

**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                          | ) |                     |

**TO: THE FEDERAL COMMUNICATIONS COMMISSION**

**PETITION OF JAMES J. CLANCY FOR RECONSIDERATION**  
**[47 U.S.C.A. § 405; 47 C.F.R. § 1.106(d)]**

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## I. SUMMARY STATEMENT

JAMES J. CLANCY, the undersigned, pursuant to 47 U.S.C.A. § 405 and 47 C.F.R. § 1.106, petitions the Federal Communications Commission (hereinafter "FCC") to reconsider its decision and *Order*, released November 14, 2002, approving the merger of AT&T Broadband and Comcast Corporation, *Order, 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 (hereinafter "*The Order*") with reference to "In the Matter of Applications for Consent to the Transfer of Control of Licenses From Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee" (hereinafter "the Proceeding")<sup>1</sup>

The FCC's denial of Petitioner's *Ex Parte Petition* was premised upon the erroneous assumption that Petitioner had submitted an *unsupported* claim that AT&T has violated Federal Communication Law and Policy by disseminating obscene material and subliminal advertising, using its cable TV operation. In fact, Petitioner's claims were substantiated by evidentiary material, filed contemporaneously with Petitioner's *Ex Parte Petition* on November 4, 2002, and which was further supplemented by the filing of additional evidentiary material on November 12 and 13, 2002. This evidence should have been considered by the FCC, and a hearing should have been set regarding the obscenity issue.

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<sup>1</sup> On November 15, 2002, the Consumer Federation of America ("CFA"), the Consumers Union ("CU"), and the Center for Digital Democracy ("CDD") filed an appeal in the Federal Court of Appeals for the District of Columbia Circuit. The docket number for this Appeal is No. 02-1347.

Both *Illinois Citizens Committee for Broadcasting v. FCC*, 515 F.2d 397 (1974), and *Monroe Communications Corporation v. FCC*, 900 F.2d 351 (1990), indicate that the use of federal channels of communication by FCC Licensees to transmit obscenity is contrary to the public interest, and concerned citizens have an important role to play in the adjudication of such obscenity issues, when such issues are placed before the FCC. However, in the instant case, any meaningful participation in that process will be cut off, unless the FCC grants reconsideration of its Order herein. Petitioner is aggrieved by the FCC's action and The Order in this Proceeding, and his interests were adversely affected by such action and Order, as more fully set forth herein and in the supporting declarations of James J. Clancy and Carol A. Clancy. In the interest of justice and in the public interest, the FCC should grant reconsideration of The Order, should vacate The Order, and should grant Petitioner's request for a hearing on the issue of obscenity and subliminal advertising, as prayed for herein and in his Ex Parte Petition. The failure by the FCC to review relevant evidence in its possession concerning violations of federal communication law, involving obscenity and subliminal advertising, in connection with the Application of AT&T for Transfer of FCC Licenses, was, under the circumstances, unfair, unjust, arbitrary and capricious, and contrary to the public interest. Under the circumstances, granting the aforementioned Application by AT&T is inconsistent with the public interest, convenience and necessity, for the reasons stated herein, and in Petitioner's supporting papers and evidence.

Petitioner's Petitioner respectfully alleges as follows:

## II. BACKGROUND OF PETITIONER'S *EX PARTE* PETITION

1. In mid to late October of 2002, my daughter, Carol A. Clancy, contacted the FCC Media Bureau on my behalf by telephone for the purpose of determining whether it was still possible for an individual (who had not yet made any filing in MB Docket No. 02-70) to participate in the Proceeding. See *Declaration of Carol A. Clancy in Support of the Petition of James J. Clancy for Reconsideration*, contemporaneously filed herewith (hereinafter "*The Declaration of Carol A. Clancy*").<sup>2</sup> Declarant Carol A. Clancy explained the following<sup>3</sup> to FCC personnel:

1. that an individual wanted to place important evidentiary matters regarding the negative business activities and conduct of AT&T involving its cable TV operations, which were contrary to and violated the public interest;
2. that this conduct undermined AT&T's basic character as an FCC Licensee, and was so egregious that it reflected negatively upon AT&T's basic qualification to continue to hold an FCC Licensee;
3. that evidence of this conduct should be taken into consideration by the FCC Decision Makers before making any decision in the Proceeding.

