

ORIGINAL

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

MAY 11 2000

In the Matter of

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Applications of America Online, Inc.
and Time Warner Inc. for
Transfers of Control

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File No. 00-30

To: Chief, Cable Services Bureau

**REPLY COMMENTS
OF
RCN TELECOM SERVICES, INC.**

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May 11, 2000

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SUMMARY

In its initial comments in this docket, RCN Telecom Services, Inc., a nascent MVPD competitor, urged the Commission to impose, as a condition precedent to grant of the AOL Time Warner merger, that the merged entity agree to make its programming available on just, reasonable, and nondiscriminatory terms to all MVPD competitors. Such a condition is justified by the dominant role AOL Time Warner will play in the converging world of Internet and video programming. AOL, of course, is the dominant Internet services provider in the country, and Time Warner is the largest media company in the world, and the second largest vertically integrated cable company. Combined, AOL and Time Warner serve tens of millions of subscribers and would have enormous power in the marketplace. Time Warner itself has described the projected merger as one of "global importance" and it is fully justified in doing so.

Moreover, AT&T and MediaOne have substantial investments and other business relationships with Time Warner. If the Commission were to approve both mergers as proposed, these four entities would control almost 60% of the MVPD market as well as a high percentage of the cable modem market. RCN accordingly urges the Commission to consider both mergers on a coordinated basis, and to take careful account of AT&T's numerous interlocking relationships with AOL and Time Warner in assessing the public interest issues presented by the merger.

Like other initial commenters, RCN has suffered from Time Warner's seemingly inveterate tendency to use a variety of anticompetitive means to inhibit or delay MVPD competition. Time Warner has sought to delay RCN's entry as an open video system operator and to keep it out of specific MVPD markets in New York City. In light of this history, the Commission must be particularly cautious in approving the proposed merger.

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DECLARATION OF SCOTT BURNSIDE

**Before the
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Pursuant to the Commission's Public Notice,¹ RCN Telecom Services, Inc. ("RCN"), by the undersigned counsel, hereby files its Reply Comments in the above-captioned docket. In a Petition to Condition Merger filed on April 26, 2000, (the "Petition"), RCN urged the Commission, if it were otherwise disposed to grant the merger of AOL and Time Warner, to impose a condition requiring the parties to agree to make their programming or that of their affiliates available on a nondiscriminatory basis to their MVPD competitors.

RCN contended that, given the enormous market dominance AOL Time Warner would have in the programming and related fields, the public interest required that they agree to make their programming available to other MVPD competitors on nondiscriminatory terms. This condition, RCN contended, is required by the AOL/Time Warner merger itself, but is even more

¹ DA 00-689, *rel.* March 27, 2000.

clear and more urgent if the Commission were also to grant the AT&T/Media One merger, because AT&T, through its investments and other business relationships with Time Warner, would then have a very strong dominating position in the cable and programming industries. Other initial commenters raised similar concerns. *See* Comments of SBC Communications, Inc., and Consumers Union, *et al.* A number of commenters provided the Commission with evidence that Time Warner has demonstrated its determination to oppose new competitors wherever they appear, including behind-the-scenes efforts to manipulate local governments or processes to freeze out or delay competitors. RCN will not burden this record with repetition of its initial contentions, but instead will confine itself to making a limited number of additional points in light of the materials filed by other commenters.

I. AOL TIME WARNER'S SHARE OF THE MVPD MARKET

RCN's principal concern with the proposed merger is that the parties would have such a commanding presence in the programming market that their ability to discriminate in the distribution of programming poses a serious threat to existing and emerging MVPD competitors. Briefly put, 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 and the world's largest media enterprise, poses significant policy issues to which the Commission must pay close heed. Demonstrating the crucial importance of the proposed merger is no more difficult than quoting from Time Warner's own 1999 annual report:

The planned merger of Time Warner and America Online is a development of global importance, universally recognized as the start of a new era in global media. AOL Time Warner will be the

first company fully prepared to compete in the borderless world of digital interactivity.²

Time Warner's dominant role in the MVPD marketplace can be demonstrated in countless ways. The following observations come from various Time Warner documents including its 1999 Fact Book and Annual Report:

- TNT, basic-cable's leader in prime time delivery of key adult demographics, reached a distribution milestone in 1998 of 75% of U.S. television homes, joining CNN and TBS (both Time Warner properties) as three of only six such networks to have achieved this level of distribution.³
- By year end 1999, TBS was distributed to more than 78 million U.S. subscribers and TNT was distributed to 77 million. Cartoon network passed 60 million U.S. subscribers.⁴
- Time Warner owns 3 of 5 top-rated basic-cable networks.⁵
- Time Warner's HBO and Cinemax served 35.7 million subscribers in 1999.⁶
- Time Warner produced 10 of Basic Cable's top 10 theatrical movies aired in 1999.⁷
- Time Warner's cable revenues in 1999 were \$5.374 billion.⁸

² Time Warner Annual Report, at 7.

