

May 26, 2000

Chairman William E. Kennard
Federal Communications Commission
Washington, DC 20554



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

Ex Parte Presentation

Dear Mr. Chairman:

Consumers Union, Consumer Federation of America and Media Access Project ("CU, *et al.*"), submit this letter to respond to some aspects of the May 24, 2000 letter from AT&T Corp. ("AT&T") to Deborah Lathen, Chief, Cable Services Bureau ("*May 24 Letter*"). Because we understand this matter is under active consideration by the full Commission, this letter is directed to you rather than to the Bureau Chief or the General Counsel.

This response is necessarily incomplete, as CU, *et al.* understand that the Commission is in the final stages of its consideration of this docket, and time therefore precludes a more comprehensive reply.

The Failure To Disclose Secret Meetings As Required Under FCC Rules

CU, *et al.* have repeatedly complained about the wholesale abuse of the Commission's *ex parte* disclosure requirements in this case. The *May 24 Letter* provides powerful confirmation of the degree to which AT&T has pursued this case through dozens of secret meetings, the details of which it has improperly failed to disclose. This pattern of egregious non-compliance with FCC rules designed to provide the public with a fair chance to participate in the Commission's processes raises serious questions as to AT&T's qualifications to be an FCC licensee.

AT&T and MediaOne are represented in this proceeding by no less than four large law firms and two huge in-house legal departments. AT&T's CEO, its ranking officers and several AT&T and MediaOne Board members have importuned agency staff and Commissioners for six months without disclosing details of what they have said. Moreover, you have as yet failed to disclose how many agency staff members and Commissioners traveled along with AT&T and MediaOne officials and their attorneys to this month's National Cable Television Association Convention in New Orleans, and what undisclosed communications transpired during that time.¹

¹By letter dated May 17, 2000, counsel for CU, *et al.* took note of the fact "that a dozen or more FCC members and staff attended the NCTA convention" along with "[s]cores of executives from AT&T, MediaOne Group and numerous other interested companies...." Counsel observed that "it defies credulity that not one new presentation addressing the merits of the pending that transaction took place during at the NCTA meeting. The absence of filings is especially troublesome in light of the fact that the Commission has "insist[ed] on strict enforcement of the...notification requirement

set out at 47 CFR §1.1206(b). *Amendment of 47 CFR §1.1200 Concerning Ex Parte Presentations in Commission Proceedings*, 12 FCCRcd 7348, 7362-63 (1997)." Accordingly, CU, *et al.* asked for a list of all members of the Commission and staff who attended the NCTA convention." As of Friday, May 26, 2000, this request had not been satisfied.

Citizens and consumer groups lack the resources to lobby on equal terms. They are dependent on agency rules which ordinarily prohibit undisclosed, private presentations in cases such as this unless the substance of those presentations be fully and promptly disclosed. The Commission has utterly failed to enforce those disclosure requirements. The Commission has betrayed its obligation to the public by waiving those rules in favor of procedures which permit secret meetings. *See Letter of Andrew Jay Schwartzman to Chairman Kennard*, May 17, 2000.

The gravity of these violations could not be more clear. More than forty years ago, the United States Court of Appeals relied upon the principle “that basic fairness requires such a proceeding to be carried on in the open,” in holding that:

[A]ttempts ‘to influence any member of the Commission except by the recognized and public processes’ go ‘to the very core of the Commission’s quasi-judicial powers.’

Sangaman Valley Television Corporation v. FCC, 269 F.2d 221, 224 (D.C. Cir. 1959)(citing *Massachusetts Bay Telecasters, Inc. v. FCC*, 261 F.2d 55, 66, 67 (D.C. Cir. 1958). It ruled that

Agency action that substantially and prejudicially violates the agency’s rules cannot stand.

Id.

In *Home Box Office v. FCC*, 567 F.2d 9, 140 (D.C. Cir. 1977), the Court of Appeals stressed “the inconsistency of secrecy with fundamental notions of fairness implicit in due process and with the ideal of reasoned decisionmaking on the merits which undergirds all of our administrative law.” It held that:

Even the possibility that there is here one administrative record for the public and this court and another for the Commission and those ‘in the know’ is intolerable....Yet here the agency secrecy stands between us and fulfillment of our obligation. As a practical matter...the public record must reflect what representations were made to an agency so that relevant information supporting or refuting those representations may be brought to the attention of the reviewing courts by persons participating in agency proceedings. This course is obviously foreclosed if communications are made to the agency in secret and the agency itself does not disclose the information presented.

