

FCC MAIL ROOM

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

2001 NOV 13 A 10: 11

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 RECEIVED

ORDER

Adopted: November 6, 2001

Released: November 13, 2001

By the Commission: Commissioner Copps concurring and issuing a statement.

I. INTRODUCTION

1. In this *Order*, we deny Consumers Union's Petition for Reconsideration of our March 16, 2001, order suspending the March 20, 2001, and May 19, 2001, compliance deadlines established in this proceeding, and conclude that it is appropriate to continue the suspension of the deadlines pending resolution of issues involving our horizontal and vertical ownership limits and attribution benchmarks, which we are reviewing on remand from the United States Court of Appeals for the D.C. Circuit.¹ We have recently issued a Further Notice of Proposed Rulemaking to consider revising these rules.²

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, Order, 16 FCC Rcd 5835 (2001) ("March 16, 2001 Order"). See *Time Warner Entertainment Co., L.P. v. Federal Communications Commission*, 240 F.3d 1126 (D.C. Cir. 2001) ("Time Warner"); *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*, Memorandum Opinion and Order, 15 FCC Rcd 9816 (2000) ("June 6, 2000 Order"); Consumers Union, Consumer Federation of America, and Media Access Project, Petition for Reconsideration and Contingent Petition for Further Reconsideration, filed April 13, 2001 ("Consumers Union Petition for Reconsideration").

²*Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, The Commission's Cable Horizontal and Vertical Ownership Limits and Attribution Rules, Review of the Commission's Regulations Governing Attribution of Broadcast and Cable/MDS Interests, Review of the Commission's Regulations and Policies Affecting Investment in the Broadcast Industry, Reexamination of the Commission's Cross-Interest Policy*, CS Docket Nos. 98-82 and 96-85, MM Docket Nos. 92-264, 94-150, 92-51, and 87-154, Further Notice of Proposed Rulemaking, FCC 01-263 (rel. Sept. 21, 2001) ("Further Notice").

II. BACKGROUND

2. Our *June 6, 2000 Order* granting the subject application to permit AT&T's acquisition of MediaOne, was conditioned on AT&T, by May 19, 2001, either (a) divesting its interests in Time Warner Entertainment, L.P. ("TWE"), (b) terminating its involvement in video programming activities, or (c) divesting its interests in other cable systems, such that it would have attributable ownership interests in cable systems serving no more than 30% of subscribers to multichannel video programming distribution ("MVPD") services nationwide.³ To ensure that AT&T took timely steps towards compliance, the *June 6, 2000 Order* established a series of interim compliance dates, including a deadline of March 20, 2001, at which time AT&T would report whether it would be in compliance with the conditions on the grant of the application by May 19, 2001. If it could not be in compliance by that date, AT&T was required to submit a proposed irrevocable trust agreement that it would implement by May 19, 2001, to effectuate sale of the assets necessary to carry out its elected compliance option.⁴

3. On March 2, 2001, the United States Court of Appeals for the D.C. Circuit released its *Time Warner* decision, in which it reversed and remanded our horizontal ownership and affiliated programming limits, as well as certain aspects of our ownership attribution rules.⁵ In light of the D.C. Circuit's ruling, we suspended the forementioned merger order compliance deadlines pending further review of the relationship between the *Time Warner* decision and the merger order conditions.⁶

4. On April 13, 2001, the Consumers Union, Consumer Federation of America, and the Media Access Project filed a Petition for Reconsideration of the *March 16, 2001 Order*, which includes a contingent petition for reconsideration of the *June 6, 2000 Order* and the Commission's order denying reconsideration of the *June 6, 2000 Order*.⁷ The Consumers Union Petition for Reconsideration of the *March 16, 2001 Order* requests that the Commission reverse the *March 16, 2001 Order* and enforce the merger conditions of the *June 6, 2000 Order*, or that it reopen the AT&T-MediaOne merger proceeding in order to conduct a new public interest analysis of the application.⁸ In light of the *Time Warner* decision and the Consumers Union Petition for Reconsideration, we sought comment on what effect, if any, the court's

³*June 6, 2000 Order*, 15 FCC Rcd at 9836.

⁴*June 6, 2000 Order*, 15 FCC Rcd at 9895.

⁵*In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Limits*, MM Docket No. 92-264, Third Report and Order, 14 FCC Rcd 19,098, 19,128 (1999); and *Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Implementation of Cable Act Reform Provisions of the Telecommunication Act of 1996, Review of the Commission's Cable Attribution Rules*, CS Docket Nos. 98-82, 96-85, Notice of Proposed Rulemaking, 13 FCC Rcd 12,990 (1998) and Report and Order, 14 FCC Rcd 19,014 (1999); *Time Warner*, 240 F.3d at 1136.

