

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

In the Matter of)	
APPLICATIONS FOR CONSENT TO THE)	
TRANSFER OF CONTROL OF LICENSES AND)	
AND SECTION 214 AUTHORIZATIONS FROM)	
)	
MEDIAONE GROUP, INC.)	CS Docket No. 99-251
Transferor)	
TO)	
)	
AT&T CORP.)	
Transferee)	
)	

To: The Commission

SUPPLEMENT TO PETITION FOR RECONSIDERATION
OF
CONSUMERS UNION
CONSUMER FEDERATION OF AMERICA
AND
THE MEDIA ACCESS PROJECT

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SUPPLEMENT TO PETITION FOR RECONSIDERATION

Consumers Union, Consumer Federation of America, and Media Access Project ("CU, *et al.*") respectfully submit this supplement to their July 6, 2000 *Petition for Reconsideration* of the Commission's June 6, 2000 *Memorandum Opinion and Order*, 15 FCCRcd 9816 (2000) ("*Merger Order*"). The *Merger Order* approved the acquisition of MediaOne Group, Inc. ("MediaOne") by AT&T Corp. ("AT&T") (collectively referred to here as "AT&T" or "Applicants").¹

This supplement presents for the record five documents reflecting *ex parte* communications highly relevant to the issues now subject to FCC reconsideration. Four of the documents relate to the Commission's refusal to consolidate this proceeding with the pending AOL/Time Warner merger proceeding (Docket 00-30)². The fourth document has significant bearing on Petitioners' request

¹A motion for leave to submit this supplement has been filed contemporaneously with the filing of this pleading. See 47 CFR §1.106(f).

²The documents are:

1. *Notice of Oral Ex Parte Communications by James Cicconi, General Counsel and Executive Vice President Law & Government Affairs, AT&T Corp. to Kathryn C. Brown, Chief of Staff, October 4, 2000 ("AT&T October 4 Ex Parte Notice")*(Exhibit 1);

for an “open access” condition in this case³.

NOTICE OF DEADLINE FOR FINAL AGENCY ACTION

Petitioners respectfully advise the Commission that, as of November 6, 2000 (four months after submission of their Petition for Reconsideration), they will regard their administrative remedies to have been exhausted, and that they may proceed to seek judicial review at any time thereafter on the basis that the Commission’s inaction constitutes agency action wrongfully withheld. See 5 USC §706(1); TRAC v. FCC, 750 F.2d 70 (D.C. Cir. 1984). The Commission should also treat this submission as notice that Petitioners regard their administrative remedies to have been exhausted with respect to their May 2, 2000 Request For Expedited Ruling Interpreting The Commission’s Ex Parte Rules and Their Application in Docket 99-251, their May 9, 2000 Complaint alleging AT&T violated the Commission’s ex parte rules, and their June 29, 2000 Application for Review of the denial of their May 9, 2000 Freedom of Information Act request.⁴

The unconscionable delay in action on these matters reflects a studied indifference to the public’s efforts to participate in the Commission’s allegedly open proceedings, and a clear preference for protecting the secrets of the agency’s regulatees. CU, et al. regret that they must now prepare to invoke judicial intervention to obtain long overdue relief in matters which the Commission has inexplicably failed to respond to legitimate efforts to “work within the system.”

Petitioners note that the Commission has attempted to adhere to a self-imposed six month deadline for completing its review of telecommunications

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2. *Written Ex Parte Communication by America Online, Inc. and Time Warner, Inc., to Deborah Lathen, Chief, Cable Services Bureau, October 5, 2000 ("AOL/Time Warner October 5 Ex Parte Submission") (Exhibit 2);*
 3. *Written Ex Parte Communication by America Online, Inc. and Time Warner, Inc. to Kathryn C. Brown, Chief of Staff, October 13, 2000 ("AOL/Time Warner October 13 Ex Parte Submission") (Exhibit 3); and,*
 4. *Written Ex Parte Communication by AT&T Corp. to Kathryn C. Brown, Chief of Staff, November 8, 2000 ("AT&T November 8 Ex Parte Notice")(Exhibit 4).*

³The document is the *Notice of Oral Ex Parte Communication by David Lawson, Counsel to AT&T to Royce Dickens, et al.*, August 31, 2000 ("AT&T August 31 Ex Parte Notice") (Exhibit 5).