³ 1999 Factbook, at 2.

⁴ Time Warner Annual Report, at 9. According to Time Warner's 1999 10-K, TBS serves approximately 78.5 million subscribers and TNT serves approximately 77.1 million. *Id.* at 6.

⁵ 1999 Factbook, at 3.

⁶ Time Warner, Annual Report, at 3, 11.

⁷ *Id.*, at 8.

⁸ Time Warner 10-K for 1999, at 60.

- Time Warner's 1999 revenues were \$27.3 billion.⁹
- There are over 100 million paying subscribers for AOL Time Warner's services.¹⁰
- "Cable's strategic position in the digital revolution would be hard to overstate."¹¹

If Time Warner merges with AOL the merged entity will consist of far more than just these two economically dominant entities. Time Warner, which, through Time Warner Inc., owns Time Warner Cable, is 10% owned by AT&T, and Time Warner Entertainment is 25.5% owned by MediaOne. Cablevision Systems is 33% owned by AT&T. Whether or not the merger of AT&T and MediaOne, currently pending at the Commission is approved, AT&T will have substantial ownership interests in 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 approximately 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. Even if the AT&T/Media One merger is rejected, this total drops only by some

⁹ Time Warner Annual Report, at 40

¹⁰ *Id.*, at 43.

¹¹ Time Warner 1999 Factbook, at 2.

5 million subscribers, leaving a total of 43.8 million, or approximately 53% of the nation's total MVPD subscribers.

Other initial comments rely on numbers which are similar but not identical in various respects. As RCN noted in its Petition, a survey of publicly available sources produces a variety of slightly different numbers for various elements. But these minor differences should not deter the Commission. What is indisputable is that the AOL Time Warner combination, alone, should be of substantial concern; when combined with the AT&T/MediaOne merger, the degree of concern rises to alarm. In this context, differences of a percentage point or two are not decisionally significant.¹²

Recent press reports have suggested that the Commission staff has already advised AT&T that approval of its merger with MediaOne will require that AT&T divest certain media interests.¹³ Certainly AT&T's agreement to divest, *e.g.*, MediaOne's 25.5% interest in Time Warner Entertainment, or Liberty Media Group's 10% interest in Time Warner, would somewhat alleviate concern about market dominance. RCN urges the Commission, however, not to simply accept on-the-fly divestitures, but instead to analyze carefully which divestitures are most likely

¹² While minor variations in such numbers are hardly critical to a dominance as overwhelming as that of the AOL Time Warner/AT&T/MediaOne combination, RCN does not mean to suggest that the Commission should not attempt to ferret out the correct numbers and base its decision on the best available numbers. On the contrary, the Commission should require AOL and Time Warner to supply complete, up-to-date ownership data.

¹³ *See, e.g.*, Communications Daily, Monday, April 24, 2000, at 6, and Monday, May 8, 2000 at 5. RCN does not know whether these accounts are accurate.

to leave the MVPD programming market competitive.¹⁴ Of course, it is not the Commission's role to structure the MVPD industry, and RCN does not urge it to do so. But when faced with the prospect of such a degree of dominance as that currently pending in the two applications, the Commission's legal obligation is to be certain that any divestitures, or programming access conditions, as suggested by RCN, are well calculated to permit the free market to do its job. The public interest would not be well served by off-hand divestitures which may or may not allow a competitive market to develop or prosper.

In this context, RCN again urges the Commission, whatever else it may do in imposing structural conditions, to adopt the program access condition proposed by RCN. That condition is necessitated by the AOL Time Warner merger alone; whatever resolution of the AT&T/MediaOne merger finally emerges, the dominance of AOL Time Warner in the MVPD marketplace is sufficient to require that Time Warner agree to make its programming, and that of its affiliates, available to its MVPD competitors on a nondiscriminatory basis. It bears repeating that RCN is not asking for a free lunch. It is fully prepared to pay a reasonable fee for such programming, and to negotiate such fees in the marketplace, subject only to some regulatory complaint process for instances in which RCN believes the prices, terms, or conditions do not conform to the program access condition accepted by AOL Time Warner.

