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EX PARTE OR IATE FILED

BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

RECEIVED & INSPECTED  
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FCC - MAILROOM

ORIGINAL

In the Matter of )  
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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

RECEIVED & INSPECTED  
NOV 13 2002  
FCC - MAILROOM

**(1) NOTICE OF LODGING EXHIBITS IN SUPPORT OF THE EX PARTE PETITION OF JAMES J. CLANCY TO DENY APPLICATIONS AND REVOKE LICENSES, AND (2) ADDITIONAL CONTENTIONS.**

**TO: SECRETARY, FEDERAL COMMUNICATIONS COMMISSION**  
**DATE: November 8, 2002**

Pursuant to footnotes 6, 7, and 8, at pages 4 and 5 of the "Ex Parte Petition of James J. Clancy to Deny Applications and Revoke Licenses" (see copy of Ex Parte Petition at **Appendix A** to this letter), I am transmitting, for filing in the above proceeding, the following Exhibits, which are alleged to be representative of the *per se* hardcore nature<sup>1/</sup> of all of the "**HotZone**" and "**HotNetwork**" videos which have been cable cast by **A.T.&T. Corp.**, a New York Corporation, on its "In Demand" Cable T.V. operation on Channels 457 and 459 during the period January, 2001 through October 2, 2002:

- 3ft.x5ft. Time and Motion Studies of three cable-casted video features
- Exhibit 1** "101 Cheerleaders & 1 Jock" (21 parts) r.f. Videotape (Ex. 7)
  - Exhibit 2** "More Than A Handful 9" (20 parts), r.f. Videotape (Ex. 8) and **separately filed DVD**

<sup>1/</sup> **Black's Law Dictionary**, rev. 4<sup>TH</sup> Ed., defines "*malum in se*" as: "**Malum in se**. A wrong in itself; an act or case involving illegality from the very nature of the transaction. upon principles of natural, moral, and public law. *Story, Ag.* section 346. *State v. Shedouly*, 45 N.M. 516, 118 P.2d 280, 287". See also, *Roth v. U.S. (Roth-Alberts)* 354 U.S. 476 at 485, fn. 15, 1 L.Ed.2d 1498 at 1507, fn. 15, 77 S.Ct. 1304 (1957).

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- Exhibit 3 “*Hell On Heels*” (23 parts) r.f. Videotape (Ex. 9)
- Exhibit 4 Previews Before “*More Than A Handful 9*”, r.f. Videotape (Ex. 8) and separately filed DVD
- Exhibit 5 Previews After “*More Than A Handful 9*”, r.f. Videotape (Ex. 8) and separately filed DVD
- Exhibit 6 Subliminal Study of the Previews After “*More Than A Handful 9*”, r.f. Videotape (Ex. 8) and separately filed DVD

Timed Videotape copies of ~~three~~ cable-casted video features

- Exhibit 7 “*101 Cheerleaders & 1 Jock*”, r.f. Time and Motion Study (Ex. 1)
- Exhibit 8 “*More Than A Handful 9*”, including “Previews Before”, and “Previews After with subliminal frames”, r.f. Time and Motion Studies (Ex.2; Ex. 4-6)
- Exhibit 9 “*Hell On Heels*”, r.f. Time and Motion Study (Ex. 3)

Exhibit 10 Copy of *Summons and Complaint in JAMES J. CLANCY, acting as a Private Attorney General, Plaintiff v. AMERICAN TELEPHONE AND TELEGRAPH, INC., (A.T.&T.), a New York Corporation; THE HOT NETWORK; THE HOT ZONE; VIVID VIDEO, a Coruoration; the VIVID ENTERTAINMENT GROUP; PLAYBOY ENTERPRISES, INC.; CHRISTIE HEFNER; JAMES HAHN, as the former Los Anpeles City Attornev; ROCKY DELGADILLO, as the present Los Anpeles City Attornev; the LOS ANGELES CITY COUNCIL; STEVE COOLEY, as the Los Anpeles County District Attornev; LLOYD W. PELLMAN, as the Los Angeles County Counsel; the LOSANGELES COUNTY BOARD OF SUPERVISORS; and JOHN ASHCROFT, as the U.S. Attornev General; and DOES 1 through 10, Defendants.*, No. LC062475, L.A. County Superior Court, Van Nuys, California,

### ADDITIONAL CONTENTIONS

#### I

THE F.C.C. HAS CONCURRENT JURISDICTION WITH THE DEPARTMENT OF JUSTICE TO ACT UPON THE ISSUES OF “FRAUD” AND “OBSCENITY” WHICH ARE ALSO BEFORE THE LOS ANGELES COUNTY SUPERIOR COURT **IN** PETITIONER’S STATE LAWSUIT, FILED OCTOBER 4, 2002 (SEE COPY, ON FILE HEREIN AS EXHIBIT 10 TO THIS PETITION). THE STATE COURT ISSUES WHICH WERE FRAMED BY PETITIONER’S COMPREHENSIVE **DECLARATION** UNDER PENALTY OF PERJURY ARE REPEATED IN **SYNOPTIC FORM IN THIS F.C.C. LETTER.**

Petitioner **requests** the Federal Communications Commission to take judicial notice of Petitioner’s comprehensive Declaration which is presently before the California Superior

Court in the State Complaint in Equity, referred to herein as Exhibit 10. To accomplish that objective, Petitioner incorporates by reference the entire content of such State lawsuit in this Petition as though such pleadings were present herein

The Federal Communications Commission has concurrent jurisdiction with the Department of Justice to act responsibly in the enforcement of Federal Laws and Regulations prohibiting or regulating the dissemination of obscene materials by means of television and/or cable, and subscription television (including by satellite or microwave). That jurisdiction must be exercised by the Federal Communications Commission independently of the judgment of the Department of Justice, in order that the joint and common goals, obligations, and responsibilities of each in the enforcement of such laws and regulations will be facilitated. See, in this regard, the copy of "Memorandum of Understanding Between the Federal Communications Commission and the Department of Justice Concerning Complaints and Cases Involving Obscenity and Indecency", dated March 19, 1991, and April 9, 1991, which is attached as Appendix B to this letter.

