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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Preston R. Padden
Executive Vice President
Government Relations

August 1, 2000

Magalie R. Salas, Esquire
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Ex Parte* Letter
CS Docket No. 00-30

Dear Ms. Salas:

Pursuant to 47 C.F.R. Section 1.1206 of the Commission's rules, attached are two copies of an *ex parte* letter sent today to Chairman William E. Kennard regarding the proposed merger between AOL and Time Warner. Copies of the letter were also delivered to all of the Commissioners as well as counsel for AOL and Time Warner. Please include this letter in the public record in this proceeding.

Very truly yours,

Preston Padden

Preston R. Padden

PRP:g

Attachment

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Preston R. Padden
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August 1, 2000

The Honorable William E. Kennard
Chairman
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CS Docket No. 00-30

Dear Chairman Kennard:

We want to thank you for the opportunity to participate in last week's en banc hearing regarding the proposed merger of AOL, Time Warner and EMI. We would like to take this opportunity to follow up on several questions posed by you and the other Commissioners.

Question: Are Disney's concerns actually related to the merger or are they issues of broad industry applicability?

Answer: Disney has stayed on the sidelines as the Commission has considered other high-profile cable mergers. And, despite concerns, we did not jump into the debate over open access. It was the proposed merger of the closed and proprietary AOL "walled garden" marketing environment and the Time Warner bottleneck cable pipelines that caused us to step forward. Our concerns are tightly focused on *this* proposed transaction, *this* unique aggregation of market power and the history of anti-competitive practices by *this* group of companies. Other cable companies have not shown the same propensity to limit consumer choice by excluding networks deemed competitive with their own channels. And, other ISPs have not abridged the "end-to-end" architecture of the Internet by building walled gardens and disabling consumer navigation links. It is *this* merger, *these* companies and *these* past practices that are the focus of our concern.

Question: Is the "trust us" response from AOL and Time Warner sufficient to assure that this merger will serve the public interest?

Answer: No. Disney agrees with Chairman Kennard that the Commission has a thoroughly legitimate role in reviewing this merger and that the burden of persuasion is

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on the parties to the transaction. Without denigrating the sincerity of the promises of good behavior, both AOL and Time Warner have a well-documented history of restricting consumer choice. AOL and Time Warner now proclaim that genuine open access, non-discriminatory caching, non-discriminatory menus/navigation and non-discriminatory return path access are actually in their best business interest. As a result, the Commission can make fulfillment of these promises a condition of merger approval without fear of burdening the parties or slowing the roll out of broadband. The Juno announcement (about which there is no meaningful detail available), does not appear to address the issues of discrimination in data rates, return path availability, local caching, menus and navigation links in Interactive Television.

Question: Is there some urgency for the Commission to act now to assure non-discrimination and open access?

Answer: Yes. In his testimony, Mr. Levin stated that in order to conduct it's open access "technical trial" Time Warner was required to install special routers capable of operating in an open access environment. This statement reveals that Time Warner was otherwise installing routers *not* capable of operating in an open access environment. This revealing admission documents the need for immediate Commission action. The architecture of AOL/Time Warner interactive cable systems is being set right now. Any delay in ordering non-discrimination and open access for these systems would lead to the deployment of infrastructure incapable of providing for consumer choice.

Question: Will the Walt Disney Company cut a commercial deal with AOL/Time Warner and abandon the public policy issues of non-discrimination and consumer choice?

Answer: This situation is very different from past cases where one party opposed an application to gain leverage in an anticipated business deal. Disney and Time Warner have *concluded* long term commercial arrangements for the carriage of Disney broadcast and cable content. The commercial deal is *done!* What were left unresolved are the public policy issues that relate to non-discriminatory consumer access to return path interactivity, menus, navigation links, locally cached content and other operating parameters of the AOL/Time Warner interactive cable television systems. Disney and Time Warner "agreed to disagree" on these issues and to argue them before the appropriate government agencies in Washington. These issues are directly analogous to the non-discrimination provisions of Section 653 of the Communications Act. Disney is absolutely aligned with the nation's leading consumer groups on these issues and we are committed to continuing our advocacy to assure non-discrimination and consumer choice.

Question: Is Time Warner correct in its assertions that "competition is in our DNA" and that "the consumer makes the choice?"

Answer: Time Warner has created or acquired a large collection of quality program networks (e.g. HBO, CNN, etc.), that without question have contributed to consumer choice. However, Time Warner has a history, unique in the cable industry, of using its distribution bottleneck to advance the market position of its own networks by denying consumers the opportunity to choose competing networks owned by other companies. It was not consumers who chose to not have access to Disney Channel on their basic service. It was not consumers who chose not to have access to state and local cable news channels owned by companies other than Time Warner. It was not consumers who chose to strip out Gemstar program guide data. It was not consumers who chose to not have cable access to the new UPN affiliate station in Rochester, NY. And, it was not consumers who chose to take ABC off of the Time Warner cable systems and to then put up a slide, which read, "Disney has taken ABC away from you." In Disney's view, the Commission cannot proceed to a grant of this merger application without taking into consideration this specific and documented history of anti-competitive limitations on consumer choice by Time Warner.

Question: Will the prevalence of URL addresses in mass market advertising make consumers more adept at finding the content they want despite discriminatory system architecture?

Answer: This is a very thoughtful question and undoubtedly there will be significant differences in the strength of individual brands. But, in a nation of VCR's blinking "12:00," it would be a mistake to premise public policy on assumptions of high level technical proficiency among the mass audience. Today, AOL's narrowband customers have the technical opportunity to access any content that they choose, anywhere on the World Wide Web. However, the walled garden marketing environment has proven to be a highly effective discriminatory barrier. AOL's customers spend 85% of their time on line inside that walled garden. We do not believe that the Commission can have any level of confidence that increased mass market advertising of URL addresses will be effective in assuring robust competition on merged AOL/Time Warner Interactive Television systems.

Question: Is Disney concerned about the stand alone AOL-TV retail appliance or the perceived bottleneck of the AOL/Time Warner cable pipelines?

Answer: Our primary concern relates to the marriage of the AOL-TV walled garden marketing environment and the AOL "sticky" applications with the Time Warner bottleneck cable pipelines.

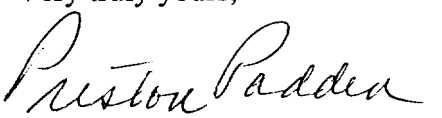
Question: Do Disney's concerns relate to "unknown tracks across the wilderness?"

Answer: Yes and no. First, the "No" part. There are certain interactive applications well known today to all parties. For example, there are many television commercials that are being produced today with ATVEF interactive "triggers" with the capability to link the consumer to a related web site. There is nothing unknown or mysterious about these interactive ads. As indicated in our exchange of correspondence with Time Warner (previously submitted for the record and attached to this letter for ease of reference), it is Disney's view that consumer access to this interactive functionality should not be governed by whether these ads are running on a AOL/Time Warner channel or on some other channel.

Also fully known and non-mysterious is the opportunity to provide consumers with interactive links to Internet sites designed to complement television programming. In the narrowband world, consumers have access to these links without regard to whether the content is owned by the company that controls their Internet access. As consumers migrate to broadband, it would be contrary to public policy for consumer choice to be limited to sites owned by AOL/Time Warner.

The "Yes" part of the answer to this question reflects that not all future interactive applications are knowable at this time. That is why Disney urges the Commission to either require the separation of content and conduit or to impose a broad non-discrimination condition on its approval of this merger.

Very truly yours,



Preston R. Padden

PRP:g

cc: The Honorable Harold W. Furchtgott-Roth
The Honorable Susan Ness
The Honorable Michael K. Powell
The Honorable Gloria Tristani
George Vradenburg, III, Esq.
Richard E.Wiley, Esq.
Timothy A. Boggs, Esq.
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