¹⁴ In its initial Petition, RCN focused on the MVPD market in assessing the dangers posed by the AOL/Time Warner merger. But there are other, and broader elements of the public policy issues which fully warrant Commission attention, such as the complex interwoven relationships between Time Warner and AT&T. Appendix A hereto sets forth certain of these corporate relationships for the record.

Numerous provisions of Title VI of the Communications Act express Congressional concern that cable programming be available to the MVPD industry. RCN's Petition concentrated on section 628, the program access provision of the Act.¹⁵ But other provisions of the Act are relevant as well. *See, e.g.*, section 601(4) of the Act¹⁶ which provides that one of the purposes of Title VI is to assure that cable communications "provide and are encouraged to provide the widest possible diversity of information sources and services to the public;" section 601(6)¹⁷ which specifies that the promotion of competition in cable communications is another of its purposes. Similarly, section 612(a) states: "The purpose of this section is to promote competition in the delivery of diverse sources of video programming and to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with the growth and development of cable systems."¹⁸ Given the fragile state of competition in the MVPD industry, which continues to be 82.5% dominated by cable,¹⁹ it is crucial that AOL Time Warner not be in a position to restrict RCN's access to its programming.

As the Commission is aware, Time Warner is already subject to program access obligations as part of the 1997 consent decree entered into in settlement of the FTC's review of

¹⁵ 47 U.S.C. § 548.

¹⁶ 47 U.S.C. § 521(4).

¹⁷ 47 U.S.C. § 521(6).

¹⁸ 47 U.S.C. § 532(a).

¹⁹ *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 Table C-1.

Time Warner's acquisition of Turner Broadcasting System, Inc. and TCI's and Liberty Media's proposed acquisition of interests in Time Warner. Fearing that these acquisitions would leave Time Warner in a position to use its then already impressive marketpower in the MVPD industry for anticompetitive purposes, the government required, *inter alia*, that Time Warner agree to certain limitations in its role as a producer and distributor of MVPD programming.²⁰ While the facts of that litigation and the present proposed merger are different, the precedent is directly applicable to the present circumstances. To be sure, the condition sought here by RCN is broader than that contained in the earlier consent decree. But the question for the FCC is not whether the AOL Time Warner merger would constitute a violation of the antitrust laws. It is whether the public interest would be served by allowing the already Internet-dominant AOL and the already MVPD-dominant Time Warner to merge without imposing on them the obligation to make their programming available to their competitors on nondiscriminatory terms and conditions. Without in any way denigrating or minimizing the importance of the FTC's own review of the merger, the public interest question is the broader of the two, and hence the condition precedent must be broader than that imposed earlier by the FTC.²¹

²⁰ See *Time Warner, Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corporation, File No. 961-0004, Agreement Containing Consent Order*, Feb. 3, 1997.

²¹ In addition, of course, Time Warner is even more dominant today in the MVPD and the broader media industry than it was when the prior consent decree was crafted and that decree remains effective only for 10 years.

II. TIME WARNER HAS A HISTORY OF ANTI-COMPETITIVE ACTIVITY

On the basis of its sheer size alone, the AOL Time Warner merger raises serious policy issues. But whatever problems that size creates are exacerbated by Time Warner's history of resisting competitive entry into its markets. It is a standard canon of economic analysis that entrenched incumbents will expend substantial resources to try to keep new competitors out of their markets. "As Congress recognized... cable operators have the incentive to impede the development of other technologies into a robust competitor to incumbent cable systems."²² This record contains substantial evidence that Time Warner has in the past conducted itself in an anticompetitive fashion; certainly Time Warner is entitled to a prize for the consistency of its efforts to harass RCN. These include Time Warner's long-running campaign to harass RCN in the roll-out of its open video system services by posing as a potential video programming provider to get a look at RCN's local competitively-sensitive system data,²³ delaying for some nine months RCN's access to Time Warner's poles in Queens to slow down RCN's competitive

²² *Implementation of Section 302 of the Telecommunications Act of 1996, Open Video Systems*, 11 FCC Rcd 18,223, ¶ 191 (1996), *affirmed in relevant part sub nom City of Dallas v. FCC*, 165 F.3d 341 (5th Cir. 1999), *recon den.*

