

October 9, 2002

By Electronic Delivery

Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
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 Ms. Dortch:

AT&T Corp. (“AT&T”) and Comcast Corporation (“Comcast”) hereby certify that AT&T Comcast will, at the closing of the merger of AT&T Broadband and Comcast, hold a non-attributable, insulated limited partnership interest in Time Warner Entertainment Company, L.P. (“TWE”).¹

In order to be insulated and relieved from attribution, a limited partner must certify that it is not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership. The Commission has established seven insulation criteria to provide “additional guidance” as to “what kind of insulation is sufficient to exempt a limited partnership interest from attribution.”² Inclusion of the seven criteria in a limited partnership agreement creates a “safe harbor” for insulation; a limited partner can also

¹ See 47 C.F.R. § 76.503, Note 2(b)(2) (requiring the limited partner to certify to the Commission that it is not materially involved, directly or indirectly, in the management or operation of the video programming-related activities of the partnership); *In re Implementation of the Cable Television Consumer Protection and Competition Act: Review of the Commission’s Cable Attribution Rules*, Rept. & Order, 14 FCC Rcd. 19014 ¶ 64 (1999) (“*Cable Attribution Order*”).

² *In re Corporate Ownership Reporting and Disclosure by Broadcast Licensees*, Memorandum Opinion and Order, 58 Rad. Reg. 2d (P&F) 604 ¶ 44 (1985), *recon.*, Memorandum Opinion and Order, 1 FCC Rcd. 802 ¶ 3 (1986) (“*Broadcast Attribution Order*”) (the criteria serve as “clarification” as to the type of insulation which would satisfy the requirement that an exempt limited partner not be materially involved in partnership affairs).

establish insulation where the attribution criteria are not explicitly delineated in the partnership agreement.³ As demonstrated below, the limited partnership interest that AT&T Comcast will have in TWE (the “TWE Interest”) will not provide AT&T Comcast with any opportunity for “material involvement” in TWE and is, therefore, insulated under the Commission’s rules and precedent.

I. AT&T Comcast Will Not Be Materially Involved, Directly Or Indirectly, In The Management Or Operation Of The Video Programming-Related Activities Of TWE.

AT&T Comcast’s relationship with TWE will be governed by three distinct mandates. First, the TWE Limited Partnership Agreement (“LPA”) itself will significantly restrict AT&T Comcast’s rights to participate in any aspect of the management or operation of TWE. Second, AT&T and Comcast have agreed to the imposition of Paragraphs 3-5 of the Safeguards adopted in the *AT&T-MediaOne Merger Order*,⁴ which, as described herein, will create a firewall between AT&T Comcast and the video programming activities of TWE. Third, AT&T Comcast’s TWE Interest will be placed in a disposition trust at the closing of the merger.⁵ These circumstances, independently and collectively, ensure insulation of AT&T Comcast’s TWE Interest.

A. The TWE LPA Establishes Insulation.

The TWE LPA severely limits AT&T’s (and post-merger, AT&T Comcast’s) rights to participate in the management or operation of TWE. The LPA provides that the business of TWE will be governed by the TWE Board of Representatives and the Cable Management Committee.⁶ AT&T Comcast will not have any right to participate in either of these governing entities.

³ See *In re Sacramento RSA Limited Partnership*, Memorandum Opinion and Order, 9 FCC Rcd. 3182 (1994), *aff’d*. *Sacramento RSA Limited Partnership v. FCC*, 56 F.3d 1531 (D.C. Cir. 1995).

⁴ *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 (“*MediaOne Safeguards*”).

⁵ 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”).

⁶ The TWE Board has “the authority and full discretion with respect to the management of the business and affairs of [TWE].” See LPA § 12.1(a). The Cable Management Committee has “full discretion and final authority with respect to the business and affairs of the Full Service

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The Board has six members; two are currently designated by AT&T Broadband with the remaining four appointed by AOL Time Warner. However, AT&T and Comcast already have committed to the Commission that the representatives appointed by AT&T Broadband will resign when the merger closes and the TWE Interest is placed in trust.⁷ Thereafter, only the trustee may appoint replacement representatives, and only if, in the trustee's sole judgment, doing so is necessary to protect the value of the TWE Interest held in trust.⁸

Similarly, AT&T, and thus AT&T Comcast, have no participation rights whatsoever in the Cable Management Committee. As AT&T and Comcast have previously explained, all of MediaOne's rights with regard to the Cable Management Committee were terminated in 1999, well before AT&T closed its merger with MediaOne.⁹ Thus, AT&T Broadband today, and AT&T Comcast post-merger, will have no right to, and will not, participate in the Cable Management Committee.

It is clear then that the TWE LPA itself denies AT&T (and will deny AT&T Comcast post-merger) any rights that would destroy insulation of the TWE Interest.

