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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

September 19, 2000

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control, CS Docket No. 00-30

Dear Ms. Salas:

Everest Connections Corp. ("Everest"), a cable overbuilder in a number of Time Warner markets, submits this *ex parte* filing in the above-captioned matter to bring to the Commission's attention recent events that demonstrate anticompetitive conduct by Time Warner Inc. ("Time Warner") and why the proposed merger of America Online, Inc. ("AOL") and Time Warner should be subject to certain conditions. This evidence, which involves Time Warner insisting that its set top box vendors refuse to sell equipment to companies that will use it to compete with Time Warner systems, is relevant to the Commission's consideration of the proposed merger and to the submissions in this docket by numerous parties, including the applicants and other interested persons, because it further establishes Time Warner's ability and willingness to use its market power to harm competition. Accordingly, we urge the Commission to impose conditions on the merger that ensure that AOL/Time Warner will not use its market power to harm competition in the MVPD marketplace.

I. EVEREST IS AN OVERBUILDER THAT COMPETES DIRECTLY AGAINST TIME WARNER AND HAS BEEN HARMED BY ITS ANTICOMPETITIVE PRACTICES.

Everest, a division of Everest Global Technologies Group, LLC, is an overbuilder that constructs and operates broadband networks to provide high quality and high bandwidth cable television, telephone, and Internet services to residential and small business customers in selected cities across the United States. In order to compete effectively with incumbent cable operators, Everest will offer its residential cable subscribers more than 300 channels of video programming, special digital cable packages and programs, pay-per-view services, video-on-

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demand service, and more than 40 channels of digital music service. Everest's Internet services will offer customers high-speed data access and a choice of data speeds and packages. Everest is currently in the process of rolling out service in Kansas City, Missouri, and it expects to move next into the Minneapolis and St. Paul, Fort Lauderdale, and Tulsa markets.

In April of this year, Everest received a franchise to offer competing cable and telecommunications services in Kansas City, Missouri, and in July it began constructing a fiber optic network to serve the Kansas City area, where it expects to begin offering service this fall.[1] Not surprisingly, Time Warner Cable, which has a franchise in Kansas City, responded to Everest in a hostile manner, claiming that Everest may be "one of those pushy out-of-towners" that would require legal action to bring it into line. (Attachment 1) Everest also has encountered difficulty as it seeks to obtain cable programming for distribution.

However, in the equipment arena Time Warner has gone beyond these tactics and deliberately used its market power to impair and significantly hinder competitors. As explained in detail in the attached declarations by Susan Arndt ("Arndt Declaration"; Attachment 2) and Carl Naes ("Naes Declaration"; Attachment 3), Time Warner has used its strong position as a major purchaser of set top boxes to interfere with Everest's ability to obtain these key components. Specifically, upon information and belief, Time Warner apparently has entered into exclusive arrangements with equipment providers that expressly preclude them from offering their products to overbuilders competing with Time Warner. Everest discovered this fact during discussions with equipment vendors because its request for set top boxes and cable system equipment has been denied by more than one manufacturer for the simple reason that the manufacturers have said that they can not provide their product to overbuild situations with the Time Warner Cable systems. *See id.* Thus, Everest has been told by leading equipment manufacturers that Everest can obtain equipment as long as Everest agrees that the product will not be offered in any competitive situation with Time Warner Cable. *See id.*

Without access to the state-of-the-art set top boxes, overbuilders are as ill-equipped to compete in the market as if they lacked critical cable programming. The Commission must not permit Time Warner to continue this anticompetitive behavior and should use the merger review process to address this matter.

II. CONGRESS INTENDED THAT CONSUMERS HAVE OPEN ACCESS TO CABLE PROGRAMMING AND EQUIPMENT, INCLUDING SET TOP BOXES.

One of the goals of the Communications Act of 1934, as amended by the 1992 Cable Act and the 1996 Telecommunications Act, is to open cable markets to competition in

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[1] Everest also has a telecommunications franchise from Lenexa and a cable franchise from Mission. It is in the process of seeking agreements in Kansas City, Kansas; Leawood; Olathe; Merriam; Mission Hills; Overland Park; Prairie Village; Shawnee; Westwood; Blue Springs; Grandview; Independence; Lee's Summit; and Raytown.

order to ensure that consumers have available to them a wide variety of video programming from a choice of sources.[2] This goal of opening markets and encouraging competition is expressed repeatedly throughout the Communications Act and has been embraced by the Commission.[3] The Communications Act makes clear that Congress wanted to promote competition in the multichannel video programming distributor ("MVPD") marketplace.