²³ *See Time Warner Cable v. RCN-BecoCom, LLC*, 13 FCC Rcd 8613 (CSB, 1998) and *Time Warner Cable v. RCN Telecom Services of New York, Inc.*, DA 98-2641 (CSB, *rel.* Dec. 30, 1998), *modified sub nom. Time Warner Cable v. RCN-BecoCom, LLC, and Time Warner Cable v. RCN Telecom Services of New York, Inc.*, Memorandum Opinion and Order, *rel.* Jan. 11, 2000, *recon. pending and appeal pending sub nom. RCN Telecom Services of New York, Inc., and RCN - BecoCom, LLC v. FCC*, D.C. Cir. Case No. 00-1043 filed February 9, 2000.

entry into the Queens market, summarily refusing, without even providing any reasons, to carry RCN's advertising in Manhattan on its cable system, and refusing to permit RCN to access cable home run wiring in a number of Manhattan MDUs so as to retain exclusivity as a video services provider in such buildings. Most recently, on March 14, 2000, Time Warner filed a spurious "Petition for Emergency Relief," seeking the imposition of "the maximum forfeitures" on RCN for alleged wilful failure to adhere to Commission orders.

In the interests of focusing narrowly on the immediate substantive issues presented by the proposed merger, RCN omitted mention of these real-world problems in its Petition. It is quite striking, however, that other Commenters, operating in different parts of the country, have experienced and reported similar problems.²⁴ The simple fact is that when any company achieves a dominant position in the market it is tempted to become arrogant and to see the rules of the road as mere niggling barriers to its total dominance. What else could explain Time Warner's recent decision to deny carriage on many of its systems of the ABC network, based on a reading of the retransmission consent rules which the Bureau promptly and flatly rejected?²⁵

RCN urges the Commission to take this qualitative factor into account in its assessment of the need for the program access condition sought by RCN. In its 1999 Fact Book, Time Warner proudly quotes from one of the company's principal progenitors, Henry Luce, who wrote

²⁴ See Comments of Memphis Network, LLC, Memphis Light, Gas & Water Division, and Gemstar International Group, Ltd.

²⁵ See *Time Warner Cable, Emergency Petition of ABC, Inc. for Declaratory Ruling and Enforcement Order for Violation of Section 76.58 of the Commission's Rules, or in the Alternative For Immediate Injunctive Relief*, CSR 5534-C (CSB), DA 00-987, rel. May 3, 2000.

that the company was formed "in the public interest as well as the interests of shareholders."²⁶ And Time Warner's current Chairman and CEO, Gerald Levin, has noted that the company has set for itself the goal "to be the formative leader in ensuring that the central medium of our age is a tool for expanding people's freedom, empowering their minds and enhancing their enjoyment..."²⁷ Given the crucial role AOL Time Warner would play in the entertainment and Internet-related segments of American life, the Commission should, simply, require that Time Warner put its programming resources where its publicists' self-serving and self-congratulatory rhetoric resides.

III. THE AOL TIME WARNER AND AT&T MEDIAONE DOCKETS SHOULD BE CONSOLIDATED

On April 11, 2000, Consumers Union, Consumer Federation of America, and Center for Media Education (collectively "Consumers") filed a Motion to Consolidate the pending matter with the AT&T/MediaOne merger docket (CS 99-251) and on April 21, 2000, AT&T and MediaOne Group, Inc. (AT&T/MediaOne) filed an Opposition. Consumers argues that the affiliations among AOL, Time Warner, AT&T and MediaOne are such as to require the Commission to consider both mergers on a consolidated basis, citing *Ashbacker Radio Corp. v. FCC*.²⁸ AT&T/MediaOne argues that all relevant information in the AT&T/MediaOne proceeding is already before the Commission, that matter has been pending nine months, and the

²⁶ Time Warner, 1999 Factbook, at 16.

²⁷ Time Warner, Annual Report, at 5.

²⁸ 326 U.S. 327 (1945).

Ashbacker case does not apply because the two applications are not mutually exclusive technically.

RCN supports Consumers' request to consolidate consideration of the AOL Time Warner and AT&T/MediaOne mergers. As argued in RCN's Petition, and by other initial commenters, these two proceedings are interrelated in countless ways and if either is considered apart from the other the Commission will be addressing facts and considerations which do not fully reflect reality. The Commission has both the obligation and the authority to order its own proceedings as it thinks best.²⁹ The fact that AT&T has supplied certain data to the CSB does not even remotely satisfy the need for the Commission to consider both mergers on a consolidated basis, including the dynamics which Commission approval of either, or both, would have on the overall public interest. The MVPD, Internet, broadband and narrowband sectors of the telecommunications industry are not isolated from each other, and any Commission decision which treats them as though they were would simply be blinking reality. Finally, while the technical mutual exclusivity which lies at the heart of the *Ashbacker* doctrine may not exist in the present circumstances, the doctrine has traditionally encompassed issues broader than radio frequency exclusivity, such as mutual economic incompatibility.³⁰ The intertwined affiliations and related policy issues are of such public consequence that full consideration of either merger requires a parallel and concomitant consideration of the other.

