

EX PARTE OR LATE FILED

Doc. 00-30



ATTORNEYS AT LAW

A PARTNERSHIP INCLUDING PROFESSIONAL CORPORATIONS
611 ANTON BOULEVARD, FOURTEENTH FLOOR
COSTA MESA, CALIFORNIA 92626-1998
DIRECT ALL MAIL TO: POST OFFICE BOX 1950
COSTA MESA, CALIFORNIA 92628-1950
TELEPHONE 714-641-5100 FACSIMILE 714-546-9035
INTERNET ADDRESS www.rutan.com

- A.W. RUTAN (1880-1972) JAMES B. TUCKER, SR. (1888-1950) MILFORD W. DAHL, SR. (1919-1988) H. RODGER HOWELL (1925-1983)
JAMES R. MOORE* PAUL FREDERIC MARK RICHARD A. CURNUTT LEONARD A. HAMPPEL JOHN B. HURLBUT, JR. MICHAEL W. JIMMELL MILFORD W. DAHL, JR. THEODORE I. WALLACE, JR. CLIBERT N. KRUGER JOSEPH D. CARRUTH RICHARD P. SIMS JAMES B. O'NEAL ROBERT C. BRAUN THOMAS S. SALINGER* DAVID C. LARSEN* CLIFFORD E. FRIEDEN MICHAEL D. RUBIN IRA C. RIVIN* JEFFREY M. ODERMAN* STAN WOLCOTT* ROBERT S. BOWER DAVID J. ALESHIRE MARCIA A. FORSYTH WILLIAM M. MARTICORENA
JAMES L. MORRIS WILLIAM J. CAPLAN MICHAEL T. HORNAK PHILIP D. KOHN JOEL D. KUPFERBERG STEVEN A. NICHOLS THOMAS G. BROCKINGTON WILLIAM W. WYNDER EVIDIKI (VICKI) DALLAS RANDALL M. BABBUSH MARY M. GREEN GREGG AMBER MICHAEL F. SITZER THOMAS J. CRANE MARK B. FRAZIER PENELOPE PARMESAS KATHERINE JENSON DUKE F. WAHLQUIST RICHARD G. MONTEVIDEO LORI SARNER SMITH ERNEST W. KLATTE, III ELIZABETH L. MARTYN KIM D. THOMPSON JAYNE TAYLOR KACER
DAVID B. COSGROVE HANS VAN LIGTEN STEPHEN A. ELLIS MATTHEW K. ROSS JEFFREY WERTHEIMER ROBERT O. OWEN ADAM N. VOLKERT JEFFREY A. GOLDFARB F. KEVIN BRAZIL LAYNE H. MELZER L. SKI HARRISON ELISE K. TRAYNUM LARRY A. CERUTTI CAROL D. CARTY PATRICK D. MCCALLA RICHARD K. HOWELL JAMES S. WEISZ* DAVID H. HOCHNER A. PATRICK MUNOZ S. DANIEL HARBOTTLE PAUL J. SIEVERS MICHAEL K. SLATTERY DEBRA DUNN STEEL DAN SLATER
KENT M. CLAYTON MARK BUDENSIK JOSEPH L. MAGA, III KRAIG C. KILGER STEVEN J. GOON DOUGLAS J. DENNINGTON TREG A. JULANDER TODD O. LITFIN KARA S. CARLSON ERIC L. DUNN FRED GALANTE CRISTY LOMENZO PARKER JEFFREY T. MELCHING MIKE D. NEUE SEAN P. FARRELL MARLENE POSE JURGENSEN APRIL LEE WALTER KAREN ELIZABETH HAN NATALE SIBBALD ALISON M. BARBAROSH JOHN W. HAMILTON, JR. LYNN LOSCHIN PHILIP J. BLANCHARD TERENCE J. GALLAGHER
ROBERT E. KING DEJA M. HEMINGWAY JULIE K. WHANG DENISE L. MESTER W. ANDREW MOORE ALISON L. TSAO CHARLES A. DAVENPORT, III DANIEL L. GEBERT ILLIE L. DREW NATASHA L. PAVIA RICHARD D. ARKO MARK M. MALOVOS NIKKI NGUYEN
OF COUNSEL EDWARD D. SYBESMA, JR. DAVID J. GARIBALDI, III

Direct Dial: (714) 641-3416
E-mail: bmarticorena@rutan.com

September 28, 2000

VIA FEDERAL EXPRESS

Federal Communications Commission
Washington, DC 20554

RECEIVED COMMUNICATIONS COMMISSION
SEP 29 2000 FCC MAIL ROOM
Cable Services Bureau
OCT 02 2000
Received
OCT 16 2000

Re: In Re: Petition of City of Hawthorne, California, City of Indian Wells, California, City of La Quinta, California and Public Cable Television Authority, California for Special Relief Seeking that the Applications of America Online, Inc. and Time Warner, Inc. for Transfers of Control Be Conditioned upon Implementation of the Memorandum of Understanding Relating to Open Access

Dear Sir or Madam:

Please find enclosed for filing, the original and two copies of the above-entitled Petition for Special Relief. I am also enclosing one additional copy which I respectfully request you conform with your filing stamp and return in the enclosed self-addressed, postage-paid envelope.

Thank you for your consideration.

