

Writer's Direct Dial No.  
(202) 463-2510

September 20, 2002

RECEIVED

SEP 20 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

**VIA MESSENGER**

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

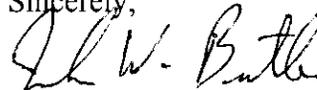
RE: In the Matter of: Application for Consent to the Transfer of Control of  
Licenses from Comcast Corporation and AT&T Corp. to AT&T Comcast  
Corporation, MB Docket No. 02-70

Dear Ms. Dortch:

Enclosed are one original and four copies of the Reply of Earthlink, Inc. To The Joint Opposition of Comcast Corporation and AT&T Corp. in the above-referenced matter. Please file the original and return the "stamp and return" copy to us as acknowledgement of your receipt.

Please contact the undersigned if you have any questions regarding this filing. Thank you for your kind assistance.

Sincerely,



John W. Butler  
Counsel for Earthlink, Inc.

cc: Qualex International  
Roger Holberg (via email)  
Erin Dozier (via email)  
Simon Wilkie (via email)  
James Bird (via email)  
William Dever (via email)  
Cynthia Bryant (via email)  
Jeff Tobias (via email)  
Lauren Kravetz Patrich (via email)  
Certificate of Service

No. of Copies rec'd 074  
List ABCDE

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

RECEIVED

SEP 20 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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 )

**REPLY OF EARTHLINK, INC. TO JOINT OPPOSITION OF  
COMCAST CORPORATION AND AT&T CORP.**

John W. Butler  
Earl W. Comstock  
Sher & Blackwell LLP  
1850 M Street, N.W., Suite 900  
Washington, D.C. 20036  
(202) 463-2510

David N. Baker  
Vice President for  
Law and Public Policy  
EarthLink, Inc.  
1375 Peachtree Street  
Level A  
Atlanta, GA 30309

September 20, 2002

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

RECEIVED

SEP 20 2002

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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 )

**REPLY OF EARTHLINK, INC. TO JOINT OPPOSITION OF  
COMCAST AND AT&T CORP.**

EarthLink, Inc. ("EarthLink"), pursuant to 47 C.F.R. § 1.45(c), hereby files its reply to the Joint Opposition of Comcast and AT&T Corp. (the "Joint Opposition"), which was filed by the applicants on September 13, 2002.

**1. The Commission Must Review The Entire TWE Restructuring Agreement In Order To Complete Its Public Interest Analysis.**

Applicant's lead argument is that the TWE Restructuring Agreement is not sufficiently relevant to the merger that the Commission should have an opportunity to understand and have access to all of its constituent parts. In support of this proposition, the applicants urge that "the Commission's public interest review is properly focused on the TWE Trust Terms, which govern *any* disposition of the TWE assets."<sup>1</sup> Joint Opposition at 5 (emphasis in original). In essence, Applicants argue that it makes no difference what the TWE

---

<sup>1</sup> Applicants filed the actual Agreement and Declaration of Trust on September 13, 2002, the same day they filed their Joint Opposition.

Restructuring Agreement says, because the affected interests will be put in trust. The fatal flaw in that argument is that it is predicated on the assumption that placing of a bundle of interests and commercial relationships in trust somehow prevents those interests and relationships from having any impact in the marketplace. Without repeating EarthLink's earlier arguments, the reason that the Commission must review the full TWE Restructuring Order, and in particular the AT&T/AOLTW High Speed Data Agreements, is that the substance of those agreements may have a substantial impact on the market for broadband Internet access. If there are substantial impacts, then those impacts will exist whether or not the interests and relationships that cause those impacts are placed in trust. The only way to know what those impacts will be is to look at the documents.

**2. EarthLink's Motion Addresses A Merger-Specific Issue.**

Applicants' second argument in opposition is that EarthLink is attempting with its motion to raise general issues regarding ISP access to cable systems. Joint Opposition at 5-6. This is simply untrue. EarthLink in its motion has raised issues regarding the commercial relationships of parties to this merger and the potential impacts of those relationships on competition and potential competition in the market for broadband Internet access. As such, these issues cannot be brushed off on the grounds suggested by applicants.

In the second section of their Joint Opposition, applicants claim that the proposed AT&T/AOLTW High Speed Data Agreement could not possibly be harmful to the public interest because it "will increase consumer choice of competing high-speed ISPs available on AT&T Comcast cable systems . . . ."

Joint Opposition at 6.<sup>2</sup> While this might be true, EarthLink's point is that there is simply no way for the Commission or anyone else to analyze what effect the AT&T/AOLTW High Speed Data Agreement will have on consumer choice unless the Commission gets a chance to read it. The Agreement might be the most pro-competitive arrangement ever conceived, or it might contain provisions that will prevent or impede competition for many years to come. For the Commission not even to review a merger-related document with such potential to impact the marketplace would be for the Commission to abdicate its public interest responsibility based on the applicants' invitation simply to "trust us."

