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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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In the Matter of:)
)
Applications of America Online, Inc.)
and Time Warner Inc. for)
Transfers of Control)

CS Docket No. 00-30

To: The Commission

**RESPONSE OF
THE ASSOCIATION FOR MAXIMUM SERVICE TELEVISION, INC.
IN SUPPORT OF IMPOSING CONDITIONS ON AOL/TIME WARNER**

The Association for Maximum Service Television, Inc. ("MSTV") hereby files this response to the comments and petitions filed in this matter to urge the Commission not 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 unless it imposes conditions that strictly prohibit AOL Time Warner from discriminating against the programming, navigation devices and other services delivered through the broadcast signal for free. This position is consistent with MSTV's recent filing in the pending proceeding concerning the Petition for Special Relief filed by Gemstar International Group, Ltd. and Gemstar Development Corp. ("Gemstar") against Time Warner,¹

¹ See Comments of the Association for Maximum Service Television, Inc., *Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission's Must-Carry Rules*, CSR 5528-Z (Apr. 12, 2000).

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and with the broader position it has advocated for over a year-and-a-half in the DTV Cable Carriage/Compatibility Proceeding.²

The threat posed by AOL Time Warner to the broadcast service is real and imminent. In the analog context, Time Warner already has demonstrated its willingness to use its bottleneck control over the broadcast signal to block consumer access to electronic program guide (“EPG”) material delivered through the broadcast signal.³ In so doing, Time Warner has left its cable subscribers with no alternative to its cable-delivered EPG, and has reserved for itself the unfettered ability to favor its affiliated programming at the expense of broadcast and other unaffiliated content. At the same time, Time Warner and other cable operators are extending their anticompetitive conduct into the digital environment, where they are demanding retransmission consent language that would restrict the delivery of free digital services and enhancements to consumers, allowing the cable systems to block or strip programming, independent EPG data and other navigation devices, and other free services carried in broadcasters’ DTV signals. Notwithstanding Time Warner’s public announcement two years ago -- as well as its purported contractual obligation -- that it would carry the digital signals of CBS-affiliated television stations according to the terms of its agreement with CBS Inc., to date, little, if any, progress has been made by CBS-affiliated stations to convince Time Warner to

² See, e.g., Comments of the Association for Maximum Service Television, Inc., *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (Oct. 13, 1998) (“*MSTV DTV Carriage Comments*”); Reply Comments of the Association for Maximum Service Television, Inc., *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (Dec. 22, 1998) (“*MSTV DTV Carriage Reply*”).

³ See Petition for Special Relief of Gemstar International Group, Ltd. and Gemstar Development Corp. for Enforcement of the Communications Act of 1934, as Amended, and the Commission’s Must-Carry Rules, CSR 5528-Z (Mar. 16, 2000; Public Notice Mar. 24, 2000).

carry their digital signals.⁴ Moreover, evidence in the DTV Cable Carriage/Compatibility Proceeding demonstrates that affiliated stations that have attempted to obtain carriage according to such agreements have been rebuffed.⁵ Absent strict conditions prohibiting AOL Time Warner from discriminating against or blocking broadcast programming, broadcast-delivered services, and other unaffiliated content and services, this anticompetitive and anti-consumer conduct can only be expected to increase if the merger is approved.

The merger between Time Warner and AOL will further entrench the cable operator's incentives to discriminate against broadcast-delivered programming and services, depriving the public of competitive options and stunting the proliferation of independent, free digital services. The merger of Time Warner and AOL will result in the creation of a vertically integrated entertainment content and distribution conglomerate whose size and reach is unprecedented.⁶ Given past behavior, the Commission should not rely on Time Warner's

⁴ See, e.g., Supplemental Comments of Meredith Corporation, *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (December 10, 1999), at 9 (Meredith has CBS affiliates in five markets, and “[i]n none of its ongoing retransmission consent negotiations has a Time Warner system offered up the CBS deal as a ‘template’ for negotiations”).

