Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

To: The Commission

PETITIONERS' REPLY
TO
JOINT OPPOSITION OF COMCAST AND AT&T CORP.
TO MOTION TO PROVIDE ADDITIONAL INFORMATION

Petitioners applaud Applicants' decision to disclose certain additional documents pertaining to the TWE Divestiture and the TWE Trust. *Joint Opposition* at 5. But this makes their reluctance to disclose the full terms of the High Speed Internet Access Agreement ("HSIA") even more puzzling and, indeed, more alarming.

Because the Applicants have failed to refute Petitioners' legal arguments, the Commission must grant Petitioners' September 5, 2002, *Motion* and compel submission of the HSIA for Commission review and, under appropriate safeguards, for examination by interested citizens and competitors.[1]

The Applicants focus much of their discussion on Petitioners' purported "failure" to prove that the HSIA is contrary to the public interest. They totally ignore the actual legal basis for Petitioners' motion, *i.e.*, that well established precedent holds that the Commission ***cannot*** make the requisite statutory findings without reviewing the HSIA.

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[1]In light of reports that the Media Bureau may dismiss the September 5 *Motion* without referring it to the full Commission, Petitioners stress that such action would exceed the delegated authority of the Media Bureau. This *Motion* relies on the Commission's decision in the *AOL Time Warner Merger Order*, in which the Commission clearly and unambiguously stated that the full Commission must consider the impact of the merger on the broadband market. *See Motion* at 6. Moreover, under 47 CFR §0.283(b)(10), the bureau lacks authority to act on the *Motion* because it would require overriding settled case law interpreting Section 309, as well as the recently issued decision in *LUJ, Inc.*, FCC 02-235 (August 22, 2002).

The Applicants instead attempt to distract the Commission by purporting to respond to arguments Petitioners did not in fact make, and by suggesting that Petitioners seek to inject inappropriate considerations into the merger. The Commission should see through this smoke screen and dismiss the application unless the Applicants submit the necessary information.

ARGUMENT

In the *Motion*, Petitioners demonstrated the following facts:

1) That the Communications Act of 1934 and relevant court decisions require the Commission to consider all relevant information in making its public interest determination; failure to consider a relevant factor will result in reversal and remand.

2) That the Commission's past precedent, as well as the expert analysis of the antitrust agencies (Department of Justice Antitrust Division and Federal Trade Commission), require analysis of the impact of the merger on the market for broadband delivery and aggregation of broadband content.

3) That the HSIA inevitably impacts that market.

4) Accordingly, the HSIA is a "relevant factor" under the cited case law and the FCC must consider it as part of its merger review or face reversal for failure to consider it.

Applicants do nothing to rebut these arguments. Instead, they argue that Petitioners have failed to demonstrate that the HSIA is contrary to the public interest, that the HSIA may not violate the terms of the Department of Justice consent decree in the *AT&T/MediaOne* merger, that Petitioners failed to support the allegation that the HSIA demonstrates market power, and that Petitioners merely seek to inject a proceeding of general applicability into a specific merger where it does not belong.

These arguments are either wrong or irrelevant. Petitioners take them each in turn.

A. Applicants Improperly Attempt to Shift the Burden to Petitioners.

Applicants argue that "[a]s an initial matter, it is significant that MAP and Earthlink fail to explain how a pending agreement that will *increase* consumer choice...could be *harmful* to the public interest."

This puts the cart before the horse. The purpose of this motion is to obtain access to the HSIA. Petitioners must have access to the HSIA because the Commission relies upon the adversarial nature

of these proceedings to develop an adequate record to evaluate whether the merger serves the public interest. *Home Box Office, Inc. v. FCC*, 567 F.2d 9, 55 (D.C. Cir. 1977). Even absent argument by interested parties, however, the Commission would have an independent responsibility to secure and review the HSIA. *Citizens Committee to Save WEFM v. FCC*, 506 F.2d 246, 259 (D.C. Cir 1973) (en banc). Even if an increase from one access choice to one affiliated access provider and one highly controlled unaffiliated provider constituted a genuine increase in "consumer choice," the public interest is not so narrowly defined. "Consumer choice" – meaning a genuine choice for subscribers – is but ***one*** element of the public interest.

