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

In the Matter of	)	RM No. 11391
	)	
E-mail Address Portability	)	
	)	

OPPOSITION OF TIME WARNER INC.

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October 26, 2007

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Time Warner Inc. ("Time Warner") hereby opposes the above-referenced Petition for Rulemaking (the "Petition").[1] Time Warner is the parent company of Time Warner Cable ("TWC") and AOL LLC ("AOL"), two leading providers of broadband and IP-enabled services, including e-mail services.

INTRODUCTION AND SUMMARY

The Petition presents a classic instance of a solution searching for a problem. Its call for rules that would force service providers to "port" (or forward) a customer's e-mail traffic to a newly designated address following termination of the customer relationship is based on the false premise that consumers today are somehow "held hostage" by their Internet service providers ("ISPs").[2] The Petition's rhetoric cannot hide the fact that robust competition among service providers has yielded a variety of options for consumers who wish to have e-mail addresses that are untethered from any ISP, or otherwise to manage their e-mail communications without ceding control to their service provider.

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1 Petition for Rulemaking, *E-mail Address Portability*, RM No. 11391 (filed July 20, 2007) ("Petition").

2 *Id.* at 4. Although the Petition specifies that such a requirement should apply to ISPs, *see id.* at 1, its flawed logic would seem to apply to all providers of e-mail services, whether or not they are also ISPs.

These competitive choices already afford consumers the "e-mail address portability" that the Petition would have the Commission establish through a rulemaking.[3] Thus, proceeding down this path would result in no discernable benefit for consumers and in fact would harm their interests by placing substantial operational and compliance burdens on service providers that could only increase costs to end users and curtail the degree of choice available in the marketplace today. The result would be a net loss for consumers as well as for the Commission, which would have wasted valuable resources in pursuit of an outcome that market forces already have produced.

The Petition is more than an invitation to make bad policy—it would represent an unprecedented (and likely unlawful) jurisdictional stretch. The Commission has never sought to regulate the provision of e-mail addresses and, as explained below, it lacks any jurisdictional basis on which to do so. The particular fact pattern described in the Petition does not alter the analysis. That misleading narrative ignores AOL's strong economic interest in ensuring that customers can continue to use their e-mail accounts after terminating paid subscriptions; indeed, since AOL's business model now hinges on maximizing the audience for its online advertising, AOL terminates e-mail accounts only in exceptional circumstances. In the petitioner's case, AOL terminated the account upon learning that it had been opened under false pretenses by her son when he was a minor. Thus, even apart from the serious policy and legal defects inherent in the petitioner's proposal, the fact that her account was terminated solely based on its

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[3] Although the Petition employs the term "e-mail address portability" when referring to the mandate it would have the Commission impose, its proposal is more accurately described as an "automatic forwarding" requirement. Indeed, true e-mail address "portability" would presumably involve the assignment of specific addresses in perpetuity that customers could then use with any ISP, even when the address is branded by another service provider. Such a proposal would be subject to myriad objections, but since that is not what the Petition appears to contemplate, this Opposition does not address those issues.

unauthorized status, rather than AOL's business preferences, undercuts the Petition's call for regulatory intervention in the robustly competitive e-mail marketplace.

DISCUSSION

I. AN E-MAIL PORTABILITY MANDATE IS UNNECESSARY AND WOULD HARM CONSUMERS.

The Commission historically has avoided regulating where market forces are sufficient to protect consumers. Indeed, as competition has developed, "the Commission has moved from adopting prescriptive regulations to relying on market forces to promote the public interest."[4] The Commission has repeatedly applied this principle in the broadband context, finding that growing competition has eliminated the need for regulatory intervention.[5] That longstanding approach is equally appropriate here. In the absence of regulation, market forces have produced an array of options for consumers who want "portable" e-mail addresses. Most significantly, consumers can buy their own domain names at nominal cost, without any need to rely on

