UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Office of the Secretary

July 17, 2002

Kathryn M. Fenton, Esquire
Jones, Day, Reavis & Pogue
51 Louisiana Avenue, N.W.
Washington, D.C. 20001-2113

Re: Motion of Respondent Liberty Media Corporation to Reopen and Modify the Commission's Order, In the Matter of Time Warner et al., Docket No. C-3709

Dear Ms. Fenton:

On March 19, 2002, Liberty Media Corporation ("Liberty") filed a Motion requesting the Commission "to reopen and set aside the Final Order in this matter insofar as it applies to Liberty and to dismiss Liberty as a Respondent." Liberty filed the Motion pursuant to Section 5(b) of the Federal Trade Commission Act[1] and Section 2.51 of the Commission's Rules of Practice and Procedure[2] on the grounds that "materially changed facts mean that the provisions of the Final Order relating to Liberty are no longer in the public interest or required to preserve competition." The Motion was placed on the public record on March 22, 2002, and the comment period closed on April 22, 2002, with no comments filed on the public record. For the reasons discussed below, the Commission has determined to deny Liberty's request to reopen and modify this Order.

The Order that Liberty seeks to modify resulted from Time Warner's 1996 acquisition of Turner Broadcasting, Inc. ("Turner"). As part of that acquisition, Tele-Communications, Inc. ("TCI"), and its wholly-owned subsidiary, Liberty, agreed to exchange their 24 percent interest in Turner for a 7.5 percent interest in Time Warner. In addition, TCI entered into a long-term agreement with Turner and Time Warner to carry some of their programming on TCI's cable television systems at discounted rates.[3]

---

[1] 15 U.S.C. § 45(b).

[2] 16 C.F.R. § 2.51.

[3] Complaint, Dkt. No. C-3709 ("Complaint"), ¶ 18.

According to the Complaint, the effects of the acquisition, together with the related agreements, would have been to reduce competition in the cable television programming and cable television system markets. Time Warner's control of so much of the cable programming in general, and of marquee or crown jewel programming in particular, would have enabled Time Warner to raise prices on its programming or condition access to some of its marquee programming on the purchase of unwanted programming, and would have limited the ability of cable television systems that buy such programming to take responsive action to avoid such price increases. The vertical integration of Time Warner's and TCI's cable systems with Time Warner's, Turner's, and TCI's programming would also have allowed Time Warner to limit competition with its programming by denying rival programmers access to TCI's and Time Warner's cable systems, thereby preventing them from gaining access to sufficient distribution to realize economies of scale. At the same time, TCI's ownership interest in Time Warner and concurrent long-term contractual obligations to carry Turner programming would have undermined TCI's incentive to sign up better or less expensive non-Time Warner programming.[4]

The Order required TCI and Liberty to divest to a "Separate Company" the Time Warner stock they would receive as a result of the merger.[5] The Separate Company could not vote or acquire any more Time Warner stock until the Separate Company established a board of directors approved by the Commission as completely independent of TCI and Liberty and their officers and directors.[6] After the divestiture, TCI and Liberty could not acquire, directly or indirectly, more than a *de minimis* interest in Time Warner without the prior approval of the Commission.[7] The Order further provided, however, that if the parties could not obtain from the IRS a ruling to treat such a divestiture as a tax-free transfer, then the parties were not required to divest. In that event, the Order allowed TCI and Liberty to keep the interest they would acquire in Time Warner but imposed a cap on the total shares that TCI and Liberty might hold and prohibited TCI and Liberty from voting their stock.[8]

Liberty's Motion seeks to modify the Order to allow it to vote the Time Warner shares it owns and to buy additional Time Warner voting securities. Since the Order was issued, Time Warner has merged with America Online, Inc., to become AOL Time Warner, Inc. For purposes of Liberty's Motion, we will continue to refer to that company as "Time Warner."

---

[4] Complaint ¶ 38. *See also* Analysis to Aid Public Comment, 61 Fed. Reg. 50301, 50309-10 (Sept. 25, 1996).

[5] Order ¶ II.A.

[6] *Id.* ¶ II.C.

[7] *Id.* ¶ III.

[8] *Id.* ¶ II.D.

