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October 30, 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:

This letter responds to arguments presented by Media Access Project ("MAP") and Earthlink on October 28 and 29,[1] respectively, in support of their pending motions that seek to require submission of a highly confidential agreement ("AOL ISP Agreement") that would allow AOL Time Warner to offer high-speed Internet service on AT&T Comcast's cable systems. MAP and Earthlink contend that the AOL ISP Agreement is "highly material" to the Commission's review of the proposed license transfers and that "established law" requires that it be included in the record in this proceeding. As detailed below, these claims are baseless. Rejecting these last ditch procedural efforts to delay the Commission's consideration of a merger that will plainly serve the public interest – and with respect to which MAP and Earthlink have failed to identify *any* legitimate substantive objection – is entirely consistent with both precedent and sound Commission policy and procedure.

Granting the MAP/Earthlink request, on the other hand, would jeopardize the confidentiality of proprietary commercial agreements, penalize Applicants for entering into precisely the kinds of ISP arrangements that the Commission has encouraged, and reward procedural gamesmanship by merger opponents whose substantive objections to the merger were proven, on the record, to be meritless. Moreover, granting the request could needlessly delay

[1] *See* MAP, *et al.*, Memorandum in Response to Questions Propounded by Office of General Counsel (filed October 28, 2002) ("*MAP Memo*"); October 29, 2002 Letter from Earl W. Comstock to Marlene H. Dortch ("*October 29 Earthlink Ex Parte*").

completion of the Commission's review of a long-pending merger, thereby postponing desirable upgrades of AT&T Broadband's cable systems and prolonging uncertainty for employees, shareholders, and lenders.

The ISP Agreement Is Not Material To The Commission's Determination Whether the Proposed Merger Will Serve the Public Interest. MAP's principal contention that the AOL ISP Agreement is material to the divestiture of AT&T's TWE interest, because the AOL ISP Agreement is related to the TWE Restructuring Agreement, is a *non sequitur* (as Earthlink appears to recognize).[2] The Applicants' commitment to divest the TWE interest is secured through the disposition trust. The trust provides that the TWE interest will be sold in one of two ways: (1) the trustee can sell the TWE interest through the existing registration rights process, or (2) the applicants can ask the trustee to divest the TWE interest through an alternative transaction. The TWE Restructuring Agreement is simply an alternative transaction that could take place. However, whether this or another alternate transaction does or does not close, the TWE interest *will be sold* by the trustee through the trust mechanism (*i.e.*, the trustee will pursue registration rights as set out in the trust).

In short, it is the *trust* that provides the Commission with an iron clad guarantee that the TWE interest will be sold, *not* the TWE Restructuring Agreement, and certainly *not* the AOL ISP Agreement.[3] Thus, even if MAP's characterization of the relationship between the TWE Restructuring Agreement and the AOL ISP Agreement was accurate, that would not support MAP's claim that the AOL ISP Agreement is material to the Commission's determination whether the Applicants have taken the necessary steps to ensure that the TWE interest will be sold.[4] In any event, as MAP well knows, the Applicants have submitted a

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[2] *See October 29 Earthlink Ex Parte* at 3 ("the competitive concerns raised by the [AOL ISP Agreement] do not primarily arise out of AT&T's interest in TWE").

[3] MAP repeatedly claims that the Applicants have relied on the TWE Restructuring Agreement as proof of their intention to divest the TWE interest. *See MAP Memo* at 3 (Applicants "have placed very substantial reliance" on the TWE Restructuring Agreement; Applicants "have made [the TWE Restructuring Agreement] a centerpiece of their Application"); *id*. at 4 (the TWE Restructuring Agreement is a document "upon which [the Applicants] seek to rely"). The Applicants have done no such thing. The Applicants have built a compelling record to demonstrate that the trust is the proof of intention to divest, and the timely execution of the TWE Restructuring Agreement, while fortuitous, is hardly the "centerpiece" of the Application.

