

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of)
)
Applications for Consent to the)
Transfer of Control of Licenses)
) CS 99-251
MediaOne Group, Inc.)
 Transferor)
AT&T Corp.)
 Transferee)

To: The Commission

MOTION TO DISMISS

Consumers Union,¹ Consumer Federation of America² and Media Access Project³ ("CU, *et al.*") respectfully move for immediate dismissal of the joint applications for transfer of control of MediaOne Group, Inc. to AT&T Corp.

The basis of this motion is that the applications are facially insufficient as a matter of law, and cannot be granted in the form submitted.⁴ The defects at issue here are not trivial procedural shortcomings. Rather, they go to the heart of the central legal and policy issues raised by AT&T's proposed acquisition of MediaOne, and render the applications fatally defective.⁵

¹Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education, and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers.

²Consumer Federation of America is the nation's largest consumer advocacy group, composed of over two hundred and forty state and local affiliates representing consumer, senior citizen, low-income, labor, farm, public power and cooperative organizations, with more than fifty million individual members.

³Media Access Project is a non-profit public interest telecommunications law firm which promotes diversity and competition in the marketplace of ideas on behalf of consumer, civil rights, civil liberties and other citizens' groups.

⁴Because the issues here are of first impression in a case of international importance, this motion is submitted to the full Commission for action. *See* 47 CFR '0.321(a)(1); 47 CFR '0.321(b)(5).

⁵It also appears that AT&T has also failed to address conditions in 37 cellular telephone markets where there will be violations of the Commission's cross-block cellular restrictions.

In submitting its applications and the "*Public Interest Statement*" supporting them,⁶ AT&T has failed to comply with the certification requirements set forth in Section 76.503(c) of the Commission's rules. This provision reads as follows:

(c) Prior to acquiring additional cable systems any person or entity holding an attributable interest in cable systems reaching 20 per cent, or more, of homes passed nationwide must certify to the Commission that no violation of the national subscriber limits prescribed in this section will occur as a result of such acquisition.

47 CFR ' 76.503(c).

Other elements of Section 76.503, including the Commission's 30% national ownership cap on cable system audience reach, are not presently being enforced because of a stay the Commission has voluntarily imposed.⁷ Thus, it is now currently permissible for an applicant to receive approval of a transfer which would place it in violation of the rules at such time as the stay were to be lifted. Accordingly, the Commission has held that "the certification should only specify the incremental change the acquisition makes in terms of the 30% of households passed standard, *i.e.*, specifying the ownership in terms of homes passed before and after the acquisition is complete." *Memorandum Opinion and Order on Reconsideration and Further Notice of Proposed Rulemaking*, 13 FCCRcd 14462, 14492 (1998) ("*Horizontal Ownership FNPRM*").

The Commission has also directed that

Affected parties will be required to come into compliance with the horizontal ownership rules within 60 days of the appellate court's issue of a mandate upholding Section 613(f)(1) [the statute mandating issuance of horizontal ownership limits] and the rules, unless the Commission determines...to lift the stay at an earlier date. ***Interested parties, including in particular parties that are now entering into business arrangements that would violate the rules but for the existence of the stay, should be well aware of the existence of the rules and thus have a full opportunity to be prepared to comply with them.***

⁶*Description of the Transaction, Public Interest Showing and Related Demonstrations*, Appendix A to Applications for Consent to the Transfer of Control of Licenses of MediaOne Group, Inc., Transferor, To AT&T Corp., Transferee, (filed July 7, 1999) (*A Public Interest Statement*@)

⁷CU, *et al.* have moved to lift this stay.

Id. (emphasis added).

Despite the Commission's unambiguous directive, AT&T has provided no certification of any kind relating to the size of its present and proposed cable television holdings,⁸ much less any specification as to the "incremental change" that would transpire. And, in the face of an uncharacteristically unusual and unqualified warning from the Commission, AT&T has disdainfully put the Commission on notice that it will **not** be prepared to give up any cable systems it may acquire without a fight.

In the *Public Interest Statement*, AT&T makes plain its abject refusal to submit to the Commission's ownership attribution policies, especially the provision which defines 5% equity interests as attributable ownership interests. In numerous press briefings and appearances before Wall Street analysts meetings, AT&T's highest level executives have bluntly announced their refusal to adhere to current FCC ownership definitions. Indeed, AT&T's General Counsel has said that these rules are "absurd." "AT&T Household Reach to be Issue in MediaOne Merger Review," *Communications Daily*, May 10, 1999, p.3.

It bears emphasis that the Commission's ownership definitions are not stayed insofar as they are necessary for compliance with the certification requirement of Section 503(c). Moreover, the very same definitions have been employed by AT&T, MediaOne and others without challenge in connection with enforcement of the Commission's cable-cross ownership rules. 47 CFR ' 76.501. AT&T and MediaOne have previously abided by that rule, as well as an even more stringent variation employed in the Commission's program access rules, 47 CFR ' 76.1000.

AT&T's approach borders on the contumacious. AT&T does at one point say that it

⁸Scattered throughout the *Public Interest Statement*, are some general data pertaining to AT&T and MediaOne cable systems, but even if aggregated and certified, these data would by no means satisfy the specific and unambiguous requirements of 47 CFR ' 76.503(c).

"will comply with all Commission rules." *Public Interest Statement*, p.60. However, this assurance is not what it seems. Rather, it is in the context of AT&T's "acknowledge[ment] that it will be subject to the general rules established in the ongoing rulemaking proceeding that is the subject of reconsideration and appellate review." Thus, AT&T is actually doing no more there than repeating its position that that it would comply with some future version of the horizontal ownership rules, once adopted.

With respect to the provisions that are being enforced, AT&T entirely ignores the certification requirement as well as the 60 day divestiture condition. Instead, it blandly assures the Commission that

if, under rules the Commission adopts, AT&T exceeds the permitted level of horizontal ownership, it will either obtain an appropriate waiver based on the benefits to competition that will not otherwise be achieved, or bring itself into compliance with the rules.

Id. Significantly, despite notice from the Commission, AT&T makes no effort to acknowledge, much less promise to adhere to, the stringent 60 day divestiture requirement.

This is not accidental or inadvertent non-compliance. Rather, it is a consequence of AT&T's extraordinary and contemptuous public campaign attempting to blackmail the Commission into changing its horizontal ownership rules to suit AT&T's wishes.

Nor can AT&T be said to have engaged in principled civil disobedience. It is not making a challenge based on principle. It does not candidly acknowledge its noncompliance. Instead, it cloaks its non-compliance in rhetoric and coy assurances.

The AT&T applications are facially incomplete and defective. They cannot be granted in the form submitted. AT&T has not provided the certification required under 47 CFR ' 503(c). The ownership interests for which it seeks authorization would appear to place it far beyond the Commission's 30% cap, but it ventures no plan for coming into compliance, much

less doing so within 60 days.

Accordingly, the application must be dismissed.

CONCLUSION

Wherefore, CU, *et al.* ask that the Commission dismiss the AT&T/MediaOne application as fatally defective, and grant all such other relief as may be just and proper.

Respectfully submitted,

Andrew Jay Schwartzman

Of Counsel:
Randi M. Albert

Harold Feld

Cheryl A. Leanza
MEDIA ACCESS PROJECT
1707 L Street, NW
Suite 400
Washington, DC 20036
202-232-4300
Counsel for CU, *et al.*

August 17, 1999