⁵ See *id.* (stating that “[t]he so-called ‘template’ of the Time Warner/CBS deal is illusory”, that Meredith’s NBC affiliate “has not been offered the AT&T/NBC deal as an option agreement” and that “Meredith has no confirmation that any AT&T system serving markets where Meredith has Fox affiliates . . . has assured carriage of the digital signal of any of those stations”); Letter from Margita E. White, President, MSTV, Edward O. Fritts, President, NAB, and James B. Hedlund, President, ALTV, to William E. Kennard, Chairman, FCC, *Ex Parte Presentation*, CS Docket No. 98-120 (Feb. 22, 2000), at 1 and Attachment (“only two DTV stations, WCBS-TV in New York and KITV in Honolulu, of the 119 on the air covering 61.3% of the country, are being carried and in each case by a single cable system”).

⁶ See, e.g., *The (World Wide) Web They Weave*, Wall Street Journal, at B12 (Apr. 3, 2000) (describing the union of AOL and Time Warner as one “that will merge cyberspace’s 800-pound gorilla with an old-media giant”); Charles Haddad, *New Media Grabs Old Media: Deal Would Alter The Entire Industry*, Atlanta Constitution, at F1 (Jan. 11, 2000).

assertions that it will act in good faith and open itself to competition after the merger.⁷ Rather, the Commission should impose specific and enforceable conditions that, by imposition of the force of law, require it to change its anticompetitive conduct. Absent such conditions, AOL Time Warner's unprecedented media market power will be wielded, as Time Warner's bottleneck power is now, to stamp out competition at the expense of broadcasters and the public they serve.⁸

The conditions sought here are consistent with the broader measures against anticompetitive conduct that MSTV has long sought in the context of the DTV Cable Carriage/Compatibility Proceeding and before.⁹ Since filing its initial comments in that proceeding in October 1998, MSTV has urged the Commission to establish the following principles to protect the public's broadcast service from the sort of discriminatory conduct Time Warner and other cable operators have evinced:

⁷ The initial comments and petitions filed in this proceeding provide ample evidence of the anticompetitive conduct that will only intensify after the merger. *See, e.g.*, Petition to Condition Merger of RCN Telecom Services, Inc. (describing Time Warner's flaunting of the Commission's program access rules by denying RCN, a competing video programming services provider, access to its video programming); Petition of Gemstar to Impose Conditions on AOL/Time Warner at 2 (describing Time Warner's stripping of EPG data from the vertical blanking interval to disable Gemstar's EPG services, which compete with a similar Time Warner service); Comments of iCast at 1 (explaining that AOL is deliberately blocking instant messages that originate with iCast users so that AOL instant messaging customers can only correspond with other AOL subscribers); Comments of Tribal Voice at 1 (same).

⁸ *See, e.g.*, New York Times editorial (May 5, 2000) ("The fundamental problem for the FCC is that cable companies like AT&T and Time Warner own not only the cable wire that runs into everyone's home, but also some of the programs that are delivered over that wire. That puts them in a position to discriminate in favor of the program channels they own, and therefore to filter the information and commercial opportunities presented to cable subscribers. Monopoly is bad enough in the orange juice or suspenders markets. It is downright dangerous when it compromises the public's right to diversified sources of news and entertainment.").

⁹ *See MSTV DTV Carriage Comments; MSTV DTV Carriage Reply. See also* Statement of Victor Tawil, Senior Vice President, MSTV, Before the Federal Communications Commission (continued...)

1. Cable operators should include the listing or display of programming information of all broadcast and other non-affiliated video services in a non-discriminatory fashion on the cable systems' navigational devices, guides or menus and should not interfere with a broadcaster's or other non-affiliated video service's ability to use part of its channel capacity to provide a program guide or menu to the cable systems' subscribers.¹⁰
2. To implement (1) above and to preserve other features of the DTV signal and serve the public interest, cable operators should carry without substantive alteration: the PSIP information that is part of the DTV signal or other data that provides channel navigation, program guide information, and/or V-chip information. Cable operators should also carry without alteration closed-captioning information.
3. Cable operators should ensure that the information required to be carried under (2) above can be accessed and used by any digital television receiver that has the capability to access and use such information in the over-the-air environment.¹¹
4. Cable operators should carry DTV signals without material degradation. Specifically, cable operators should transmit the entire qualified video bitstream

Roundtable on DTV Compatibility with Cable and Other Video Distribution Services (May 20, 1999), at 15-16.

