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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

May 19, 2000

The Honorable William E. Kennard
Chairman
Federal Communications Commission
The Portals
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: CS Docket No. 00-30

Dear Mr. Chairman:

As the Commission considers the proposed merger between America Online, Inc. ("AOL") and Time Warner Inc. ("TW"), NAB urges you and your colleagues to recognize that the fundamental question presented is literally "[w]hat constitutes monopoly control of your TV."[1] Various telecommunications services providers, broadcasters and consumer groups have certainly recognized the grave competitive concerns raised by the pending AOL/TW merger, and have called for the Commission to impose a variety of conditions on the proposed merger to insure that the combined companies do not harm consumers by stifling competition from other service and content providers. NAB generally agrees with those parties who have expressed reservations about the anti-competitive effects of the AOL/TW merger, and strongly believes that the Commission should adopt and enforce a strict "nondiscrimination" condition preventing AOL/TW from utilizing their video distribution system to discriminate against unaffiliated content providers in any way. The Commission should also condition the proposed merger on the carriage by AOL/TW's upgraded cable systems of broadcasters' digital television signals so as to prevent further deterioration of competition in the video marketplace and delays in the transition to free over-the-air digital broadcasting.

[1] R. Grover, *A Media Monopoly in the Making?*, Business Week at 45 (May 15, 2000) (commentary describing AOL/TW merger as "uncharted territory for the FCC" and arguing that "clear access rules" may be needed to prevent further disruptions in television service such as TW's pulling ABC off the air).

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The Commission Should Prohibit AOL/TW from Discriminating against Unaffiliated Content Providers and from Blocking Access to Any Part of Broadcast Signals that Consumers Could Receive Free Over-the-Air.

A number of commenters in this proceeding expressed concern that the combined AOL/TW will have an enhanced capability, as well as the incentive, to choke off competition from a range of video and other communication services providers.[2] These commenters generally called for the Commission to impose strict conditions on the proposed merger to prevent AOL/TW from stifling competition in a variety of telecommunications services.[3] Broadcasters in particular urged the Commission to impose conditions on the pending merger that would prohibit AOL/TW from discriminating against the programming, navigation devices and other services delivered through free over-the-air broadcast signals.[4] Similar to these broadcast and other commenters, NAB strongly urges the Commission to adopt a stringent "nondiscrimination" condition preventing AOL/TW from utilizing their existing video distribution system (and their future digital broadband system) to discriminate against unaffiliated content providers in any way.

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[2] *See, e.g.*, Comments/Petitions of SBC Communications Inc. at 18-24 (AOL/TW will have ability and incentive to leverage dominance over broadband content and portal services to increase its market power in residential broadband Internet access service, and vice versa); Memphis Light, Gas & Water Division at 2-4 (asserting that TW, as an entrenched cable provider, uses its position to delay or deter any competitor of enhanced broadband services); American Cable Association at 8-13 (merger of AOL and TW raises serious threat that the combined entity will condition access to video programming on the carriage of AOL services); Memphis Networx, LLC at 2-3 (TW actively attempts to prevent new entrants from competing against it in local telecommunications and cable television markets); RCN Telecom Services, Inc. at i-ii (AOL/TW merger would further enhance TW's market power in programming to inhibit or delay entry of competitive multichannel video service providers); iCast and Tribal Voice at 1-2 (contending that AOL has engaged in anti-competitive tactics to maintain its dominance in the instant messaging market and that AOL's exercising of market power will only be facilitated by merger with TW); Consumers Union, *et al.* at 4-20 (summarizing anti-competitive impacts of AOL/TW merger, including a "chokehold" on emerging interactive television content); Gemstar at 2 (TW is currently using its control over program delivery systems to harm consumers and impede competition in the market for electronic program guides, and this anti-competitive behavior would continue if merger approved); BellSouth Corp. at 3 (arguing that AOL and TW have "repeatedly shown a willingness to engage in anticompetitive exclusionary behavior").

[3] *See, e.g.*, Comments/Petitions of RCN Telecom Services, Inc. at 10-19 (calls for condition assuring that AOL/TW programming will be made available to other multichannel video programming competitors on a nondiscriminatory basis); Gemstar at 4-7 (FCC's consent to merger should be conditioned on specific and detailed steps ensuring that TW will keep its systems open to competitive content and service providers); iCast and Tribal Voice at 10 (FCC should require AOL to work with industry in setting open standard for instant messaging); American Cable Association at 12 (supporting AOL divestiture of its interest in DirecTV); Memphis Networx, LLC at 7-9 (FCC should require AOL/TW to open its cable networks to competitive content providers, and to take a neutral stance to the entry of facilities-based network providers in areas in which TW provides telecommunications and cable services); SBC Communications Inc. at 29-39 (proposing a number of significant conditions to, *inter alia*, prevent AOL/TW from linking its content and transport); Consumers Union, *et al.* at 2-3 (if merger approved in any form, FCC should require specified divestitures and impose "open access" to AOL/TW's cable systems); BellSouth Corp. at 21-23 (FCC must require AOL/TW to make its content, portals and applications available on a non-discriminatory basis and impose a binding condition of open access to AOL/TW's cable platform).

