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August 2, 2002

**Ex Parte**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, D.C. 20554

Re: *Applications for the Consent to Transfer Control of Licenses from  
Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast  
Corporation, Transferee*  
MB Docket No. 02-70

Dear Ms. Dortch:

AT&T Corp. ("AT&T") hereby submits for inclusion in the above captioned proceeding its Supplemental Reply Comments regarding the Office of Plans and Policy Working Paper No. 35, "Horizontal Concentration in the Cable Television Industry: An Experimental Analysis", filed today in CS Docket Nos. 98-82 *et. al.*

Very truly yours,

/s/ David Lawson

David Lawson

Encl.

**Before The  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
Implementation of Section 11 of the Cable Television Consumer Protection and Competition Act of 1992	)	CS Docket No. 98-82
	)	
Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996	)	CS Docket No. 96-85
	)	
The Commission’s Cable Horizontal and Vertical Ownership Limits and Attribution Rules	)	MM Docket No. 92-264
	)	
Review of the Commission’s Regulations Governing Attribution Of Broadcast and Cable/MDS Interests	)	MM Docket No. 94-150
	)	
Review of the Commission’s Regulations and Policies Affecting Investment In the Broadcast Industry	)	MM Docket No. 92-51
	)	
Reexamination of the Commission’s Cross- Interest Policy	)	MM Docket No. 87-154
	)	

**SUPPLEMENTAL REPLY COMMENTS OF AT&T CORP.**

Opponents and proponents of limits on cable ownership concentration agree that the student-populated mock trading experiments reported in the Office of Plans and Policy Working Paper No. 35, “Horizontal Concentration in the Cable Television Industry: An Experimental Analysis” (“*Working Paper*”), bear no resemblance to the real world in which experienced cable and network representatives, reacting to myriad dynamic market constraints, negotiate complex, multi-year carriage contracts. For that reason alone, no sustainable subscriber limit could be based upon the *Working Paper*’s “efficiency” or other findings. Even SBC, which appears to favor cable ownership limits more stringent than the 30 percent ownership limit reversed by the court of appeals, explains: “[a] study such as this can be useful only if the model used in the

study reflects the real world situation and the behavior of the experimental participants can reasonably be expected to mirror that of real marketplace participants.” SBC at 2.<sup>1</sup> There is a consensus that the model used in this study does not do that, and it would therefore be irrational – and, under *Time Warner II*, unlawful – to rely upon the *Working Paper* as support for speech-restricting cable ownership limits. As SBC notes, “the Working Paper fails to reflect the real world and, as a result, is of no practical use, particularly as related to the AT&T/Comcast transaction.” *Id.* at 1.

The many theoretical, methodological, data integrity and data interpretation reasons why the *Working Paper* provides no support for a subscriber limit are detailed in the comments and supporting declarations of AT&T, Comcast, Time Warner and NCTA. This is the rare case, however, in which even the parties that *favor* regulation and therefore have every reason to extol any study that could arguably be said to support that regulation, concede that the study at issue is fatally flawed. SBC points out that “students reacting to hypothetical examples may well act differently than experienced businesspeople whose decisions have real economic consequences.” *Id.* at 2. Moreover, “the number of both buyers (MVPDs) and sellers (program networks) in the study ranges from 3 to 5, far less than the hundreds of buyers and sellers with very diverse relevant characteristics in the real world.” *Id.* And, most importantly, “the experimental study is static, while the real-world marketplace is dynamic,” *id.* at 3. That, of course, is one of the primary flaws that the court of appeals identified in rejecting the Commission’s 30 percent subscriber limit.

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<sup>1</sup> See also, e.g., Shapiro and Woodbury, Cable Television Subscriber Limits: A Critique (submitted by NCTA) at 20 (“the correspondence between the experimental environment in the [Working Paper] and the real world in which transactions occur between MVPDs and program services is quite weak”).

RCN agrees that “there are several deficiencies in the Working Paper’s underlying methodology,” that “undercut the relevance of its conclusions to the real-world interactions between MVPDs and programming networks.” RCN at 3, 6. As RCN notes, “buyers and sellers were not permitted to talk with one another; they merely exchanged bids electronically via computer terminals.” *Id.* at 7. The only information exchanged via computer “was the affiliate fee; in reality, other issues . . . can arise in such negotiations, that would affect the outcome.” *Id.* “Also, the human subjects recruited to play buyers and sellers in the experiment were not representatives from the cable operator and video programming provider industries, but rather undergraduate and graduate students asked to participate in the study, who had no apparent industry expertise.” *Id.* These are, indeed, serious methodological problems that render the study results meaningless for purposes of real-world policymaking.

