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April 21, 2000

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APR 21 2000
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Submission
CS Docket No. 99-251
CS Docket No. 00-30

Dear Ms. Salas:

Attached is the Opposition of AT&T Corp. and MediaOne Group, Inc. to the joint Motion to Consolidate filed on April 11, 2000 by Consumers Union, Consumer Federation of America, and the Center for Media Education in the above-captioned proceedings.

Kindly place a copy of this filing in the dockets of the above-captioned proceedings.

An original and four (4) copies of this letter and attachment are submitted herewith in accordance with Section 1.1206(b) of the Commission's rules.

Sincerely,

Francis M. Buono

Francis M. Buono

Attachment

cc: Parties on attached service list

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

RECEIVED

APR 21 2000

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of:	)	
	)	
Applications for Consent to the Transfer of Control of Licenses	)	
	)	
MediaOne Group, Inc. Transferor,	)	CS Docket No. 99-251
	)	
To	)	CS Docket No. 00-30
	)	
AT&T Corp. Transferee.	)	

OPPOSITION OF AT&T CORP. AND MEDIAONE GROUP, INC. TO MOTION TO CONSOLIDATE

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Sean C. Lindsay
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April 21, 2000

BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of:	)	
	)	
Applications for Consent to the Transfer of Control of Licenses	)	
	)	
MediaOne Group, Inc. Transferor,	)	CS Docket No. 99-251
	)	
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	)	
AT&T Corp. Transferee.	)	

OPPOSITION OF AT&T CORP. AND MEDIAONE GROUP, INC. TO MOTION TO CONSOLIDATE

Pursuant to Section 1.45(b) of the Commission's rules, 47 C.F.R. § 1.45(b), AT&T Corp. and MediaOne Group, Inc. (hereinafter jointly "AT&T") hereby oppose the Motion to Consolidate ("Motion") filed April 11, 2000 by Consumers Union, Consumer Federation of America, and the Center for Media Education ("CU *et al.*"). For the reasons set forth below, the Motion should be rejected.

First, the alleged facts that CU *et al.* claim necessitate the filing of this Motion are spurious.[1] CU *et al.* contend that a recent exchange of correspondence between AT&T and the

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1 *See Motion* at 1-2.

Commission regarding AT&T's post-merger subscribership levels and a further explanation of certain provisions of the Time Warner Entertainment ("TWE") limited partnership agreement demonstrate that "the Commission cannot fully consider the effects of [ ] the AT&T/MediaOne merger and the AOL/TW merger on the relevant markets and on each other with certainty unless it has all four parties before it."[2] What CU *et al.* fail to note, however, is that AT&T has *already* provided the Commission with the relevant information CU *et al.* claims is missing, and, indeed, had done so *before* CU *et al.* even filed the instant Motion with the Commission. Regarding its subscribership levels, AT&T filed a certification letter with the Commission on March 17, 2000 that provided a detailed analysis of AT&T's current subscribers as well as subscribers in MediaOne's and TWE's cable systems,[3] and then filed a revised version of that letter on April 7, 2000.[4] Regarding the TWE partnership agreement, AT&T had filed the agreement with the

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2 *Id.* at 2.

3 *See Ex Parte* Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T Broadband, L.L.C., to Deborah Lathen, Chief, Cable Services Bureau, filed in CS Docket No. 99-251 & MM Docket No. 92-264 (March 17, 2000).

4 *See Ex Parte* Letter from Douglas G. Garrett, Senior Regulatory Counsel, AT&T Broadband, L.L.C., to Deborah Lathen, Chief, Cable Services Bureau, filed in CS Docket No. 99-251 & MM Docket No. 92-264 (April 7, 2000). AT&T notes that the effect of the revised TWE subscribership level reported in the 4/7/00 filing was to *lower* AT&T's post-merger subscribership levels by over 300,000 subscribers. *See id.* at 2.

Commission on September 3, 1999,[5] and provided the Commission with supplemental information regarding certain provisions of the agreement on April 7, 2000.[6] Thus, the subscriber certification, as well as the TWE limited partnership agreement and AT&T's explication of the agreement -- the absence of which CU *et al.* claim necessitated its Motion -- were delivered to the Commission *prior* to the filing of the Motion.

Second, the legal predicate underlying the Motion is equally incorrect. CU *et al.* assert that the Supreme Court's decision in *Ashbacker Radio Corp. v. FCC*[7] requires the Commission to consider the AT&T/MediaOne and AOL/Time Warner merger applications simultaneously because they are "mutually exclusive."[8] CU *et al.*'s reliance on *Ashbacker* is misplaced. In the *Ashbacker* case, two applicants were seeking to use the same spectrum to operate their respective broadcast stations, so that one application could not be approved without necessarily depriving the other applicant of a hearing.[9] Under *Ashbacker*, applications are "mutually exclusive" and thus subject to simultaneous consideration by the Commission only where "the grant of one application *necessarily precludes* another."[10] The AT&T/MediaOne and AOL/Time Warner

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5 *See Ex Parte* Letter from Michael G. Jones, Willkie Farr & Gallagher, to Magalie Roman Salas, Secretary, FCC, filed in CS Docket No. 99-251 (Sept. 3, 1999).