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4 *Review of Regulatory Requirements for Incumbent LEC Broadband Telecommunications Services*, Notice of Proposed Rulemaking, 16 FCC Rcd 22745 ¶ 17 n.38 (2001) (citing examples); *see also, e.g., Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c)*, Memorandum Opinion and Order, 19 FCC Rcd 21496 ¶ 24 (2004) ("[C]ompetition is the most effective means of ensuring that charges, practices, classifications, and regulations are just and reasonable and not unreasonably discriminatory."); Remarks of Chairman Kevin J. Martin, NARUC Summer Meeting, Austin, Texas, at 6 (July 26, 2005) (stating that to promote innovation and to avoid stifling new service offerings, "the government must get out of the way and trust in the ability of market forces to deliver these benefits to consumers").

5 *See, e.g.*, *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002) (deregulation of cable modem service), *aff'd*, *National Cable & Telecomm. Ass'n v. Brand X Internet Servs.*, 125 S. Ct. 2688 (2005); *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 (2005) (deregulation of wireline broadband Internet access); *see also infra* section II (noting the Act's directives to refrain from regulating information services and the Internet).

commercial e-mail providers for addresses.[6] Such personalized domains enable consumers to change Internet access providers as often as they like without having to obtain a new e-mail address. This freedom contrasts starkly with the telephone context, where carriers have exclusive access to numbering resources and customers thus cannot purchase numbers directly. The fact that any consumer can obtain a domain name as easily as ISPs can obviates the rationale for compelling e-mail providers to construct a complicated portability regime.

In addition, some e-mail services already offer forwarding options that allow customers to direct some or all of their e-mail traffic to alternate addresses. For example, Google's Gmail service includes a free automatic forwarding feature that Google even markets as "email portability."[7] Pobox offers several e-mail packages that allow users to forward e-mail messages to multiple addresses,[8] and Bigfoot likewise offers e-mail forwarding subscription plans.[9] Further, software-based tools (such as that provided by Plaxo and others) make it easy for users to update their contacts' address books with new e-mail information.[10] By availing herself of any of these options, instead of relying on her minor son's e-mail account to conduct business, the petitioner could have avoided the inconvenience of which she now complains.

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6 Various services allow consumers to obtain domain names for fees ranging from $15 to $30 per year, and often lower. *See, e.g.*, http://www.domainnamesystems.com/faqs.html ($15 per year); http://www.quality.org/aliases.html (renting domain names for $30 per year).

7 *See* http://mail.google.com/mail/help/intl/en/about_whatsnew.html (noting that users can "forward new messages to an email account you specify. You can even switch to other email services without having to worry about losing access to your messages. Think of it as email portability.").

8 *See* http://www.pobox.com/pobox_basic/email_forwarding/ ("With email forwarding, you can change your job, change your location, change your ISP, but never change your email address.").

9 *See* http://www.bigfoot.com/ef/en/infopage.jsp?show=forwarding.default.

10 *See* http://www.plaxo.com/products.

Finally, consumers can choose from a plethora of free e-mail services that are not tied to any particular Internet access provider. AOL, Yahoo!, MSN, and Google all provide e-mail addresses to consumers at no charge. A consumer who is concerned about being tethered to a paid subscription can simply obtain one or more e-mail addresses from any of these providers, who generally have a strong interest in supplying them. AOL, for example, now provides e-mail addresses (as well as its proprietary content) for free as a means of increasing the size of its user base, thereby creating the potential for greater revenues from online advertising.[11]

This abundance of choice allows consumers to select services that meet their particular needs. Not only can consumers obtain e-mail addresses that are agnostic as to the ISP, but they can maintain multiple addresses for different purposes (such as business, communications with family and friends, and online shopping), transition from one account to another as necessary, and direct e-mail traffic among their various accounts—all at little or no cost. Moreover, all customers have immediate access to storage options—ranging from their computer hard drive to more sophisticated online archiving tools—that allow them to retain e-mail communications and other data without needing to rely on their service provider. This array of market-driven options is far superior to the automatic-forwarding requirement that the Petition describes, because it

