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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

APR 26 2000

In the Matter of	)	
	)	
Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control	)	Dkt. ~~File~~ No. 00-30
	)	
To: Chief, Cable Services Bureau	)	

PETITION TO CONDITION MERGER

RCN TELECOM SERVICES, INC.

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SUMMARY

The proposed merger of AOL, the largest Internet services provider in the country, and Time Warner, one of the largest and most fully integrated cable MSOs, poses significant policy issues to which the Commission must pay close heed. If Time Warner merges with AOL the merged entity will consist of far more than just these two economically dominant entities. Time Warner Entertainment, which owns Time Warner Cable, is 10% owned by AT&T, and 25.5% owned by MediaOne. Cablevision Systems is 33% owned by AT&T. If the merger of AT&T and MediaOne, currently pending at the Commission is approved, AT&T will own more than 35% of Time Warner Entertainment. Combining AT&T's almost 19 million cable subscribers with MediaOne's 5 million, Cablevision's 3.50 million, and Time Warner's 13 million, would provide AOL/Time Warner with close affiliations with entities serving a total of almost 40.5 million subscribers. If to this total is added the 8.3 million subscribers of DirecTV, in which AOL holds an indirect $1.5 billion investment, a total of almost 48.8 million MVPD subscribers would be served by AOL/Time Warner and affiliated entities. This would constitute more than 59% of the total number of MVPD subscribers, or almost twice the existing 30% cap, and on its face should be of deep concern to the Commission.

RCN provides a variety of services to the public, including CLEC, Internet access, and cable and open video services. In the latter segment of its business RCN has found competitive entry to be a series of hurdles, largely thrown up by incumbents such as Time Warner and Cablevision. One of the most serious problems is access to programming, since competitive multichannel video service is of little or no interest to the public if the programming carried by a competitor is not deemed attractive. Programming access is governed by section 628 of the Act,

and implementing sections of the Commission's rules which impose nondiscriminatory obligations on program distributors who fall into certain defined categories.

Time Warner touts itself as the "world's leading media company."[1] Given Time Warner's enormous footprint in the programming and cable distribution business, RCN is concerned that approval of the AOL/Time Warner merger would further enhance Time Warner's ability to exercise its huge market power in the programming field to inhibit or delay competitive multichannel video service entry. To date the Cable Bureau has interpreted section 628 and the Commission's program access rules narrowly, so as to exclude any programming which is carried terrestrially or which is not offered by a vertically integrated programmer. This interpretation has led to the Bureau's rejection of most program access complaints over the last few years. Accordingly, in the same way the Commission approved the SBC/Ameritech merger with the imposition of a series of market-opening conditions, RCN urges the Commission, if it finds public interest benefits sufficient to grant the AOL/Time Warner merger, to impose on the merger applicants a condition which will assure that their programming is made available to other competitors in the MVPD marketplace on a nondiscriminatory basis, and without the limitations such as those the Cable Services Bureau has imposed by its narrow interpretation of section 628 of the Act. If the applicants accepted the obligation to be bound by a merger condition imposing broad programming access obligations on them, one of the major policy issues raised by the dominance of AOL and Time Warner in their respective fields would be substantially alleviated. A proposed condition is attached as Appendix C.

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[1] http:\\www.timewarner.com/corp/about/timewarnerinc/corporate/index.html.

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PETITION TO CONDITION MERGER

RCN Telecom Services, Inc. ("RCN") hereby seeks the imposition of a procompetitive programming access condition on the above-captioned application. RCN provides CLEC and IXC telephone services, high-speed Internet access and traditional cable and OVS broadband distribution services. It is one of the largest ISPs in the country. However, RCN's Comments are limited to the issue of programming access. RCN urges the Commission to condition the AOL/Time Warner merger on a commitment from the applicants (the "Applicants") and their affiliates to provide programming to their multichannel video programming distributor ("MVPD") competitors on nondiscriminatory terms and conditions. The burden of proof with respect to the question whether the proposed merger, on balance, will serve the public interest lies on the Applicants.[2] AOL, the dominant Internet firm, and Time Warner, the second largest vertically integrated MSO in the country, when combined will constitute an enormous presence in the entertainment and programming segments of the telecommunications industry. The bold and ringing affirmation by the Applicants that "there is no possibility that this merger could

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[2] *See In Re Applications of Ameritech Corp; Transferor, and SBC Communications Inc., Transferee*, FCC 99-279 *rel.* Oct. 8, 1999, at ¶ 48 and cases cited therein.

'frustrate or undermine [the Commission's] policies'" [3] is simply incorrect. Their merger poses serious and substantial dangers both from a traditional antitrust perspective and from the broader perspective required by the Communications Act. As a cable overbuilder and the largest open video system (OVS) operator in the country, RCN is attempting to compete in the MVPD marketplace. Unless the applicants, albeit principally Time Warner, are constrained in the exercise of programming market power, the likelihood is that they will dominate the programming marketplace to the point where the public interest in a competitive market for MVPD services will be at serious risk. RCN accordingly seeks the imposition of a merger condition on the Applicants which will assure that programming they produce or distribute will be available on nondiscriminatory terms to the entire MVPD industry.

I. INTRODUCTION

Contrary to the facile assertions of the Applicants to the contrary, the instant proposed merger poses substantial public interest concerns. Standing alone, the combination of AOL, with its dominant position in the Internet sector of the telecommunications industry, and Time Warner's position as one of the largest cable operators and cable program producers in the country, would raise serious issues on which the Commission must carefully reflect. If the pending AT&T/MediaOne merger is approved by the Commission, the AOL/Time Warner merger becomes even more troublesome. While there are numerous public policy issues raised by the combination of AOL and Time Warner, RCN confines itself to just one: the availability to the MVPD industry of vital programming on nondiscriminatory terms and conditions.

