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Before the
Federal Communications Commission
Washington, D.C. 20554

2000 DEC 28 P 12:00

In the Matter of)
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Applications for Consent to the)
Transfer of Control of Licenses and)
Section 214 Authorizations from)
)
MediaOne Group, Inc.,)
Transferor,)
)
To)
)
AT&T Corp.)
Transferee)
)

CS Docket No. 99-251

ORDER

Adopted: December 21, 2000

Released: December 21, 2000

By the Commission:

1. In this *Order*, we find that AT&T Corp. ("AT&T") has not complied with Ordering Clause paragraph 187 and Appendix B, Section (f)(1), of the *Merger Order* issued in this proceeding.¹ The *Merger Order* required AT&T to submit, by December 15, 2000, a written document stating which one of the three compliance options it has elected to satisfy the *Merger Order's* Video Condition.² Although AT&T has filed a written document that purports to comply with this condition, we conclude that this submission does not satisfy our *Merger Order*.³

2. In the *Merger Order*, we granted AT&T 12 months from May 19, 2000 to come into compliance with the Commission's horizontal ownership rules.⁴ In order to ensure that AT&T took

¹ *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee*, CS Docket No. 99-251, Memorandum Opinion and Order ("*Merger Order*"), 15 FCC Rcd. 9816 (2000).

² The *Order's* "Video Condition" requires AT&T, by May 19, 2001, to either (a) divest its interests in TWE, (b) terminate its involvement in TWE's video programming activities (pursuant to the limited partnership exemption and the officers/directors attribution waiver provisions of the cable ownership attribution rules, 47 C.F.R. § 76.503 n.2), or (c) divest its interests in other cable systems, such that it will have attributable ownership interests in cable systems serving no more than 30% of MVPD subscribers nationwide. See Ordering Clause paragraph 186.

³ See Letter from James W. Cicconi, General Counsel, AT&T Corp., to Deborah A. Lathen, Chief, FCC Cable Services Bureau dated Dec. 15, 2000; Letter from James W. Cicconi, General Counsel, AT&T Corp., to Deborah A. Lathen, Chief, FCC Cable Services Bureau dated Dec. 19, 2000.

⁴ *Merger Order*, 15 FCC Rcd. 9816 at ¶ 71. The rules went into effect on May 19, 2000. *Id.*

timely steps towards compliance by the May 19, 2001 deadline, the *Merger Order* set forth a series of interim compliance deadlines. The *Order* requires AT&T to elect, within six months of the merger's closing, one of the three Video Condition compliance options and to satisfy the elected option by May 19, 2001. This first deadline would assure the Commission that AT&T was well on its way towards compliance. Ordering Clause paragraph 187, which establishes the deadline, required AT&T to file with the Cable Services Bureau a written document within six months after the merger's closing "stating which one of the compliance options specified in the Video Condition it has elected." This requirement is unambiguous. This ordering clause further provides that, after electing one of the three options, "AT&T shall complete its divestiture of the elected assets by May 19, 2001."

3. Ordering Clauses paragraphs 188 and 189 further make clear that the interim compliance deadlines require AT&T to follow through on its six-month election. Ordering Clause paragraph 188 states that if AT&T is not in compliance by the May 19, 2001 deadline, it "shall place into an irrevocable trust for the purpose of sale the assets that it must divest in order to effectuate the Video Condition compliance option it has elected pursuant to paragraph 187 above" (emphasis added). Ordering Clause paragraph 189 further states that, if AT&T is not in compliance by the May 19, 2001 deadline, AT&T must place the elected assets into a trust.

4. We find that AT&T's December 15, 2000 and December 19, 2000 letters do not comply with the *Merger Order*'s requirement that AT&T unambiguously elect a single compliance option that it will satisfy by May 19, 2001.⁵ Instead, AT&T's December 15 and December 19 letters state that AT&T intends to satisfy Video Condition Option (b) by divesting Liberty Media Group and AT&T's other video programming interests; however, the letters also state that, under certain circumstances, AT&T may decide to satisfy Video Condition Option (a) by divesting its interest in Time Warner Entertainment, LP ("TWE").⁶ AT&T has proffered a conditional election, rather than the single unambiguous election that the *Merger Order* requires.

5. Reading the two letters together, we determine that it appears to be AT&T's intent to elect Option (a), the divestiture of TWE, and will treat AT&T's election as choosing that option only. The December 15, 2000 letter's clearest commitment appears to be its certification that AT&T will comply with the *Order* by divesting TWE or placing its TWE interest in an irrevocable trust for purposes of sale in the event that it declines to divest Liberty.⁷ In AT&T's December 19 letter, AT&T states, "[F]or purposes of the election in the event AT&T is unable to comply with the Video Condition by May 19, 2001, AT&T has selected a single option, *i.e.*, to divest its TWE interest or to put that interest in an irrevocable trust for the purposes of sale."⁸ AT&T has represented that the TWE assets are the only assets it can commit to place in an irrevocable trust for sale as required by the *Order*. AT&T's December 19, 2000, letter states:

... our ability to complete the Liberty transaction is dependent on our receipt of the tax

⁵ We note that, in an Emergency Motion for Expedited Declaratory Ruling and to Waive Procedural Rules filed by Consumers Union, Consumer Federation of America, and Media Access Project ("CU") on December 18, 2000 in this proceeding, CU requested that the Commission issue a declaratory ruling finding that AT&T had not definitively specified which one of the three options it was electing. Given our finding in this *Order*, we grant the Emergency Motion to the extent discussed herein and dismiss the remainder as moot.

⁶ See n. 3 *supra* for the three compliance options.

⁷ December 15 letter at 2.

⁸ December 19 letter at 2 n.2.

rulings for which we have already applied. If we do not receive those rulings, AT&T will not have the right either to spin off Liberty or to place it in an irrevocable trust for purposes of sale. For this reason, it would not be proper for AT&T to designate this option as our "election" for purposes of the Order, because we cannot in good faith represent that our interest in Liberty could be placed in the trust required by the Order.

Without changing the terms of the original order, AT&T could only have elected the TWE option, as of the date it was required to make the choice. Therefore, for purposes of our enforcement of Ordering Clause paragraph 187 of the *Order*, we determine that AT&T has elected Option (a).⁹

ORDERING CLAUSES

6. Accordingly, IT IS ORDERED, pursuant to sections 4(i), 214, 303(r), and 310 of the Communications Act, as amended, that AT&T Corp. has elected Video Condition Option (a) pursuant to Ordering Clause paragraph 187 of the *Merger Order*.

7. IT IS FURTHER ORDERED, pursuant to sections 4(i), 214, 303(r), and 310 of the Communications Act, as amended, should AT&T seek to have the Commission consider a modification of this *Order* to allow it to elect Option (b), it must submit a written request by January 15, 2001 with an appropriate showing as to why such a modification would serve the public interest.

8. IT IS FURTHER ORDERED that, pursuant to sections 4(i), 214, 303(r), and 310 of the Communications Act, as amended, that the Emergency Motion for Expedited Declaratory Ruling and to Waive Procedural Rules filed by Consumers Union, Consumer Federation of America, and Media Access Project filed on December 18, 2000 in this proceeding IS GRANTED to the extent discussed herein and otherwise IS DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

⁹ Should AT&T seek to have the Commission consider a modification of this *Order* to allow it to elect Option (b), it must submit a written request by January 15, 2001 with an appropriate showing as to why such a modification would serve the public interest.

In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Media One Group, Inc., Transferor, To AT&T Corp. Transferee, CS Docket No. 99-251

Dissenting Statement of Commissioner Harold W. Furchtgott-Roth

In the original Memorandum Opinion and Order approving the transfer of certain licenses from Media One Group, Inc., to AT&T Corporation, I agreed that the combined entity was obliged to come into compliance with our horizontal ownership rules. I did not agree, however, that the Commission possessed the authority under any rule to direct the company as to how to achieve that compliance or otherwise to control the company's relationship with Time Warner Entertainment (TWE). *See generally* Statement of Commissioner Harold W. Furchtgott-Roth, Concurring in Part and Dissenting in Part, *In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Media One Group, Inc., Transferor, To AT&T Corp. Transferee*, 15 FCC Rcd. 9816 (2000). Accordingly, I do not support today's action, founded as it is on those aspects of the Order.

In any event, today's action seems to me to be based on an over-aggressive reading of the relevant ordering clause. Nothing in the text of that clause affirmatively prohibits the positing of an alternative course of action. As required by the clause, AT&T *did* "elect[]" "one of the compliance options" – divestiture of Liberty Media Group and other programming interests. It simply went on to say that if the tax consequences of that transaction proved prohibitive due to an adverse ruling by the Internal Revenue Service in a pending filing, it would pursue another of the compliance options -- divestiture of TWE. Again, despite the Commission's conclusion that this supplementary designation obviously contravened the plain language of the clause, I see nothing in its language that barred AT&T from specifying a fallback position to its chief election.

Indeed, it seems quite prudent and sensible to fully explain to the Commission the possible scenarios that might occur in the execution of the large and complicated corporate transactions contemplated here. In the real world, companies such as AT&T face obstacles to the effectuation of certain plans that cannot always be predicted. Events beyond the control of the companies – here, an unfavorable tax ruling by the Internal Revenue Service that may have ancillary effects on contracts and ownership rights – can create a situation involving inordinate costs or even legal impossibility. For AT&T to make provision for those realities, and for this Commission in turn to recognize them, does not seem unreasonable to me. At the very least, AT&T was certainly not on clear notice that the filing it submitted acknowledging these possibilities was somehow impermissible under the terms of the ordering clause.

Similarly, I think it an over-aggressive reading of AT&T's letter for the Commission to conclude that it elects divestiture of TWE. The letter makes clear that AT&T's Plan A, if you will, was to pursue divestiture of Liberty Media. Today's Order wholly ignores this intent, however, and literally puts words in AT&T's mouth.

For the foregoing reasons, I respectfully dissent from this Order.

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