

ORIGINAL

EX PARTE OR LATE FILED



Betsy J. Brady, Esq.
Federal Government Affairs
Vice President

Suite 1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-3824
FAX 202 457-2545
EMAIL betbrady@lga.att.com

November 24, 1999

RECEIVED

NOV 24 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. To-Quyen Truong
Associate Chief, Cable Services Bureau
Federal Communications Commission
The Portals
445 12th Street, S.W., Room 3-C488
Washington, D.C. 20554

Re: **Ex Parte**, Application for Consent to the Transfer of Control of Licenses from
MediaOne Group, Inc. to AT&T Corp. (CS Docket No. 99-251)

Dear Ms. Truong:

This letter and the attachment to it are in response to your October 26, 1999 letter to Joan Marsh requesting that AT&T document that, after its proposed merger with MediaOne, AT&T will be attributed with no more than 30% of all MVPD subscribers nationwide.

As shown in the attachment, AT&T will be attributed with approximately 27% of MVPD subscribers after its merger with MediaOne is completed. In arriving at this percentage, AT&T did not count the subscribers in cable systems currently held by Time Warner Entertainment Company, L.P. ("TWE"), in which MediaOne currently has a 25.51% limited partnership interest. The TWE cable systems will not be attributable to AT&T post-merger because AT&T's interest in TWE will be insulated under the Commission's recently adopted cable attribution rules. As you know, these rules permit a limited partner to maintain insulation in a limited partnership if it is not "materially involved in the video-programming

No. of Copies rec'd 012
List ABCDE

activities" of the limited partnership.¹ For the following reasons, which are described fully in the attachment to this letter, AT&T will not be "materially involved" in the video programming activities of TWE post-merger:

- Once the merger is completed, AT&T will inherit the rights in TWE currently held by MediaOne. All MediaOne's rights to participate in the management and operation of TWE's video programming businesses, *already* have been terminated.
- AT&T post-merger will retain rights to vote on a limited list of Participant Matters, which are described in the attachment. However, these rights are the type the Commission routinely allows investors to have without triggering attribution.
- AT&T's insulation in TWE will not be affected by the fact that certain entities in which AT&T has minority, non-managing (and, in most cases, indirect) interests sell programming to TWE. Because all of AT&T's interests in these programming entities are attenuated, the sale of programming by such entities to TWE cannot reasonably be found to "materially involve" AT&T in the video programming activities of TWE. Nonetheless, in order to allay all possible concerns about the merger's impact on video programming, AT&T proposes several additional safeguards to ensure that it will not be "materially involved" in TWE's video programming activities.
- AT&T also describes in the attachment the steps it will take to ensure that the duties and responsibilities of any representatives that it appoints to the TWE Board of Representatives will be "wholly unrelated to the video-programming activities" of both AT&T and TWE. Thus, AT&T's appointment of representatives to the TWE Board will comply with the Commission's rules and will not affect the insulated nature of AT&T's interest in TWE.

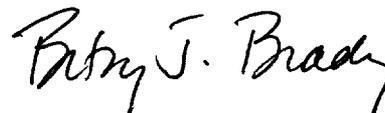
¹ *In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Review of Commission's Cable Attribution Rules*, CS Docket Nos. 98-82, 96-85, FCC 99-288 (rel. Oct. 20, 1999), at ¶ 63.

Ms. To-Quyen Truong
November 24, 1999
Page 3

The conclusion that AT&T's interest in TWE post-merger will be insulated -- and, therefore, not attributable -- is particularly compelling in light of the enormous benefits the merger will bring to consumers, including the more rapid development of effective facilities-based competition to the ILECs for millions of the nation's homes and businesses. Indeed, the very reason why the Commission last month revised its cable attribution rules was to permit "investments between companies whose combination may bring benefits to the public, such as cable broadband and telephony services and competition," so long as those investments do not threaten the video programming marketplace.² The nature of AT&T's post-merger interest in TWE *alone* -- and certainty when combined with the additional safeguards proposed in the attachment to this letter -- amply protect video programming and, therefore, AT&T's interest in TWE should properly be treated as insulated under the Commission's new attribution rules.

Please do not hesitate to contact me if I can be of any further assistance.

Sincerely,



² *Id.*

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

In the Matter of:)
)
Applications for Consent to the)
Transfer of Control of Licenses)
)
MediaOne Group, Inc.)
Transferor,) CS Docket No. 99-251
)
To)
)
AT&T Corp.)
Transferee.)

**EX PARTE COMMENTS OF AT&T CORP. AND
MEDIAONE GROUP, INC.**

Mark C. Rosenblum
Stephen C. Garavito
Lawrence J. Lafaro
AT&T Corp.
295 N. Maple Avenue
Room 1131M1
Basking Ridge, N.J. 07920

Susan M. Eid
Sean C. Lindsay
MediaOne Group, Inc.
1919 Pennsylvania Avenue, N. W.
Suite 610
Washington, D.C. 20006

Michael H. Hammer
Francis M. Buono
Jonathan Friedman
Willkie Farr & Gallagher
Three Lafayette Centre
1155 21st Street, N.W.
Suite 600
Washington, D.C. 20036

November 24, 1999

TABLE OF CONTENTS

	PAGE NO.
I. INTRODUCTION AND SUMMARY.....	1
II. AT&T CURRENTLY IS ATTRIBUTED WITH LESS THAN 30% OF ALL MVPD SUBSCRIBERS AND WILL BE ATTRIBUTED WITH LESS THAN 30% OF ALL MVPD SUBSCRIBERS POST-MERGER.....	5
A. AT&T Pre-Merger.....	5
B. AT&T Post-Merger.....	7
III. AT&T'S POST-MERGER INTEREST IN TWE WILL NOT BE ATTRIBUTABLE BECAUSE THAT INTEREST WILL BE INSULATED.....	8
A. AT&T Will Have No Material Role In The Video Programming Activities of TWE Post-Merger.....	8
1. TWE Cable Management Committee.....	9
2. TWE Board of Representatives.....	11
B. AT&T's Limited Interests In Certain Entities That Sell Video Programming To TWE Will Not Disturb AT&T's Status As An Insulated Limited Partner In TWE.....	15
C. AT&T Will Ensure That Any Representatives It Appoints To The TWE Board Of Representatives Fully Qualify For The Waiver Contemplated In The Commission's Rules.....	23
IV. CONCLUSION.....	26

EXHIBITS

TAB

AT&T Cable Ownership Chart.....A

The Kagan Media Index, October 31, 1999, at 8
(providing MVPD subscriber numbers as of September 30, 1999)B

Time Warner Entertainment Company, L.P., Securities and Exchange Commission
Form 8-K (filed Aug. 5, 1999).....C

Declaration of John C. Coffee, Jr., Professor of Law
(Regarding Relationship of MediaOne (and AT&T Post-Merger) and Time Warner
Entertainment, L.P.)D

Supplemental Declaration of John C. Coffee, Jr., Professor of Law
(Regarding Relationship Between AT&T Corp. and Liberty Media Corp.)E

I. INTRODUCTION AND SUMMARY

The Commission's Cable Services Bureau¹ recently asked AT&T to file a document demonstrating that, after AT&T's proposed merger with MediaOne, AT&T would be attributed with no more than 30% of all MVPD subscribers nationwide, consistent with the Commission's recently adopted cable horizontal ownership rules.² This *ex parte* filing is in response to that request. As shown below, AT&T will be attributed with approximately 27% of MVPD subscribers after its proposed merger with MediaOne is completed. In arriving at this percentage, AT&T counted all subscribers with the single exception of the subscribers served by Time Warner Entertainment Company, L.P. ("TWE"), in which MediaOne currently holds a 25.51% limited partnership interest.³ The TWE subscribers are not counted because AT&T's post-merger interest in TWE will be insulated under the Commission's new cable attribution rules.⁴

¹ See Letter from To-Quyen Truong, Associate Chief, Cable Services Bureau, to Joan Marsh, Director, Federal Government Affairs, AT&T, October 26, 1999.

² See *In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Rules*, MM Docket No. 92-264, FCC 99-289 (rel. Oct. 20, 1999) ("*Horizontal Order*"). AT&T emphasizes that the Commission stayed the rules adopted in the Horizontal Order. Thus, the Commission cannot enforce the rules directly, and should not attempt to enforce them indirectly through its public interest standard, because any such action would be arbitrary and capricious in light of the stay.

³ As described below, AT&T does not count subscribers in systems for which it already has announced that it will sell its interest prior to closing the proposed MediaOne merger.

⁴ See *In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Review of Commission's Cable Attribution Rules*, CS Docket Nos. 98-82, 96-85, FCC 99-288 (rel. Oct. 20, 1999) ("*Attribution Order*")

When the Commission adopted the cable attribution rules last month, it revised the criteria under which an entity could qualify as an insulated limited partner for purposes of the horizontal and channel occupancy limits. The Commission did so for two reasons. First, it recognized that the horizontal and channel occupancy limits were designed to address concerns about a cable operator's ability to affect programming. Where a cable operator is "not materially involved in the video-programming activities of a limited partnership," the Commission concluded, programming concerns are not implicated, and it is appropriate to view the operator's interest in the partnership as insulated.⁵ Second, the Commission realized that the pre-existing insulation criteria prevented "investments between companies whose combination may bring benefits to the public, such as cable broadband and telephony services and competition."⁶

AT&T's post-merger interest in TWE will be completely consistent with the Commission's goals in adopting the new attribution rules. As described below, AT&T will not be materially involved in the video programming activities of TWE post-merger. Once the merger is consummated, AT&T will inherit the rights in TWE currently held by MediaOne. However, all of MediaOne's rights to participate in the management and operation of TWE's video programming businesses, and most other governance rights, *already* have been terminated. MediaOne's remaining rights consist of veto rights on a list of "Participant Matters."⁷ These remaining rights are the type the Commission routinely

⁵ *Id.* at ¶ 63.

⁶ *Id.*

⁷ Participant Matters, which require the consent of both Time Warner's and MediaOne's representatives on the TWE Board, consist of the following: the merger of
(footnote continued ...)

allows investors to have without triggering attribution. Thus, AT&T's rights post-merger will be consistent with the Commission's desire to allow insulation where a limited partner is not involved in the video programming business of the partnership. In fact, AT&T will have no ability to participate in or to influence TWE's video programming decisions post-merger.

AT&T's insulated status in TWE will not be affected by the fact that certain entities in which AT&T has minority, non-managing (and, in nearly all cases, indirect) interests sell programming to TWE. Given the attenuated nature of AT&T's interests, the sale of programming by such entities to TWE cannot reasonably be found to "materially involve" AT&T in the video programming activities of TWE. Nonetheless, in order to allay all possible concerns about the merger's impact on video programming, AT&T proposes several safeguards to ensure that it will not be materially involved in TWE's video programming activities.

Similarly, AT&T describes below the steps it will take to ensure that the duties and responsibilities of any representatives that it appoints to the TWE Board of

(... footnote continued)

TWE; sale or transfer of assets constituting more than 10% of the TWE assets; expansion of TWE into new lines of business; specified issuances of additional partnership interests; indemnification of any partner or affiliate for liability in excess of \$500,000,000; incurrance of debt for money borrowed above a defined ratio; admission of a new general partner; extension of the corporate services term beyond that contemplated in the LPA; certain acquisitions above the greater of \$750 million or 10% of TWE's consolidated revenues for its most recent fiscal year; cash distributions above the level provided for in the LPA; dissolution of TWE; voluntary bankruptcy of TWE; amendment or modification of the LPA; and transfer or sale of certain major interests in TWE or any sub-partnership thereof. Mechanically, these rights are exercised by MediaOne through MediaOne's representatives on the TWE Board.

Representatives will be "wholly unrelated to the video-programming activities" of both AT&T and TWE. As noted, the TWE representatives appointed by MediaOne (and who will be appointed by AT&T upon completion of the merger) will have no right to participate in the management or operation of TWE's video programming businesses in any event. With regard to the participation of such representatives in the video programming businesses of AT&T, AT&T sets out below the steps it will take to ensure that such representatives are fully recused from any such activities. Thus, AT&T's appointment of representatives to the TWE Board will comply with the Commission's rules and will not affect the insulated nature of AT&T's interest in TWE.

Moreover, as AT&T has previously demonstrated, the merger will create enormous benefits for consumers, including the more rapid development of effective facilities-based competition to the incumbent LECs for millions of the nation's homes and businesses. This is the very reason why the Commission last month revised its cable attribution rules -- to permit investments that held the promise of greater competition in telephony and other broadband services so long as those investments did not threaten the video programming marketplace. The structure of AT&T's post-merger interest in TWE, along with the additional safeguards proposed below, amply protect video programming and, therefore, AT&T's interest in TWE should properly be seen as insulated under the Commission's new attribution rules.

Finally, while AT&T cannot anticipate at this time how its relationship with TWE might in the future change, it believes that the Commission must analyze the facts of

AT&T's interest in TWE as they will exist at the time of the merger.⁸ Any other approach would necessarily involve the Commission in speculation.⁹ However, AT&T recognizes that it has a continuing obligation to comply with the attribution and horizontal ownership rules post-merger, and it fully understands that any change that may occur in its relationship with TWE would have to be consistent with such rules applicable at the time of any such change.

II. AT&T CURRENTLY IS ATTRIBUTED WITH LESS THAN 30% OF ALL MVPD SUBSCRIBERS AND WILL BE ATTRIBUTED WITH LESS THAN 30% OF ALL MVPD SUBSCRIBERS POST-MERGER.

Both pre- and post-merger, AT&T will be attributed with less than 30% of all MVPD subscribers nationwide.

A. AT&T Pre-Merger

AT&T currently is attributed with approximately 20,623,000 MVPD subscribers. This number includes all subscribers in AT&T's owned and operated, consolidated, and non-consolidated systems, which are listed in Appendix A of the AT&T/MediaOne *Public*

⁸ This is the approach commonly taken by the Commission. For example, in *News International*, the Commission recognized that Warner Communications might increase its interest in BHC from 20% to 42.5% and that News International might buy additional shares of Warner Communications and that these actions could affect the attribution analysis. However, the Commission concluded that "[t]hese matters are in a state of flux, and it is more appropriate to consider them at renewal time when the ownership interests may be more stable." *News International*, 97 FCC 2d 349, at ¶ 36 (1984).

⁹ See *NBC*, 6 FCC Rcd. 4882, at ¶ 6 (1991) (rejecting claims that NBC might in the future violate the multiple ownership rule by acquiring more than a permissible number of broadcast stations as "speculative and hypothetical" and because such claims "fail to address actual or present violations of our rules or policies.").

Interest Statement,¹⁰ with two exceptions. First, AT&T has updated the subscriber totals so that they are current as of September 1999. These updated subscriber numbers are listed in the chart attached hereto as Exhibit A.¹¹ Second, subsequent to filing its *Public Interest Statement*, AT&T closed a number of transactions that affected its total number of attributable subscribers. Specifically, AT&T purchased the cable television systems in White Sands and Mesilla Valley, New Mexico, exchanged certain cable television systems in South Carolina, Indiana, Kentucky, Utah, Montana, and Tennessee with affiliates of Charter Communications, Inc., Insight Communications, Inc., and InterMedia Management, Inc.,¹² and sold its interest in Falcon Communications, L.P. to Charter Communications, Inc.¹³ Consequently, AT&T's subscriber numbers have been adjusted to account for these transactions.

¹⁰ AT&T/MediaOne Public Interest Statement, filed on July 7, 1999, in CS Docket No. 99-251 ("Public Interest Statement"). AT&T includes in this analysis, for example, the subscribers served by Cablevision and the cable system joint ventures in which AT&T participates with Time Warner in Missouri, Kansas, and Texas.

¹¹ AT&T notes that while the subscriber numbers cited herein and in the attached chart for AT&T's owned and operated and consolidated systems are all as of September 30, 1999, a *de minimis* number of affiliates have not yet provided AT&T with subscriber numbers as of this date. In most of these cases, August 1999 subscriber numbers were used, and June 1999 numbers in a few cases. AT&T believes that use of September subscriber numbers for these few affiliate systems would not alter AT&T's percentage of MVPD subscribers currently or post-merger.

¹² See Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T Broadband and Internet Services, to Magalie Roman Salas, Esq. (October 1, 1999).

¹³ See Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T Broadband and Internet Services, to Magalie Roman Salas, Esq. (November 9, 1999).

AT&T's current percentage of total MVPD subscribers thus is approximately 25.3%. This percentage is derived by dividing 20,623,000 by 81,400,000.¹⁴

In addition, AT&T has announced several other transactions that will further reduce its subscriber count, including: 1) the reduction below 5 percent of its interest in the cable systems currently owned by Bresnan Communications Co., Ltd. Partnership; 2) the sale of its interest in certain cable systems to Cox Communications, Inc.; 3) the sale of its interest in Lenfest Communications, Inc.; and 4) an exchange of interests in cable systems with Comcast Corporation.¹⁵ AT&T anticipates that it will complete the first three of these transactions prior to the closing of its proposed merger with MediaOne, and the fourth soon after closing.¹⁶

Taking these transactions into account, AT&T will be attributed with approximately 16,995,000 subscribers. AT&T's percentage of total MVPD subscribers will be 20.9%. This percentage is derived by dividing 16,995,000 by 81,400,000.

B. AT&T Post-Merger

Post-merger, AT&T will be attributed with approximately 21,995,000 subscribers. This number includes the 16,995,000 subscribers that will be attributed to AT&T pre-

¹⁴ See *The Kagan Media Index*, October 31, 1999, at 8 (providing MVPD subscriber numbers as of September 30, 1999) (*See Exhibit B*). This is a conservative denominator given that Kagan estimates that the year-end total MVPD subscribers will be 83.1 million. See *Kagan Cable Program Investor*, July 14, 1999, at 4.

¹⁵ See *Public Interest Statement* at n. 12.

¹⁶ Even if AT&T does not complete the exchange of interests in cable systems with Comcast Corporation prior to closing the proposed MediaOne merger, however, AT&T will still be attributed with less than 30% of all MVPD subscribers at the time the MediaOne merger is closed.

merger as described above, plus the approximately 5 million subscribers currently attributed to MediaOne. This number does not include the subscribers currently held by TWE, in which MediaOne has a 25.51% ownership interest. For the reasons referenced above and explained below, AT&T's interest in TWE post-merger will be insulated and, therefore, the TWE subscribers will not be attributed to AT&T.

AT&T's percentage of total MVPD subscribers post-merger will therefore be approximately 27%. This percentage is derived by dividing 21,995,000 by 81,400,000.

III. AT&T'S POST-MERGER INTEREST IN TWE WILL NOT BE ATTRIBUTABLE BECAUSE THAT INTEREST WILL BE INSULATED.

A. AT&T Will Have No Material Role In The Video Programming Activities of TWE Post-Merger.

Under the Commission's recently revised cable attribution rules, a limited partner's interest in a partnership is considered insulated and therefore not attributable if the limited partner "is not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership."¹⁷ Under the terms of the TWE limited partnership agreement ("LPA"), MediaOne had rights in two areas: (1) the TWE Cable Management Committee; and (2) the right of its designees on the TWE Board of Representatives ("TWE Board") to vote on the limited list of Participant Matters described above.¹⁸ Upon completion of the merger, AT&T will assume the rights in TWE that currently are held by MediaOne. However, MediaOne's rights relating to the Cable Management Committee already have been terminated in their entirety. Therefore, AT&T

¹⁷ 47 C.F.R. § 76.503(b)(1).

¹⁸ See n. 7, *supra*.

will inherit no rights relating to the Cable Management Committee upon consummation of the proposed merger. MediaOne retains only its rights on the TWE Board to vote on specified Participant Matters. These matters are all the types of shareholder protection rights the Commission has routinely allowed investors to have without triggering attribution or disturbing insulation. Thus, AT&T post-merger will have no material involvement in the day-to-day management or operation of TWE's video programming activities, and its interest in TWE will qualify as an insulated limited partnership.

1. TWE Cable Management Committee

The Cable Management Committee has full discretion and final authority over TWE's cable operations.¹⁹ The Cable Management Committee's decisions are binding on the TWE Board.²⁰

However, all of MediaOne's rights with regard to the Cable Management Committee have been terminated. This termination occurred no later than August 1999 as a result of the operation of a non-compete clause in the TWE LPA. The non-compete clause prohibited MediaOne from competing in any lines of business with TWE. MediaOne had the right unilaterally to terminate the non-compete clause.²¹ However, upon termination by MediaOne, Time Warner had the right to terminate entirely MediaOne's right to participate on the Cable Management Committee and the right to terminate certain other governance rights. On August 3, 1999, MediaOne sent notice to

¹⁹ See LPA § 12.11(b).

²⁰ *Id.*

²¹ See LPA § 5.5(f).

Time Warner that it was terminating the non-compete clause.²² On August 4, 1999, Time Warner sent notice to MediaOne that it was immediately terminating all of MediaOne's management rights with regard to TWE that it was entitled to terminate, including all rights with regard to the Cable Management Committee.²³

In documents filed with the Securities and Exchange Commission ("SEC") in August, Time Warner stated that, as a result of the termination of the non-compete clause, "*MediaOne no longer has a vote on or any right to participate in the Cable Management Committee.*"²⁴ Thus, the insulated nature of MediaOne's interest in TWE (and AT&T's interest upon completion of the merger) is not affected by any rights relating to the TWE Cable Management Committee because MediaOne has *no* such rights, and AT&T will have *no* such rights upon completion of the merger.²⁵

²² See Letter from Pearre A. Williams, Chief Executive Officer of MediaOne Multimedia Ventures, to Richard Parsons, President of TWE, and Richard Bressler, Chairman and Chief Executive Officer of Time Warner Digital, August 3, 1999. The termination notice also advised Time Warner that MediaOne took the position that, because of various Time Warner actions, the one-year period prior to the effective termination of the non-compete technically had commenced at the end of December 1998. The issues related to the respective dates are unrelated to, and have no bearing on, attribution of TWE subscribers under the Commission's rules.

²³ See Letter from to Peter Haje to MediaOne Group, Inc., August 4, 1999. There may be disagreement between MediaOne and Time Warner as to whether MediaOne's veto rights over some Participant Matters were also terminated, but MediaOne's rights are, in any event, no greater than the Participant Matters rights described above.

²⁴ See Time Warner Entertainment Company, L.P., Securities and Exchange Commission Form 8-K (filed Aug. 5, 1999), at 2 ("*Time Warner SEC Letter*") (emphasis added). The *Time Warner SEC Letter* is attached to this *ex parte* letter as Exhibit C.

²⁵ Even in the absence of termination of MediaOne's rights on the Cable Management Committee as a result of its termination of the non-compete clause, the LPA makes clear that MediaOne's right to appoint representatives to the TWE Cable Management Committee would, in any event, "automatically terminate" upon the closing of MediaOne's
(footnote continued ...)

2. TWE Board of Representatives

The termination by MediaOne of the non-compete clause, and the subsequent termination by Time Warner of the MediaOne rights that Time Warner could terminate, left MediaOne only with its veto rights on Participant Matters through participation on the TWE Board of Representatives.²⁶ All of these are the types of rights the Commission has in the past routinely permitted insulated limited partners, L.L.C. members, and other entities to have in order to protect their investment without triggering attribution.²⁷

(... footnote continued)

merger with AT&T. *See* LPA § 12.11(b). *See also* Declaration of Professor John C. Coffee, Jr., submitted as Appendix E to AT&T/MediaOne Reply Comments, filed in CS Docket No. 99-251 on September 17, 1999, at ¶ 13 ("*AT&T/MediaOne Reply Comments*") ("I must conclude that MediaOne has no further rights with regard to the management Committee and that AT&T will acquire none.") ("*Coffee TWE Declaration*"). The *Coffee TWE Declaration* is attached to this *ex parte* letter as Exhibit D.

