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May 21, 2002

VIA MESSENGER

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Room TW-B204  
445 12<sup>th</sup> St., S.W.  
Washington, D.C. 20554

**RECEIVED**

**MAY 21 2002**

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

RE: EarthLink, Inc. Reply Comments in MB Docket No. 02-70;  
In the Matter of Applications for Consent to the Transfer of  
Control of Licenses from Comcast Corporation and AT&T  
Corp. to AT&T Comcast Corporation

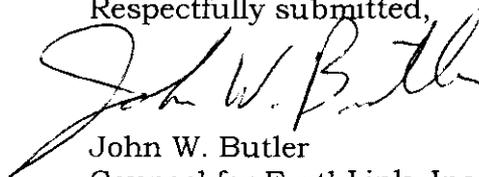
Dear Ms. Dortch:

Enclosed are one original and four copies of the Reply Comments of EarthLink, Inc. in the above-referenced matter.

Also enclosed is an extra copy for acknowledging receipt. Please date stamp and return that copy to our messenger.

Please contact the undersigned if you have any questions regarding this filing.

Respectfully submitted,

  
John W. Butler  
Counsel for EarthLink, Inc.

cc: Qualex International  
Linda Senecal, Media Bureau  
Roger Holberg, Media Bureau  
Erin Dozier, Media Bureau  
David Sappington, Office of Plans & Policies  
Donald Stockdale, Office of Plans & Policies

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James Bird, Office of General Counsel  
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Cynthia Bryant, International Bureau  
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Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

In the Matter of )  
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Applications for Consent to the )  
Transfer of Control of Licenses from )  
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COMCAST CORPORATION and )  
AT&T CORP., )  
 )  
Transferors )  
to )  
AT&T COMCAST CORPORATION, )  
Transferee )

MB Docket No. 02-70

**RECEIVED**

MAY 21 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**REPLY COMMENTS OF EARTHLINK, INC.**

EarthLink, Inc. ("EarthLink") hereby submits its reply comments regarding the above-captioned applications for authority to transfer control of certain licenses in connection with the proposed merger of AT&T and Comcast. As discussed below, the public interest requires that any approval of the applications be conditioned on an enforceable requirement that the merged entity offer to unaffiliated Internet service providers ("ISPs") nondiscriminatory access to the cable-based transmission services used by the merged entity to provide broadband Internet access to its own customers.

**INTRODUCTION AND SUMMARY**

EarthLink is the nation's third largest ISP, with over half a million broadband Internet access subscribers among its approximately 4.9 million total subscribers. EarthLink is "platform agnostic," deploying broadband

services over cable, DSL, and satellite connections. For those millions of consumers whose only option for broadband Internet access is via cable, EarthLink's ability to offer choice and promote competition in the ISP market depends upon its ability to reach customers over cable facilities. Where regulators have prohibited anticompetitive network restrictions by cable operators, as in the case of AOL Time Warner, customers have welcomed a choice in broadband offerings over cable and driven increased cable-modem subscribership.

The lessons learned from the AOL Time Warner merger and the prohibitions on anticompetitive conduct adopted in that proceeding by both the Federal Trade Commission ("FTC") and the Federal Communications Commission ("FCC") provide a clear, simple, and workable model for necessary conditions on the approval of the current merger. Specifically, implementation to date of the requirement that AOL Time Warner enter into nondiscriminatory transmission agreements with unaffiliated ISPs has demonstrated that: (1) cable platforms with multiple ISPs are technically workable; (2) cable platforms with multiple ISPs result in service and price competition for broadband Internet access; (3) having multiple ISPs on a system results in increased subscribership for cable modem service and therefore increased revenues and sources of investment capital for the cable company; and (4) customers value and support a choice of ISPs.<sup>1</sup>

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<sup>1</sup> This multiple ISP access relationship benefits all involved. Not only can EarthLink offer broadband service to customers formerly foreclosed to it, but this ISP choice has helped drive overall broadband subscriber growth on Time Warner Cable systems. Time Warner executives have noted a 20% to 25% increase in overall broadband take rates. *Remarks by Chris Bogart, President and CEO of Time Warner Cable Ventures, at*

In the present case, the proposed AT&T/Comcast will be, by far, the largest cable company in the nation, serving approximately one third of American households that subscribe to cable. Both of the applicants are vertically integrated and provide a range of services in addition to their core cable television business. Most relevant, both applicants have their own broadband Internet access services. Yet they have refused to sell transmission capacity to unaffiliated ISPs, subject to the limited exceptions noted herein.<sup>2</sup> In addition to the reasons discussed below why the merged entity must offer unaffiliated ISPs nondiscriminatory access to cable transport, the sheer size of the merged company, coupled with the applicants' denying their customers competitive Internet access over cable, dictates that a nondiscriminatory access provision modeled on the AOL Time Warner merger must be adopted here.

## **ARGUMENT**

### **I. A Requirement For Multiple ISP Access Would Simply Enforce Promises That The Applicants Have Already Made.**

The conversation between applicant AT&T and the Commission regarding ISP choice is not a new one. In December 1999, AT&T and MindSpring

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*Goldman Sachs Communacopia 2002, April 9, 2002.* Consumers also benefit as they now have competitive choice in their internet provider over cable, with price differentiation and EarthLink service offered at a market-leading \$41.95 a month.

<sup>2</sup> On March 11, 2002, EarthLink entered into an agreement with AT&T Broadband under which EarthLink will offer high-speed Internet access over cable to customers in Seattle and Boston. As discussed further below, although EarthLink is pleased to offer service to consumers in these two markets, this piecemeal approach is no substitute for a requirement that the merged entity provide nondiscriminatory access to its transmission network by multiple ISPs throughout its entire service area. By the same token, Comcast's announced agreement to provide access to United Online in Indianapolis and Nashville does not change the need for much broader measures.

Enterprises (now merged with EarthLink) submitted a letter agreement to FCC Chairman William E. Kennard in which AT&T committed to opening its cable network to multiple ISPs upon the expiration of its exclusive contractual arrangement with Excite@Home, which arrangement was scheduled to end in June of 2002.<sup>3</sup> In approving the AT&T/MediaOne merger in June 2000, the Commission relied heavily on this letter agreement in deciding not to impose a nondiscriminatory access condition.<sup>4</sup> As the Commission is keenly aware, Excite@Home itself expired before its contract with AT&T did.<sup>5</sup> Accordingly, as of Excite@Home's termination of service and dissolution in late 2001, AT&T was both free to and obligated to implement the system-wide open access principles to which it agreed in writing in December of 1999. It has not done so.

AT&T has made other promises to provide consumers a choice of ISPs over cable. In June of 2000, AT&T signed an agreement with the Massachusetts Coalition for Consumer Choice and Competition, which was seeking to place a cable open access referendum on the November 2000 ballot. In exchange for the Coalition's termination of the ballot initiative, AT&T agreed to conduct a multiple ISP trial no later than October of 2001, and to implement ISP choice throughout Massachusetts by July 1, 2001.<sup>6</sup> While AT&T's March

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<sup>3</sup> December 6, 1999 AT&T/MindSpring letter, attached hereto as Exhibit A.

<sup>4</sup> *In the Matter of Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, Memorandum Opinion and Order, 15 F.C.C.R. 9815 at ¶ 120 (June 6, 2000).

<sup>5</sup> See letter of November 29, 2001, from Chairman Powell to the Honorable Thomas Carlson, United States Bankruptcy Court judge.

<sup>6</sup> AT&T/Massachusetts Coalition agreement, attached hereto as Exhibit B.

2002 access agreement with EarthLink helps to fulfill that pledge, AT&T's commitment to the FCC to allow consumer choice to the rest of its cable customers remains unfulfilled.

The plain fact is that each time AT&T is faced with the possibility that regulators might require it to offer cable transport to unaffiliated ISPs on a nondiscriminatory basis, AT&T offers promises to regulators in order to forestall any such requirements.<sup>7</sup> In each instance, however, once the immediate threat has passed, AT&T has returned to its strategy of delay and denial of access.

EarthLink remains hopeful that AT&T will live up to the promises that it has made to regulators, to its competitors, and to consumers. The time for relying on hope alone, however, has passed. Given the history described above, the Commission cannot, consistent with its obligation to safeguard the public interest, rely yet again on promises of voluntary action by AT&T and Comcast to ensure that consumers have a choice of cable-based ISPs.

