

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.,)	MB Docket No. 02-70
Transferors,)	
)	
AT&T Comcast Corporation,)	
Transferee)	

To: The Office of General Counsel

**MEMORANDUM IN RESPONSE TO QUESTIONS
PROPOUNDED BY OFFICE OF GENERAL COUNSEL**

**SUBMITTED ON BEHALF OF PETITIONERS
CONSUMER FEDERATION OF AMERICA
CONSUMERS UNION
CENTER FOR DIGITAL DEMOCRACY
AND
THE MEDIA ACCESS PROJECT**

Harold Feld
Andrew Jay Schwartzman
MEDIA ACCESS PROJECT
1625 K St., NW
Washington, DC 20006
(202) 232-4300

Intern: Katherine Sheely
October 28, 2002

TABLE OF CONTENTS

INTRODUCTION AND SUMMARY 1

I. THE *MOTION* RELIES ON ESTABLISHED LAW AND SPECIFIC FACTS TO REQUEST THAT THE COMMISSION REQUIRE SUBMISSION OF A SINGLE HIGHLY MATERIAL DOCUMENT 3

II. THE HSDA IS HIGHLY MATERIAL TO THIS PROCEEDING 6

III. THE COMMUNICATIONS ACT AND COMMISSION PRECEDENT REQUIRE THE COMMISSION TO EXAMINE THE HSDA BEFORE APPROVING THE MERGER 9

A. The Commission’s Previous Merger Orders 9

1. The Commission’s Actions in the *ATT/TCI Merger Order* 9

2. The Commission’s Analysis Grows More Refined in its *ATT/MediaOne Order* as its Concern over AT&T’s Ability to Block Content and Competition Grows 10

3. Market Definition in the *AOL Time Warner Merger Order* 12

4. Two Recent Orders Reinforce Petitioners’ Arguments 13

B. Consideration of Competition in Core Video and Telephony Markets 15

CONCLUSION 17

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.,)	MB Docket No. 02-70
Transferors,)	
)	
AT&T Comcast Corporation,)	
Transferee)	

To: The Commission

**MEMORANDUM IN RESPONSE TO QUESTIONS
PROPOUNDED BY OFFICE OF GENERAL COUNSEL**

This memorandum responds to questions propounded by the Commission's Office of General Counsel (OGC) during a telephone conversation with counsel for Petitioners on October 25, 2002. OGC staff asked that Petitioners respond to certain objections to Petitioners' September 5, 2002 *Motion to Require Applicants to Provide Information Material to Consideration of Application to Transfer Control of Licenses*. See Notice of Oral Ex Parte Presentation by Comcast and AT&T ("Applicants"), filed October 25, 2002 ("October 25 Notice"); Letter of Arthur R. Block, filed October 24, 2002 ("October 24 Letter"). Petitioners agreed to respond in writing, and also to address related issues that have arisen regarding the *Motion*.

INTRODUCTION AND SUMMARY

At the outset, Petitioners reiterate their belief that the Commission's continuing inaction on the September 5, 2002 *Motion*, as well as a Earthlink's motion of the same date needlessly subjects the Commission to public criticism of its decisionmaking processes. This runs the risk of

"misappl[ying the legal] standard in a way reminiscent of the problem in *Citizens for Jazz [on WRVR, Inc. v. FCC, 775 F.2d 392, (D.C.Cir.1985)]*: "The statute in effect says that the Commission must look into the possible existence of a fire only when it is shown a good deal of smoke; the Commission has said that it will look into the

possible existence of a fire only when it is shown the existence of a fire." 775 F.2d at 397.

Serafyn v. FCC, 149 F.3d 1213, 1120 (D.C. Cir. 1998). Its refusal even to look at a document which is so clearly related to the future of the Internet lends an unfortunate appearance that the Commission is more interested in form than substance. See, *Office of Communication of the United Church of Christ v. FCC*, 425 F.2d 1043, 1047 (D.C. Cir. 1969)(Burger, J.)(criticizing “[a] curious neutrality-in-favor-of-the-licensee”).

Petitioners call upon the Commission to consider what possible cost can accrue from requesting access to a single document, which can be filed immediately, and then subjected to a rapid comment process by the parties pursuant to an existing protective order, or under such additional restrictions that the Commission might deem necessary. Even if Applicants experience some inconvenience from a delay for proper review (a delay which Applicants could have avoided had they submitted the High Speed Data Agreement (“HSDA”) in a timely manner as required by law, or had the Commission acted in a timely manner on Petitioners’ *Motion*), this inconvenience must surely pale beside placing the entire merger at risk by urging the Commission to adopt a course that would likely result in reversal appeal.

By the same token, even if the Commission believes that there arguably exist legal grounds that would serve as a basis for denying Petitioners’ *Motion*, Petitioners are baffled as to why the Commission should wish to do so. Even if the decision not to review the HSDA were supportable under the law, it is profoundly bad policy.

In this memorandum, Petitioners show that established law requires the Commission to direct the Applicants to submit the entire TWE Restructuring Agreement, including the agreement contained

in Appendix D thereto. The agreement at issue is part of a document which the Applicants themselves submitted to the Commission, and on which they have placed very substantial reliance. Their attempt to liken this case to a fishing expedition for background documents filed with the Justice Department as part of an antitrust review is wholly inapposite.

Petitioners next demonstrate that the particular document here at issue is highly material to the application, and that it may even contain provisions which undermine or trump portions of the *TWE Restructuring Agreement* which have been filed.

Finally, Petitioners review the Commission's case law to show that residential broadband is a separate market and that the Commission has regarded actions that inhibit access to high speed broadband as very much part of the purview of the Commission's jurisdiction under the public interest standard.

ARGUMENT

I. THE *MOTION* RELIES ON ESTABLISHED LAW AND SPECIFIC FACTS TO REQUEST THAT THE COMMISSION REQUIRE SUBMISSION OF A SINGLE HIGHLY MATERIAL DOCUMENT.

In opposing the *Motion*, Applicants have recently compared it to cases in which the Commission has been asked to review documents collected by the Department of Justice Antitrust Division ("DoJ") under the Hart Scott Rodino Act ("HSR"). Applicants argue that the that the Commission need not review all such when determining whether a merger serves the public interest. *See* October 25 Notice at 2, *citing SBC v. FCC*, 56 F.3d 1484, 1496 (D.C. Cir 1995) (HSR documents contained "millions of pages" and review of them "would have delayed a decision on the transfer indefinitely").

This entirely misconstrues the nature of Petitioners' motion. Applicants' argument that grant of the *Motion* "would have far-reaching and harmful public interest consequences" by "[r]equiring

the Commission to place in the record every HSR document” is no more than a straw-man designed to should not divert the Commission’s attention

Petitioners have not asked the Commission to engage in a fishing expedition to review “millions of pages” of background material on the off chance that it will encounter something relevant. The document did not surface as part of the Justice Department’s general HSR process. Nor would review of the single document specified in Petitioners’ *Motion* “delay a decision on the transfer indefinitely.”

This case is different in every possible respect from *SBC v. FCC*. The Applicants here have voluntarily submitted the *TWE Restructuring Agreement* to the Commission and have made it a centerpiece of their application. Although the HSDA is an essential element of the *TWE Restructuring Agreement*, and appended as Appendix D thereto, the Applicants declined, without explanation, to submit it at the time they filed the *TWE Restructuring Agreement*. See *LUJ, Inc.*, FCC 02-235 (August 22, 2002)(holding that applicants have always been required to submit all documents material to their applications, and establishing new policy permitting non-submission of trivial documents, subject to the obligation that they identify and justify such omissions).

The issue, then, is whether Applicants bearing the burden of establishing that grant of their application is in the public interest may withhold material information by filling incomplete versions of documents upon which they seek to rely. Petitioners’ request for a single, specifically identified document introduced into the proceeding by Applicants themselves falls squarely within the line of cases cited by Petitioners in the *Motion* and *Reply to Opposition*. For example, in *Weyburn Broadcasting L.P. v. FCC*, 984 F.2d 1220 (D.C. Cir. 1220), the D.C. Circuit reversed the FCC’s determination that grant of a license served the public interest when the FCC refused to investigate issues presented by Petitioners and supported by specific evidence in the record. *Id.* at 1232-34. In addition,

the court reversed the Commission for artificially constraining discovery so as to make it impossible for Petitioners to gather sufficient evidence. *Id.* at 1231.

This is but one in a long line of cases directly supporting Petitioners' *Motion* for review of a single document raising clear, material issues and where Petitioners have introduced sufficient evidence into the record to support the relevance of the document to the merger. *See, e.g., David Ortiz Radio Corp.*, 941 F.2d 1253, 1260-61 (D.C. Cir. 1991) (refusal to address allegations of misrepresentation supported by evidence arbitrary and capricious and demonstrate "a disquieting laxity on the Commission's part"); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501, 508-511 (D.C. Cir. 1988); *California Public Broadcasting Forum v. FCC*, 752 F.2d 670, 679-80 (D.C. Cir. 1985); *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621, 633-34 (D.C. Cir. 1978) (en banc); *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 259-60, 265-66 (D.C. Cir. 1974) (en banc); *Citizens Committee to Preserve the Present Programming of the Voice of the Arts in Atlanta on WGKA-AM and FM v. FCC*, 436 F.2d 263, 271-72 (D.C. Cir. 1970).

As these cases demonstrate, the Commission has discretion to direct the conduct of its own proceedings, but it may not blind itself to available facts which relate to the Commission's core public interest findings. As the D.C. Circuit has observed on several occasions, "it is fundamentally unfair for the FCC to dismiss a challenge where...the defending party is the party with access to the relevant information." *Beaumont Branch of the NAACP v. FCC*, 854 F.2d at 509 (quoting *California Public Broadcasting Forum v. FCC*, 752 F.2d at 79); *see also Citizens Committee to Save WEFM v. FCC*, 506 F.2d at 265-66. The Commission can resolve any uncertainty by simply requiring the document from Applicants and permitting public comment subject to suitable safeguards. It is both arbitrary and "fundamentally unfair" for the Commission to refuse to do so.

II. THE HSDA IS HIGHLY MATERIAL TO THIS PROCEEDING.

In their October 24 letter, Applicants attempt to engage in a cynical “shell game” to try to keep the Commission’s attention away from the HSDA. Applicants argue that the only document of concern to the Commission in this merger is the “TWE Trust Agreement” which includes a “commitment to divest” but that the “TWE Restructuring Agreement” and, by extension, the HSDA, are “not material to the Commission’s consideration of the Applicant’s consideration to divest the TWE interest.” October 24 Letter at 2.

The Commission’s staff has already recognized the importance of the *TWE Restructuring Agreement*. Indeed, on September 23, 2002, the Media Bureau “stopped” the Commission’s informal 180-day “clock” explicitly to consider the TWE Restructuring Agreement. *Letter from W. Kenneth Ferree, Chief, Media Bureau to James Coltharp, Comcast Corp. and Betsy Brady, AT&T Corp.*, September 23, 2002 at 2.

The Applicants cannot neatly divide the tangle of agreements pertaining to the ownership and divestment of AT&T’s interest in *TWE*. To review the relevant history, the Commission approved the AT&T/MediaOne Merger on condition that AT&T divest itself of its interest in TWE or otherwise comply with the Commission’s horizontal ownership limit. *MediaOne Group, Inc.*, 15 FCC Rcd 9816 (2000). When AT&T failed to make an election on compliance in accordance with the terms of the Commission’s *Merger Order*, the Commission ordered AT&T to divest its interest in TWE by June 11, 2001. *Id.*, 15 FCC Rcd at 9899.¹

¹ Following issuance of the D.C. Circuit opinion remanding the Commission’s horizontal ownership limit, *Time Warner L.P. v. FCC*, 240 F.3d 1126 (D.C. Cir. 2001), the FCC stayed operation of its order pending announcement of the final rule. *MediaOne Group, Inc.*, 16 FCC Rcd 5835 (2001).

As a voluntary condition of the merger, the Applicants stated an intent to divest their interest in TWE, and have submitted the *TWE Restructuring Agreement*, albeit without Appendix D, in support thereof. This voluntary offer, however, does not curtail the Commission's obligation to examine the impact of the transaction on the public, or otherwise to limit the scope of the Commission's inquiry. The Commission's recent decision in *LUJ, Inc., supra*, makes clear yet again that an Applicant has the responsibility to provide to the Commission **all** relevant documents.