Sincerely,

RUTAN & TUCKER, LLP

William M. Marticorena

WMM:vb
Enclosure

- cc: Russell Miyahara, Esq., City of Hawthorne
Troy Butzlaff, City of Indian Wells
Britt Wilson, City of La Quinta
Mary Morales, Public Cable Television Authority

No. of Copies rec'd 011
List ABCDE

RECEIVED

SEP 29 2000

FCC MAIL ROOM

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554**

Cable Services Bureau

OCT 02 2000

Received

IN RE: PETITION OF

City of Hawthorne, California
City of Indian Wells, California
City of La Quinta, California
Public Cable Television Authority,
California

CSR _____

For Special Relief Seeking That
The Applications of America Online, Inc.
And Time Warner, Inc.
For Transfers of Control Be Conditioned
Upon Implementation of the Memorandum
of Understanding Relating to Open Access

RUTAN & TUCKER, LLP
WILLIAM M. MARTICORENA
611 ANTON BLVD., SUITE 1400
COSTA MESA, CA 92626
714-641-5100
714-546-9035 (FAX)
Attorneys for Petitioner's
and Franchising Authorities

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

I. INTRODUCTION..... 1

II. INTERESTS OF THE PARTIES..... 1

III. SUMMARY..... 2

IV. AOL HAS AFFIRMATIVELY AND CONVINCINGLY
DEMONSTRATED THE NEED FOR OPEN ACCESS THROUGH
ITS PRIOR FILINGS WITH LOCAL GOVERNMENT AS WELL
AS THIS COMMISSION. 2

 A. AOL Makes the Case for Open Access. 4

 B. AOL Makes the Case for a Non-Voluntary Approach. 6

 C. AOL's Proposed Model. 7

V. AOL FINDS THE RELIGION OF CLOSED ACCESS. 8

 A. The Birth of the MOU..... 9

 B. The Franchising Authorities' Long Journey Into a Meaningful
 Commitment to Implementation of the MOU..... 10

VI. THIS COMMISSION, IF IT CHOOSES TO APPROVE THE
TRANSFER, SHOULD CONDITION ITS APPROVAL UPON
MANDATORY OPEN ACCESS OR, AT A MINIMUM,
COMPLIANCE WITH AND IMPLEMENTATION OF THE
TERMS AND CONDITIONS OF THE MOU..... 13

VII. CONCLUSION..... 14

TABLE OF AUTHORITIES

Page

FEDERAL CASES

AT&T Corp. v. City of Portland, et al., 43 F.Supp.2d 1146 (D.Or. 1999)
reversed 216 F.3d 821 (9th Cir.,2000) 10, 11

STATUTES

Cable Television Consumer Protection and Competition
Act of 1992, Pub. L. No. 102-385, Sec. 8, 106 Stat. 1484 12

MISCELLANEOUS

In The Matter of Transfer of Control of FCC Licenses
of MediaOne Group, Inc. to AT&T Corporation, Federal Communications
Commission CS Docket No. 99-251 (August 23, 1999)..... 3, 5, 6, 7, 8

"Open Access to America Online, Inc."; Department of Telecommunications
and Information Services, San Francisco (October 27, 1999) 3, 5, 6, 8,

In the Matter of Applications of America Online, Inc. and
Time Warner, Inc. for Transfers of Control, CS00-30 (April 26, 2000)..... 14

47 CFR Section 76.7 1

1 I. INTRODUCTION.

2 This Petition for Special Relief is filed pursuant to 47 CFR § 76.7 and relates to the
3 pending applications of America Online, Inc. ("AOL") and Time Warner, Inc. ("TWI") for
4 transfers of control of certain licenses and authorizations (Docket No. CS 00-30). It is
5 filed collectively on behalf of the Public Cable Television Authority ("PCTA"), the City of
6 Hawthorne, California ("Hawthorne"), the City of Indian Wells, California ("Indian
7 Wells") and the City of La Quinta, California ("La Quinta"), (PCTA, Hawthorne, Indian
8 Wells and La Quinta shall hereinafter collectively be referred to as the "Franchising
9 Authorities"). For the reasons set forth below, the Franchising Authorities respectfully
10 request the Federal Communications Commission (the "Commission") condition approval,
11 if approval is otherwise granted, of the applications of AOL and TWI for transfers of
12 control (the "Transfer") upon compliance by AOL Time Warner, Inc. ("AOLTWI"), the
13 ultimate merged parent entity, with the Memorandum of Understanding, dated as of
14 February 29, 2000, between AOL and TWI (the "MOU") relating to Open Access.

15 II. INTERESTS OF THE PARTIES.

16 The Franchising Authorities possess cable television franchise agreements with
17 TWI or an affiliated entity thereof. The governing boards of the Franchising Authorities
18 constitute elected representatives of approximately One Hundred and Seven Thousand
19 (107,000) cable television subscribers residing within TWI's Southern California cable
20 empire.¹ As jurisdictional local franchising authorities responsible for regulating TWI's
21 operations within their boundaries, the Franchising Authorities stand at the front line of the
22 Digital Divide and are primarily responsible for ensuring that their citizens enjoy the
23 benefits of the new technologies of video and the Internet. They serve as a guardian to
24 prevent monopolistic or oligopolistic strangleholds upon the very medium which has

25 _____
26 ¹ TWI, or an affiliated entity, possesses direct franchise agreements with Hawthorne,
27 Indian Wells and La Quinta. In addition, TWI has been granted a franchise by PCTA.
28 PCTA is a multi-jurisdictional joint powers authority representing the California Cities of
Fountain Valley, Huntington Beach, Stanton, and Westminster. The Directors of the
PCTA are elected representatives of each of those Cities and are authorized and delegated
pursuant to the PCTA Joint Powers Agreement to regulate cable television matters within
the jurisdictional boundaries of those four communities.

