

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

***EXPEDITED ACTION REQUESTED - FINAL DECISION
MUST BE RENDERED BY SEPTEMBER 17, 1999***

_____)	
In the Matter of)	
Implementation of Section 11(c))	
of the Cable Television Consumer Protection)	MM Docket No. 92-264
and Competition Act of 1992)	
Horizontal Ownership Limits)	
_____)	
In the Matter of)	
Implementation of the Cable)	
Television Consumer Protection)	CS Docket No. 98-82
and Competition Act of 1992)	
Review of the Commission's)	
Cable Attribution Rules)	
_____)	

TO: The Commission

REPLY TO OPPOSITION TO MOTION TO VACATE STAY

Consumers Union, Consumer Federation of America and Media Access Project ("CU, *et al.*") respectfully submit this reply to the August 23, 1999 *Opposition of AT&T Corp. and MediaOne Group, Inc. to Motion to Vacate Stay of Enforcement of Horizontal Ownership Limits* ("AT&T *Opposition*").

The Need For Immediate and Final Action By the Full Commission

CU, *et al.* have called for the Commission to complete action on their request for relief by September 17, 1999. That is the last day of the pleadings cycle established by the Commission for the pending applications for transfer of control of MediaOne Group, Inc. to AT&T Corp.¹ *Motion to Vacate Stay of Enforcement of Horizontal Ownership Limits*, filed August 17, 1999 ("*Motion to Vacate Stay*"). As CU, *et al.* explained in their *Motion to Vacate Stay*, at 12-13, members of the

¹AT&T Corp. and MediaOne Group, Inc. are referred to herein as "AT&T".

public they represent will face immediate and severe harm in the absence of Commission action by that date.

Because CU, *et al.* must protect the rights of the public in seeking enforcement of a validly enacted law of the United States, they will consider seeking judicial relief at any time after September 17, 1999.

The AT&T Opposition

Much of the *AT&T Opposition* is devoted to rearguing the merits of the cable industry's challenge to the facial and as-applied constitutionality of the 1992 Cable Act and the rationality of the Commission's implementing rules. It is a challenge the Commission has twice rejected in adopting and reaffirming its horizontal ownership rules. See *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking*, 13 FCCRcd 14462 (1998) ("*Horizontal Ownership FNPRM*"); *Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal and Vertical Ownership Limits*, 8 FCCRcd 8565 (1993) ("*Second Report and Order*"). Moreover, the Commission (joined by the Department of Justice) has forcefully defended the law and the Commission's actions in a newly-filed brief in the United States Court of Appeals.² Brief for the FCC and the United States in *Time Warner Entertainment*

²AT&T is more than willing to treat the government's brief as authoritative insofar as it argues that the pendency of this Docket makes judicial review of the horizontal ownership rules "premature." *AT&T Opposition* at 3. The argument is utterly wrong, as CU, *et al.* and other groups argued in their brief *Amici Curiae* in the same case. The fact that the Commission has taken this position merely increases the degree and likely duration of aggrievement CU, *et al.* would experience absent lifting the stay.

Co., LP v. FCC, No 94-1035 (D.C. Cir., filed August 13, 1999).

AT&T falls far short of demonstrating a substantial likelihood that Section 11(c) of the 1992 Cable Act or the Commission's implementing rules, 47 CFR ̳76.503(c), will be invalidated in the appeal now pending in the United States Court of Appeals. CU, *et al.* will not repeat their arguments to the contrary. *See Motion to Vacate Stay*, at 7-12.

