Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Applications for Consent to the	)	
Transfer of Control of Licenses and	)	CS Docket No. 99-251
Section 214 Authorizations from	)	
	)	
MediaOne Group, Inc.	)	
Transferor,	)	
	)	
To	)	
	)	
AT&T Corp.	)	
Transferee	)	

ORDER ON RECONSIDERATION

Adopted: February 8, 2001 **Released: March 14, 2001**

By the Commission: Commissioner Furchtgott-Roth approving in part, dissenting in part, and issuing a statement; Commissioner Tristani concurring in the result.

I. BACKGROUND

1. The Consumers Union, the Consumer Federation of America and the Media Access Project (collectively referred to as "CU")[1] jointly filed a petition for reconsideration of *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, Memorandum Opinion and Order, CS Docket No. 99-251 ("*Merger Order*").[2] The *Merger Order* found that a merger between AT&T and MediaOne ("AT&T"), would serve the public interest by facilitating the provision of local telephony and new advanced technologies and services, and thus approved the applications. The *Merger Order* further found that potential anti-competitive harms associated with the merger would be addressed through the imposition of mandatory conditions and interim safeguards,[3] through AT&T's obligation to divest its interest in cable high-speed Internet access provider Road Runner pursuant to a consent decree issued by the Department of

[1] On July 6, 2000, CU filed a petition for reconsideration. On July 17, 2000, AT&T Corp and MediaOne Group, Inc. filed an oppostion to CU's petition. On July 24, 2000, SBC Telecommunications, Inc. ("SBC") filed comments. CU filed a reply to AT&T MediaOne's opposition on July 27, 2000, and a supplement to its petition on November 9, 2000.

[2] 15 FCC Rcd 9816 (2000).

[3] *See Merger Order*, 15 FCC Rcd at 9895, 9898-05.

Justice,[4] and through AT&T's commitment to afford nonaffiliated internet service providers ("ISPs") with access to its cable system facilities.[5]

II. DISCUSSION

2. In its petition for reconsideration, CU requests that the *Merger Order* be rescinded and that the application be dismissed or be designated for hearing, or alternatively, that AT&T be required to comply with the Commission's cable horizontal ownership rules by November 19, 2000.[6] In support, CU's "central argument" concerns alleged procedural irregularities[7] involving allegedly "undisclosed" meetings between AT&T and Commission staff, which CU claims violated the agency's ex parte rules and ultimately tainted the Commission's deliberations regarding approval of the merger.[8] CU also faults the *Merger Order's* failure to justify the waiver of the deadline for AT&T's compliance with the cable horizontal ownership provisions,[9] its failure to consolidate consideration of the AT&T-Media One merger with the then-pending merger of Time Warner Inc. ("TW") and America Online, Inc. ("AOL"), and its failure to require AT&T to afford unaffiliated ISPs "open access" to its systems.[10] For the reasons set forth in the *Merger Order* and outlined herein, we reject CU's arguments and deny its petition for reconsideration.

3. With respect to alleged procedural irregularities, CU contends that AT&T conducted "hundreds" of meetings with Commission staff without filing adequate notification of the substantive issues presented, violating the Commission's ex parte rules and depriving CU "of information necessary to pursue their rights of administrative and judicial review effectively."[11] CU also faults the Commission for not responding to its complaints of ex parte violations prior to approving the merger.[12] Additionally, CU asserts that the record contains "extrinsic evidence" that the Commission relied upon information obtained

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[4] *See United States v. AT&T Corp. and MediaOne Group, Inc.*, No. 1:00CV01176RLC (D.D.C. Sept. 27, 2000)("*AT&T Consent Decree*").

[5] *See Merger Order*, 15 FCC Rcd at 9869-70.

[6] Cable operators were required to come into compliance with the Commission's cable horizontal ownership limit within 180 days of the decision rendered by the United States Court of Appeals for the District of Columbia upholding the constitutionality of the horizontal provision of Section 613(f) of the Cable Television Consumer Protection and Competition Act of 1992. *See Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal Ownership Limits*, Third Report and Order, MM Docket No. 92-264, 14 FCC Rcd 19098, 19128 (1999); *see also Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal OwnershipRules*, Order on Reconsideration, MM Docket No. 92-264, 15 FCC Rcd 1167 (2000). The D.C. Circuit upheld Section 613(f)'s subscriber provision on May 19, 2000. *See Time Warner Entertainment Co., L.P. v. United States*, 211 F.3^{d} 1313, 1315 (2000). Accordingly, cable operators were required to comply with the Commission's horizontal ownership limit, 47 C.F.R. § 76.503, by November 15, 2000. The *Merger Order* allowed AT&T an additional six months to come into compliance with section 76.503. *See Merger Order*, 15 FCC Rcd at 9848-50.

[7] CU's reply at 1.

[8] CU's petition at 7-19; CU's reply at 1-9.

[9] *See* n. 6, *supra.*

[10] SBC's comments address imposition of a mandated "open access" requirement as well.

[11] CU's petition at 7-8.

[12] *Id.* at 11.

through such meetings, outside the public record.[13] CU claims the *Merger Order's* discussion regarding the conditions of MediaOne's divestiture of its TWE partnership interest was based on numerous undisclosed meetings regarding the provisions of MediaOne's TWE partnership agreements. CU also claims that the Commission's decision affording AT&T twelve months to come into compliance with the cable horizontal ownership limit provisions was based on undisclosed discussions with AT&T regarding its willingness to accept a twelve-month waiver period. In opposition, AT&T maintains that the ex parte rules were complied with, and that the necessary documentation, including the requisite disclosure notifications, were filed and included in the public record.[14]

4. We disagree with the CU's contention that our decision was in any way tainted by violations of the ex parte rules. We have examined CU's separately filed request for declaratory ruling[15] regarding alleged ex parte rule violations[16] that was pending before the Commission when the *Merger Order* was issued.[17] CU has alleged no facts or circumstances demonstrating that the meetings involved in the notices that CU cited presented any significant data or arguments not already reflected in written presentations, and there appears no reason to doubt AT&T's assertions that no such data or arguments were presented. Contrary to CU's argument, we based our decision-making process only on a thorough review of the voluminous record compiled in this proceeding. We "relied on no information or arguments" that were not made part of, that record, and CU had an adequate opportunity to comment on the evidence we did rely on. In particular, AT&T timely filed MediaOne's TWE partnership agreements. CU had ample opportunity to read and comment upon the provisions of the agreements that were discussed in the *Merger Order*.[18] Similarly, the arguments advanced for affording AT&T a waiver period, whether the original eighteen-month, or "modified" twelve-month waiver period, were thoroughly ventilated on the record.[19] Thus, we find no merit in CU's claims that it was deprived an opportunity to respond to extra-record evidence relied upon by the Commission. We find that CU was afforded a full opportunity to comment on all aspects of the merger, and, in fact, did comment extensively throughout the proceeding. CU's allegations do not persuade us that the record needs to be reopened or that any party was denied their right to participate in this matter.

5. With respect to the *Merger Order'* waiver of the deadline for compliance with the cable ownership limit, CU claims that the Commission's "overly generous determination to give AT&T 12 months . . . was arbitrary and capricious and in violation of the 1992 Cable Act."[20] CU claims that the *Merger Order's* justification for a twelve-month compliance period was "terse," was erroneously premised on waivers granted in the non-comparable broadcast area, and was unsupportable because it did not

[13] *Id.* at 13-19.

[14] AT&T's opposition at 5-11.

[15] *See* Letter from Andrew Schwartzman to Christopher Wright General Counsel (May 9, 2000); Letter from Andrew Schwartzman et al. to Christopher Wright General Counsel (May 2, 2000). The General Counsel has separately responded to aspects of CU's request not essential to this Order. *See* Letter from Christopher Wright to Andrew Schwartzman (January 19, 2001).

[16] *See* 47 C.F.R. §§ 1.1206(b)(1),(2); *see also AT&T Corp. and MediaOne Group, Inc. Seek FCC Consent for a Proposed Transfer of Control*, Public Notice, DA-99-1447, 14 FCC Rcd 11867, 11867-68 (1999).

[17] *See Merger Order*, 15 FCC Rcd at 9894.

[18] *Id.* at 9848 n 220.

