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The Honorable William E. Kennard
Chairman, Federal Communications Commission
445 12th Street, S.W., Room 8B 201
Washington, D.C. 20554

Re: Ex-parte presentation of the American Cable Association ("ACA"); CS Docket No. 00-30.

Dear Chairman Kennard:

ACA's concerns over the proposed AOL Time Warner merger have intensified. The Applicants have still not squarely addressed the following critical public interest issue raised by ACA: [1]

> Will AOL Time Warner force smaller cable businesses to carry AOL services as a condition of access to essential Time Warner programming?

As explained in ACA's filings, ACA members are leading the charge to close the digital divide in smaller markets.[2] Forced carriage of AOL services as a condition of access to essential Time Warner programming presents a fundamental threat to smaller cable businesses. It will sap capacity, raise costs, disrupt existing partnerships with ISPs and stall infrastructure development in smaller markets.

The Applicants' filings and reports of AOL's "hardball tactics" and "anticompetitive practices" validate ACA's fears.[3] Absent a condition on the merger, nothing will deter AOL from forcing smaller cable systems to carry AOL services as a condition of access to Time Warner programming. Or worse, AOL will tie carriage of AOL services to Time Warner programming, and make smaller cable businesses *pay for both.*

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[1] *See* April 24, 2000 Comments of American Cable Association ("ACA Comments") at 3-4; May 11, 2000 Response of The American Cable Association at 3-4.
[2] ACA Comments at 5-8.
[3] Ken Feinstein, *The AOLization of America; The AOL Way or No Way* (April 19, 2000), available at <www.cnet.com/techtrends/0-1544320-7-1-1708289.html>

The Applicants’ Reply skirts the issue. At the same time, AOL has announced an open access trial with AT&T that offers a possible solution. If AOL wants access to smaller cable systems, it should pay fair compensation to do so with no tying to Time Warner programming. I explain further below.

AOL Time Warner's Reply provides no solution to the problem.

The Applicants' Reply attempts to dismiss our concerns with clever argument. A few remarks on behalf of our members are warranted.

ACA members support multiple ISP access on fair terms and conditions. The Reply states "ACA appears to argue against the cause of multiple ISP access. . . "[4] No support exists for this statement. If AOL wants access to smaller cable systems in exchange for fair compensation, multiple ISP access can make economic sense for smaller cable businesses.

Just like Disney and ABC, AOL has ample incentive to tie carriage of AOL services to Time Warner programming. The Reply argues that tying of AOL services to Time Warner programming "is inconsistent with the merged company's economic best interest."[5] This statement seems incredible coming on the heels of Time Warner's dispute with ABC/Disney.

Like ABC/Disney, CBS/Viacom, Hearst-Argyle, FOX and others, acquirers of popular satellite or broadcast programming find it absolutely "in their economic best interest" to leverage that programming by requiring cable operators to carry other services as a condition of access. AOL will be no exception but with a profoundly different twist – tying of AOL’s internet services to essential satellite programming.

Just like ABC programming, no substitutes exist for essential Time Warner programming. The Applicants contend that forced carriage of AOL services as a condition of program access "could not be sustained in the marketplace because there are too many diverse, competing programming networks to step into the void. . . "[6] This is an amazing statement in light of the Time Warner/Disney spat. No network stepped into the “ABC void" for Time Warner.

Smaller cable businesses would face the same subscriber revolt if they did not carry CNN, HBO, TNT and other essential Time Warner programming. In short, small cable businesses will have no choice but to transact with AOL Time Warner. The marketplace of fungible programming networks described by AOL Time Warner does not extend to essential programming required by smaller cable businesses.

[4] AOL Time Warner Reply at 43.
[5] *Id.* at 43.
[6] *Id.* at 44.

If the conduct ACA fears cannot happen due to marketplace forces, why won't AOL Time Warner commit? At bottom, the Commission can cut through the Applicants' arguments with one question:

> If AOL Time Warner has no incentive to do what ACA fears, why not just commit to not doing it?

If the Applicants believe their own arguments, then all ACA requests is a no-cost concession. The refusal to make this concession speaks volumes about the accuracy of ACA's predictions.

<u>If AOL wants access to smaller cable systems, AOL should pay fair compensation, just like it is paying AT&T</u>.

AOL has refused to acknowledge the threat to smaller cable businesses of forced AOL carriage. At the same time, AOL has agreed with AT&T for carriage on AT&T's Bolder, Colorado system.[7] The public details of the transaction suggest that AOL is paying a wholesale rate for access, one that enables AT&T to recover its costs and a reasonable profit.[8] Moreover, AOL has not demanded that AT&T carry Time Warner programming as a condition of the deal.

The AT&T/AOL transaction suggests a solution. If AOL desires access to smaller cable's broadband networks, it should offer fair compensation, just like AOL is compensating AT&T. And, most importantly, <u>AOL should not be allowed to require carriage of AOL as a condition of access to essential Time Warner programming</u>.

ACA has asked the Applicants for a commitment on this issue. They have refused. To protect the public interest in a viable smaller cable industry and its efforts to close the digital divide in smaller markets, the Commission should condition its approval on a commitment from AOL Time Warner not to tie carriage of AOL Services to access to Time Warner programming.

Respectfully submitted,

Matthew M. Polka
President

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[7] Patricia Fusco, *AT&T to Test Shared Cable Access, Internet News-ISP News,* (June 7, 2000) available at <http://www.internetnews.com/isp-news/article/0,2171,8 389461,00.html.

[8] *Id.*