⁴Petitioners also point out that the Commission has yet to act on the January 3, 2000 *Petition for Reconsideration* in Docket 92-264. Cable operators- and their investors - should bear in mind that favorable action on that appeal would necessitate additional divestitures.

*mergers and acquisitions*⁵. Given the strict page limits ⁶and narrow scope ⁷of issues which may be raised in reconsideration proceedings and the fact that the Commission has already had the opportunity to become familiar with a case which is subject to reconsideration, there is no possible reason why the Commission should not be able to conclude its deliberations on reconsideration much more expeditiously than for its initial decision.

INTRODUCTION AND SUMMARY

This supplement updates the record and provides additional legal bases requiring grant of Petitioners' July 6, 2000, *Petition for Reconsideration* in this case.

In their pending appeal, Petitioners have argued, *inter alia*, that the ownership relationships of Time Warner and AT&T are so intertwined that it was arbitrary and capricious to view these two transactions in isolation. *Petition for Reconsideration* at 15-16. Petitioners also showed that the Commission erroneously failed to impose an open access condition upon AT&T's cable broadband service offerings.

AT&T has opposed the request for consolidation as initially brought and on appeal, but, in oral presentations to the FCC's Chief of Staff on October 3, 2000 and October 4, 2000, AT&T re-

⁵In accordance with this policy, for example, the Commission acted upon the AT&T/MediaOne acquisition docket within six months of the date on which the application was completed by submission of the requisite waiver request on December 21, 1999.

⁶Petitions for reconsideration may not exceed 25 double-spaced pages in length. See 47 CFR §1.106(f). Assuming that the instant supplement is accepted for filing, the *Petition for Reconsideration*, the *Opposition of Applicants*, *Petitioners' Reply*, and this supplement together total no more than 70 pages. This compact and narrowly focused record stands in stark contrast to the expansive record accumulated during the primary phase of this proceeding. Confronted by thousands of pages of arguments and data, and hundreds of hours of oral *ex parte* presentations, the Commission nonetheless met its target of resolving the docket within six months of receipt of a complete application. There is no logical reason why reconsideration cannot be conducted much more quickly.

⁷Reconsideration petitions are limited to issues which were previously presented to the Commission, or which could not have been raised arose only after the last opportunity for participation. See 47 CFR §1.106(b)(3), 47 CFR §1.106(d)(2).

requested relief which involved discussion of *both* the AT&T/MediaOne and AOL/Time Warner proceedings. Thereafter, it filed the required notice of the two communications in each of the two dockets. In these presentations, AT&T took the position that it will be unable to divest its partnership interest in Time Warner Entertainment Limited Partnership, LLP (“TWE”) unless the Commission imposes “an obligation on” AT&T and Time Warner to terminate their partnership relationship.

The improperly terse⁸ two paragraph notice provided in the *AT&T October 4 Ex Parte Notice* does not state whether AT&T explicitly requested that the Commission condition any grant of the pending AOL/Time Warner applications upon a breakup of the Time Warner partnership cross-interests. Even so, AOL and Time Warner quite properly construed AT&T's presentations as having a request that the Commission require the newly merged AOL/Time Warner to terminate common ownership of TWE. In two written responses, the two companies objected to AT&T's request, characterizing it as an attempt to “reargue” the terms of the MediaOne divestiture requirement. *AOL/Time Warner October 5 Ex Parte Submission* at 1. They explained how, in their view, “[t]o the extent the Commission wishes to reexamine its decision in AT&T/ MediaOne, the now pending AT&T/MediaOne reconsideration proceeding -- and not [the AOL/ Time Warner merger] -- is the

⁸The Commission has tolerated wholesale disregard of its own requirements that *ex parte* communications be fully disclosed. On May 2, 2000, Petitioners asked the General Counsel to issue clarifying interpretations with respect to parties' obligations under the *ex parte* rules. The General Counsel has yet to respond. Even so, the terse *AT&T October 4 Ex Parte Notice* is clearly deficient viewed in light of the Commission's October 11, 2000 *Public Notice* (FCC 00-358); the filing fails to "describe the substance of the new data or arguments and not merely list the subjects discussed." It might be argued that the terse three sentence substantive portion of the notice is in technical compliance with the admonition that "[g]enerally, more than a one or two sentence description is required....," because three is “more than” two. However, even on that simplistic level, the fact that the filing covers *two* separate presentations suggests that at least four sentences would be in order. More fundamentally, and regardless of length, the submission utterly fails to fulfill the basic filing requirement, because it does not "describe the substance" of arguments presented.

appropriate forum for doing so." *Id.* AOL and Time Warner again stressed this point in their October 13 filing, stating:

In a letter dated October 5, 2000, America Online, Inc. and Time Warner, Inc. explained in great detail why any reexamination of the divestiture obligation imposed on AT&T in the AT&T/ MediaOne Order would appropriately be considered in the pending AT&T/MediaOne reconsideration proceeding -- not in connection with the AOL/Time Warner merger.

AOL/Time Warner October 13 Ex Parte Submission at 3. Although the letters were filed only in the AOL/Time Warner docket, substantial portions of the two presentations related to issues which had been raised in the AT&T/MediaOne proceeding.

By chastising AT&T for attempting to "reargue" the resolution of the AT&T/MediaOne merger as part of the AOL/Time Warner case, and calling upon the Commission instead to consider such issues "in the now pending *AT&T/*MediaOne* reconsideration proceeding...", AOL and Time Warner have requested exactly the relief Petitioners have sought. *See AOL/Time Warner October 5 Ex Parte Submission* at 1.

AT&T renewed its request in a letter dated November 8, 2000. *See Written Ex Parte Communication by AT&T Corp. to Kathryn C. Brown, Chief of Staff*, November 8, 2000. The new letter dispels whatever ambiguity may have been left by the incomplete nature of the October 4 submission, and unambiguously asks that the Commission assure that the Commission use its regulatory power in the context of the AOL/Time Warner merger to direct that Time Warner cooperate in the implementation of the TWE divestiture alternative directed in the AT&T/MediaOne case.

Taken singly and together, these arguments demonstrate that Petitioners were correct in claiming that the Commission cannot act upon these two proceedings as if they were independent of each other, and that the *Petition for Reconsideration* should be granted.

AT&T has also made a recent submission (also in the AOL/Time Warner docket) with respect to AOL's "instant messaging" plans and practices. Its position with respect to instant messaging is utterly inconsistent with its opposition to "open access" and thus provides powerful new force to the arguments on open access which Petitioners have interposed.

FACTUAL BACKGROUND

In their July 6, 2000 *Petition for Reconsideration*, CU, *et al.* argued that the AT&T/MediaOne and AOL/Time Warner proceedings are inextricably linked, and the Commission was therefore required to consolidate them.⁹ *Petition for Reconsideration* at 15-16. Petitioners challenged the Commission's erroneous conclusion, *see Merger Order*, 15 FCCRcd at 9892-93, that the two Applications were not mutually exclusive as a matter of law, and that the applications must be mutually exclusive as a matter of law to require consolidation.

The TWE Ownership Interest - The critical link between AT&T and the proposed AOL Time Warner is the common ownership of the TWE partnership. MediaOne held a 25.5% interest in TWE, which AT&T now owns. Time Warner owns the remaining 74.5% of TWE. *See, e.g., Motion to Consolidate* at 5, *AT&T/MediaOne Merger Order*, 15 FCCRcd at 9829-30. TWE operates the bulk of Time Warner's cable systems, and itself controls a host of premium programming which it sells to AT&T. *Merger Order* 15 FCCRcd at 9829-30.

As the Commission found in the *AT&T/MediaOne Merger Order*, the merger creates an "aligning of interests" among AT&T and Time Warner which can have profoundly detrimental impact upon the multichannel video programming distribution (MVPD) market, the video programming

⁹In the *Merger Order*, 15 FCCRcd at 9896, the Commission specifically denied Petitioners' April 11, 2000 *Motion to Consolidate*.

market, and the diversity of programming received by the American people. *Merger Order*, 15 FCCRcd at 9836-9850. The Commission also agreed with Petitioners that the two largest cable operators' common ownership of TWE created a considerable danger to these markets because:

AT&T, MediaOne, and TWE are the industry leaders both in their operation of cable systems and their ownership of video programming networks....The combination of these two factors makes the merged entity a powerful gatekeeper that could affect the diversity of video programming delivered to consumers.

Merger Order, 15 FCCRcd at 9844 (footnote omitted).