Id., 567 F.2d at 132. Clearly, any decision the Commission may make based upon this secret record will inevitably be reversed on appeal:

[W]here...an agency justifies its action by reference only to information in the public file while failing to disclose the substance of other relevant information that has been presented to it, a reviewing court cannot presume that the agency has acted properly,...

Id.

AT&T has flouted the requirement that its *ex parte* communications be disclosed. It has repeatedly submitted meaninglessly vague one and two sentence notices of its private meetings with the Commission which, on their face, fail to comply with the explicit requirement in the Commission's rules that "[m]ore than a one or two sentence description...is generally required." 47 CFR §1.1206(-b)(2). Even more distressingly, the Commission has inexplicably acquiesced in this patent abrogation of FCC processes.

The *May 24 Letter* purportedly summarizing what it has said "on the record" begs the question of what it has been saying off the record. Has AT&T, for example, been suggesting to the Commission that grant of a waiver will somehow help AT&T bring cable telephony to the TWE systems, despite the fact that AT&T had been engaged in negotiations to do so even before this merger was proposed? The record does not say. What is clear is that for some months AT&T has been engaged in an extensive set of private communications with the Commission in efforts to postpone for as long as possible its obligations to comply with the statutorily mandated horizontal cap rules (while simultaneously challenging the validity of those rules in court). These communications have been accompanied by virtually no disclosure of their contents. A decision to grant AT&T relief from the rules plainly cannot be based on extra record evidence.

It is hard to imagine a greater threat to public confidence in the Commission's work than what has transpired in this case.

AT&T's Dilatory Behavior

The pattern of denial, delay, and secret negotiation have been the hallmark of AT&T's conduct throughout the course of this docket. From the beginning, AT&T refused to acknowledge that the Commission's rules applied to it. AT&T continues its practice of holding meetings outside public review with Commission staff and attempting to negotiate a deal it can "live with."

The main point of AT&T's *May 24 Letter* is that it has, in recent letters and meetings, demonstrated the difficulty and complexity of completing such transactions as may be needed to achieve compliance with FCC ownership rules.

CU, *et al.* have argued that there is nothing in the *public* record to support AT&T's request for additional time to attain compliance with agency rules. The material which AT&T cites does not establish any such showing has been made. Rather, it demonstrates only that AT&T would prefer to have more time within which to complete transactions. AT&T has utterly failed to show why it cannot do so within the six months allotted by Commission rules to obtain compliance.

AT&T has taken no action to anticipate the need to arrange the transactions it knew would be required to effectuate the MediaOne acquisition. It maintains that it had no reason to expect that the Commission's ownership limits might be applied to it. It is a matter of no small consequence to the future of these proceedings that Consumers Union has specifically disputed the Commission's resolve to obtain compliance with the Commission's ownership rules in this case in a pending judicial appeal. *Consumers Union v. FCC*, No. 99-1522 (D.C. Cir.) In response to Consumers Union's charges, the Commission has repeatedly advised the Court that

the Commission was justified in its expectation that it could effectively require cable operators to come into compliance after the stay expires. After all,...cable operators have been on notice that they might ultimately have to divest if they exceeded the prescribed subscriber limit while the stay was in effect.

Brief for the FCC and the United States, No. 94-1035 and Consolidated Cases (D.C Cir., filed April 6, 2000, p. 49.²

AT&T submitted its application to acquire MediaOne on July 7, 1999. It did not request any waivers, or otherwise indicate how it might achieve compliance with FCC ownership rules.

Then, on December 21, 1999, on page 30 of a 50-page filing bearing the innocuous title "*Ex Parte Reply Comments of AT&T Corp. and MediaOne Group, Inc.*," AT&T made an "alternative" request for an 18 month waiver within which to come into compliance with Commission cable ownership rules.

AT&T's terse waiver request was largely devoted to explaining AT&T's surprise that it might be subject to any divestiture obligation. The only justification offered for the requested 18-month duration was in a short footnote which simply stated that AT&T's "proposed 18 month waiver period is consistent with well-established Commission precedent...." *Ex Parte Reply Comments of AT&T Corp. and MediaOne Group, Inc.*, December 21, 1999 at 37-38, n. 59.

²See also, *Letter from General Counsel Christopher Wright to America Online, Inc. and Time Warner, Inc.*, March 6, 2000 (stressing that merger applicants must provide complete information and comply with Commission rules); *1999 Broadcast Attribution Order*, 14 FCCRcd 12559 at 12658, 12661 (1999) (statements of Chairman Kennard and Commissioner Ness).

It is impossible to know what else may have said in at least 61 *ex parte* meetings³ between AT&T and MediaOne representatives and Commissioners and staff over the five months which transpired between the submission of AT&T's waiver request and the date of this letter. However, the *May 24 Letter* makes it clear that, by AT&T's own version of events, it was April 7, 2000 before it placed **anything** in the public record which might justify the length of time requested.⁴ Thus, by AT&T's own admission, AT&T disclosed no additional justification for its waiver request for nearly **four months** after it was filed. This was **nine months** after the original application was submitted.

In reviewing AT&T's request for such an extraordinary request, the Commission must take this dilatory action into account. AT&T's lack of planning is surely not the Commission's problem. Nor should the public be asked to pay the price so that AT&T can avoid application of the rules.

Rather than justify the requested waiver, AT&T's December, 1999 "backdoor" waiver request and its subsequent public filings have persisted in maintaining the fiction that AT&T was surprised to learn that it might have to divest cable properties came as a surprise. *See Ex Parte Reply Comments of AT&T Corp. and MediaOne Group, Inc.*, at 31-32; *Transcript of February 4, 2000 Hearing* at 56 (testimony of James W. Cicconi, General Counsel, AT&T). This implausible construction of unambiguous agency rules affords no legitimate basis for special relief.

AT&T's inherently incredible position should not excuse it from sitting on its hands for nine months, during which time it evidently has made no effort to locate potential buyers for MediaOne's cable properties.

In determining the appropriate length of a divestiture waiver, the Commission has generally expected applicants to proceed diligently to establish that it may be difficult to dispose of the properties without a waiver. Applicants seeking a waiver to forestall a "fire sale" are typically expected to submit evidence about what efforts have been made to find suitable buyers prior to the submission of the waiver request. They must also present expert opinions as to the difficulty which might be faced in disposing of the properties in question. *See, e.g., Multiple Ownership Second Report & Order*, 50 FCC.2d 1046, 1084 (1975) (noting that "we shall not give any weight to a showing that does not include a full description of the effort made to sell" an interest prohibited by rules change and requiring certification that asking prices is consistent with fair market value). *E.g., Metromedia Radio and TV, Inc.*, 102 FCC2d 1334, 1337 (1985), *aff'd sub nom. Health and*

³On May 26, 2000 Commission staff advised counsel for CU, *et al.* that there may have been a number of recent AT&T *ex parte* communications which the Commission has failed to make available for public inspection on the FCC's ECFS system.

⁴AT&T submitted, under seal, an April 7, 2000 letter which, it says, described the complexity of exercising its contractual rights to divest its MediaOne's interest in Time Warner Entertainment, L.P. This showing is very much beside the point; as CU, *et al.* have maintained, the FCC is under no obligation to assist AT&T in exercising those contractual rights. AT&T can divest the MediaOne interest by amending its Time Warner Entertainment partnership. AT&T has no right to buy MediaOne, and there is no public interest justification for subjecting the public to unlawful degrees of media concentration to accommodate AT&T's desire to have a more advantageous negotiating position.

Medicine Policy Research Group v. FCC, 807 F.2d 1038 (D.C. Cir. 1986) (affidavit described preapplication identification prospectuses and identification of likely buyers and special hardship of selling non-dominant properties).

AT&T and MediaOne have had a full year to contemplate the need for divestiture. Instead of planning, they have simply challenged the notion that the rules are valid, and must be applied.

The Failure To Disclose Modification of the Waiver Request

The *May 24 Letter* does not even purport to support AT&T's request for an 18 month waiver. Rather, it seeks only to establish that AT&T is entitled to up to 12 months to divest.

So far as CU, *et al.* can determine, there is nothing in any record to support AT&T's modified request, or any explanation as to why a 12 month waiver is any more supportable than the originally requested 18 month relief. Since any such arguments, or any other reference to a modification of AT&T's waiver request have been made in secret, CU, *et al.* are unable to address them.

Although trade press reports indicate that AT&T has for some time sought only a 12 month waiver, AT&T has not amended its application to reflect that position. More importantly, there is no public disclosure of any presentation in which AT&T has asked for less than 18 months, until May 17, 2000. On that date, in one conversation with a Commissioner's legal assistant, an attorney for AT&T disclosed (in an otherwise legally insufficient notice) that he had argued for a 12 month waiver.