1 traditionally served as the prototype for robust communicative diversity. In both theory
2 and practice, the Franchising Authorities stand hand in hand with this Commission to
3 ensure that all cable television subscribers enjoy unfettered access to multiple information
4 sources delivered through the use of public rights-of-way ("PROW"). The Franchising
5 Authorities petition this Commission both in their role as regulators and their role as
6 *parents parenti asserting* First Amendment interests of their collective 107,000
7 subscribers.²

8 III. SUMMARY.

9 AOL and TWI have entered into a non-binding commitment to the provision of
10 limited Open Access upon TWI's cable properties by way of the MOU. The Franchising
11 Authorities have attempted to secure binding commitments from AOL and TWI as to the
12 long-term implementation and efficacy of the MOU without success. In response to
13 attempts of the Franchising Authorities to incorporate binding contractual commitments to
14 the MOU into a legally-enforceable Transfer Agreement, AOL and TWI responded with
15 refusals and threats of litigation. The Franchising Authorities now petition this
16 Commission to condition the approval of the AOL Transfer, if approval is granted under
17 any circumstances, upon implementation of the MOU and the creation of an ongoing
18 regulatory framework which ensures that the lofty ideals espoused by the MOU become a
19 marketplace reality.

20 IV. AOL HAS AFFIRMATIVELY AND CONVINCINGLY
21 DEMONSTRATED THE NEED FOR OPEN ACCESS THROUGH ITS
22 PRIOR FILINGS WITH LOCAL GOVERNMENT AS WELL AS THIS
23 COMMISSION.

24 It is well known that AOL, both directly and through organizations created and/or
25 supported by AOL, has stirred, if not created, the national debate regarding Open Access.

26 _____
27 ² TWI possesses approximately 80,000 subscribers within the PCTA. There are
28 currently approximately 14,000 subscribers in Hawthorne, 3,200 subscribers in Indian
Wells, and 9,800 subscribers in La Quinta. The cable television systems serving the
Franchising Authorities constitute a material portion of TWI's Southern California cluster
serving subscribers in Los Angeles, Orange, Riverside, and San Diego Counties.

1 It was through AOL's artful and persuasive advocacy that numerous public entities
2 attempted to condition other cable television franchise transfers, including the combination
3 of Telecommunications, Inc. and AT&T Corp. (the "AT&T Transfer") and MediaOne, Inc.
4 and AT&T Corp. (the "MediaOne Transfer"), upon a requirement that that the consolidated
5 cable operator open its cable modem platform to multiple Internet Service Providers
6 ("ISP") on non-discriminatory technological and economic conditions. AOL has been a
7 vigorous advocate of Open Access.³ Through its policies, persuasion, rhetoric, and sheer
8 logic, AOL has propelled local government agencies throughout this land into frontal
9 assaults with the cable industry, which has traditionally opposed Open Access, often
10 erupting into litigious disputes with dominant members of a cable industry whose
11 economic interests are apparently best served through the retention of a closed platform.
12 Although AOL has apparently changed its spots based upon its current economic self-
13 interest, much of its own legal, factual, and economic arguments should not be lost in the
14 shuffle since they provide a powerful and meaningful justification for the flat out
15 imposition of Open Access upon cable transactions which involve market power or, even
16 worse, potential market power abuses. Although AOL now asks this Commission to "trust
17 me" by allowing an open-market approach to access, one cannot forget AOL's compelling
18 arguments against the efficacy of a market solution. Those very market conditions which
19 AOL often described as access limiting are only worsened through the combination of
20 these true media mega-giants. Why mandatory government regulation, based upon the
21 structural ineffectiveness of market conditions, should now be replaced with a "hands-off"
22 free market approach escapes the understanding of the Franchising Authorities.

23 In past filings with local government⁴ as well as this Commission⁵, AOL has

24 _____
25 ³ The terms "Open Access" and "Forced Access" are used interchangeably and connote a
26 mandatory as opposed to voluntary requirement.

27 ⁴ America Online, Inc. ("Open Access, to America Online, Inc." Before the Department
28 of Telecommunications and Information Services, San Francisco, October 27, 1999.)
(hereafter, "AOL-SF")

29 ⁵ In the Matter of Transfer of Control of FCC Licenses of MediaOne Group, Inc. to
30 AT&T Corporation, Federal Communications Commission CS Docket No. 99-251, August
31 23, 1999 (hereinafter, "AOL-FCC"). In AOL-FCC, AOL argued that Open Access was a
32 critical requirement in the marriage of two massive Internet Pipeline owners based upon

1 presented persuasive evidence as to the inability of market forces to ensure non-
2 discriminatory access to the Internet, AOL has made a convincing case that the economic
3 self-interests of any monopolistic or even oligopolistic market gatekeeper will ultimately
4 interfere with true non-discriminatory access. It was AOL which provided local and
5 federal policy makers with the market analyses demonstrating that openness can only be
6 achieved through a regulatory mandate. Why government regulators should now simply
7 trust AOL to temper its structural monopolistic power, which AOL has already indicated
8 necessarily result in market abuses, simply escapes imagination. Once again, AOL's
9 specific words should not be lost in the policy debate since they provide the most
10 compelling argument as to why market forces cannot ensure non-discriminatory access.

11 A. AOL Makes the Case for Open Access.

12 AOL urged government to make an unequivocal commitment to a comprehensive
13 and meaningful policy of Open Access. It asked San Francisco to fortify that commitment
14 by providing a private right of action and a threat of government enforcement. AOL
15 stated:

16 "The City's critical and appropriate role is to establish
17 and firmly embrace a meaningful Open Access policy, not to
18 manage the marketplace. We believe that once such a policy
19 is fully in place, the industry players will negotiate the details
20 to fairly implement Open Access. The City thus should not
21 have to play an active role in enforcing non-discriminatory
22 pricing or resolving pricing disputes. Rather, the City should
23 simply adopt and rely on a rule that a broadband provider
24 must offer high speed Internet transport services to
25 unaffiliated ISPs on the same rates as it offers them to itself or
26 its affiliated ISP(s). The City's unequivocal commitment to
27 this policy and the resulting public spotlight should offer
28 enforcement enough, and indeed we expect that cable
operators will adjust their ways readily once they understand
that a closed model for broadband Internet access will not
stand. When necessary, the opportunity to seek injunction or
bring a private cause of action would offer a fallback method
of obtaining redress.

As stated above, the City's role is to establish a
their prior commitments to medium-sized Internet content providers. Certainly, the union
of the world's largest ISP to the world's second largest cable operator, which happens to
also dominate the world of video and print content, presents a situation far more dangerous
to robust and diverse content and subscriber choice than did the MediaOne Transfer.

1 comprehensive Open Access policy with an effective
2 enforcement mechanism. Network management issues are
3 best left to the industry players, and the City need not play a
4 hands-on role in this area. The companies involved are in the
5 best position to work out specific implementation issues. This
6 is not to say, however, that a reluctant provider would not
7 have the ability to interfere with the successful
8 implementation of an Open Access regime. Accordingly,
9 through its enforcement policy if necessary, the City should
10 ensure that the necessary degree of cooperation is achieved."
11 (AOL, pp. 4-5).

12 AOL applauded San Francisco in its search for Open Access. As AOL put it:

13 "AOL applauds the City for taking this critical step in
14 the implementation of the Board of Supervisors' Open Access
15 resolution, which wisely supports consumers' freedom to
16 choose their Internet service provider and to access any
17 content they desire – unimpeded by the cable operator."
18 (AOL-SF, p.1).

19 AOL also offered its arguments for Open Access in this Commission's proceeding
20 overseeing the MediaOne Transfer:

21 "What this merger does offer, however, is the means
22 for a newly "RBOC-icized" cable industry reinforced by
23 interlocking ownership relationships to (1) prevent Internet-
24 based challenge to cable's core video offerings; (2) leverage its
25 control over essential video facilities into broadband Internet
26 access services; (3) extends its control over cable Internet
27 access services into broadband cable Internet content; (4) seek
28 to establish itself as the "electronic national gateway" for the
full and growing range of cable communications services.

To avoid such detrimental results for consumers, the
Commission can act to ensure that broadband develops into a
communications path that is as accessible and diverse as
narrowband. Just as the Commission has often acted to
maintain the openness of other late-mile infrastructure, here
too it should adopt open cable Internet access as a competitive
safeguard – a check against cable's extension of market power
over facilities that were first secured through government
protection and now, in their broadband form, are being
leveraged into cable Internet markets. Affording high-speed
Internet subscribers with an effective means to obtain the full
range of data, voice and video services available in the
marketplace, regardless of the transmission facility used, is a
sound and vital policy – both because of the immediate benefit
for consumers and because of its longer-range spur to
broadband investment and deployment. Here, the
Commission need do more than establish an obligation on the
merged entity to provide non-affiliated ISPs connectivity to
the cable platform on rates, terms and conditions equal to
those accorded to affiliated providers." (AOL-FCC, p. 4)

1 AOL described the threat of vertically integrated cable companies, such as
2 AOLTWI, in the U.S. in precisely these terms:

3 "At every link in the broadband distribution chain for
4 video/voice/data services, AT&T would possess the ability
5 and the incentive to limit consumer choice. Whether through
6 its exclusive control of the EPG or browser that serve as
7 consumer's interface; its integration of favored Microsoft
8 operating systems in set-top boxes; its control of the cable
9 broadband pipe itself; its exclusive dealing with its own
10 proprietary cable ISPs; or the required use of its "backbone"
11 long distance facilities; AT&T could block or choke off
12 consumers' ability to choose among the access, Internet
13 services, and integrated services of their choice. Eliminating
14 customer choice will diminish innovation, increase prices, and
15 chill consumer demand, thereby slowing the roll-out of
16 integrated service." (AOL-FCC, p. 11).

17 B. AOL Makes the Case for a Non-Voluntary Approach.

18 AOL has demonstrated that even the presence of competitive alternative facilities
19 does not eliminate the need for Open Access.

20 "Moreover, an Open Access requirement would
21 provide choice and competition of another kind as well. It
22 would allow ISPs to choose between the first-mile facilities of
23 telephone and cable operators based on their relative price,
24 performance, and features. This would spur the loop-to-loop,
25 facilities-based competition contemplated by the
26 Telecommunications Act of 1996, thereby offering consumers
27 more widespread availability of Internet access; increasing
28 affordability due to downward pressures on prices; and a
menu of service options varying in price, speed, reliability,
content and customer service." (AOL-FCC, p. 14)

In San Francisco, AOL was asked whether Open Access should apply only to
residential services since the business sector has enjoyed more competition for telephone
and broadband services. AOL unambiguously rejected this notion:

"Defining 'consumers' to include only residential
customers, however, would unduly limit the fulfillment of
these goals. There is no indication that the Board intended to
exclude the business customers from the benefits flowing from
competition and choice. . . The City should thus ensure
nondiscriminatory Open Access to broadband Internet access
for residential and business services alike." (AOL-SF, pp. 1-
2).

AOL has argued that requiring Open Access early in the process of market
development will establish a much stronger structure for a consumer-friendly and

1 competitive market. Early intervention prevents the architecture of the market from
2 blocking access and avoids the difficult task of having to reconstruct an open market at a
3 later time.

4 "The Commission should proceed while the
5 architecture for cable broadband is still under construction.
6 To wait any longer would allow the fundamentally anti-
7 consumer approach of the cable industry to take root in the
8 Internet and spread its closed broadband facility model
9 nationwide. Must consumers await an "MFJ for the 21st
10 Century"?"