Despite these findings, the Commission approved the application, granting AT&T 12 months to comply with the cable ownership rules, either by divesting its interest in TWE or by otherwise satisfying the cable horizontal ownership limits, and imposed certain limited interim safeguards. *Id.*

The Reconsideration Petition - Petitioners demonstrated in their *Petition for Reconsideration* that granting AT&T a year to comply was arbitrary and capricious. *Petition for Reconsideration* at 16-22. *See also*, *Letter from Andrew Jay Schwartzman to Chairman Kennard, May 26, 2000* at 6-8. They have argued, both in the *Motion to Consolidate* and in the AOL/Time Warner merger, that the Commission must require the parties to sever the TWE link between the two largest cable Multi-System Operators ("MSOs"). *Motion to Consolidate* at 7-8; *Petition to Deny of CU, et al.* in Docket 00-30 (AOL/Time Warner) at 157; *see, e.g., Notice of Oral Ex Parte Communications by Andrew Jay Schwartzman and Gene Kimmelman to Kathryn C. Brown, April 24, 2000; Notice of Oral Ex Parte Communication by Andrew Jay Schwartzman to Deborah Lathen, May 3, 2000; Notice of Oral Ex Parte Communications by Andrew Jay Schwartzman to David Goodfriend, Marsha MacBride, and Helgard Walker, June 2, 2000.* Petitioners also demonstrated in the *Petition for Reconsideration*

that the Commission erroneously failed impose an open access condition on all parties in the consolidated docket.

The October 3, 2000 and October 4, 2000 *Ex Parte* Presentations - On October 3, 2000 and October 4, 2000, James W. Cicconi, General Counsel and Executive Vice President of Law & Government for AT&T, spoke with Chief of Staff Kathryn C. Brown regarding the complex relationship between AT&T and Time Warner. According to AT&T's improperly terse disclosure statement, Mr. Cicconi spoke to why Commission intervention is necessary to ensure the sale of TWE by the Commission's May 19, 2001 deadline. *See AT&T October 4 Ex Parte Notice*. It is of particular significance here that AT&T filed its notice in ***both*** the AT&T/MediaOne and the AOL/Time Warner dockets.

AOL and Time Warner filed two written *ex parte* responses rebutting the AT&T initiative. In the *AOL/Time Warner October 5 Ex Parte Submission*, AOL and Time Warner disputed the appropriateness of using the AOL/Time Warner proceeding to address concerns about the ownership of Time Warner Entertainment LP. They argued that the Commission should address the divestiture issue in the AT&T/MediaOne docket. In the *AOL/Time Warner October 13 Ex Parte Submission*, AOL and Time Warner took issue with AT&T's characterization of the TWE partnership agreement. In particular, they argued that AT&T could sell its TWE partnership interest to a third party at any time, subject only to Time Warner's right of first refusal. Furthermore, they explained that AT&T can cause TWE to be reconstituted as a corporation, and sell its interest on the open market in this fashion.

The AOL and Time Warner submission provides strong support for grant of the pending *Petition for Reconsideration*. Their explication of the TWE relationship essentially duplicates what

Petitioners said in seeking reversal on this point, and rebuts AT&T's *Opposition to Petition for Reconsideration*, filed July 17, 2000.

The November 8, 2000 Letter - AT&T elaborated upon its request in a letter dated November 8, 2000. *See Written Ex Parte Communication by AT&T Corp. to Kathryn C. Brown, Chief of Staff*, November 8, 2000. The new letter dispels whatever ambiguity may have been left by the incomplete nature of the October 4 submission, and unambiguously asks that the Commission assure that the Commission use its regulatory power in the context of the AOL/Time Warner merger to direct that Time Warner cooperate in the implementation of the TWE divestiture alternative directed in the AT&T/MediaOne case.

AT&T's letter formally asks the FCC to modify the non-final AT&T/MediaOne *Merger Order* by providing the relief in the AOL/Time Warner case. AT&T says that

The Commission can provide the appropriate incentive to AOL/Time Warner to complete...[the sale of AT&T's TWE interest]...by requiring as a condition of its approval of the merger of AOL and Time Warner that in the event AT&T and AOL/Time Warner fail to reach agreement on the price Time Warner will pay...the matter will be submitted to binding arbitration.

Id. at 3.

The August 31, 2000 Instant Messaging Meeting - AT&T took part in an August 21, 2000 meeting with FCC staff relating to instant messaging (IM). AT&T explained the importance of the principles of interconnectivity and the need to keep new platforms of communication open and non-discriminatory. The very arguments AT&T raised in the context of IM paralleled those which Petitioners have placed at issue in this docket in the context of open access.