One point AT&T leaves unaddressed does merit emphasis and clarification: since the Commission's voluntarily imposed stay on enforcement of 47 CFR ̳76.503(c) was *not* based on doubt as to the constitutionality of Section 11(c) or the Commission's rules promulgated thereunder, the Commission has never made the requisite findings to justify issuance of a stay. *See Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921 (D.C. Cir. 1958). Moreover, no court has ever determined that a stay should be issued; the only authority is, if anything, to the contrary.³

As CU, *et al.* explained in their *Motion to Dismiss*, at 3, the Commission's issuance of the stay was based entirely on the desire of the former membership of the Commission to avoid potential confusion and uncertainty...." *Second Report and Order*, 8 FCCRcd at 8567.⁴ And in no event has the Commission ever expressed concern as to its statutory authority to adopt a horizontal ownership cap, or as to the soundness of its decisionmaking in doing so. As a consequence, any denial of this request would be a new ruling utterly at odds with the Commission's action in adopting the rules and

³*See Motion to Vacate Stay*, at 4-5. The judge in the *Daniels* case did not enjoin enforcement of the horizontal ownership provisions. In fact, on his own motion, he issued an order staying the effect of his decision, thereby *permitting* the FCC to put these the horizontal ownership rules into effect. *Daniels Cablevision, Inc. v. United States of America*, 835 F.Supp. 1 (D.D.C. 1993).

⁴In denying an earlier request of CU, *et al.* to vacate the stay, the Commission simply stated that it would not do so "in light of the continuing pendency of the judicial proceedings." *Horizontal Ownership FNPRM*, 13 FCCRcd at 14491.

reaffirming them on administrative appeal. The burden of defending such a U-turn is especially high. *Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co.*, 463 US 29, 43 (1983).

The only other aspect of the *AT&T Opposition* which merits any reply is its assertion that the balance of harms favors AT&T. AT&T seems incapable of saying in so many words that it is *already* above the 30 per cent cap the Commission has established in an exhaustive rulemaking docket. However, by complaining that "application of the stayed rule could require AT&T to divest ownership of certain cable systems..." *AT&T Opposition* at 8, it says the same thing by indirection.

The prospect of immediate divestiture is not so daunting as the AT&T suggests. Only a naif who has never participated in federal administrative proceedings would take this assertion seriously. Leaving aside the fact that any party proceeds at its own risk in undertaking a transaction prior to finality, *see Astroline Communications v. FCC*, 857 F.2d 1556 (D.C. Cir. 1988), the FCC has been all too willing to grant waivers to forestall divestiture pending the outcome of rulemakings. *See, e.g., Infinity Broadcasting Corp.*, FCC 96-495 (released December 26, 1996).⁵

AT&T's fanciful assertion that it might have to divest systems it has already acquired prior to the end of this litigation is intended to obscure the issues. Actually, it places them in stark relief. CU, *et al.* seek to vacate the stay not to obtain immediate divestiture of AT&T systems before the Commission's rules are finally adjudicated; rather, they seek enforcement of the rules to keep AT&T from acquiring *more* systems. In this regard, cable operators choosing to take the risk of acquiring systems above the thirty per cent threshold have already been given the assurance of an orderly

⁵AT&T's argument that the public somehow *benefits* from the stay because leaving it in place will somehow accelerate broadband development stretches credulity. As CU, *et al.* have pointed out in their August 23, 1999 *Petition to Dismiss or Deny* in Docket CS 99-251 at 25, the Commission has already found that the TCI acquisition gives AT&T sufficient incentive to proceed with broadband deployment.

divestiture process, since the Commission has already informed them that they will, indeed, have a sixty day grace period to sell off their systems should the rules be finally upheld. *Horizontal Ownership FNPRM*, 14 FCCRcd at 13462.

CONCLUSION

Expedited action has been requested. For the reasons stated above, CU, *et al.* will deem their administrative remedies exhausted if the Commission has not taken final action disposing of this motion by September 17, 1999.

Wherefore, CU, *et al.* ask that the Commission vacate all remaining aspects of its voluntarily imposed stay of 47 CFR §§76.503(a), (b), (c), (d), (e), and (f); that, to the extent necessary, it clarify that cable television systems are currently subject to attribution rules and policies set forth in 47 CFR §501(a); and that it grant all such other relief as may be just and proper.

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September 2, 1999

CERTIFICATE OF SERVICE

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