[3] Public Interest Statement filed February 11, 2000, at ii.

A. AOL/Time Warner's Share of the MVPD Market

The exact number of Time Warner's cable subscribers is open to some question. Public filings of Time Warner report a variety of numbers.[4] In addition to being one of the largest MSOs in the country, Time Warner is vertically integrated in numerous respects and owns some of the largest cable programming ventures in the country, such as HBO and CNN. Indeed, it claims to be the world's leading media company.[5] Appendix A hereto consists of a chart showing Time Warner's current major relationships with other telecommunications entities. But this is only part of the picture. As the Bureau staff has recognized, it must take account of the pending AT&T/MediaOne merger application in assessing the AOL/Time Warner proposal.[6] Appendix B is a chart focusing on AT&T's and Time Warner's various relationships.

Taken as a whole, these interests and affiliations suggest that extreme caution must be exercised in considering the proposed AOL/Time Warner merger. If the Commission approves both mergers, the result will be that AT&T will hold, cumulatively, more than a 35% interest in Time Warner Entertainment, along with its 33% interest in Cablevision Systems.[7] As even

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[4] *See* Supplemental Information filed March 21, 2000 at 8 (12.65 million) and at 15 (approximately 13 million). AOL Time Warner's Form 425, filed with the SEC on April 3, 2000, at 1 indicates the number is 12.6 million. In their Applications and Public Interest Statement filed on February 11, 2000, at n. 23 the Applicants claim that Time Warner has 11.2 million subscribers. This Petition relies on the "approximately 13 million" figure which appears to encompass certain cable holdings other than those in Time Warner Entertainment.

[5] *See, in general,* Supplemental Information filed by the Applicants at 7-15, and Time Warner's Web page at http://www.timewarner.com, which provides extensive detail on Time Warner's massive holdings in cable networks, cable systems and other media-related activities.

[6] Letter from D. Lathen to Andrew Schwartzman, Feb. 14, 2000.

[7] *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules*, Docket No. 98-82, *rel.*, Oct. 20, 1999,

AT&T admits, it currently controls approximately 18.959 million cable subscribers, or 23% of U.S. cable subscribers, and if its total existing and proposed cable ownerships are included, the figure rises to approximately 40%.[8] Approval of both mergers would thus bring together AT&T with its dominance of the cable industry, Time Warner, with the second largest cable subscribership and unmatched programming resources, and AOL, the largest ISP in the country with some 23 million subscribers.[9] In addition to its dominant position in the Internet, AOL also owns $1.5 billion worth of stock in GM, which in turn indirectly owns DirecTV, the largest DBS provider in the country with 8.3 million subscribers. To permit Time Warner and DirecTV to share such an affiliation poses substantial risks to competition in the MVPD universe. While the Applicants' FCC filings list other associated entities, such as Road Runner and various cable programming services, they neglect to mention that, in total, they serve approximately 100 million subscribers.[10]

The applicants contend that AOL's investment in GM, which indirectly owns DirecTV, "is far too insubstantial to be deemed attributable under *any* FCC attribution standards. As a result, AOL has no ability to influence the decision-making of DirecTV in any way."[11] Given the

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17 CR 1104. at App. C, item iii(c). On April 19, 2000, it was announced that AT&T and Cablevision have reached agreement for the sale by Cablevision of all its Boston-area cable properties to AT&T. See Communications Daily for April 19, 2000, at 5.

[8] 18.959 million AT&T subscribers rises to 23.773 million after the MediaOne merger. If the Time Warner subscribers as calculated by AT&T are added, the total is 33.523 million or 40.7% of the nationwide total. *See* Letter of D. Garrett to D. Lathen filed in the AT&T/MediaOne proceeding, March 17, 2000 at 2.

[9] Together with Compuserve. Supplemental Information, at 4.

[10] *See* AOL/Time Warner SEC Form 425 filed April 3, 2000, at 1.

[11] Public Interest Statement, at 23 (emphasis in original).

national scope of DirecTV's service and its very rapid growth, this ownership interest can hardly be dismissed so lightly.[12] In its recent *Cable Affiliation Report and Order* addressing in detail the cable affiliation rules,[13] the Commission emphasized that application of affiliation guidelines should be strongly contextual, observing that a variety of statutory provisions and Commission rules govern the conduct of cable system owners and limit what types of ownership interests or other relationships "are sufficient that two legally separate entities should be treated as if they were commonly owned or managed or subject to significant common influence."[14] The Commission also observed in the *Cable Attribution Report and Order* that the Cable Attribution Notice was intended to assess what rules should apply to "financial relationships and multiple business interrelationships that, although not individually attributable, should be treated as attributable interest [sic] when held in combination."[15]

Although there are currently no statutory provisions or cross-ownership rules barring acquisition of DBS interests by cable companies, the legislative history of the Cable Act of 1992 clearly reflects concern about the issue. The Conference Report accompanying that legislation notes that the Commission is expected to "exercise its existing authority to adopt such limitations

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[12] Similarly, the observation that Time Warner faces "significant competition from a wide range of rival [MVPDs] in its local franchise areas" (*Id.* at 23 n. 25) is almost frivolous. In Manhattan, for example, Time Warner serves 1.2 million subscribers and RCN serves about 50,000, or less than 5% of the total. While there are undoubtedly scattered SMATV operators in Manhattan, the total subscribership of all Time Warner's competitors in that market must be very small indeed. When RCN sought to put paid advertising on Time Warner's Manhattan cable system, it was turned down peremptorily, and without any explanation.

