UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

COMMISSIONERS: **Deborah Platt Majoras, Chairman**
Pamela Jones Harbour
Jon Leibowitz
William E. Kovacic
J. Thomas Rosch

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

ORDER REOPENING AND MODIFYING ORDER

On February 16, 2006, Liberty Media Corporation ("Liberty"), one of the respondents named in the consent order issued by the Commission on February 3, 1997, in Docket No. C-3709 ("Order"), filed a Motion requesting the Commission to reopen and terminate the Order insofar as it applies to Liberty. Liberty's Motion was filed pursuant Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) and Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51. On February 27, 2006, the Commission placed on the public record Liberty's Motion and invited the public, for a period of 30 days, to submit comments on the Motion. No comments have been received. The Commission has reviewed the Motion and has determined to grant Liberty's Motion.

The Order that Liberty seeks to modify resulted from Time Warner Inc.'s ("Time Warner") 1996 acquisition of Turner Broadcasting, Inc. ("Turner"). Respondent Tele-Communications, Inc. ("TCI"), and its then wholly-owned subsidiary, Liberty, had a minority interest in Turner. As a result of the acquisition TCI and Liberty acquired approximately a 7.5 percent ownership interest in Time Warner. The transaction raised competitive concerns relating to the integration of Time Warner's programming services and cable systems with other cable systems.[1]

The Order, among other things, requires that the Liberty shares of Time Warner be nonvoting unless and until the shares are sold to an independent third party.[2] In addition there are further restrictions on Liberty's ability to increase its overall position in Time Warner.[3] The Order will terminate on February 3, 2007.[4]

Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b), 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. A satisfactory showing sufficient to require reopening is made when a request to reopen identifies significant

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[1] According to the Complaint, the effects of the acquisition 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. Complaint ¶ 38. *See also* Analysis to Aid Public Comment, 61 Fed. Reg. 50301, 50309-10 (September 25, 1996) ("Analysis to Aid Public Comment").

[2] *Id*. at II.D.(2).

[3] *Id*. at II.D.(1). The remaining substantive Order provisions (Paragraphs IV. through IX.) apply only to TCI and Time Warner.

[4] Order ¶ XIII.

changes in circumstances and shows that the changes eliminate the need for the order or make continued application of it inequitable or harmful to competition.[5]

The language of Section 5(b) plainly anticipates that the burden is on the petitioner to make a "satisfactory showing" of changed conditions to obtain reopening of the order. The legislative history also makes clear that the petitioner has the burden of showing, other than by conclusory statements, why an order should be modified. The Commission "may properly decline to reopen an order if a request is merely conclusory or otherwise fails to set forth specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions require the requested modification of the order."[6] If the Commission determines that the petitioner has made the necessary showing, the Commission must reopen the order to consider whether modification is required and, if so, the nature and extent of the modification. The Commission is not required to reopen the order, however, if the petitioner fails to meet its burden of making the satisfactory showing required by the statute. The petitioner's burden is not a light one in view of the public interest in repose and the finality of Commission orders.[7]

Where a request to reopen based on a change of fact alleges that respondent has exited the market that was subject of the order, the respondent must show *both* that it has in fact exited and

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[5] *See Louisiana Pacific Corp*., Docket No. C-2956, Letter to John C. Hart (June 5, 1986), at 4 (unpublished); S. Rep. No. 96-500, 96th Cong., 2nd Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *see Phillips Petroleum Co.*, 78 F.T.C. 1573 (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 (January 22, 1982) (changed conditions must be unforeseeable, create severe competitive hardship and eliminate dangers order sought to remedy) (unpublished); *see also United States v. Louisiana-Pacific Corp.*, 967 F.2d 1372, 1376-77 (9th Cir. 1992) ("A decision to reopen does not necessarily entail a decision to modify the order. Reopening may occur even where the petition itself does not plead facts requiring modification."); *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).

[6] *See* S. Rep. No. 96-500, 96th Cong., 1st Sess. 9-10 (1979); *see also* Rule 2.51(b) (requiring affidavits in support of petitions to reopen and modify).

[7] *See Federated Department Stores, Inc. v. Moitie*, 425 U.S. 394 (1981) (strong public interest considerations support repose and finality).

that it has a present intention not to reenter that market.[8] In all cases, the petitioner must provide all relevant information and material for the Commission to review at the time of the filing.[9] As required by Section 2.51(b) of the Commission's Rules, Liberty has submitted an affidavit affirming that it has exited the relevant market *and* that it has no current intention to reenter that market.[10]

Liberty's Motion seeks to terminate the Order insofar as it applies to Liberty based on "materially changed facts [which] mean that the Order's provisions relating to Liberty are no longer in the public interest or required to preserve competition."[11] Liberty notes that since the Order was issued, there have been significant changes in the corporate structure of Liberty and TCI, particularly as it relates to any ownership interest in United States cable systems.

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[8] *See KKR Associates, L.P.*, 116 F.T.C. 335 at 341 (1993) (request to modify denied where the "exit from the two relevant markets may be temporary." *Also* "KKR, in contrast, has not definitively stated an intention to remain out of these markets") (The Order was subsequently set aside in 1995 pursuant to the *Statement of the Federal Trade Commission Concerning Prior Approval and Prior Notice Provisions*, 120 F.T.C. 879 (1995)); and Letter to Abbott B. Lipsky, Jr. (January 26, 1996) 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."). *Contrast*, *Union Carbide*, 108 F.T.C. 184, 188 (1986) (granting a modification where "Carbide states its intention not to reenter that line of business."); and *Allied Corporation*, 109 F.T.C. 83, 84 (1987) (granting a modification where "Allied states that it does not intend now to reenter that market.").

[9] 16 C.F.R. § 2.51(b)(2). Liberty has not asserted that any changed condition of law requires reopening the Order, and the Commission, therefore, does not need to consider that issue. Additionally, where changed circumstances do not require reopening, Section 5(b) further provides that the Commission may reopen and set aside an order when it determines that the public interest so requires. Liberty's Motion also addresses the public interest standard, which requires that the requester make a *prima facie* showing of a legitimate public interest reason or reasons justifying relief. In this instance, however, we do not need to assess the sufficiency of Liberty's public interest showing, because Liberty has made the requisite satisfactory showing that changed conditions of fact require the Order to be set aside as to Liberty.

[10] In 2002, the Commission denied a motion by Liberty to reopen and modify the Order that was similar to Liberty's February 16, 2006, Motion. Among other things, the Commission based its denial on the fact that Liberty's Motion failed to address the issue of whether its exit from the relevant market was temporary or permanent. *Time Warner Inc., et al.*, Docket C-3709, Letter to Kathryn M. Fenton (July 17, 2002) at 3, accessible at http://www.ftc.gov/opa/2002/07/fyi0240.htm

[11] Motion at 2.

Specifically, in 1999, TCI merged with AT&T Corporation ("AT&T"). In 2001, Liberty was split off from AT&T to the holders of AT&T's Liberty Media Group Tracking Stock, making Liberty a separate publicly traded company with no further relationship with the former TCI cable systems that were the focus of the Turner merger review. Liberty also asserts that it "has no current intention to acquire or to invest in any other cable television systems in the United States [including] both specific acquisitions of or investments in particular cable television systems as well as any more generalized intent to acquire or invest in any such cable television systems as a current goal or direction of Liberty's overall business plan."[12]

Upon consideration of Liberty's Motion and other information, the Commission finds, pursuant to Section 2.51 of the Commission's Rules of Practice and Procedure, 16 C.F.R. § 2.51, that changed conditions of fact warrant reopening and setting aside the Order as to Liberty. Liberty has shown that it has exited the relevant market and that it does not have the current intention of reentering that market. The Order provisions relating to Liberty were designed to ensure that Time Warner's acquisition of Turner will not leave TCI/Liberty, or their management in a position to influence Time Warner to alter its own conduct in order to benefit TCI's/Liberty's, interests.[13] Consequently, Liberty severing its ties with TCI and becoming an independent company with no ties to United States cable systems together with its intention not to reenter that market, warrants relieving Liberty from the Order's proscriptions.

Accordingly,

IT IS ORDERED THAT this matter be, and it hereby is, reopened; and that the Commission's Order issued on February 3, 1997, as modified on December 21, 2004, be, and it hereby is, set aside as to respondent Liberty Media Corporation as of the effective date of this Order.

By the Commission, Commissioner Kovacic recused.

Donald S. Clark
Secretary

SEAL
ISSUED: June 14, 2006

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[12] Motion, Affidavit of Charles Y. Tanabe, Senior Vice President, General Counsel and Secretary of Liberty Media Corporation (February 16, 2006) ("Tanabe Affidavit") ¶ 5.

[13] Analysis to Aid Public Comment.