FCC personnel Roger Holberg told Declarant Carol A. Clancy the following<sup>4</sup>:

1. that the "basic character" of AT&T as an FCC Licensee was relevant to the Proceeding in MB Docket No. 02-70;

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<sup>2</sup> *The Declaration of Carol A. Clancy* recites the background facts surrounding the filing of *The Ex Parte Petition of James J. Clancy*, filed November 4, 2002.

<sup>3</sup> *Declaration of Carol A. Clancy*, at paragraph 1 therein.

<sup>4</sup> *Id.*

2. that it was still possible for an individual to participate and address the "basic character issue" in the Proceeding by filing an "*ex parte presentation*," under 47 CFR Section 1.1206 [permit-but-disclose proceedings]; and
3. that any *ex parte presentation* should be sent to "Secretary, Federal Communications Commission, 445 12th Street, S.W., Washington, D.C. 20554."

2. On Monday, November 4, 2002, on my behalf, Declarant Carol A. Clancy transmitted to the FCC the *Ex Parte Petition of James J. Clancy To Deny Applications and Revoke Licenses*, dated November 3, 2002, together with certain supporting evidentiary exhibits (hereinafter collectively "*The FCC November 4<sup>th</sup> Filing*"), using "same day delivery" via Federal Express. Although my *Ex Parte Petition* was in electronic format and could have been filed electronically, the supporting evidentiary exhibits were not in electronic format. These supporting evidentiary exhibits consisted of the following<sup>5</sup>:

1. Two DVD disc copies (parts 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 copies contain 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

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<sup>5</sup> The supporting evidentiary exhibits are described in the Certificate of Service attached to the *Ex Parte Petition of James J. Clancy To Deny Applications and Revoke Licenses*, dated November 3, 2002 and filed November 4, 2002, which document has been marked as "received and inspected November 4, 2002, FCC-Mailroom," and is on file with the FCC herein.

of federal law, as complained of herein, are intentional and willful.<sup>6</sup>

[Reference: Ex Parte Petition, at 6].

2. Exhibit A in support of the Ex Parte Petition of James J. Clancy, consisting of a partial list of AT&T Cable transmissions of obscene programming.<sup>7</sup>

[Reference: Ex Parte Petition at 4].

3. Time and Motion Study of AT&T's Transmissions of "pandering" previews, shown after the feature "More Than A Handful 9," which show the use of "subliminal frames."<sup>8</sup> [Reference: Ex Parte Petition, at 5-6.]

The above-referenced evidentiary exhibits could not be transmitted to the FCC Decision Makers in the Proceeding except by the use of a delivery service (such as U.S. Mail or Federal Express). I considered it absolutely essential that this supporting evidence reach the FCC Decision Makers before they rendered a decision in the

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<sup>6</sup> To date, Declarant Carol A. Clancy has been informed by FCC personnel Roger Holberg that of the two DVD discs filed, only one DVD disc (consisting of Part I, the first portion of the obscene movie "More Than A Handful 9") has been located by the Media Bureau. See *Declaration of Carol A. Clancy*, at paragraph 11 therein. The location of the second DVD disc (consisting of Part II, the last portion of the obscene movie "More Than A Handful 9" and pandering previews, including the previews containing "subliminal frames") apparently, after filing, has been lost by the FCC. An exact duplicate copy of this second DVD disc is being lodged with the FCC contemporaneously herewith under separate cover, with the request that the FCC receive it and in the interests of justice and in the public interest deem it *nunc pro tunc* as having been filed November 4, 2002, under the FCC's power to correct filing errors caused by the Agency. See 47 C.F.R. § 1.7, which indicates that the FCC has the power to determine the date of filing of pleadings and other documents, by decision of the Commission or of the Commission's staff acting on delegated authority.

<sup>7</sup> Although filed on November 4, 2002, Exhibit A, consisting of a partial list of AT&T Cable transmissions of obscene programming, setting forth the name of over 100 obscene movies, together with the date and channel of their transmission over AT&T's cable TV service, has apparently been lost, after filing, by the FCC. An exact duplicate copy of this list is being lodged with the FCC, with the request that the FCC receive it and in the interests of justice deem it *nunc pro tunc* as having been filed November 4, 2002, under the FCC's power to correct filing errors caused by the Agency. See 47 C.F.R. § 1.7, which indicates that the FCC has the power to determine the date of filing of pleadings and other documents, by decision of the Commission or of the Commission's staff acting on delegated authority.