[13] *Cable Attribution Report and Order, supra*, n.7.

[14] *Id.* at ¶ 2, and, to the same effect, ¶¶ 4,105.

[15] *Id.*, at ¶ 7.

should it be determined that such limitations would serve the public interest."[16] In its *NPRM* considering the desirability of adopting a variety of DBS rules, the Commission noted that in respect to the adoption of DBS cross-ownership rules, it could maintain the flexibility of addressing the issue on a case by case basis.[17] It inquired specifically about whether a limiting cross-ownership rule would be appropriate in particular for large cable operators.[18]

It is accordingly appropriate for the Commission to consider whether the public interest would be served by allowing Time Warner to acquire a significant degree of influence on DirecTV. According to the Commission's most recent assessment of the state of competition in the MVPD industry, the DBS segment of the market has risen to 12.5%.[19] DirecTV is one of the largest MVPD operators in the country, and the leading DBS provider, with more than 8.3 million customers as of March 30, 2000,[20] and, as of June, 1999, a 72% share of the domestic DBS market.[21] While AOL's relatively small investment in GM may not give it any significant degree of voting power, it naturally has led to a high degree of cooperation between AOL and

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[16] H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess (1992).

[17] *Policies and Rules for the Direct Broadcast Satellite Service*, 13 FCC Rcd. 6907, 6939 (1998).

[18] *Id.* at 6941.

[19] *Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, FCC 99-418, *rel.* Jan. 14, 2000, at ¶ 15.

[20] Http://www.skyreport.com/skyreport/apr2000/040500.htm#dtv.

[21] *Annual Assessment*, at ¶ ¶ 15, 70.

DirecTV. In the second half of 2000 AOL and DirecTV will launch an AOL-TV initiative, including special programming, set-top boxes and other elements of close cooperation.[22]

Accordingly, the relatively small equity investment in DirecTV's ultimate 100% parent held by AOL cannot so lightly be dismissed as falling below the attribution rules' radar. As said by a witness in the Bureau's recent public forum on the AT&T/MediaOne merger: "You can't possibly chart it, you cannot possibly put monitors in, you can't possibly deal with the myriad ways that relationships in this kind of situation go back and forth."[23] Nor is the problem eliminated by the fact that AOL's ownership in GM is in the form of a preference stock which ordinarily does not vote. If anyone believed that DirecTV's management would not give AOL/Time Warner's views on programming issues more weight than its small equity interest would justify if noses were being counted, he or she would be very naive indeed.[24] Put differently, the Applicants' insistence that AOL has "no ability to influence" DirecTV because it has only a small equity interest is disingenuous.[25]

[22] Http://www.skyreport.com/skyreport/apr2000/041300.htm#dtv.

[23] Andrew Schwartzman, AT&T/MediaOne Merger, MM CS Docket No. 99-251 Public Forum, February 4, 2000, transcript at 98.

[24] To be sure, AOL would probably have little influence on GM's management in respect to automobile manufacturing, even if it had a significantly larger equity position. That, however, is not the issue before this Commission.

[25] As is true in cases where the issue is whether control exists *vel non*, the analysis must be based on the facts and the totality of the circumstances, including a careful appraisal of the influence any particular investor has on the corporation's management and policies. *See, e.g., SEC v. Kavanagh*, 1 F. Supp. 2d 337, 366 (S.D.N.Y. 1998), and *Rochester Tel. Corp. v. U.S.*, 307 U.S. 125, 145-6 (1939).

Aggregating all the MVPD subscriberships associated with Time Warner, AT&T, MediaOne, Cablevision, and DirecTV produces the following numbers:

Entity	Subscribers (millions)
AT&T	18.95
Time Warner	13.00
MediaOne	5.00
Cablevision	3.49
DirecTV	8.30
Total:	48.74

This total constitutes 59.22% of the total MVPD subscribership of 82.3 million.[26] Clearly, this is a position of overwhelming dominance. When AOL's 23 million subscribers are added, AOL/Time Warner will, together with the other entities listed, provide service to some 71 million subscribers to MVPD and Internet services, not counting Time Warner's millions of cable programming subscribers or the Internet subscribers served by AT&T, Time Warner, MediaOne and Cablevision.[27] Indeed, as noted already the Applicants themselves acknowledge publicly, albeit for some reason not in their FCC filings, that they are serving 100 million subscribers without reference to AT&T, MediaOne, or Cablevision.[28] The Commission's statutory task in this matter is not to make antitrust judgments. Nevertheless, given the degree of cross-interests apparent in this matter, the Commission should, at a bare minimum, conduct a

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[26] The total MVPD subscribership estimate is taken from AT&T's letter of March 17, 2000, to the Cable Services Bureau concerning its percentage of MVPD subscribers, at n.1. AT&T advises the CSB in its letter that the figure is derived from the Kagan Media Index, dated January 31, 2000.

[27] These subscribers are excluded from the total to avoid double counting, *i.e.* counting twice a subscriber to both Time Warner cable and Road Runner service.