[4] MAP's suggestion that the Commission "stop[ped]" the "informal 180-day 'clock' explicitly to consider the TWE Restructuring Agreement," *MAP Memo* at 6, and that in so doing the Commission implicitly determined the materiality of the TWE Restructuring Agreement, is plainly wrong. In fact, the Commission stopped the clock only twice, once to consider the

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certification to the Commission that the ISP Agreement "in no way supercedes or contradicts the terms of the TWE Restructuring Agreement."[5]

Nor is there any other material relationship between the AOL ISP Agreement and the proposed merger. As the Applicants have previously explained, AT&T and AOL have agreed that even if the AT&T Comcast merger does not close, AT&T and AOL will (assuming other conditions to the TWE Restructuring have been met or waived) enter into a comparable ISP agreement on terms that are *identical* in all material respects to the AOL ISP Agreement that would apply to AT&T Comcast.[6] Thus, there is no possible argument that the terms of the AOL ISP Agreement reflect some difference in size between AT&T and AT&T Comcast or could trigger, or provide evidence of, any merger-specific harm caused by the combination of AT&T and Comcast. To the contrary, under any rational view, the AOL ISP Agreement can only represent *forward* progress on the multiple ISP front, given that it will provide millions of cable subscribers with *additional* ISP choice.[7]

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Applicant's proposed material terms and conditions of trust, *see Public Notice*, "Media Bureau Seeks Comment on Proposed Insulation and Divestiture of AT&T's Interest in Time Warner Entertainment, L.P.", MB Docket No. 02-70 (Aug. 9, 2002), and again to consider a large volume of documents, including the trust instrument, a statement of why the trust is in the public interest, and a letter regarding the sunset of safeguards adopted in the MediaOne order, in addition to the TWE Restructuring Agreement. *See* Letter from W. Kenneth Feree to James R. Coltharp and Betsy J. Brady, at 2, MB Docket No. 02-70 (Sept. 24, 2002).

[5] *See* October 24, 2002 Letter from Arthur R. Block, Comcast Senior Vice President and General Counsel, to Marlene H. Dortch. This fully addresses MAP's "gravest concern" regarding the AOL ISP Agreement. *MAP Memo* at 3.

[6] *See* October 28, 2002 Letter from Arthur R. Block, Comcast Senior Vice President and General Counsel, and Mark C. Rosenblum, AT&T Vice President – Law, to Marlene H. Dortch ("the only difference of consequence between the two agreements concerns the cities in which the agreements would be implemented" in recognition of the fact that if "the AT&T-Comcast merger has not closed, of course, AT&T would not be in a position to offer the service on Comcast systems").

[7] The Applicants have certified that the AOL ISP Agreement "does not give AOLTW any exclusive rights to provide Internet service over any AT&T Comcast cable system nor does it constrain AT&T Comcast's ability to negotiate and reach agreements with other ISPs in the future." October 2, 2002 Letter from Mark C. Rosenblum to Marlene H. Dortch. Moreover, contrary to MAP's speculation, the AOL ISP Agreement does *not* limit subscriber access to streaming (or other) content available over the public Internet, and is fully consistent in this regard with Applicants' responses to the Commission's data requests regarding the Applicants'
(continued . . .)

There Is No Support In Any Court Or Commission Decision For MAP's Argument That The Commission Must Nonetheless Demand That The AOL ISP Agreement Be Placed In The Record In This Proceeding. With respect to legal obligations, MAP's latest submission, like its previous ones, attacks a straw man. The question here is not whether the Commission may "*blind* itself to available facts which relate to the Commission's core public interest findings." *MAP Memo* at 5 (emphasis added). The Commission has developed an extensive, indeed exhaustive, record on alleged impacts of the merger on Internet and content markets, and that record contains overwhelming evidence that the merger could have no possible adverse impacts in those markets. Moreover, in the course of its analysis, the Commission's staff *did* review the proprietary broadband-related HSR documents that applicants have submitted to the DOJ. Thus, MAP's complaint is merely with the entirely proper determination that the vast majority of those documents are not material to the Commission's public interest review of the proposed merger.[8]

Contrary to MAP's claims, the issue here was addressed in *SBC Communications v. FCC*, 56 F.3d 1484 (D.C. Cir. 1995). There, as here, the Commission's staff reviewed many of the Applicants' HSR documents, but required that only a subset of the reviewed documents be placed in the record of the Commission's proceeding. There, as here, an opponent of the merger challenged the agency's determinations of materiality. The court of appeals summarily rejected the claim, confirming that the Commission has broad discretion in determining what documents are material to its public interest decision-making in a license transfer proceeding.

