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January 5, 2001

Federal Trade Commission
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Office of
Commissioner Leary

Mr. Thomas B. Leary
Commissioner
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room 528
Washington, D.C. 20580

Dear Mr. Leary:

I am writing on behalf of Orbitz, L.L.C., a startup technology development and Internet travel service company, to express Orbitz's concern that the pending merger of America Online, Inc. and Time Warner, Inc. could significantly harm competition in the online travel market, absent sufficient provisions to ensure nondiscriminatory access to the distribution channels that the combined entity will control. I appreciate that the Commission has voted to approve the merger based upon certain agreed conditions, but that this tentative approval is subject to public comment.

While the agreed conditions appear to satisfy one of the primary concerns expressed about the proposed merger, access to broadband cable services owned by Time Warner for competing Internet service providers, it fails to address the other side of the ledger, fair and open access for competing content and online service providers such as Orbitz. The case for competitive access for content and online service providers was the gravamen of a recent editorial by Robert W. Crandall, a senior fellow at the Brookings Institution. There he identified the concern shared by Orbitz: "But the danger in the AOL-Time Warner merger is not simply that it may tie Time Warner Cable's customers to one Internet service provider. It might allow the combined firm to discriminate against non-Time Warner content ....." Wall Street Journal, December 13, 2000.

Based on Orbitz' experience with AOL and Travelocity, AOL's dominant business partner in the online travel industry, Mr. Crandall is absolutely right to worry. Accordingly, Orbitz seeks an amendment to any final approval of the proposed merger to ensure fair access for content providers to the enormous number of consumer who will use the Internet services of the combined entity. Fair access benefits these consumers and protects competition among content providers.

As you may be aware, online travel is both the largest and fastest-growing online sector. (Forrester Research recently estimated, for example, that online leisure travel purchases in 2001 will total $20.7 billion; for the same year, estimated online book sales will $2.2 billion and online music sales will be $2.1 billion.) Industry analysts estimate that 21 million Americans will make online travel purchases in 2000, including 7 million who

buy travel exclusively online. See, e.g., PhocusWright Survey (Nov. 15, 2000), http://www.phocuswright.com/press.html. Within the travel distribution industry, two names are dominant: Sabre, which holds nearly 50 percent of the domestic computerized reservation business, and Travelocity.com, Sabre's subsidiary, which holds a 40 percent share of online travel bookings.

Because "access to eyeballs" is essential to success in this online travel market, Internet portals or sites that can direct consumers to a particular travel site provide an unrivaled distribution alternative. That is particularly the case for Internet "powerhouse" portals like AOL, which a potential customer is likely to visit when logging onto the Internet. If this initial portal provides an exclusive "travel channel" link to a particular online agency, a customer seeking travel information will be transferred to the travel agency without even knowing the agency's name or website address -- all the customer needs to do is click the "travel" button. In the world of the Internet, a competitor's inability to obtain customers through such portals is a major barrier to entry, as online travel agencies otherwise must spend millions of marketing dollars motivating customers to remember the agency's web address and take the additional steps required to visit the agency's site.

Given this market structure, the critical anticompetitive risk derives from exclusive vertical agreements between dominant Internet portals, such as AOL, and Internet content or service providers that are themselves dominant in their own online field. For example, the anticompetitive impact of exclusive arrangements by dominant distribution channels for online travel is reflected in the experience of Travelocity.com. Travelocity has entered into preferred or exclusive distribution arrangements with six of the top eight Internet sites, including the dominant portal, AOL. According to industry analysts' reports, approximately 40 percent of Travelocity's bookings come from these portal arrangements, making access to these customers much more costly and difficult for Travelocity's competitors.

The agreement between AOL and Travelocity.com is extraordinary and preclusive, both with respect to its length and scope. The agreement, which covers all of AOL's distribution channels (AOL, AOL.com, Netscape, Compuserve, Digital City), has a term of five years, and is not scheduled to expire until 2003. Moreover, Orbitz discovered only recently that AOL's exclusivity arrangement with Travelocity provides not only for an exclusive link through "travel" channels on the AOL portals, but also precludes competing travel agencies even from purchasing "banner advertisements" anywhere on AOL sites.

By contrast, of the two remaining top Internet sites that do not have an arrangement with Travelocity, one is Time Warner. (The other is Microsoft/MSN, which has a distribution arrangement with Expedia, its own online travel provider.) Time Warner's CNN sites previously had a distribution arrangement with leisure.com, an online travel agency in which Time Warner held a substantial equity interest, but leisure.com exited the market several months ago. The Road Runner broadband service provider, in which Time Warner has a substantial equity stake, has a partnering arrangement with Travelocity, but

this arrangement is not exclusive. To Orbitz's knowledge, none of Time Warner's other Internet or cable distribution channels has entered into exclusive dealing arrangements with online travel providers.

