

May 23, 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, this letter memorializes separate May 23, 2000 telephone conversations pertaining to Docket 99-251 on April 24, 2000, between Andrew Jay Schwartzman of Media Access Project (MAP) and Marsha McBride and Sarah Whitesell, Legal Advisors to Commissioners Powell and Tristani, respectively.

The attached memorandum summarizes the arguments presented in the conversation with Ms. McBride. Most of the same points were also made in the conversation with Ms. Whitesell. In addition, Mr. Schwartzman discussed with Ms. Whitesell the importance of specifying that AT&T divest its TWE interest.

Because this presentation may be of interest to other offices, a copy of this letter is being sent to each of the other three Commissioners' legal staff.

Sincerely,

Andrew Jay Schwartzman
President and CEO

cc. Marsha McBride
Sarah Whitesell
Karen Edwards Onyeije
Helgi Walker
David Goodfriend

***Memorandum of Conversation With Marsha McBride
May 23, 2000***

In a terse notice disclosing an *ex parte* oral communication dated May 16, 2000, counsel for AT&T argued that the company requires a 12 month waiver to complete the transactions necessary to come into compliance with FCC cable ownership rules.

This was the first written record that AT&T has ever modified its prior request for an 18 month waiver.

CU, *et al.* have interposed repeated objections to the abuse of the Commission's *ex parte* disclosure requirements in this case. To the extent that AT&T has sought to justify a waiver for reasons other than what were set forth in its written submissions and the May 16, 2000 letter, CU, *et al.* do not know what may have been said. It is a gross abuse of the Commission's rules, and antithetical to fundamental principles of administrative law to conduct such proceedings in secret. It would be reversible error to grant a waiver based on secret arguments that CU, *et al.* to which CU, *et al.* cannot reply.

Without knowing exactly what may have been said, CU *et al.* offer the following observations:

1. It is long overdue for the Commission to commence enforcement of the 1992 Cable Act. The Commission has adopted rules defining the ownership limits. Even for those who might have preferred different limits, there is tremendous value in demonstrating that the Commission will enforce the law. Adoption of regulations should not be understood simply to be the starting point of a new negotiation over how much the Commission will bend them.

2. At the time the AT&T/MediaOne sale was proposed one year ago, the transaction was subject to achieving compliance with FCC rules within 60 days of any court decision upholding the 1992 Cable Act's ownership rules. While AT&T hoped that the rules would be amended to eliminate that requirement, and they were later modified to provide six months leeway, AT&T has had ample time to prepare for this sale. The fact that AT&T did not request a waiver until late December, 1999 (in *ex parte* "reply comments") is because AT&T was "in denial," and should not give it any right to claim surprise.

3. If the Commission tells AT&T to comply, it can and will do so. When the Commission recently told US West and Qwest that divestitures were needed prior to closing, they divested. Even more instructive is what happened in this very docket with respect to the handling of MediaOne's interest in the Time Warner Telephone (TWT) CLEC. Only after issue was raised did MediaOne acknowledge a problem. Finally, on March 24, 2000, without conceding that 47 USC §652(b) was applicable, MediaOne said that in any event the question was moot because it had taken steps to sell its interest. It asked for 12 months from the date of closing of the AT&T/MediaOne transaction to complete the sale. MediaOne updated this information on April 3, 2000, suggesting that it "will commit" to a deadline six months from the date of closing to complete the offering plus an additional six months if needed. On April 26, 2000, MediaOne filed a written *ex parte* submission advising 9 million shares of TWT had been "priced," and, if sold, would bring MediaOne's interest

down to 5.5% of the outstanding equity. In another filing on May 9, 2000, MediaOne informed staff that the sale had been completed and its board representatives had resigned. MediaOne now has an equity interest below 6 % and a 7.7% voting interest. It maintains that "the question of whether Section 652(b) of the Communications Act applies to AT&T's acquisition of MediaOne is moot."

4.. MediaOne's interest in Time Warner Entertainment (TWE) is a fungible asset which could be sold quickly. The MediaOne partnership interest has been designed to be converted to corporate stock; the partnership agreement contemplates that the TWE interest can be converted into corporate stock, and that MediaOne can do so without TWE consent for the sixty day period beginning January 1, 2001. A requirement to divest within six months simply requires AT&T to negotiate with Time Warner for consent to accelerate the exercise of that right, or for permission to sell the MediaOne partnership interest to a willing buyer. (It is a matter of record that Comcast had previously agreed to buy MediaOne, and would thus almost certainly be willing to consider the purchase of the TWE asset. It is also quite likely that other buyers are likely to come forward.) While this is something AT&T surely can do, it is clearly something it wishes to avoid.

5. It is impossible to discern this from anything AT&T has filed, but it may well be that the real reason AT&T wants an 18 month waiver is that it seeks the extraordinarily inappropriate benefit of a waiver to permit it enough time to exercise its conversion right when it accrues on January 1, 2001. The FCC should not intercede in a private contract to confer a multi-billion dollar advantage to one party. If AT&T wished to take advantage of that contractual provision, it could have waited to buy MediaOne. Having chosen instead to bid for MediaOne in May, 1999, it should not make the FCC reform the partnership agreement for AT&T's convenience.

6. With respect to suggestions that the CBS/Viacom 12 month waiver is precedent for a 12-month waiver, there are numerous distinctions:

First, the Commission should approach a waiver of cable horizontal ownership rules with greater caution because there is no statutory mandate at issue.

Second, as to cable operators, there is a governing Congressional determination that the cable industry exercises monopoly power, and a directive to the FCC to remediate those conditions. This is in marked contrast to the recent CBS/Viacom decision, in which the Commission based its waiver on the fact that "there is no evidence that [anti-competitive] conduct will actually occur, or that such potential abuses should be addressed by the Commission." Put another way, the harm of allowing even a temporary waiver of the limits is greater than in the case of discretionary broadcast ownership policies designed to preclude future anti-competitive conduct.

Third, CBS' filing postdated AT&T's by many months; the total time involved from application to divestiture is much shorter. As noted above, AT&T should not be rewarded for its dilatory tactics.

Fourth, the process of selling a single asset (the MediaOne partnership interest) is less complicated than selling a substantial number of TV stations to many buyers.