

March 20, 2001

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



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

Notice of Oral *Ex Parte* Presentation

Dear Ms. Roman-Salas:

This letter memorializes a March 16, 2001 oral *ex parte* presentation made by Andrew Jay Schwartzman of Media Access Project on behalf of Consumers Union, *et al.* to Chairman Powell and Acting General Counsel Jane Mago.

Mr. Schwartzman expressed his opposition to any action which would suspend or otherwise delay enforcement of the Commission's several orders directing AT&T Corp. ("AT&T") to divest its ownership interest in Time Warner Entertainment Co., LP, ("TWE") and to place that interest in a trust by March 20, 2001 in the event that divestiture could not be completed by May 19, 2001.

Mr. Schwartzman first objected to the fact that it appeared that the Commission was contemplating such action on the basis of an informal oral "suggestion" made by AT&T. The absence of any written pleadings leaves citizens groups such as those he represents unable to know what arguments have been presented and hence unable to respond effectively. He urged that the Chairman ask that AT&T present its "suggestion" in written form in which the arguments and requested relief are specified.

Mr. Schwartzman emphasized the unfortunate message that such action would send to the telecommunications industry, especially in light of AT&T's defiant public posture with respect to the Commission's divestiture directive. He noted that AT&T has not sought reconsideration of the FCC's June, 2000 order finding that AT&T's acquisition of MediaOne was contrary to the public interest absent significant divestitures. Nor, he noted, did AT&T seek reconsideration of the Commission's now December, 2000 order declaring that AT&T had obligated itself to divest its TWE partnership interest. That order is now final, he said, AT&T must follow the timeline established for such divestment. It is particularly important in this regard that AT&T has not challenged the Commission's divestiture action as a burden on its putative First Amendment rights.

Mr. Schwartzman then explicated the Commission's June, 2000 decision to demonstrate that it was based upon public interest considerations. The decision makes plain that AT&T's post-transactional status would pose competitive as well as diversity problems; the agency's reference to its cable horizontal ownership rules was because this provided a sufficient extant remedy, not as the jurisdictional basis of the opinion. Therefore, he said, the Commission's divestiture requirement was unaffected by the recent *TWE v. FCC* appeals court decision, which, if not reversed, invalidates those regulations.

Chairman Powell then engaged in a colloquy with Mr. Schwartzman about whether the *TWE v. FCC* decision did not, in fact, undermine the validity of the AT&T/MediaOne decision. Mr. Schwartzman took the position that, even if it were not reversed, the court's decision related to a statute that was not relied upon in the current case, and did not address the FCC's broader power to impose horizontal ownership limitations on a case by case basis. Such actions are, he said, not *prima facie* unconstitutional, under the earlier *TWE v. FCC* decision issued several months ago. The Court of Appeals reference to the pending AT&T/MediaOne transaction could not have been, and surely was not, a holding that its decision would necessarily control the AT&T/MediaOne decision. Since the Court did not have the record of that case, its statement was, at most, an acknowledgment of the possible impact of its decision on the AT&T/MediaOne docket. The panel did not know, for example, that the FCC referenced its horizontal ownership rules only as an extant remedy, not a jurisdictional basis.

Respectfully submitted,

Andrew Jay Schwartzman
Counsel for CU, *et al.*

cc. Chairman Michael Powell
Acting General Counsel Jane Mago