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

In the Matter of	)	
TIME WARNER APPLICATION FOR CONSENT TO ASSIGNMENT OF LICENSES	)	MB Docket No. 08-120 DA 08-1574

TO: Chief, Media Bureau

REPLY OF NATIONAL ASSOCIATION OF INDEPENDENT NETWORKS TO RCN'S PETITION TO CONDITION CONSENT OR TO DENY APPLICATION

Kathleen Wallman
Wallman Consulting, LLC
9332 Ramey Lane
Great Falls, VA 22066
202-641-5387
Advisor to National Association of Independent Networks

August 15, 2008

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

In the Matter of	)	
TIME WARNER APPLICATION FOR CONSENT TO ASSIGNMENT OF LICENSES	)	MB Docket No. 08-120 DA 08-1574

REPLY OF NATIONAL ASSOCIATION OF INDEPENDENT NETWORKS TO RCN'S PETITION TO CONDITION CONSENT OR TO DENY APPLICATION

I. INTRODUCTION AND SUMMARY

In its Application for Consent to Assignment of Licenses ("Application"), Time Warner proposes to separate its national programming divisions from its cable operations divisions and regional and local programming divisions. The bulk of Time Warner's national programming would ultimately be owned and handled by Time Warner, Inc. (TWX), while the cable systems operations and the regional and local programming (along with a small amount of other programming services) would be owned and handled by Time Warner Cable, Inc. (TWC). In connection with this proposed spin-off, which Time Warner styles "the Separation Transaction," Time Warner seeks the Commission's consent to assign the various licenses.

In its Petition to Condition Consent or Deny Application, RCN points out that the Commission's consent should not be granted without certain conditions necessary to protect the public from the harms that are caused when cable companies reap the competitive advantages of vertical integration while disregarding the Congressionally-mandated obligations that accompany

that integration. National Association of Independent Networks ("NAIN") agrees with RCN and, in this Reply to RCN's Petition, further explains the conditions that should be imposed

Time Warner's proposed spin-off, poses the risk of allowing the anticompetitive abuses flowing from vertical integration in the cable industry to continue outside the reach of the remedial scheme that was designed to mitigate those abuses. In particular, the Separation Transaction may be claimed to have the effect of exempting various transactions between or involving TWX and TWC from Section 616 of the Communications Act of 1934 ("Section 616"), 47 U.S.C. § 536, on the ground that these two entities are no longer integrated with each other, even as they continue to implement contracts that were made while they were in fact integrated. Failure to deem the two entities to be integrated as they implement these contracts will undermine the pro-diversity and pro-competitive purposes of Section 616.

In order to ensure that whatever positive potential of the transaction proposed by Time Warner is realized, while also ensuring that the harmful side effects are not, the Commission should grant its consent to the license assignments that will implement the Separation Transaction only on the conditions that, for the duration of the presently existing contracts for carriage of TWX programming on TWC cable systems and the renewal thereof or for a period of five years, whichever is greater, (a) TWX and TWC, as well as all of their subsidiaries and affiliates, successors and assigns, shall be deemed to be affiliated for purposes of Section 616, and (b) any discrimination by TWC or a TWC cable system against an unaffiliated programmer that is based on a presently existing contract for carriage of TWX programming on TWC cable systems shall be deemed to be discrimination based on affiliation or non-affiliation for purposes of Section 616. The purpose and effect of these conditions will be to ensure that Time Warner cable systems may not discriminate against unaffiliated programming

services in favor of Time Warner programming services on the basis of Time Warner programming services' enjoying the contractually entrenched benefits of prior affiliation with the Time Warner cable systems.

II. THE PUBLIC INTEREST REQUIRES ENFORCEMENT OF SECTION 616 AS LONG AS THERE IS A RISK THAT THE HARMS THAT SECTION 616 SOUGHT TO ELIMINATE WILL ARISE.

Without imposition of the condition requested here, the harms that Section 616 is designed to prevent will occur but may be argued to be outside the coverage of Section 616. Should the Separation Transaction proposed by Time Warner go forward, it is clear, beyond cavil that Section 616 will apply as a matter of course to at least some of TWC's operations:

- *First*, whether TWC remains affiliated with the national programming divisions of TWX, TWC will not be permitted to require a financial interest in any program service as a condition of carriage. *See* 47 C.F.R. § 76.1301(a) ("*No* cable operator or other multichannel video programming distributor shall require a financial interest in any program service as a condition for carriage on one or more of such operator's/provider's systems.") (emphasis added).

- *Second*, whether TWC remains affiliated with the national programming divisions of TWX, TWC will not be permitted to engage in coercive efforts to obtain from programmers exclusive rights to carry their programming. *See id.* § 76.1301(b) ("*No* cable operator or other multichannel video programming distributor shall coerce any video programming vendor to provide, or retaliate against such a vendor for failing to provide, exclusive rights against any other multichannel video programming distributor as a condition for carriage on a system.") (emphasis added).