ARGUMENT

The attached exhibits provide additional new support for Petitioners' position. They dem-

onstrate yet more clearly that AT&T/ MediaOne and AOL/Time Warner proceedings are so inextricably linked, and must be consolidated, that the Commission must assert authority over all the merger parties and direct severance of the common ownership of TWE, and that an open access requirement should be imposed on both AT&T/MediaOne and AOL/Time Warner.

I. THE RECENT *EX PARTE* FILINGS OF AT&T AND AOL DEMONSTRATE THAT THE AT&T/MEDIAONE MERGER AND THE AOL/TIME WARNER MERGER ARE INEXTRICABLY LINKED AND SHOULD BE CONSOLIDATED AS REQUESTED IN THE *PETITION FOR RECONSIDERATION*.

As explained in the initial *Motion to Consolidate*, the mutual interests of AT&T, MediaOne, AOL, and Time Warner -- both in each other and through a host of partnerships, joint ventures, and industry alliances -- necessitate consolidating the two proceedings. The companies' ownership interests and businesses are so intertwined as to make it impossible to consider the impact of acting upon one of the mergers without also evaluating how the other is affected. Only with all four applicants before the Commission can the Commission properly consider all the ramifications of the proposed mergers. Petitioners reiterated these arguments in their *Petition for Reconsideration*, observing:

The Commission has the authority to consolidate proceedings even where the applications are not "mutually exclusive as a matter of law." Here, ***the mergers are demonstrably interrelated***, not merely by virtue of general market concentration, but ***by virtue of the mutual ownership interests***.

Petition at 15-16.

As Petitioners explained in the *Motion to Consolidate*, TWE is a partnership holding the majority of Time Warner's cable systems. Through the non-final MediaOne acquisition, AT&T now holds 25.5% of TWE, and Time Warner holds the remaining 74.5%. This interest - which the Commission found to be fully attributable to AT&T - when combined with AT&T's additional interests in Time Warner through Liberty Media and RoadRunner, creates "a conjoined media colossus that dominates the narrowband and broadband Internet markets, the cable market, and the content provider market." *Motion to Consolidate* at 8.

Petitioners warned it would prove impossible for the Commission to consider either merger

adequately without having all four parties before it. Resolving the myriad of interrelated issues in the context of the complex joint interests and the differing incentives of the parties makes consolidation essential.

The recent filings of AT&T and AOL/Time Warner powerfully prove the point.

On October 3, 2000 and October 4, 2000, James W. Cicconi, General Counsel and Executive Vice President for Law and Government Affairs of AT&T, spoke with Kathryn C. Brown, FCC Chief of Staff. In the *Notice of Ex Parte Presentation* documenting these conversations, Mr. Cicconi wrote regarding AT&T's attempts to divest itself of TWE:

In the absence of a negotiated settlement between the parties, which appears unlikely, the only alternative to the uncertainties created by the registration rights process **would be an obligation on both parties** to ensure the fair and timely termination of the partnership.

AT&T October 4, 2000 Notice of Oral Ex Parte Presentation.

In their written response dated October 5, 2000, AOL and Time Warner acknowledged the close connection between the proceedings. By chastising AT&T for attempting to "reargue" the resolution of the AT&T/MediaOne merger as part of the AOL/Time Warner case, and calling upon the Commission instead to consider such issues "in the now pending *AT&T/MediaOne* reconsideration proceeding....," AOL and Time Warner have requested exactly the relief Petitioners have sought. *See Written Ex Parte of America Online, Inc. and Time Warner, Inc.*, filed October 5, 2000, at 1.¹⁰

A week later, AOL and Time Warner filed a second written *Ex Parte* submission disputing AT&T's characterization of the TWE partnership agreement. *See Written Ex Parte Of America*

¹⁰ In the same filing, AOL and Time Warner argued that the combination of AOL and Time Warner raised no issues that the Commission had not already considered and rejected in approving the AT&T/MediaOne merger. This is an argument Petitioners predicted and asked the Commission to address in the *Petition for Reconsideration*. *See Petition for Reconsideration* at 16 n.13.

Online, Inc. and Time Warner, Inc., October 13, 2000. AOL maintained that AT&T has the power to terminate the TWE partnership in a variety of ways, at a time of AT&T's choosing, including the right to sell its interest to a neutral third party at full market value. Alternatively, they pointed out, AT&T can invoke its rights under the partnership agreement to spin off TWE as an independent, publicly traded corporation, or sell its interest in TWE to Time Warner.

This is precisely the situation Petitioners predicted would result if the Commission refused to consolidate the two merger proceedings. The divestment of TWE and a thorough understanding of the relationships between AT&T, MediaOne, AOL, and Time Warner, remain elusive, and likely impossible, unless the Commission consolidates the two proceedings and has all four parties equally before it. In addition, other issues raised in the course of the AOL/Time Warner proceeding -- such as the nature of the market for broadband services, the need for open access, the implications of Instant Messaging (IM) and interactive television (ITV) -- raise doubts regarding the Commission's conclusions in the *AT&T/MediaOne Order*.

Thus, even if it were plausible to believe at the time of the *AT&T/MediaOne Order* that the two mergers were severable, the recent exchange between AT&T and AOL demonstrates otherwise. The Commission should therefore grant the *Petition for Reconsideration* and consolidate the mergers.

II. BECAUSE AT&T HAS INDICATED ITS DESIRE TO DIVEST TWE, AND TIME WARNER -- THE ONLY OTHER TWE PARTNER-- AGREES THAT AT&T CAN DIVEST ITS INTEREST IN TWE AT ANY TIME, THE COMMISSION SHOULD LIFT THE 12 MONTH STAY.

The Commission erroneously granted AT&T a 12-month waiver of the horizontal ownership rules because "all three of the divestiture options available to Applicants involve complex business transactions." *Merger Order*, 15 FCCRcd at 9848. The *AT&T October 4 Ex Parte Notice* manifest's

AT&T's evident desire that the Commission assist it in divesting its interest in TWE. AOL and Time Warner have reassured the Commission that AT&T is capable of divesting this interest at any time by selling its interest to a third party, negotiating a fair price with Time Warner, or by activating its rights under the partnership agreement.

The AOL and Time Warner *October 13, 2000 Ex Parte* speaks to the very issues Petitioners addressed at length in numerous *ex parte* meetings and submissions in April and May 2000. AT&T's *November 8, 2000* letter demonstrates beyond cavil that Petitioners were correct as to the points raised in the *Petition for Reconsideration*. See *Written Ex Parte Communication by AT&T Corp. to Kathryn C. Brown, Chief of Staff*, November 8, 2000.

First, compare the *Petition for Reconsideration* at 19 & n.19, arguing that AT&T can divest itself through selling its interests to Time Warner, or to a third party with Time Warner's consent, with Time Warner's statement that:

there is no reason why a mutually agreeable sale to a third party or to Time Warner could not be completed prior to May 19, 2001. ***Contrary to the impression that might have been conveyed by AT&T's letter, negotiations with AT&T for such purchase by Time Warner are ongoing and proceeding constructively.***

AOL/Time Warner October 13 Ex Parte Submission at 2 (Emphasis added.)¹¹

Second, Time Warner agrees with Petitioners' assessment that AT&T can activate the "re-registration rights" process in the TWE partnership agreement and divest itself of its interest in TWE without interference from Time Warner. Compare *Petition for Reconsideration* at 19-20 with *AOL/Time Warner October 13 Ex Parte Submission* at 2.

¹¹Although AOL and Time Warner assume in this statement that the Commission will maintain its current deadline, the point applies with equal force if the Commission were to grant Petitioners' request for immediate divestiture.

Finally, AOL and Time Warner make the same point that Petitioners made time and again: It is possible, of course, that completing such a public sale prior to May 19, 2001 may not be consistent with AT&T's desire to maximize its return on such a sale. However, as the Commission has recognized, at the time of their merger negotiations, AT&T and MediaOne 'were on notice that they should not enter into any transaction that would be difficult for them to divest within 60 days after the stay [of the FCC cable horizontal ownership cap] was lifted, and they assumed the risk that they would be forced to divest within 60 days if and when the stay is lifted.'

AOL/Time Warner October 13 Ex Parte Submission at 3.

There is, therefore, no reason for the Commission to forestall granting the relief requested by AT&T, AOL, Time Warner and Petitioners. By consolidating the two proceedings and ordering the parties to sever their relationship in a way that protects the public from potentially discriminatory practices, but without dictating a business "winner," the Commission will ensure that no "fire sale" occurs. Furthermore, such a neutral Order will prevent any party from holding a negotiating advantage over the others, nullifying AOL's concern that the Commission not "influence any private negotiations between AOL Time Warner and AT&T." *AOL/Time Warner October 5 Ex Parte Submission* at 2. To the contrary, with all parties equally incented to sever the relationship, the Commission can anticipate an expeditious compliance with the Horizontal Ownership Limits on terms fair to all.

It should be noted in this regard that there is no merit to AOL's argument that the Commission's determination in the *AT&T/MediaOne Merger Order* forecloses further consideration of any additional anti-competitive impacts attributable to the AOL/Time Warner merger. See *AOL/Time Warner October 5 Ex Parte Submission* at 10. A lengthy line of cases and administrative determinations upholds the ability of federal authorities to dissolve joint ventures that, while permissible when

created, raise anti-competitive concerns because of subsequent interventions by third parties.¹²

With AT&T's previous fear of a fire sale eliminated, and AOL and Time Warner expressing will-

¹² See, e.g., *In re Columbia/HCA Healthcare Corporation*, 1995 WL 594849 (F.T.C. October 3, 1995) (consent decree resolving Columbia/HCA's ("C/HCA") acquisition of Healthtrust, Inc., by, inter alia, requiring dissolution of a joint venture between Healthtrust and Orlando Regional Healthcare System, ("ORHS") for the operation of South Seminole Hospital, a competitor of C/HCA, through acquisition by C/HCA of ORHS' interest or divestiture to a third party); *United States v E.I. du Pont de Nemours & Co., Inc.*, [1980-1988 Transfer Binder] Trade Reg. Rep. ¶45,081 at 3,493 (D.D.C. Aug. 4, 1981) (consent decree resolving concerns over du Pont's pending acquisition of Conoco by requiring du Pont to purchase Monsanto's interest in a joint venture between Conoco and Monsanto for petrochemicals production, given competition between du Pont and Monsanto in production of certain fibers using the petrochemicals subject to the joint venture, the acquisition would "enable du Font to obtain competitively sensitive information and opportunities to affect Monsanto's [fibers] production . . . and for the exchange of information"); *In re Brunswick*, 96 F.T.C. 151(1980), *aff'd sub. nom. FTC v. Brunswick Corp.*, 657 F.2d 971 (8th Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (ordering (i) dissolution of a joint venture between Yamaha and Brunswick for the production and marketing of a new outboard motor, given the elimination of potential competition in a highly concentrated market, and (ii) the sale by Brunswick to Yamaha of its 38% stockholding in Sapsin, a Japanese manufacturer of motors already 38% held by Yamaha, on the grounds that such holding "could enable Brunswick to hamper Sanshin's competitive efforts, making Saashin a less effective competitor than it had been before the joint venture" and "would also provide Brunswick access to competitively sensitive information otherwise unavailable to competitors"); *U.S. v. Hercules, Inc*, 1973 Trade Cas. (CCH) ¶74,530 (D. Del, 1973) (ordering dissolution of a joint venture between Hercules and Mitsui Petrochemical Industries (U.S.A.), formed to manufacture and sell a form of plastics in the United States, and noting that "the terms and conditions for dissolution of such joint venture or partnership arrangement . . . may include the sale by one party to the other, or to a third party, of not less than its entire interest therein, or a winding up of the partnership and payment of its debts and distribution of its asset to the partners or sale of such assets to one or more purchasers which may include [the joint venture parents]"); *In re Phillips Petroleum Co.*, 70 F.T.C.456 (1966) (requiring the dissolution of three joint ventures between Phillips and National Distillers and Chemical Corp. found to have "created inducements and incentives for avoidance of competition between them in the manufacturing and sale of propylene-based and ethylene-based products" to be accomplished by National selling its interest in one of the joint ventures to Phillips, and Phillips selling its interest in two other joint ventures to National). See Also *In re Zeneca Group PLC*, 64 Fed. Reg. 15166 (1999) (consent decree resolving concerns over Astra AB's proposed acquisition of Zeneca by requiring Zeneca to transfer all rights and assets relating to levobupivacaine, a long-acting local anesthetic, to Chiroscience, with which it had entered into agreements for the marketing and development of the drug, given Astra's leading position in the market for such drugs and Zeneca's role as an actual potential competitor, and also requiring the sale of Zeneca's 3% investment interest in Chiroscience).

ingness to see AT&T divest its interest in TWE, there is simply no justification for delaying compliance with the rules.

III. AT&T HAS ACCEPTED THE BASIC PRINCIPLE OF END-TO-END INTERCONNECTION, WHICH MUST INCLUDE OPEN ACCESS.

Throughout the AT&T/MediaOne merger and the AOL/Time Warner merger, Petitioners have stressed the need to provide non-discriminatory access to the cable platform to facilitate deployment of systems and services, encourage innovation (particularly "disruptive" innovations that challenge the dominance of traditional industry players), preserve competition (with concomitant improvements in quality and price to subscribers), and allow the Internet to achieve its potential as the most truly diverse and accessible marketplace of ideas in the history of human communication. AT&T has now accepted these principles and applied them, albeit to a different communications platform: Instant Messaging.

On August 30, 2000, AT&T representatives joined with a consortium of others to urge the Commission to impose an open access condition on AOL's Instant Messaging software. *See AT&T August 31 Ex Parte Notice*. AT&T's arguments, as summarized in its August 31 *Notice of Oral Ex Parte Presentation*, apply with equal force to open access. For example, AT&T states that IM is critical because "IM will serve as a platform for a range of applications, including...voice-over-the-Internet, and interactive television." The *Notice* also states that combining these interactive services with "Time Warner's vast content and cable holdings would harm the public interest."

The arguments made by AT&T in its August 30, 2000 *Notice of Oral Ex Parte Presentation* could have been lifted word for word from Petitioners' own filings in AT&T/MediaOne and AOL/Time Warner. Like AOL and Time Warner, AT&T and MediaOne combine "vast content and

cable holdings," offers the same package of interactive services AOL Time Warner would offer, and the lack of an interconnection requirement likewise "harm[s] the public interest." ***It makes no sense to accept the logic of open access and interconnection for Instant Messaging without accepting the same open access interconnection principles for cable Internet access generally.***

Although AT&T persists in maintaining that it opposes the imposition of an open access provision, *see Notice of Oral Ex Parte Presentation by Joan Marsh, Director, AT&T Federal Government Affairs, to William Jay Friedman, Legal Advisor to Commissioner Tristani*, filed October 4, 2000, it has clearly accepted the principle of end-to-end open architecture. The Commission should therefore put no stock in AT&T's argument that the recently published *Notice of Inquiry* somehow ameliorates the need for an open access condition in these two specific mergers, or that the NOI obscures the dangers of concentration. *See Notice of Ex Parte of Joan Marsh*, October 4, 2000. AT&T has clearly accepted the position that interconnection is a merger specific concern, and appropriate when a combination of content and conduit threaten innovation and competition.

Commission precedent also supports the principle that special conditions arising from mergers give rise to special concerns and may require special remedies. *See In re Application of Ameritech Corp. and SBC Communications, Inc.*, 14 FCCRcd 14712, 14738-40 (1999). While Petitioners believe that it is appropriate to impose an open access requirement on the industry generally, the failure to do so does not excuse the Commission from its responsibilities in the mergers currently before it.

CONCLUSION

The recent presentations of AT&T and AOL to the Commission demonstrate objectively the reasons raised by Petitioners for consolidating the proceedings: that the joint ownership of TWE by Time Warner and AT&T/MediaOne and the maze of paper surrounding the relationships among all

four parties to these two mergers makes it impossible for the Commission to consider them separately. To the contrary, only by consolidating the mergers can the Commission gather complete information and tailor appropriate conditions.

AT&T's recent filings, however, indicate that it in essence accepts two of Petitioners' key principles. First, that the Commission should order the parties to immediately sever their joint relationship through TWE, and should impose an equally binding condition on all parties so as to avoid giving either side a competitive advantage. Second, AT&T has accepted the basic principle of end-to-end communication, the need for interconnection, and the danger of combining monopoly networks with vast content resources. The ongoing industry wide proceeding, itself wholly inadequate to address the issues raised here, should not prevent the Commission from addressing the specific harms raised by these two mergers.

Wherefore, CU, *et al.* ask that the Commission grant the *Petition for Reconsideration* as supplemented here, and grant all such other relief as may be just and proper.

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November 9, 2000

CERTIFICATE OF SERVICE

I, Harold Feld, certify that on this 9th day of November, 2000, I caused one copy of the attached *Supplement to Petition to Deny* to be served by U.S. mail upon the parties listed below:

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