

**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**

**REPLY OF JAMES J. CLANCY TO THE OPPOSITION TO  
RECONSIDERATION, FILED BY COMCAST CORPORATION AND AT&T  
CORPORATION**  
**[47 C.F.R. § 1.106(h)]**

JAMES J. CLANCY, the undersigned, pursuant to § 1.106(h) of the Commissions' rules, hereby files this reply to the opposition (hereinafter "the Opposition") filed on behalf of Comcast Corporation (hereinafter "Comcast") and AT&T Corp. (hereinafter "AT&T"). The Opposition seeks denial of the Petition for Reconsideration filed on behalf of Petitioner James J. Clancy (hereinafter "The JJC Petition for Reconsideration").

The Opposition completely lacks merit. It fails to address the substantive claims against AT&T, as an F.C.C. Licensee. Instead, the Opposition attempts to avoid

examination of serious, substantive violations of the Federal Communication Act and federal communication policy by AT&T. In essence, the Opposition advocates that the actions of AT&T should be shielded from Commission review, based on a technical (and incorrect) interpretation of the rules governing proceedings before the Federal Communication Commission (hereinafter "F.C.C."), which is wholly divorced from any public policy analysis or considerations. The claims of Petitioner (being in the nature of a Private Attorney General), as asserted in the papers on file herein, have been made on behalf of the Public, and the public interest. These public interest claims can only be addressed in the context of this License Transfer proceeding, for they will be incapable of vindication in any future proceeding.

The evidence placed before the F.C.C. establishes that as a regular course of conduct, AT&T used its F.C.C. Licenses to transmit *per se* obscene material, in violation of the Federal Communication Act, 47 U.S.C. § 559, federal communication policy, and federal law. This demonstrates that AT&T lacked the basic character qualifications required of all F.C.C. Licensees, and was therefore not entitled to a granting of its request for transfer of its F.C.C. licenses. The obscenity issue should have been set for a hearing, and AT&T's Application for Transfer should have been denied under the proposed tendered evidence.

This License Application proceeding involves broad public policy and legal issues. Under federal law, the Applications pending should not have been 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 should have been approved (as here) where the transfer would be contrary to the

public interest. The Opposition incorrectly asserts that the AT&T "character issue" should not be revisited in the context of this proceeding. This is an assertion without foundation in law. Such an assertion is patently absurd, in light of the factual circumstances of this proceeding: *i.e.* where the division of AT&T most responsible for violations of federal communication law (namely, AT&T Broadband) is being "spun off" and is being wholly acquired by the proposed License Transferee, at great financial benefit to AT&T.

The problem with the Opposition's approach is that it miscasts the substantive and procedural stance of this case. The evidence that supported the original Petition to Deny established conduct by AT&T which that is contrary to the public interest and specifically violates the Federal Communication Act. Nevertheless, the Opposition argues that "form must prevail over substance", and that, therefore, this Commission should ignore evidence of violations of the public interest by AT&T, because it arises "in the context" of a License Transfer Application.

Petitioner seeks correction of the record in this proceeding. The F.C.C. should restore to the Record the evidence that supported Petitioner's original Petition to Deny, which the F.C.C. either damaged, lost, or otherwise misplaced after it was filed and in the possession of the F.C.C.. After restoration of this evidence to the Record, Petitioner has requested that this Commission reconsider its denial of his Petition to Deny. Petitioner has requested that the F.C.C. review the restored evidence, that was damaged, lost, or misplaced by the F.C.C, and evaluate it in light of the issues raised by both his original Petition to Deny, and the JJC Petition for Reconsideration, and all supporting papers and documents on file herein.

In its Decision, the F.C.C. referred to the lateness of the filing of the original Petition to Deny, but nevertheless reviewed the original Petition to Deny *on its merits*. The Petition to Deny was rejected as constituting a *substantively inadequate claim*, based on the erroneous supposition that it had been filed *without any supporting evidence of "obscenity."* This evaluation was patently unfair, because the F.C.C. had either damaged, lost, or otherwise misplaced the supporting evidence of obscenity. Nevertheless, The F.C.C.'s denial was a decision that addressed the *merits* of the Petition.

Since the November 2002 Decision addresses and rules on the merits of the original Petition to Deny, it also indicates that the F.C.C. has already exercised its discretion to accept the Petitioner's materials – regardless of the date of filing, as appropriate under the circumstances. The burden now shifts to the Opposition to establish that the decision by the F.C.C. to allow this "late filing" and to address the Petition to Deny, constituted an "abuse of discretion." The Opposition fails to carry this burden.

In urging denial of The JJC Petition for Reconsideration, the Opposition acknowledges that the F.C.C. has the discretion to permit the filing, but attempts to establish that there was no showing of "good cause" for the filing of the original Petition to Deny, in November, as opposed to April, of 2002. The Opposition is also incorrect in dismissing the legal significance of the failure by both United States Department of Justice and the F.C.C. to follow the express provisions of the Memorandum of Understanding (hereinafter "M.O.U.") that was signed and exists as a matter of public record between those two Agents of one Government. The M.O.U. was mentioned in the papers that supported the original Petition to Deny. (See copy of the M.O.U., filed in

connection with the *(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*. The decision to review the original Petition on the Merits was not arbitrary or capricious, in light of the facts of this case.

