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ELECTRONICALLY FILED

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

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

Dear Ms. Dortch:

On September 5, 2002, EarthLink, Inc. ("EarthLink") filed a motion with the Commission requesting that the Commission order the applicants in the above-referenced proceeding to produce for inclusion in the record and for public comment certain documents named by and incorporated by reference in the "TWE Restructuring Agreement" dated as of August 20, 2002. In particular, EarthLink urged the Commission to require submission of the AT&T/AOLTW High Speed Data Agreement ("HSDA") referenced in the TWE Restructuring Agreement.[1] Applicants on September 13, 2002, filed a joint opposition to EarthLink's motion and a separate motion seeking similar relief filed by Media Access Project ("MAP"), and on September 20, 2002, EarthLink filed a reply to the joint opposition. Since these pleadings were filed, there have been a number of permitted *ex parte* communications regarding the pending motions filed by EarthLink and by MAP.

[1] Applicants refer to the HSDA as the "AOL ISP Agreement" in their correspondence quoted below.

The purpose of this letter is to respond to arguments raised by the applicants in letters to you dated October 24 and October 25, 2002.[2]

1. The October 24, 2002, Letter.

In the October 24, 2002, letter, applicants argue that the HSDA is not relevant to the Commission's analysis of the merger. Applicants appear to argue that, because the Trust Agreement proposed by the applicants will apply to the AT&T Comcast ownership interest in Time Warner Entertainment ("TWE") regardless of the structure of the TWE interest, then the TWE Restructuring Agreement and the HSDA that is part of the TWE Restructuring Agreement are irrelevant. The applicants put it this way in their October 24, 2002, letter:

> In addition, MAP and EarthLink are simply wrong in suggesting that the TWE Restructuring Agreement "*is* part of this merger." While the Trust Agreement can be characterized as "part of the merger," the TWE Restructuring Agreement and the AOL ISP Agreement most certainly are not. The AT&T Comcast merger is not conditioned upon the closing of the transactions contemplated in the TWE Restructuring Agreement, nor is it conditioned upon the effectiveness of the AOL ISP Agreement – in fact, neither agreement is even contemplated in the AT&T Comcast merger agreement.

Id. at 2 (emphasis and quotations in original).

Applicants' argument appears to be based on the assumption that no transaction that is not a technical precondition to consummation of the merger can be relevant to the Commission's analysis. That construction is far too narrow to square either with the scope of the Commission's public interest responsibilities or with common sense. The Commission succinctly summarized its statutory duty in its order approving the America Online/Time Warner merger and at the same time explained why its consideration of merger impacts on the high-speed Internet access services market could not be deferred to a non-merger proceeding:

> The Commission has a statutory duty to determine whether the proposed transaction would serve the public interest, and may not approve it absent such a finding. We cannot abdicate this duty on the basis of speculation that a future proceeding might be able to remedy harms to the public interest that we believe would result from a proposed merger.

In the Matter of 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, CS Docket No. 00-30, Memorandum and Order at ¶ 81 (Rel. Jan. 22, 2001) (hereinafter "*AOL Time Warner Order*").

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[2] The October 24, 2002, letter is three pages in length and is signed by Mr. Arthur R. Block, Senior Vice President and General Counsel for Comcast Corporation. The October 25, 2002, letter is four pages long and is signed by David L. Lawson, Esq. of Sidley Austin Brown & Wood LLP, counsel to the applicants.

The Commission in that proceeding went on to explain the sorts of harms that required the Commission's attention and action:

> The marriage of AOL and Time Warner would wed the nation's leading ISP with its second largest cable provider and would thereby yield a company with unprecedented potential to dominate the market for residential high-speed Internet access services. The record demonstrates that the Applicants have already begun to contemplate using their combined potential in a manner that would render unaffiliated ISPs in that market unable to compete effectively.

Id. at ¶ 82.

Keeping in mind the Commission's statutory duty to make an affirmative public interest finding before approving the merger, and keeping in mind that the AT&T Comcast merger will create by far the nation's largest cable company, the relevance of the HSDA becomes clear. First, the HSDA is described as governing AOL Time Warner's access to the combined AT&T Comcast cable network. That this is the case is plain from the applicants' own press release on the subject, which states that "AT&T Broadband and Comcast have reached a three-year non-exclusive agreement with AOL Time Warner under which AOL High-Speed Broadband would be made available on AT&T Comcast cable systems, which pass about 10 million homes."[3] Accordingly, the proposed agreement contemplates an arrangement between the nation's largest ISP (AOL) and what will be the nation's largest cable company, the combined AT&T Comcast. Inasmuch as it is primarily the vast size of the merged company that raises competitive concerns with respect to the high-speed Internet access services market, it simply defies common sense to say that the HSDA is not relevant to the Commission's merger analysis.

