December 20, 2000

Magalie Roman-Salas
Secretary, Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CS Docket No. 00-30
Written *Ex Parte* Presentation

AOL-Time Warner Merger

Dear Ms. Roman-Salas:

Pursuant to Section 1.1206(b)(1) of the Commission's rules, the attached letter is submitted here for inclusion in Docket 00-30.

Respectfully submitted,

Andrew Jay Schwartzman
Counsel for CU, *et al.*

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December 20, 2000

Chairman William E. Kennard
Federal Communications Commission
Washington, DC 20554

RE: AT&T/MediaOne Merger (Docket 99-251)

Dear Mr. Chairman:

The time has come for the Federal Communications Commission to act decisively to enforce its June 6, 2000 decision conditioning approval of the AT&T/MediaOne merger upon full and timely compliance with its terms. *MediaOne Group, Inc.*, 15 FCCRcd 9816, 9895 (2000) ("*Merger Order*").

To protect the legitimacy of the Commission's regulatory jurisdiction, Consumers Union, *et al.* respectfully ask that the Commission take the following steps by COB, December 20, 2000:

> Grant CU, *et al.'s* December 18, 2000 request for a declaratory ruling by declaring that AT&T's December 15, 2000 election, as "clarified" in AT&T's December 19, 2000 letter, satisfies the terms of the July 6, 2000 *Merger Order* for the reasons stated in the December 18, 2000 letter to AT&T from the Chief, Cable Services Bureau;[1]
>
> Rule that the December 15, 2000 election as described above was to divest AT&T's partnership interest in Time Warner Entertainment Co., LP by May 19, 2000;
>
> Rule that the December 15, 2000 election as described above is irrevocable;
>
> Rule that any "spin-off" of AT&T's attributable ownership interest in Liberty Media Corp. does not relieve AT&T of the irrevocable obligation to divest its partnership interest in Time Warner Entertainment Co., LP by May 19, 2000; and
>
> Clarify that the obligation to place AT&T's assets in an irrevocable trust in the event that compliance with the *Merger Order* is not possible by May 19, 2000 is not an option AT&T is free to choose in lieu of compliance with the divestiture obligation by that date, but that the trust requirement is a remedial provision designed to itigate harm from untimely compliance with the divestiture duty.

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[1]In their *Emergency Motion for Expedited Declaratory Ruling and to Waive Procedural Rules*, CU, *et al.* stated that they "believed]" that the December 15, 2000 election did not satisfy the terms of the *Merger Order*. To the extent that the Commission's follows the approach set forth in the December 18, 2000 letter of the Chief, Cable Services Bureau, CU, *et al.* agree that the election could be deemed sufficient. Specifically, if AT&T is deemed to have made an irrevocable election to divest its TWE assets, such an election would comply with the terms of the *Merger Order*. To the extent that the Commission deems the December 15, 2000 letter to be a sufficient election, but one which is not irrevocable, or to be a sufficient election that permits it to satisfy the *Merger Order* in any other manner, than CU, *et al.* ask that the *Merger Order* be reconsidered for the reasons set forth in their December 18, 2000 *Contingent Supplement to Petition for Reconsideration.*

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AT&T's December 19, 2000 letter to the Chief, Cable Services Bureau is an evasive and intentionally obfuscatory document which raises serious questions about AT&T's candor, and its qualifications to be an FCC licensee. Cutting through the rhetoric, however, are two essential points:

First, AT&T has not elected a divestiture of Liberty, because, as it says in the December 19, 2000 letter, "it would not be proper for AT&T to designate this option as our 'election' for purposes of the Order, because we cannot in good faith represent that our interest in Liberty could be placed in the trust required by the Order."

Second, since AT&T has not elected the Liberty divestiture, AT&T is thus "unable to complete the insulation of the TWE interest [by divesting Liberty]...," then "AT&T has made the election to divest its TWE interest...."

This matter is governed by the analysis in the Cable Service Bureau Chief's December 18, 2000 letter:

> [I]t appears that your December 15, 2000 letter means that AT&T has elected to divest TWE as the means for compliance with the Order.

Nothing in AT&T's December 19, 2000 response affords any basis to disturb that determination. The Commission should therefore take prompt and decisive action to declare that AT&T has irrevocably elected to divest TWE.

It is unfortunate that AT&T buries the operative language of its response amidst inappropriate and legally inaccurate language that requires the Commission to have to parse what ought to be straightforward statements. The misleading nature of AT&T's language, requires the Commission to provide additional clarification.

AT&T's belief that the Commission's ordering paragraphs do not mean what they plainly say, and that AT&T therefore has until the last day of the waiver period to take any truly irrevocable action, would seem incredible were it not so consistent with AT&T's belief throughout this proceeding that for some reason the rules did not apply to it. As chronicled at length by CU, *et al.*, has chronicled at length in this docket, AT&T obtusely insisted for many months that the FCC's rules did not say what they say. Only when the Commission made it clear it would not allow AT&T to write new rules for its convenience, AT&T asked for a waiver. Throughout the pendency of its merger application, AT&T refused to take a single step toward preparing to come into compliance with the 1992 Cable Act. *See, e.g., Petition for Reconsideration* filed July 6, 2000, at 17-20. Then, after accepting without appeal the Commission's *Merger Order*, it surreptitiously lobbied to overturn the Commission's decision.[2]

AT&T improperly argues, at page 3 of the December 19, 2000 letter, that it is free to select

[2]AT&T has a First Amendment right to lobby. However, the actions it takes nonetheless reflect on its sincerity and candor.

among "any" of the three compliance options set out in the *Merger Order*. It declares that "we believe the Order makes clear that the election..., and the trust mechanism..., are 'failsafe' measures designed to guarantee that AT&T makes timely and meaningful progress toward completing...any of the options that comprise the Video Condition...."

