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

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

ORDER

Adopted: November 5, 2002 **Released: November 6, 2002**

By the Commission: Commissioner Copps dissenting and issuing a statement.

I. INTRODUCTION

1. Before the Commission are the motions of Consumer Federation of America, *et al.* ("CFA") and EarthLink, Inc. ("EarthLink") (each a "Motion" and together the "Motions"), urging the Commission to compel Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") (collectively, the "Applicants") to file certain documents in this proceeding, and other relief. For the reasons set forth below, we deny the Motions. To the extent that EarthLink's Motion requests documents that have already been filed by the Applicants, we dismiss its Motion as moot.

II. BACKGROUND

2. AT&T and Comcast have filed applications, pursuant to sections 214 and 310(d) of the Communications Act, as amended (the "Act"), 47 U.S.C. §§ 214 and 310, asking the Federal Communications Commission ("Commission") to approve the transfer of control of licenses and authorizations currently held or controlled, directly or indirectly, by them in connection with the proposed merger of AT&T and Comcast.[1]

[1] On February 28, 2002, the Applicants filed a Public Interest Statement and associated applications for consent to the transfer of control of certain licenses and authorizations. On various subsequent dates, up to and including March 26, 2002, the Applicants filed additional, related transfer of control applications, re-filed certain applications, and filed supplemental information or amendments to the applications to make them acceptable for filing.

3. During the pendency of this proceeding, the Applicants proposed a means of insulating and ultimately divesting AT&T's interest in Time Warner Entertainment, L.P. ("TWE").[2] After filing the TWE Proposal, the Applicants reached an agreement with AOL Time Warner, Inc. ("AOLTW"), to restructure TWE (the "TWE Restructuring Agreement").[3] In connection with the TWE Restructuring Agreement, the Applicants and AOLTW reached a "three-year non-exclusive agreement" under which AOL broadband Internet access service would be made available on AT&T Comcast cable systems (the "AOL ISP Agreement").[4] If the proposed merger has not closed by March 1, 2003, and all other conditions to closing the TWE restructuring have been met or waived, AT&T and AOLTW have agreed to enter into an ISP agreement, "substantially identical to the AOL ISP Agreement, that would govern the provision of AOLTW's high-speed Internet services on AT&T's cable systems" (the AOL-AT&T ISP Agreement").[5] A copy of the TWE Restructuring Agreement was filed with the Commission on August 23, 2002. The exhibits and certain other documents referenced in the agreement (collectively, the "Exhibits"), including the AOL ISP Agreement, were not filed with TWE Restructuring Agreement.

4. Upon initial review of a press release concerning the TWE Restructuring Agreement, Commission staff believed that the TWE Restructuring Agreement and some of the Exhibits might be relevant to our analysis of the Application. We requested that the Applicants file the documents setting forth the TWE Restructuring Agreement with the Commission. The Applicants filed the TWE Restructuring Agreement, but asked that the Commission review the Exhibits at DOJ to determine their relevance before requiring filing of the Exhibits at the Commission, because of the commercially sensitive nature of the Exhibits, and because of the Applicants' view that the Exhibits were not relevant. Based on a review of the Exhibits at DOJ, the staff concluded that only certain Exhibits were relevant to our review, because they would allow the Commission to verify assertions made by the Applicants in connection with the TWE Proposal. The Commission staff agreed that the remaining documents, including the AOL ISP Agreement,[6] were not relevant to the Commission's evaluation of the Application.

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[2] *See* Letter from Betsy J. Brady, AT&T Corp. and James R. Coltharp, Comcast Corporation to W. Kenneth Ferree, Chief, Media Bureau (Aug. 8, 2002) (the "TWE Proposal"). Under the TWE Proposal, AT&T's interest in TWE will be placed in a trust and ultimately divested. Until divestiture, the interest also will be subject to certain safeguards modeled on those imposed by the Commission in connection with the merger of AT&T and MediaOne. We sought comment on the TWE Proposal. *See Media Bureau Seeks Comment on Proposed Insulation and Divestiture of AT&T's Interest in Time Warner Entertainment, LP*, Public Notice, DA 02-1987 (rel. Aug. 9, 2002).

[3] AT&T Corp. and Comcast Corporation, AOL Time Warner, AT&T and Comcast Agree to Restructure Time Warner Entertainment Partnership (press release), Aug. 21, 2002 ("TWE Restructuring Press Release"); *see also* Restructuring Agreement By and Among AOL Time Warner, Inc., AT&T Corp. and Comcast Corporation, dated as of August 20, 2002 ("TWE Restructuring Agreement"). The TWE Restructuring Agreement was filed with the Commission on August 23, 2002.