Applicants' second argument -- that the existence of the Trust Agreement renders the content of the TWE Restructuring Agreement and the HSDA irrelevant -- fares no better. Here applicants make two errors of logic. The first is that they assume that, because the TWE Restructuring Agreement was produced in the course of a dialogue with Commission staff about divestiture of the TWE interests, the HSDA can be relevant, if at all, only as it relates to divestiture. As the discussion above indicates, the competitive concerns raised by the HSDA do not primarily arise out of AT&T's interest in TWE. Rather, those concerns arise out of the likelihood – based on press reports and the applicants' own press releases -- that the merged AT&T Comcast may be able to dictate unfavorable terms to even the largest ISP in the nation,[4] a situation that sounds alarms for competition generally in the high-speed Internet access services market. Inasmuch as the HSDA as described by the

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[3] Press release attached to August 22, 2002, *ex parte* letter filed by James L. Casserly, Esq. (emphasis added).

[4] AOL, of course, is not merely the largest ISP. As a result of the AOL Time Warner merger, AOLTW also controls the second largest cable network in the country. AOLTW is, in the Commission's words, "a company with unprecedented potential to dominate the market for residential high-speed Internet access service." *AOL Time Warner Order* at ¶ 82. Even with AOLTW's acknowledged strength, however, press reports indicate that AT&T Comcast got the best of the deal by far. It is this exercise of market power by AT&T Comcast in the high-speed Internet access market that requires the Commission to conduct a thorough examination of the HSDA.

applicants themselves will apply to the merged entity, then the market power of that entity resulting from the merger is at the heart of the issues that the Commission is legally bound to consider.

Second, as the Applicants correctly point out, "[t]he AOL ISP Agreement is not even mentioned in the Trust Agreement." October 24, 2002, *ex parte* at 2. Far from meaning that the HSDA is irrelevant, the fact that it is not covered by the Trust Agreement means that the Commission must address it separately from that Trust Agreement. Here the applicants have it exactly backwards. If in fact the HSDA memorialized a set of rights that arose out of AT&T's TWE ownership interest, then the Trust Agreement might provide a proper vehicle for dealing with the HSDA. Because the HSDA will create rights by contract rather than by ownership, however, the Trust Agreement will in no way restrict or regulate the manner in which the parties behave under the HSDA. Accordingly, for the applicants to argue that the Trust Agreement somehow makes it unnecessary for the Commission to examine the HSDA flatly contradicts the applicants' own description of the Trust Agreement.

For all of the foregoing reasons, the HSDA is clearly relevant to the Commission's statutorily mandated public interest analysis. That agreement as described by the applicants embodies a contractual agreement between the nation's largest ISP and what is about to become by far the nation's largest cable company. As such, it is impossible to say with a straight face that the contents of the HSDA are irrelevant to the Commission's public interest analysis of this merger.

The October 25, 2002, Ex Parte Letter.

The bulk of applicants' October 25, 2002, ex parte letter is devoted to attacking an argument that neither EarthLink nor MAP has made. Specifically, applicants take forceful exception to the proposition that the Commission is required to obtain and review all documents that the applicants have made available to the Department of Justice ("DOJ") in connection with DOJ's Hart-Scott-Rodino ("HSR") pre-merger review procedures. Applicants are quite right to argue against such a standard, because no such standard exists. Applicants argument is badly misdirected, here, however, because EarthLink has never asked for the purported "thousands of boxes of material that the parties submitted to the DOJ. . . ." October 25 *ex parte* at 1-2. Quite to the contrary, EarthLink has focused its inquiry on the HSDA, a document which, if EarthLink's experience is any guide, is almost surely less than 100 pages. In addition to the fact that there is no burden involved with producing and reviewing this short document (it is inconceivable that production and Commission review of the document and any comments thereupon could take even a fraction of the time so far spent arguing about that document), EarthLink and MAP have made a clear case for why the Commission is statutorily required to review the document. Given that there is only one document at issue, and a key document at that, the cases cited by applicants regarding HSR documents are entirely inapposite.[5]

[5] For the avoidance of any doubt, the fact that the HSDA appears to have been filed with DOJ as part of the HSR process has nothing to do with EarthLink's request that the HSDA be included in the record of the Commission's proceeding. Instead, EarthLink's request stems from the subject matter of the HSDA and its potential impact on competition in the high-speed Internet access market. Applicants' legal arguments, on the other hand, seem to be predicated entirely on the coincidence that the HSDA was filed with DOJ.