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[11] *See, e.g.*, Matthew Karnitschnig, *Time Warner Posts Solid Profit, Driven by Cable Unit*, WALL ST. J., Aug. 3, 2006, at A3 ("Time Warner hopes that its plan to offer AOL's services free will allow AOL to maintain [its] ad growth. Instead of relying on subscription revenue as it has in the past, AOL is shifting to an advertising-supported model similar to those of Yahoo Inc. and Google Inc."); "A Global Web Services Company," *available at* http://corp.aol.com/whoweare/ ("In 2006, AOL shifted its strategy to build on [its] strengths, making its popular e-mail and AOL software, along with other services, available free to anyone with an Internet connection. AOL continues to move forward on this strategy in 2007, with a focus on growing the size of its online audience, increasing the engagement of its users and improving its ability to monetize its Web audience.").

ensures that the consumer—rather than the service provider—retains control over his or her past and future communications.

Introducing some sort of automatic forwarding requirement into a market that is already functioning to consumers' benefit would not just be unnecessary—it would be affirmatively harmful. Far from being the "simple measure" that the Petition suggests,[12] such an obligation would add significant cost and complexity to e-mail delivery and risk diminishing the range of service options that now exists. For example, service providers that must forward all e-mail traffic received by former customers to new addresses would have to add significant data storage and other resources. The resultant cost increases would jeopardize the availability of free e-mail services, or at least cause providers to offer less generous terms—such as decreasing mailbox sizes and eliminating address lists and other features that consume capacity.

Such a mandate also would threaten to degrade service quality. Routing e-mails from one provider to another (and potentially among three or more providers, if the customer switches providers more than once within the prescribed time period) would lead to complex and ultimately inefficient message routing. Adding new legs to such delivery routes would needlessly exacerbate mounting congestion on the Internet and increase the risk of packet loss. As a result, some e-mails might arrive only after substantial delay, in a corrupted or incomplete format, or not at all, regardless of whether they are sent directly or are diverted through a former service provider that is required to forward them.

These burdens on service providers and their networks—and the corresponding detriment caused to consumers—would be magnified depending on the specific contours of the forwarding obligation. For example, requiring service providers to forward not just future e-mail traffic but

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[12] Petition at 5.

also archived e-mails and other data saved online would require an even greater commitment of resources. Similarly, if the scope of the requirement were construed to include platform-specific e-mail communications—such as those sent and received on social network sites like Facebook and MySpace—its implementation would become even more unwieldy.

In addition to these operational costs, an e-mail portability regime would subject service providers to various regulatory compliance challenges and litigation risks. Indeed, one can reasonably anticipate complaints from former customers if e-mails were not forwarded within certain timeframes. Moreover, an e-mail provider might face liability risks if it automatically forwarded certain types of messages, such as spam or messages containing obscene content. And a provider would find it challenging to address such concerns, as it would be difficult to communicate with a consumer regarding his or her filtering preferences after the service relationship has been terminated. The need for service providers to process and respond to such complaints from former customers would divert their attention from maintaining existing customer relationships and attracting new ones through continued innovation. Moreover, the Commission would inevitably be called upon to exercise oversight over such disputes, causing a continuing drain on its resources. This diversion of resources from service providers and the Commission would be particularly hard to justify given the lack of consumer benefit to be derived from an e-mail portability mandate.

Finally, it is worth emphasizing the absurdity of forcing service providers to incur any of these burdens for customers who have *voluntarily* terminated their accounts—yet that is precisely what the Petition seeks.[13] While the marketplace realities and significant compliance costs discussed above should make an e-mail portability mandate a non-starter regardless of the

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[13] Petition at 1 (stating that the mandate should apply "for at least six months after a customer terminates service with an ISP").

customer's circumstances, the case is even more compelling with respect to customers who choose to move on to other accounts. Such customers—who likely are responsible for the vast majority of terminated e-mail accounts—would have ample opportunity to avail themselves of the various options described above to store, forward, and otherwise transition their e-mail communications to another provider before terminating their original account. It is impossible to justify any mandate that would force service providers to maintain a *de facto* customer relationship in such situations.

