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NEW YORK
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1501 K STREET, N.W.
WASHINGTON, D.C. 20005
TELEPHONE 202 736 8000
FACSIMILE 202 736 8711
www.sidley.com
FOUNDED 1866

BEIJING
GENEVA
HONG KONG
LONDON
SHANGHAI
SINGAPORE
TOKYO

WRITER'S DIRECT NUMBER
(202) 736-8088

WRITER'S E-MAIL ADDRESS
dlawson@sidley.com

October 25, 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:

On October 25, 2002, James Casserly of Mintz, Levin and Richard Metzger of Lawler, Metzger, & Milkman, outside counsel to Comcast Corporation ("Comcast"), and Michael Hammer of Willkie, Farr & Gallagher and the undersigned, outside counsel to AT&T Corp. ("AT&T") met with James Bird, Michelle Ellison, Joel Kaufman, and Karen Onyeije of the Office of General Counsel to discuss pending motions by Media Access Project and Earthlink that seek to require submission of a confidential agreement ("AOL ISP Agreement") that would allow AOL Time Warner to offer high-speed Internet service on AT&T Comcast's cable systems. In the course of that discussion, the representatives of AT&T and Comcast explained why the AOL ISP Agreement was not relevant to the Commission's public interest determination in the pending Comcast/AT&T Broadband merger proceeding, for the reasons the Applicants previously have explained on the record in this proceeding. As discussed below, the representatives of Comcast and AT&T also showed that there is no legal basis for a claim that the Commission is obligated to require the Applicants to place the AOL ISP Agreement in the record of this proceeding.

The Applicants, like the parties to prior proceedings arising from proposed mergers, waived Hart-Scott-Rodino ("HSR") confidentiality provisions to the extent necessary to allow the Commission to review the parties' submissions to the Department of Justice ("DOJ"). As in prior merger-related proceedings, the Commission requested that the parties submit in the record in this proceeding material from the DOJ submissions that the Commission deemed relevant and important to its review (either by submitting the documents themselves or the relevant information contained therein). And, as in prior merger-related proceedings, the Commission determined that the bulk of the thousands of boxes of material that the parties submitted to the

Ms. Marlene H. Dortch
October 25, 2002
Page 2

DOJ was not relevant and important to the Commission's own review. Contrary to the claims of some opponents of the merger, this established practice, which is designed to facilitate coordination between the Commission and the DOJ and to avoid unnecessary duplication of efforts, is entirely consistent with established administrative law and, indeed, has been expressly endorsed by the D.C. Circuit.

In *SBC Communications Inc. v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995), the D.C. Circuit affirmed a Commission order approving the transfer of radio licenses in connection with AT&T's acquisition of McCaw. In that case, the Commission required submission of only a portion of the HSR documents that it had reviewed. BellSouth contended on appeal that the Commission "erred by asking AT&T and McCaw to submit to it only a portion of their voluminous HSR submissions to the DOJ." *Id.* at 1496. The court flatly rejected the claim: "The Commission is fully capable of determining which documents are relevant to its decision-making; for us to hold that the Commission is bound to review every document deemed relevant by the parties would be an unwarranted intrusion into the agency's ability to conduct its own business and would 'arm interested parties with a potent instrument for delay.'" *Id.* (citation omitted). As the court had previously explained: "Someone must decide when enough data is enough. In the first instance that decision must be made by the Commission not by the Department of Justice or the Federal Trade Commission, not by the parties to the proceeding, and not by the courts. To allow others to force the Commission to conduct further evidentiary inquiry would be to arm interested parties with a potent instrument for delay." *United States v. FCC*, 652 F.2d 72, 90-91 (D.C. Cir. 1980). *See also Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 630-31 (D.C. Cir. 1978) ("[T]he scope of our review is quite narrow; we sit to review two license renewal orders, not to restructure the FCC's information-gathering process. If the Commission's action in granting those renewals 'was not arbitrary, capricious or unreasonable,' we must affirm.") (citation omitted). In short, it is well-established law that Commission has broad discretion in determining what documents are relevant to its public interest decision-making in a license transfer proceeding.¹

In arguing otherwise, opponents of the merger have apparently conflated the Commission's broad discretion to determine what documents are *relevant* to its public interest review with the quite separate obligation of an agency conducting a rulemaking proceeding to

¹ *See also TCI-AT&T Merger Order*, 14 FCC Rcd. 3160, ¶ 153 (1999) ("the Commission has discretion to review or not review HSR documents based on the requirements of a particular case. If the Commission chooses to review HSR documents, it is under no obligation to disclose such documents unless we rely on them in the decision-making process"); *McCaw-AT&T Merger Order*, 9 FCC Rcd. 5836, ¶ 157 (1994) ("[T]he Commission has broad discretion to determine the scope of information required to complete its public interest analysis and the manner in which it will conduct its fact finding inquiries in license transfer proceedings.").

Ms. Marlene H. Dortch
October 25, 2002
Page 3

make public the most critical documents or evidence upon which the agency expressly relies to support its substantive rulings. See *Association of Data Processing Service Organizations, Inc. v. TymShare, Inc.*, 745 F.2d 677, 685 (D.C. Cir. 1984) (“ADAPSO”); *Air Transport Assoc. of America v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (citing precedent).² The ADAPSO line of cases plainly does not obligate the Commission to disclose every document that it reviews and determines to be irrelevant or unimportant; indeed, any such reading of those cases would directly conflict with the D.C. Circuit’s holding in the *SBC* case that it is for the Commission, and not the courts, to decide which material is relevant to the Commission’s public interest review.³

In addition to being contrary to established law, the approach urged by the merger opponents would have far-reaching and harmful public interest consequences. Requiring the Commission to place in the record every HSR document (and, under the merger opponents’ view, any other document) that a private party with an axe to grind deems relevant would create a Catch-22. Under that rule, if the Commission failed to conduct a relevance review of a document that a private party deemed relevant, the private party, as merger opponents do here, would attack the failure to review as “willful blindness.” But if the Commission did conduct the requested relevance review, then it would have to go into the record regardless of relevance. As the D.C. Circuit has recognized, that would “arm interested parties with a potent instrument for delay.” *United States v. FCC*, 652 F.2d 72, 91 (D.C. Cir. 1980). The public is well served by coordination between the Commission and the DOJ. Commission review, however, is dependent

² The courts have stressed that the obligation to put a document on the record applies only to the most “critical” or “vital” documents used to support a substantive ruling. For example, in the appeal of the Commission’s cable ownership rules, AT&T and Time Warner argued that the Commission had violated the ADAPSO doctrine by basing its 5% attribution rule on two unpublished studies that were not part of the record. *Time Warner Entertainment Co. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001). The D.C. Circuit summarily rejected this argument, citing several prior cases holding that, even with respect to documents upon which the agency expressly relies, not every document is “critical.” *Id.* at 1140. The court then went on to explain that the Commission’s citation in an earlier order on attribution to another study that was in the record was sufficient. *Id.*

³ Of course, *in camera* review of documents of disputed relevance is standard practice in adjudications, and the Administrative Procedure Act makes clear that Congress contemplated that established practice in agency adjudications and rulemakings. See, e.g., 5 U.S.C. § 556(d) (“the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence”). *AOL-TW Merger Order*, 16 FCC Rcd. 6547, ¶ 7 (2001) (“License transfer applications, even those associated with significant mergers, are adjudications focused on particular parties.”).

Ms. Marlene H. Dortch
October 25, 2002
Page 4

upon the parties' waiver of HSR confidentiality, and parties would obviously be reluctant to give such waivers, if it meant that every document that the Commission reviewed had to be placed in the Commission's record.⁴

In short, the Commission's review of HSR documents, and its determinations that many of those documents are not sufficiently relevant or important enough to the Commission's own review to require their submission in the record in this proceeding, have been entirely appropriate. Arguments to the contrary are designed only to create delay through the specter of "appeal risk," where no such risk, in fact, exists. Accordingly, and as detailed in the parties' oppositions, the Commission should deny the various motions of Media Access Project and Earthlink and should expeditiously complete its review of this merger on the complete and voluminous existing record.

Sincerely,

David L. Lawson

cc: James Bird
Susan Eid
Michelle Ellison
Joel Kaufman
Karen Onyeije
Qualex International

⁴ It is no answer to say that any HSR document placed on the Commission record would be covered by the protective order in this proceeding. Many of the documents submitted to the DOJ pursuant to HSR contain highly sensitive business information that would cause irreparable harm if a competitor's business personnel gained access to them. Although a protective order provides some assurance that this will not happen, as the experience from the AOL-Time Warner merger makes clear, there can be no guarantees against inadvertent disclosure.