Thus, the question at this stage is whether the HSIA is a material element of the proposed transaction, because all such provisions must be considered in the Commission's determination that grant of the application is in the public interest. For the reasons detailed in the *Motion*, the answer is unequivocal: the HSIA is a material provision which the Commission must review.

That the agreement might well be contrary to the public interest is quite clear. Indeed, the Department of Justice has already explained how an agreement between Time Warner and AT&T "could be harmful to the public interest." *Competitive Impact Statement* at 15-17. Even without the finding of the expert antitrust agency that such agreements have the potential to reduce competition in the broadband market, it is relatively easy to imagine terms in the agreement that would be contrary to the public interest. For example, the agreement might contain terms limiting either parties' ability to allow other ISPs onto their respective systems, or restricting the ability of one or another party to offer new services. Indeed, detailed trade press accounts which claim to be based on knowledge of the terms of the HSIA state that the agreement forbids AOL Time Warner from providing broadband video services which would compete with Comcast's MVPD services. *See, Electronic Media*, "Comcast Makes Out; AOL TW Works It Out," September 16, 2002 p.6. The Commission simply cannot blind itself to the possible existence of such provisions and ignore such reports. Nor can it possibly

approve the proposed merger without at least determining the validity of these reports.

Significantly, Applicants do not even mention, much less dispute, the applicability of the case law Petitioners cited. They effectively acknowledge that the Communications Act of 1934 requires the Applicants to provide all relevant information to the Commission, and that the Commission cannot make a final decision without reviewing all relevant information. *Mester v. United States*, 70 F. Supp. 118 (E.D.N.Y) *aff'd per curiam,* 332 U.S. 749 (1947). Applicants concede that the statute places the burden squarely on applicants to prove that the merger will serve "the public interest, convenience and necessity." 47 USC §310(d); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361 (D.C. Cir. 1987); *In re Applications of AOL and Time Warner, Inc.*, 16 FCCRcd 6547 (2001). Further, if circumstances change, it is the responsibility of the Applicants to provide the information to the Commission, and the Commission must refuse to process the application until it receives all necessary relevant information. *LUJ, Inc.*, FCC 02-235 (August 22, 2002) at p. 4-5.

Most importantly, applicants do not dispute that the deployment of broadband services constitutes a distinct market, and the Commission must consider the impact of the merger on that market. *See AOL Time Warner Merger Order* 16 FCCRcd at 6549-51, 6568-70. Indeed, the Commission has no fewer than five open proceedings pertaining to the deployment of high speed broadband services[2] and has declared the deployment of broadband a national priority and a "primary policy goal" for the Commission[3]. Applicants cannot claim, nor can the Commission pretend, that the impact of the HSIA on the broadband market is immaterial to the merger.

In short, any speculation about the nature of the agreement prior to reviewing it is obviously

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[2]In addition to the Commission's annual *Inquiry* under Section 706 of the Telecommunications Act of 1996, *see Review of Section 251 Unbundling Obligations*, Docket No. CC 01-338, *In re Review of Regulatory Requirements for ILEC Broadband Telecom Service* Docket No. CC 01-337, *In re Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, *In re Appropriate Framework for Broadband Access to the Internet Over Cable Facilities*, Docket No. CS 02-52.

[3]*In re Cable Internet Over cable Declaratory Ruling*, Docket No. GN 00-185 (released March 15, 2002) at ¶4.

premature, and the Commission should reject Applicants' attempt to require Petitioners to prove that the agreement runs contrary to the public interest as a condition of ***producing*** the HSIA for review.

B. The Analogy to MCI-Worldcom Is Inapplicable.

Applicants cite but one case in support of their position that the Commission need not review the HSIA. Applicants argue that in the Worldcom/MCI *Merger Order*, the Commission rejected the request of other parties for additional information. *In re Worldcom, Inc. and MCI Corp. Transfer of Control*, 13 FCCRcd 18025, 18109 n.402. The facts of that case are not applicable here.

