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May 11, 2000

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Ms. Magalie Roman Salas
Office of the Secretary
Federal Communications Commission
445 12th Street, SW, Room TW B204
Washington, D.C. 20554

VIA FEDERAL EXPRESS
Airbill #: 791084114852

Re: CS Docket No. 00-30; Response of the American Cable Association

Dear Ms. Salas:

On behalf of the American Cable Association, we enclose an original and four copies of ACA's Response in CS Docket No. 00-30. We have also filed the Comments via the Commission's ECFS.

We also include a "FILE COPY" and ask that it be date-stamped and returned in the enclosed envelope.

Please call with any questions.

Sincerely,



Christopher C. Cinnamon

Enclosures

cc: American Cable Association
International Transcription Service, Inc.
James Bird, Office of General Counsel
To-Quyen Truong, Associate Chief, Cable Services Bureau
Royce Dickens, Cable Services Bureau
Matthew Vitale, International Bureau
Marilyn Simon, International Bureau
Monica Desai, Wireless Telecommunications Bureau
Laura Gallo, Mass Media Bureau
Linda Senecal, Cable Services Bureau (12)

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Before the
Federal Communications Commission
Washington, D.C. 20554

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In the Matter of)
)
Applications of America Online, Inc.) CS Docket No. 00-30
and Time Warner Inc. for)
Transfers of Control)

**RESPONSE OF THE
AMERICAN CABLE ASSOCIATION**

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May 11, 2000

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**Before the
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**RESPONSE OF THE
AMERICAN CABLE ASSOCIATION**

I. Introduction.

ACA and its 300 member smaller cable business share substantial concern over what type of company will control access to essential Time Warner and Turner programming. The applicants have not yet provided meaningful answers to the questions raised by ACA and others. ACA fears that the following observations could describe what lies ahead.

Not only are Microsoft and AOL the two largest Internet service providers in the world, but they are also the two companies that have done the most to move the Internet away from open standards and interoperability. Both companies have highly anti-consumer visions of the future of electronic commerce.¹

[AOL] uses hardball business tactics to maintain control of its users and suppress competition.²

Diverse commenters and petitioners express similar concerns about the anticompetitive impact of the merger. AOL's likely influence on the recent

¹ Interview with Jamie Love, Antitrust economist opposes AOL-Netscape deal, Business & Stocks (November 26, 1998) available at <www5mercurycenter.com/business/center/aolga112798.html> (emphasis added).

² Ken Feinstein *The AOLization of America: The AOL Way or No Way* (April 19, 2000), available at <www.cnet.com/techtrends/o-1544320-7-1-1708289.html> (emphasis added).

retransmission consent dispute between Time Warner and Disney/Disney, combined with reports of AOL's "hardball, anticompetitive tactics," underscore the necessity of Commission scrutiny, and, if necessary, imposing conditions on the Commission's consent to assignment of the licenses.

Specifically, ACA seeks answers to the following two questions:

- Will AOL Time Warner require small cable businesses to carry AOL services as a condition of obtaining essential Time Warner and Turner programming?
- Will AOL's substantial investment in DirecTV result in anticompetitive practices against smaller cable businesses?

An affirmative answer to either question will threaten the public interest in a viable smaller cable industry and will stifle investment in broadband network development in smaller markets and rural areas.³

If the applicants do not voluntarily commit to protecting the public interest concerns raised by ACA and other smaller businesses, the Commission should impose two conditions on its consent to assignment:

- AOL Time Warner cannot require smaller cable businesses to carry AOL services as a condition of access to Time Warner programming.
- AOL must divest its interest in DirecTV.

³ See Comments of American Cable Association ("ACA comments") at 5-7 for example of broadband service deployment in smaller markets by ACA members.

- II. **The Commission must prevent AOL Time Warner from requiring smaller cable businesses to carry AOL services as a condition of program access.**
 - A. **The record shows substantial risk of anticompetitive conduct by AOL against smaller cable businesses.**

ACA's comments explain that Time Warner provides programming essential to the channel line-ups of smaller cable businesses.⁴ Without core programming like CNN, TBS, HBO and other services, customers will flee smaller cable businesses for the nearest dish provider, most likely DirecTV. Unlike Time Warner in its retransmission consent dispute with Disney/ABC, smaller cable business have neither the leverage nor the legal budgets to survive a program access standoff with AOL Time Warner. Smaller cable businesses will have no choice but to transact with AOL Time Warner. Put another way, through the merger, AOL will gain ultimate leverage over smaller cable businesses - accept AOL terms of access to Time Warner programming, or your businesses will fail.

A fundamental threat to the viability of smaller cable business will arise if AOL requires carriage of AOL services as a condition of access to essential Time Warner programming. This would sap capacity, raise costs, disrupt existing partnerships with ISPs and stall infrastructure investment in smaller markets. These results would seriously impair smaller cable's ability to compete - to the benefit of DirecTV.

