

UNITED STATES OF AMERICA BEFORE THE
FEDERAL FEDERAL TRADE COMMISSION



In the Matter of)
)
TIME WARNER INC., ET AL.)
)
_____)

Docket No: C-3709

Public

MOTION OF RESPONDENT LIBERTY MEDIA CORPORATION TO REOPEN AND TERMINATE

The Final Order in this proceeding is scheduled to expire in just under one year from now. But its continuation for that period could have an impact on issues and events that were completely unanticipated, either at the time the Order was entered, or even at the time that Liberty Media Corporation ("Liberty") last sought relief from this Order. Because of these changed circumstances, and because Liberty has not had any ownership interest in any U.S. cable system since 2001 and is now able to unequivocally represent that it has no intention to acquire any such interests, it hereby requests the Federal Trade Commission (the "Commission") to reopen and terminate the Final Order in this matter insofar as it applies to Liberty.

The Final Order in this proceeding was intended to address competitive concerns relating to the integration of Time Warner Inc. ("Time Warner") programming services and cable systems with other cable systems. In 2002, Liberty was split off into an independent company with no ties to U.S. cable systems, and thus it sought termination of the Order on that basis. The Commission denied Liberty's motion because it was not able to represent that it would not reacquire some interest in a U.S. cable system during the foreseeable future.

Liberty can now make that representation, and perhaps as importantly, the continuation of the Order's restrictions on Liberty's ownership of stock in Time Warner has the potential to significantly disrupt the efficient operation of securities markets. Recent press accounts have

made clear that Time Warner and its current management are being subject to intense scrutiny and possible shareholder challenge. Liberty currently holds approximately 4 percent of the actual issued and outstanding stock of Time Warner. Based on publicly available information, Liberty believes that its position makes it one of the two or three largest single shareholders in Time Warner. The Order's mandate that these shares be non-voting, as well as other Order limitations capping Liberty's total ownership and affecting its ability to take positions on matters presented to Time Warner shareholders, conceivably could have an impact on the resolution of the current debate about the future of Time Warner.

This was obviously unanticipated at either the time of the Order or the denial of Liberty's previous motion, and is equally obviously undesirable and unnecessary. Given the underlying rationale of the Order, the fact that Liberty has had no U.S. cable interests other than Time Warner for the last four years,¹ and Liberty's ability today to unequivocally represent that it has no intention of acquiring any such interests eliminate the remedial necessity of the Order, and make it possible, by terminating the Order, to avoid any possibility of an unnecessary distortion of the operation of securities markets.

Liberty therefore moves to reopen and terminate the Final Order pursuant to 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, because materially changed facts mean that the Order's provisions relating to Liberty are no longer in the public interest or required to preserve competition.

¹ Prior to the spin off of Liberty Media International ("LMI") in July 2004, Liberty owned indirectly, through LMI, an interest in a cable system in Puerto Rico.

I. FACTUAL BACKGROUND

On February 3, 1997, the Commission issued a Final Order regarding Liberty's proposed acquisition of voting securities of Time Warner arising from Time Warner's 1996 acquisition of Turner Broadcasting, Inc. ("Turner"). Prior to that acquisition, Tele-Communications, Inc. ("TCI"), and its wholly owned subsidiary Liberty, had an approximately 24 percent interest in Turner. By exchanging their interest in Turner for an interest in Time Warner, TCI and Liberty acquired approximately 7.5 percent of the fully diluted voting securities in Time Warner, valued at approximately \$2 billion. (Complaint ¶ 21.)²

Although the Order required that TCI and Liberty divest their Time Warner shares, the Order permitted TCI and Liberty to retain their Time Warner shares, subject to certain restrictions, if the Internal Revenue Service ("IRS") determined that the divestiture would be taxable. Because the IRS subsequently ruled that a divestiture would be a taxable event, TCI and Liberty have retained their Time Warner stock. Consequently, the Order imposes conditions on the type and amount of Time Warner shares that may be retained by TCI and Liberty.³

Since the date of the initial Order, there have been significant changes in the corporate structure of Liberty and TCI, particularly as it relates to any ownership interest in U.S. cable systems. 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.

² Subsequent events, including the merger of Time Warner and AOL, reduced Liberty's ownership share to approximately 4 percent. As of December 31, 2005, Liberty and John C. Malone, Chairman of Liberty, held 171,196,350 shares, which represented 3.31 percent of the Fully Diluted Equity and 3.73 percent of the actual issued and outstanding shares of Time Warner. *Ninth Annual Compliance Report of Liberty Media Corporation Required by Final Order in the Matter of Time Warner, Inc., et al.*, Docket No. C-3709 (Feb. 1, 2006).

³ Final Order ¶ II.D.(1-2). The Final Order requires that the Liberty shares of Time Warner be nonvoting (other than de minimis votes necessary for tax purposes) unless and until the shares are sold to an independent third party. (*Id.* at ¶ II.D.(2).) In addition, there are further restrictions on Liberty's ability to increase its overall position in Time Warner. (*Id.* at II.D.(1).)

As of that date, Liberty became a separate publicly traded company, and had no further relationship with the former TCI cable systems that were the focus of the Turner merger review.

Based on these changed factual circumstances, on March 19, 2002, Liberty moved to reopen and set aside the Final Order as it applied to Liberty. On July 17, 2002, the Commission denied this motion finding 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.*” (Letter from Donald S. Clark to Kathryn M. Fenton, Esq., “Motion of Respondent Liberty Media Corporation to Reopen and Modify the Commission’s Order, *In the Matter of Time Warner, et al.*,” Dkt. No. C-3709 (July 17, 2002) at 4 (emphasis in original).)

In denying Liberty’s Motion, the Commission found:

[T]he 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 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. (*Id.* at 7.)

In particular, the Commission determined that Liberty had failed to address “the issue of whether its split from TCI and its exit from the cable system market are temporary or permanent.” (*Id.* at 5.) Liberty did not pursue the Order modification further in 2002,⁴ but is now prepared to provide the assurances the Commission sought—that it has no current intention of acquiring any interest in U.S. cable system operations.

⁴ In 2004, Liberty filed a separate motion to reopen and modify the order in order to permit Liberty to enter into particular forms of loan agreements relating to the Time Warner shares. This motion was granted by the Commission on December 21, 2004, but that order modification did not address the fundamental restrictions on Liberty’s ownership of Time Warner shares that are at issue here.

II. LEGAL STANDARD FOR REOPENING AND MODIFICATION

This changed circumstance fully satisfies the legal standard for reopening and modifying Final Orders. 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 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. S. Rep. No. 96-500, 96th Cong., 1st Sess. 9 (1979) (significant changes or changes causing unfair disadvantage); *Louisiana-Pacific Corporation*, Docket No. C-2956, Letter to John C. Hart at 4 (unpublished) (June 5, 1986) (“Hart Letter”).

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. Respondents are therefore invited in petitions to reopen to show how the public interest warrants the requested modification. Hart Letter at 5; 16 C.F.R. § 2.51. The Commission has described the showing needed to obtain a modification based on the public interest standard:

[A] “satisfactory showing” requires, with respect to “public interest” requests, that the requester make a *prima facie* showing of a legitimate “public interest” reason or reasons justifying relief [T]his showing requires the requester to demonstrate, for example, that there is a more effective or efficient way of achieving the purposes of the order⁵

⁵ 65 Fed. Reg. 50636, 50637 (Aug. 21, 2000).

As discussed below, both changed circumstances and the public interest requires such a modification here.

**III.
CHANGED CIRCUMSTANCES AND THE PUBLIC INTEREST
WARRANT REOPENING AND MODIFICATION OF THE ORDER**

Liberty is now in a position to give the assurance it was unable to give in 2002—that it has no current intention of acquiring any ownership interest in a U.S. cable system at any time in the future and, most particularly, during the remaining term of the Order. As indicated in the attached affidavit of Charles Y. Tanabe, Senior Vice President, General Counsel and Secretary of Liberty, apart from the Time Warner shares, Liberty currently has no interest in any entity that owns or operates U.S. cable systems. (Tanabe Affidavit ¶ 4.) Nor, as the Tanabe Affidavit further states, does Liberty have any current intention to acquire any such interest in U.S. cable systems. (*Id.* ¶ 5.) This lack of present intent to reenter the U.S. cable system business fully satisfies the requirements identified by the Commission in its July 17, 2002 decision denying Liberty’s earlier requested modification.

