The Honorable Timothy J. Muris, Chairman
Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, D.C. 20580

June 8, 2001

Subject: Unfair advertising practices in violation of AOL/Time Warner Consent Decree

Dear Chairman Muris:

We are writing on behalf of Consumers Union[1] the Consumer Federation of America,[2] the Media Access Project[3] and the Center for Digital Democracy[4] to urge you to investigate AOL Time Warner's refusal to carry advertising of phone companies trying to promote DSL Internet service on Time Warner cable systems.[5] This refusal appears to be a violation of both the letter and spirit of the consent decree.

Time Warner cable has denied requests for carriage of DSL advertisements in markets around the country. This anti-competitive behavior appears to violate the letter of the consent decree, as the decree provided an unmistakable requirement that AOL Time Warner must promote the DSL services of other carriers. The Commission's *Decision and Order In the Matter of America Online, Inc. and Time Warner Inc.* stated clearly that

> Respondents shall market and promote DSL Services to Subscribers in those geographic areas in which any of Respondents' Cable Holdings are located and Affiliated Cable Broadband ISP Service or Road Runner is Available at the same or comparable level and in the same or comparable manner as Respondents market and promote DSL Services to Subscribers in those areas in which neither

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions that affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] The Consumer Federation of America is the nation's largest consumer advocacy group, composed of over 280 state and local affiliates representing consumer, senior, citizen, low-income, labor, farm, public power an cooperative organizations, with more than 50 million individual members.

[3] Media Access Project is a twenty-nine year old non-profit tax exempt public interest telecommunications law firm that promotes the public's First Amendment right to hear and be heard on the electronic media of today and tomorrow.

[4] The Center for Digital Democracy is a non-profit organization that promotes open access to broadband Internet services.

[5] Schiesel, Seth. *"Cable Giants Block Rival Ads in Battle for Internet Customers,"* The New York Times, June 8, 2001.

> Affiliated Cable Broadband ISP Service nor Road Runner is available. *Decision and Order at 12.*

It is hard to understand how the Commission could have intended anything but the prevention of exactly the kind of behavior in which AOL Time Warner is engaging.

Time Warner Cable's refusal to promote DSL services that compete with its cable modem service also seems to violate the spirit of the consent decree. The Commission's *Decision and Order* expressed a fear that if AOL acquired a cable broadband distribution platform—Time Warner Cable and its RoadRunner broadband service—it would have the effect of 1) lessening broadband competition by reducing or eliminating their incentive to provide broadband Internet service over DSL and 2) providing an incentive to discriminate against the broadband services of Internet Service Providers not affiliated with AOL Time Warner. In other words, AOL, once the most vocal and powerful advocate of open networks and competitive broadband technologies, after the merger would have an obvious incentive to squash competing technologies to more quickly grow their cable broadband market share.

To mitigate this danger, the Commission prohibited the merged company from discriminating against competitive Internet Service Providers seeking to promote DSL services. As the company appears to now be violating this requirement, we urge the Commission to investigate this anti-competitive behavior and remedy this problem.

Sincerely,

Gene Kimmelman
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Consumers Union

Mark Cooper
Research Director
Consumer Federation of America

Andrew Schwartzman
President and CEO
Media Access Project

Jeff Chester
Executive Director
Center for Digital Democracy