AT&T now presents a test of the Commission's resolve. If the Commission rewards AT&T's behavior by granting the waiver, it will send a clear message that Applicants may game the Commission's rules, dig in their heels, and bully the Commission into submission. By contrast, if the Commission stands by its rules, future applicants will know that they must come to the Commission with a compliance plan in hand, treating the Commission's rules and deadlines with respect.

AT&T Has Failed to Demonstrate It Is Entitled Even To A 12 Month Waiver

As to the substance of AT&T's new filing, AT&T does little more than reiterate broad statements previously made. The *May 24 Letter* seeks only to establish that any disposition it may make would take up to 12 months to consummate, and suggests that the Commission has allowed similar periods of time for other companies in other cases. *May 24 Letter* at 3, 4 & fn 9 ("The Commission has frequently - and recently - allowed periods of 12 months or longer where parties were required to divest.")

It is not enough for AT&T to say that sale of assets would be "complex," especially since AT&T has presented no evidence that it has taken any efforts to minimize the length of the violation period by seeking buyers and otherwise anticipating the inevitable divestiture. Indeed, as AT&T's own counsel has recently pointed out, "a waiver request allows -- and indeed requires...a particularized assessment."⁵ AT&T has not supplied information to support such an evaluation.

⁵May 22, 2000 Letter from James L. Casserly to Secretary, FCC. This letter was made available on the Commission's ECFS site on May 26, 2000, only after counsel for CU, *et al.* advised Commis-

In fact, the Commission's judgment that cable operators can achieve compliance with its rules within six months of judicial affirmation is fully consistent with precedent based "on the facts presented in each individual case." *CBS Inc.*, 11 FCCRcd 3733, 3755 (1995)(refusing to grant more than six months for duopoly waiver given dominance of TV outlets). *See also, Jacor Communications, Inc.* 14 FCCRcd 3391 (1999); *Maximum Communications, Inc.*, 12 FCC 3391 (1997).

Nor can the Commission seriously entertain the notion that AT&T's dithering on a compliance strategy constitutes good grounds to provide a waiver. AT&T has known for over a year that it must comply with the Commission's rules, yet it claims it has not even begun to consider how it will comply.

To the extent that it is possible to glean what AT&T has said from the outrageously incomplete disclosure statements it has submitted, AT&T appears to be acting under the assumption that

sion staff of rumors of recent AT&T *ex parte* communications, but that no such disclosures were available on the FCC's ECFS service.

the only way that it can divest MediaOne's partnership interest in Time Warner Entertainment, L.P, is by employing contractual procedures which it cannot invoke as a matter of right until January 1, 2001. AT&T also appears to have argued that it faces insuperable tax liabilities which preclude a "spin off" of Liberty Media until the second quarter of 2001.⁶

Assuming that CU, *et al.* correctly understand what has been said in this secret and unlawful lobbying campaign, AT&T's premise is fundamentally flawed. While it might prefer to wait until January 1, 2001 to invoke its previously negotiated contractual rights, AT&T must be presumed to be fully capable of implementing the MediaOne divestiture immediately upon FCC approval of the pending applications. *AT&T has filed nothing to indicate that its partner, Time Warner, is unwilling to consider an immediate sale, or even that AT&T has asked for Time Warner's consent.*

AT&T evidently argues that if it must sell MediaOne's interest in Time Warner Entertainment (TWE) prior to January 1, 2001, it will be forced to do so at "fire sale" prices. But if there is an auction among several buyers, or if there is an IPO to sell the interest to the public, the sale price will be a market price, not a "fire sale." The unproven suggestion that MediaOne's partner might not consent to an earlier sale without extracting some additional contractual concessions is simply one more of the inevitable costs a seller must incur in a transaction such as this. That there may be key employees entitled to "golden parachutes," tax penalties, lease termination clauses or other costs is unrelated to whether the price paid by the purchaser is a fair market price. It is AT&T which has chosen to purchase MediaOne, and it is AT&T that must bear the costs associated with the transaction.

AT&T has not established that it might face added costs in selling the MediaOne's TWE interest within the time frame contemplated by FCC rules. But even if what it hints were to be demonstrated on the record, there is no case in which the Commission has ever granted a waiver because the seller might bear additional transactional costs in realizing what would be a fair market price from willing buyers.⁷

⁶CU, *et al.* dispute that anything except a sale of the MediaOne interest could ever be in the public interest.

⁷Nor does that fact that AT&T might decide at its leisure that it prefers to divest Liberty Media make the resultant sale a "fire sale." AT&T has a clear means available to comply with the Commission's rules while receiving fair market value for the assets it divests.

