

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

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, Transferee
MB Docket No. 02-70

ORDER ON RECONSIDERATION

Adopted: March 30, 2010

Released: March 31, 2010

By the Commission:

I. INTRODUCTION

1. The Commission granted its consent to the transfer of control of certain licenses from AT&T Corp. to AT&T Comcast Corporation. James J. Clancy ("Clancy") filed a petition for reconsideration, arguing that the Commission should vacate the Comcast-AT&T Order, and grant his request for a hearing relating to certain AT&T distributed pay-per-view programming. In addition, twelve individuals from Marietta, Georgia ("Marietta Petitioners"), filed a petition for reconsideration, arguing that AT&T filed unsubstantiated criminal reports against them resulting in their arrest, and that accordingly, AT&T lacks the requisite character qualifications to transfer its licenses. The Marietta Petitioners request that the Commission designate these issues for hearing.

1 See Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, 17 FCC Rcd 23246 (2002) ("Comcast-AT&T Order"). On November 19, 2002, the entities notified the Commission that the transaction was consummated, and attached a press release announcing the name of the company formed by the merger as "Comcast Corporation." See Letter from Charles W. Logan, Lawler, Metzger & Milkman, LLC, to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Docket No. 02-70 (Nov. 19, 2002). By the date Comcast Corporation filed its opposition to the petitions for reconsideration, the name change was effective. We will refer to the combined entity as Comcast Corporation in this order.

2 See Petition of James J. Clancy for Reconsideration, MB Docket No. 02-70 (filed Dec. 13, 2002); see also Comcast Corporation and AT&T Corp. Opposition to Petitions for Reconsideration, MB Docket 02-70 (filed Dec. 27, 2002); see also Reply of James J. Clancy to the Opposition to Reconsideration filed by Comcast Corporation and AT&T Corporation, MB Docket 02-70 (filed Jan. 15, 2003).

3 See Petition of Lisa Burton, Carmen (Robinson) Gonzales, Betty Maina, Tracey Massay, Osmisa Peacock, Kizzie Sanders, Anthony Scott, Deborah Maria Shepard, Maria Smith, Gloria Marie Mitchell Taylor, Zelda Tepper, and Patrick Young for Reconsideration, MB Docket No. 02-70 (filed Dec. 16, 2002) ("Marietta Petition for Reconsideration"); see also Marietta Petitioners Reply to Opposition to Petition for Reconsideration, MB Docket No. 02-70 (filed Jan. 9, 2003).

II. BACKGROUND

2. Reconsideration is appropriate only when the petitioner either shows a material error or omission in the original order or raises additional facts not known or not existing until after the petitioner's last opportunity to present such matters.⁴ It is well settled that "[r]econsideration will not be granted to debate matters upon which the Commission has already deliberated and spoken.⁵ Neither Clancy nor Marietta Petitioners have demonstrated material error or omission, or presented new matters to the Commission. For the reasons set forth below, we deny the petitions for reconsideration.

3. *Clancy Petition for Reconsideration.* Clancy seeks reconsideration of the Commission's action on his petition to deny, which the Commission denied as late-filed.⁶ The Commission also noted that supporting exhibits and attachments referenced in Clancy's petition had not been received by the staff reviewing the transfer at the time of the order's adoption.⁷ The Commission addressed Clancy's petition as an informal complaint and determined that his allegations should be treated as an enforcement matter, not as a matter to be adjudicated in the context of the license transfer applications.⁸ Subsequently, the Commission referred Clancy's allegations and evidence to the Commission's Enforcement Bureau for further action, as warranted, and to the Department of Justice ("DOJ") pursuant to the Memorandum of Understanding (MOU) between DOJ and the Commission.⁹

⁴ 47 C.F.R. §1.106(c); *see also* *WWIZ, Inc.*, Memorandum Opinion and Order, 37 FCC Rcd 685, 686 (1994), *aff'd sub nom. Lorain Journal Co. v. FCC*, 351 F.2d 824 D.C. Cir. 1965), *cert denied*, 383 U.S. 967 (1966)); *National Association of Broadcasters*, 18 FCC Rcd 24414, 24415 (2003).

⁵ *WWIZ, Inc.*, 37 FCC Rcd at 686; *see also* *Applications of William L. Carroll, et al., a General Partnership d/b/a McMurray Communications for Construction Permit for a New FM Station on Channel 247A, Lebanon, Ohio*, Memorandum Opinion and Order, 8 FCC Rcd 6279 (1993).

