



December 18, 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 *Emergency Motion for Expedited Declaratory Ruling and to Waive Procedural Rules* as filed in Docket 99-251 is submitted here for inclusion in Docket 00-30.

Respectfully submitted,

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

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
APPLICATIONS FOR CONSENT TO THE)
TRANSFER OF CONTROL OF LICENSES AND)
AND SECTION 214 AUTHORIZATIONS FROM)
MEDIAONE GROUP, INC.,) CS Docket No. 99-251
Transferor)
to)
AT&T CORP.,)
Transferee)

To: The Commission

**EMERGENCY MOTION FOR EXPEDITED DECLARATORY
RULING AND TO WAIVE PROCEDURAL RULES**

Consumers Union, Consumer Federation of America, and Media Access Project (collectively "CU, *et al.*") respectfully seek an expedited emergency declaratory ruling as to whether AT&T Corp. ("AT&T") has complied with the terms of the Commission's June 6, 2000 decision ("*Merger MO&O*") giving conditional approval of AT&T's acquisition of MediaOne Group, Inc. Specifically, CU, *et al.* ask for a ruling as to whether AT&T has complied with the requirement that it submit, by December, 16, 2000, "a written document stating which one of the three compliance options...it has elected" to satisfy the ownership limitations established in the 1992 Cable Act. *Media One Group, Inc.*, 15 FCCRcd 9816, 9895 (2000).

CU, *et al.* believe that AT&T's December 15, 2000 letter purporting to satisfy the requirements of the Commission's decision does not definitively specify "which one" of the options AT&T has elected, and that it does not comply with the terms of the Commission's June 6, 2000 decision. *Id.* Because of the time-sensitive nature of this case, its relationship to the pending

AOL/Time Warner merger proceeding, and the forthcoming holiday season, CU, *et al.* ask that the Commission issue its declaratory ruling by December 21, 2000, and that it waive its procedural rules as may be necessary to fulfill this request.¹

Failure of the Commission to act by December 21, 2000 will be regarded as a denial of this request, and CU, et al. will regard their administrative remedies to have been exhausted.

In the event the Commission rules that the December 15, 2000 letter does contain an election sufficient to satisfy the terms of the *Merger MO&O*, CU, *et al.* believe that the MO&O would thus necessarily be impermissibly vague and must be modified to assure that it achieves the purposes for which it was issued. Accordingly, CU, *et al.* are also filing a *Contingent Supplement to Petition for Reconsideration* to add this issue to those already presented in their pending *Petition for Reconsideration* of the June 6, *Merger MO&O*.² CU, *et al.* will request reversal of the *Merger MO&O*, *inter alia*, on the grounds that any decision which would permit an "election" of the kind contained in AT&T's December 15, 2000 letter is impermissibly vague, and hence, arbitrary and capricious.

¹CU, *et al.* ask that the Commission direct that any responses to this motion be filed by COB, December 19, 2000, that the Commission rule by COB, December 21, 2000, that service be made by fax or email, and that the parties may proceed hereafter by letter pleadings.

²CU, *et al.* note in this regard that it has been approximately five and one-half months since CU, *et al.* filed their 23 page reconsideration petition. Given that the Commission has imposed a six-month deadline for complete action on all merger applications, some of which involve many thousands of pages of record material, it is unconscionable that the Commission has as yet failed to act on the reconsideration petition. Accordingly, CU, *et al.* regard their administrative remedies to have been exhausted with respect to this matter.

Given the time constraints, and the straightforward nature of the issue presented, CU,

et al. will not discuss the background of this case in this motion. The question before the Commission is simple: did the conditional nature of the commitment in its December 15, 2000 letter render it insufficient to satisfy the terms of the *Merger MO&O*?

The *Merger MO&O* affords AT&T three different means for achieving compliance with the ownership limitations of the 1992 Cable Act.³ Paragraph 187 of the *Merger MO&O* orders that AT&T submit to the FCC "a written document stating which *one* of the three compliance options...it has elected...." MMO, 15 FCCRcd at 9895 (emphasis added). As the Chairman explained in his statement accompanying the decision, "AT&T must make an irrevocable election among three divestiture options." *Id.*, FCCRcd at 9906 (Statement of Chairman Kennard).

The AT&T letter purports to select one of those options, a "spin-off" of AT&T's attributable interest in Liberty Media Corporation. However, the election is qualified; footnote 2 of the letter contains a cross-reference to AT&T's press release announcing plans to spin-off Liberty Media.⁴

³CU, *et al.* have sought reconsideration of this aspect of the *Merger MO&O*. They contend that the Commission must direct AT&T to divest its partnership interest in Time Warner Entertainment Co., LP. This is one of the three options permitted in the *Merger MO&O*.

⁴The press release also states that AT&T will take such other steps as are necessary to "insulate" its ownership interest in Time Warner Entertainment, LP ("TWE") within the ambit of the Commission's present rules. CU, *et al.* note in this regard that the Commission has inexplicably and indefensibly failed to act on a year-old *Petition for Reconsideration* challenging the "insulated limited partnership" provisions of those rules. The Petitioners consider their administrative remedies to have been exhausted and deem the horizontal ownership proceeding to be ripe for judicial review.

There, AT&T specifically warns that "the spin-off is subject to a favorable tax ruling and that AT&T intends to seek rulings from the Internal Revenue Service that the Liberty Media spin-off is tax-free to AT&T, Liberty Media, and their shareowners." AT&T further explains

If, however, AT&T is unable for any reason to achieve insulation of its TWE interest by May 19, 2001 as described above, AT&T hereby certifies that it will, by such date, either divest its ownership interest in TWE or place this interest in an irrevocable trust for purposes of sale.

Id. AT&T does not explain whether, when or how it may intend to obtain the necessary IRS rulings.

The November 15, 2000 press release to which AT&T refers contains the following additional warning:

[T]here can be no guarantee that the spin-off plan will be implemented or that changes in the plan will not be made.

See AT&T Announces Plans To Spin Off Liberty Media: Liberty Media To Become An Independent Company, AT&T News Release, Nov. 15, 2000. [Viewed at <http://www.att.com/press/item/0,1354,3482,00.html>, December 18, 2000]

Thus, AT&T has not made "an irrevocable election...." Rather, AT&T has said that "There can be no guarantee that the spin-off plan will be implemented...." Its choice of the Liberty spin-off can be revoked at any time at AT&T's sole option, and it has reserved the right to "make changes in the plan." Nor has AT&T identified "one" choice to which it will adhere. Rather, it has indicated that it will follow either one of two different courses of action depending on whether or not "favorable" tax rulings are received by an unstated date. Whether or not AT&T obtains any IRS ruling is entirely within ATT's control. Moreover, AT&T has reserved for itself the decision as to what constitutes "favorable" action. It can decide what kind of ruling to seek, and, indeed, whether to request any ruling at all. It can decide what arguments it may make in support of such a request. In short,

AT&T's condition gives it substantial power over whether its conditional "election" will ever be satisfied.

The fact that AT&T may wish to have "favorable" tax treatment is understandable, but irrelevant. However, costly it may be, AT&T is free to spin off Liberty with or without an IRS ruling. The tax treatment of that transaction is has no bearing on the Commission's policy objectives in mandating divestiture, and it cannot possibly control how the Commission enforces its ownership limits. In retrospect, given the evident importance of receiving such a ruling, AT&T's must surely regret that it has failed to initiate proceedings at the IRS over the last seven months. If AT&T was unwilling to bear the risk that a "favorable" IRS ruling could not be obtained, it had two other options from which to choose.

Underlying AT&T's unwillingness to elect in compliance with the Commission's decision is its inability to strike a satisfactory arrangement with Time Warner for the disposition of AT&T's TWE partnership interest. *See Notice of Ex Parte Communication to Kathryn Brown by AT&T Corp.* (October 4, 2000). It bears emphasis that one of the bases on which CU, *et al.* have sought reconsideration of the AT&T/MediaOne decision is that the Commission improperly failed to consolidate the AT&T/MediaOne proceeding with the pending AOL/Time Warner merger. As CU, *et al.* explained in their July 5, 2000 *Petition for Reconsideration*, and their November 9, 2000 supplement thereto, the Commission may not use its processes to benefit one or another party to a financial dispute. Rather, the Commission should take all steps necessary to vindicate its regulatory orders, regardless of the impact on negotiations of private parties.

Accordingly, CU, *et al.* ask that the Commission issue a ruling declaring that AT&T's December 15, 2000 letter does not constitute an "election" within the meaning of the June 6, 2000 *Merger MO&O*, that it waive its procedural rules to rule upon this request by December

21, 2000, and that it grant all other relief as may be just and proper.

Respectfully submitted,

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December 18, 2000

CERTIFICATE OF SERVICE

I, Andrew Schwartzman certify that on December 18, 2000, I caused one copy of the attached *Emergency Motion for Expedited Declaratory Ruling and to Waive Procedural Rules* to be served by U.S. mail, and by facsimile, upon the parties listed below.

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