

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



RE: *Written Ex Parte Presentation*
CS Docket 99-251

AT&T/Media One Acquisition

Dear Ms. Roman-Salas:

On May 10, 2000, between 8pm and 9pm, numerous unsuccessful attempts were made to submit the attached letter to the Commission's ECFS. At about 8:25 pm, the text of the letter was submitted to the ECFS system via email.

This submission is made in WordPerfect format for the Commission's records and for ease of use by the public and interest parties employing the ECFS system.

Sincerely,

Andrew Jay Schwartzman
President and CEO

May 10, 2000



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

RE: ***Written Ex Parte Presentation
CS Docket 99-251***

AT&T/Media One Acquisition

Dear Ms. Roman-Salas:

CU, *et al.* submit this letter memorandum as a written *ex parte* presentation in Docket 99-251 to address the scope of the Commission's authority under the public interest standard of the Communications Act.

Questions have been raised about the Commission's legal power to condition any grant of the AT&T/MediaOne merger application on the divestiture of MediaOne's interest in Time Warner Entertainment, LP. CU, *et al.* believe that the Commission has ample authority to mandate any such divestiture under its "horizontal ownership" powers conferred by Section 613(f) of the Communications Act. In addition, as demonstrated in their August 23, 1999 *Petition to Dismiss or Deny*, CU, *et al.* believe the Commission also has independent authority to impose a divestiture condition under Section 310(d) of the Communications Act, which incorporates the Commission's Title III public interest standard powers.

Section 310(d) requires that no transfer of control of a holder of Commission licenses occur "except upon application to the Commission and upon finding by the Commission that the public interest, convenience, and necessity will be served thereby." 47 U.S.C. § 310(d). The public interest standard has been widely interpreted to give the Commission extremely broad authority, subject of course to judicial review under the Administrative Procedure Act to prevent arbitrary and capricious agency action.

The Supreme Court established the scope of the public interest standard 60 years ago. As Justice Frankfurter held, that standard is a "supple instrument for the exercise of discretion by the expert body which Congress has charged to carry out its legislative policy." *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 138 (1940). With respect to Title III licenses, it reflects "a desire on the part of Congress to maintain, *through appropriate administrative control*, a grip on the dynamic aspects of radio transmission." *Id.* at 138 (emphasis added). Congress provided for such expansive authority because it was unable itself to anticipate the future uses of a "new and dynamic" medium (radio), "the dominant characteristic of which was the rapid pace of its unfolding." *NBC v. United States*, 319 U.S. 190, 219 (1943). Twenty-five years later, again addressing a new communications medium

(cable television), the Supreme Court reaffirmed the Commission's "broad authority." *United States v. Southwestern Cable Co.*, 392 U.S. 157, 172 (1968) (quoting legislative history). Accordingly, the Commission views its "public interest standard of sections 214(a) and 310(d) [as] a flexible one that encompasses the 'broad aims of the Communications Act,'" *Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, 13 FCC Rcd 18,025 ¶ 9 (1998), and under the public interest standard the Commission may consider "the complexity and rapidity of change in the industry," *NYNEX Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent To Transfer Control of NYNEX Corp. and Its Subsidiaries*, 12 FCC Rcd 19,985 ¶ 32 (1997) ("NYNEX/BA") (citing *Pottsville, NBC*, and other Supreme Court precedent). The Supreme Court has never retreated from its view, and Congress has not revisited the Court's or the Commission's conclusions. Indeed, the rationale presented for having "flexible" and "broad authority" has if anything even greater force today, in this era of rapid changes in the communications industry.

As former Commissioner Robinson has recognized from a review of the legislative history, it is also "clear . . . that [under the public interest standard] Congress expected the agency to investigate and take appropriate action as needed on problems such as ownership concentration."¹ Indeed, in *NBC*, the Supreme Court specifically rejected the argument that "considerations relating to competition" lie "outside the Commission's concern" under the public interest standard. *NBC*, 319 U.S. at 222. The D.C. Circuit has also "made clear that 'competitive considerations are an important element of the 'public interest'" standard." *United States v. FCC*, 652 F.2d 72, 81-82 (D.C. Cir. 1980) (en banc). The Commission itself acknowledges that the public interest "analysis must include, among other things, consideration of the possible competitive effects of the transfer." *Applications 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 ¶ 14 (1999). The Commission thus has long exercised its public interest authority under Section 310(d) to protect against competitive harms posed by specific acquisitions, regardless of whether such protections would be necessary with respect to other firms in an industry. This exercise is consistent with the established authority of administrative agencies to articulate their policies based on the facts and circumstances of individual cases. See *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 294 (1974).