A. The Intent Of The Navigation Devices Requirement Is To Provide An Open Market For Set Top Boxes.

The Telecommunications Act of 1996 included statutory directives to the Commission to make all navigational devices commercially available to consumers by ensuring their interoperability.[4] While the statute also permits a MVPD to offer its own set top boxes to subscribers if its "charges to consumers for such devices and equipment are separately stated and not subsidized by charges for any such service,"[5] Congress made plain in the Conference Report that its reason for enacting this section was to break the hammerlock that cable operators had on set top boxes and to give consumers access to a choice of set top boxes.[6]

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[2] *See, e.g.*, 47 U.S.C. § 521(4) (explaining that one purpose of the cable services provisions in the Communications Act is to assure that cable operators "provide and are encouraged to provide the widest possible diversity of information sources and services to the public"); 47 U.S.C. § 521(6) (explaining that promoting competition in cable communications is another purpose of the Act).

[3] *See* Conf. Rep. No. 102-862, at 93 ("[T]he conferees expect the Commission to address and resolve the problems of unreasonable cable industry practices, including restricting the availability of programming and charging discriminatory prices to non-cable technologies."); *see also In re Implementation of the Satellite Home Viewer Improvement Act of 1999, Retransmission Consent Issues: Good Faith Negotiation and Exclusivity, First Report and Order*, CS Docket No. 99-363, at ¶ 1 (rel. Mar. 16, 2000) ("[T]he Satellite Home Viewer Improvement Act of 1999 . . . generally seeks to . . . give consumers more and better choices in selecting a multichannel video program distributor."); *In re Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992, First Report and Order*, 8 FCC Rcd 3359, 3360 (1993) (explaining that the program access rules are "intended to increase competition and diversity in the multichannel video programming market, as well as to foster the development of competition to traditional cable systems, by prescribing regulations that govern the access by competing multichannel systems to cable programming services").

[4] *See* 47 U.S.C. § 549(a) ("The Commission shall, in consultation with appropriate industry standard-setting organizations, adopt regulations to assure the commercial availability, to consumers of multichannel video programming and other services offered over multichannel video programming systems, of converter boxes, interactive communications equipment, and other equipment used by consumers to access multichannel video programming and other services offered over multichannel video programming systems, from manufacturers, retailers, and other vendors not affiliated with any multichannel video programming distributor.").

[5] *Id.*

[6] *See* Conf. Rep. No. 104-230, at 181 (1996) ("One purpose of [the navigation device requirements] is to help ensure that consumers are not forced to purchase or lease a specific, proprietary converter box, interactive device or other equipment from the cable system or network operator."); *see also* H. Rep. No. (continued...)

When the Commission implemented this congressional mandate, it made clear that "[s]ubscribers have the right to attach *any* compatible navigation device to a multichannel video programming system."[7] It therefore adopted a rule preventing a MVPD from entering into a contract or agreement to "prevent navigation devices . . . from being made available to subscribers from retailers, manufacturers, or other vendors that are unaffiliated with such owner or operator."[8] The Commission also recognized that subscribers have a right to attach equipment that is not part of the cable operator's network plant, explaining that "consumers must also not be precluded from the possibility of obtaining equipment from commercial outlets by virtue of contractual or other restrictions on the availability of equipment that the service provider might seek to directly impose on suppliers of equipment."[9] The Commission concluded that "an MVPD is not the exclusive purveyor of navigation devices for its system. . . . [T]he right to attach leads to a broader market for equipment used with MVPD systems."[10]

Thus, Section 629 of the Act and the Commission's *Navigation Devices Report & Order* clearly focus on consumer choice in the set top box arena.[11] It would be contrary to (i) the congressional intent behind that section, (ii) the pro-competitive provisions in the 1996 Act, and (iii) the public interest, for a cable operator to deny subscribers of *other* MVPDs a choice in the set top box arena. Congress could not have intended for an incumbent cable operator to interfere with the rights of consumers of competing MVPDs to have selection and choice in the navigation devices market. Yet that is precisely what Time Warner is doing. By using its market power to

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104-204, at 112 (1995) ("[C]ompetition in the manufacturing and distribution of consumer devices has always led to innovation, lower prices and higher quality. Clearly, consumers will benefit from having more choices among telecommunications subscription services arriving by various distribution sources.").