<sup>8</sup> See "*Exhibit in Support of the Ex Parte Petition of James J. Clancy, Time and Motion Study of AT&T's Transmission of 'pandering' previews, shown after the feature 'More Than A Handful 9,' which show the use of 'subliminal frames.'*" [Reference: Ex Parte Petition at 5-6]", on file herein and marked "Received & Inspected, November 4, 2002, FCC-Mailroom."

Proceeding. Therefore, Federal Express "same day delivery" service was used to file my *Ex Parte Petition* in order to lodge the supporting evidence before the expiration of the FCC designated 180-day ideal cycle established by Agency personnel for this Proceeding. The Federal Express charge for same-day delivery was \$204.97.<sup>9</sup> The FCC November 4th Filing was addressed to: "Secretary, Federal Communications Communication, 445 12th Street, S.W., Washington, D.C. 20554."

The supporting evidence was viewed by me to be crucial in establishing the truth of the claims set forth in my *Ex Parte Petition*, dated November 3, 2002, and filed November 4, 2002. See *Illinois Citizens Committee for Broadcasting, et al. v. Federal Communications Commission*, 515 F.2d 397 [holding that the FCC has jurisdiction to determine the issue of obscenity, and that representatives of the public have a role in FCC proceedings concerning obscenity determinations]. See, also, *Monroe Communications Corporation v. Federal Communications Commission*, 900 F.2d 351 (1990) [in a licensing proceeding context, holding that dissemination of obscene material is proscribed as contrary to the public interest and is relevant in determining whether the licensing action requested by an FCC License Applicant would be "in the public interest." Holding, also, that in order to raise an obscenity claim before the FCC in a licensing proceeding context, ordinary citizens are not required, in the first instance, to set forth allegations constituting a prima facie case of obscenity, as defined in *Miller v. California*, 413 U.S. 15, 24 (1973)]. See, also, 47 U.S.C. § 559 [proscribing transmission of obscene cable programming], and 18 U.S.C. § 1468 [proscribing distribution of obscene

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<sup>9</sup> *Declaration of Carol A. Clancy*, at paragraph 2 therein.



material by cable or subscription television], and 18 U.S.C. § 1466 [prohibiting engaging in the business of selling or transferring obscene matter].

3. On November 4, 2002, in tracking the delivery of The FCC November 4th Filing, Declarant Carol A. Clancy was told that Federal Express had attempted delivery of The FCC November 4th Filing, but that the Secretary's office had refused to receive the package.<sup>10</sup> Declarant Carol A. Clancy telephoned the FCC, and was told that because of anti-terrorist precautions, only packages sent via United States Mail could be received at the FCC's Washington, D.C. address. Any package sent via Federal Express had to be delivered to "9300 E. Hampton Dr., Capitol Heights, Maryland 20743." Declarant Carol A. Clancy then telephoned Federal Express, and directed that The FCC November 4th Filing be immediately delivered to the Capitol Heights address.<sup>11</sup>

4. On November 4, 2002, Declarant Carol A. Clancy made a number of telephone calls to the FCC to ascertain whether The FCC November 4th Filing had been received by the FCC. Since she could not ascertain from the FCC personnel whether the Agency had in fact received my *Ex Parte Petition*, plus exhibits, she was advised to "e-mail" a copy of my *Ex Parte Petition* using the FCC electronic filing system – which she did.<sup>12</sup> Although Declarant Carol A. Clancy had been told by Federal Express that the package would be delivered on November 4, 2002, on the following day (November 5, 2002), she called the tracking service for Federal Express, and they confirmed that the package (containing my *Ex Parte Petition* and the supporting evidentiary exhibits described in the accompanying Certificate of Service) had been delivered intact and received by the

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<sup>10</sup> *Declaration of Carol A. Clancy*, at paragraph 3 therein.

<sup>11</sup> *Id.*

FCC.<sup>13</sup> Declarant Carol A. Clancy has made multiple inquiries to Federal Express, and has been informed that the *The FCC November 4th Filing* (consisting of my *Ex Parte Petition and supporting evidentiary exhibits*) was delivered undamaged, unopened and intact, and was received by the Federal Communications Commission on the afternoon of Monday, November 4, 2002, at approximately 2:25 p.m., at the address specified by FCC personnel Roger Holberg. [9300 E. Hampton Dr., Capitol Heights, Maryland 20743]. According to Federal Express, the name of the person who received The FCC November 4th Filing, on behalf of the FCC, was "B. Pettiford."<sup>14</sup>