This is precisely the approach the Commission took in first addressing similar "horizontal" ownership concerns for AM radio. Before the Commission adopted a *per se* seven-station rule, CBS applied to acquire an eighth AM radio station. The Commission determined that the particular facts of that transaction -- namely, CBS's control of six clear channel stations and a seventh regional station -- would "result in such a concentration of broadcast facilities as not to be in the public

¹Glen O. Robinson, *The Federal Communications Act: An Essay on Origins and Regulatory Purpose*, in *A Legislative History of the Communications Act of 1934*, at 3, 18 (Max D. Paglin ed., 1989).

interest.” See *Sherwood B. Brunton*, 11 F.C.C. 407, 412 (1946). Similarly, the cross-interest policy “evolved almost entirely through case-by-case adjudication . . . to examine relationships not proscribed by the Commission’s early attribution rules, but which nevertheless raised competitiveness concerns.” *Reexamination of the Commission’s Cross-Interest Policy*, Notice of Inquiry, 2 FCC Rcd 3699 ¶¶ 2-3 (1987).

In fact, the Commission has imposed competitive safeguards under the public interest standard of Section 310(d) not only in the absence of any general rule but also where the validity or propriety of industry-wide rules has been under direct challenge in collateral proceedings. In the Bell Atlantic/NYNEX merger, the Commission found that the loss of Bell Atlantic as a potential competitor in NYNEX’s markets raised serious concerns about local exchange competition. See *NYNEX/BA* ¶ 43. Similarly, it found that the SBC/Ameritech merger eliminated SBC and Ameritech as potential competitors in adjacent markets. See *Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control*, 14 FCC Rcd 14,712 (1999) (“*Ameritech/SBC*”). To address what it found to be risks to competition in those markets, the Commission required competitive safeguards analogous to those applicable to all ILECs that had actually been vacated by the Eighth Circuit, see *NYNEX/BA* ¶ 185 & n.345, and “regardless of the outcome of the Commission’s UNE Remand proceeding,” *Ameritech/SBC* ¶ 393.

The record in this case provides ample support for similar conditions, designed to avoid potential foreclosure of competition in the video programming market, as well as in the market for broadband access. As numerous parties have demonstrated in their pleadings in this proceeding, this merger of interests in the first, second, and third largest cable MSOs, and in many of the most popular cable program services, substantially threatens the viability of emerging cable programmers and competing ISPs -- just as the proposed acquisition of an eighth AM station by CBS was found to be inconsistent with the public interest standard in *Sherwood B. Brunton*. So does the prospect of AT&T’s proposed interest in Road Runner, which serves the Time Warner cable systems. The existing pattern of concerted action between AT&T and Time Warner heightens these competitive risks. See AT&T News Release, <<http://www.att.com/press/item/0,1354,2666,00.html>> (March 7, 2000) (joint marketing agreement between AT&T and Time Warner); AT&T News Release, <<http://www.att.com/press/item/0,1354,629,00.html>> (Feb. 1, 1999) (agreement to provide AT&T-branded cable telephony over Time Warner systems).

Under these circumstances, the public interest considerations reflected in Section 310(d) plainly warrant conditions designed to prevent consolidation of interests in highly vertically integrated cable systems serving over 40% of all MVPD subscribers. And there is ample precedent for granting six months to do so. See *RKO General, Inc.*, 4 FCC Rcd 4089 ¶ 8 (1989) (granting six month waiver of national radio ownership limit); *TVX Broad. Group, Inc.*, 2 FCC Rcd 1534 (1987) (granting six month waiver of national television ownership limit). Given the established market power wielded by cable systems, the extent of vertical integration and corresponding incentives to foreclose competition by new programmers, and the “rapid pace of . . . unfolding” of the MVPD and broadband access markets, *NBC*, 319 U.S. at 219, no greater time for divestiture would be appropriate here. Moreover, the parties to this transaction have already had *one year* since entering into their merger agreement to consider divestiture possibilities, and they have made *no record showing* of

any need for more time.

Sincerely,

Andrew Jay Schwartzman
President and CEO

Harold Feld
Associate Director

cc: Chairman Kennard
Commissioner Ness
Commissioner Furchtgott-Roth
Commissioner Powell
Commissioner Tristani
Christopher Wright
Kathryn Brown
Karen Edwards Onyeije
James Bird
David Goodfriend
Helgi Walker
Marsha MacBride
Sarah Whitesell
Deborah A. Lathen
To-Quyen Truong
Royce Dickens