[7] *In re Implementation of Section 304 of the Telecommunications Act of 1996: Commercial Availability of Navigation Devices, Report and Order*, 13 FCC Rcd 14775, 14778 (1998) ("*Navigation Devices Report and Order*) (emphasis added); *see also id.* at 14786 ("[W]e mandate that subscribers have a right to attach any compatible navigation device to an MVPD system, regardless of its source, subject to the proviso that the attached equipment not cause harmful interference, injury to the system or compromise legitimate access control mechanisms.").

[8] 47 C.F.R. § 76.1202.

[9] *Navigation Devices Report and Order*, 13 FCC Rcd at 14786.

[10] *Id.* Interestingly enough, the Commission went on to "agree with Time Warner that the marketplace, not the MVPD, should determine the price and features of navigation devices available to subscribers." *Id.*

[11] *See id.* at 14778 ("Subscribers have the right to attach any compatible navigation device to a multichannel video programming system."). The Commission likened this right to the *Carterfone* principle, which guarantees that consumers may use their choice of telephone equipment.

impose exclusive arrangements on key vendors, Time Warner is blocking the ability of Everest's customers to obtain from their MVPD otherwise commercially available navigation devices.[12]

B. Congress Rejected Exclusive Arrangements By Vertically Integrated MSOs in Adopting the Program Access Rules.

Congress and the Commission explicitly prohibited exclusive agreements by vertically-integrated cable operators in the program access provision of Section 628 of the Communications Act and the accompanying implementing regulations. When Congress enacted the 1992 Cable Act, it was concerned that increased horizontal concentration and vertical integration in the cable industry had created an imbalance of power in the programming market and frustrated competition by other MVPDs. Congress recognized that access to a key building block for a successful cable system (programming) was essential if competition was to have a chance. In adopting Section 628, Congress further recognized that vertically-integrated cable operators had every incentive to withhold their programming assets from competitors for the simple purpose of hindering competition. To address this problem, the 1992 Cable Act required the Commission to adopt program access rules to ensure that MVPDs have access, on non-discriminatory terms, to the programming of vertically integrated programming providers.

Thus, the program access rules achieve a goal similar to the goal of the navigation devices rules: require open access in the cable marketplace to promote competition. Both the program access and the navigation device rules focus on consumer choice and facilitating a diversity of video programming and equipment from a variety of sources. Time Warner's exclusive arrangements to deny equipment to an overbuilder such as Everest are contrary to the clear goals of the 1992 Cable Act and the 1996 Act and thus are contrary to the public interest.

III. THE COMMISSION SHOULD CONDITION THE TRANSFER OF CONTROL TO PROHIBIT ANTICOMPETITIVE AND DISCRIMINATORY PRACTICES BY TIME WARNER.

As the comments of Disney, Gemstar, RCN, and other commenters in this proceeding have established, there is nothing in the record to indicate that the anticompetitive behavior of Time Warner will change once the proposed merger is completed, and indeed, for all the reasons set forth by those parties, we have every reason to expect this kind of behavior to get worse. As a consequence, we urge the Commission to expressly condition the transfer of control on a requirement that Time Warner shall not use its leverage with equipment vendors to prohibit

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[12] Curiously, Time Warner took a different approach in its filings in the *Navigation Devices* proceeding. There it stated that "if equipment manufacturers and retailers can help maximize a subscriber's enjoyment of the services that Time Warner offers over its broadband networks, all affected parties will stand to benefit, especially consumers." Comments of Time Warner Entertainment Co., L.P. in CS Docket No. 97-80, at 26 (May 16, 1997). Time Warner also urged the Commission to "prohibit MVPDs from interfering with a consumer's right to attach *any* authorized navigation device to the network so long as it does not harm the network and is not used or usable to facilitate unauthorized reception of service or copying of copyright material." *Id.* at 28 (emphasis added).

sales of equipment to competitors. Similarly, the Commission should adopt the recommendation of RCN, another cable overbuilder that competes with Time Warner in a number of markets, to impose a general anti-discrimination condition on the transfer of control that addresses AOL/Time Warner's substantial power over programming.[13]

A. The Commission Should Prohibit Time Warner From Enforcing Exclusive Arrangements for Set Top Box Equipment.

As explained above and set forth in the attached declarations, the actions by Time Warner to prohibit key vendors from selling set top boxes to certain overbuilders significantly hinders competition. The exclusive arrangement negotiated by Time Warner has one purpose: to impair competition. As the Arndt and Naes Declarations make clear, Time Warner does not impose this exclusivity requirement across all providers, or across the country, but only insists upon it in markets where the possible buyer competes head-to-head with Time Warner. There is no justification for this provision other than to impair competition. For that reason, the Commission should state as part of the transfer approval that AOL/Time Warner shall not enforce any arrangement that has the effect of interfering with the ability of other MVPDs to obtain any cable equipment.