11 Obliging AT& T to afford unaffiliated ISPs access on
12 nondiscriminatory terms and conditions – so that they, in turn,
13 may offer consumers a choice in broadband Internet Access –
14 would be a narrow, easy to administer, and effective remedy.
15 It would safeguard, rather than regulate, the Internet and the
16 new communications marketplace. The openness it would
17 afford is critical to a world in which – as boundaries are erased
18 between communications services and applications – we
19 ensure that consumers likewise are truly afforded choice
20 without boundaries." (AOL-FCC, p. 18).

21 AOL has suggested that Open Access might actually speed the development and
22 deployment of broadband facilities within a developing competitive market:

23 "Open Access will not unduly increase cable operator's
24 financial risk. A nondiscriminatory transport fee set by the
25 cable operator would allow AT&T to recover full transport
26 cost plus profit from each and every interconnecting provider.
27 And AT&T's affiliated ISP would still be free to compete
28 based on cost and quality – with other ISPs. As Forrester
Research observed, "[c]able companies can make money as
providers of high-speed access for other ISPs. Instead of
gnashing their teeth, large cable operators should make their
networks the best transport alternative for providers of all
types of telecommunications services." According to AT&T
itself, "the only way to make money in networks is to have the
highest degree of utilization." Open Access would allow
AT&T to do just that, fostering a wholesale broadband
transport that would increase use of the cable operator's
platform, fuel innovation, and attract additional investment."
(AOL-FCC, pp. 6-7).

29 C. AOL's Proposed Model.

30 AOL's Open Access proposal to for San Francisco merits consideration by this
31 Commission as a possible model in relation to this Transfer:

32 "*Section 1: Non-discrimination requirements:*
33 Franchisee shall immediately, with respect to this franchise,
34 provide any requesting Internet Service Provider access to

1 its broadband Internet transport services (unbundled from
2 the provision of content) on rates, terms and conditions that
3 are at least as favorable as those on which it provides such
4 access to itself, to its affiliates, or to any other person. Such
5 access shall be provided at any point where the Franchisee
6 offers access to its affiliate. Franchisee shall not restrict the
7 content of information that a consumer may receive over the
8 Internet. . .

9 *Section 2: Private Right of Action: Any Internet*
10 *Service Provider who has been denied access to a*
11 *Franchisee's Broadband Internet Access Transport Services*
12 *in violation of this Ordinance has a private cause of action to*
13 *enforce its right to such access.*

14 *Section 3: Enforcement of Rights of City and County:*
15 *In addition to any other penalties, remedies or other*
16 *enforcement measures provided by Ordinances or state or*
17 *federal laws, City and County may bring suit to enforce the*
18 *requirements of this Ordinance and to seek all appropriate*
19 *relief including, without limitation, injunctive relief."*
20 *(AOL-SF, pp. 2-3).*

21 AOL made essentially the same recommendation to the Commission:

22 "The essence of an Open Access policy is thus
23 competition, not regulation. Open Access would create a
24 competitive check on conduct – a far more preferable option
25 than a behavioral check requiring constant step-by-step
26 scrutiny of a cable operator's dealing with every provider of
27 content or new applications to make sure that the company's
28 conduct doesn't skew its network in favor of affiliated
service providers.

This approach does not require imposition of legacy
common carrier regulation. The model for such early,
targeted safeguarding is drawn directly from the existing
cable regulatory framework, but its policy foundation cuts
across all FCC regulation. Any cable television system
operator that provides any Internet service provider access
to its broadband cable facilities would have to provide a
requesting ISP comparable access to its facilities on rates,
terms, and conditions equal to those under which it provides
access to its affiliate or to any other person." (AOL, FCC, p.
14).

24 V. AOL FINDS THE RELIGION OF CLOSED ACCESS.

25 AOL's profound commitment to Open Access apparently convinced numerous
26 government authorities to expend valuable governmental resources to judicially defend the
27 concept of Open Access. However, one party that now seems unconvinced as to the need
28 for Open Access is AOL. The Franchising Authorities struggled unsuccessfully with AOL

1 and TWI to secure some binding commitment to Open Access. A brief chronological
2 summary of AOL's tailspin into closed access merits discussion.

3 A. The Birth of the MOU.

4 On February 29, 2000, AOL and TWI ceremoniously announced their joint
5 approval and execution of the MOU which purportedly guaranteed Open Access to
6 competitive ISPs on the AOLTWI cable modem platform. Although rich on intent and
7 indigent on details, the MOU did constitute a valuable first step toward an Open Internet
8 platform.⁶

9 Although the Franchising Authorities applaud AOL and TWI for their unilateral
10 commitment to the MOU, both pragmatics as well as a healthy dose of cynicism lead the
11 Franchising Authorities to conclude that the MOU was adopted, at least in part, as a
12 preemptive strike to Open Access conditions which could reasonably have expected to be
13 imposed by at least some local franchising authorities as well as this Commission and/or
14 the Federal Trade Commission ("FTC"). Although one can debate the issue both ways, a
15 rational argument can be crafted for the proposition that government should first allow the
16 marketplace, and its integral players, to establish access conditions before government
17 intervention is warranted. However, such an approach assumes that the MOU is a real as
18 opposed to illusory and will not fall by the regulatory wayside moments after closing of
19 the Transfer. Unfortunately, based upon the facts which have been presented to the
20 Franchising Authorities, they now believe that the MOU may constitute nothing more than
21 "blue smoke and shiny mirrors" and was adopted primarily as a short-term disincentive to
22 the imposition of vitally needed structural reforms.