Since *Worldcom*, the Commission has established that the impact of cable residential mergers on the broadband market falls within the purview of the Commission's merger review. *AOL Time Warner Merger Order* 16 FCCRcd at 6549-51, 6568-70. This makes perfect sense. The MCI/Worldcom merger involved two common carriers. Cable mergers involve vertically integrated content producers and distributors. This implicates not merely traditional concerns about pricing, but the core First Amendment issues of diversity of views and the public's paramount right of access to information that the Commission must protect. *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 389-90 (1969); Cable Television and Consumer Protection Act of 1992, Pub. L. 102-385 §2(a)(6) *codified at* 47 U.S.C. §521 nt.

The rumored terms of the HSIA include provisions designed to prohibit AOL from permitting streaming media in competition with Applicants' per-pay-view and other video content. "Comcast Makes Out" at 6 ("sources said the new pact actively prohibits AOL from offering any service that would directly compete with AT&T-Comcast's digital cable content, such as streaming video"). If true, the HSIA would "substantially impair or frustrate the enforcement of the [Communications] Act or the policies of the Act." *AOL Time Warner Merger Order*, 16 FCCRcd at 6550. As the Commission further explained:

> Among major policies and objectives that may be affected in significant mergers are preserving an enhancing competition in related markets, ensuring a diversity of voices,

> and providing advanced telecommunications services to all Americans as quickly as possible. To gain approval, an applicant bears the burden of establishing that the potential for benefits to the public interest outweighs the potential for harms.

Id.

Here in particular, Congress has found "a substantial governmental and First Amendment interest in promoting a diversity of views provided through multiple technology media" and articulated a national policy "to promote the availability to the public of a diversity of views and information through cable television and other video distribution media." 1992 Cable Act §2 (a)(6), §2(b)(1). The reports about the HSIA raise the very real specter that the HSIA frustrates these interests and policies of the Communications Act and the First Amendment.

Furthermore, in *Worldcom*, the parties provided substantial details to the Commission describing the entire transaction, merely omitting certain price information. *Id.* at 18109-18111. In addition, the agreement to divest was negotiated under the auspices of the Department of Justice Antitrust Division and the European Union antitrust authorities. *Id*. Given both the level of detail provided and the blessing of two expert agencies, the Commission could reasonably conclude that it did not have to examine specific pricing information.

Here, by contrast, the Applicants and AOL Time Warner have negotiated a private agreement on precisely the subject which the Department of Justice Antitrust Division has identified as fraught with anticompetitive potential. In contrast to the *Worldcom* Applicants, Comcast and AT&T Corp. have provided ***no*** substantive information about the agreement. Applicants' grudging disclosure of some necessary details of the related TWE divestiture does not constitute disclosure of any relevant detail of the HSIA, an agreement with profound impact on the broadband market and utterly essential to the public interest determination in this merger.

B. Applicants' Attempt To Confuse the Issue By Challenging Whether The High Speed Internet Agreement "Technically" Falls Under the DoJ Decree.

Applicants attempt to distinguish the HSIA from the agreements addressed in the DoJ

AT&T/MediaOne Consent Decree by arguing that the bankruptcy of Excite@Home somehow alters the analysis. This is clearly wrong. As an initial matter, the combined AT&T Comcast will serve more customers and have access to more homes than Excite@Home did in 2000 when the parties entered into the consent decree. Nor has DSL or any other broadband technology challenged the primacy of cable in the residential broadband market. To the contrary, as predicted by the *AT&T/MediaOne* Consent Decree, cable has maintained its early lead in broadband deployment.

More importantly, however, the fundamental dangers identified by the Consent Decree persist. Depending upon the terms of the agreement, AT&T Comcast might have the ability to control AOL Time Warner's offering of potentially competitive services, or may allow AT&T and AOL Time Warner to collude to restrict the flow of content over either set of systems.

In short, whether the consent decree applies to the HSIA or not (and Petitioners believe that it does) does not matter. The Commission is required to consider the effects of the merger on competition generally and upon the broadband market specifically. *See, e.g., AOL Time Warner Merger Order,* 16 FCCRcd 6547, 6549-70 (2001). *See also United States v. Radio Corp. of America,* 358 U.S. 334, 350-52 (1959) The expert antitrust agency has identified agreements of this nature as having strong anticompetitive potential. The agreement would not happen but for the merger. Accordingly, the Commission must review the agreement, or fail in its statutory responsibility. *Weyburn Broadcasting L.P. v. FCC,* 984 F.2d 1220 (D.C. Cir. 1993).

For this reason, Applicants argument that "private parties have no standing to enforce government consent decrees," *Opposition* at 10, misses the point. Petitioners do not seek to enforce the Consent Decree. Petitioners ***do*** respectfully request that the Commission fulfill its statutory responsibilities by examining an agreement of the kind that an expert antitrust agency has red-flagged as having tremendous anticompetitive potential.

It is worth stressing again that Petitioners do not assert at this point that the HSIA necessarily

violates the public interest standard, although all evidence so far strongly indicates that it does. In the absence of the agreement Petitioners – and more importantly the Commission – can only speculate. For this very reason, the Commission must review the HSIA to fulfill its obligations under Section 310(d).

C. Applicants' Attempts to Dismiss Petitioners' Claims That The High Speed Internet Agreement Demonstrates the Post-Merger Market Power of AT&T Comcast Is Both Misleading and Unavailing.

Applicants suggest that Petitioners have asked the Commission to review the reasonableness of the agreement out of some concern for AOL's well-being. *Opposition* at 11. This misdirection, while amusing, has little bearing on Petitioners real argument – that examination of the HSIA would demonstrate the market power of the combined AOL Comcast.

Indeed, the reports in the trade press indicate that AOL Comcast extorted terms in the agreement that support allegations of abuse of market power by the combined AT&T Comcast. According to insiders, the deal not only prohibits AOL from offering video or music that might compete with AT&T Comcast's video and music offerings, but requires AOL to pay $38 per subscriber to AT&T Comcast. This exceeds AT&T Comcast's profit per subscriber from its own broadband offering, and ensures that AOL can never compete on the basis of price against AT&T Comcast. *See* Comcast Makes Out at 6. As one industry analyst put it:

> Comcast was able to leverage their customer access into over $2 billion of cash, $1.5 billion in stock, and a clear exit strategy. In addition, it was able to negotiate a favorable broadband carriage agreement. That's pretty impressive.

Id.

Applicants address the true argument regarding market power with a blatant mischaracterization of the record. Applicants assert that Petitioners have made "unsubstantiated allegations" of market power which Applicants have rebutted with "expert testimony." To the contrary, Petitioners have submitted substantial expert testimony, supported by objective evidence, that the combined market power of AT&T and Comcast will allow the new entity to set the terms for deployment of

residential broadband. The HSIA provides further objective proof of Petitioners' arguments.

In the *Petition to Deny*, Petitioners warned that the combined market power of AT&T Comcast would allow the Applicants to dictate standards for the broadband Internet and set terms for access by unaffiliated ISPs. *See Petition to Deny Of CFA, et al.*, filed April 29, 2002 at 24. The attached exhibit to the *Petition*, as well as Petitioners' previous filing in the Commission's separate unbundled network elements (UNE) proceeding, provided extensive objective and theoretical support for the conclusion that cable operators exercise market power in the residential broadband market and that allowing cable MSOs to increase in size via merger will exacerbate the dominance of cable MSOs in residential broadband. *See* Mark Cooper, *The Failure of Intermodal Competition in Cable Markets*, Consumer Federation of America (2002) 10-13; *In re Review of Section 251 Unbundling Requirements*, CC Docket No. 01-338, *Comments of CFA, et al.*, filed April 5, 2002 at 33-46, 67-72.

In their *Opposition* to the *Petition to Deny*, Applicants submitted studies commissioned by the Applicants and others which attempted to negate the evidence submitted Petitioners. On reply, Petitioners demonstrated the flaws in Applicants' evidence, *see Attached Declaration of Dr. Mark Cooper* at 57-71, and submitted new evidence forcing the conclusion that the Applicants (a) separately already possess sufficient market power to engage in discriminatory behavior and, (b) grant of the Application will exacerbate the market dominance of applicants in residential broadband and other markets. *Reply Comments* at 12-18. The comments of others in this proceeding have provided further specific, empirical evidence that the danger of market power and abuse of market power is real and grounded in fact, not merely conclusory or unsupported as AT&T and Comcast maintain. *See Comments of RCN* (alleging predatory pricing and program discrimination); *Comments of Prime Communications* (alleging abusive practices designed to leverage local cable monopoly for the benefit of AT&T broadband services).

As Petitioners predicted, "AT&T Comcast will be a must-have partner, given the control it

will have over the distribution layer." *Reply Comments* at 17. Based on reports in all major newspapers and industry trade press, AT&T Comcast successfully leveraged its control over the distribution layer in exactly the manner predicted by Petitioners.

Applicants attempt to persuade the Commission otherwise by quoting a Time Warner spokesperson that "the economics of the deal will work out fine." This again misses the point.

How much weight the Commission should give a company spokesman "spinning" a deal in the trade press for the benefit of Wall St. does not matter at this stage. The Commission can, and must, satisfy itself by examining the HSIA. The Commission itself must examine the four corners of the document to determine whether its terms illustrate market power in violation of the public interest. While the Commission must consider the statements of Time Warner, it must ***first*** obtain a copy of the agreement and evaluate its terms and, with appropriate safeguards, allow citizens and industry rivals to comment.

CONCLUSION

Applicants fail to rebut Petitioners' legal arguments that the HSIA is a "relevant factor" the Commission must consider before it can determine whether grant of the Application serves the public interest. Instead, Applicants attempt to argue the merits of the public interest question and to shift the burden to Petitioners. The Commission should reject this ploy, grant Petitioners' *Motion*, and compel Applicants to produce the HSIA or suffer rejection of the Application.

Respectfully Submitted,

Harold Feld
Andrew Jay Schwartzman
Cheryl A. Leanza
MEDIA ACCESS PROJECT
1625 K. Street, NW
Suite 1118
Washington, DC 20006
(202) 232-4300
Counsel for CFA, et al.

September 23, 2002

CERTIFICATE OF SERVICE

I, Andrew Jay Schwartzman, certify that on this 23rd day of September, 2002, I caused a true copy of the foregoing *Petitioners' Reply* to be mailed, postage prepaid, to the following:

John W. Butler
Earl W. Comstock
Sher and Blackwell
Suite 900
1850 M Street, NW
Washington, DC 20036

A. Richard Metzger, Jr.
Lawler, Metzger and Milkman
Suite 802
2001 K Street, NW
Washington ,DC 20006

Michael H. Hammer
Willkie Farr & Gallagher
1155 21st Street, NW
Washington, DC 20036

I have also caused electronic copies to be emailed to:

Roger Holberg
Media Bureau
Federal Communications Commission
rholberg@fcc.gov

James Bird
Office of General Counsel
Federal Communications Commission
jbird@fcc.gov

Simmon Wilkie
Office of Plans and Policy
Federal Communications Commission
swilkie@fcc.gov

Cynthia Bryant
International Bureau
Federal Communications Commission
cbryant@fcc.gov

William Dever
Common Carrier Bureau
Federal Communications Commission
wdever@fcc.gov

Lauren Kravetz Patrich
Wireless Telecommunications Bureau
Federal Communications Commission
lkravetz@fcc.gov

Jeff Tobias
Wireless Telecommunications Bureau
Federal Communications Commission
jtobias@fcc.gov

Quazlex International
qualexint@aol.com

Erin Dozier
Media Bureau
Federal Communications Commission
edozier@fcc.gov

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Andrew Jay Schwartzman