In the end, a regime of the sort contemplated by the Petition would leave consumers worse off than they are today and stifle the continued development of a competitive market for e-mail services. This can hardly be viewed as a worthwhile objective to which the Commission should direct its resources.

II. THE COMMISSION LACKS AUTHORITY TO IMPOSE AN E-MAIL PORTABILITY MANDATE.

Aside from the fact that it would produce more harm than good for consumers, the Commission must reject the Petition's call for a rulemaking because it lacks the authority to promulgate an e-mail portability mandate. In stark contrast to the specific duty imposed on all local exchange carriers to provide number portability to the extent technically feasible,[14] nothing in the Communications Act remotely authorizes the Commission to adopt comparable rules for e-mail service providers. Nor does the Commission have jurisdiction over the assignment of e-mail addresses, in contrast to its plenary jurisdiction over the assignment of telephone numbers.[15] In fact, the Commission has never purported to regulate the provision of e-mail at all. To the

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[14] 47 U.S.C. § 251(b)(2).

[15] *Id.* § 251(e).

contrary, it has held consistently that e-mail is an "information service," which under well-established Commission precedent is presumptively free of regulation.[16]

Nor could the Commission properly rely on its Title I ancillary authority to impose an e-mail portability requirement. As a general matter, that authority is not nearly as sweeping as the Petition suggests.[17] Rather, while the Commission has imposed some regulations in other contexts pursuant to Title I, as the Petition notes,[18] the courts have established that the Commission's ancillary jurisdiction actually is quite limited.[19] In fact, the Commission may exercise that authority only when its "general jurisdictional grant under Title I covers the subject of the regulation" and the regulation is "reasonably ancillary to the Commission's effective performance of its statutorily mandated responsibilities."[20]

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16 *See, e.g.*, *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd 1830 ¶ 78 (1998) (determining that e-mail, which "utilizes data storage as a key feature of the service offering," "offers users the 'capability for . . . acquiring, storing, transforming, processing, retrieving, utilizing, or making available information through telecommunications,'" thus satisfying the statutory definition of an "information service") (quoting 47 U.S.C. § 153(20)); *id.* ¶ 75 (noting that, since the time of the Modification of Final Judgment, "[e]lectronic mail, like other store-and-forward services, . . . [was] classed as an information service," and that "the Commission has consistently classed such services as 'enhanced services' under" its *Computer Inquiries* decisions); *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863 ¶ 27 n.94 (2004) (referring to "electronic mail" as an "enhanced service").

17 *See* Petition at 5 (referring to the Commission's "broad ancillary authority over communications").

18 *See id.*

19 *See American Library Ass'n v. FCC*, 406 F.3d 689 (D.C. Cir. 2005) (holding that the Commission lacked authority under Title I to impose broadcast flag regulations); *Motion Picture Ass'n of America, Inc. v. FCC*, 309 F.3d 796 (D.C. Cir. 2002) (holding that the Commission lacked authority under Title I to impose video description requirements for the benefit of visually impaired individuals).

20 *American Library*, 406 F.3d at 700 (citing *United States v. Southwestern Cable Co.*, 392 U.S. 157, 177-78 (1968)).

An e-mail portability requirement would not fall with the subject matter of Title I because such a mandate would not entail "the process of radio or wire transmission" itself.[21] In any event, such a mandate can in no way be considered "reasonably ancillary" to any provision of the Act. Unlike the examples cited in the Petition—in which the Commission used its Title I authority to impose obligations on what the Petition accurately describes as "telecommunications-like services"—it is difficult to identify any specific statutory responsibility of the Commission that would be advanced by regulating e-mail at all, let alone in the manner proposed by the Petition.[22] To the contrary, an e-mail portability requirement would contravene those portions of the Act establishing a policy of non-interference with the Internet.[23]

Although the Petition also makes reference to the Commission's "ongoing obligation to consumers,"[24] that obligation should compel the agency to *reject* the Petition's proposal for the reasons set forth above. In any event, the Commission cannot seek to promote consumer welfare in a manner that exceeds its jurisdiction, which is precisely the case here.

