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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

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Re: CS Docket No. 00-30

Dear Mr. Chairman:

As the Commission nears the conclusion of its consideration of the proposed merger between America Online, Inc. ("AOL") and Time Warner Inc. ("TW"), NAB urges you and your colleagues to recognize that the question of "open access" involves much more than allowing competing Internet service providers ("ISPs") access to AOL/TW's cable systems. Indeed, as discussed in detail below, the basic concept of "open access" should apply to a variety of service and content providers, including, for example, instant messaging, electronic program guides, and digital and interactive television. Beyond concerns with AOL/TW's dominance as an ISP, which the Commission appears to recognize, NAB stresses that monopoly control of consumers' televisions is also at stake in this proposed merger.[1] NAB therefore emphasizes that the Commission should adopt and enforce strict conditions preventing the merged AOL/TW from utilizing their cable/Internet distribution platforms to discriminate against unaffiliated content or service providers in any way.

The Commission Should Adopt "Open Access" Provisions With Regard To Other Service And Content Providers, As Well As ISPs.

As the Commission continues to review the AOL/TW merger, press reports indicate that the Commission may approve the proposed merger, provided the merged company allows competing ISPs access, on nondiscriminatory terms, to customers over AOL/TW's cable systems. While NAB believes this open access condition for Internet services is entirely appropriate, such a condition limited to ISPs only will not prevent AOL/TW from utilizing their existing cable systems (and their future digital broadband systems) from discriminating against other unaffiliated service and content providers, including instant messaging services, electronic program guides, and video programming services. 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 incentive to exercise

[1] *See* R. Grover, *A Media Monopoly in the Making?*, Business Week at 45 (May 15, 2000) (commentary asserting that the AOL/TW merger presents question of "[w]hat constitutes monopoly control of your TV" and that "clear access rules" may be needed to prevent further disruptions in television service such as TW's pulling ABC off the air last spring).

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"gatekeeper" control through its distribution systems to the detriment of unaffiliated service and content providers, including analog and digital television broadcasters.

Indeed, TW's recent actions clearly illustrate its ability and strong incentive to disfavor unaffiliated service and content providers seeking distribution to consumers. For example, last spring the Commission found that TW's removal of the signals of ABC-owned television stations from TW's cable systems during a "sweeps" rating period violated the Communications Act of 1934 and Commission rules.[2] In addition, Gemstar, a vendor of electronic program guides ("EPGs") has filed a petition for special relief at the Commission alleging 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.[3] TW's actions in blocking consumer access to the EPG of Gemstar (an unaffiliated entity) clearly advantage TW's own EPG service (and potentially its own programming), to the detriment of Gemstar and competing program providers. Thus, as the Court of Appeals for the D.C. Circuit recently recognized, a cable operator like TW has the "incentive to favor its affiliated programmers" and such an "operator may, as a rational profit-maximizer, compromise the consumers' interests."[4]

To counteract the natural incentive of the combined AOL/TW to continue favoring its own content and services over those of unaffiliated entities, and to protect the interests of consumers in receiving services and content from a variety of competing sources, the Commission must ensure that unaffiliated content and service providers are not subject to discriminatory treatment by AOL/TW. To achieve this goal, the Commission should extend the basic principle of open access beyond Internet access so as to include such services as instant messaging, EPGs, and digital and interactive television. Specifically, as NAB explained in its May 19, 2000 letter to you and your colleagues, 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 or service providers in any way. Just as the cable customers of AOL/TW should be permitted to choose their Internet provider freely, consumers should also be allowed the same freedom in selecting, for example, any analog, digital or interactive video programming, whether owned by an affiliated or unaffiliated content provider. NAB submits there is no reason to limit the benefits of an open access requirement to competing ISPs only, and not to competing providers of instant messaging, EPGs, video programming or other services.[5]

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[2] *Memorandum Opinion and Order*, DA 00-987 (rel. May 3, 2000).

