

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554**

In the Matter of:)
)

Time Warner Cable Separation Application)
File No. CAR-20080701AA-09)
_____)

MB 08-120
DA 08-1574

**PETITION OF RCN CORPORATION TO CONDITION CONSENT OR DENY
APPLICATION**

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Dated: July 31, 2008

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RCN Corporation (“RCN”), through its undersigned attorneys and pursuant to the Public Notice issued in the above-captioned proceeding,¹ hereby requests that the Commission condition its consent to the Application filed by Time Warner NY Cable LLC (“Time Warner”) for approval of certain license assignments in connection with an internal restructuring and subsequent “Separation Transaction” (together the “Transactions”) whereby Time Warner Inc. (“TWX”) will divest Time Warner Cable (“TWC”) into a separate publicly traded corporation. The Application characterizes the Transactions as *pro forma* insofar as they consist of internal restructurings and a subsequent spin-off or split-off (or a combination thereof) of TWC shares to existing TWX shareholders.²

¹ *Public Notice*, Time Warner Seeks FCC Consent to Assign or Transfer Control of Licenses and Authorizations in Connection with the Time Warner Cable Separation, MB Docket No. 08-120, Pleading Cycle Established, DA 08-1574 (rel. July 1, 2008).

² Application at Ex. B-2, pp. 1-3.

Summary

The separation of TWX and TWC will purportedly result in an “insubstantial change” in their current ownership.³ Nevertheless, Time Warner’s sparse public interest arguments also assert that the Transactions will “eliminate the vertical integration of TWX” with respect to programming and cable distribution interests.⁴ Although Time Warner lauds this as one of the two public interest benefits it claims from the Transactions, it also presumably means that Time Warner believes that TWX, and its massive interests in must-have cable programming such as the HBO channels, the CNN channels, the Cinemax channels, TBS, TNT, Turner Classic Movies, and Cartoon Network, will no longer have an attributable interest in TWC and therefore will no longer be subject to the program access obligations set forth in Section 628 of the Communications Act and the Commission’s Rules.⁵

Even though Applicants acknowledge that there will be at most an “insubstantial change” in the current common ownership of TWC and TWX, as a technical matter it appears from Time Warner’s statement that there will no longer be vertical integration between TWX and TWC that the thresholds of ownership attribution set forth in Section 628 will therefore no longer be met following the separation. This would mean, absent action by the Commission to condition its approval, that TWX will no longer be subject to Section 628’s prohibitions on exclusive and discriminatory programming agreements.

For the reasons set forth herein, this raises substantial public interest concerns about continued non-discriminatory access to programming by RCN and other cable service providers. RCN therefore respectfully requests that any grant of the Application be accompanied by a

³ Application at Ex. B-2, p. 3.

⁴ Application at Ex. B-2, p. 4.

⁵ 47 U.S.C. § 548 and 47 C.F.R. § 76.1000 *et seq.*

condition that, for a period of 6 years following the closing of the transactions, TWX must continue to ensure that cable service providers, such as RCN, remain able to obtain programming from TWX or its subsidiaries or affiliates on a non-exclusive and non-discriminatory basis pursuant to Section 628 of the Communications Act and Section 76.1000 *et seq.*, of the Commission's Rules.

I. Background

A. Standard of Review

Pursuant to Sections 214 and 310(d) of the Communications Act, the Commission must determine whether Time Warner has demonstrated that the proposed Transactions and related assignments and transfers of control of licenses and authorizations will serve the public interest, convenience, and necessity.⁶ In making this assessment, the Commission must first determine whether the proposed transaction would comply with the specific provisions of the Communications Act,⁷ other applicable statutes, and the Commission's rules. If the transaction does not violate a statute or rule, the Commission considers whether it could result in "public interest harms" by frustrating or impairing the objectives or implementation of the Act or related statutes. The Commission then employs a balancing process, weighing any potential public interest harms of the proposed transactions against any potential public interest benefits.⁸ Applicants bear the burden of proving, by a preponderance of the evidence, that the proposed transactions, on balance, would serve the public interest.

⁶ 47 U.S.C. §§ 214, 310(d).

⁷ Section 310(d) requires that the Commission consider the applications as if the proposed transferee were applying for the licenses directly. 47 U.S.C. § 310(d).

⁸ See, e.g., *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203, MB 05-192, FCC 06-105, ¶ 4 (rel. July 21, 2006) ("*Adelphia Order*").