## II

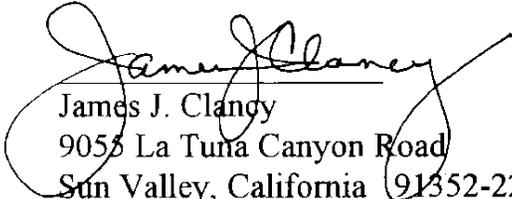
THE "MEMORANDUM OF UNDERSTANDING BETWEEN THE FEDERAL COMMUNICATIONS COMMISSION AND THE DEPARTMENT OF JUSTICE CONCERNING COMPLAINTS AND JURISDICTION TO ACT, ETC." (SEE COPY AT APPENDIX B) HAS NOT BEEN ADMINISTERED PROPERLY IN THAT SUCH "JURISDICTION" HAS NOT BEEN EXERCISED "INDEPENDENTLY" BY EACH GOVERNMENTAL AGENCY, NOR HAS THE DUTY OF EACH TO RESPOND TO SUCH COMPLAINTS BEEN ADDRESSED. SUCH FAILURES, AS IN THIS CASE, ARE RESPONSIBLE FOR (1) THE FAILURE OF THE DEPARTMENT OF JUSTICE TO ACT RESPONSIBLY ON THIS MATTER IN THE TWO YEARS OF ITS DAILY OPERATIONS, AND (2) THE INCREDIBLE RATE OF GROWTH OF HARDCORE PORNOGRAPHY ON CABLE AND SATELLITE. V. DURING THE ELEVEN YEARS THAT SAID "MEMORANDUM OF UNDERSTANDING" HAS BEEN IN FORCE.

The Federal Communications Commission is requested to take judicial notice that the Trial Facts which are presently before the California Superior Court in the State lawsuit (see Appendix B) were unilaterally brought to the attention of the U.S. Attorney General two years ago (see *Complaint* at footnote 12 and 13 at page 23 and 24). Although Petitioner's complaint requested the use of that body's "civil jurisdiction", the Justice Department did ~~nothing~~ nothing on the matter **and** referred the matter to the Criminal Division, which also did ~~nothing~~ nothing on the matter. Neither Agency assumed "Jurisdiction" to act in such matter, or complied with its corresponding duty to address the issues which were framed by that complaint.

Pursuant to § 1.1206 of the Commission's Rules, an original and two copies of this Notice are being sent, using U.S. Mail, addressed to Secretary, Federal Communications Commission, 445 12<sup>TH</sup> Street, S.W., Washington, D.C. 20554. One copy of this Notice is being served by first-class U.S. Mail, postage prepaid, upon the following

AT&T Corp., a New York Corporation  
c/o C.T. Corporation System  
818 West Seventh Street  
Los Angeles, California 90017

Respectfully submitted:

  
James J. Clancy  
9055 La Tuna Canyon Road  
Sun Valley, California 91352-2221  
(818) 352-2069

APP  
A

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses	)	MB Docket No. 02-70
	)	
From	)	
	)	
Comcast Corporation and AT&T Corp.,	)	
Transferors,	)	
	)	
To	)	
	)	
AT&T Comcast Corporation,	)	
Transferee	)	

**EX PARTE PETITION OF JAMES J. CLANCY  
TO DENY APPLICATIONS AND REVOKE LICENSES**

**1. INTRODUCTORY FACTS**

Beginning on February 28, 2002,<sup>1</sup> Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") (collectively, the "Applicants") filed applications (collectively, "Applications"), pursuant to sections 214 and 310(a) of the Communications Act, as amended, 47 U.S.C. §§ 214 and 310, asking the Federal Communications Commission ("Commission") to approve the transfer of control of licenses and authorizations (collectively, "FCC Licenses") currently held or controlled, directly or indirectly, by them in connection with the proposed merger of AT&T and Comcast and related agreements.<sup>2</sup>

The Commission's "AT&T/Comcast Merger Page"<sup>3</sup> sets forth the following facts relevant to the background of the Applications:

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<sup>1</sup> On February 28, 2002, the Applicants filed a Public Interest Statement and associated applications for consent to the transfer of control of certain licenses and authorizations. On various subsequent dates, up to and including March 26, 2002, the Applicants filed additional, related transfer of control applications, re-filed certain applications, and filed supplemental information or amendments to the applications to make them acceptable for filing.

<sup>2</sup> See Protective Order [Document DA-02-734] adopted in this proceeding [M.B. Docket No. 20-70] on March 28, 2002, released March 29, 2002.

<sup>3</sup> AT&T/Comcast Merger Page, at < \_\_\_\_\_ >, visited October 31, 2002.

The proposed transfer of control will result from the spin-off of AT&T Broadband Corp. ("AT&T Broadband"), a holding company for AT&T's broadband division, to AT&T's shareholders, and the subsequent merger of AT&T Broadband and Comcast into wholly-owned subsidiaries of AT&T Comcast. After the merger is consummated, existing AT&T shareholders will hold 53 percent of the economic interest and between 54 and 58 percent of the voting interest of AT&T Comcast; existing Comcast shareholders will hold 41 percent of the economic interest and between 3 and 7 percent of the voting interest of AT&T Comcast; and Brian L. Roberts will directly or indirectly hold 1 percent of the economic interest and 33 percent of the voting interest of AT&T Comcast.

AT&T Broadband is a major provider of cable television service, serving 13.44 million customers through cable systems in which AT&T Broadband holds more than a 50 percent interest. AT&T Broadband also holds a 50 percent or less interest in cable systems serving in the aggregate 16,585,000 additional customers. The latter group includes AT&T Broadband's 25.51 percent limited partnership interest in Time Warner Entertainment, which serves 12.8 million cable subscribers on systems that it owns or manages. AT&T Broadband also provides cable modem services and cable telephony services and holds attributable interests in certain national and regional video programming services.

Comcast also is a major provider of cable television service: serving 8,481,500 million subscribers through cable systems in which it holds an attributable interest. Additionally, it holds a general partnership interest in high-speed Internet access service, electronic commerce, video programming and other services. Comcast offers a number of services that it characterizes as "interactive TV services," provides telephone service to over 40,000 customers, and offers integrated broadband communications services to over 4,000 business and governmental customers. Additionally, Comcast holds attributable interests in several regional and national video programming networks, and owns various sports teams and arenas.

The Applicants assert that the proposed transaction will accelerate the deployment of facilities-based broadband and cable telephony services, as well as digital video services. The Applicants submit that this will occur

because the greater scale and scope of economies, cost savings, and financial standing of the combined company would better enable it to make new investments in these technologies and services. The Applicants also assert that the combined company would be in a better position to leverage AT&T Broadband's expertise in providing cable telephony on the Comcast cable systems.