Applicants raise a second issue in their October 25, 2002, *ex parte*, although they do so somewhat obliquely. That issue is whether the Commission must put the HSDA in the record if the Commission has in fact reviewed that document. As is reflected in *ex parte* filings describing recent meetings among EarthLink and MAP representatives, staff, and Commissioners, there is an open factual question as to whether in fact staff may have already reviewed the HSDA by obtaining a copy from or visiting DOJ. Applicants seem to suggest that, even if this has occurred, the Commission is not required to place the document in the record of this proceeding.

At the outset, EarthLink respectfully urges the Commission promptly to clear up the factual question of whether or not staff or Commissioners have reviewed the HSDA. Setting aside for now the question of whether the Commission has already reviewed the HSDA that EarthLink seeks to have included in the record, EarthLink notes that the cases cited by applicants for the proposition that the Commission need not place the HSDA in the record even if the Commission has reviewed that document fare no better than the cases that applicants cite with respect to their "relevance" argument, and for the same reason. Specifically, the applicants cite cases that support the proposition that, in the context of informal rulemaking, the Commission need not place in the record absolutely every scrap of information upon which it relied in making its decision, no matter how insignificant. Just as applicants' arguments about "thousands of boxes" of HSR documents are entirely unrelated to the minimal documentation that EarthLink is actually asking for in its motion, the applicants' arguments about including or not including inconsequential documents in the record address a situation that is not here presented.

Without engaging the debate as to whether the public interest standard under which the Commission reviews mergers of this sort allows the Commission the same amount of leeway that it might have in a different type of proceeding, it is sufficient here to note that the HSDA is the only document of which EarthLink is aware that provides concrete information about how the merged AT&T Comcast will behave in the high-speed Internet access service market. Accordingly, under the cases cited by applicants, the HSDA clearly falls into the category of documents that are "critical" to the agency's decision.[6] In this regard, for example, one of the cases cited by applicants is directly on point with respect to the need for the Commission to obtain factual information adequate to support its public interest determinations:

> We think that these findings, taken together, created a factual uncertainty as to whether KONO had engaged in intentional discrimination during the expiring license term.

[6] *See, e.g., Air Transport Ass'n of America v. F.A.A.*, 169 F.3d 1, 7 (D.C. Cir. 1999). In *Air Transport*, of course, the court held that the *ex parte* information there was "critical" because "the supplemental material provided by the Port Authority *ex parte* as justification for the application critically deviated from the justification in the application itself." *Id*. Here, the original application neither disclosed nor discussed the HSDA, and the later acknowledgement of the existence of that agreement must be viewed as a critical deviation from the original. Moreover, as is discussed in the text above, there is nothing "supplementary" about the HSDA; it is the only known document that can provide insight into the market power of the merged entity relative to other players in the high-speed Internet access market and the impacts of that market power on competition.

> Yet the Commission refused either to grant BBC's request for discovery or to conduct its own inquiry into the "underlying reasons" for the employment disparities. Instead, without making any findings as to employment discrimination, the Commission renewed KONO's license for a full three-year term, subject only to *future* monitoring.
>
> This was an abuse of discretion. On the initial pleadings before it, the FCC had insufficient undisputed factual information to conclude that renewal of KONO's license was in the public interest. We therefore remand this case in order that the Commission may get the facts concerning KONO's alleged employment discrimination; unless this factual uncertainty is resolved favorably to KONO, a hearing will have to be held before KONO's license can be renewed.

Bilingual Bicultural Coalition v. F.C.C., 595 F.2d 621, 635 (D.C. Cir. 1978).

In the present case there is nothing but "factual uncertainty," because the applicants have refused to provide (and the Commission has so far failed to demand) the only document that describes just what the proposed high-speed Internet transport arrangement between AOLTW and AT&T Comcast will look like. For the reasons discussed above and in previous filings by both EarthLink and MAP, the public interest as defined by the Commission itself requires that the Commission review and take comment on the HSDA. For all of those reasons, EarthLink respectfully urges the Commission to grant the motions of EarthLink and MAP.

Sincerely,

/s/ John W. Butler

John W. Butler
Earl W. Comstock

Counsel for Earthlink, Inc.

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Roger Holberg (via email)
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