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January 16, 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:

Carolina BroadBand Inc. 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

Rebecca P. Dick

cc: Molly S. Boast
Michael E. Antalics
Catharine M. Moscatelli
Christopher J. Rozycki

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SECRETARY

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

Comment of Carolina BroadBand Inc.

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THE FEDERAL TRADE COMMISSION'S AGREEMENT CONTAINING CONSENT ORDERS PLACING CONDITIONS ON THE MERGER OF AOL AND TIME WARNER

COMMENT OF CAROLINA BROADBAND, INC.

Carolina BroadBand, Inc. ("Carolina BroadBand") hereby submits the following comment regarding 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").

Carolina BroadBand urges the Commission to modestly extend its proposed order, since the order, as drafted, falls somewhat short of two of the Commission's stated goals. First, in the proposed order, the Commission expresses a desire to preserve technological competition in the provision of high-speed Internet access. In an effort to achieve that goal, the proposed order requires AOL to "market and promote" delivery of AOL's Internet service via DSL within Time Warner cable system areas. The proposed order thereby attempts to promote competition with Time Warner's cable-modem delivery of high-speed Internet access. Carolina BroadBand supports the Commission's goal.

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 service from facilities-based broadband providers.[1] These firms offer a third, wired avenue into the customer's home or premises and utilize what may well prove to be the best delivery technology available. By protecting one type of competitor, incumbent telephone companies, but not another, the new broadband companies, the proposed order unintentionally disadvantages an important group of new entrants.

A second goal expressed in the proposed order is the Commission's desire to open Time Warner's cable network to non-affiliated ISPs. To accomplish this goal, the order requires Time Warner to allow three non-affiliated ISPs to offer services over Time Warner's cable system where Time Warner offers AOL. While the proposed requirement would allow at least three ISPs to render services over Time Warner's network, there is no prohibition against Time Warner's making exclusive contracts with those ISPs. If Time Warner offers AOL and exclusively contracts with three leading ISPs, newly competing facilities-based broadband communications companies will be significantly disadvantaged. For example, if in each city where AOL/Time Warner and Carolina BroadBand begin to compete, the Time Warner cable system were to offer AOL, EarthLink, Juno, and the most popular regional ISP – all exclusively – Carolina BroadBand would have difficulty attracting customers to its new facilities-based broadband network. Carolina BroadBand requests that the Commission reconsider the proposed order and revise it to address these issues.

[1] In this comment, we refer to such companies as "broadband communications providers," "broadband companies," and "broadband providers." These companies, also known as cable over-builders, are building wholly new, fiber-optic networks that deliver multiple telecommunications services (local and long distance telephone 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.

This comment describes Carolina BroadBand's business, outlines the types of competition introduced into the marketplace by broadband communications providers, points out the proposed order's likely adverse consequences, and proposes needed additional provisions.

1. Carolina BroadBand and Other Broadband Providers Offer Meaningful, Committed, New Competition in Consumer Telecommunications Markets

Carolina BroadBand is one of a new breed of broadband communications providers, often called cable over-builders, that are currently constructing state-of-the-art networks capable of delivering cable TV, video on demand, local and long-distance telephone services, and high-speed Internet access over a single system. Carolina BroadBand aims to compete by utilizing a technologically superior telecommunications delivery network. Carolina BroadBand will offer its services in both a bundled format and separately.

Carolina BroadBand is currently constructing its first network in Charlotte, North Carolina, and has plans to expand into other markets in North Carolina and South Carolina. In most of these markets, Time Warner is the incumbent cable TV provider. No other competitive broadband communications provider or competitive local telephone company has attempted to offer such advanced services to residential consumers in the North or South Carolina markets Carolina BroadBand is targeting.

2. Broadband Communications Providers Will Compete With Incumbent Monopolists

The networks constructed by Carolina BroadBand and other new competitive broadband communications providers will be built to each residential customer in the service area. The networks will be a "last-mile" facility that includes a new cable reaching into the consumer's home and will provide consumers with their first true opportunity to receive communications alternatives to those provided by incumbent cable television and telephone companies. It is this last-mile network that defines broadband communications providers as "facilities-based" and distinguishes them from the DSL broadband service providers that lease their last-mile facility from the incumbent telephone company.

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 a 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. In addition to new competition in cable television, high-speed Internet access, ISP delivery, and telephone services, the new facilities-based broadband firms also offer an opportunity for consumers to obtain bundled 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. Limitations on facilities-based broadband communications providers' abilities to offer any one of the above noted services or to offer the content accessed through these services would limit their ability to compete effectively with incumbent telecommunications and cable providers.

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 attempts to preserve competition in the delivery of high-speed ISP service in Time Warner cable system areas. The proposed order requires 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

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

services are able to continue to compete on the merits. If adopted as currently written, the proposed order would not achieve that goal.[3]

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 broadband provider. AOL can affect the viability of new facilities-based broadband firms by refusing to permit those firms to offer AOL service in Time Warner cable areas. AOL can simply select the local incumbent telephone company as the sole DSL provider under the order. Using this type of market-controlling tactic, AOL can limit the entry of new facilities-based broadband firms in Time Warner cable markets. In most markets, Time Warner and the incumbent local telephone company do not compete head-to-head, except in the offering of ISP service. By contrast, local facilities-based broadband companies already compete with Time Warner's cable service or soon will. As a result, it is easy to see why AOL/Time Warner will do everything possible to thwart the success of new cable competitors.