In the past, Time Warner and Turner programming affiliates have dealt reasonably with smaller cable business and buying cooperatives like the National Cable Television Co-op. The merger will fundamentally change these transactions. For the

⁴ ACA comments at 9.

first time, AOL will control essential cable programming. The parties post-merger commitment to "AOL Anywhere", combined with AOL's apparent track record of harsh dealings with small businesses, raise serious concerns about forced carriage of AOL services on smaller cable businesses.

Other smaller business commenters raise similar concerns based on experiences with AOL.⁵ The letter of Anno Domini expresses the issue forcefully:

Given AOL's proven aggressive and money-grabbing policy we cannot but think any merger would create a power hungry monopoly that would penalize and marginalise not only internet and media consumers, but also small and medium sized businesses worldwide.⁶

The statements from smaller entities and others concerning AOL's continuing efforts to suppress competition emphasize the need for vigilance by the Commission.

B. A "free market" solution to forced carriage of AOL will not work because AOL will control access to essential programming.

The parties will likely advance a "free-market" solution to ACA's concerns. The applicants' filings contain numerous references to the merger either "leading" other companies to carry AOL services, or AOL Time Warner "actively encouraging" carriage of AOL services.⁷ These arguments should not distract the Commission from imposing conditions on the merger. A free marketplace will fail when AOL seizes an overwhelming concentration of market power over smaller cable businesses. It is precisely this potential for marketplace failure that the Commission should address in this proceeding.

⁵ Letter from Anno Domini, (April 26, 2000) ("Domini Letter"); Comments of iCast, (April 25, 2000); Comments of Tribal Voice (April 25, 2000).

⁶ Domini Letter.

⁷ Public Interest Statement at 6 and 16.

C. The program access rules do not provide sufficient protection for smaller cable.

The parties will also likely argue that the program access rules protect small cable from unreasonable treatment by AOL. This argument fails for two reasons. First, the administrative costs and burdens of a program access complaint prevent most smaller cable businesses from seeking Commission relief. Second, Time Warner cable systems will agree to carriage of AOL services as a condition of access to Time Warner programming. Why wouldn't they? Is that not one of the "synergies" of which the parties speak in advocating their merger? Consequently, the program access rules provide no protection for smaller cable businesses against forced carriage of AOL services as a condition of program access.

D. Solutions: A commitment to reasonable terms of program access or Commission action to protect the public interest.

Conceivably, the parties could address this concern through a commitment not to condition program access for smaller cable on carriage of AOL's services. If not, then the Commission must act to shield smaller market consumers from the public interest threats raised by merger. As a condition of consent, the Commission should order that AOL Time Warner cannot require smaller cable businesses to carry AOL services as a condition of access to Time Warner programming.

III. The Commission should require AOL to divest its interest in DirecTV.

ACA's comments identify the substantial incentive for anticompetitive behavior toward smaller cable business arising from AOL's \$1.5 billion investment in DirecTV.⁸ AOL's control over essential Time Warner programming will secure AOL complete leverage over terms and conditions of access to core programming. Conditions of access will likely include forced carriage of AOL services and AOLTV on smaller cable systems. Like the Disney/ABC SoapNet and Toon Disney strategy, AOL could require smaller cable to carry, and to pay for, AOL services as a condition of access to Time Warner programming. This strategy will sap capacity on smaller cable systems, raise programming costs to customers, deter investment in expanding networks, and hurt smaller cable businesses' ability to compete for customers.

The unavoidable issue is this: A customer lost by smaller cable is a customer gained by DirecTV. AOL's \$1.5 billion investment in smaller cable's principal competitor creates a powerful incentive for more "hardball, anticompetitive tactics" by AOL.

Diverse commenters and petitioners share ACA's concerns.⁹ In light of AOL's post-merger control over essential programming and its reported history of anticompetitive tactics, the Commission should require AOL to divest its interest in DirecTV.

⁸ ACA Comments at 12.

⁹ Petition to Deny of Consumers Union, Consumer Federation of America, Media Access Project and Center for Media Education, (April 26, 2000); Petition to Condition Merger, RCN Telecom Services, Inc., (April 26, 2000); Comments of SBC Communications Inc., (April 26, 2000).

IV. Conclusion.

ACA recognizes the interesting potential of the merger to create "boundless opportunities for new consumer services." Still, ACA must join other commenters and petitioners in voicing serious concerns over the potential for anticompetitive conduct by the post-merger entity. The possibility of forced carriage of AOL services and the incentives inherent in AOL's \$1.5 billion investment in DirecTV present substantial threats to the public interest in a viable small cable industry. To ensure that these threats do not become reality, the applicants must answer these concerns. If not, the Commission should condition consent as follows:

- AOL Time Warner cannot require smaller cable businesses to carry AOL services as a condition of access to Time Warner programming.
- AOL must divest its interest in DirecTV.

With these protections in place, either voluntarily or by Commission action, ACA and its members can support the merger.

Respectfully submitted,

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