## 2. SUMMARY OF ARGUMENT.

1. Federal law prohibits the use of federal channels of communication to transmit obscene material. AT&T has used its FCC Licenses to distribute obscene material, in violation of specific provisions of federal law and FCC policy (see discussion set forth below).

2. AT&T's conduct in distributing obscene material, using federal channels of communication, is contrary to the public interest. See *Monroe Communications Corporation v. FCC*, 283 U.S. App. D.C. 367, 900 F.2d 351 (1990), and discussion, below.

3. When an FCC Licensee comes before the Commission and requests a transfer of FCC Licenses, as AT&T has done herein, the Application for Transfer puts a number of questions into issue. First and foremost is the question about the prior and current use of said FCC Licenses by the FCC Licensee, and the basic character qualifications of the FCC Licensee. These issues must be determined before any transfer is approved.

4. Because of this Application for Transfer, the Commission has the mandate, under federal law, to determine whether AT&T's programming, complained about and discussed herein (see below), is obscene, and therefore in violation of federal law, FCC policy, and the public interest.

5. The federal law requires that the Commission exercise its concurrent jurisdiction to determine the obscenity question of the specifically named films disseminated by AT&T, using federal obscenity standards (see *Illinois Citizens Committee for Broadcasting v. F.C.C.*, 169 App. D.C. 166, 515 F.2d 397, 404 (D.C. Cir. 1974). See, also, *Monroe Communications Corporation v. F.C.C.*, 283 U.S. App. D.C. 367, 900 F.2d 351 (1990), and whether AT&T lacks the requisite basic character qualifications, such that the Applications must be denied, and AT&T's FCC Licenses be revoked. See 47 U.S.C. 312.

6. Petitioner is seeking a determination: (a) that the films disseminated by AT&T during the 3 month period from October 20, 2000, through October 2, 2002, and specifically named in e \_\_\_\_\_ with this proceeding, are obscene *per se*; (b) that the within described activity by AT&T violates federal law and FCC policy, is a public nuisance, constitutes an unfair business practice under federal law, and is contrary to the

public interest, (c) that such conduct demonstrates that AT&T lacks the basic character qualifications required of FCC Licensees, and that AT&T is not entitled to a transfer of its FCC Licenses; (d) that said Applications therefore **must** be denied; and further, (e) that AT&T's FCC Licenses be revoked.

7. Petitioner is providing the Following as evidence of his claim that AT&T is using its FCC Licenses in such a way so as to disseminate *per se* obscene material under its Cable TV operations, and that this conduct violates federal law, is in contravention of FCC policy, is contrary to the public interest, and demonstrates that AT&T lacks the basic character qualifications required of an FCC Licensee, and is not entitled to transfer or continue to hold its FCC Licenses:

(1) Petitioner is a resident of California, and an attorney with a long-time practice that has centered around issues involving the First Amendment and obscenity law enforcement. Petitioner is a subscriber to the Cable TV service provided by AT&T, the only Cable TV provider available in Petitioner's area. For the purpose of law enforcement, Petitioner has subscribed to and received transmission of AT&T's "1st Demand, Pay Per View, Adults Only" Service on Cable Channel 96 (analogue), and Cable Channels 457 and 459 (digital), respectively, since January 1, 2001 to the present, and has recorded such transmissions on videotapes [hereinafter, "AT&T Transmissions"], copies of which will be filed with the Commission<sup>4</sup> in connection with this Petition. The AT&T Transmissions are obscene *per se* in violation of the United States Supreme Court's rulings in *Miller v. California*, 413 U.S. 15 (1973) and its subsequent progeny<sup>5</sup> [setting forth the Constitutional test for obscenity]; *United States v. 12 200 Ft. Reels of Film*, 413 U.S. 123 (1973) [engrafting the *Miller* test into federal law through specific judicial construction, and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973) [holding that the fact that material is disseminated only to "consenting adults" has no impact on whether the AT&T Transmissions are obscene *per se*, and provides no defense under federal obscenity law.]

(2) Autoptical preferences will be submitted<sup>6</sup> in the form of three computerized *Time and Motion Studies* (;e., still photo continuities)<sup>7</sup> and computerized (timed) video

<sup>4</sup> See the list of named features at Exhibit A, attached hereto and incorporated herewith, which represents only a partial listing of the AT&T Transmissions that were surveilled. The sheer volume of obscene features makes their duplication lengthy. In addition, certain "9/11" Emergency Precautions have made their transit to Washington, D.C. more difficult. Therefore, additional exhibits in support of this Petition are being delivered to the Commission by a special separate carrier.

<sup>5</sup> The *Miller* test can apply to actual or simulated sexual acts and lewd genital exhibitions. See, for example, *Miller v. California*, 413 U.S. 15, at 24-25 (1973); *Smith v. United States*, 431 U.S. 291, at 300-02, 309 (1977); *Pope v. Illinois*, 481 U.S. 497, at 500-01 (1987).

<sup>6</sup> Because of the size of these exhibits, and the difficulty of their duplication for purposes of review by the FCC, they are being sent to the Commission under separate cover.

<sup>7</sup> The *Time and Motion Study* of the AT&T transmissions were created by recording each specified feature (on VHS videotape). This videotape was thereafter subjected to the computerized process in which each one of the thousand of "picture frames" used by the film producer was "time stamped" by the computer. The computer then "captured" as a "time stamped" photograph (frame) at four second intervals. These photographs were then arranged and labeled sequentially. This results in a visual analysis that "slows" the

tape picture studies of the three motion picture films ["101 Cheerleaders & 1 Jock," "Hell on Heels," and "More than a Handful 9"] which AT&T has been disseminating repetitiously during the past 23 months. In these three films, there is either no dialogue or, as such, virtually no dialogue. Hardcore sexual conduct, exploited in such a way so as to make an appeal to the prurient interest of a specific targeted audience, dominates these and all the AT&T Transmissions.<sup>8</sup>

The aforesaid *Time and Motion Studies* are representative of AT&T's entire "Pay-Per-View "Adults Only" subscription service disseminated during the period described in his Petition.

