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UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

In the Matter of **TIME WARNER INC.,** a corporation; **TURNER BROADCASTING SYSTEM, INC.,** a corporation; **TELE-COMMUNICATIONS, INC.,** a corporation; and **LIBERTY MEDIA CORPORATION,** a corporation.	)	**Docket No. C-3709**

COMPLAINT

Pursuant to the provisions of the Federal Trade Commission Act and the Clayton Act, and by virtue of the authority vested in it by said Acts, the Federal Trade Commission ("Commission"), having reason to believe that respondents Time Warner Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corporation, all subject to the jurisdiction of the Commission, have entered into various agreements in violation of Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and that if the terms of such agreements were to be consummated, would result in a violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and it appearing to the Commission that a proceeding in respect thereof would be in the public interest, hereby issues its complaint, stating its charges as follows:

I. Definitions

1. For the purposes of this complaint, the following definitions shall apply:

a. "Cable Television Programming Service" means satellite-delivered video programming that is offered, alone or with other services, to Multichannel Video Programming Distributors ("MVPDs") in the United States.

b. "Fully Diluted Equity of Time Warner" means all Time Warner common stock actually issued and outstanding plus the aggregate number of shares of Time Warner common stock that would be issued and outstanding assuming the exercise of all outstanding options, warrants and rights (excluding shares that would be issued in the event a poison pill is triggered) and the conversion of all outstanding securities that are convertible into Time Warner common stock.

c. "Multichannel Video Programming Distributor" or "MVPD" means a person providing multiple channels of video programming to subscribers in the United States for which a fee is charged, by any of various methods including, but not limited to, cable, satellite master antenna television, multichannel multipoint distribution, direct-to-home satellite (C-band, Ku-band, direct broadcast satellite), ultra high-frequency microwave systems (sometimes called LMDS), open video systems, or the facilities of common carrier telephone companies or their affiliates, as well as buying groups or purchasing agents of all such persons.

d. "Turner Cable Television Programming Service" means each Cable Television Programming Service, whether or not satellite-delivered, that is currently owned, controlled by, or affiliated with Turner.

II. Respondent Time Warner Inc.

2. Respondent Time Warner Inc. ("Time Warner") is a corporation organized, existing, and doing business under and by virtue of the laws of the State of Delaware, with its headquarters office and principal place of business located at 75 Rockefeller Plaza, New York, New York 10019. Time Warner had sales of approximately $8 billion in 1995.

3. Respondent Time Warner is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Time Warner's primary Cable Television Programming Services include Home Box Office ("HBO") and Cinemax, and their multiplexed versions. Other Cable Television Programming Services that are controlled by or affiliated with Time Warner include E! Entertainment Television, Comedy Central, and Court TV. Time Warner also owns approximately 20 percent of the outstanding stock of Turner. Time Warner is the nation's largest producer of Cable Television Programming Services sold to MVPDs, measured on the basis of subscription revenues. Time Warner's

subscription revenues from the sale of Cable Television Programming Services to MVPDs in 1995 were approximately $1.5 billion, and its total revenues from Cable Television Programming Services in 1995 were approximately $1.6 billion.

4. Respondent Time Warner's HBO, the largest Cable Television Programming Service measured on the basis of subscription revenues, is viewed by MVPDs as a "marquee" or "crown jewel" service, *i.e.*, those services necessary to attract and retain a significant percentage of their subscribers.

5. Respondent Time Warner is, and at all times relevant herein has been, an MVPD. Time Warner currently serves, either directly or indirectly, approximately 11.5 million households in selected areas in the United States. These 11.5 million households are approximately 17 percent of all of the households in the United States that purchase Cable Television Programming Services from MVPDs. Time Warner is the nation's second largest MVPD. Time Warner's total revenues in 1995 from serving as an MVPD were approximately $3.25 billion.

6. Respondent Time Warner is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

III. Respondent Turner Broadcasting System, Inc.

7. Respondent Turner Broadcasting System, Inc. ("Turner") is a corporation existing and doing business under and by virtue of the laws of the State of Georgia with its headquarters and principal place of business located at One CNN Center, Atlanta, Georgia 30348. Turner had sales of approximately $3.4 billion in 1995.