5. On November 4, 2002, Declarant Carol A. Clancy had a conversation with Margo Davenport, concerning the following<sup>15</sup>:

1. Declarant Carol A. Clancy discussed some of the procedural problems that had been encountered in filing my *Ex Parte Petition*, with supporting evidentiary exhibits, and, in general, the difficulty of sending evidentiary exhibits to the Commission.
2. She reiterated my concern that the matters presented by the evidentiary exhibits supporting my *Ex Parte Petition* should be examined and determined by Commission decision-makers before any decision was taken on the Applications filed in the AT&T/ Comcast matter.
3. When Davenport asked Declarant Carol A. Clancy to describe briefly the substance of my *Ex Parte Petition*, she explained to Davenport that the

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<sup>12</sup> *Id.*, at paragraph 4 therein.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*, at paragraph 5 therein.

<sup>15</sup> *Id.*, at paragraph 6 therein.

Petition asserted: that AT&T lacked the basic character qualifications required of all FCC Licensees, by reason of their past and present conduct in transmitting specifically identified obscene matter as a regular and continuing course of conduct; that the basic character qualifications required of all FCC Licensees had been placed into issue by the AT&T Applications; that under federal law, the transmission of obscenity over cable TV is not in the public interest; and that AT&T's conduct demonstrates it lacks the requisite FCC License holder character qualifications.

4. When Davenport asked Declarant Carol A. Clancy to name the specific programming that formed the subject matter of the complaint (*e.g.* whether it was HBO, Playboy, *etc.*), she responded to Davenport that the programming involved AT&T's transmission of "The Hot Network."<sup>16</sup>

6. Subsequent to *The FCC November 4<sup>th</sup> Filing*, described above, I filed a document entitled: (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*, dated November 8, 2002, on file herein, which has been marked "Received & Inspected, Nov. 12, 2002, FCC-Mailroom," and "Received & Inspected Nov. 13, 2002, FCC-Mailroom." Transmitted with this filing were the following evidentiary exhibits:

1. 3ft. x 5 ft. Time and Motion Studies, plus accompanying timed video tape copies, of three named obscene movies and preview materials, as transmitted over AT&T's cable TV service, entitled:

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<sup>16</sup> See, also *Notice of Ex Parte Presentation* by Carol A. Clancy, dated November 5, 2002, on file herein, which memorializes the conversation between Carol A. Clancy and Margo Davenport.

- A. "101 Cheerleaders & 1 Jock",
  - B. "More Than A Handful 9" (which referenced the separately filed DVD which comprised part of *The FCC November 4<sup>th</sup> Filing*, referred to above),
  - C. "Hell on Heels,"
  - D. Previews Before "More Than A Handful 9" (which referenced the separately filed DVD which comprised part of *The FCC November 4<sup>th</sup> Filing*, referred to above),
  - E. Previews After "More Than A Handful 9" (which referenced the separately filed DVD that comprised part of *The FCC November 4<sup>th</sup> Filing*, referred to above),
  - F. Subliminal Study of the Previews After "More Than A Handful 9" (which referenced the separately filed DVD which comprised part of *The FCC November 4<sup>th</sup> Filing*, referred to above), and
  - G. a Copy of the Summons and Complaint in the California State Action entitled *James J. Clancy, acting as a Private Attorney General v. American Telephone and Telegraph, Inc., (AT&T), a New York Corporation, et al.*, No. LC062475, Los Angeles County Superior Court, Van Nuys, California.
2. A Copy of the *Ex Parte Petition of James J. Clancy to Deny Applications and Revoke Licenses*, filed November 4, 2002, and
  3. A copy of the *Memorandum of Understanding between the Federal Communications Commission and the Department of Justice concerning Complaints and Cases Involving Obscenity and Indecency*, dated 1991.

### **III. PETITIONER'S RECONSIDERATION REQUEST**

As explained herein, and in the supporting declarations of both James J. Clancy and Carol A. Clancy, Petitioner's *Ex Parte Petition* raised the issue of that AT&T had transmitted obscene material using their cable TV operation, as a repeated and continuous business practice, in flagrant violation of Federal Communication law and policy. The supporting evidentiary exhibits, filed on November 4, 2002, as well as the supporting evidentiary exhibits filed on November 12 and 13, 2002, substantiate AT&T has violated express provisions of "the Act" (see 47 U.S.C. § 559), as well as various provisions of

Title 18 (see, for example, the express provisions of 18 U.S.C. §§ 1468 and 1466). In addition, there is evidence that AT&T has utilized "subliminal frames" in advertising its "Adults Only" service. The FCC has an articulated policy that the transmission of both obscenity and subliminal advertising are contrary to the public interest. Petitioner's allegations were supported by the aforementioned *evidentiary exhibits*, and the FCC should not decide the Applications for Transfer of FCC Licenses in this Proceeding, without first taking into consideration and examining these evidentiary exhibits.