MAP claims that "[t]his case is different in every possible respect from *SBC* v. *FCC,*" but offers only two such respects, neither of which has any merit. MAP first suggests – incorrectly – that the issue in *SBC* was whether the Commission had an obligation to insist that the record include *all* of the millions of pages of HSR documents. In fact, the relevant dispute in *SBC* related only to "certain documents" that BellSouth claimed were "deemed relevant by both AT&T and BellSouth." *Id*. at 1496. Second, MAP suggests that, unlike the documents at issue in SBC, the document at issue here is an attachment to a document that has been placed in the record. But the very case cited by MAP for the proposition that all attachments to material documents must be submitted, in fact, expressly rejects that proposition. In *LUJ, Inc.*,[9] the Commission rejected a challenge (of an order approving a license transfer) that relied upon the

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policies and intentions with respect to ISP agreements.

[8] The AOL ISP Agreement was among the documents submitted to DOJ.

[9] *Application of LUJ, Inc. (Assignor) and Long Nine, Inc. (Assignee)*, 2002 WL 1926852 (Rel. August 22, 2002).

applicant's failure to submit schedules and attachments to the asset transfer agreement. The Commission did so in the face of an express requirement that applications of the type at issue (those involving FCC Form 314) include "a complete and final copy" of the asset purchase agreement "including all exhibits and attachments." In so ruling, the Commission "recognize[d] that certain schedules, exhibits and other contract attachments may not be material to the Commission's review of a particular transaction and may, moreover, contain proprietary information" and "conclude[d] that a failure, by itself, to submit such documents is neither a material omission . . . nor grounds for finding that a particular transaction is not in the public interest." The Commission further noted that "it has been longstanding staff practice to accept assignment and transfer of control applications containing sales contracts that omit schedules and exhibits that are not material to our review." Plainly, if the Commission need not require the submission of immaterial attachments to the merger/asset transfer agreement itself, even where the applicable rule expressly *requires* submission of "all exhibits and attachments," there can be no serious claim that the Commission must require submission of immaterial attachments to ancillary agreements that are themselves of questionable materiality.

MAP responds with a string cite of court decisions reviewing Commission determinations under section 309(e), which provides that, in the case of an application for a broadcast "station license," the Commission must "designate the application for hearing" if there is a "substantial and material question of fact." 47 U.S.C. § 309(e). None of the cited decisions supports MAP's position here. As those decisions recognize, the Commission need conduct a hearing on such applications only if the facts in dispute are "material and substantial." In the cases cited by MAP, the disputed facts plainly were material, because they related directly to the *fitness* of the applicant/transferee to hold the license. *See, e.g., Weyburn Broadcasting Ltd. v. FCC*, 984 F.2d 1220, 1238-39 (D.C. Cir. 1993) (failure adequately to investigate claims that applicant misrepresented its financial statements); *Beaumont Branch of the NAACP v. FCC*, 854 F.2d 501 (D.C. Cir. 1988) (failure adequately to investigate claims that applicant engaged in intentional race discrimination); *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 265-66 (D.C. Cir. 1974) (failure adequately to investigate evidence that transferor overstated losses and that transferee misrepresented survey results). Here, in contrast, MAP has not identified, and could not identify, any merger-specific issue to which the AOL ISP Agreement is material in any respect. As explained above, the Applicants' commitment to divest the TWE interest is secured with or without the TWE Restructuring Agreement or the AOL ISP Agreement. Moreover, the existing record refutes MAP's erroneous claim that review of the AOL ISP Agreement is necessary to assess AT&T Comcast's "market power" in dealing with ISPs. Because the terms of AOL ISP Agreement will be identical in all material respects whether AOL contracts with AT&T Comcast or only with AT&T, there can be no claim that the AOL ISP Agreement could shed any light on the relative "power" of AT&T Comcast and AT&T with respect to ISPs – an issue on which there is, in any event, already overwhelming record evidence that AT&T