[4] TWE Restructuring Press Release. An officer of AT&T has certified that the AOL ISP Agreement "does not give AOL exclusive rights to provide Internet service over any AT&T Comcast cable system, nor does it constrain AT&T Comcast's ability to negotiate and reach agreements with other ISPs in the future." *See* Letter from Mark C. Rosenblum, Vice President – Law, AT&T Corp., to Marlene H. Dortch, FCC Secretary (Oct. 2, 2002).

[5] Applicants' Joint Opposition at 6-7; TWE Restructuring Agreement § 9.1(a)(ii).

[6] We initially reviewed the AOL ISP Agreement only for the purpose of determining its compliance with the merger conditions in our *AOL-Time Warner Order*, which prohibit AOLTW from entering into any agreement with AT&T that gives AOL exclusive carriage rights on AT&T's cable systems, or otherwise limits AT&T's ability to enter into agreements with ISPs not affiliated with AOLTW. *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc., Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, 6662 ¶ 272 (2001) ("*AOL-Time Warner Order")*. As we explain (continued.…)

The staff requested that the Applicants file the relevant Exhibits with the Commission, which they did on September 13, 2002. Subsequently, and in response to arguments raised by movants, Commission staff again reviewed the AOL ISP Agreement, as well as the AOL-AT&T ISP Agreement, and concluded that neither agreement was relevant to the proposed license transfer.

5. CFA and EarthLink filed Motions urging the Commission to: (a) compel the Applicants to file some or all of the Exhibits; (b) initiate a pleading cycle seeking comment on the Exhibits; and (c) stop the informal 180-day review period for this proceeding pending receipt of the Exhibits and the close of the proposed comment cycle.[7] In support of their Motions, EarthLink and CFA assert that the Commission cannot complete the public interest analysis required by sections 214 and 310 of the Act without reviewing, and considering public comment on, one or more of the Exhibits.[8] EarthLink contends that the Commission cannot evaluate the TWE Restructuring Agreement absent the Exhibits, because the Exhibits could contain provisions that contradict or materially change the terms contained in the agreement itself.[9] Moreover, EarthLink asserts that one of the Exhibits -- the AOL ISP Agreement – is relevant to issues that the Commission considered in a separate license transfer proceeding involving AOL and Time Warner, and it asserts that similar issues are raised in this case.[10] CFA urges the Commission to compel the Applicants to file the AOL ISP Agreement, without reference to the other Exhibits. In support of its Motion, CFA, citing press reports, asserts that, the AOL ISP Agreement is "highly restrictive and exclusionary" and may pose significant impediments to broadband deployment.[11] CFA asserts that, to secure access to AT&T Comcast's cable modem platform, AOL agreed to "highly unprofitable terms," providing proof of the merged firm's power to dominate the broadband market.[12]

6. For the reasons set forth below, we deny the CFA and EarthLink Motions. To the extent that the EarthLink Motion requests documents that have now been filed by the Applicants, we dismiss its Motion as moot.

(…continued from previous page)
further below, we later reviewed the AOL ISP Agreement in order to confirm that the agreement is identical in all material respects to the AOL-AT&T Agreement.

[7] *See* Motion of Consumer Federation of America, *et al.*, to Require AT&T and Comcast to Provide Information Material to Consideration of Application to Transfer Control of Licenses (filed Sept. 5, 2002) ("CFA Motion"); Motion of EarthLink, Inc., for Order Requiring Submission of Additional Information, Providing for Supplemental Comment, and Suspending the 180-Day Review Period (filed Sept. 5, 2002) ("EarthLink Motion"); *see also* Supplemental Comments of EarthLink, Inc. (filed Sept. 5, 2002) ("EarthLink Supplemental Comments"); Comments of Petitioners Consumer Federation of America, Consumers Union, Center for Digital Democracy, and Media Access Project on Proposed Time Warner Entertainment, LP Trust (filed Sept. 5, 2002) ("CFA Supplemental Comments"). CFA urges the Commission to require the Applicants to file the AOL ISP Agreement. EarthLink requests that the Commission require the Applicants to file all of the Exhibits.

[8] EarthLink Motion at 2; CFA Motion at 4-5.

[9] EarthLink Supplemental Comments at 3.

[10] *Id.* at 4.

[11] CFA Supplemental Comments at 1.

