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APR 2 0 2000

April 26, 2000

By Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Comments of Memphis Light, Gas & Water Division in CS Docket No. 00-30

Dear Ms. Salas:

In accordance with the Commission's Public Notice dated March 27, 2000, enclosed for filing please find the original and four (4) copies of the Comments of Memphis Light, Gas & Water Division in the above-referenced docket. Additional copies have been filed with Commission personnel as specified in the Public Notice.

Please stamp and return to this office with the courier the enclosed extra copy of this filing designated for that purpose. Please direct any questions that you may have to the undersigned.

Respectfully submitted,

Erwin G. Krasnow

Enclosures

cc: Chairman William E. Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

APR 2 0 2000

In the Matter of	)	
	)	
Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control	)	CS Docket No. 00-30
	)	
	)	
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COMMENTS OF MEMPHIS LIGHT, GAS & WATER DIVISION

Pursuant to the Public Notice released by the Federal Communications Commission ("FCC") on March 27, 2000,[1] Memphis Light, Gas & Water Division ("MLG&W"), by its attorneys, hereby submits its comments in the above-referenced proceeding. MLG&W, a division and agency of the City of Memphis, Tennessee, is the largest three-service municipal utility in the nation, and supplies more than 400,000 customers in Memphis and Shelby County, Tennessee, with electricity, natural gas and water.

I. INTRODUCTION

MLG&W applauds the Commission for allowing interested parties to comment on a proposed merger with a potential impact that extends beyond corporate boardrooms and

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[1] America Online, Inc. and Time Warner Inc. Seek FCC Consent for a Proposed Transfer of Control, *Public Notice* (DA 00-689) (March 27, 2000).

into the hearts of cities and neighborhoods across the nation. MLG&W urges the Commission to view the potential impact of the merger between America Online, Inc. ("AOL") and Time Warner Inc. ("Time Warner") on local communities and MLG&W offers its experience in Memphis and Shelby County Tennessee as a foundation for this examination.

Through a joint venture with A & L Networks - Tennessee, LLC, MLG&W has formed Memphis Networx, LLC ("Memphis Networx"). This limited liability company will provide primarily wholesale telecommunications services as an open access provider to carriers - including competitive local exchange carriers and incumbent local exchange carriers - but will also provide retail services to otherwise unserved parts of the community. Memphis Networx recognizes that telecommunications services of broad-ranging capability and widespread availability are essential to the future prosperity of Memphis and Shelby County, and it offers a state of the art, next generation, fiber optic network designed to move immense amounts of voice, data, and video traffic to all local consumers.

Among other benefits, Memphis Networx will: (1) bring essential and cutting-edge telecommunications services to unserved and under-served areas; (2) provide more choices and lower prices to telecommunications consumers; (3) stabilize and/or lower electric rates; (4) solidify and guarantee Memphis' position as a business center; and (5) establish new sources of revenue for local governmental authorities.

Unfortunately, Memphis Networx's attempt to enter the Memphis market has been staunchly opposed by the region's entrenched cable provider: Time Warner. Time Warner

dominates the local broadband market in Memphis and Shelby County and is using its entrenched status to throw up as many roadblocks as possible to delay or deter any new competitor who might provide the enhanced services that they do not. The proposed merger will only increase Time Warner's ability to maintain its dominant position and therefore does not bode well for competition or consumers in Memphis and Shelby County.

II. THE PROPOSED AOL/TIME WARNER MERGER WILL AMPLIFY EXISTING ANTI-COMPETITIVE BEHAVIOR TO THE DETRIMENT OF CONSUMERS

AOL and Time Warner assert that "there is no credible risk that the merged company could impede competition."[2] Yet, over the past few months, Time Warner has unilaterally exhibited *prima facie* anti-competitive behavior in Memphis. Time Warner has gone to extraordinary lengths to protect its dominant position in the Memphis broadband market, including the following:

- Time Warner has opposed MLG&W's applications for permission to compete at various levels of government, often on grounds asserted solely to delay the governmental process. For example, Time Warner has urged the Memphis City Council to deny an entrance application which was, in the opinion of MLG&W's attorneys, in order. At the State level, Time Warner has urged the General Assembly to repeal a 1999 Act which gave municipal utilities the ability to enter into joint ventures with private entities to provide telecommunications services.

- Time Warner has made false and *ad hominem* allegations of the most serious nature to members of the Memphis City Council and other government representatives concerning Memphis Networx. Using statements taken out of context from documents obtained pursuant to a public records request, Time Warner has cast doubt on MLG&W's ability to provide telecommunications services through Memphis Networx.

- Time Warner's campaign in opposition has extended to its contacts with others in the industry. It has sent letters to other companies in the industry that contain false

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2 *AOL/Time Warner Public Interest Statement* at 16.