MediaOne has not lacked for suitors. See *The Washington Post*, "Pact Ends MediaOne Bid War," May 11, 1999. To the contrary, AT&T paid Comcast a hefty "break up" fee to win the bidding war, and other parties expressed interest in acquiring MediaOne. *Id.* It is a matter of public knowledge that investor Paul Allen has acquired substantial cable TV property interests over the past several years and might well be willing to bid for MediaOne. If MediaOne or its systems were again on the market, there is every reason to believe a plethora of buyers would express interest. An auction is certainly not a fire sale, and AT&T has presented no evidence that it will sell its properties at a loss if it divests within the time required for all cable MSOs to comply with the Commission's rules.⁸

The lengthy waiver here is particularly inappropriate in light of the serious threat to diversity and competition involved, and the Commission's established recognition that such concerns are relevant to temporary as well as permanent waivers. The D.C. Circuit has recently confirmed that the horizontal ownership cap serves a substantial governmental interest in promoting diversity and competition in the delivery of cable programming. Applying that cap to prevent the Nation's largest MSO to expand its reach to include attributable interests in systems with over 40% of the Nation's MVPD subscribers is not, as AT&T again urges, just a worry about a "technical matter." There is nothing technical about AT&T's ownership of and fiduciary duty to Liberty, about the interrelationships between and among their officers, directors, shareholders, and option holders, or about Liberty's role in providing critical programming to the TWE cable systems. To accept AT&T's persistent efforts to deny the obvious would not only make a mockery of this rule, but have "significant ramifications in other [attribution] cases." *Twentieth Holdings Corp.*, 4 FCCRcd 4052, 4054 (1989) (finding attribution based on similar programming relationship).

AT&T's ultimate argument for why these important rules should be waived for AT&T and AT&T alone is a promise -- a promise that although MediaOne was a market leader in the cable telephony field long before this transaction, AT&T's ownership will accelerate telephone penetration among the MediaOne cable systems. This promise includes no commitment, but only a projection that AT&T's penetration rates -- which have recently been reported to have been significantly lower than projected -- can be extrapolated to the MediaOne systems on a linear basis that takes no account of the law of diminishing marginal returns. And it provides absolutely no evidence concerning any such benefits with respect to the TWE systems that are the subject of AT&T's waiver request. This is at best a treacherous basis for departing from the Commission's clear divestiture policy -- established in 1993, repeated in 1998, and articulated again most recently to the D.C. Circuit in *Time Warner v. FCC*, No. 94-1035 (D.C. Cir., May 19, 2000).

Conclusion

AT&T's attempt to supplement the record at the last minute merely highlights AT&T's failure to comply with, or even respect, the Commission's rules. AT&T began by openly scoffing at the

⁸The Court of Appeals for the District of Columbia Circuit upheld the constitutionality of Section 613(f) of the Communications Act, 47 USC §533(f), on May 19, 2000. System operators have 180 days from the issuance of the decision to comply with the Commission's regulations limiting horizontal ownership. *Order on Reconsideration*, 15 FCCRcd 1167 (2000). Accordingly, all cable system owners, including AT&T, must comply by November 13, 2000.

notion that the Commission's "absurd" rules should apply to AT&T. *See Communications Daily*, "AT&T Household Reach To Be Issue In MediaOne Merger Review," May 10, 1999. AT&T has failed to comply with the rules requiring documentation of oral *ex parte* presentations, preferring to rely on secret negotiations. When it has filed information it does not wish to disclose, AT&T has done it grudgingly and piecemeal, in response to persistent and repeated Commission and staff requests. Finally, to this very day, AT&T has not taken a single step to ready itself for the possibility that it might have to comply with the Commission's rules. Indeed, after a full year, AT&T has not even decided *how* it will comply.

The Commission must now decide whether to reward this behavior, or to allow AT&T to suffer the consequences of its consistent refusal to believe that the rules apply to AT&T as much as to anyone else. Either course of action will send a strong message to future applicants, and will shape the course for the FCC's merger review for the foreseeable future. Hopefully, the Commission will uphold its rules, and send a strong message to future applicants that the Commission's rules are worthy of respect, not abuse.

Respectfully submitted,

Andrew Jay Schwartzman
Harold Feld
Cheryl A. Leanza

Attorneys for CU, *et al.*

Law Student Intern:
Irene Feldman
UC Davis Law School

cc. All Commissioners