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EDWARD J. MARKEY
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COMMERCE COMMITTEE
RANKING MEMBER
SUBCOMMITTEE ON
TELECOMMUNICATIONS, TRADE
AND CONSUMER PROTECTION
BUDGET COMMITTEE
RESOURCES COMMITTEE
(on leave)

2108 RAYBURN BUILDING
WASHINGTON, DC 20515-2107
(202) 225-2850

DISTRICT OFFICES:

3 HIGH STREET, SUITE 101
MEDFORD, MA 02165
(781) 396-2900

158 CONCORD STREET, SUITE 102
FRAMINGHAM, MA 01702
(508) 875-2000

Congress of the United States

House of Representatives

Washington, DC 20515-2107

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The Honorable William E. Kennard
Chairman, Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Dear Chairman Kennard:

I am writing with respect to the proposed merger of America Online (AOL) and Time Warner. As you well know, if approved this venture would combine America's largest Internet service provider (ISP) with our nation's second largest cable television enterprise.

AOL and Time Warner have consistently promoted their combination as achieving a synergy that is both pro-competitive and pro-consumer. While many of the benefits of the 'synergy' they envision for their combined companies may ultimately serve consumer interests and competitive policy goals, I have a number of concerns about potential negative consequences of the merger regarding privacy, open access, Instant Messaging interoperability, and media concentration that I want to convey to you and your fellow Commissioners at this time.

Privacy

Personal privacy has increasingly become a consumer concern as more and more personal data become available in the digital environment. I am writing in this regard to emphasize the risks to personal privacy posed by the merger of a cable operator and an ISP, and to underscore the legal responsibilities of such a merged entity.

The cable industry has obligations to protect consumer privacy that are contained in Section 631 of the Communications Act. It is clear that in enacting Section 631, Congress intended to place a high priority on consumer privacy and for that reason the applicability of Section 631 is very broad. The general requirement of Section 631 is that cable operators obtain "prior written or electronic consent" in order to utilize any personal information gathered from subscribers.

These privacy obligations, however, are not limited to personal information gathered through a customer's use of a "cable service." Rather, the privacy requirements of Section 631 apply to "any wire or radio communications service provided using any of the facilities" of the cable system, not solely a consumer's use of cable service.

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Moreover, the obligation to provide consumer privacy protection extends not merely to "cable operators," as it is defined in Section 602 for most of the Communications Act's provisions affecting such operators. Instead, for purposes of protecting consumer privacy, Congress expressly expanded the scope of applicability of Section 631 to include, additionally, "any person who is owned or controlled by, or under common ownership with, a cable operator." Thus, under this broader definition, the privacy obligations of Section 631 would also apply to AOL post-merger. In other words, if the Commission decides to approve the AOL-Time Warner merger, any wire or radio services offered by AOL over Time Warner cable systems would fall under the consumer privacy protections contained in Section 631.

I understand that the Commission typically receives assurances from merging companies that they are otherwise in compliance with the law at the time they file for necessary regulatory approvals. In this instance, due to the heightened consumer concern over personal privacy, I strongly encourage the Commission to assure itself of the preparedness of AOL and Time Warner to comply with the privacy requirements of Section 631 as of the effective date of its merger approval.

Open Access & Non-discrimination

As you are aware from my previous statements on the subject, I believe that open access is the embodiment of the robust competition, consumer choice and content diversity that the Telecommunications Act was intended to bring to Americans across the country.

The Internet has thrived because it is a free and open medium that allows businesses, whether large or small, easy access to a global platform for electronic commerce and communication. It has also become a vital medium for freedom of expression by individuals around the world. I believe that the continued success of the Internet, as well as the information revolution that it has spawned, depends on ensuring non-discriminatory access to broadband facilities, irrespective of whether such facilities are controlled by the telephone company or the cable company.

For consumers, the openness of the Internet to date has meant a competitive marketplace with an incredible array of choices, lower prices and improved services. Without open access, cable operators would be able to close down the competitive Internet by forcing consumers who want a cable connection to the Internet to buy service from the cable company's own ISP. This will slow the Internet's growth and be a major blow to job creation and consumer choice.

For competitors, it is increasingly clear that the AOL-Time Warner merger creates incentives for the combined company to unfairly exploit its market dominance by thwarting such competitors' access to consumers over cable broadband facilities. Overly discriminatory

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access to such consumers would be a serious setback to the long term prospects for competition from unaffiliated ISPs across various markets -- from applications software and instant messaging to interactive television and IP telephony. I believe entrepreneurship and innovation will suffer greatly if this situation is not remedied.

In my view, broadband access to the Internet is a telecommunications service and ought to be treated from a regulatory standpoint as such. At the federal level, I have introduced legislation (H. Con. Res. 173) on this matter with Representative Tom Campbell (R-CA) calling upon the FCC to fully implement the requisite provisions of the Telecommunications Act and to support open Internet access as a matter of national policy.

While the Commission may not be prepared to implement a nation policy at this time, the size and nature of the AOL-Time Warner combination necessitates Commission action if it intends to approve this merger. In order to mitigate against the inherent incentive of the combined AOL-Time Warner to favor unfairly its own content and services over those provided to consumers by independent, unaffiliated entities, the Commission should make prescriptive, enforceable open access conditions a part of any merger approval.

Yet it is important to emphasize that access alone is insufficient. This is because an entity can obtain access that is deficient in quality, discriminatory in terms and conditions, and woefully inadequate when consumers cannot easily find that entity's content because it is otherwise buried electronically deep within a website or navigation guide. For these reasons, the Commission also should consider a requirement that the parties, prior to approval, have entered into a meaningful arms-length agreement that ensures competing providers will have open and fair access on reasonable terms and conditions.

The Commission should not accept a open access settlement that fails to address the serious competitive problems raised by this merger. Based on published reports, it appears that AOL-Time Warner's proposed access agreement with Earthlink may be ineffectual in safeguarding competitive markets and simply inadequate for small ISPs or competing content providers. Again, according to media reports of the terms of this agreement, it would apparently require all ISPs that want access to Time Warner's cable facilities to share a large fraction of their profits with their dominant competitor -- the merged AOL-Time Warner. It is difficult to understand how competition can be preserved by such an agreement. It would seem that a natural consequence of such a provision would be to lessen the ability of small broadband ISPs to compete on price with AOL. Such a scenario could severely lessen the incentives of broadband ISPs to invest in the creation and development of the new technologies that are essential for consumers to realize the full promise of broadband Internet access.

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Instant Messaging

Instant Messaging (IM) is a growing service that is accelerating rapidly in popularity and has many potential future uses for businesses and consumers. Indeed, it is conceivable that IM could become a critical communications platform in the near future. When considering the future implications of AOL -- with its control of well over 80% of the active IM users -- joined together with Time-Warner -- with its control over scores of films, music, TV shows, copyrights and magazines -- it is highly likely that AOL's established market power will only increase. Competitive content and applications providers, who require access to the IM platform to bring their presence-enabled services and applications to consumers, would be at a very serious disadvantage without interoperability with AOL's IM services. In addition, lack of effective interoperability could allow AOL to leverage its IM dominance into other markets, such as wireless services and interactive television. For instance, although AOL has stated that it will not block the Advanced Television Enhancement Forum signals from rival video programmers, AOL has indicated that its closed IM system will be an integral feature of its own interactive TV platform and may in fact become the exclusive IM service supported by AOL-TV.

As Congressional hearings on this subject have indicated, AOL has a poor track record in working with others in the industry to achieve IM interoperability. It is important that the Commission take steps to prevent the "balkanization" of telecommunications networks and services and I encourage the Commission to take action that requires AOL to cease blocking rival IM services and to work toward achieving a common protocol for IM interoperability as a condition of the merger. Quite simply, approval of the merger without any such conditions means that IM interoperability will remain at the whim of AOL, and as such, would undoubtedly become an ever more elusive goal.

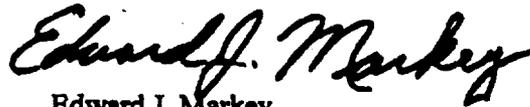
Media Concentration

Another aspect of this merger that I believe deserves particular scrutiny is the 25% ownership stake that AT&T has in Time Warner Entertainment (TWE). TWE contains much of Time Warner's cable systems and programming interests. I am concerned that this partnership between AT&T and a merged AOL-Time Warner means that these entities are less likely to compete against each other in other areas, such as local telephony and Internet access. I believe such excessive media concentration could also result in a greater inability of new programming providers, independent voices, to reach the media marketplace. Moreover if AOL-Time Warner and AT&T are joined in interest through TWE, they could have reduced incentives to engage in vigorous arms-length negotiations over the sale of programming, a corporate coziness that may lead to higher than necessary cable rates for consumers. I encourage the Commission to disentangle the financial relationship between these communications colossi and believe that this merger presents an excellent opportunity to do so.

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I thank you for the opportunity to express my views on these matters and I thank you and your fellow commissioners for your time and extensive attention you are giving to this merger. Kindly include these remarks in the official record of this proceeding. If you have any questions with respect to these issues or my comments please feel free to call me or have your staff contact Colin Crowell in my office at 225-2836.

Sincerely,



Edward J. Markey
Ranking Democrat
House Subcommittee on Telecommunications,
Trade, and Consumer Protection

cc: Commissioner Susan Ness
Commissioner Harold W. Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani