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February 16, 2000

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

Re: Notice of Ex Parte Meeting
In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp. (CS Docket No. 99-251)

Dear Ms. Salas:

On behalf of U S WEST, Inc., William R. Richardson, Jr. and Julie A. Veach met yesterday with James Carr of the Office of General Counsel. We discussed the material in the attachment hereto and the issues raised in U S WEST's pleadings.

The original and one copy are enclosed for filing. Should you have any questions, please communicate with the undersigned.

Sincerely,

Julie A. Veach

Julie A. Veach

Attachment

cc: James Carr

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February 8, 2000

AT&T/MEDIAONE MERGER

1. **The Horizontal Ownership Cap Does Not Permit AT&T To Own *Both* Liberty and Its Limited Partnership Interest in TWE.**

- AT&T now appears to have abandoned its untenable argument that the Liberty programming relationships with TWE are not sufficiently extensive to count for attribution purposes. *See* attachment to U S WEST December 14 comments (web page for Manhattan Cable showing carriage of extensive Liberty programming).

- AT&T still argues that some of Liberty's many programming investments are less than controlling.

    - AT&T has no response to Liberty's SEC filings, confirming its intention to "exert significant influence over management" of these cable networks.

    - AT&T mistakenly relies on the Commission's "equity-debt" test for support of its attribution arguments. Like other Commission decisions cited by AT&T (relying on the totality of circumstances relating to an investor's involvement in the enterprise), this test is designed to *expand* attribution to situations in which an investment is not — unlike here — technically attributable. But the equity-debt test is a useful analogy in one respect: in looking at whether an investor has a programming relationship, it considers not just controlling interests in program networks, but any *attributable* interest in them. *See Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests*, FCC 99-207, ¶ 55 (rel. Aug. 6, 1999).

- AT&T still suggests that it can somehow be walled off from attribution of Liberty, its 100% subsidiary.

    - If accepted, this unprecedented argument would create a gaping hole in the attribution principles underlying not only the Commission's cable ownership policy but also its broadcast multiple ownership and wireless spectrum cap policies. In the past, the Commission has been careful to avoid relaxing its attribution policy where to do so would have "significant ramifications in other cases." *Twentieth Holdings Corp.*, 4 FCC Rcd 4052, 4054 ¶ 15 (1989).

    - AT&T has never denied the variety of AT&T/Liberty interrelationships: Liberty's preferred vendor status, AT&T's corporate fiduciary duty that overrides any dividend passthrough or other purported separation, and the overlap among officers, directors, shareholders, and option holders of the respective companies. Six of the nine Liberty directors, for example, hold more than 39 million shares of AT&T stock. *Cf. Columbia Pictures Indus., Inc.*, 30 F.C.C.2d 9 (1971) (even in a complete spinoff, and where the issue was not attribution but common control, Commission rejected proposed trust and required complete divestiture of Viacom stock by CBS officers, directors, broadcast division presidents and 10% shareholders).

- The extensive relationships between parent and sub cannot be walled off, in the way the Commission permits when a single officer or director may have "wholly unrelated" interests. 47 C.F.R. § 76.503 notes.
  - Whoever the three AT&T directors on the Liberty board will be, they will still be nominees of (and thus beholden to) *AT&T*.
  - Insulating *AT&T* employees from Liberty or TWE relationships does not solve the basic problem of *Liberty's* programming relationships with TWE.
  - AT&T now proposes to exclude the Chairman of Liberty (an AT&T board member and its largest shareholder) from AT&T board decisions regarding the video programming activities of AT&T's cable systems.
    - This offer does not appear to extend to board decisions concerning Liberty programming or TWE cable systems.
    - It is also limited only to board decisions. As noted at the February 4 public forum, the real question is how the Chairman of Liberty otherwise communicates with the Chairman of AT&T (directly or through their subordinates).
    - Even in the context of individual directors (as opposed to *entire subsidiaries*), the Commission has recognized that "decisionmaking [cannot] be compartmentalized in this fashion" -- and that "it would be virtually impossible for the Commission to ascertain whether the promise not to participate is being adhered to." *Warner Amex Cable Communications, Inc.*, 75 F.C.C.2d 393, 396 (1979); *accord, Macfadden Acquisition Corp.*, 104 F.C.C. 2d 545, 564 (1986).
    - Any such commitment cannot cure the multiplicity of parent-subsidiary interrelationships described above. Even in the case of far less than 100% interests, the Commission "ha[s] long held that entities . . . with substantial common

business interests cannot be expected realistically to compete at arm's length in other businesses." *New International, PLC*, 97 F.C.C.2d 349, 370 (1984). Nor can they be expected to ignore the vertical relationship the Commission has already recognized to exist (regardless of tracking stocks) in applying the program access rules to the merged AT&T/TCI.

- Nothing under the offer proposed by AT&T would prevent AT&T (through Liberty) from advancing AT&T's interests by making use of its programming power to influence TWE to join AT&T in excluding new programmers, particularly those that compete with Liberty.

2. **AT&T Has Failed To Carry the Substantial Burden of Demonstrating Any Entitlement to the Significant Waiver of the Horizontal Cap That It Now Seeks.**

- Any such applicant has a "high hurdle" even at the starting gate. *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969).

- AT&T has essentially three prongs to its justification for the waiver it seeks: that its violation of the cap is only "technical" or "mechanical," that the application of the rules to its 25.5% interest in TWE is a surprise (or not justified because of the pending stay of the rule), and that it is entitled to a waiver because its merger with MediaOne will provide unrelated public interest benefits in the form of competition by MediaOne in local phone service. None of these arguments satisfies AT&T's substantial burden in clearing this high hurdle.

  - As noted above, AT&T's interest in the TWE cable systems is attributable, because the programming provided by its 100% subsidiary to those systems amounts to the kind of potential influence that the Commission has determined to warrant attribution. There is nothing "technical" about this violation; AT&T has repeatedly refused to amend its limited partnership agreement to cure it. Unlike the cases cited by TWE, there is nothing *de minimis* about this violation, either. It involves interests in TWE cable systems serving 11.15 million subscribers, increasing its MVPD subscriber share to 40%, even assuming other divestitures.

  - There is nothing surprising about the application of these established rules to AT&T.

    - The seven insulating criteria have been in effect since 1985. These clearly require attribution if a limited partner *communicates* with respect to the day-to-day operations of the limited partnership, or *contracts* to provide services to it. The Commission's 1999 attribution revisions certainly did not *tighten* these criteria.

- In its 1998 attribution rulemaking comments filed long before its agreement with AT&T, MediaOne recognized that these criteria made its TWE interest attributable. It also recognized full well the importance, in any attribution analysis, of whether TWE is *"included in . . . the [investor's] carriage agreements."* Indeed, to demonstrate its lack of "control over the selection of programming on Time Warner cable systems," MediaOne attached an affidavit that no TWE system is "covered today *by any MediaOne programming affiliation agreement*." Consolidated Comments of MediaOne Group, Inc., CS Docket No. 98-82, at 9 & n.15, 25 (filed Aug. 14, 1998).

- The Commission also made clear long ago how these insulation principles applied to programming relationships, in the analogous area of trust arrangements. *See Twentieth Holdings Corp.*, 4 FCC Rcd 4052, 4054 ¶¶ 15-17 (1989).

- AT&T has been on notice since 1993 that the Commission intended to apply the horizontal cap rules on a judicial reversal of *Daniels*, within 60 days (now extended to 180) thereafter.

- The Commission's order approving the AT&T/TCI merger put AT&T on notice that its decision to issue tracking stocks would not affect the Commission's view of Liberty as vertically integrated with the AT&T cable systems.

- Whatever the status of MediaOne's existing telephony plans (or the need for a full fledged *merger*, with *AT&T*, to fulfill them), AT&T's claims regarding the unrelated telephony competition benefits of its merger with MediaOne cannot carry its substantial burden in seeking a waiver to obtain MediaOne's substantial interest in *TWE*.

  - The rationale underlying waivers of Commission rules is not, as AT&T argues, whether (as in a merger case that does not involve waivers) the merger proponent can find some aspect of the merger that may serve the public interest by balancing out its anticompetitive effects. The rationale, which derives from *Storer Broadcasting*, is that the price for articulating policy by general rule rather than by adjudication is a safety valve procedure to include situations that do not serve the underlying purpose of the rule. *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 205 (1956).

  - This principle is even more compelling where the Commission's rules are mandated by Congress, and where the Commission has now represented in court that it will enforce them upon lifting of the stay.[1]

- AT&T's argument boils down to the very troublesome proposition that those who want to engage in substantial violations of the Commission's rules are entitled to do so if they can identify some wholly unrelated benefit that results from the transaction. This argument extends far afield from the waiver policy articulated in *Storer*. It admits of essentially no standard other than advancing an unrelated interest that happens to appeal to any given Commission at any given time. *Cf. Stockholders of CBS Inc. and Westinghouse Elec. Corp.*, 11 FCC Rcd 3733 (1995) (granting waivers for *television* ownership relying in part on pledge for children's *television* programming) and Separate Statement of Commissioner Quello (expressing concern that waiver not be conditioned on any such commitment).

  - As Commissioner Ness has recently cautioned, "the basis which guides licensing officials in granting or denying a permit must not give them a free hand." *WQED Pittsburgh*, FCC 99-393 (rel. Dec. 29, 1999) (partially vacated, FCC 00-25) (separate statement), quoting *Neimotko v. Maryland*, 340 U.S. 268, 284-85 (1951) (Frankfurter, J., concurring).

  - One could just as easily argue that the policies of Section 706, to promote deployment of and competition in advanced telecommunications capability, require *denial* of the waiver request to avoid common ownership between Excite@Home and Road Runner systems.

- The Commission has already accommodated AT&T by recently relaxing the rule so as to permit nonvideo relationships with TWE. *See Implementation of the Cable Television Consumer Protection and Competition Act*, Report and Order, FCC 98-288, CS Docket No. 98-82, ¶ 64 (rel. Oct. 20, 1999). AT&T's waiver request simply seeks reconsideration of the balance struck in the rule itself, but petitions for reconsideration of the Commission's decision are now untimely.

- The cable telephony benefits described by AT&T relate to the MediaOne systems, not the TWE systems that are the subject of the waiver request. AT&T has made no showing of how that

[1] Opp. of Respondents to [Consumers Union] Summary Motion to Vacate and Remand at 12-13 (D.C. Cir. Jan. 19, 2000) (No. 99-1522).

waiver would be necessary to achieve this *MediaOne* telephony capability that it cites to justify the merger. Nor does it attempt to demonstrate that this waiver with respect to Liberty's video programming has any bearing on *TWE's* ability to provide telephony.

3. **AT&T Has Made No Showing of Any Need for a Waiver of 18 Months.**

- AT&T has made no showing that it needs that long to cure any rule violation. Indeed, it still refuses even to discuss how it might cure the violation.

- The Commission has recently determined that it would be "reasonable" to allow parties 6 months from the date of a decision reversing *Daniels* to complete "the disposition of such property." This determination, which *extended* the cure period by 4 months, governs here absent any showing by AT&T. Nor is it inconsistent with precedent. *See, e.g., Jacor Communications, Inc.,* 14 FCC Rcd 6867, ¶¶ 33, 42 (1999); *Maximum Media, Inc.,* 12 FCC Rcd 3391, ¶ 17 (1997).

- This is no *de minimis* overlap of the kind that might justify such a lengthy waiver. TWE has 11.15 million subscribers.

4. **The Commission's Authority and Responsibility under Section 706 To Ensure Regulatory Parity in the Deployment of Advanced Telecommunications Capability Require That Any Merger Approval Be Conditioned on a Requirement of Open Access.**

- Section 706 expressly directs the Commission to encourage the deployment of advanced telecommunications capability "without regard to any transmission media or technology," and to do so "by utilizing . . . measures that promote competition in the local telecommunications market."

- DSL providers are substantially handicapped by an even greater "morass of regulation" than AT&T/MediaOne/TWE — who are the largest providers of this emerging service.[2]

- As the Commission has advised the Ninth Circuit in the Portland case, Section 706 makes the Commission uniquely qualified to prevent "regulatory disparity" by addressing broadband access issues across different technologies.

- Chairman Kennard has agreed that regulatory disparity here is inappropriate. Multichannel News, Nov. 1, 1999, at 38: Rep. Dingell: "Why should they be regulated differently when they are giving functionally equivalent service?" Chairman Kennard: "Well, they shouldn't, but the question is: How do we get them both on an even keel?"

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[2] Remarks of Chairman Kennard at NATOA 19th Annual Conference, Sept. 17, 1999, at 6.

- AT&T recognizes that regulation "would reduce investment in cable infrastructure and deny or delay the availability" of advanced service offerings. It also recognizes the "significant competitive advantage" afforded those who provide service "free of the onerous regulations that apply to their . . . counterparts" using different technologies. AT&T Reply Comments 59-60 (addressing DBS), 106. That advantage is far greater in the case of cable modem service, which is the dominant means of providing broadband access today.