

RECEIVED

MAY 11 2001

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

DOCKET FILE COPY ORIGINAL

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

**COMMENTS OF AT&T CORP.**

Michael H. Hammer  
Jonathan A. Friedman  
WILLKIE FARR & GALLAGHER  
Three Lafayette Centre  
1155 21st Street, N.W.  
Suite 600  
Washington, D.C. 20036-3384  
(202) 328-8000

David W. Carpenter  
David L. Lawson  
SIDLEY AUSTIN BROWN & WOOD  
1722 Eye Street, N.W.  
Washington, D.C. 20006  
(202) 736-8000

Mark C. Rosenblum  
Steve C. Garavito  
AT&T CORP.  
295 North Maple Avenue  
Basking Ridge, NJ 07920  
(908) 221-3539

*Attorneys for AT&T Corp.*

May 11, 2001

ORIGINAL

No. of Copies rec'd  
List ABCDE

024

## TABLE OF CONTENTS

	Page
COMMENTS OF AT&T CORP. ....	1
INTRODUCTION AND SUMMARY .....	1
ARGUMENT .....	5
I. THE <i>TIME WARNER</i> DECISION CLEARLY INVALIDATES THE PREDICATE FOR THE <i>MERGER ORDER</i> OWNERSHIP CONDITION.....	5
A. Background.....	6
B. In Rejecting The Ownership Rule And The Reasons The Commission Supplied For That Rule, <i>Time Warner</i> Directly And Completely Undermines The Ownership Condition.....	8
C. In Vacating The Attribution Rules, in Part, <i>Time Warner</i> Also Calls Into Question The Underlying Determination That AT&T Would, Absent The Ownership Condition, Have Been In Violation Of The 30% Limit.....	12
1. Sale of programming to TWE.....	14
2. Board representation on TWE.....	14
D. The Commission Should, At a Minimum, Continue Its Suspension of the Ownership Condition Until It Completes the Rulemaking in Response to the <i>Time Warner</i> Decision.....	16
II. CU'S CONTINGENT PETITION FOR RECONSIDERATION MUST BE DISMISSED BECAUSE IT IS PROCEDURALLY DEFECTIVE AND SUBSTANTIVELY BASELESS.....	19
A. CU's Contingent Petition For Reconsideration Is Procedurally Defective.....	20
B. The Contingent Petition For Reconsideration Is Substantively Baseless.....	24
1. The <i>Time Warner</i> decision invalidates the rationale for the ownership condition.....	25
2. The <i>Time Warner</i> decision and AT&T's recent divestitures of cable systems mean that AT&T should be attributed substantially fewer cable subscribers.....	25

3.	AT&T's presence in the programming market has been substantially reduced as a result of the <i>Time Warner</i> decision and the pending spin-off of Liberty Media will further reduce AT&T's attributable programming holdings. ....	27
4.	CU's reliance on the Commission's decision approving the AOL-Time Warner merger and AT&T's restructuring plans is also unavailing. ....	30
	CONCLUSION .....	32

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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

**COMMENTS OF AT&T CORP.**

Pursuant to the Commission's Public Notice, DA 01-913 ("*Notice*"), released on April 20, 2001, AT&T Corp. ("AT&T"), respectfully submits these comments addressing the effect of the D.C. Circuit's decision in *Time Warner Entertainment v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner*") on the ownership condition adopted in this proceeding and opposing the April 13, 2001 Petition for Reconsideration and Contingent Petition for Further Reconsideration ("CU Petition") filed by the Consumers Union, Consumer Federation of America, and Media Access Project (collectively, "CU").

**INTRODUCTION AND SUMMARY**

As the recent orders of the D.C. Circuit make explicit, there is no basis for the Commission either to enter the order and require the divestiture that CU seeks or otherwise "to proceed with [enforcement of] the [cable ownership] condition[]" imposed in the AT&T-

*MediaOne Merger Order*.<sup>1</sup> *Notice* at 2. Indeed, in light of the serious constitutional and statutory infirmities the Court found with a 30% ownership limit – and with the “diversity” and “competition” rationales upon which both the ownership rules and the parallel *Merger Order* ownership condition are expressly based – it appears that significant changes must be made if sustainable ownership rules are to be fashioned in a future remand proceeding. AT&T respectfully submits that, in view of these necessary changes, it would be appropriate for the Commission to eliminate the ownership condition and deem AT&T in compliance with the *Merger Order*. At a minimum, however, the Commission should leave its March 16, 2001 order suspending enforcement of the ownership condition<sup>2</sup> in place and proceed to reconsider the cable ownership and attribution rules on remand, consistent with the D.C. Circuit decision. This approach will fully protect the public interest and the Commission’s legitimate diversity and competition concerns by ensuring that AT&T, like all other cable companies, must comply with whatever ownership restrictions can be justified as truly necessary to address those concerns. This course of action is dictated by the D.C. Circuit’s decision – and by its subsequent order staying the *Viacom-CBS* divestiture condition.<sup>3</sup>

---

<sup>1</sup> Memorandum Opinion and Order, Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations From MediaOne Group, Inc. to AT&T Corp., 15 FCC Rcd. 9816 (rel. June 6, 2000) (“*Merger Order*”).

<sup>2</sup> Order, *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, ¶ 4 (rel. Mar. 16, 2001) (“*Suspension Order*”).

<sup>3</sup> This approach also will enable the Commission to take into account the ownership circumstances of AT&T and other cable companies at the time any new ownership rules go into effect. As detailed below, since the adoption of the *Merger Order*, for example, AT&T has announced that it will spin-off Liberty Media and that it hopes to complete a commercially  
(continued . . .)

First and foremost, *Time Warner* invalidated the 30% ownership cap, holding that it violated the First Amendment because the Commission failed to identify any “non-conjectural risk of anti-competitive behavior,” either by collusion or other means, that could justify this ownership restriction. *Time Warner*, 240 F.3d at 1132. In light of the D.C. Circuit’s May 7, 2001 denial of CU’s petition for rehearing and for rehearing *en banc* of the *Time Warner* decision, there is no question that the 30% rule is now invalid, and it is likely that any sustainable cap would be considerably higher.

Moreover, subsequent action by the D.C. Circuit has confirmed that *Time Warner*’s First Amendment holding has broad implications for any merger conditions that seek to limit ownership, regardless of the statutory basis for the ownership condition. In this regard, after the Commission rejected the claim that *Time Warner* required it to suspend the Viacom-CBS merger condition requiring compliance with the Commission’s 35% broadcast ownership limit, the D.C. Circuit stayed the enforcement of this condition pending the Court’s review of the First Amendment and other challenges to the 35% broadcast rule. *Fox Television Stations, Inc., et al. v. FCC*, Nos. 00-1222, 01-1136, Order at 2 (D.C. Cir. Apr. 6, 2001) (Attachment A, hereto).

Against this background, the Commission clearly was justified in suspending the condition requiring AT&T to comply with the 30% ownership limit by May 19, 2001. The ownership condition unquestionably is expressly based, in largest part, upon the Commission’s invalid ownership rules. *See Merger Order*, ¶ 73. But the Commission’s *Suspension Order* is

---

(... continued)

reasonable divestiture of its minority interest in Time Warner Entertainment, L.P., and AT&T already has divested a number of other cable systems.

appropriate even if assessed solely against a separate public interest determination that allowing AT&T to have attributable interests exceeding 30% would threaten “competition and diversity in the provision of video-programming.” CU Petition at 6. This is the same rationale that *Time Warner* held to be constitutionally and statutorily insufficient to support a 30% ownership limit. By holding that enforcement of the 30% subscriber limit violates the First Amendment, *Time Warner* forecloses any claim that there are distinct “public interest harms” requiring “remediation” that arise from a determination that the merged entity has actual and attributable interests in systems serving more than 30% of subscribers.

Moreover, there is an entirely separate and independent reason why AT&T should not be ordered to divest its TWE interests (or any other cable interests). In *Time Warner*, the D.C. Circuit vacated a principal basis for the Commission’s holding that Time Warner Entertainment, L.P. (“TWE”) and Time Warner, Inc. (“TWI”) subscribers are attributable to AT&T: the sale of programming by AT&T to TWE. The Court reasoned that where an otherwise insulated limited partner certifies that it plays no role in video programming decisions of a cable system, the mere fact of selling programming to the system cannot rationally establish an ability to influence or control programming decisions. *Time Warner*, 233 F.3d at 1143. This reasoning equally vitiates the Commission’s alternative basis for attributing TWE subscribers to AT&T: AT&T’s representation on TWE’s board. As AT&T has previously explained (and repeats below), AT&T’s TWE directors have absolutely no right or ability to influence TWE programming. In these circumstances, there is simply no legitimate diversity or competition reason for the Commission to continue to attribute TWE or TWI to AT&T and on this basis to require AT&T to divest its TWE interest or otherwise reduce its cable holdings.

CU alternatively argues that if the *Suspension Order* is not lifted, the Commission should reopen the AT&T/MediaOne merger proceeding, conduct an entirely new “public interest” analysis, and order AT&T immediately to divest its limited partnership interest in TWE. This claim is even more clearly without merit. It is procedurally improper, for CU is now seeking the same relief that the Commission rejected both in the *Merger Order* and in denying CU’s first petition for reconsideration. *See* 47 C.F.R. § 1.106(k)(3). CU relies on purported “changed circumstances,” but the factors on which it relies all were or could have been raised by CU before the Commission released its order denying CU’s first petition for reconsideration.

In any event, the claim is baseless on the merits. All of the relevant “changed circumstances” since the *Merger Order* – including the *Time Warner* decision and AT&T’s independent decisions to divest Liberty Media and to reduce its other cable holdings – confirm the propriety of the Commission’s *Suspension Order*.

## ARGUMENT

### **I. THE TIME WARNER DECISION CLEARLY INVALIDATES THE PREDICATE FOR THE MERGER ORDER OWNERSHIP CONDITION.**

In striking down the Commission’s cable ownership rule, *Time Warner* rejected the same reasoning and analysis articulated by the Commission in support of the *Merger Order*’s ownership condition. Accordingly, whether the ownership condition is viewed as an application of the rules invalidated in *Time Warner* or as a product of a separate “public interest” analysis that reflects an identical or substantially similar rationale, the effect of the *Time Warner* decision is the same: it invalidates the basis for the ownership condition in the *Merger Order*. As a result, the Commission’s *Suspension Order* was an appropriate response to the *Time Warner*

decision that should, at a minimum, remain in effect pending the Commission's reassessment of its ownership rules on remand.

**A. Background.**

The *Merger Order* addressed claims that the post-merger AT&T would serve more subscribers than the 30% limit allowed by the Commission's ownership rules and that the size of AT&T would therefore threaten video programming "diversity" and "competition." *Merger Order* ¶ 3. The Commission agreed that "the proposed merger violates the Commission's cable horizontal ownership rules, which are designed to address threats to diversity and competition in the video programming marketplace." *Id.* Citing its rule that "preclude[s] insulation where a limited partner sells video programming to the partnership," *id.* ¶ 46, the Commission determined that acquiring MediaOne's minority interest in TWE would cause over 12 million TWE and TWI subscribers to be attributable to AT&T and, as a result, AT&T would have attributable interests in cable systems serving over 41% of subscribers, *id.* 49.

The Commission summarily rejected AT&T's argument that, whatever its post-merger size, DBS competition would prevent any harm to diversity and competition, reasoning that it "already h[ad] considered this factor in [its] analysis supporting the horizontal ownership rules." *Id.* ¶ 61. But the Commission also rejected the argument that the public interest demanded that AT&T specifically divest MediaOne's minority interest in TWE, reasoning that the "concern about coordinated action" is "reflected in the horizontal ownership rules," *id.* ¶ 57, and thus is "sufficiently mitigated" by compliance with those rules, *id.* ¶ 59.

Accordingly, the Commission directed AT&T, as a condition of approval of the merger, to come into compliance with the ownership rules by implementing its choice of one of three alternatives: (a) divesting its interests in TWE, (b) terminating involvement in TWE's

video programming activities, or (c) divesting its interests in other cable systems, such that AT&T would have attributable ownership interests in cable systems serving no more than 30% of subscribers nationwide. *Id.* ¶ 183 (“To avoid potential harm to competition and diversity in video programming . . . the Applicants must reduce their attributable cable system ownership interests such that the merged firm will serve no more than 30% of all MVPD subscribers nationwide”).<sup>4</sup>

When the *Merger Order* was adopted, AT&T’s constitutional and statutory challenges to the Commission’s ownership and attribution rules were pending in the D.C. Circuit. There, the Commission defended the 30% ownership rule as necessary to serve the same two interests – competition and diversity – that it relied upon in the *Merger Order* to impose the 30% ownership condition. In *Time Warner*, the D.C. Circuit rejected both arguments. The Court held that the Commission had “failed to identify a non-conjectural harm” to competition that could support a 30% ownership limit, and it specifically concluded that the Commission had not adequately considered “the true relevance of [DBS] competition.” 240 F.3d at 1134.

The Court likewise rejected the Commission’s diversity rationale, which “opens the door to illimitable restrictions,” holding that “Congress has not given the Commission authority to impose, solely on the basis of the ‘diversity’ precept, a limit that does more than guarantee a programmer two possible outlets.” *Id.* at 1135-36. At most, the Court held, the record before the Commission might justify a 60% ownership limit. *Id.* at 1136. Finally, the

---

<sup>4</sup> See also *id.* ¶ 40 (“In applying the four-prong public interest test, we find that the merger will violate the cable ownership statute and rules, which establish limits on a cable operator’s size in order to prevent it from threatening diversity and competition in the provision of video programming”).

Court vacated the Commission rule that precludes insulation where a limited partner sells programming to the partnership, finding that “the no-sale criterion bears no rational relation to the [Commission’s stated attribution] goal.” *Id.* at 1143.

**B. In Rejecting The Ownership Rule And The Reasons The Commission Supplied For That Rule, *Time Warner* Directly And Completely Undermines The Ownership Condition.**

The *Merger Order*’s analysis of the video programming competition and diversity issues, as well as its description of the ownership condition, refer expressly to the ownership rules that were invalidated in *Time Warner*. See, e.g., *Merger Order*, ¶ 73 (“The foregoing conditions will bring the merged firm into compliance with Section 613(f)(1)(A) and our cable horizontal ownership rules”); *id.* ¶ 60 (rejecting Applicants’ arguments that their “post-merger size will not threaten competition and diversity in the provision of multichannel video programming,” because Applicants are required to “abide” by the “30% horizontal ownership limit”). And the Commission specifically rejected arguments that it should “use its public interest authority” to impose additional conditions beyond requiring AT&T to come into compliance with the 30% ownership rule. See, e.g., *id.* ¶ 56. Even the timing of the ownership condition – *i.e.*, “12 months from the effective date of the horizontal ownership rules” – is explicitly tied back to the ownership rules, rather than the effective date of the *Merger Order*. *Id.* ¶ 71.

To be sure, the *Merger Order* does rely on the “third prong of [the] public interest test,” but only in noting that the 30% ownership condition would “ensure that the merger will not frustrate nor impair the Commission’s implementation of the Communications Act and its objectives with regard to the *promotion of competition and diversity in the provision of video programming*.” *Merger Order*, ¶ 73 (emphasis added). These are, of course, precisely the same

objectives that the Commission unsuccessfully advanced in support of the 30% ownership rule. Indeed, the *Merger Order* confirmed that point, explaining that the ownership rules “establish limits on a cable operator’s size in order to prevent it from threatening diversity and competition in the provision of video programming.” *Id.* ¶ 40.<sup>5</sup> Thus, it makes no difference whether the ownership condition is viewed as based solely upon the ownership rules or also upon public interest considerations, because in concluding that the ownership condition would serve the public interest, the Commission unquestionably relied on a substantially similar rationale, pulled from its adoption of the ownership rules.

In this regard, the *Merger Order*’s reliance upon supposed threats both to diversity and competition is directly and completely undermined by the *Time Warner* decision. As to the concern regarding diversity in video programming, the *Merger Order* states that the merged entity would be “a powerful gatekeeper that could affect the diversity of video programming delivered to consumers.” *Merger Order*, ¶ 58. But the *Time Warner* Court held that “Congress has not given the Commission authority to impose, solely on the basis of the ‘diversity’ precept, a limit that does more than guarantee a programmer two possible outlets.” 240 F.3d at 1135. Accordingly, the Court held that diversity concerns could not support a 30% ownership limit, but, at best, supported a 60% limit. *Id.* at 1136. That ruling unquestionably precludes any “public interest” argument that those very same diversity concerns support a 30% limit directed only at AT&T.

---

<sup>5</sup> See also Third Report & Order, *Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992; Horizontal Ownership Limits*, 14 FCC Rcd. 19098, 19101-022, ¶ 8 (1999) (noting that the Commission, when implementing horizontal ownership rules, was required “to consider and balance” “public interest objectives”) (“*Horizontal Third Report & Order*”).

The *Time Warner* decision is equally dismissive of the competitive concerns identified by the *Merger Order* as a justification for the ownership condition. CU contends that *Time Warner* is irrelevant because it “criticized the Commission for a lack of record support for its prediction that cable companies would act jointly to limit the programming available to the public,” whereas in the *Merger Order*, “the Commission explicitly found in the factual record unique to this case that the merged entity would be likely to utilize its size . . . ‘to exercise excessive market power in the purchase of video programming.’” CU Petition at 7. In fact, most of the *Merger Order* paragraphs cited by CU merely catalogue the pre-merger holdings of AT&T and MediaOne. See *Merger Order* ¶¶ 14-20, 25-27.

More to the point, the other paragraphs of the *Merger Order* upon which CU relies simply recite the same competition rationale that led the *Time Warner* Court to reject the Commission’s conclusions regarding the potential for threats to competition. Specifically, the *Merger Order*’s conclusions regarding AT&T’s post-merger “market power” were based on the *Horizontal Third Report & Order* in which the Commission found “that the number of subscribers served by a cable operator most accurately reflects that cable operator’s purchasing market power.” *Merger Order*, ¶ 51 (citing *Horizontal Third Report & Order*, 14 FCC Rcd. at 19108, ¶ 22). As noted, the Court ruled that the Commission’s *Horizontal Third Report & Order* did not reflect an accurate understanding of “market power” because the Commission “seem[ed] to ignore the true relevance of competition” in general, and “the impact of DBS on that market power” in particular. *Time Warner*, 240 F.3d at 1134. CU claims that the *Merger Order* also relied on the threat that “the merged entity may coordinate its purchasing decisions with other

MVPDs.” CU Petition at 5. The Court rejected this same threat of collusion rationale as unsupported. *Time Warner*, 240 F.3d at 1132-33.<sup>6</sup>

The First Amendment implications of *Time Warner* apply with equal force to the *Merger Order*’s ownership condition. As the *Time Warner* Court explained, limits on cable ownership “interfer[e] with [cable operators’] speech rights by restricting the number of viewers to whom they can speak.” *Id.* at 1129. As a result, the Commission may not impose *any* such limit unless it can, at a minimum, meet its burden to demonstrate that the limit advances “important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests.” *Time Warner*, 240 F.3d at 1129-30 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997)). The *Time Warner* Court concluded that the Commission’s horizontal ownership rules – and the diversity and competition reasoning underlying those rules – did not satisfy that First Amendment standard. *Id.* at 1132-33.

Of course, the Commission’s exercise of its statutory “public interest authority,” like its exercise of any other statutory authority, is subject to these same First Amendment restrictions. As the Supreme Court has explained, “the ‘public interest’ standard necessarily invites reference to First Amendment principles.” *Columbia Broadcasting Sys., Inc. v. Democratic Nat’l Comm.*, 412 U.S. 94, 122 (1973). Because, as the Court held, the Commission’s justifications for the 30% ownership rule do not satisfy the First Amendment

---

<sup>6</sup> CU is also wrong when it argues that the D.C. Circuit “endorsed” the “Commission’s conclusion that a 40% open field is required for [an] independent programmer.” CU Petition at 7. The *Time Warner* Court made clear that “the validity of the premises supporting the FCC’s conclusion that a 40% ‘open field’ is necessary” was “a question that [the Court] need not answer here.” 240 F.3d at 1132.

requirements, those same justifications for the *Merger Order*'s parallel 30% ownership condition cannot do so.

CU ignores these dispositive facts and steadfastly maintains that "the Court in *Time Warner* did not critique the analysis and conclusions relied upon in the *Merger Order*." CU Petition at 7. But that argument is clearly wrong. As detailed above, the *reasoning and arguments* that the Court rejected are the very same ones that CU now contends formed the basis of the "public interest" justification for the ownership condition. It is, of course, true that *Time Warner* does not specifically reference the *Merger Order*, but CU ignores that the Court went out of its way to point out that the invalidated "rule's main bite is on firms obtaining subscribers through merger or acquisition." 240 F.3d at 1129. In short, *Time Warner*'s rejection of the 30% ownership rule clearly invalidates all of the *Merger Order* predicates for the 30% ownership condition.<sup>7</sup>

**C. In Vacating The Attribution Rules, in Part, *Time Warner* Also Calls Into Question The Underlying Determination That AT&T Would, Absent The Ownership Condition, Have Been In Violation Of The 30% Limit.**

The *Time Warner* decision is also highly relevant in another respect. The D.C. Circuit found fault not only with the 30% ownership limit imposed in the *Merger Order*, but also with the attribution rules employed to measure AT&T's size post-merger. In particular, the

---

<sup>7</sup> Lacking any legitimate substantive basis to argue that the *Merger Order* ownership condition should be reflexively enforced notwithstanding the *Time Warner* decision, CU retreats to *Tribune Co. v. FCC*, 133 F.3d 61 (D.C. Cir. 1998), to argue that, as a procedural matter, "AT&T remains obliged to comply with the 'non-severable' conditions placed on its merger." CU Petition at 4. That argument too is baseless. In *Time Warner*, AT&T successfully challenged the ownership rules upon which the *Merger Order*'s ownership condition is predicated. As the Court stated in *Tribune Co.*, "where an agency is confronted with an undisputable indication that its rule is illegal, . . . it may be entitled, indeed obliged, to decline to apply it." *Tribune Co.*, 133 F.3d at 68 (citing *AT&T Co. v. FCC*, 978 F.2d 727, 737 (D.C. Cir. 1993)).

Court vacated the sale of programming exception that was a principal basis for the Commission's determination that the TWE and TWI subscribers should be attributed to AT&T, notwithstanding the fact that AT&T exercises no control over (and plays no role in) TWE's programming decisions. *See Time Warner*, 240 F.3d at 1143. Moreover, the Court's rationale for doing so – that the Commission failed to show that the sale of programming was rationally related to the Commission's stated goal of identifying interests that confer influence over video programming – also undermines the Commission's alternative attribution rationale based on AT&T's board representation on TWE.

At the outset, it bears emphasis that the Commission's attribution rules are designed to identify “the interests that confer on their holders” the “type of economic incentives that the substantive cable rules are intended to address.”<sup>8</sup> In particular, where a cable operator “is not materially involved in the video-programming activities of a limited partnership, its investment does not extend its national programming power and the concerns of Section 613 [“Ownership Restrictions”] are not implicated.” *Merger Order*, ¶ 63. In this regard, overly inclusive attribution rules constitute a public interest *harm* because they deny the public the efficiency benefits of cable consolidation that Congress directed the FCC to take into “account.” 47 U.S.C. § 533(f)(2)(D).

---

<sup>8</sup> Report & Order, *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of the Cable Act Reform Provisions of the Telecommunications Act of 1996; Review of the Commission's Cable Attribution Rules*, 14 FCC Rcd. 19014, 19015, ¶ 1 (1999) (“*Attribution Rules Order*”).

