STATEMENT OF
ANDREW JAY SCHWARTZMAN

AT&T/MEDIAONE MERGER
Docket 99-251

Submitted to the Federal Communications Commission
February 4, 2000

I appreciate the opportunity to appear today on behalf of Consumers Union, Consumer Federation of America as well as my own law firm, Media Access Project. (I refer to these groups collectively as "CU, *et al.*").

I especially regret that I have to devote much of my time today to discussing procedural concerns rather than to speak to the vitally important policy issues the Commission must now confront. The sad fact is that we are not being treated fairly, and I have no choice but to explain why. We have already had to take the Commission to court to challenge its unjustifiable giving AT&T four additional months to come into compliance with rules of which it has been aware since 1993. I am instructed to tell you that we will aggressively seek judicial review of any decision approving the proposed AT&T/MediaOne, conditionally or otherwise.

I want to start by making two requests for action.

First, CU, *et al.* ask that the Commission refer their October 7, 1999 complaint against AT&T to the Enforcement Bureau and that it be acted upon immediately.

The complaint (Attachment A) alleges that AT&T has repeatedly violated the Commission's horizontal ownership reporting requirements and misrepresented the facts surrounding these violations in written submissions to Commission staff. The Cable Services Bureau was aware of these violations, but did nothing to stop them.

The violations continue. The latest occurred just three weeks ago. (Attachment B).

Although the complaint raises character questions which must be resolved before the Commission can lawfully act on the MediaOne merger, the Cable Services Bureau is unable to state when, or even whether, it will act on the complaint.

Chairman Kennard has promised that FCC enforcement will be "firm" "fast" and "flexible." The Cable Services Bureau has been none of these.

Acquiescence in these violations calls the Cable Services Bureau's objectivity into question. The case should be referred to the new Enforcement Bureau, which is far better suited to handle this matter.

Second, CU, *et al.* ask the Commission to solicit public comment on the impact of the proposed America Online/Time Warner merger on the AT&T/MediaOne application.

950 18TH STREET, NW SUITE 220 WASHINGTON, DC 20006
VOICE: (202) 232-4300 FAX: (202) 466-7656 http://www.mediaaccess.org

MediaOne and Time Warner are 50/50 partners in RoadRunner, the number two cable internet service provider. AT&T owns some 58% of Excite@Home, the number one cable Internet service provider. CU, *et al.* and other parties have complained that this combination will monopolize the market for delivery of Internet services, and inhibit free expression on the Internet. The possibility that AOL, by far the largest Internet service provider will now share ownership of RoadRunner would give these companies even greater incentive to act in concert.

My clients oppose approval of the proposed AT&T/MediaOne merger. They have submitted extensive and detailed arguments as to why the transaction violates FCC rules and policies and is contrary to the public interest.

As to the many questions that I lack time to address today, I note that our filings are a matter of public record.[1]

Open Access- Among the issues I cannot discuss at length is the "open access" question. Our objections emphasize that open access means more than a choice of Internet Service Providers (ISP's),[2] and that open architecture is essential to sustaining the innovation and free expression which have fueled unprecedented growth in the American economy. As Kevin Werbach (formerly of the Commission's Office of Plans and Policy) says, the closed cable platform is "not the Internet."

With respect to the anti-competitive implications of the closed cable Internet model, I have attached to my written testimony a copy of the most eloquent pleading I have seen on the topic. (Attachment C). It is America Online's (AOL) August 23, 1999 *Comments* arguing that "any approval of this transaction should be conditioned upon the combined firms' provision of open access to its cable platform to its cable platform...."[3]

AOL is right. And, I can assure you, we will ask that the same condition be imposed on its proposed merger with Time Warner.

The Christmas Eve Stealth Waiver- I wish to place on the record a written presentation (Attachment D) objecting to AT&T's latest and most audacious demand. Although the Commis-

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[1]I would observe, however, that the same cannot be said for what AT&T and MediaOne has said to the FCC. Indeed, many of their most important representations remain hidden behind a conveniently excessive cloak of confidentiality.

[2]My December 6, 1999 letter to the Chairman elaborates on these points. The letter explains my reservations about a letter agreement between AT&T and MindSpring which was also sent to the Chairman that day. I regret that AT&T's letter has been publicized on the Commission's AT&T merger web page, but that staff has declined to post my letter. However, it is available at: http://www.nogatekeepers.org/newsletter/945143812.shtml#feature

[3]AOL concludes that "With this deal's consolidation of cable control over consumer choice among traditional and advanced video and integrated video/voice/data services, the place and time to act is here and now. The Commission should proceed while the architecture for cable broadband is still under construction. To wait any longer would allow the fundamentally anti-consumer approach of the cable industry to take root in the Internet and spread its closed broadband facility model nationwide." *Id.*, p. 18.

sion has - over our objection and the dissent of Commissioner Tristani - provided AT&T six months to come into compliance with its cable ownership rules once they are upheld in court, AT&T has belatedly sought to obtain an ***additional 18 month dispensation.*** The request was submitted just before Christmas, The devious manner in which this extraordinary demand was presented to the Commission (buried on page 30 of a 45 page "*Ex Parte Reply*" pleading filed just before Christmas), and the staff's acquiescence in this unprecedented abuse of FCC procedures,[4] serves to underscore why there is a rapidly diminishing confidence in the legitimacy of the Commission's processes. Many people would conclude that applicants promising to accelerate broadband deployment get what they want, no matter how hollow the promise.

The Rush to Judgment- I personally expect the Commission and its staff to approach this transaction in good faith, and that once this case is judged on the merits, we will prevail. However, the handling of this case has been infused with unfairness. However, my optimism is not widely shared by my colleagues. The Commission's "curious neutrality in favor" of AT&T, *see UCC v. FCC*, 425 F.2d 543, 547 (D.C. Cir. 1969), has given rise to a pervasive sense in the legal and regulatory community, in the press, and in the investment community, that the FCC's approval of this transaction is a foregone conclusion.

The handling of this case has been characterized by numerous instances of disparate treatment, large and small, signalling favoritism of AT&T. To cite a minor example, I have complained repeatedly that the Cable Services Bureau has given AT&T a platform to push its case by establishing a special web page which provide downloadable word processor files for all of AT&T's major filings. Only this week, in response to my repeated objections, has the staff added an explicit reference to the fact that other parties have filed pleadings in this case, and directions on how to find them in the Commission's ECFS system. A referral to the notoriously cumbersome and accident prone ECFS is hardly the same thing as prominent placement on the bureau's own website. Has anyone on the eighth floor tried to use the ECFS with a 28.8 modem, rather than with their T-1 one lines?[5] Those who (unlike FCC staff) lack high speed connections and fast computers are unlikely to find our comments even if they go to look for them.[6]

CU, *et al.* have attempted to take issue with this administrative version of the old fas-

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[4]47 CFR §78.20, and 47 USC §309(b), as well as fundamental fairness, dictate that the waiver should have been placed on public notice and subjected to public comment. Only after CU, *et al.* and others objected did the staff agree to follow a half-baked procedure far short of what the agency's rules require.

[5]As a matter of personal privilege, I take particular objection to the fact that AT&T's December 6, 1999 letter announcing its access agreement with MindSpring has received prominent placement on the bureau's web page, while my own letter of the same date explaining my concerns about that agreement has not been made available anywhere on the Commission's web site. Does not the staff believe that my views are worthy of the same public exposure as Mr. Cicconi's?

[6]I take particular objection to the staff's repeated expressions of belief that posting of documents on the Commission's web page or the impossibly cumbersome ECFS fulfills its outreach obligation. I represent those on the wrong side of the digital divide, many of whom have no Internet access, or are restricted to 28.8 baud or slower speed.

hioned "bum's rush." In particular, CU, *et al.* objected to the atypical and inappropriate use of "permit but disclose" procedures for what is a Title III license adjudication which is typically subject to service requirements and other protections against improper contacts.[7] CU, *et al.* sent a letter to staff on October 26, 1999 noting that it is impossible to reconcile these practices with the Chairman's repeated statements expressing a commitment to open processes in merger proceedings.[8] The staff's November 24, 1999 response to this objection was, in my opinion, snide and dismissive, advising us that "We are mindful of the disparity in resources between various parties and we seek to be as inclusive and open as possible in our proceedings. We believe our current procedures allow efficient conduct of merger reviews and other proceedings of interest on the record."[9]

CU, *et al.* are not alone objecting to this dramatic turnaround abandoning policies reaffirmed just a few months ago. In fact, it was the ***Federal Communications Bar Association*** which "raised objections to the broad use of permit-but-disclose procedures in adjudications," in the Commission's recent *ex parte* rulemaking. Just three months ago, the Commission reaffirmed its endorsement of the FCBA's views, and its rejection of plans to employ the very practices which have been used to rush AT&T's applications along on their way. *Ex Parte Presentations in Commission Proceedings*, 12 FCC Rcd 7348, 7351 (1997).[10]

The result of the Commission's inappropriate and unwise suspension of the *ex parte* rules

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[7]CU, *et al.* said that, "Unlike large law firms and huge corporations with full-time 'government relations' offices, citizens' groups and their public interest counsel do not have the resources to troll through Commission dockets containing scores of entries to determine if substantive matters relating to Title III authorizations are the subject of private unannounced discussions with the applicants."

[8]For example, in testimony presented on November 8, 1999 to the Senate Commerce Committee, he stressed that the Commission employs the "well defined legal standards" of the Administrative Procedure Act ("APA") in its merger reviews, and that "the process is open, [and] the Commission explains its decisions in writing,..."

[9]The letter also urged me consult the staff's web page which, as discussed above, contains AT&T's filings, but not those of other parties.

[10]The FCBA had "contended that allowing *ex parte* presentations in informal adjudications would foster the appearance that some parties have greater access to the decisionmaker than others." In addition,

> [it] expressed concern that -- in the case of oral presentations - disclosure procedures would neither fully reflect the presentation nor substitute for an opportunity to be present and thus be unfair to a party.

Id. Heeding those objections, the Commission declared that

> We have been persuaded by the concerns expressed by experienced practitioners that our proposal would be disruptive in adjudicatory proceedings. In addition, we do not wish to adopt a policy that commenters believe would create the appearance of unfairness. We have therefore decided to continue to treat as restricted proceedings most informal (*i.e.*, non-hearing) adjudications."

Id., at 73541-52. Three months ago, the Commission reaffirmed this holding on reconsideration. FCC 99-322 (released Nov. 9, 1999).

is a record that is hopelessly and unfairly one-sided. By our count, AT&T has had 65 conversations with Commission staff from the time its application was filed through this week. Most of them involved upper level executives of the company. Typically, they are memorialized in extremely terse and artfully vague language which gives opposing parties no basis to know what kind of information is transmitted. There is little reason to seek meetings to reply when there is no way to know what was said.[11]

Intentions do not matter so much as appearance. Even if our challenge will, indeed, receive objective consideration, it does not change the fact that there is an appearance of unfairness, and a pattern of unseemly favoritism towards AT&T. This undermines public respect for the integrity of the Commission's processes, and needlessly lends comforts to the enemies of the FCC's public interest jurisdiction who now seek to limit the FCC's merger authority.

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[11]A representative letter, submitted on September 10, discloses that AT&T's President and two AT&T Vice Presidents and counsel met with Commissioner Ness and her legal assistant. The full text of the substantive "notice" reads as follows: "We discuses the need to conform the cable horizontal ownership and attribution rules to the programming concerns underlying the cable horizontal ownership statute. We also discussed the impact of the cable horizontal and attribution rules on the proposed merger of AT&T and MediaOne."

ATTACHMENT A

October 7, 1999 Complaint

October 7, 1999

Chairman William E. Kennard
Federal Communications Commission
Washington, DC 20554

Re: *Complaint Against AT&T Corp. and Tele-Communications, Inc. for Misrepresentation to the Commission, Willful and Repeated Violations of 47 CFR §76.503(c) and for Lack of Candor*

Dear Mr. Chairman:

In this complaint, Consumers Union, Consumer Federation of America and Media Access Project ("CU, *et al.*") seek expedited imposition of severe sanctions against AT&T Corp. and its subsidiary, Tele-Communications, Inc. (collectively, "AT&T") As is explained below, AT&T has committed at least 46 separate violations of FCC rules:

- AT&T made a material representation to the FCC by falsely certifying its compliance with the cable TV ownership disclosure rule, 47 CFR §76.503(c):
- Based on CU, *et al.*'s reading of Section 76.503(c), all nine certification letters filed by AT&T since June, 1998 were untimely;
- Five of the nine letters certified to previously consummated transactions, thereby violating even AT&T's own strained reading of Section 76.503(c);
- AT&T lacked candor in its statements to the FCC in twice attempting to camouflage untimely filings by "piggy-backing" them onto other filings; and
- AT&T often failed to include required information in its filings.

Under FCC enforcement guidelines, AT&T's misconduct is subject to a fine of no less than $2,702,250. Furthermore, because of the repeated and deliberate nature of AT&T's conduct, the Commission should condition all grants of agency authority upon strict compliance with FCC disclosure rules. The Commission should also require AT&T to audit all of its certifications from the time the Commission lifted the stay on 47 CFR §76.503(c), and report any additional violations beyond those which CU, *et al.* have discovered.

INTRODUCTION

One of the FCC's core missions is to promote diversity in marketplace of ideas. Accordingly, under 47 CFR §76.503(c) the Commission requires large cable operators (including AT&T) to certify "[p]rior to acquiring additional cable systems...that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition." The certification must "specify[] the ownership in terms of homes passed before and after the acquisition is complete." *Horizontal Ownership FNPRM,* 13 FCC Rcd 14462, 14492 (1998).

Material Misrepresentations

AT&T has deliberately misrepresented its past practice to the FCC. AT&T failed to file necessary certifications in a timely fashion. Then, when the issue arose in the context of a motion to dismiss its pending application to acquire MediaOne, AT&T falsely represented its

1707 L STREET, NW SUITE 400 WASHINGTON, DC 20036
VOICE: (202) 232-4300 FAX: (202) 466-7656 http://www.mediaaccess.org

practices to the FCC.

AT&T falsely told the Commission that it has complied with 47 CFR §76.503(c). Specifically, in its August 23, 1999 *Opposition of AT&T Corp. and MediaOne Group, Inc. to Motion to Dismiss* ("*Opposition*"), AT&T stated the following:

> [Rule 76.503(c)] requires only that the necessary certification be made "[p]rior to acquiring additional cable systems. 47 CFR §76.503(c). Consistent with established practice, AT&T will submit a Rule 76.503(c) certification to the...Commission prior to acquiring MediaOne's cable systems.[1]
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> [1]AT&T has routinely filed Rule 76.503(c) letters since...June 1998. In fact, just last week, AT&T filed such a letter informing the Commission...of AT&T's acquisition of a cable system in Clyde Hill, Washington. [footnote in original]

Contrary to AT&T's assertion in the above quoted language, AT&T has ***not*** "routinely filed Rule 76.503(c) letters" prior to certification. Indeed, the ***very letter*** referred to by AT&T contained a certification of a transaction that had taken place ***two weeks previously***. AT&T therefore clearly knew that, at the time that it made the representation that it "routinely" complied with "established Commission practice...." it had ***not*** complied with even its own interpretation of the rules.[1]

Failure to Use Candor in Statements to the FCC

On at least 12 occasions, AT&T has made truthful statements which lacked candor, *i.e.*, they were intended to mislead the Commission through omission in violation of the requirement of 47 CFR §1.17. This is an extraordinary pattern of violations displaying a general disregard for the Commission's rules: in fact, none of AT&T's certifications under Section 76.503(c) satisfies a reasonable reading of Section 76.503(c).

First, AT&T's August 23, 1999 *Opposition* referred to the August 13, 1999 letter to demonstrate its compliance with FCC rules (in the Clyde Hill transaction) without disclosing that the Cedar Falls transaction mentioned in the same letter was not certified "prior" to the date of closing, but thirteen days thereafter. Even under AT&T's reading of the rules, this 13 day delay was a severe violation of 47 CFR §76.503(c), and its deliberate omission in AT&T's August 23, 1999 Opposition is clearly "material" under 47 CFR §1.17.

The second through sixth violations of the candor requirement arise from AT&T's certifying the impact of cable television acquisitions only ***after*** concluding the relevant transactions. Despite the clear language of 47 CFR §76.503(c) requiring notice "***prior to*** acquiring" the relevant cable system, AT&T construed the rule as permitting it to file prior to closing on, not "acquiring" the cable systems. *See Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking*, 13 FCC Rcd 14462, 14492 (1998) ("*Horizontal Ownership FNPRM*").

On two other occasions, AT&T further sought to mislead the Commission by combining late filings with arguably timely filings in a single letter. Moreover, AT&T has failed to provide the Commission with required information necessary to evaluate the transactions certified. AT&T has thus established a pattern of evading the Commission's regulatory powers through late and

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[1]CU, *et al.* note in passing that even the Clyde Hill transaction referred to by AT&T was filed on the same day, and not "prior to" the closing of the transaction.

incomplete filings.

REGULATORY BACKGROUND

This complaint is submitted pursuant to 47 CFR §1.41. The complaint requests forfeitures pursuant to 47 CFR §1.80 and other sanctions pursuant to the Commission's general enforcement power for repeated violations of 47 CFR §1.17 (requiring complete and honest statements to the Commission), 47 CFR §1.80, and 47 CFR §76.503(c).

47 CFR §76.503(c)

The *Horizontal Ownership NPRM* lifted a previously imposed stay on enforcement of Section 76.503(c), thus activating the Commission's authority to monitor transactions affecting cable ownership. The rule reads:

> (c) Prior to acquiring additional cable systems any person or entity holding an attributable interest in cable systems reaching 20 percent, or more, of homes passed nationwide must certify to the Commission that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

Horizontal Ownership NPRM, 13 FCC Rcd at 14492.

CU, *et al.* believe that the Commission can only fulfill its monitoring duty when the required certifications are filed ***contemporaneously with*** transfer or assignment applications. Section 76.503(c) has no meaning if the Commission's oversight of the cable industry is reduced to mere notification of already completed transactions. *See* CU, *et al.*'s *Reply to Opposition to Motion to Dismiss*, CS 99-251, filed Sep. 2, 1999 (*"Reply"*), at 2-3.

AT&T has disputed CU, *et al.*'s interpretation, *see Opposition* at 2. AT&T has represented to the Commission that section 76.503(c) requires certification at some time ***before*** completion of transactions, but not necessarily before FCC approval of an application, *see Opposition* at 1, and that its practices have conformed with this understanding. *See Opposition* at 2 n. 1.

47 CFR §1.17

Section 1.17 codifies the general requirement that all written statements to the Commission may neither state false facts nor lie by omission. The rule states in pertinent part:

> No applicant, permittee or licensee shall in any response to Commission correspondence or inquiry or in any application, pleading report or any other written statement to the Commission, make any misrepresentation or willful material omission bearing on any matter within the jurisdiction of the Commission.

As the language makes plain, the rule prohibits more than the knowing statement of a false fact. The rule includes willful omissions that seek to hide necessary or relevant information from the Commission. *See Emision de Radio Balmeseda, Inc.*, 7 FCC Rcd 3852 (1992). The rule also prohibits statements which, while literally true, imply facts which are not true or which seek to create a false impression with the Commission. *See Richardson Broadcast Group*, 7 FCC Rcd 1583 (1992).

47 CFR §1.80

Section 1.80 authorizes the Commission to assess forfeitures against any licensee or other person that:

> [w]illful[illegible]or repeatedly failed to comply with[illegible]y of the provisions of the Communications Act of 1934, as amended; or of any rule, regulation or order issued by the Commission under that Act....

47 CFR §1.80(a)(2). Section 1.80(b)(4) requires the Commission to consider certain factors in determining the amount of any forfeiture, and provides a set of guidelines for the Commission and its staff. As noted in the guidelines, however, the Commission may impose stiffer penalties than those provided in the Guidelines should it find an upward departure warranted. In addition, the guidelines provide for upward adjustments where the misconduct is egregious, repeated or intentional, where the applicant has an ability to pay and requires a large forfeiture to serve as a suitable disincentive, and where the misconduct resulted in substantial economic gain.

With this regulatory framework in mind, *CU, et al.* turn to a detailed consideration of AT&T's multiple violations of the rules enabling the Commission's evaluations.

ANALYSIS

AT&T has committed repeated violations of the Commission's rules. As CU, *et al.* demonstrate below, these violations include tardiness, sloppy filing practices, and, most crucially, misrepresentations to the Commission.

The Commission's rules strictly prohibit dishonest statements and statements which lack candor. 47 CFR §1.17. Honesty in self-reporting is a foundation of the Commission's practice, and its lack cannot be ignored without threatening the basis of the FCC's authority. Moreover, as CU, *et al.* explain in their *Supplement to Petition to Dismiss or Deny,* ("*Supplemental Petition*") filed with this complaint, at 3, the Commission's deregulation process makes it especially necessary for the Commission to rely upon the representations and self-reporting of parties before it. *See, e.g., MobileMedia Corporation*, 12 FCC Rcd 14896, 14899 (1997) (explaining that the Commission's need to rely on applicants' representations is "crucial to the functioning of the regulatory process").

Section 76.503(c), as enforced pursuant to the *Horizontal Ownership NPRM*, requires applicants to file certification of the change in their cable homes passed figures with their applications. AT&T has agreed that the rule requires certification "[p]rior to acquiring additional cable systems." *See Opposition* at 1.

AT&T has claimed to the Commission that it complies with this understanding, representing that it has "routinely filed Rule 76.503(c) letters" and will continue to do so. AT&T's assurances that its "routine[]" filings comply with its understanding of the rule are indisputably untrue.

On five occasions AT&T has notified the Commission of already completed transactions. *See* Attachment 2, Letters of August 13, 1999; May 3, 1999; January 21, 1999; December 4, 1998; and August 28, 1998.[2] On two occasions, AT&T notified the Commission of transactions completed on the same day. *See* Letters of August 13, 1999 and August 31, 1998. Under no interpretation, ***including AT&T's***, does this willful and repeated misconduct comply with Section 76.503(c). By inaccurately stating to the Commission that it had complied with its own understanding of the rules, AT&T violated Rule 1.17 and eschewed the core value of honesty in self-reporting.

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[2]The letter dated August 28, 1998 was received by the Commission on August 31, 1998.

Attachment 2 includes copies of three other AT&T letters submitted in response to the requirements of 47 CFR §76.503(c). In each letter, AT&T notifies the Commission of transactions it anticipates closing within the next few days. The transactions are presented as completed deals, awaiting only formal closing. *See* Attachment 2, Letters of February 23, 1999; December 30, 1998; and October 29, 1998. None of the letters affords the Commission any reasonable opportunity to review the transactions, as several letters describe transactions to be completed the ***following day***. AT&T's practice renders Section 76.503(c) a virtual nullity.

In four letters, AT&T attempts to notify the Commission simultaneously of more than one transaction, without providing specific details as to how many homes passed each individual transaction adds to or subtracts from AT&T's total. This practice violates 47 CFR §76.503(c). CU, *et al.* note that *each* application for transfer of control requires a separate determination that the deal furthers the public interest. In order to make this determination, the Commission needs adequate figures for ***each individual transaction***. The language of Section 76.503(c), which refers to individual acquisitions, clearly reaffirms that each acquisition must be treated separately.

Worse, however, AT&T has used this practice of reporting multiple transactions in a single letter to hide its more egregious late filing violations. On two separate occasions, (January 21, 1999 and August 13, 1999) AT&T attempted to "piggy-back" late notices on less tardy transactions. The August 13, 1999 letter is particularly egregious: one of the transactions had ***occurred two weeks previously***. Incredibly, AT&T held up this letter as an example of its rigorous compliance with the Commission's rules in its *Opposition*, at 2 n.1. AT&T's repeated practice of combining very late notices with arguably timely certifications demonstrates that this misconduct is no mistake. Rather, this duplicitous behavior evidences AT&T's goal of slipping late notices past the Commission.

Each of these practices and violations demonstrates AT&T's lack of candor and desire to minimize the reported number of additional homes passed.[3] This behavior clearly aims to deceive the Commission and threatens the Commission's bedrock policy of self-reporting by honest applicants and licensees. Even where AT&T has complied with its own understanding of the rules, AT&T has resorted to vagueness to evade exacting review.

This conduct manifests AT&T's hostility to the FCC's authority to review its transactions. As CU, *et al.* have argued, the purpose of certification lies in its placing all relevant information before the Commission when it considers an application. *See Reply* at 2-3. Consequently, 47 CFR §76.503(c) requires applicants to furnish the Commission with information relevant to each individual transaction. Without this, the Commission cannot properly determine if a transfer serves the public interest. AT&T's practices of providing incomplete information, and combining additional homes passed from two or more transactions into one figure, violate the requirements of the rule.

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[3]For example, in one letter AT&T reported two transactions ***adding*** cable systems and one transactions ***subtracting*** cable systems from its holdings. *See* Letter of August 31, 1998, *infra*. By combining the numbers of homes passed from these three transactions, AT&T effectively evaded review of any one of them, especially the two adding systems to AT&T's possession. This combination is particularly pernicious, since AT&T had no obligation to report the transaction which subtracted systems. Section 76.503(c) only requires certification when acquiring systems. AT&T clearly included the transaction subtracting systems for the sole purpose of minimizing the other transactions and evading Commission review.

CALCLUATION OF FORFEITURE

In the nine letters filed by AT&T since the Commission lifted the stay, CU, *et al.* have identified 46 separate violations. These violations include one outright misrepresentation, 12 statements lacking in candor, 13 late filings, and 20 failures to provide the Commission with required information. Using the guidelines provided in 47 CFR §1.80, the Commission should assess a total forfeiture of $2,702,250.

These findings are fully supported in Attachment 1. Below, CU, *et al.* set forth the methodology used to determine the appropriate forfeiture.

Misrepresentation and Lack of Candor

Using the guidelines provided in 47 CFR §1.80, CU, *et al.* have identified, as detailed in Attachment 1, 46 separate violations of the Commission's rules.

CU, *et al.* identified one outright misrepresentation and 12 separate instances where AT&T's filed statements lacking candor. Under the guidelines, the Commission should assess the maximum possible penalty per violation -- in this case, $27,500 per individual violation.

Late Filings

In seven individual instances, AT&T filed late certifications even under its own interpretation of the rules, *i.e.* either after closing the transaction or on the same day it closed the transaction. These instances constitute a "failure to file required information," with a recommended forfeiture of $3,000 per day per violation.

Although each violation should be deemed to have begun at the time AT&T filed each application for transfer of licenses, CU, *et al.* have computed the violation as beginning on the day the transaction closed (the first late day under AT&T's reading of the rule). This avoids needless squabbling over AT&T's odd and self-servingly incongruous reading of the rule.

For the same reason, as to those certifications filed consistent with AT&T's incorrect interpretation of 47 CFR §76.503(c), *i.e.*, filed prior to closing, but after the application was filed, CU, *et al.* have treated each as a single violation, with a forfeiture of $3,000 per violation. CU, *et al.* identified six separate instances where AT&T filed after receiving Commission approval, but prior to closing the transaction.

CU, *et al.* note that the Commission may deem it appropriate to adjust the forfeitures requested for these violations upwards once it determines the dates on which the relevant transfer applications were filed.

Failure To File Required Information

In 20 separate instances, AT&T failed to report required information critical to the Commission's evaluation of the transfers. In 10 instances, AT&T failed to provide the change in the number of homes passed caused by each transaction. Instead, AT&T sought to evade Commission review by reporting aggregate figures for a number of transactions in a single letter. For each individual transaction for which AT&T failed to provide the change in the number of homes passed, the Commission should assess a forfeiture of $3,000.

CU, *et al.* have also found 10 instances in which AT&T failed to provide critical information, such as the location of the systems in question. Without this information, the Commission cannot possibly assess the impact of the transaction. For each such act of omission, the guidelines recommend a forfeiture of $3,000.

Upward Adjustments

The guidelines recommend upward adjustments in cases involving:

> (1) Egregious misconduct: (2) ability to pay/relative disincentive: (3) intentional violation: (4) substantial harm: (5) prior violation of any FCC requirements: (6) substantial economic gain: (7) repeated or continuous violation.

As CU, *et al.* have demonstrated, all of these factors, with the exception of the fifth factor, apply here. AT&T's conduct in making a knowingly false certification to the Commission, and in filing numerous statements lacking candor, was both intentional and egregious. Similarly, its repeated and continuous pattern of late filings and withholding critical information warrant stiff sanctions.

It is of particular relevance in this regard that AT&T has openly expressed its disdain for the Commission's ownership rules, especially the attribution provisions, at the same time that it was improperly certifying its ownership transactions. Its general counsel has referred to the Commission's attribution rules as "absurd." "AT&T Household Reach to be Issue in MediaOne Merger Review," *Communications Daily*, May 10, 1999, p. 2. In fact, late last year, ***long before the MediaOne*** transaction was proposed, the Commission indicated that AT&T "pass[ed] approximately 37% of total homes passed." *Fifth Report and Order,* 13 FCCRcd 24284, 24375. Six months later, at the same time that AT&T was filing misleading and confusing ownership certifications with the FCC indicating that it is already at or near the Commission's 30% cap, its chief legal officer told a press conference that "One can argue that we are at 25% or 35% or 40% coverage post MediaOne, but to get to these wildly inflated figures you really have to violate any rule of reason." "AT&T Deal Faces 'Careful Scrutiny'." *USA Today*, May 10, 1999, p. 10.

CU, *et al.*, like consumers everywhere, have suffered substantial harm from AT&T's evasion of Commission review. In particular, CU, *et al.* and its consumer members have suffered harm from AT&T's ongoing violation of the Commission's stayed rules on horizontal ownership. Similarly, AT&T has reaped enormous economic gains from the expansion of its cable system unchecked by review by a Commission armed with complete information required under the rules.

Finally, the Commission must consider a substantial upward adjustment based on factor (2), the need to provide a strong disincentive for future misconduct. Unless AT&T is punished severely, it has no reason to discontinue its practice of outright violation of and slipshod compliance with the Commission's rules.

The guidelines do not provide specific guidance for the upward adjustments. CU, *et al.* therefore recommend the following based on the nature of the conduct at issue. The Commission should adjust the total forfeiture upward 50% due to the egregious nature of the conduct, another 50% for the large number of intentional violations, 50% for the substantial harm, 50% for the substantial economic gain, and 50% for the repeated nature of the violations. Finally, CU, *et al.* suggest that nothing less than a 100% percent upward departure based for ability to pay/disincentive will provide a sufficient disincentive to prevent continued misconduct on the part of AT&T.

OTHER REQUESTED RELIEF

AT&T's knowing and repeated violation of the rules demands a stern response from the Commission. Furthermore, because of AT&T's size and resources, a monetary forfeiture using the 47 CFR §1.80 guidelines may not prove sufficient to deter future bad conduct.

The need for such a response is further heightened because of AT&T's position as the largest multiple system operator (MSO) in the United States. Indeed, this size gives AT&T a tremendous incentive to seek to minimize the number of homes passed gained by each transaction. Given this powerful incentive, and AT&Ts demonstrated willingness to make active misrepresentations and material omissions to avoid its 47 CFR §76.503(c) requirements, no monetary forfeiture may prove sufficient.

Accordingly, CU, *et al.* request the following, additional sanctions.

Requirement That AT&T Audit Its Certifications Since The Commission Lifted the Stay and Report Any Additional Violations

As discussed above, the Commission failed to establish a proper procedure for filing certifications under 47 CFR §76.503(c). The staff of the Cable Bureau have informed CU, *et al.* that CU, *et al.* have all of the certifications filed by AT&T known to the Cable Bureau. Staff also informed CU, *et al.*, however, that other certifications may have been filed or may have been required.

CU, *et al.* therefore request that the Commission order AT&T to conduct a thorough audit of its 47 CFR §76.503(c) obligations since the Commission lifted the stay in June 1998. The Commission should order AT&T to submit a report providing the following information: (1) the date on which AT&T submitted its application to acquire the system to the Commission, (2) the date on which the Commission granted approval of the transaction, (3) the date on which AT&T filed the required certification, and (4) if AT&T failed to file a certification, a statement to that effect. The report should then identify any violations, including those already identified by CU, *et al.* in this complaint. This report should be made public and subject to public comment.

Once the Commission has the report before it, it should assess further sanctions as appropriate.

Notice That Future Violations Will be Dealt With Harshly, and May Include Additional Sanctions Besides Forfeiture

The Commission has the authority to impose application denial and license revocation as sanctions for repeated violations; the Commission may find it particularly appropriate in cases involving misrepresentation and lack of candor. *See MobileMedia*, 12 FCC Rcd at 14901. AT&T should be put on notice that future violations of its rules may warrant even such severe sanctions as these. Without this threat, AT&T may well consider the potential gain from future violations worth the price of a possible forfeiture.

CONCLUSION

For the above stated reasons, the Commission should grant the relief requested in the complaint.

Respectfully submitted,

Andrew Jay Schwartzman
Harold Feld
Cheryl A. Leanza

G. William W. Carmany
Law Student Intern,
UCLA School of Law

October 7, 1999

ATTACHMENT B

January 19, 2000 Letter
(Retroactively Reporting January 18, 2000 Transaction)

ORIGINAL

EX PARTE OR LATE FILED

AT&T Broadband & Internet Services
P.O. Box 5630
Denver, CO 80217-5630

January 19, 2000

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

RECEIVED
JAN 19 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: *Ex Parte* Submission
MM Docket No. 92-264
CS Docket No. 99-251

Dear Ms. Salas:

Pursuant to Paragraph 76 of the Commission's Memorandum Opinion and Order on Reconsideration, MM Docket No. 92-264, FCC 98-138 (released June 26, 1998), Tele-Communications, Inc. ("TCI") hereby notifies the Commission that on January 18, 2000, TCI closed a transaction with Comcast Corporation ("Comcast") whereby TCI sold all of its interest in Lenfest Communications, Inc. to Comcast.

Based on available data, and assuming the most conservative interpretation of the Commission's current attribution rules, TCI estimates that prior to the transaction it had approximately 34,120,000 cable homes passed and after the transaction it will have approximately 32,090,000 cable homes passed.

In addition, TCI notes that on December 2, 1999, it filed a letter with the Commission reporting on how a transaction between Century Communications Corporation and TCI affected TCI's number and percentage of MVPD subscribers nationwide both before and after consummation of AT&T's proposed merger with MediaOne ("Century Letter"). The Lenfest transaction described above will remove approximately 1,504,000 subscribers from AT&T's current attributable subscribers and will affect the numbers and percentages reported in the Century Letter in the following manner: AT&T is now attributed with approximately 19,639,000 MVPD subscribers, or approximately 24.1% of all MVPD subscribers nationwide (i.e., 19,639,000 ÷ 81,400,000).[1]

[1] The 81.4 million MVPD subscriber number is the September, 1999 total from *The Kagan Media Index*, October 31, 1999, at 8.

0105325.03

The other subscriber numbers and percentages reported in the Century Letter are unaffected by the Lenfest transaction. Specifically: (1) taking into account the remaining pending transactions referred to in the Century Letter (two of which will be completed prior to the closing of the MediaOne merger, and one soon thereafter), AT&T will be attributed with approximately 17,515,000 MVPD subscribers, and its percentage of total MVPD subscribers will be approximately 21.5% (*i.e.*, 17,515,000 ÷ 81,400,000); and (2) after the proposed merger with MediaOne is completed, AT&T will be attributed with approximately 22,515,000 MVPD subscribers, and its percentage of total MVPD subscribers will be approximately 27.7% (*i.e.*, 22,515,000 ÷ 81,400,000).[2]

An original and four (4) copies of this letter and attachment are submitted herewith in accordance with Section 1.1206(b) of the Commission's rules.

Sincerely,

Douglas G. Garrett / FMB

Douglas G. Garrett
Senior Regulatory Counsel

DGG:fmb

cc: See attached service list

---

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

ATTACHMENT C

America Online, Inc. Comments in Docket 99-251
Filed August 23, 1999

ORIGINAL

FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

DOCKET FILE COPY ORIGINAL

RECEIVED

AUG 23 1999

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In The Matter Of	)	
	)	
Transfer of Control of FCC Licenses	)	
Of MediaOne Group, Inc.	)	CS Docket No. 99-251
To AT&T Corporation	)	

99-251

To: The Commission

COMMENTS OF AMERICA ONLINE, INC.

George Vradenburg, III
Jill A. Lesser
Steven N. Teplitz

AMERICA ONLINE, INC.
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
(202) 533-7878

August 23, 1999

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FEDERAL COMMUNICATIONS COMMISSION

Washington, D.C. 20554

In The Matter Of	)	
	)	
	)	
Transfer of Control of FCC Licenses	)	
Of MediaOne Group, Inc.	)	CS Docket No. 99-251
To AT&T Corporation	)	

To: The Commission

COMMENTS OF AMERICA ONLINE, INC.

America Online, Inc. ("AOL"), pursuant to Section 1.51(c) of the Commission's Rules, hereby submits these comments in response to the above-referenced joint applications filed by AT&T Corporation ("AT&T") and MediaOne Group, Inc. ("MediaOne").[1] We believe that any approval of this transaction should be conditioned upon the combined firms' provision of open access to its cable platform in order to empower consumer choice among competing Internet service providers.

We do not repeat the arguments regarding the Commission's authority to impose an open access condition,[2] believing that such authority is clear and recognized by the

---

[1] Public Notice, *AT&T Corp. and MediaOne Group, Inc. Seek FCC Consent for a Proposed Transfer of Control*, DA 99-1447 (rel. July 23, 1999). The parties' description of the transaction and their public interest showing, filed as an appendix to their application, is referenced hereinafter as "Description of Transaction."

[2] For an extensive discussion of the Commission's legal authority to impose such a condition, *see AOL Comments in Joint Application of AT&T Corporation and Tele-Communications, Inc.*, CS Docket No. 98-178 at 39-46 (October 29, 1998).

Commission.[3] Nor do we recite here, in detail, the description of the substantial horizontal and vertical consolidation resulting from this merger, believing that such detailed description will be offered by others and that our recitation would only be cumulative. Rather, AOL focuses here on the need for Commission engagement at this time in order to fulfill the agency's long-standing commitment to competition, choice, and diversity.

Introduction And Summary

The newly combined AT&T/TCI's proposed acquisition of MediaOne's substantial cable, programming, Internet, telephony, and related holdings has spurred broad concerns over the resulting anti-consumer effects spanning video, voice, and data markets.[4] Surely a merger met from the outset with such widespread concern—and, indeed, one filed in the immediate wake of the Commission's arduous SBC/Ameritech approval process—would be understood to be in for serious FCC scrutiny. Yet AT&T has offered public assurance that this merger, just like its TCI deal, wouldn't encounter significant regulatory hurdles.[5]

AT&T claims that "[f]or the same reasons . . . that AT&T's acquisition of TCI was pro-competitive and served the public interest, the Commission also should find that the merger of AT&T and MediaOne is pro-competitive and serves the public interest."[6] But the

---

[3] *Kennard Claims Jurisdiction Over Cable Unbundling*, Communications Daily (May 20, 1999) ("there's very compelling argument that the FCC has jurisdiction in this area.").

[4] *See, e.g., AT&T Household Reach to Be Issue in MediaOne Merger Review*, Communications Daily (May 10, 1999).

[5] *Id.* (Citing AT&T's reassurances to financial analysts).

[6] Description of Transaction at 4.