B. The Commission Should Impose A Non-Discrimination Requirement.

In its comments in this proceeding, RCN has stated that it shares Disney's concerns about the anticompetitive effects the proposed merger could have on the MVPD marketplace and is concerned about potential loss of access to Time Warner programming to offer to subscribers on its systems.[14] Everest agrees with RCN and with Disney that the Commission should impose an anti-discrimination condition on the merger modeled after the Commission's program access rules.[15] Such a requirement would be similar to the FTC's order approving the merger of Time Warner and Turner Broadcasting[16] and the FCC's order approving the SBC/Ameritech merger.[17] We also support the position that RCN set forth in its Petition to Condition Merger that Commission reluctance to enforce program access rules and its narrow interpretation of them makes a condition in the context of this merger necessary.[18]

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[13] *See* Response of RCN Telecom Services, Inc. to *Ex Parte* Filings in CS Docket No. 00-30, at 3 (Aug. 11, 2000) ("RCN Response"); *see also* Written *Ex Parte* Filing of the Walt Disney Co. in CS Docket No. 00-30, at 60-80 (July 27, 2000) ("Disney *Ex Parte*").

[14] *See* RCN Response at 3.

[15] *See id.* at 6; Disney *Ex Parte* at 65.

[16] *See In re Time Warner Inc., et al.*, Docket No. C-3709, 1997 FTC LEXIS 13 (Feb. 3, 1997).

[17] *See In re Applications of Ameritech Corp. & SBC Communications Inc. for Consent to Transfer of Control, Memorandum Opinion & Order*, CC Docket No. 98-141 (Oct. 8, 1999).

[18] *See* Petition to Condition Merger of RCN Telecom Services, Inc. in CS Docket No. 00-30, at 10-13 (Apr. 26, 2000).

C. Mere Promises Are Not Enough.

Given the number of statements AOL and Time Warner have already made to the Commission, Congress, and the public regarding their commitment to providing consumers with the widest possible availability of choices, they should not object to a nondiscrimination requirement.[19] In fact, if a merged AOL/Time Warner acts the way the parties claim now that they will, they will not need to take any additional measures to comply with a nondiscrimination condition.[20] In reply comments filed at the Commission soon after Time Warner resolved its retransmission consent dispute with ABC, AOL and Time Warner explained to the Commission that the merger will promote competition in a variety of areas, including the market for video programming.[21] Because navigation devices allow consumers to access video programming, and Time Warner supports competition among video programming providers, it should not use its market power to frustrate the ability of competitors to obtain equipment from key suppliers.

Despite the applicants' assurances to the contrary, the Commission has every reason to be skeptical that mere promises are insufficient to ensure that the public interest is served. Only concrete conditions will protect consumers and advance the goals set forth in the 1992 Cable Act and the 1996 Telecommunications Act.

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[19] *See, e.g.*, Opening Statement of Steve Case, Chairman & CEO, AOL, to FCC (July 27, 2000) ("[W]e want to make clear that our commitments to consumer choice and competition will help lead our industries into the Internet Century in a way we can all be proud of."); Opening Statement of Gerald M. Levin, Chairman & CEO, Time Warner Inc. (July 27, 2000) ("Our goal, like yours, is to give consumers access to content from all of the sources they desire, over as many platforms as possible, anywhere, anytime.").

[20] *See, e.g.*, Letter From Peter D. Ross, Counsel for AOL, & Arthur H. Harding, Counsel for Time Warner, to Royce Dickens, Cable Services Bureau, FCC, at 38 (July 17, 2000) ("Time Warner Cable has discovered no exclusive contract with any nationally distributed video programming network.").

[21] *See Reply of America Online, Inc. and Time Warner Inc.* in CS Docket No. 00-30, at 1 (May 11, 2000) ("[B]ecause the merged company will bring together experience, incentives, and resources that can help lead the integration and transformation of traditional media and online services, the Commission can well expect that AOL Time Warner will work to speed the delivery of enticing new content products and communications services to consumers. These advances, in turn, should prompt the merged company's many rivals to do the same.").

* * *

For these reasons, Everest urges the Commission to impose an anti-discrimination condition on the transfers of control of AOL and Time Warner.

Respectfully submitted,

Amy L Levine

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July 21, 2000

Mr. James Moffitt
CEO
Everest Connections Corp.
5555 Winghaven Blvd.
O'Fallon, MO 63366

Re: Welcome to Kansas City

Dear Mr. Moffitt:

On behalf of my client, Time Warner Cable, I want to be one of the first to welcome you to Kansas City. I believe you will find the people here in the greater Kansas City metropolitan area to be friendly folk who will welcome an out-of-towner.

One thing Kansas Citians will not tolerate, however, are strangers who come to town and try and push us locals around. Unfortunately, it has been Time Warner Cable's experience in other markets that when a newcomer like you comes to town and starts stringing wire and cable, it learns that many of the "good spots" on the utility poles and in the underground conduits are already taken. Thinking that because it is newer it must be somehow better, the newcomer or its contractor attempts to solve its problem by simply pushing aside or cutting up whatever is in its way.

Be advised that if that is your intent, such actions will certainly not be tolerated. Time Warner Cable has invested millions of dollars and tens of years in building and upgrading a distribution system that is the envy of many. Accordingly, Time Warner Cable will take swift and decisive legal action against anyone who attempts to move, cut, displace, reroute or otherwise damage any Time Warner Cable wire, cable, fiber or other equipment.

If you, on the other hand, are not one of those pushy out-of-towners but instead want to work with Time Warner Cable in freeing up available space for you and any other new entrants to the market, my client will be happy to work with you. If that is truly your intent, I am sure you will find that the enclosed draft agreement fairly protects the rights of both parties in stimulating healthy, fair competition while at the same time protecting Time Warner Cable's valuable existing assets.

Please look over the draft agreement and give me your suggestion on how we should fill in the blanks I have inserted in the agreement. If you have any other comments or concerns about the agreement, or simply would like me to show you around town, please give me a call. I look forward to hearing from you.

Very truly yours,

LATHROP & GAGE LC

By: Bernard J. Rhodes
Bernard J. Rhodes

Enclosure

cc: Robert B. Niles, Division President

MAKE-READY AGREEMENT

This Agreement (the "Agreement") between _____ ("Overbuilder") and Kansas City Cable Partners d/b/a Time Warner Cable ("KCCP"), addresses procedures Overbuilder and KCCP have agreed to follow in performing any construction of their respective network systems on the poles and in the ducts and conduits of power and telephone utilities in Jackson, Clay, Platte and Cass Counties in Missouri and Wyandotte, Johnson and Leavenworth Counties in Kansas, including municipalities within the county boundaries.

1. Definitions

Make-Ready Work - the movement of existing pole attachments and/or cable or wire owned by one of the parties to this agreement in order to accommodate the right of the other party to this agreement to attach to or relocate its facilities on utility poles or in ducts or conduits.

Requesting Party – the party requesting that the other party to this agreement move its existing facilities to accommodate the placement of Requesting Party's facilities on a pole or in a duct or conduit.

Facilities Owner – the party that owns the facilities that must be moved to accommodate the placement of Requesting Party's facilities on a pole or in a duct or conduit.

Relocation – the movement of a party's attachment, cable or wire, including an adjustment in height of a party's attachments on poles.

Splicing – splicing of a party's facilities to add sufficient length to those facilities so that they may be moved.

Changeout – the replacement of an existing pole with a new pole at the same location when the Pole Owner determines that a pole does not have sufficient room for the proposed new facilities and the existing facilities on the pole.

Transfer – the transfer of a party's facilities to a new pole in connection with a Changeout.

Replacement – replacement of a party's service drop where necessary as a result of Relocation, Splicing or Changeout and Transfer.

Pole Owner – the utility owning or controlling the relevant pole, duct or conduit.

Pole Attachment Agreements – any agreement which Overbuilder and/or KCCP may have with a Pole Owner that allows Overbuilder or KCCP to attach to the Pole Owner's utility poles or use the Pole Owner's ducts or conduits.

2. **Preparation of Make-Ready Description.** The following procedures shall exclusively govern any Make-Ready Work sought by either party:

a. **Notice of Applications.** The Requesting Party shall provide the Facilities Owner with copies of all applications filed with the Pole Owner that contemplate attachment to poles on which the Facilities Owner has existing facilities or which contemplate use of ducts or conduits in which Facilities Owner has existing facilities, and copies of all correspondence in connection with such applications.

b. **Joint Rideouts and Other Meetings.** The Requesting Party shall provide the Facilities Owner with at least 72 hours prior notice of any joint rideout or other meeting at which the Requesting Party and the Pole Owner will be discussing pole attachments or use of ducts or conduit. The Requesting Party shall use reasonable efforts to accommodate a request by the Facilities Owner to participate in any such rideout or meeting.

c. **Avoiding Duplicative Make-Ready Work.** If the Requesting Party or the Facilities Owner has reason to believe that a third party may request access to a pole(s), duct(s) or conduit(s) within the 180 day period after Requesting Party submits an application, the Facilities Owner and the Requesting Party shall schedule a joint rideout with the third party and the Pole Owner for the purpose of identifying the Make-Ready Work necessary to accommodate both the Requesting Party and the third party.

d. **Make-Ready Description.** The Requesting Party shall provide, or request Pole Owner to provide, the Facilities Owner with a written description of any Make-Ready Work the Facilities Owner is being requested to perform (the "Make-Ready Description"). The Requesting Party shall reimburse the Facilities Owner for any expenses incurred by the Facilities Owner in connection with preparation of a Make-Ready Description, including the expense of participating in any rideout or other meeting.

e. **Verification of Description.** Upon receipt of the Make-Ready Description, the Facilities Owner may verify the Requesting Party's determination that Make-Ready Work is required on the identified pole(s), duct(s) or conduit(s) and the type of Make-Ready Work required. Such verification will be completed as soon as practicable, considering such factors as the number and location of the poles involved and the weather, after receiving the Make-Ready Description.

f. **Inaccurate or Incomplete Descriptions.** If the Facilities Owner determines that the information in the Make-Ready Description submitted by the Requesting Party is not complete and/or accurate, the Facilities Owner shall so notify the Requesting Party. After notifying the Requesting Party, the Facilities Owner shall be under no further obligation until the Requesting Party submits complete and accurate information.

3. **Performance of Make-Ready Work**

a. **Option of Facilities Owner.** If the Facilities Owner verifies that the Make-Ready Work is required, the Facilities Owner shall advise the Requesting Party (1) which Make-Ready Work the Requesting Party may perform, and (2) which Make-Ready Work the Facilities Owner will perform. If any Make-Ready Work is performed by the Facilities Owner, the Requesting Party shall reimburse the Facilities Owner for its reasonable costs, as outlined below. If the Make-Ready Work is performed by the Requesting Party, the Requesting Party shall bear its own costs for performing such work. It is understood that it is the responsibility of the Requesting Party to bear the expense of all Make-Ready Work performed on its behalf.

b. **Work Performed by Facilities Owner.**

i. If the Facilities Owner elects to perform Make-Ready Work itself, the Facilities Owner shall provide the Requesting Party an estimate of the expense of such work to the Facilities Owner within ten (10) business days of completing its verification, provided that the Facilities Owner shall not be expected to provide estimates for more than _____ poles in any period of 5 working days. The Facilities Owner shall base such estimates on the Estimated Flat Rates, attached hereto as Attachment A.

ii. Upon receipt of the estimate of the Facilities Owner, the Requesting Party may authorize the Facilities Owner to perform such work. If the Requesting Party authorizes the Make-Ready Work, and the Facilities Owner elects to perform such work, the Facilities Owner shall complete such work within thirty (30) days of the Requesting Party's authorization of the work, provided that

the Facilities Owner shall not be expected to complete Make-Ready Work on more than _____ poles within any period of ten (10) working days, and provided that all necessary approvals from the Pole Owner, other party attached to the pole, or any government authority have been obtained, and any necessary, preliminary work involving other attachments to the pole has been completed prior to the commencement of the 30-day period. The Requesting Party shall be responsible for obtaining any necessary approvals for any Make-Ready Work to be performed from the Pole Owner, other attaching party, or from any governmental authority or agency.

iii. The Facilities Owner shall provide an itemized invoice outlining the costs it incurred to perform any Make-Ready Work authorized hereunder within ten (10) business days after the end of each month during which the Facilities Owner performs such work. The Requesting Party agrees that it will pay all undisputed invoices submitted to it by the Facilities Owner in connection with the Make-Ready Work performed under this Agreement within 30 days of receipt. If the Requesting Party disputes the amount of any invoice, the Requesting Party shall pay the undisputed portion, if any, within thirty (30) days of receipt and will promptly notify the Facilities Owner of any disputed amounts and the basis of the dispute. Any invoice or portion thereof unpaid by the Requesting Party thirty (30) days after receipt shall bear interest at a rate of 1.5% per month or the maximum allowed under applicable law if lower. It is hereby understood and agreed that all costs shall be based on the schedules attached as Attachment A hereto, and that it shall be conclusively established that any charges based on such schedules for Make-Ready Work authorized hereunder are reasonable.

c. **Work Performed by Requesting Party.** If the Requesting Party performs any Make-Ready Work as permitted under this Agreement, the Requesting Party shall ensure that such work is performed **only** by a contractor jointly approved by both Overbuilder and KCCP (an "Approved Contractor").

i. Notwithstanding anything else in this Agreement, the Facilities Owner shall always perform any Splicing and Replacement of service drops necessary in connection with Make-Ready Work under this Agreement.

ii. The Requesting Party shall not Relocate, Transfer or otherwise move any of the facilities of the Facilities Owner, except pursuant to the terms of this Agreement. The Requesting Party shall ensure that its Approved Contractor(s) performing any Make-Ready Work under this Agreement do not Relocate, Transfer or otherwise move any of the facilities of the Facilities Owner, except pursuant to the terms of this Agreement.

iii. The Requesting Party shall ensure that any Make-Ready Work performed by its Approved Contractors under this Agreement shall be performed in accordance with the respective construction standards of either Overbuilder or KCCP, whichever party is the Facilities Owner, as attached at Attachment B, hereto.

iv. Prior to the commencement of underground construction, the Requesting Party shall be obligated to call the appropriate locating service and to pay all costs associated with the locating service.

v. In the event Requesting Party accidentally damages any portion of Facilities Owner's facilities, Requesting Party shall immediately notify Facilities Owner of the damage so that appropriate steps can be taken to both protect Facilities Owner's facilities and restore service to Facilities Owner's customers.

vi. All vehicles used by the Requesting Party and/or its Approved Contractors when performing Make-Ready Work on behalf of the Requesting Party shall clearly identify in a manner visible to the public that the Requesting Party is the party responsible for the construction and all employees, agents and contractors of the Requesting Party will correctly identify themselves as performing services for the Requesting Party and not the Facilities Owner.

d. Notice of Completion/Inspection. Within ten (10) business days after the performance of any Make-Ready Work performed by the Requesting Party, as outlined in Paragraphs 3(c), the Requesting Party shall provide notice thereof to the Facilities Owner. The Facilities Owner shall, within ten (10) business days after the receipt of such notice, or such time period as the Facilities Owner may reasonably require, inspect the pole location(s) on which Make-Ready Work has been performed to ensure that all such work has been performed correctly and in compliance with the National Electrical Safety Code, the Pole Attachment Agreements, and the construction standards of the Facilities Owner (the "Final Inspection").

i. If the Facilities Owner concludes, based on the Final Inspection, that any of the authorized Make-Ready Work was not performed correctly or in compliance with applicable construction standards, the Facilities Owner shall either (1) request that Requesting Party remedy any deficiencies in construction within 10 days; or (2) remedy the deficiencies itself and bill the Requesting Party pursuant to Paragraph 3(b) above. If the Facilities Owner

requests that Requesting Party correct deficiencies and such corrections are not made within 10 days, the Facilities Owner may remedy the deficiencies itself and bill the Requesting Party for the cost of such remedy plus an additional 25% for liquidated damages.

ii. If the Facilities Owner does not notify the Requesting Party of any deficiencies within 10 days after performing a Final Inspection, the Make-Ready Work shall be deemed accepted.

iii. If Facilities Owner determines that its facilities have been damaged as a result of any construction by or on behalf of Requesting Party, Facilities Owner may repair or replace the damaged facilities and bill the Requesting Party for all costs of repair or replacement, plus an additional 25% for liquidated damages.

iv. The Requesting Party shall reimburse the Facilities Owner for the cost of any inspection conducted pursuant to this paragraph, at the rates identified in Attachment A.

4. **Construction Standards.** All Make-Ready Work performed by either the Facilities Owner or the Requesting Party, or their respective contractors, shall be in full compliance with all applicable codes and the requirements of the Pole Attachment Agreements and the standards of the other party, as identified in Attachment B.

5. **Pole Owner's Obligation.** KCCP and Overbuilder agree that it is Pole Owner's obligation to provide poles that are in compliance with the National Electric Safety Code, the Pole Attachment Agreements or other applicable regulatory standards. If a pre-existing violation involving facilities of Facilities Owner is identified during preparation of the Make-Ready Description, the Requesting Party shall request that the Pole Owner—and not the Facilities Owner—take the steps necessary to remedy the violation, and the Requesting Party shall not seek to require Facilities Owner to make or pay for such remedial action.

