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May 31, 2000

By Hand Delivery

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
445 Twelfth Street, S.W.
Room TW-A325
Washington, DC 20554

Re: Notice of Oral Ex Parte
In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp. (CS Docket No. 99-251)

Dear Ms. Salas:

On behalf of U S WEST, Inc. ("U S WEST"), William R. Richardson, Jr. and Julie A. Veach of Wilmer, Cutler & Pickering met yesterday with Karen Edwards Onyeije of Chairman Kennard's office. We discussed the nature of U S WEST's interest in this proceeding, as a competing provider of broadband access over DSL facilities and as a new competitor in the market for delivery of cable services, holding cable franchises. We also discussed issues identified in the attachment hereto, as well as the procedures involving telco mergers that were designed to ensure compliance with divestiture conditions.

The original and one copy are enclosed for filing pursuant to Section 1.1206 of the Commission's rules. Should you have any questions, please communicate with the undersigned.

Sincerely,

Julie A. Veach

Julie A. Veach

cc: Karen Edwards Onyeije

Attachment

No. of Copies rec'd 0+1
List A B C D E

May 30, 2000

AT&T/MEDIAONE MERGER

I. THE CAP RULE MUST NOW BE ENFORCED AS OF NOVEMBER 2000.

- The rules are required by statute.

- Enforcing the rules as of November (or earlier) is what the Commission told cable MSOs it would do in 1993 and 1998. It is what the Commission just told the D.C. Circuit it will do. FCC Br. 48; *cf. id.* at 52 n.20 ("speculative and premature" to address AT&T waiver).

- There is nothing surprising about enforcing them. Well before MediaOne entered into its agreement with AT&T, it recognized that attribution would flow from an investor's programming affiliation agreement with TWE. Consolidated Comments of MediaOne Group, Inc., CS Docket No. 98-82, at 9 & n.15, 25 (filed Aug. 14, 1998).

- If the Commission now fails to adhere to its undertaking for the Nation's largest MSO, with attributable interests in systems serving over 40% of the Nation's MVPD subscribers and in all of the Liberty programming interests, the substantial governmental interests in protecting independent programmers recently upheld in *Time Warner* will be a dead letter.

- The implicit message will extend far beyond the confines of this particular rule. The Commission has been careful to avoid relaxing its attribution policy where to do so would have "significant ramifications in other cases." *Twentieth Holdings Corp.*, 4 FCC Rcd 4052, 4054 (1989) (finding attribution based on similar programming relationship).

II. THE RECORD DOES NOT SUPPORT A WAIVER TO EXTEND THIS PERIOD.

- While *the public interest standard* of Section 310(d) does warrant weighing of competitive benefits and harms in unrelated markets, *rule violations* -- particularly violations of rules required by Congress -- should not be excused, or compliance deferred, based on promises of wholly unrelated benefits in other markets.

- Even where temporary waivers are appropriate, the Commission does not grant such waivers without a demonstration that they "will not harm competition and diversity in the relevant markets." *Stockholders of Renaissance Communications Corp.,* 12 FCC Rcd 11866, 11874 n.13, 11875 (1997).

- Here, the alleged separation between AT&T and Liberty, one of TWE's principal program suppliers, cannot be credited in light of the variety of AT&T/Liberty interrelationships, AT&T's corporate fiduciary duty, and the massive overlapping interests among their officers, directors, shareholders, and optionholders.

- In any event, there is *no record evidence* of cable telephony benefits here regarding the *TWE* cable systems that are the subject of AT&T's waiver request (as opposed to the *MediaOne* cable systems).

- And there is *no record evidence* that the Commission was wrong in concluding that 6 months would be adequate for divestiture.

    1. AT&T and MediaOne have now already had *one year* to plan for divestiture. Instead of making any such plan, they have filed a challenge to the rules.

    2. They have just demonstrated how quickly they can divest their interests when required to do so -- to comply with the cable/telco buyout rule for TWT. After insisting on March 24 that they needed 12 months after closing to sell that interest, they then arranged to sell it by May 1, *before closing.*

    3. **AT&T *still* has provided no record evidence that it cannot simply sell its investment in TWE, just as it did with TWT. It has not stated that it needs (or that it has asked for) Time Warner's consent thereto, or why such sale would not be a Permitted Disposition under Section 11.2(b).**

- The Commission's 6-month judgment is fully consistent with prior precedent, which contrary to AT&T's suggestion bases the duration of each waiver "on the facts presented in each individual case." *Stockholders of CBS Inc. and Westinghouse Elec. Corp.,* 11 FCC Rcd 3733, 3755, 3764 (1995) (refusing to grant more than six months for duopoly waiver in light of dominance of TV outlets). *See also Jacor Communications, Inc.,* 14 FCC Rcd 3391 (1999); *Maximum Media, Inc.,* 12 FCC Rcd 3391 (1997).

- This is not a *de minimis* violation. It is a case involving bottleneck monopoly cable systems rather than competitive broadcast markets. And it requires the sale of a single minority investment with minimal regulatory delays.

III. A DECISION TO GRANT A MORE EXTENSIVE WAIVER CANNOT BE BASED ON EXTRARECORD EVIDENCE.

- *Home Box Office, Inc. v. FCC,* 567 F.2d 9, 53-54 (D.C. Cir. 1977):

  "If actual positions were not revealed in public comments . . . and . . . if the Commission relied on these apparently more candid private discussions in framing the final pay cable rules, then the elaborate public discussion in these dockets has been reduced to a sham."

- While the Commission may have wider latitude with respect to ex parte presentations in informal rulemakings, *see Air Transport Ass'n v. FAA,* 169 F.3d 1 (D.C. Cir. 1999), this is an adjudicatory proceeding. *See id.* (citing *United States Lines, Inc. v. FMC,* 584 F.2d 519 (D.C. Cir. 1978).

IV. SECTION 706 REQUIRES REGULATORY PARITY WITH DSL PROVIDERS IN THE EMERGING MARKET FOR HIGH-SPEED INTERNET ACCESS SERVICE.

- This major merger will set a practical standard for the cable industry.

- AT&T proposes voluntary, post-2002 nondiscriminatory access promises as it sees fit, in a race against DSL providers facing mandatory, immediate line-sharing, loop unbundling, and DSLAM collocation obligations. These providers cannot be distinguished based on their degree of control over the wire into the home.

- Rep. Dingell: "Why should they be regulated differently when they are giving functionally equivalent service?"

  Chairman Kennard: "Well, they shouldn't, but the question is: How do we get them both on an even keel?"

  Multichannel News, Nov. 1, 1999, at 38.