[12] CFA Motion at 8; *see also* Letter from Harold J. Feld, Associate Director, Media Access Project, to Marlene H. Dortch, FCC Secretary (Oct. 30, 2002).

III. DISCUSSION

7. It is incumbent upon the Commission to include in the public record documents or evidence of decisional significance.[13] In most cases, this obligation requires that we make antecedent determinations regarding which documents or other evidence will be most probative and relevant to our decision-making. For example, in license transfer cases such as this, the Department of Justice ("DOJ"), conducting its review pursuant to the Antitrust Civil Process Act and Hart-Scott Rodino Antitrust Improvements Act ("HSR"), may receive hundreds or thousands of boxes of documents in response to its general discovery requests. To avoid having to respond to similar broad discovery requests from this agency, applicants normally will sign a limited waiver of their confidentiality rights so that Commission staff may review and determine the relevance of material filed with DOJ.[14] We are not, however, obliged to do so; nor do any substantive rights attach to any party as a result of this review. As we have said previously, we have "discretion to review or not review HSR documents based on the requirements of a particular case. If the Commission chooses to review HSR documents, it is under no obligation to disclose such documents unless we rely on them in the decision-making process."[15]

8. The Commission's authority to use its administrative discretion in determining which documents and materials are necessary to, or otherwise most relevant and probative to, its public interest analysis is well-established. As the D.C. Circuit noted in *SBC Communications Inc. v. FCC*, "the Commission is fully capable of determining which documents are relevant to its decision-making; for us to hold that the Commission is bound to review every document deemed relevant by the parties would be an unwarranted intrusion into the agency's ability to conduct its own business and would arm interested parties with a potent instrument for delay."[16] The D.C. Circuit also has observed that: "Someone must decide when enough data is enough. In the first instance that decision must be made by the Commission not by the Department of Justice or the Federal Trade Commission, not by the parties to the proceeding, and not by the courts."[17]

9. In this case, Commission staff have reviewed certain HSR documents filed by the applicants with DOJ, including the AOL ISP Agreement, and have determined that the AOL ISP Agreement is not relevant to our public interest analysis of this proposed license transfer. Based on this review and determination, we agree that the AOL ISP Agreement is not relevant to our public interest analysis.

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[13] *See, e.g., Association of Data Processing Service Organizations, Inc. v. TymShare, Inc.*, 745 F.2d 677, 685 (D.C. Cir. 1984) ("*ADAPSO*"); *Air Transport Assoc. of America v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) (citing precedent).

[14] *See* Letter from Ilene Knable Gotts, Wachtell, Lipton, Rosen & Katz, and Arthur Burke, Davis, Polk, and Wardwell to Nancy M. Goodman, Chief, Telecommunications Task Force, DOJ (March 7, 2002) (waiving confidentiality rights to permit Commission review of HSR materials filed with DOJ by AT&T and Comcast); Letter from A. Richard Metzger, Lawler, Metzger & Milkman, LLC, and David Lawson, Sidley, Austin, Brown & Wood, LLP to William F. Caton, Acting Secretary, FCC (Apr. 2, 2002) (notifying Commission of waiver).

[15] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.,* 14 FCC Rcd 3160, 3234 ¶ 153 (1999) ("*AT&T-TCI Order*"); *see also Applications of Craig O. McCaw, Transferor, and American Telephone and Telegraph Company, Transferee*, 9 FCC Rcd 5836 ¶ 157 (1994) ("[T]he Commission has broad discretion to determine the scope of information required to complete its public interest analysis and the manner in which it will conduct its fact finding inquiries in license transfer proceedings.").

[16] *SBC Communications Inc. v. FCC,* 56 F.3d 1484 (D.C. Cir. 1995) (citation and quotation omitted).

[17] *United States v. FCC*, 652 F.2d 72, 90-91 (D.C. Cir. 1980).

10. First, as the Applicants have correctly stated, they are proposing to insulate the TWE Interest pursuant to the safeguards and trust instruments described in the TWE Proposal, not pursuant to the TWE Restructuring Agreement.[18] The terms of the TWE Restructuring Agreement are therefore relevant to the merger only to the extent that they contradict the TWE Proposal, or otherwise contain terms that have merger-related effects. The Commission has evaluated whether the TWE Restructuring Agreement will have merger-related effects by reviewing those Exhibits that have been filed by the Applicants, and other statements in the record. A Comcast officer has represented that the AOL ISP Agreement "in no way supercedes or contradicts the terms of the TWE Restructuring Agreement."[19] Moreover, in reviewing the AOL ISP Agreement, the staff did not observe any clause that contradicted or amended the TWE Restructuring Agreement.