¹⁰ The Commission has recognized the importance of EPGs in "promoting consumer choice" and competition in the video marketplace. See Report and Order, *Implementation of Section 304 of the Telecommunications Act of 1996, Commercial Availability of Navigation Devices*, CS Docket No. 97-80 (1998), at ¶ 116. It also recognized that rules may be needed to promote fair competition between cable-provided and independent EPGs in the DTV Cable Carriage/Compatibility Proceeding. See Notice of Proposed Rule Making, *Carriage of the Transmissions of Digital Television Broadcast Stations*, CS Docket No. 98-120 (1998), at ¶ 82.

¹¹ Technically, it should not be difficult for a cable system to comply with these first three principles. To the extent that broadcasters use their DTV channel capacity to transmit program information (e.g., PSIP), a cable operator would have to transmit the signal of its 8 VSB format for early generation sets built to receive a signal, arrive at a satisfactory QAM to 8 VSB conversion standard, or arrive at a satisfactory interface or baseband video output standard which preserved the in-band program guides that broadcasters are transmitting. In all cases, to the extent that cable operators are transmitting their own program information, guides or navigation devices, they would have to ensure that the DTV information was seamlessly integrated into the guide or navigation device. See, e.g., Letter from Victor Tawil, Senior Vice President, MSTV, and Henry L. Baumann, Executive Vice President and General Counsel, NAB, to William E. Kennard, Chairman, FCC, *Ex Parte Presentation*, CS Docket No. 97-80 (June 4, 1998) (stressing the need to ensure interoperability of navigation and other digital devices with DTV receivers, TV monitors, cable systems, and broadcast signals); Letter from Victor Tawil, Senior Vice President, MSTV, to William E. Kennard, Chairman, FCC (September 16, 1998) (highlighting cable industry's role in hampering development of interoperability standards).

of the DTV signal through the cable facility (defined to include those set-top boxes the cable system deploys) in a way that DTV receivers capable of receiving and displaying the DTV signal can do so with as high a resolution as they could if they received signals over the air.¹²

These principles should guide the Commission in developing and imposing conditions on AOL Time Warner that will protect consumers from the anticompetitive harms that otherwise will result if the merger is approved. Moreover, MSTV strongly believes that the increasing abuses of Time Warner and other cable operators relating to the carriage of digital television signals should be addressed on an industry-wide basis through the adoption of DTV cable carriage rules that reflect these broad principles.

Specific and enforceable conditions must be placed on AOL Time Warner to protect the public's access to all of the digital offerings broadcast stations would deliver to consumers free of charge. If the Commission decides to grant the instant transfer application, it should impose conditions consistent with the four basic principles set forth above to ensure that

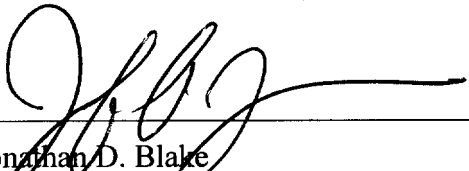
¹² To comply with the non-degradation principle, a cable system must either pass through a DTV signal untouched or ensure that set-top box or headend processing does not interfere with the ability of DTV sets to receive all the bits of the DTV signals such sets are capable of receiving.

AOL Time Warner does not discriminate against, block or otherwise interfere with the free programming, navigational device, or other services included in the broadcast signal.

Respectfully submitted,

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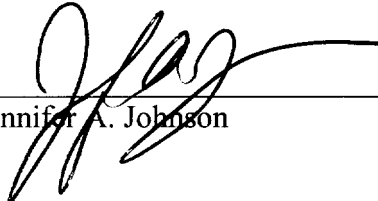
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