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December 15, 2000

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Magalie Roman Salas  
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Federal Communications Commission  
445 Twelfth Street, S.W.  
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EX PARTE OR LATE FILED

**NOTICE OF WRITTEN *EXPARTE* SUBMISSION**

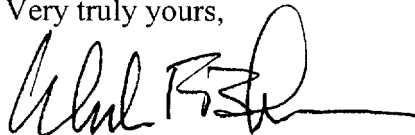
Re: *Applications of America Online, Inc. and Time Warner, Inc.  
for Transfers of Control, Docket No. 00-30*

Dear Ms. Salas:

On behalf of RCN Telecom Services, Inc., submitted herewith for filing in the above-referenced matter pursuant to Section 1.1206(b) of the Commission's rules are an original and one copy of the attached written *ex parte* submission regarding AOL's "integration" activities at Time Warner headquarters in New York.

Any questions concerning this matter should be directed to the undersigned.

Very truly yours,



William L. Fishman

Enclosure

- cc: Deborah Lathen
- Royce Dickens
- Linda Senecal
- John Berresford
- James Bird
- Darryl Cooper

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December 15, 2000

Ms. Deborah Lathen  
Chief  
Cable Services Bureau  
Federal Communications Commission  
445 Twelfth Street, S.W.  
Washington, D.C. 20554

## ***EX PARTE***

Re: *Applications of America Online, Inc. and Time Warner, Inc.  
for Transfers of Control, Docket No. 00-30*

Dear Ms. Lathen:

RCN Telecom Services, Inc. ("RCN"), a party to the above-described proceeding, by the undersigned counsel, files this *ex parte* submission to bring to the Commission's attention the attached article printed yesterday, December 14, 2000, on page E-1 of *The Washington Post*.

As the Commission is well aware, the AOL/Time Warner merger application is required because both AOL and Time Warner, directly or through affiliates or subsidiaries, hold a myriad of licenses under the Communications Act.<sup>1</sup> Transfers of control require specific Commission consent and transfers of control which precede the grant of such authority are violations of law. *See* 47 U.S.C. sections 310(d).<sup>2</sup> According to the Washington Post article a senior AOL

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<sup>1</sup> A list of these licenses, totaling some hundreds of authorizations, is set forth as part of the initial application, filed with the Commission on February 11, 2000.

<sup>2</sup> "No construction permit or station license, or any rights thereunder, shall be transferred, assigned, or disposed of in any manner, voluntarily or involuntarily, directly or indirectly, or by transfer of control of any corporation holding such permit or license, to any person except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby."

executive, Robert W. Pittman, AOL's president and chief operating officer, "[n]ot one to wait for the formality of regulatory approval ...has already taken up residence in Time Warner's New York offices and is busy weaving an old media colossus and new media juggernaut into a single enterprise."

Along with a great many others, RCN has addressed numerous public interest issues posed by the AOL/Time Warner merger.<sup>3</sup> Those concerns have in no way been reduced or abated by recent developments, including yesterday's announcement that the Federal Trade Commission has approved the merger under the antitrust laws, based on the applicants' agreement to certain conditions. Nevertheless in this submission RCN does not advert to the major policy issues still to be resolved by the Commission. Rather the narrow scope of this submission is to urge the Commission to carefully investigate the extent to which – as suggested in the accompanying article – the merger applicants may have already consummated certain aspects of the proposed merger without having received FCC consent to do so.

The Commission's *corpus juris* is full of precedent for the proposition that premature assumption of control, *i.e.*, prior to the grant of FCC approval, is a serious violation of law. *See, e.g. Greater Boston Television Corp. v. FCC*, 444 F.2d 841 (D.C. Cir.1970), *cert. den.* 403 U.S. 293 (1971) (transfer of control has occurred when a new entity or individual has obtained the right to determine basic operating policies). Section 310 (d) of the Act has been interpreted to forbid either *de jure* or *de facto* transfer of control without prior approval by the FCC. *Lorraine Journal Co. v. FCC*, 351 F. 2d 824, 828 (D.C. Cir. 1965), *cert. denied*, 383 U.S. 967, *reh. denied*, 384 U.S. 947, *petition to reopen denied*, 4 FCC 2d 608 (1966). ("Control" for purposes of Sec. 310(d) need not be legal control; rather, it may consist of actual control).

There is no exact formula by which control of a licensed facility can be determined. It is well settled that "control," as used in the Act and pertinent Commission rules, encompasses all forms of control, actual or legal, direct or indirect, negative or affirmative, and that the passage of *de facto* as well as *de jure* control demands the prior consent of the Commission. *See, e.g., Stereo Broadcasters, Inc.*, 55 FCC 2d 819, 821 (1975), *modified*, 59 FCC 2d 1002 (1976). A determination whether a transfer of *de facto* control has occurred requires that the Commission consider the totality of the circumstances to ascertain where actual control resides. *Brian L. O'Neill*, 6 FCC Rcd 2572, ¶ 25 (1991). The basic criteria for determining control were

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<sup>3</sup> *See* RCN's Petition to Condition Merger filed April 26, 2000, Reply Comments filed May 11, 2000, Response of RCN Telecom Services, Inc. to *Ex Parte* filings filed August 11, 2000, and a letter from RCN's Chief Executive Officer, David McCourt, filed September 20, 2000.

established by the Commission in the six-factor test set out in *Intermountain Microwave*, 24 RR 983 (1963). They include (1) whether the licensee has unfettered use of all facilities and equipment; (2) who controls daily operations; (3) who determines and carries out policy decisions; (4) who is in charge of employment; (5) who controls payment of financing obligations; and (6) who receives monies and profits from the operation of the facilities.<sup>4</sup>

Based on these precedents and established doctrines, a serious question exists whether Mr. Pittman, alone or together with other AOL personnel, has improperly and unlawfully assumed control of any of Time Warner's licensed operations. A related and broader question, albeit one of more complexity, is whether either AOL or Time Warner has unlawfully relinquished control over any of its licensed facilities to the other, whether through the activities of any one or any group of individuals, or simply by participating in the ongoing integration of "an old media colossus and new media juggernaut" into a single enterprise. At a bare minimum the Washington Post story raises issues which can only be resolved by developing the facts surrounding the extent to which AOL personnel are involved in the operations of Time Warner and vice versa.

RCN therefore suggests that the Commission immediately initiate an inquiry into this matter, including a written request for a complete description from both applicants of the ways in which and the extent to which the integration of their corporate activities has been effectuated. Until that inquiry has been completed, approval of the application would be improper. Of course, forfeitures can be imposed for violations of the Act, and RCN urges the Commission to consider such remedies if it concludes that violations of law have occurred.<sup>5</sup> But given the unprecedented publicity and public importance of the proposed merger, the imposition of a forfeiture, even of a significant amount, would represent an inadequate remedy for violations of the Act. At the end of the day, the "formality of regulatory approval" is the bedrock principle which must be vindicated by any action taken by the Commission. Adherence to the limitation

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<sup>4</sup> *Intermountain Microwave* at 984.

<sup>5</sup> Section 503(b) of the Act, 47 U.S.C. § 503(b) and various implementing sections of the Commission's Rules, state that any person who willfully or repeatedly fails to comply with the provisions of the Act or the Rules shall be liable for a forfeiture penalty. For purposes of Section 503(b) of the Communications Act, the term "willful" means that the violator knew it was taking the action in question, irrespective of any intent to violate the Commission's rules. For purposes of computing a forfeiture under Section 503(b)(1) of the Act, each day of a continuing violation is considered a separate violation.

Ms. Deborah Lathen  
December 15, 2000  
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imposed by the Act and the integrity of the Commission's processes cannot be ignored even by AOL and Time Warner.

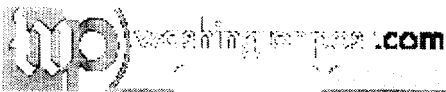
Respectfully submitted,

A handwritten signature in black ink, appearing to read 'W. L. Fishman', with a long horizontal flourish extending to the right.

William L. Fishman

Counsel to RCN Telecom Services, Inc.

Attachment



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## On AOL, a Hint of Promotions to Come

By Christopher Stern  
Washington Post Staff Writer  
Thursday, December 14, 2000; Page E01

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Log on to America Online these days and it's possible to get a glimpse of things to come as it closes in on its merger with Time Warner Inc.

AOL users who want to check out music or television reviews are steered to Time Warner's Entertainment Weekly Web site. If they want the latest news on celebrities their mouse will take them to Time Warner's People.com. And AOL users who seek the latest developments in the presidential election will find that Time Warner's CNN.com and Time.com are prominent options.

Robert W. Pittman, AOL's president and chief operating officer, has proudly declared that cross promotion between the two companies has already produced 500,000 new magazine subscriptions over a five-month period. Not one to wait for the formality of regulatory approval, Pittman has already taken up residence in Time Warner's New York offices and is busy weaving an old media colossus and new media juggernaut into a single enterprise.

The potential dominance of such a combination is a chief reason why it has taken until today--11 months after the two companies announced their union--for federal antitrust regulators to schedule a final vote on the deal.

Rivals such as Walt Disney Co. and the NBC and USA networks have aggressively lobbied federal agencies to place limits on the merger, out of concern the combined company would have too much market power in the entertainment industry. AOL has 28 million subscribers; Time Warner's cable operations alone serve 12.6 million.

A majority of Federal Trade Commission members favors placing some restrictions on the deal, allowing it to move forward, sources have said. The company must also undergo a review by the Federal Communications Commission before the merger can be finalized.

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**BRITANNICA.COM**

But how AOL Time Warner, as the new company would be called, wields that power is not just an issue for rivals and regulators. Analysts say the media giant needs to find a balance in which it is able to profit from the promotion of its products without frustrating consumers who have become accustomed to the wide variety of choice made available by the Internet over the last several years.

The temptation to profit from its market power will be intense: "They have not yet begun to cross-promote," predicted Henry M. Blodget, an analyst who follows AOL for Merrill Lynch Global Securities.

Analysts say Pittman's success depends to a large part on making Time Warner content a central element of AOL's online version of a walled garden. As long as consumers remain in that online garden, sequestered from the wider variety of choice provided by the larger Internet, Pittman will be able to steer them toward Time Warner products, say the experts—movies from its Warner Bros. film studio, music from the Warner Music Group music labels, and even television programming from the WB network.

But if that garden becomes too hard to leave, he risks alienating AOL subscribers, sending them elsewhere to do their online surfing and shopping.

When it was first announced in January, the Time Warner-AOL deal was not warmly embraced by many on Wall Street. Analysts and investors worried the deal would put an old economy brake on the new economy's seemingly limitless potential. But as the dot-com industry has gone through a massive shakeout in the past year, the AOL-Time Warner combination has emerged as an example of how to keep a dot-com afloat, by combining its assets with those of an established bricks-and-mortar partner.

AOL's stock has not dropped as precipitously as shares of Yahoo and other dot-com competitors. In part, that's because they don't have anything like AOL's profitable subscription-based business. AOL's stock closed at \$48.45 yesterday, down 20 cents. It was at \$72.63 on Jan. 10, when the merger was announced. Time Warner's stock, meanwhile, closed at \$72.60 yesterday, up 61 cents. On Jan. 10, it was \$92.25.

Analysts are divided over whether Disney and the other entertainment companies have something to worry about. Blodget insists AOL has learned that consumers want choice online, and that means it must promote entertainment products not owned or controlled by Time Warner.

A recent visit to AOL's entertainment sites, for instance, found advertising for several movies not owned by Time Warner, among them Universal's "The Grinch" and Sony Picture Entertainment's "Vertical Limit." AOL's television site featured links to Viacom's Nickelodeon and its music site offered acts such as the Wallflowers, who record for Virgin Records, a label that is not owned by Time Warner.

John H. Corcoran, an analyst with CIBC World Markets, expects AOL to go through a transformation once it receives final federal approval.

to go through a transformation once it receives final federal approval. "Will AOL act as a gatekeeper once the deal gets done?" asked Corcoran, before answering his own question: "As much as they possibly can."

Washington-based analyst Scott Cleland of the Precursor Group agrees. "There are all sorts of subtle and legal ways to steer the way people are marketed," Cleland said.

Disney is particularly worried about the ways AOL Time Warner might influence consumer choice. Take AOLTV, a new set-top box that will allow customers to surf the Net, send e-mail and use it as an interactive television device. Boston-based Forrester Research, an Internet research firm, is predicting that advertising and other new interactive features will bring in \$25 billion in revenue over the next five years. Disney worries that AOL will use the box to influence viewers' television choices, much the way it already steers subscribers to Time Warner magazine content.

For big media companies, the stakes on the Internet could not be higher--especially as access to the Web speeds up and it becomes as easy for a consumer to download a 90-minute movie as it is now to download a three-minute song.

Time Warner, Comcast and AT&T are already conducting technical experiments, with the possibility of selling hit movies such as "Analyze This" and "The Matrix" or individual episodes of television shows such as "The West Wing" and "The Drew Carey Show" directly to consumers over the Internet.

And next year, Sony plans to launch its own Web site that will allow users to download video games to the new PlayStation2 video-game console. Sony hopes that the video-game console, which has expansion slots for a high-speed modem and a hard drive, will become a place where users will regularly download movies and music--creating its own walled garden.

Eventually, every entertainment company is expected to set up servers that will allow homes with high-speed Internet connections to buy movies, music and even television shows over the Internet.

During hearings on Capitol Hill and in meetings with regulators, company officials have said they are committed to giving consumers a choice. They announced two deals to give rival Internet service providers access to Time Warner's Internet cable lines, in hopes of allaying regulator concerns.

Regulators are expected to make those concessions and others part of any approval agreement they reach today, sources have said.

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