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Consumer Federation of America



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Chairman William Kennard  
Federal Communications Commission  
445 12<sup>th</sup> St., S.W.  
Washington, DC 20054

Dear Chairman Kennard:

As you are aware, a primary concern of ours in a number of proceedings before the FCC over the last several years has been to protect the open and competitive nature of the Internet. As we have detailed to you in our filings and meetings, we believe that if the proposed merger between America Online (AOL) and Time Warner, Inc. (Time Warner) is allowed to go through without significant conditions, it will threaten that openness and competitiveness in a number of ways. In particular, we have expressed to you the importance of the principle of Open Architecture, and our concern that the merger will allow the combined AOL Time Warner to convert the existing open architecture of the Internet to a fragmented Internet of proprietary protocols and closed networks.

We are pleased at recent news reports that both of you are giving the merger a "hard look," particularly in the area of open access. The press has also reported that both agencies have begun to seriously explore the issue of Instant Messaging, or "IM." We are concerned that combining AOL's dominance of the IM market to combine with Time Warner content and the Time Warner cable network, the merged company will be able to build an even higher and thicker wall around the combined AOL Time Warner customers and choke off competition.

We stress, however, that open access, not open IM, is the single most important element in preserving an open and competitive Internet. Only open access can protect the vital First Amendment principles at stake in this merger, and keep the Internet a medium as diverse as human thought. A set of merger conditions which required AOL /TW to adopt an open standard for IM, while allowing the merged entity to retain a closed, proprietary network, would represent a loss for the people of the United States. Open standards for IM cannot in any way undo the damage done by allowing cable broadband to continue to develop into a closed cartel dominated by AT&T & AOL Time Warner through their combined control over Excite@Home and RoadRunner.

This does not mean, however, that the FCC and the FTC should ignore the emerging situation in IM. It is troubling that AOL, in stark contrast to providers of other communications services such as telephony and e-mail, already blocks instant messages from other service providers. The combined companies will make the currently bad situation even worse. If IM applications companies are forced to use the AOL IM platform due to the fact that it is the only way to communicate with the vast majority of the market, they could also be forced to use Time Warner content. AOL could use its leverage over the IM market to force companies who want access to its platform to agree to favorable deals in other contexts. Competition in the emerging interactive TV market could be dramatically, and negatively, affected by a failure to insist on interoperability in instant messaging. As the ability to instant message others who are watching TV at the same time is a key value added service of interactive TV, AOL's stranglehold over the instant messaging market could choke off competitors to AOLTV.

It is critical that the government agencies protect the bedrock public policy principle that users of critical communications functions should be able to communicate with all others, even those who use different service providers. ILECs are not allowed to prevent CLEC customers from calling ILEC customers. AT&T would not be allowed to block its customers from receiving calls from Sprint's customers. It would have been a disaster for the Internet if e-mail had been held captive to a proprietary technology so that users of one e-mail system could not communicate with e-mail users of a different system or if one company could dictate the terms by which all others companies could use e-mail. Instant messaging must be subject to the same principle.

The government has been appropriately vigilant in the past in assuring that communications networks benefit from open standards and interoperability. For example, the government provided that various interfaces in the telephone network would be subject to open standards. As a result, innovation, competition and consumer choice flourished in ways that would not have occurred if the technology were the proprietary property of a single provider. Today's e-mail and telephone systems pass communications back and forth seamlessly precisely because the hand-off of traffic is done pursuant to an open technological standard, rather than a proprietary standard.

We recognize that there are technical issues involved in assuring interoperability in a way that does not threaten the users' privacy or security. But we agree with what AOL Chairman and CEO Steve Case said at the Senate Forum on Technology and Innovation on May 19, 1999. When asked about the technical problems in providing unlimited ISP access to cable networks, Case said such problems could be solved "quickly and inexpensively." Case went on to say that if the FCC were to pursue open access "you would be startled how quickly they could come back with a simple solution as opposed to a complicated solution. My own view is they do believe it will be open, but they are just trying to postpone that as long as possible." Similarly here, if the government applies the principle of interoperability to instant messaging, the technical problems, to the extent there are any, will be solved, and solved far sooner than if AOL Time Warner is allowed to continue blocking competitors.

For the government to support the principle of open standards does not require that the government regulate or set the standard. But the government should make it clear to the marketplace its expectation that no single provider will be allowed to put a wall around the market, either to keep their customers in or to keep competition and innovations out.

Sincerely,

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cc: Chairman Pitofsky  
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