²⁶ Moreover, as a practical matter, the TWE Board of Representatives has no role with regard to the day-to-day operations of TWE. Under the terms of the LPA, the managing general partner of TWE can take any action (other than Participant Matters) without approval of the Board if such action is approved by the voting Class B representatives on the Board. *See* LPA § 12.1(b). Time Warner is the managing general partner and designates all the Class B representatives on the Board. Thus, Time Warner completely controls the Board, except for the limited Participant Matters. *See Coffee TWE Declaration* at ¶ 17 ("In reality, MediaOne does not have two seats on the general decision-making body that governs TWE, because that body is really the Voting Class B Representatives on the Board. All that MediaOne possesses are its limited approval rights under Section 12.1(c)."). This arrangement explains why the TWE Board has never met -- there is no reason for it to meet since Time Warner can act unilaterally without notice to, or participation by, MediaOne. This same circumstance will exist upon completion of the merger when AT&T assumes MediaOne's interest in TWE.

²⁷ *See, e.g., In Re Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, Mem. Opin. & Order, 58 RR 2d 604, at ¶ 50, n. 72 (1985); *Roy Speer and Silver Management Company*, 11 FCC Rcd. 14147 (1996); *BBC License Subsidiary*, 10 FCC (footnote continued ...)

The Commission has made clear in numerous decisions that "[t]he right to participate in matters involving extraordinary corporate action ... does not ordinarily undermine the nonattributable character of otherwise noncognizable interests."²⁸ The Commission has viewed these rights as necessary to protect the investor's interest, not to involve the investor in the management of the entity or to give it control or influence. For example, in *Roy Speer*, the Commission found that TCI had a nonattributable interest in Silver Management notwithstanding TCI's right to participate in "fundamental matters."²⁹ It reasoned that rights to participate in fundamental matters "are permissible investor protections that neither substantially restrict [the managing party's] discretion nor rise to the level of attributable influences."³⁰ In fact, the Commission has characterized a right to

(... footnote continued)

Rcd. 7926 (1995); *Quincy Jones*, 11 FCC Rcd. 2481 (1995); *NBC*, 6 FCC Rcd. 4882 (1991); *News International*, 97 FCC 2d 349 (1984).

²⁸ *Quincy Jones*, 11 FCC Rcd. 2481, at ¶ 29 (the interests of Tribune Broadcasting Company ("Tribune") in Qwest Broadcasting L.L.C. ("Qwest") were not attributable notwithstanding that Tribune had the right to vote on extraordinary actions taken by Qwest). See also *BBC*, 10 FCC Rcd. 7926, at ¶ 8 (Fox Television Stations Inc. ("Fox") interest in BBC License Subsidiary L.P. ("BBC") not attributable even though Fox had rights regarding extraordinary matters undertaken by BBC); *NBC*, 6 FCC Rcd. 4882, at ¶ 4 (NBC interest in Multimedia not attributable notwithstanding NBC had rights regarding extraordinary actions taken by Multimedia).

²⁹ 11 FCC Rcd. 14147, at ¶¶ 18, 25.

³⁰ *Id.* See also *News International*, 97 FCC 2d 349, at ¶ 21 (no transfer of control to Warner Communications from Chris-Craft even though Warner Communications had rights over extraordinary matters).

vote on fundamental corporate acts similar to those retained by MediaOne (and AT&T upon completion of the merger) as less than "meaningful."³¹

Thus, the insulated nature of MediaOne's interest in TWE (and AT&T's interest post-merger) is not disturbed by any right to participate in TWE Participant Matters.³²

* * *

In short, MediaOne's current rights are limited to its veto on Participant Matters, and it has *no role* in the day-to-day management or operation of TWE generally, let alone in the video programming area. Professor Coffee confirms that, viewed in terms of standard business practice, MediaOne has "no involvement in day-to-day management of TWE's cable operations."³³ As a result, AT&T will inherit MediaOne's limited rights and have *no role* in the day-to-day management of TWE once the proposed merger is completed. In particular, AT&T will have no role in the video programming activities of TWE. For example:

- AT&T will not be involved in any manner in the decisions of TWE regarding which video programming services are purchased for or carried on TWE's cable systems;

³¹ See *Cleveland Television*, 91 FCC 2d 1129, at ¶ 6 (1984). See also *Quincy Jones*, 11 FCC Rcd. 2481, at ¶ 34.

³² The veto rights retained by MediaOne (and AT&T upon consummation of the merger) regarding Participant Matters are the types of rights traditionally permitted to limited partners without disturbing their limited liability. For example, under the Revised Uniform Limited Partnership Act § 303 (1976), all of MediaOne's rights regarding extraordinary actions are of the type that would not destroy a limited partner's limited liability. See *Coffee TWE Declaration* at ¶¶ 22-26 (noting that the rights retained by MediaOne are not unlike those that a lender or other financial institution would negotiate and clearly do not give MediaOne the right to participate in the management of TWE).

³³ *Coffee TWE Declaration* at ¶ 27.

- AT&T will not purchase video programming services for the TWE cable systems;
- AT&T's cable systems will not receive any volume discount or other favorable terms and conditions from any video programming vendor as a result of TWE's purchase or carriage of any video programming for TWE's cable systems;
- AT&T will not receive any information from TWE with respect to the price, terms, and conditions which TWE negotiates with video programming vendors for the carriage of their video programming on TWE cable systems, nor will AT&T provide any information to TWE with respect to the price, terms, and conditions which AT&T negotiates with video programming vendors for the carriage of their video programming on AT&T cable systems;
- AT&T will not be involved in setting the prices for the sale of video programming by the TWE cable systems to end users; and
- AT&T will not participate in the hiring and firing of TWE employees directly involved in the video programming activities of TWE.³⁴

Because AT&T will not be "materially involved in the video-programming activities" of TWE, its investment in TWE "does not extend its national programming power and the concerns of Section 613 are not implicated."³⁵ This is demonstrated by the terms of the LPA itself, the *Time Warner SEC Letter*, and the declaration of AT&T's independent expert, Professor John C. Coffee, Jr. Specifically, as the discussion above

³⁴ Of course, the Commission could specify each of the foregoing limitations as conditions of its approval of the AT&T/MediaOne merger in order to ensure their enforceability.

³⁵ *Attribution Order* at ¶ 63.

demonstrates, AT&T's interest in TWE upon consummation of the merger will meet the criteria set out in the Attribution Order for an insulated limited partnership.³⁶

- 1) AT&T will not act as an employee of TWE in any capacity, including functions directly or indirectly related to the video programming enterprises of TWE;
- 2) AT&T will not serve, in any material capacity, as an independent contractor or agent with respect to TWE's video programming enterprises;
- 3) AT&T will not communicate with TWE or the general partner of TWE on matters pertaining to the day-to-day operations of TWE's video programming business;
- 4) Because only Time Warner can nominate a new general partner, AT&T's right to vote on the admission of additional general partners effectively will be subject to the power of the general partner of TWE to veto such admissions;
- 5) AT&T will not have the ability to remove the general partner of TWE except where the general partner is subject to bankruptcy proceedings;
- 6) AT&T will not perform any services for TWE materially relating to TWE's video programming activities;³⁷ and
- 7) AT&T will not be involved in the management or operation of the video programming businesses of TWE.

B. AT&T's Limited Interests In Certain Entities That Sell Video Programming To TWE Will Not Disturb AT&T's Status As An Insulated Limited Partner In TWE.

AT&T's interests post-merger in certain cable programming entities that sell programming to TWE will not destroy the insulated nature of AT&T's interest in TWE,

³⁶ See *id.* at ¶ 64.

³⁷ As described in the next section, AT&T's minority, non-managing (and, in nearly all cases, indirect) interests in certain entities that sell video programming to TWE will not "materially involve" AT&T in the video programming activities of TWE and, therefore, will not disturb the insulated nature of AT&T's interest in TWE.

because, as shown below, AT&T's interests in these programming entities are minority and non-managing, and, in nearly all cases, indirect in nature.

1. Rainbow.

The sale of programming by Rainbow to TWE should not affect AT&T's insulation in the TWE partnership. AT&T, through its minority interest in Cablevision Systems Corporation, has only an indirect, minority interest in Rainbow and has no say in whether and on what terms Rainbow sells programming to TWE. To the contrary, as AT&T demonstrated in its *Public Interest Statement* and merger Reply Comments, the Dolan family and certain trusts in favor of members of the Dolan family, through their supervoting Class B shares, control the Cablevision Board and, in turn, control the Rainbow programming services.³⁸ If Rainbow sells programming to TWE, it does not do so at the direction or with the involvement of AT&T.

2. MediaOne Programming Interests.

MediaOne currently has minority interests in a handful of programming services and does not manage any of these properties. In addition, MediaOne holds a 50% interest in New England News and Fox Sports New England.³⁹ MediaOne does not manage any of these programming entities. Under such circumstances, it makes no sense to view a sale of programming by these entities as a sale by MediaOne -- or AT&T post merger. Therefore, the sale of such services to TWE should not affect in any way AT&T's insulation in TWE.

³⁸ See *Public Interest Statement* at 12; *AT&T/MediaOne Reply Comments* at 36.

³⁹ See *Public Interest Statement* at 17; *AT&T/MediaOne Reply Comments* at 37.

3. Viewer's Choice.

AT&T currently has a 33% interest in Viewer's Choice. The remaining interests are held by Time Warner Entertainment and Advance/Newhouse Partnership (33% jointly), Comcast Corp. (11%), Cox Communications (11%), and MediaOne (11%). AT&T does not control or manage Viewer's Choice currently, nor will it control or manage Viewer's Choice post-merger. Thus, the sale of programming by Viewer's Choice to TWE also should not affect AT&T's insulation in TWE.