Comcast will have neither the ability nor the incentive to exercise market power.[10] In short, in contrast to the cases cited by MAP that centered on the Commission's failure to investigate adequately a material factual issue, the only allegation advanced by MAP that purports to raise a merger-specific issue has been thoroughly examined in the course of this proceeding, as demonstrated by the extensive expert testimony and other record evidence.

For its part, Earthlink suggests that the Commission may ignore precedent because the circumstances here are *sui generis* in that the AOL ISP Agreement "is the *only* document . . . that provides concrete information about how the merged AT&T Comcast will behave in the high-speed Internet access service market." *October 29 Earthlink Ex Parte* at 5. But that is simply wrong. The record is replete with evidence – including detailed economic and fact declarations and the Applicants' responses to the Commission's data requests – that provide ample support both for the Applicants' longstanding commitments to ISP choice and for the unassailable conclusion that the combination of AT&T and Comcast will not impede ISP competition. The AOL ISP Agreement, whatever its terms, could add nothing to the record in this regard, because it does not differ from the terms that would apply between AT&T and AOL in the absence of the merger (and it bears noting that Earthlink's zeal to review the terms of a direct competitor's agreement should be particularly troubling to the Commission).

Indeed, the only relevant language in the decisions cited by MAP and Earthlink is the consistent recognition that the courts' role is "not to restructure the FCC's information-gathering process." *Bilingual Bicultural Coalition on Mass Media, Inc. v. FCC*, 595 F.2d 621. 630-31 (D.C. Cir. 1978) ("the scope of our review is quite narrow; we sit to review two license renewal orders . . . . If the Commission's action in granting those renewals 'was not arbitrary, capricious or unreasonable,' we must affirm."). Any other rule would, of course, be unworkable. Neither the full Commission nor the courts are equipped to conduct materiality reviews with respect to every proprietary document that a merger opponent identifies (and it bears noting that the AOL ISP Agreement is, in fact, just one of the *many* documents that MAP claims are "highly

[10] Moreover, the cases make clear that "mere conclusory allegations are not sufficient" to trigger any obligation to hold a hearing even under section 309(e). Rather, as the cases cited by MAP hold, the opponent of the broadcast application or renewal has a "heavy burden" to demonstrate with "specificity and support" the existence of a substantial material issue of fact. *CPBF*, 752 F.2d at 674; *NAACP*, 854 F.2d at 507. Here, MAP offers only rank and uninformed speculation about the significance of the contract; speculation that has been answered in all relevant respects by corporate officers' certifications on critical points. *See California Public Broadcasting Found.* v. *FCC*, 752 F.2d 670, 674 (D.C. Cir. 1985) ("A hearing is not required to resolve issues the Commission finds are . . . not substantial . . . regardless of whether the facts involved are in dispute.").

material" and must be placed in the record).[11] As the D.C. Circuit recognized long ago, MAP's proposed approach would "arm interested parties with a potent instrument for delay." *U.S.* v. *FCC*, 652 F.2d 72, 91 (D.C. Cir. 1980). It would also severely undermine the ability of the Commission and the DOJ to coordinate merger review efforts and to avoid wasteful duplication. MAP and Earthlink may claim (incorrectly) that they only seek one document today,[12] but they identify no limiting principle that would prevent them (and others) from demanding the same treatment with respect to ten or one hundred or one thousand documents that it might subsequently speculate are "highly material." On this record, there is no real possibility that a reviewing court would rule the Commission's denial of the MAP and Earthlink requests an abuse of the Commission's broad discretion to determine which documents are relevant to its public interest determinations.

