March 16, 2001

Dissenting Statement of Commissioner Gloria Tristani

APPLICATIONS FOR CONSENT TO THE TRANSFER OF CONTROL OF LICENSES FROM MEDIAONE GROUP INC., TO AT&T CORP.

The Commission's *sua sponte* action, suspending two conditions of the Order approving the merger between AT&T and MediaOne,[1] violates the explicit terms of the merger Order and is, under any circumstances, a premature application of a non-final D.C. Circuit court opinion striking down the Commission's horizontal cable ownership rules.[2] The suspension Order utterly confounds the Commission's obligation to approve only those license transfers that serve the public interest with its obligation to ensure compliance with existing rules.[3] I dissent.

I. The Ownership Conditions Imposed on the AT&T and MediaOne Merger Arose from the Commission's Obligation to Ensure the Public Interest was Served by the License Transfers and Not Solely to Bring the Merged Party into Compliance with the Horizontal Ownership Rules

Although not discussed in the Commission's suspension Order, the conditions it suspends were imposed to satisfy two distinct legal obligations of the Commission, each of which standing alone is sufficient to sustain the conditions. The D.C. Circuit's decision in *Time Warner*, even were it final, would remove only one of two grounds for the conditions.

The June 2000 merger Order cited and discussed the Commission's horizontal cable ownership cap rules because parties must comply with existing rules and the merged entity failed that test.[4] More importantly, the conditions were also imposed because they were necessary to meet the independent obligation imposed by the public interest requirement of our license transfer authority. The merger Order states:

> Finally, under the third prong of our public interest test, we conclude that the Applicants' compliance with the above divestiture requirements also will ensure that the merger will not frustrate nor impair the Commission's

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[1] Although my colleagues draw comfort from their suspension of "deadlines" rather than the conditions themselves, the distinction is most charitably called semantic. There is no difference to the public interest between suspending the condition or suspending indefinitely compliance therewith.

[2] *See Time Warner Entertainment Co., L.P. v. Federal Communications Commission,* (No. 94-1035)(March 2, 2001).

[3] *Compare* 47 U.S.C. §§ 214(a) and 310(d)(license transfers) with 47 U.S.C. §154(i)(enforcement authority) and §303(r)(authority to impose conditions)

[4] *Merger Order* at Para. 3.

> implementation of the Communications Act and its objectives with regard to the promotion of competition and diversity in the provision of video programming.[5]

Section 310(d) of the Communications Act ("Communications Act") sets forth a requirement that license transfers be approved only upon finding the transfer serves the public interest, convenience, and necessity.[6] Among the policies that guide the exercise of the Commission's transfer discretion are maintaining independent sources of news and information.[7] Review of merger applications to detect public interest benefits, and imposition of conditions to ensure such benefits are forthcoming, have long been part of the Commission's practice.[8]

As the above language from the merger approval Order demonstrates, the conditions ensured the license transfers satisfied our public interest obligation under §310(d). The merger Order, at Paras. 52-76, discusses both the reasons for imposing the conditions and for denying a request that the application of the horizontal ownership limits rule be waived.[9] The Order cites the horizontal ownership limits as a touchstone for the merger analysis for two reasons, neither of which justifies the Commission's suspension of the conditions now.[10] First, the Order discusses the horizontal ownership rule because the "potential harms" of the merger obviously implicate the same policy concerns Congress had expressed in 47 U.S.C. §614 and were at issue in the general rulemaking. Second, the applicants sought a waiver of application of the rule, thus

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[5] *Merger Order* at Para. 76.

[6] *See* 47 U.S.C. § 310(d); *see also* § 214(a).

[7] *See, e.g.*, Communications Act, 47 U.S.C. § 257 (1996) (noting that one of the "policies and purposes" of the Communications Act favors a "diversity of media voices"*); Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 567 (1990) ("Safeguarding the public's right to receive a diversity of views and information over the airwaves is therefore an integral component of the FCC's mission"); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 663 (1994) ("[I]t has long been a basic tenet of national communications policy that the widest dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." (quoting *United States v. Midwest Video Corp.*, 406 U.S. 649, 668 n.27 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)).

[8] *See* 47 U.S.C. §§ 214(a), 310(d); *see also Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee, for Consent To Transfer Control of Corporations Holding Commission Licenses and Lines Pursuant to Sections 214 and 310(d) of the Communications Act and Parts 5, 22, 24, 25, 63, 90, 95, and 101 of the Commission's Rules,* CC Docket No. 98-141, Memorandum Opinion and Order ("*SBC-Ameritech Order*"), 14 FCC Rcd 14712, 14736 ¶ 46 (1999); *Application of WorldCom, Inc. and MCI Communications Corporation for Transfer of Control of MCI Communications Corporation to WorldCom, Inc.*, CC Docket No. 97-211, Memorandum Opinion and Order ("*WorldCom-MCI Order*"), 13 FCC Rcd 18025, 18026-27, 18030-32 ¶¶ 1, 8-10 (1998); *Applications of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and Its Subsidiaries*, File No. NSD-L-96-10, Memorandum Opinion and Order ("*Bell Atlantic-NYNEX Order*"), 12 FCC Rcd 19985, 19987, 20000-04 ¶¶ 2, 29-32 (1997).

[9] The rule, 47 C.F.R. §503, was effective at the time of the entry of the Commission's Report and Order. *See* 15 FCC Rcd. 9816 at fn181 (noting stay dissipated on May 19, 2000).

