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August 9, 2002

Ex Parte

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *AT&T/Comcast License Transfer Application*, MB Docket No. 02-70

Dear Ms. Dortch:

This letter responds to the July 22, 2002, *ex parte* submission by Prime Communications, Inc. ("Prime") in the above-captioned proceeding. Prime's allegations that AT&T Broadband has somehow monopolized a Massachusetts and New Hampshire "cable advertising" market are the subject of pending federal court litigation, in which Prime seeks the same relief it seeks here.¹ The Commission has consistently rejected attempts to pursue private disputes through the Commission's license assignment and transfer review process,² and it should summarily reject Prime's attempt to enlist the Commission in Prime's private (and meritless) antitrust action.

¹ *Prime Communications, Inc. v. AT&T Corp. and AT&T Broadband LLC*, U.S. District Court for the District of Massachusetts, Civil Action No. 01-CV-10805-MLW.

² *E.g., In re Applications of Vodafone Airtouch, PLC and Bell Atlantic Corporation, et al., for Consent to Transfer of Control or Assignment of Licenses and Authorizations*, Docket DA 02-1374, File Nos. 0000032969, *et al.*, Order on Further Reconsideration, 2002 WL 1291255 (rel. June 13, 2002); *In re Applications of McCaw Personal Communications, Inc., for consent to Transfer of Control of MCI Airsignal Inc.*, File No. 29532-CL-TC-86 *et al.*, Memorandum Opinion and Order, 1986 WL 292005 (1986). "The Commission has consistently indicated it will not adjudicate claims arising out of private contractual agreements; the appropriate forum for private litigation is the courts." *In re Applications of Metromedia Company for Consent to Transfer of Control of Metromedia Company*, Docket No. DA 86-334, Memorandum Opinion and Order, 1 F.C.C.R. 1227, 1986 WL 291290 (1986).

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In any event, it is clear that there is no factual or legal basis for the Commission to grant the relief Prime seeks. Prime contends that AT&T Broadband has denied Prime the ability to buy cable advertising time. In fact, Prime has bought more cable advertising time in the 15 months since AT&T Broadband stopped treating Prime as an ad agency than it did before. Prime remains free to (and does) place ads through third parties with AT&T Broadband on behalf of Prime's auto dealer clients.

Prime's contention that AT&T Broadband unlawfully dominates cable advertising in Massachusetts fails to state a claim, because there is no relevant "cable advertising" market. Rather, cable competes for advertising dollars with other media, including (but by no means limited to) local and regional newspapers, DBS, radio and television broadcast media, and direct mail. Indeed, Prime's own submissions and evidence in the pending federal court litigation demonstrate both that there is no separate relevant market for cable advertising, and that AT&T Broadband could not possibly exercise any market power over advertising. For example, the December 2001 report of Prime's expert witness states that the relevant product market is not "the smaller market for cable television advertising services," but rather the much larger market for all "advertising services to automotive dealers."³ And Prime's executives have explained in sworn deposition testimony that their auto dealer clients set overall advertising budgets and that Prime helps the dealer decide how to allocate those advertising dollars among *competing* media. Indeed, Prime's website and its own profit and loss statements confirm that advertising in local newspapers and through direct mail are much more important to local auto dealers than advertising on cable television.⁴

Prime's suggestion that AT&T Broadband's use of the Vehix website threatens to monopolize the Internet or the market for online automotive advertising and customer relationship management products is equally infirm. Vehix competes with other well-established services, including Cars.com, carfind.com, and Autotrader.com, in addition to Prime's own CableCars.com offering. Just days ago Prime submitted a second expert report which expressly states that all of the products or services available through Vehix are also "presently available competitively on the open market," and which concludes that there is an "established competitive

³ Preliminary Expert Report of Professor Lee W. McKnight, dated December 4, 2001, at 24.

⁴ Prime claims total gross revenues are somewhat more than \$20 million per year. Of this, it claims that no more than \$200,000 (or one percent) come from selling cable advertising. The vast majority of Prime's revenues come from selling newspaper advertising and direct mail sales. Prime's revenues from selling time on its own broadcast television show, and from selling promotional items, also are much more significant than its revenues from cable advertising. (All of these figures are for the period before AT&T chose not to permit Prime to place cable ads directly, *i.e.* before any of the conduct of which Prime complains in its lawsuit and in its *ex parte* presentation.)

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market for online automobile advertising services.”⁵ And Prime itself has acknowledged that 50-60% of auto dealers in Prime’s territory use Autotrader.com, that a large portion of Prime’s own clients also use cars.com, and that many auto dealers make use of multiple listing services.⁶

In any case, the proposed transfer of licenses will do nothing to change the concentration of cable system ownership in the eastern Massachusetts and southern New Hampshire region that is the subject of Prime’s lawsuit. Thus, the private dispute of which Prime complains is entirely unrelated to the proposed merger, and the Commission should, for lack of merger specificity, decline to address Prime’s assertions or demands.

⁵ “Prime Communications v. AT&T – An Economic Analysis,” by Michael A. Turner, Ph.D., dated July 31, 2002, at 31 & 37-38.

⁶ Prime suggests that AT&T’s use of Vehix to make cable advertising more attractive to automobile dealers constitutes an unlawful tying arrangement. That claim would have no merit even if there was such a thing as a separate market for cable advertising (which, of course, there is not). There can be no tying claim where – as here – dealers are free to purchase cable advertising time while choosing not to obtain or use Vehix. *See, e.g., Data General Corp. v. Grumman Systems Support Corp.*, 36 F.3d 1147, 1180 (1st Cir. 1994) (“Proof of a tying arrangement generally requires evidence that the supplier’s sale of the tying product is conditioned upon the unwilling purchase of the tied product from the supplier or an unwilling promise not to purchase the tied product from any other supplier”).

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Sincerely,

David L. Lawson

cc: James Bird
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