[19] *Id.* at 9846-50.

[20] CU's petition at 20.

examine AT&T's prior efforts to comply with the horizontal limit.[21] In opposition, AT&T asserts that given the magnitude and complexity of the merger, the *Merger Order's* waiver recognized that AT&T needed additional time to come into compliance with the horizontal limit, and that the twelve-month time period was consistent with Commission precedent involving similarly complicated divestitures.[22]

6. As a preliminary matter, all cable operators were allowed six months to come into compliance with the horizontal ownership limit.[23] Our decision to grant AT&T an additional six months rested upon our finding that special circumstances warranted the additional time period, and that such grant, as conditioned, served the public interest.[24] Specifically, our decision reflects consideration of the realities involved in the merger, which joined the nation's largest and fourth largest cable operators, with attributable interests in other affected entities, including the second largest cable operator TW,[25] and for which each divestiture option entailed complicated and time-consuming business transactions.[26] Moreover, our decision established interim safeguard conditions,[27] designed to ensure that the public interest objectives of the horizontal and vertical limit provisions of the 1992 Cable Act were not thwarted during the twelve-month compliance period.[28] Finally, our decision appropriately cited broadcast precedent as examples of mergers, which similarly involved complicated business transactions and for which longer divestiture periods were allowed.[29] We thus find that the *Merger Order* justified the basis for the twelve-month waiver, and that such waiver was fully consistent with the divestiture periods afforded to similarly complex, multifaceted mergers.

7. With regard to the *Merger Order's* determination not to consolidate this merger with the

[21] *Id.* at 20-26.

[22] AT&T's opposition at 12-13.

[23] *See* n. 6, *supra*.

[24] *See Merger Order*, 15 FCC Rcd at 9846-50.

[25] *Id.* at 9823-33.

[26] *Id.* at 9848-49, 9895. *See also Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne, Inc., Transferor, to AT&T Corp, Transferee*, CS Docket No. 99-251, Order, FCC 00-447(rel. Dec. 21, 2000)("*Compliance Order*")(finding that AT&T's recent submissions represented an election to divest its TW partnership interest, or place such interest in an irrevocable trust in order to timely effect compliance with the horizontal limit).

[27] *See Merger Order*, 15 FCC Rcd at Appendix B, 9849-50, 9898-9904.

[28] Indeed, both the *Merger Order's* divestiture options and interim safeguards are designed to limit AT&T's reach and influence in the mulitchannel video programming distribution market, and thus address, and serve the underlying objectives, of the horizontal and vertical limit provisions of Sections 613(f)(1),(2) of the Cable Television Consumer Protection Act of 1992. *See* 47 U.S.C. §§ 533(f)(1),(2); *see* 47 C.F.R. § 76.503(limiting a cable operator's service to no more than 30% of all multichannel video programming subscribers nationwide through its own or attributed cable systems, but excluding subscribers served by the operator's new overbuild cable systems); 47 C.F.R. § 76.504(limiting a cable operator's carriage of video programming in which it owns or has an attributable interest in to no more than 40% of its activated channels, applicable only to channel capacity up to 75 channels). It should be noted that the Consumer Federation of America, the Center for Media Education, the Association of Independent Video and Filmmakers, and the Office of Communication, Inc. United Church of Christ jointly filed petitions for reconsideration challenging certain aspects of the Commission's horizontal and vertical limit provisions.

[29] *See Merger Order*, 15 FCC Rcd at 9848.

then-pending AOL/TW merger, CU argues that the Commission failed to properly consider the "concentration of market power that would result from a merger of AOL and Time Warner, if MediaOne continues to hold its interest in TWE,"[30] and the fact that both mergers are interrelated.[31] In opposition, AT&T maintains that the *Merger Order* properly found that the mergers were not mutually exclusive, and that CU has not identified any "non-arbitrary basis" that would necessitate consolidation.[32]

8. The *Merger Order* addressed commenters' arguments that the instant merger should be consolidated with the then-pending AOL/TW merger.[33] At the outset, we determined that consolidation was not mandated under the *Aschbacker* doctrine because the mergers were not mutually exclusive, in that approval of one merger would not require the denial of the other.[34] Moreover, we specifically considered and rejected CU's argument, finding that the imposition of the interim safeguard conditions and the final divestiture requirements addressed any potential anti-competitive harms associated with the horizontal and vertical consolidation of AT&T MediaOne and other cable operators and programming vendors, including TW.[35] CU simply seeks to void the alternative divestiture options delineated in the *Merger Order*,[36] and to mandate implementation of option (a) - - divestiture of TWE interests - - thus "sever[ing] the TWE link between the two largest cable Multiple System Operators."[37] We reject CU's arguments and reaffirm our findings that each of the divestiture options established in the *Merger Order* will satisfy the requirements, and the underlying objectives, of the cable horizontal and vertical limits by ensuring diversity in media voices and guarding against AT&T's ability to coordinate action and exercise undue influence and control with other large industry players in the multichannel video programming marketplace.[38]

9. Finally, with respect to the Commission's determination not to condition approval of the applications on a requirement that unaffiliated ISPs be given access to AT&T's systems, CU argues that the *Merger Order* ignores the anti-competitive consequences of AT&T's position in the market.[39] CU argues that that determination must be revisited,[40] in light of the Department of Justice's findings in connection with the *AT&T Consent Decree*.[41] Moreover, CU and SBC both urge the Commission to

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[30] CU's petition at 19.

[31] *See* CU's supplement at 6-12.

[32] AT&T's opposition at 12.

[33] *See Merger Order*, 15 FCC Rcd at 9892-94.

[34] *See Aschbacker Radio Corp. v. FCC*, 326 U.S. 327 (1945); *see also Merger Order*, 15 FCC Rcd at 9893.

[35] *Merger* Order, 15 FCC Rcd. at 9893-94.

[36] The *Merger Order* established three divestiture options. Under the divestiture options, AT&T must either: (a) divest its TWE interests; (b) terminate involvement in TWE's video-programming activities (per the insulation criteria applicable to limited partners, officers and directors under 47 C.F.R. § 76.503 n.2); or (c) divest interests in other cable systems, so as to comply with the cable horizontal limit. *See MergerOrder*, 15 FCC Rcd at 9895. We note that AT&T has since elected to divest its TWE interests. *See Compliance Order*, n. 27, *supra*.

[37] CU's supplement at 7.

[38] *See Merger Order*, 15 FCC Rcd at 9893; *see also* n. 27, *supra*.

[39] *See* CU's petition at 27-28; CU's supplement at 13.

[40] *Id.*

[41] *See* n. 4, *supra.*

reconsider its decision in the wake of *AT&T v. City of Portland*,[42] by subjecting cable operators to the same non-discriminatory "open access" requirements imposed on common carriers,[43] and "at the very least now condition the merger on AT&T/MediaOne's demonstration that it has, or immediately will, comply with the Ninth Circuit's holding."[44] In opposition, AT&T asserts that consistent with Commission precedent, the *Merger Order* properly determined not to impose any mandatory "open access" requirement upon AT&T.[45] AT&T further asserts that neither the *AT&T Consent Decree* nor the *AT&T v. City of Portland* decision requires reconsideration of the *Merger Order*.[46]

10. We find that the *Merger Order* fully considered arguments advocating the imposition of "open access" conditions to curb AT&T's potential dominance in residential high-speed services, given its interests in the two largest cable ISPs, Excite@Home and Roadrunner and a vast network of last-mile cable facilities.[47] As we observed, though, under the *Proposed AT&T Consent Decree*, which has since been finalized and judgment entered,[48] AT&T must divest its interest in Road Runner.[49] We thus found that the *Proposed AT&T Consent Decree* adequately addresses arguments that a combination of Excite@Home and Roadrunner would give AT&T "the ability and the incentive to discriminate against unaffiliated content providers and/or to leverage proprietary software protocals to favor networks owned by or affiliated with the merged entity."[50] Additionally, we found that AT&T was committed to the principles of access by multiple ISPs to its cable systems, and in furtherance of such commitment was actively negotiating to afford access to unaffiliated nationwide ISP MindSpring.[51] Moreover, we found that potential harms associated with the merger were minimized by the growth of "significant actual and potential competition" from alternative DSL, wireless and satellite broadband access providers,[52] which were "attracting new subscribers at an exponential rate."[53] Based on all of our findings, we declined to condition approval of the merger on an "open access" requirement. However, we stated that we would continue to monitor

[42] 216 F. 3d 871(9th Cir. 2000)(indicating that cable broadband Internet transport service is a "telecommunications," not a "cable," service; that the FCC, not the local franchise authority, has jurisdiction over telecommunications services; and that the local franchise authority thus lacks authority to regulate or condition approval of cable franchises with respect to the provision of unaffiliated ISPs' access to cable facilities).