⁶*March 16, 2001 Order*.

⁷*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, Order on Reconsideration, 16 FCC Rcd 5610 (2001) ("*Reconsideration Order*"); Consumers Union Petition for Reconsideration.

⁸Consumers Union, Consumer Federation of America, and Media Access Project, Petition for Reconsideration and Contingent Petition for Reconsideration, filed April 13, 2001 ("*Consumers Union Petition for Reconsideration*").

ruling has on the merger conditions imposed in the *June 6, 2000 Order*.⁹ Specifically, we sought comment on whether to proceed with enforcing the merger conditions in light of the *Time Warner* decision.¹⁰

III. DISCUSSION

5. AT&T argues that we should eliminate the ownership divestiture condition and deem AT&T in compliance with the *June 6, 2000 Order* as a result of the *Time Warner* decision.¹¹ At a minimum, AT&T urges us to continue to suspend the compliance deadlines for the *June 6, 2000 Order* until such time as we adopt new ownership and attribution rules.¹² AT&T contends that requiring compliance with the ownership divestiture condition would force AT&T to comply with the horizontal ownership limit overturned in the *Time Warner* decision. AT&T claims that the public interest analysis in the *June 6, 2000 Order* is the same as that rejected by the D.C. Circuit in the *Time Warner* decision.¹³ Furthermore, AT&T argues that the *Time Warner* decision invalidates the sale of programming prong of the insulated limited partner exemption to our ownership attribution rules, which we relied upon in our *June 6, 2000 Order*, in holding that TWE and Time Warner, Inc. ("TWI") are attributable to AT&T.¹⁴ Based on the rationale of that holding, AT&T contends that the *Time Warner* decision also serves to invalidate the *June 6, 2000 Order*'s reliance on the officers/directors ownership attribution rule, whereby we found TWE attributable to AT&T.¹⁵

6. AT&T also requests that we deny the Consumers Union Petition for Reconsideration of the *March 16, 2001 Order*.¹⁶ In its Petition for Reconsideration, Consumers Union seeks reconsideration of the *March 16, 2001 Order* that suspended the deadlines for compliance with the *June 6, 2000 Order* and requests that the Commission maintain those deadlines based on the Commission's public interest authority. In the event the Commission denies this reconsideration request, the Consumers Union seeks, through its Contingent Petition for Further Reconsideration, further reconsideration of the *June 6, 2000 Order* and the Commission's decision denying reconsideration thereof in order that the Commission might conduct a full public interest analysis and, as a result, require AT&T to divest its ownership interest in TWE within 75 days of action on the Consumers Union Petition for Reconsideration.¹⁷ Consumers Union argues that the public interest analysis underlying the *June 6, 2000 Order* and new facts and changed circumstances support its reconsideration request, citing AT&T's October 25, 2000, announcement of its restructuring into four separate companies; the Commission's *December 21, 2000 Order*¹⁸ determining that AT&T elected to divest its TWE ownership by May 19, 2001; the January 22, 2001, finding that the AOL-Time Warner merger's deleterious effects would be remediated by AT&T's

⁹*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, Public Notice, DA 01-913 (rel. Apr. 18, 2001) ("*Public Notice*").

¹⁰*Id.*

¹¹AT&T *Public Notice* Comments at 1-2, 32.

¹²*Id.*

¹³*Id.* at 3-12, 17-19.

¹⁴*Id.* at 4, 12-16.

¹⁵*Id.*

¹⁶*Id.* at 5, 19-32.

¹⁷Consumers Union Petition for Reconsideration at 1, 14-15.

¹⁸*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, 16 FCC Rcd 456 (2000) ("*December 21, 2000 Order*").

divestiture of TWE as required by the *June 6, 2000 Order*,¹⁹ and the March 2, 2001, *Time Warner* decision invalidating the cable horizontal ownership rules.²⁰

7. AT&T contends that Consumers Union's request is procedurally improper because the Commission has already denied similar requests for relief in the *June 6, 2000 Order* and the *Reconsideration Order*.²¹ Moreover, AT&T believes that Consumers Union is primarily making arguments in order to maintain the horizontal ownership limit rules, arguments which it alleges have now been rejected twice by the courts.²² AT&T contends that the Consumers Union Petition for Reconsideration is baseless on the merits for the following reasons. First, AT&T argues that the *Time Warner* decision invalidated the cable ownership rule and thereby undermined the merger order ownership condition. Second, AT&T contends that the combination of the court's invalidation of the sale of programming attribution rule, AT&T's subsequent divestiture of several cable systems, and AT&T's intention to divest some of its programming interests has undermined the ownership divestiture condition's rationale. Next, AT&T claims that the increasing competition from DBS providers diminishes the necessity of an ownership condition designed to promote diversity and competition in the video programming marketplace. Further, AT&T argues that Commission concerns raised in the *AOL-Time Warner Merger Order* regarding the impact of AT&T's limited partnership interest in TWE on competition for cable modem services are different from the concerns addressed by the AT&T MediaOne merger condition, which seeks to address potential harm to diversity in video programming services. Finally, AT&T vigorously denies the Consumers Union claim that AT&T's recently proposed restructuring indicates that AT&T will not vigorously continue its commitment to deploy local telephony services.²³

8. In its reply comments, Consumers Union seeks a reversal of our *March 16, 2001 Order* and asks us to require AT&T to comply with the ownership divestiture condition from the *June 6, 2000 Order*.²⁴ Consumers Union contends that the ownership divestiture condition is fully supported by our public interest analysis in the *June 6, 2000 Order*.²⁵ Consumers Union notes that the D.C. Circuit's *Time Warner* decision did not negate our diversity rationale for the ownership divestiture condition from the *June 6, 2000 Order*, but merely rejected and remanded the diversity rationale for the horizontal ownership limit.²⁶ Consumers Union further argues that TWE remains fully attributable to AT&T under the Commission's attribution rules, and therefore TWE must be divested.²⁷ Consumers Union contends that the court's invalidation of our sale of programming attribution rule does not preclude us from finding that the AT&T-MediaOne merger will allow AT&T to exercise influence over the programming decisions of TWE, and that AT&T has failed to prove that it is sufficiently insulated as a limited partner from exercising influence over TWE programming decisions. Consumers Union notes that AT&T both sells

¹⁹*Applications for Consent to the Transfer of Control of Licenses and Section 214 by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, CS Docket No. 00-30, Memorandum Opinion and Order, 16 FCC Rcd 6547 (2001) ("*AOL-Time Warner Merger Order*").

²⁰Consumers Union Petition for Reconsideration at 1, 14-15.

²¹AT&T *Public Notice* Comments at 5, 19-32.

²²*Id.*

²³*Id.*; see also Letter from Betsy J. Brady, Esq, Vice President, AT&T, to W. Kenneth Ferree, Chief, Cable Services Bureau, FCC, dated June 6, 2001.

²⁴Consumers Union *Public Notice* Reply at 1-3.

²⁵*Id.*

²⁶*Id.* at 4-9.

²⁷*Id.* at 10-18.

and buys programming from TWE and it has representation on TWE's Board of Directors.²⁸ Finally, Consumers Union contends that the interim safeguards in the *June 6, 2000 Order* are insufficient to justify allowing AT&T to continue to hold its interest in TWE post-merger because the interim conditions fail to address the impact of AT&T's programming influence over TWE.²⁹

9. Consumers Union requests that, if the *March 16, 2001 Order* is not reversed, the Commission grant its request for further reconsideration and thereby reopen the AT&T-MediaOne proceeding to conduct a new public interest analysis in order to require AT&T to divest its interest in TWE.³⁰ Consumers Union contends that such a grant is procedurally proper because there are changed circumstances as a result of the *March 16, 2001 Order*, which suspended the *June 6, 2000 Order* ownership divestiture condition, and also because we have not previously denied its requested relief as suggested by AT&T.³¹ Consumers Union believes that its petition is appropriate on the merits for the following reasons: (1) the *Time Warner* decision did not invalidate the merger ownership condition and its underlying diversity rationale; (2) the Commission failed to address certain video programming harms in the AOL-Time Warner proceeding "because it found they were remediated by AT&T's divestiture of TWE" as provided in the *June 6, 2000 Order*; and (3) AT&T has not yet spun-off Liberty Media.³²

10. The Commission applied a four-part public interest test to AT&T and MediaOne's application to transfer MediaOne's cable television licenses to AT&T.³³ In applying this test, the Commission concluded that the merger of these two companies would result in violation of the cable horizontal ownership statute and rules, and required that AT&T comply with the ownership divestiture condition as described in the *June 6, 2000 Order*.³⁴ Thus, the cable horizontal ownership and attribution rules form a significant and integral portion of the rationale underlying the *June 6, 2000 Order*. Regardless of whether the divestiture condition is thought of as a specific application of the rules overturned by the D.C. Circuit in the *Time Warner* case or the result of an analysis of public interest issues undertaken independently as part of the license transfer process, the issues are sufficiently linked in terms of the underlying rationale that the pending remand necessarily implicates the question of whether the conditions are sustainable and should continue to be enforced. Accordingly, we believe the prudent and proper course of action is to continue the suspension of the deadlines for compliance with the ownership divestiture condition from the *June 6, 2000 Order* until we have resolved the issues remanded to us by the D.C. Circuit through our *Further Notice*.³⁵ Based on that conclusion, we also deny the

²⁸*Id.*

²⁹*Id.* at 18-19.

³⁰*Id.* at 20.

³¹*Id.* at 19-21.

³²*Id.*; *AOL-Time Warner Merger Order*. We note that AT&T has completed its spin-off of Liberty Media Corporation effective August 10, 2001. See AT&T Corp., "AT&T Completes Split Off of Liberty Media," News Release (August 10, 2001).

³³*June 6, 2000 Order*, 15 FCC Rcd at 9836.

³⁴*Id.*

³⁵The interim safeguards prescribed in Appendix B of the *June 6, 2000 Order* will continue in force. AT&T acknowledges their continued application. See AT&T *Public Notice* Comments at 18-19; Letter from Stephen C. Garavito, General Attorney, AT&T, to Magalie Roman Salas, Secretary, FCC, dated June 15, 2001. The interim safeguards require AT&T to take specific measures to minimize its involvement in TWE's video programming activities. See *June 6, 2000 Order*, 15 FCC Rcd at 9898-9905. We disagree with Consumers Union that the interim safeguards are insufficient to justify allowing AT&T to continue to hold its interest in TWE post-merger. See Consumers Union *Public Notice* Reply at 18-19. As explained in the *June 6, 2000 Order*, we considered the interim conditions sufficient to limit the merged firm's involvement in TWE's video-programming activities during the period granted by the Commission for compliance with the merger order and the horizontal ownership rules. See

(continued...)

Consumers Union Petition for Reconsideration and likewise determine that it is inappropriate at this time to reopen the merger proceeding to conduct a new public interest analysis, as requested by its Contingent Petition for Further Reconsideration. We reserve the question of whether the specific divestiture conditions should continue to be enforced independent of the rules pending completion of the remand process.

IV. CONCLUSION

11. For the reasons outlined above, we deny the Consumers Union Petition for Reconsideration and Contingent Petition for Further Reconsideration and continue the suspension of the *June 6, 2000 Order* compliance deadlines pending the outcome of our *Further Notice*.

V. ORDERING CLAUSE

12. Accordingly, IT IS ORDERED, that both the interim March 20, 2001 deadline and the final compliance deadline of May 19, 2001, prescribed in the *June 6, 2000 Order* in this proceeding ARE SUSPENDED pending further order of the Commission.

13. IT IS FURTHER ORDERED, that pursuant to Sections 4(i), 214(a), 214(c), 309, 310(d), 405 and 613(f) of the Communications Act of 193, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), 533(f), 405, and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the petition for reconsideration and contingent petition for further reconsideration jointly filed by the Consumers Union, the Consumer Federation of America, and the Media Access Project ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION



Magalie Roman Salas
Secretary

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June 6, 2000 Order, 15 FCC Rcd at 9849. We continue to believe that these interim safeguards will adequately limit AT&T's involvement in TWE's video programming activities post-merger pending resolution of issues involving our horizontal ownership and affiliated programming limits. See Consumers Union *Public Notice Reply* at 18-19.

CONCURRING STATEMENT OF COMMISSIONER MICHAEL J. COPPS

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

In approving the transfer of Media One to AT&T, the Commission conducted the required public interest analysis. In this analysis the Commission asked: Does the transaction 1) violate the Communications Act or any other statute; 2) violate Commission rules; 3) substantially frustrate the Commission's enforcement of or interfere with the objectives of the Communications Act or other statutes; or, 4) promise to yield affirmative public interest benefits.

After completing this analysis, the Commission *conditionally* approved the transfer, subject to the combined company's divestiture of certain interests. It is indisputable that the conditions were an essential part of the Commission's finding that the transaction served the public interest.

I am sympathetic to the petitioners' argument that because the conditions were essential to the approval of the transaction, they should be enforced, or, in the alternative, the transaction should be reanalyzed to determine whether, as presently constituted, it continues to serve the public interest.

Nevertheless, I reluctantly concur in the decision today, because we have recently taken steps to evaluate the impact of the D.C. Circuit decision on our cable ownership rules, and on the matter before us. We must, however, remain cognizant that as time continues to pass, suspension of compliance with these conditions becomes tantamount to their elimination. We therefore should complete the proceeding on our cable ownership rules expeditiously, and reevaluate the conditions on this transaction in light of our conclusions in that proceeding.

In the future, as we evaluate transactions, it is crucial that we remain cognizant of the public interest and the principles of competition and diversity – all found in the Communications Act – that guide our decision making and rely on those principles as we make our decisions.