[28] *See* n. 10, *supra.*

Herfindahl-Hirschman Index (" HHI") analysis to test the degree of dominance in the MVPD market structure which would occur if the AOL/Time Warner merger occurred, or if both the AOL/Time Warner merger and the AT&T/MediaOne merger occurred. The Commission has conducted such studies in the past in the context of programming markets and the present record appears to be an appropriate context in which to do so again.[29]

RCN recognizes that cable service and Internet service cannot simply be added together. Internet and ISP services are not part of the MVPD universe.[30] Nevertheless, one of the convergences that is occurring is of video and other broadband services, epitomized by streaming video, web pages presented on television receivers, and the like. As noted above, AOL and DirecTV will shortly roll out some blended TV and Internet initiatives, and these activities are undoubtedly indicative of more to come throughout these industries.[31] In sum, the AOL/Time Warner combination is very likely to exercise substantial power in the programming marketplace, to the point where the Commission would be derelict if it failed to secure some market-opening concessions from the Applicants.

Nor would the proposed safeguards relating to video programming filed by AT&T last week in connection with the pending AT&T/MediaOne merger provide adequate assurances that

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[29] *See, e.g., Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, FCC 99-418, *rel.* January 14, 2000, at ¶¶ 175-177.

[30] Section 522 of 47 U.S.C. defines the term multichannel video programming distributer as "a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming."

[31] It is one of the Commission's statutory obligations to make expert judgments about where future industry develops will occur. *See Ameritech/SBC, supra,* at ¶¶ 50-51.

programming would be available to MVPD competitors on a nondiscriminatory basis, even if Time Warner were willing and able to establish such safeguards in its own operations.[32] Those safeguards are complex, convoluted, and awkward. They would require a significant degree of enforcement by the Commission and monitoring by other industry participants. They inappropriately put the Cable Services Bureau in the role of selecting individuals to play a variety of private sector roles and, at best, are excessively intrusive and commercially unrealistic. In fact, the very complex nature of AT&T's proposals serves amply to demonstrate that the extent of the interrelationships proposed in these merger applications is inappropriate and should simply be disallowed in the absence of affirmative commitments to nondiscriminatory access to programming.

B. The Need For A Program Access Condition

Over the last three years RCN has on numerous occasions brought to the Commission's attention the critical importance to nascent MVPD competitors of access to a wide variety of high-quality programming.[33] Programming is, of course, the one essential component – the very heart – of the MVPD industry. If competitors do not have reasonable access to programming, nothing else much matters. Consumers of MVPD services do not care about industry structure, technical details, legal theories, or economic models. They care about programming and the price they have to pay for that programming. The Commission, of course, is fully aware of the

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[32] Letter of AT&T to Magalie Roman Salas, in CS Docket No. 99-251 and MM No. 92-264, dated April 18, 2000.

[33] *See, e.g.*, Comments of RCN Corporation in CC Docket No. 99-230, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, filed Aug. 6, 1999, at pp. 18-23.

critical and central role of programming in the development of competition in the MVPD marketplace.[34] Time Warner is one of the principal producers and distributors of MVPD programming. In its *Sixth Annual Report on MVPD Competition,* the Commission identified Time Warner as one of the four largest purchasers of video programming for distribution at the household or MDU level, with a share of 15.95%.[35]

The importance of securing adequate programming has long been recognized by the Communications Act. Section 628 of the Act[36] was passed by Congress in 1992 to redress widespread programming abuses perpetuated by vertically integrated cable operators, who often refused to provide programming to emerging MVPD competitors. The overriding importance of the availability of programming to an MVPD has compelled RCN to devote disproportionate resources to such efforts. In 1998 RCN filed a formal program access complaint against Cablevision Systems, Inc., protesting its refusal to provide the full range of local area sports programming to RCN's New York City OVS system.[37] Others have similarly filed program

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[34] See *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, Sixth Annual Report, FCC 99-418, *rel.* January 14, 2000, at ¶ ¶ 168-205.

[35] *Id.*, at ¶ 174. The other three largest participants were identified as AT&T (20.5%), DirecTV (9.23%) and Comcast (8.23%) – all as of June, 1999. *Id.*

[36] 47 U.S.C. § 548. Section 628 of the Act has been implemented by the Commission in 47 C.F.R. §§ 76.1001-4. *See Report and Order*, *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, 8 FCC Rcd 3359 (1993) ("*Program Access Order*").

[37] *RCN Telecom Services Of New York, Inc. v. Cablevision Systems Inc., et al*, (CSB) DA 99-2094, *rel.* October 7, 1999. The Bureau denied RCN's complaint which is currently on appeal at the full Commission. Other cable MSOs with which RCN competes have threatened to curtail or cut off RCN's access to local area sports.

access complaints against cable MSOs, but the Bureau has, almost without exception, denied these complaints. It has been the Bureau's view that section 628 of the Act and the Commission's implementing rules should be construed to be inapplicable to cases in which the relevant programming has been distributed by terrestrial means.[38] As a consequence, the MSOs have simply altered the distribution technology they employ, and then refuse to make their programming available to competitors.[39] Similarly, because the statute and the rules speak of "vertically integrated" programmers, competitive MVPDs have been unable on occasion to secure programming where the producer or distributor is not affiliated with a cable operator.[40]

RCN disputes the Bureau's narrow interpretation of section 628 and the relevant rules. It contends that, taken as a whole and in the context of the Communications Act, section 628 was intended to compel programmers to make their programming available in general on nondiscriminatory terms even if the programming is distributed by terrestrial means, and particularly where it had previously been distributed by satellite and the shift in transmission method was designed to evade the strictures of section 628. To date, however, neither the Bureau nor the full Commission has shown any disposition to accept this broader interpretation. Under the circumstances, RCN suggests that the Commission seek to accomplish the pro-

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[38] *See, e.g., RCN Telecom Services of New York, Inc. v. Cablevision Systems, Inc., et al, supra,* at ¶ 26.