B. Paragraphs 3-5 of the *MediaOne* Safeguards Provide Additional Insulation.

In addition to the restrictions in the TWE Interest under the LPA, AT&T Comcast will also be constrained by operation of Paragraphs 3-5 of the *MediaOne* Safeguards. Those Paragraphs prohibit any effort to influence, or otherwise participate in, the management or

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Network." *Id.* § 12.11(b). The Full Service Network is defined in the LPA to include all of the cable systems, except for certain foreign assets. *Id.* § 12.11(a). Moreover, the Cable Management Committee's decisions are binding on the TWE Board. *See id.* (stating that "the determinations of the Management Committee . . . shall be binding upon the Partnership and the Board"). The TWE LPA has been previously filed in this docket subject to the protective order. Letter of Michael H. Hammer, Willkie Farr & Gallagher, to William F. Caton, Acting Secretary, FCC, filed in MB Dkt. No. 02-70 (Apr. 16, 2002).

⁷ *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, Trust Agreement § 4 (Sept. 13, 2002) ("Trust Agreement").

⁸ *Id.*

⁹ *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 57-58 (filed Feb. 28, 2002); *see also* Time Warner Entertainment Company, L.P., Securities and Exchange Commission Form 8-K, at 2 (filed Aug. 5, 1999) ("MediaOne no longer has a vote on or any right to participate in the Cable Management Committee.").

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."¹⁰ These restrictions bolster the conclusion that AT&T Comcast's TWE Interest will be insulated under the Commission's rules.

C. The Disposition Trust Also Insulates the TWE Interest.

Placing the TWE Interest into trust similarly provides the requisite degree of insulation -- indeed, it exceeds it. The trustee is given sole authority over *all aspects* of AT&T Comcast's interest relating to the operations and management of TWE. Communications between the trustee and AT&T Comcast with respect to TWE's operations are prohibited. (In contrast, the standard limited partnership insulation criterion permits limited partners to communicate regarding operations so long as they do not involve the "day-to-day" operations or video programming activities.) Moreover, it is clear that putting an asset into an irrevocable disposition trust renders the asset insulated and non-attributable to the grantor.¹¹ The Trust Agreement submitted by AT&T and Comcast plainly qualifies as an insulating trust under Commission rules and precedent. Indeed, after being placed on public notice for comment, the terms of the Trust Agreement were not merely unopposed, but hailed as "a conscientious effort to apply prior FCC precedent . . . designed to preclude the Applicants from directly controlling or influencing the programming decisions of TWE."¹²

¹⁰ *MediaOne Safeguards* ¶¶ 3-5. See Letter from Arthur R. Block, Comcast Corp., and Mark C. Rosenblum, AT&T Corp., to Marlene H. Dortch, Secretary, FCC, filed in MB Dkt. No. 02-70 (Sept. 30, 2002) ("Safeguards Letter"). At the same time, nothing in these Safeguards will prohibit AT&T Comcast or programming services in which AT&T Comcast owns an attributable interest from negotiating or entering into agreements relating to carriage by TWE cable systems of such programming services. This is consistent with the Safeguards adopted in the *AT&T-MediaOne Merger Order*, which have not prohibited the sale to TWE of programming attributable to AT&T.

¹¹ See *In re Attribution of Ownership Interests*, 47 F.C.C.2d 997 ¶¶ 53-56 (1984) ("*Broadcast Ownership/Attribution Order*"). See also *In re 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."); *In re Jacor-Clear Channel*, 14 FCC Rcd. 6867 ¶ 32 (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 Comments of Petitioners Consumer Federation of America, Consumers Union, Center for Digital Democracy, and Media Access Project on Proposed Time Warner Entertainment L.P. Trust, MB Dkt. No. 02-70, at 2-3 (filed Sept. 5, 2002).

* * *

The three governing authorities independently and collectively, establish that AT&T Comcast will not be materially involved, directly or indirectly, in the management or operation of the video programming-related activities of TWE and, thus, AT&T Comcast's interest in TWE will be insulated. Moreover, AT&T and Comcast demonstrate below that the TWE Interest also will be insulated pursuant to the Commission's seven insulation criteria.

II. AT&T Comcast's Interest Is Insulated Under The Seven Criteria.

Criterion # 1: The limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video-programming activities of the company. AT&T (and AT&T Comcast) cannot and will not act as an employee of TWE.¹³ Under the TWE LPA, MediaOne (AT&T's predecessor in interest in TWE) at one time had the right to send management and other trainees to participate in the business of the partnership. Pursuant to the LPA, Time Warner sent notice to MediaOne on August 4, 1999 that it was immediately terminating MediaOne's rights pursuant to the LPA to send management and other trainees to TWE. Thus, when AT&T closed its merger with MediaOne on June 15, 2000, AT&T had already lost any right to become an employee of TWE.