(3) Also included are computerized *Time and Motion Studies* of AT&T's Transmissions of "pandering" previews, shown before and after the feature "More Than A Handful 9," together with a *Time and Motion Study* showing the use of "subliminal frames" in the "pandering" "Previews After" AT&T's Pay-Per-View Transmission of the Hot Network feature, "More Than a Handful 9." In preparing the computerized *Time and Motion Study* of the AT&T transmission of its "pandering" previews, it was noted that the film editor inserted "subliminal frames", 1/30 of a second (not visible to the viewer), depicting females in lewd poses within that part of the ad previews, that read "Tune In". Then, using the "frame-by-frame" and the "advance" or "reverse" mode to locate the time for the 10 single frames (1/30 of a second each), and one set of double frames, which were inserted as indicated in the *Time and Motion Study* exhibit. This *Time and Motion Study* captures each lewd frame, sandwiched between the frames of the "tune in" advertisement as a "subliminal" message to the audience. Use of subliminal advertising is inconsistent with FCC policy and is contrary to the public interest.<sup>9</sup>

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pictorial projection and "stays" the action to a 'still photograph' taken every 4 seconds. The resulting "slow motion" swdy is presented to the Commission in the format of what the legal professions refers to and recognizes as an "Autoptic Preference."

The legend at the bottom of each page provides an analytical "editorial account" by a reviewer of the videotape who has also heard the audio portion, and results in the creation of a "continuity," or "transcript" device, containing a record of what is said, with such additional editorial comments as may be necessary to explain what is occurring. It is important to note that in the case of the above films identified by name, there is either no "dialogue", or virtually no "dialogue." This is a common occurrence in "hard-core pornographic films," where the emphasis is on the crass exploitation of sexual conduct for the purpose of making an appeal to the prurient interest of its target audience. Cf: *Pans Adult Theatre I v. Slaton*, 411 U.S. 49, 67 (1973): "Conduct or depictions of conduct that the state police power can prohibit on a public street do not become automatically protected by the Constitution merely because the conduct is moved to a bar or a 'live' theater stage, any more than a 'live' performance of a man and woman locked in a sexual embrace at high noon in Times Square is protected by the Constitution because they simultaneously engage in a valid political dialogue."

<sup>8</sup> Because of the size and construction of these exhibits, they are being sent under separate cover.

<sup>9</sup> In this regard, see the report by Timothy Egan in the *New York Times* article, dated October 23, 2000, which states that nearly one in five of AT&T's Broadband customers pays an average of \$10.00 a film to see that the distributor calls "red. live all-American sex -- not simulated by actors". A report entitled "Subliminal Survives" (copyright 1997-1999 ParaScope, Inc.), available at [www.parascopes.com](http://www.parascopes.com) observes: "With the widespread use of digital television on the close horizon, it won't be long before the technology is in place in most homes to insert subliminal messages more easily and effectively than ever before. Will the tactic be used? Will millions at last be manipulated by subliminals?" This web site also posts the following documents: A January 24, 1973 public notice

(4) With respect to the feature "More Than A Handful 9," the version disseminated by AT&T has a playing time of 72 minutes, and uses a total of 129,600 "picture frames" (30 frames per second (of the camera's operation) x 60 seconds x 72 minutes = 129,600) to finalize the pornographer's production. The "computerized" *Time and Motion Study*, originally recorded on a VHS videotape for law enforcement purposes, reverses that process. Contemporaneously with this filing, Petitioner is submitting two DVD disc copies (part 1-2) of the "timed" version of the 129,600 frames (captured within the computer) of the feature "More Than A Handful 9." The DVD disc copy contains the film "More Than a Handful 9," together with pandering Previews shown Before and Previews shown After said film, which collectively are representative of AT&T's entire "In Demand, Pay Per View, Adult's Only" programming, and which demonstrate that AT&T's violations of federal law, as complained of herein, are intentional and willful. For purpose of analyzing the nature of AT&T's programming, this exhibit has the capacity of being played at slow motion or in the "Game by frame" advance mode. Virtually every "frame" is a "lewd display of the private parts." Under *United States v. Rosen*, 148 U S 605 (1896), it is clear that AT&T knew the "content and the character" of the films it disseminated, and that such films were obscene *per se* under federal law.

The aforesaid DVD disc copies, which are representative of AT&T's entire "On Demand, Pay-for-View, Adults' Only" Cable TV programming disseminated during the period described, are being contemporaneously submitted with this Petition, and are incorporated by reference herein as though set forth in full.

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states the FCC position on the issue: "we believe that use of subliminal perception is inconsistent with the obligations of a [broadcast] licensee, and therefore we take this occasion to make clear that broadcasts employing such techniques are contrary to the public interest. Whether effective or not, such broadcasts clearly are intended to be deceptive." See *Public Notice*, Federal Communications Commission, FCC 74-78, 08055, January 24, 1974 - B, "Broadcast of Information by Means of "Subliminal Perception" Techniques. In 1977, twenty years after the first reported use of subliminal ads in movies, the FCC released an 8-page information bulletin on subliminal projection, reviewing the history of controversial subliminal telecasts. See Federal Communications Commission, *Information Bulletin*, "subliminal Projection" (1977). Representative Dan Glickman, chairman of the House Subcommittee on Transportation, Aviation and Materials, opened an August 6, 1984 hearing on subliminal communication technology with a reference to "Orwellian developments." Among the guests who contributed testimony was FCC official Dr. John Kamp. His statement updated the subcommittee on the history of government policy toward subliminal communication. See *Statement of Dr. John Kamp, Assistant to the Deputy Chief, Mass Media Bureau, Federal Communications Commission, accompanied by Charles Kelley, Enforcement division, Mass Media Bureau*. This statement references the clear prohibition against use of this technique by holders of Broadcast Licenses (whether the technique is effective or not). The Commission's authority to regulate subliminal projection techniques stems broadly from the public interest provisions of the Communications Act, including, in particular, §§ 303 [giving the Commission general authority to regulate the industry to further the public interest, convenience or necessity] and 317 [contains more specific authority which was reiterated in § 75.1212 of the FCC's regulations, and which essentially prohibit covert advertisements]. He explained that "Subliminal projections, which are designed to sidestep conscious awareness of advertisements, have been found to be against the public interest and the spirit and the language of § 317.