Some of the evidentiary exhibits, filed with the FCC on November 4, 2002, were either damaged, delayed, lost or destroyed by the FCC.<sup>17</sup> It is unjust that Petitioner was prevented from having this supporting evidence considered in connection with his *Ex Parte Petition* in this Proceeding. The filing of November 4, 2002 was supported by evidence sufficient to require that the FCC consider and decide that a hearing was warranted on the obscenity issue *in connection with AT&T's Application for the transfer of FCC Licenses herein*. It is ludicrous to suggest that justice or the public interest can be served by an "enforcement" action taken "subsequent" to the transfer of FCC Licenses. On November 4, 2002, the obscenity issue was supported by clear and convincing evidence of violations of federal law, and should have resulted in the setting of a hearing on the obscenity issue *in connection with AT&T's Application for the transfer of FCC Licenses herein*. Instead, the FCC unjustly "denied" Petitioner's claims, because the Office of the Secretary either delayed delivery of Petitioner's supporting evidentiary exhibits to the "staff reviewing the transaction" – until well *after* the adoption of *The Order* deciding AT&T's Applications, or in some instances, "lost" or "misplaced"

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<sup>17</sup> See *Declaration of Carol A. Clancy*.

evidentiary exhibits. This manner of disposing of Petitioner's claims improperly relegates the issue of "obscenity" as functionally "moot." This action and *The Order* by the FCC, is unjust and against the public interest.

The text of *The Order*, at Section VI, entitled "*Qualifications and Character Issues*," at paragraph 207, states:

"Section 301(d) of the Communications Act provides that no station license may be transferred, assigned, or disposed of in any manner except upon a finding by the Commission that the 'public interest, convenience and necessity will be served thereby.' [Footnote omitted.] Among the factors that the Commission considers as part of its public interest inquiry is whether the applicant for a license has the requisite 'citizenship, character, financial, technical, and other qualifications. [Footnote omitted.] The Commission has previously determined that, in deciding character issues, it will consider certain forms of adjudicated, non-FCC related misconduct that includes: (1) felony convictions; (2) fraudulent misrepresentations to governmental units; and (3) violations of antitrust or other laws protecting competition. [Footnote omitted.] *With respect to FCC related conduct, the Commission has stated that it would treat any violation of any provision of the Act, or of the Commission's rules or policies, as predictive of an applicant's future truthfulness and reliability and, thus, as having a bearing on an applicant's character qualifications.*<sup>18</sup> [Footnote omitted.] The Commission has used its character policy in the broadcast area as guidance in resolving similar questions in transfer of common carrier authorizations and other license transfer proceedings. [Footnote omitted.]" (Emphasis Added.)

*The Order*, at paragraph 209, notes:

"James J. Clancy ('Clancy') urges us to deny the Application on grounds that AT&T has, over a 23-month period from October 20, 2000, through October 2, 2002, repeatedly distributed obscene material and subliminal

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<sup>18</sup> It is Petitioner's claim in his *Ex Parte Petition of James J. Clancy* that AT&T, by disseminating over its cable TV operation (1) obscene material and (2) advertising that utilizes "subliminal frames" in its "pandering previews", had violated specific provisions of the Act, and of the FCC's rules or policies, and that these violations bear on character qualifications in the Proceedings in MB 02-70, and that these violations were required to be addressed in the context of those Proceedings. 47 U.S.C. § 559 (as well as 18 U.S.C. § 1468) specifically proscribe the transmission of obscene programming over cable TV, as contrary to the public interest. In 1984, the FCC has articulated a specific policy against the use of subliminal advertising techniques (see *infra*, at note 21).

messages over its cable system serving La Tuna Canyon, California."

*The Order*, at paragraph 212, entitled "*Discussion*," concludes:

"The parties raising issues of character and legal non-compliance have failed to convince us that we should deny the merger based on the allegations. . . ."