[39] Most recently this problem was brought to the Commission's attention in the public forum held Feb. 4th, 2000 on the proposed AT&T/Media One merger, MM CS Docket No. 99-251. *See* remarks of Peter Glass for Seren Communications, Tr. at 142-149.

[40] *See, e.g., Dakota Telecom, Inc. v. CBS Broadcasting, Inc. d/b/a Midwest Sportchannel and Bresnan Communications*, CSR-5381-P, DA 99-1276 *rel.* July 1, 1999 (complaint denied because programming non-vertically integrated).

competitive goal of wide availability of MVPD programming by conditioning the instant merger on the Applicants' agreement to make programming available to their competitors on nondiscriminatory terms and conditions, notwithstanding the existing language in the Act, the rules and Commission precedent. To be specific, RCN proposes that the Applicants agree to be bound by a condition which requires nondiscriminatory access to Time Warner's programming without reference to the mode of delivery and without the requirement of vertical integration.[41] Doing so would go a long way to assure that the enormous economic weight which the Applicants will enjoy in the programming area will be wielded in a pro-competitive way.

RCN therefore urges the Commission to impose conditions to approval of the merger as it did in the case of the *SBC/Ameritech* merger.[42] Specifically, RCN seeks as a condition to approval of the merger that the Applicants agree to provide programming to other MVPD competitors without regard to the specific language of section 628 of the Act or the Commission's program access rules, but instead as set forth in Appendix C hereto. It is interesting to note that in regard to the so-called "open access" issue, *i.e.*, the matter of unaffiliated ISPs being carried by the Applicants, they have offered voluntarily to assure that they would not discriminate.[43] All RCN seeks is a similar commitment, albeit one imposed by the Commission, in respect to programming.

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[41] Appendix C hereto contains a draft Condition to accomplish this purpose.

[42] *See Ameritech Corp, Transferor, and SBC Communications, Inc. Transferee*, FCC 99-279, *rel.* Oct. 8, 1999.

[43] Public Interest Statement, at pp. 14-16.

II. THE COMMISSION HAS AMPLE AUTHORITY TO IMPOSE SUCH A CONDITION ON THE APPLICANTS

The Commission's ability to impose conditions on a proposed merger which threatens to harm consumers is clear.[44] In view of the Commission's extended discussion of its authority to evaluate proposed mergers and impose conditions set forth in its recent approval of the Ameritech and SBC merger, RCN relies on that discussion without further citation. RCN understands that its proposed condition goes beyond the scope of section 628 of the Act and the Commission's implementing rules as they have been previously interpreted by the Commission. Nevertheless, the Commission has ample legal authority to impose the condition requested by RCN. The program access rules contained in section 628 establish the minimum activities that are prohibited, and provide the Commission with sufficient flexibility to prohibit additional types of conduct. By entitling Section 628(c) "Minimum Contents of Regulations," Congress gave the Commission authority to adopt additional rules that will advance the purposes of Section 628; it did not limit the Commission to adopting rules only as set forth in that statutory provision. Moreover, in implementing section 628(b) of the Act, the Commission specifically indicated that its authority extended beyond vertically integrated programmers and cable operators, stating:

> This provision is a clear repository of Commission jurisdiction to adopt additional rules or to take additional actions to accomplish the statutory objectives should additional types of conduct emerge as barriers to competition and obstacles to the broader distribution of satellite cable and broadcast video programming. In this regard it is worth emphasizing that the language of § 628(b) applies on its face to all cable operators.[45]

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[44] *In re Ameritech/SBC, supra* at ¶¶ 1,3, and 46-54.

[45] *In the Matter of Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity*

Even if the Bureau's narrow reading of section 628 were correct, the Commission would still have full authority to take appropriate remedial action in this instance. The Commission's authority under the Act to address program access issues encompasses the concern that "no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer" and the duty to "ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of the video programming of such programmers to other video distributors."[46] Sections 4(i) and 303(r)[47] of the Act give the Commission broad authority to adopt rules or policies, not otherwise inconsistent with law, as it deems necessary to implement the other provisions of the Act. Section 4(i) provides, in part, that the Commission may "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." Section 303(r) grants the Commission authority to "make such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act..."

The Commission has interpreted these sections of the Act broadly on many occasions, and these interpretations have been upheld by the courts. For example, when the cable inside

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in Video Programming Distribution and Carriage, 8 FCC Rcd. 3359, 3374 (1993).

[46] *See* 47 U.S.C. § 533 (f)(2).

[47] 47 U.S.C. §§ 154 (i) and 303 (r).

wiring rules were under consideration, incumbent cable operators argued that the forced disposition of cable home run wiring goes beyond the narrow language of sections 623(b) and 624(i) of the Act,[48] which do not encompass the sale of such wiring and restrict the Commission's authority to regulate cable home wiring. The Commission rejected these arguments, relying on its authority under sections 4(i) and 303(r):

> We conclude that the Commission has authority under §§ 4(i) and 303(r) of the Communications Act, in conjunction with the pervasive regulatory authority committed to the Commission under Title VI, and particularly § 623, to establish procedures for the disposition of MDU home run wiring upon termination of service. *The Commission may properly take action under § 4(i) even if such action is not expressly authorized by the Communications Act, as long as the action is not expressly prohibited by the Act and is necessary to the effective performance of the Commission's functions.*[49]

Over 30 years ago the Supreme Court, in *U.S. v. Southwestern Cable Co*, 392 U.S. 157 (1968), sustained the FCC's assertion of regulatory authority over cable television systems even though no provision of the Act as it then existed purported to give the Commission such authority. In doing so, the Court emphasized at length the breadth and scope of the Commission's authority:

> The Commission's authority to regulate broadcasting and other communications is derived from the Communications Act of 1934, as amended. The Act's provisions are explicitly applicable to 'all interstate and foreign communication

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[48] 47 U.S.C. §§ 543(b) and 544(i).

[49] *Telecommunications Services, Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring*, Report and Order and Second Further Notice of Proposed Rulemaking, CS Docket 95-184 and MM Docket No. 92-260, 13 FCC Rcd. 3659, ¶ 83 (1997) ("*Inside Wiring Order*"), *recon. pending and appeal pending sub nom. Charter Communications, Inc. v. FCC*, Case No. 97-4120 (8th Circuit). (Emphasis added).

> by wire or radio ***.' 47 U.S.C. s 152(a). The Commission's responsibilities are no more narrow: it is required to endeavor to make available*** to all the people of the United States a rapid, efficient, Nation-wide, and world-wide wire and radio communication service ***." 47 U.S.C. s 151. *Id.* at 167-8 (footnotes omitted).

Similarly, in affirming the very substantial expansion of the Commission's jurisdiction to encompass regulation of cable, the Court observed that "[W]e may not, 'in the absence of compelling evidence that such was Congress' intention . . . prohibit administrative action imperative for the achievement of an agency's ultimate purposes.'"[50]

These principles have been recently reaffirmed. In *City of Dallas, Texas v. FCC*, 165 F.3d 341 (5th Cir. 1999), the court affirmed the Commission's contention that it had authority under section 4(i) of the Act to allow non-LECs to provide OVS service pursuant to section 653(a)(1),[51] even though that section expressly authorizes only LECs to provide such service: "The fact that the first sentence of § 653 (a)(1) expressly authorizes LEC's to provide OVS service, however, does not bar the FCC from permitting other entities to provide it, for the FCC has ancillary authority under § 4(i) of the Communications Act to permit non-LEC's to be certified as OVS operators."[52] As the court observed, "if the FCC had ancillary authority to adopt an entire

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[50] 392 U.S. at 178, quoting from *Permian Basin Area Rate Cases,* 390 U.S. 747.

[51] 47 U.S.C. § 573(a)(1).

[52] *Id.*, 165 F.3d at 351-2, citing *United States v. Southwestern Cable Co.*, 392 U.S. 157 and *General Tel Co. of Southwest v. United States*, 449 F.2d 846, 853-4 (5th Cir. 1971).

regulatory regime for cable television, it surely has ancillary authority to extend to non-LEC's the permission to operate OVS's."[53]

The Commission cannot, of course, rely on its ancillary authority to take action which is otherwise forbidden by the Act. But this limitation is irrelevant: RCN does not contend that sections 4(i) and 303(r) permit the Commission to regulate terrestrial delivery of cable programming even though section628 forbids doing so. Section 628 does not forbid the Commission to do so; it merely affirmatively grants authority to regulate access at a minimum to satellite-distributed cable programming. Moreover, the important public policy which is expressed in section 628 and in the Commission's orders and policies governing program access -- to encourage competitors' access to cable programming -- expands the discretion enjoyed by the Commission in relying on its ancillary powers: "Discretion is particularly broad when an

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[53] *Id.* at 352. *See also Mobile Communications Corp (MTEL) v. FCC*, 77 F.3d 1399 (D.C. Cir. 1999), *cert. den.* 117 S.C. 81, in which the Court resoundingly sustained the Commission's decision to rely on § § 4(i) and 303(r) of the Act to expand its auction authority notwithstanding narrower language in § 309(j) of the Act specifically setting forth such authority. The court in *MTEL* quoted from its own earlier decision in *Texas Rural Legal Aid, Inc. v. Legal Serv. Corp*, 940 F.2d 685 (D.C. Cir. 1991): "[A] congressional prohibition of particular conduct may actually support the view that the administrative entity can exercise its authority to eliminate a similar danger." 940 F.2d at 694. *See also Mourning v. Family Publications Service, Inc.*, 411 U.S. 356, 372-3 (1973) (a congressional decision to prohibit certain activities does not imply an intent to disable the relevant administrative body from taking similar action with respect to activities that pose a similar danger). In *North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th Cir. 1985), the Commission, relying on § 4(i), required the Bell holding companies to file capitalization plans for equipment subsidiaries, although the Communications Act conferred no authority over holding companies and the legislative history suggested that Congress had considered and rejected such authority. The court sustained the Commission, because it found that "Section 4(i) empowers the Commission to deal with the unforeseen – even if that means straying a little way beyond the apparent boundaries of the Act – to the extent necessary to regulate effectively those matters already within the boundaries." *Id.* at 1292.

agency is concerned with fashioning remedies and setting enforcement policy."[54] As the Supreme Court observed in *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974): "When interpreting a statute, the court will not look merely to a particular clause in which general words may be used, but will take in connection with it the whole statute (or statutes on the same subject) and the objects and policy of the law, as indicated by its various provisions, and give to it such a construction as will carry into execution the will of the Legislature," quoting *Brown v. Duchesne*, 19 How. 183, 194, 15 L.Ed. 595 (1857).[55] These precedents and principles provide, together with those relied upon by the Commission in its *Ameritech/SBC Order*, the Commission with ample authority to impose the program access condition on the Applicants set forth in Appendix C hereto since the proposed merger threatens an anticompetitive degree of dominance in the MVPD marketplace.

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[54] *Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 857 (D.C. Cir. 1970), *cert. denied*, 403 U.S. 923 (1971).

[55] *See Herman & MacLean v. Huddleston,* 459 U.S. 375, 387 (1983) (canons of construction "long have been subordinated to the doctrine that courts will construe the details of an act in conformity with its dominating general purpose"). Similarly, in *New England Telephone & Telegraph Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987, *cert. denied*, 490 U.S. 1039 (1989), the court sustained the imposition of a refund obligation on carriers for certain charges which produced revenue in excess of an authorized rate of return, even though the Communications Act's only provision explicitly mentioning refunds did not apply to the circumstances, because refunds were necessary to remedy the violation of the Commission's rate of return order. *Id.*, 826 F.2d at 1107-09.

WHEREFORE RCN urges the Commission, if it finds that grant of the merger application would otherwise serve the public interest, to impose the Condition set forth in Appendix C hereto as a condition to approval of the AOL/Time Warner merger.

Respectfully submitted,

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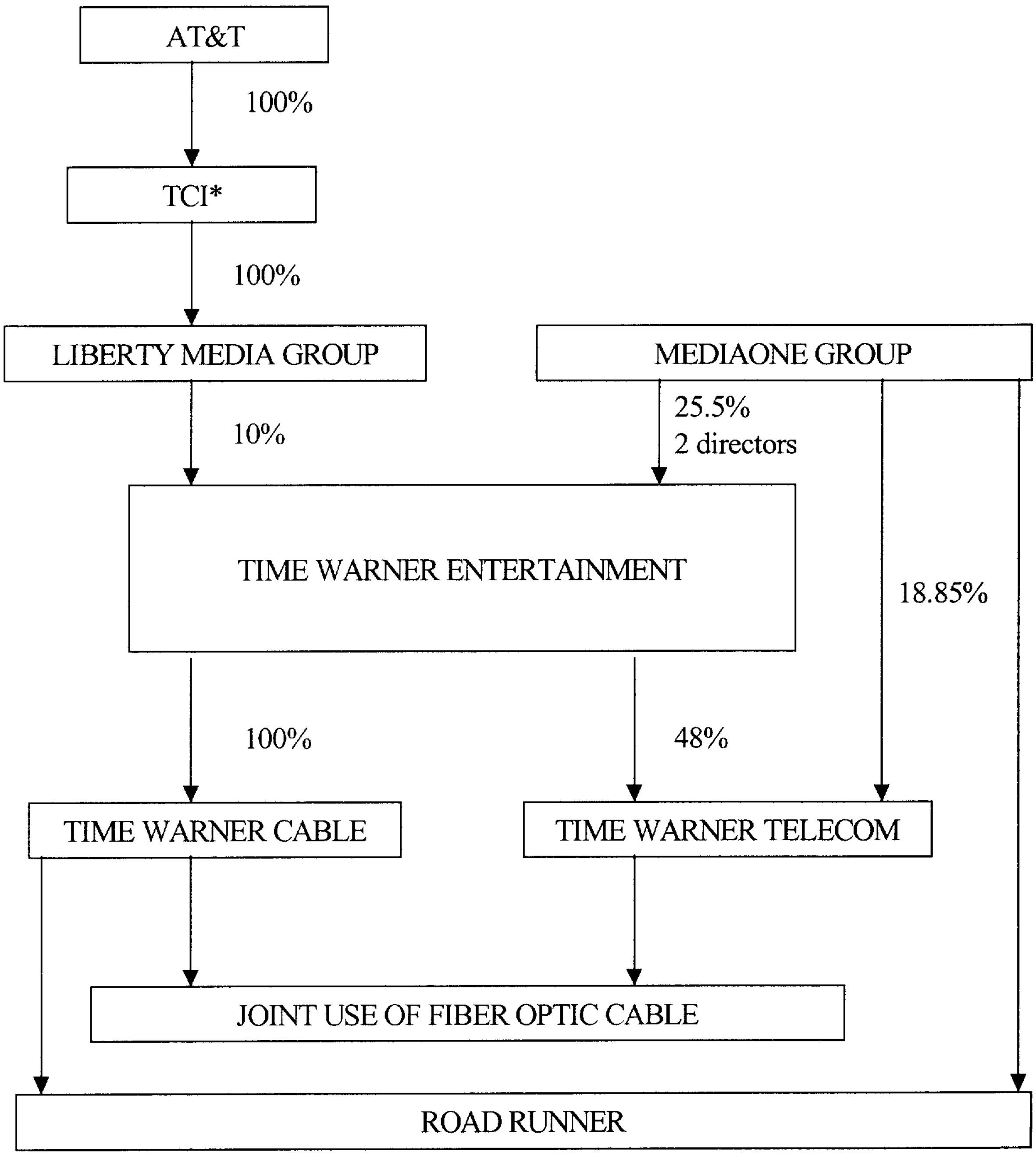
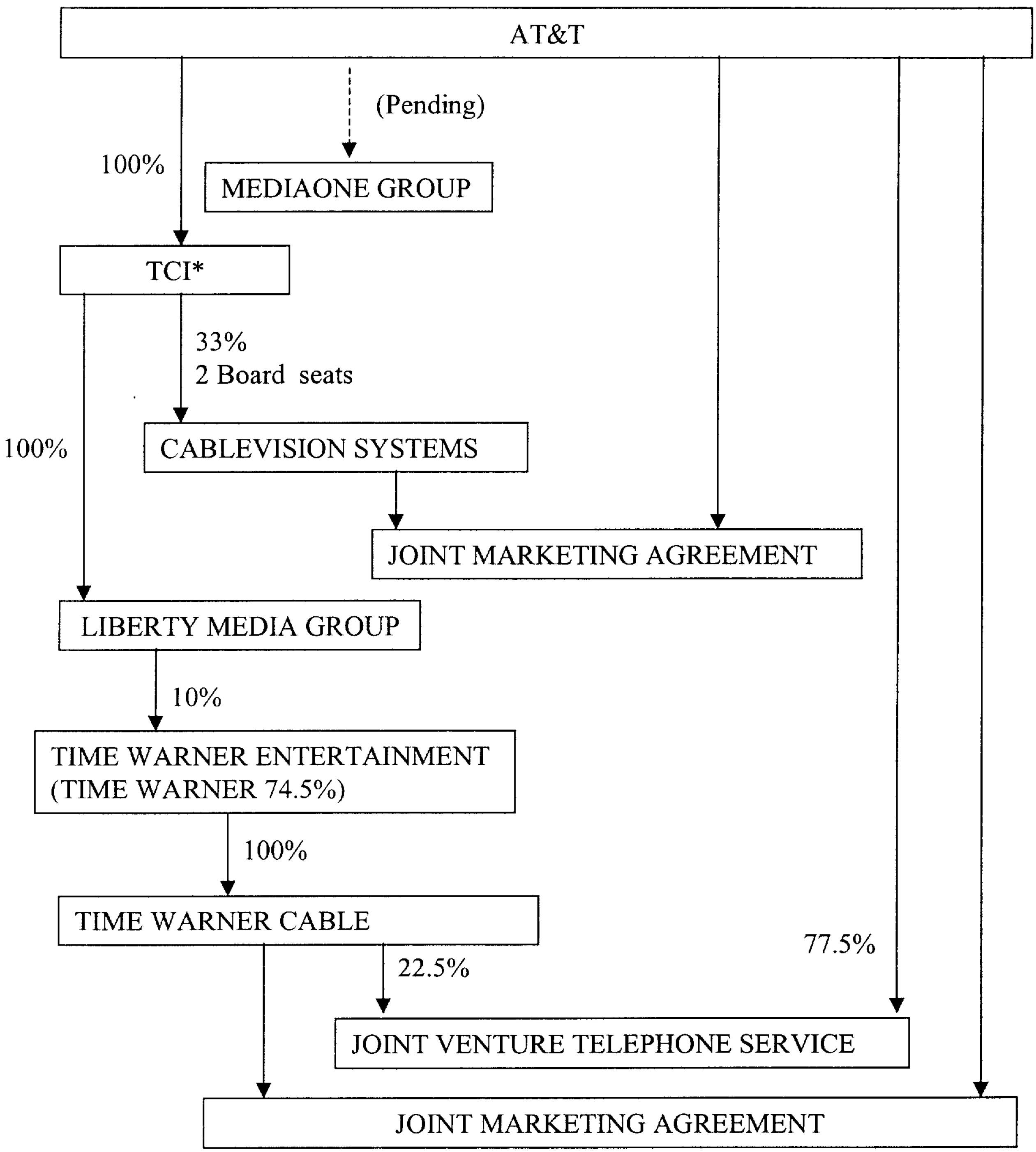
April 26, 2000.

APPENDIX A



* Renamed AT&T Broadband and Internet Services

APPENDIX B



*Renamed AT&T Broadband and Internet Services

APPENDIX C

Proposed Program Access Condition to Approval of AOL/Time Warner Merger

Neither AOL Time Warner, nor any other entity in which AOL Time Warner owns an affiliated interest, or which owns an affiliated interest in AOL Time Warner (collectively, the "Merger Parties"), shall engage in any unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or prevent any multichannel video programming distributor ("MVPD") from providing programming to subscribers or consumers. The Merger Parties shall not discriminate or cause any other party to discriminate in the prices, terms, and conditions of sale or delivery of MVPD programming among or between competing MVPDs, including affiliates of the Merger Parties, provided, however, that the provisions of section 76.1002 of the rules (47 C.F.R. § 76.1002), appropriately modified to conform to this condition, shall be applicable to the enforcement of this condition.

Any MVPD aggrieved by conduct that it alleges constitutes a violation of this condition may commence an adjudicatory proceeding at the Commission as provided for in section 76.1003 of the Commission's rules, (47 C.F.R. § 76.1003). The Commission may itself proceed as otherwise provided in the Communications Act of 1934, as amended, 47 U.S.C. § 151 *et seq.*, and in its rules or as set forth in the Order associated with this condition, to investigate and act upon any claimed instance of violation of this condition.

As used herein an affiliated interest shall mean an equity investment of one percent or more, debt interest of ten percent or more, or any common officers, directors, or employees. The definitions set forth in section 76.1000 of the rules (47 C.F.R. § 76.1000) shall govern the meaning of any term used in this condition to the extent applicable.

CERTIFICATE OF SERVICE

I hereby certify that on the 26th day of April, 2000, a copy of the foregoing Petition To Condition Merger was served on the following parties via messenger or, if marked with an asterisk, by first class postage-paid U.S. mail:

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