**3. AS A REGULAR COURSE OF CONDUCT, AT&T HAS USED ITS FCC LICENSES TO TRANSMIT *PER SE* OBSCENE MATERIAL, IN VIOLATION OF FEDERAL COMMUNICATION POLICY AND FEDERAL LAW. THIS DEMONSTRATES THAT AT&T LACK! THE BASIC CHARACTER QUALIFICATIONS REQUIRED OF FCC LICENSEES, AND IS THEREFORE NOT ENTITLED TO A TRANSFER OF SAID FCC LICENSES. THE APPLICATIONS MUST BE DENIED.**

As recognized by the Commission, this License Application proceeding involves broad public policy and legal issues. Under federal law, said Applications *cannot* be approved where the record reflects that either the transferor or the transferee lack the basic character qualifications required of FCC Licensees. In addition, no application for transfer can be approved where the transfer would be contrary to the public interest.

This *Ex Parte* Petition<sup>1</sup> addresses these important public policy and legal issues. Under the United States Constitution, Congress has been given plenary power over federal communications, and the creation of federal communication policy. Pursuant to this power, Congress has enacted a number of federal statutes that are designed to punish and deter the use of federal channels of communication to traffic in obscenity. As a matter of federal communication policy and federal statute, AT&T's transmission of obscenity raises a federal question, subject to mandator). review and adjudication by the Commission in this federal forum.<sup>11</sup>

Federal Treaty", statutes, and cases *comprehensively* ban<sup>12</sup> the use of federal channels of communication to transmit obscene material for all audiences (*i.e.* it is illegal to use federal channels of communication to disseminate obscene material to both children and adults, including "consenting adults")." Obscenity, by definition, is the crass exploitation of human sexuality using explicit depictions or descriptions of hard-

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\* Submitted pursuant to the procedures set forth in Section 1.1206 of the Commission's rules applicable to non-restricted proceeding

<sup>11</sup> AT&T's request for transfer of FCC Licenses places the obscenity of their programming in issue. and opens up mandatory federal review of the issues raised in this Petition. The Commission has concurrent jurisdiction to determine the obscenity issue raised by AT&T's conduct. See *Illinois Citizens Committee for Broadcasting v. F.C.C.*, 169 App. D.C. 166, 515 F.2d 397, 404 (D.C. Cir. 1974). See also, *Monroe Communications Corporation v. F.C.C.*, 2B3 US App. D.C. 367, 900 F.2d 351 (1990).

<sup>12</sup> See Agreement for the Suppression of the Circulation of Obscene Publications, 37 Stat. 1511. Treaties in Force 209 (U.S. Dept. of State), cited in *Roth v. United States*, 354 U.S. 476, 495 n.15 (1957).

<sup>13</sup> See, for example, 18 U.S.C., §§ 1460-1470; *United States v. Alpers*, 338 U.S. 680 (1950); *Roth v. United States*, 354 U.S. 476 (1957); *United States v. Reidel*, 402 U.S. 351 (1971); *United States v. Thirty-Seven Photographs*, 402 U.S. 363 (1971); *United States v. 12-200 Ft. Reds of Super 8mm Film*, 413 U.S. 123 (1973); *United States v. Ortiz*, 413 U.S. 139 (1973); and *Smith v. United States*, 431 U.S. 291 (1977); *Reno v. ACLU*, 521 U.S. 844, n. 44 (1997); *Apostolides Corp. v. Reno*, 19 F.Supp.2d 1081, judgment affirmed, 119 S.Ct. 1450 (1997) (Mem.).

<sup>14</sup> See *Paris Adult Theatre v. Slaton*, 413 U.S. 49 (1973), and 18 U.S.C. §§ 1460-1470.

core sexual conduct for the purpose of making an appeal to a prurient interest in sex, and has no serious literary, artistic, political, or scientific value." Obscenity is not protected by the First Amendment.<sup>15</sup>

Contrary to federal law and Federal Communication Commission policy, AT&T has used its FCC Licenses in the operation of its cable TV business to disseminate obscene materials as a regular and continuing course of conduct, for the purpose of commercial profit. AT&T's conduct violates specific federal statutes which are part of the Congressional articulation of Federal Communication Policy, which include:

(1) 18 U.S.C. § 1468: This section proscribes the distribution of obscene material by cable or subscription television. As used in this section, the term "distribute" means to send, transmit retransmit, telecast, broadcast, or cablecast, including by wire, microwave, or satellite, or to produce or provide material for such distribution.

(2) 18 U.S.C. § 1466: This section prohibits engaging in the business of selling or transferring obscene matter. "Engaged in the business" means that the person who sells or transfers or offers to sell or transfer obscene matter devotes time, attention, or labor to such activities, as a regular course of trade or business, with the objective of

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<sup>15</sup> See *Miller v. California*, 413 U.S. 15, at 24-25 (1973); *Smith v. United States*, 431 U.S. 291, at 300-02, 309 (1977); *Pope v. Illinois*, 481 U.S. 497, at 500-01 (1987), which set forth the constitutional test for obscenity. The *Miller* test has been judicially engrafted into federal law under *United States v. 12,200 Ft. Reels of Film*, 413 U.S. 123 (1973). Under the so-called "*Miller*" test, three elements must coalesce: the trier of fact must determine whether (1) the average person, applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest in nudity, sex, or excretion; (2) the average person, applying contemporary community standards, would find that work depicts or describes in a patently offensive way, sexual conduct (i.e. ultimate sex acts, normal or perverted, actual or simulated; masturbation; excretory functions; lewd exhibition of the genitals, or sadomasochistic sexual abuse), and (3) a reasonable person would find that the work, taken as a whole, lacks serious literary, artistic, political or scientific value. Federal obscenity enforcement proceedings such as the instant case, involve "community standards." Community standards are a "measure" (and not an "element") of the obscenity offense. "The phrasing of the *Miller* test makes clear that contemporary standards take on meaning only when they are considered with reference to the underlying questions of fact [i.e. involving prurient appeal and sexual conduct] that must be resolved in an obscenity case." *Smith v. United States*, 431 U.S. 291, 300 (1977). See *Smith v. United States*, *supra*, at 302: "[C]ommunity standards simply provide the measure against which the jury decides the questions of appeal to prurient interest and patent offensiveness. See, also, *Hamling v. United States*, 418 U.S. 87, 107 (1974): "This court has emphasized on more than one occasion that a principle concern in requiring that a judgment be made on the basis of 'contemporary community standards' is to assure that the material is judged neither on the basis of each juror's personal opinion, nor by its effect on a particularly sensitive or insensitive person or group." See, also, *Miller v. California*, 413 U.S. at 33; *Mishkin v. New York*, 383 U.S. 502, 508-09 (1966); and *Roth v. United States*, 354 U.S. 476, 488-90 (1957). In making any determination under "contemporary community standards" the trier of fact, "is entitled to draw on his own knowledge of the views of the average person in the community or vicinage from which he comes for making the required [community standards] determination, just as he is entitled to draw on his own knowledge of the propensities of a "reasonable" person in other areas of the law. *Hamling*, *supra*, 418 U.S. at 104-105. In a civil proceeding involving a determination of obscenity (such as this), no jury is required. Cf. *Alexander v. Virginia*, 413 U.S. 636 (1973). See, also, *Monroe Citizens Committee for Broadcasting v. F.C.C.*, 169 App.D.C. 166, 515 F.2d 397, 404 (D.C. Cir. 1974) and *Monroe Communications Corporation v. F.C.C.*, 283 U.S. app. D.C. 367, 900 F.2d 351 (1990).

