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Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, SW
Room TWB-204
Washington, D.C. 20554

Re: 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, MB Docket No. 02-70.

Dear Ms. Dortch:

Prime Communications ("Prime"), by its counsel, submits this letter to underscore the reasons why the proposed merger between AT&T's broadband business ("AT&T") and Comcast Corporation ("Comcast") is anticompetitive, inconsistent with fundamental antitrust principles, would harm consumers, and is inconsistent with the public interest. This letter expands upon the issues raised in our July 22, 2002 meeting with the Commission, and highlights issues presented in the attached expert economic analysis—a report that examines the details and impact of AT&T's existing anticompetitive practices and antitrust violations.[1]

In addition, Prime requests that the Commission "stop" the informal 180-day clock to enable Commission staff to investigate more fully AT&T's anticompetitive conduct and examine how the merger likely will increase such practices in the expanded AT&T-Comcast territory. Finally, Prime urges the Commission either to deny the AT&T-Comcast application as harmful to the public interest or grant the merger only on the condition that AT&T ceases its harmful actions.

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[1] Michael A. Turner. Ph.D. *Prime Communications v. AT&T – An Economic Analysis*, at 39, attached hereto. ("Economic Analysis").

I. Background

Prime is a small, regional, full-service advertising firm for auto dealers operating in parts of Massachusetts, New Hampshire, Rhode Island and Connecticut. In this capacity, Prime: (1) provides independent advertising advice for its clients; (2) produces and purchase advertisements for cable, broadcast and print; and (3) provides an Internet automotive advertising website portal.[2]

In the same region – particularly New Hampshire and Massachusetts, AT&T is the dominant cable provider and, therefore, controls cable advertising for this region. AT&T also operates an online automotive advertising affiliate in this region, known as Vehix. However, instead of competing on fair terms with other providers, AT&T has been using its cable monopoly to thwart competition in the online automotive industry. While Prime highlights its experiences with AT&T below, the affect and ramifications of AT&T's illegal unlawful behavior is not limited to Prime. To the contrary, AT&T's conduct has far-reaching negative public interest consequences that will only be exacerbated if the merger is approved.

We first detail AT&T's existing violations and then explain how the merger will magnify the existing situation, to the detriment of consumers and competition nationwide.

II. Absent Conditions, the AT&T-Comcast Merger is Not in the Public Interest

In determining whether to approve a proposed merger, the Commission examines whether the merger would be in the public interest. In so doing, "[t]he Commission's analysis of public benefits and harms includes, but is not limited to, an analysis of the potential competitive effects of the transaction, as informed by traditional antitrust provisions …. To find that a merger is in the public interest, therefore, the Commission must 'be convinced it will enhance competition.'"[3] In this case, unless proper conditions are imposed, the proposed AT&T-Comcast

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[2] The Internet automobile websites are immensely popular with consumers. It is estimated that between 60% and 75% of all new car buyers researched their purchase online, while nearly 6% of all new cars sold last year in the U.S. were done so online. This represents about $21 billion worth of new cars sales during 2001. *Id*., 39-44.

[3] *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. Transferors, to AOL Time Warner Inc., Transferee*, 16 FCC Rcd 6547, ¶ 21 (2001) ("AOL-Time Warner Order").

merger will deter competition, harm consumers and therefore will not be in the public interest.

A. AT&T's Existing Antitrust Violations

AT&T is already violating several antitrust principles. These actions are distorting competition, artificially increasing prices, and harming competitors and consumers.

Maintenance of Monopoly Power. AT&T unquestionably dominates the market for cable television advertising spots the areas of Eastern Massachusetts and Southern New Hampshire, with more than 85 percent of households in such areas subscribing to AT&T cable television services. AT&T has engaged in conduct with the purpose and effect of maintaining its monopoly in cable television by protecting and expanding its cable television advertising revenue.

In particular, AT&T has held Prime largely responsible for AT&T's inability to attract cable advertising from auto dealers. In addition, AT&T has attempted to eliminate Prime as a full-service advertising agency by purchasing Prime's Internet advertising services. The offer would have eliminated Prime as a competitor of AT&T's Vehix service in the market. When Prime declined the offer, AT&T subsequently precluded Prime from making direct purchases of cable television advertising—thereby prohibiting Prime from continuing as a full-service advertising agency for its auto dealer customers. AT&T's refusal to deal is a clear effort to maintain its monopoly power.

