

*In the*  
**UNITED STATES COURT OF APPEALS  
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

CONSUMER FEDERATION OF AMERICA,  
CONSUMERS UNION, AND CENTER FOR DIGITAL  
DEMOCRACY

Petitioners,

v.

FEDERAL COMMUNICATIONS  
COMMISSION

and

UNITED STATES OF AMERICA,

Respondents.

No. 02-1337

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CONSUMER FEDERATION OF AMERICA,  
CONSUMERS UNION, AND CENTER FOR DIGITAL  
DEMOCRACY,

Appellants,

v.

FEDERAL COMMUNICATIONS COMMISSION

Appellee.

No. \_\_\_\_\_

**CONSENT MOTION TO EXPEDITE**

Petitioners/Appellants Consumer Federation of America, *et al.* (“Petitioners/Appellants”) respectfully seek expedited review in two dockets concerning the merger of the cable broadband business of AT&T Corp (“AT&T”) and Comcast Corp. (“Comcast”). Petitioners/Appellants also ask that this Court adopt the briefing schedule set forth below. In a companion motion filed simultaneously with this motion, Petitioners/Appellants request that these two related matters be consolidated.

Counsel for Respondents Federal Communications Commission and the United States and for Appellees the Federal Communications Commission (“Respondents/Appellees”) do not object to this

motion. AT&T, Comcast and AT&T/Comcast have filed or will file motions to intervene in the instant proceedings. Comcast and AT&T have agreed not to object to the briefing schedule the request that oral argument to take place during this term set out below, subject to the following three conditions. First, Petitioners/Appellants have agreed not to seek a stay of the Commission's order on appeal here. Second, Comcast and AT&T do not oppose adoption of this briefing schedule only so long as no other party receives a stay of the Commission's order on appeal here. Finally, counsel for Comcast and AT&T have not reviewed, and Comcast and AT&T do not necessarily agree with, any rationale set forth by Petitioners/Appellants in support of this motion.

**Proposed Briefing Schedule**

<u>Date</u>	<u>Pleading</u>
January 15, 2003	Petitioners'/Appellants' Brief
February 17, 2003	Respondents'/Appellee's Brief
February 24, 2003	Intervenors' Briefs in Support
March 10, 2003	Petitioners'/Appellants' Reply Brief

This schedule follows the Court's ordinary timetable for briefing, and leaves ample time for this Court to schedule oral argument during this term. Petitioners/Appellants respectfully request that the Court schedule oral argument this term, but if possible not between April 28 and May 12, 2003. Counsel of record for Petitioners/Appellants will be out of the country during that time and this schedule can not be changed. However, Petitioners/Appellants will present oral argument during that period if this Court so orders.

## **Reasons for Expedition**

### Background

Petitioners/Appellants seek expedition because delay in this case will cause irreparable injury to their members and to large portions of the general public on whose behalf they speak. The decision under review is subject to substantial challenge. As explained in the companion motions filed today, the two decisions under review concern the transfer of licenses, as part of a merger, from AT&T, Corp., the largest U.S. cable company to Comcast, Corp., the third largest U.S. cable company. Specifically, Petitioners/Appellants contest, *inter alia*, the Commission's exclusion of relevant material from the record, and from the Commission's consideration of the merger.

To demonstrate that their merger application was in the public interest, the merger applicants voluntarily submitted a document to the Commission describing a major restructuring of their assets, but excluded from this submission one portion of the document. Although the excluded portion of the document was labelled as an "exhibit," it was an integral element of the asset restructuring. The excluded "exhibit" is a contract between AT&T and AOL/Time Warner, the second-largest U.S. cable company, setting out the terms under which AOL/Time Warner may provide high speed Internet service to customers of the newly-merged company. Petitioners/Appellants requested that the FCC require submission of this "exhibit." Petitioners/Appellants' September 5, 2002 motion is attached as Attachment A hereto.<sup>1</sup> Petitioners/Appellants argued that the contract is material to the merger proceeding for a number of reasons, among them, because in prior merger proceedings the FCC had determined that the highspeed broadband market was a relevant factor in assessing whether the merger of cable companies was in the public interest *See Applications of America Online and Time*

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<sup>1</sup>Another opponent of the merger, EarthLink, Inc., filed a similar motion.

*Warner*, 16 FCC Rcd 6547, 6569-71 (2001); *see also Applications of MediaOne Group, Inc. and AT&T Corp.*, 15 FCC Rcd 9816, 9871-73 (2000) (special concern regarding AT&T systems post-MediaOne merger).

The September 5 motions were aggressively litigated. Counsel for both parties made numerous oral and written presentations on the merits of the motion. On October 28, 2002, the CEO of Applicant Comcast Corp. telephoned the Chairman of the Commission to press his opposition to the motion. Notwithstanding the fact that the FCC had issued its standard protective order to maintain the integrity of proprietary data, according to Comcast's description of the conversation, he told the Chairman that:

were it to be submitted to the Commission in the context of this proceeding despite having no relevance to the merger review, there is serious risk that its confidentiality could be compromised, even with current Commission procedures in place.

*Letter to FCC Secretary*, October 29, 2002 (Attachment B).

The Commission denied the motion in an *Order* dated November 6, 2002, with Commissioner Cops in dissent. *In re Applications of Comcast Corp. & AT&T Corp.*, *Order*, FCC 02-301 (released November 6, 2002) ("*November 6 Order*") (Attachment C). Petitioners/Appellants have sought review of this decision in Docket Number 02-1337. In the *November 6 Order*, the Commission also revealed that, at the time the merger applicants originally submitted their restructuring documentation, FCC staff acceded to the applicants' request that they withhold the AOL/Time Warner contract. Instead, the staff agreed to review the document at the Department of Justice, where it had been filed pursuant to the terms of the previous consent order entered into by AT&T and the Department of Justice when AT&T acquired MediaOne. *Id.*, at 2, ¶4. *See United States v. AT&T Corp. and MediaOne Group, Inc.*, Case No. 1:00CV01176, *Complaint and Proposed Final Judgment* (D.D.C.,

filed May 25, 2000), Competitive Impact Statement at 15 (requiring submission for approval of any agreement regarding broadband distribution between AT&T and Time Warner).

Using this procedure, an unknown number of agency staff members, but apparently no members of the Commission, reviewed the document at the Department of Justice on at least several different occasions. *See November 6 Order* at 2, ¶4. This extraordinary mechanism precluded Petitioners/Appellants from reviewing and commenting upon the contract, and leaves it outside of the record in this case.

The FCC approved the transfer of licenses from AT&T to Comcast in a decision released on November 14, 2002. *In re Applications of AT&T Corp. and Comcast Corp.*, FCC 02-310 (released November 14, 2002). By *Notice of Appeal* filed simultaneously with this motion, Petitioners/Appellants have appealed that decision.

### Discussion

Delay will cause irreparable injury for several interrelated reasons. Without expedition, this case almost certainly would not be set for oral argument until next term, and might not reach resolution until at least one year from now. The additional six to eight months are of critical importance given the present factual circumstances. This decision will itself likely accelerate and/or precipitate industry restructuring of two kinds. This decision will critically affect the development of a competitive Internet market, in an industry in which a few months could dramatically alter the competitive landscape. Additionally, consolidation of this magnitude in the cable industry, with impending FCC decisions on other media ownership issues, will likely lead to a dramatic restructuring of the industry. The resulting likelihood of many mergers subject to FCC review will increase the severity of Petitioners/Appellants' loss of procedural rights during the relevant timeframe. The impending mergers will

be difficult if not impossible to unwind if approved under the framework employed by the Commission here.

Unless promptly reversed, the FCC's decisions will set precedent foreclosing public access to the documents which form the basis of FCC, and possibly other agency, decisions. During the pendency of this litigation, the FCC can be expected to employ the tactic used here, in which it negotiates with merging parties to permit certain critical documents to be filed with the Department of Justice under the Hart-Scott-Rodino Act, but not filed with the FCC, thereby making them unavailable to the members of the Commission and to interested parties which may wish to oppose a merger. The deprivation of public access to the basis of agency decision-making is a grievous and immediate harm, and is particularly severe given the market changes likely to occur during the upcoming year.

The FCC's action will also deprive citizens and consumers of a fully competitive broadband Internet market at a time crucial to the development in competition in that market. The undisclosed contract between the two largest cable operators in the country, almost half of the nation's cable customers, will define the boundaries for other competitors that seek to provide high speed access to customers of these two cable companies. In the absence of access to the contract, Petitioners/Appellants are left to rely on general and trade reports which indicated that the terms of the deal appear to foreclose competition in this market. *See, e.g., Letter to FCC Secretary, October 24, 2002* (providing article summarizing reported terms of the contract) (Attachment D). The loss of additional competitors will deprive citizens and consumers of choice and lower prices in broadband Internet access, and which could also make more difficult, or impossible, access to certain content over the Internet.

Finally, this decision will precipitate additional mergers both because the FCC has established

a more lenient standard of review for such mergers, and because this merger will prompt other companies to increase in size to compete with the merged entity. The procedural and substantive precedents established in this case establish a lenient standard which invite merging parties to seek approval of greater levels of media concentration than would have been sought prior to the agency's action. In particular, the agency now appears to be tolerant of regional "clustering" of media properties to a greater degree than has been the case in the past. Additionally, this case is widely seen as part of the leading edge of a surge of media mergers, and approval of this transaction will likely stimulate other companies to seek merger partners.

The decision under review is subject to substantial challenge. In particular, on its face, the FCC's decision did not address any of Petitioners/Appellants' legal arguments demonstrating why the Commission must consider the contract governing the terms of AOL/Time Warner's access to Comcast's systems after the merger. *See Memorandum In Response to Questions Propounded By Office of General Counsel*, October 28, 2002 (Attachment E) at 3-5. In addition, the Commission based its decision below on staff review of material significance but which was excluded from the record.

WHEREFORE, Petitioners/Appellants asks this Court to grant this motion and all such other relief as may be just and proper.

Respectfully Submitted,

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November 15, 2002



## CERTIFICATE OF SERVICE

I, Harold Feld, hereby certify that, on this 15<sup>th</sup> day of November, 2002, I caused copies of the foregoing *Consent Motion to Expedite* to be served upon the parties listed below by first class mail:

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