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March 7, 2012

BY ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CS Docket No. 00-30; Request to Terminate Merger Condition

Dear Ms. Dortch:

Pursuant to the Commission's recent order in the above-captioned docket,¹ Time Warner Cable Inc. ("TWC") respectfully requests that the Commission terminate the only remaining condition attached to its approval of the license transfers associated with the 2001 merger between Time Warner Inc. and America Online, Inc. ("AOL").² The Commission recently terminated other merger conditions at the request of Time Warner Inc., finding that, "[b]ecause corporate restructuring has severed the ties between AOL, Time Warner [Inc.], and Time Warner's cable systems, the rationale supporting adoption of the conditions no longer exists."³ However, Time Warner Inc.'s letter requesting that relief did not address one condition—which was intended to prevent "AOL Time Warner from utilizing certain indirect means to disadvantage unaffiliated [Internet service providers ("ISPs")] on its cable systems due to their lack of affiliation"⁴—prompting the Commission to invite TWC to submit this request for relief

¹ See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Order, CS Docket No. 00-30, FCC 12-6, ¶ 5 (rel. Jan. 9, 2012) ("Merger Conditions Removal Order").

² See *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, Memorandum Opinion and Order, 16 FCC Rcd 6547 ¶ 126 (2001) ("Merger Order").

³ See *Merger Conditions Removal Order* ¶ 6.

⁴ *Merger Order* ¶ 126.

from that remaining condition.⁵ As discussed below, the remaining condition should be terminated for the same reasons the Commission identified in recently eliminating the other merger conditions. In particular, because TWC has no incentive or ability to prefer AOL vis-à-vis unaffiliated broadband ISPs—and, indeed, AOL no longer even operates as a broadband ISP—the remaining condition has no purpose or effect.

The Commission consistently has terminated merger conditions when “post-merger circumstances changed in a material way that undermined the purpose of the condition,” such that it is no longer “necessary in the public interest.”⁶ And in the *Merger Order*, the Commission expressly provided that AOL Time Warner could seek to terminate the conditions at issue here to the extent “such requirements are no longer necessary to mitigate or prevent potential public interest harms.”⁷ As the Commission already has recognized, fundamental changes in the relationships among Time Warner Inc., TWC, and AOL have eviscerated any conceivable rationale for maintaining the merger conditions adopted in 2001.⁸

At the time of the AOL-Time Warner merger, AOL was the largest ISP in the world and, in the Commission’s estimation, “one of the most significant forces in the Internet environment.”⁹ Time Warner Inc., for its part, held one of the world’s largest content libraries and had control over TWC’s cable systems.¹⁰ Although the Commission found that the combination of these companies was generally in the public interest,¹¹ it nevertheless was concerned that the merged company would have both the incentive and the ability to engage in anticompetitive conduct, including by discriminating against unaffiliated ISPs in order to advantage AOL in its capacity as a broadband ISP.¹²

⁵ *Merger Conditions Removal Order* ¶ 5.

⁶ *General Motors Corp., Hughes Electronics Corp., Transferors, and The News Corp., Limited, Transferee*, Memorandum Opinion and Order, 24 FCC Rcd 8674 ¶ 8 (2009) (citations omitted); *see also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee; Petition of AOL Time Warner Inc. for Relief From the Condition Restricting Streaming Video AIHS*, Memorandum Opinion and Order, 18 FCC Rcd 16835 ¶ 14 (2003) (removing condition relating to instant messaging “because there has been a material change in circumstances from the market conditions that existed at the time of” the merger approval order).

⁷ *Merger Order* ¶ 127.

⁸ *See generally Merger Conditions Removal Order*.

⁹ *Merger Order* ¶ 8.

¹⁰ *Id.* ¶ 11.

¹¹ *See, e.g., id.* ¶ 18.

¹² *See, e.g., id.* ¶ 61 & n.176.

The Commission believed that this potential harm would be “substantially averted” by a Consent Agreement between the companies and the Federal Trade Commission (“FTC”),¹³ which, among other things, mandated access to Time Warner cable systems for multiple unaffiliated ISPs if AOL were “carried” on those systems. But the Commission also imposed additional requirements that were “narrowly tailored to augment” and to work “in conjunction with” the FTC Consent Agreement while it remained in effect.¹⁴ Specifically, the condition at issue here, which applied only to the extent that an unaffiliated ISP entered into “a contract with AOL Time Warner . . . [to make] its service available over AOL Time Warner’s cable facilities,” prohibited AOL Time Warner from discriminating against unaffiliated ISPs with respect to the method by which customers choose an ISP, an ISP’s selection of content displayed on subscribers’ start-up screen, an ISP’s billing relationship with its subscribers, or technical performance of the underlying broadband network.¹⁵

This remaining condition has no continuing relevance in light of the fundamental changes that have occurred in the decade following its adoption. The unwinding of the AOL Time Warner merger standing alone is sufficient to warrant elimination of the condition, and AOL’s departure from the broadband ISP marketplace further confirms that the condition no longer serves any purpose.

First, as the Commission recognized in the *Merger Conditions Removal Order*, Time Warner Inc.’s spin-off of TWC and AOL into “separate independent companies” without any common ownership or overlapping officers or directors has eliminated the “rationale supporting adoption of the conditions.”¹⁶ Just as the Commission eliminated the various requirements and restrictions applicable to Time Warner Inc. based on this corporate restructuring,¹⁷ it should lift the remaining nondiscrimination condition applicable to TWC. Because TWC is no longer affiliated with AOL, TWC has no incentive to confer any unfair competitive advantages on it (even assuming such incentives existed at the time of the merger).

¹³ *Id.* ¶ 57; see also *America Online, Inc. and Time Warner Inc.*, FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 (Dec. 14, 2000) (“FTC Consent Agreement”).

¹⁴ *Merger Order* ¶¶ 126-27. Notably, the FTC Consent Agreement sunset five years after its effective date, on April 17, 2006. FTC Consent Agreement, Section IV.A. The Commission’s condition relating to the “carriage” of unaffiliated ISPs condition could not reasonably have been expected to outlive an FTC restriction that it was only intended to “augment,” but the question whether the condition was intended to operate independent of the FTC restriction is moot in light of the changes described below that unquestionably eliminate any continuing rationale for the condition.

¹⁵ *Id.* ¶ 126. The condition also included terms governing the disclosure of TWC’s contracts with third-party ISPs and enforcement provisions. *Id.*

¹⁶ *Merger Conditions Removal Order* ¶¶ 4, 6.

¹⁷ *Id.* ¶ 6.

Second, TWC has no ability to favor AOL over unaffiliated broadband ISPs in any event, because AOL does not even operate as a broadband ISP. AOL adopted a new business model several years ago centering on the provision of web content, rather than Internet access services. Far from becoming dominant in the broadband Internet access arena as the Commission originally feared, AOL exited that line of business entirely.¹⁸ TWC therefore could not grant AOL preferential treatment as a broadband ISP, even apart from the termination of their former affiliation.

Finally, terminating the remaining merger condition will advance the Commission's interest in eliminating unnecessary regulations. President Obama has called on government agencies to "identify and use the best, most innovative, and least burdensome tools for achieving regulatory ends,"¹⁹ and Chairman Genachowski has emphasized the importance of "removing needless burdens on industry, enabling the agency to efficiently promote competition and empower consumers, and unleashing innovation and investment across the broadband economy."²⁰ Consistent with those goals, the Commission recognized in the *Merger Conditions Removal Order* that eliminating the merger conditions identified by Time Warner Inc. would further the Commission's "broader efforts to remove unnecessary regulations."²¹ The Commission should eliminate the final remaining condition in furtherance of those same objectives.

For these reasons, the Commission should terminate the remaining AOL-Time Warner merger condition relating to the "carriage" of unaffiliated ISPs on TWC's cable systems.

Respectfully submitted,

/s/ Matthew A. Brill

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¹⁸ See, e.g., Time Warner Inc. 10-K/A, *Management's Discussion and Analysis of Results of Operations and Financial Condition*, filed Sept. 13, 2006 (describing changes in AOL business model).

¹⁹ President Barack Obama, Executive Order No. 13563 (Jan. 18, 2011), 76 Fed. Reg. 3821 (2011).

²⁰ Chairman Julius Genachowski, Remarks of FCC Chairman Julius Genachowski at the Georgetown Center for Business and Public Policy, available at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db1107/DOC-310876A1.pdf, at 2 (Nov. 7, 2011).

²¹ *Merger Conditions Removal Order* ¶ 1.