11. Second, our merger review is limited to consideration of merger-specific effects.[20] The AOL ISP Agreement is not contingent on the merger. In the event that the merger with Comcast is not approved or consummated, an access agreement will be entered into between AOL and AT&T.[21] The Applicants have certified in the record that this agreement is identical in all material respects to the agreement involving AT&T Comcast systems, except with regard to the cities in which the agreement will be implemented.[22] Our own staff review of the Exhibits confirms that the only material difference between the two agreements is with regard to which systems will be subject to the agreement. The only link between the merger and the AOL ISP Agreement is that, if the merger closes, AOL will have access to some Comcast systems as well as some AT&T systems. Even this connection is attenuated, however, because there is nothing preventing AOL from entering into an ISP agreement with Comcast if the merger is not consummated. In short, because the AOL ISP Agreement survives regardless of whether the merger is consummated, we do not believe it is sufficiently merger-specific to consider in our review.

12. Third, as part of our public interest analysis, we analyze the effects of a proposed merger on all product markets within our jurisdiction, including broadband Internet access markets.[23] Upon consideration of the Motions, subsequent filings by Earthlink and CFA, and the responsive pleadings filed by the Applicants, we conclude that we can complete this analysis without the AOL ISP Agreement being

[18] Moreover, the TWE Restructuring Agreement may close absent the merger closing. *See* TWE Restructuring Agreement § 11.1(f) (providing that if the AT&T-Comcast merger has not closed by March 1, 2003, the parties will be deemed to have automatically waived a condition that the merger close prior to the closing of the TWE Restructuring Agreement).

[19] *See* Letter from Arthur R. Block, Comcast Senior Vice President and General Counsel, to Marlene H. Dortch, FCC Secretary (Oct. 24, 2002). Moreover, in the Application, each Applicant certified that "any contracts or other instruments submitted herewith are complete and constitute the full agreement." *See* FCC Form 312 (filed in connection with applications for transfer of control of satellite earth stations). Willful false statements provided in an Application violate 18 U.S.C. § 1001, as well as the Communications Act and our rules.

[20] *See, e.g., Applications of Chadmoore Wireless Group, Inc. and Various Subsidiaries of Nextel Communications, Inc.,* 16 F.C.C.R. 21105, 21111 ¶18 (2001); *AOL-Time Warner Order,* 16 F.C.C. Rcd. at 6550 ¶ 6 (2001); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc., Transferor, to AT&T Corp., Transferee*, 15 FCC Rcd at 9834 ¶ 35 (2000) ("*AT&T-MediaOne Order").*

[21] Applicants' Joint Opposition at 6-7; TWE Restructuring Agreement § 9.1(a)(ii).

[22] Letter from Mark C. Rosenblum, Vice President-Law, AT&T Corp. and Arthur R. Block, Senior Vice President and General Counsel, Comcast, to Marlene H. Dortch, FCC Secretary (Oct. 28, 2002).

[23] *See Memorandum in Response to Questions Propounded by Office of General Counsel Submitted on Behalf of CFA, et al.* at 9-14 (filed Oct. 28, 2002) (expressing concerns about the effects of the proposed merger on Broadband Internet access).

placed in the record.

