

September 19, 2002

By Electronic Delivery

W. Kenneth Ferree, Chief
Media Bureau
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Ex Parte Notice

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

Dear Mr. Ferree:

AT&T and Comcast submit this letter in the above-captioned proceeding to explain why the “Safeguards Relating to Video Programming” (“Safeguards”) adopted by the Commission in the *AT&T-MediaOne Merger Order*¹ will not and should not apply after the proposed merger between AT&T and Comcast closes and AT&T’s interest in Time Warner Entertainment Company, L.P. (“TWE”) is placed in an irrevocable disposition trust.² Notwithstanding that all of the Safeguards will cease to apply after the TWE Interest is placed in trust, AT&T and Comcast have agreed that post-merger AT&T Comcast would continue to adhere to paragraphs 3-5 of the Safeguards.³

¹ *In re 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 & Order, 15 FCC Rcd. 9816 (2000) (“*AT&T-MediaOne Merger Order*”); *id.* Appendix B (“Safeguards”).

² See Letter from Betsy J. Brady, AT&T Corp., and James R. Coltharp, Comcast Corp., to W. Kenneth Ferree, Chief, Media Bureau, FCC, filed in MB Dkt. No. 02-70 (Aug. 8, 2002) (“Proposed Trust Letter”).

³ See Proposed Trust Letter at 1-2.

Since the Safeguards were adopted, there have been significant legal and factual changes that undermine substantially their continued application. In particular, the U.S. Court of Appeals for the D.C. Circuit issued the *Time Warner* decision, in which it reversed and remanded the Commission's cable horizontal ownership rule and vacated the "program sale" prong of the insulated limited partnership attribution rules.⁴ Given that the Commission adopted the merger conditions, including the Safeguards, because it found that the combination of AT&T and MediaOne would violate the cable horizontal rule and because AT&T's interest in TWE could not be insulated in light of the program sale rule,⁵ the rationale for the Safeguards plainly is no longer viable.

In addition, the Commission expressed concern that the combined AT&T and MediaOne would own a "vast number of programming networks."⁶ However, since the merger, AT&T has dramatically reduced its ownership of programming. For example, AT&T divested its interest in Liberty Media Corporation, reduced its interest in Cablevision Systems Corp. (and, therefore, Rainbow Media Sports Holdings, Inc.) below the 5% attribution benchmark, and sold its interests in The Food Network, Outdoor Life, Speedvision, and the Sunshine Network. The result of these actions is that AT&T is attributable with *over 80 fewer programming services* than it was at the time the Safeguards were adopted. Viewed broadly, the driving concern of the Safeguards -- AT&T's extensive integration into programming -- has been eliminated. More specifically, those Safeguards that relate to Liberty, Cablevision and Rainbow have necessarily become meaningless.

For these reasons alone, AT&T and Comcast believe the Safeguards have lost their vitality and should not apply post-merger. At any rate, the terms of the Safeguards and the *AT&T-MediaOne Merger Order* dictate that the Safeguards sunset once AT&T's TWE Interest is

⁴ *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001) ("*Time Warner*").

⁵ See *AT&T-MediaOne Merger Order* ¶ 38 ("We conclude that the merger will violate the cable horizontal ownership rules and accordingly order the Applicants to take compliance steps as a condition of this Order."); ¶ 49 (noting that, because AT&T post-merger will sell programming to TWE, "the merged firm will be deemed materially involved in TWE's video programming activities, precluding application of the insulated limited partnership exemption"); *AT&T-MediaOne Merger, In re Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Order, 16 FCC Rcd. 5835 (2001) ("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.").

