ORIGINAL EX PARTE OR LATE FILED

[redacted]

AT&T

Betsy J. Brady, Esq.
Federal Government Affairs
Vice President

RECEIVED

JUN 6 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Suite 1000
1120 20th Street, N.W.
Washington, DC 20036
202 457-3824
FAX 202 457-2545
EMAIL betbrady@att.com

June 6, 2001

Mr. W. Kenneth Ferree
Chief, Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: **Ex Parte**, In the Matter of Applications for Consent to Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee (CS Docket No. 99-251); In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 (MM Docket No. 92-264).

Dear Mr. Ferree:

This *ex parte* letter addresses certain arguments raised by Consumers Union, Consumer Federation of America, and Media Access Project (collectively, "CU") in their May 25, 2001 reply comments in this proceeding. CU argues that the Commission, in order to protect its "reputation" and "integrity," should largely ignore the unanimous panel decision by the United States Court of Appeals for the D.C. Circuit in *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner*"). CU Reply at 2, 3. Although the court in *Time Warner* rejected, on constitutional and statutory grounds, the same reasoning articulated by the Commission in support of the ownership condition at issue in this proceeding, CU argues that the Court's decision should have no impact on the Commission's determination whether that condition should remain suspended. *See id.* at 3. CU misstates both the holding in *Time Warner* and the substance of AT&T's Comments.

I. CONTRARY TO CU'S CLAIMS, *TIME WARNER* UNDERCUTS THE COMMISSION'S PUBLIC INTEREST DIVERSITY RATIONALE FOR THE OWNERSHIP CONDITION.

CU's principal argument is that the ownership condition at issue here was justified on a public interest "diversity" rationale that is unaffected by *Time Warner*. This argument is based entirely upon a mischaracterization of the Court's decision. CU claims that because "[t]he *Time Warner* court . . . found that Congress did not give the Commission the authority to consider diversity under Section 11(c) of the 1992 Cable Act," the decision

134310.2

Recycled Paper

cannot be relevant to the Commission's public interest analysis, which does allow consideration of diversity. *Id.* at 4.[1] CU's premise is false. The Court ruled that the Commission *could* consider "diversity" in applying Section 11(c) to establish a generic horizontal limit. *Time Warner*, 240 F.3d at 1131-32 ("If this interest in diversity is to mean anything in this context, the government must be able to ensure that a programmer have at least two conduits through which it can reach the number of viewers needed for viability"). The problem the Court identified was in the Commission's *reasoning* in support of a diversity-based 30 percent limit. *See id.* at 1135-36 (Congress did not give the Commission "carte blanche" to impose "illimitable restrictions in the name of diversity"); *id.* at 1135 (the Commission cannot "impose, solely on the basis of the 'diversity' precept, a limit that does more than guarantee a programmer two possible outlets").

More generally, CU is wrong in claiming that the Commission's analysis under Section 11(c) is wholly distinct from the Commission's analysis under the public interest standard of Section 309. Section 11(c), by its terms, provides that in establishing "limits on the number of cable subscribers a person is authorized to reach," the Commission "shall" consider "public interest objectives." 47 U.S.C. § 533(f)(2). As the Commission explained when it promulgated the horizontal ownership limits struck down in *Time Warner*, "Congress directed in Section [11(c)] that, the Commission must consider and balance, among other public interest objectives, seven specific public interest guidelines in determining the appropriate horizontal limits." 14 FCC Rcd. 19098, 19102-03 (¶ 8) (1999). Thus, contrary to CU's claim, the Court's rejection of the Commission's diversity rationale for a 30 percent ownership rule is highly relevant to the viability of any diversity rationale for the 30 percent ownership condition at issue here. *Compare Rules Order*, 14 FCC Rcd. at 19114, ¶ 38 (noting concern with "media gatekeepers" who, absent horizontal ownership limit, "could reduce the number of diverse programming voices in the United States") *with Merger Order* ¶ 58 (expressing concern that merged entity might be "a potentially powerful gatekeeper that would affect the diversity of video programming delivered to consumers").

But even if the public interest foundation of the Commission's Section 11(c) authority could be disregarded, CU's limited view of the important First Amendment boundaries in this context is misguided. Although the *Time Warner* Court did not ultimately need to measure the Commission's diversity rationale against the First Amendment, it expressed serious concerns regarding the extent to which limits on horizontal ownership based on diversity could be "pressed against First Amendment norms." 240 F.3d at 1135. A horizontal ownership limit "interferes with [cable operators'] speech rights by restricting the number of viewers to whom they can speak" 240 F.3d at 1129, and therefore can be upheld only "if it 'advances important governmental interests unrelated to the suppression of free

[1] *See also id.* at 5 ("[i]n *Time Warner*, the Court held that Section 11(c) of the 1992 Cable Act *did not allow the Commission to utilize a diversity rationale* in adopting the industry-wide cable horizontal cap") (emphasis added).

speech and does not burden substantially more speech than necessary to further those interests.'" 240 F.3d at 1130 (quoting *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)). As the Court stressed, when the basis for such limits is solely diversity, although "each additional 'voice' may be said to enhance diversity," "at some point, . . . the marginal value of such an increment in 'diversity' would not qualify as an 'important' governmental interest." *Id.* And the prospect of intermediate First Amendment scrutiny is all the more daunting here because, as the Commission has noted, "concentration of cable operators could *promote* the introduction of new programming services by providing capital and a ready subscriber base for new services." 14 FCC Rcd. at 19103 (emphasis added).

II. CU IS ALSO WRONG IN SUGGESTING THAT *TIME WARNER* DOES NOT AFFECT THE COMMISSION'S COMPETITION RATIONALE FOR THE OWNERSHIP CONDITION.

CU's discussion of the implications of the *Time Warner* decision on the Commission's competition rationale for the ownership condition fares no better. In its petition, CU argued that the *Merger Order* was based on the contention that "'the merged entity may coordinate its purchasing decisions with other MVPDs.'" CU Petition at 5 (*quoting Merger Order* ¶ 51 n.173). As AT&T pointed out, that precise analysis was rejected in *Time Warner*. *See* AT&T Comments at 11 (citing *Time Warner*, 240 F.3d at 1132-33). Now, in its Reply Comments, CU quietly reverses course, arguing that "[v]ery little in [the] AT&T/MediaOne Order is concerned with coordinated action by AT&T and other cable companies." CU Reply at 8. But CU was correct the first time, because the *Merger Order* expressly relied on the notion that "[c]oncentrated markets are more prone to collusive outcomes than are competitive markets." *Merger Order* ¶ 57. That conclusion cannot be reconciled with *Time Warner*'s holding that reliance on "the economic commonplace" that "collusion is less likely when there are more firms" does not satisfy the First Amendment's requirements. 240 F.3d at 1132-33.

CU also contends that the ownership condition is "based on the individualized circumstances of a particular case." CU Reply at 6. According to CU, *Time Warner* has no effect on the *Merger Order* because "the Commission was particularly cognizant of the unique role the new AT&T would play in the video programming market, and of the economic incentives of *that particular company*." *Id.* at 7. In *Time Warner*, however, the D.C. Circuit explained that (i) an "assessment of a real risk of anti-competitive behavior . . . is itself dependant on an understanding of market power" and (ii) the Commission's statements regarding market power "seem[ed] to ignore the true relevance of competition" and "the impact of DBS on that market power." 240 F.3d at 1134. The same analysis of market power was incorporated expressly into the *Merger Order*. *See* AT&T Comments at 10 (citing *Merger Order* ¶ 51). Because the *Merger Order*'s analysis of AT&T's post-merger role in video programming was predicated on a market power analysis rejected in *Time Warner*, the competition basis for the condition obviously can no longer be considered valid.

III. CU MISCHARACTERIZES THE EFFECT OF *TIME WARNER* ON AT&T'S PARTNERSHIP INTEREST IN TWE.

As explained in AT&T's Comments, the *Time Warner* decision undermines both of the *Merger Order*'s reasons for attributing TWE subscribers to AT&T. The D.C. Circuit vacated the limitation on a limited partner's sale of programming to the partnership. *See Time Warner*, 240 F.3d at 1143. Further, the Court's rationale for so doing — "that the no-sale criterion bears no rational relation to the goal" of ensuring that the limited partner does not influence video programming — also undercuts the *Merger Order*'s attribution of TWE's interests to AT&T based upon AT&T's board representation. *See id.*

CU nevertheless insists that "the Commission [cannot] ignore the fact that AT&T sells programming to TWE." CU Reply at 17. The D.C. Circuit's opinion, however, could not be clearer: "the Commission has drawn no connection between the sale of programming and the ability of a limited partner to control programming choices." 240 F.3d at 1143. CU urges that the D.C. Circuit's invalidation of the no-sale criterion has no bearing on the specific facts of this case because "the *Time Warner* decision addressed a generic industry-wide rule." CU Reply at 17. CU once again ignores the sweeping holding of the *Time Warner* decision. The D.C. Circuit held that, even if a seller could exert influence notwithstanding "the independent criterion barring even communications on the video-programming business," that influence would be immaterial for purposes of attribution because any such influence "would depend on the desirability of the partner's programming, *not* on its status as a partner." 240 F.3d at 1143. In fact, the D.C. Circuit went on to negate the possibility of a fact-specific exception such as the one CU posits, noting that the "Commission does not even offer a hypothetical to the contrary." *Id.*

CU asserts a brand new basis for attribution, contending that "[o]f perhaps greatest moment is the fact that AT&T . . . *buys* programming from TWE. CU Reply at 16. In support, CU notes that AT&T purchases from TWE "two of the premiere pay television services — HBO and Cinemax." *Id.* (footnote omitted). CU's statements reflect a fundamental misunderstanding of the Commission's attribution rules. In fact, the Commission has specifically ruled that "[a]n exempt limited partner can be a customer of the partnership" without destroying its insulated status.[2] In light of this holding, CU is plainly wrong to suggest AT&T's purchase of programming from TWE triggers attribution.

As to the second basis for attribution — board representation — CU does not dispute that the *Time Warner* decision requires that the Commission show a rational relationship between board representation and an impact on video programming decisions.

---

2 *In the Matter of Reexamination of the Commission's Rules and Policies Regarding the Attribution of Ownership Interests in Broadcast, Cable Television and Newspaper Entities*, 58 R.R. 2d 604, at ¶ 50, n. 72 (1985).

See CU Reply at 17-18. Instead, CU faults AT&T for only establishing that its board members "lack . . . control power," and failing to attempt to demonstrate a lack of "influence" over or "involvement" in video programming decisions. CU Reply at 18. But this is simply false. AT&T demonstrated — with facts that CU does not dispute — that AT&T lacks both control *and* influence over TWE programming decisions because AT&T's representatives on TWE's board are not involved with programming.[3] AT&T maintained that "[a]ttributing TWE subscribers to AT&T . . . could be rational only if the AT&T representatives have the ability to *influence* or control programming choices, and they plainly have no such ability." AT&T Comments at 14 (emphasis added) (citation omitted). AT&T then explained that under the TWE limited partnership agreement, all "TWE's programming decisions are made by the TWE Management Committee," and "the representatives [AT&T] appointed to the TWE Board — which has *never* met — have no right to be *involved* with the decisionmaking process of the Committee." AT&T Comments at 14-15 (second emphasis added). Additionally, AT&T noted that under the partnership agreement, AOL Time Warner — the general partner of TWE — does not need Board approval to act. AOL Time Warner is permitted to act with the mere approval of Class B Board representatives who are exclusively designated by AOL Time-Warner. As a result, AT&T concluded that its "representatives on the TWE Board have absolutely *no influence* or control over programming." AT&T Comments at 15. Accordingly, under *Time Warner*, there is no rational basis for attributing TWE's interests to AT&T based upon board representation.[4]

* * *

3 *See* AT&T Comments at 14-16. CU also mischaracterizes the statements of Professor John Coffee, AT&T's expert on partnership matters. After reviewing the key provisions of the TWE Limited Partnership Agreement, Professor Coffee specifically concludes that "AT&T and MediaOne simply do not have the power to control decisions, policies, or practices at TWE, and, indeed, have *no involvement in day-to-day management of TWE's cable operations*." AT&T *Ex Parte* Comments, filed in CS Dkt. No. 99-251, at Att. D, ¶ 27 (Dec. of Prof. John C. Coffee, Jr.) (Nov. 24, 1999) (emphasis added). This conclusion makes plain that AT&T has no material involvement in the video programming activities of TWE.

4 Contrary to CU's claims, *see* CU Reply at 14, a limited partner can establish insulation when the attribution criteria are not specifically delineated in the limited partnership agreement. Indeed, the Commission may look at the totality of the circumstances to make such a determination. *See, e.g.*, *In Re Application of Sacramento RSA Limited Partnership*, 9 FCC Rcd. 3182, at ¶ 12 (1994).

For the reasons set out above and in AT&T's Comments, CU's Petition for Reconsideration and Contingent Petition for Further Reconsideration are without merit and should be rejected. AT&T respectfully recommends that the Commission affirmatively declare AT&T in compliance with the ownership condition as that condition must necessarily be modified in light of *Time Warner*, or, at a minimum, continue the suspension of the condition until the Commission completes the reconsideration of its cable ownership limit and attribution rules required by the *Time Warner* court's remand.

Respectfully submitted,

Betsy J. Brady (MHH)

Betsy J. Brady
Vice President
Federal Government Affairs
AT&T Corp.

cc: Attached Service List

134310.2

CERTIFICATE OF SERVICE

I, Robin Smith, do hereby certify that I caused one copy of the foregoing *Ex Parte* Letter of AT&T Corp. to be served by hand delivery on the following parties this 6th day of June, 2001.

Magalie R. Salas
Secretary
Federal Communications
Commission
445 12th Street, SW
Room TW-A325
Washington, DC 20554

James Bird
Federal Communications Commission
Office of the General Counsel
445 12th Street, SW
Room 8-C818
Washington, DC 20554

Royce Dickens Sherlock
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-A729
Washington, DC 20554

Linda Senecal
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Room 3-A734
Washington, DC 20554

Cheryl A. Leanza
Andrew Jay Schwartzman
Harold J. Feld
Media Access Project
950 18th Street, NW
Suite 220
Washington, DC 20006

Jane Mago
General Counsel
Federal Communications Commission
445 12th Street, S.W.
Room 8-C723
Washington, DC 20554

Sarah Whitesell
Associate Bureau Chief
Cable Services Bureau
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Daniel Wang
International Transcription Service
1231 20th Street, N.W.
Washington, DC 20036-2307

Robin Smith

Robin Smith