RCN submits that the Commission’s public interest evaluation should encompass the broad aims of the Communications Act, which include, but are not limited to, “a deeply rooted preference for *preserving and enhancing competition in relevant markets*, accelerating private sector deployment of advanced services, ensuring a diversity of information sources and services to the public, and generally managing the spectrum in the public interest.”⁹

B. The Time Warner Application

The Application and Public Notice state that under the proposed Transactions, all of TWX’s current Commission-authorized licenses related to its cable business will be ultimately controlled by the public shareholders of TWC, rather than TWX. It does not specify exactly how such a divestiture would be accomplished, but instead states that shares in TWC will be distributed to the shareholders of TWX either through a spin-off or split-off transaction. If a spin-off is elected, TWX will distribute to all of its shareholders a *pro rata* number of shares of TWC, necessarily resulting in common ownership of the two entities at least immediately following the close of the transaction. If a split-off is elected, TWX will offer its shareholders the opportunity to exchange their shares of TWX stock for a specified number of shares of TWC stock (again, resulting in at least temporary common ownership between the two companies, albeit apparently not on a fully *pro rata* basis).¹⁰

In keeping with its position that the Transactions are “*pro forma*,” Time Warner’s public interest discussion in the Application is insubstantial. Time Warner simply claims, without elaboration, that the public interest will benefit because separating the TWX media content

⁹ See *Adelphia Order*, ¶ 24 (internal citations omitted) (emphasis supplied).

¹⁰ The Application specifically pertains to the assignment or transfer of Cable Television Relay Service (“CARS”) licenses issued under Part 78 of the Commission’s Rules, Ku-band transmit earth station licenses issued under Part 25 of the Commission’s Rules, land mobile radio licenses issued under Part 90 of the Commission’s Rules, and point-to-point microwave licenses issued under Part 101 of the Commission’s Rules.

businesses from the TWC content delivery platform “will place both companies in a better position to improve the number and quality of products and services they provide, to the ultimate benefit of consumers, including both their current customers and prospective new customers.”¹¹ Time Warner, however, does not in any way explain *how* such a separation will lead the two companies to accomplish such “improvements,” and this bare statement clearly does not outweigh the public interest harm that eliminating all TWX program access obligations would have on competition and therefore consumers.

The only other ground that Time Warner asserts in support of its public interest claim is that the transactions are designed to eliminate concerns regarding vertical integration by “eliminat[ing] the vertical integration of TWX” with TWC’s programming business, and reducing the vertical integration of TWC with certain Regional Sports Networks (“RSNs”) and other limited programming interests that will remain with TWC following the Transactions.¹² As discussed below, RCN wholeheartedly agrees in principle that eliminating vertical integration between cable programmers who control must-have programming and cable operators is a good thing for competition generally, and that the separation of TWX and TWC will, in the long run, have a positive effect. However, to the extent that TWX and TWC will continue to have substantial, if not total, overlap in their ownership after the Transactions are completed and for

¹¹ Application at Ex. B-2, p. 3.

¹² The Application states that “the Transactions will substantially reduce the vertical integration of TWC,” presumably since TWC will no longer be affiliated with TWX and its programming interests and will only have attributable interests in certain local and regional programming services, including certain Regional Sports Networks (“RSNs”), and interests in certain video-on-demand and music programming services. Application at Ex. B-2, p. 4 n.9. RCN believes that, with respect to these programming interests in which TWC retains an attributable interest, the Section 628 program access rules will continue to apply. In addition, RCN believes that the additional program access obligations set forth by the Commission as conditions to TWC’s Adelphia merger, will continue to apply to TWC following the Transactions. *See generally Adelphia Order*. To the extent that there may be any doubt about these continuing obligations, any Commission grant of the Application should expressly clarify that they continue in full force and effect.

the foreseeable future thereafter, the “benefit” asserted by Time Warner could have negative implications for RCN and other cable operators (and their ability to serve their customers) since the FCC’s program access rules will no longer apply to TWX programming once the separation occurs.¹³ This would be particularly true for competitors in TWC markets such as New York City where RCN and Verizon offer facilities-based head-to-head competition to TWC, since such competitors would be significantly impacted by any discriminatory rate structure between TWX and TWC, but since TWX distributes national “must have” programming, it is also the case even in markets where TWC is not subject to significant competition, since an exclusive or discriminatory agreement would potentially harm competing operators throughout their systems.

C. The Commission’s Program Access Rules

In adopting the program access provisions as part of the Cable Television Consumer Protection and Competition Act of 1992 (“1992 Cable Act”), Congress intended to encourage entry into the multichannel video program distribution (“MVPD”) market by existing or potential competitors to traditional cable systems by making available to those entities the programming necessary to enable them to become viable competitors. Congress concluded at that time that integrated program suppliers have the incentive and ability to favor their affiliated cable operators over other MVPDs. Pursuant to these provisions, codified at Section 628 of the Act, competing cable operators like RCN have enjoyed the protections of the programming access rules as applied to TWX’s programming businesses and TWC to ensure access to TWX

¹³ The *Adelphia Order*’s program access conditions apply to “Time Warner’ mean[ing] Time Warner Cable Inc. and its subsidiaries, affiliates, parents, successors, and assigns” and cover RSNs that Time Warner “currently manages or controls” or which Time Warner, on or after the date of the *Adelphia Order* and during the 6 years for which the condition applies, acquires an attributable interest. *Adelphia Order* at Appx. B, ¶ A, and n.1. Accordingly, similar to the continued applicability of the *Adelphia Order* conditions to TWC after the transactions, RCN believes that the *Adelphia* conditions will continue in effect for TWX with respect to RSN programming. To the extent that there may be any doubt about these continuing obligations, any Commission grant of the Application should expressly clarify that they continue in full force and effect.

programming. Once the TWX/TWC separation is completed, TWC and TWX may not be formally “vertically integrated,” but as noted above, the common ownership and long-standing relationship between the companies, and continued personal and professional relationships among their managements (if not perhaps even common Board members or managers) will remain. The FCC should condition any grant the application to ensure that the continued functional vertical integration between the two companies does not result in negative impacts on MVPDs, and that the programming access rules remain in effect between the two companies at least on a temporary basis.

II. The Commission Should Condition Approval of the Application to Ensure Competing Cable Operators Are Not Harmed Through the Loss of Programming Access Protections

A. Programming Access Protections Are Necessary to Ensure the Public Interest is Not Harmed

As mentioned above, Section 628 addresses concerns that vertical integration between cable programming and distribution offers a powerful means to preclude competition from entering what has long been a monopoly arena. Section 628 therefore fosters the development of competition to traditional cable systems by facilitating competing MVPDs’ access to cable programming services. Generally, the program access rules prohibit cable operators from engaging in “unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder significantly or to prevent any MVPD from providing satellite cable programming or satellite broadcast programming to subscribers or consumers.”¹⁴

Unfortunately, Time Warner’s application does not detail the level of continued integration that the two entities may have subsequent to the proposed separation transaction. At a minimum, the Application clearly asserts that the Transactions are *pro forma*, on the basis that

¹⁴ 47 U.S.C. § 548(b).

the equity ownership of the two companies will be substantially similar, if not identical, after the consummation of the proposed Transactions. The potential for other types of continued “affiliation” such as common officers, board members or other management, are all facts that the Application fails to disclose or discuss. But regardless of whether any such additional formal ties continue, the common ownership of the two companies and the long-standing practical and personal business integration between TWX and TWC, will clearly not be erased overnight. As such, the potential “harms” that may be suffered by RCN and other MVPDs should be addressed by the Commission prior to any grant of the Application.

B. The Commission Has Previously Placed Programming Access Conditions on Cable Operator Transactions

Access to video programming is necessary for competition in the video distribution market. An MVPD’s ability to compete will be significantly harmed if denied access to popular programming, especially in those instances where no good substitute exists. Cable providers are dependent on programming owned and/or distributed by TWX, including HBO channels, the CNN channels, the Cinemax channels, TBS, TNT, Turner Classic Movies, Cartoon Network, and other popular cable networks. As such, RCN respectfully requests that the Commission condition any grant of the Application on continued applicability of Section 628 and the Commission’s program access rules for a period of at least 6 years following the closing of the Transactions.

The Commission’s public interest authority enables it to impose and enforce narrowly tailored, transaction-specific conditions that ensure that the public interest is served by the transaction.¹⁵ Section 303(r) of the Communications Act authorizes the Commission to prescribe

¹⁵ See, e.g., *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047-48 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19148 ¶ 15. See also *WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (stating that the Commission *may* attach conditions to the transfers); *Applications of VoiceStream Wireless Corp., Powertel Inc. and Deutsche Telekom AG for Consent to Transfer Control of Licenses and Authorizations*, 16 FCC Rcd 9779, 9782 (2001)

restrictions or conditions, not inconsistent with law, that may be necessary to carry out the provisions of the Act.¹⁶ Similarly, section 214(c) of the Act authorizes the Commission to attach to the certificate “such terms and conditions as in its judgment the public convenience and necessity may require.”¹⁷ These policies were put into practice in the *Adelphia Order*,¹⁸ where the Commission imposed certain programming access conditions on the relevant entities, including TWX and TWC, for a period of 6 years following the merger.