23
24 ⁶ The MOU constituted a far lesser commitment to Open Access than had been
25 advocated by AOL before federal, state, and local authorities. For example, the MOU
26 conditions access on technological availability without specifying the technological
27 limitations which might prevent unbridled access (MOU, ¶¶ 4 and 8). Second, the MOU
28 restricted access to an unspecified number of ISPs as opposed to all ISPs. (MOU, ¶ 4).
Third, the MOU did not provide a structural enforcement mechanism but apparently relied
upon notions of voluntary compliance and potential third-party contractual claims.
Finally, the MOU did not preclude future modifications to the MOU, or even termination
thereof, which might ultimately gut the laudable purposes and policies established by that
document.

1 B. The Franchising Authorities' Long Journey Into a Meaningful
2 Commitment to Implementation of the MOU.

3 The Franchising Authorities commenced discussions with AOL and TWI regarding
4 Open Access prior to the Ninth Circuit Court of Appeals decision in AT&T Corp. v. City
5 of Portland, et al., 43 F.Supp2d 1146 (D.Or. 1999), reversed 216 F.3d 871 (9th Cir., 2000)
6 (hereinafter, "Portland"). Thus, at the time of those initial discussions, the only law in the
7 Ninth Circuit relating to the ability of a local franchising authority to impose Open Access
8 as a condition of transfer renewal was the approving opinion of the District Court in
9 Portland.⁷

10 In their initial meetings with AOL and TWI, the Franchising Authorities
11 propounded four approaches to Open Access. Those approaches, which were intended to
12 be incorporated into a final Transfer Agreement, were:

13 (1) The adoption of an Open Access requirement mandating non-
14 discriminatory access to AOLTWI's cable modem platform by competitive
15 ISPs;

16 (2) A reservation of rights whereby the Franchising Authorities
17 could expand their regulatory purview in relation to Open Access based upon
18 future perceived needs and policy decisions;

19 (3) A Most Favored Nations Clause ("MFN") whereby AOLTWI
20 would commit to provide the Franchising Authorities with a greater degree
21 of Open Access protection if and when it was provided to any other
22

23 ⁷ The Franchising Authorities, along with the cities of Lawndale, Poway, and Torrance,
24 were jointly represented by William M. Marticorena, Esq., of Rutan & Tucker, LLP in
25 relation to the Transfer. All of the discussions regarding Open Access were part of global
26 discussions on behalf of all of these entities. AOL, TWI, and AOLTWI were primarily
27 represented, at least from a legal viewpoint, by Gary R. Matz, Assistant General Counsel
28 of TWI, and J. Larson Jaenicke, of Rintala, Smoot, Jaenicke & Rees, outside counsel. All
of the representations regarding the positions of AOL, TWI, and AOLTWI are based upon
discussions and meetings which took place between and among, potentially among others,
William M. Marticorena, on behalf of the Franchising Authorities and Messrs. Matz and
Jaenicke on behalf of AOL, TWI, and AOLTWI. The factual allegations in this Petition
are supported by the Declarations of Mary Morales, Executive Director of the PCTA
(Exhibit A), and William M. Marticorena Esq. (Exhibit B).

1 franchising authority; and

2 (4) A contractual commitment on the part of AOLTWI to maintain,
3 implement, and not materially degrade the commitments to Open Access set
4 forth in the MOU.⁸

5 From the beginning, AOL and TWI opposed any form of mandatory Open Access
6 and argued that its voluntary commitment to Open Access through the MOU should be
7 deemed sufficient.⁹ Although not accusing the Franchising Authorities of an attempted
8 illegality, at least at that point in time, lawyers for AOL and TWI made it absolutely clear
9 that AOLTWI intended neither to commit to Open Access as part of the Transfer process
10 nor agree to incorporate its commitment to or implementation of the MOU as a mandatory
11 regulatory requirement. "Trust me" was the motto of the day in relation to the Franchising
12 Authorities' discussions with AOL and TWI regarding Open Access.

13 AOLTWI's position on Open Access took a dramatic turn for the less inclusive
14 upon announcement of the Ninth Circuit's decision in Portland. At that point in time,
15 AOL's rhetoric shifted from "hell-no-we-won't-go" to "we'll see you in court" based on
16 reliance upon Portland.

17 In a letter of Gary R. Matz to William M. Marticorena, dated August 4, 2000, AOL
18 and TWI cut to the proverbial chase and lectured the Franchising Authorities upon their
19 lack of legal authority in the arena of Open Access:

20 "In short, the law is quite clear in the Ninth Circuit, including within
21 the State of California. A community may not regulate a cable television
22 operator's provision of cable Internet service in its capacity as a franchising
23 authority and any such Open Access condition contained in a Franchise
24 Transfer Agreement is void as being beyond the legal authority of the

23 ⁸ A copy of an early draft of the proposed Transfer Agreement provisions relating to
24 Open Access is attached hereto as Exhibit C. The relevant provision is paragraph 15.
25 AOL and TWI rejected options 1, 3 and 4 described above.

26 ⁹ The Franchising Authorities, through their Special Counsel, asked AOLTWI to
27 articulate its legal position as to the legal enforceability of Open or Forced Access, as those
28 terms have commonly been utilized in the cable industry over the last year. (See letter of
William M. Marticorena to Gary R. Matz dated February 25, 2000, attached hereto as
Exhibit D). AOL and TWI, through their legal representatives, skirted the issue of legal
enforceability of Open or Forced Access but argued strenuously in favor of a voluntary
approach given the public commitment of both AOL and TWI to Open Access as
implemented through the MOU. (See letter of Gary R. Matz to William M. Marticorena
dated March 22, 2000, attached hereto as Exhibit E).

1 community. Similarly, it is beyond the legal authority of the California
2 communities to try to reach this same result in an indirect manner by
incorporating the MOU into the Transfer Agreement."¹⁰

3 In conversations between representatives of AOL, TWI, and the Franchising
4 Authorities, AOL and TWI made their intent clear to initiate litigation with the Franchising
5 Authorities if they attempted, in whole or in part, to impose a mandatory Open Access
6 condition the Transfer upon implementation of the MOU, and/or deny approval based
7 upon AOLTWI's refusal to commit to either of the two previously mentioned
8 requirements.¹¹

9 In a complete turnaround from its prior advocacy to federal, state, and local
10 government authorities, AOL has now threatened to sue a group of local franchising
11 authorities which attempted to impose the very Open Access conditions which AOL itself
12 had advocated in prior administrative actions or, having failed in that goal, sought to
13 simply require AOL to "stand by its word" and make the MOU a reality as opposed to an
14 illusory regulatory "bait and switch".¹²

15
16
17
18
19 _____
20 ¹⁰ See letter of Gary R. Matz to William M. Marticorena dated August 4, 2000 attached
hereto as Exhibit F.

21 ¹¹ See Declaration of William M. Marticorena, dated September 29, 2000 (Exhibit B).

22 ¹² The Franchising Authorities argued to AOL and TWI that the combination of AOL's
23 abrupt policy turnaround upon Open Access, presumptively based upon its situational
24 economic benefit, plus its refusal to contractually or regulatorily commit to its marketplace
25 representations regarding Open Access, caused concern as to whether AOLTWI would
26 possess the requisite degree of "legal, financial, and technical" qualifications pursuant to
27 Section 617 of the Cable Television Consumer Protection and Competition Act of 1992.
(P.L. 102-385, Sec. 8, 106 Stat. 1484) Ultimately, the Franchising Authorities made
28 specific findings of "regulatory fraud" in their Resolutions reluctantly approving the
Transfer. (See La Quinta Resolution No. 2000-102, dated August 15, 2000, attached
hereto as Exhibit G. The La Quinta Resolution is substantially identical to those adopted
by Hawthorne, Indian Wells, and PCTA.) Although the Franchising Authorities ultimately
chose not to force their citizens to fund a litigious battle with AOLTWI regarding what the
Franchising Authorities perceived to be outrageous and potentially misleading actions
upon both the marketplace and government regulators, they could not refrain from at least
articulating their disgust with AOLTWI and to question its credibility regarding non-
mandatory commitments specifically intended to induce regulatory forbearance.

1 VI. THIS COMMISSION, IF IT CHOOSES TO APPROVE THE TRANSFER,
2 SHOULD CONDITION ITS APPROVAL UPON MANDATORY OPEN
3 ACCESS OR, AT A MINIMUM, COMPLIANCE WITH AND
4 IMPLEMENTATION OF THE TERMS AND CONDITIONS OF THE
5 MOU.

6 AOL has eloquently articulated the justification for rejection of a voluntary market-
7 based Open Access policy by telling government regulators, in these words or words of
8 equivalent substance, that parochial economic self-interests will always prevail over
9 voluntary non-enforceable commitments. While it may be true that the economic interests
10 of cable platform owners are best served by providing subscribers with a robust choice of
11 competitive ISP offerers, such a conclusion may ultimately prove wrong. At this point in
12 time, the economics of cable modem marketing and dissemination are in their infancy
13 stage and we simply do not know if exclusive marketing agreements, similar to those
14 which are rampant on the video side and have historically existed in relation to Excite At-
15 Home and Roadrunner, will prove to be the most economically beneficial paradigm. The
16 Franchising Authorities believe, and hereby respectfully submit to this Commission, that
17 money will control this ultimate decision and that a cable modem provider, particularly
18 one operating in a non-competitive market, will make the access decision that results in the
19 largest net revenues and not one that necessarily promotes diversity of content or access.

20 Although AOL and TWI "walk-the-walk and talk-the-talk" of non-discriminatory
21 access, the Franchising Authorities believe that their actions speak louder than words.
22 Quite frankly, an entity that has demonstrated its willingness to completely reverse
23 proffered regulatory positions, many of which were accepted in good faith by local
24 government as a prelude to litigation against other members of the cable industry, and now
25 abruptly and without reasoned articulation reverses its position to the point of threatening
26 litigation against local government if it even attempts to saddle AOLTWI with a
27 semblance of Open Access, must be questioned as to the reality of any meaningful
28

1 voluntary commitment.¹³

2 AOL's previous filings demonstrate the policy justification for adoption of Open
3 Access and rejection of voluntary compliance. AOL and TWI's conduct in this particular
4 matter brings generalities down to the specifics and strongly suggests that AOLTWI will
5 make, on an ad hoc basis, the economic decisions which are most advantageous to its
6 economic interests and ultimately those of its shareholders. Either AOL was disingenuous,
7 and simply promoting its economic interests, when it paraded Open Access before
8 legislative tribunals throughout this land, and adamantly opposed any form of voluntary
9 compliance, or it is now being insincere in arguing that voluntary compliance best serves a
10 fair and open marketplace. At a minimum, its actions create uncertainty as to its true
11 commitment to non-discriminatory access. The potential consequences of empowering an
12 economic gargantuan such as AOLTWI with the potential market power to monopolize
13 "one-wire" interactive communications are simply not acceptable.¹⁴

14 VII. CONCLUSION.

15 Based upon its fact-finding process, the Franchising Authorities have specifically
16 determined that neither AOLTWI's purported good faith commitments nor its alleged
17 economic interests provide sufficient comfort to adopt regulatory forbearance and

18 ¹³ The Franchising Authorities appreciate, and even applaud, TWI's foray into non-
19 discriminatory access through its agreements with Juno Online Services, Inc. and its
20 experimental trial of multiple ISP access in a few selected franchising areas. However,
21 one must wonder whether those actions will continue or increase subsequent to the
22 approval of the Transfer by the Commission, as well as other regulatory authorities in the
23 absence of some form of mandatory commitment. Once again, the Franchising Authorities
24 are genuinely concerned that these efforts, although innovative and laudable, are simply
25 short-term and small-scale designs to avoid greater regulatory requirements. Although
26 perhaps a cynical viewpoint, the actions of AOL and TWI in relation to the Franchising
27 Authorities can only create these types of doubts and suspicions.