Contrary to its own, and other parties’ logic, RCN nonetheless urges the Commission to base “program access” merger conditions on the *Working Paper* results. The Commission has repeatedly rejected requests to impose merger conditions that would expand program access obligations on such a company-specific basis.<sup>2</sup> In any event, nothing in the *Working Paper* remotely supports such conditions (or any subscriber limit).

RCN notes (at 4) that the *Working Paper*’s authors observed a lower “efficiency” in a scenario in which the largest buyer had a 51% share than in a scenario in which the largest buyer had a 27% share. But, as SBC recognizes, “none of the scenarios comes close to reflecting the market structure that exists either with or without the merger,” SBC at 5, and therefore the *Working Paper* could not possibly support any merger conditions. Moreover, contrary to RCN’s suggestion, the Working Paper’s “efficiency” measure of whether *mutually beneficial* deals were

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<sup>2</sup> See Applicants’ Reply Comments, MB Docket No. 02-70 at 99 (*citing* Commission decisions).

consummated during the six minute experimental trading periods lacks even a theoretical connection with the market power issues that RCN contends animate its program access and subscriber limit concerns. RCN seeks to bridge that obvious logical gap by asserting that the *Working Paper*'s efficiency results are "consistent with" a theory that "as a cable operator gains national market share" its bargaining power "increase[s]," RCN at 4, but that ignores the fact that the *Working Paper* found that, in fact, "[t]here is *no* statistically significant difference in the bargaining power of the largest buyer in each of the three concentration treatments." *Working Paper* at 33 (emphasis added). Moreover, as detailed in AT&T's supplemental comments, the sole efficiency difference the *Working Paper* deemed significant is explained by a single outlier trading session.<sup>3</sup>

RCN next claims that the *Working Paper* concludes that "[e]ven at 27% of the market," a cable operator "has a detrimental affect on the bargaining power of DBS providers." RCN at 4. The *Working Paper* contains no such conclusion; rather, the *Working Paper* found only that the bargaining power of the player designated as the "DBS" buyer was *relatively* higher in the 27% scenario than in a more concentrated scenario in which the largest cable operator had a 44% share. Even taken at face value, that observation of relative DBS bargaining power could not support any conclusion that DBS providers (much less other cable operators like RCN) would, in fact, be competitively handicapped by any proposed (or hypothetical) increases in cable

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<sup>3</sup> See AT&T at 5. Moreover, the *Working Paper* provides no confirmation that the authors performed Bonferroni or other standard statistical adjustments to correct for possible "cherry-picking" bias (and differences attributable merely to random chance) of relying upon one comparison from among multiple paired comparisons of treatments. Had these adjustments been made, the p-value associated with the observed efficiency difference would almost certainly have exceeded 0.1, thereby precluding even a claim of statistical significance.

ownership concentration. And, as explained in AT&T's supplemental comments, the *Working Paper's* DBS results are, in any event, not at all robust.<sup>4</sup>

Finally, RCN claims that the *Working Paper* concludes that cable operators' use of "MFN" clauses has "detrimental" effects that give large cable operators an "unwarranted advantage" over their "smaller MVPD competitors." RCN at 5-6. That is also a blatant misrepresentation of the *Working Paper*, which, in fact, found *no* statistically significant difference in efficiency or bargaining power between its "MFN" and "No MFN" treatments. *See Working Paper* at 28.<sup>5</sup>

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<sup>4</sup> *See* AT&T at 12-13.

<sup>5</sup> The only other commenter, an Assistant Professor at the University of Miami, also agrees that the *Working Paper* methodology would require an overhaul if it is to "be used to simulate a real market." Reza Dibadj at ¶ 7. Professor Dibadj plainly misunderstands the buyer market power issues in this proceeding, however, in complaining that the experiments reported in the *Working Paper* failed to model a scenario that reflects cable operators typical "actual" shares of *retail* MVPD customers in some local markets. *See* AT&T Reply Comments at 4 ("[t]he relevant inquiry is whether limits on cable operators' *national* share are necessary to prevent them from exercising market power over *programmers*, and thereby impeding the flow of programming to consumers").

## CONCLUSION

For the foregoing reasons and the reasons set out in AT&T's initial, reply and supplemental comments in this proceeding, the Commission should conduct this proceeding in accordance with the dynamic market power analysis mandated by *Time Warner II* and the Commission's longstanding policies on the basis of the market-specific evidence already in the record.

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August 2, 2002

**CERTIFICATE OF SERVICE**

I hereby certify that on this 2<sup>nd</sup> day of August, 2002, I caused true and correct copies of the forgoing Supplemental Reply Comments of AT&T Corp. to be served on all parties by mailing, postage prepaid to their addresses listed on the attached service list.

Dated: August 2, 2002  
Washington, D.C.

/s/ Peter M. Andros

Peter M. Andros

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\* Filed electronically