

November 7, 2002

*By Electronic Delivery*

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445-12th Street, S.W.  
Washington, DC 20554

**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:

Earlier this afternoon, several consumer groups (collectively, "Petitioners") filed an "emergency motion" asking the Commission to "suspend action on the above-cited application pending resolution of an expedited judicial proceeding to review the Commission's Order" released November 6. This motion is unfounded and irresponsible and part of a pattern of activities clearly intended to delay the Commission from completing its review of the proposed merger. It should be dismissed out of hand.

The Commission's *November 6 Order* explains, with exceptional detail and clarity, the Commission's reasons for concluding that the AOL ISP Agreement is not relevant to the Commission's public interest determination regarding the applicants' proposed merger. Petitioners obviously disagree with that determination, and they are entitled to try to challenge it in court at the appropriate time, as part of a challenge to a final order of the Commission approving the merger. But the outstanding feature of the "emergency motion" is its utter failure to articulate any substantive basis to refute the careful reasoning of the *November 6 Order*. Petitioners' shrill but empty assertions plainly afford no basis for further delaying the merger review process.

Petitioners' motion includes the assertion (at 2) that the merger "will dramatically restrict on [*sic*] the free flow of information, especially on the broadband Internet." The record in this proceeding is decidedly to the contrary, and it is replete with Petitioners' prior failed attempts to give this assertion substance. Petitioners' latest reiteration of this charge does not give it merit. Indeed, the applicants have repeatedly stated on the record that they have not and will not restrict their subscribers from accessing any content available on the Internet. There is nothing in the "emergency motion" or in logic to suggest that requiring the filing of a private commercial agreement that will *expand* consumers' choice of Internet service providers could undermine applicants' representations.

Petitioners' claim (at 2) that delay will not cause substantial harm to applicants is plainly false. At this late stage of the process, with preparations for closing of the merger far advanced, further delays would cause serious harm to applicants' customers, lenders, shareholders, and employees. Petitioners' assessment of the effects of further delays on the "public interest" relies entirely on their mistaken belief about dangers to the "free flow of information." The Petitioners' assertions also ignore the merger's public benefits – as described on the record – including most particularly accelerating the upgrade of cable systems and expanding the availability of broadband services.

Finally, as with the balance of the motion, Petitioners' argument (at 2) that they will "prevail on appeal" rests on the hollow (and inherently circular) claim that the Commission "cannot make the requisite public interest findings . . . without considering the contents" of the AOL ISP Agreement. Yet the plain fact is that Commission staff has had the opportunity to examine thousands of documents filed with the Department of Justice to determine their relevance – or lack thereof – to the public interest determination that the Commission is required to make, and Commission staff has made independent judgments about all of them. In this one case, the Commission itself has considered that judgment, evaluating it against the Petitioners' claims of relevance, and determined that the AOL ISP Agreement is *not* relevant to the public interest analysis. In so doing, as the cases cited in the *November 6 Order* make clear, the Commission is treading familiar and solid ground. As the D.C. Circuit has ruled, "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 of delay." *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1496 (D.C. Cir. 1995) (citation and quotation omitted).

Petitioners cite no Commission rule or precedent that supports the extraordinary relief they request. Contrary to their conclusory, hyperbolic assertions, their petition falls woefully short of meeting what they concede is the "stringent standard" set forth in *Virginia Petroleum Jobbers Ass'n v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir. 1958) and *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). In fact, the Commission has on numerous occasions denied precisely the sort of relief Petitioners seek. *See, e.g., In re Teleprompter Corp.*, Memorandum Opinion and Order, 87 F.C.C.2d 531, ¶¶ 90-93 (1981); *In re Application of Metromedia Radio & Television, Inc.*, Order, 59 Rad. Reg.2d (P&F) 1209 (1986); *In re Applications of Seggi Broadcasting Corp.*, Memorandum Opinion and Order, 1 FCC Rcd 592 (1986); *In re Applications of Capital Cities Communications, Inc.*, Order, FCC 85-652, 1985 FCC LEXIS 2127 (released Dec. 18, 1985); *In the Matter of Lockheed Martin Global Telecommunications*, Order, 17 FCC Rcd 1552 (Int'l Bureau 2002).

Two months ago, when the merger review process had been underway for six and one-half months, applicants noted that "[t]here comes a time . . . when the regulatory gamesmanship . . . must stop . . ." That statement is all the more true today. Petitioners have already caused substantial delay in this proceeding through their efforts to compel

disclosure of the AOL ISP Agreement and through additional out-of-time filings. The Commission, in turn, has properly determined that the document is not relevant. Petitioners' inability to accept that determination provides no excuse for *additional* delay.

The public interest plainly directs that the Petitioners' motion be denied. We respectfully urge that the Commission dismiss Petitioners' latest motion in an ordering clause of the final order on the merger, and otherwise disregard it.

Pursuant to section 1.1206(b) of the Commission's rules, this letter is being filed electronically with the Office of the Secretary. Copies of this letter are also being sent to the merger review team. Please let us know if you have any questions.

Respectfully submitted,

/s/ Betsy J. Brady

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