[4] *See, e.g.*, Response of The Association for Maximum Service Television, Inc. at 1-7; Reply Comments of The Walt Disney Company at 15-19; Sinclair Broadcast Group, Inc. at 1-2.

AOL is currently the largest Internet service provider in the world, and TW is the owner of a vast array of television, film, music, print and other content, as well as the second largest cable operator in the U.S. with control of nearly 70% of the television households in its cable markets. The proposed combination of these two behemoths raises obvious competitive concerns. Because the combined AOL/TW would control both cable and Internet distribution systems *and* the content to distribute over those systems, their merger would create an entity with the ability and the incentive to exercise "gatekeeper" control through its distribution systems to the detriment of unaffiliated content providers, including television broadcasters. The market power created by AOL/TW's joint ownership of both distribution systems and content in the analog world could, moreover, be leveraged into the digital environment, thereby extending AOL/TW's dominance into interactive television and other emerging broadband services.

As recently shown by TW's action in dropping carriage of ABC television signals from its cable systems during an all-important "sweeps" rating period,[5] entities that own both distribution systems and content have a particularly strong incentive to disfavor unaffiliated content providers seeking distribution to consumers. As the U.S. Court of Appeals for the District of Columbia Circuit just today opined, "a cable operator," because it "has an incentive to favor its affiliated programmers," may, "as a rational profit-maximizer, compromise the consumers' interests."[6] To counteract this natural incentive of a communication services distributor to favor its own content over the content of unaffiliated entities, and to protect the interests of consumers in receiving content from a variety of competing sources, the Commission must insure that unaffiliated content providers are not subject to discriminatory treatment by AOL/TW.

Specifically, the Commission should condition any approval of the proposed merger on strict requirements prohibiting AOL/TW from blocking the access of unaffiliated content owners to consumers, or by discriminating against unaffiliated content providers in any way. The Commission must obviously prevent AOL/TW from flatly denying unaffiliated content or interactive service providers access to AOL/TW's existing cable or future broadband platforms, or from engaging in discriminatory pricing equivalent to a denial of access. But beyond prohibiting such blatant discrimination, the Commission must also insure that the combined AOL/TW does not discriminate against unaffiliated content or interactive service providers in, for example, such technology-related matters as navigation devices and electronic program guides, screen displays, channel assignment and positioning, caching of information, and downstream and return path traffic. The imposition of such detailed and specific nondiscrimination conditions are needed to insure that unaffiliated content and interactive services can reach consumers unhindered through the analog and digital distribution systems controlled by AOL/TW. Without the adoption of these nondiscrimination requirements, AOL/TW's capability and incentive to exploit its gatekeeper position to promote its own content and services, while disfavoring in a myriad of ways the content owned by unaffiliated entities, will remain entirely unchecked. Prevention of these types of discrimination by gatekeeper

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[5] *See Memorandum Opinion and Order,* DA 00-987 (rel. May 3, 2000) (concluding that the removal of signals of ABC-owned television stations from TW's cable systems violated the Communications Act and Commission rules).

[6] *Time Warner Entertainment Co. v. U.S.*, No. 96-5272 (D.C. Cir. May 19, 2000) (upholding constitutionality of subscriber limits and channel occupancy provisions of 1992 Cable Act).

facilities has been recognized by Congress as in the public interest. *See, e.g.*, 47 U.S.C. §§ 534(b)(3)(B); (b)(4)(A); (b)(6).

The Commission should also act to insure nondiscriminatory treatment of unaffiliated content and interactive service providers by prohibiting AOL/TW from blocking customer access to any part of broadcast signals that consumers could receive free over-the-air. For example, in a petition for special relief recently filed with the Commission, Gemstar, a vendor of electronic program guides ("EPGs"), alleged that TW is stripping Gemstar's EPG information from the vertical blanking interval of local broadcasters' signals carried over TW's cable systems to consumers.[7] TW's actions with regard to Gemstar are equivalent to denying consumers access to the programming of unaffiliated service providers, and the Commission must prevent the combined AOL/TW from blocking viewer access to such content that is transmitted free over-the-air as part of broadcast stations' local programming services. AOL/TW's ability to deny customers access to content provided free over-the-air by unaffiliated entities will unfairly disadvantage unaffiliated content providers, including broadcasters, and the programming they offer. To prevent such discrimination against unaffiliated content and interactive service providers, any approval of the proposed merger must therefore be conditioned on AOL/TW allowing consumers access to any parts of broadcast signals that consumers could receive free over-the-air.