⁶ *AT&T-MediaOne Merger Order* ¶ 58.

placed in an irrevocable disposition trust. As the Applicants have proposed, this will occur at the time of the closing of the AT&T Comcast merger.⁷

The Safeguards state that AT&T shall comply with the enumerated restrictions “during the Compliance Period.”⁸ The “Compliance Period” is defined as the period from the closing of the AT&T-MediaOne merger until AT&T has taken the “Compliance Action.”⁹ The “Compliance Action” will be satisfied when AT&T has taken one of the following steps: (1) divested its TWE Interest; (2) terminated its involvement in TWE’s video programming such that “TWE is no longer attributable to AT&T” under the Commission’s attribution rules; or (3) divested interests in other cable systems so that AT&T serves no more than 30% of all MVPD subscribers nationwide.¹⁰

It is clear that putting an asset into an irrevocable disposition trust approved by the Commission renders the asset non-attributable to the grantor.¹¹ Placing AT&T’s TWE Interest into such a trust therefore satisfies Compliance Action # 2. Once a Compliance Action is satisfied, the Compliance Period is ended, and the Safeguards no longer apply.

Although paragraph 71 of the *AT&T-MediaOne Merger Order* describes Compliance Action # 2 as requiring AT&T to terminate its involvement in TWE’s video programming activities pursuant to the limited partnership exemption and director waiver rules,¹² it is clear that the Commission considered a disposition trust a substitute or equivalent action. Indeed, paragraph 71 itself states that if AT&T is not in compliance by the deadline established by the Commission, it must place into trust the assets it must divest “*pursuant to the compliance*

⁷ See Proposed Trust Letter.

⁸ Safeguards ¶ 1.

⁹ *Id.* ¶ 2(e).

¹⁰ *Id.* ¶ 2(c).

¹¹ See *Broadcast Ownership/Attribution Order*, 47 F.C.C. 2d 997, ¶¶ 53-56 (1984). See also *Infinity Broadcasting Corp.*, 12 FCC Rcd 5012, ¶ 57 (1996) (“*Infinity*”) (“We find that the merged entity would comply with the Commission’s local radio ownership rules...either through the proposed divestiture of stations or through assigning the proposed stations to trusts.”); *Jacor-Clear Channel*, 14 FCC Rcd 6867, ¶ 32 (MMB 1999) (“Under the Commission’s attribution criteria, the ownership interests of beneficiaries will not be attributed to them if they are sufficiently insulated to prevent exercise of control or influence over the trustee.”).

¹² *AT&T-MediaOne Merger Order* ¶ 71. AT&T Comcast’s limited partnership interest will in fact be insulated at closing, thereby providing an additional basis for finding compliance. See *Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Dkt. No. 02-70, Applications and Public Interest Statement at 61-63 (filed Feb. 28, 2002).

option,”¹³ and that the trust is designed to “effectuate the compliance option” AT&T has elected.¹⁴

Additional support for this interpretation is found in footnote 222 of the *AT&T MediaOne Merger Order*, in which the Commission states that the 12-month compliance period is reasonable “given our further requirements . . . that [AT&T] make provision for compliance using an irrevocable trust”¹⁵ This, of course, is consistent with Commission rulings that trusts can be established “to effect compliance with the Commission’s [ownership] rules.”¹⁶ Moreover, given that the Commission clearly sets out insulation as a means of compliance

¹³ *Id.* (emphasis added).

¹⁴ *Id.* (emphasis added).

¹⁵ *Id.* at n.222 (emphasis added).

¹⁶ See *Attribution of Ownership Interests*, 97 F.C.C. 2d 997, 1023 (1984), *recon. in part*, 58 R.R.2d 604 (1985), *further recon.*, 1 FCC Rcd. 802 (1986) (stating that “trusts are occasionally established specifically to effect compliance with the Commission’s rules for holdings which would violate the rules if held outright”). *Twentieth Holdings Corp.*, 4 FCC Rcd. 402 (1989) (“*Twentieth*”), does not affect insulation of the trust proposed by AT&T and Comcast. In *Twentieth*, the Commission required the broadcast station in trust to end its affiliate relationship with the grantor television network. The Commission noted that the relationship between an affiliate and a network is “substantial and ongoing” and that a network affiliation “goes to the essence of a station’s operations.” *Twentieth* at 4054. This is consistent with other Commission findings regarding the unique characteristics of the television network-affiliate relationship. *Attribution Modification*, 14 FCC Rcd. 12559 (1999) (networks “provide substantial quantities of programming to a licensee [and are], we believe, in a strong position to exert significant influence over that licensee”); *Seven Hills TV Company*, 2 FCC Rcd. 6867 (1987) (networks can “exert awesome power over putatively independent broadcast licensees.”). By contrast, AT&T Comcast post-merger will own interests in a small number of programming services, none of which, singly or together, can be considered to “go[] to the essence of [TWE’s] operations.” *Twentieth* at 4054. See also *AT&T/Comcast Public Interest Statement* at 14-15, 24-25 (discussing relative commercial significance of AT&T Comcast’s programming interests). In fact, the ruling in *Twentieth* may be readily understood as applicable only to the unique television network-station context in light of more recent Commission rulings approving trusts in the context of radio station divestitures where the grantor would continue to supply programming to the radio stations held in trust. See e.g., *AM/FM and Clear Channel Communications, Inc.*, 15 FCC Rcd 16062 (2000); *Infinity Broadcasting and Westinghouse Electric Corp.*, 12 FCC Rcd 5012 (1996).

(Compliance Action # 2), and further notes that the Safeguards “fall far short” of insulation,¹⁷ it is difficult to see why the Safeguards should apply when an insulating trust is in place.¹⁸

Nonetheless, as noted, to dispel any remaining concerns pertaining to AT&T Comcast’s ownership of the TWE Interest (albeit in trust), AT&T and Comcast have agreed to adhere to the conditions set forth in paragraphs 3 through 5 of the Safeguards post-merger (until the TWE Interest is sold and the trust dissolved).¹⁹ Those paragraphs prohibit any effort to influence, or otherwise participate in, the management or operation of TWE’s video programming activities and bar involvement in certain specific matters, including TWE’s decisions regarding “which Video Programming services are purchased for and carried on TWE’s cable systems,” as well as the “negotiation of the prices paid by TWE for Video Programming.”²⁰

¹⁷ *AT&T-MediaOne Merger Order* at ¶ 72.

¹⁸ *Twentieth* is readily distinguishable in another crucial respect. There, the grantor owned *all* of the stock of the broadcast station it sought to transfer to the trustees. Under the terms of the trust agreement proposed in that case, “exclusive authority to manage and operate the” station would reside “in the hands of the Trustees.” *Twentieth* at 4053. In order to provide programming to the broadcast station, the grantor would have to communicate directly with the trustee about such programming. The Commission found that this would violate the prohibition on communications regarding programming between a grantor and a trustee and, therefore, the trust was not consistent with the insulation rules. In contrast, the TWE Interest which AT&T and Comcast propose to place in trust is a *minority* limited partnership interest. Control over the management and operation of TWE resides entirely with an unaffiliated third party, AOL Time Warner. The trustee will have no role in the management or operation of TWE, including its video programming activities. *AT&T/Comcast Public Interest Statement* at 57. Should AT&T Comcast post-merger sell programming to TWE, it will not have to communicate with the trustee, and in fact will be barred under the trust from communicating with the trustee regarding such matters. Proposed Trust Letter, Material Terms and Conditions at §12(i). Therefore, the Commission’s concern in *Twentieth* that the grantor and the trustee would engage in impermissible communications is simply not present here.

¹⁹ See Proposed Trust Letter 1-2.

²⁰ Safeguards ¶¶ 3-5.

For the above reasons, AT&T and Comcast believe that the order approving the merger of AT&T Broadband and Comcast should explicitly acknowledge that the remaining Safeguards will sunset at the closing of the proposed merger and the contribution of the TWE Interest into an irrevocable disposition trust.

Respectfully submitted,

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