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21 *Id.*

22 *See Implementation of Sections 255 and 251(a) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996, Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, Report and Order and Further Notice of Inquiry, 16 FCC Rcd 6417 ¶ 107 (1999) (declining to use ancillary authority to impose disability access obligations on e-mail).

23 *See* 47 U.S.C. § 230(b)(2) (stating that it is the policy of the United States "to preserve the vibrant and competitive free market that presently exists for the Internet"); *id.* § 157 note (a) (stating that the Commission "shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans"); *see also Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 3 (2005) (noting the Commission's statutory directives to reduce regulation and remove barriers to infrastructure investment, particularly in the broadband context).

24 Petition at 6 (citing *Consumer Protection in the Broadband Era*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 14853 ¶ 146 (2005)).

III. THE FACTUAL PREDICATE DESCRIBED IN THE PETITION DOES NOT SUPPORT AN E-MAIL PORTABILITY REQUIREMENT.

In an attempt to illustrate the need for regulation, the Petition purports to describe the events that led to the petitioner's account being terminated. That narrative, however, is grossly misleading. First, the Petition's suggestion that AOL terminates its customers' accounts "at [its] whim"[25] is undercut by AOL's strong incentives to do precisely the opposite. As discussed above, AOL's advertising-driven business model spurs it to develop as large an e-mail user base as possible. Cavalierly terminating its customers' accounts would subvert that business model and also damage AOL's goodwill with present and future customers.[26] In light of these market-based incentives, there is no need for a "portability" requirement, particularly since customers are unlikely to find themselves in the petitioner's situation.

The petitioner's predicament, while unfortunate, was a direct consequence of her misplaced reliance on an account opened under false pretenses. As the Petition itself makes clear, the account in question was opened by her son while he was a minor[27]—which could only have been achieved by submitting false information during the registration process.[28] In fact, in her prior communications with AOL, the petitioner asserted that the subscription fees for her son's account were charged to her credit card without proper authorization—which led AOL to issue a full refund of all subscription fees the petitioner had paid to AOL since her son opened

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25 *Id.* at 5.

26 Thus, even if an e-mail provider has a right under its terms of service to terminate a customer's account without notice, it would exercise that right only at its own peril.

27 *Id.* at 1 (stating that her "son had originally opened the account when he got a new computer as a young teen").

28 AOL's registration path has always required a new subscriber to confirm that he or she is at least 18 years old, and it further requires certification that the subscriber owns the credit card account or other payment method. The petitioner's minor son thus had to falsify his account information to open an account.

the account. At that point, AOL also terminated the account. The petitioner can hardly be heard to complain about the cancellation of an account that she claimed was opened without her authorization, and it is hard to fathom why she would rely on such an account to conduct her business affairs.

Given these circumstances, an e-mail portability requirement would not have helped the petitioner even if it had been in place when the events in question occurred—unless such a rule would cover accounts that were opened fraudulently. Yet, since such a portability requirement would effectively extend a prior contractual agreement, it could only apply where that agreement was lawfully established. Further, as noted above, a requirement to forward e-mail traffic only prospectively, which is what the Petition describes, would not provide any relief with respect to past communications. Thus, the petitioner would have been in the same situation even if AOL had been subject to an e-mail portability requirement.

CONCLUSION

Time Warner consistently has supported the goal of ensuring consumer protection in the broadband world. That objective, however, is best attained in the present context (as well as others) by continuing to allow market forces to develop robust e-mail service options, unencumbered by intrusive regulation. Accordingly, Time Warner urges the Commission to reject the Petition's call for a rulemaking on e-mail portability.

Respectfully submitted,

/s/ Matthew A. Brill

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