

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

To: The Commission

COMMENTS OF
CONSUMERS UNION,
CONSUMER FEDERATION OF AMERICA,
and
MEDIA ACCESS PROJECT
ON *EX PARTE* COMMENTS OF AT&T CORP. AND MEDIAONE GROUP, INC.

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INTRODUCTION

Consumers Union, Consumer Federation of America, and Media Access Project ("CU, *et al.*") respectfully submit this response to *Ex Parte* Comments of AT&T Corp. and MediaOne Group, Inc. ("*Ex Parte* Comments") filed in the above-reference proceeding on November 24, 1999. AT&T/MediaOne's *Ex Parte* Comments were filed in response to the October 26, 1999 letter from the Cable Services Bureau of the Federal Communications Commission ("FCC" or "Commission") requesting that AT&T document its post-merger compliance with the Commission's cable TV horizontal ownership rules.

The *Ex Parte* Comments are consistent in tone and substance with prior AT&T/MediaOne submissions in this proceeding. As before, AT&T/MediaOne start by declaring that they do not recognize the validity of the horizontal ownership rules because the Commission has voluntarily stayed their enforcement. *Ex Parte* Comments at 2, n. 2. Thereafter, the comments flagrantly ignore the FCC's clear and recently reaffirmed emphasis on attributing ownership based on the ability to influence another cable operator, and instead adhere to their own version of law as they prefer it to be. On this basis, AT&T/MediaOne provide supercilious assurances that the transaction would add only about 1.3 million cable subscribers to AT&T's holdings. Significantly, they have **not** requested a waiver. Nor have they provided the certifications which would be required under their theory that the merged firm's 25% interest in Time Warner Entertainment ("TWE") could be "insulated" under the FCC's recently amended ownership standards.

SUMMARY

The proposed AT&T/MediaOne merger will definitively establish the structure of the cable television industry for the foreseeable future. Consolidation has placed virtually all but the most

rural of the nation's TV homes in the hands of approximately 10 MSO's. The proposed merger between AT&T and MediaOne presents the prospect of an unprecedented level of horizontal concentration in the cable/video programming markets. Indeed, once the assets and interests of AT&T/TCI, MediaOne, and the Time Warner Entertainment limited partnership ("TWE") are combined, together controlling some 60% of the nations cable homes, very little more concentration that could conceivably occur. In short, the remaining owners will have little opportunity to do anything but remain in their present structure or to consolidate into a third, somewhat smaller MSO. There will not be a fourth major MSO.¹

AT&T/MediaOne labor to downplay AT&T's existing and contemplated role in the video programming marketplace. These considerations, however, do not belong in an evaluation under the cable horizontal ownership rules of the proposed combination of the vast assets and interests of AT&T/TCI/Liberty and MediaOne/TWE. The Commission must apply its logical, enforceable and traditional model for defining ownership interests in media firms capable of dominating the marketplace of ideas, as recently reaffirmed with respect to both broadcasting and cable. It should ignore AT&T/MediaOne's attempts to deflect attention from AT&T's ever-widening influence over all aspects of the cable and video programming industries.

The central issue here should be a bright beacon through the fog of rhetoric AT&T/MediaOne have attempted to generate: it is whether the proposed merger implicates the concerns which impelled Congress to direct the FCC to adopt a horizontal ownership limit and permit the monopsonistic influence over the video programming marketplace which the Commission's rules

¹*Horizontal Ownership FNPRM*, 13 FCCRcd 14462, 14507 (1998) (separate statement of Commissioner Tristani, dissenting in part).

were designed to foreclose.

- A. The Goal of This Proceeding Is To Gauge the Proposed Merger's Compliance With the Horizontal Ownership Limit Mandated By Congress and Crafted By the Commission.

Underlying the staff's current inquiry is the Congressional directive that the Commission adopt a national horizontal ownership limit to permit the development of meaningful competition in the video programming market.

In directing the Commission to establish horizontal limits, Congress acted on the premise that excessive concentrations in the cable industry provided cable operators both the incentive and the ability to engage in anticompetitive acts.² Long before the recent wave of consolidation, Congress made express statutory findings that cable operators were in a position to deny access, or discriminate in access, to the cable platform.³

Although enforcement of most aspects of the FCC's rules implementing the ownership cap, have been stayed, albeit without rational explanation, the Commission has nonetheless required the largest cable operators to report on their ability to comply with the horizontal ownership limits. AT&T/MediaOne's initial "Public Interest Statement" made no attempt to demonstrate compliance under the then-existing rules until the Commission called upon them to do so. Their proposed merger seeks to combine not only significant interests in the three of the four largest cable operators, but their respective vast video programming holdings as well.

AT&T/MediaOne have attempted to craft a Potemkin marketplace of illusory competition

² See, e.g., 1992 Cable Act at § 2(a)(4).

³ H.R. 4850 Committee Report (Report 102-628) at 32.

premised upon wildly implausible premises and wholly unbelievable promises. It is hard to imagine how this could *possibly* comport with a legislative belief that undue horizontal concentration “could discourage entry of new programming services, restrict competition, impact adversely on diversity, and have other undesirable effects on program quality and viewer satisfaction.” H.R. 4850 Committee Report (Rpt. 102-628) p. 43. Even a master novelist could not make this scenario rise to the level of fiction.

B. AT&T and MediaOne Repeatedly Attempt to Redirect Attention From The Central Issue: Whether the Unprecedented Combination of the Assets and Interests of AT&T/TCI/Liberty With Those of MediaOne/TWE Would Cause Harm to the Video Programming Marketplace.

AT&T and MediaOne insist that the merged entity will not violate the FCC’s horizontal ownership cap – an assertion that they can maintain only by concluding that the Commission will not attribute MediaOne’s 25.51 percent limited partnership interest in TWE to the combined AT&T/MediaOne. Indeed, despite all of the hoopla surrounding the announcement of the deal, AT&T now assures the Commission that the merger is, in effect, an insignificant transaction -- adding only 1.3 million subscribers to AT&T’s cable holdings.

FCC approval of the proposed AT&T/MediaOne merger should turn on a cold-blooded assessment of the video programming marketplace. The Commission must not allow AT&T/MediaOne to cloud the issue with elaborate sideshows based on the commentary of their designated legal scholar, Professor John Coffee.

