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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

PETITION OF GEMSTAR
TO IMPOSE CONDITIONS ON AOL/TIME WARNER

Gemstar International Group, Ltd. and Gemstar Development Corp. (collectively, "Gemstar"), by its attorneys, hereby urge the Commission to grant the application of America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") to transfer control of licenses and authorizations controlled by them or their affiliates and subsidiaries to AOL Time Warner only upon conditions that proscribe the activities of Time Warner described herein.

At the outset, we emphasize that this Petition is directed solely at conduct displayed by Time Warner and the implications of that conduct for the future. Gemstar has enjoyed an excellent business relationship with AOL, which has consistently exhibited respect for Gemstar and its intellectual property, and a sensitivity to the importance of protecting competition in the new technological environments in which all media companies are now required to compete. AOL has licensed Gemstar's intellectual property and is both a customer and competitor of Gemstar, and we believe that AOL is fully qualified to be a Commission licensee and to shepherd a large and multifaceted media company.

Time Warner, on the other hand, has been and presently is engaging in serious anticompetitive behavior in its current lines of business, and it is not at all clear, given the

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governing structure of the new company, that AOL will be in a position to modify Time Warner's behavior. Specifically with respect to Gemstar, Time Warner has been denying certain consumers -- indeed its own cable subscribers -- access to essential electronic television program guide ("EPG") information that Gemstar delivers free of charge to those with compatible receivers via the vertical blanking interval ("VBI") of local broadcast television signals. As a result, Time Warner subscribers who desire an interactive television programming guide will be left with no choice but to accept a Time Warner-supplied guide that is likely to be packaged, for a fee, with an enhanced set-top box and premium program services. Thus, Time Warner is using its *de facto* control over the delivery system to harm consumers and impede competition in an area which it seeks to dominate. And Time Warner's anticompetitive behavior suggests that this course of conduct would continue if the merger is approved without significant conditions. There is every reason to believe, as well, that Time Warner will use its own program guide to favor content in which it has a financial stake, at the expense of all other content.

I. INTRODUCTION

The Communications Act of 1934, as amended, the Commission's must carry rules, and the Commission's actions over the past thirty years reflect principles of nondiscrimination, access, and consumer choice. Beginning with the Commission's seminal decision in *Carterphone*[1] and continuing to the cable equipment compatibility rules mandated in the Cable Television Consumer Protection and Competition Act of 1992,[2] the long-time policy of the Commission and Congress has been to favor consumers' freedom to choose services and content

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[1] *In re Use of the Carterphone Device in Message Toll Telephone Service*, 13 FCC 2d 420 (1968).

[2] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385 (1992).

in which they are interested, and the equipment needed to support those choices.[3] The Commission is required to scrutinize the merger of Time Warner and AOL in the context of these policy goals. Permitting elements of this combined company to exercise control over broadband facilities, particularly given its broad cable reach, will be contrary to the public interest unless specific conditions are put into place.

As we have noted above, Gemstar's interest in this proceeding stems from the anticompetitive activity of Time Warner with respect to Gemstar's television electronic program guide. "*Guide Plus+*," the nation's leading interactive electronic program guide ("EPG"), conveys to consumers using enabled receivers information about available television programming, delivering it in the vertical blanking interval ("VBI") of broadcast television signals. *Guide Plus+* is a component in many television receivers that are on the market and is available to consumers on an ongoing basis at no monthly charge and without the need for set-top boxes or other devices. However, *Guide Plus+* only works when the television can receive updated programming information transmitted via the VBI. Time Warner has disabled the EPGs of *Guide Plus+* consumers in a number of markets across the country by searching out and stripping Gemstar's EPG updating information from the broadcast VBI it carries on some of its systems. These actions render many consumers' EPGs useless. There is no question (1) that Time Warner is engaging in the stripping of Gemstar's *Guide Plus+* data, even though it does not need the portion of the VBI that Gemstar uses, and even though this information is contextually and logically related to the content of the broadcast signals in which the data are carried; (2) that Time Warner has been increasing the number of systems on which it is stripping;

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[3] *See* Telecommunications Act of 1996, Pub. L. No. 104-104 § 304 (1996) (codified at 47 U.S.C. § 629).

and (3) that it is taking such actions for the express purpose of disabling the leading competitor to its own EPG.

Gemstar has filed a Petition for Special Relief to address this issue, and that matter is pending before the Commission.[4] Gemstar is taking the additional step of filing in this proceeding because it believes that the promises of open access that Time Warner is making in the context of this transfer application must be viewed in light of Time Warner's actual conduct, and in particular its conduct toward Gemstar. The only way to ensure that the public interest is going to be protected against Time Warner's anticompetitive conduct is not through the acceptance of vague statements of principles, but through the imposition of specific and detailed safeguards.

As we have noted also here, while we are confident that AOL would not itself engage in such actions, or countenance such actions by a fully controlled subsidiary, we are on this record uncertain whether AOL will be in a position to ensure that Time Warner's penchant for anticompetitive conduct in its own lines of business is contained and discontinued.

II. BASED ON TIME WARNER'S BEHAVIOR, GEMSTAR URGES THE COMMISSION NOT TO RELY ON TIME WARNER'S ASSERTIONS THAT IT IS COMMITTED TO PRINCIPLES OF NONDISCRIMINATION AND OPENNESS.

When Time Warner and AOL announced their proposed merger, there were numerous suggestions that the resulting entity might not act in the public interest.[5] To address these concerns, Time Warner has assured Congress, the Commission, and the public that it can be

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[4] *See In re Petition for Special Relief of Gemstar*, Docket No. CSR-5528-Z (filed Mar. 16, 2000). We hereby incorporate our pleadings filed in that proceeding.

[5] *See, e.g.*, Paige Albiniak, *Promises, Promises*, Broadcasting & Cable, Mar. 6, 2000, at 6-7; Michael Stroh, *'A Good Deal for Consumers'; But the Implications may be as Uncertain as They* (continued...)

trusted not to discriminate against other service providers.[6] However, Time Warner's actions with respect to *Guide Plus+* are *prima facie* evidence that the company will in fact use its bottleneck control to act in precisely such an anticompetitive manner. This conduct also suggests that the combined company is willing to use its *de facto* monopoly over the distribution of video content to harm competitors offering competing services and even equipment manufacturers. Despite protests to the contrary, there is no reason for the Commission to believe that Time Warner will modify its behavior after the merger is consummated, absent Commission-imposed conditions.

A. None Of The Public Statements Time Warner Has Made To Demonstrate Its Commitment To Open Access Is Binding.

The Commission should not accept Time Warner's "trust me" attitude with respect to its commitment to openness. First, Time Warner's "commitments" to openness are not binding. The Memorandum of Understanding ("MoU") the parties disclosed on February 29, 2000, which purports to set out their "intentions" with respect to open access, for example, leaves open the possibility that Time Warner may alter its terms at any time:

> This MoU represents *an initial step* by Time Warner . . . to articulate the terms, conditions and parameters under which a combined AOL Time Warner will offer consumers access to multiple ISPs on its broadband cable systems. It is the intention of the parties to *continue to refine those particulars* in a manner that is responsive to, and consistent with, the desire of consumers to

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are Far-Reaching, Baltimore Sun, Jan. 11, 2000, at 1C; Aaron Zitner, *Smooth Sailing Likely but Clouds Loom*, Boston Globe, Jan. 11, 2000, at D9.

[6] *See, e.g.*, *America Online and Time Warner Announce Framework for Agreements to Offer AOL Service and Other ISPs on Time Warner Broadband Cable Systems*, AOL/Time Warner Press Release (Feb. 29, 2000); *America Online and Time Warner Will Merge to Create World's First Internet-Age Media and Communications Company*, AOL/Time Warner Press Release (Jan. 10, 2000); Memorandum of Understanding Between Time Warner Inc. and America Online, Inc. Regarding Open Access Business Practices (Feb. 29, 2000) ("MoU").

> have a choice among multiple ISPs offering broadband service and the still-evolving nature of the cable infrastructure.[7]

Thus, Time Warner would have the leeway to change or evade the applicability of the document at any time. Indeed, when asked about the MoU during a Senate Judiciary Committee hearing called to address congressional concerns about the merger, the Time Warner representative stated only that the MoU represents a strong commitment by Time Warner to principles of open access.

As we have noted, these principles, however salutary, are inconsistent with Time Warner's ongoing behavior. Indeed, at the same time as Time Warner asserts its sense of community responsibility, it is acting to strip the *Guide Plus+* signal from the VBI in a number of communities, thereby actively denying many of its *own subscribers* access to free information that happens to compete with its own guide service.

B. The Commission Should Impose Binding Conditions On The AOL/Time Warner Merger.

The merger of Time Warner and AOL is historic in scope and will result in the unprecedented creation of a vertically integrated entertainment content and distribution behemoth. Based on Time Warner's past behavior, the Commission should proceed with caution and should not rely on Time Warner's assertions that it will act in good faith and open itself to competition after the merger -- in the absence of either tangible evidence that it has changed its behavior or in the presence of specific and enforceable conditions that, by imposition of the force of law, require it to change.

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[7] Memorandum of Understanding at ¶ 10 (emphasis added).

If the FCC decides to approve the transfer of control, it should thus make its consent conditional upon steps that ensure that Time Warner will be required to keep its systems open to competitive content and service providers, such as Gemstar.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of April, 2000, I caused copies of the foregoing Petition Of Gemstar To Impose Conditions to be delivered by U.S. First Class Mail, postage prepaid, to the following:

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