In addition, Paragraph 4 of the *MediaOne* Safeguards, which will apply to AT&T Comcast post-merger, specifically precludes any employee of AT&T from influencing or participating in the video programming activities of TWE. Employment would plainly be inconsistent with this proscription. The Trust Agreement's insulation features confirm this.¹⁴

Criterion # 2: The limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video-programming activities. As explained above, the LPA reserves to the TWE Board and to the Cable Management Committee all authority over and participation in all aspects of TWE's cable operations, including its video programming activities. AT&T Comcast will not participate in either governing body. Additionally, Paragraphs 3-5 of the *MediaOne* Safeguards preclude AT&T Comcast's participation in TWE's video programming activities; this proscription applies to both direct and indirect involvement, such as through the device of independent contractor or agency. Finally, the terms of the Trust Agreement preclude AT&T Comcast's participation not only in TWE's video programming activities but in any of TWE's operations.¹⁵

¹³ If the limited partner is not a natural person, these restrictions apply to the constituent parts of the limited partner, "e.g., its directors, officers, partners, etc." *Broadcast Attribution Order* ¶ 48 n.61.

¹⁴ Trust Agreement § 4.

¹⁵ *Id.*

Criterion # 3: The limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video-programming activities. AT&T Comcast has no role in the management or operations of TWE, including its video programming-related activities. Again, the Board and the Cable Management Committee have full and exclusive authority over TWE's cable operations, and AT&T Comcast cannot participate in either entity. Of course, the Trust Agreement also independently bars any such communications between AT&T Comcast and the trustee,¹⁶ as do Paragraphs 3-5 of the *MediaOne* Safeguards. Consequently, AT&T Comcast will not be involved in, and will have no communication with TWE concerning the day-to-day operations and management of TWE, including TWE's video programming activities.

Criterion # 4: The rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions. The right of AT&T Comcast to vote on the admission of additional general partners to TWE is subject to the power of the general partner, AOL Time Warner, to veto any such admission. AOL Time Warner may exercise this veto power by simply refusing to approve such admission.¹⁷ In any event, as explained above, any participation on behalf of AT&T Comcast in the admission of general partners will, upon closing, be transferred to the trustee.

Criterion # 5: The limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter. AT&T Comcast has no rights under the TWE LPA to remove TWE general partners and, post-merger, AT&T Comcast will have no such rights.

Criterion # 6: The limited partner may not perform any services for the partnership materially relating to its video-programming activities, except that a limited partner may make loans to or act as a surety for the business. AT&T (and AT&T Comcast post-merger) does not have any right or obligation under the TWE LPA to perform any services for TWE relating to the video programming activities of TWE, and AT&T Comcast will not perform any such services for TWE.¹⁸ In addition, because the Trust Agreement will separate the management of AT&T

¹⁶ *Id.* § 12.

¹⁷ See LPA § 12.1(c)(i) (stating that Participant Matters "may be decided only by resolution by both the Voting Class A Representatives by a Majority Vote and the Voting Class B Representatives by a Majority Vote").

¹⁸ In the *AT&T-MediaOne Merger Order*, the Commission concluded that AT&T's limited partnership interest in TWE was not insulated because AT&T had an attributable interest in certain entities that sold video programming to TWE. *AT&T-MediaOne Merger Order* ¶ 49. However, the D.C. Circuit's decision in *Time Warner Entertainment v. FCC* vacated the Commission's conclusion that sale of programming by the limited partner to the partnership defeats insulation. The court's decision therefore permits AT&T Comcast and its affiliates to sell programming to TWE without destroying insulation. See *Time Warner Entm't v. FCC*, 240

(footnote continued...)

Comcast's ownership interest in TWE (the responsibility of the trustee) from AT&T Comcast's sale of programming, if any, to TWE (the responsibility of AT&T Comcast), insulation is achieved independent of the court decision. Finally, as noted, Paragraphs 3-5 of the *MediaOne* Safeguards, as adapted for application to AT&T Comcast post-merger, will further restrict AT&T Comcast's ability to perform services for TWE, or to exchange information with TWE.

Criterion # 7: The limited partner may not become actively involved in the management or operation of the video-programming businesses of the partnership. As discussed above, under the terms of the TWE LPA, the Board and the Cable Management Committee have full authority over TWE's cable operations, including the video-programming activities of TWE. AT&T Comcast cannot participate in either of the governing bodies of the TWE partnership, ensuring that AT&T Comcast will have no involvement -- let alone "active" involvement -- in the management or operation of the video-programming businesses of TWE. In addition, the *MediaOne* Safeguards, as well as the terms of the Trust Agreement, independently preclude such involvement.

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F.3d 1126, 1143 (D.C. Cir. 2001). The Commission also found in the *AT&T-MediaOne Merger Order* that AT&T's appointment of two members to the TWE board was an impediment to insulation. *AT&T-MediaOne Merger Order* ¶ 42. That impediment will be eliminated by the resignation of AT&T's representatives prior to closing of the merger.

III. CONCLUSION

For the foregoing reasons, AT&T and Comcast certify that, upon closing of the merger between AT&T Broadband and Comcast, AT&T Comcast's limited partnership interest in TWE will be insulated and non-attributable.

Respectfully submitted,

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