[10] Section 614 is the underlying authority for the horizontal ownership rules.

squarely placing its application at issue. The fact that the divestiture conditions brought the merged party into compliance with the rule cannot be read as the sole basis for Commission action. The purpose of the conditions in this specific case, and the horizontal ownership limits in the general rule, are complementary rather than mutually dependent.[11] Moreover, in rejecting the merged party's reliance on the Justice Department's competition review, we explicitly noted our merger analysis "is guided by different public interest principles."[12]

Almost three months ago this Commission referenced the same divestiture conditions:

> [W]e find that AT&T Corp. ("AT&T") has not complied with Ordering Clause paragraph 187 and Appendix B, Section (f)(1), of the *Merger Order* issued in this proceeding.[13]

At that time, we explicitly rejected any modification of the merger Order conditions in the absence of a "showing" that such modification would serve the public interest. We also stated:

> Should AT&T seek to have the Commission consider a modification of this *Order* to allow it to elect Option (b), it must submit a written request by January 15, 2001 with an appropriate showing as to why such a modification *would serve the public interest.*[14]

It is impossible to square the Commission's reading of the merger Order in December 2000 with the suspension Order's utter silence on the question of the public interest ramifications just three months later.

II. Suspension of the Compliance Deadlines Violates the Non-Severability Clause of the Merger Order

The merger Order repeatedly refers to the conditions as "non-severable," from the license transfer grant.[15] The Commission's severance of the divestiture deadlines from

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[11] *See Merger Order* at Para. 1 (citing obligation to ensure "public interest benefits."); Para. 3 (noting rule "designed to address threats to diversity and competition"); Para. 4 (noting interim conditions mitigate potential harm to "diversity of programming"); Para. 5 (noting review of application to avoid violation of any "federal communications policies."); Para.76 (explicit reliance on merger review authority to impose conditions).

[12] *See Merger Order* at Para. 64.

[13] *Report and Order*, at 1 (December 21, 2000).

[14] *Id.* at n9.

[15] *See Merger Order* at Paras. 4, 71, 183-84, 191 (separate non-severablity provision)

the transfer approval, as well as from the conditions themselves, manifestly violates that language. It is also entirely unclear by what authority the Commission ignores the factual bases for imposition of the conditions, and by what legal authority a non-final decision of the D.C. Circuit compels removal of conditions that went unchallenged by the parties.[16]

Just three months ago the D.C. Circuit said, "Whether the offending portion of a regulation is severable depends upon the intent of the agency and upon whether the remainder of the regulation could function sensibly without the stricken provision."[17] Several points bear noting. First, the merger Order unambiguously intended the conditions, including their deadlines, be non-severable. The express use of non-severable conditions constitutes explicit proof that the merger Order could not function sensibly in their absence. Second, no mandate has issued in *Time Warner* so the decision is non-final. Third, the court did not vacate the horizontal ownership rule nor did it conclude a 30% ownership limit was under all circumstances unjustified. The court simply ordered the FCC to justify its choice of 30% after a remand. Treating the deadlines as severable from the transfer approval, and severable from the divestiture conditions because of the *Time Warner* decision, eviscerates the logic of the merger Order as well as the court's reasoning when it remanded the general rule for further action.

The language of the suspension Order demonstrates how strained its reliance on the non-final decision in *Time Warner* is. The Order states the suspension will allow:

> [T]he Commission an opportunity to determine the relationship, if any, between the Court's decision on the ownership rules and the ownership conditions adopted in this proceeding…[18]

Suspension of the conditions prior to *even concluding suspension is compelled* by the *Time Warner* decision puts the cart before the horse. I am at a loss to explain how we can base the suspension on the *Time Warner* decision while still evaluating its impact. In December, the Commission said modification of the divestiture conditions would not be allowed absent a "showing" that the public interest would be served by such modification. The suspension Order's stated rationale prematurely and unjustifiably deviates from this standard.

Finally, the D.C. Circuit has repeatedly held that conditions imposed in license transfer cases are binding subject only to exhaustion of appeal remedies provided by 47 C.F.R. §1.110. Failure to comply with this rule has been held to foreclose further judicial review.[19] In this case the divestiture conditions were accepted without challenge in June

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[16] *See e.g Merger Order* at Para. 191 (separate non-severability provision).

[17] *See MD/DC/DE Broadcasters v. FCC*, 236 F.3d 13, 22 (D.C. Cir. 2001).

[18] *See Suspension Order* at Para. 4

[19] *See Central Television Inc. v. FCC*, 834 F.2d 186, 190-91; *see also Tribune Co. v. FCC*, 133 F.2d 61 (D.C.Cir. 1998).

2000. In December 2000 the Commission subsequently applied the divestiture conditions without complaint from the party. Now, with nothing more than an *ex parte* meeting before it, the Commission has decided to grant relief from the unchallenged conditions. This action is inconsistent with controlling authority, both substantively and procedurally.

III. Relief by Ex Parte Meeting

The Commission's suspension of unchallenged conditions with no request for relief before it, creates dangerous precedent. By this *sua sponte* action the Commission sends a signal that it will be open to reconsidering conditions appearing in any adjudicative order of the Commission. To be sure, the circuit court decision relied upon to justify the Commission's action provides good cover. But the unanswered question is whether subsequent Commission majorities may provide relief from conditions that were considered by prior Commission majorities to be both in the public interest and "non-severable" from the approval of the license transfer. Calling the action a suspension of "deadlines" rather than an elimination of the "conditions" merely obscures the fundamental question.

The Commission had no pleading before it seeking relief based on the application of the *Time Warner* decision. This deprived interested parties and the public of an opportunity to respond to a request for relief, and deprived the Commission of a factual record to analyze. Acting without a record, and in the absence of any discussion of the effect of the suspension on the public interest, smacks of back-room dealmaking. A cynical reading of the Commission's action here suggests it is open season on public interest obligations appearing in prior orders. The Commission is skating on thin ice and the water beneath it is deep, dark and very cold.