Donna N. Lampert Associates, P.C.
701 Pennsylvania Avenue, N.W.
Washington, D.C. 20004

Donna N. Lampert
dnlampert@aol.com

Telephone: 202/393-6410
Fax: 202/393-6411

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December 17, 1998

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

EX PARTE

BY HAND
Magalie Roman Salas
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Joint Application of AT&T Corp. and Tele-Communications, Inc. for Transfer of Control to AT&T of Licenses and Authorizations Held by TCI and Its Affiliates or Subsidies -- CS Docket No. 98-178; and Deployment of Wireline Services Offering Advanced Telecommunications Capability -- CC Docket No. 98-147

Dear Ms. Salas:

On December 16, 1998, George Vradenburg (Senior Vice President - Global and Strategic Policy) and Steven Teplitz (Public Policy – Senior Counsel) of America Online, Inc. ("AOL"); Peter Ross (Attorney) of Wiley, Rein & Fielding; and I, met with Thomas Krattenmaker, (Office of Plans and Policy); Bill Rogerson (Office of Plans and Policy); John Norton (Cable Services Bureau); Royce Dickens (Cable Services Bureau); To-Quyen Truong (Common Carrier Bureau); Pamela Megna (Office of Plans and Policy); Anne Levine (Cable Services Bureau); Sunil Daluvoy (Cable Services Bureau); and John Adams (Cable Services Bureau) to discuss the attached written presentation.

In its presentation, AOL underscored the wisdom of our national policy "to preserve the vibrant and competitive free market that presently exists for the Internet ... unfettered by Federal or State regulation." (47 U.S.C. § (b)(2)). Indeed, to assure the continued vibrancy and freedom of today's Internet competition, AOL urged the FCC to ensure that the underlying "last mile" infrastructure upon which the Internet rests and through which consumers access the Internet continue to be as open and accessible in the broadband context as it is in the narrowband context. By doing so, consumer choice and consumer welfare and demand for Internet services will be maximized and investment in broadband services will best be fostered. AOL emphasized that this policy should be executed in the cable environment not through common carrier regulation but through measures analogous to those already applied to cable systems.

AOL stressed that an open access model has been promoted by the United States to policy makers around the globe as the best stimulant to investment and promotion of network facilities deployment. The First Annual Report of the US Government Working Group on Electronic Commerce emphasizes the need for "all participants [to] have access to the facilities that are critical to the deployment of high bandwidth technology to homes and offices" (at 26). More specifically, that Report notes that "regulation to encourage competition and facilitate consumer choice is most appropriately directed to telecommunications facilities over which services run and should not be extended to competitive Internet-based services" (id.).

During its presentation, AOL emphasized its support for the AT&T/TCI transaction because of its promise of competition in local telephony services and urged the FCC to condition the transfer only to the extent needed to assure the same pro-competitive benefits in high-speed Internet service. AOL also urged that the Commission not to interpret its public interest mandate expansively as a roving mandate to impose conditions neither germane nor material to core Commission obligations. In this regard, however, AOL highlighted that Commission action in this context is directed by specific statutory provisions of the Communications Act of 1934, as amended, including the duty to make available "rapid, efficient" service with "adequate facilities" (§ 1, 47 U.S.C. § 157); the mandate to foster the development of advanced transmission capabilities (§ 706, 47 U.S.C. § 706); and the pro-competitive, deregulatory framework of the Telecommunications Act of 1996 (Pub. L. No. 104-104, 110 Stat. 56, codified at 47 U.S.C. §§ 151 et seq.). AOL also noted that the condition it is seeking -- a requirement that affiliated and unaffiliated Internet service providers be treated by cable systems in a non-discriminatory manner -- will maintain an open and competitive system of "last mile" facilities to promote directly those statutory obligations. With such a policy, AOL noted, robust and comprehensive Internet-centric voice and video service competition would develop and create facilities-based competition between the telephony and video infrastructures.

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

Sincerely,

Donna N. Lampert

Enclosures

cc (w/encl.):

Thomas Krattenmaker
William Rogerson
Pamela Megna
John Norton
Royce Dickens
To-Quyen Truong
Anne Levine
Sunil Daluvoy
John Adams
International Transcription Service

OPEN BROADBAND FACILITIES – OVERVIEW

1. **PROMOTING CONSUMER CHOICE AND OPEN ACCESS TO "LAST MILE" BROADBAND FACILITIES WILL INCREASE OVERALL INVESTMENT AND INNOVATION IN INTERNET SERVICES TO THE BENEFIT OF THE ECONOMY AND THE PUBLIC INTEREST**

2. **ESTABLISHING NOW AN OPEN BROADBAND STRUCTURE FOR "LAST MILE" FACILITIES WILL REDUCE THE NEED LATER FOR MORE DETAILED BEHAVIORAL REGULATION OF ENTRENCHED GATEKEEPERS**

3. **THERE ARE NO TECHNICAL OR OPERATIONAL OBSTACLES THAT WOULD PRECLUDE OR RENDER UNECONOMIC OPEN ACCESS FOR "LAST MILE" CABLE BROADBAND SERVICES**

4. **THE AT&T/TCI MERGER IS AN APPROPRIATE VEHICLE TO IMPLEMENT AN OPEN PLATFORM POLICY FOR "LAST MILE" BROADBAND FACILITIES**

PROMOTING CONSUMER CHOICE AND OPEN ACCESS TO "LAST MILE" BROADBAND FACILITIES WILL INCREASE OVERALL INVESTMENT AND INNOVATION IN INTERNET SERVICES TO THE BENEFIT OF THE ECONOMY AND THE PUBLIC INTEREST

- **United States policy has consistently underscored in national and international debates a commitment to open and competitive "last mile" transmission platforms.**

- **The open model of service provision will maximize economic benefits by stimulating aggregate investment in new and advanced Internet services from network facilities providers and from service providers.**

- **Promoting open access is a marketplace solution precisely because it permits consumers to choose their ISPs based upon price, performance, content, and reliability rather than having their choices made for them by the owners of the transmission pipes.**

- **Rather than undermining incentives to invest in network facilities upgrades, ensuring accessible "last mile" transport will help stimulate market demand for upgrades and deployment.**

- **An open structure for transport access allows the competitive development of exclusive, proprietary content.**

- **Since the cable facilities are being upgraded for advanced digital video and telephony purposes, the incremental investment costs for Internet access are small.**

- **Arguments that @Home will not be able to afford network upgrade and transmission costs if the current economic structure changes ignore the real issue of "last mile" loop investments made by AT&T and TCI, not the affiliated ISP.**

- **AT&T/TCI's so-called "economies of scale" are the same practices that AT&T and TCI have been labeling "anticompetitive cross-subsidization" when their competitors have engaged in them.**

ESTABLISHING NOW AN OPEN BROADBAND STRUCTURE FOR "LAST MILE" FACILITIES WILL REDUCE THE NEED LATER FOR MORE DETAILED BEHAVIORAL REGULATION OF ENTRENCHED GATEKEEPERS

- **The FCC should not allow history to repeat itself – the long history of cable's growth and development underscores that the public interest suffers if bottlenecks are allowed to take hold.**
- **The FCC should heed the early warning signs and act swiftly and certainly to ensure that the true competitive promise of "loop to loop" competition is fulfilled.**
- **Already, history is repeating itself as bottleneck control is being used to limit bandwidth allocated to advanced Internet services.**
- **An initial open framework can obviate the need for heavy-handed intrusive regulation later on to address entrenched "gatekeeper" problems.**
- **Ample FCC authority and precedent demonstrate that open access requirements do not require the imposition of Title II common carrier rate regulation.**
- **Ultimately, an open environment for competing wireline "last mile" providers will decrease the need for government regulation.**

THERE ARE NO TECHNICAL OR OPERATIONAL OBSTACLES THAT WOULD PRECLUDE OR RENDER UNECONOMIC OPEN ACCESS FOR "LAST MILE" CABLE BROADBAND SERVICES

- **Despite business and network configuration decisions regarding the delivery of Internet access services to consumers by cable companies, there are no technical reasons that would preclude an open access policy for Internet services.**
- **The cable architecture can accommodate multiple ISPs and can be easily modified to the extent necessary.**
- **No physical changes to the HFC network are required to accommodate multiple ISPs.**
- **No changes to existing standards are required to accommodate multiple ISPs.**
- **There are no technical compatibility or network security issues that would preclude multiple ISP access.**
- **Arguments that multiple ISP access will create congestion or operational burdens ignore the fact that these issues are related to the overall level of traffic, not the number of ISPs.**
- **The Canadian Cable Television Association in cooperation with the Canadian Association of Information Providers has already devised a workable approach to offer multiple ISP access in Canada.**

THE AT&T/TCI MERGER IS AN APPROPRIATE VEHICLE TO IMPLEMENT AN OPEN PLATFORM POLICY FOR "LAST MILE" BROADBAND FACILITIES

- **The FCC has clear authority to impose targeted conditions in the context of the pending AT&T/TCI merger review proceedings and has a statutory duty to do so when the public interest dictates.**

- **Consumer choice through open access and elimination of bottlenecks is fundamental to the FCC's public interest mandate and should be firmly adopted as a bedrock policy from the outset.**

- **The FCC must not allow the AT&T/TCI merger to entrench bottlenecks in Internet services, which are now central to the health of the U.S. economy and the lives of the American people**

- **Allowing cable to establish a gatekeeper position will deter service, application and facilities development and competition, contrary to the public interest.**

- **There is no statutory bar to imposition of an open access obligation when cable operators offer Internet access services.**