

May 8, 2000



Magalie Roman-Salas  
Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

**Re: Notice of *Ex Parte* Presentation**  
**CS Docket No. 99-251**  
***Merger Application of AT&T & MediaOne***

Dear Ms. Salas:

In accordance with Section 1.1206(b)(2) of the Commission's rules, I am submitting a copy of a letter faxed and emailed today to David Goodfriend, legal advisor to Commissioner Ness.

Sincerely,

Andrew Jay Schwartzman  
President/CEO

cc. David Goodfriend

May 8, 2000



David Goodfriend  
Office of Commissioner Susan Ness  
Federal Communications Commission  
8B115  
445 12th Street, SW  
Washington, DC 20554

Dear David:

I am enclosing a passage from the April 27, 2000 reply brief Consumers Union filed in its pending appeal of the FCC's stay decision. (Footnotes have been renumbered.)

In particular, I call to your attention the discussion concerning the FCC's historic inability to obtain timely compliance with waivers. Bluntly put, waivers are frequently extended or made permanent after recipients use the waiver period to lobby for regulatory or legislative relief. The brief devotes somewhat less attention to abuse of trust devices in this situation, but the Commission has frequently encountered efforts to "park" assets using instruments designed to insure that they are returned to the grantor or at least to promote that outcome.

Our view continues to be that six months is what the FCC said is necessary to obtain compliance with its ownership rules, and that there is no record for granting a waiver of any greater length in Docket 99-251. Commissioner Ness may want to consider the uncertainty caused by the litigation risk of waivers of greater length in this case.

Sincerely,

Andrew Jay Schwartzman  
President and CEO

**C. The Commission Credulously Ignores the Likelihood That its Stay is a Prelude for Further Extension Requests.**

The government's brief entirely ignores Commissioner Tristani's warning that the stay "constitutes a serious threat to the orderly enforcement of our rules," [APP131], and her skeptical declaration that "I do not believe its admonition about divestitures will ever be enforced...." *Id.* Instead, the Commission blandly opines that "the stay in this case will not deprive the subscriber limit rules of 'real-world effect...,' Resp. Br. at 47, *quoting* CU Br. at 20, repeating what it said below, that the Commission "has placed cable operators on notice that...they will be required to come into compliance with the limit shortly after the stay is lifted." *Id.*, *citing Third Report at APP781-782.*

In fact, the stay will vitiate the statute. Although the cable operators have solemnly assured this court that "the Commission has properly recognized that it can ensure compliance with the new rules if and when they go into effect...," Int. Br. at 6, they surely recognize that the Commission has placed them on a well-trod path towards permanent retention of what are otherwise impermissible interests. Waiver recipients use the time to exercise their First Amendment right to lobby the Commission and, often, the Congress, for regulatory changes. Stays become "temporary" waivers. "Temporary" waivers are extended, and often transmogrify into permanent waivers or modified rules.

There is nothing unlawful about regulated parties lobbying for regulatory changes. As Commissioner Tristani said below, "This is not a criticism of the Commission, but a recognition of administrative reality." [APP131.] However, it not only disingenuous for the FCC not to acknowledge the effect of its action, it is also arbitrary and capricious not to take that factor into account when it has failed over the course of seven years ever to fulfill a statutory command.

In this instance, the concern is far from far from speculative. Although the Commission has repeatedly assured this Court that it will enforce rules immediately upon termination of its six month stay, the fact is that during the pendency of this litigation, AT&T has aggressively pursued an 18 month extension for achieving compliance with the horizontal ownership rule after its proposed acquisition of MediaOne Group, Inc. *See Order*, CS Docket No. 99-251, 15 FCCRcd 774 (2000) (seeking comment on AT&T's request). AT&T's highest level executives have lobbied the members of the Commission and its staff for this further extension. *See, e.g., Letter from James W. Cicconi to Secretary, FCC*, March 16, 2000 (documenting meeting between AT&T CEO and the FCC Chairman in which "we reviewed AT&T's proposal that the Commission grant AT&T an 18 month waiver [extension]").<sup>1</sup> Moreover, as of the date of the submission of this Reply Brief, national newspapers and wire services have reported that the FCC staff has, indeed, recommended, a waiver which would be tantamount to a twelve month extension of the Commission's stay. *See, e.g., "FCC Will Approve AT&T Acquisition of MediaOne If Some Assets Are Sold," Wall Street Journal*, April 25, 2000, p. A3.

Once applicants successfully obtain an FCC waiver, they have several routes available to extend their grant.<sup>2</sup> For example, parties often seek to extend their holding period by citing pending

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<sup>1</sup> This letter, and numerous similar letters documenting similar contacts with each of the Commissioners and many members of the staff are available as part of Docket 99-251 in the FCC's Electronic Comments Filing Service, viewable at <http://www.fcc.gov/e-file/ecfs.html>.