Commission embraced the AT&T/TCI merger because it viewed the public interest calculus as easy in that case: great benefits from the long-sought emergence of a new, formidable competitor to incumbent local exchange carriers, and no horizontal effects or merger-specific harm. The Commission found "that the merger of AT&T and TCI is likely to result in benefits for consumers, including a local telephony alternative . . . without creating competitive harm with respect to other services."[7]

The merger now before the Commission is not about bringing new benefits to consumers; it is about one important step in the massive restructuring—or the "RBOC-ization"[8]—of the cable industry, the aggressive effort to extend cable's closed model into a new generation of cable services, and the resulting implications for consumers. This AT&T/MediaOne deal crystallizes the cable world trend: the few remaining big players are consolidating their control over centralized clusters of cable "first mile" loops to consumers, while also banding more tightly together in interlocking relationships to dictate how consumers may obtain advanced services—the coming integration of video, data, and voice—through those cable facilities.

This time around the public interest calculus of the AT&T-TCI deal has been turned on its head. Both AT&T and MediaOne already have developed and pursued aggressive

---

[7] *Application for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, 3160 (1999) ("*AT&T/TCI Merger Order*").

[8] David Lieberman, *AT&T Bargains For Cable System Swap*, USA Today, June 18, 1999 at B1 (quoting AT&T's President for Broadband Services Leo J. Hindery, Jr.) ("Lieberman Article").

telephony business plans before this deal. Indeed, this merger offers no public interest benefit that the parties haven't already promised.

What this merger does offer, however, is the means for a newly "RBOC-icized" cable industry reinforced by interlocking ownership relationships to: (1) prevent Internet-based challenge to cable's core video offerings; (2) leverage its control over essential video facilities into broadband Internet access services; (3) extend its control over cable Internet access services into broadband cable Internet content; and (4) seek to establish itself as the "electronic national gateway" for the full and growing range of cable communications services.

To avoid such detrimental results for consumers, the Commission can act to ensure that broadband develops into a communications path that is as accessible and diverse as narrowband. Just as the Commission has often acted to maintain the openness of other last-mile infrastructure, here too it should adopt open cable Internet access as a competitive safeguard—a check against cable's extension of market power over facilities that were first secured through government protection and now, in their broadband form, are being leveraged into cable Internet markets. Affording high-speed Internet subscribers with an effective means to obtain the full range of data, voice and video services available in the marketplace, regardless of the transmission facility used, is a sound and vital policy—both because of the immediate benefit for consumers and because of its longer-range spur to broadband investment and deployment. Here, the Commission need do no more than establish an obligation on the merged entity to provide non-affiliated ISPs connectivity to the cable platform on rates, terms and conditions equal to those accorded to affiliated service providers.

AT&T/MediaOne Is Not AT&T/TCI

The parties to this transaction would have the Commission believe that, at its heart, this is a merger about local telephone competition. But simply invoking the mantra used in the TCI acquisition does not make it so.

There, the Commission found that "[a]lthough some cable operators are successfully entering local exchange markets today, we do not believe TCI presently should be considered a 'most significant market participant' for purposes of our competitive analysis."[9] Here, MediaOne is already committed to, and indeed has been the cable industry leader in, cable telephony. In fact, MediaOne has already been seeking "to upgrade or rebuild substantially all of its systems nationwide by the end of the year 2000."[10] Thus, unlike TCI, MediaOne is already a "most significant market participant" in developing local telephony competition.

And, having already acquired TCI, AT&T doesn't need *another* mega-merger to gain entry into the local exchange business. AT&T already is in. AT&T already has committed. AT&T has shown that it can enter joint ventures with—and need not acquire—other cable operators to pursue the nationwide brand in local telephony it desires.[11] Promoting local

---

[9] *AT&T/TCI Merger Order* at 3185.

[10] Comments of MediaOne, *Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, CC Docket No. 99-230 at 15-16 (Aug. 6, 1999).

[11] AT&T has announced such joint venture agreements with Time Warner, Comcast, and other cable operators. *See, e.g.*, *AT&T and Comcast Agree to Swap Cable Systems*, News Release, <http://www.att.com/press/item/01193,467,00.html> (May 4, 1999); *AT&T and Time Warner Form Strategic Relationship to Offer Cable Telephony,* News Release, <http://www.att.com/press/item/0,1193,330,00.html> (Feb. 1, 1999).

exchange competition does not mean that it must be AT&T, and only AT&T, that is to be the cable telephony provider in every local market or—or even two-thirds of all such markets.[12]

Rather than a telephone merger, the proposed consolidation of the AT&T and MediaOne cable systems and programming interests is better understood as an enormous horizontal and vertical consolidation in broadband video facilities and in video and Internet programming. This consolidation is part of what's seen as (together with the rest of the ongoing consolidation in cable ownership) "the RBOC-ization of cable"[13]—namely, the emergence of a limited number of geographically distinct local cable monopolies. This strikingly apt metaphor highlights the structural competitive dangers being built into the cable architecture—danger that the FCC, just this month, underscored for the Court of Appeals in defending the necessity of its national cap on cable ownership.[14]

Further, AT&T/MediaOne's contemplated nationwide grip on the key broadband pipeline to the home also poses a fundamental threat to an open and competitive Internet. The threat is magnified not just by the combination of AT&T and MediaOne facilities, not just by the added block of cable facilities interlocked through @Home's ownership and contractual relationships, but also by the common ownership of the cable industry's two proprietary Internet service providers—@Home and RoadRunner—that have functioned across the nation as the exclusive valves into, and out of, that pipeline.

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[12] Moreover, AT&T's MediaOne application provides no service commitments, no implementation schedule, and no investment plan to back up its telephony promises.

[13] Lieberman Article.

[14] *See* Initial Brief for Appellees [FCC] at 26-41, *Time Warner Entertainment Co., v. FCC*, No. 94-1035 (D.C. Cir. filed Aug. 13, 1999).