13. CFA and EarthLink urge us to require Applicants to enter the AOL ISP Agreement into the record so that we can determine (i) whether it will reduce unaffiliated ISP access to AT&T Comcast's facilities,[24] (ii) whether the terms of the agreement demonstrate that the cable industry plans to "treat broadband like a 'premium movie channel' rather than an interactive communications medium,"[25] and (iii) whether the agreement demonstrates that AT&T Comcast will have unfair bargaining power over ISPs.[26] First, an AT&T officer has certified,[27] and the staff's review has confirmed, that the AOL ISP Agreement is not exclusive. Moreover, the first two of these assertions assume a regulatory context that does not exist. Although we have pending proceedings that may affect the regulatory status of broadband offerings, we have not yet established policies or rules governing whether, and on what terms, unaffiliated ISPs should have access to cable systems. Indeed, the very question of whether government intervention is necessary or appropriate to ensure that unaffiliated ISPs have access to cable systems is squarely at issue in an ongoing rulemaking proceeding.[28] With one limited exception, we have consistently refused to intervene in marketplace decisions concerning ISP access to cable facilities or the terms and conditions of such access, despite requests for such intervention by other parties—including the movants.[29] Concerns regarding unaffiliated ISP access and the offering of broadband services will be addressed on a market-wide basis when we have made policy determinations applicable to the relationship between cable operators and ISPs generally. Movants' reliance on the *AOL-Time Warner Order* as authority for compelling production of the AOL ISP Agreement is misplaced. The proposed merger of AOL and Time Warner presented a combination of the largest ISP, which itself owned many leading Internet brands and applications, with the second largest cable operator in the U.S., which already held an enormous library of multimedia content.[30] The AOL-Time Warner merger presented a unique combination of services, facilities, and content that raised competitive concerns that are not presented by this merger or the AOL ISP Agreement. Although the AOL ISP Agreement provides AOL access to AT&T Comcast systems, such an agreement is clearly distinguishable from AOL's *acquisition* of distribution systems that are affiliated with multi-media content. To the extent that the movants are raising issues about whether the Commission should compel ISP access to cable systems, or intervene in the terms and conditions of such access, those issues will be addressed in our ongoing rulemaking proceeding.

14. With respect to the third claim, CFA charges that the review of the AOL ISP Agreement will allow us to determine the extent of AT&T Comcast's power to dominate the broadband market. The

[24] EarthLink Supplemental Comments at 4.

[25] CFA Motion at 2.

[26] *Id.* at 8-9.

[27] An AT&T officer certified that the AOL ISP Agreement "does not give AOL exclusive rights to provide Internet service over any AT&T Comcast cable system, nor does it constrain AT&T Comcast's ability to negotiate and reach agreements with other ISPs in the future." *See* Letter from Mark C. Rosenblum, Vice President – Law, AT&T Corp., to Marlene H. Dortch, FCC Secretary (Oct. 2, 2002).

[28] *See generally Inquiry Concerning High-Speed Access to the Internet over Cable and Other Facilities*, 17 FCC Rcd 4798 (2002).

[29] *See AT&T-TCI Order*, 14 FCC Rcd at 3207 ¶ 96 (1999); *AT&T-MediaOne Order*, 15 FCC Rcd at 9870 ¶ 121 (2000) ("*AT&T-MediaOne Order"). But see AOL-Time Warner Order*, 16 FCC Rcd at 6600-03 ¶¶ 126-127 (requiring that, to the extent AOLTW provided access to its cable system to unaffiliated ISPs, all ISPs would receive such access on nondiscriminatory terms).

[30] *AOL-Time Warner Order*, 16 FCC Rcd at 6580 ¶ 78.

fact that the ISP agreement between AOL and AT&T is identical in all material respects to that between AOL and AT&T Comcast refutes the claim that the AOL ISP Agreement evidences the merged entity's market power. Moreover, the AOL ISP Agreement was entered into as part of a complex plan to restructure TWE that involves the exchange of cable assets, programming assets, cash, stock, and limited partnership interests among the parties to the agreement. Whatever the terms of the AOL ISP Agreement, it is highly doubtful that we could conclude with certainty that AT&T Comcast's "market power" was the only factor, or even a primary factor, in AOL's decision to accept those terms.[31] Further, AOLTW not only has interests in the broadband market as an ISP, it also is one of the nation's largest cable multiple system operators ("MSO"). Under the terms of a consent agreement with the Federal Trade Commission, if AOL enters into an ISP agreement with any of the five largest MSOs,[32] it must give unaffiliated ISPs access to its cable platform on the same terms and conditions negotiated by AOLTW in its ISP agreements with those MSOs.[33] Thus, to the extent that the terms of the AOL ISP Agreement are less than favorable from the perspective of an ISP, that fact may be due to AOLTW's interest in protecting its cable assets. In short, the terms of the AOL ISP Agreement may have been influenced by a range of factors and/or conflicting economic incentives. It is therefore unlikely that review of the substantive terms of the AOL ISP Agreement would be conclusive or critical to the ultimate question of whether the merger is in the public interest.

15. In sum, the issues that have been raised by CFA and Earthlink to which the terms of the AOL ISP Agreement may be probative are not merger-specific; they relate to business relationships between all unaffiliated ISPs and all cable operators, not only the Applicants and AOL. Those issues are, therefore, beyond the scope of this proceeding.

