Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses of	)	CS 99-251
MediaOne Group, Inc. and AT&T Corp.	)	
and	)	
Applications of America Online, Inc. and	)	CS 00-30
Time Warner, Inc. for transfers of Control	)	

MOTION TO CONSOLIDATE

of

CONSUMERS UNION

CONSUMER FEDERATION OF AMERICA

and

CENTER FOR MEDIA EDUCATION

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To: The Commission

MOTION TO CONSOLIDATE

Consumers Union, the Consumer Federation of America, and the Center for Media Education (collectively, "CU, *et al.*"), respectfully submit this motion to consolidate two pending applications, the *Application of MediaOne Group to Transfer Licenses to AT&T Corp.*, Docket No. FCC 99-251, with the *Applications of America Online, Inc and Time Warner, Inc. for Transfers of Control*, Docket No. CS 00-30. Because grant of either application may preclude grant of the other, it would be contrary to the public interest and administratively inefficient to consider them independently. Rather, the Commission must regard them as mutually exclusive and consider them together.[1]

INTRODUCTION

This motion is necessitated by the recent exchange of correspondence between AT&T and the Chief, Cable Services Bureau in which AT&T has refused to supply certain information about the attributable cable television system ownership interests of a post-merger AT&T/ MediaOne combination, and disclaimed its capability to provide other information. The data in question relates to the market penetration of Time Warner Entertainment, L.P. (TWE), which is 25% owned by

[1]This motion must be considered by the full Commission, inasmuch as the Chief, Cable Services Bureau lacks delegated authority to act upon CARS applications "that present novel questions of fact, law, or policy that cannot be resolved under existing precedents and guidelines." 47 CFR §0.321(e).

MediaOne, as well as Time Warner Cable, Incorporated (TWI), a subsidiary of TWE's parent, Time Warner Incorporated (Time Warner or TW).

By letter dated April 7, 2000, AT&T amended previously-submitted information about TWE's subscribership, relying upon information recently supplied to the FCC by Time Warner and America Online, Inc. (AOL), as part of their proposed merger. AT&T also provided information for TWI's subscribership based upon the same Time Warner filings. However, AT&T emphasized that "AT&T is not in a position to certify to the TWI subscriber numbers,..."

As this exchange demonstrates, the Commission cannot fully consider the effects of either the AT&T/MediaOne merger and the AOL/TW merger on the relevant markets and on each other with certainty unless it has all four parties before it. Accordingly, the interests of the public and of administrative efficiency require the Commission to consolidate the applications. Furthermore, because the proposed AT&T/MediaOne merger would fundamentally change not merely the nature of the relevant markets, but the nature of the ***applicants*** in the AOL/TW merger, the Commission must treat the AT&T/MediaOne application and the AOL/TW application as mutually exclusive and consolidate the proceedings.

SUMMARY

The recent exchange of correspondence between the Cable Bureau Staff and AT&T demonstrates the need for this motion. Unless the Commission consolidates these two proceedings, it cannot properly act on them.

In the two mergers at issue, America Online, Inc., the world's largest Internet service provider (ISP), seeks to buy Time Warner, the second largest cable multiple system operator (MSO) in the United States. Through TW, AOL will hold approximately 75% of TWE, and approximately 40%

of Road Runner -- the second largest cable ISP.[2] The remaining 25% of TWE is held by MediaOne, which also holds approximately 35% of Road Runner.[3] MediaOne also has the power to appoint two of the six members of the TWE Board.[4] AT&T, the largest cable MSO, owner of Excite@Home, the largest cable ISP, seeks to acquire MediaOne. Through its subsidiary Liberty Media, AT&T already holds a nine percent passive interest in Time Warner.[5] Between them, AT&T and TWE own outright, or hold interests in, the majority of major cable networks, as well as numerous other video and other content providers.

If the two mergers were granted in the form submitted, therefore, the largest and second largest cable MSOs, passing over two-thirds of the homes in the United States, will have united with the largest narrowband and cable ISPs. This access control will be coupled with control over the

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[2] *See Supplement Information* of AOL and TW, filed March 21, 2000 ("*AOL/TW Supplement*"). This information was filed in response to the request for further information by FCC General Counsel Christopher Wright. *See* Letter of Christopher Wright, March 6, 2000 ("*Commission Response Letter*").

[3] As discussed below, the exact nature of MediaOne's ownership of Road Runner and the extent to which MediaOne and TW share operational control remains unclear.

[4] *AT&T/MediaOne Public Interest Statement* at 17.