8. Respondent Turner is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Turner's Cable Television Programming Services include Cable News Network ("CNN"), Headline News ("HLN"), Turner Network Television ("TNT"), TBS Superstation ("WTBS"), Cartoon Network, Turner Classic Movies ("TCM"), CNN International USA ("CNNI USA"), CNN Financial Network ("CNNfn"), and services emphasizing regional sports programming. Turner is one of the nation's largest producers of Cable Television Programming Services sold to MVPDs as measured by subscription revenue. Turner's subscription revenues from the sale of Cable Television Programming Services to MVPDs in 1995 were approximately $700 million, and its total revenues from Cable Television Programming Services in 1995 were approximately $2 billion. As a programmer that does not own its own distribution systems, Turner had no incentive to, and generally did not, charge significantly higher prices for the same Cable Television Programming Services to new MVPD entrants compared to the prices offered to established MVPDs.

9. Respondent Turner's CNN, TNT, and WTBS are viewed by MVPDs as "marquee" or

"crown jewel" services, *i.e.*, those services necessary to attract and retain a significant percentage of their subscribers.

10. Respondent Turner is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

IV. Respondent Tele-Communications, Inc.

11. Respondent Tele-Communications, Inc. ("TCI") is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 5619 DTC Parkway, Englewood, Colorado 80111. TCI had sales of approximately $6.85 billion in 1995.

12. Respondent TCI is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States. Some of the larger Cable Television Programming Services that are controlled by or affiliated with TCI include Starz!, Encore, Discovery Channel, The Learning Channel, Court TV, E! Entertainment Television, BET, The Family Channel, Home Shopping Network, and services emphasizing regional sports programming. TCI also owns, directly or indirectly, approximately 24 percent of the outstanding stock of Turner. TCI's subscription revenues from the sale of Cable Television Programming Services controlled by TCI to MVPDs in 1995 were approximately $300 million. TCI's total revenues, excluding home shopping retail sales, from Cable Television Programming Services that are controlled by or affiliated with TCI in 1995 were approximately $520 million.

13. Respondent TCI is, and at all times relevant herein has been, an MVPD. TCI currently serves approximately 14 million households in selected areas in the United States. TCI also has either direct or indirect interests in cable television systems that distribute Cable Television Programming Services to an additional approximately 4 million households in the United States. These 18 million households are approximately 27 percent of all of the households in the United States that subscribe to Cable Television Programming Services from MVPDs. TCI is the nation's largest MVPD. TCI's total revenues in 1995 from serving as an MVPD were approximately $5 billion.

14. Respondent TCI is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

V. Respondent Liberty Media Corporation

15. Respondent Liberty Media Corporation ("LMC") is a corporation existing and doing business under and by virtue of the laws of the State of Delaware, with its headquarters and principal place of business located at 8101 East Prentice Avenue, Englewood, Colorado 80111. LMC is a wholly-owned subsidiary of Respondent TCI.

16. Respondent LMC is, and at all times relevant herein has been, engaged in the sale of Cable Television Programming Services to MVPDs throughout the United States.

17. Respondent LMC is, and at all times relevant herein has been, engaged in commerce as "commerce" is defined in Section 1 of the Clayton Act, as amended, 15 U.S.C. § 12, and is a corporation whose business is in or affecting commerce as "commerce" is defined in Section 4 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 44.

VI. The Agreements

18. This matter comprises three related principal agreements: (a) the acquisition by Time Warner of Turner; (b) the acquisition by TCI and LMC of an interest in Time Warner; and (c) the long-term mandatory carriage agreements between TCI, Turner, and Time Warner requiring TCI to carry Turner's CNN, Headline News, TNT, and WTBS at a discounted price based on the industry average price.

A. The Time Warner-Turner Acquisition

19. On or about September 22, 1995, Respondent Time Warner and Respondent Turner entered into an agreement for Time Warner to acquire the approximately 80 percent of the outstanding shares in Turner that it does not already own.

20. The value of the Time Warner-Turner acquisition as of the date the Time Warner-Turner agreement was entered into was approximately $7.5 billion. As initially structured, the transaction called for each share of Turner Class A Common Stock and Turner Class B Common Stock to be converted into the right to receive .75 of a share of New Time Warner Common Stock. In addition, each share of Turner Class C Convertible Preferred Stock was to be converted into the right to receive 4.8 shares of New Time Warner Common Stock.

B. The TCI-Time Warner Acquisition

21. Respondents TCI and LMC have, directly or indirectly, an approximately 24 percent existing interest in Respondent Turner. By trading their interest in Turner for an interest in Time Warner, TCI and LMC would have acquired approximately a 7.5 percent interest in the Fully Diluted Equity of Time Warner, or approximately 10 percent of the outstanding shares of Time Warner, valued at approximately $2 billion as of the date the Respondents signed the proposed consent agreement.

22. Respondent TCI also would acquire a right of first refusal on the approximately 7.4 percent interest in the Fully Diluted Equity of Time Warner that R. E. Turner, III, chairman of Turner, would receive as result of trading his interest in Turner for an interest in Respondent Time Warner. Although Time Warner has a "poison pill" that would prevent TCI from acquiring more than a certain amount of stock without triggering adverse consequences, that poison pill would still allow TCI to acquire approximately 15 percent of the Fully Diluted Equity of Time Warner, and if the poison pill were to be altered or waived, TCI could acquire more than 15 percent of the Fully Diluted Equity of Time Warner.

C. The Long-Term Mandatory Carriage Agreements

23. On or about September 14, 1995, and September 15, 1995, in anticipation of and contingent upon the Time Warner-Turner and TCI-Time Warner acquisitions, TCI, Turner, and Time Warner entered into two long-term mandatory carriage agreements formally referred to as the Programming Services Agreements ("PSAs"). Under the terms of these PSAs, TCI would be required, on virtually all of its cable television systems, to carry CNN, Headline News, TNT, and WTBS for a 20-year period. The price to TCI would be 85 percent of the average price paid by the rest of the industry for these services.

VII. Trade and Commerce

24. One relevant line of commerce (*i.e.*, the product market) in which to analyze the effects of the proposed transaction is the sale of Cable Television Programming Services to MVPDs.

25. Another relevant line of commerce in which to analyze the effects of the proposed transaction is the sale of Cable Television Programming Services to households.

26. Cable Television Programming Services are a relevant line of commerce because over-the-air broadcast television, video cassette rentals, and other forms of news and entertainment do not have a sufficient price-constraining effect on the sales of Cable Television Programming Services to MVPDs, or the resale of Cable Television Programming Services by MVPDs to households so as to prevent the exercise of market power.

27. The relevant section of the country (*i.e.*, the geographic market) in which to analyze the effects of the sale of Cable Television Programming Services to MVPDs is the entire United States.

28. The entire United States is the relevant section of the country in which to analyze the effects of the proposed transactions in the sale of Cable Television Programming Services to MVPDs because most Cable Television Programming Services are distributed throughout the United States.

29. The relevant sections of the country in which to analyze the effects of the sale of Cable Television Programming Services by MVPDs to households are each of the local areas in which either Respondent Time Warner or Respondent TCI operate as MVPDs.

VIII. Market Structure

30. The sale of Cable Television Programming Services to MVPDs in the United States is highly concentrated, whether measured by the Herfindahl-Hirschman Index (commonly referred to as "HHI") or by two-firm and four-firm concentration ratios.

31. The post-acquisition HHI for the sale of Cable Television Programming Services to MVPDs in the United States measured on the basis of subscription revenues would increase by approximately 663 points, from 1,549 to 2,212, and will increase further if Time Warner converts WTBS from a "superstation" to a cable network charging subscriber fees. Post-acquisition Time Warner will be the largest provider of Cable Television Programming Services to MVPDs in the United States and its market share will be in excess of 40 percent.

32. The post-acquisition HHI in the sale of Cable Television Programming Services by MVPDs to households in each of the local areas in which Respondent Time Warner and Respondent TCI sell Cable Television Programming Services is unchanged from the proposed acquisitions and remains highly-concentrated. Time Warner, as an MVPD, serves, either directly or indirectly, approximately 11.5 million households in selected areas in the United States that represent approximately 17 percent of all of the households in the United States that purchase Cable Television Programming Services. TCI, as an MVPD, serves, either directly or indirectly, approximately 18 million households that represent 27 percent of all of the households in the United States that subscribe to Cable Television Programming Services.

XI. Entry Conditions

33. Entry into the relevant markets is difficult, and would not be timely, likely or sufficient to prevent anticompetitive effects.

34. Entry into the production of Cable Television Programming Services for sale to MVPDs that would have a significant market impact and prevent the anticompetitive effects is difficult. It generally takes more than two years to develop a Cable Television Programming Service to a point where it has a substantial subscriber base and competes directly with the Time Warner and Turner "marquee" or "crown jewel" services throughout the United States. Timely entry is made even more difficult and time consuming due to a shortage of available channel capacity.

35. Entry into the sale of Cable Television Programming Services to households in each of the local areas in which Respondent Time Warner and Respondent TCI operate as MVPDs is dependent upon access to a substantial majority of the high quality, "marquee" or "crown jewel" programming that MVPD subscribers deem important to their decision to subscribe, and that such access is threatened by increasing concentration at the programming level, combined with vertical integration of such programming into the MVPD level.

X. Competition Affected

36. Respondent Time Warner and Respondent Turner are actual competitors with each other and with other sellers in the sale of Cable Television Programming Services to MVPDs, and Time Warner's HBO, and Turner's CNN, TNT, and WTBS, are a large percentage of the limited number of "marquee" or "crown jewel" Cable Television Programming Services which disproportionately attract subscribers to MVPDs.

37. Respondent Time Warner faces actual and potential competition from other MVPDs and potential MVPD entrants in the sale of Cable Television Programming Services to households in each of the local areas in which it serves as an MVPD.

38. The effects of the agreements, if consummated, may be substantially to lessen competition in the relevant lines of commerce in the relevant sections of the country in violation of Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, in the following ways, among others:

a. enabling Respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs, directly or indirectly (*e.g.*, by requiring the purchase of unwanted programming), through its increased negotiating leverage with MVPDs, including through conditioning purchase of one or more "marquee" or "crown jewel" channels on purchase of other channels;

b. enabling Respondent Time Warner to increase prices on its Cable Television Programming Services sold to MVPDs by raising barriers to entry by new competitors or to repositioning by existing competitors, by preventing such rivals from achieving sufficient distribution to realize economies of scale; these effects are likely, because

(1) Respondent Time Warner has direct financial incentives as the post-acquisition owner of the Turner Cable Television Programming Services not to carry other Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services; and

(2) Respondent TCI has diminished incentives and diminished ability to either carry or invest in Cable Television Programming Services that directly compete with the Turner Cable Television Programming Services because the PSA agreements require TCI to carry Turner's CNN, Headline News, TNT, and WTBS for 20 years, and because TCI, as a significant shareholder of Time Warner, will have significant financial incentives to protect all of Time Warner's Cable Television Programming Services; and

c. denying rival MVPDs and any potential rival MVPDs of Respondent Time Warner competitive prices for Cable Television Programming Services, or charging rivals discriminatorily high prices for Cable Television Programming Services.

XI. Violations Charged

39. The agreement entered into between Time Warner and Turner for Time Warner to acquire Turner violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

40. The agreement entered into between TCI, LMC, and Time Warner for TCI and LMC to acquire an equity interest in Time Warner violates Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and would, if consummated, violate Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

41. The PSAs entered into between TCI, Turner, and Time Warner violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45, and would, if consummated, violate Section 5 of the Federal Trade Commission Act, as amended, 15 U.S.C. § 45.

WHEREFORE, THE PREMISES CONSIDERED, the Federal Trade Commission on this third day of February, 1997, issues its Complaint against Respondents Time Warner, Turner, TCI, and LMC.

By the Commission, Commissioner Azcuenaga and Commissioner Starek dissenting.

Donald S. Clark
Secretary

SEAL: