Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of Applications for Consent to the Transfer of Control of Licenses	)	
Comcast Corporation and AT&T Corp., Transferors,	)	MB Docket No. 02-70
AT&T Comcast Corporation, Transferee	)	

To: The Commission

MOTION OF PETITIONERS CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, CENTER FOR DIGITAL DEMOCRACY, AND MEDIA ACCESS PROJECT TO REQUIRE APPLICANTS AT&T BROADBAND AND COMCAST TO PROVIDE INFORMATION MATERIAL TO CONSIDERATION OF APPLICATION TO TRANSFER CONTROL OF LICENSES

On August 23, 2002, Applicants AT&T Broadband and Comcast Corp. ("Applicants") filed a copy of the proposed agreement between AT&T, Comcast and AOL Time Warner ("AOL TW") to divest AT&T's existing ownership interest in Time Warner Entertainment, LP ("TWE"). Although the Divestiture Agreement makes frequent reference to their "High Speed Internet Agreement" ("HSIA"), purportedly contained in "Appendix D" thereto, the parties have inexplicably failed to submit the HSIA to the Commission for review.

Pursuant to 47 CFR §1.41, Petitioners submit this *Motion* requesting the Commission require the Applicants to submit the HSIA to the Commission for consideration in this proceeding. The HSIA directly implicates concerns raised by Petitioners in their *Petition to Deny*. The agreement also implicates the Department of Justice consent decree entered into by AT&T and MediaOne,[1]

[1] *United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, *Complaint and Proposed Final Judgment* (D.D.C., filed May 25, 2000).

(incorporated by reference into the Commission's *AT&T MediaOne Merger Order*),[2] the consent decree entered into by AOL Time Warner and the Federal Trade Commission,[3] and the Commission's own findings in the *AOL Time Warner Merger Order*.[4]

Based on the accounts in the press, the High Speed Internet Agreement constitutes a material amendment to the Application and a significant blow to the Commission's longstanding position that private negotiations will create a regime wherein subscribers enjoy a choice broadband providers in a competitive environment that preserves the Internet's open nature. Press stories indicate that the Agreement sets terms for carriage of AOL's high-speed Internet service on the future AT&T Comcast's systems; these terms establish that the cable industry will treat broadband like a "premium movie channel" rather than as an interactive communications medium – precisely the opposite of the dynamic, interactive Internet of today. *New York Times*, "A New Model for AOL May Influence Cable's Future,"August 26, 2002, C1; Dan Gilmore, *The San Jose Mercury News*, "AOL Capitulates, Gives Up Struggle for 'Open Access,'" September 1, 2002.

Previous decisions of the Commission make plain that the Commission must consider the potential effects of the merger on the broadband Internet market as part of its public interest determination under the Section 310(d). *AOL TW Merger Order*, 16 FCCRcd at 6569-70; *see also United States v. FCC*, 652 F.2d 72, 81-88 (D.C. Cir. 1980) (*en banc*) (FCC must consider competition as

[2] *In re Applications of Mediaone Group and AT&T Corp.*, 15 FCCRcd 9816 (2000).

[3] *In re AOL and Time Warner, Inc.* FTC Docket No. C-3989 (2000).

[4] *In re Applications of AOL and Time Warner, Inc.*, 16 FCCRcd 6547 (2001).

part of public interest analysis). The Commission cannot possibly make such an evaluation, however, without seeing the agreement. In the past, the Commission has not hesitated to "stop the clock" on its self-imposed and entirely voluntary 180-day deadline for deciding mergers when the Applicants have declined to submit relevant material information. *See, e.g, Letter of W. Kenneth Ferree to Pantelis Michalopous and Gary M. Epstein*, March 7, 2002, http://www.fcc.gov/transaction/echostar-directv/fccextensionletter030702.pdf. Indeed, the Commission has only recently warned broadcast applicants situated essentially identically to these applicants that

> the failure to submit documentation that contains all material terms of an agreement for the assignment or transfer of control of a broadcast authorization, including the sales price, will delay processing of the application and may result in the Bureau providing the public with an additional thirty-day period, following the submission of all such documentation, for the filing of petitions to deny.

LUJ, Inc., FCC 02-235 (August 22, 2002) at p. 4-5.

Failure to evaluate the HSIA would violate the Commission's duty under the Communications Act and would constitute grounds for reversal. *See, e.g., Weyburn Broadcasting L.P. v. FCC*, 984 F.2d 1220 (D.C. Cir. 1993); *Citizens Committee to Preserve WGKA-AM and FM v. FCC*, 436 F.2d 263 (D.C. Cir. 1970). Accordingly, the Commission should refuse to complete its review of the merger until Applicants submit the HSIA and the Commission receives comments on it from the parties.[5]

ARGUMENT

1. LEGAL FRAMEWORK: THE COMMISSION MUST CONSIDER ALL RELEVANT

[5]Petitioners recognize that the portions of the HSIA may fall within the Commission's protective order. In the event the Applicants submit the HSIA under the terms of the protective order already issued in this proceeding. Petitioners will, of course, abide by the terms of the protective order.

FACTORS BEFORE **ISSUING A DETERMINATION THAT A LICENSE TRANSFER SERVES THE PUBLIC INTEREST.**

Section 310(d) of the Communications Act of 1934 prohibits the Commission from transferring licenses unless such transfer would serve the public interest. 47 U.S.C. §310(d). Since the earliest days of the Commission, this responsibility has included an obligation by the Commission to consider all "relevant factors." *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1490 (D.C. Cir. 1995); *Mester v. United States*, 70 F. Supp. 118 (E.D.N.Y) *aff'd per curiam,* 332 U.S. 749 (1947). Only two weeks ago, the Commission reaffirmed the importance of including all relevant information in applications for transfers and stressing the Commission's reliance of public participation in the review of transactions and the correlative need to insure "'easy public access to sales agreements and contracts...." *LUJ, Inc., supra. at 3.* While that case involved the transfer of broadcast authorizations, this is also a Title III case and every policy and legal consideration in that case has equal or greater bearing here.

As an initial matter, it falls to the Applicants to voluntarily provide all relevant information. *Id.* The Commission may refuse to consider an application lacking relevant information, and may "stop the clock" if an Applicant fails to provide information requested by the Commission. *Letter of W. Kenneth Ferree, supra.* ("stopping the clock" on Echostar/DirecTV merger until Applicants provided requested information); *Letter of Christopher Wright, FCC General Counsel, to Arthur Harding and Peter Ross*, March 6, 2000, http://www.fcc.gov/mb/aoltw/aoltwextlet.doc (declining to consider AOL/ Time Warner Application until Applicants submitted information relevant to broadband market and other concerns). Ultimately, the failure of Applicants to provide relevant information must result in the rejection of the Application, because the burden lies with Applicants to demonstrate that the merger serves the public interest. *See, e.g., New Orleans Channel 20, Inc.*

v. FCC, 830 F.2d 361 (D.C. Cir. 1987).

The failure of the Applicant to provide relevant information, however, does not excuse the Commission from examining all "relevant factors" that are brought to its attention. The Commission has an affirmative duty to investigate and to ensure that the merger serves the public interest. Failure to discharge this duty properly is arbitrary and capricious and subject to reversal by the courts. *See, e.g., Weyburn Broadcasting L.P. v. FCC,* 984 F.2d 1220, 1231 (D.C. Cir. 1993) (error to reach conclusion when "a full airing of the financial qualifications issue never occurred"); *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 259 (D.C. Cir 1973) (en banc) (even in the absence of a *Petition to Deny* Commission has responsibility to make a public interest determination on a proper record – when Petitioners raise the issue, the FCC must investigate thoroughly); *Citizens Committee to Preserve WGKA-AM and FM v. FCC*, 436 F.2d 263 (D.C. Cir. 1970) (error for Commission to refuse to investigate disputed material fact).

As discussed below, the HSIA is clearly a "relevant factor" that the Commission must consider when evaluating whether the merger serves the public interest. Accordingly, the Commission must request the HSIA from Applicants and "stop the clock" on the merger until Applicants provide it.

2. THE HIGH SPEED INTERNET AGREEMENT IS CLEARLY A "RELEVANT **FACTOR" THE COMMISSION MUST CONSIDER BEFORE APPROVING THE MERGER.**

Applicants have indicated to Petitioners that they do not consider the HSIA "relevant" to the merger in that it constitutes an entirely separate and independent agreement.

The HSIA is a relevant factor for the following reasons – (1) The Commission has previously determined that it must determine the effect of the merger on the residential broadband market; (2) The HSIA implicates the same antitrust concerns raised by the Department of Justice in the

AT&T/MediaOne Consent Order; (3) the agreement would not happen "but for" the merger; and (4) the description of the merger indicates that Petitioners correctly analyzed the scope of AT&T Comcast's market power by imposing on AOL TW – the second largest cable company and the largest narrowband Internet service provider (ISP) – highly unprofitable terms similar to those cable operators imposed upon programmers prior to the 1992 Cable Act.[6]

1. The Commission Has Previously Determined That It Must Consider the Effects of the Merger on the Residential Broadband Market.

As the Commission has explained, "the Commission's review encompasses an examination of anticompetitive effects but also evaluates...the potential impact of the proposed transaction on the rules, policies and objectives of the Communications Act." *AOL TW Merger Order*, 16 FCCRcd at 6549-50.

This review includes consideration of the impact of the merger on the development and deployment of broadband communications. *Id.* at 6568-70. As the Commission found in *AOL TW*, the Commission would violate its statutory responsibilities if it failed to consider the impact of the merger on the high-speed broadband market. *Id.* 6550-51.

2. The HSIA Raises Antitrust Concerns **Identified By the Department of Justice in Its AT&T/MediaOne Consent Decree.**

In addition, the HSIA directly implicates antitrust concerns raised in the AT&T/MediaOne merger by the DoJ. In the *AT&T MediaOne Consent Decree*, the DoJ identified the residential broadband market as a distinct market. *DoJ Amended Complaint*, ¶¶13-20. It further identified the

[6]The Applicants have also intimated to Petitioners that they believe the HSIA serves the public interest by providing subscribers to the future AT&T Comcast with the choice of a second ISP. Petitioners dispute this based assertion based on the terms reported in the media. In asserting such an argument, however, Applicants miss the point. As discussed in Part I above, the Commission has an ***independent*** obligation to investigate the facts of the merger. It cannot rely on Applicants' word alone.

joint interest of Time Warner and AT&T in TWE as raising significant anti-competitive concerns. *Id.* at ¶29-34.

The DoJ required more than divestiture, however. As the DoJ explained:

> Even if AT&T divests its interest in the ServiceCo joint venture, however, those risks to competition could be re-created through contractual arrangements between AT&T and Time Warner that would have competitive effects similar to the effects of the ServiceCo joint venture.

United States v. AT&T Corp. and MediaOne Group, *Competitive Impact Statement* at 15. The DOJ therefore prohibited outright joint ventures between Time Warner and AT&T to offer broadband Internet access for two years, and required permission from DoJ prior to engaging in any such activties thereafter. *Id.* In its order approving the AT&T/MediaOne merger, the Commission expressly relied upon the Department of Justice conditions as alleviating the public interest concerns raised by the common interests of AT&T and Time Warner. *AT&T/MediaOne Merger Order*, 15 FCCRcd at 9870-71.

The HSIA agreement clearly implicates these concerns. As DoJ predicted, AT&T and Time Warner seek to recreate the anticompetitive effects of their joint interest through contracts. The Commission must therefore examine the agreement before it can satisfy its obligations under the statute to determine if the merger serves the public interest.

3. The HSIA Would Not Occur "But For" the Merger.

The TWE Divestiture Agreement makes it clear that the HSIA is central to the TWE Divestiture Agreement and the relationship between AOL Time Warner and the merged AT&T Comcast. The TWE Divestiture Agreement prohibits any change in the HSIA. In the event that either the FCC, the Department of Justice, or the Federal Trade Commission takes any action to modify the HSIA or prohibit operation of the HSIA, AOL TWE may withdraw from the entire TWE

Divestiture Agreement. *See* TWE Divestiture Agreement §9.1(c).

In addition, press reports make it clear that, but for the AT&T Comcast merger, this deal would not occur. All press reports point to the intervention of Brian Roberts and his decision to "make this happen" as the critical element that broke the two-year log-jam between AT&T and AOL. *See, e.g., Wall St. Journal*, "AOL to Unwind TWE Partnership,"August 21, 2002, A3.

4. The HSIA Demonstrates the Accuracy of Petitioners' Predictions Regarding the Market Power of AT&T Comcast.

Finally, Petitioners observe that AOL's apparent capitulation is a direct result of the market power AT&T Comcast will wield as a result of the merger. AOL Time Warner agreed to highly unprofitable terms, representing a full retreat for AOL in the face of AT&T Comcast's superior market power. *See USA Today*;"AOL to Offer Broadband on AT&T, Comcast Lines; Step is Part of $9B TWE Deal," MONEY, August 22, 2002 (describing financial terms); Dan Gilmore, *The San Jose Mercury News*, "AOL Capitulates, Gives Up Struggle for 'Open Access,'" September 1, 2002; *Wall St. J.*, "Cable Deal Brings Expansion to America Online, At a Price," August 21 B1; *New York Times*, "A New Model for AOL May Influence Cable's Future,"August 26, 2002, C1 (AOL unable to make headway until it shifted to treating broadband as a "premium movie channel"). The agreement is therefore not merely material to the merger, but proof of Petitioners' conclusions that the combined AT&T Comcast will have sufficient market power to dominate the broadband market (and other markets as well).

Petitioners recognize that the HSIA may contain information the Applicants and AOL Time Warner consider proprietary. The Commission has issued a protective order which addresses these concerns. In any event, the highly sensitive nature of the material cannot relieve the Commission

of its statutory responsibility to examine it. If the Applicants do not trust the Commission to follow its own rules and decline to risk providing the Commission with copies of the agreement, the Applicants can withdraw their merger application. The Commission, however, ***must*** comply with the law and review the agreement before approving the proposed merger.

CONCLUSION

For the above stated reasons, the Commission must require the Applicants to submit the HSIA into the record. If the Applicants refuse, the Commission must "stop the clock," as it did in the DirecTV/Echostar merger, until the Applicants comply.

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