complaint of United States Department of Justice v. Primestar, Inc.*, Docket No. 98 CV01193 (filed May 12, 1998) at ¶¶57, 91-101.

More recently, Time Warner engaged in a brazen display of monopoly power, removing ABC's signal from its systems as part of its "hardball" retransmission strategy. Despite statements of contrition and attempts to minimize the incident in AOL Time Warner's filing, Time Warner's statements at the recent NCTA Conference in New Orleans make clear that Time Warner is unrepentant and feels it did no wrong.[3]

Finally, although Time Warner pays lip service to encouraging the growth of DSL and other competing platforms, it has done its best to keep Internet subscribers from finding out about rival services. According to the Austin American Statesman, Time Warner Cable has instituted a new policy in Austin to refuse ads for DSL services.

> Jump Point Communications wanted this week to advertise its high-speed digital subscriber lines to reach customers. So, as it has at various times during the past two years, Jump Point went to Time Warner Cable to buy ads on such channels as CNN and CNBC.
> No more, Time Warner Cable said.
> Jump Point's Director of Marketing R.W. Rushing, said he was told the ads would no longer

[3]Dumb and Dumber, http://www.fortune.com:80/fortune/2000/05/29/tim.html.

> be accepted because Jump Point will compete with Road Runner, Time Warner's high speed Internet service that uses cable television lines.

Austin American Statesman, "What's Next, An Anvil From A Cliff Top?", Page D1, May 5, 2000.

In short, although Time Warner will not allow a rival DSL service to advertise on its cable television systems, AOL/TW asks the Commission to believe that it will voluntarily allow rival cable ISPs onto its systems in a non-discriminatory fashion.

Given this history, it is inappropriate for the Commission to rely on voluntary commitments subject to reinterpretation, and market pressures. No matter how sincere such promises may be or how personally honest those making them, history shows the voluntary commitments are simply not adequate safeguards against exploitation of monopoly power. Furthermore, changes in boards of directors and key officers can undermine even the best of present intentions. To achieve certainty, and guarantee to Americans the vibrant Internet they have today, the Commission must impose an open access requirement.

C. THE COMMISSION'S "WATCHFUL WAITING" STRATEGY HAS FAILED TO PRODUCE EITHER TRUE OPEN ACCESS OR A PLATFORM THAT RIVALS CABLE.

Contrary to AOL/TW's assertions, the market has ***not*** responded by producing new platforms or greater commitments for open access. On the contrary, in assessing the value of the AOL Time Warner merger, Wall St. analysts agree that the Commission's policy has failed and no rival broadband technology will challenge cable's dominance in the near future. *See, e.g.*, Sanford C. Bernstein & McKinsey & Co., *Broadband!*, January 2000 at 18, 21, 32, 45-49; Merrill Lynch, *AOL Time Warner*, February 23, 2000 at 33. Similarly, Cisco Systems, the primary manufacturer of Internet routing and network technology, has declared: "[c]able operators are prepared to win in the

broadband era." Cisco Systems, *Smart New World Digital Networks: A cable Provider's Guide to Deployment*, 2000. *See also* Cisco Systems, *Streaming Media Opportunity for Cable*, 2000 at 2 (noting superiority of cable to DSL or DBS).

Nor has a single major cable MSO actually opened its systems to a competitor on non-discriminatory terms. Although Comcast and Cox have made vague promises to consider opening their systems in 2001, none of the top MSOs has made any concrete move to open its system to a rival ISP, or even to begin negotiations. Indeed, Charter Communication has re-iterated that it has no intention of opening its systems.

The Commission's "watchful waiting" approach has yet to produce any tangible results. If the Commission allows the merger to proceed forward without an open access condition, hoping that the "free market" will provide a solution without the need for government intervention, it will have abandoned its responsibility to the American people to maintain the Internet as an engine of commercial innovation and a vibrant marketplace of ideas. Rather than wait for catastrophe to happen and try to repair the damage, the Commission should engage in mild prophylaxis now.

III. THE COMMISSION HAS A RESPONSIBILITY TO REVISIT THE OPEN ACCESS ISSUE IN THIS MERGER.

AOL and Time Warner make sweeping claims to the effect that the Commission's failure to impose an open access condition in the AT&T/TCI merger last year acts as binding precedent that somehow bars the Commission from imposing non-discriminatory open access conditions in this case. This flies in the face of the Commission's responsibility to examine each application before it individually on the basis of the facts as they exist now, not over a year ago. *See* 47 USC §309.

AOL is its own worst opponent. Just a few months ago, it took precisely the opposite

position as it addressed the dangers of the AT&T/MediaOne acquisition:

> [T]he proposed consolidation of AT&T and MediaOne cable systems and programming interests is better understood as an enormous horizontal and vertical consolidation in broadband video and Internet programming. This consolidation is part of what's seen as (together with the rest of the ongoing consolidation in cable ownership) "the RBOC-ization of cable" -- namely, the emergence of a limited number of geographically distinct local cable monopolies ... Further, AT&T/MediaOne's contemplated nationwide grip on the key broadband pipeline to the home also posses a fundamental threat to an open and competitive Internet....
> . . .
> So, no, this is not *AT&T/TCI redux*.

