

November 28, 2000

Open Letter to the FTC and the FCC

Robert Pitofsky,
Chairman Federal Trade Commission
William Kennard,
Chairman Federal Communications Commission

One-Size-Fits-All Open Access Agreements Won't Work (Secret Negotiations Make Bad Public Policy)

As the Open Access agreements are being negotiated between AOL/Time-Warner and three other national ISPs (Earthlink, Juno, and MSN), I think it is worth mentioning two important issues effecting small to medium-sized ISPs: (1) an *One-Size-Fits-All Open Access Agreement is not possible*, especially given the current financial market conditions and the national ISP business model; and, (2) *these negotiations are taking place on a secret basis*. This would make it impossible for all effected parties to review and comment on the exact financial details of these ground-breaking agreements. With the enormous potential for ant-competitive behavior by AOL/Time-Warner, the FTC must not under-estimate the significance of their merger review and their subsequent conditions for approval. Ultimately, the FTC and the FCC will be establishing a national telecommunication policy of fair play and competition for the third generation of Internet usage, namely broadband.

One Size Does Not Fit All

As I review the available 10Q financial information on Earthlink and Juno for the third quarter, I notice that each of these publicly traded companies has been punished severely by the stock and bond markets. Earthlink has seen 88 percent of its market value disappear over the last seven or eight months;. and moreover, Earthlink had a net loss of \$240 million for the nine months ended September 30, 2000. Similarly, Juno has seen more than 95 percent of its market value disappear, while it recorded an \$119 million loss for the nine months ended September 30, 2000. Also, the high-risk, high-yield bond market for ISPs has dried up. Consequently, Earthlink and Juno are not exactly well positioned to drive a hard bargain at the negotiation table.

Additionally, Earthlink has seen its value per subscriber shrink to \$216.00 and Juno has seen its value per subscriber shrink to \$31.00, both of which are well under AOL's current value per subscriber of \$4000.00. Is it any wonder that publicly traded companies like Earthlink and Juno would be interested in entering an agreement that would effectively make them into a franchisee of AOL/Time-Warner? The harsh financial reality is that any Open Access agreement with Earthlink and Juno could be a prelude to their being bought up at bargain basement prices by AOL/Time-Warner at a later date. In each case, AOL/Time-Warner could swallow the national ISP with their spare change. And, at the same time, AOL/Time-Warner could afford to pay a premium on each company to satisfy their shareholders.

My major point is that an Non-Discriminatory Open Access agreement with a publicly traded company is irrelevant because it does not provide for privately owned ISPs, who cannot afford large operating losses or large capital investments without a clear path to profitability. Under the current situation, small and medium-sized ISPs should qualify for Chairman Pitofsky edict , "Open Access should be imposed if competing companies have no other means of getting to the customer of the company in question."

Even if other publicly- traded ISPs such as MSN are better financed, the national ISPs business model is different, because it includes significant revenue streams from advertising, e-commerce, and strategic partnerships . For most small and regional ISPs, advertising and e-commerce revenues are virtually non-existent. We will survive only if the wholesale rate is low enough to allow us to pay our related cable expenses and still make a profit.

Therefore, unbundling the Internet connection from the other terms of any agreement is essential. Otherwise, the wholesale rate we would be required to pay AOL/Time-Warner would be higher per an Earthlink-like agreement, and we could not offset it with other revenues. The net effect would be that privately-owned ISPs would be financially incapable of competing for local and regional broadband customers.

For the reasons demonstrated above, the AOL/TW-Earthlink agreement does not illuminate the broader issues surrounding a “non-discriminatory open access” policy for all ISPs and should not be seen as such.

Secret Negotiations Are Bad For Consumers And Competition

Finally, the problem of secret negotiations cannot be understated, especially in light of the two voices of AOL/Time-Warner. The Public Relation voice is saying that AOL/Time-Warner supports Open Access to other ISPs; and, the Wall Street voice, personified by new President Robert Pittman, is saying that the merged company will pursue a strategy of “relentless linkage.” If that is not scary enough, The Industry Standard’s magazine cover for October 30, 2000 entitled “Big, Bad AOL” shows a large dark shadowy man threatening two frightened businessmen.

Without saying it directly, the Wall Street voice suggests that small and medium-sized ISPs will be “relentlessly” de-linked or at least intimidated into acquiesces. In another example, the Public Relation voice of Jerald Levin asked ISPs to request for access to their cable on July 29, 2000; and, the Wall Street voice sent out an anti-competitive Term Sheet on August 11, 2000 to all ISPs that responded that PR voice. If anything is apparent by now, it is that AOL/Time-Warner has entirely lost of its credibility to negotiate in good faith..

In the current state of secret negotiation, most ISPs are asking the following questions:

- Does the Earthlink/Time-Warner agreement become the definitive business model for “non-discriminatory open access?”
- Will the small and medium sized ISPs have the opportunity to provide input into final shape of the Open Access business model (s)?
- How long will the Earthlink access agreement remain secret?
- Will the Open Access agreement prevent “price squeezing” by the merged companies?
- Will AOL/Time-Warner be allowed to delay access until the second half of 2001?
- Will ISPs be able to provide alternative, not Time-Warner, content?
- Who will have control of the set-top box in the consumer’s home?
- Does Non-Discriminatory Open Access include Interactive Television?
- Will ISPs be able to provide broadband cable to the business community?

With so many questions unanswered, I think it would appropriate to include a national ISP association such as AASP or USIIA in the current FTC discussions with Earthlink and AOL/Time-Warner. How else will the FTC be able to develop a comprehensive plan that outlines the obligations of AOL/TW in its relationships with ISPs of all sizes and reaches.

Given the fact that so much is at stake for competitors and consumers, I am asking you at the FTC and FCC to accept your responsibility for designing a comprehensive national telecommunication policy for the next twenty-five years. Frankly, it may be more important than who wins this presidential election. Furthermore, if the Telecommunication Act of 1996 was written to protect the consumer and competition from large corporate interests, then the "telecommunication service" provided by AOL/Time-Warner deserves the same level of FTC and FCC involvement. This is especially true since this merger will combine the Internet's two most powerful forces: broadband connectivity and content all owned by their largest providers. In the current closed marketplace of cable, how could you do any thing less?

Respectfully,

Stephen A. Heins
Director of Marketing
NorthNet