6. **Existing Agreements.** This Agreement is being made with the recognition between the parties that it does not modify any Pole Attachment Agreement entered into by Overbuilder or KCCP, nor does it obligate either party to comply with the terms of the other parties' Pole Attachment Agreement.

7. **Notice.** For purposes of this Agreement, notices shall be deemed to have been received three business days after they are mailed, first class, U.S. Mail to:

For KCCP: Kansas City Cable Partners
6550 Winchester Avenue
Kansas City, MO 64133
Attn: Robert B. Niles, Division President

For Overbuilder:

8. **Scope.** This Agreement applies to (i) entities acquired by either party or its affiliates subsequent to execution of this Agreement, and (ii) to Overbuilder's and KCCP's successors and assigns.

9. **Term.** The term of this Agreement shall commence the date on which it has been signed by all parties and shall continue for an initial term of three (3) years. Thereafter, the Agreement shall be automatically renewed for subsequent one (1) year terms. Either party may terminate this Agreement upon written notice to the other party not less than ninety (90) days prior to the expiration of the initial or any renewal term. Upon default under this Agreement, the non-defaulting party may terminate the Agreement, after giving notice and a reasonable opportunity to the defaulting party to cure the default.

10. **Dispute Resolution.** Any controversy between the parties arising out of this Agreement or breach thereof, is subject to the mediation process described herein. A meeting will be held promptly between the parties to attempt in good faith to negotiate a resolution of the dispute. The meeting will be attended by individuals with decision making authority regarding the dispute. The parties may mutually agree to extend such meeting beyond one day. If, the parties have not succeeded in resolving the dispute during such meeting, then, within no more than 30 days after the meeting's conclusion, they will submit the dispute to a mutually acceptable third party mediator who is acquainted with dispute resolution methods. Overbuilder and KCCP will participate in good faith in the mediation and the mediation process. The mediation shall be nonbinding. If the dispute is not resolved by mediation, within three months after the end of the meeting referred to above, either party may pursue resolution of the dispute before a court or agency with jurisdiction over the same. Should either party in good faith determine that a controversy creates a situation requiring immediate relief from an agency or court, that party may pursue such relief prior to the commencement or completion of the

mediation process. Any party electing to pursue such immediate relief before an agency or court shall notify the other party of its actions. The parties agree that the mediation process may continue contemporaneously with any action taken to secure immediate relief from an agency or court.

OVERBUILDER

By:_____
Name:
Title:
Date:

KANSAS CITY CABLE PARTNERS
By Time Warner Entertainment Company, L.P., a general partner, through its Kansas City Division

By:_____
Robert B. Niles
Division President
Date:

US OFFICE PRODUCTS

DECLARATION OF SUSAN ARNDT

1. My name is Susan Arndt. I am a Vice President of Marketing at Everest Connections Corporation ("Everest"), located at 5555 Winghaven Blvd., O'Fallon, Missouri 63366. I have worked for or with Everest since its inception (for approximately 18 months).

2. My responsibilities at Everest include market planning, market research, product development, programming negotiation and vendor selection for set top boxes and digital services.

3. Everest is currently competing with Time Warner in two markets, Kansas City and Minneapolis.

4. Initially, Everest identified Scientific Atlanta (SA) as a vendor for its Head End solution. The Head End is the platform in which Everest will launch its programming through its network. But, upon information and belief, Everest was advised that SA had an exclusive agreement with Time Warner not to sell its Head End or set top boxes in any market in which Time Warner provided service. SA is one of the few major manufacturers of set top boxes.

5. On June 29, 2000, I was advised by Video on Demand ("VOD") vendor Sea Change that it would like to sell Everest its product, but that it could not sell the VOD line of its product in certain markets, including Kansas City and Minneapolis, because Sea Change has an agreement with an MSO not to sell to overbuilders of that MSO. Sea Change indicated that it would sell Everest its product for use in markets in which we do not compete with that MSO.

6. On July 24, 2000, I was advised by VOD vendor Pioneer Digital Technologies that it would like to sell Everest its product, but that it could not sell to us if we would be using its product in any market in which we compete with Time Warner because Pioneer has an agreement with Time Warner not to sell to overbuilders of Time Warner. Pioneer indicated that it would sell Everest its product for use in markets in which we do not compete with Time Warner.

7. I have spent over 10 years dealing with equipment and product vendors. It is my general experience that most are anxious to sell their product to all buyers.

8. Upon information and belief, Everest's ability to compete effectively with Time Warner has been hindered significantly by the conduct of Time Warner in its dealings with major vendors of equipment and VOD products.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

Susan Arndt

Susan Arndt

September 19, 2000