In the *Adelphia Order*, the Commission imposed certain program access conditions on Comcast and Time Warner with respect to their affiliated RSNs that are in addition to the requirements of Section 628 and the Commission’s program access rules.¹⁹ The continued applicability of the program access rules is equally important here. In addition, the Commission noted that the *Adelphia Order* conditions “are intended to prohibit all exclusive arrangements, including those that *may not be effectuated by a formal agreement*.”²⁰ Clearly, the Commission determined that even non-formal arrangements between programming providers and cable

(conditioning approval on compliance with agreements with Department of Justice and Federal Bureau of Investigation addressing national security, law enforcement, and public safety concerns).

¹⁶ See 47 U.S.C. § 303(r). See *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *WorldCom-MCI Order*, 13 FCC Rcd at 18032 ¶ 10 (citing *FCC v. Nat’l Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding broadcast-newspaper cross-ownership rules adopted pursuant to section 303(r)); *U.S. v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968) (holding that section 303(r) permits Commission to order cable company not to carry broadcast signal beyond station’s primary market); *United Video, Inc. v. FCC*, 890 F.2d 1173, 1182-83 (D.C. Cir. 1989) (affirming syndicated exclusivity rules adopted pursuant to section 303(r) authority).

¹⁷ *Cingular-AT&T Wireless Order*, 19 FCC Rcd at 21545 ¶ 43; *Bell Atlantic-GTE Order*, 15 FCC Rcd at 14047 ¶ 24; *AT&T Corp.-British Telecom. Order*, 14 FCC Rcd at 19148 ¶ 15.

¹⁸ See *Applications for Consent to the Assignment and/or Transfer of Control of Licenses, Adelphia Communications Corporation, Assignors to Time Warner Cable, Inc., Assignees, et al.*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006) (“*Adelphia Order*”).

¹⁹ *Adelphia Order*, Appx. B, ¶ B.1.a. The Commission specifically noted that these were in addition to, and “not intended to affect the application of the program access rules [Section 76.1000 *et seq.*].” *Adelphia Order* at Appx. B, p.2 n.4.

²⁰ *Adelphia Order*, Appx. B, p.1 n.1 (emphasis supplied).

operators should not be used to discriminate against competing cable operators. Given the long-standing relationship between TWX and TWC, and the common control (and perhaps management) following the close of the proposed transaction, RCN believes that a similar condition should be imposed on TWX and TWC (and their respective subsidiaries and affiliates) for a period of 6 years from the closing of the Transactions.²¹

Taken at face value, the information in the Time Warner Application implies that the companies may eventually be two truly separate and distinct operating entities. However, practically speaking, given the initial common ownership of both TWX and TWC, and the other long-standing relationships between the two entities (as well as the lack of information on other attributes of common management or operations after the Transaction are completed), such a final “true” separation will likely be years in the making.

Moreover, if the companies are truly going to separate their ownership, operations, and management, and thereby at some point arguably eliminate the incentive to discriminate in favor of each other in connection with programming agreements, RCN submits that they should have no problem accepting the programming access condition requested herein, as they would have no incentive to “play favorites.” If, however, the companies resist such a condition, it should serve to demonstrate to the Commission the long-standing connections between the companies and make obvious the public interest need for imposition of the requested condition.

III. Conclusion

Non-discriminatory programming access is clearly in the public interest. The Commission has recently concluded that “the exclusive contract prohibition continues to be necessary to preserve and protect competition and diversity in the distribution of video

²¹ The conditions in the *Adelphia Order* were likewise established for a period of 6 years. *Adelphia Order*, Appx. B, ¶ B.1.d.

programming....”²² For the reasons set forth above, RCN respectfully submits that the Commission condition any grant of the Time Warner Application to ensure that TXW and TWC do not engage in anti-competitive and discriminatory activities, and that TWX (and TWC RSN) programming remain available on a fair and non-discriminatory basis to other cable service providers. Consistent with the *Adelphia Order*, such a condition should be imposed for a period of 6 years so as to ensure that the mutual interests between the two entities has been sufficiently dissolved.

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Dated: July 31, 2008

²² See *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution: Section 628(c)(5) of the Communications Act: Sunset of Exclusive Contract Prohibition; Review of the Commission’s Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order and Notice of Proposed Rulemaking, MB Docket Nos. 07-29 & 07-198, ¶ 12 (rel. Oct. 1, 2007).