This perverse construction flatly contradicts the clear language of the Commission's *Merger Order*.

Paragraph 190 requires AT&T to "comply with the conditions set forth in Appendix B," entitled "Ensuring Compliance With and Enforcement of These Safeguards."

Subparagraph 18(f)(1) of Appendix B, titled "Enforcement Mechanisms Related to Compliance Action" requires AT&T:

> to make an election by a date certain (December 16, 2000) "to identify which of the three options...it has elected to pursue.

The term "elected" is in the past tense. It does not allow for later modification.

Subparagraph 18(f)(2)(I) requires that no later no later than March 20, 2001, AT&T must:

confirm that it "will take the Compliance Action" on schedule (*i.e.*, by May 19, 2001).

Subparagraph 18(f)(2)(ii) requires that, if AT&T cannot fulfill the requirements of Subparagraph 18f)(2)(I), then, no later no later than March 20, 2001, AT&T must:

> describe the extent to which it will not be in compliance with the Order, identify the assets...that it must divest in order to effectuate the Compliance Action option ***that it has elected pursuant to subparagraph 18(f)(1)***, and submit a proposed irrevocable trust agreement for the purpose of sale of ***these assets*** pursuant to the next subparagraph.

Merger Order, 15 FCCRcd at 9904 (emphases added).

In referring to "the Compliance Action," and not "a Compliance Action," paragraph 18(f)(2)(I) of the Commission's *Merger Order* clearly refers to the specific election AT&T made on December 15, 2000. This is confirmed by "the next subparagraph," Paragraph 18(f)(3), which states that

> [i]f AT&T has not taken the Compliance Action by the Compliance Deadline {May 20, 2001], then,...AT&T shall transfer into an irrevocable trust...***the assets AT&T designated pursuant to subparagraph 18(f)(2)(ii).***[3]

[3]There is a typographical error in Subparagraph 18(f)(3). It refers to "subparagraph

(emphasis added).

This language leaves no room for doubt. AT&T was to have identified the assets it intends to divest by December 16, 2000. If, as of March 19, 2001, it appears that AT&T cannot truthfully represent that it expects to be in compliance with its divestiture obligation, it must place the assets ***identified in the December, 2000 election*** into an irrevocable trust.

. AT&T insists, at page 2 of its December 19, 2000 letter, that "our December 15 letter does not, and in our view, need not, make an irrevocable election to dispose of the TWE interest because that election and the corresponding trust mechanism,...are to take effect only in the event AT&T does not otherwise satisfy the" terms of the Merger Order. It explains that "We understand both the language and purpose of paragraph 186 [of the *Merger Order*] to require AT&T to satisfy the [conditions] by accomplishing any of the three options set out in that paragraph on or before May 19, 2001."

This is nothing short of outrageous. AT&T flaunts the Chairman's own unequivocal statement that by December 16, 2000 "AT&T must make an irrevocable election among three divestiture options." *Merger Order, 15* FCCRcd at 9906 (Statement of Chairman Kennard). It renders the entire election process nugatory. It flies in the face of the language of Paragraph 18 of Appendix B explicated above. And it ignores Paragraph 187 of the *Merger Order*, which unequivocally states that "AT&T shall complete its divestiture of the elected assets by May 19, 2001.

Thus, to the extent that the Commission accept AT&T's December 15, 2000 election as a legally sufficient election to divest TWE assets, it must clearly rule that the election is irrevocable. Moreover, to vindicate the force of its *Merger Order*, it must reiterate that, in stating that AT&T must "complete its divestiture of the elected assets," Parapgraph 187 means that AT&T must divest the TWE assets ("the elected assets") irrespective of whether it has taken other steps, or plans to implement either of the other two options which it failed to elect as of December 15, 2000.

Finally, the Commission must also clarify that the irrevocable trust described in Subparagraph 18(f)(2)(ii) is not simply a fourth option open for AT&T to exercise at will. The trust is clearly intended as a remedial enforcement mechanism to be employed ***only*** if, after sincere effort, AT&T finds itself unable to certify that it will be able to bring itself into compliance with the requirements of the 1992 Cable Act by the established deadline.

It is clear that AT&T is playing for time. Its clumsy attempt to forestall compliance with the Commission's *Merger Order* should not be countenanced.

Sincerely,

18(g)(2)(ii). However, paragraph 18 is the final paragraph in the Appendix; there is no subparagraph 18(g). Clearly, the reference was intended to be to subparagraph 18(f)(2)(ii).

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Counsel for CU, *et al.*

cc. Other Commissioners
Counsel