



James D. Ellis
Senior Executive Vice President
and General Counsel

SBC Communications Inc.
175 E. Houston Street
San Antonio, Texas 78205
Phone 210 351-3500

ORIGINAL EX PARTE OR LATE FILED
RECEIVED

May 24, 2000

Mr. William Kennard
Chairman
Federal Communications Commission
445 12th Street, S.W.
Washington, D. C. 20554

MAY 24 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: In the Matter of Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control ~~File~~ No. 00-30

Docket

Dear Chairman Kennard:

I'm writing to ask you to supplement the record in the Commission's review of the AOL-Time Warner merger in light of a troubling matter that appears to involve anti-competitive behavior by Time Warner or RoadRunner or both and which only recently has been brought to SBC's attention. Indeed, I believe this matter warrants investigation by the FCC staff so the Commission may gain a full understanding of the facts and their implications for its review of the AOL-Time Warner transaction. SBC is also today filing a Complaint in connection with this matter with the Texas Public Utility Commission, a copy of which is attached for your convenience.

SBC has recently obtained credible information suggesting that Time Warner affiliates or Road Runner or both implemented what appears to be an unlawful program in which employees of one or both of those companies were induced to place bogus orders with Southwestern Bell in Texas to install DSL service in their homes and then to cancel those orders after Southwestern Bell had confirmed in writing its willingness to provide such service. Such a program increases our expenses, burdens our systems, causes Southwestern Bell to undertake a substantial amount of work, adversely affects service to real customers and may negatively affect our ability to meet required performance measurements.

Moreover, this episode may be an illustration of the type of anti-competitive behavior that we previously had brought to the FCC's attention in connection with the proposed merger with AOL. In Comments we filed on April 26, 2000, SBC demonstrated that the

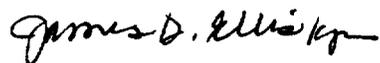
No. of Copies rec'd 041
List ABCDE

AOL/Time Warner/Road Runner consortium and the AT&T MediaOne/Excite@Home consortium – if they are allowed to remain so tightly intertwined – will be able to leverage their combined dominance in broadband content (i.e., video e-mail, interactive advertising, video conferencing, enhanced video programming) and portal markets (Road Runner and Excite@Home) to improperly increase their market power in the residential market for high-speed Internet access.

The actions apparently undertaken by Time Warner against Southwestern Bell in the Internet access market should also be of particular concern to the Commission since they come on the heels of Time Warner's unjustified actions in its recent dispute with Disney. While the Time-Warner decision to cut off ABC programming in its dispute with Disney illustrated Time Warner's willingness to exercise its market power in a heavy-handed manner, this episode may illustrate its willingness to use under-handed tactics to improperly enhance its position in the broadband access market. The heavy-handed and under-handed tactics that Time Warner may have employed in recent weeks (while its merger is still pending before regulatory agencies and it should be on its best behavior) would demonstrate a propensity to disregard the legal rights of others that should be of serious concern to the Commission.

I encourage you to empower the FCC staff to get to the bottom of this matter so that you and the Commission will fully understand its implications for the AOL-Time Warner transaction.

Sincerely,

A handwritten signature in black ink that reads "James D. Ellis". The signature is written in a cursive, slightly slanted style.

James D. Ellis

Attachment

cc: Ms. Magalie Salas (2 copies)
Mr. Lawrence Strickling
Ms. Dorothy Attwood
Ms. Rebecca Beynon
Mr. Kyle Dixon
Mr. Jordan Goldstein
Ms. Karen Edwards Onyveije
Mr. David Goodfriend
Ms. Marsha MacBride
Ms. Sarah Whitesell
Ms. Helgi Walker
Ms. Deborah Lathen
Mr. ToQuyen Truong
Mr. James Bird
Mr. Robert Pitofsky, Federal Trade Commission

SWB
May 23, 2000

TABLE OF CONTENTS

PROJECT NO. 18000

COMPLAINT OF SOUTHWESTERN BELL TELEPHONE COMPANY AGAINST TIME WARNER AND ROAD RUNNER

	<u>Page(s)</u>
Complaint	2-7
<u>Addenda</u>	
Exhibit A	8
Exhibit B	9-10
Exhibit C	11

Original + 10

PROJECT NO. 18000

COMPLAINT OF SOUTHWESTERN	§	PUBLIC UTILITY COMMISSION
BELL TELEPHONE COMPANY	§	
AGAINST TIME WARNER TELECOM	§	OF TEXAS
OF TEXAS, L.P., TIME WARNER	§	
CONNECT, TIME WARNER	§	
COMMUNICATIONS AND	§	
ROAD RUNNER	§	

**COMPLAINT OF SOUTHWESTERN BELL TELEPHONE COMPANY
AGAINST TIME WARNER AND ROAD RUNNER**

Southwestern Bell Telephone Company (“Southwestern Bell”) respectfully requests that the Public Utility Commission of Texas (the “Commission”) commence an investigation in the above referenced proceeding to determine whether Time Warner Telecom of Texas, L.P. (holder of SPCOA No. 60124), Time Warner Connect (holder of SPCOA No. 60075), and Time Warner Communications (collectively “Time Warner affiliates”), together with Road Runner,¹ have engaged in anti-competitive conduct in violation of the Public Utility Regulatory Act (“PURA”). Southwestern Bell has recently obtained credible information suggesting that Time Warner affiliates or Road Runner or both implemented an unlawful program in which employees of one or both of those companies were induced to place bogus orders with Southwestern Bell to install DSL service in their homes and then to cancel those orders once Southwestern Bell had confirmed its willingness to provide that service.

Southwestern Bell recently obtained a copy of a document that appears to have been prepared by Time Warner and distributed to Time Warner employees and that

¹ According to Road Runner's Internet site, Road Runner is a joint venture among affiliates of Time Warner Inc., MediaOne Group, Inc., Microsoft Corp., Compaq Corp., and Advance/Newhouse.

solicits those employees to participate in a program to place orders for DSL service in the Houston, Texas, metropolitan area. The document, a copy of which was allegedly distributed with employee pay checks, advised that “Road Runner is FREE to qualified employees (If you can’t receive Road Runner, read on because you're entitled to win \$100).” A copy of the solicitation is attached to this Complaint as **Exhibit A**. The document further advised employees how they could become “qualified” to participate in the program. Under a heading entitled, “Here's how to qualify,” Time Warner employees were instructed to:

- 1) Sign up for DSL through Southwestern Bell 1-888-792-3751.
- 2) Receive confirmation letter from Southwestern Bell indicating that you are confirmed for the installation.
- 3) Once you receive the confirmation letter, cancel your install.
- 4) Send the confirmation letter to Linda Willis at the Tidwell office.

The solicitation advised that the purpose of the program was to enlist the employees' help “in accomplishing our objective which is to locate areas in Houston that Southwestern Bell (*our competitor*) can and cannot service with their high speed online service, DSL” (emphasis in original).

On May 17, 2000, James D. Ellis, Senior Executive Vice President and General Counsel of SBC Communications Inc., wrote to (i) Christopher P. Bogart, Executive Vice President, General Counsel, and Secretary of Time Warner Inc., and (ii) James R. Brueneman, Vice President and Deputy General Counsel of Road Runner, asking “whether your company or any affiliate is responsible for this program,” and if so, to

“identify all locations where the program or similar scheme has been implemented and the number of orders submitted to Southwestern Bell or any other SBC affiliate.” A copy of this letter is attached as **Exhibit B**. The letter further requested by May 18, 2000, a representation from both companies either “disclaiming responsibility for the program or confirming that appropriate action to terminate this program has been taken.”

Road Runner did not respond to this letter. Time Warner responded in a letter dated May 18, 2000, signed by Jeff Zimmerman, Assistant General Counsel, Time Warner Cable. A copy of that letter is attached as **Exhibit C**. Time Warner did not deny either that it had prepared the document in question or that it had distributed the document to Time Warner or Road Runner employees in the Houston area. Instead, Time Warner stated generally that “Time Warner employees have not been engaged in an anti-competitive campaign, and that no Time Warner employees have engaged in any activities with the intent to burden SBC's staff and systems or to hurt SBC's performance in the marketplace.” Time Warner did not answer Southwestern Bell's specific inquiries as to “the locations where the program or similar scheme has been implemented and the number of orders submitted to Southwestern Bell or any other SBC affiliate.”

Time Warner also failed to represent unambiguously that the program had been terminated. Rather, in carefully crafted language, Time Warner stated merely that it had been “assured by our Houston Division that its employees have been instructed not to engage in any course of behavior that involves signing up with Southwestern Bell for DSL service, and then canceling the scheduled installation after receiving a confirmation letter.”

Time Warner's tacit acknowledgement that the program existed in Houston, coupled with its failure to state whether the program was implemented in locations other than Houston, and its refusal to state categorically that all aspects of this program have been terminated, suggests that certain aspects of the program may remain in effect. As an example, Time Warner's artful response provides no assurance that even in the Houston area Time Warner employees have not been encouraged to make fictitious inquiries about Southwestern Bell's DSL service, to place orders to determine the scope of Southwestern Bell's DSL services, or to cancel such orders before Southwestern Bell issues a confirmation letter. And Time Warner makes no representations concerning similar activities outside the Houston area.

Southwestern Bell respectfully submits that, based on the foregoing, the Commission should promptly initiate an investigation to (i) establish whether Time Warner instituted a program to place, and cancel, orders for DSL service with Southwestern Bell; (ii) establish the extent and scope of such a program; and (iii) take appropriate remedial action.

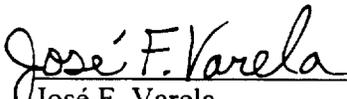
The allegations fall within the Commission's broad jurisdiction to protect the market for telecommunications services and to prevent anti-competitive conduct. "It is the policy of this state to . . . encourage a fully competitive telecommunications marketplace." PURA § 51.001(b)(2). Further, the Commission is charged with protecting customers from the adverse consequences of "fraudulent, unfair, misleading, deceptive, or anti-competitive practices." PURA §§ 17.001(b), 64.001(b). The alleged conduct of Time Warner and/or Road Runner adversely affects Southwestern Bell's

ability to provide its customers with DSL and other services in a timely and cost-effective fashion and is inimical to fair competition, and subjects consumers of high-speed Internet access and other telecommunications services to the harmful effects of these fraudulent and anti-competitive practices.

For the reasons set forth above, Southwestern Bell respectfully requests that the Commission promptly institute proceedings to investigate the allegations set forth in the complaint and to fashion a suitable remedy including, as appropriate, (i) a cease and desist order that prohibits Time Warner and Road Runner from engaging in any aspect of the program, *see City of Brownsville v. Public Utility Comm'n of Texas*, 616 S.W.2d 402, 408 (Tex. Civ. App.--Texarkana 1981) (PUC authorized to issue cease and desist orders); (ii) civil and administrative penalties, *see PURA* § 15.023; (iii) an order requiring Time Warner and Road Runner to pay the costs incurred by Southwestern Bell in connection with this program; and (iv) costs and attorney's fees.

Respectfully Submitted,

ANN E. MEULEMAN
General Counsel-Austin



José F. Varela
General Attorney
State Bar No. 20496300

ATTORNEYS FOR SOUTHWESTERN
BELL TELEPHONE COMPANY
1616 Guadalupe, Room 600
Austin, Texas 78701
Tel: (512) 870-5711
Fax: (512) 870-3420

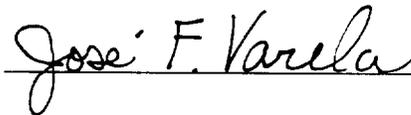
CERTIFICATE OF SERVICE

I, José F. Varela, General Attorney for Southwestern Bell Telephone Company, certify that a true and correct copy of this document was served upon:

Jeffrey M. Zimmerman
Assistant General Counsel
Time Warner Cable
290 Harbor Drive
Stamford, CT 06902
Fax: (203) 328-4840

Susan C. Gentz
Casey, Gentz & Sifuentes, L.L.P.
919 Congress Avenue, Suite 1060
Austin, TX 78701
Fax: (512) 480-9200

on May 23, 2000, in the following manner: via facsimile transmission or hand delivery.



ROAD RUNNER FREE TO EMPLOYEES! OR

WIN A \$100 (if you don't need Road Runner)!

We are pleased to announce that Road Runner is FREE to qualified employees (If you can't receive Road Runner, read on because you're entitled to win \$100).

In order to qualify, we need your help in accomplishing our objective which is to locate areas in Houston that Southwestern Bell (our competitor) can and cannot service with their high speed online service, DSL. All you need to do is follow the four steps below and you'll get Road Runner FREE in your home or you'll be entered into a drawing to win \$100. (two drawings \$100 each)



Here's how to qualify:

- 1) Sign up for DSL through Southwestern Bell 1-888-792-3751.
- 2) Receive confirmation letter from Southwestern Bell indicating that you are confirmed for the installation.
- 3) Once you receive the confirmation letter, cancel your install.
- 4) Send the confirmation letter to Linda Willis at the Tidwell office.

In order to process your FREE monthly Road Runner, please be sure to attach the following with your letter.

.....
ENTER ME IN: (circle one) FREE ROAD RUNNER DRAWING FOR \$100

Employee Name: _____

Address (city, state, zip): _____

Phone Number: _____

Time Warner Account Number: _____

If Southwestern Bell says DSL is not available in your area, please indicate how far you are from Southwestern Bell's Central Office (they will tell you). Also, indicate the representative's full name you talked to and the date you called.

Distance from Central Office: _____

Representative's Name: _____

Date You Called: _____

DEADLINE TO QUALIFY FOR FREE ROAD RUNNER OR \$100 DRAWING IS May 31, 2000.

EXHIBIT A





James D. Ellis
Senior Executive Vice President
and General Counsel

SBC Communications Inc.
175 E. Houston Street
San Antonio, Texas 78205
Phone 210 351-3300

May 17, 2000

Mr. Christopher P. Bogart
Exec. VP, General Counsel & Secy.
Time Warner Inc.
75 Rockefeller Plaza
New York, New York 10019

Mr. James R. Brueneman
Vice President & Deputy
General Counsel
Road Runner
13241 Woodland Park Road
Herndon, Virginia 20171

Gentlemen:

It has come to our attention that Time Warner or Road Runner or both may be engaged in an anticompetitive campaign directed specifically at Southwestern Bell. It appears that one or both of your companies operating out of Time Warner's Houston offices is offering financial incentives to their employees to encourage them to sign up with Southwestern Bell for DSL service and, after receiving a confirmation letter, to cancel the scheduled installation. This campaign is both unethical and unlawful.

We understand that a flyer has been distributed to employees of Time Warner and/or Road Runner inviting them to take part in this scheme and promising them their choice of free Road Runner service or the chance to participate in a drawing to win \$100, if they follow the instructions set forth in the flyer. The instructions direct employees to "sign up for DSL through Southwestern Bell;" "receive confirmation letter from Southwestern Bell indicating that you are confirmed for the installation;" then "cancel your install" and "send the confirmation letter to Linda Willis at the Tidwell office." A copy of the flyer is enclosed with this letter.

As you are no doubt aware, sham orders increase our costs, tie up our systems, and prevent our employees from dealing with real customers. In addition, burdening our staff and systems with fake orders may not only hurt our performance in the marketplace, it can

EXHIBIT B

adversely affect our ability to meet performance measures and expose the company to performance penalties or other regulatory actions. . .

This is a matter of utmost concern to my client and requires immediate action to terminate this sham campaign. In addition, as our first step in pursuing a claim against the appropriate party or parties, please state whether your company or any affiliate is responsible for this program. If so, please identify all locations where the program or similar scheme has been implemented and the number of orders submitted to Southwestern Bell or any other SBC affiliate.

We expect a response to this letter by 5:00 p.m., May 18, 2000 disclaiming responsibility for the program or confirming that appropriate action to terminate this program has been taken.

Very truly yours,



Enclosure

200 Hartford Drive
Hartford, CT 06102
Tel: 203-528-4000
Fax: 203-528-4000
http://www.time Warner Cable.com

Jeffrey M. Zimmerman
Assistant General Counsel



May 18, 2000

Via Facsimile 210-351-2290
And Regular Mail

James D. Ellis, Esq.
Senior Executive Vice President & General Counsel
SBC Communications Inc.
175 East Houston Street
San Antonio TX 78205

Re: DSL

Dear Mr. Ellis:

Your letter to Chris Bogart of May 17, 2000 has been referred to me. After investigating the matter, we can assure you that Time Warner employees have not been engaged in an anti-competitive campaign, and that no Time Warner employees have engaged in any activities with the intent to burden SBC's staff and systems or to hurt SBC's performance in the marketplace.

I have been assured by our Houston Division that its employees have been instructed not to engage in any course of behavior that involves signing up with Southwestern Bell for DSL service, and then canceling the scheduled installation after receiving a confirmation letter.

Please contact me if I can be of any further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read 'Jeff', followed by a horizontal line representing the signature.

Jeff Zimmerman

cc: Chris Bogart
Jim Brueneman