28 ¹⁴ The Franchising Authorities have carefully reviewed and considered the Petition to
Deny of the Consumer Union, the Consumer Federation of America, the Media Access
Project, and the Center for Media Education (In the Matter of Applications of America
Online, Inc. and Time Warner, Inc. for Transfers of Control, CS00-30, Petition dated April
26, 2000 (the "Denial Petition")). Although the Franchising Authorities have not chosen to
formally oppose the Transfer under all conditions, the Franchising Authorities do generally
support the analysis contained in the Denial Petition relating to the policy justifications for
mandatory Open Access and the rejection of voluntary compliance. The Franchising
Authorities support the Denial Petition's alternative request that the Transfer be
conditioned upon true, meaningful, and enforceable requirements of Open Access and non-
discrimination.

1 voluntary access. The Franchising Authorities helplessly watched two media giants,
2 Disney Corporation and TWI, battle over their own respective economic interests in
3 relation to the carriage of ABC affiliates with the primary victims being the Franchising
4 Authorities' captive cable subscribers which were arbitrarily and, according to a ruling of
5 the Cable Services Bureau of this Commission, wrongfully denied access to ABC affiliates
6 during a prime programming period. The Franchising Authorities have learned from this
7 lesson that economic concentration of media power has both its blessings and burdens but
8 ultimately cannot be expected, without government intervention, to protect the interests of
9 subscribers and consumers which, at least in many cases, possess little or no competitive
10 options. The approval of the Transfer will concentrate ownership and operational control
11 in one entity of the monopolistic pipeline, the hardware, the software, the applications, and
12 the content in relation to millions of existing and future cable and broadband subscribers.
13 Although the Franchising Authorities do not dispute that subscriber benefits can be given
14 birth through the marriage of pipeline and content, the reverse can be equally true. The
15 subscribers' best chance of achieving a reasonable balance between the advantages of
16 "bigness" and its potential burdens lies in a rational and reasonable government policy
17 which recognizes the existing limitations on competition at the facilities level and creates a
18 competitive model at the content level in situations where the marketplace simply cannot
19 achieve this result. To the extent that AOLTWI intends to honor and implement the MOU,
20 as opposed to terminating its existence or denigrating its requirements subsequent to the
21 presumptive approval of the Transfer, little is lost by a regulatory program which simply
22 forces AOLTWI to "do what it says and say what it does." Sometimes, the simple
23 solutions are the best solutions.

24
25
26
27
28

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: September 29, 2000

Respectfully submitted
CITY OF HAWTHORNE, CALIFORNIA
**CITY OF INDIAN WELLS,
CALIFORNIA**
CITY OF LA QUINTA, CALIFORNIA
**PUBLIC CABLE TELEVISION
AUTHORITY, CALIFORNIA,
REPRESENTING THE CITIES OF
FOUNTAIN VALLEY, HUNTINGTON
BEACH, STANTON AND
WESTMINSTER**

RUTAN & TUCKER, LLP
WILLIAM M. MARTICORENA

By: *William M. Marticorena*
WILLIAM M. MARTICORENA
Attorneys for Petitioners



Recycled Paper

Professional Indexes & Files, Inc. 800-429-0191

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF MARY MORALES

I, Mary Morales, declare as follows:

1. I am the Executive Director of the Public Cable Television Authority ("PCTA").

2. This Declaration is submitted in support of the Petition for Special Relief relating to the Applications for Consent to Transfer Control of Licenses from Time Warner, Inc., CS Docket No. 00-30, filed collectively on behalf of the PCTA, the City of Hawthorne, California and the City of La Quinta, California.

3. I have reviewed the factual assertions contained in the Petition for Special Relief and declare that they are true to the best of my knowledge.

I hereby state under penalty of perjury, that the foregoing is true and correct.

Executed this 29 day of September, 2000



MARY MORALES

"A"



Recycled Paper

Professional Indexes & Files, Inc. 800.423.9141



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

DECLARATION OF WILLIAM M. MARTICORENA

I, William M. Marticorena declare as follows:

1. I am an attorney licensed to practice law in the State of California, am a partner in the law firm of Rutan & Tucker, LLP, and serve as counsel to the Public Cable Television Authority ("PCTA"), the City of Hawthorne, California and the City of La Quinta, California (collectively, the "Franchising Authorities").

2. This Declaration is submitted in support of the Petition for Special Relief Relating to the Applications for Consent to Transfer Control of Licenses from Time Warner, Inc., CS Docket No. 00-30, filed on behalf of the Franchising Authorities.

3. I have reviewed the factual assertions contained in the Petition for Special Relief relating to the discussions and negotiations among the Franchising Authorities, America Online, Inc., and Time Warner, Inc., relating to Open Access and the incorporation of the terms and conditions of the MOU into the transfer documents.

4. I declare that those factual assertions are true to the best of my knowledge. I hereby declare under penalty of perjury, that the foregoing is true and correct.

Executed this 21 of September, 2000.


WILLIAM M. MARTICORENA

"B"

EXHIBIT C



Recycled Paper

Product Line: Business & Finance, Inc. 500-423-9191