With respect to the specific claims of James J. Clancy, *The Order*, at paragraph 213,

states:

"We deny Clancy's late-filed petition to deny the Application. Clancy does not offer any evidence that a court has adjudged that any programming distributed by AT&T is or was obscene, *nor any other evidence to support his allegations*.<sup>19</sup> . . . . Clancy's allegations do not justify action on the petition in the context of this proceeding.<sup>20</sup> We will, however, refer Clancy's petition to

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<sup>19</sup> *The Order*, at footnote 649, states: "Clancy's petition references several exhibits and attachments that, at the time of adoption, still had not been received by staff reviewing the transaction." Under 47 C.F.R. Section 1.7, "pleadings and other documents are considered to be filed with the Commission upon their receipt at the location designated by the Commission." Therefore, supporting evidentiary exhibits had been filed with the FCC on November 4, 2002 (the date *The FCC November 4th Filing* was received), and should have been forwarded to the "staff reviewing the transaction." Petitioner is informed and believes that the supporting evidentiary exhibits were received for by the FCC on November 4, 2002, and that once subjected to inspection and review under the "anti-terrorist" FCC procedures, they were received for by the Office of the Secretary of the FCC on November 6, 2002 (see *Declaration of Carol A. Clancy*), at which time they should have been immediately transferred to the "staff reviewing the transaction." Instead, the supporting evidence was either "lost" or delayed, so that this relevant and essential evidence could not be considered in connection with Petitioner's *Ex Parte Petition* by the "staff reviewing the transaction." In view of the egregious nature of AT&T's conduct, this is inequitable, and should be corrected by granting Petitioner's Petition for Reconsideration and granting a hearing on the obscenity issue, as prayed for herein.

<sup>20</sup> *The Order*, at footnote 651, states:

"See *Litigation Recovery Trust Petition for a Determination Whether Comsat Corp. Has Violated the Public Interest Standard of the Communications Satellite Act*, FCC 02-279 (rel. Oct. 28, 2002)" (holding that an unsupported allegation of obscenity did not warrant requested relief).

The *Litigation Recovery Trust Petition* case (containing *unsubstantiated claims* of obscenity) is not in point here. *The Ex Parte Petition of James J. Clancy* had asserted that the programming disseminated by AT&T is "obscene," and was supported by *evidence*. *The Ex Parte Petition of James J. Clancy* does not raise an "indecentcy" claim. In this Proceeding, Petitioner's allegations of "obscenity" were *supported* by the evidentiary exhibits contained in *The FCC November 4th Filing*, filed on November 4, 2002 (which were later delayed, misplaced, lost, or destroyed by the FCC). The "evidence of obscene programming," which was filed with the FCC contemporaneously with the *Ex Parte Petition* consisted of: (1) 2 DVDs (Part I contained the first part of the obscene movie entitled "More Than A Handful 9"; Part II contained the conclusion of said obscene movie, as well as certain obscene "pandering previews") which illustrated and exemplified the content and character of all of the specifically identified obscene films named in the *Ex Parte Petition* , (2) one "Time/Motion Study" providing pictorial evidence of the use of subliminal

the Commission's Enforcement Bureau for any further action it deems appropriate. In addition, we note that the petition was extremely untimely, having been filed 189 days after the date for the filing of such petitions and only nine days before the Commission's adoption of its *Order* in this proceeding."

It should be noted that the *Ex Parte Petition of James J. Clancy*, with supporting exhibits, was filed within the time period designated by the FCC for the making of "*ex parte presentations*," was filed in compliance with the instructions of FCC staff and the procedure described in 47 CFR Section 1.1206, and was filed before the expiration of the "180-day Timeline" established as the "internal agency guideline" for the ideal disposition of the Proceeding (see Declaration of Carol A. Clancy).

The fact that the violations by AT&T of Federal Communication law were brought to the attention of the FCC on November 4, 2002, does not relieve the FCC from its duty to adjudicate and resolve the obscenity question in this licensing transfer proceeding. The Order, as written, improperly moots the obscenity issue and makes it incapable of meaningful examination and just adjudication.