Liberty alleges that the Order ought to be set aside as to Liberty on the grounds that "[t]he Final Order provisions applicable to Liberty arose from and were intended to address the linkage that existed, through Liberty, between Liberty's then parent, [TCI], and [Time Warner]"[9] – a linkage that has been broken.[10] Liberty claims that the "split off" of Liberty from TCI "eliminates any of the hypothesized competitive harms sought to be addressed by the Order provisions applicable to Liberty."[11] It concludes that the Order provisions relating to Liberty should be set aside "[b]ecause continuation of the Order provisions . . . is unnecessary to serve the public interest and significantly restricts Liberty's ability to maximize shareholder value."[12]

Liberty's Motion to reopen and modify the Order appears to read the Complaint and Order to say that the only competitive concern with respect to Liberty's ownership of Time Warner voting securities had to do with the vertical integration between TCI's cable systems and Time Warner's systems and programming. The Motion appears to assume that this concern is limited to TCI and not to any other cable system or group of cable systems. The only changed condition of fact asserted in Liberty's Motion and its supporting affidavit is the current separation between TCI and Liberty. Liberty has not asserted any other change of fact; in particular, it has said nothing about whether it plans to remain free of connections with TCI and other cable systems. Thus, Liberty has not addressed the broader competitive concerns raised in the Complaint and addressed in the Order regarding the integration of Time Warner programming services and cable systems with other cable systems.

The FTC Act provides that the Commission shall reopen an Order to consider whether it should be modified if the respondent "makes a satisfactory showing that changed conditions of law or fact" so require.[13] A showing sufficient to require reopening is made when a request to reopen identifies

---

[9] Motion at 1.

[10] In March, 1999, TCI merged with AT&T Corporation ("AT&T"). On August 10, 2001, Liberty was split off from AT&T to the holders of AT&T's Liberty Media Group Tracking Stock. As of that date, Liberty became a separate publicly traded company. *Id* at 1.

[11] *Id.* at 1-2.

[12] *Id.* at 2. The Motion offers no argument or facts in support of these conclusory assertions.

[13] Section 5(b) provides, in part:

> [T]he Commission shall reopen any such order to consider whether such order (including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require

significant changes in circumstances and shows that the changes eliminate the need for the order or make continued application of the order inequitable or harmful to competition.[14]

The Commission has repeatedly emphasized that, where a request based on a change of fact alleges that a respondent has exited the market that was the subject of the order, the respondent must show both (1) that it has in fact exited and (2) that it has a present intention not to reenter that market.[15]

If the Commission determines that the petitioner has made the required showing of a change of

---

such order to be altered, modified, or set aside, in whole or in part.

The 1980 amendment to Section 5(b) did not change the standard for order reopening and modification, but "codifie[d] existing Commission procedures by requiring the Commission to reopen an order if the specified showing is made," S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979), and added the requirement that the Commission act on petitions to reopen within 120 days of filing.

[14] *Louisiana Pacific Corp.,* 112 F.T.C. 547 (1989), Letter to John C. Hart (June 5, 1986). *See* S. Rep. No. 96-500, 96th Cong., 1st Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Phillips Petroleum Co.,* 78 F.T.C. 1573, 1575 (1971) (modification not required for changes reasonably foreseeable at time of consent negotiations); *Pay Less Drugstores Northwest, Inc.,* Docket No. C-3039, Letter to H.B. Hummelt (Jan. 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Swift & Co.*, 286 U.S. 106, 119 (1932) ("clear showing" of changes that have eliminated reasons for order, or such that the order causes unanticipated hardship).

Section 5(b) also provides that the Commission may modify an order when, although changed circumstances would not require reopening, the Commission determines that the public interest so requires. In the case of public interest requests, Commission Rule 2.51(b) requires the petitioner to make an initial satisfactory showing of how modification would serve the public interest before the Commission will determine whether to reopen an order and consider all of the reasons for and against its modification. Liberty's Motion does not seek reopening or modification under the separate public interest standard, and the Commission has therefore not considered that question.

[15] *See KKR Associates, L.P.*, 116 F.T.C. 335, 341 & n.7 (1993) (request to modify denied where the "'exit' from two of the relevant markets may be temporary;" "KKR, in contrast, has not definitively stated an intention to remain out of these markets"); Letter to Abbott B. Lipsky, Jr., et al. concerning *The Coca-Cola Company*, 121 F.T.C. 958, 960 (1996) (request to reopen denied because "Coca-Cola has to this day never disavowed an interest in acquiring Dr Pepper in the future"). By way of contrast, *see Allied Corp.,* 109 F.T.C. 83, 84 (1987) (granting a modification where "Allied states that it does not intend now to reenter the market"); *Union Carbide*, 108 F.T.C. 184, 188 (1986) (granting a modification where "Carbide states its intention not to reenter that line of business").

fact, the Commission will then consider and balance all of the reasons for and against modification. In no instance does a decision to reopen an order oblige the Commission to modify it,[16] and the burden remains on the petitioner in all cases to demonstrate why the order should be reopened and modified. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[17] All information and material that the petitioner wishes the Commission to consider must be contained in the request at the time of filing.

In its Motion and the accompanying affidavit, Liberty asserts that no ties between it and TCI currently exist. For purposes of considering whether to reopen and modify the Order, the Commission accepts that assertion as true. Liberty has not shown, however, how this fact eliminates the need for the Order or makes continued application of the Order inequitable or harmful to competition.

First, there is no reason to believe, and Liberty offers none, that the concerns expressed by the Commission in the Complaint regarding the effects of the vertical integration of cable systems and Time Warner's cable programming are limited to TCI. The Commission concluded that Liberty's ownership interest in Time Warner could reduce TCI's incentive to open up its systems to non-Time Warner programming, making it more difficult for other programmers to achieve sufficient distribution to make them competitive in the programming market.[18] Your petition has provided no basis for concluding that similar ties between Liberty and other cable systems would not produce this same distortion of incentives – with the same effects on competition in the cable programming market – if Liberty were allowed to own and vote more stock in Time Warner.

Second, Liberty's Motion fails to address the issue of whether its split from TCI and its exit from the cable system market are temporary or permanent. Liberty disputes that there is any requirement that it disavow an intention to reacquire assets in the relevant market. To be sure, Section 5(b) of the FTC Act refers only to "changed conditions of law or fact [that] require such order to be altered . . . ."[19] As explained earlier, however, not every change of fact requires an order to be altered. The foregoing discussion of Commission precedent demonstrates that, as part of a "satisfactory showing" that an order is no longer needed to prevent the harm it was designed to prevent or remedy, a respondent must show that it intends to remain out of the relevant market addressed in the

---

[16] *See United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) (reopening and modification are independent determinations).

[17] *See Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394 (1981) (strong public interest considerations support repose and finality).

[18] Complaint ¶ 38.

[19] 15 U.S.C. § 45(b).

order.

The requirement that a respondent define its intention is not merely formalistic. Respondent's intention goes to the very question raised by Liberty, *viz*., whether there has in fact been a change in circumstances that warrants Commission action. If that change is temporary or momentary, there is no basis for altering the Order. Press reports about John Malone, Chairman of the Board of Liberty, indicate that Liberty is actively considering acquisition of cable systems. One recent article regarding Malone's plans reported:

> Mr. Malone also says he expects Liberty could eventually become the largest shareholder in Comcast Corp., the Philadelphia cable-TV company that recently agreed to buy AT&T's cable systems.[20]

Another article addressing Malone's anticipated role in the cable system market reported:

> But if the chips fall as he [Malone] hopes they will, by spring Liberty Media will be the world's largest cable company, with 25 million subscribers – three million more than the company that would be created by the proposed merger of AT&T and Comcast.[21]

And one magazine, published after Liberty filed its motion, reported that Mr. Malone is interested in a seat on the board of Time Warner to influence its cable operations.[22] The Commission is not suggesting that these press reports rebut Liberty's factual assertions; nevertheless, they illustrate dramatically why it is important that Liberty submit evidence that clearly demonstrates that it has no intention to acquire U.S. cable systems. In the absence of such evidence, the Commission cannot find for the petitioner.

After the Commission's staff pressed Liberty for a clear statement of whether it intends to stay out of the cable systems market, you submitted a letter dated April 30, 2002, in which you stated: "Although Liberty has no current plans to acquire any interest in U.S. cable system operators, this fact is simply not relevant to its motion here." You also suggested, in discussing some puts and other rights that might result in Liberty's owning an interest in a U.S. cable system: "As discussed above, hypothesizing and speculating about possible future events are not appropriately considered in resolving the pending motion." To the contrary, the threat to competition in the cable programming market that may arise from future ties between Time Warner and other cable systems through Liberty's ownership of Time Warner stock is one of the concerns addressed by the Order. The Commission is not

---

[20] The Wall Street Journal (Feb. 14, 2002, at B1).

[21] Fortune (Feb. 18, 2002, at 98).

[22] Business Week (May 13, 2002, at 86).

required to reopen the Order to consider freeing Liberty from its constraints without sufficient assurance from Liberty that its future participation in the cable systems market is so unlikely as to make the Order unnecessary.[23]

Liberty has not made an adequate showing that changed circumstances have made the Order unnecessary to address the concerns reflected in the Commission's Complaint and addressed by the Order's prohibition on Liberty's owning or voting additional Time Warner stock. Accordingly, the Commission has denied Liberty's Motion to reopen and modify the Order in Docket No. C-3709.

By direction of the Commission.

Donald S. Clark
Secretary

---

[23] More recently, after further discussions with the Commission's staff, you submitted an affidavit by Robert Bennett, President and CEO of Liberty, in which Mr. Bennett addressed his understanding of Liberty's intentions regarding future acquisitions of cable television systems. Commission Rule 2.51 requires that "[a]ll information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing." 16 C.F.R. § 2.51. Because the affidavit was submitted three months after Liberty's Motion, and only a month before the Commission was required to rule on Liberty's Motion, the Commission has not had time to investigate and fully consider whether the affidavit provides adequate assurance that Liberty's future participation in the cable systems market is so unlikely as to make the Order unnecessary and, therefore, to require a reopening of the Order.