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October 30, 2002

## **ELECTRONICALLY FILED**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
Room TW-B204  
445 12<sup>th</sup> 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 October 29, 2002, EarthLink, Inc. ("EarthLink") filed an *ex parte* letter in the above-referenced proceeding responding to arguments made by applicants in their own *ex parte* letters filed on October 24 and 25, 2002. After EarthLink's October 29 filing, additional *ex parte* filings by applicants, dated October 28, 2002, became publicly available. This letter responds to those October 28, 2002, filings by applicants.

The Comcast Corporation *ex parte* letter dated October 28, 2002, and signed by Mr. Arthur R. Block states that the only difference between the two versions of the "AOL ISP Agreement"<sup>1</sup> is that one (which would apply if the merger closes) would allow AOL access to the networks of both AT&T and Comcast, while the other (which would apply if the merger did not close) would allow AOL access only to the AT&T system. Applicants do not specifically argue in their October 28 letter that these alleged facts have any bearing on the motions filed by EarthLink and Media Access Project, but applicants have previously argued that similarities between the two versions of the Agreement somehow render the Agreement irrelevant to the Commission's merger review process. See Joint Opposition at 7 (September 13, 2002). Assuming that the information provided in the October 28 letter is intended to support the argument made by applicants in the Joint Opposition, it

<sup>1</sup> In our October 29, 2002, correspondence we referred to this agreement as the High Speed Data Agreement, or "HSDA."

proves just the opposite of the proposition for which it is offered. Specifically, even if it is correct that the two versions of the Agreement are substantially similar except for their geographic scope (something that can be determined only if both versions are reviewed by the Commission), that fact directly supports EarthLink's contentions, because it is the size of the footprint of the combined AT&T Comcast entity (and the resulting market power) that is the primary cause for concern about the AOL ISP Agreement. See EarthLink Supplemental Comments at 1-2 (September 5, 2002); EarthLink October 29, 2002, *ex parte* letter at 3. In any event, the AOL ISP Agreement was first revealed in a joint AT&T Comcast press release dated August 21, 2002 announcing the TWE Restructuring Agreement, thus demonstrating that both versions of that Agreement arose out of merger-related negotiations in which both AT&T and Comcast participated.

In a separate letter filed October 28, 2002, by James Casserly, Esq. on behalf of the applicants, the penultimate paragraph notes that "the AOL ISP Agreement contains a confidentiality provision that precludes the disclosure of its terms and conditions except by consent of the parties (including AOL Time Warner) or under compulsion of law." If this fact is offered as an argument against placing the Agreement in the record, then the argument is entirely without merit. First, an order of the Commission would satisfy the "compulsion of law" provision of the claimed contract clause. Second, the parties to the Agreement clearly contemplated that regulators might wish to review the Agreement, as is demonstrated by the language of Section 9.1(c) of the Restructuring Agreement (page 58):

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, 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 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 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 thereafter have no liability or obligation in respect of the AOL High Speed Data Agreement.

In light of this understanding among the parties that regulators might wish to examine the Agreement, it seems unlikely that AOL would refuse its permission for release of the document. In any event, no such refusal has been alleged. Finally, even if AOL did refuse permission to disclose the Agreement, that presents a problem for the applicants (who retain the burden of demonstrating that the proposed transaction is in the public interest), not for the Commission. If a private confidentiality provision could successfully be raised as a bar to the ability of regulatory authorities to obtain necessary

information, then every regulatory law in the country would become a nullity.

Sincerely,

/s/ John W. Butler

John W. Butler  
Earl W. Comstock

Counsel for Earthlink, Inc.

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