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EX PARTE OR LATE FILED FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

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 and John Butler of Sher & Blackwell met with Deborah Lathen and Royce Dickens of the Cable Services Bureau, along with other staff of that bureau and other offices of the Commission listed in Attachment 1.

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

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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.

The participants discussed the structure of the Internet access market and the relationships among dial-up, Digital Subscriber Line service (DSL), cable, and other access platforms. Mr. Baker indicated that cable access has been growing at an exponential rate. This growth pattern is one of the primary reasons why the cable platform must be opened now, before cable system operators are able to expand and entrench their existing competitive advantage. Mr. Baker noted that due to factors such as the need to change customer premises equipment, "churn" is much lower in broadband markets and therefore it is much less likely that a cable Internet access customer would switch to a competing DSL-based ISP should the reach and availability of DSL be extended.

The participants then discussed the issue of why a cable open access provision should be adopted as part of the subject merger in addition to being adopted in a more general proceeding. Mr. Baker stated that the unique circumstances of this merger require such treatment. America Online is already the nation's largest ISP with approximately 50% market share. Time Warner is the second largest cable operator in the U.S. Furthermore, AOL's control over proprietary content as well as applications such as Instant Messaging (IM), combined with Time Warner's vast holdings of news and entertainment content, would give the vertically integrated entity formed by the merger the ability to exert considerable control over the content choices of consumers using the AOL-Time Warner network. Furthermore, it has become increasingly clear that voluntary commitments and commercial negotiations have not worked to provide access for independent ISPs or resulted in a competitive market. Mr. Baker noted that the Commission's earlier approvals of the AT&T acquisitions of TCI and MediaOne, without conditions, serve to increase, rather than decrease, the importance of requiring an open access condition in this merger.

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.

The participants discussed how an open access condition could be structured. The EarthLink representatives stated that the proper beginning point of such a condition would be an acknowledgment that cable transport service used for the transmission of Internet access and other information services over a cable network should be recognized as a Title II telecommunications service as held by the Ninth Circuit Court of Appeals in the *AT&T v. Portland* case. Under that regime, cable companies offering such telecommunications services would at a minimum be required to sell those services to unaffiliated entities on a non-discriminatory basis. Notwithstanding that the Commission has not yet stated that such services are telecommunications services under the Act, the adoption of an open access requirement would be consistent with the authority of the

Commission under the public interest test that governs this transaction, irrespective of the statutory classification of the service.

Please direct any questions regarding this filing to the undersigned.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Earl W. Comstock". The signature is fluid and cursive, with a long horizontal stroke at the end.

Earl W. Comstock  
John W. Butler

Counsel for EarthLink, Inc.

cc: Attached list

# ATTACHMENT 1

October 17, 2000

Meeting with EarthLink Representatives

Sherille Ismail	Cable Services Bureau
Dale Hatfield	Office of Engineering and Technology
William Johnson	Cable Services Bureau
Pieter van Leenwen	Office of General Counsel
Anne Levine	Cable Services Bureau
Joel Rabinovitz	Office of General Counsel
Darryl Cooper	Cable Services Bureau
Erez Kalir	Office of General Counsel
Royce Dickens	Cable Services Bureau
Andrew Wise	Cable Services Bureau
Michael Kende	Office of Plans and Policy
Jim Bird	Office of General Counsel
Gerald Faulhaber	Office of Plans and Policy
Robert Pepper	Office of Plans and Policy
Deborah Lathen	Cable Services Bureau
John Berresford	Common Carrier Bureau