AOL ATT Comments at 6-7.

If the proposed AT&T/MediaOne transaction is not "AT&T/TCI *redux,* the Application at issue here most certainly cannot be controlled by the AT&T/TCI decision. Even if the Commission were not to permit the merger of AT&T and MediaOne, the AOL/TW combination would create a level of concentration in Internet and cable and content unparalleled in telecommunications history. This magnifies the dangers of "RBOC-ization" well beyond those AOL considered dangerous in AT&T/MediaOne.

Nor do the Commission's previous determinations to adopt a "watchful waiting" attitude preclude it from imposing any necessary conditions. To the contrary, the Commission's previous determinations hinged on constant re-evaluation and re-assessment of the issues of concentration and the development in the market.

Clearly the world has changed dramatically, even since the October 1999 Cable Service Bureau's report cited by AOL/TW. As CU, *et al.* demonstrated in both their *Petition to Deny* and the *Motion to Consolidate*, the Commission's prior analysis depends upon AOL placing competitive pressure on the cable industry to open its platform, and on AOL driving other platforms to compete

with cable. With this merger, AOL has demonstrated that the Commission's policy has failed. AOL will ***not*** pressure cable systems to open generally (although it will pressure rival systems to offer AOL in exchange for access to Time Warner's systems). Nor will AOL cannibalize its cable markets by urging swift deployment of DSL and other platforms to residential subscribers. AOL has voted with its feet on the Commission's policy of inaction, and has concluded that, "if you can't beat 'em, buy 'em."

With AOL now a prospective member of the "cable club," the Commission's analysis ***must*** change. Indeed, the Commission would be derelict in its duty if it did not take a "hard look" and re-evaluate its previous determinations in light of the radical changes to the market this merger will would make.

Similarly, the Commission should reject AOL's and Time Warner's argument that concerns about AT&T's connection to Time Warner through MediaOne have no place here. As CU, *et al.* argued in their motion to consolidate, the Commission does not have the leisure to ignore the effects of these transactions on the relevant market, or to decide matters based on what is "fair" to AT&T, MediaOne, Time Warner, and AOL. "The public, not some private, interest, convenience, or necessity governs the issuance of licenses under the [Communications] Act.." *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327, 333 (1945).[4]

IV. THE COMMISSION SHOULD CONSIDER AND ACT UPON THE ANTI-COMPETITIVE ISSUES RAISED BY OTHER COMMENTERS.

The American Cable Association, the Disney Corporation and other broadcasters, Gemstar,

[4]CU, *et al.* still await a determination on their April 11, 2000 *Motion to Consolidate*, and note that the Commission can best resolve AOL and Time Warner's objection by granting the motion.

iCast, Tribal Village, and Memphis Networx have all raised concerns regarding specific anti-competitive practices by AOL and Time Warner. AOL and Time Warner have attempted to dismiss these actions as "commercial disputes" best left to the market or alternate fora.

As discussed above, these comments are highly relevant to show the likelihood of AOL and Time Warner following through on even their scaled back version of "open access." In addition, however, the Commission should consider these practices both in the context of the merger as a whole and in addressing the specific grievances raised.

A. THE COMMISSION SHOULD REJECT AOL AND TIME WARNER'S ATTEMPTS TO NARROW THE SCOPE OF REVIEW AND SHOULD INSTEAD CONSIDER "THE BIGGER PICTURE."

Since their initial filing, the Applicants have sought to narrow the scope of the Commission's review to simple comparisons of business lines. Wisely, the Commission has rejected this approach, and should continue to do so here. Rather than allow AOL and Time Warner to trivialize and dismiss the issues raised by commenters, the Commission should instead consider them as part of the "bigger picture."

AOL has itself argued for the necessity of considering "the bigger picture." In the context of the AT&T/MediaOne merger, AOL urged the Commission to review "critical 'mega-effects'" of these applications:

> While the Commission will be well-served by several of the full market-by-market analyses of the merger submitted in the docket, AOL urges the agency to assess the impact of this consolidation not just by its component parts -- but stepping back to appreciate its aggregate effects....
> We submit that, to answer this question, the Commission should examine certain critical "mega-effects" of the proposed ... combination. First, the FCC should consider how the merger's video and Internet access components together would serve to keep consumers from obtaining access to Internet-delivered video programming -- and thereby shield cable from competition in the video marketplace. Second, the agency should reflect upon how this

> merger would enable cable to use its RBOC-like structure to limit consumer access to the increasingly integrated video/voice/data communications services offered over broadband pipe controlled by cable. And finally, the agency should recognize how these two "mega-effects" of the merger together reinforce cable's ability to deny consumers the right to chose: (a) between competitive video-enhanced Internet service rather than a traditional cable service; (b) among competing cable Internet services; and (c) among competing "bundles" of video/data/voice services that contain multichannel video.

AOL AT&T Comments at 7-8.

The Commission should therefore pay careful attention to the perceived dangers of commenters such as Disney, ACA and others who foresee significant danger form the "mega-effects" of the proposed merger.