[5] *Id.* at 9.

most popular cable networks and content producers. Such a concentration of interests does not serve the public interest. The Commission should therefore treat the applications as mutually exclusive, and should consider them simultaneously in one docket.

AT&T's recent refusal to comply with an initial request for information from Commission staff relating to these very issues demonstrates the need to formally merge these dockets and consider the mergers together. According to the April 5, 2000 letter from Deborah Lathen, Chief of the Cable Service Bureau, to AT&T, the Bureau requested that AT&T provide further information pertaining to the number of subscribers attributable to MediaOne through Time Warner Entertainment and Time Warner's other subsidiary, TWI Cable, Inc. (TWI). Bureau staff also asked AT&T to explain statements in recent SEC filings pertaining to a possible public offering of stick by TWE.

Because of the relationships among AOL, Time Warner, MediaOne, AT&T, and the broadband providers Excite@Home and Road Runner, ***this is precisely the kind of information that the Commission will need to properly consider the AOL/TW merger as well as the AT&T MediaOne merger.*** Yet AT&T apparently refused to provide the requested in-formation, demanding that the Commission make its determination on the merger and the waiver request without any further submissions. After Ms. Lathen's letter made it clear that staff would not consider the merger and waiver request without the required information, however, AT&T quickly relented and delivered the required information.

Without continuing jurisdiction over the AT&T/MediaOne merger, the Commission will have no way to compel AT&T to provide information necessary to both the AT&T/MediaOne merger and the AOL/TW merger. Accordingly, as explained below, the Commission must consolidate the mergers.

BACKGROUND

America Online, Inc.:

AOL dominates the existing Internet dial-up access market with 22 million subscribers. No other ISP even comes close. AOL has invested $1.5 billion in DirecTV through its parent company, and has a joint marketing agreement to provide Internet access through DirecTV's broadband satellite system.[6] AOL has also struck joint marketing agreements with the leading RBOC DSL providers -- Bell Atlantic, GTE and SBC. In addition to these Internet access holdings, AOL owns, or has interests in, a large number of Internet content and application providers, such as ICQ (instant messaging), Spinner.com (online music), and Digital City, Inc. (local content network and community guide).[7]

Time Warner:

TW holds the second largest number of cable systems in the United States, with over 12.6 million subscribers. Nearly all of these systems are owned by Time Warner Entertainment ("TWE") -- a partnership in which Time Warner owns approximately 75% and MediaOne owns 25%.[8] The remaining systems are owned by TWI, Inc., an indirectly held wholly-owned subsidiary of Time Warner. Time Warner also has a 40 percent interest in Road Runner, the second largest ISP providing broadband access over cable systems. It shares control of Road Runner with MediaOne, although, as described below, the exact nature of the relationship is unclear.

In addition, through its 75% interest in TWE, Time Warner holds interests in the most popular cable networks such as CNN and HBO, as well as some of the most popular television and cable programming. It has leveraged this content into some of the most popular Internet content and websites, such as CNN.com and CNNfn.com. Time Warner also controls television stations, the WB television network, and the WTBS "Superstations."

AT&T Corp.

AT&T holds the largest number of cable systems in the country. Based on AT&T's own calculations, adding MediaOne's cable interests would give AT&T 40% of the total MVPD subscribers. In addition, through its attributable affiliates Liberty Media ("Liberty") (a wholly owned subsidiary) and Rainbow Media (through AT&T's 33% interest in Cablevision, Cablevision holds 75% of Rainbow), AT&T will hold significant or controlling interests in most of the popular cable networks.[9]

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[6] *AOL/TW Supplement* at 11-13.

[7] *Id.* at 5-6.

[8] Approximately 10.8 million of these subscribers are on systems owned by TWE or the TWE-Advance/Newhouse partnership, TWE-A/N. *AOL/TW Supplemental Information* at 8.

[9] *AT&T/MediaOne Public Interest* at 8-12.

Excite@Home:

Excite@Home, dominates the residential broadband market. Of the 1.8 million broadband users in the United States at the end of 1999, 1.1 million subscribed to Excite@Home. The next closest provider, Road Runner, served only 500,000 subscribers.[10] *See* "AT&T Bares Its Teeth," http://www.isp-planet.com/news/ahomeatt.html (visited March 31, 2000).[11] AT&T effectively controls Excite@Home. AT&T holds a 70% voting interest and the remaining cable partners have given up their rights to appoint board members.[12]

Road Runner:

The second most popular residential broadband provider, Road Runner has 550,000 subscribers. Together, Road Runner and Excite@Home account for 90% of the residential broadband market. As discussed below, MediaOne and TW both hold significant interests in Road Runner and appear to share operational control. As discussed below, however, the exact nature of the relationship between MediaOne and TW and their precise ownership interests remains unclear.