⁶ The petition to deny was filed more than six months after the date established for the filing of such petitions. *See Comcast-AT&T Order*, 17 FCC Rcd at 23328 n.648. Section 73.3584(a) of the Commission's rules provides that, "Petitions to Deny must be filed not later than 30 days after issuance of a public notice of the acceptance for filing of the applications" to transfer licenses. *See* 47 C.F.R. § 73.3584(a). The public notice in this proceeding was released on March 29, 2002. *AT&T Corp. and Comcast Corp. Seek FCC Consent for a Proposed Transfer of Control*, DA 02-733 (rel. Mar. 29, 2002). The deadline for the filing of petitions to deny the applications was April 29, 2002. *Id.* The pleading was filed on November 3, 2002.

⁷ *See Comcast-AT&T Order*, 17 FCC Rcd at 23328 n.649.

⁸ Clancy alleged that certain pay-per-view programming carried by an AT&T cable system was obscene and included subliminal advertising. In his petition, Clancy stated that computerized time and motion studies that he submitted showed pay-per-view features in which "the film editor inserted "subliminal frames" that read "Tune In," for 1/30 of a second (not visible to the viewer), depicting females in lewd poses within that part of the advertising previews. Clancy Ex Parte Petition to Deny, MB Docket No. 02-70 (filed Nov. 3, 2002) at 5; *see also* Clancy Petition for Reconsideration at 3, 4, 7 n.8, 12, 13, 14 n.18, 15 n.20, and 19. The Commission indicated that Clancy's petition would be referred to the Commission's Enforcement Bureau "for any further action it deems appropriate." *Comcast-AT&T Order*, 17 FCC Rcd at 23328.

⁹ In accordance with the MOU, the Commission's Office of General Counsel forwarded Clancy's complaint to DOJ's Child Exploitation and Obscenity Section so that it could process the complaint in accordance with its own rules, policies, and procedures. *See* Letter from Joel Kaufman, Deputy Associate General Counsel, Federal Communications Commission, to Andrew Osterbaan, Chief, Child Exploitation and Obscenity Section, Criminal Division, United States Department of Justice (Mar. 24, 2004); *see also* Memorandum of Understanding between the Federal Communications Commission and the Department of Justice concerning Complaints and Cases Involving Obscenity and Indecency, rel. April 9, 1991. Future DOJ action on the complaints is not affected in any way by this order.

4. Clancy argues that the Commission's rejection of his petition to deny was based upon the erroneous assumption that the allegations were unsupported.¹⁰ He asserts that the Commission improperly failed to consider the exhibits he submitted.¹¹ Clancy adds that his petition was late-filed because he "realized after two years of sending written communication" to DOJ about his complaints against AT&T, that DOJ "was not going to act on or respond" to his complaints. Clancy asserts that DOJ failed to notify the Commission about his obscenity complaints against AT&T's cable operations, and that DOJ should have done so pursuant to the MOU regarding the coordinated handling with the Commission of obscenity complaints involving cable operators and broadcasters.¹² Clancy contends that the Commission's "reference" to the timeliness of his petition to deny the transfer applications in the *Comcast-AT&T Order* is irrelevant because he is not at fault in the delay concerning notice to the Commission of the alleged obscenity violations in light of the MOU.¹³ In its opposition, Comcast points out that, although the Commission has discretion to accept late-filed materials in appropriate circumstances, it will do so only upon a showing of good cause by the requesting party, adding that Clancy did not acknowledge that his petition was untimely, show good cause for the late filing, or ask the Commission to accept the petition notwithstanding that it was filed months after the deadline.¹⁴

5. *Marietta Petition for Reconsideration.* The Marietta Petitioners allege that the Commission ignored the *prima facie* case, set out in their petition to deny, that AT&T committed acts of racial discrimination and unfair trade practices against them.¹⁵ Marietta Petitioners reference, in this regard, a civil court proceeding brought by them against AT&T.¹⁶ Marietta Petitioners assert that their allegations demonstrate that AT&T and its subsidiaries lack the character qualifications required of Commission licensees.¹⁷ Comcast argues that Marietta Petitioners' claims are: (1) unsubstantiated; (2) wholly unrelated to the merger under review; (3) the subject of then-pending state court litigation; and

¹⁰ Clancy Petition for Reconsideration at 3.

¹¹ *Id.* at 14. In support of the allegations in his petition to deny, Clancy submitted under separate cover three "time and motion studies," three videotapes and two digital video discs (DVDs) onto which he recorded the allegedly obscene programming and subliminal content.

¹² Clancy Petition for Reconsideration at 17-18.

¹³ *Id.* at 18.

¹⁴ Comcast Opposition at 2-3. Comcast concluded that the Commission "properly excluded those irrelevant claims from its review of the merger." Comcast Opposition at 4-5. Comcast did not differentiate between Clancy's obscenity and subliminal advertising allegations.