²⁹ See *SEC v. Chenery Corp*, 332 U.S., 194, 203 (1947).

³⁰ See, e.g., *Petitions to Deny DPLMRS Applications*, 30 RR 2d 922 (1974).

WHEREFORE RCN reiterates its request that, if the Commission otherwise determines that the proposed merger is in the public interest, it condition approval on AOL Time Warner's agreement to make its programming available on just, reasonable, and nondiscriminatory terms to all its MVPD competitors.

Respectfully submitted,



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May 11, 2000

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APPENDIX A

Time Warner Telecom (“TWT”), a division of Time Warner, is owned 61.98% by various Time Warner subsidiaries and 18.85% by Media One.³¹ TWT is actively providing service in many urban areas including New York City.³² TWT, which is commonly owned with Time Warner Cable (“TWC”), has entered into various licensing and sharing agreements with TWC for the use of TWT’s fiber optic facilities by TWC.³³ Through TCI, AT&T indirectly owns 10% of Time Warner.³⁴ On February 1, 2000, Time Warner and AT&T announced the formation of a Joint Venture for the provision of AT&T-branded telephony service by Time Warner. AT&T is to hold 77.5% of the Joint Venture and TWC will hold 22.5%.³⁵ AT&T and TWC recently announced a Joint Marketing Agreement, permitting customers of each to benefit from a variety of incentives including long distance minutes and pay-per-view movies.³⁶ Time Warner and

³¹ Public Interest Statement of America Online, Inc. and Time Warner, filed Feb. 11, 2000 at p.16. MediaOne has announced its intention to divest this interest but seeks up to 12 months to do so following closing of the AT&T MediaOne merger. *See Ex Parte Presentation in CS Docket No. 99-251*, letter from Susan Eid to To-Quyen Truong, March 24, 2000, at 2.

³² Time Warner Telecommunications Inc., 10-Q for the quarter ending September 30, 1999, Part I, overview.

³³ Time Warner Telephone Prospectus dated May 11, 1999, at pp. 40-47 and 70.

³⁴ *Cable Attribution Report and Order*, Appendix C, item iii(a). This interest, however, amounts to only 1% of the voting power.

³⁵ *Id.*, p. 4.

³⁶ AT&T News Release: <http://www.att.com/press/item/0,1354,2666,00.html>.

AT&T operate joint ventures in Kansas City and Texas, serving 1.45 million cable subscribers.³⁷ AT&T, which indirectly owns 33% of Cablevision Systems, Inc. and controls two of the six board seats,³⁸ has also entered into an agreement with Cablevision to joint-market.³⁹ On April 19, 2000, it was announced that AT&T and Cablevision have agreed to AT&T's purchase of Cablevision's Boston-area cable systems.⁴⁰

³⁷ Letter from D. Garrett to Deborah Lathen in CS Docket No. 99-251, filed March 17, 2000, at 2.

³⁸ *Id.* at Table A, p. 3.

³⁹ AT&T News Release: <http://www.att.com/press/item/0,1354,2603,00.html>.

⁴⁰ Communications Daily, Vol. 20 No. 76, pp. 5-6.

DECLARATION

My name is Scott Burnside. I am Senior Vice President of RCN Telecom Services, Inc., with responsibility for all regulatory matters. I have reviewed the foregoing Reply Comments of RCN Telecom Services and, under penalty of perjury, declare that the facts set forth therein concerning Time Warner's anticompetitive activities are true and correct to the best of my knowledge, information and belief.

May 11, 2000


Scott Burnside

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of May, 2000, a copy of the foregoing REPLY COMMENTS OF RCN TELECOM SERVICES, INC. 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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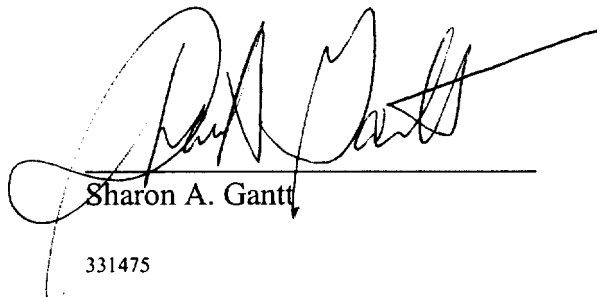
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