ORIGINAL

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP ORIGINAL

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116
TELEPHONE (202)424-7500
FACSIMILE (202) 424-7645

WILLIAM L. FISHMAN
DIRECT DIAL (202) 945-6986
WLFISHMAN@SWIDLAW.COM

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174

January 10, 2001

VIA HAND DELIVERY

RECEIVED

JAN 10 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
12th Street Lobby, TW-A325
Washington, D.C. 20554

EX PARTE OR LATE FILED

NOTICE OF WRITTEN *EXPARTE* SUBMISSION

Re: *Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control, Docket No. 00-30*

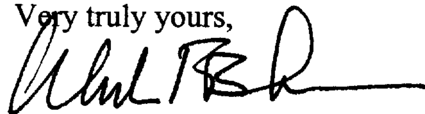
Dear Ms. Salas:

On behalf of Utilicom Networks LLC, submitted herewith for filing in the above-referenced matter pursuant to Section 1.1206(b) of the Commission's rules are an original and one copy of the attached written *ex parte* submission consisting of Utilicom Network's simultaneous filing in the FTC's consideration of public comments on its proposed consent order in the proposed America Online, Inc. merger with Time Warner.

Utilicom's comments to the FTC emphasize the need for the FTC to broaden its proposed order to permit facilities-based broadband providers a fair opportunity to compete with the merged entity for ISP service.

Any questions concerning this matter should be directed to the undersigned.

Very truly yours,



William L. Fishman

Enclosure
cc: Deborah Lathen
Royce Dickens
Linda Senecal
John Berresford
James Bird
Darryl Cooper

No. of Copies rec'd 0+1
List ABCDE

363585.1

Utilicom Networks LLC
Comments

Proposed FTC Order Placing Conditions on the Merger of America OnLine, Inc. and Time Warner Inc.

Paul T. Denis
Rebecca P. Dick
Michael D. Farber
Swidler Berlin Shereff Friedman, LLP
Washington, D.C.

January 10, 2001

SWIDLER BERLIN SHEREFF FRIEDMAN, LLP

REBECCA P. DICK*
DIRECT DIAL 202/295-8450
RPDICK@SWIDLAW.COM

3000 K STREET, NW, SUITE 300
WASHINGTON, DC 20007-5116

NEW YORK OFFICE
405 LEXINGTON AVENUE
NEW YORK, NY 10174

*ADMITTED ONLY IN NEW YORK

TELEPHONE (202)424-7500
FACSIMILE 202/424-7643

January 10, 2001

BY MESSENGER

Donald S. Clark
Secretary
Federal Trade Commission
Room 374
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580

Re: Proposed Consent Order in *In re America OnLine, Inc.*, File No. 001-0105

Dear Mr. Clark:

Utilicom Networks ("Utilicom") hereby submits the following comments regarding the Federal Trade Commission's proposed Agreement Containing Consent Orders and Decision and Order in *In re America Online, Inc.*, File No. 001-0105 (December 14, 2000).

Sincerely,

Rebecca P. Dick

cc: Molly S. Boast
Michael E. Antalics
Catharine M. Moscatelli
Federal Communications Commission
Joel deJesus

January 10, 2001

Comment of Utilicom Networks LLC on the Federal Trade Commission's Agreement Containing Consent Orders Placing Conditions on the Merger of AOL and Time Warner

Utilicom Networks LLC ("Utilicom") hereby submits the following comment to the Federal Trade Commission's Agreement Containing Consent Orders ("proposed order"), which places certain conditions on the Commission's approval of the merger of America Online, Inc. ("AOL"), and Time Warner Inc. ("Time Warner").