¹⁵ See Marietta Petition for Reconsideration at 6, 9, 12; see also *Petition to Deny of Lisa Burton, Carmen (Robinson) Gonzales, Betty Maina, Tracey Massay, Osmisa Peacock, Kizzie Sanders, Anthony Scott, Deborah Maria Shepard, Maria Smith, Gloria Marie Mitchell Taylor, Zelda Tepper, and Patrick Young* at 39-41, MB Docket No. 02-70 (filed Apr. 29, 2002) ("Marietta Petition to Deny"). The Marietta Petitioners allege in their petition to deny that employees of AT&T Broadband of Georgia, LLC, wrongfully accused them of cable theft, had them unlawfully arrested, and attempted to prosecute theft claims against them in Marietta criminal court. Marietta Petition to Deny at 40.

¹⁶ *Lisa Burton, et al. v. AT&T Broadband of Georgia I, LLC, et al.*, State Court of Fulton County, State of Georgia, File No. 01VS026415. The case was dismissed, with prejudice, on April 6, 2004. Telephone Interview with Lenora Hawkins, Manager, State Court Civil Division, State Court of Fulton County Georgia (Mar. 12, 2007).

¹⁷ Marietta Petition to Deny at 39-40.

(4) an inadequate basis for the Commission to deny the transfers based on character qualifications.¹⁸

III. DISCUSSION

6. We deny Clancy's petition for failure to demonstrate, pursuant to Section 1.106 of the Commission's rules, that reconsideration is warranted. Clancy's petition fails to demonstrate any material error or omission in the Commission's order, and fails to present any new evidence that would warrant reconsideration. In the *Comcast-AT&T Order*, the Commission noted that although Clancy styled his pleading as a petition to deny, it was filed more than six months after the due date for the filing of such petitions.¹⁹ Moreover, it was filed without any request that his late-filed petition be accepted or any showing that he could not have filed his petition in a timely manner. Furthermore, the evidence supporting the petition was filed even later – too late for the Commission to consider it in acting on the transfer application.²⁰ Under these circumstances, it was appropriate for the Commission to treat Clancy's pleading as an informal complaint and refer it to the Enforcement Bureau and DOJ for appropriate action.²¹ We find unpersuasive Clancy's assertions that the untimeliness of his petition should be excused on reconsideration because DOJ had the responsibility to inform the Commission of his obscenity allegations against AT&T. The Commission established filing deadlines in the Comcast-AT&T transaction to facilitate the orderly processing and review of the numerous applications at issue and any petitions filed by interested persons. Clancy's concerns about DOJ's handling of his allegations should be addressed to DOJ; they do not excuse his failure to bring his concerns about the Comcast-AT&T transaction to the Commission's attention in a timely manner.

7. In view of Clancy's failure to demonstrate material error or omission, or make known additional facts not known to him or not existing until after Clancy's last opportunity to present such matters, we deny Clancy's petition for reconsideration.²²

8. We find likewise that Marietta Petitioners have failed to demonstrate any material error or omission warranting reconsideration. Petitioners re-argue issues raised in their petition to deny, asserting no new facts heretofore not addressed by the Commission.²³ In addition, the petitioners' civil litigation was dismissed with prejudice. Thus, there is no adjudication of non-FCC misconduct by AT&T.²⁴ We therefore deny the petition for reconsideration.

¹⁸ Comcast Opposition at 6.

¹⁹ See note 6, *supra*. In this regard, the instant proceeding is unlike that in *Monroe Communications Corp. v FCC*, 900 F.2d 351, 357 (D.C. Cir. 1990), where the court found that the Commission acted arbitrarily by failing to consider a filing that was late under a newly announced policy requiring that complaints regarding obscenity be filed contemporaneously with the allegedly obscene broadcast, rather than at renewal time.

²⁰ See *Comcast-AT&T Order*, 17 FCC Rcd at 23328 n.649.

²¹ We note that Commission staff reviewed the videotapes submitted by Clancy in support of his subliminal advertising allegation and found that the words "Tune In" can be identified without difficulty when the programming is viewed at normal speed, and thus are not below the threshold of perception. Therefore, no further action was warranted regarding that allegation. See *Concerning the Broadcast of Information by Means of "Subliminal Perception" Techniques*, 44 FCC 2d 1016 (1974).

²² See 47 C.F.R. § 1.106.

²³ *Comcast-AT&T Order*, 17 FCC Rcd at 23326-27.

²⁴ The Commission's longstanding policy is that "[w]e will not take cognizance of non-FCC misconduct ... unless it is adjudicated." See *Policy Regarding Character Qualifications in Broadcast Licensing*, 102 F.C.C. 2d 1179 (1986).

IV. ORDERING CLAUSE

9. Accordingly, IT IS ORDERED that the Petitions for Reconsideration filed by James J. Clancy and the Marietta Petitioners ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary