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

In the Matter of	)	
	)	
Applications for Consent to the	)	**MB Docket No. 02-70**
Transfer of Control of Licenses from	)	
	)	
COMCAST CORPORATION and	)	
AT&T CORP.,	)	
Transferors	)	
To	)	
AT&T COMCAST CORPORATION,	)	
Transferee	)	

SUPPLEMENTAL COMMENTS OF EARTHLINK, INC.

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September 5, 2002

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EarthLink, Inc. ("EarthLink") files these supplemental comments in response to the Commission's notice dated August 9, 2002, as modified by the notice dated August 26, 2002.

BACKGROUND

EarthLink's greatest concern with the proposed merger is that it will have the effect of expanding and reinforcing the policy of both AT&T and Comcast generally to refuse to sell cable-based high speed data transport to independent Internet service providers ("ISPs"). On May 21, 2002, EarthLink filed reply comments in the above-referenced docket. In those comments, EarthLink urged the Commission to adopt a multiple ISP access condition for the proposed AT&T/Comcast merger modeled on the multiple ISP access conditions which the FCC and FTC placed on the AOL/Time Warner merger. Among other points raised in its earlier comments, EarthLink pointed out that the size of the proposed merger – both in terms of customers served and in terms of

geographic footprint – is substantially larger than the AOL/Time Warner merger. Combined with the fact that both AT&T and Comcast have, with only very limited exceptions, refused to sell high speed data transport over their cable systems to competing ISPs, the case for a mandatory multiple ISP condition is clear.

THE COMMISSION CANNOT DETERMINE WHETHER THE PUBLIC INTEREST IS MET WITHOUT FIRST REVIEWING ALL RELEVENT DOCUMENTS AND RECEIVING PUBLIC COMMENT THEREON

The supplemental information filed by the applicants – in particular the "Restructuring Agreement" dated as of August 20, 2002[1] – indicates that the anticompetitive effects of the proposed merger on the broadband Internet access market may be even more severe than previously thought unless the Commission requires a multiple ISP access condition as part of any approval of the merger. The likelihood of further anticompetitive harm to the broadband Internet access market is suggested especially by Section 9.1 of the Restructuring Agreement (page 57). That section describes two alternative versions of an AOL High Speed Data Agreement, under which AT&T/Comcast apparently will supply cable-based high speed data transmission service to AOL, which transmission AOL will use to deliver its Internet access service to consumers.

The details of the AT&T/AOLTW High Speed Data Agreements have not been provided to either the public or the Commission. It is EarthLink's understanding that the Commission has not demanded that it be provided with copies of these agreements or the other exhibits to the Restructuring

[1] Filed August 23, 2002, in this docket under cover of a letter from James L. Casserly, Esq., counsel for the applicants.

Agreement. EarthLink objects vigorously to the fact that these documents have not been made available for public comment or even Commission review. The Restructuring Agreement explicitly incorporates 13 exhibits and numerous other documents, any or all of which could contain provisions that contradict or materially change the conditions and agreements set forth in the Restructuring Agreement.[2] As a result, the Commission has no ability to evaluate the Restructuring Agreement, and it is impossible for the Commission to determine the public interest impacts of the Restructuring Agreement, unless the Commission obtains, reviews, and has the benefit of public comment on, the referenced documents.

It is essential for the Commission's public interest analysis that the Commission both review and receive public comment on all aspects of the Restructuring Agreement, and in particular the AT&T/AOLTW High Speed Data Agreements.

In the proceedings under which the FCC and the FTC approved the AOL/Time Warner merger, both of those agencies required conditions under which the merged entity was required to sell cable-based broadband transport to independent ISPs in order for AOL to offer Internet access over Time Warner cable facilities in any given market. The purpose of those conditions was to mitigate the anticompetitive effects of the vertical combination of the world's largest Internet access provider with a large cable operator that otherwise refused to sell cable-based data transport to unaffiliated ISPs.

From the descriptions given in documents that have been filed, the

[2] In fact, section 8(b)(ii) specifically references provisions of the AOL High Speed Data Agreement which the parties agree not to change, or to make their best efforts not to change. Those provisions may adversely affect the interests of parties like EarthLink, which has also sought access to the AT&T and Comcast cable transport networks.

undisclosed AT&T/AOLTW High Speed Data Agreements appear to create problems of the same type as those deemed unacceptable in the AOL/Time Warner merger, but on a much larger scale. Here, instead of AOL gaining access just to the Time Warner cable system, it appears that AOL will obtain access to the far larger merged AT&T/Comcast cable system. As EarthLink noted in its earlier comments, with only minimal exceptions, AT&T and Comcast have refused to sell cable-based transport to competing ISPs. Assuming that such a policy continues post-merger, the existence of the AT&T/AOLTW High Speed Data Agreements will mean that AOL will be the only ISP (other than AT&T's and Comcast's own cable internet services) able to offer service on the largest cable system in the country. Thus, the proposed AT&T/AOLTW High Speed Data Agreements, if accepted, would place AOL in a position that is substantially more competitively privileged than the one that was deemed by both the FCC and the FTC in the earlier merger to present an unacceptable risk to competition and the public interest.

In addition to the rather obvious anticompetitive impacts that would flow from allowing the nation's largest ISP (AOL) the exclusive right to purchase transport on the AT&T/Comcast cable transport system when other ISPs are denied that right, the proposed agreements appear to directly contradict the terms of the September 20, 2000, consent decree in the AT&T/MediaOne merger. The Final Judgment entered on September 20, 2000, by the U.S. District Court for the District of Columbia in the AT&T/MediaOne merger (Civil Action No.: 1:00CV01176) states in relevant part:

> Prior to the earlier of December 31, 2003 or two years after AT&T's and MediaOne's divestiture of the ServiceCo interest, unless they obtain the prior consent of Plaintiff, AT&T, MediaOne, and their Affiliates shall not (1) enter into any contractual or other arrangement with Time Warner to

> jointly offer or provide any wholesale or retail Residential Broadband Service[3]; . . . .

Id. at section V.A.

The Department of Justice press release issued in conjunction with the filing of the complaint and proposed consent decree in the AT&T/MediaOne merger specifically referenced the proposed AOL/Time Warner merger and stated that the provision quoted above (along with other, related broadband Internet provisions) was included to prevent "an anticompetitive impact on the emerging broadband market. . . ." May 25, 2000 Department of Justice Press Release.[4] None of the concerns expressed by the Department of Justice with respect to the AT&T/MediaOne merger has lessened in the time since the entry of the Final Judgment, and the current proposed merger, which dwarfs its predecessor, substantially multiplies those concerns. Under these circumstances, it is difficult to imagine why a condition entered in the AT&T/MediaOne merger would be waived here in order to make way for an even more anticompetitive combination.

Finally, the most obvious reason why the Commission (and the Department of Justice) should take a hard look at the AT&T/AOLTW High Speed Data Agreements is that the parties have made it clear that they anticipate that the Commission, the FTC, and DOJ might take action against

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[3] The Final Judgment defines "Residential Broadband Service" as "any service offered to residential customers in the United States of America that permits users to transmit and receive information using Internet protocols at speeds which may exceed 128 kilobits per second." *Id.* at Section II.F. While the Restructuring Agreement does not define "High Speed Data" per se, it does define "High Speed Data Subscribers" as "paying customers to Internet Access services at signal rates of 128 kilobits per second or above…" Restructuring Agreement, Article 1.1(a) (page 12). It would appear from the definitions used by the parties themselves that the "high speed data" service which is the subject of the AT&T/AOLTW High Speed Data Agreements is almost certain to constitute the Residential Broadband Service referenced in the Final Judgment.

[4] The press release is available at www.usdoj.gov.atr.

those agreements. Section 9.1(c) of the Restructuring Agreement (page 58) reads as follows:

> Notwithstanding anything else contained in this Agreement or any other Transaction Agreement, at the same time when all conditions to Closing are satisfied or waived other than the execution and delivery of the AOL High Speed Data Agreement, <u>if an administrative or judicial action or proceeding brought by the DOJ, the FTC or the FCC challenging or objecting to the AOL High Speed Data Agreement shall be pending (or overtly threatened) and</u> any such action or proceeding shall have been commenced (and not withdrawn) by the DOJ, the FTC or the FCC, in each case which would be reasonably likely to result in changes or modifications to the AOL High Speed Data Agreement to which AT&T would not be required to agree pursuant to Section 8.1(b)(ii) hereof <u>then AT&T may elect at Closing, by delivery of written notice to AOLTW, not to execute and deliver the AOL High Speed Data Agreement and shall</u> thereafter have no liability or obligation in respect of the AOL High Speed Data Agreement. <u>Upon such election (the "ISP Termination Election"), the condition set forth in Section 11.3(d) shall be deemed incapable of being satisfied and AOLTW shall have the right to terminate this Agreement pursuant to Section 12.1(d)(iii).</u>

Id. (emphasis added).

Although there is nothing inherently wrong with parties to an agreement providing for a remedy to deal with a possible regulatory objection to a proposed transaction, the inclusion of the language quoted above should at the very least cause the Commission to inquire further. More bluntly, AT&T has made it clear that it believes that there is a substantial possibility of negative regulatory reaction to the AT&T/AOLTW High Speed Data Agreements and that regulatory changes sought in response to those objections might be significant enough to warrant scuttling the entire Restructuring Agreement – an agreement that the applicants have offered as a central piece of their plan to implement required divestitures. That, even more bluntly, is a red flag that the Commission simply cannot ignore if it is to fulfill its duty to protect the public interest. To turn a blind eye to potential problems that the applicants themselves have highlighted

(but not disclosed the substance of) would amount to an abdication of the Commission's statutory responsibilities.

For all of the reasons set forth above, EarthLink respectfully requests that the Commission obtain from the applicants and make available for public review and comment the Exhibits to the Restructuring Agreement (in particular Exhibit D) and all of the other documents referenced in the Restructuring Agreement but not attached to the submission by the applicants (including the AT&T Disclosure Letter referenced in section 9.1(a)(ii) of the Restructuring Agreement). As requested in the motion filed concurrently herewith, EarthLink further respectfully requests that the clock remain stopped on the Commission's 180 review period until such necessary information has been made available to the public and the public has had an adequate period of time to review and comment on that information. Applicants cannot be heard to complain of any resulting delay -- which will be as brief as they choose to make it through prompt disclosure -- because any delay is caused entirely by applicants' failure to produce at the outset all of the documents relevant to a complete understanding of their proposed agreement.

Respectfully submitted,

/s/ Earl W. Comstock

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