It is well known that AT&T intended (and has in fact) "spun off" the AT&T Broadband division that ran AT&T's cable TV operation. This "spun off" entity has merged with Comcast Corporation to form a new corporation (named AT&T Comcast), which will hold the FCC Licensees as Transferree under *The Order*, unless it is reconsidered and reversed. Since "AT&T Broadband" (as a division of AT&T) *no longer exists*, and AT&T Corp. (the parent corporation of the former "AT&T Broadband") no

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advertising frames in the obscene pandering previews (a copy of the actual pandering previews were contained on Part II of the DVDs filed, and (3) a list of over 100 obscene films, with detailed information concerning dissemination (date, time, channel), the content and character of which were illustrated and exemplified by the aforementioned obscene movie "More Than A Handful 9" and obscene pandering



longer holds its cable TV licensees (unless *The Order* is reconsidered and reversed), it is no "remedy" to "refer Clancy's petition to the Commission's Enforcement Bureau" for "further action" (as stated in *The Order* at paragraph 213).

Moreover, with respect to the "timeliness" of Petitioner's claims, after the close of the April 29th "deadline" for the filing of comments or petitions to deny the Application, the FCC openly invited the participation of interested persons in the Proceeding by permitting presentations under its *Ex Parte* Presentation Rules (47 C.F.R. § 1.1200, *et seq.*). It is Petitioner's understanding that the FCC has considered the *ex parte* objections of other individuals and has disposed of them on the merits of those claims, in spite of the fact that these claims may have been filed after the April 29, 2002 "deadline."

The explanation for the delay in filing of James J. Clancy's *Ex Parte* Petition, on November 4, 2002, is explained in the Declaration of James J. Clancy in Support of Petition for Reconsideration [*i.e.* the *Ex Parte* Petition was filed as soon as Petitioner realized that after two years of sending written communication to U.S. Attorney General Ashcroft concerning complaints about AT&T's continued violation of federal cable TV obscenity law, the Department of Justice was not going to act on or respond to those written complaints, and that contrary to the express terms of the Memorandum of Understanding (hereinafter "MOU") that exists between the Department of Justice and the FCC, the Department of Justice (for some unknown and inexplicable reason) *had not notified the FCC about his obscenity complaints against AT&T's cable TV operation, as it was obligated to do so under the MOU*]. Any delay concerning notice to the FCC

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previews. These claims were later amplified by Petitioner's filing, dated November 8, 2002, which lodged additional supplemental evidentiary exhibits.

concerning the cable TV obscenity violations of AT&T involving Federal Communications law and policy was caused by the government, and is not the fault of Petitioner.

Therefore, the following reference to the "timeliness" of Petitioner's Ex Parte Petition, appearing in The Order, at footnote 648, would appear to be irrelevant:

"The petition was filed on November 3, 2002, more than six months after the April 29, 2002 deadline for filing of petitions to deny the Application. AT&T Corp. and Comcast Corp. Seek FCC Consent for a Proposed Transfer of Control, MB Docket No. 02-70, Public Notice, 17 FCC Rcd 5907 (2002) (establishing a deadline of April 29, 2002 for filing of comments or petitions to deny the Application); see also 1.939(a)(2)(providing that petitions to deny may be filed no later than 30 days from the date of public notice listing an application as accepted for filing)."

The FCC has both the power and duty to address Petitioner's cable TV obscenity claim in the context of the AT&T Application in this Proceeding, especially in light of the many months (over 21 months) duration of AT&T's direct violation of Federal Communication Law and Policy. AT&T's conduct represents a direct violation of Federal Communication Policy, and should be adjudicated by the FCC in this Proceeding. This policy is expressly contained in The Cable Communication Policy Act, Title 47, Chapter 5, Part IV [47 U.S.C. § 559] which is an amendment to the Communications Act of 1934 ("the Act"), and states:

"Obscene Programming. Whoever transmits over any cable system any matter which is obscene or otherwise unprotected by the Constitution of the United States shall be fined under title 18 or imprisoned not more than 2 years, or both."

In addition, the FCC has both the power and duty to address Petitioner's Ex Parte Petition, and the supporting evidentiary exhibits which were in fact filed on November 4, 2002, and those evidentiary exhibits filed on November 12 and 13, 2002. These exhibits

establish that the issue of whether AT&T has transmitted obscene matter over its cable TV operation should be set for a hearing *in this Proceeding*, and that *no decision* concerning the issue of transfer should be decided until after this hearing. In addition, Petitioner has lodged evidence which raised the issue of whether AT&T has violated the FCC's 1984 Statement on Subliminals, which states: "Subliminal projections, which are designed to sidestep conscious awareness of advertisements, have been found to be against the public interest and the spirit and language of section 317" of the Communications Act.<sup>21</sup> This matter should also be reviewed and decided at a hearing, which should be held *in connection with this Proceeding*.