As to the Applicants' contention that the HSDA is independent of the *TWE Restructuring Agreement*, a simple perusal of the *TWE Restructuring Agreement* submitted into the public record quickly dispels this argument.

From the beginning, the restructuring agreement makes the HSDA agreement "a condition precedent" to the closing of the restructuring agreement. *Restructuring Agreement By and Among AOL Time Warner Inc., AT&T Corp., Comcast Corp., and the Other Parties Named Herein*, dated August 20, 2002 at 2 ("*TWE Restructuring Agreement*" or "*TWE Divestiture Agreement*"). Article I refers to the "AOL High Speed Data Agreement" as "Exhibit D" and requires it to be submitted unaltered unless modified through other provisions of the *TWE Restructuring Agreement*. *Id.* at 4. The Applicants further intertwine HSDA and the *TWE Restructuring Agreement* by defining "Transaction Agreements" as including the HSDA. *ID.* at 19. As a consequence, the document by its very terms makes the HSDA integral to and inseparable from the *TWE Restructuring Agreement*.

Several significant consequences flow from this. First, the closing of the HSDA becomes necessary to the closing of the other elements of the *TWE Restructuring Agreement*, and the closing of all other aspects of the *TWE Restructuring Agreement*—**including Commission approval pursuant to the Trust Document approved as a condition of the merger**—becomes dependent upon the closing

of the HSDA. *Id.* at 26.

Of gravest concern is an issue Petitioners have repeatedly raised - whether the terms of the HSDA supercede those in the *TWE Restructuring Agreement* itself. There are numerous clauses of the main agreement that permit terms and conditions in the “Transaction Agreements” – including the HSDA – to supercede terms in the public document. *See, eg., id.* at 15-16 (requiring parties disposing of property to “expressly assume and be bound by...the relevant obligations...under the Transaction Agreements.” *Id.* at Article VI (“Covenants of AOLTW”) (making terms of the *TWE Restructuring Agreement* subject to the terms of the “Transaction Agreements”) at 48, and at 50 (requiring AOLTW to require subsidiaries to comply with terms of the “Transaction Agreements”); Article VII (“Covenants of AT&T and Comcast”) at 50 (making terms of public document subject to terms of the “Transaction Agreements”) at 51 (same).²

As even this casual perusal demonstrates, the *TWE Restructuring Agreement* and the HSDA are interrelated and integral to one another. As to Applicant’s argument that the *TWE Restructuring Agreement* is outside the scope of the Commission’s merger review, the Commission’s staff have already answered this contention in the negative. In short, not a shred of justification exists to allow AT&T and Comcast to hide aspects of the merger and related agreements from the Commission in a sort of “three card monte” where the parties hide damaging information in the one agreement in this troika they withhold from the Commission.

²This listing excludes those provisions expressly addressing the HSDA, which Earthlink has addressed in its own motion.

III. THE COMMUNICATIONS ACT AND COMMISSION PRECEDENT REQUIRE THE COMMISSION TO EXAMINE THE HSDA BEFORE APPROVING THE MERGER.

Petitioners have now explained on numerous occasions to OGC and the Commission the relevance to the HSDA to the Commission's merger review, independent of the link between the HSDA and the *TWE Restructuring Agreement*. For the purposes of assisting the Commission and OGC in evaluating these arguments, Petitioners will attempt a comprehensive discussion here. This discussion, however, does not supercede other arguments made to the Commission and its staff either in the *Motion and Reply to Opposition* or in the subsequent *ex parte* presentations.

A. The Commission's Previous Merger Orders.

The Commission has twice previously addressed the question of AT&T's management of Internet access agreements with third parties as part of its review of AT&T acquisitions. In addition, its merger orders have clearly established that the Commission must consider the impacts of the merger on the broadband access market and the broadband content market.

1. The Commission's Actions in the *ATT/TCI Merger Order*.

The Commission first considered the question of broadband offered via cable in the context of AT&T's acquisition of Tele-Communications, Inc. (TCI) *Application of Tele-Communications, Inc. and AT&T Corp.*, 14 FCC Rcd 3160 (1999). At that time, the Commission did not determine whether broadband Internet access and narrowband access constituted separate markets. *Id* at 3205. The Commission assumed that they did, however, for purposes of its public interest determination. *Id.*

In making its determination, the Commission relied on representations from AT&T that it would in no way interfere with any internet user's access to content (whether an AT&T subscriber

or a non-subscriber accessing AT&T controlled content). *Id.* at 3206-07. As the Commission explained:

We take this representation seriously....Based on this representation, we conclude that nothing about the proposed merger would deny any customer (including AT&T-TCI customers) the ability to access the Internet content or portal of his or her choice.

Id. at 3207.

Thus, even at the earliest stage of consideration, the Commission expressed concern within the context of its public interest determination that AT&T not block or otherwise interfere with a subscriber's access to content. While the Commission may have declined to impose a specific merger condition at such an early stage in the deployment of broadband, it clearly regarded broadband access and content aggregation as relevant to its consideration and regarded unfettered access by subscribers to broadband content as necessary to a public interest determination.

2. The Commission's Analysis Grows More Refined in its *ATT/MediaOne Order* as its Concern Over AT&T's Ability to Block Content and Competition Grows.

The Commission next considered the implications of mergers to broadband markets in the AT&T -MediaOne merger. *Applications of MediaOne Group, Inc. and AT&T Corp.*, 15 FCC Rcd 9816 (2000). As part of its consideration of the merger, the Commission observed that the consent decree into which DoJ and AT&T had entered alleviated any potential harm to the emerging broadband market. *Id.* at 9861. In particular, the Commission observed that the consent decree applied to any agreement between AT&T and Time Warner that proposes joint provision of any broadband service" or "that would prevent inclusion of any content in a cable modem service." *Id.* at 9870-71.

At the same time, however, the Commission acknowledged that it had a separate responsibility to review the impact on the competitiveness of the broadband market and the diversity of content

available to Internet users. *Id.* at 9866, 9871-73. Specifically, the Commission addressed itself to “competition and diversity in the provision of broadband Internet services, content, applications or architecture.” *Id.* at 9871.

In finding that the merger would serve the public interest, the Commission again relied upon AT&T’s express representations that it would not discriminate against any content or service. In addition it relied on AT&T’s express representation that it would provide subscribers with multiple ISP access:

AT&T and MediaOne have also agreed to negotiate, upon expiration of their exclusive arrangements...private contracts with multiple ISPs in order to offer these ISPs reasonably comparable access prices, the opportunity to market and bill consumers directly, and the opportunity to differentiate service offerings and to maintain brand recognition in all such offerings....Finally, AT&T has committed to facilitating maximum access by its customers to any content of their choosing, including streaming video. We expect the Applicants to adhere to the foregoing commitments.

Id. at 9870.

The Commission also explicitly “agreed with Commenters” that imposition of proprietary protocols or otherwise restricting the development of services and content would constitute a significant harm to the public interest. *Id.* at 9871-2. Nevertheless, because the industry remained “nascent” and the Commission found “promises of competition” that would restrain the Applicants, it declined to impose further conditions. *Id.* The Commission, however, sounded a cautionary note:

We remain concerned, however, that the recent trend toward both horizontal and vertical consolidation in the broadband industry has the potential to threaten the openness, competition, and innovation of the Internet and the diversity of media voices that are available to Americans.

Therefore, although we decline to impose “open/forced” access on the Applicants as a condition of the proposed merger, we will continue to aggressively monitor broadband developments ***and the steps taken by the merged entity to provide unaffiliated ISPs with direct access to its cable systems....*** We will review our “hands-off” policy if

competition fails to grow as expected, especially if we find signs of the following possible market failures: (a) if competition from alternative broadband providers (such as DSL, satellite, and wireless) does not develop as anticipated; (b) if the merged firm fails to fulfill expeditiously its commitment to open its systems to unaffiliated ISPs, either by limiting access to a few large ISPs, through pricing or other contractual terms, or by utilizing technology that would make an open access regime difficult or costly to implement; or (c) if the merged firm successfully enters into exclusive agreements with broadband Internet content or applications providers so as to disadvantage competing broadband providers.

Id. at 9873 (emphasis added).