Nor, contrary to MAP's and Earthlink's claims, is there anything in the Commission's prior merger orders that suggests otherwise. MAP argues that the Commission cannot, consistent with its orders in the AT&T/TCI, AT&T/MediaOne, AOL/Time Warner, and DirecTV/Echostar merger proceedings, "ignore the implications of the ATT Comcast Merger on the broadband services and content markets." *MAP Memo* at 14. But no one proposes that the Commission do anything of the sort. The Applicants and other commenters have submitted mountains of evidence relating to potential impacts of the merger on broadband Internet and content competition, and this evidence demonstrates that the merger will have no anticompetitive effects in those (or any other) areas. MAP's speculation that the AT&T Comcast agreement to carry AOL could shed light on the need for "forced access" is particularly ironic given that MAP would have made exactly the same argument if the Applicants had announced, in connection with the TWE Restructuring Agreement, that an ISP deal would *not* be negotiated. And precisely how would MAP have the Commission determine that the particular terms that AOL – hardly a shrinking violet – negotiated demonstrate that it is a "victim" of AT&T Comcast "market power"? Multiple ISP access over cable has only recently become a commercial reality and there are no conceivable metrics against which the Commission could, in this proceeding,

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[11] MAP has a separate pending motion that asks the Commission to "reopen the record and . . . insist that AT&T and Comcast disclose the underlying corporate documents that will support – or belie – their assertions regarding the competitive issues raised by the Joint Consumer Petitioners and other market participants." Supplemental MAP Petition to Deny at 4 (filed September 30, 2002). In other words, MAP seeks access to *any* document relating to the claims of *any* merger opponent – and asks that the Commission's review of the merger be postponed until *all* such documents are submitted into the record in this proceeding.

[12] Even the latest MAP pleading calls for the "entire TWE Restructuring" agreement, MAP Memo at 2, which would require disclosure of many other documents besides the AOL ISP Agreement and those that have already been submitted in the record.

determine "right" or "wrong" prices or other terms. And in marked contrast to its eagerness to look at its competitor's deal, Earthlink has not offered to submit its own agreement for review and comparison. In any event, Earthlink and AOL each had their own views of what is and is not important in an arrangement of this type and the deals they negotiated are accordingly different and not comparable. Indeed, the only meaningful comparison could be between an AT&T Comcast deal with AOL and a standalone AT&T deal with AOL, and as the Applicants' senior officers have certified *that* comparison confirms that there is no material difference and thus no basis for speculation that the particular negotiated terms could shed any light on issues of market power. Rather, the Commission must, in this proceeding, like every other merger proceeding, rely upon economic analysis of the relevant marketplace conditions. And, as the voluminous record in this proceeding quite conclusively and overwhelmingly demonstrates, there is no basis for any claim of broadband market power here.

Finally, Earthlink contends that the Commission's AOL/Time Warner order makes clear that the AOL ISP Agreement "raises competitive concerns with respect to high-speed Internet access services," *October 29 Earthlink Ex Parte* at 3, but Earthlink's block quote from that order confirms that no such concerns could exist here. As the Commission made clear, its concern in that prior proceeding was a unique circumstance not present here – *i.e.*, that "the marriage of AOL and Time Warner would wed the nation's leading ISP with its second largest cable provider," a combination that could "render unaffiliated ISPs in that market unable to compete effectively."[13]

MAP and Earthlink have now tried for *eight weeks* to attempt to cobble together a coherent theory why the Commission must have the AOL ISP Agreement to reach a reasoned determination that the proposed merger is in the public interest. They have utterly failed to do so; indeed, their latest submissions largely rehash previous baseless arguments. Accordingly, the Applicants respectfully request that the Commission reject MAP's attempts to inject further delay into this proceeding and expeditiously approve the proposed license transfers.

[13] *AOL/Time Warner Order* at ¶ 82.

Sincerely,

David L. Lawson

cc: James Bird
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