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

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

WRITTEN TESTIMONY

OF

THE AMERICAN CABLE ASSOCIATION

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TABLE OF CONTENTS

I. Introduction 1

II. The Commission should require clarification of AOL Time Warner's commitment to not require carriage of AOL services as a condition of access to Time Warner programming 2

A. In a July 12, 2000 filing, the Applicants unequivocally committed to not tie AOL ISP services to Time Warner programming 3

B. The Applicants' May 11, 2000 Reply maintained that they would not tie AOL ISP services and Time Warner programming only because no economic incentive exists to do so 4

C. The Applicants' July 17, 2000 filing repeats a flawed economic argument 5

D. The Applicants' should clarify their position and affirm the commitment in their July 12, 2000 letter 6

III. ACA's concern over AOL's DirecTV investment will abate if the Applicants affirm their July 12 statement concerning program access 6

IV. Conclusion 7

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I. Introduction

ACA's membership of 300 smaller cable businesses share substantial concern over access to essential Time Warner programming following the merger. For this reason, ACA has sought answers to the following two questions:

- Will AOL Time Warner require smaller 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 would threaten the public interest in a viable smaller cable industry and stifle investment in broadband network development in smaller markets and rural areas.[1] As Disney/ABC's treatment of cable operators (including Time Warner) demonstrates, there is strong incentive for a media conglomerate to leverage popular programming to force cable carriage of other services. Following the merger, AOL would have a similar incentive to force its "AOL Anywhere" strategy on smaller market cable systems. Such strategic behavior would harm smaller cable's ability to upgrade networks, provide advanced services and compete with DirecTV.

Because the record reflects inconsistent responses to ACA's questions to date, ACA must continue its request for Commission action on these issues.

II. The Commission should require clarification of AOL Time Warner's commitment to not require carriage of AOL services as a condition of access to Time Warner programming.

ACA members have made solid progress in closing the digital divide in smaller markets, an area of continuing concern for the Commission. If unchecked, the post-merger AOL would have the power to derail this progress by forcing carriage of AOL ISP service as a condition of access to essential Time Warner and Turner 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 - all to the benefit of DirecTV, the primary competitor in smaller markets.

Inconsistencies on the record, combined with reports of AOL's harsh treatment of competitors and small businesses, underscore the necessity of continued Commission

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

scrutiny.

In response to ACA's comments and the Commission's information requests, the Applicants have answered ACA's program access question differently on three occasions. One of the responses is unequivocal - AOL Time Warner will not require carriage of AOL services as a condition of access to Time Warner programming. Elsewhere on the record, the Applicants' responses seem to diverge from this commitment.

A. In a July 12, 2000 filing, the Applicants unequivocally committed to not tie AOL ISP services to Time Warner programming.

One of the Applicants' responses, provided orally and in writing to the Commission, reflects very appropriate consideration by AOL and Time Warner for the public interest issues raised by ACA. The Applicants' July 12, 2000 letter states:

> AOL Time Warner will not attempt to force MVPDs to carry the AOL high-speed Internet service as a condition to receipt of any of the Time Warner cable programming services.[2]

By itself, this answer appears to address squarely the public interest issues raised by ACA. If this were the Applicants' final commitment on this issue, and the Commission's order in this docket reflects this commitment, ACA's principal concern with the merger would be resolved. ACA could support the merger. Moreover, the Applicants' acknowledgment of the important public interest concerns of smaller cable would contrast sharply with the positions of ABC/Disney and CBS/Viacom, which both

[2] July 12, 2000 Ex Parte Letter from Arthur H. Harding to Magalie R. Salas, p. 6.

continue to use enormous, unchecked leverage against smaller cable for carriage of Disney/ABC and CBS/Viacom programming.

But both before and after submitting the July 12 filing, the Applicants have expressed a different position on the record.

B. The Applicants' May 11, 2000 Reply maintained that they would not tie AOL ISP services and Time Warner programming only because no economic incentive exists to do so.

The Applicants' initial response to ACA's question differs substantially from the July 12, 2000 statement. The Applicants' May 11 Reply states:

> ACA goes on to speculate that AOL Time Warner might attempt to further this goal by conditioning carriage of its popular cable networks upon carriage of the AOL service. This suggestion is inconsistent with the merged company's economic best interest.
>
> * * *
>
> The type of practices ACA imagines, furthermore, could not be sustained in the marketplace because there are too many diverse, competing programming networks to step into the void if AOL Time Warner in any way limited access to its programming.[3]

These statements conflict with the post-merger behavior of all companies that acquire access to popular programming. A prime example: ABC/Disney's treatment of all cable operators, including Time Warner. The Applicants must acknowledge that no network stepped into the "ABC void" when Disney's retransmission consent demands forced Time Warner systems to delete ABC.

Smaller cable businesses would face the same subscriber revolt if they did not

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3 Reply of AOL and Time Warner, Inc., May 11, 2000, pp. 43-44.

carry CNN, HBO, TNT and other essential Time Warner programming. A marketplace of fungible programming networks described in the Applicants' Reply does not extend to essential programming required by smaller cable businesses.

Like Disney/ABC, 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 would be no exception, unless it balances public interest concerns against the economic incentive to leverage programming assets to expand AOL carriage.

C. The Applicants' July 17, 2000 filing repeats a flawed economic argument.

Shortly after the Applicants' July 12, 2000 ex parte letter, they filed a response to the Commission's June 23, 2000 information request.[4] In that request, the Commission asked the principal question raised by ACA.[5] The Applicants' July 17 filing appears to differ from their July 12 statement:

> For the reasons stated in their May 11, 2000 reply comments, AOL and Time Warner have no plans or intentions to require an MVPD to carry AOL ISP service as a condition of granting the MVPD access to Time Warner's affiliated video programming, just as Time Warner has never attempted to force any third party MVPD to affiliate with Road Runner as a condition to receive any of Time

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[4] AOL and Time Warner Inc. Response to Document and Information Request, July 17, 2000 ("July 17 Response to Information Request").

[5] Document and Information Request, June 23, 2000, p. 8:

> If the merger is consummated, will AOL and Time Warner require an MVPD to carry AOL's ISP service as a condition of granting the MVPD access to Time Warner's affiliated video programming?

access could include forced carriage of AOL services and AOLTV on smaller cable systems. This strategy will sap capacity on smaller cable systems, increase costs, deter investment in expanding networks, and hurt smaller cable businesses' ability to compete with DirecTV.

If the Applicants commit to not requiring smaller cable businesses to carry AOL services as a condition of access to Time Warner programming, the potential for anticompetitive behavior by AOL against smaller market cable systems decreases.

IV. Conclusion.

ACA recognizes the interesting potential of the merger to create "boundless opportunities for new consumer services." Still, ACA must continue to voice concern over the potential for anticompetitive conduct by the post-merger entity. The statement in the Applicants' July 12 letter could be a significant step in demonstrating AOL Time Warner's commitment to supporting the public interest in a viable smaller cable industry.

Because of inconsistencies on the record, the Applicants should affirm their July 12 statement:

> AOL Time Warner will not attempt to force MVPDs to carry the AOL high-speed Internet service as a condition to receipt of any of the Time Warner cable programming services.

If the Applicants decline do to so, 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.

Respectfully submitted,

AMERICAN CABLE ASSOCIATION

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