#### IV. CONCLUSION

1. The following evidentiary exhibits, filed with the FCC on November 4, 2002, have either been damaged by the FCC, or have been "misplaced" by the FCC:

- (1) Part I of the DVD disc copy, containing the first part of the obscene film "More Than A Handful 9" which is representative of AT&T's entire "In Demand, Pay Per View, Adult's Only" programming;
- (2) Part II of the DVD disc copy, containing the last part of the obscene film "More Than A Handful 9" together with obscene 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"

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<sup>21</sup> Citing 47 U.S.C. §§ 303 and 317, and 47 C.F.R. § 73.1212. 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, before the August 6, 1984 Hearing on Subliminal Communication Technology, House Subcommittee on Transportation, Aviation and Materials.

programming, and which demonstrate that AT&T's violations of federal law, as complained of herein, are intentional and willful; and

- (3) Exhibit A in Support of the Ex Parte Petition of James J. Clancy, consisting of a partial list of AT&T Cable transmissions of obscene programming, showing the date and channel of specifically named obscene movies as transmitted by AT&T's cable TV operation.

A true and correct duplicate copy of these "damaged" or "lost" evidentiary exhibits have been filed concurrently with the *Declaration of Carol A. Clancy*. In the interests of justice and the public interest, these substitute duplicate copies should be received in lieu of the originals, and deemed *nunc pro tunc* "filed" as of November 4, 2002, pursuant to 47 C.F.R. Section 1.7.

2. As both *Illinois Citizens Committee for Broadcasting v. FCC*,<sup>22</sup> *supra*, and *Monroe Communications Corporation v. FCC*,<sup>23</sup> *supra*, indicate, the use of federal channels of communication to transmit obscenity is contrary to the public interest, and concerned citizens have an important role to play in the adjudication of such obscenity issues placed before the FCC. However, in the instant case, any meaningful participation in that process will be cut off, unless the FCC grants reconsideration of its Order herein. Petitioner is aggrieved by the FCC's action and *The Order* in this Proceeding, and his interests were adversely affected by such action and *Order*, as set forth above, and as set forth in the supporting declarations of James J. Clancy and Carol A. Clancy. In the interest of justice and in the public interest, the FCC should grant reconsideration of *The*

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<sup>22</sup> 515 F.2d 397 (1974).

<sup>23</sup> 900 F.2d 351 (1990).

*Order*, released November 14, 2002, and should grant Petitioner's request for a hearing as prayed for herein and in his *Ex Part Petition*. The failure by the FCC to review relevant evidence *in its possession* concerning violations of federal communication law, involving obscenity and subliminal advertising, in connection with the Application of AT&T for Transfer of FCC Licenses, was, under the circumstances, unfair, unjust, arbitrary and capricious, and contrary to the public interest. Under the circumstances, granting the aforementioned Application by AT&T would be inconsistent with the public interest, convenience and necessity, for the reasons stated herein, and in Petitioner's supporting papers and evidence.

3. For all the above stated reasons, the FCC should grant reconsideration of its decision and *Order*, released November 14, 2002, approving the merger of AT&T Broadband and Comcast Corporation, *Order, 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 (hereinafter "*The Order*") with reference to "In the Matter of Applications for Consent to the Transfer of Control of Licenses From Comcast Corporation and AT&T Corp., Transferors, To AT&T Comcast Corporation, Transferee" (hereinafter "the Proceeding").

4. In light of the foregoing, the FCC should immediately stay the effectiveness of its decision granting the Applications in this Proceeding MB Docket No. 02-70, pending its decision on this Petition; and

5. The Application of AT&T for transfer of FCC Licenses should be set for a hearing on the following issues: All relevant violations of federal communication policy by AT&T, including the obscenity and subliminal advertising issues, as raised herein and

in the *Ex Parte Petition of James J. Clancy*, and in Petitioner's supporting papers and evidence, should be examined, and notice of such should be included in the FCC's order designating the Application of AT&T for transfer of FCC Licenses for a hearing, as prayed for herein.

Dated: December 12, 2002

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JAMES J. CLANCY, PETITIONER

## **CERTIFICATE OF SERVICE**

1. This document is being electronically filed.
2. Also, pursuant to the Commission's Rules, an original and four copies of this Petition for Reconsideration are being sent, using the U.S. Mail (Express Mail), addressed to Secretary, Federal Communications Commission, 445 12TH Street, S.W., Washington, D.C. 20554.

Dated: December 13, 2002

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