

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of Applications for Consent	)	
to the Transfer of Control of Licenses	)	
	)	
<b>Comcast Corporation and AT&amp;T Corp.,</b>	)	MB Docket No. 02-70
Transferors,	)	
	)	
<b>AT&amp;T Comcast Corporation,</b>	)	
Transferee	)	

To: The Media Bureau

**COMMENTS OF PETITIONERS CONSUMER FEDERATION OF AMERICA, CONSUMERS UNION, CENTER FOR DIGITAL DEMOCRACY, AND MEDIA ACCESS PROJECT ON PROPOSED TIME WARNER ENTERTAINMENT L.P. TRUST**

AT&T and Comcast (“Applicants”) propose to add yet another twist to the pretzel of responsibility and ownership. Their plan is facilitated by the Commission’s continuing failure to enforce the horizontal ownership limits and attribution criteria mandated by the 1992 Cable Act. Petitioners cannot fault Applicants for exploiting the Commission’s willingness to overlook its legal responsibilities. While Petitioners agree that the proposed trust, with one minor modification, addresses several of the concerns they have raised, the trust cannot -- and does not – remediate the fundamental flaws in the proposed transaction.

The matters as to which the Commission has sought comment here are far less important than other highly substantial and material questions which are raised by other aspects of the restructuring of the AOL/Time Warner and AT&T relationship filed with the FCC on August 21, 2002 agreement as to which no public comment has been sought. In particular, the highly restrictive and exclusionary “High Speed Internet Agreement” for marketing AT&T’s high speed broadband service with an AOL/Time Warner may pose a significant impediment to broadband deployment, and surely requires intense inquiry by the Commission. Although the agreement is wholly integral to the August 21, 2002

agreement, and is set out as “Attachment D” thereto, the Applicants have apparently taken the stunningly arrogant position that the broadband elements of the deal are not a matter of FCC interest or jurisdiction, and have not even filed it with the Commission. Amazingly, the Bureau appears to have acceded to this position by failing to require its submission.

Accordingly, Petitioners have separately filed a motion calling for the Commission to require the applicants to submit their “High Speed Internet Agreement” to the Commission, and asking that the merger “clock” be stopped pending public comment thereupon.<sup>1</sup>

### **THE TRUST PROPOSAL**

The Commission has failed to fulfill properly the Congressional intent embodied in Section 11(c) of the 1992 Cable Act. It has diluted its ownership attribution criteria to permit transparently pretextual “insulation.” It granted a wholly inappropriate waiver allowing AT&T to retain its ownership interest in Time Warner Entertainment, LP (“TWE”) after it acquired MediaOne in 2000. Thereafter, it improperly declined to enforce the TWE divestiture requirement once the waiver expired, suspending its operation the basis of a telephonic request by AT&T. These actions have created a situation which permits a single entity to have ownership stakes in more than 40% of the multichannel video programming market, and, of great relevance for the future deployment of broadband, the majority of cable lines in the United States as measured by homes passed.

The Applicants propose to deal with AT&T’s continuing inability to divest its TWE ownership interest by placing it in a trust that exists solely for the purpose of disposing of the assets. The Trust Agreement proposal they have submitted appears to be a conscientious effort to apply prior FCC

---

<sup>1</sup>Commentors recognize that the High Speed Internet Agreement may well contain sensitive business information and would, accordingly be accessible only to parties willing to sign the terms of the protective order.

precedent, and is evidently designed to preclude the Applicants from directly controlling or influencing the programming decisions of TWE once the asset is placed in trust. Given the fact that divestiture remains a worthy goal, this mechanism will promote the public interest by facilitating something which should have been accomplished a long time ago.

Petitioners urge, however, that the Commission should retain the power to veto the Applicants' proposed Trustee. The Trustee will sit in a unique position to facilitate anticompetitive behavior among AOL Time Warner, TWE, and AT&T Comcast. As the corporate scandals of the last few months have demonstrated, the Commission cannot simply rely on the probity of well-known individuals. Rather, the Commission must satisfy itself that the individual vested with the responsibility of carrying out the divestiture the Commission itself previously required (and subsequently erred in suspending) is genuinely independent and will carry out his or her duties without regard to the video business strategy of any of the effected parties – but will seek only to maximize the financial return from the divestiture of the assets in the trust.

#### **THE AT&T/AOL/TIME WARNER/COMCAST RESTRUCTURING**

For the reasons explained above, Petitioners cannot comment on any other aspect of the TWE divestiture agreement until such time as its full terms and conditions are available for review.

Even without access to the details of the reciprocal arrangement between AOL/Time Warner and AT&T Comcast for high-speed access over each other's cable lines, it is nonetheless clear that it would alter fundamentally the nature of the merger. Indeed, if the press reports are accurate, the deal confirms the worst-case scenarios Petitioners have previously postulated. The market-power of the combined AT&T Comcast has forced AOL/Time Warner to capitulate by treating AOL's core business of broadband access as "just another premium cable channel, like HBO." *New York Times*,

“A New Model for AOL May Influence Cable’s Future,” August 26, 2002, C1. The Commission could hardly ask for clearer proof of the dangers of this merger or the failure of its broadband policy. Dan Gilmore, *The San Jose Mercury News*, “AOL Capitulates, Gives Up Struggle for ‘Open Access,’” September 1, 2002.

Neither the Media Bureau nor the Commission should take Petitioners inability to comment on the incomplete submission of the TWE divestiture agreement as approval of the portions of the agreement placed in the public record. Furthermore, because the Communications Act requires applicants to prove affirmatively that the merger will serve the public interest, the Commission should reject the merger application if the Applicants refuse to submit the remaining portions of the agreement to the Commission. *See generally David Ortiz Radio Corp. v. FCC*, 941 F.2d 1253 (D.C. Cir. 1991); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987); *Mester v. United States*, 70 F. Supp. 118 (E.D.N.Y) *aff’d per curiam* 332 U.S. 749 (1947).

Respectfully submitted,

Harold Feld

Andrew Jay Schwartzman

Cheryl A. Leanza  
MEDIA ACCESS PROJECT  
1625 K. St., NW  
Suite 1118  
Washington, DC 20006  
(202) 232-4300  
*Counsel for CFA, et al.*

September 5, 2002