Unlawful Bundling. As part of its unlawful monopoly maintenance, AT&T offers its Vehix service ostensibly for free. However, auto dealers must agree to purchase cable television advertising in amounts prescribed by AT&T. This activity not only locks in dealers to the exclusion of Internet competitors, but also artificially increases the demand for cable television advertising. Advertising agencies and online service providers that do not have a pre-existing cable monopoly cannot match AT&T's offer. Indeed, no business entity can compete in such environment. In addition, AT&T is engaging in illegal price squeezing by offering Prime's customers discriminatory below-cost discounts that are subsidized by AT&T's lucrative cable monopoly.

Finally, AT&T is subsidizing Vehix with more than $70 million in advertising on AT&T's cable systems. By using valuable advertising slots, or avails, to promote Vehix, there is a reduction in the total supply of local advertising avails for all advertisers in AT&T's cable system.[4]

Leveraging Monopoly Power. Monopoly leveraging occurs when a firm uses its monopoly power in one market to gain a competitive advantage in another.[5] It is clear that AT&T is engaging in such monopoly leveraging. In particular, AT&T is leveraging its cable monopoly to provide a bundle of free Vehix services and guaranteed cable advertising in order to gain a competitive advantage in the online automotive market. In addition, AT&T is utilizing its cable monopoly to provide millions of dollars of free cable advertising to promote Vehix. This subsidy is an enormous competitive advantage. Indeed, the largest online automotive portal, Autobytel, did not have the means to advertise on cable at all during 2001.[6]

AT&T's actions obstruct the ability of web service providers to compete effectively with AT&T's in-house affiliated media services because they cannot offer these services for free. In short, AT&T's actions eliminate competitors. As a result, there is a real probability that AT&T will dominate the online automotive market and the production of cable and television advertising spots in Eastern Massachusetts and Southern New Hampshire.

Violation of Essential Facilities Doctrine. The ability to place cable advertising is essential to a full-service advertising agency, such as Prime. AT&T's actions also satisfy the four elements necessary to establish a violation of the essential facilities doctrine. First, AT&T holds a monopoly and controls the cable television market. Second, competitors cannot practically or reasonably duplicate the essential facilities due to the high barriers to entry. Third, AT&T has denied the use of this facility to competitors. For example, AT&T has cutoff Prime's ability to make direct purchases of cable television advertising. Finally, there is no question that it is feasible for AT&T to permit others to advertise on its cable network. Indeed, Prime purchased such ads from AT&T and its predecessor for 15 years prior to AT&T's recent abrupt refusal.

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4 Even if AT&T's advertising subsidy to Vehix were comprised of purely excess inventory or "fill," this still eliminates perks and bonus runs for other advertisers that usually negotiate such benefits in the terms of their contracts.

5 *See Covad Comm. v. BellSouth*, No. 01-16064 (11th Cir. Aug. 2, 2002) (citing *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 276 (2d Cir. 1979)).

6 Economic Analysis, at 49-50

B. The Merger Will Magnify the Harm to Consumers and Competition

It is not disputed that the merger will increase significantly the national market power of the AT&T-Comcast. Combined, AT&T and Comcast will control 8 of the 10 markets in the country, and, further, will have a strong position in the remaining 2 of the top 10 markets. However, what might not be readily apparent is that the merger and resulting market power will also transform the Vehix brand from a regional brand, to a strong national brand.

Today, only AT&T offers the bundle of free Vehix on the condition auto dealers agree to prescribed cable advertising. There is no indication that Comcast actively promotes Vehix. With the merged entity, there is a high probability that such arrangements will be expanded into new markets in Comcast's territory. As a result, AT&T's monopoly maintenance of cable will be transported to the other top ten markets. Moreover, Internet automobile retailers in the AT&T-Comcast markets will see their market share rapidly erode as area auto dealers opt for the free Vehix package bundled with the purchase of local cable television avails. Given the fragile state of the nascent online industry, it is likely that many players will be forced out of the market, either through bankruptcy or consolidation. Further, this market is characterized by strong "network effects" – wherein a service's value increases substantially with the addition of new users. Here, marketing experts fully recognize these effects by stressing the significant competitive advantage of strong brands, including the unique advantage of national brands where national advertising is feasible. By substantially increasing the geographic market and, therefore, increase the number of AT&T customers, the proposed AT&T-Comcast merger will greatly magnify these network effects.[7] Consequently, in light of the asymmetry in advertising as well as the network effects in play, there is good reason to believe that Vehix will become the dominant player in an otherwise competitive online retail industry.

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[7] Indeed, the network effects in this situation are similar to those the Commission found troubling in the AOL-Time Warner merger. Specifically, in the AOL-Time Warner merger, the Commission concluded that "AOL's market dominance in text-based messaging, coupled with the network effects and its resistance to interoperability, establishes a very high barrier to entry for competitors that contravenes the public interest in open and interoperable communications systems, the development of the Internet, consumer choice, competition and innovation." AOL-Time Warner Order, ¶ 157. To address these concerns, the Commission imposed specific conditions on the merger. Likewise, in this case, the Commission should impose the conditions proposed by Prime to ensure that the AT&T-Comcast merger is in the public interest.

What is more, AT&T's subsidized promotion of Vehix also harms competition by artificially increasing the price for advertising avails on AT&T's cable system. As noted above, AT&T is spending millions promoting its Vehix service. AT&T's massive advertising cross-subsidy, plus for "free" pricing, will "tip" the market, allowing AT&T to dominate the fragile, fledgling online auto retailing industry. In addition, AT&T's advertising subsidy is reducing the total number of cable advertising slots available to the public. At the same time, the demand for cable advertising avails is increasing because auto dealers must agree to spend a prescribed amount of cable advertising in their bundle for free Vehix. With the supply of cable advertising slots decreasing and the demand increasing, the price of each slot escalates. The result of this ripple effect is to increase the rates for advertising on AT&T's cable network for everyone. These prices eventually get passed along, resulting in higher prices to consumers.

Consumers will also be harmed because many of the savings consumers currently enjoy as a result of transacting in this market will be lost. Reduction in the number of players in this market will translate into reduced bargaining by Internet automobile retailers on behalf of consumers. Further, to the extent that Vehix becomes dominant in the Internet automobile retailing market, auto dealers will pass on the large cable advertising costs required to qualify for Vehix on to consumers. In short, the estimated $420 million saved on the purchase of new cars during 2001 is at risk.[8] If Vehix continues to succeed in tipping the market for Internet automobile retailing, the savings currently enjoyed by consumers either will be significantly reduced or eliminated altogether. Either way, consumers and the public interest are harmed.

In addition, AT&T's refusal to deal with Prime is intended to eliminate an independent voice for auto dealers in the purchase of cable television advertisements. Because Prime would not subscribe to AT&T's preferred sales methodology – one that maximizes cable system profits, rather than ensuring advertising clients receive the best value for their advertising dollars—and because Prime competed with AT&T (in the sale of local cable avails, in the production of commercials, and in the regional Internet automobile retailing market), AT&T has acted to punish Prime to force its compliance with AT&T's rules or its exit from the full-service advertising agency business. Should AT&T's behavior be expanded

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[8] NEBR study estimates online new car purchasers save 2% over offline purchasers of average car. Assuming $21 billion in online new car sales in 2001, the resulting savings are $420 million. *Id*., at 61.

with the merged AT&T-Comcast entity, it will have a chilling effect on competition in the advertising and online automotive markets.

Equally alarming, AT&T's domination of the online automotive dealer market is only the beginning. Given AT&T's success and ability to cutoff competitors such as Prime, AT&T-Comcast will have every incentive to offer such bundling arrangements and stunt competition in similar markets, such as real estate, retail outlets, fast food companies, mortgages, and service industries. Thus, instead of buttressing competition, the merged entity will stifle competition. Accordingly, the negative ramifications to the public interest from the merger are far-reaching and significant.

III. Two Merger Conditions Are Necessary to Safeguard Competition

No other entities should suffer the wrath of an unwieldy monopoly leveraging its position in a thinly veiled effort to maintain its monopoly power. To avoid this result, and to ensure that all future and existing entrants have a level playing field, the Commission should permit the proposed AT&T-Comcast merger only on the following two conditions:

(1) AT&T-Comcast must permit all independent advertising agencies to purchase cable television advertising on a direct and nondiscriminatory basis; and
(2) AT&T-Comcast must unbundle its Vehix Internet-based product from its cable television advertising.

Finally, given the seriousness of AT&T's actions, and to give the Commission adequate time to investigate such matters, Prime urges the Commission to "stop" the informal 180-day clock that the Commission uses as a benchmark for action on proposed transactions.

Respectfully submitted,

/s/ John F. Kamp

John F. Kamp

Enclosure

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