The present HSDA directly implicates the Commission's previous holding as to AT&T in the *AT&T/MediaOne Merger Order*. Based on the press reports cited by Petitioners in their *Motion, Reply to Opposition*, and subsequent *ex parte* presentations, the proposed agreement between AT&T, Comcast and AOL Time Warner ***violates every single provision of the Commission's public interest determination*** in *AT&T/MediaOne*. It does not provide unaffiliated ISPs with access to the customer. It restricts the ability of the unaffiliated ISP to offer new services. It limits the ability of subscribers to access streaming video. It does not allow the unaffiliated ISP to offer identical services on commercially competitive terms.

In short, the HSDA appears to represent a complete reversal of the representations on which the Commission relied in the previous acquisition by AT&T. Given that the Commission found in the *AT&T/MediaOne Merger* that the conditions like those reported in the press would be anathema to the public interest, the Commission has an obligation to review the HSDA.

3. Market Definition in the *AOL Time Warner Merger Order*.

Any remaining doubt as to the Commission's duty to address impacts of the merger in the broadband access, content and services markets were resolved by the Commission's order in the merger of America Online and Time Warner, Inc. *Applications of America Online and Time Warner*,

16 FCC Rcd 6547 (2001). The Commission recognized that the Federal Trade Commission had reiterated the finding of the DoJ that broadband Internet access constituted a separate market from narrowband. *Id.* at 6553. The Commission made a further independent finding with respect to “residential Internet access services,” declaring that they “constitute a relevant product market distinguishable from residential narrowband Internet access services.” *Id.* at 6569. The Commission concluded:

Our authority to address the merger’s impact on competition for high-speed Internet access services derives from our statutory duty to ensure that the proposed transaction serves the public interest. As discussed in Section II above, we conduct our public interest inquiry by determining, among other things, whether the proposed transaction would substantially frustrate or impair the Commission’s implementation or enforcement of the Communications Act, or would interfere with the objectives of the Act or of other statutes. Several such objectives are relevant to our analysis here. First, in adopting the 1996 Act, Congress established a clear national policy to “promote the continued development of the Internet” and “to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services unfettered by Federal or State regulation.” Concurrently, Congress charged the Commission with “encourag[ing] the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans.” The principal purpose of such capability is to facilitate the use of advanced services, of which residential high-speed Internet access services are one kind. Finally, “it has long been a basic tenet of national communications policy that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public.” This national policy to promote the public’s access to a diversity of viewpoints from a multiplicity of sources finds expression in statutory law as well as in previous decisions of this Commission.

Id. at 6569 (footnotes omitted).

In reviewing the merger, the Commission concluded that a result which would “diminish the public’s ability to obtain information from diverse sources” or “constrain consumers’ access to the ‘widest possible’ array of information over high speed technology” would be contrary to the public interest. *Id.* at 6571. Accordingly, the Commission was required, under the Communications Act,

to examine the effects of the merger on the relevant markets and impose appropriate conditions. *Id.* at 6571. As the Commission explained:

The Commission has a statutory duty to determine whether the proposed transaction would serve the public interest, and may not approve it absent such a finding. We cannot abdicate this duty on the basis of speculation that a future proceeding might be able to remedy harms to the public interest that we believe would result from a proposed merger.

Id. at 6582.

The Commission cannot, consistent with the *AOL Time Warner Merger Order*, ignore the implications of ATT Comcast Merger on the broadband services and content markets. The description of the HSDA in the press appears to track almost precisely the Commission's recitation of potential harms to the public interest in permitting further concentration in this market. Accordingly, the Commission must at least review the agreement to fulfill its obligation under the Communications Act as set forth in the *AOL Time Warner Merger Order*.

4. Two Recent Orders Reinforce Petitioners' Arguments.

Two decisions issued within the last two months further underscore the points made above.

In the Commission's recent order designating the Echostar/DirecTV Application for hearing, the Commission once again made explicit findings in the broadband access market. *Echostar Communications Corp., General Motors Corp., and Hughes Electronics Corp.*, FCC 02-284, at ¶¶218-47 (released October 18, 2002). The Commission also reaffirmed the importance of maintaining viewpoint diversity, *id.*, at ¶¶42-43, 49-51, and 55. The Commission explicitly designated as issues for determination at hearing the effects on the broadband market and the effects on viewpoint diversity. *Id.*, at ¶289.

In *LUJ, Inc.*, the Commission clarified its past practice that it would not require the submission

of certain irrelevant material. The Commission stressed, however, that it would require the submission of all relevant documents and side agreements, and that failure to provide any such would delay processing of an application. *LUJ, Inc.* FCC 02-235 (released August 22, 2002).

B. Consideration of Competition in Core Video and Telephony Markets.

In addition to concerns in the broadband market, the HSDA agreement reaches core concerns in the Commission's video competition market. It is well established that the Commission must consider whether a merger frustrates the purposes of the Communications Act: notably whether it impedes the goals of promoting competition in the voice and video markets, or threatens the First Amendment goal of fostering "decentralization of information production" and preserving viewpoint diversity. *AOL Time Warner Merger Order*, 16 FCC Rcd at 6555-56.

In the *AOL Time Warner Merger Order*, the Commission found that its review must include consideration of "whether the proposed merger will further statutory goals of assuring that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public and promoting competition in the delivery of diverse sources of video programming." *Id.* at 6556.

In this regard Petitioners observe that the terms of the agreement prohibiting AOL Time Warner from offering potentially competing video (or potentially, IP telephony) services via broadband are identical in all respects to those Congress found contrary to public policy when it passed the 1992 Cable Act. *See* Cable Television Consumer Protection and Competition Act of 1992, Pub. L. 102-385 §§2(a)(5)-(a)(6), 2(b)(1). *See also Report on S.12, Cable Television Consumer Protection Act of 1991*, S-Rep. 102-92 (1991) at 24-32 (detailing anticompetitive practices such as requiring non-compete agreements and placement in more expensive tier for potentially competing programming

services).

The Communications Act has long embodied a basic principle of prohibiting the formation of monopoly in Title III services. *See, e.g.*, 47 USC §314 (prohibition on license transfer that would lessen competition). This was further emphasized by the passage of the 1996 Act, which removed the Commission's ability to insulate parties from antitrust law Telecommunications Act of 1996, Pub. L. 104-104 §602, and which the Commission has consistently found requires the Commission to carefully consider any threats to competition.

Petitioners have submitted lengthy comments demonstrating that the combination of ATT and Comcast will increase concentration to dangerous levels. It has long been presumed that levels in excess of 30% raise significant antitrust concerns. *See, e.g., United States v. Philadelphia National Bank*, 374 U.S. 321 (1963). In antitrust analysis, of course, the parties have the right to rebut this presumption and the government must then produce additional evidence. *FTC v. H.J. Heinz Co.*, 246 F.3d 708, 715 (D.C. Cir. 2001). But the parties have not yet reached this stage. Rather, the Commission at this point, even as a matter of pure antitrust law, has a duty to diligently investigate the potential for the merger to diminish competition in the relevant markets.

The Commission, of course, has a duty to intervene well before levels of concentration that would give rise to an antitrust action. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 194 (1997). More significantly, Petitioners have filed voluminous comments demonstrating that the combination of ATT and Comcast raises concentration to a level that permits ATT Comcast to exercise market power on a national level. Petitioners will not, however, repeat here the arguments advanced in the *Reply* and in numerous notices of oral *ex parte* presentations.

In this regard, Applicants observe that a recent paper by the Commission has questioned the

fundamental premise of Applicants' expert testimony that the combination of ATT and Comcast represents no threat to the current levels of competition. *See Public Notice, Media Bureau Releases Two Staff Research Papers Relevant to the Cable Ownership Rulemaking and the AT&T-Comcast Proceeding*, October 9, 2002. By contrast, the material submitted by Petitioners has not only withstood scrutiny, it has proven predictive.

CONCLUSION

For the above stated reasons, the attempts by Applicants to refute the arguments of Petitioners must fail. If the Commission refuses to grant Petitioners *Motion* and require production of the HSDA and opportunity for public comment, it will fail in its responsibilities under the Communications Act. Furthermore, refusal would be arbitrary and capricious, since it would fly in the face of past precedent to the contrary.

Respectfully submitted,

Harold Feld
Andrew Jay Schwartzman
MEDIA ACCESS PROJECT
1625 K. St., NW
Suite 1118
Washington, DC 20006
(202) 232-4300
Counsel for Petitioners

Student Intern: Katherine Sheely

October 28, 2002