B. THE LAYERING OF "COMMERCIAL DISPUTES" OVER CARRAIGE, INTEROPERABILITY, AND OTHER STANDARDS CREATE BARRIERS TO ENTRY AND CONVERGENCE.

Finally, the Commission must be sensitive to the layering of "commercial disputes" over carriage, interoperability, and content. Taken together, these "commercial disputes" build impenetrable barriers to entry and critical markets.

That a dispute involves two commercial parties does not mean it lacks public interest affect. To the contrary, the public may well have a substantial stake in the outcome where, as here, the "commercial disputes" involve the use of monopoly power to thwart the development of competition and stifle free expression in the marketplace of ideas.

This leveraging of private and commercial rights can rise to the level of an anti-trust violation. Indeed, the practice of erecting barriers through aggressive efforts to create or enforce dubious commercial rights deters potential entrants even from attempting to compete. The most vulnerable victims to such concentrated efforts to erect barriers to entry are small, lightly capitalized new entrants who cannot hope to protect themselves in a prolonged war of attrition over "commercial

disputes."

Indeed, it is precisely this kind of practice that the Commission is best suited to address, due to its pro-competitive public interest authority. *See, e.g.*, *Bell Atlantic/Nynex*, 12 FCCRcd 19985, 19987-88 (identifying pro-competitive purpose of 1996 Telecommunications Act); 1992 Cable Act §2(b)(1) (purpose of Cable Act to promote diversity of viewpoint), §2(b)(4)-(5)(protect public from exercise of undue market power by cable MSOs). The Commission should therefore take a hard look at the practices identified by commentors and impose conditions on the merger that protect rival service providers and citizens from the exercise of undue market power by AOL Time Warner.

CONCLUSION

AOL and Time Warner have failed to rebut the issues raised by CU, *et al.* and others. Instead, AOL/TW have attempted to divert the Commission's attention from the issues in this case by re-iterating their unenforceable promises to allow multiple ISPs on their systems -- at terms to be determined by AOL and Time Warner. This does not even come close to what is required here. Rather, as AOL itself advocated previously, the Commission should impose a genuine, mandatory rule of non-discrimination with a private right of action as described by CU, *et al.* in their *Petition to Deny*.

Nor should the Commission allow AOL/TW to dismiss the anti-competitive practices raised by others in this merger proceeding as mere "commercial disputes." To the contrary, the Commission must take a hard look at the issues raised and the safeguards proposed by commentors such as ACA, Disney, and iCast.

Indeed, given the past history of AOL and Time Warner to leverage their monopoly assets to erect barriers to entry, and the ongoing pattern of behavior cited by commentors such as Tribal

Voice and Gemstar, the Commission should either deny the Application to merge, or impose the conditions requested by CU, *et al.* and others.

Respectfully submitted,

Harold Feld

Andrew Jay Schwartzman

Cheryl A. Leanza
MEDIA ACCESS PROJECT
Counsel for CU, *et al.*
950 18th St., NW
Suite 220
Washington, D.C. 20036

Date: May 22, 2000

CERTIFICATE OF SERVICE

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

George Vradenburg, III
Jill A. Lesser
Steven N. Teplitz
America Online, Inc.
1101 Connecticut Ave., N.W.
Suite 400
Washington, DC 20036

Richard E.Wiley
Peter D. Ross
Wayne D. Johnsen
Wiley, Rein & Fielding
1776 K Street, NW
Washington, DC 20006
Counsel for America Online, Inc.

Mark C. Rosenblum
Stephen C. Garavito
Larry Lafaro
AT&T Corp.
Room 3252G1
295 North Maple Avenue
Basking Ridge, NJ 07920

Howard J. Symons
Michelle M. Mundt
Mintz Levin Cohn Ferris Glovsky & Popeo
Suite 900
701 Pennsylvania Avenue, NW
Washington, DC 20004
Counsel for AT&T Corp.

Timothy A. Boggs
Catherine R. Nolan
Time Warner, Inc.
800 Connecticut Ave., N.W.
Suite 800
Washington, DC 20006

Aaron I. Fleischman
Arthur H. Harding
Craig A. Gilley
Fleischman & Walsh, L.L.P.
1400 Sixteenth St., N.W., Suite 600
Washington, D.C. 20036
Counsel for Time Warner

Susan Eid
Sean C. Lindsay
MediaOne Group, Inc.
1919 Pennsylvania Avenue, NW
Suite 610
Washington, DC 20006

Wesley R. Heppler
Robert L. James
Cole Raywid & Braverman, LLP
1919 Pennsylvania Avenue, NW
Suite 200
Washington, DC 20006
Counsel for MediaOne Group, Inc.

Philip L. Verveer
Michael H. Hammer
Michael G. Jones
Francis M. Buono
Willkie Farr & Gallagher
1155 21st Street, NW
Suite 600
Washington, DC 20036
Counsel for MediaOne Group, Inc.

David W. Carpenter
Mark D. Schneider
David L. Lawson
C. Frederick Beckner
Sidley & Austin
1722 Eye Street, NW
Washington, DC 20006
Counsel for AT&T Corp.

_____

Andrew Jay Schwartzman Date