I. OWNERSHIP AND OPERATING CONTROL OF ROAD RUNNER REMAINS UNCLEAR DESPITE FILINGS BY AT&T/MEDIAONE AND AOL/TW

Road Runner is a joint venture in which Microsoft holds 10%, Compaq holds 10%, and the remaining 80% is held by ServiceCo LLC. ServiceCo LLC is held by MediaOne, TWI, TWE and TWE-A/N. MediaOne reports in its public interest filing that it holds 25.51% of TWE and calculates its interest in Road Runner as 34.67%. *AT&T/MediaOne Public Interest Statement* at 17.

TW reports in its filings with the Commission that "Time Warner holds an indirect 40 percent ownership interest in Road Runner." This leaves approximately five percent of the ownership of

[10]The remaining 200,000 were primarily served though DSL. *Id.*

[11]Road Runner has now increased its subscriber base to 550,000. *See Time Warner Annual Report*, filed with the SEC March 30, 2000.

[12]This is based on the agreement announced on March 29, 2000, to increase AT&T's voting interest from 56% to 70%, to consolidate Excite@Home's earnings with those of AT&T, and to extend AT&T's distribution agreement with Excite@Home through 2008. The parties expect the arrangements to go into effect by the end of the 3rd quarter of 2000. *See* Press Release on Ex-

Road Runner unaccounted for. *Supplement* at 9.

More importantly, neither TW or MediaOne have explained on this record how the management and operation of Road Runner works. MediaOne has the power to appoint two members of Road Runner's six member board. *AT&T/MediaOne Public Interest Statement* at 17.

The Commission therefore has no way to judge to what extent road Runner will remain independent of MediaOne, AT&T and Excite@Home. From the information currently available to the Commission, granting both merger applications would consolidate 90% of the emerging broadband market by linking the two leading residential broadband providers -- Excite@Home and Road Runner -- through their parent corporations.

II. GRANTING THE AT&T/MEDIAONE MERGER APPLICATION CHANGES THE VERY NATURE OF TIME WARNER, RENDERING THE AOL/TW MERGER CONTRARY TO THE PUBLIC INTEREST

Allowing both the AOL/Time Warner merger and the AT&T/MediaOne merger to proceed would create unprecedented levels of concentration in the cable, video programming, Internet access, and Internet content markets. In addition, however, through ties of cross-ownership, the two corporations will own significant interests in ***each other***.

AOL and Time Warner submitted their response to the Commission's request for additional information on March 21, 2000:

> ***It is of critical importance to both of the pending transactions that AOL and TW ignored the pending AT&T/MediaOne application in their responses on the nature***

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cite@Home's homepage, http://corp.excite/com/news/pr_000329_01.html (visited March 31, 2000).

of the Internet market, AOL's relationship with DirecTV, and the nature of AOL's and Time Warner's business lines. The Supplemental Information captured a misleadingly incomplete snapshot of the market as it exists today, not as it may well exist at such time as the Commission completes its review of the AOL/TW application.

Through Liberty, AT&T already holds a passive nine percent ownership in Time Warner directly. MediaOne holds approximately 26 percent active interest in TWE. It also holds an interest in Road Runner roughly equivalent to Time Warner's. Attachment A graphically demonstrates the web of direct ownership, indirect interests, and other business relationships that will link AT&T, MediaOne, AOL and Time Warner.

Simply put, if the Commission grants both the AT&T/MediaOne merger and the AOL/Time Warner merger, it will create a conjoined media colossus that dominates the narrowband and broadband Internet markets, the cable market, and the content provider market, joined through AT&T's and MediaOne's common interests in Time Warner, Time Warner Entertainment, and Road Runner.

ARGUMENT

If AOL acquires Time Warner, the concentration of media assets linked with AT&T could rise to the level of an effective monopoly over broadband Internet, cable video programming, and the MVPD market generally.

As the diagram in Attachment A demonstrates, AT&T's passive interest in the future AOL Time Warner, coupled with MediaOne's existing active interest in Time Warner Entertainment (TWE), would link AT&T/MediaOne and AOL Time Warner at every key junction of deployment in the cable and Internet industry, coupled with control or attributable interests in virtually all of the most popular content providers for cable and the Internet.