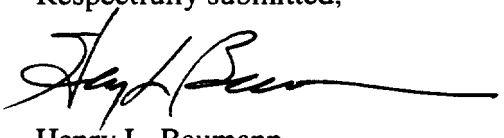
[3] *Gemstar Petition for Special Relief*, file No. CSR 5528-Z (filed March 16, 2000).

[4] *Time Warner Entertainment Co, L.P. v. U.S.*, 211 F.3d 1313 (D.C. Cir. 2000).

[5] *See, e.g., Trying to Connect You*, The Economist at 69 (June 24, 2000) ("antitrust enforcers clearly ought to make approval of the AOL/Time Warner deal contingent on a cast-iron agreement to open up the merged firm's instant-messaging service and cable networks"); *No Chokeholds Allowed*, Los Angeles Times, Metro Section (Sept. 22, 2000) (regulators should require AOL/TW to provide open access to their cable lines and accord nondiscriminatory treatment to competing content providers); D. Mermigas, *AT&T Looks for Leverage in Shadow of AOL-TW*, Electronic Media at 24-26 (Sept. 18, 2000) ("[t]he lengths to which players will go in the future to protect and assert their gatekeeper power was merely hinted at in Time Warner's daylong blackout of The Walt Disney Co.'s ABC signal earlier this year," and regulators are beginning to realize "that if they don't impose limits now, they will be powerless to do much after transactions close"); *Time Warner's Power Play*, New York Times at A-26 (May 5,

In sum, the Commission must guarantee nondiscriminatory open access as a condition of approving the AOL/TW merger. That is, the Commission must adopt sufficient conditions to ensure that AOL/TW's existing cable and future broadband digital platforms will function in the same manner for all consumers, regardless of the service (*e.g.*, Internet, interactive television, instant messaging, EPG) or content (*e.g.* unaffiliated video programming) selected by those consumers. It is vital that the Commission act now to adopt open access requirements ensuring that AOL/TW's existing analog and future 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. As has been repeatedly expressed, the failure to act to prevent the domination of high-speed cable access by a single entity will compromise consumers' interests and may hinder the further growth and development of the "new economy."[6] NAB therefore urges the Commission to extend any open access requirement beyond Internet service to include, *inter alia*, analog, digital and interactive video programming services.

Respectfully submitted,



Henry L. Baumann
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cc: Honorable Susan Ness
Honorable Harold Furchtgott-Roth
Honorable Michael Powell
Honorable Gloria Tristani
James Bird, FCC/OGC
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Matthew Vitale, FCC/IB
Marilyn Simon, FCC/IB
Monica Desai, FCC/WTB
Linda Senecal, FCC/CSB
Barbara Kreisman, FCC/MMB

2000) ("federal regulators, as they study the [AOL/TW] merger, should be guided by the same principle in regard to Internet access and digital television services: nondiscrimination"); R. Grover, *A Media Monopoly in the Making?*, Business Week at 45 (May 15, 2000) ("[u]ntil clear access rules are adopted . . . there will be a lot more skirmishes between [media] superpowers – and possibly more nights without prime-time TV").

[6] *See, e.g., Time Warner's Power Play*, New York Times at A-26 (May 5, 2000) ("[m]onopoly control over cable access" jeopardizes "the emerging electronic economy," and also "threatens the flow of ideas and opinion that feeds the democratic process"); *Trying to Connect You*, The Economist at 69 (June 24, 2000) (in calling for open access conditions on AOL/TW merger, article observed that the "success of the Internet has shown the value of open standards and a neutral platform on which everybody can compete on equal terms. Had the Internet been dominated by any one company, it would not be where it is today."); *No Chokeholds Allowed*, Los Angeles Times, Metro Section (Sept. 22, 2000) (in supporting open access and nondiscrimination conditions for AOL/TW merger, editorial commented that "openness" is the "key" to the Internet's success and that it "should stay that way").