4. Liberty.

As AT&T has demonstrated, AT&T's ownership of Liberty has been structured to ensure that: (1) Liberty and AT&T are economically distinct entities; and (2) Liberty is operationally independent from AT&T.⁴⁰ Stated another way, Liberty is a structurally separate company from AT&T, and AT&T neither shares in the economics or the operations of Liberty nor can it compel Liberty to take actions, even if it had the incentive to do so.⁴¹ Moreover, as Professor Coffee points out, AT&T is prohibited from exercising

⁴⁰ See, e.g., *Public Interest Statement* at 8-12; *AT&T/MediaOne Reply Comments* at 29-32; Supplemental Declaration of Professor John C. Coffee, Jr., submitted as Appendix F to *AT&T/MediaOne Reply Comments*, at ¶¶ 8-16 ("*Coffee Liberty Declaration*"). AT&T incorporates all of these prior statements by reference. The *Coffee Liberty Declaration* is attached hereto as Exhibit E.

⁴¹ In fact, as AT&T pointed out in its *Reply Comments* at 32, the Justice Department found in its Competitive Impact Statement regarding the AT&T-TCI merger that AT&T and Liberty had a "hold separate" relationship that justified an extended divestiture period for Liberty's Sprint PCS interest. See Competitive Impact Statement at 12-13, U.S. v. AT&T Corp., No. 1:98CV03170 (D.D.C. filed December 30, 1998). It would be arbitrary for the Commission to deny AT&T's ability to retain an insulated relationship with TWE simply because Liberty -- a "hold separate" company according to the Justice Department -- sold programming to TWE.

any of the traditional means by which a majority shareholder would seek to influence or expropriate value from Liberty.⁴² For example, AT&T cannot authorize additional Liberty shares and thereby dilute the power of existing shareholders and shift control to AT&T.⁴³ Similarly, AT&T cannot expropriate the value of Liberty through self-dealing transactions since Liberty will continue to be managed by its current management independent from AT&T.⁴⁴ AT&T also has no power to force Liberty to take actions (or refrain from taking actions) by refusing to pay dividends on profits earned by Liberty. To the contrary, the Liberty Board of Directors can declare dividends as it chooses, and AT&T is required to pass through these dividends to Liberty shareholders.⁴⁵ Finally, AT&T has no power to appoint or remove Liberty's corporate officers.⁴⁶ As a result of these restrictions, Professor Coffee concludes that AT&T does not share either in the economics or the operations of Liberty.⁴⁷

In light of these facts, the sale of programming by Liberty should not be seen as the sale of programming by AT&T. Moreover, Liberty sells very few programming services *directly*. Liberty has financial interests in a number of programming services, but those services are controlled by and managed by other entities. Thus, even if AT&T had a

⁴² See generally *Coffee Liberty Declaration*.

⁴³ *Id.* at ¶¶ 7-11.

⁴⁴ *Id.* at ¶¶ 12-13.

⁴⁵ *Id.* at ¶ 14.

⁴⁶ *Id.* at ¶ 15.

⁴⁷ *Id.* at ¶ 16.

controlling financial interest in Liberty -- which it does not -- the sale of programming by these other entities would be separated by several layers from AT&T. Accordingly, the sale of programming by Liberty's affiliates to TWE should not in any way affect AT&T's insulation in TWE because AT&T literally has nothing to do with (and derives no economic benefit from) any such sale.

* * *

In short, upon completion of the merger, AT&T will have minority, non-managing, and often indirect interests in certain video programming services that are sold to TWE. Because AT&T's programming interests are so attenuated, the sale of such services to TWE will not "materially involve[] [AT&T] in the video-programming activities" of TWE, and, therefore, such programming sale cannot reasonably be found to disturb AT&T's status as an insulated limited partner in TWE.⁴⁸ This conclusion is especially true given that, as shown above, AT&T will have *no role* in the video programming activities or decisions of TWE. To the contrary, Time Warner clearly has *de jure* and *de facto* control of TWE (subject only to MediaOne's rights with respect to Participant Matters).⁴⁹

This conclusion is not altered by the Commission's statement in its recent broadcast attribution order that "a contractual arrangement to provide programming [to an

⁴⁸ Cf. *Quincy*, 11 FCC Rcd. 2481, at ¶ 29 ("[E]ven a party wholly owning and controlling a programmer is not attributable simply by providing network programming for the television station of a licensee in which it invests.").

⁴⁹ See, e.g., *BBC*, 10 FCC Rcd. 7926, at ¶ 39 (Fox's interest in broadcast station held nonattributable despite the fact that Fox held a 25% nonvoting equity interest in the station and also sold programming to the station. The Commission's holding of nonattribution was influenced by the fact that "Savoy is in *de jure* and *de facto* control of [the licensee]." *Id.*)