6 *See Ex Parte* Letter from Michelle Mundt, Mintz Levin, to Magalie Roman Salas, Secretary, FCC, filed in CS Docket No. 99-251 (April 7, 2000).

7 326 U.S. 327 (1945).

8 *See Motion* at 10-11.

9 *See Ashbacker*, 326 U.S. at 328-330.

10 *Application of Hughes Communications Galaxy, Inc., DBS-84-02,* 1985 FCC LEXIS 2731, at ¶ 7 (1985) (emphasis added). *See also R.L. Mohr, d/b/a RadioCall Corp.*, 85

(footnote continued ...)

merger applications involve two different proceedings that present different sets of facts, and approval of one merger application would in no way "necessarily preclude" approval of the second application.

Third, CU *et al.*'s proposal to consider the two mergers simultaneously is unlawful and unworkable. As an initial matter, the Communications Act specifically directs the Commission to make individualized determinations on transfer of control applications. In particular, Section 309 of the Act provides that "the Commission shall determine in the case of *each application* filed with it . . . whether the public interest, convenience, and necessity will be served by the granting of *such application*[.]"[11] The Commission may not, consistent with this provision, simply lump the two merger applications together for joint consideration.[12]

Even if the Commission were to accept CU *et al.'s* invitation to revisit every pending merger application every time a new merger application is filed, it would create a never-ending review process. AT&T's merger application has been under review for over nine months. That

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(...footnote continued)

F.C.C.2d 596, at ¶ 34 (1981) (applications are "mutually exclusive" and subject to simultaneous review where "the grant of one application would necessarily require the denial of the other.").

11 47 U.S.C. § 309(a) (emphasis added).

12 CU *et al.* appear less interested in adjudication of the AT&T/MediaOne merger application, as the Communications Act requires, than in a full-fledged exercise in social engineering. According to CU *et al.*, "[r]efusing to consolidate these applications denies the public the right to *have the Commission determine the best possible outcome*." *Motion* at 10 (emphasis added). CU *et al.* continue that "the *Commission will never determine what configuration of these four companies best serves the public interest* if it decides the AT&T/MediaOne application first." *Id.* (emphasis added). To say the least, it is not the Commission's role to determine how each company that comes before it in the context of a merger should be "configured."

review process should not be extended further while the effects of a different, later-proposed merger are considered, and theoretically even longer should yet a third merger application be filed that assertedly has some effect on the two pending applications.

Finally, the concerns relative to the AT&T/MediaOne merger that CU *et al.* want reviewed in a consolidated merger proceeding[13] have *already* been fully briefed.[14] AT&T addressed these concerns in the four major pleadings it has filed on its merger application,[15] as well as in voluminous *ex parte* documents. Similarly, CU *et al.* and other members of the public have had numerous opportunities to comment on every aspect of the merger. The Cable Services Bureau established a pleading cycle on the proposed merger application on July 23, 1999; invited comments on AT&T's November 24, 1999 filing regarding compliance with the revised cable ownership rules on November 30, 1999; invited sur-reply comments on AT&T's waiver request on January 13, 2000; and held a public forum on the merger on February 4, 2000. CU *et al.* have participated fully in all phases of this proceeding, including the public forum, and have also filed separate motions regarding various aspects of the merger. Given the lengthy and comprehensive

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13 For example, CU *et al.* suggest that the Commission more closely review the effects of the AT&T/MediaOne merger on the broadband and video programming markets. *See Motion* at 6-7, 11-13.

14 Other issues that CU *et al.* raise, such as the effect of AOL's interest in DirecTV on the video programming market, *see Motion* at 13, are more appropriately considered in the context of the AOL/Time Warner merger review process.

15 *See* Public Interest Statement of AT&T Corp. and MediaOne Group, Inc., filed in CS Docket No. 99-251 (July 7, 1999); Reply Comments of AT&T Corp. and MediaOne Group, Inc., filed in CS Docket No. 99-251 (Sept. 17, 1999); Supplemental Comments of AT&T Corp. and MediaOne Group, Inc., filed in CS Docket No. 99-251 (Nov. 24, 1999); Supplemental Reply Comments of AT&T Corp. and MediaOne Group, Inc., filed in CS Docket No. 99-251 (Dec. 21, 1999).

assessment that already has taken place on all potential effects of the AT&T/MediaOne merger, there is absolutely no basis for *CU et al.'s* suggestion that the Commission now reconsider those effects.

CONCLUSION

AT&T's merger application has been under review for over nine months. It is time for the Commission to approve the merger so that the benefits of local telephony competition can be brought to millions of American consumers, not to turn back the clock and start anew based on *CU et al.'s* fanciful notions about "mutual exclusivity." AT&T respectfully urges the Commission to deny CU *et al.'s* Motion.

Respectfully submitted,

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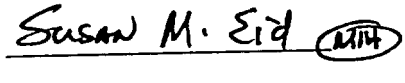

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April 21, 2000

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CERTIFICATE OF SERVICE

I, Robin Smith, do hereby certify that I caused one copy of the foregoing Opposition of AT&T Corp. and MediaOne Group, Inc. to be served by hand delivery on all parties on the attached service list, this 21st day of April, 2000.

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