<sup>16</sup> *Miller v. California*, 413 U.S. 15 (1973); *Roth v. United States*, 354 U.S. 476 (1957).

earning a profit, although it is not necessary that the person make a profit or that the selling or transferring or offering to sell or transfer such material be the person's sole or principal business or source of income.

(3) **18 U.S.C. § 1465:** This section prohibits the use of a facility or means of interstate or foreign commerce, in or affecting such commerce, for the purpose of sale or distribution of obscene material.

(4) **18 U.S.C. § 1464:** This section proscribes the use of any means of radio communication to transmit obscene matter.

(5) **18 U.S.C. § 1462:** This section proscribes the bringing of obscene material into the United States, or any place subject to the jurisdiction thereof, or the use of an express company or common carrier for carriage of obscene materials in interstate or foreign commerce.

(6) **18 U.S.C. § 1961:** This section makes the violation of 18 U.S.C. §§ 1461-1465 (relating to obscene matter) a predicate offense under the Racketing and Corrupt Practices Act (RICO).

(7) **18 U.S.C. § 1467(b):** This section indicates that AT&T, as a result of its corporate choice to transmit obscene material using channels of federal communication under its control, may have seriously harmed the corporation and its shareholders, and deliberately misrepresented and falsely characterized its actions before the United States Security and Exchange Commission.<sup>7</sup> § 1467(b) specifically states that with respect to (1) any obscene material produced, transported, mailed, shipped, or received in violation of 18 U.S.C. Chapter 71 [Obscenity; 18 U.S.C. §§ 1460-1470]; and (2) any property, real or personal, constituting or traceable to gross profits or other proceeds obtained from such offense, all right, title, and interest vests in the United States upon the commission of the act giving rise to forfeiture under this section [i.e. upon AT&T's dissemination of the obscene material]. In addition, any property, real or personal, used or intended to be used

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<sup>7</sup> The provisions of 18 U.S.C. § 1467(b) clearly indicate that any AT&T profits received from the dissemination of obscene materials would be subject to forfeiture. See SEC No Action Letter pursuant to Rule 14a-8, dated February 21, 2001, Re AT&T Corp., 2001 SEC No-Act. LEXIS 240, involving a proposal by a group of AT&T Shareholders requesting that AT&T prepare a report reviewing AT&T's policies for involvement in the pornography industry and an assessment of the potential financial, legal, and public relations liabilities. In that SEC proceeding, by letter dated December 21, 2000, AT&T opposed this request, and affirmatively (and, it would appear, erroneously) stated: "The Company's actual policy regarding cable programming is a responsible and ethical one". *Id.* Subsequent correspondence in connection with this SEC matter indicated that Shareholders had received reports that AT&T was retaining 90% of the distribution revenue from its "On Demand, Pay-for-View, Adult's Only" cable service. See Letter to Joseph P. Gallagher, Manager, Office of the Corporate Security, AT&T, dated April 23, 2001, from Frank A. Rauscher, President & CEO, Aquinas Investment Advisers, Inc. Objectively speaking, the retention by a cable company of 90% of the distribution revenue from programming provided by a movie studio would "raise a red flag" to any reasonable investor concerning the legitimacy of the distribution agreement. This is because the "rate of return" (90%) for distribution of films suffers from being "too good to be true." This would, of necessity, raise suspicions in the minds of any reasonable Investment Advisor, because of the highly unusual payment structure, indicating that the product being disseminated under the AT&T agreement is categorically dissimilar from other "product" obtained from the more "conventional" Major Movie Studio sources. AT&T shareholders were reasonable in their fears that producers of hardcore obscene films might be willing to pay a heavy financial price to "buy respectability." In addition, Shareholders expressed the concern that some of these suppliers were reputed to have ties to organized crime, according to reports received by Shareholders, and therefore might involve AT&T in collusion with organized crime.

to commit or to promote the commission of such offense may also be subject to forfeiture, if subsequently so determined by a court, taking into consideration the nature, scope, and proportionality of the use of the property in the offense.

(8) 18 U.S.C. § 1470: In the event that the Acts surrounding certain reports" establish that these transmissions include minors under the age of 16 years. AT&T may be found to be in violation of 18 U.S.C. § 1470, which prohibits the use of any facility or means of interstate or foreign commerce to knowingly transfer obscene matter to minors.

(9) 19 U.S.C. § 1305: This section prohibits the importation of obscene materials, and provides for its forfeiture. See *United States v. 37 Photographs*, 402 U.S. 363, at 376-377 (1971).

(10) 47 U.S.C. §§ 308 (Requirements for License), 309 (applications for License), and 310 (License Ownership Restrictions): These sections requires that in FCC Licensing proceedings, the Commission is charged with considering basic character qualifications of FCC Licensees, and must act to promote the public interest.

(10) 47 U.S.C. § 312: This section provides for administrative sanctions. The Commission may revoke an FCC License or construction permit for a violation of the obscenity statute.

(11) 47 U.S.C. § 503: The Commission may exact a forfeiture or other sanction upon a licensee that has violated the obscenity statute.

(12) 15 U.S.C. § 45: This basic consumer protection statute declares as unlawful any "unfair methods of competition" and "unfair or deceptive acts or practices," in or affecting commerce.

#### **4. AT&T's DISSEMINATION OF *PER SE* OBSCENE MATERIAL IS CONTRARY TO THE PUBLIC INTEREST. THE APPLICATIONS MUST BE DENIED.**

As more fully discussed below, the conduct of AT&T in the operation of cable TV has been so notorious<sup>19</sup>, that based upon this conduct alone, federal law and FCC policy require that the Commission deny the Applicants' current requests for transfer. The public interest, convenience and necessity mandate **denial**.

For the reasons set forth in this Ex Parte Petition, the Applications should be denied, because

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<sup>18</sup> See SEC No Action Letter pursuant to Rule 14a-8, dated February 21, 2001, Re AT&T Corp., 2001 SEC No-Act LEXIS 240, involving a proposal by a group of AT&T Shareholders requesting that AT&T prepare a report reviewing AT&T's policies for involvement in the pornography industry and an assessment of the potential financial, legal, and public relations liabilities. By letter dated February 16, 2001, Shareholders expressed concern, with respect to the ability of children to access AT&T's pornographic programs on the Hot Network, that the so-called safeguards which the Hot Network claimed to have in place were clearly far from foolproof, noting that in the year 2000 the "safeguards" failed utterly in Iowa City where the Hot Network was temporarily made available for everyone to view who was a cable subscriber.

<sup>19</sup> As hereinafter described, AT&T's conduct violates FCC Policy and federal and state law.

(1) AT&T has demonstrated that it lacks the basic character qualifications required of an FCC Licensee, based upon its past conduct. The corporate decision of AT&T to engage in certain past conduct is now a *matter* of public record, and has serious implications with respect to its ability to transfer any FCC licenses it may hold, which cannot be "cured." The filing of the Applications affirmatively opens up a review of the "basic character qualifications" of AT&T. This Commission must review and make a determination on this issue. If the past conduct of AT&T demonstrates it lacks the requisite basic character qualifications, the Applications must be denied.

(2) The granting of the Applications is contrary to the public interest

(3) With respect to the public interest the granting of the Applications would create harm.

(4) With respect to the public interest, the granting of the applications would make worse an already harmful situation.

(5) AT&T's wrongful business decisions have negative consequences, and affect in particular the manner in which their Applications must be analyzed. Denial of the Applications has both specific and general deterrence value with respect to the cable industry and violations of FCC policy and federal law. Granting the Application is contrary to the public interest, because it would insulate corporate business from the consequences of wrongful decisions and would reward corporate greed. Denial of the Applications will help restore public confidence in the integrity of Government, by encouraging and promoting the value of corporate integrity.

The Commission must designate the above-captioned proceeding for hearing upon at least the following issues:

(1) To determine whether AT&T and/or its subsidiaries, employees or agents exhibited *per se* obscene programming, in violation of federal or state law.

(2) To determine whether AT&T and/or its subsidiaries, employees or agents engaged in unfair trade practices by exhibiting *per se* obscene programming, in violation of federal or state law.

(3) In light of the facts and circumstances adduced pursuant to issues (1) and (2) above, whether AT&T and/or its subsidiaries possess the requisite character qualifications to be permitted to transfer control of their cable television system and dated licenses and radio stations; and

(4) In light of the facts and circumstances adduced pursuant to issues (1), (2), and (3) above, whether the public interest convenience and necessity would be served by a grant of the Applications.

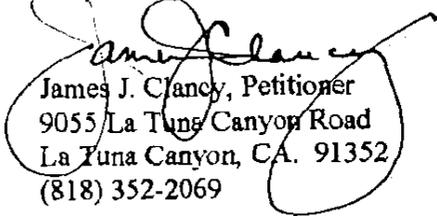
### CONCLUSION OF LAW

Where, as here, reasonable **minds** would not differ and **all** reasonable persons would say that AT&T, has **been and is now dealing exclusively in matters which are per se obscene**, **their** FCC Licenses to do so cannot be transferred, but must be revoked. This is because **such business practices are unlawful as a matter of law** and **not** as a question of **fact**. The moral **and** legal obligation of the Commission, **as a governmental body implementing the policy of the Bush Presidency**, requires that AT&T's FCC Licenses be revoked.

WHEREFORE, James J. Clancy urges that the Applications **BE DENIED, DISMISSED OR DESIGNATED FOR HEARING** upon the issues framed above and/or **other** appropriate hearing issues, **and** that AT&T **BE DIRECTED TO SHOW CAUSE why** their FCC Licenses should not be REVOKED, at a **hearing** to be held at a time and location to be specified **upon** the issues framed above **and/or** other appropriate hearing issues.

Dated: November 3, 2002

Respectfully submitted,

  
James J. Clancy, Petitioner  
9055 La Tuna Canyon Road  
La Tuna Canyon, CA. 91352  
(818) 352-2069

APP

B

APP  
B

MEMORANDUM OF UNDERSTANDING  
between  
THE FEDERAL COMMUNICATIONS COMMISSION  
and  
THE DEPARTMENT OF JUSTICE  
concerning  
COMPLAINTS AND CASES INVOLVING  
OBSCENITY AND INDECENCY

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1. PURPOSE

This Agreement is entered into by the Federal Communications Commission (the "Commission") and the Department of Justice (the "Department") for the purpose of facilitating their joint and common goals, obligations, and responsibilities in the enforcement of laws and regulations prohibiting or regulating the dissemination of obscene and indecent material by means of radio, television, and telephone communications, and obscene material on cable and subscription television (including by satellite or microwave) systems. See generally: 47 U.S.C. §§ 223, 503, 559; and 18 U.S.C. §§ 1464, 1468.

Recognizing that legal, technical, and investigative expertise and experience exists within each agency which is valuable for rendering advice and guidance to the other in these cases, this Memorandum of Understanding serves to facilitate such enforcement efforts by referring and sharing information on complaints and cases to each other and assisting in their resolution. In this regard, "complaints" shall include factual and legal objections and requests for enforcement or investigation submitted by private citizens and business entities and also includes investigative and prosecutive filings, to the extent such filings are not confidential, submitted by law enforcement and governmental agencies for review as to criminal, civil, or administrative action by either or both the Commission and the Department.

This Memorandum of Understanding also recognizes that the Department of Justice has authority and responsibility for the criminal prosecution of obscenity and indecency violations of the federal statutes referred to above and that the Federal Communications Commission has authority and responsibility for administrative and civil enforcement and regulation pursuant to those and related statutes, rules, and regulations. Such independent and concurrent jurisdiction provides a more effective enforcement of federal law as well as provides an opportunity for the parties to coordinate or assist each other in such enforcement. This Agreement seeks to encourage and improve the exercise of this jurisdiction by the Commission and the Department.