Utilicom urges the Commission to modestly extend its proposed order, since the order, as drafted, falls somewhat short of the Commission's stated goals. The proposed order seeks to preserve technological competition in the provision of high-speed internet access by requiring AOL to "market and promote" delivery of AOL's internet service via "DSL" in competition with Time Warner's own cable-modem delivery of AOL within Time Warner cable system areas. If, as is likely, Time Warner selects incumbent telephone companies to deliver the required DSL services, subscribers in these areas will be left with no opportunity to obtain the highly popular AOL internet access services from facilities-based broadband providers.[1] These firms offer a third avenue into the customer's home or premises and utilize what may well prove to be the best delivery technology of the three. By protecting one segment of competitors, telephone companies – but not another, the new broadband companies, the proposed order unintentionally tilts the competitive playing field against an important group of new entrants. The proposed order's failure to protect emerging broadband communications providers also leaves unaddressed the merger's adverse impact on competition to provide cable service.

This comment describes Utilicom's business, outlines the types of competition introduced into the marketplace by broadband communications providers, summarizes

[1] In this comment, we refer to such companies as "broadband communications providers," "broadband companies," and "broadband providers." These companies are building wholly new, fiber-optic networks that deliver multiple telecommunications services (local and long distance phone service, high-speed internet access, and cable services) and utilize state-of-the-art technology that is more advanced than that of the older incumbent telephone and cable networks.

the Commission's proposed order, points outs its likely adverse consequences, and proposes needed additional provisions.

1. Utilicom Networks LLC is a Significant Committed Entrant

Utilicom Networks LLC is one of a new breed of broadband communications providers that are currently constructing state-of-the-art networks capable of delivering cable, local and long-distance telephone, and high-speed internet access service over a single system. Utilicom aims to compete by utilizing a technologically superior telecommunications delivery network. Utilicom promotes its services in both a bundled format and separately. The bundled package of services has proved popular with customers.

In the markets in and around Evansville, Indiana, Utilicom completed installation of its network in less than two years and ahead of schedule. It already has a penetration rate in Evansville of over 20% and more than half of its customers subscribe to two or more of its services. Utilicom plans to provide service in additional cities in the east and midwest that currently have fewer than one million residents, but expect substantial growth. In several of these markets, Time Warner is the incumbent cable provider. Utilicom subsidiaries have obtained authority to provide telecommunications services in the States of Connecticut, Florida, Indiana, Kentucky, Massachusetts, Michigan, and Ohio, and have an application pending in New Hampshire. Utilicom subsidiaries have obtained cable franchises in Indianapolis, Dayton, and Louisville.

2. Broadband Communications Providers Offer Significant Competitive Alternatives to Existing Monopoly Firms

In many cities around the country, including many Time Warner cable system areas, consumers are already enjoying entry by broadband communications providers. Because these firms are constructing wholly new, fiber-optic capacity at their own expense, broadband providers are described as "facilities-based." This term distinguishes them from other firms that merely market services using existing capacity, called "resellers." Broadband providers are terrestrially based, like the incumbents with which

they compete most directly, and thus should also be distinguished from the various wireless technologies, including direct broadcast satellite services.

Facilities-based broadband providers offer the first significant direct competition that most incumbent local cable monopolies have ever faced. They deliver full cable service without the limitations and problems of direct broadcast satellite (DBS) service, such as less local content, rain fade, the need for a direct line of sight to the satellite, and the need for an unsightly dish. Facilities-based broadband providers offer the first complete substitute for the services provided by incumbent local cable monopolies.

Similarly, facilities-based broadband communications providers offer a high-quality alternative to the traditional local telephone monopoly. They also offer high-speed internet access in competition with telephone and cable incumbents. And in addition to offering consumers new competition in cable, ISP delivery, and telephone services, the new facilities-based broadband firms also offer an opportunity for consumers to obtain bundles of telecommunications services from a single source and pay only one monthly bill. This option is attractive to many consumers, as long as the bundle includes all of the content that they have traditionally enjoyed. Any limitations on the ability of facilities-based broadband communications providers to offer any one of these types of services or the content accessed through these services would limit their ability to compete effectively with incumbent telecommunications providers in all of the services they offer.

3. The Proposed Order Needs Minor Amendments in Order to Preserve Competition and Avoid Unintended Consequences

a. The Decree Should Preserve Broadband Competition as Well as "DSL" Competition

In announcing the Commission's action in this case, Chairman Pitofsky described the Commission's concern that the merger of AOL and Time Warner would deny competitors access to "amazing new broadband" technology.[2] The proposed order

[2] FTC Approves AOL/Time Warner Merger with Conditions (FTC Press Release) (December 14, 2000).

attempts to preserve competition in the delivery of high-speed ISP service in Time Warner cable system areas by requiring AOL to market and promote delivery of high-speed AOL via "DSL services" to subscribers in Time Warner cable areas in a manner equivalent to AOL's promotion and marketing of DSL services in other areas. The order also requires AOL to charge a price for DSL delivery of AOL in Time Warner cable areas that is comparable to the price it charges in other areas. These provisions in Section IV of the proposed order seek to ensure that AOL's choice of a delivery path for its high-speed ISP service is not skewed by its affiliation with Time Warner cable monopolies, and that alternative avenues for delivery of high-speed ISP services are able to continue to compete on the merits.

In crafting these provisions, the Commission recognized the competitive importance of technological competition with Time Warner cable systems in the delivery of high-speed internet access. Indeed the proposed order, as written, would be satisfied if AOL authorized a new facilities-based broadband firm, rather than an incumbent telephone company, to deliver its service.[3] But what the Commission apparently failed to appreciate is that the order, as drafted, could be satisfied in a way that thwarts competition in both cable and ISP markets.

AOL is by far the most popular ISP among consumers, with nearly five times the market share of its nearest competitor and about half the nation's ISP household subscribers overall.[4] The ability to offer AOL, especially via an increasingly popular high-speed connection, is competitively very significant to a facilities-based telecommunications provider.

[3] High-speed internet access provided by broadband communications providers fits within the order's definition of "DSL Services," which are defined as "Broadband ISP Services delivered via DSL." "DSL" is defined as "a digital subscriber line or a modem technology that provides Broadband transport over telephone lines." *In re America Online, Inc.*, File No. 001-0105 (December 14, 2000) (Decision and Order at 5). Although broadband networks are configured differently than traditional telephone networks, they deliver local and long-distance telephone services and hence utilize technology that provides "Broadband transport over telephone lines."

[4] These figures are averages, drawn from a variety of industry sources. The Federal Trade Commission alleged in its Complaint in this matter that AOL's ISP share is "approximately 50 percent of narrowband subscribers." Complaint, Docket No. C-3989, ¶ 8 (December 14, 2000).

The proposed order is likely to be implemented in a manner that leaves facilities-based broadband firms without the ability to offer AOL service in Time Warner cable areas, since Time Warner is likely to select the local incumbent telephone company as the sole "DSL" provider required by the decree. Most incumbent local telephone companies do not yet compete with Time Warner in the offering of telecommunications services other than ISP service; local facilities-based broadband companies already do or soon will. Time Warner likely will prefer not to deal with these cable competitors.

Not only would this result favor DSL technology over broadband technology, a choice the Commission seems unlikely to have intended to make, it also protects what may well prove to be the technologically inferior alternative. DSL suffers from technical problems that have been well documented.[5] There remains some doubt as to whether DSL providers can ultimately overcome these technological difficulties to provide reliable high-speed internet access. Thus, AOL may not have much to fear, competitively, from DSL delivery of its ISP service.

Moreover, the proposed order actually makes things worse for the new facilities-based broadband firms. Under the order as it is likely to be implemented, both incumbent monopolists – the Time Warner cable provider and the incumbent telephone company – will be able to offer high-speed AOL, but the facilities-based broadband entrants that are attempting to compete with them will not. The new broadband providers compete on their ability to offer a full menu of telecommunications services from a single source. In order to attract customers away from their traditional suppliers, the new broadband firms must be able to offer the full range of services offered by the incumbents.

The proposed order also fails to address the merger's impact on the ability of Utilicom and other new broadband firms to compete effectively for cable subscribers in Time Warner cable areas: once Time Warner cable systems can provide high-speed AOL ISP service to their subscribers, Utilicom and other firms like it will be unable to compete

[5] *See* "D.S.L. Service for Linking to the Internet Problem Ridden," *New York Times* (online edition) (Dec. 28, 2000) (available at www.nytimes.com). In addition, unlike cable, DSL availability is limited by the location of telephone switching equipment. Customers must be close to a switch for the service to work. Analysts have estimated that perhaps only 60% of American homes and businesses are situated to have access to DSL.

for cable subscribers who would like to obtain high-speed AOL from their cable provider. Thus, the proposed order fails to preserve the existing and potential cable market competition between Time Warner cable systems and new broadband providers that is threatened by the merger. This collateral damage – harming emergent competition in the provision of cable services – is particularly troublesome given that cable markets have been monopolized for so long.

Absent the merger, the competitive landscape would have been quite different. The Time Warner cable system, from which the broadband firms are trying to attract customers, would not have carried AOL. Only the telephone company, with its problem-plagued DSL service, would have been able to provide high-speed AOL. Now the merger has enabled Time Warner cable systems to carry AOL, and the proposed decree will, as implemented, preserve the incumbent telephone company's ability to carry high-speed AOL. The broadband firms will be attempting to attract cable and telephone customers with an array of services that is more limited, in a competitively significant way, than the either of the incumbent monopolies with which it competes.

Pre-merger, AOL sought to deliver its service via high-speed connection in the most efficient manner possible.[6] Post-merger, it will have the added incentive of protecting its valuable cable monopoly. A combined AOL/Time Warner is not likely to permit a significant cable rival (*i.e.*, a facilities-based broadband communications provider like Utilicom) to carry its popular ISP service. Moreover, if it must select a carrier, it will be content to select one that, like DSL, may be technologically inferior to its own cable modem service. To replace the incentives distorted by the merger, the Commission should extend its proposed order to require the merged firm to contract for carriage of high-speed AOL service by a new facilities-based broadband firm in each Time Warner cable market.

The Commission recognized the competitive harm to DSL providers threatened by the merger and acted to address that harm. But because the DSL service required by

[6] On one occasion, AOL refused to enter into a distribution contract with Utilicom. It is likely, however, that as Utilicom and other broadband communications providers built-out their respective networks and attracted a significant number of subscribers, absent the merger, AOL would have found it profitable to deal with them.

the proposed order likely will be delivered by incumbent local phone companies,[7] the Commission's attempt to protect DSL providers produces a somewhat perverse outcome. In seeking to preserve competition in "broadband internet transport services," the Commission has proposed an order that protects the historical monopolies while raising barriers for the insurgent facilities-based broadband communications providers that are poised to offer these firms real, committed competition. Thus, the decree should require AOL also to make its service available over a broadband network in each Time Warner cable area.

b. Time Warner Cable Systems Should be Precluded from Entering into Exclusive Agreements with Unaffiliated ISPs

The proposed decree also seeks to preserve competition by requiring the merged AOL/Time Warner to allow unaffiliated ISPs to deliver ISP services and content to residents served by Time Warner cable systems. In its cable system markets, Time Warner must offer three ISPs if it offers AOL (and possibly other Time Warner ISP affiliates) to its cable subscribers. This relief seeks to ensure that content providers outside of the AOL collection of sites, and competitive ISPs, will be readily available to customers in these areas who wish to purchase high-speed internet access from their incumbent cable supplier.

The proposed decree does nothing, however, to prevent Time Warner from acquiring the exclusive right to carry leading non-AOL ISPs on its cable systems. Having required Time Warner cable systems to carry unaffiliated ISPs, the decree should not be silent on the issue of exclusivity, lest its silence be confused with assent. Exclusive arrangements between AOL/Time Warner cable systems and leading unaffiliated ISPs would prevent Utilicom and other facilities-based broadband communications providers from offering access to these ISPs over their respective networks in Time Warner cable system areas, potentially placing them at a significant competitive disadvantage. A combined AOL/Time Warner would have the ability and

[7] One expert estimates that "[a]s many as 90% of DSL customers could soon be served by the incumbent telephone services. *Id.*

incentive to negotiate such exclusive arrangements, which would frustrate competition by ensuring that the ISP offerings of competing, facilities-based broadband communications providers were less attractive to consumers than the selection offered by AOL/Time Warner.

The decree should guard against this unintended adverse consequence of what is otherwise a procompetitive requirement. Thus, the decree should be revised to clarify that AOL/Time Warner may not enter into exclusive carriage arrangements with unaffiliated ISPs in Time Warner cable system areas. Competing facilities-based broadband companies should be able to negotiate to offer those ISPs to their customers as well.

4. Proposed Changes to the Order

a. Allow Facilities-Based Broadband Communications Providers to Offer High-Speed AOL Services in Time Warner Cable Areas

Utilicom respectfully suggests that Section IV of the Commission's proposed consent order be revised to add provisions allowing one broadband communications provider in each Time Warner cable system area to offer high-speed AOL services over its network. This will ensure that the consent decree does not unfairly tilt the playing field in these areas against emerging broadband communications providers in favor of cable and telephone service providers.[8]

Specifically, in Section I of the proposed order, the following should be inserted:

> "Facilities-Based Broadband Communications Provider" means a competitive, facilities-based, broadband network that offers a combination of local and long-distance telephone service, cable service, and high-speed internet access over a single network consisting of fiber-optic cable to the node.

In addition, the following should be added, in or after Section IV:

---

[8] In the event that the Commission declines to modify the proposed consent order to include these types of provisions, Utilicom would need to rely on the reporting requirement contained in section VII.B. of the proposed order, which requires Respondents to report complaints by broadband communications providers regarding any refusal by Respondents to permit carriage of its services by broadband communications providers. This is not likely to be a very effective remedy.

> In both Identified and other areas in which any of Respondents' Cable Holdings are located and Affiliated Cable Broadband ISP Services or Road Runner is available, Respondents shall allow at least one Facilities-Based Broadband Communications Provider to offer AOL Cable Broadband ISP Services to subscribers. Access to AOL Cable Broadband ISP services must be provided to Facilities-Based Broadband Communications Providers at terms equivalent, on a market-by-market basis, to those offered to DSL providers pursuant to this order.

This latter provision, by using the benchmark already fixed in the order, would ensure that the terms on which AOL high-speed services would be made available to broadband communications providers would be market-driven.

To ensure that the Respondents would not degrade the quality of AOL Cable Broadband ISP Services provided to subscribers of broadband communications providers, additional provisions tracking provisions contained in Section III of the proposed order also should be added to any final consent order. These provisions should read:

> Respondents shall not interfere in any way, directly or indirectly, with Content transmitted to subscribers of Facilities-Based Broadband Communications Providers as part of AOL Cable Broadband ISP Services.
>
> Respondents shall not interfere in any way, directly or indirectly, with the ability of subscribers of Facilities-Based Broadband Communications Providers to use ITV services that are part of AOL Cable Broadband ISP Services.

b. Preserve the Right of Broadband Communications Providers to Offer Competing ISPs in Time Warner Cable Areas

Utilicom respectfully suggests that Section II of the Commission's Consent Order be revised to add a provision stating:

> In Time Warner Cable Areas, Respondents shall not enter into any contract, agreement, or arrangement limiting the ability of Facilities-Based Broadband Communications Providers to make available non-affiliated ISPs to subscribers.

This provision will help ensure that the merged AOL/Time Warner does not act to frustrate the ability of facilities-based broadband communications providers to compete by entering into exclusive arrangements with non-affiliated ISPs in Time Warner cable areas.

5. Conclusion

The Commission's proposed order does not adequately protect against competitive harm in ISP and cable markets that the merger would inflict on facilities-based broadband communications providers and the consumers who benefit from the competition they introduce. Moreover, in one respect the proposed order actually compounds the competitive harm. It protects some – but not all – facilities-based competition, thereby favoring one form of technology over another and favoring incumbent monopolists over a committed, competitive entrant. The Commission surely did not anticipate this result. It should take advantage of this public comment process to ensure that the proposed order does not have competitively adverse and unintended consequences.