16. The public and the parties to a license transfer proceeding are well served by coordination between the Commission and the DOJ. Part and parcel of this coordination is Commission access to, and review of, confidential HSR materials. This review not only helps to avoid unnecessary duplication of effort, it also allows the Commission to focus its inquiry on the public interest issues that are truly relevant to a proposed transaction. Parties would be deterred from voluntarily waiving their confidentiality rights and allowing Commission staff to review HSR documents if that review compelled inclusion of those documents into the Commission's record. Separately, we have an obligation not to overreach in our discovery requests when confidential third party agreements are at issue. Consequently, we limit our document requests to those documents that, in our judgment, are likely to be necessary for our public interest analysis. In this case, we have determined that the AOL ISP Agreement is not necessary for that public interest analysis, nor is it proper to consider issues that do not fairly arise form the proposed combination.

[31] We note that AOL has not complained that the terms of the agreement are "highly unprofitable." To the contrary, AOLTW CEO Richard Parsons views the AOL ISP Agreement as "a critical opportunity to partner with a key player in the cable industry." *See* AOL Time Warner, AOL Time Warner Announces Restructuring of Time Warner Entertainment Company (press release), Aug. 21, 2002. AOLTW Chairman Steve Case said that the AOL ISP Agreement "is an important step forward in achieving our company's strategic goals" and "gives AOL a new opportunity to market its High Speed Broadband service to a broader audience." *Id.*

[32] The MSOs specified by the Consent Agreement are Adelphia, AT&T, Cablevision, Charter, Comcast, and Cox. *In the Matter of America Online, Inc. and Time Warner Inc.,* FTC Docket No. C-3989, Agreement Containing Consent Orders; Decision and Order, 2000 WL 1843019 (FTC) (proposed Dec. 14, 2000) ("Consent Agreement").

[33] *Id.* This requirement lasts for a period of five years from the date of the Consent Agreement, or December 2005.

IV. ORDERING CLAUSES

17. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 214(a), 214(c), 309, and 310(d) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), 214(a), 214(c), 309, 310(d), that the Motions are DENIED.

18. IT IS FURTHER ORDERED that the EarthLink Motion, as it relates to Exhibits that have now been filed with the Commission, is DISMISSED AS MOOT.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

DISSENTING STATEMENT
OF
COMMISSIONER MICHAEL J. COPPS

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

I respectfully dissent from the Commission's decision to deny the motions of the Consumer Federation of America and Earthlink, Inc. (Petitioners) to compel AT&T Corp. and Comcast Corporation (Applicants) to file certain exhibits into the record of this proceeding. I believe it would have been better as a matter of procedure to put the requested material into the record pursuant to a protective order and allow Petitioners an opportunity to comment on it.

The documents Petitioners sought to have entered into the record are two Internet service provider access agreements that Applicants have negotiated with an unaffiliated provider, AOL. In the course of this proceeding, Applicants have pointed to the accelerated deployment of facilities-based high-speed internet service, digital video, and other broadband services, particularly to residential customers, as one of the major public interest benefits of the proposed merger. Applicants have also pointed to their existing agreements with unaffiliated Internet service providers as evidence of their willingness to offer consumers choices with respect to the Internet service they receive over Applicants' systems. Petitioners thus contend that Applicants have placed matters pertaining to Internet access into issue in this proceeding.

Section 309 of the Act contemplates that interested members of the public will have a full opportunity to challenge license transfer applications. In addition, the Commission has recognized, in its policy governing the treatment of confidential information, that petitioners to deny generally must be afforded access to "all information submitted by licensees that bear upon their applications." Under this policy, even confidential information must be produced, pursuant to a protective order, with an opportunity for petitioners to comment.

My lodestar in all of our decisions is serving the public interest. In that vein, I believe the public interest is served when government actions and processes are conducted, to the maximum extent possible, "in the sunshine." I feel we could have served that interest, and the goals of Section 309 – while still protecting Applicants' interests in an expeditious process and preserving the confidentiality of their business information – by allowing for limited review and comment.

I recognize that Commission staff have reviewed the documents at issue and have concluded that they are not relevant to our merger analysis. By dissenting here, I do not intend to impugn Commission staff's abilities. We are quite lucky to have the quality of public servants we have here working with us at the FCC. In this situation, however, I believe the Commission's interest in the transparency and fairness of its processes would have been better served by allowing Petitioners to review and comment on the agreements at issue, under the terms of a protective order. I further believe that interest outweighs the concerns raised by the Applicants that placing the requested agreements into the record could briefly delay our decision on the merger and might jeopardize the confidentiality of sensitive business information. I therefore respectfully dissent.