The ability to provide a such definitive statement today reflects an evolution in Liberty’s business strategy, which now focuses largely on expansion of its electronic commerce business and organic growth of its few remaining media businesses, including Starz Entertainment Group and GSN (formerly Game Show Network), in which it has a significant ownership position. Liberty’s increased focus on electronic commerce is evidenced by its acquisition in 2003 of Comcast’s majority interest in QVC, Inc., which operates the leading television home shopping network in the United States, and its acquisition this month of Provide Commerce, Inc., an on-line seller of flowers and other items.

Lifting the Order’s restrictions regarding the treatment of Time Warner stock held by Liberty will also serve the public interest. Continuation of the Order’s restrictions might

adversely affect current securities market activities relating to Time Warner. In recent months, considerable attention has been focused on the operational performance and current management of Time Warner. Numerous proposals have been advanced to address alleged concerns and performance deficiencies, including possible break-ups of the company. Other proposals and responses by Time Warner management are likely in the coming weeks and months.

Although Liberty currently owns just 3.73 percent of fully issued and outstanding Time Warner stock, the market value of this stock is approximately \$2.8 billion. At a time when there are significant public market developments relating to this stock, the public interest is not served by maintaining the continuing restrictions on Liberty, most particularly the nonvoting status of this stock position.

Liberty's ability to participate as a shareholder in this significant debate about the future of Time Warner is forestalled by the terms of the Order. While Liberty does not as yet have any position with respect to possible outcomes, its obligations to Liberty shareholders, its role as a Time Warner shareholder, and the public interest in the efficient operation of securities markets,⁶ all suggest that Liberty should be allowed to participate in such decisions by voting its shares where there is no longer any competitive need to restrict its role as a Time Warner shareholder.

With Liberty's unequivocal statement that it has no present intention to acquire an ownership interest in any U.S. cable system, it is clear that preservation of competition does not require continuation of any restrictions relating to the Time Warner shares. In contrast, continuation of the Order's restrictions, which mandate that a significant block of shares will be

⁶ The Commission has recognized this public interest in granting Liberty's 2004 Motion to Reopen and Modify relating to the loan of Time Warner shares:

Preventing such a large holding of shares from participating in the market for Time Warner loaned securities could distort that market and make it less efficient.

In the Matter of Time Warner Inc., Dkt. No. C-3709, Order Reopening and Modifying Order (Dec. 21, 2004) at 6.

unable to participate in the current deliberations about the future of Time Warner, produces an unnecessary and highly undesirable outcome.

**IV.
CONCLUSION**

Because the competitive concerns that caused Liberty to be subject to the Final Order no longer exist following the spin off that separated Liberty interests and the former TCI cable systems, there is no continuing public interest served by the maintenance of the Order provisions relating to Liberty. These provisions should be terminated and Liberty should be dismissed as a Respondent.

Dated: February 16, 2006

Respectfully submitted,

By: 

Joe Sims
~~Jones Day~~
51 Louisiana Avenue, N.W.
Washington, DC 20001-2113
Telephone: (202) 879-3939
Facsimile: (202) 626-1700
Counsel for Liberty Media Corporation

**UNITED STATES OF AMERICA BEFORE THE
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**AFFIDAVIT OF CHARLES Y. TANABE
IN SUPPORT OF MOTION OF LIBERTY MEDIA
CORPORATION TO REOPEN AND MODIFY**

1. I am Senior Vice President, General Counsel and Secretary of Liberty Media Corporation ("Liberty"), a respondent in the above-captioned matter, and I submit this affidavit, based on my personal knowledge, in support of Liberty's Motion to Reopen and Modify.

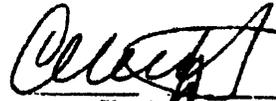
2. I understand that in reviewing Liberty's Motion to Reopen and Modify, the FTC will consider Liberty's current intentions with respect to future acquisitions of or investments in non-Time Warner cable television systems in the United States.

3. Liberty owns interests in a broad range of electronic retailing, media, entertainment and communications businesses, including QVC, Encore, Starz!, IAC/Interactive Corp., and News Corporation.

4. At present, Liberty's only interests in U.S. cable television operations are through its approximately 4 percent ownership interest in Time Warner.

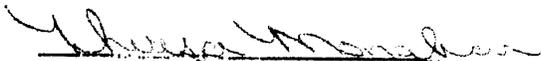
5. To the best of my knowledge and belief, Liberty has no current intention to acquire or to invest in any other cable television systems in the United States. This includes both

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.



Charles Y. Tanabe

Subscribed and sworn to before me,
this 16 day of Feb., 2006


Notary Public

My commission expires: 1-27-2010