[3] Unlike most other facilities-based broadband communications providers, Carolina BroadBand may not qualify as a "DSL" provider within the meaning of the decree, because of certain characteristics of the "last-mile" cable it may select. If it fails to qualify, it would be worse off than other facilities-based broadband providers, most of which qualify even though they are unlikely to be selected by AOL/Time Warner to provide the DSL delivery of AOL required by the proposed order.

[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).

As likely to be implemented, the Commission's proposed order favors DSL technology over broadband technology. While it is unlikely that the Commission knowingly made this choice, the fact is that broadband, the superior technology, will be excluded from the protections created by the Commission's proposed order.[5] The proposed order's requirement of a single additional delivery channel for high-speed AOL and its use of language that excludes some broadband providers from qualifying for the opportunity, coupled with the access Time Warner now has to AOL, will substantially disadvantage new facilities-based broadband companies' ability to enter the market.

Pre-merger, AOL sought to deliver its service via high-speed connection in the most efficient manner possible. Post-merger, it will have the added incentive of protecting its valuable cable monopoly. Without a restriction by the Commission a combined AOL/Time Warner is not likely to permit a significant rival to carry its popular ISP service. To minimize the distorted incentives created by the merger, the Commission should require the merger firm to offer its AOL service for carriage by a new facilities-based broadband firm in each Time Warner cable market.

[5] DSL suffers from technical problems that have been well documented. There remains some doubt as to whether DSL providers can ultimately overcome these technological difficulties to provide reliable high-speed Internet access. *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.

b. *Time Warner Cable Systems Should be Precluded from Entering into Exclusive Agreements with Non-affiliated ISPs*

The proposed order suggests that the Commission additionally seek to preserve competition by requiring the merged AOL/Time Warner to allow non-affiliated ISPs to deliver ISP services to residents served by Time Warner cable systems. The proposed order mandates that in its cable system markets, Time Warner must offer its cable subscribers access to three ISPs if it offers AOL and possibly other Time Warner ISP affiliates. This relief seeks to ensure that non-AOL content providers, and competitive ISPs, will be readily available to Time Warner cable customers who purchase high-speed Internet access.

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. The decree should clearly require Time Warner cable systems to carry non-affiliated ISPs and prohibit exclusive agreements with non-AOL ISPs. Exclusive arrangements between AOL/Time Warner cable systems and leading non-affiliated ISPs would thwart competition, preventing Carolina BroadBand and other facilities-based broadband communications providers from offering access to these ISPs over their respective networks. AOL/Time Warner has the ability and incentive to negotiate such exclusive arrangements, which would frustrate competition by ensuring that the ISP offerings of competing, facilities-based broadband communications providers are less attractive to consumers than the selection offered by AOL/Time Warner. Time Warner already has demonstrated its willingness to use exclusive contracts that block competitive entry by firms like Carolina BroadBand.[6] In the absence of government intervention, AOL/Time Warner is likely to continue to use exclusive contracts to ward off competition.

The decree should guard against this unintended anticompetitive consequence. To correct this problem, the decree should be revised to clarify that AOL/Time Warner may not enter into exclusive carriage arrangements with non-affiliated ISPs in Time Warner cable system areas. Competing facilities-based broadband companies should be able to contract to offer those ISPs to their customers at terms similar to those available through AOL/Time Warner.

4. Needed Revisions

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

Carolina BroadBand respectfully suggests that Section IV of the Commission's proposed consent order be revised to add provisions requiring AOL/Time Warner to contract with a facilities-based broadband communications provider in each Time Warner cable system area to offer high-speed AOL services. This will ensure that the consent decree does not unfairly tilt the playing field in these areas against emerging

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[6] For example, less than ten years ago, to the best of Carolina BroadBand's knowledge, Time Warner did not have exclusive contracts with multi-family dwelling units ("MDUs) in the Carolinas. It has since begun to sign many of those units to long-term, exclusive contracts. Carolina BroadBand has learned that Time Warner is now urging some building owners to sign exclusive contracts that would last for up to 15 years. Time Warner has even threatened to terminate its cable TV service to one building if the owner refuses the 15-year term. These exclusive contracts will prevent the residents of MDUs from selecting a competitive alternative to Time Warner for many years and thereby prohibit these consumers from realizing the benefits of competition. They will also deny Carolina BroadBand the ability to compete for some of the most attractive customers in its target markets. By the time Carolina BroadBand's Charlotte network is operational, 25% of the city's residents may be denied an opportunity to choose any alternative to Time Warner.

broadband communications providers in favor of incumbent cable and telephone service providers.[7]

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 TV 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:

> 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 tracking provisions contained in Section III of the proposed order 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.

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[7] In the event that the Commission declines to modify the proposed consent order to include these types of provisions, Carolina BroadBand 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.

> 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. Broadband Communications Providers May Compete to Offer Non-affiliated ISPs in Time Warner Cable Areas

Carolina BroadBand 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

Carolina BroadBand appreciates the Commission's efforts to minimize the negative impact the AOL/Time Warner merger will have on competition and, as a result, on consumers. The Commission's proposed order, however, 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. The proposed order actually compounds the competitive harm. It protects DSL facilities-based competition, while possibly crippling competitive cable modem providers. In addition, while requiring Time Warner to work with three other ISPs where it offers AOL, it does not prevent Time Warner from requiring those ISPs to work with it exclusively. Carolina BroadBand does not believe the Commission anticipated those results. The Commission should take advantage of this public comment process to ensure that the proposed order does not have competitively adverse and unintended consequences. The recommendations contained in this comment will further reduce the negative competitive impact of this merger on consumers.

Respectfully submitted,

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