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

In the Matter of	)	
	)	
Applications for Consent to the Transfer of Control of Licenses	)	
	)	
Comcast Corporation and AT&T Corp., Transferors,	)	MB Docket No. 02-70
	)	
To	)	
	)	
AT&T Comcast Corporation, Transferee	)	

JOINT OPPOSITION OF COMCAST CORPORATION AND AT&T CORP.

September 13, 2002

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I. Introduction and Summary

Comcast Corporation ("Comcast") and AT&T Corp. ("AT&T") (collectively, "Applicants") submit this opposition to the motions filed on September 5 by the Consumer Federation of America, Consumers Union, Center for Digital Democracy, and Media Access Project, filing jointly (collectively, "MAP"), and EarthLink, Inc. ("EarthLink"). Both motions seek to delay – needlessly – completion of the Commission's review of a merger that has been shown, through an exhaustive public record that encompasses all conceivably relevant issues, to be manifestly in the public interest.

EarthLink's motion asks the Commission to suspend its review of the AT&T-Comcast merger pending the submission and review of various confidential commercial documents that are related to a recent agreement among AT&T, Comcast, and AOL Time

Warner Inc. ("AOL TW") to restructure Time Warner Entertainment Company, L.P. ("TWE") ("TWE Restructuring Agreement"). As discussed below, the Applicants believe that a review of these confidential and competitively sensitive commercial documents is not necessary in order for the Commission to complete its public interest analysis of the merger. Nonetheless, after a discussion with Commission staff regarding the TWE Restructuring Agreement, the Applicants have agreed voluntarily to file confidential copies of certain exhibits and other agreements related to the TWE Restructuring Agreement pursuant to the terms of the Protective Order entered in this proceeding.[1] Thus, EarthLink's motion regarding these confidential materials is moot and its request for the production of other documents should be denied.

In addition, EarthLink and MAP ask the Commission to require the Applicants to submit an agreement that will allow AOL TW to offer high-speed Internet service on AT&T Comcast's cable systems ("AOL TW ISP Agreement").[2] As shown below, there is no credible basis for requiring the Applicants to submit the AOL TW ISP Agreement. Accordingly, the EarthLink and MAP motions regarding the AOL TW ISP Agreement should also be denied.

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[1] *Applications 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, 17 FCC Rcd 5926 (2002) ("Protective Order").

[2] AOL TW and AT&T Comcast will enter into the proposed AOL TW ISP Agreement once certain conditions are satisfied.

II. The Commission Requires No Additional Information to Assess the Applicants' Plans for Insulating Their Minority Interest in TWE Prior to its Ultimate Sale.

From the outset of this proceeding, AT&T and Comcast have emphasized that they intend to divest AT&T's minority limited partnership interest in TWE and that they will ensure that, prior to such divestiture, AT&T Comcast would not be able to influence the management or operations of TWE.[3] On August 8, 2002, the Applicants submitted a document entitled "Proposed Material Terms and Conditions to Govern Establishment of Trusts to Hold AT&T's Limited Partnership Interests in TWE" ("TWE Trust Terms"). The Commission on August 9, 2002 sought comment on the TWE Trust Terms.[4] The Public Notice explicitly directed commenters "not [to] use this pleading cycle as an opportunity to reiterate arguments they have already made in this proceeding, or to discuss matters that pertain to the proposed merger generally, but not to the TWE proposal in particular." Public Notice at 2.

It is noteworthy that, following twenty-seven days for analysis and comment, not a single party has challenged the Applicants' showing that the proposed trust will fully address any asserted public interest concerns regarding AT&T Comcast's ownership of

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[3] AT&T and Comcast stated in their Application: "In the event that the sale of the TWE interest to a third party or parties has not been completed when the Applicants are ready to close the merger, AT&T, if it has not already done so, is prepared to take the steps that may be necessary to insulate the interest under the Commission's rules before it transfers that interest to AT&T Comcast. In addition, Comcast and AT&T Broadband will take such additional steps, if any, as may be appropriate to ensure that AT&T Comcast would not be able to influence TWE prior to its ultimate sale." *See Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee,* MB Dkt. No. 02-70, Applications and Public Interest Statement at 61 (filed Feb. 28, 2002) ("Application").

[4] *See* Public Notice, *Media Bureau Seeks Comment on Proposed Insulation and Divestiture of AT&T's Interest in Time Warner Entertainment, L.P.* (DA 02-1987) (rel. Aug. 9, 2002) ("Public Notice").

the TWE interest prior to its ultimate sale. Indeed, the only comments filed on the one issue on which the Commission requested comment expressly acknowledge (with one minor qualification) that the proposed trust is in the public interest:

> The Trust Agreement proposal [AT&T and Comcast] have submitted appears to be a conscientious effort to apply prior FCC precedent, and is evidently designed to preclude the Applicants from directly controlling or influencing the programming decisions of TWE once the asset is placed in trust. Given the fact that divestiture remains a worthy goal, this mechanism will promote the public interest . . . .[5]

During the comment period established by the Commission, AT&T, Comcast, and AOL TW announced that they had entered into the TWE Restructuring Agreement,[6] and copies of the main agreement were promptly made available to the public through filings with both the Securities and Exchange Commission and the FCC.

Although the TWE Restructuring Agreement clearly represents a positive development, hastening the divestiture of the TWE assets, it does not have the relevance to the merger review process that MAP and EarthLink suggest. MAP mischaracterizes the TWE Restructuring Agreement as setting forth a plan for divesting AT&T's existing TWE interest.[7] It does no such thing. EarthLink asserts that the TWE Restructuring

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[5] Comments of Petitioners Consumer Federation of America, Consumers Union, Center for Digital Democracy, and Media Access Project on Proposed Time Warner Entertainment L.P. Trust, MB Dkt. No. 02-70, at 2-3 (filed Sept. 5, 2002).

[6] *See, e.g.,* News Release, *AOL Time Warner, AT&T and Comcast Agree to Restructure Time Warner Entertainment Partnership* (Aug. 21, 2002), appended to letter from James L. Casserly to Marlene H. Dortch, Secretary, Federal Communications Commission, MB Dkt. 02-70 (filed Aug. 22, 2002).

[7] Motion of Petitioners Consumer Federation of America, Consumers Union, Center for Digital Democracy, and Media Access Project to Require Applicants AT&T Broadband and Comcast to Provide Information Material to Consideration of Application to Transfer Control of Licenses, MB Dkt. No. 02-70, at 1 (filed Sept. 5, 2002) ("MAP Motion").

Agreement has been "proffered by the applicants as a solution to the divestiture issues."[8] That is not the case.

The Applicants' plan for divesting the TWE interest is set forth in detail in the TWE Trust Terms, not in the TWE Restructuring Agreement. As a result, the Commission's public interest review is properly focused on the TWE Trust Terms, which govern *any* disposition of the TWE assets.

Nevertheless, because FCC staff has expressed an interest in reviewing certain other documents related to the restructuring of TWE, the Applicants have agreed voluntarily to submit those documents to the Commission pursuant to the terms of the Protective Order entered in this proceeding. EarthLink's request for the production of those documents is therefore moot and, for the reasons stated above, its motion otherwise should be denied.

III. The AOL TW ISP Agreement Is Not Relevant to the Commission's Review of the Proposed Merger.

In addition to EarthLink's broad request for access to confidential documents relating to the TWE Restructuring Agreement, MAP and EarthLink specifically argue that the Applicants should be required to submit the AOL TW ISP Agreement. In reality, MAP and EarthLink are attempting to inject (or, in EarthLink's case, renewing its attempt to inject) into this merger review proceeding their views about the terms and conditions under which high-speed Internet services are provided over cable systems.[9]

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[8] Motion of EarthLink, Inc. for an Order Requiring Submission of Additional Information, Providing for Supplemental Comment, and Suspending the 180 Day Review Period, MB Dkt. No. 02-70, at 2 (filed Sept. 5, 2002) ("EarthLink Motion").

[9] EarthLink earlier requested that the Commission impose an "open access" requirement as a condition of its approval of the merger. *See generally* Reply Comments

Those issues, however, are the subject of another pending FCC proceeding of general applicability[10] and have no place in this proceeding. The Commission has rebuffed similar efforts to introduce such issues in previous merger decisions and should do so here as well.[11]

As an initial matter, it is significant that MAP and EarthLink fail to explain how a pending agreement that will *increase* consumer choice of competing high-speed ISPs available on AT&T Comcast cable systems conceivably could be *harmful* to the public interest. In fact, the proposed Internet service arrangement between AT&T Comcast and AOL TW is precisely the type of market-driven, commercially negotiated solution that the Commission has frequently praised and encouraged. The arrangement is the result of voluntary, arm's-length negotiations concerning the provision of a service that the Commission has properly determined to be unregulated. Far from harming the public interest, the agreement benefits consumers by permitting Applicants to offer increased ISP choice to approximately 10 million homes. Moreover, the AOL TW ISP Agreement

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of EarthLink, MB Dkt. No. 02-70 (filed May 21, 2002). The Applicants have explained why this request is improper in the context of this merger and ill-advised in general. *See Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, MB Dkt. No. 02-70, Reply to Comments and Petitions to Deny Applications for Consent to Transfer Control at 92-95 (filed May 21, 2002) ("Reply Comments").

[10] *See Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities; Appropriate Regulatory Treatment for Broadband Access to the Internet Over Cable Facilities*, 17 FCC Rcd 4798, ¶¶ 83-91 (2002) (seeking comment on issues related to forced access).

[11] *See, e.g., Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.*, 15 FCC Rcd 9816, ¶¶ 120-23 (2000); *Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc. to AT&T Corp.*, 14 FCC Rcd 3160, ¶¶ 94-96 (1999).

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 services on AT&T's cable systems.

The Commission previously has rejected similar attempts to require applicants in a merger proceeding to disclose confidential documents that were not required for the FCC to complete its review. During the pendency of the MCI-WorldCom merger, the applicants submitted a term sheet that described MCI's proposed divestiture of its Internet assets to Cable & Wireless. Other parties asked the Commission to require the production of sales documents and other documents relating to the proposed divestiture, claiming that "more information concerning the divestiture is necessary in order for the Commission to complete its public interest analysis."[12] The Commission rejected these claims.

The case for rejecting such claims is even stronger in the present case. The Applicants have submitted all documents even remotely relevant to the Commission's public interest inquiry, including most importantly a detailed description of their plans to insulate the AT&T interest in TWE pending divestiture.[13] In addition, the Applicants

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[12] *See Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control*, 13 FCC Rcd 18025, ¶ 151 n.402 (1998); *see also Application of GTE Corporation and Bell Atlantic Corporation for Consent to Transfer Control*, 15 FCC Rcd 14032 (2000) (approving the merger of Bell Atlantic and GTE based on Conditions for Establishment of Genuity as a Separate Corporation).

[13] The trust instruments themselves are also being filed with the Commission.

have submitted the public TWE Restructuring Agreement and are filing, pursuant to the Protective Order, certain related exhibits and other agreements. Consequently, claims that the Commission requires production of the AOL TW ISP Agreement to complete its public interest review are without merit. The Commission should thus deny the EarthLink and MAP motion regarding the AOL TW ISP Agreement.

The various specific arguments advanced by MAP and EarthLink in support of their claim that the FCC must review and approve the AOL TW ISP Agreement do not require extended discussion. EarthLink makes the astonishing assertion that the FCC should review the AOL TW ISP Agreement because the agreement would give AOL TW the "exclusive right" to provide ISP service over AT&T Comcast cable systems.[14] EarthLink is perfectly aware of its own ISP agreement with AT&T Broadband, as well as AT&T's agreements with NET1Plus and Internet Central, and Comcast's ISP agreement with United Online. Moreover, AT&T Comcast has agreed to offer the same terms to Microsoft's ISP, The Microsoft Network, that AT&T Comcast has offered to other ISPs. *See* Application at 8 n.9. Thus, EarthLink's allegations that AOL TW has an "exclusive" ISP arrangement are simply not true. The Applicants have been and remain fully committed to offering customers a choice of ISPs, subject to negotiation of mutually beneficial terms.

EarthLink and MAP also appear to claim that the consent decree adopted by the U.S. District Court in the AT&T-MediaOne merger ("Consent Decree" or "Decree")

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[14] *See* Supplemental Comments of EarthLink, MB Dkt. No. 02-70, at 4 (filed Sept. 5, 2002) ("EarthLink Comments").

prohibits AT&T and AOL TW from entering into an ISP agreement.[15] MAP asserts that the Consent Decree barred joint ventures between AOL TW (then Time Warner) and AT&T for the provision of broadband Internet access for two years after AT&T's and MediaOne's divestiture of their interest in Road Runner, and required permission from the Department of Justice ("Justice Department") for such arrangements thereafter. MAP Motion at 7. EarthLink similarly claims that "the proposed agreements appear to *directly contradict* the terms of the September 20, 2000, consent decree in the AT&T/MediaOne merger." EarthLink Comments at 4-5 (emphasis added).

First, Petitioners fundamentally misunderstand the terms of the Consent Decree. Contrary to their claims, the Decree does not flatly prohibit any types of agreement between AT&T and AOL TW. Instead, the Decree merely provides that, for two years following the divestiture of Road Runner, AT&T may not "enter into" certain types of agreements without prior Justice Department approval. (Contrary to MAP's claim, this provision expires after the two year period runs.) As noted, however, the parties have not yet "entered into" any ISP agreement.[16] Accordingly, by definition, there could not be a violation of the Consent Decree. Of course, AT&T and Comcast have complied and will continue to comply with all consent decrees and orders applicable to them.

Second, it is not at all clear whether the agreement at issue is covered by the Consent Decree. As MAP concedes, the Decree appears to be focused on preventing certain types of "joint ventures" between AT&T and AOL TW. That is understandable given that the AT&T-MediaOne Decree required AT&T-MediaOne to exit an Internet

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[15] *See United States v. AT&T Corp. & MediaOne Group, Inc.*, No. CIV.A. 1:00CV01176, 2000 WL 1752108 (D.D.C. Sept. 27, 2000) (Final Judgment).

[16] *See supra* note 2.

high-speed joint venture between the parties (Road Runner) due to AT&T's concurrent control of a competing high-speed online joint venture, At Home Corp. The Decree thus understandably speaks to precluding parties from reconstituting a Road Runner-like joint venture. Given that background, it is not clear that the present agreement would fall within the scope of the Consent Decree.[17]

Third, even if the proposed AOL TW ISP Agreement falls within the terms of the Consent Decree, this is irrelevant to the present FCC proceeding. The Department of Justice has responsibility for enforcing its decree. Furthermore, it is well established that private parties have no standing to enforce government consent decrees.[18]

Moreover, it is absurd to suggest that the AOL TW ISP Agreement raises the same competitive issues that concerned the Justice Department at the time of the AT&T-MediaOne merger. The purpose of the Consent Decree in that case was to require AT&T to divest its ownership interest in Road Runner acquired as part of the MediaOne merger; such divestiture was required because AT&T also owned a controlling interest in Excite@Home. Road Runner and Excite@Home were owned by cable operators and at that time were the dominant providers of Internet service over cable systems. But now, Excite@Home has gone bankrupt and is out of business, and AT&T's interest in Road Runner has been divested. In this case, the AOL TW ISP Agreement means an additional unaffiliated provider of high-speed Internet service will be available to AT&T Comcast cable customers, in competition with the ISP affiliated with the cable system, additional

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[17] In any event, Section V of the Decree will expire in December 2002 and the TWE restructuring is not expected to close until early 2003. Therefore, the ISP Agreement will likely be "entered into" after that date.

[18] *See, e.g., Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975).

unaffiliated ISPs that have successfully negotiated mutually satisfactory arrangements, including EarthLink, United Online, NET1Plus, Internet Central, and The Microsoft Network, and others that may negotiate future arrangements. Thus, the effect of the agreement is unequivocally pro-competitive and it is just one of several ISP arrangements.

MAP also suggests that the Commission needs to review the AOL TW ISP Agreement to assess the reasonableness of the commercial terms, alleging that the agreement will prove to be "highly unprofitable" for AOL TW.[19] That judgment is the responsibility of the management of AOL TW, not the Commission and certainly not MAP. In fact, a senior AOL official bluntly dismissed such concerns: "[t]he economics [of the AOL TW ISP Agreement] will work out fine. *This deal compares favorably* to the Time Warner Cable deal and to our other distribution deals, so we're quite happy with it."[20]

The Commission likewise should reject MAP's related claim that the AOL TW ISP Agreement constitutes "proof" of its prior unsubstantiated allegations that AT&T Comcast will exercise market power in the provision of broadband Internet services. MAP Motion at 8. The Applicants have submitted in the record of this proceeding extensive expert testimony demonstrating that the merger will not have any

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[19] MAP Motion at 8-9. MAP seems to want to have the argument both ways. At one moment, it decries the "unprofitable terms" forced upon AOL TW, while at another it states that AOL TW and AT&T together "seek to recreate the anticompetitive effects of their joint interest through contracts." *Id.* at 7-8. Neither of these speculations is correct.

[20] *See* Interview with AOL Broadband President Lisa Hook, Multichannel News Day at 3 (Aug. 23, 2002) (emphasis added).

anticompetitive effects on the provision of broadband Internet services.[21] MAP's naked allegation clearly is insufficient to refute that showing, especially in view of the fact that the proposed AOL TW ISP Agreement provides more choice to cable Internet customers. Moreover, even if the AT&T-Comcast deal did not close, 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 services on AT&T's cable systems.[22] Consequently, it is clear that the agreement is not the product of any "enhanced bargaining power" resulting from the proposed merger.

Finally, EarthLink attempts to justify its demand for FCC review of the AOL TW ISP Agreement by grossly exaggerating the importance of a standard contingency provision in the TWE Restructuring Agreement. Specifically, EarthLink claims that a provision that, in general, would apply in the event the Justice Department, Federal Trade Commission or FCC commences a proceeding to challenge the AOL TW ISP Agreement somehow suggests that the parties believe "there is a substantial possibility of negative regulatory reaction" to the proposed agreement. EarthLink Comments at 5-7. The provision represents nothing of the kind. It is a standard approach to dealing with a potential risk of regulatory uncertainty and similar types of contingencies that may develop after the terms of an agreement have been decided. Even EarthLink acknowledges that "there is nothing inherently wrong with parties to an agreement

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[21] *See* Reply Comments at 71-95; Declaration of Howard A. Shelanski ¶¶ 4-39 (attached as Appendix 4 to Reply Comments).

[22] In addition, AOL TW has struck multiple broadband service agreements that provide alternative outlets to reach users in AT&T Comcast's service areas. *See, e.g.*, Anitha Reddy, "AOL to Boost Its Access to Broadband," *Washington Post*, at E01 (Sept. 6, 2002) (noting that the deal gives AOL TW access to Covad's network, which can reach more than 40 million homes and businesses).

providing for a remedy to deal with a possible regulatory objection to a proposed transaction." *Id.* at 6.

In sum, none of the arguments advanced by MAP and EarthLink in support of their motions justifies the relief they have requested regarding the AOL TW ISP Agreement. The Commission should reject their efforts to inject into this proceeding issues of industry-wide applicability that are not relevant to this merger. As Chairman Powell observed during the AOL-Time Warner merger, it is improper to address within a merger proceeding issues that "should be entertained, if at all, in a broader-based proceeding."[23] The Commission has in the past, "declined to address the question of mandating open cable access because most of the questions raised [are] not merger-specific, and more rightly [are] a debate about the regulatory paradigm for these new services offered over cable infrastructure."[24] It should do the same here. MAP and EarthLink strongly support forced access and government-dictated terms and conditions. By contrast, this Commission has correctly encouraged voluntary ISP agreements with terms set by the marketplace. MAP and EarthLink should reserve their views on the proper paradigm for third-party ISP arrangements for consideration in the relevant rulemaking proceeding.

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[23] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations by Time Warner Inc. and America Online, Inc. to AOL Time Warner, Inc.,* 16 FCC Rcd 6547 (2001) ("*AOL-TW Merger Order*"), Separate Statement of (then) Commissioner Powell at 1 n.1, 2 (objecting to the imposition of an open access condition in the AOL-Time Warner merger because it might "conflict with and prejudge issues in the *Notice of Inquiry* proceeding regarding broadband Internet access," and noting that the Commission should not use its merger review process to address issues that "should be entertained, if at all, in a broader-based proceeding").

[24] *AOL-TW Merger Order*, Press Statement of (then) Commissioner Powell at 2 (rel. Jan. 11, 2001).

IV. Conclusion

For the foregoing reasons, the Commission should dismiss, in part, EarthLink's motion as moot and otherwise deny the motions of EarthLink and MAP.

Respectfully submitted,

AT&T CORP.

/s/ Michael H. Hammer
Michael H. Hammer
WILLKIE FARR & GALLAGHER
1155 21st Street, N.W.
Washington, DC 20036

COMCAST CORPORATION

/s/ A. Richard Metzger, Jr.
A. Richard Metzger, Jr.
A. Renée Callahan
LAWLER, METZGER & MILKMAN, LLC
2001 K Street, NW, Suite 802
Washington, DC 20006

September 13, 2002

Certificate of Service

I, Ruth E. Holder, hereby certify that on this 13th day of September, 2002, I caused a true and correct copy of the foregoing Joint Opposition of Comcast Corporation and AT&T Corp. to be mailed, postage prepaid, to:

John W. Butler
Earl W. Comstock
Sher & Blackwell, LLP
1850 M Street NW, Suite 900
Washington, DC 20036
Counsel for EarthLink, Inc.

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

Harold Feld
Andrew Jay Schwartzman
Cheryl A. Leanza
Media Access Project
1625 K Street NW, Suite 1118
Washington, DC 20006
Counsel for CFA, *et al.*

I also caused a true and correct electronic copy to be e-mailed to:

Roger Holberg, Media Bureau
Federal Communications Commission
445 12th Street SW, Room 2-C262
Washington, DC 20554
rholberg@fcc.gov

Simon Wilkie, Chief Economist
Office of Plans and Policy
Federal Communications Commission
445 12th Street SW, Room 7-C452
Washington, DC 20554
swilkie@fcc.gov

William Dever, Common Carrier Bureau
Federal Communications Commission
445 12th Street SW, Room 5-C266
Washington, DC 20554
wdever@fcc.gov

Jeff Tobias
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW, Room 2-C828
Washington, DC 20554
jtobias@fcc.gov

Erin Dozier, Media Bureau
Federal Communications Commission
445 12th Street SW, Room 2-C221
Washington, DC 20554
edozier@fcc.gov

James Bird
Office of General Counsel
Federal Communications Commission
445 12th Street SW, Room 8-C824
Washington, DC 20554
jbird@fcc.gov

Cynthia Bryant, International Bureau
Federal Communications Commission
445 12th Street SW, Room 6-C807
Washington, DC 20554
cybryant@fcc.gov

Lauren Kravetz Patrich
Wireless Telecommunications Bureau
Federal Communications Commission
445 12th Street SW, Room 2-C828
Washington, DC 20554
lkravetz@fcc.gov

Qualex International
Portals II
445 12th Street SW, Room CY-B402
Washington, DC 20554
qualexint@aol.com

/s/ Ruth E. Holder
Ruth E. Holder