Petitioner respectfully submits that this Commission, in the exercise of its discretion, is not at liberty to ignore the fact that 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 deter the use of federal channels of communication to traffic in obscenity. Under the specific provision of the Federal Communications Act, 47 U.S.C. § 559, as a matter of federal communication policy and federal statute, AT&T's transmission of obscenity raises a federal question, and is subject to mandatory review and adjudication by the Commission in this federal forum *and in this proceeding*. The Commission has 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.*, 283 U.S. App. D.C. 367, 900 F.2d 351 (1990).

### **CONCLUSION**

The JJC Petition for Reconsideration raises issues of great importance regarding the public interest and the operation of the Federal Communications Act, federal communication law (especially as it relates to other federal statutes), and the United

States Constitution. The Opposition, without legal basis, seeks to reduce these issues to minor procedural issues, of no consequence to the public interest.

Dated: January 7, 2003

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JAMES J. CLANCY, PETITIONER

## **CERTIFICATE OF SERVICE**

I, C.J. Clancy, hereby certify that on January 7, 2003:

An original and four copies of this Reply of James J. Clancy to the Opposition to Reconsideration, Filed by Comcast Corporation and AT&T Corporation was sent, using the U.S. Mail, addressed to Secretary, Federal Communications Commission, 445 12TH Street, S.W., Washington, D.C. 20554. A copy of said document was also mailed, postage prepaid, to the following:

SECRETARY  
FEDERAL COMMUNICATIONS COMMISSION  
445 12TH STREET, S.W.  
WASHINGTON, D.C. 20554

FED EX ADDRESS:  
SECRETARY  
FEDERAL COMMUNICATIONS COMMISSION  
9300 EAST HAMPTON DRIVE  
CAPITOL HEIGHTS, MARYLAND 20743

MICHAEL J. POWELL  
CHAIRMAN  
FEDERAL COMMUNICATIONS COMMISSION  
445 12TH STREET, S.W.  
WASHINGTON, D.C. 20554

KATHLEEN Q. ABERNATHY  
COMMISSIONER  
FEDERAL COMMUNICATIONS COMMISSION  
445 12TH STREET, S.W.  
WASHINGTON, D.C. 20554

JONATHAN S. ADELSTEIN  
COMMISSIONER  
FEDERAL COMMUNICATIONS COMMISSION  
445 12TH STREET, S.W.

WASHINGTON, D.C. 20554

MICHAEL J. COPPS  
COMMISSIONER  
FEDERAL COMMUNICATIONS COMMISSION  
445 12TH STREET, S.W.  
WASHINGTON, D.C. 20554

KEVIN J. MARTIN  
COMMISSIONER  
FEDERAL COMMUNICATIONS COMMISSION  
445 12TH STREET, S.W.  
WASHINGTON, D.C. 20554

AT&T Corp.  
c/o David Lawson  
Sidley Austin Brown & Wood, LLP  
1501 K. Street, N.W.  
Washington, D.C. 20005

Comcast Corporation  
c/o A. Richard Metzger, Jr.  
Lawler, Metzger & Milkman, LLC  
1909 K. Street, N.W., Suite 820  
Washington, D.C. 20006

Petitioner Borough of Blawnox, Pennsylvania  
c/o Frederick A. Polner, Esq.  
Rothman Gordon, P.C., Grant Building  
310 Grant Street  
Pittsburgh, PA. 15219

Harold Feld, Counsel for CFA, et al.  
MEDIA ACCESS PROJECT  
1625 K St., N.W., Suite 1118  
Washington, DC 20006

Dennis J. Kelly  
Law Offices of Dennis J. Kelley  
Attorneys for Lisa Burton, et al.  
Post Office Box 41177  
Washington, D.C. 20018

Petitioner Minority Television Project, Inc.  
c/o James L. Winston and Paul M. Breakman  
Rubin, Winston, Diercks, Harris & Cooke



1155 Connecticut Ave. N.W., 6th Floor  
Washington, DC 20036

RCN Telecom Services, Inc.  
c/o Andrew Lipman, Jean Kiddoo, and L. Elise Dieterich  
Swidler Berlin Shereff Friedman, LLP  
3000 K Street, N.W., Suite 300  
Washington, DC 20007

Verizon Telephone Companies and Verizon Internet Solutions d/b/a/ Verizon.net  
c/o Andrew G. McBride and Jeffrey S. Linder  
Wiley Rein & Fielding, LLP  
1776 K Street N.W.  
Washington, DC 20006

Stanley L. Wang  
Joseph W. Waz, Jr.  
Comcast Corporation  
1500 Market Street  
Philadelphia, Pennsylvania 19102

James R. Coltharp  
Comcast Corporation, Suite 500  
2001 Pennsylvania Avenue, N.W.  
Washington, D.C. 20006

Mark C. Rosenblum  
Stephen C. Garavito  
A.T.&T. Corp., Room 1131M1  
295 North Maple Avenue  
Basking Ridge, New Jersey 07920

Dated: January 7, 2003

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C.J. Clancy