EarthLink speaks in terms of the need for choice among competing "cable-based ISPs" because the reality is that there are of millions of consumers for whom DSL, the only price-comparable competitor to cable, is physically unavailable. That situation is likely to persist for the foreseeable future because of DSL architecture limitations and simple economics (not, incidentally, because of regulations on ILECs). In other words, it is not possible

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<sup>7</sup> The Commission has issued a Declaratory Ruling that holds that the "telecommunications" underlying the "information service" of Internet access is not a "telecommunications service" even when it is offered to millions of subscribers on standard terms and conditions. *In the Matter of Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Order and Notice of Proposed Rulemaking (Rel. March 15, 2002). EarthLink and others have filed petitions for judicial review of that ruling.

to avoid the question of the need for multiple ISPs over cable by making reference to the availability of other transmission modes over which high-speed Internet access might be available, even if one were to subscribe to the dubious proposition that a duopoly constitutes "competition."<sup>8</sup>

Instead of continuing to rely on mere promises by the applicants, it is necessary that deadlines and a meaningful enforcement structure be attached to the promises that the Commission has accepted as substantive reasons for approving previous mergers, and which are offered again in support of this merger. Adopting a schedule and procedures provides a structure for reaching a goal -- customer choice of multiple ISPs over cable -- that the applicants profess to share with the Commission and unaffiliated ISPs. As the applicants have stated:

Finally, both AT&T Broadband and Comcast already have ample market incentives to make commercially reasonable, customer-friendly arrangements with unaffiliated ISPs in order to maximize the attractiveness of their Internet offerings to customers and potential customers. Given the need to compete with DSL and other comparable offerings, AT&T Broadband and Comcast have significant incentives to offer their customer [sic] a choice of ISPs.<sup>9</sup>

And further:

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<sup>8</sup> As the applicants themselves contend, "the relevant market for Internet service is local." Application at 90. How focused a "local" market must be to be meaningful for the purposes of competition analysis depends on how competitors' services are deployed. This means that where there is only one meaningful broadband Internet access provider -- cable -- there is no competition; i.e., there is a monopoly. This situation exists today in many cable-served communities around the country. Accordingly, the Commission must in this proceeding directly address whether it will take steps to break the applicants' monopoly on broadband Internet access or whether it will tell those consumers that have no choice that it is not within the mission or the power of the Commission to remedy that situation.

<sup>9</sup> Applications and Public Interest Statement at 93 (April 28, 2002).

The Applicants are fully committed to offering customers a choice of ISPs, subject to negotiation of mutually beneficial terms.<sup>10</sup>

In light of these statements, the conditions that EarthLink proposes are less a regulatory mandate than a mere formal acceptance by the Commission of commitments made by the applicants to mitigate adverse effects that the merger would otherwise have on the public interest. Put differently, the applicants have given their word that they would open their networks to multiple ISPs as of this year. The Commission should hold the applicants to their word and set a schedule for implementation of their promises.

**II. A Requirement For Multiple ISP Access Should Be Modeled On That In The AOL Time Warner Merger In Order To Simplify Enforcement And To Ensure Uniformity Within The Industry.**

EarthLink Chief Executive Officer Gary Betty testified on April 23, 2002, before the Senate Committee on the Judiciary regarding the present merger. In that testimony, Mr. Betty outlined the minimum open access conditions necessary to ensure that the proposed merger does not stifle consumer choice and competition in the market for high-speed Internet access services. Those conditions are as follows:

1. Consumers of cable-based Internet access services must have a choice among ISPs.
2. AT&T/Comcast must offer arms-length, nondiscriminatory transmission arrangements to both affiliated and non-affiliated ISPs.
3. ISPs must have the same access to the cable network whether they operate on a national, regional, or local basis.
4. Both the ISP and the cable operator should have the opportunity for a direct relationship with the customer.

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<sup>10</sup> *Id.* at 94.

5. ISPs must be allowed to provide video streaming and there must be no discriminatory restrictions on provision of content.<sup>11</sup>

These core nondiscrimination principles are based on the conditions adopted in the AOL Time Warner merger. In that proceeding, the enforcement mechanism consists of a requirement that AOL cannot roll out cable-based Internet access services in a market until Time Warner Cable offers one unaffiliated ISP (EarthLink) in that market, with the services of two other unaffiliated ISPs to be made available within 90 days thereafter.

In the case of the AT&T/Comcast merger, both entities are already vertically integrated into the cable-based Internet access business. This situation presents the Commission with an existing restriction on broadband competition in light of both companies' general refusal to allow other ISPs on their networks. In other words, the anticompetitive practices of the applicants in the cable-based Internet access market are already in place. The merger will magnify the scope of those practices and further discourage new entrants by converting two regional monopolies into a single monopoly with a substantially larger geographic scope.<sup>12</sup> Accordingly, the necessary conditions in the current

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<sup>11</sup> Mr. Betty's testimony is attached hereto as Exhibit C.

<sup>12</sup> The applicants' argument that the merger will not enhance market power in the provision of high-speed Internet because the applicants do not currently compete is simply wrong. Application at 90. That argument entirely ignores the fact that, despite the cable industry's chosen practice of operating as regional monopolies instead of national competitors, the applicants nonetheless exist today as potential competitors. Antitrust doctrine holds that the existence of viable potential competitors constrains to at least some degree the anticompetitive activities of regional monopolists. *See, e.g., United States v. Marine Bancorporation*, 418 U.S. 602 (1974). That the applicants are seemingly unaware that market forces would normally have been expected to encourage the applicants to compete in the past should give the Commission as much pause about the past activities of the applicants as it does about their future activities. Put more bluntly, the fact that the cable companies have chosen to carve up the country into regional monopolies should not be accepted as a legitimate argument as to why

case must be implemented before the merger is approved. Specifically, AT&T and Comcast must each enter into binding, nondiscriminatory, commercially reasonable contracts with enough independent ISPs to provide consumers competitive alternatives to the cable company ISPs throughout the combined service areas of the applicants. The basic right to transmission under those agreements must be assured for at least five years, or until superseded by a broader open access requirement. In order that the applicants, the industry, and consumers have certainty, the Commission should require that such agreements be in place within 90 days of the Commission's order establishing the requirements, with failure to execute the required agreements within that period triggering automatic denial of the license transfer applications.

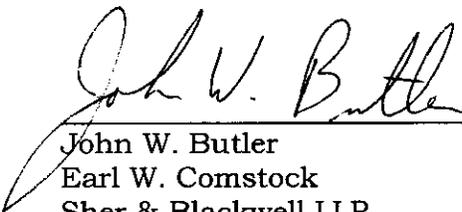
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combining two of those monopolies into one larger monopoly should be viewed as furthering the public interest.

### CONCLUSION

Cable-based Internet access is the only broadband choice for millions of Americans. With a few exceptions, noted herein, the applicant cable companies have refused to offer their customers access to any broadband Internet service other than their own. Accordingly, a substantial percentage of the current and potential broadband Internet access customers in the service area of the merged entity will face unregulated monopoly conditions in the market for broadband Internet access unless the Commission adopts appropriate conditions on this merger. EarthLink submits that the conditions proposed in these comments are appropriate, effective, proven, and required by the public interest. EarthLink therefore respectfully urges their adoption.

Respectfully submitted,



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Dave Baker  
Vice President for  
Law and Public Policy  
EarthLink, Inc.  
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Atlanta, GA 30309

# EXHIBIT A

December 6, 1999

Chairman William E. Kennard  
Federal Communications Commission  
445 Twelfth Street, SW, Room 8-B201  
Washington, DC 20554

Dear Chairman Kennard:

At your suggestion, the undersigned met to discuss an acceptable means of providing consumers with a choice of Internet Service Providers ("ISPs") when connecting to the Internet at high speed over cable. After a series of extensive discussions, this effort has produced the principles set forth below. While there remains disagreement concerning current exclusive contractual arrangements between AT&T and other companies, AT&T has agreed to adhere to the following principles once these exclusive contractual arrangements no longer apply.

AT&T will work toward, and implement, high-speed Internet access over cable that will provide consumers with:

- a choice of ISPs;
- the ability to exercise their choice of ISPs without having to subscribe to any other ISP;
- a choice of Internet connections at different speeds, and at prices reasonable and appropriate to those speeds;
- direct access to all content available on the World Wide Web without any AT&T-imposed charge to the consumer for such content;
- the continued ability to change or customize their "start page" and other aspects of their Internet experience;
- the functionality of their ISP comparable to that which such ISP has on competing high-speed systems, subject to any technical constraints particular to, or imposed upon, all ISPs using AT&T's cable system to deliver high-speed Internet access.

To that end, AT&T is prepared to negotiate private commercial arrangements with multiple ISPs, to take effect upon the expiration of existing exclusive contractual arrangements, that would provide the ISP:

- Internet transport services for high-speed Internet access at prices reasonably comparable to those offered by AT&T to any other ISP for similar services, subject to other terms negotiated between the parties on a commercial basis;
- the opportunity to market directly to consumers high-speed Internet access over cable using AT&T's Internet transport services;

- the opportunity through means to be mutually agreed upon, to market their high-speed Internet access which uses AT&T's Internet transport services to AT&T's cable customers who have not already designated an ISP;
- the opportunity to bill cable subscribers directly for services provided by the ISP that are additional to the services provided by AT&T;
- the opportunity to differentiate service offerings by various means, such as enhanced customer care and advanced applications; and
- the opportunity to maintain brand recognition in all such offerings.

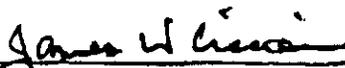
Any such opportunities will be subject to terms and conditions to be agreed upon by the parties which will address, as appropriate, but not be limited to issues such as pricing, billing, customer relationship, design of start page, degree of customization, speed, system usage, caching services, co-branding, ancillary services, advertising and e-commerce revenues, and infrastructure costs.

Please do not hesitate to call any of us if you have any questions.

Sincerely,



David N. Baker  
Vice President, Legal & Regulatory Affairs  
Mindspring Enterprises, Inc



James W. Cicconi  
General Counsel & Executive Vice President  
AT&T Corp.



Kenneth S. Fellman, Esq.  
Chairman, FCC Local & State Government  
Advisory Committee

cc: Commissioner Ness  
Commissioner Furchtgott-Roth  
Commissioner Powell  
Commissioner Tristani

# EXHIBIT B

**MEMORANDUM OF AGREEMENT  
BETWEEN AT&T CORP. AND  
THE MASSACHUSETTS COALITION FOR  
CONSUMER CHOICE AND COMPETITION ON THE INTERNET  
WITH RESPECT TO AT&T'S POLICY TO  
PROVIDE CUSTOMERS WITH A CHOICE OF ISPs WITHIN ITS  
MASSACHUSETTS CABLE SYSTEMS**

**WHEREAS**, The Massachusetts Coalition for Consumer Choice and Competition on the Internet has collected over 100,000 citizen signatures and garnered the support of many prominent Massachusetts citizens and organizations for passage of Initiative Petition "H", entitled "A Law To Promote Competition In The Cable-Based Internet Access Market;" and whereas, the Coalition is in the process of placing on the ballot this November said Initiative petition which, if enacted, would require all cable systems in Massachusetts to provide non-discriminatory open access to unaffiliated ISPs; and

**WHEREAS**, AT&T Corp. has stated its policy that customers should have a choice of ISPs and both AT&T Corp. and The Massachusetts Coalition for Consumer Choice and Competition on the Internet have stated their intent and desire to resolve issues relating to customer choice by agreement between themselves rather than through a ballot initiative; and

**WHEREAS**, AT&T Corp. and The Massachusetts Coalition for Consumer Choice and Competition on the Internet have met to attempt to resolve this issue in Massachusetts by voluntary agreement and have succeeded in agreeing upon a basic structure therefore which is acceptable to both parties; and

**WHEREAS**, AT&T Corp. and The Massachusetts Coalition for Consumer Choice and Competition on the Internet are committed to the improvement and enhancement of the competitiveness, innovation, and accessibility of "new economy" technologies in the Commonwealth.

**NOW, THEREFORE**, AT&T Corp. and its affiliates and subsidiaries (collectively "AT&T") and The Massachusetts Coalition for Consumer Choice and Competition on the Internet ("Coalition") hereby enter into this agreement, which sets out the commitments that AT&T and the Coalition are undertaking.

- I. MASSACHUSETTS POLICY REGARDING CUSTOMER CHOICE.** AT&T agrees to adopt and implement a policy in Massachusetts of offering its cable modem customers a choice among multiple ISPs who have negotiated commercial arrangements with AT&T, including ISPs that are unaffiliated with AT&T. Consistent with technological and facilities limitations and with AT&T providing a high-quality broadband consumer experience, AT&T agrees to use reasonable commercial efforts to provide cable-based broadband Internet

customers with a broad choice among unaffiliated ISPs.

- ii. **ISP AGREEMENTS.** AT&T shall enter into negotiations for private commercial arrangements with unaffiliated ISPs that wish to offer high speed Internet access and related services to consumers over AT&T's broadband cable systems. It is understood that the commercial terms negotiated between AT&T and ISPs may vary depending on a number of economic factors (including but not limited to costs incurred by AT&T, marketing and technical commitments made by the respective parties, and the types of services offered). However, AT&T intends that such commercial arrangements would provide the ISP Internet transport services for high-speed Internet access at prices reasonably comparable to those offered by AT&T to any other ISP, including its affiliates, for similar services, subject to other terms negotiated between the parties on a commercial basis. AT&T shall not require ISPs to grant equity in their companies as a condition of entering into service agreements. AT&T also agrees that it will allow ISPs, at their option, to have a direct relationship with cable modem customers which would include, but not be limited to, the ISP marketing and selling high speed Internet access and related services over cable directly to customers and directly billing and collecting from these customers for services provided by the ISP. Nothing in this Section will preclude AT&T from maintaining or establishing a commercial relationship with such high speed Internet access customers including, but not limited to, the offering of billing options, service bundling options and the use of the AT&T brand name.
- iii. **AT&T OPERATING POLICIES.** AT&T shall operate its broadband cable systems in a manner which does not discriminate among ISP traffic based on whether an ISP is affiliated with AT&T. To the extent commercially and technically practicable, AT&T shall allow consumers to switch ISPs subject to reasonable order processing charges. As a matter of principle and of customer satisfaction, AT&T is committed to facilitate maximum access by its customers to any content of their choosing. Therefore, AT&T is committed to developing and negotiating appropriate technical and commercial mechanisms for managing bandwidth usage associated with video streaming on a shared network, and for ensuring the availability of streaming video to customers who desire it. AT&T will permit ISPs to obtain Internet backbone capacity from its own service, or to supply their own Internet backbone capacity. AT&T is committed to negotiating appropriate technical and commercial terms for such arrangements.
- iv. **TIMING AND IMPLEMENTATION.** AT&T agrees to conduct a pilot program to offer customers a choice of ISPs over its cable systems in at least one and up to three Massachusetts cities and/or towns, commencing operations no later than October 31, 2001. AT&T agrees to commence implementation of the customer choice policies stated herein within all of its broadband operations in Massachusetts no later than July 1, 2002.
- v. **NATIONAL BROADBAND CUSTOMER CHOICE POLICY.** AT&T declares that its national broadband customer choice policy is comparable and consistent with

the provisions contained herein. AT&T also agrees to actively encourage other U.S. cable operators to voluntarily adopt comparable policies for Massachusetts and for the nation.

- VII. **BALLOT INITIATIVE.** In consideration of AT&T's commitments contained herein and since this agreement will render the Coalition's ballot initiative unnecessary, the Coalition and the First Ten Signers of Initiative Petition "H", represented by Christopher Grace, hereby agree not to complete the qualification process for Initiative Petition "H" for the November 2000 ballot.
- VIII. **DISPUTES ARISING FROM THIS AGREEMENT.** Any and all disputes between the parties arising from this agreement shall be resolved through good-faith negotiation and/or mediation rather than through litigation. Additionally the agreement is not intended to create any third-party rights or causes of action.

**AGREED BY:**

AT&T Corp.

  
James W. Cicconi, General Counsel and Executive Vice President

The Massachusetts Coalition for Consumer Choice and Competition on the Internet

  
J. Christopher Grace, Chairman,  
and as the designated representative of the First Ten Signers of Initiative Petition "H"

# EXHIBIT C

Senate Committee on the Judiciary  
Subcommittee on Antitrust, Competition and Business and Consumer Rights  
"Dominance on the Ground: Cable Competition and the AT&T - Comcast Merger"  
April 23, 2002

Garry Betty  
CEO  
EarthLink

**Introduction**

Good afternoon and thank you for inviting me to testify today about the proposed merger between AT&T and Comcast and its potential impact on competition and consumer choice in broadband internet access.

I am Garry Betty, CEO of EarthLink. EarthLink is the nation's third largest Internet Service Provider (ISP) and is the largest independent ISP. EarthLink serves 4.9 million customers with dial-up, broadband and web hosting services. In broadband, EarthLink is "platform agnostic" providing high-speed internet access to over 530,000 customers through Digital Subscriber Line (DSL), cable, and satellite connections. The majority of EarthLink's broadband subscribers today have DSL connections as most major cable companies do not offer cable modem customers a choice of ISPs.

All of us here today want to encourage broadband deployment. "Broadband deployment" is a term that is frequently used these days. Unfortunately, it is also

sometimes misused as an excuse for activities that benefit network owners at the expense of consumers. It has been said that you can do just about anything you want in Washington these days as long as you say it is to promote broadband deployment.

One example of this has been the refusal of most major cable companies to allow consumers who want to connect to the broadband internet through a high-speed cable modem to choose their internet provider. Rather, these cable companies have forced consumers to use just their cable company's in-house internet service. This take-it-or-leave-it choice has resulted in higher prices and lower adoption rates than would be the case if consumers had competitive choice in their internet provider over cable.