## II. PROCESSING COMPLAINTS

### (A) Cable, Subscription Television, and Radio Common Carrier Complaints

If a complaint is filed with either the Commission or the Department which alleges the transmittal of obscene programming by a cable or subscription television system (including by satellite and microwave) or obscene or indecent programming by a radio common carrier facility, the Commission and the Department shall proceed as follows:

(1) When the Commission receives such a complaint, it shall first review the complaint. All complaints that involve potentially obscene material shall be forwarded to the Department's Child Exploitation and Obscenity Section (formerly the National Obscenity Enforcement Unit), which will process the complaint in accordance with its own rules, policies, and procedures. In addition, all complaints involving transmissions in a non-subscription, non-scrambled mode using any radio common carrier facility shall be forwarded to the Department if the complaint includes potentially indecent material. The Commission may notify the charging party that it has forwarded the complaint to the Department.

(2) When the Department receives such a complaint, either originally or on referral from the Commission, it will process the complaint in accordance with its rules, policies, and procedures. Upon request, the Commission shall provide advice and guidance to the Department during any investigation or prosecution which results from review of such complaint. In addition, the Department will send semi-annual reports to the Commission concerning the receipt and disposition of such complaints. These reports will also note the status of all pending prosecutions regarding such complaints and cases.

### (B) Radio and Television Broadcast Complaints

If a complaint is filed with either the Commission or the Department which alleges the transmittal of obscene or indecent programming by a radio or television broadcast licensee, the Commission and the Department shall proceed as follows:

(1) When the Department receives such a complaint, it shall first review the complaint. All complaints that involve potentially indecent or obscene material shall be forwarded to the

Commission, which will process the complaint in accordance with its own rules, policies, and procedures. The Department may notify the charging party that it has forwarded the complaint to the Commission.

Recognizing that such complaints may involve violations of 18 U.S.C. § 1464, the Department shall evaluate such complaints for possible prosecution. In the event the Department determines that an investigation should be commenced, or that a prosecution will not occur or should be declined, the Department will notify the Commission of that determination. Upon request, the Commission shall provide advice and guidance to the Department during any investigation or prosecution which is commenced by the Department.

(2) When the Commission receives such a complaint, either originally or on referral from the Department, it will process the complaint in accordance with its rules, policies, and procedures. Upon request, the Department shall provide advice and guidance to the Commission during any investigation or administrative or civil action which results from its review of such complaint. In addition, the Commission will send semi-annual reports to the Department concerning the receipt and disposition of such complaints. These reports will also note the status of all pending administrative or civil actions regarding such complaints and cases. As an additional measure, the Commission may refer a particular complaint to the Department, which shall also evaluate such a complaint for possible prosecution.

(C) Dial-A-Porn Complaints

If a complaint is filed with either the Commission or the Department which alleges the transmittal of obscene or indecent material by telephone for commercial purposes, the Commission and the Department shall proceed as follows:

(1) When the Commission receives such a complaint, it will process the complaint in accordance with its rules, policies, and procedures. Upon request, the Department shall provide advice and guidance to the Commission during its investigation and/or adjudication of such complaints and cases. In addition, the Commission will regularly send copies of all such complaints to the Department, as well as semi-annual reports concerning the receipt and disposition of all dial-a-porn complaints and cases. These reports will also note the status of all such pending investigations and cases.

(2) When the Department receives such a complaint, it will process the complaint in accordance with its rules, policies, and procedures. Upon request, the Commission shall provide advice and guidance to the Department during its investigation and/or

adjudication of such complaints and cases. In addition, the Department will send semi-annual reports to the Commission concerning the receipt and disposition of all dial-a-porn complaints and cases. These reports will also note the status of all such pending investigations and cases.

(D) Effect of Determinations and Actions

In seeking to encourage and facilitate the enforcement of the law in these cases, the parties recognize that decisions by either or both agencies to take or withhold action are not, except by operation of law, binding on or intended to restrict action by the other agency.

In the event the Commission and/or the Department determine to commence an investigation or institute administrative or judicial proceedings, the parties recognize that such actions are independent and concurrent and the fact one party may decide to take, decline, or withdraw from any such action shall not interfere with or prevent the decision of the other to proceed in the manner it determines is in the best interest of its law enforcement goals, obligations, and responsibilities.

(E) Other Complaints and Cases

In furtherance of the purposes of this Agreement, the Commission and the Department may agree in the future to add other categories of obscenity or indecency complaints and cases, not specifically listed above, to this memorandum of Understanding.

III. COORDINATION LIAISON

To provide far more effective exchange of complete information so that both agencies' resources will be utilized to the maximum effectiveness to serve the public interest in this area, each agency will designate a liaison officer to serve as the primary source of contact. These liaison officers will be responsible for informing each other of proposed proceedings and internal developments in areas of joint concern, to the extent that such information is not privileged. Additionally, the parties shall conduct reviews of the implementation of this Agreement to assure proper effectuation.

CORRESPONDING SECTIONS FOR LIAISON OFFICERS

Child Exploitation and  
Obeccnity Section  
Department of Justice  
criminal Division, Room 2216  
10th & Constitution Avo., N.W.  
Washington, D.C. 20530  
Phone: 202-514-5780  
FAX: 202-914-1791

Office of the General Counsel  
Federal Communications Commission  
1919 M Street, N.W., Room 614  
Washington, D.C. 20554  
Phone: 202-632-7020  
FAX: 202-632-0149

IV. AMENDMENT AND TERMINATION

This agreement becomes effective immediately upon signature or both parties. This agreement may be modified with the mutual consent of both parties. and may be terminated by either party upon ninety (90) days advance written notice.

APPROVED AND ACCEPTED FOR THE  
FEDERAL COMMUNICATIONS COMMISSION

  
\_\_\_\_\_  
Robert E. Mueller  
General Counsel  
Federal Communications Commission

Date

4/9/91

APPROVED AND ACCEPTED FOR THE  
DEPARTMENT OF JUSTICE

  
\_\_\_\_\_  
Robert E. Mueller, III  
Assistant Attorney General  
Criminal Division  
U.S. Department of Justice

Date

3/29/91