The proposed merger of AOL and Time Warner potentially could eliminate these Time Warner channels as potential distribution alternatives. AOL already has shown a willingness to enter into long-term exclusive-dealing arrangements, which may give rise to their own antitrust implications. Travelocity, AOL's partner in online travel distribution, has exacerbated the anticompetitive harm created by the exclusive AOL agreement by layering it with additional exclusive arrangements with other portals. Orbitz's recent dealings with AOL have caused Orbitz to become acutely concerned that AOL may extend the scope and duration of its exclusive arrangement with the dominant online travel service provider. Moreover, post-merger it will control a dramatically expanded range of channels across broadband, narrowband, and cable television. Through such control, AOL/Time Warner would be in position potentially to foreclose online travel competitors from such a substantial portion of the online market that it would be difficult if not impossible for them to compete effectively against AOL/Time Warner's designated "partner," whether Travelocity or some AOL/Time Warner affiliate. AOL/Time Warner could benefit from such upstream foreclosure by inducing the online travel "partner" to share the resulting supracompetitive profits. See generally M. Patterson, Role of Power in the Rule of Reason, 68 Antitrust L.J. 429, 442 (2000) (where downstream retailer or distributor has market power, distributor may be induced to exclude upstream provider if the provider's competitor is willing to share the resulting benefits).

Orbitz respectfully submits that the Commission's final approval of the merger should be conditioned, inter alia, on undertakings by AOL/Time Warner sufficient to prevent it from becoming the distribution "gatekeeper" to online consumer services, including online travel. As a new entrant set to launch its service in June 2001, Orbitz already faces enormous first-mover obstacles in the market, including the barriers to entry treated by the distribution arrangements previously entered into by Travelocity and Microsoft's Expedia. See, e.g., K. Knapp, Former Airline Exec Getting Set to Fly in New Orbitz Here, Crain's Chicago Business (Oct. 9, 2000) (Orbitz "will need every advantage to crack the Internet travel market. There are hundreds of online travel agents, and Travelocity and Expedia have an overwhelming 70% market share. Also, the two rival services have long-term agreements with Yahoo, America Online and 95% of other major Web portals that direct traffic to their sites"). Orbitz has the benefit of equity backing from five of the major airlines (United, Delta, Northwest, Continental, and American), but even with such financial backing, industry analysts have observed that "to break through the clutter with its unique message this late in the game," Orbitz "will have to spend more than even the biggest spender among them [i.e., more than Travelocity and Expedia]." H. Harteveldt, Top Airlines' New Travel Site Will Succeed (Jan. 24, 2000), <http://www.forrester.com/ER/Research/Brief/0,1317,8895,FF.html.

New entrants in other online consumer markets are likely to face equally steep barriers to entry. See generally D. Balto, Emerging Issues in Electronic Commerce, 1999 Antitrust Institute Distribution Practices: Antitrust Counseling in the New Millennium (Nov. 12, 1999) ("Where incumbents have built substantial advantages by being the first to market, we cannot allow the apparent fast growth and low fixed costs to blind us to the fact that potential entrants now face a different market than existed only a few years ago"). The proposed combination of AOL and Time Warner threatens to further raise these barriers to entry if AOL/Time Warner is left unrestrained in its ability to act as "gatekeeper" to online consumer services. Accordingly, Orbitz respectfully urges the Commission to require, as a condition to approval of the combination, AOL/Time Warner's commitment to offer competing online content and service providers continued access to all of its combined distribution channels on equal and non-discriminatory terms. At a minimum, we request that the scope of the duties for the proposed Monitor Trustee be expanded to oversee potential discrimination by the combined AOL/Time Warner in the access for online content and service providers to all of the online distribution channels controlled by the combination.

Please let me know if we can be of any further assistance in this matter.

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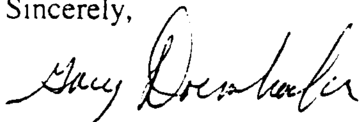

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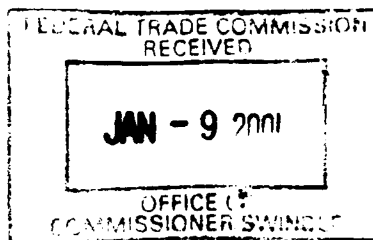

Gary R. Doernhoefer
Vice President and General Counsel

January 5, 2001

Mr. Orson Swindle
Commissioner
Federal Trade Commission
600 Pennsylvania Ave., N.W., Room 540
Washington, D.C. 20580

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