We are therefore here today to ask that AT&T and Comcast commit to providing customers in all their markets a choice in broadband ISPs over cable by signing commercially reasonable contracts with independent ISPs prior to their merger being approved.

## **AT&T and Comcast must offer cable modem customers a choice of ISPs**

ATT and Comcast have argued since 1998 to Congress, the FCC, federal courts and local authorities that they should not be required to offer their subscribers a choice in internet providers over broadband cable. Rather, they have proposed that open access should be voluntary and have promised that they would open their networks by this year. They have couched these arguments in very appealing calls for market-based solutions for broadband internet access over cable.

Unfortunately, while ISPs have always existed in a competitive marketplace, cable companies have not. Just as most consumers have no competitive choice in their cable television provider, so too most consumers have no choice in their internet provider over broadband cable.

This is a significant problem since cable is and will remain the primary platform through which consumers get broadband internet access. In 2001, Cable provided about 2/3 (6.5 million out of 9.7 million) of all broadband connections. By year-end 2002, cable will still provide 60% (8.0 million out of 13.8 million) of all broadband connections. By 2005, cable will still provide more than half (est. 17.0 million out of 30.7 million) broadband connections.

Notwithstanding calls for ubiquitous competition in platforms (i.e. cable vs. DSL vs. satellite) the fact remains that cable will remain the only broadband connection for millions of Americans for years to come. This many consumers should not be denied meaningful choice in their internet provider over those cable connections.

Furthermore, broadband is the future of the internet. While the market for dial-up internet access has matured and reached a plateau at about 55 million households, broadband continues to grow from about 1 million households at year-end 1999 to an estimated 30 million or more households by 2005.

### **Promises Made**

In 1999, during the FCC's review of AT&T's merger with TCI (even then the nation's largest cable company), AT&T told the Commission that it was committed to an open broadband platform and that it "would favor the unbundling of the modem in order to provide consumers with choice and lowest prices."

Later that year, at the urging of then FCC Chairman Kennard, AT&T signed a statement of principles with MindSpring Enterprises (now part of EarthLink) in which AT&T committed to offer its broadband consumers a choice of ISPs when its exclusive contract with its own affiliated ISP, Excite@Home, expired in June

2002. (Letter to FCC Chairman William E. Kennard from James W. Cicconi, David N. Baker and Kenneth S. Fellman, December 6, 1999).

### **Boston and Seattle: Local Commitments**

In June 2000, AT&T signed an agreement with the Massachusetts Coalition for Consumer Choice and Competition which was seeking an open access referendum from the November 2000 ballot. In exchange for removing the ballot initiative, AT&T committed to conduct a multiple ISP trial no later than October 2001, and to implement ISP choice statewide by July 1, 2002. (Memorandum of Agreement between AT&T Corp. and the Massachusetts Coalition, June 27, 2000).

As part of their acquisition of TCI, AT&T also made a commitment in year 2000 to the local franchising authority in King County, Washington to provide multiple ISP choice to consumers once their contract with Excite@Home expired on June 4, 2002. As Excite@Home expired before their contract did, King County demanded in February 2002 that open access should immediately be implemented. (Letter to Janet Turpen, AT&T, from Kevin Kearns, King Co. Washington, February 19, 2002).

## **Small Steps Forward**

On March 12, 2002, EarthLink announced an agreement with AT&T to offer broadband internet service to AT&T Broadband cable customers in Boston and Seattle later this year. AT&T has also suggested that they will open additional markets in 2003. While we are pleased to have reached the agreements we have, and look forward to signing others like them, there are still millions of AT&T and Comcast cable customers who still have no competitive choice in broadband internet service providers over cable.

Similarly, Comcast recently signed an agreement with United Online to provide Indianapolis and Nashville customers with a choice of ISPs. Again, these limited agreements raise the question as to whether this is a slow trend toward long-promised open access or merely an effort to forestall open access requirements in the context of a merger review.

While we would like to believe that AT&T, Comcast and other cable companies will voluntarily open their systems, promises may no longer be enough. This merger would combine the nations first and third largest cable companies into super-size company controlling cable TV and internet access to over 40% of American homes. We would prefer to be able to sign business contracts on

commercially reasonable terms. But barring such commitments, open access requirements would be necessary to ensure consumer choice in access.

### **AOL Time Warner Example**

As part of its antitrust review of the AOL Time Warner merger, the FTC required open access as a condition of approving that merger. In order to offer cable internet access through its affiliate AOL, Time Warner Cable must allow subscribers on its cable systems to choose from among AOL, Roadrunner (another in-house service), EarthLink, or other two other unaffiliated ISPs.

While it is still early in our relationship with Time Warner, we are glad to report significant progress. Beginning in September 2001, EarthLink now offers broadband internet access to Time Warner Cable customers in 30 of their top 40 markets, with the remainder to come online by the end of this year.

This open access relationship benefits all involved. Not only can EarthLink offer broadband service to customers formerly foreclosed to us, but we have helped drive overall broadband subscriber growth on the Time Warner systems. Time Warner executives have noted a 20% to 25% increase in overall broadband take rates. (Chris Bogart, Pres./CEO of Time Warner Cable Ventures, at Goldman Sachs Communacopia 2002, April 9, 2002). Consumers also benefit as they now

have competitive choice in their internet provider over cable, with price differentiation and EarthLink service offered at a market-leading \$41.95 a month.

I urge you today to support the same basic conditions of open access on the AT&T and Comcast systems that apply to the AOL Time Warner systems.

The minimum standards for effective open access are:

- Consumers of broadband cable services should have a choice among multiple ISP's.
- Cable broadband providers must negotiate at arms-length nondiscriminatory commercial arrangements with both affiliated and non-affiliated ISPs (including "first screen" placement).
- ISPs should have the choice of operating on a national, regional, or local basis.
- Both the ISP and the cable operator should have the opportunity for a direct relationship with the customer.
- ISPs should be allowed to provide video streaming and there should be no discriminatory restrictions on provision of content.

These are the basic standards that shaped the FTC's requirement for open access on the AOL Time Warner systems. These same requirements should be met by AT&T and Comcast as a condition of their merger.

## **Not regulating the Internet**

There's been a lot of rhetoric by cable companies and their surrogates that open access is "regulatory." But stop for a moment and consider what's being regulated. Throughout the country, cable companies have had exclusive local franchises to operate the cable system in any given area. These franchises were created by government regulations. Actions that seek to limit cable monopoly power created by these regulations, and to give consumers increased choices in broadband services are, by definition, de-regulatory.

This is also not "regulating the internet." The open unregulated competitive internet we enjoy today exists because of regulations on the underlying largely non-competitive infrastructure over which it travels. That's why even though consumers until recently had no choice in local phone service (and may only have limited choice today), they have never been required to buy the local phone company's ISP. For example, Verizon's ISP is available as a competitive choice, but you're not required to buy or use their ISP just because you get your local phone service from them. Compare this to most cable companies (which are also regulated, just under different rules) where if you want internet access through a cable modem, you have no choice but to purchase the cable company's affiliated ISP.

By comparison, internet access has always been competitive. There are over 6,000 ISP's across the country. Consumers in major cities can choose from hundreds of ISP's that serve their local area. And over 96% of internet users throughout the country, even in the smallest towns and rural areas, can choose from among at least 4 Internet Service Providers. Compare this to cable, where over 96% of customers throughout the country have NO choice in who their cable company is. As high speed internet access becomes available over cable, we are at a crossroads. Will we follow the open consumer choice path of the internet, or the closed no choice model of cable?

Cable folks will say that open access isn't necessary because there are other means of high-speed access to the internet, such as Digital Subscriber Line (DSL) technology over phone lines. But DSL has distance limitations. Once you get more than a mile and a half from a telephone central office, DSL service starts to degrade. Once you get beyond three miles, it is essentially unavailable. And technologies such as satellite, wireless and electric lines will not be widely available for many years to come. The upshot is that for as many as a third of consumers across the country, particularly in rural areas, if they get any broadband access at all in the next five years, it will only be through a cable line. These customers deserve choice in broadband internet access as well.

It has been consistent policy in this country for over 20 years to give consumers greater choice in their telecommunications services. The federal court decision

that broke up the old Ma Bell AT&T in 1984 and allowed competition in long distance has resulted in rates that are more than 2/3 lower today than they were then. In passing the Telecommunications Act of 1996, Congress established the framework to bring these same benefits of competition to local phone service and to wireless. Legislation such as the Satellite Home Viewer Act and the program access provisions of the 1992 Cable Act sought to end cable's longstanding monopoly over multi-channel video programming. And consumers have always had competitive choice in Internet Service Providers in large part because FCC decisions beginning in the 70's, and 80's and continuing today that allowed such information services to travel unfettered over phone lines. At every turn, policy makers have sought to give consumers greater choice in their communications services. Broadband internet access over cable should be no exception.

Thank you for giving me the opportunity to speak with you today. I look forward to any questions you may have.

END