The real lesson to be learned from AT&T's filing is that if one needs a Columbia Law School professor to prove that a contract affords independence, it does not afford independence. Rather, the elaborate arrangements so characteristic of the cable industry were created to assure

interdependence and maintain industry discipline. The contract terms are far less enforceable in fact than in theory, making them especially well suited to paint over the binds of a monopsony.

For example, AT&T/MediaOne's rely heavily on the fact that on August 3, 1999 MediaOne notified Time Warner that it was terminating a key non-compete clause in their partnership, retroactive to December 1998. AT&T/MediaOne claim that this demonstrates that MediaOne's connections with TWE are attenuated and remote. *Ex Parte* Comments at 9-10.

The alleged basis justifying the convenient retroactivity in this supposedly compelling demonstration of independence was that it became possible "because of various Time Warner actions,... [which] are unrelated to, and have no bearing on, attribution of TWE subscribers...." *Ex Parte Comments* at 10 n. 22.

In other words, it took MediaOne **eight months** to determine that Time Warner committed a material breach of the partnership agreement. How does one expect the FCC to evaluate such claims going forward? And how quickly?

AT&T's fantastic claims fly in the face of reality. The fact is that AT&T has promoted its proposed merger with MediaOne to investors as a combination of the enormous assets of not just the merger parties, but those of TWE as well. Its initial presentation to Wall Street analysts, perhaps before the regulatory lawyers weighed in, emphasized the claim that the merger would "strengthen [the] outlook for telephony Jvs [joint ventures] with other MSOs" as well as "enhance [the] existing relationship" with Time Warner. See *Ex Parte* Letter from Larrie M. Marcel, Sidley and Austin to Secretary, FCC, December 6, 1999, Exhibit 4(c)-18, p. 15.

When the proposed merger between AT&T and MediaOne was announced, however, industry consensus held that the FCC's rules in place at that time, though stayed, posed a serious

obstacle to merger approval. Indeed, it was generally agreed that the combination would result in a single entity having an attributable interest in cable systems passing over two-thirds of homes nationwide. Nevertheless, ignoring this reality, AT&T and MediaOne boldly contended that the merger faced no significant regulatory hurdles. Further ignoring reality -- and the Commission's rules -- the Public Interest Statement filed by the merger parties failed to demonstrate (as required under Section 76.503(c) of the FCC's rules) that the proposed transaction complied with the FCC's horizontal ownership rules. *See generally*, Motion to Dismiss of CU, *et al.*

Adhering to the position that it has held throughout this case, AT&T and MediaOne persist in discussing the transaction based upon the irrelevant claim that it does not "control" Liberty Media and the other companies in its elaborate web. But those are the rules AT&T/MediaOne would like to have but was unable to obtain.⁴ They are not what the Commission has established as controlling law. In fact the Commission has rejected the "control" test for broadcasting as well as cable, adopting a broad additional body of case law supporting its conclusions. *See Attribution of Broadcast and Cable/MDS Interests* 14 FCCRcd 12559 (1999).

⁴TCI (now AT&T) unsuccessfully argued in the Commission's cable ownership rulemaking that an attribution standard based on operational control is "the least restrictive and most efficient method for the Commission to identify attributable interests." *Attribution Order* at ¶ 23. However, the Commission found that the control test does "not take into account the variety of ways that an investor may exert influence or control over a company. An individual or firm does not need actual operational control over ... a company in order to exert influence." *Id.* at ¶ 36. Despite this explicit rejection by the Commission, AT&T has repeatedly invoked the language of the control test in its *Ex Parte* Comments and in the press. *See, e.g.*, Mark Leibovich, "Foes Place Ads Hitting AT&T-MediaOne Deal," *The Washington Post*, May 7, 1999, at E1 (AT&T General Counsel and Executive Vice President James Cicconi said, "I would argue that if you are talking about control, you are talking about the companies we own and operate."); and, Paul Farhi, "AT&T: Too Big Once Again: Critics See Cable Behemoth Forming," *The Washington Post*, April 27, 1999, at E1 (Cicconi said, "It [the merger] does not give us an inordinate degree of control....").

C. The *Ex Parte* Comments Of AT&T And MediaOne Continue To Demonstrate Their Unwillingness To Accept The Commission's Rules As Written.

To appreciate the true audacity of AT&T's approach, and the utter injustice should it prevail, one need only look at the Commission's steadfast refusal to alter its views on insulation criteria. For the last 14 years, the Commission has refused countless entreaties to relax its insistence that limited partners seeking to have their holdings deemed non-attributable must present for review their limited partnership agreement along with a certification that the agreement explicitly sets forth seven specific criteria of insulation. See *Twentieth Century Corp.*, 4 FCCRcd 4052 (1989). Simply stated, AT&T/MediaOne have not fulfilled this threshold requirement, and their application is deficient on its face.

Since the Commission released its revised cable horizontal ownership limits and attribution rules, AT&T and MediaOne have continued to substitute their own conceptions of the rules for the actual rules. Indeed, their inexplicably late-filed *Ex Parte* Comments are an all-too perfect example of their continued unwillingness to adhere to the rules as they are written. Instead of actually documenting how the interest in TWE would be non-attributable under the Commission's rules - an issue which they concede is dispositive of their ability to meet the 30% limit. They offer no real analysis of the significant horizontal cap issues presented by the proposed merger, simply stating that the combined entity complies. In so doing, the merger parties have taken the position that the minor change the Commission has made to its limited partnership insulation criteria to "reflect the dynamic nature of the communications marketplace," see 47 USC § 613(f)(2)(E), constitutes the Commission's implicit approval of the AT&T/MediaOne transaction without

modification.⁵

Reduced to essentials, AT&T/MediaOne propose no significant changes to MediaOne's interest in or relationships with TWE. Rather, AT&T essentially takes the position that the Commission's "fix" to the horizontal cap attribution criteria has magically rendered the interest it will obtain in TWE non-attributable.

D. Appropriately Applied, The Commission's Revised Rules Continue To Pose A Virtually Insurmountable Obstacle To The Proposed Merger Absent Substantial Restructuring.

Far from justifying AT&T's view, however, the Commission's recent Orders making modest revisions of the cable horizontal ownership limit⁶ and attribution rules⁷ overwhelmingly reaffirm the concerns underlying these rules. While concluding that the attribution rules should be revised to allow for greater relationships between and among cable operators to enhance competition to incumbent local exchange carriers in the provision of telephony and data service, the Commission recognized that it must maintain safeguards to protect the video programming market from the exercise of cable operator's monopsony power.

In the horizontal ownership proceeding the Commission forcefully reaffirmed the importance of the statutorily mandated ownership limit; specifically rejected any sort of manage-

⁵See *ex parte* Letter of CU *et al.* to Chm. William Kennard in Docket No. 92-262 (Cable Television Horizontal Ownership Regulations), October 1, 1999.

⁶*In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Horizontal Ownership Rules*, MM Docket No. 92-264, FCC 99-289 (rel. Oct. 20, 1999) ("*Horizontal Order*").

⁷*In the Matter of Implementation of Section 11(c) of the Cable Television Consumer Protection and Competition Act of 1992, Review of Commission's Cable Attribution Rules*, CS Docket Nos. 98-82, 96-85, FCC 99-288 (rel. Oct. 20, 1999) ("*Attribution Order*").

ment/control test to determine whether one cable operator would be deemed to hold an attributable interest in another; (*Attribution Order* at ¶36) and reaffirmed the insulation criteria that limited partners need to meet in order to be non-attributable (*Attribution Order* at ¶64).

The Commission made one change of substance with respect to attribution. CU, *et al.* believe this change both legally unsustainable and completely at odds with sound policy, but for immediate purposes, it is important only to emphasize that this change was of narrow scope, albeit capable of permitting high levels of mischief. To “reflect the dynamic nature of the communications marketplace,” the Commission adopted a more narrow definition of the areas in which a limited partner must be insulated in order to be deemed non-attributable. Under the old rules, a limited partner could not be involved, directly or indirectly, in the *mass media-related* activities of the partnership in order for its interest to be non-attributable; the new rules preclude any material involvement in the *video programming-related* activities of the partnership.

Thus, to conclude that the merged entity’s interest in TWE will not be attributable, the FCC must affirmatively find that the myriad relationships between AT&T, TWE, and their various video programming interests will not implicate the concerns of both Congress and the Commission that underlie the horizontal ownership limit. As demonstrated below, however, the merged entity’s video programming relationships with TWE will go far beyond those allowed for limited partners seeking to claim “insulation” and non-attributable status. Because these multiple relationships and AT&T/MediaOne’s influence over virtually all areas of the video programming marketplace preclude a finding that AT&T’s interest in TWE is non-attributable, it is clear that the merged entity will far exceed the Commission’s horizontal ownership limits.

PRELIMINARY OBSERVATION

At the outset, CU, *et al.* must regretfully observe that the circumstances of the AT&T/MediaOne submission are as unsettling as the substantive aspects discussed below. Once the Commission voted upon its new rules on October 8, 1999, AT&T/MediaOne were on notice as to the kind of submission which would inevitably be required of them. The October 26 FCC staff letter contemplated that AT&T would submit its response no later than November 12. Although AT&T did not file until two weeks later, the record does not reflect that AT&T/MediaOne requested, much less received, an extension of time for the filing.⁸ It would appear that AT&T/MediaOne, which have two large in-house legal offices available, and at least two of the nation's largest law firms at their disposal, simply took the time they felt they needed.

AT&T/MediaOne had six weeks to prepare their comments. Once they perfected them, on the afternoon before Thanksgiving Day, the Commission staff suddenly began to move with alacrity. By the time most people next returned to their offices the following Monday, the hard-working FCC staff had published a public notice giving citizens groups and others but two weeks to address what AT&T/MediaOne had worked on for three times longer. The public notice also established an unprecedented and stunningly brief window for further *ex parte* presentations. Together, these actions appear to signal a sudden rush to judgment.

This is all too consistent how this proceeding has been administered all along. From the moment the AT&T/MediaOne transaction was proposed, the two companies have proceeded with

⁸It is quite possible that an oral request was made in one of the numerous *ex parte* communications between AT&T/MediaOne and the Commission. If so, it is not reflected in the superficial and incomplete summaries the firms have later filed.

haughty disrespect for the Communications Act and FCC rules and policies promulgated thereunder. They first assured the press and Wall Street that approval would be automatic, and that to the extent that the Commission's ownership attribution rules appeared to preclude such action, they were, in the word of AT&T's General Counsel, "absurd."⁹

Astonishingly, the Commission and its staff have compliantly tolerated this arrogance. For example, as CU, *et al.* demonstrated in a complaint filed on August 17, 1999, AT&T consistently failed to provide timely certifications as to its ownership reach required under those aspects of the ownership rules which are **not** being stayed. Once this was brought to light, AT&T misrepresented what its practices had been. See *Opposition of AT&T Corp. and MediaOne Group, Inc. to Motion to Dismiss*, filed August 28, 1999; *Complaint of CU et al. Against AT&T Corp. and Tele-Communications, Inc. for Misrepresentation to the Commission, Willful and Repeated Violations of 47 CFR §76.503(c) and for Lack of Candor*, filed October 7, 1999.

Most troubling, the Commission time after time stood by as AT&T violated the certification requirement. Even when AT&T failed entirely to file certifications until after transactions had closed, the Commission studiously avoided any enforcement action. Now, four months after CU, *et al.* have filed a complaint setting out these transgressions in specific detail, the Commission remains inert, sending a clear message that it places a much higher priority on processing applications than on vindicating its own rules.

CU, *et al.* have attempted to interpose objections to this administrative version of the old fashioned "bum's rush." See, *e.g.*, Letter of CU *et al.* to Deborah Lathen, November 9, 1999.

⁹"AT&T Household Reach to Be Issue in MediaOne Merger Review," *Communications Daily*, May 10, 1999.

In particular, CU, *et al.* objected to the atypical and inappropriate use of "permit but disclose" procedures for a Title III license adjudication. Commission staff assurances that the procedures employed here are less resource intensive are surely correct, but just as surely are beside the point. If a party presents the Commission with a transaction which is so large that it is hard to administer, that is no reason to change the rules to the favor of that applicant. The Commission's first and second jobs are to protect, and then promote, competition. Accommodating merging parties is secondary by comparison.

CU, *et al.* do not stand alone in their objections to these abuses of the *ex parte* procedures. Just two years ago, the Federal Communications Bar Association, among others, "raised objections to the broad use of permit-but-disclose procedures in adjudications," in the Commission's rulemaking revising and strengthening the *ex parte* rules. *Ex Parte Presentations in Commission Proceedings*, 12 FCC Rcd 7348, 7351 (1997). The Commission endorsed the FCBA's views and abandoned plans to employ the very practices which have been used to rush AT&T's applications along on their way. The FCBA had "contended that allowing *ex parte* presentations in informal adjudications would foster the appearance that some parties have greater access to the decision-maker than others." In addition, it

expressed concern that -- in the case of oral presentations -- disclosure procedures would neither fully reflect the presentation nor substitute for an opportunity to be present and thus be unfair to a party.

Id. Heeding those objections, the Commission declared that

We have been persuaded by the concerns expressed by experienced practitioners that our proposal would be disruptive in adjudicatory proceedings. ***In addition, we do not wish to adopt a policy that commenters believe would create the appearance of unfairness.*** We have therefore decided to continue to treat as restricted proceedings most informal (*i. e.*, non-hearing) adjudications."

Id., at 7351-52. Only last month, the Commission reaffirmed this holding on reconsideration. FCC 99-322 (released Nov. 9, 1999).

ARGUMENT

I. THE PROPOSED MERGER WILL RESULT IN A VAST MOSAIC OF INTERTWINED CABLE SYSTEM AND VIDEO PROGRAMMING-RELATED INTERESTS.

In analyzing the combination of AT&T and MediaOne for compliance with the horizontal ownership rules, the Commission must, of course, act in light of Congress' and the Commission's concerns regarding competition in the video marketplace. The Commission set the horizontal ownership cap at 30 percent to ensure that "no single cable operator 'or group of cable operators' can 'unfairly impede the flow of video programming from the programmer to the consumer.'" *Horizontal Order* at ¶ 39, quoting 47 USC § 553 (f)(2)(A). The horizontal ownership rules therefore gauge the market power that an entity could potentially assert through ownership of cable systems.¹⁰

A. The Aggregation of AT&T and MediaOne Would Produce the Nation's Largest Cable Operator.

The proposed merger of two of the world's largest media companies, AT&T and MediaOne, would add MediaOne's cable systems serving 5.1 million subscribers, passing 8.4 million homes, and located in 26 of the top 100 markets, (including 8 markets with more than 200,000 subscribers), to AT&T's coffers.¹¹ With the acquisition of MediaOne, AT&T will have a "significant

¹⁰See *id.* at ¶ 54. ("With more MSOs making purchasing decisions, this increases the likelihood that the MSOs will make different programming choices and a greater variety of media voices will therefore be available to the public.")

¹¹See <http://www.mediaonegroup.com/whatweoffer/index.html>.

presence” in 18 of the top 20 markets.¹² AT&T will also acquire MediaOne’s 25.51% limited partnership interest in TWE, the second largest MSO after AT&T.¹³

B. The Proposed Merger Would Bring Together a Substantial Number of Video Programming Assets.

In addition to these extensive cable system holdings, the proposed merger would also consolidate a large number of programming services, including those owned by Liberty Media Corporation, Rainbow Media, MediaOne, and TWE.

In describing these holdings, AT&T/MediaOne depart from any semblance of adhering to Commission case law. They describe attributable relationships and simply claim non-attribution. This is bold, but it is not persuasive. Admitting to being “a little bit pregnant,” AT&T/MediaOne describes these widespread interests in cable programming as “minority and non-managing, and in nearly all cases, indirect in nature.” *Ex Parte Comments* at 16. However, even cursory review shows not only that some of these interests are direct and majority interests, but, when viewed in the aggregate, it is clear that the merger will cause the video programming interests of AT&T and TWE to become even more heavily and inextricably intertwined.

1. Liberty Media Group

The Liberty/AT&T relationship is discussed at some length in CU, *et al.*'s original challenge to the AT&T/MediaOne transaction. See August 23, 1999 Petition to Deny pp. 27-30.

¹²“AT&T Offers \$62 Billion in cash, stock, and assumed debt and preferred equity for MediaOne Group,” AT&T News Release, April 22, 1999.

¹³See <http://www.mediaonegroup.com/whatweoffer/index.html>. TWE cable systems pass 15.25 million homes, serving 9.7 million subscribers. See *AT&T/MediaOne Public Interest Statement*, CS Docket No. 99-251, filed July 7, 1999, at n. 151 (“*Public Interest Statement*”).

To treat Liberty as distinct from AT&T is lunacy.

As a preliminary matter, CU *et al.* observe that AT&T's predecessor company, TCI, previously "spun off" and "reconsolidated" Liberty Media on two prior occasions before helping engineer the AT&T transaction. As this suggests, the intimacy and interdependence of the TCI/Liberty relationship cannot be overstated, whatever formal separations may exist on paper.¹⁴ The Commission must take note of this relationship, since "evaluating the insulation criteria as applied to specific parties is not a formulaic analysis, but rather is fact-intensive."¹⁵

AT&T owns 100 percent of the stock of Liberty Media Corporation, which wholly owns Liberty Media Group ("Liberty"). See *Public Interest Statement* at 9. Liberty has interests in a wide array of programming services,¹⁶ including: Discovery Communications,¹⁷ which includes among others, the Discovery Channel, the Learning Channel, and Animal Planet (49% interest);

¹⁴It is of considerable import that Liberty and AT&T are "content partners" for delivery of Internet services, a venture which threatens to transform the Internet into the monopoly content oriented model Liberty and TCI (now AT&T) have used for video.

¹⁵*In re Applications of BBC Licensee Subsidiary, L.P.*, 10 FCC Rcd. 7926 (1995), at ¶ 35.

¹⁶See Liberty Media Corporation *Report to Investors*, "Cable, Satellite, and Broadcast Television Networks," May, 1999 ("Liberty Report to Investors").

¹⁷Discovery is a rapidly growing documentary maker that now has seven digital channels. See Neil Weinberg, "Taking Liberty," *Forbes*, Oct. 18, 1999, at 133 ("Taking Liberty"). Furthermore, "Consumer research consistently cites Discovery as one of the most recognized and respected brands in the U.S." Liberty *Report to Investors*, Letter to Shareholders.

USA Networks (21%); BET (35%); QVC¹⁸ (43%), Court TV¹⁹ (50%); TV Guide, Inc.²⁰ (44%); the Golf Network (35%); MacNeil/Lehrer Productions (67%); E! Entertainment Television (10%); Encore Media Group,²¹ which includes among others, Encore and STARZ! (100%); Odyssey (33%); and the International Channel (90%). Indeed, Liberty is “endowed with arguably the world’s richest trove of media assets” and owns “significant chunks” of 22 of the top 50 cable channels and seven of the ten fastest growing program services. “Taking Liberty” at 127.

Liberty not only controls several program services directly, but is also an active participant in the program services in which it invests. Dr. John C. Malone, the Chairman of the Board of Liberty and an AT&T director, is also a director of BET Holdings II, Inc., Discovery Communications, Inc., and USA Networks, LLC.²² Robert R. Bennett, President and CEO of Liberty, is a director of USA Networks, LLC, TV Guide, Inc., Discovery Communications, Inc., BET Holdings II, Encore Media Group, E! Entertainment Television, Court TV, and Odyssey. See *id.* Gary S. Howard, Executive Vice President and COO of Liberty, is on the Board of TV Guide, Inc. See *id.*

¹⁸QVC is “unmatched in TV sales know-how.” “Taking Liberty” at 133.

¹⁹Court TV, which provides coverage of live and taped legal proceedings, was available in approximately 32 million homes at the end of 1998. See Time Warner, Inc. 1998 Form 10-K, filed March 26, 1999.

²⁰“TV Guide, Inc. markets and distributes products in the United States to over 100 million cable and satellite homes every week.” Liberty *Report to Investors*, Letter to Shareholders.

²¹Encore Media Group is the “fastest growing provider of cable and satellite-delivered premium movie networks in the United States. Its 13 domestic networks with 26 different feeds reach over 49 million pay units.” Liberty *Report to Investors*, Letter to Shareholders. Furthermore, Encore is now number two in pay channels. See “Taking Liberty” at 133.

²²See http://www.LibertyMedia.com/liberty_glance/02-index.html.

Liberty also owns about 10 percent of Time Warner, Inc., which in turn owns 74.49% of TWE. See “Taking Liberty” at 133. While the shares held by Liberty are, pursuant to the Time Warner/Turner Consent Decree, non-voting, the Federal Trade Commission (“FTC”) found that the inability to vote these shares, on its own, was **insufficient** to eliminate the opportunity for influence.²³ See *Petition to Deny*, pp. 27-30. Attempting to eliminate the potential for influence among these interrelated companies, the FTC placed a number of restrictions on Time Warner, TCI, and Liberty.²⁴ This FTC finding demonstrates that even at the time of the Time Warner/Turner merger, there was a concern for the intermingling of Time Warner and Liberty, a concern which is even more pressing now with the proposed union of AT&T and MediaOne.

Even accepting AT&T’s depiction of Liberty as “operationally independent” and “structurally separate” from AT&T, *Ex Parte Comments* at 17, AT&T retains a great ability, through ownership, positional interests, and mutual programming supply relationships, to influence Liberty. AT&T has the right to elect three of the nine directors to Liberty’s Board.²⁵ These AT&T representatives on Liberty’s Board are: John D. Zeglis, AT&T President; Daniel E. Somers, AT&T Senior Executive Vice President and CEO of AT&T Broadband and Internet Services; and

²³See *In the Matter of Time Warner, Inc., Turner Broadcasting System, Inc., Tele-Communications, Inc., and Liberty Media Corporation*, FTC Docket No. C-3709 (rel. Feb. 3, 1997) (“*FTC Consent Decree*”).

²⁴These FTC conditions included, among others: divesting TCI and Liberty of their interests in Time Warner to a separate company; disallowing concurrent officers, directors, or employees between TCI, Liberty, and the separate company; restricting TCI’s and Liberty’s chairmen’s ownership interests in Time Warner; and restricting programming service agreements between Time Warner, TCI, and Turner for six months following the Closing. See *id.*

²⁵See *AT&T/MediaOne Response to November 4, 1999 Request for Information*, Question 3, November 22, 1999.

John C. Petrillo, AT&T Executive Vice President of Corporate Strategy and Business Development.²⁶ Under Commission attribution rules, this right alone would preclude any finding that AT&T's interests in Liberty should somehow be deemed nonattributable and is clear evidence of the significant influence (if not outright control) that AT&T can exert.

Last, but by no means least, the most troublesome and unenforceable source of common interests among AT&T and Liberty is the presence of three high-level officers on the Liberty Board. One of those is Dr. John C. Malone, the Chairman of the Board of Liberty. Dr. Malone is evidently one of the largest individual shareholders of AT&T,²⁷ and also sits on the AT&T Board.²⁸ The relationship is not accidental, and it is not susceptible to neutering; in fact, in the AT&T/TCI merger, Dr. Malone was added to AT&T's Board specifically to "understand and reflect issues of concern to the Liberty Media Group and the holders of Liberty Media Group tracking stock." *AT&T/TCI Public Interest Statement* at 12. Thus, ***Malone sits on AT&T's Board for the specific purpose of representing Liberty's interests.***

Dr. Malone's personal history is also of relevance. His direct, hands-on role in designing and executing the cable industry's anti-competitive practices were singled out repeatedly during the debate on the 1992 Cable Act.²⁹ To construe the Act as permitting his interests to be treated

²⁶See *id.* See also, <http://www.att.com>.

²⁷Malone owns 32 million AT&T shares. He also holds 4 percent of the equity, 33 percent of the vote, and controls the Board of Liberty. See "Taking Liberty" at 128, 130, 132.

²⁸See http://www.LibertyMedia.com/liberty_glance/02-index.html.

²⁹See, e.g., 138 Cong. Record S.408 (January 27, 1992), statement of Senator Ford ("when people want to do business in the cable business, they have to talk to John Malone -- chairman of TCI").

as insulated from the cable TV MSO he operated for the last generation would be the ultimate act of perverse formalism.

2. Rainbow Media

AT&T owns a 33% interest in Cablevision Systems Corporation, which owns 75% of Rainbow Media Sports Holdings, Inc. (“Rainbow”). *See Public Interest Statement* at 12. Rainbow has an interest in numerous programming services, including: Fox Sports Net (50%), Regional Programming Partners (60%), American Movie Classics, Romance Classics, Bravo, Bravo International, The Independent Film Channel, AMC Music Pop, MuchMusic, and News 12 Network. *See id.* AT&T has the right to nominate two directors to Cablevision’s Board.

3. MediaOne

Now, AT&T seeks to add the programming services in which MediaOne has an ownership interest. MediaOne owns 50 percent of New England Cable News and Fox Sports New England. *See Public Interest Statement* at 17. Additionally, MediaOne has less than majority interests in: Food Network, Sunshine Network (in which Liberty also has an interest), Music Choice, E! Entertainment Television (in which Liberty also has an interest), Viewers Choice (in which AT&T also has a 33 percent interest), Speedvision, and Outdoor Life. *See id.*

4. TWE

Finally, AT&T seeks to acquire MediaOne’s 25.51 percent interest in TWE. TWE owns 100 percent of HBO and Cinemax and 50% of Comedy Central and Court TV (co-owned with Liberty). *See id.* at 16-17

These programming interests, moreover, do not stand in isolation from AT&T’s cable holdings. Liberty, Rainbow, and all of AT&T -- as one of the largest purchasers of video pro-

gramming -- will have ongoing dealings with the other programming services in which AT&T/MediaOne hold interests.

In sum, even before working through the attribution analysis, the array of cable system and video programming assets that this proposed merger would bring together are startling. If horizontal ownership limits are to have any use in preventing the harms to the video programming marketplace that Congress identified will flow from cable industry consolidation, the Commission must take into account these multiple relationships arising from the proposed merger. As demonstrated below, at least in this instance, the Commission's horizontal ownership attribution rules recognize AT&T's pervasive influence and, when properly applied, cause the merged entity to far exceed the 30% limit.

II. IN LIGHT OF THESE MULTIPLE RELATIONSHIPS BETWEEN AT&T AND TWE IN THE VIDEO PROGRAMMING MARKETPLACE, AT&T'S INTEREST IN TWE FOLLOWING THE MERGER WOULD BE FULLY ATTRIBUTABLE TO THE MERGED ENTITY.

Against this backdrop, the Commission has requested AT&T to demonstrate how the merged entity will comply with the 30% horizontal ownership limit. Given the significant issues presented by the merger, and the widespread view that it flies in the face of any reasonable horizontal ownership limits, one would expect AT&T to have grappled with the hard issues. The failure to offer to make any significant changes to the structure of the transaction or to venture any serious arguments in defense of the existing structure under applicable law is puzzling and troublesome. That is because it is impossible to posit that this transaction will pass muster, but AT&T exudes confidence that it can push and bully its way through to approval, regardless of what the law might require.

Based on the *Ex Parte* Comments, AT&T/MediaOne manifest a fundamental failure to appreciate of the magnitude of the problems presented by the proposed merger. They simply ignore applicable attribution standards in favor of an implausible assurance that the combined company will be in compliance with the horizontal ownership limit because the 25.51% limited partnership interest that AT&T will obtain in TWE is not attributable. *Ex Parte* comments at 8.

That issue, however, is for the Commission to decide, not for AT&T to announce. While AT&T/Media One craft a facially compelling story about their inability to control TWE, it is more useful to analyze the relationship under the standards set forth in the Commission's rules. Under the Cable Attribution Rules, limited partnership interests are deemed attributable unless it can be demonstrated that the interest is insulated. *See Attribution Order* at ¶¶ 57, 61. Therefore, as discussed more fully below, even accepting AT&T's position that it does not control TWE, any attribution analysis commences with the assumption that AT&T/MediaOne's 25.51% interest in TWE is attributable to AT&T unless AT&T is able to demonstrate, under the Commission's stringent insulation criteria, that it is not materially involved in the video programming-related activities of TWE.

A. The Commission's Narrow Modification of the Insulation Requirements in the Context of the Horizontal Ownership Rules Was Only Designed to Allow for Non-Video Programming Relationships.

At the time the Commission revised its horizontal ownership rules in October 1999, it strongly reaffirmed the continued need for horizontal ownership limits and, in certain respects, tightened its attribution rules. The FCC also made one narrow adjustment to its limited partner attribution criteria as applied for purposes of those rules. The change was made in order to foster investments between companies whose combination may bring benefits to the

public, such as cable broadband and telephony services and competition to the incumbent local exchange carriers or Internet. In order for the limited partnership to benefit from an investor's expertise in these areas, it is necessary to craft insulation criteria that will not prevent the investor from offering its services to the partnership ***so long as those services are unrelated to the partnership's video programming services.***"

Attribution Order at ¶ 63. (emphasis added).

The Commission thus drew the line at video programming. Any benefits to be achieved through a limited relaxation of the rules did not, the Commission concluded, warrant relaxed vigilance in that critical area. *See id.* Accordingly, although, for purposes of other multiple ownership rules, a limited partner must be shielded from the *mass media-related* activities of the partnership in order for its interest to be deemed non-attributable, under the revised horizontal ownership attribution rules, a limited partner must certify that it "is not materially involved, *directly or indirectly*, in the management or operation of the *video programming-related* activities of the partnership" in order to obtain non-attributable status. *Attribution Order* at ¶ 64. Thus, under no circumstances may a limited partner be involved in the video programming activities of the partnership and be considered non-attributable for purposes of the horizontal ownership limits.

To determine whether there is "material involvement," it is necessary to apply the Commission's insulation criteria. Significantly, while narrowing the inquiry to video programming - - related activities, ***the Agency did not alter the general methodology for determining whether a limited partner is materially involved in a partnership's activities.*** The insulation criteria are a highly stringent set of restrictions on the permissible involvement of a limited partner in the video programming marketplace. Specifically, those criteria, in the context of the horizontal ownership limits, state that:

- the limited partner cannot act as an employee of the partnership if his or her functions, directly or indirectly, relate to the video-programming enterprises of the company;
- the limited partner may not serve, in any material capacity, as an independent contractor or agent with respect to the partnership's video-programming enterprise;
- the limited partner may not communicate with the licensee or general partners on matters pertaining to the day-to-day operations of its video-programming business;
- the rights of the limited partner to vote on the admission of additional general partners must be subject to the power of the general partner to veto any such admissions;
- the limited partner may not vote to remove a general partner except where the general partner is subject to bankruptcy proceedings, is adjudicated incompetent by a court of competent jurisdiction, or is removed for cause as determined by a neutral arbiter;
- the limited partner may not perform any services for the partnership materially relating to its video-programming activities, except that a limited partner may make loans to or act as a surety for the business; and the limited partner may not become actively involved in the management or operation of the video-programming businesses of the partnership.

Attribution Order at ¶64.

A limited partner that is unable to meet even one of these criteria will be deemed to hold an attributable interest in the partnership. *See id.* The Commission has recognized, moreover, that the power of a limited partner to permissibly participate in the limited partnership depends in large part on the partnership agreement. *See Wilner and Scheiner*, 103 FCC 2d. 519, 520-521 n.3 (1985). Accordingly, before the attribution inquiry can even begin, “[t]he Commission’s insulation standards require among other things, that the Agreement spell out that an exempt limited partner cannot become materially involved in the management and operation...and cannot act as an employee, independent contractor, or agent” of the limited partnership, and that it “contain a

provision restricting the limited partner from communicating with respect to” the limited partnership.³⁰ Where a partnership agreement has not contained the requisite insulation criteria, the Commission has found the limited partner not to be insulated.³¹

Here, AT&T has made absolutely no attempt to demonstrate that the TWE limited partnership agreement contains the insulation criteria, as required by the FCC. According to Commission precedent, AT&T/MediaOne’s 25.51% interest in TWE should, on that basis alone, be attributed.

- B. Despite AT&T’s Rhetoric, the Loss of Certain Management Rights in TWE is Not Dispositive of the Questions of Whether the Limited Partnership Interest in TWE Satisfies the Insulation Criteria; AT&T’s Attribution Analysis Improperly Seeks to Focus On Control, A Standard Repeatedly Rejected by the Commission.

Paying scant attention to the relevant criteria, AT&T/MediaOne, in large part, base their claim for non-attribution on the fact that certain management rights in TWE previously held by MediaOne either have been or will be eliminated. In particular, AT&T/MediaOne’s *Ex Parte* Comments discuss the limited voting rights that AT&T will have on the TWE Board of Representatives, see *Ex Parte Comments* at 12-13, and enumerates a number of TWE activities in which AT&T/MediaOne will not be involved.³² Similarly, AT&T/MediaOne trumpets the fact that it has lost representation on the TWE Cable Management Committee as evidence of the merged entity’s lack of control of TWE. See *id.* at 9-10.

³⁰*In re Applications of Eunice Wilder and Sheridan Broadcasting Corp. et al*, 4 FCC Rcd. 5310 (1989).

³¹See *id.* See also, *In re Application of Coastal Broadcasting Partners*, 6 FCC Rcd. 4242 (1991), and *In re Application of Sacramento RSA Limited Partnership*, 9 FCC Rcd. 3182 (1994).

³²See *id.* at 13-14.

Whether or not AT&T/MediaOne has lost its representation on a specific committee within TWE, however, is ultimately irrelevant. The test for determining the attribution of a limited partner simply is not based on control, but on the ability to exert influence.

Professor John C. Coffee, Jr., AT&T/MediaOne's expert, also performs his economic analysis on the misguided basis. Professor Coffee concludes that AT&T/MediaOne's rights in TWE regarding voting on fundamental corporate changes "do not amount to a participation in control." *Declaration of Professor John C. Coffee, Jr.* at ¶ 26 ("*Coffee Declaration*"). He wholly neglects, however, to address the FCC standard for determining limited partner attribution: whether the merged entity will have a material involvement in the video programming activities of TWE. Because Professor Coffee completely fails to examine the AT&T/MediaOne and TWE relationship under the Commission's insulation criteria or to discuss the influence that AT&T/MediaOne will have over TWE, his declaration is simply irrelevant, other than to serve as yet another example of AT&T/MediaOne's refusal to acknowledge the Commission's insulation standard and substituting its own, Commission-rejected, test in its place.

- C. The Alleged Existence of Other Benefits Flowing From the Merger Have No Impact on an Analysis of Whether AT&T Will, Under the Insulation Criteria, Be Materially Involved in the Video Programming Activities of TWE.

AT&T/MediaOne, perhaps recognizing the fatal flaw in their position, argue that other potential benefits of the merger compel a finding that the interest in TWE should be non-attributable. AT&T/MediaOne champions potential public interest gains from the merger, stating that "the merger will create enormous benefits for consumers, including the more rapid development of effective facilities-based competition to the incumbent LECs for millions of the nation's homes

and businesses.”³³ Irrespective of the validity of this position, and while AT&T/MediaOne may be correct in asserting that a desire to produce such benefits was “the very reason why the Commission last month revised its cable attribution rules,” *Ex Parte Comments* at 4, any potential benefits these areas do not warrant a more relaxed application of the insulation criteria.

The Commission’s attribution rules simply do not provide any justification for ignoring otherwise forbidden material involvement in video programming activities so that other benefits may be achieved. Indeed, the Commission went the other way, allowing additional (and previously impermissible) participation in management “so long as these services are unrelated to the partnership’s video programming services.” *Attribution Order* at ¶63.

In other words, the Commission already considered the potential public interest benefits of a merger such as the one proposed. The Commission decided to relax the attribution rules to some extent to accommodate these benefits. AT&T/MediaOne have done nothing to show that their specific merger warrants even further relaxation of the rules. Indeed, they have not even requested a waiver, a pre-requisite for a claim that their specific circumstances somehow warrant special treatment.

Instead of attempting to distract the public and the Commission with the alleged telephony benefits of the merger, AT&T must demonstrate it can meet the insulation criteria with respect to TWE’s video programming activities. In making this analysis, the Commission must put any other potential benefits aside and scrutinize the pertinent relationships between TWE and the

³³*Ex Parte Comments* at 4. See also, Letter by C. Michael Armstrong, Chairman and CEO of AT&T to Charles M. Lillis, Chairman and CEO of MediaOne, April 22, 1999 (“The merger will accelerate our ability to bring a wide array of broadband services to the consumer and business customers across the nation.”)

merged AT&T/MediaOne to ensure that the video programming marketplace is not harmed.

- D. Because Myriad Relationships Between the Merged Entity and TWE Does Not Include Safeguards to Prevent the Merged Entity from Communicating with TWE Regarding its Video Programming-Related Activities Preclude any Finding of Insulation, the Limited Partnership Interest in TWE is Fully Attributable

Despite AT&T/MediaOne's renewed attempt to have attribution determined on their own terms rather than in accordance with the Commission's rules, the insulation criteria, as discussed above, go far beyond control. Rather, they are a highly stringent set of restrictions on the permissible relationships between a limited partner seeking non-attributable status and the limited partnership. Using the criteria set forth above as the starting point for any limited partner attribution analysis, the Commission has stated that "evaluating the insulation criteria as applied to specific parties is not a formulaic analysis, but rather is fact-intensive."³⁴

Thus, even if one were to overlook the fact that there is no evidence that the TWE Partnership Agreement contains the requisite insulation criteria (or even if the partnership agreement were to be amended to include the required language), the Commission will still look at the totality of the circumstances involved. "Although review of the written partnership agreement is, perforce, a prerequisite to determining whether that insulation exists ... the inquiry cannot end there. [...] It is the totality of the record evidence that must be considered." *Tulsa Broadcasting Group*, 2 FCCRcd 6124 (1987). See also, *BBC Licensee Subsidiary, L.P.*, 10 FCCRcd 7926 (1995), at ¶ 42. Looking at the totality of the circumstances, the relationships between AT&T/MediaOne and TWE go far beyond those permitted under the insulation criteria

³⁴*In re Applications of BBC Licensee Subsidiary, L.P.*, 10 FCC Rcd. 7926 (1995), at ¶ 35.

of the horizontal ownership attribution rules.³⁵

1. AT&T's Involvement In the Sale of Programming to TWE

In its recent review of the insulation criteria in the context of the broadcast attribution rules, the Commission rejected strongly the notion that a limited partner could enter into a program affiliation agreement with the partnership and still claim insulated status. Specifically, in response to a question asked by Cap Cities/ABC, the Commission stated in its *Broadcast Attribution Order* that a “contractual arrangement to provide programming [to an FCC licensee] would be inconsistent with the insulation criterion that ‘the limited partner may not perform any services for the partnership materially relating to its media activities....”³⁶

Thus, under straightforward insulation analysis, the merged entity's involvement in the sale of video programming to and from TWE precludes AT&T from claiming that it will not be materially involved in the video programming activities of TWE. AT&T's ownership of, and positional interests in, Liberty Media Group, which sells programming to TWE would, on its own, prevent AT&T/MediaOne from achieving non-attributable status.

Professor Coffee improperly focuses on the ability of AT&T to derive material economic benefit from its ownership of Liberty. *See Supplemental Declaration of Professor John C. Coffee, Jr.* at ¶ 1. The true issue, however, is whether the sale of video programming by Liberty to TWE

³⁵Indeed, it seems unlikely that the criteria could be met in light of AT&T's statement in a news release that “following its acquisitions of MediaOne, it looks forward to strengthening its existing relationship with Time Warner” “AT&T Offers \$62 Billion in cash, stock, and assumed debt and preferred equity for MediaOne Group,” AT&T News Release, April 22, 1999.

³⁶*Broadcast Attribution Order*, MM Docket Nos. 94-150, 92-51, and 87-154, FCC 99-207 (rel. Aug. 6, 1999) at ¶ 133.

implicates AT&T. Due to AT&T's multiple relationships with Liberty, which Professor Coffee concedes, the answer must be yes.³⁷

2. AT&T's Purchase of Video Programming from TWE

Of course, TWE's video programming activities comprise much more than the operation of cable systems. TWE also operates two of the premiere pay television services -- HBO and Cinemax³⁸ -- and has significant interests in several others. *See supra*, n. 55. Thus, in addition to its role in, and influence over, the sale of programming to TWE, the merged entity would be one of the largest customers of the video programming services marketed by TWE. As noted above, the Commission has definitively stated that a program network cannot meet the insulation criteria with respect to one of its affiliates. Ignoring for the moment the sale of AT&T-affiliated programs services to TWE, AT&T would have the Commission take the view that an affiliate should somehow be able to claim insulation insulated status in the network.

Not only is there no indication in the *Broadcast Attribution Order* that the Commission's statement should be limited to the context of Cap Cities/ABC, but this conclusion would be absurd on its face. First, there is no reasoned basis for distinguishing a broadcast affiliate from a cable affiliate for this purpose, particularly here, where there are multiple program affiliation relation-

³⁷AT&T/MediaOne argues that a number of factors, such as the existence of a tracking stock and the temporary inability of AT&T to remove members of Liberty's Board, should alter this conclusion. *See Ex Parte Comments* at 17-18; *see also, Public Interest Statement* at 10-12. However, in the Time Warner/Turner Consent Decree, the FTC concluded, and the FCC agreed, that substantially more stringent safeguards were necessary to ensure that TCI (now AT&T) would not be able to influence Time Warner. *See supra*, n. 40. Additionally, as a result of the AT&T/TCI merger, Dr. John C. Malone sits on the boards of both AT&T and Liberty

³⁸HBO and Cinemax serve more than 32 million subscribers. *See* <http://www.mediaonegroup.com/whatweoffer/index.html>.

ships between the programmer and the cable operator.

More importantly, however, it is simply impossible to imagine how a cable operator could enter into an affiliation agreement with a programmer without communicating with the programmer.³⁹ Such communication specifically directed to the video programming activities of the partnership, however, is impermissible for a limited partner seeking to claim insulated status and would therefore preclude any certification that AT&T's limited partnership interest in TWE should be considered non-attributable.

In sum, the Commission here is looking not only at TWE's ownership of the "crown jewel" of cable programming,⁴⁰ but also with AT&T's ownership of Liberty and its vast array of programming services. Then, add to that mix AT&T's interests in Rainbow, Viewer's Choice, and MediaOne's programming services. The result is AT&T/MediaOne and TWE, the two largest MSOs, buying and selling programming to and from one another. Given this multitude of interrelationships, it is inconceivable that AT&T/MediaOne can be insulated from the video programming-related activities of TWE.

CONCLUSION

There can be no argument that the vast web of relationships that will exist between the

³⁹Indeed, given AT&T/MediaOne's right to name two of the six members of TWE's Board of Representatives, provides it with another avenue to communicate with TWE regarding video programming. See *Coffee Declaration* at ¶ 8. Yet, if the AT&T/MediaOne representatives have any communications with TWE relating to the partnership's video programming activities, the insulation criteria are violated. Given the other programming relationships between AT&T and TWE, it is inconceivable that this type of communication between AT&T and TWE would not occur.

⁴⁰The FTC referred to HBO as a "crown jewel" service, one that is "necessary to attract and retain a significant percentage of ... subscribers." *FTC Consent Decree*.

merged AT&T/MediaOne and TWE encompasses virtually all of the major players in both the multichannel video programming distribution and video programming markets. Given these myriad relationships, AT&T's interest in TWE must be considered attributable under existing Commission precedent. The merged entity's ownership of video programming services which sell programming to TWE and its purchase of programming from TWE makes it impossible for it to meet the Commission's insulation criteria. Accordingly, because TWE's cable subscribers must be attributed to AT&T, the merged entity will far exceed the 30 percent horizontal ownership limit set forth in the Commission's rules. Indeed, if the Commission comes to any other conclusion in this proceeding, it is difficult to conceive of any situation in which the Agency could credibly enforce the ownership cap.

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