The Commission clearly understands the significance of the AOL/Time Warner merger to the cable and Internet industries, and the complexities it must consider before determining whether the application satisfies the public interest, convenience and necessity. On March 6, 2000, in res-ponse to the initial bare-bones public interest statement filed by AOL and Time Warner, FCC General Counsel Christopher Wright directed Time Warner and AOL to provide additional information regarding AOL's interest in broadband providers such as DirecTV's broadcast satellite service and Time Warner's interests in the broadband market, to address the nature of the broadband and narrow band Internet markets, to quantify and justify the public interest benefits, and to explain why cooperative agreements or other measures short of merger cannot provide the same benefit. *Commission Response Letter* at 2-3.

The answers to the General Counsel's questions, however, would be materially different if AT&T owned MediaOne, and through it a substantial interest in Time Warner's cable and broadband networks. The nature not merely of the market, but of the ***applicants*** in the AOL/TW merger changes as a result of granting the AT&T MediaOne application. The Commission must therefore consider the two applications simultaneously and, as explained below, mutually exclusive as submitted.

I. LEGAL STANDARD

Since the Supreme Court's seminal decision in *Ashbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945), where an administrative body is confronted by mutually exclusive applications, it must consider them simultaneously, and select the application which will best serve the public interest. To do otherwise is to deny the public the best service available and to deny the applicant whose application is considered second its right to due process.

Although *Ashbacker* dealt with interference in the physical spectrum, the basic principle applies here. It appears unlikely the Commission can grant both applications. The pendency of the AOL/Time Warner merger materially changes the nature of the issues presented in the AT&T/MediaOne merger. Thus the Commission cannot simply grant the AT&T/MediaOne application because AT&T applied first.

Refusing to consolidate these applications denies the public the right to have the Commission determine the best possible outcome. It is possible that some configuration of ATT/MediaOne and AOL/TW would be consistent with the public interest. But the Commission will never determine what configuration of these four companies best serves the public interest if it decides the AT&T/MediaOne application first.

Even if the Commission might properly grant either one of the applications standing alone, grant of both may be contrary to the public interest. As detailed below, the Commission may not be able to grant both applications in the form each was submitted. The combination of AT&T's passive interest in AOL/TW, and its active interest through MediaOne in Time Warner Entertainment would create a concentration of power that would stifle competition in the Internet access market, the broadband Internet market, the cable market, the broader MVPD market, the video programming market, and the emerging market in Internet content and interactive services.

Furthermore, the complex array of marketing arrangements, ownership interests, and joint ventures outlined in Attachment A would clearly impair the Commission's ability to establish and enforce rules necessary to establish and maintain competition.

Even if either or both applications could be granted under some permutation of conditions, the Commission cannot decide that sequentially. It must have all of the facts before it, and the ability to compel all parties to provide new information and conform themselves to the Commission's determination.

Finally, the interests of efficiency require the Commission to consider the mergers simultaneously. Due to the nature of the mergers and the relevant markets, discussion of the AOL Time Warner merger cannot take place without discussion of the AT&T/MediaOne merger. Rather than requiring multiple rounds of comments on this issue, "with a concomitant waste of resources and time by the Commission and all the parties," *Commission Response Letter* at 1, the Commission should simply combine the dockets now and consider the applications jointly.

II. GRANT OF BOTH PENDING APPLICATIONS WOULD COMBINE THE LARGEST CABLE BROADBAND PROVIDERS WITH THE LARGEST DIAL-UP "NARROWBAND" PROVIDER

As the General Counsel stated in the *Commission Response Letter*, the character of the narrowband and broadband Internet access markets is a "key issue" in the AOL Time Warner application. *Commission Response Letter* at 2. The nature of the Internet access market for both narrowband and broadband changes dramatically if the Commission grants the AT&T/MediaOne application.

At present, AOL dominates the narrowband market. It has partnered with DSL and satellite broadband providers, but until its proposed acquisition of TW, had not yet found an entry into the closed cable broadband networks. Since cable continues to be the most popular form of residential broadband, AOL has not secured a dominant position in the broadband market to match its position in the narrowband market.

By contrast, Time Warner has no narrowband service offering. It provides broadband access over its cable systems through its cable ISP, Road Runner. Although Time Warner has not yet completed its planned upgrades, it intends to offer Road Runner (and, after the merger, AOL) on all its systems.

As discussed above, even in the absence of the AT&T/MediaOne merger, a combination of AOL and Time Warner creates a substantial concentration in the Internet access market by combining the dominant narrowband provider with a significant broadband access provider. In addition, AT&T's nine percent interest in Time Warner will give the holder of the dominant cable ISP a substantial direct (albeit passive) interest in the dominant narrowband provider.

If AT&T acquires MediaOne, however, the nature of the market and the effect of the acquisition change dramatically. Through MediaOne's interests in Road Runner and TWE, AT&T would directly control the dominant residential broadband provider, Excite@Home, and its closest rival, Road Runner -- and thus control nearly 90% of the entire residential broadband market.

AT&T will also hold a nine percent passive interest in the merged AOL Time Warner, the dominant narrow-band access provider and the only other provider with significant market arrangements with other broadband platform providers. This it will combine with MediaOne's 25% active interest in TWE. Although 25% does not allow an entity to exercise outright control, the

Commission has long recognized -- and recently reaffirmed -- that a holder of even a 5% active interest can exercise sufficient influence to warrant attribution. *See Cable Attribution First Report and Order*, 14 FCCRcd at 19034-35. Accordingly, AT&T's potential 35% stake in AOL Time Warner (nine percent passive, 25% active through TWE) is cause for considerable concern.

III. THE CONCENTRATION OF CONTENT PROVIDERS AND DELIVERY SYSTEMS WOULD VIOLATE THE 1992 CABLE ACT AND THE COMMISSION'S DUTY TO PROMOTE DIVERSITY IN THE MARKET PLACE OF IDEAS

As with the Internet access market, the nature of the AOL Time Warner merger changes significantly depending on whether AT&T owns a 25% interest in TWE through MediaOne.

Time Warner controls some of the most popular cable network programming through TWE: Home Box Office (HBO) and associated movie channels, CNN and associated news channels, Turner network channels, and the Cartoon Network. AT&T, through its Liberty Media and Rainbow Media affiliates, controls or has significant interests in such popular programming as BET, USA Networks, and movie channels such as Encore and Starz.

The dangers of this concentration become critical when combined with AOL's $1.5 billion investment in DirecTV. As the Commission has recognized, cross-ownership of DBS systems by cable system operators may harm competition the MVPD market. *See Policies and Rules for the Direct Broadcast Satellite Service*, 13 FCCRcd 6907, 6939 (1998). Although the Commission has not yet determined whether to adopt a general rule on cable cross-ownership, the Commission "coninue[s] to address specific competition and public interest concerns related to DBS ownership on a case-by-case basis." *Id.*

It is unclear whether combining AOL's interest in the leading DBS provider, DirecTV, with

Time Warner's cable systems will harm consumers. The Commission cannot fully consider this issue without also considering the combined interests of AT&T/MediaOne in Time Warner, Time Warner Entertainment, and through them, AOL Time Warner. Nor can the Commission consider whether AOL's interest in DirecTV is sufficiently insulated from TWE and Time Warner's cable systems without knowing the level of concentration in the marketplace generally. A level of concentration safe in a world where AT&T and MediaOne compete might prove untenable in a world where AT&T and MediaOne, and their attendant programming assets, are combined.

IV. THE COMMISSION CANNOT ADDRESS THESE CONCERNS WITHOUT CONSOLIDATING THE MERGER APPLICATIONS

For the reasons discussed above, the two applications are likely mutually exclusive as applied. At the least, they affect each other, and the market, so profoundly that the Commission cannot consider the impact on the public interest of either of these mergers without considering the other.

The Commission cannot consider what configuration of these applicants will satisfy the public interest unless it has all the applicants before it. Once it decides the ATT/MediaOne application, the Commission will have no power to require information from it, information necessary in crafting appropriate limits to the concentrations of market power represented by these two mergers. As the *Commission Response Letter* recognized, the public has a right to study and comment on the entire transaction in all its detail. Furthermore, the Commission staff must consider all relevant details of this transaction, including a fully informed public comment. To meet that requirement here requires information obtainable not merely from AOL and Time Warner, but also information under the control of AT&T and MediaOne.

Finally, waiting until after comments are filed to consider the effects of the AT&T/MediaOne

application, or requiring an additional round of comments after Commission action on the pending AT&T/MediaOne application, would be a "waste of resources and time by the Commission and all the parties." *Commission Response Letter* at 1. Accordingly, in the interest of efficiency as well as in the public interest, the Commission should consolidate the applications and consider them simultaneously.

CONCLUSION

For the reasons stated above, consolidating the AT&T/MediaOne merger and the AOL/Time Warner merger serves the public interest and the interests of efficiency. By contrast, failure to consider the two applications together would violate well-established principles of Commission jurisprudence and would needless extend the AOL Time Warner review process. Accordingly, the Commission should consolidate the dockets and consider the applications jointly.

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I Harold Feld, do hereby certify that I caused one copy of the attached *Motion to Consolidate* to be served by U.S. mail upon the parties listed below.

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