- *Third*, whether TWC remains affiliated with the national programming divisions of TWX, TWC will not be permitted to discriminate on the basis of affiliation or non-affiliation in the carriage terms it offers unaffiliated programmers. *See id.* § 76.1301(c) ("No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.").

The difficulty in this matter concerns the application of the third item above. Because TWC will continue to own various programming services,[1] it is clear that *at least* with respect to these services, TWC may not discriminate on the basis of affiliation or non-affiliation, as for example by providing these services with broad distribution on favorable terms while denying comparable carriage to similarly situated (that is, competing) independent programmers.

Nevertheless, TWC may argue, in connection with pending and future carriage access complaints, that there is a gap in the coverage of Section 616: in some cases, the harms that Section 616 is designed to prevent will occur but may not be covered by Section 616. This gap, if it arises, will arise because provisions entrenching Time Warner's market power from the days when it was a monolithic, vertically integrated cable operator and programmer are now *built into* existing contracts (both for program carriage and program access) that will continue after the Separation Transaction.

In all events, the Commission should make clear that as a matter of public policy, Section 616 will be deemed to continue to apply. Conditions to this effect should be made part of the Commission's consent to the Separation Transaction. This clarification is necessary because, even though, ostensibly, TWC cable systems may dealing with two non-affiliated channels with respect to carriage decisions (*e.g.*, TWX's Turner Classic Movies, and a truly independent programmer), the reality is that the TWC cable systems' relationship with TWX's affiliated channel is a product of the prior affiliation of TWC and TWX. That prior affiliation and the contract it produced permit the TWX programming service to enjoy advantages over independent programming that arise only because it has contractual rights that were created at a

[1] Time Warner's Application states that "TWC will continue to own its local and regional programming services . . . . TWC also will continue to hold indirect, minority interests in SportsNet New York; In DEMAND, L.L.C., which provides video-on-demand services and operates the MOJO programming network; and Music Choice, which provides music programming services." Application, Ex. B-2, at 4 n.9.

time when it was affiliated with the TWC cable system. *Even if* the carriage contract was not discriminatory at the time it was created, it is the product of a relationship between vertically integrated entities. The separation of those entities via the spin-off does nothing to alter the fundamental nature of the contractual terms, which almost certainly would have been different, and less favorable, had the parties never been affiliated in the first place.

It is no answer to argue that once the affiliation terminates, any harms to independent programmers and to the viewing public are caused only "by contract" and not by vertical integration. The contract is a *product* of vertical integration. And the reality is that a contract entered into between a vertically integrated cable company and its affiliated programmer is simply not the same as a contract entered into between a cable company and an independent programmer. The former type of contract is likely to incorporate special benefits and considerations designed to maximize the leverage to be gained from vertical integration. For example, the vertically integrated cable company might provide especially broad distribution to a new programming service that it has developed, in order to permit the new channel to reach "critical mass" and thereby gain more market power vis-à-vis other new, independent networks, when it would *not* have provided similarly favorable carriage to a competing new, independent network. Even if the original carriage terms may well have complied with Section 616 at the time they were created, the reality is that the terms are still a *product* of affiliation, and that provenance does not change simply because the affiliation is itself terminated in the Separation Transaction.

If the fact that certain contractual terms are a legacy of vertical integration is ignored, significant public harms would result. The situation would essentially permit Time Warner to enjoy all the advantages of vertical integration – including, for example, sweetheart

carriage deals for Time Warner programs on Time Warner cable systems – with none of the attendant responsibilities. A TWX channel might enjoy years' worth of more favorable carriage (and perhaps even exclusive carriage, to the exclusion of competing channels) on a TWC cable system, at the expense of independent networks that would – if the TWC cable system were not making carriage decisions based in part on contracts embodying a history of vertical integration – offer viewers better and more diverse programming, offer advertisers more compelling access to their desired audience demographics, and do it all at better rates. Section 616 is designed to promote programming diversity and competition. Both of these objectives would be harmed if carriage terms that embody a vertically integrated relationship were treated as though they did not.