<sup>2</sup> This Court is well aware of the circumstances surrounding some of the legislative and regulatory efforts to avoid divestitures under the newspaper-broadcast cross-ownership rules. *See, e.g., Tribune Company v. FCC*, 133 F.3d 61, 69 (1998) (arguing the Commission was obliged to reconsider its cross-ownership rule based on change in legislation).

or contemplated rulemaking proceedings as justification for the extension. *See, e.g., Insight Communications Inc.*, 12 FCCRcd 19623 (1997) (extension of cable/TV cross-ownership waiver); *Gannett Co., Inc.*, 12 FCCRcd 11582 (1997); (extension of TV duopoly waiver) based on pendency of rulemaking).<sup>3</sup> In at least some of those cases, the waivers will have been extended for up to 6-8 years at the expiration of their term. *See, e.g., American Radio Systems Corp.*, 13 FCCRcd 12430 (1998); *Greater Los Angeles Radio Inc.*, 12 FCCRcd 10501 (1997).<sup>4</sup>

Another common method for attempting to extend the holding period, or in some cases for attempting to retain control over the divested entity, is to devise complex trusts and other devices, to fulfill the divestiture requirement. *See, e.g., Lorimar Telepictures Corp.*, 3 FCCRcd 6250, 6252 (1988) (trust designed to avoid application of attribution rules); *Farmville Broadcasting Co.*, 47 FCC2d 463 (1974) (trust designed to avoid applicability of multiple-ownership rules).<sup>5</sup>

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<sup>3</sup> In one illustrative example of how temporary waivers are stretched to enable parties to "game" the regulatory process while waiting for elections or other events to change the regulatory environment, an 18-month waiver was extended over 44 months until a permanent waiver was obtained. In 1985, the Commission approved the merger of Capital Cities Communications and American Broadcasting Companies, Inc., and granted an 18 month waiver of the FCC's "one-to-a-market" rule. *See Capital Cities Communications Inc.*, 59 RR2d 451 (1985). Prior to the divestiture deadline, the Commission instituted a rulemaking proceeding in which it proposed to amend the broadcast multiple ownership rules. Capital Cities/ABC, Inc. subsequently received a deferral of the divestiture for a period of up to six months after the effective date of the Commission's final action in that rulemaking. *See Capital Cities/ABC, Inc.*, 2 FCCRcd 2539 (1987). Four years after the original divestiture requirement was imposed, Capital Cities/ABC requested and received a permanent waiver of the one-to-a-market rule. *Capital Cities/ABC Inc.*, 4 FCCRcd 5498 (1989).

<sup>4</sup> *See, Citadel Communications Company, Ltd.*, 8 FCCRcd 855 (1993) (12 month waiver of the duopoly rule extended to 31 months and resulting in grant of permanent waiver); *Infinity Broadcasting Corp.*, 12 FCCRcd 5012 (1996) (12 month waiver of one-to-a-market rule extended to 51 months and beyond). In a recent decision, the Commission extended approximately 13 broadcast cross ownership waivers until 2004, despite their continued noncompliance with those rules. *Review of the Commission Regulations Governing Television Broadcasting*, 15 FCCRcd 12903 (1999).

<sup>5</sup> Twentieth Holdings Corporation's ("Twentieth") attempt to acquire control of WFXT-TV (Boston, MA), is exemplar. In 1986, Twentieth was allowed to acquire WFXT, notwithstanding the newspaper-broadcast cross-ownership rule. Twentieth requested and received an 18-month waiver within which to divest the TV station or a commonly-owned daily newspaper. *Twentieth Holdings Corp.*, 1 FCCRcd 1201 (1986). Twentieth successfully appealed the FCC's initial denial of its extension request in this Court. *News America Publishing, Inc. v. FCC*, 844 F.2d 800 (D.C. Cir. 1988). Thereafter, Twentieth filed an application proposing to transfer ownership to a new, supposedly "insulated" trust, and received a temporary extension pending review of the new application. *See Twentieth Holdings Corp.*, 4 FCCRcd 7657 (1988). The proposed trust arrangement contained provisions designed to maintain Twentieth's control over the terms of any subsequent asset sales and to enable the Trustees to communicate with Twentieth over program content. After imposing certain additional safeguards, the Commission granted the transfer application on April 26, 1989. *Twentieth Holdings Corp.*, 4 FCCRcd 4052

Petitioners do not dispute that the various devices employed in these cases are inappropriate, or that the relief sought is unmerited. Rather, the point is that history shows that it is naïve to expect the recipients of temporary waivers or stays will not use all the tools at their disposal to extend their holdings well beyond the original contemplated term for divestiture, many times in an attempt to avoid ever complying with Commission rules. It is also naïve to expect that waivers will not be given out in the first instance, given “the pretense of a waiver process [at the Commission] that is, in practice, a rubber stamp.” *United Broadcasting Company, Inc., et. al.*, 13 FCCRcd 21563 (1998) (dissenting statement of Commission Tristani). It is arbitrary and capricious for the Commission to insist otherwise.

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(1989).