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July 30, 1998

RECEIVED

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

BY HAND
Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation Concerning Section 706 Petitions, Petition of Bell Atlantic Corporation – CC Docket No. 98-11; Petition of US WEST Communications, Inc. – CC Docket No. 98-11; Petition of Ameritech Corporation – CC Docket No. 98-32; CC Docket No. 98-78; Petition of Southwestern Bell Telephone Company, et al. – CC Docket No. 98-91

Dear Ms. Salas:

On July 30, 1998, on behalf of America Online, Inc. ("AOL"), the attached letter was sent to Kathryn C. Brown, Chief, Common Carrier Bureau, regarding the above-referenced dockets.

Pursuant to Section 1.1206(a)(1) of the Commission's Rules, two copies of this written document are attached for inclusion in the public record in the above-captioned proceedings. Should you have any questions regarding this matter, please contact me.

Sincerely,

Donna N. Lampert

Attachments

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AMERICA ONLINE
INCORPORATED

July 30, 1998

Kathryn C. Brown
Chief
Common Carrier Bureau
Federal Communications Commission
1919 M. Street, N.W.
Room 500
Washington, D.C. 20554

Re: Notice of Ex Parte Presentation Concerning Section 706 Petitions, Petition of Bell Atlantic Corporation – CC Docket No. 98-11; Petition of US WEST Communications, Inc. – CC Docket No. 98-11; Petition of Ameritech Corporation – CC Docket No. 98-32; CC Docket No. 98-78; Petition of Southwestern Bell Telephone Company, et al. – CC Docket No. 98-91

Dear Ms. Brown:

I am writing in connection with the consideration by the Federal Communications Commission ("FCC" or "Commission") of proceedings designed to implement Section 706 of the Telecommunications Act of 1996 ("1996 Act"), regarding the provision of Advanced Telecommunications Services. As the world's leading Internet online services provider, America Online, Inc. ("AOL") has a vital interest in assuring the rapid, efficient, and economic deployment of open, competitive, high speed, data-friendly networks for all Americans.

Today, the Internet Service Provider ("ISP") industry is robustly competitive, with thousands of providers, including independent as well as local exchange carrier ("LEC")-affiliated ISPs, all offering consumers diversity and choice in their Internet access. In important part, that competition and diversity is the product of the openness and accessibility of the telephone infrastructure on which the Internet service business relies. In today's marketplace, Internet service providers acquire business lines offered to all by incumbent or competitive LECs and then those ISPs utilize that capability to provide Internet access to residential customers. Similarly, residential customers also rely upon the facilities and services offered by LECs to utilize their telephone lines (or acquire second lines) to obtain access to those ISPs and the wide range of Internet access services available in each geographic region, ranging from the "no-frills"

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pure-access offerings of companies like Erol's to full service access offerings of companies like AOL.

Yet, today's circuit-based infrastructure on which Internet access rests is "borrowed" from a telephone system designed for voice telephony – not the data intensive needs of the Internet. Given the inherent inefficiencies of using the circuit-switched telephone network for packet-based, data services, we are hopeful that recent announcements by the Bell Operating Companies ("BOCs") and others promising the deployment of high-speed, Digital Subscriber Line ("DSL") capacity will result in introducing into today's voice-oriented networks a more data-friendly "overlay" that will be responsive to the demands of Internet users. AOL believes that substantial investment in and deployment of these services will assist many Americans to obtain faster, "always-on" Internet access services.

As the FCC reviews the appropriate regulatory framework under which incumbent and competitive LECs will offer DSL and other advanced telecommunications services, AOL urges the Commission to consider carefully the ramifications of its decision with respect to competition and diversity in Internet services. The Commission recognized in its Computer III Further Notice of Proposed Rulemaking,[1/] that the "continued competitiveness of the already robust information services market" is a critical policy goal. To achieve that goal, AOL urges the Commission to ensure that there are safeguards designed to continue the open and accessible infrastructure that has fostered competition in the Internet access business. Simply put, an environment where all ISPs can compete openly and fairly will best serve the needs and interests of consumers and thereby best promote the public interest.

In adopting the 1996 Act, Congress understood that to ensure the competitiveness of the information services marketplace, certain fundamental safeguards were necessary to guard against anticompetitive behavior by incumbent carriers. These safeguards require, among other things, that the BOCs offer interLATA information services through a separate affiliate that operates independently from the BOC, that the affiliate engage in arms length transactions reduced to writing, that the affiliate have separate officers and directors, that the BOC abide by specific accounting safeguards, and that the BOC not discriminate between its affiliate and any other entity.[2/] Similarly, for decades the FCC has understood the unique competitive risks involved when BOC-affiliated ISPs compete with independent ISPs, and for that reason has consistently underscored the need for safeguards to minimize the potential for anticompetitive

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[1/] Computer III Further Remand Proceedings: Bell Operating Company Provision of Enhanced Services, CC Docket Nos. 98-10 and 95-20, Further Notice of Proposed Rulemaking, FCC 98-8, ¶ 1 (Jan. 30, 1998).

[2/] 47 U.S.C. § 272 (Separate Affiliate; Safeguards); see also Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1996, as amended, CC Docket 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (subsequent citations omitted) ("Non-Accounting Safeguards Order"); Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996, CC Docket No. 96-150, Report and Order, FCC No. 96-490 (Dec. 24, 1996).

behavior. These safeguards, currently embodied in the Computer III/ ONA regime that is now being reviewed by the FCC, are designed to ensure that the BOCs afford competing, independent ISPs access to the same underlying services and information that the BOCs afford their affiliated ISPs. In distinct contrast to the rights afforded to competitive telecommunications carriers under the 1996 Act, such as Section 251 unbundling and resale rights, these safeguards are designed specifically for ISPs who are by definition not telecommunications carriers.

It is AOL's understanding that in implementing Section 706 of the 1996 Act, the FCC is considering a regulatory structure for the provision of data services, such as DSL services, that would effectively negate the applicability of these carefully-designed safeguards by allowing the BOCs to provide advanced telecommunications services through a competitive affiliate that would not be deemed either a BOC or a "successor or assign" of the BOC as defined by the 1996 Act.[3/] Under such a structure, however, none of the existing safeguards that have been carefully crafted to promote competition by requiring nondiscrimination and equal, open access for independent ISPs would appear to apply, as they are only applicable when services are provided by a BOC. If the data services affiliate is not a BOC or a successor or assign, therefore, it would be free to afford preferential treatment to the affiliated ISP, whose operations could even be integrated into the data services affiliate.

Significantly, these concerns are not hypothetical. Today, DSL services have been proposed or deployed in multiple states as well as on an interstate basis by several carriers. In the context of those deployments and proposals, substantial competitive concerns have been raised, including allegations that the offering carrier has been improperly favoring its affiliated ISP. For example, the Minnesota Department of Public Service, the enforcement arm of the Public Utility Commission, recently filed a complaint alleging anticompetitive pricing by the incumbent carrier when it offered customers a free digital modem, free software and a discount on installation and training charges if they ordered DSL services through the affiliated ISP.[4/] Similarly, the Oregon Public Utilities Commission staff has raised serious concerns regarding the fair provisioning of DSL services to independent ISPs, including issues regarding preferential service treatment and improper cross-marketing.[5/] Similar allegations have been made in connection with the introduction of DSL services in other states, including New Mexico, Utah

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[3/] 47 U.S.C. § 153 (4).

[4/] Failure of US WEST Communications, Inc. to File Notice of Its Promotion for Its Megabit Services, Docket No. P421/C-98-997, Comments of the Minnesota Department of Public Service at 2 (July 9, 1998) (although US WEST has withdrawn its offering of the free modem and software, it is still providing the discount on installation and training; therefore, according to the Minnesota Department of Public Service, there are still concerns about anticompetitive conduct such that the complaint will not be withdrawn).

[5/] US WEST Communications, Inc.'s Transmittal No. 98-009-PL, docketed as UT 144, subsequently modified by Supplement No. 2, Establishes Asynchronous Digital Subscriber Line (ADSL) Service, Public Utility Commission of Oregon Staff Report at 2-3 (July 1, 1998).

and Washington.[6] Likewise, in addressing the proposed tariffs that have been filed at the FCC for an interstate DSL service,[7] multiple concerns regarding the fairness of competition have been voiced by petitioning parties.[8] While AOL is not suggesting that the Commission prejudge the outcome of any of these pending proceedings, the FCC should be mindful of the long-recognized incentives that exist for anticompetitive behavior, including unlawful cross-subsidization and impermissible discrimination.

Under these circumstances, AOL believes that the FCC must ensure that there are appropriate safeguards to preserve and promote competitive choice for consumers among non-incumbent LEC-affiliated ISPs should the FCC determine that the proposed separate affiliate structure for the provision of data services by incumbent carriers will serve the public interest. Specifically, AOL requests, that at a minimum, these safeguards include: a requirement that the data services affiliate be structurally separate from the incumbent LEC-affiliated ISP operations, including all associated safeguards enumerated in Section 272 of the 1996 Act; a requirement that the data services affiliate offer all services it offers to the affiliated ISP to independent ISPs under nondiscriminatory rates, terms, and conditions; a requirement that the data services affiliate be subject to reporting requirements sufficient to inform independent ISPs of new network services and network changes as well as nondiscrimination reports regarding maintenance and service and network interoperability requirements; a requirement that the data services affiliate be subject to ONA-type requirements that allow independent ISPs to utilize needed network functionalities and services in an open and nondiscriminatory manner; and an expedited complaint and enforcement process for the resolution of disputes. In fact, without these safeguards, vibrant competition in the provision of Internet services is unlikely to flourish. As the FCC has recognized, today, "the Commission's Computer II, Computer III and ONA rules are the only regulatory means by which certain independent ISPs are guaranteed nondiscriminatory access" to necessary BOC services.[9]

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[6] Docket No. 98-199-TC – In the Matter of US WEST's Proposed Tariff Revision to Its Advanced Services Tariff § 8, MegaBit Services, Prepared Direct Testimony of Dan W. Hall (Utility Economist in the Telecommunications Division of the New Mexico State Corporation Commission) at 4-7 (June 15, 1998) ("New Mexico Complaint"); Docket No. 98-049-15 – Informal Complaint of the Coalition of Utah Independent Internet Service Providers, Complaint at 2-4 (May 13, 1998) ("Utah Complaint"); Docket No. UT-98-416 -- In the Matter of the Filings of US WEST Communications, Inc. for Approval of a New Digital Subscriber Line Service Offering Denominated as "MegaBit Service," Order Setting Banded Rate Provisions of MegaBit Services Tariff with Conditions and Order Instituting Investigation (Apr. 22, 1998) ("Washington Complaint") (US WEST's tariff has been approved with modifications to reduce the possible anti-competitive impact of the service provision).

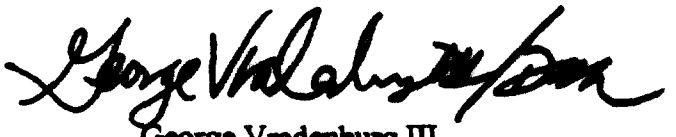
[7] GTOC Tariff FCC No. 1, Transmittal No. 1148 (filed May 15, 1998) as revised by GTOC Tariff FCC No. 1, Transmittal No. 1162 (filed July 15, 1998); Pacific Bell Telephone Company Tariff FCC No. 128, Transmittal No. 1986 (filed June 15, 1998).

[8] See, e.g., GTOC Tariff FCC No. 1, Transmittal No. 1148, Petition of ACI Corp. at 2; Petition of California Cable Television Association at 7-9; Petition of the Commercial Internet Exchange Association at 7; Petition of MCI Communications, Inc. at 7 (filed May 22, 1998).

[9] Non-Accounting Safeguards Order, supra, at ¶ 134.

The FCC has repeatedly stated that the goal of its regulation is to enable service providers to "compete on an equal footing by not allowing one service provider to game regulatory requirements in such a way as to hinder competition."[10] As such, AOL respectfully requests that the FCC ensure that any restructured regulatory framework for the provision of advanced data services permit all ISPs, whether independent or carrier-affiliated, to compete on a full and fair basis. Only in this way will the benefits of competition and choice continue to be available to all Americans.

Sincerely,



George Vradenburg III
Senior Vice President and General Counsel

cc: Chairman William Kennard
Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Gloria Tristani
Commissioner Harold Furchtgott-Roth
Don Stockdale
Carol Mattey
Melissa Newman
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[10] Id. ¶ 19.