There is another concern that must be noted: after the reorganization that Time Warner proposes, the same shareholders will own both TWC and TWX. Though TWC and TWX will be putatively separate companies, they will in fact be commonly owned for the foreseeable future. Even after the Separation Transaction, the owners of TWC will still have the exact same "incentive and ability" as they had before to favor TWX programming services, for the exact same reasons as they had before the reorganization: they may benefit more from a sweetheart carriage deal for TWX programming services (the profits of which will accrue to them through their ownership of TWX) than they would lose from such a deal (the costs of which will accrue to them through their ownership of TWC). The Commission should find that even if TWX and TWC are no longer vertically integrated as a technical matter – an issue it need not resolve for purposes of the Application – their common owners will still be positioned with both the motive and the opportunity to engage in the precise affiliation-based discrimination that

Section 616 sought to prevent. At a minimum, this means that in the near future,[2] Commission oversight of the sort embodied in 47 C.F.R. §§ 76.1300-76.1302 is warranted.

III. STATUS OF PENDING CARRIAGE ACCESS COMPLAINTS

The vertically-integrated, pre-spin-off Time Warner currently has two program carriage complaints pending against it.[3] The spin-off transaction should not enable Time Warner to evade any remedial obligations that flow from these pending complaints. But beyond that, just as violations of law perpetrated by XM and Sirius with respect to their interoperability obligations were required to be resolved before the FCC approved their merger application,[4] so the pending discrimination complaints against Time Warner should be resolved prior to effectuation of the spin-off.

IV. CONCLUSION

NAIN does not oppose Time Warner's application for FCC consent to its vertical integration. Perhaps in time, TWC cable systems and TWX programming services will come to deal with each other and with independent programmers on equal terms untainted by the legacy of their current vertical integration. But because TWC cable systems and TWX programming services are already parties to contracts that embody their current vertical integration with each other, with all the attendant incentive and ability to discriminate that that integration entails, effective precautions are necessary.

---

[2] The present term of existing carriage contracts between channels that will ultimately be owned by TWX and cable systems that will ultimately be owned by TWC – the duration of the condition sought in this Reply – is a conservative estimate of the amount of time it will take for TWX and TWC to begin to be truly separately owned.

[3] It has lost one such discrimination complaint brought by MASN, an adjudication now before the full Commission on a petition for review. *TCR Sports Broadcasting Holding, L.L.P. v. Time Warner Cable Inc.*, Petition for Review (filed Jul. 2, 2008). *See also Herring Broadcasting, Inc. v. Time Warner Cable Inc.*, Complaint, File No. CSR-7709-P (filed Dec. 20, 2007).

[4] *Sirius Satellite Radio Inc.*, Consent Decree & Order, File Nos. EB-06-SE-250 and EB-06-SE-386, FCC 08-176 (rel. Aug. 5, 2008); *XM Radio, Inc.*, Consent Decree & Order, File Nos. EB-06-SE-148 and EB-06-SE-356, FCC 08-177 (rel. Aug. 5, 2008).

Thus, NAIN respectfully requests that the Commission grant Time Warner's Application subject to the following conditions: 1. for the duration of the presently existing contracts for carriage of TWX programming on TWC cable systems and the renewal thereof or for a period of five years, whichever is greater, (a) TWX and TWC, as well as all of their subsidiaries and affiliates, shall be deemed to be affiliated for purposes of Section 616, and (b) any discrimination by TWC or a TWC cable system against an unaffiliated programmer that is based on a presently existing contract or the renewal thereof for carriage of TWX programming on TWC cable systems shall be deemed to be discrimination based on affiliation or non-affiliation for purposes of Section 616. "Presently existing contract" means a contract in effect as of the date of the consummation of the Separation Transaction. "Duration of the presently existing contract" means the present term of that contract and any renewals thereof as of the date of the consummation of the Separation Transaction, and any extensions. 2. All pending programming carriage access discrimination complaints against Time Warner should be resolved prior to effectuation of the spin-off.

Without such conditions, the Application should be denied for the reasons stated herein and in the RCN Petition.

Respectfully submitted,

_____

August 15, 2008

CERTIFICATE OF SERVICE

I, Kathleen Wallman, certify that on this 15th day of August, 2008, I caused a true and correct copy of the foregoing NAIN's Reply to RCN's Petition to Condition Consent or to Deny Application to be served via first-class mail, postage prepaid, upon:

Marc Lawrence-Apfelbaum, Esq.
General Counsel
Time Warner Cable Inc.
One Time Warner Center, North Tower
New York, NY 10019
Counsel to Time Warner Cable Inc.

Richard Ramlall
Senior Vice President Strategic
& External Affairs and Programming
RCN Corporation
196 Van Buren Street
Herndon, VA 20170

Jean L. Kiddoo
Jeffrey R. Strenkowski
Bingham McCutchen LLP
2020 K Street, N.W.
Washington, DC 20006
Counsel for RCN Corporation

Michael G. Jones, Esq.
Willkie Farr & Gallagher LLP
1875 K Street, N.W.
Washington, DC 20006-1238

John R. Wilner
Bryan Cave LLP
700 Thirteenth Street N.W.
Washington, DC 20005-3960

Kathleen Wallman