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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

By Hand

Ms. Magalie Roman Salas
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

EX PARTE OR LATE FILED

Re: Notice of *Ex Parte* Presentation Regarding the Applications of America Online, Inc. and Time Warner Inc. for Transfers of Control; CS Docket No. 00-30

Dear Ms. Salas:

On behalf of EarthLink, Inc. (EarthLink) we hereby submit an original and one copy of this notice regarding a permitted *ex parte* presentation in the above-referenced proceeding. On October 17, 2000, Dave Baker, EarthLink Vice President for Law and Public Policy, and Earl Comstock of Sher & Blackwell met with Susan Eid of Commissioner Powell's office.

Mr. Baker addressed the need for the Commission to adopt in any merger approval a condition requiring the applicants to provide to competing Internet Service Providers (ISPs) access to the applicants' cable transport services on non-discriminatory terms and conditions. With reference to potential market-based or commercially negotiated open access solutions, EarthLink indicated that unenforceable proposals made to date are inadequate to establish a competitive market for cable-based Internet access, and that the history of negotiations on such proposals suggests that a commercial solution is unlikely to emerge in time to avoid serious competitive distortions. In this regard, EarthLink noted that terms and conditions reportedly offered to a number of ISPs include provisions under which the applicants would set ultimate end user rates, as well as provisions under which the applicants would retain percentages of total revenues from both Internet access service and incremental revenues from other services provided by the ISP. These proposals are similar to those EarthLink has experienced in its own negotiations with the applicants, and such conditions would make the arrangements economically infeasible for ISPs not affiliated by ownership with the applicants.

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Also discussed was what appears to be an emerging trend among cable access facility owners of requesting that ISPs seeking to use such facilities agree to non-disclosure provisions with respect to the proposed terms and conditions for use of such facilities. It was pointed out that such non-disclosure provisions have an adverse impact on the ability of the market to operate freely and on the ability of government agencies to evaluate the competitiveness of the market. Finally, the question of who maintains the direct relationship with the customer under the types of arrangements reportedly proposed by the applicants was discussed, and in particular how the proposed arrangements differ from those available to ISPs using DSL or other platforms to serve customers.

Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Earl W. Comstock", written in a cursive style.

Earl W. Comstock

Counsel for EarthLink, Inc.

cc: Susan Eid, Office of Commissioner Powell