[43] CU's petition at 27-28; CU's supplement at 13; SBC's comments at 1, 3-5.

[44] SBC comments at 1.

[45] AT&T's opposition at 14-15(citing *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160 (1999); *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, 14 FCC Rcd 2398 (1999)).

[46] AT&T's opposition at 15-16.

[47] *See Merger Order*, 15 FCC Rcd at 9861-71.

[48] *See* n. 4, *supra*.

[49] *Merger* Order, 15 FCC Rcd at 9870-71. We also observed that the *AT&T Consent Decree* requires AT&T to obtain Justice Department's prior approval before entering into any agreements with TW regarding the provision of residential Broadband services. *Id.*

[50] *Id.* at 9871.

[51] *Id.* at 9869.

[52] *Id.* at 9866.

[53] *Id.* at 9867.

competition in the provision of cable broadband services generally, and the merged firm's implementation of its "open access" commitment particularly, and will revisit the issue if we determine that regulatory incentives or curbs are warranted.[54]

11. At this juncture, we do not believe that we need to revisit this aspect of the *Merger Order* in view of the Justice Department's findings or the *AT&T v. City of Portland* decision. Specifically, we find that the *Merger Order*, in fact, considered and relied upon the Justice Department's findings as memorialized in the *Proposed AT&T Consent Decree*. Moreover, contrary to CU's and SBC's assertions, we do not find that the *AT&T v. City of Portland* decision compels us to impose mandatory "open access" conditions in the context of this particular merger.[55] In the absence of any evidence that AT&T has engaged in a pattern of anti-competitive behavior, or is likely to engage in such behavior after the merger, we believe that it is appropriate to consider this issue in the context of our recently initiated inquiry, which is examining access to the developing broadband Internet service on an industry-wide basis.[56]

III. CONCLUSION

12. For the reasons set forth in the *Merger Order* and outlined above, we deny CU's petition for reconsideration.

IV. ORDERING CLAUSE

13. Accordingly, IT IS ORDERED, that pursuant to Sections 4(i), 214(a), 214(c), 309, 310(d), 405 and 613(f) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d) 533(f), 405 and section 1.106 of the Commission's rules, 47 C.F.R. § 1.106, the petition for reconsideration jointly filed by the Consumers Union, the Consumer Federation of America and the Media Access Project IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

[54] *Id.* at 9871-73.

[55] Indeed, the decision explicitly recognizes this agency's authority under 47 U.S.C. § 160 to forbear from enforcing regulations with respect to telecommunications services. *See AT&T v. City of Portland*, 216 F.2d at 879-80.

[56] *See Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, Gen. Docket No. 00-185, Notice of Inquiry, FCC 00-355 (Sept. 28,2000), *summarized at* 65 F.R. 60,441 (October 11, 2000).

STATEMENT OF COMMISSIONER HAROLD W. FURCHTGOTT-ROTH, APPROVING IN PART AND DISSENTING IN PART

In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee, CS Docket No. 99-251

Order on Reconsideration

I approve of this item because it disposes of the Petition for Reconsideration before the Commission and finally brings closure to this merger proceeding.

I dissent because I continue to take issue with the review process that engulfed the Commission during the AT&T/MediaOne merger. As I have stated many times before, I believe that we should review license transfer proposals for consistency with the Communications Act and existing administrative regulations. That is all we are empowered to do. I did not support the public interest framework for the merger then and I cannot support it now.

I hold out hope that future merger reviews and related actions by this Commission will be straightforward, expedient, and consonant with applicable law. We owe the public nothing less.

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