The recent actions of TW with regard to both ABC and Gemstar also illustrate the vital importance of the retransmission consent and must carry provisions of the 1992 Cable Act. Because entities such as TW that own both distribution systems and content are so clearly inclined to disfavor the content of any unaffiliated provider, safeguards (including retransmission consent and must carry) are necessary to preserve consumer access to the content offered by unaffiliated providers such as broadcasters. The fact that the cable industry, lead by TW, has recently called for a rewrite of the eight-year-old retransmission consent statutes[8] shows their fundamental reluctance to act as a non-discriminatory gatekeeper to existing cable (or future broadband) platforms. TW's evident eagerness to repeal well-established congressional directives regarding broadcasters' access to cable distribution systems should give the Commission reason to wonder whether the combined AOL/TW should possess the unfettered ability to act as gatekeeper to the Internet. Indeed, the response to the AOL/TW merger should not be reconsideration of broadcasters' retransmission consent rights, but instead steps to strengthen them, including a provision allowing broadcasters in a market to collectively negotiate with a monopsony cable operator.

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[7] *Gemstar Petition for Special Relief*, file No. CSR 5528-Z (filed March 16, 2000). In reply comments supporting this petition filed on April 24, 2000, NAB argued that TW's actions in blocking consumer access to an unaffiliated entity's EPG advantaged TW's own EPG service (and potentially its own programming) and disadvantaged competing programming (such as that offered by broadcasters).

[8] T. Heard & M. Farrell, *Cable to Congress: Rework Retrans*, Multichannel News at 1 (May 15, 2000) (rather than "conceding defeat or error" in its dispute with The Walt Disney Company, Gerald Levin, head of TW, has said TW would instead fight to overhaul the retransmission law).

The Commission Should Also Condition Any Approval of the Proposed Merger on the Carriage by AOL/TW's Upgraded Cable Systems of the Digital Signals of Broadcast Television Stations.

In our comments submitted on the proposed merger of AT&T and Tele-Communications, Inc. ("TCI"),[9] NAB asked the Commission to condition its approval of the merger on those companies' assurances that all of their upgraded cable systems would be fully capable of delivering over-the-air digital television signals to consumers' digital television sets without degradation and that the upgraded cable systems would carry the digital signals of all television stations in their markets. Since the primary public benefit of the AT&T and TCI merger was, according to those parties, the construction of broadband digital facilities by the merged company, NAB requested the Commission to ensure that those facilities would not be used to weaken competition in the video marketplace through the exercise of gatekeeper control over competitors' access to consumers. To prevent AT&T and TCI from using the digital capacity that they planned to construct so as to frustrate competition, NAB asked the Commission to condition its approval of that merger on the carriage of all digital signals of local television stations in the markets in which the merged company operated upgraded cable television systems.

NAB urges the Commission to adopt a similar condition in connection with the proposed AOL/TW merger. Just as AT&T and TCI argued that their merger would promote the public interest by speeding the transition of TCI's cable systems from analog to digital and allowing the faster provision of broadband digital services, AOL and TW now contend that their merger "will accelerate the digital transformation of Time Warner" and "maximize the potential of broadband technology to deliver next-generation branded content at the highest possible speed." *Public Interest Statement* of TW and AOL at 11 (Feb. 11, 2000). To ensure that AOL and TW will not use the digital capacity that they will construct to enhance their already formidable market power, the Commission should require, as a condition of this merger, that AOL/TW carry all digital signals of local television stations in the markets in which they operate upgraded cable television systems.[10] Such a condition is needed to ensure that the broadband digital facilities of the merged AOL/TW will not be utilized to frustrate competition in the video marketplace through the exercise of gatekeeper control over competitors' access to millions of consumers.

As has already been well expressed, "[m]onopoly control over cable access" not only jeopardizes "the emerging electronic economy," but also "threatens the flow of ideas and opinion that feeds the democratic process."[11] Accordingly, the Commission should condition any

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[9] *See* Comments of NAB in CS Docket No. 98-178 (filed Oct. 29, 1998).

[10] As discussed in detail in NAB's Comments in CS Docket No. 98-120 (filed Oct. 13, 1998), the Commission is obligated under Section 614 of the Communications Act, 47 U.S.C. § 534, to adopt rules requiring carriage of local digital television signals by all cable systems. AOL/TW's request for approval of their merger based on assertions that their merger will speed the construction of digital broadband systems provides a separate basis for the Commission to require carriage of digital television signals on those systems. All cable systems, including those owned by TW, are of course obligated under Section 614 to also carry the analog signals of local television stations in the markets in which they operate.

[11] *Time Warner's Power Play*, The New York Times at A-25 (May 5, 2000).

approval of the proposed merger on requirements ensuring that AOL/TW's broadband digital facilities will not be used to enhance AOL/TW's position as a gatekeeper able to control access to consumers by a variety of potential competitors. It is particularly vital for the Commission to ensure that AOL/TW does not utilize its extensive existing video distribution system (and future digital broadband system) to discriminate against unaffiliated content providers in any way. In addition, conditioning the proposed merger on the carriage by AOL/TW's upgraded cable systems of broadcasters' digital television signals will contribute significantly to the success and speed of the digital television transition by increasing consumer access to digital broadcasts.

Respectfully submitted,

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