**1. Sale of programming to TWE.**

The Commission concluded that AT&T's "sale of programming, via its attributable programming affiliates, to TWE is a service for TWE 'materially relating to its video programming activities'" and gives AT&T the "capability and incentive to influence TWE's video programming choices." *Merger Order*, ¶ 49. As a result, the Commission concluded that "[AT&T] will be deemed materially involved in TWE's video-programming activities, precluding application of the insulated limited partnership exemption." *Id.* That conclusion plainly cannot be squared with *Time Warner*. The Court vacated the no-sale criterion because it "bears no rational relation to the goal [of ensuring that the limited partner is not involved in the partnership's programming decisions], as the Commission has drawn no connection between the sale of programming and the ability of a limited partner to control programming choices." *Time Warner*, 240 F.3d at 1143.

**2. Board representation on TWE.**

The reasoning underlying the *Time Warner* decision also invalidates the Commission's reliance on AT&T's representation on the TWE Board as a basis for attributing TWE's subscribers to AT&T. In *Time Warner*, the Court explained that there must be a "rational relation" or "connection" between attribution and the concern regarding influence over programming decisions. *Id.* at 1143. Attributing TWE subscribers to AT&T because AT&T has representatives on the TWE Board could be rational only if the AT&T representatives have the ability to influence or control programming choices, *see id.*, and they plainly have no such ability.

TWE's programming decisions are made by the TWE Management Committee. AT&T, and the representatives it appointed to the TWE Board – which has *never* met – have no

right to be involved with the decisionmaking process of the Committee, and have never participated in the Committee's deliberations. Rather, under the terms of the TWE Limited Partnership Agreement ("LPA"), the decisions of the TWE Management Committee are binding on the TWE Board.<sup>9</sup> See LPA § 12.11(b). Moreover, the managing general partner of TWE can act without approval of the Board if such action is approved by the voting Class B representatives on the Board. *Id.* § 12.1(b).<sup>10</sup> AOL-Time Warner is the managing general partner of TWE and designates *all* Class B representatives. Thus, the AT&T representatives on the TWE Board have absolutely no influence or control over programming and are limited to voting solely on the types of extraordinary shareholder protection matters that the Commission has repeatedly held do not implicate attribution concerns.<sup>11</sup>

---

<sup>9</sup> AT&T has previously shown that it has no right to be involved in, is not involved in, and has no communication with, TWE or AOL Time Warner concerning the day-to-day operations and management of TWE, including TWE's video programming activities. See AT&T *Ex Parte* Comments, filed in CS Dkt. No. 99-251, at 9-10 (Nov. 24, 1999) ("AT&T *Ex Parte* Comments"). As noted, under the terms of the TWE LPA, the Cable Management Committee has full discretion and final authority over TWE's cable operations. See LPA § 12.11(b). All of MediaOne's rights with regard to the Cable Management Committee were terminated well before AT&T acquired MediaOne. Pursuant to the terms of a non-compete clause in the LPA, Time Warner sent notice to MediaOne on August 4, 1999 that it was immediately terminating *all* of MediaOne's rights with regard to the Cable Management Committee. See Time Warner Entertainment Company, L.P., Securities and Exchange Commission Form 8-K, at 2 (noting that "MediaOne no longer has a vote on or any right to participate in the Cable Management Committee") (filed Aug. 5, 1999). See also AT&T *Ex Parte* Reply Comments, filed in CS Dkt. No. 99-251, at 5-6 (Dec. 21, 1999).

<sup>10</sup> See AT&T *Ex Parte* Comments, at Att. D, ¶ 17 (Declaration of Prof. John C. Coffee, Jr.) ("In reality, MediaOne does not have two seats on the general decision-making body that governs TWE, because that body is really the Voting Class B Representatives on the Board").

<sup>11</sup> AT&T's representatives may vote on certain extraordinary events, referred to in the TWE LPA as "Participant Matters," such as the merger of TWE, the sale of more than 10% of TWE's assets, incurrence of debt for money borrowed above a defined ratio, or voluntary bankruptcy. All of the Participant Matters are the types of events the Commission has in the past routinely  
(continued . . .)

In short, *Time Warner* not only directly invalidates the predicates to the *Merger Order*'s conclusion that diversity and competition would be threatened if AT&T were allowed to exceed the ownership rules' 30% subscriber limit, it undermines even the Commission's conclusion that the post-merger AT&T would exceed that 30% limit.

**D. The Commission Should, At a Minimum, Continue Its Suspension of the Ownership Condition Until It Completes the Rulemaking in Response to the *Time Warner* Decision.**

Based on the foregoing, AT&T submits that the Commission should, at a minimum, leave the *Suspension Order* in place and take no further action with regard to the *Merger Order* ownership condition until the conclusion of any remand proceedings to address the cable ownership and attribution rules in light of the *Time Warner* decision. As explained above, the Commission was fully justified in suspending compliance with the ownership

---

(. . . continued)

permitted insulated limited partners, L.L.C. members, and other entities to vote on in order to protect their investment without triggering attribution. *See, e.g., 1985 Attribution Order*, 58 R.R. 2d. 604, at ¶ 50, n. 72 (1985); Memorandum Opinion & Order, *Roy Speer and Silver Management Company*, 11 FCC Rcd. 14147, at ¶ 25 (1996) (rights to participate in fundamental matters "are permissible investor protections that neither substantially restrict [the managing party's] discretion nor rise to the level of attributable influences"); Order, *BBC License Subsidiary*, 10 FCC Rcd. 7926 (1995) (Fox Television Stations interest in BBC not attributable even though Fox had rights regarding extraordinary matters undertaken by BBC); Memorandum Opinion & Order, *Quincy Jones*, 11 FCC Rcd. 2481 (1995) (interests of Tribune Broadcasting Company in Qwest Broadcasting were not attributable notwithstanding that Tribune had the right to vote on extraordinary actions taken by Qwest); Memorandum Opinion & Order, *NBC*, 6 FCC Rcd. 4882 (1991) (NBC interest in Multimedia not attributable notwithstanding NBC had rights regarding extraordinary actions taken by Multimedia); Memorandum Opinion & Order, *News International*, 97 FCC 2d 349 (1984) (no transfer of control to Warner Communications from Chris-Craft even though Warner Communications had rights over extraordinary matters); Decision, *Cleveland Television Corp.*, 91 FCC 2d 1129 (1982) (characterizing a right to vote on fundamental corporate acts similar to those retained by AT&T as less than "meaningful").

condition. Indeed, that was the only reasonable course given that the Court's ruling directly undermines and invalidates the *Merger Order's* rationale for the ownership condition.

As the Commission has recognized, it has a continuing responsibility to assess whether enforcement of merger conditions remains warranted or would instead be arbitrary and capricious.<sup>12</sup> On the present record, insisting on compliance with the ownership condition would be patently arbitrary and would raise serious constitutional questions. The analytical underpinning of the ownership condition clearly is no longer valid. Indeed, the D.C. Circuit has observed that, at least on the record upon which the rules were adopted, no cable ownership limit less than 60% can be justified. *Time Warner*, 240 F.3d at 1136. In reaching that conclusion – and holding that the 30% limit embodied in the ownership rule is an unjustified restriction on speech that violates the First Amendment – the Court rejected the very same diversity and competition arguments that the *Merger Order* offers in support of the same 30% limit embodied in the ownership condition.<sup>13</sup>

What is more, the D.C. Circuit made clear that its invalidation of the ownership rules would have an impact on proceedings like this one because, as noted, the “rule’s main bite

---

<sup>12</sup> See, e.g., Memorandum Opinion & Order, *Monitoring Compliance with Conditions Underlying GTE's Acquisition of Telenet*, 91 FCC 2d 215, at ¶¶ 16-21 (1982) (concluding that merger conditions no longer warranted in light of “past concerns” for imposing conditions); Public Notice, *Common Carrier Bureau Seeks Comment on Letters Filed by Verizon and Birch Regarding Most-Favored Nation Condition of SBC/Ameritech and Bell Atlantic/GTE Orders*, CC Docket Nos. 98-141, 98-184, DA 01-722 (Mar. 30, 2001).

<sup>13</sup> See, e.g., *Sierra Club v. U.S. Fish & Wildlife Serv.*, 245 F.3d 434, 447 (5th Cir. 2001) (“As the [agency] relied on an invalid regulation ... we find that [its] decision was arbitrary and capricious”); *Perales v. Sullivan*, 948 F.2d 1348, 1354 (2d Cir. 1991) (“An agency’s action is arbitrary and capricious when it fails to meet statutory, procedural or constitutional requirements”).

is on firm's obtaining subscribers through merger or acquisition." *Time Warner*, 240 F.3d at 1129. In these circumstances, there could be no non-arbitrary finding that requiring AT&T to comply with the divestiture requirement would serve the public interest. Rather, any such requirement could only be perceived as punitive and disregarding completely the *Time Warner* decision. See, e.g., *Fox Television Stations, Inc. v. FCC*, No. 00-1222, Order (D.C. Cir. Apr. 6, 2001) (granting motion for interim relief and entering stay of "the time for Viacom and CBS to come into compliance with the Commission's national television ownership rule"); see also *PPG Industries v. NLRB*, 671 F. 2d 817, 823 n.9 (4th Cir. 1982) ("We cannot . . . defer to a legal determination which flouts our previous statements on the law").

Finally, in rejecting the no-sale attribution criterion, *Time Warner* also called into question the Commission's underlying determination that AT&T should be attributed with the TWE and TWI subscribers and therefore would exceed the now invalid 30% limit. In this regard, it is important to recognize that even apart from the governing TWE documents that prevent AT&T from exercising any influence over TWE programming decisions, the interim *Merger Order* safeguards, which remain in force, expressly prohibit AT&T from doing so.<sup>14</sup> In

---

<sup>14</sup> See, e.g., *Merger Order*, Appendix B, 15 FCC Rcd. at 9899:

No officer, director, or employee of AT&T shall, directly or indirectly, influence or attempt to influence, or otherwise participate in, the management or operation of the Video Programming activities of TWE. In particular, no member of the TWE Board of Directors appointed by AT&T shall be involved in the following matters:

- a) the decisions of TWE regarding which Video Programming services are purchased for or carried on TWE's cable systems;
- b) negotiation of prices paid by TWE for Video Programming carried on TWE's cable systems;

(continued . . .)

these circumstances, AT&T respectfully submits that it is appropriate for the Commission affirmatively to declare AT&T in compliance with the ownership condition as it must necessarily be modified in light of *Time Warner*.

**II. CU'S CONTINGENT PETITION FOR RECONSIDERATION MUST BE DISMISSED BECAUSE IT IS PROCEDURALLY DEFECTIVE AND SUBSTANTIVELY BASELESS.**

For all of the reasons stated above, CU's Petition for Reconsideration of the *Suspension Order* should be denied. CU's alternative request that the Commission "undertake a public interest analysis to re-open the merger proceedings to find alternate methods to remediate the harm demonstrated in the record of that proceeding" should also be denied.<sup>15</sup> That request is procedurally barred, because it conflicts with the Commission's rules and precedent regarding dismissal of repetitious petitions for reconsideration. The contingent petition also fails to state

---

(... continued)

- c) setting the schedule for rollout of Video Programming carried on TWE's cable systems;
- d) marketing by TWE of Video Programming carried on TWE's cable systems;
- e) setting the budget for the Video Programming operations of TWE's cable systems. . . .
- f) selecting the electronic programming guide used by TWE's cable systems;
- g) the hiring, firing, or supervising of TWE employees directly involved in the Video Programming activities of TWE's cable systems; or
- h) assessing the performance of any Video Programming service carried by TWE's cable systems.

AT&T is committed to taking any other steps reasonably necessary to satisfy the Commission that it has no ability to influence TWE's programming.

<sup>15</sup> See CU Petition at 8.

“changed circumstances” that might properly form the basis for review under the Commission’s rules and precedent. Moreover, even if such reconsideration were appropriate – and it is not – recent events, if anything, confirm that there is no possible basis for a finding that the public interest requires that AT&T be ordered to divest its TWE interest.

**A. CU’s Contingent Petition For Reconsideration Is Procedurally Defective.**

Section 1.106(k)(3) of the Commission’s rules provides that a Commission order disposing of a petition for reconsideration may itself be subject to a further petition for reconsideration where it *reverses or modifies* the original order.<sup>16</sup> Conversely, “[a] petition for reconsideration of an order which has been previously denied on reconsideration may be dismissed by the staff as repetitious.”<sup>17</sup> The Commission has plainly stated that “[o]ur rules do not contemplate that we will entertain petitions for reconsideration of petitions for reconsideration.”<sup>18</sup> CU previously filed a petition for reconsideration of the *Merger Order* as well as a supplemental filing to that petition.<sup>19</sup> In its *Reconsideration Order* disposing of CU’s

---

<sup>16</sup> See 47 C.F.R. § 1.106(k)(3) (“In no event . . . shall a ruling which denies a petition for reconsideration be considered a modification of the original order”).

<sup>17</sup> *Id.* See Memorandum Opinion & Order, *Liberty Productions et al.*, 8 FCC Rcd. 4264 (1993) (dismissing petitions for reconsideration as repetitious pursuant to §1.106(k)(3) where petitioners raised the same objection to grant of the subject application raised in their initial petition for reconsideration, even though petitions were styled as addressing denial of one petitioner’s request to enlarge issues). See also Memorandum Opinion & Order, *United Broadcasting Company of Florida, Inc.*, 61 FCC 2d 970, at ¶ 5 (1976) (“Stripped of its label and verbiage, [petitioner’s] request is nothing more than a petition for reconsideration of our denial of reconsideration of our decision denying its license renewal application”); *In the Matter of GTE Telenet Corp.*, 1985 FCC Lexis 2209, at ¶ 9 (CCB 1985) (dismissing claim as repetitious); Memorandum Opinion & Order, *Radio Greenbriar, Inc., et al.*, 80 FCC 2d 144, at n. 4 (Rev. Bd. 1980) (same).

<sup>18</sup> *United Broadcasting*, ¶ 5.

petition for reconsideration, as supplemented, the Commission *did not* reverse or modify the *Merger Order*, but instead *denied* CU's petition in its entirety.<sup>20</sup> Thus, CU's repetitious contingent petition for reconsideration should be dismissed under the express terms of Section 1.106(k)(3).

Section 1.106(c)(1) of the Commission's rules – upon which CU relies in filing its contingent petition<sup>21</sup> – provides that a petition for reconsideration which relies on facts not previously presented to the Commission will be entertained *only if*: (1) the facts relied on relate to events occurring since the last opportunity to present such matters; or (2) the facts relied on were unknown until after such last opportunity and could not through ordinary diligence have been discovered prior to such opportunity.<sup>22</sup> The Commission routinely rejects reconsideration petitions that fail to satisfy these requirements,<sup>23</sup> and it should do so here.

CU cites a number of “changed circumstances” that it believes support further reconsideration of the *Merger Order*, including: (1) AT&T's October 25, 2000 announced restructuring plans; (2) the Commission's December 21, 2000 order concerning AT&T's election

---

(. . . continued)

<sup>19</sup> See CU, *et al.* Petition for Reconsideration, filed in CS Dkt. No. 99-251 (July 5, 2000) (“First CU Petition”); CU, *et al.* Motion for Leave to Supplement Petition for Reconsideration, filed in CS Dkt. No. 99-251 (filed Nov. 13, 2000) (“CU Supplement”).

<sup>20</sup> See *AT&T-MediaOne Reconsideration Order*, CS Dkt. No. 99-251, FCC 01-47, at ¶ 12 (rel. Mar. 14, 2001) (“*Reconsideration Order*”).

<sup>21</sup> See CU Petition at 1 (citing 47 C.F.R. § 1.106(c)(1) as basis for contingent petition).

<sup>22</sup> See 47 C.F.R. § 1.106(c)(1) (referencing *id.* § 1.106(b)(2)).

<sup>23</sup> See, e.g., *Liberty Productions*, at ¶ 4; Memorandum Opinion & Order, *Warren Price Communications*, 7 FCC Rcd. 6850, at ¶ 2 (1992); *Beaumont-Port Arthur, TX, et al.*, 1986 FCC LEXIS 3750, at ¶ 2 (CCB 1986); *GTE Telenet*, at ¶ 9.

of a compliance option; (3) the January 22, 2001 Commission decision approving the AOL-Time Warner merger; and (4) the *Time Warner* decision.<sup>24</sup> However, CU fully briefed the Commission on these events, or had the opportunity to do so, *before* the Commission released its order denying CU's original petition for reconsideration. Thus, these events cannot justify initiation of yet another reconsideration proceeding.

First, AT&T's restructuring plans were announced October 25, 2000, and CU had ample opportunity to make the Commission aware of its views on these plans prior to the release of the *Reconsideration Order*, but did not do so. Indeed, as noted above, CU filed a supplement to its original reconsideration petition on November 9, 2000 and made no mention of AT&T's restructuring plans.<sup>25</sup>

Second, CU fully briefed issues relating to the Commission's December 21, 2000 order prior to the release of the *Reconsideration Order*.<sup>26</sup> Hence, that order provides no basis for the Commission to conduct another reconsideration proceeding to hear CU's views on this subject.

Third, CU's supplemental filing to its original reconsideration petition was dedicated almost entirely to the purported impact of the AOL-Time Warner merger on the *AT&T-MediaOne Merger Order*.<sup>27</sup> As noted, that supplemental pleading was filed on

---

<sup>24</sup> See CU Petition at 2.

<sup>25</sup> See CU Supplement.

<sup>26</sup> See, e.g., Emergency Motion for Expedited Declaratory Ruling And To Waive Procedural Rules, filed by CU *et al.* in CS Dkt. No. 99-251 (Dec. 18, 2000); *Ex Parte* Letter, from Andrew Schwartzman, CU, *et al.*, to FCC Chairman William Kennard, filed in CS Dkt. No. 99-251 (Dec. 20, 2000).

<sup>27</sup> See CU Supplement.

November 9, 2000, well before the Commission released its *Reconsideration Order*. Hence, CU's views on this subject are well known to the Commission, and there is no justification for yet another reconsideration proceeding to rehash them.

Moreover, it would be inappropriate for the Commission to revisit the *Merger Order* in light of the subsequently-decided *AOL-Time Warner Merger Order*. The Communications Act specifically directs the Commission to make individualized determinations on transfer of control applications.<sup>28</sup> At the time AT&T and MediaOne filed their public interest application with the Commission, AOL had no ownership interests in the cable industry. The Commission's review thus was limited to the particularized facts presented in the AT&T-MediaOne merger application, and not issues raised months later in an entirely separate merger application.<sup>29</sup> The Commission limited its review notwithstanding CU's concerted lobbying efforts in favor of a TWE divestiture condition in light of the proposed AOL-Time Warner merger.<sup>30</sup> The Commission instead gave AT&T three alternative methods of complying with the

---

<sup>28</sup> See 47 U.S.C. § 309(a) ("[T]he Commission shall determine, in the case of *each application* filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of *such application*" (emphasis added)).

<sup>29</sup> If the Commission were to accept CU's invitation to revisit every merger order in light of subsequent merger orders, the Commission would create a never-ending review process. See AT&T Opposition To Motion To Consolidate, filed in CS Dkt. No. 99-251, at 4-5 (Apr. 21, 2000).

<sup>30</sup> AT&T notes that CU lobbied the Commission extensively to impose such a divestiture requirement on AT&T in light of the AOL-Time Warner merger application. See, e.g., CU, *et al.* Motion to Consolidate, filed in CS Dkt. No. 99-251, at 7-8 (Apr. 11, 2000); CU, *et al.* Petition to Deny, filed in CS Dkt. No. 00-30, at 157 (Apr. 26, 2000); *Notice of Ex Parte Communication of Andrew Schwartzman and Gene Kimmelman to Kathryn C. Brown*, filed in CS Dkt. No. 99-251 (Apr. 25, 2000); *Notice of Ex Parte Communication of Andrew Schwartzman to Deborah Lathen*, filed in CS Dkt. No. 99-251 (May 1, 2000); *Notice of Ex Parte Communications of Andrew*  
(continued . . .)

ownership condition, two of which would not have affected AT&T's post-merger interest in TWE.<sup>31</sup>

Fourth, and finally, it is evident that CU's primary concern is with the *Time Warner* decision. As noted, just this week, the D.C. Circuit denied CU's petition for rehearing of that decision. CU's views have now been rejected at least three times by the Commission and twice by the courts. There is no need to initiate yet another proceeding to assess these same claims.

**B. The Contingent Petition For Reconsideration Is Substantively Baseless.**

Even assuming, *arguendo*, that the Commission were to consider CU's contingent petition, the changed circumstances adverted to by CU are either irrelevant or argue *against* imposition of the ownership condition. Most significantly, the *Time Warner* decision invalidates the rationales relied upon by the Commission in imposing the ownership condition. Moreover, other recent developments involving AT&T's cable-related holdings not referenced by CU, such as AT&T's divestiture of several cable systems and the imminent spin-off of Liberty Media, also support continuation of the *Suspension Order* or removal of the ownership condition.

---

(. . . continued)

*Schwartzman to David Goodfriend, Marsha MacBride, and Helgi Walker*, filed in CS Dkt. No. 99-251 (June 2, 2000).

<sup>31</sup> See *Merger Order* at ¶ 59. Moreover, the Commission expressly rejected CU motion to consolidate the two merger proceedings, *see id.* at ¶ 181, as well as CU's subsequent request on reconsideration that the Commission void the alternative compliance options and mandate the divestiture of TWE. See *Reconsideration Order* at ¶ 8. And, the Commission did not impose such a requirement on AOL in the *AOL-Time Warner Merger Order*, where at least the Commission had before it the transaction that allegedly gave rise to the concerns asserted by CU.

**1. The *Time Warner* decision invalidates the rationale for the ownership condition.**

CU's suggestion that the *Time Warner* decision provides a basis for grant of its contingent petition<sup>32</sup> cannot withstand scrutiny. As shown above, the strong constitutional holding in that decision plainly *invalidates* the predicates for the ownership condition and, in no event, can be considered a changed circumstance *justifying* the ownership condition.

**2. The *Time Warner* decision and AT&T's recent divestitures of cable systems mean that AT&T should be attributed substantially fewer cable subscribers.**

The Commission imposed the ownership condition because it found that post-merger AT&T would have the potential to harm the programming market because of its size.<sup>33</sup> Specifically, the Commission estimated that AT&T post-merger would serve 41.8% of the nation's MVPD subscribers,<sup>34</sup> and that by virtue of exceeding the 30% cap established in the then-effective ownership rules, AT&T thus could adversely affect the diversity of video programming delivered to consumers.<sup>35</sup> The *Time Warner* decision, however, significantly changed the Commission's attribution rules such that the TWE subscribers can no longer properly be attributed to AT&T. Consequently, the decision – as well as recent divestitures of

---

<sup>32</sup> See CU Petition at 2.

<sup>33</sup> *Merger Order* at ¶ 51 (“Video programmers’ need for a large number of subscribers confers on AT&T, MediaOne, and TWE, which have access to a large number of subscribers, significant bargaining power”); see also *id.* (noting that “the number of subscribers served by a cable operator most accurately reflects that cable operator’s purchasing market power”).

<sup>34</sup> *Id.* at ¶¶ 52, 58.

<sup>35</sup> *Id.* at ¶ 58.

cable systems by AT&T – have plainly destroyed the rationale for imposing the ownership condition.

The Commission's estimate of AT&T's size post-merger was based upon its conclusion that AT&T should be attributed with "ownership" of the 12.65 million subscribers served by TWE.<sup>36</sup> The Commission's conclusion that AT&T should be attributed with the TWE subscribers, in turn, was premised on its view that the attribution rules were triggered by AT&T's 25.51% limited partnership interest in TWE and AT&T's sale of programming to TWE. Because, as explained above, *Time Warner* invalidated the sale of programming exception (and the reasoning underlying the only other basis for attributing the TWE subscribers to AT&T), the TWE subscribers cannot properly be attributed to AT&T. Consequently, AT&T is dramatically smaller than the Commission assumed in the *Merger Order*. Indeed, had the Commission not attributed the TWE subscribers to AT&T in the *Merger Order*, AT&T would have been *under* even the 30% horizontal limit that the D.C. Circuit rejected.

Moreover, as reported to the Commission, AT&T has completed several cable system sales and swaps over the last year, the effect of which has been to reduce further the number of subscribers attributable to AT&T by almost two million.<sup>37</sup> Today, without the TWE

---

<sup>36</sup> The Commission attributed to AT&T the 10,856,000 subscribers held in TWE as well as 1,795,000 subscribers held in TWI, even though AT&T has no attributable interest in TWI. *Merger Order* at nn. 95 & 145. AT&T notes that of the 12,651,000 TWE subscribers the Commission attributed to AT&T, 1,444,000 were already attributed to AT&T through the TWE-AT&T joint ventures in Kansas City and Texas. *See Ex Parte* Letter, from Douglas Garrett, AT&T to Deborah Lathen, filed in CS Dkt. No. 99-251, at n. 2 (Apr. 7, 2000). Consequently, the net TWE subscribers attributed to AT&T as a result of the Commission's action was 11,207,000. *See Ex Parte* Letter, filed in CS Dkt. No. 99-251, at n. 2 (July 25, 2000).

<sup>37</sup> *See Ex Parte* Letter, filed in CS Dkt. No. 99-251 (July 25, 2000); *Ex Parte* Letter, filed in CS Dkt. No. 99-251 (Sept. 7, 2000); *Ex Parte* Letter, filed in CS Dkt. No. 99-251 (Oct. 31, 2000); (continued . . .)

and TWI subscribers and the divested cable systems, AT&T should be attributed with approximately 22.1 million subscribers, or only 25.3% of the nation's total MVPD subscribers,<sup>38</sup> far less than the 41.8% the Commission used as the basis of its analysis in the *Merger Order*. As a result, the Commission's finding that the merger created the potential for harm to the programming market because of AT&T's post-merger size can no longer stand.

**3. AT&T's presence in the programming market has been substantially reduced as a result of the *Time Warner* decision and the pending spin-off of Liberty Media will further reduce AT&T's attributable programming holdings.**

The *Merger Order* concluded that AT&T post-merger would have interests in a large number of programming networks, including the networks owned by TWE.<sup>39</sup> As explained above, *Time Warner* precludes any rational finding that TWE interests should be attributed to AT&T. Therefore, AT&T's programming interests are far smaller than the Commission believed when it analyzed the merger, and will become even more so after the spin-off of Liberty is completed later this summer.

First, as described above, the *Time Warner* decision makes plain that AT&T cannot rationally be considered to influence or control the programming services that are owned

---

(... continued)

*Ex Parte* Letter, filed in CS Dkt. No. 99-251 (Dec. 18, 2000); *Ex Parte* Letter, filed in CS Dkt. No. 99-251 (Jan. 23, 2001); *Ex Parte* Letter, filed in CS Dkt. No. 99-251 (Feb. 28, 2001); *Ex Parte* Letter, filed in CS Dkt. No. 99-251 (Mar. 29, 2001).

<sup>38</sup> AT&T arrived at the 25.3% figure by dividing its total number of attributable subscribers (22.1 million) by the total number of MVPD subscribers (87.3 million). See *Kagan Media Index* at 8 (April 25, 2001). The 22.1 million subscriber figure is derived by taking the total number of AT&T subscribers reported to the Commission in AT&T's March 29 *Ex Parte* (i.e., 33,329,150) and subtracting 11,207,000 (i.e., the total TWE and TWI subscribers other than those still attributed to AT&T through AT&T-Time Warner joint ventures in Kansas City and Texas).

<sup>39</sup> See *Merger Order* at ¶¶ 58-59.

by TWE. These programming services include, among others, HBO, Cinemax, Cartoon Network, and, Comedy Central. And even if it ever were attributable at all under the now-invalidated rules, TWI-owned programming, which includes CNN, TNT, and the WB broadcast network, is no longer properly attributable to AT&T.<sup>40</sup>

Moreover, the Commission also attributed to AT&T a large number of programming services as a result of AT&T's affiliation with Liberty Media. However, AT&T announced on April 11, 2001 that the Internal Revenue Service had ruled that AT&T's proposed spin-off of Liberty Media would be tax free to AT&T, Liberty Media, and their shareowners.<sup>41</sup> Accordingly, AT&T plans, by mid-summer of 2001, to implement its previously announced plan to convert the Liberty Media tracking stock into an asset-based security and spin-off Liberty Media as an independent, publicly-traded company. AT&T has also announced that upon the spin-off, John Malone, Chairman and CEO of Liberty Media, will retire from the AT&T Board.

When the spin-off of Liberty Media occurs, the number of video programming services affiliated with AT&T under the Commission's attribution rules will be dramatically reduced. Specifically, the following services, all of which the Commission assumed were attributed to AT&T will no longer be attributed to AT&T: Encore, Starz!, Discovery Channel, QVC, Court TV, MacNeil/Lehrer Productions, TV Guide, Style, BET, USA Networks, the Learning Channel, Regional Programming Partners, Odyssey, International Channel, MOVIEplex, Animal Planet, Telemundo Network, Telemundo Station Group, and a number of

---

<sup>40</sup> See *id.* at ¶ 58. AT&T disagreed with the Commission's statements regarding TWI-owned programming because AT&T never had an interest in TWI. This issue has, of course, been mooted by the *Time Warner* decision.

other foreign programming service providers, including Flextech P.L.C. in the United Kingdom, and Jupiter Programming Co., Ltd. in Japan.<sup>42</sup>

Finally, the continued growth in DBS and other non-cable MVPDs further reduces the possibility that AT&T, or any cable operator, could threaten diversity and competition in the video programming marketplace. Non-cable MVPDs now serve approximately 22 percent of all multichannel video subscribers nationwide and compete with cable companies for virtually all other subscribers.<sup>43</sup> This fact, which *Time Warner* recognizes was not taken adequately into account in adopting now-invalidated ownership rules, makes it even more appropriate for the Commission to leave undisturbed the *Suspension Order*.

DBS providers in particular are thriving. DirecTV and EchoStar are the third and sixth largest MVPDs and are far larger than *any* cable operator in terms of reach and population of potential subscribers.<sup>44</sup> Indeed, the DBS subscriber base is growing at a percentage rate that is 20 times as fast as cable, and more than half of new DBS subscribers are former cable customers. *See Annual Assessment of the Status of Competition in the Markets for the Delivery of Video Programming*, Seventh Annual Report, CS Dkt. No. 00-132, FCC 01-1, 2001 WL 12938, at ¶ 14 (2001) (comparing cable's 1.5 percent subscriber growth rate to the 29 percent growth rate for

---

(... continued)

<sup>41</sup> *See AT&T Receives Tax-Free Ruling From The IRS For Future Split Off Of Liberty Media*, AT&T News Release (Apr. 11, 2001).

<sup>42</sup> *AT&T-MediaOne Merger Order* at ¶¶ 19, 58.

<sup>43</sup> *See Kagan Media Index*, at 8 (Apr. 25, 2001).

<sup>44</sup> DirecTV currently serves over 9.8 million subscribers, and EchoStar has over 5.7 million customers. *See Amy Hellickson, EchoStar 1<sup>st</sup> Quarter Loss Narrows On More Customers*, Bloomberg News (May 3, 2001).

DBS). The presence of these non-cable distributors provides a powerful alternative for programmers and therefore further reduces the need for the ownership condition. Indeed, the *Time Warner* decision highlighted these facts by instructing the Commission, when revisiting the ownership rules, “to take account of the impact of DBS on [cable MVPDs’] market power.” 240 F.3d at 1134.

**4. CU’s reliance on the Commission’s decision approving the AOL-Time Warner merger and AT&T’s restructuring plans is also unavailing.**

As noted above, CU contends that the Commission’s approval of the AOL-Time Warner merger as well as AT&T’s announced restructuring support granting its contingent petition.<sup>45</sup> CU is incorrect on both accounts.

To the extent that the Commission raised concerns about AT&T’s limited partnership interest in TWE in the *AOL-Time Warner Merger Order*, those concerns related exclusively to AOL Time Warner’s ability to obtain “preferential access rights” for its high-speed Internet access services on AT&T’s cable systems.<sup>46</sup> The Commission adopted specific conditions which “prohibit[] AOL Time Warner from entering into exclusive contracts with AT&T for access by AOL Time Warner’s affiliated ISPs and that further prohibit[] AOL Time Warner from interfering with AT&T’s ability to offer other ISPs any rates, terms, or conditions of service that AT&T and an ISP find mutually agreeable.”<sup>47</sup> The Commission made no finding in the *AOL-Time Warner Merger Order* with regard to potential harm to the video programming

---

<sup>45</sup> See CU Petition at 2.

<sup>46</sup> Memorandum Opinion & Order, *AOL-Time Warner Merger Order*, CS Dkt. No. 00-30, FCC 01-12, 2001 WL 55636, at ¶ 257 (rel. Jan. 22, 2001).

<sup>47</sup> *Id.* at ¶ 258.

market. Consequently, that order is not a basis for reopening the *AT&T-MediaOne Merger Order* to reconsider the video condition.

Finally, CU's concerns that AT&T, in view of its proposed restructuring, will not vigorously pursue telephony deployment<sup>48</sup> are inaccurate and plainly immaterial to the requested "remedy" of a TWE divestiture. In fact, AT&T continues to make significant gains in its telephony rollout. In the first quarter of this year, AT&T added approximately 153,000 broadband telephony customers, a greater than 100% increase from 58,000 customers added a year earlier. AT&T now provides telephony service to 700,000 customers in 16 major markets, and has approximately 6.4 million marketable homes for telephony service.<sup>49</sup> Moreover, as of March 31, 2001, 74% of AT&T's broadband plant had been upgraded to at least 550 MHz with the majority of the network upgraded to 750 MHz; and 72% of the broadband plant was two-way capable at the end of the quarter.<sup>50</sup> In short, AT&T remains committed to ensuring that its cable systems will provide a long-term, viable, competitive alternative to the incumbent local phone companies.

---

<sup>48</sup> See CU Petition at 11-14.

<sup>49</sup> See *First Quarter Earnings Were \$0.06 Per Diluted Share*, AT&T Group Earnings Commentary, First Quarter 2001, at 9-11 (April 24, 2001).

<sup>50</sup> See *id.*

## CONCLUSION

For these reasons, the Commission should continue its suspension of the enforcement of the horizontal ownership conditions pending its reevaluation of its horizontal ownership rules in light of the D.C. Circuit's decision in *Time Warner* and, indeed, should affirmatively declare AT&T in compliance with the ownership condition as that condition must necessarily be modified in light of *Time Warner*. Further, the Commission should deny CU's Petition for Reconsideration and Contingent Petition for Further Reconsideration.

Respectfully submitted,

By:

*Mark C. Rosenblum / 022*

Mark C. Rosenblum  
Steve C. Garavito  
AT&T CORP.  
295 North Maple Avenue  
Basking Ridge, NJ 07920  
(908) 221-3539

Michael H. Hammer  
Jonathan A. Friedman  
WILLKIE FARR & GALLAGHER  
Three Lafayette Centre  
1155 21st Street, N.W.  
Suite 600  
Washington, D.C. 20036-3384

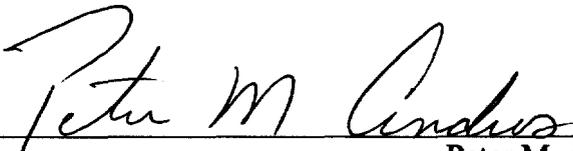
David W. Carpenter  
David L. Lawson  
SIDLEY AUSTIN BROWN & WOOD  
1722 Eye Street, N.W.  
Washington, D.C. 20006  
(202) 736-8000

*Attorneys for AT&T Corp.*

**CERTIFICATE OF SERVICE**

I hereby certify that on this 11<sup>th</sup> day of May, 2001, I caused true and correct copies of the forgoing Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: May 11, 2001  
Washington, D.C.

  
Peter M. Andros

## **SERVICE LIST**

Magalie R. Salas, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW, TW-A325  
Washington, D.C. 20554

ITS  
445 12<sup>th</sup> Street, SW  
Room CY-B400  
Washington, D.C. 20554

James Bird  
Office of the General Counsel  
445 12<sup>th</sup> Street, SW, 8-C818  
Washington, D.C. 20554

Royce Dickens Sherlock  
Cable Services Bureau  
445 12<sup>th</sup> Street, SW, 3-A729  
Washington, D.C. 20554

Linda Senecal  
Cable Services Bureau  
445 12<sup>th</sup> Street, SW, 3-A734  
Washington, D.C. 20554

Cheryl A. Leanza  
Andrew Jay Schwartzman  
Harold J. Feld  
Media Access Project  
950 18<sup>th</sup> Street, NW  
Suite 220  
Washington, D.C. 20006



# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

**No. 00-1222**

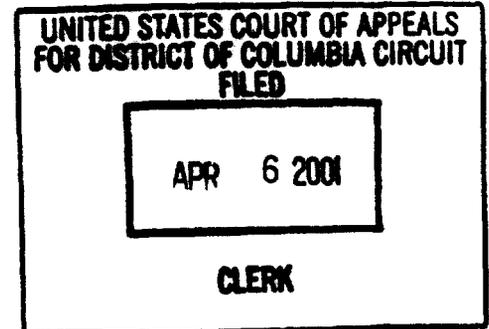
**September Term, 2000**

Fox Television Stations, Inc.,  
Petitioner

Filed On:

v.

Federal Communications Commission and United  
States of America,  
Respondents



---

National Association of Broadcasters, et al.,  
Intervenors

---

Consolidated with 00-1263, 00-1326, 00-1359,  
00-1381

**01-1136**

Viacom Inc. and CBS Broadcasting Inc.,  
Appellants

v.

Federal Communications Commission,  
Appellee

---

Consumer Federation of America and Office of  
Communication of the United Church of Christ,  
Intervenors

**BEFORE:** Williams, Ginsburg, and Randolph, Circuit Judges

## **ORDER**

Upon consideration of the emergency motions for interim relief filed by Viacom Inc. and CBS Broadcasting Inc., the responses thereto, and the reply; the emergency motion to consolidate Nos. 01-1136 and 00-1222, et al.; and the motion to expedite the briefing schedule and to accelerate the date for oral argument in No. 00-1222, et al., it is

**ORDERED** that the motion to consolidate be granted. It is

# United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 00-1222

September Term, 2000

**FURTHER ORDERED** that the motions for interim relief be granted; the time for Viacom and CBS to come into compliance with the Commission's national television ownership rule is hereby stayed pending further order of the court. Movants have met the stringent standards for a stay pending court review. See Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 32 (2000). It is

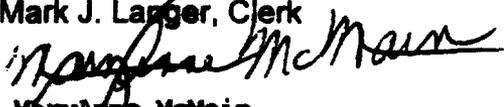
**FURTHER ORDERED** that the motion for expedition be denied. Briefing will proceed as previously ordered. The Clerk is directed to calendar these consolidated cases for oral argument at the earliest appropriate date following completion of briefing.

Per Curiam

FOR THE COURT:

Mark J. Langer, Clerk

BY:

  
MaryAnne McMain

Deputy Clerk/LD