

Before the
Federal Communications Commission
Washington, DC 20554

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

CS Docket No. 00-30

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Comments of
State of Connecticut, Office of the Attorney General

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

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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 maintaining 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. See 47 U.S.C. 214(a), 310(d) and 309(e). Several of the comments currently before the Commission, however, and most notably the petition submitted by the Consumers Union *et al.*, raise significant arguments that allowing the America Online and Time Warner merger to proceed, at least without significant restrictions and conditions placed upon the parties, may ultimately harm consumers by creating a single, dominant company that unduly controls both access to, and the contents of, consumer internet service.

As to access, one need go no further than the recent conflict between Time Warner and ABC television to demonstrate the potential harm to consumers posed by consolidation. In that incident, an apparent contract dispute between ABC and Time Warner resulted in the cable company removing ABC from its transmission systems for over thirty-six hours. This had the effect of denying subscribers, or at least those who did not have meaningful access to competing technologies such as antennas or satellite dishes, the ability to view to ABC programming. On a gross level, this event demonstrates the harm that can result any time a single carrier is able to

establish dominant control over the means of access to particular content. If, as Consumers Union argues, a consolidated America Online - Time Warner would both dominate broadband internet access and simultaneously largely eliminate competing access technologies, the public harm could be significant.

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 . . . harmful, objectionable, or inaccurate.”

Although one may disagree with certain of the choices an IAP may make under a content policy, an IAP, as a private company, should, all else being equal, be able to limit access to the internet as it sees fit. For example, I encourage the internet industry both to work with parents to enable meaningful supervision of children’s online activities, and to refuse to become complicit in the illegal activities of its users.

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. For example,

America Online may at some point opt to make its “youth filter” selections into general content filters for all users. In that scenario, 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.

As a final illustration regarding the importance of preserving the democratic nature of internet speech, I turn to the recent passage by the United States House of Representatives of H.R. 3439, which greatly curtailed the FCC’s plans for community-based radio. Radio is not presently a democratic medium, as I have been using that term; control over broadcast frequencies is owned by a relative few, and, the ability of the general public to use radio to communicate a message is very limited. As a result, the FCC recently developed a plan to allow individuals and communities much greater access to the public airwaves through low-power FM transmissions. As you are aware, however, the radio industry successfully lobbied the House of Representatives to severely limit implementation of the plan, causing at least two FCC Commissioners to issue statements reflecting pronounced disappointment. Chairman Kennard noted that “[s]pecial interests triumphed over community interests today,” and that the bill would hurt “tiny stations operated by churches, schools, community groups, and public safety agencies.” Commissioner Tristani observed that “low power radio [is] an important new outlet for local groups such as schools, churches, and volunteer fire departments to reach their communities. I hope the Senate will help us give a voice to the voiceless.”

The foregoing situation demonstrates why the Commission must carefully evaluate any anti-competitive elements of the America Online - Time Warner merger plan. Access to the broadcast airwaves is presently concentrated in a relatively few hands; as a result, there are significant special interest pressures against opening the airwaves to the public. The current state of the internet, by contrast, is already open to the community. In other words, it already embodies the community ideals towards which the FCC is attempting to direct broadcast radio. 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,



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