Testimony of

Mr. Garry Betty

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Introduction

Good afternoon and thank you for inviting me to testify today about the proposed merger between AT&T and Comcast and its potential impact on competition and consumer choice in broadband internet access.

I am Garry Betty, CEO of EarthLink. EarthLink is the nation's third largest Internet Service Provider (ISP) and is the largest independent ISP. EarthLink serves 4.9 million customers with dial-up, broadband and web hosting services. In broadband, EarthLink is "platform agnostic" providing high-speed internet access to over 530,000 customers through Digital Subscriber Line (DSL), cable, and satellite connections. The majority of EarthLink's broadband subscribers today have DSL connections as most major cable companies do not offer cable modem customers a choice of ISPs.

All of us here today want to encourage broadband deployment. "Broadband deployment" is a term that is frequently used these days. Unfortunately, it is also sometimes misused as an excuse for activities that benefit network owners at the expense of consumers. It has been said that you can do just about anything you want in Washington these days as long as you say it is to promote broadband deployment.

One example of this has been the refusal of most major cable companies to allow consumers who want to connect to the broadband internet through a high-speed cable modem to choose their internet provider. Rather, these cable companies have forced consumers to use just their cable company's in-house internet service. This take-it-or-leave-it choice has resulted in higher prices and lower adoption rates than would be the case if consumers had competitive choice in their internet provider over cable.

We are therefore here today to ask that AT&T and Comcast commit to providing customers in all their markets a choice in broadband ISPs over cable by signing commercially reasonable contracts with independent ISPs prior to their merger being approved.

AT&T and Comcast must offer cable modem customers a choice of ISPs

ATT and Comcast have argued since 1998 to Congress, the FCC, federal courts and local authorities that they should not be required to offer their subscribers a choice in internet providers over broadband cable. Rather, they have proposed that open access should be voluntary and have promised that they would open their networks by this year. They have couched these arguments in very appealing calls for market-based solutions for broadband internet access over cable.

Unfortunately, while ISPs have always existed in a competitive marketplace, cable companies have not. Just as most consumers have no competitive choice in their cable television provider, so too most consumers have no choice in their internet provider over broadband cable.

This is a significant problem since cable is and will remain the primary platform through which consumers get broadband internet access. In 2001, Cable provided about 2/3 (6.5 million out of 9.7 million) of all broadband connections. By year-end 2002, cable will still provide 60% (8.0 million out of 13.8 million) of all broadband connections. By 2005, cable will still provide more than half (est. 17.0 million out of 30.7 million) broadband connections.

Notwithstanding calls for ubiquitous competition in platforms (I.e. cable vs. DSL vs. satellite) the fact remains that cable will remain the only broadband connection for millions of Americans for years to come. This many consumers should not be denied meaningful choice in their internet provider over those cable connections.

Furthermore, broadband is the future of the internet. While the market for dial-up internet access has matured and reached a plateau at about 55 million households, broadband continues to grow from about 1 million households at year-end 1999 to an estimated 30 million or more households by 2005.

Promises Made

In 1999, during the FCC's review of AT&T's merger with TCI (even then the nation's largest cable company), AT&T told the Commission that it was committed to an open broadband platform and that it "would favor the unbundling of the modem in order to provide consumers with choice and lowest prices."

Later that year, at the urging of then FCC Chairman Kennard, AT&T signed a statement of principles with MindSpring Enterprises (now part of EarthLink) in which AT&T committed to offer its broadband consumers a choice of ISPs when its exclusive contract with its own affiliated ISP, Excite@Home, expired in June 2002. (Letter to FCC Chairman William E. Kennard from James W. Cicconi, David N. Baker and Kenneth S. Fellman, December 6, 1999).

Boston and Seattle: Local Commitments

In June 2000, AT&T signed an agreement with the Massachusetts Coalition for Consumer Choice and Competition which was seeking an open access referendum from the November 2000 ballot. In exchange for removing the ballot initiative, AT&T committed to conduct a multiple ISP trial no later than October 2001, and to implement ISP choice statewide by July 1, 2002. (Memorandum of Agreement between AT&T Corp. and the Massachusetts Coalition, June 27, 2000).

As part of their acquisition of TCI, AT&T also made a commitment in year 2000 to the local franchising authority in King County, Washington to provide multiple ISP choice to consumers once their contract with Excite@Home expired on June 4, 2002. As Excite@Home expired before their contract did, King County demanded in February 2002 that open access should immediately be implemented. (Letter to Janet Turpen, AT&T, from Kevin Kearns, King Co. Washington, February 19, 2002).

Small Steps Forward

On March 12, 2002, EarthLink announced an agreement with AT&T to offer broadband internet service to AT&T Broadband cable customers in Boston and Seattle later this year. AT&T has also suggested that they will open additional markets in 2003. While we are pleased to have reached the agreements we have, and look forward to signing others like them, there are still millions of AT&T and Comcast cable customers who still have no competitive choice in broadband internet service providers over cable.

Similarly, Comcast recently signed an agreement with United Online to provide Indianapolis and Nashville customers with a choice of ISPs. Again, these limited agreements raise the question as to whether this is a slow trend toward long-promised open access or merely an effort to forestall open access requirements in the context of a merger review.

While we would like to believe that AT&T, Comcast and other cable companies will voluntarily open their systems, promises may no longer be enough. This merger would combine the nations first and third largest cable companies into super-size company controlling cable TV and internet access to over 40% of American homes. We would prefer to be able to sign business contracts on commercially reasonable terms. But barring such commitments, open access requirements would be necessary to ensure consumer choice in access.

AOL Time Warner Example

As part of it's antitrust review of the AOL Time Warner merger, the FTC required open access as a condition of approving that merger. In order to offer cable internet access through its affiliate AOL, Time Warner Cable must allow subscribers on its cable systems to choose from among AOL, Roadrunner (another in-house service), EarthLink, or other two other unaffiliated ISPs.

While it is still early in our relationship with Time Warner, we are glad to report significant progress. Beginning in September 2001, EarthLink now offers broadband internet access to Time Warner Cable customers in 30 of their top 40 markets, with the remainder to come online by the end of this year.

This open access relationship benefits all involved. Not only can EarthLink offer broadband service to customers formerly foreclosed to us, but we have helped drive overall broadband subscriber growth on the Time Warner systems. Time Warner executives have noted a 20% to 25% increase in overall broadband take rates. (Chris Bogart, Pres./CEO of Time Warner Cable Ventures, at Goldman Sachs Communacopia 2002, April 9, 2002). Consumers also benefit as they now have competitive choice in their internet provider over cable, with price differentiation and EarthLink service offered at a market-leading $41.95 a month.

I urge you today to support the same basic conditions of open access on the AT&T and Comcast systems that apply to the AOL Time Warner systems.

The minimum standards for effective open access are:

Consumers of broadband cable services should have a choice among multiple ISP's.
Cable broadband providers must negotiate at arms-length nondiscriminatory commercial arrangements with both affiliated and non-affiliated ISPs (including "first screen" placement).
ISPs should have the choice of operating on a national, regional, or local basis.
Both the ISP and the cable operator should have the opportunity for a direct relationship with the customer.
ISPs should be allowed to provide video streaming and there should be no discriminatory restrictions on provision of content.

These are the basic standards that shaped the FTC's requirement for open access on the AOL Time Warner systems. These same requirements should be met by AT&T and Comcast as a condition of their merger.

Not regulating the Internet

There's been a lot of rhetoric by cable companies and their surrogates that open access is "regulatory." But stop for a moment and consider what's being regulated. Throughout the country, cable companies have had exclusive local franchises to operate the cable system in any given area. These franchises were created by government regulations. Actions that seek to limit cable monopoly power created by these regulations, and to give consumers increased choices in broadband services are, by definition, de-regulatory.

This is also not "regulating the internet." The open unregulated competitive internet we enjoy today exists because of regulations on the underlying largely non-competitive infrastructure over which it travels. That's why even though consumers until recently had no choice in local phone service (and may only have limited choice today), they have never been required to buy the local phone company's ISP. For example, Verizon's ISP is available as a competitive choice, but you're not required to buy or use their ISP just because you get your local phone service from them. Compare this to most cable companies (which are also regulated, just under different rules) where if you want internet access through a cable modem, you have no choice but to purchase the cable company's affiliated ISP.

By comparison, internet access has always been competitive. There are over 6,000 ISP's across the country. Consumers in major cities can choose from hundreds of ISP's that serve their local area. And over 96% of internet users throughout the country, even in the smallest towns and rural areas, can choose from among at least 4 Internet Service Providers. Compare this to cable, where over 96% of customers throughout the country have NO choice in who their cable company is. As high speed internet access becomes available over cable, we are at a crossroads. Will we follow the open consumer choice path of the internet, or the closed no choice model of cable?

Cable folks will say that open access isn't necessary because there are other means of high-speed access to the internet, such as Digital Subscriber Line (DSL) technology over phone lines. But DSL has distance limitations. Once you get more than a mile and a half from a telephone central office, DSL service starts to degrade. Once you get beyond three miles, it is essentially unavailable. And technologies such as satellite, wireless and electric lines will not be widely available for many years to come. The upshot is that for as many as a third of consumers across the country, particularly in rural areas, if they get any broadband access at all in the next five years, it will only be through a cable line. These customers deserve choice in broadband internet access as well.

It has been consistent policy in this country for over 20 years to give consumers greater choice in their telecommunications services. The federal court decision that broke up the old Ma Bell AT&T in 1984 and allowed competition in long distance has resulted in rates that are more than 2/3 lower today than they were then. In passing the Telecommunications Act of 1996, Congress established the framework to bring these same benefits of competition to local phone service and to wireless. Legislation such as the Satellite Home Viewer Act and the program access provisions of the 1992 Cable Act sought to end cable's longstanding monopoly over multi-channel video programming. And consumers have always had competitive choice in Internet Service Providers in large part because FCC decisions beginning in the 70's, and 80's and continuing today that allowed such information services to travel unfettered over phone lines. At every turn, policy makers have sought to give consumers greater choice in their communications services. Broadband internet access over cable should be no exception.

Thank you for giving me the opportunity to speak with you today. I look forward to any questions you may have.

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