

October 16, 2002

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
TW-A325  
445 Twelfth St., SW  
Washington, DC 20554



Re: *Ex parte* presentation in: MB Docket No. 02-70

Dear Ms. Dortch:

On October 15, 2002, a meeting took place at the Commission to discuss the motion filed by CFA, *et al.*, and the separate motion filed by Earthlink, on September 5, 2002 requesting that the Commission compel the Applicants in this merger to enter the High Speed Internet Access agreement (HSIA) entered into by the Applicants and AOL Time Warner into the record and that the Commission receive public comment on this agreement as part of its consideration of the merger.

Present at the meeting were, for Media Access Project (MAP), counsel to CFA, *et al.*, Andrew Jay Schwartzman, President, and Harold Feld, Associate Director; for Earthlink, John Butler of Sher & Blackwell, LLP; and Jeffery Chester, President, Center for Digital Democracy. Present from the Commission staff were: Ken Ferree (MB), Jim Bird (OGC), Erin Dozier (MB), Royce Sherlock (MB), and Nandan Joshi (OGC).

Mr. Schwartzman inquired as to the status of the motion. Mr. Ferree answered that the motion was addressed to the Commission and that therefore, presumably, the Commission would respond. Accordingly, he could not speak to its status. Mr. Schwartzman stated that because the nature of the motion is integral to the decision on the merger, Petitioners must know whether or not to pursue other remedies, such as interlocutory relief. Accordingly, if the Commission cannot quickly decide the motion, the Commission should know that Petitioners will have to treat it as agency action wrongfully withheld. Mr. Ferree said he would convey this concern to the General Counsel and to the Chairman's office, and urged Petitioners to communicate directly with the Chairman's office as well.

Mr. Bird asked why the Commission should consider the HSIA a "material fact" within the meaning of the case law cited by Petitioners. Mr. Butler answered that HSIA is part and parcel with the TWE divestiture agreement, which clearly *is* a part of this merger. Mr. Butler stated that he had examined the confidential material submitted by Applicants pursuant to the protective order established by the Commission and, although he could not discuss the documents in the presence of those who had not signed the notice of confidentiality, he could state that his general belief was that the TWE divestiture documents demonstrated the close interrelationship between the TWE agreement and the HSIA, and it would be entirely possible for clauses in the HSIA to affect the implementation of the divestiture agreement or even supercede it.

Mr. Schwartzman added that the Communications Act requires the Commission to make a public interest finding and that reports in the press raise serious concerns that the agreement is not in the public interest. Mr. Chester added that the press descriptions indicated that the agreement was setting a pattern for the industry in violation of the public interest.

Mr. Ferree observed that the Commission is engaged in proceedings relevant to the deployment of broadband and multiple ISP access to cable platforms. If the question is one of the broad public interest, then why should it be considered in this merger? Mr. Bird added that whether the HSIA violated the public interest was dependent upon the outcome of the open proceedings and that therefore the Commission should defer consideration until after the conclusion of those proceedings.

Mr. Schwartzman answered that the Commission has an obligation under Section 309 and 310(d) of the Communications Act to make a public interest determination before granting the current application. The Commission therefore cannot defer a determination about the public interest in this merger until after it concludes a proceeding. To the contrary, as the Commission explicitly observed in its *AOL Time Warner* Order, its responsibility in the merger is independent of any open proceeding and does not prejudice the proceeding, being limited to the facts at issue in this case.

Mr. Feld stated that the Commission's decision in the *AOL Time Warner* Order established that the broadband content aggregation and broadband access markets were relevant markets that the Commission must consider when confronted with an Application to transfer cable systems. While *AOL Time Warner* did not dictate a **result**, since each merger must be considered on its own facts, it does establish the relevant market. Mr. Feld further observed that the agreement reportedly dealt with the ability of AOL Time Warner to offer rival video services in ATT Comcast territory – a matter clearly impinging upon the Commission's core responsibility to ensure competition in the MVPD market and clearly central to the Commission's public interest determination. Finally, Mr. Feld noted that the *Petition to Deny* explicitly predicted that the combined ATT Comcast would have sufficient leverage in the broadband market to secure conditions like those reported in the press. Accordingly, the HSIA is relevant as proof of claims made in *Petition to Deny*.

Mr. Joshi observed that there could be many reasons for the agreement besides market power. Mr. Feld agreed. The critical fact was that, without looking at the agreement, the FCC simply could not tell whether the agreement resulted from the exercise of market power by a combined ATT Comcast or from other reasons. Mr. Joshi asked how examination of the agreement would demonstrate market power. Mr. Feld stated that, while no economist, he understood from such cases as *United States v. Microsoft* that examination of contract terms was relevant to determinations of market power. Obviously the FCC, as expert agency and employing economists as well as lawyers, could ultimately determine that the HSIA did not demonstrate market power – **after** the agency reviewed it. But, based on the press reports and Petitioners predictive model, the Commission had a responsibility to at least **look** at the agreement.<sup>1</sup>

Mr. Feld also observed that, after review, the FCC might still decide the HSIA was irrelevant

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<sup>1</sup>Mr. Feld also observed that Petitioners' model was, so far, the only model that actually **predicted** what happened rather than merely described existing conditions (by contrast, the Commission's own recent study had demonstrated the fallacy of Applicants' model). If the Commission is to rely on economics as a science, argued Mr. Feld, the Commission should use a model which not merely describes the existing world with a credible explanation, but accurately predicts the future.

to the merger. The difficulty was that without looking at the HSIA, Commission could not make such a judgment.

Mr. Ferree observed that the Justice Department already had the agreement and suggested the Commission could rely on the DoJ determination. Mr. Feld argued that the DoJ uses a different legal standard and that the Commission itself has repeatedly stated that an agreement which might pass muster under the antitrust laws would not satisfy the public interest.<sup>2</sup>

In accordance with Section 1.1206(b), 47 C.F.R. § 1.1206, this letter is being filed electronically with your office today.

Respectfully submitted

Harold Feld  
Associate Director

cc: Ken Ferree  
Royce Sherlock  
Jim Bird  
Nandan Joshi  
Erin Dozier

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<sup>2</sup>While not cited at the meeting, the Commission's decision to impose extensive conditions on the SBC/Ameritech merger after the merger was approved by the Department of Justice is an excellent example of a situation where a merger meeting the standards of the Clayton Act did not meet the more rigorous public interest standard of the Communications Act.