Finally with respect to the argument that the AT&T/AOLTW High Speed Data Agreement is not relevant to the merger, applicants argue that:

Moreover, the AOL TW ISP Agreement is not contingent on the closing of the merger. Instead, as provided in Section 9.1(a)(ii) of the TWE Restructuring Agreement, if the merger has not closed by March 1, 2003 and all other conditions to closing the TWE restructuring have been met or waived, then AT&T and AOL TW have agreed to enter into an ISP agreement, substantially identical to the AOL TW ISP Agreement, that would govern the provision of AOL TW's high-speed Internet access services on AT&T's cable systems.

Joint Opposition at 6-7.

The argument that the High Speed Data Agreement is not technically "contingent" on the closing of the merger misses the mark. It is plain that the applicants intend to merge and that they intend to enter into the AOLTW High Speed Data Agreement. The market implications of that agreement between what will be the nation's largest cable company and the largest ISP are clearly an important issue for the Commission to consider. What is most striking

---

<sup>2</sup> Also on page 6, applicants assert that the AT&T/AOLTW High Speed Data Agreement concerns "the provision of a service that the Commission has properly determined to be unregulated." The Commission has never held that such a service provided by AT&T or Comcast is unregulated.

about the applicants' argument quoted above, however, is that the applicants admit that there is one agreement if the merger closes and another if it does not. That would appear to be all but irrefutable proof of a connection between the merger and the High Speed Data Agreements. It would appear that an examination of the differences in the two versions of the agreement could shed considerable light on the relationship of the High Speed Data Agreement to the merger and on the relationship of the Agreement to competition in the broadband Internet access marketplace.<sup>3</sup>

**3. Applicants Do Not Generally Sell Cable Transport To Unaffiliated ISPs.**

Applicants take EarthLink to task for arguing that AOL would apparently have the exclusive right to system-wide access to the AT&T/Comcast cable network. In so doing, applicants point to EarthLink's "own ISP agreement with AT&T Broadband. . . ." Joint Opposition at 8. As AT&T is well aware, that agreement has so far resulted in EarthLink's being able to offer service over AT&T Broadband cable only in Seattle and Boston. As to the AT&T Comcast offer to The Microsoft Network, that offer was part of a \$5 billion debt- for-equity restructuring.<sup>4</sup> If this arrangement represents an example of how "unaffiliated ISPs have successfully negotiated mutually satisfactory arrangements" (Joint Opposition at 11, emphasis added), then EarthLink stands corrected.

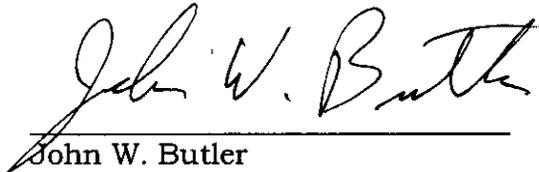
---

<sup>3</sup> Applicants describe the two versions of the High Speed Data Agreement as "substantially identical. . . ." Joint Opposition at 7. This raises the obvious question of why there are two agreements if they really are "substantially identical." This obvious paradox would, again, suggest that the Commission can best discharge its duty to the public by having a look at the documents.

<sup>4</sup> See Application Public Interest Statement at 8 and Appendix 5 thereto (QUIPS Exchange Agreement).

For all of the reasons set forth above and in EarthLink's September 5, 2002, Supplemental Comments, EarthLink respectfully urges the Commission to grant the relief requested in EarthLink's motion dated September 5, 2002.

Respectfully submitted,

A handwritten signature in black ink that reads "John W. Butler". The signature is written in a cursive style and is positioned above a horizontal line.

John W. Butler  
Earl W. Comstock  
Sher & Blackwell LLP  
1850 M Street, N.W, Suite 900  
Washington, D.C. 20036  
(202) 463-2510

Counsel for EarthLink, Inc.

David N. Baker  
Vice President for  
Law and Public Policy  
EarthLink, Inc.  
1375 Peachtree Street  
Level A  
Atlanta, GA 30309

September 20, 2002

## Certificate of Service

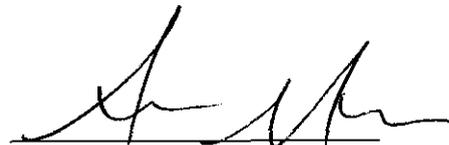
This is to certify that a copy of the foregoing Reply of Earthlink, Inc. to Joint Opposition of Comcast and AT&T Corp. was mailed U.S. postage prepaid this 20<sup>th</sup> day of September, 2002 to:

A. Richard Metzger, Jr., Esq.  
Lawler, Metzger & Milkman, LLC  
2001 K Street, N.W., Suite 802  
Washington, D.C. 20006

James L. Casserly, Esq.  
Mintz, Levin, Cohn, Ferris,  
Glovsky and Popeco, PC  
701 Pennsylvania Avenue, N.W.  
Washington, D.C. 20004

David Carpenter, Esq.  
Sidley Austin Brown & Wood LLP  
1501 K Street, N.W.  
Washington, D.C. 20005

Michael H. Hammer  
Willkie Farr & Gallagher  
1155 21<sup>st</sup> Street, N.W.  
Washington, D.C. 20036



Aubrey L. Montgomery