> and misleading allegations against Memphis Networx, and that solicit the recipients' participation in Time Warner's effort to stir up as much anti-Memphis Networx (and anti-competition) sentiment in the community as possible. Time Warner urges the recipients of these letters to carry on Time Warner's anti-competitive campaign in various fora, and, indeed, even furnishes the anti-competitive arguments for the recipients to make.

The threat posed by these tactics to the economic interests of the people of Memphis is clear. If Time Warner is allowed to continue its domination of the local fiber-optic market (which will only be fortified if the AOL/Time Warner merger is completed), then the innovation and price-reduction that flows from competition will be thwarted. Memphis consumers will be deprived of substantial benefits, as an editorial in the Commercial Appeal newspaper last year recognized:

> If the telecommunications network proposed by MLG&W works as utility executives say it will -- and there now seems no reason to think that it won't -- the results should include broader competition in advanced telephone and Internet services, and more choices at lower costs for consumers....[3]

In Memphis, as well as in other cities across the country, Time Warner is doing everything it can to maintain its position as the "only game in town" and there is no indication that a combined AOL/Time Warner would adopt a different strategy. Instead, the proposed merger would combine the strengths of the two companies and create an integrated media and communications company with an enhanced ability to fend off competitors and ensure profits at the expense of consumers.

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[3] *"Better, Cheaper - LGW Plan Should Help Phone, Net Services,"* MEMPHIS COMMERCIAL APPEAL, Aug. 25, 1999, at A6.

III. THE PROPOSED AOL/TIME WARNER MERGER WILL EXACERBATE THE DIGITAL DIVIDE

AOL and Time Warner tout their proposed merger as insignificant because "thousands of entities offer Internet access and/or Internet content across the nation." [4] Even assuming that this assertion is true in a generalized nationwide context, there are many individual consumers in this country that do not have a choice when it comes to Internet access or other broadband services. In point of fact, too many consumers -- typically low-income, minorities, and the young, particularly in rural areas and central cities – have no choice at all. In Memphis for example, Time Warner rushes to provide newer services and functions to businesses and certain affluent residential areas. It continually picks the low-hanging fruit (*i.e.*, businesses and select high-end residential consumers) while ignoring entire communities perceived as lacking the requisite dollars and demand. Even more disconcerting and anti-consumer, Time Warner springs to action when a competitor such as Memphis Networx moves to deploy a state-of-the-art broadband network and affirmatively bridge this digital divide – even though the Tennessee Valley Authority (MLG&W's electric supplier) and the Tennessee Comptroller have given necessary legal approval as required by law.

In addition to insulating its infrastructure from competition, Time Warner does not offer competitive opportunities for multiple Internet Service Providers ("ISPs") who wish to efficiently utilize its broadband platform. Vague promises of an open access paradigm in the future do not remedy the current or long-term anti-competitive effects of a closed

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[4] *AOL/Time Warner Public Interest Statement* at 18 (emphasis added).

infrastructure. In the burgeoning ISP market, providers must capture consumers today. The proposed merger will permit only two ISPs, AOL and Road Runner (both under the proposed AOL/Time Warner umbrella), to establish a meaningful foothold. Consumer groups have warned that "a combination of AOL and Time Warner creates a substantial concentration in the Internet access market."[5] In stark contrast to Time Warner, Memphis Networx intends to provide immediate open access to telecommunications providers who wish to offer services over the network. Memphis Networx will not only provide an alternative infrastructure, but its open access platform will actually stimulate new competition and innovation.[6]

IV. CONCLUSION

MLG&W urges the Commission, in discharging its statutory mandate, to consider the adverse impacts on local competition that will ensue from the merger of AOL and Time Warner. Time Warner's monopolistic and profit-motivated efforts to stifle competition should not be re-enforced via its proposed merger with AOL. The citizens of the Memphis metropolitan area, and consumers in similarly situated regions of the country, must not be

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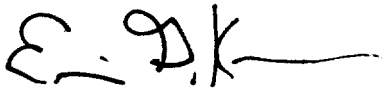
[5] Applications for Consent to the Transfer of Control of the Licenses of MediaOne Group, Inc. and AT&T Corp. and Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control, *Motion to Consolidate of Consumers Union, Consumer Federation of America, and Center for Media Education in* CS Dockets 99-251 and 00-30, at 12 (April 11, 2000).

[6] "[T]he greatest benefit would be in the new competition the [MLG&W] project could stimulate, offering the real promise of more, better and cheaper telecommunications services, to low-income Memphians and public institutions as well as affluent consumers and businesses." *"Better, Cheaper - LGW Plan Should Help Phone, Net Services,"* MEMPHIS COMMERCIAL APPEAL, Aug. 25, 1999, at A6.

deprived of the benefits of a competitive market. In its assessment of the net public interest effect of the proposed AOL/Time Warner combination, MLG&W respectfully urges the Commission to consider the merger's impact on consumers in Memphis, and in cities and neighborhoods across the nation.

Respectfully submitted,

MEMPHIS LIGHT, GAS &
WATER DIVISION



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April 26, 2000