

*Before the*  
**FEDERAL COMMUNICATIONS COMMISSION**  
**Washington, DC 20554**

In the Matter of	)	
	)	
Joint Application of AT&T Corporation and	)	CS Docket 98-178
Tele-Communications, Inc. For Approval of )		
Transfer of Control of Commission Licenses )		
and Authorizations	)	

***EX PARTE* COMMENTS**  
**OF MT. HOOD CABLE REGULATORY COMMISSION**

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## INTRODUCTION

*Those cut off from these high-speed networks today will find themselves cut off from the economic opportunities of tomorrow. And more importantly, they will be cut off from the most important network that there is B the network of our national community. FCC Chairman William Kennard*<sup>1</sup>

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<sup>1</sup>Separate Statement of FCC Chairman William E. Kennard, January 28, 1999, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capability*, CC Docket No. 98-146 (available on FCC web page <[www.fcc.gov](http://www.fcc.gov)>).

The Mt. Hood Cable Regulatory Commission (AMHCRC≅) is an appointed group of ordinary citizens in the city and eastern suburbs of Portland, Oregon. The MHCRC was established to handle cable franchising and regulatory matters on behalf of six local governments.<sup>2</sup>

The MHCRC meets monthly, and has for a number of years been accustomed to toiling in relative obscurity.<sup>3</sup> MHCRC members typically view their task as primarily one of serving the public interest, protecting cable consumers, monitoring franchise compliance,<sup>4</sup> and following as best we can the policies set forth by Congress, the FCC, applicable law, and the provisions of our cable franchises.<sup>5</sup>

On the night of November 16, 1998, the MHCRC=s comfortable and customary anonymity ended.<sup>6</sup> On that date, the MHCRC recommended that nondiscriminatory access to

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<sup>2</sup>The MHCRC was created in 1992 by local intergovernmental agreement to carry out cable regulation on behalf of Multnomah County and the Cities of Fairview, Gresham, Portland, Troutdale, and Wood Village ("MHCRC Jurisdictions"). Among other things, the MHCRC acts in an advisory capacity to the MHCRC Jurisdictions in connection with potential or proposed transfers or changes in ownership or control of any cable franchisee of the MHCRC Jurisdictions.

<sup>3</sup>MHCRC meetings only sporadically attract a noticeable amount of citizen turnout (depending on the issue at hand), and until the current AT&T/TCI transfer, MHCRC meetings were only rarely covered by the local press here.

<sup>4</sup>The MHCRC on behalf of its Jurisdictions oversees five separate cable franchises controlled by the two largest Multiple System Operators (AMSOs≅) in the nation: TCI (three small franchises servicing about 31,000 subscribers in the western portion of Multnomah County) and Time Warner (two franchises doing business as AParagon Cable≅ in eastern Multnomah County servicing around 130,000 subscribers). The proposed AT&T/TCI transfer as submitted pursuant to FCC Form 394 requested approval of a change in control of TCI cable franchises in the City of Portland and Multnomah County only.

<sup>5</sup>The MHCRC=s four current AGoals and Objectives≅, and an overview of MHCRC processes and procedures, is available on the MHCRC page on the world wide web at <[www.mhcr.org](http://www.mhcr.org)>.

<sup>6</sup>The *Wall Street Journal* in its November 19, 1998 edition referred to the MHCRC in its ADigits≅ column as the AMouse that Roared.≅

AT&T/TCI=s planned high-speed internet cable modem platform be required as a condition of Portland and Multnomah County approving a change in control of TCI=s local cable franchises to AT&T.<sup>7</sup> It is in part the purpose of these *ex parte* comments to set forth with some particularity the policy and legal factors underlying the MHCRC recommendation. An initial survey of several of the factors influencing the MHCRC would include, the following, among others:

- < the pro-competitive pronouncements and provisions of the Communications Act, particularly Title VI;
- < a sincere attempt by the MHCRC staff to follow the FCC staff=s latest thinking on *Internet Over Cable*<sup>8</sup>, and;

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<sup>7</sup>Resolution No. 98-12, Adopted by the MHCRC November 16, 1998. Section 2.2(f) of Res. 98-12 recommends the following condition, among others, be imposed on the AT&T/TCI transfer by Portland and Multnomah County: *Anondiscriminatory treatment of other providers in connection with TCI=s proposed internet cable modem platform and services, and compliance with applicable cable commercial leased access requirements* See Exhibit A hereto.

<sup>8</sup>Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper No. 30, August, 1998, Federal Communications Commission (available on FCC website at <www.fcc.gov>). Ms. Esbin=s paper was particularly relevant in its affirmation that The FCC could reasonably conclude that cable Internet-based services, such as Road Runner, @Home and like offerings, when provided by a cable operator over its cable system in its

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franchised service area, come within the definition of Acable services $\cong$  under Title VI. $\cong$  *Esbin*  
(page v).

< the public interest as expressed in our franchises and public process here.

A more detailed survey of these factors is developed in the remainder of these comments.

On December 17, 1998, the Multnomah County Board of Commissioners and the Portland City Council upheld the MHCRC recommendation by a nearly unanimous margin. To the best of our knowledge, Portland and Multnomah County thus became the first governmental entities in the nation to impose such a condition in a cable regulatory process.

TCI and AT&T on December 29, 1998 failed to submit an unqualified acceptance of the transfer conditions imposed by the City of Portland (ACity≡) and Multnomah County (ACounty≡). The proposed change in control was therefore automatically denied as of that date by operation of the original City ordinance and County resolution<sup>9</sup>.

On January 19, 1998, TCI and AT&T filed a Complaint against the City and the County in the United States District Court for the District of Oregon seeking Aa declaratory judgment that the condition sought to be imposed by the (City and County) requiring carriage by TCI of unaffiliated providers of online and Internet access services, is unlawful and a violation of AT&T=s and TCI=s civil rights;≡ and Aan award of damages in an amount to be proved at trial;

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<sup>9</sup>City of Portland Ordinance No. 172955, passed by the Council December 17, 1998, Ɂ 1.c. Multnomah County Resolution No. 98-208, adopted by the Board of County Commissioners December 17, 1998, Ɂ 2 . Both the City Ordinance and County resolution are available at the date of this filing on the MHCRC web page <[www.mhcr.org](http://www.mhcr.org)> under ACurrent Issues.≡

and costs and attorneys fees.<sup>10</sup>

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<sup>10</sup>AT&T et. al. vs. City of Portland and Multnomah County, Case No. CV 99-65 AA, U.S. District Court (D. Oregon), filed January 19, 1999, page 2 (hereafter AComplaint).

These *ex parte* comments are for the purpose of directly providing updated<sup>11</sup> information to the FCC regarding the MHCRC, City and County deliberations and action on this proposed change in control, and to inform the FCC of the subsequent litigation that has been filed against the City and County by TCI and AT&T. The litigation has been filed despite earnest City and County efforts (facilitated in part by the direct involvement of Oregon's senior United States Senator) to explore alternatives and compromises short of litigation<sup>12</sup>. These comments are also

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<sup>11</sup>The MHCRC apologizes to the FCC for our lateness in submitting these *ex parte* comments, which we had originally hoped to submit to you last month (pursuant to Res. 98-15, adopted by the MHCRC on December 14, 1998). However, with events developing here at a breakneck pace, we wanted the FCC to have the most current information, up to and including the filing of the lawsuit by AT&T and TCI.

<sup>12</sup>Both City and County attorneys on January 7, 1999 wrote separate letters to TCI/AT&T local legal counsel urging AT&T and TCI to consider alternatives short of litigation, and stating that a decision by AT&T and TCI to engage in litigation about this matter should not be either inevitable or a necessary result of this denial. The January 7, 1999 City Attorney and County Counsel letters are available at this time on the MHCRC web page <[www.mhcr.org](http://www.mhcr.org)> under Current Issues. The Mayor of Portland and Oregon Senator Ron Wyden also held subsequent informal discussions with AT&T/TCI representatives in order to attempt to reach a compromise.

intended to respectfully urge that the FCC promptly open a regulatory proceeding to assist in clarifying the matters at issue here, so that a nationwide resolution of these important national communications matters can be expedited.<sup>13</sup>

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These efforts failed, and the lawsuit (*op. cit.* at fn 5) was filed as indicated on January 19, 1999.

<sup>13</sup>The MHCRC notes and expresses substantial concurrence with the actions requested by the letter filing of the Consumer Federation of America et. al. dated January 27, 1998 and addressed to Chairman Kennard, with copies provided to all FCC Commissioners.

Particularly in light of the litigation now facing Portland and Multnomah County (and possibly other local governments as well in the near future)<sup>14</sup>, a federal solution led by the FCC is urgently requested. In making its original recommendation to Portland and Multnomah County, the MHCRC consciously sought to carry out what the MHCRC and its staff sincerely understood to be a broad, federally-encouraged policy of providing for competition, deregulation, and an open and accessible marketplace in communications and Internet access. The FCC=s current open docket on the AT&T/TCI transfer presents an ideal opportunity for the FCC to consider the implementation of an open cable access policy at a national level. Whether the FCC chooses to impose such a requirement on the AT&T/TCI transfer request now pending, or whether the FCC chooses instead to open a separate rulemaking to consider the benefits of imposing or allowing an open access requirement industrywide on cable=s planned high speed cable modem platform, the

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<sup>14</sup>The MHCRC has learned that just prior to the date of this filing the City Council of Los Angeles, California has expressed support for open access as a policy matter, and that the County Executive of King County, Washington (comprising the suburbs of Seattle and including approximately 100,000 TCI cable subscribers) has recommended that the King County Council impose a similar >open access= condition.

need for prompt and decisive FCC guidance in this area is clearly urgent.<sup>15</sup>

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<sup>15</sup>The MHCRC notes that the FCC on January 28, 1999 announced release of a Report (No. CC 99-1) concerning the deployment of advanced telecommunications capability, or broadband, to all Americans pursuant to Section 706 of the 1996 Telecommunications Act. Although the FCC indicated that initial aggregate data suggested reasonable and timely deployment of broadband, the FCC press release also concluded that it is too early to reach definitive conclusions, that the FCC intended to closely monitor the deployment of broadband capability to all Americans, and that the FCC would not hesitate to reduce the barriers to competition where necessary. The MHCRC remains encouraged by the FCC's serious commitment to these issues, as reflected in the January 28th FCC press release and the separate statements on that date of each FCC Commissioner.

## II. CHRONOLOGICAL PROCESS OVERVIEW OF MHCRC/PORTLAND/MULTNOMAH CONSIDERATION OF AT&T/TCI REQUEST FOR CHANGE OF CONTROL

*At the challenge for the regulator, at each step, is to examine the underlying purposes and policy goals behind existing regulatory categories, and to apply them only where those purposes and policy goals make sense. Any regulatory efforts in this arena should begin with an analysis of whether the operator in question exercises undue market power over an essential service or facility necessary to provide an essential service.*≡ **Barbara Esbin**<sup>16</sup>

To understand the genesis of the imposition of the Aopen access≡ condition imposed by Portland and Multnomah County, it will be necessary to review the history of local franchising authority consideration of the change of control of TCI cable franchises to AT&T here. The process throughout has been governed by the applicable section of Title VI of the Communications Act<sup>17</sup>, and relevant FCC rules<sup>18</sup>.

A chronology, highlighting the development and imposition of the cable modem open access condition by Portland and Multnomah County, is as follows:

**September 2, 1998**    FCC Form 394 filing received. FCC Form 394 filing requesting approval by the City of Portland and Multnomah County of the change of control of TCI cable franchises to AT&T was received by the MHCRC staff office. Assuming the original filing was complete, the 120 day time limit imposed by FCC rules required the City and County to act within 120 days or by December 31, 1998 or the transfer would be deemed approved without conditions.

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<sup>16</sup>Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*≡, page 117, *op.cit.* at fn 8.

<sup>17</sup> 47 U.S.C. 537

<sup>18</sup> 47 CFR 76.502

- September 21, 1998** MHCRC established transfer consideration process. The MHCRC at its regular monthly meeting adopted a resolution establishing a process and timelines for a public hearing and MHCRC recommendations on the proposed transfer to the City Council of Portland and the Multnomah County Board of Commissioners.<sup>19</sup>
- September 30, 1998** First staff letter to AT&T. MHCRC staff sent first formal letter requesting specific information from AT&T/TCI. The MHCRC staff letter asked the following question (among others): *Does the company plan to introduce cable modem internet services utilizing a proprietary platform? To what extent, if any, will TCI afford access to cable modem services to other Internet Service Providers on nondiscriminatory terms and conditions?*
- October 12, 1998** First AT&T reply. AT&T/TCI submitted a partial reply to the MHCRC staff letter (not all MHCRC questions were answered by AT&T/TCI). With respect to the modem question, the AT&T reply stated: *A...We plan to deploy @Home, a proprietary cable service.... We consider @Home to be a proprietary product. TCI intends to provide @Home as a cable service over its cable system and therefore is not subject to common carrier obligations.≡*
- October 19, 1998** MHCRC public hearing. The MHCRC conducted a televised, live public hearing on the proposed AT&T/TCI transfer utilizing the facilities of Portland Cable Access. The hearing format provided for live (in-studio) public testimony, as well as telephone testimony and comments from viewers. As the minutes of this meeting<sup>20</sup> reflect, the most significant issue raised at the hearing (measured in terms of the amount of written and oral testimony) was the issue of nondiscriminatory access to TCI=s cable modem platform. Written testimony on this issue was received (via email) in advance of the hearing by an interested ISP representative. Richard Horswell, President of Oregon Internet Service Providers Association (ORISPA) testified in person, along with James Deibele, CEO of Teleport. After the hearing, in open discussion (attended by TCI/AT&T representatives). **MHCRC members agreed that the cable modem access issue was significant, and the MHCRC directed its staff to pursue the issue.**
- October 30, 1998** Second staff letter to AT&T. MHCRC staff submitted a follow-up letter to

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<sup>19</sup>Res. No. 98-9, passed by the MHCRC September 21, 1998.

<sup>20</sup>Minutes of this and other MHCRC meetings are available on the Mt. Hood Cable Regulatory Commission website, located at <[www.mhcr.org](http://www.mhcr.org)>.

AT&T/TCI requesting further information and comment on the open access issue, among others. With respect to the open access issue, the staff letter stated: *You may be aware that a number of local Internet Service Providers (ISPs) have provided testimony on this issue, and requested access by ISPs to the cable modem platform under nondiscriminatory terms and conditions.* The staff letter goes on to ask for responses to two legal questions to determine AT&T's view of the status of cable modems as >cable services=, and one business question as to whether AT&T intends to offer its own AAT&T WorldNet≡ Internet access service using TCI cables.

**November 10, 1998** Second AT&T reply. AT&T's second reply letter was received via fax on the evening of Monday, November 9, and reviewed by staff and legal counsel on Tuesday, November 10. Among other things, AT&T in this second letter re-asserted that @Home is planned *As a cable service under current law*≡ and declared that applicable law prohibits local governments from regulating Atelecommunications services≡ but not cable services. AT&T also asserted a novel legal position that cable commercial leased access rules can=t apply because cable modem services are not Avideo programming.≡

**November 12, 1998** Proposed MHCRC action and ordinances distributed to AT&T/TCI. Proposed MHCRC resolution #98-12 in draft form, with attached proposed draft ordinances for consideration by Portland and Multnomah County, was distributed to AT&T/TCI, the public, and interested parties. Among other things, the proposed MHCRC resolution recommends *Anondiscriminatory treatment of other providers in connection with TCI=s proposed internet cable modem platform and services, and compliance with applicable cable commercial leased access requirements*≡. The resolution also attached ordinances for the City of Portland and Multnomah County, including specific recommended implementing language regarding the open access condition.

**November 16, 1998** MHCRC adopts resolution and ordinances. At a crowded meeting at Mt. Hood Community College, the MHCRC took testimony from AT&T and TCI representatives, and further testimony from interested parties including three local Internet service providers (AISP=s≡), US West, and members of the public. AT&T and TCI requested more time to review the proposed resolution and ordinances, but also indicated that they would not be willing to entertain any provision requiring access by third parties to their cable modem platform. After discussion, the MHCRC voted to send the resolution and ordinances, as drafted, to the Portland City Council and Multnomah County Commission. The Aopen access≡ condition recommended by the MHCRC is as follows: *Non-discriminatory access to cable modem platform.* *Transferee shall provide, and cause TCI to provide, nondiscriminatory access to TCI=s cable modem platform for providers of internet and on-line services, whether or not such providers are affiliated with Transferee or TCI, unless otherwise required by applicable law. So long as cable modem services are deemed by law to be*

*Acable services*≡, as provided under Title VI of the Communications Act of 1934, as amended, Transferee and TCI agree to comply with all lawful requirements regarding such services, including, but not limited to, the inclusion of revenues from cable modem services and access within the gross revenues of TCI's cable franchises, and commercial leased access requirements

- December 2, 1998** AT&T/Staff meeting, compromise proposed. AT&T/TCI representatives met with MHCRC staff and legal counsel and proposed compromise language on the Internet modem open access issue. The compromise language tentatively agreed to by AT&T representatives and MHCRC staff on the Aopen access≡ issue in essence changed the language from a requirement to a policy statement. These changes necessitated further MHCRC review.
- December 14, 1998** Mt. Hood Cable Regulatory Commission endorsed original language and rejected compromise. The MHCRC conducted a lengthy meeting to review the proposed compromise language (and make its final recommendation). After substantial discussion (including presentations and testimony by a number of interested parties) the MHCRC declined to endorse the limited Apolicy language≡ of the proposed compromise , and unanimously determined to support the language of the original MHCRC recommendation.
- December 17, 1998** Multnomah County Commissioners voted (4-1) and the Portland City Council voted (5-0) to uphold the uncompromised, original MHCRC recommendation approving the AT&T/TCI change in control, but imposing the open access condition, as unanimously endorsed by the MHCRC. TCI/AT&T were given 12 days to file an unqualified acceptance, or else the proposed change of control would be automatically denied.
- December 24, 1998** Commissioner Erik Sten (City of Portland) and Commissioner Sharon Kelley (Multnomah County) sent a letter to AT&T and TCI suggesting further dialogue and the exploration of alternatives short of litigation.
- December 29, 1998** AT&T filed a unilaterally-modified version of the acceptance form required by the City and County. The acceptance form provided by AT&T and TCI, among other things, deleted the open access condition. The AT&T/TCI cover letter to the modified acceptance form stated that AT&T would not agree to the acceptance conditions related to open modem access and would accept only Alawful≡ conditions.
- January 7, 1999** Following legal review by the City Attorney and County Counsel, the City and County notified TCI and AT&T that their requested change in control of TCI/Portland and TCI/Multnomah cable franchises had been initially denied (as of December 29, 1998) due to the failure of TCI and AT&T to submit an unqualified acceptance of the conditions attached to the transfer

by the City and County on December 17, 1998. The City and the County continued to suggest further dialogue or the exploration of other alternatives short of litigation.

**January 19, 1999** Following unsuccessful attempts at compromise (including the intervention of Oregon U.S. Senator Ron Wyden), TCI and AT&T file a lawsuit against the City of Portland and Multnomah County in U.S. District Court for the District of Oregon.

### III. THE PUBLIC INTEREST

*In the two-and-a-half years since the 1996 Act passed, I'm concerned that consumers may have seen more changes for the worse in telecommunications than for the better. If there ever were a time for the Commission to ensure that consumers' interests don't take a back seat to the interests of telecom giants, it is now. One powerful tool the FCC has to make that happen is the imposition of meaningful merger conditions* **FCC Commissioner Gloria Tristani**<sup>21</sup>

There is no question but that the main issue resulting in the preliminary denial here of the proposed change in control of TCI cable franchises to AT&T was the disagreement among the parties regarding local authority to impose a nondiscriminatory access condition with respect to AT&T/TCI's planned high-speed cable modem Internet platform. This issue is unfortunately now the subject of litigation by AT&T and TCI against the City of Portland and Multnomah County----litigation the City and County sought diligently to avoid.<sup>22</sup>

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<sup>21</sup>*"Mergers, Consumers, and the FCC* **Remarks of FCC Commissioner Gloria Tristani before the National Association of Regulatory Utility Commissioners, November 8, 1998**

<sup>22</sup>*See* discussion in footnote 12, above.

The Mt. Hood Cable Regulatory Commission respectfully submits that this is no ordinary cable transfer. Cable transfers in recent years have primarily involved rectifying the boundaries of local cable franchises so that the cable industry can realize economies of scale and competition through a >clustering= strategy. Here, however, the MHCRC was not faced with a routine request for the transfer of one or more cable franchises from one Multiple System Operator (AMSO≡) to another.<sup>23</sup> Instead, the filing and the previous announcements from the parties described a transfer with national significance: a change in control of one of the largest cable operators in the nation to one of the largest telecommunications companies in the world.

The requirement recommended by the MHCRC, providing for open access to the high speed Internet platform planned by AT&T and TCI, was heavily debated here at both the MHCRC level and before the elected bodies of Portland and Multnomah County. Ultimately, the Cable Commission unanimously recommended, and Portland and Multnomah County approved by substantial margins the open access provision (the combined City/County elected official vote was 9-1). Our view is that this is the position that best protects consumers, competition, technological innovation, and an open marketplace in the rapidly growing world of Internet information and commerce.

The MHCRC is aware this decision has attracted national and local interest, but the key point in our view is *the public interest*.

The public interest is clearly best served by providing for robust competition and choice in

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<sup>23</sup>The MHCRC has considered and processed several cable MSO to cable MSO transfers, and presently is considering a transfer request (filed with FCC Form 394 on December 22, 1998) from TCI and Time Warner for transfer to TCI of the cable franchises presently held by Time Warner located in the eastern portion of the MHCRC=s jurisdiction.

the thriving Internet market, a market which is clearly more important every day (as the FCC itself recognizes) when considered from a business or public policy perspective. An Open access<sup>24</sup> is especially important because of the critical need to ensure that a maximum variety of choices concerning high-speed access to the Internet be available to *users and citizens of any income level or social status*.

As the FCC is aware, the current narrowband business model for the most part sets forth differential rates for high-speed access<sup>24</sup>, *yet such differential rates for speed of access may not be technically necessary on the broadband pipe*. Surely the FCC does not seek to encourage an Internet access marketplace where the economically disadvantaged (e.g the poor, public schools, and libraries) are trapped in a low-speed, low-tech "text-only" Internet world, while businesses and the well-off enjoy the high speeds, dense graphics, and multimedia options growing every day on the Internet.

The MHCRC and City and County officials and staff here have discussed internally with great concern the implications of an An information-rich<sup>24</sup> vs. An information-poor<sup>24</sup> society. MHCRC staff has attempted to actualize the implications of Aspeed-rich<sup>24</sup> versus Aspeed-poor<sup>24</sup> Internet options by visualizing real-life scenarios, such as the following: imagine a 30-student classroom sharing one computer terminal where one student must wait twenty minutes or longer utilizing a 28 kpbs telephone modem to download a graphically-detailed map of the Thirteen Colonies for a history report. Such a low-speed Internet connection will simply not be able to benefit all students in the limited time available. Yet a higher-speed DSL connection may be

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<sup>24</sup>That is, Internet access over the narrowband telephone wire is cheaper for >dial-up= service at 56 kbps or less, but more expensive for ISDN and DSL service.

economically or technically infeasible for the school, and an alternative high-speed cable connection (if available at all) is reachable through only one platform and one provider which the school must buy through to reach its Internet Service Provider of choice.

Moreover, the proprietary platforms represented by A@Home and similar developing cable services may not by any means become available universally and in all markets and franchise areas unless local governments retain and utilize the regulatory tools available under existing franchise agreements and federally-recognized consumer protection authority<sup>25</sup> to ensure that no *de facto* redlining or discrimination in price and availability occurs. This may well become an increasingly critical issue given the general availability of cable connections in urban areas, and the potentially superior technical fit for many households to the robust cable platform as compared with the more limited DSL and other options available on the narrowband telephone platform.<sup>26</sup>

The development of a information haves and have-nots, divided by purchasing power, is a social result devoutly to be avoided<sup>27</sup>. Yet we fear this result when Internet speed is related to economic capabilities, and this is the unfortunate result which appears to be developing on the telephone wire. The MHCRC hopes that the FCC will not through inaction encourage investment and deployment of a proprietary cable modem platform which will be dominated by a

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<sup>25</sup>See generally, Sec. 632 of Title VI of the Communications Act of 1934 [47 U.S.C. 552] concerning cable consumer protection and customer service, referencing the ability of local franchising authorities to exceed federal minimum consumer protection standards if necessary.

<sup>26</sup>It is the understanding of MHCRC staff that the availability of the DSL platform is distance-limited and that the ISDN platform also has technical limitations which the cable modem platform does not.

<sup>27</sup>As FCC Chairman Kennard has recognized. See quotation referenced in footnote 1 hereof.

single, incumbent cable carrier. The need for open access on the broadband pipe remains a very significant issue, and the MHCRC earnestly recommends that the FCC approach this issue frontally by either imposing an open access condition on the AT&T/TCI merger, or else immediately moving to open a rulemaking docket on this matter.

#### IV. LEGAL CONSIDERATIONS

*A Our shared goal of competition is one of the biggest ways in which we are on common ground---over the past year, the enemies of competition and change have learned that they are not going to profit from legalistic disputes about jurisdiction.*≡ **FCC Chair William Kennard**<sup>28</sup>

The MHCRC and its staff have been frequently asked about our views regarding the basis for our authority to impose an open access condition at the local level. Since this matter is now in litigation, we are confident that a fuller and more formal statement of our legal views will be forthcoming in the judicial process. However, MHCRC staff and legal counsel have carefully reviewed this matter, and we are comfortable that our actions are lawful as well as in the public interest. A very brief overview of our views regarding local authority as well as the policy and process basis for our action would include the following, among other things:

- < Section 613(d) of the Cable Act (Title VI of the Communications Act) specifically authorizes local authorities to impose pro-competitive conditions;
- < Imposition of third party access requirements to a cable system is already required in various parts of cable law (e.g. PEG requirements and commercial leased access

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<sup>28</sup>Remarks of William E. Kennard, Chairman of the Federal Communications Commission, to the National Association of Regulatory Utility Commissioners, Orlando, Florida, November 11, 1998 (available on FCC web page <[www.fcc.gov](http://www.fcc.gov)>)

requirements)<sup>29</sup>;

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<sup>29</sup>See Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, OPP Working Paper No. 30, August, 1998, *op. cit.* at footnote 8. Ms. Esbin's paper contains a particularly useful discussion of PEG access, commercial leased access, and similar requirements under Title VI for third-party access to the cable platform (pp 102-113).

< The record of our process in Portland showed strong support for an open access provision from consumers, businesses and interested parties<sup>30</sup>;

< Our franchises allow us to impose appropriate public interest conditions related to AT&T's legal, financial, and technical abilities<sup>31</sup>; and

< in the absence of clear federal preemption or specific federal statutes or rules to the contrary, we think that the best reading of applicable federal law and telecommunications policy is one that is consistent with local authority to require open access to the high speed cable modem Internet platform in order to encourage competition and consumer choice on the nation's most critical information superhighway.≡

In the final analysis, the MHCRC did not consider an Aopen access≡ requirement to be, in any manner, a constraining level of regulation on a nascent technology<sup>32</sup>. Rather, the thrust of the MHCRC recommendation was toward open markets---not regulation; toward competition---and not monopoly. We continue to feel strongly, on legal as well as policy grounds, that the essential nature of our open access recommendation was one that strongly encouraged the continued growth of an unfettered, unimpeded, vibrant Internet---with many choices available on many

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<sup>30</sup>See in particular, MHCRC meeting minutes of October 19, 1998; November 16, 1998; and December 14, 1998, available on the Mt. Hood Cable Regulatory Commission website, located at <[www.mhrc.org](http://www.mhrc.org)>.

<sup>31</sup>See, e.g., City of Portland/TCI franchise, §15.1(B)(2), Ord. No. 166469, passed by the Portland City Council April 28, 1993.

<sup>32</sup>The MHCRC staff notes the comments of FCC Chairman William Kennard to the effect that >we must be very careful in imposing regulations on nascent technology≡ in an interview with Charlie Rose on or about January 15, 1999 on PBS, when Mr. Kennard was asked by Mr. Rose to comment on the open access requirement imposed by Portland and Multnomah County.

platforms---and we would oppose any regulations that demonstrably produce an opposite result.

## V. FCC ACTION NEEDED.

*A...the policies of interconnection, equal access, and open architecture have served us well in the wireline context. Indeed, the concepts of connectivity and interoperability and openness are the lifeblood of the Internet. These principles are worth preserving. Some worry that any mention of these principles portends premature and excessive governmental intervention, jeopardizing investment and deterring build-out. Not so.≡*

**FCC Commissioner Susan Ness**<sup>33</sup>

There is an urgent need for prompt FCC action to address the implications of the plans of cable MSOs, including ATT/TCI, to offer broadband services using franchised cable TV system facilities. The issues surrounding cable broadband have been raised both in the context of the proposed AT&T/TCI merger, CS Docket 98-178, and in the Commission's proceedings to implement section 706 of the Telecommunications Act, CC Dockets 98-146 and 98-147). In addition, many local franchising authorities and our local regulatory colleagues around the country have shared their concern with us regarding the likely negative impact on both consumers and the Internet of the cable industry as the bottleneck gatekeeper of broadband internet access . Should the FCC decide to approve the merger of these two companies, the FCC should condition its approval upon the outcome of the proceedings the FCC opens on these issues..

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<sup>33</sup>*Deregulation: Pursuing Congress's Vision*, Remarks of FCC Commissioner Susan Ness, Federal Communications Bar Association, Washington, DC., January 20, 1999. (available on FCC web page <[www.fcc.gov](http://www.fcc.gov)>)

Ultimately, the importance of this issue transcends the business plans of AT&T. The need for the Internet to remain open and competitive is a matter of national policy and should be addressed on a national level. In the absence of FCC action, it is likely that the proprietary cable modem platforms will become the cable industry norm. This can only damage the openness and innovation that has made the Internet the unfettered medium it is today.<sup>34</sup>

## VI. CONCLUSION

*It is true that the devil is in the details. And let's be candid about the fact that we are not always going to agree on every substantive issue. But we can and must agree to work together, to maintain an open dialogue for addressing our differences and resolving them as best we can.≡ FCC Chair William Kennard<sup>35</sup>*

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<sup>34</sup>There is a further argument that locking out ISP=s and other unaffiliated providers from wholesale access to the cable modem platform may also create unanticipated impacts on local right-of-way management, inasmuch as many such providers may seek additional local permit or franchise authority to deploy separate broadband facilities in local streets, many of them already congested or under severe management constraints due to the plethora of telecommunications providers in urban areas, including Portland.

<sup>35</sup>Remarks of William E. Kennard, Chairman of the Federal Communications Commission, to the National Association of Regulatory Utility Commissioners, Orlando, Florida, November 11, 1998 (available on FCC web page <[www.fcc.gov](http://www.fcc.gov)>)

As the FCC has often recognized, the Internet is a critical information superhighway containing important public interest resources for all citizens (medical, government, education, etc.). The Internet was in fact begun for governmental and public interest---not commercial--- purposes.<sup>36</sup> The recent and extraordinarily rapid development of the Internet into a commercial success (E-commerce), is to be applauded, and will enhance the Internet's importance as a gateway enabling consumers to bring competitive goods and services into their homes.

However, in the MHCRC's best judgment, home access to the Internet for most citizens for at least the next few years and beyond will continue to depend on the existing two wires already built to most homes: the telephone wire (narrowband), and the cable wire (broadband). Despite niche availability of wireless or other options yet unknown in some markets, the mass of people (rich and poor) will depend on the two wires already present. And these two wires will continue, in our best judgment, to provide the only realistic mass access to the Internet for most citizens.

Under enlightened FCC and federal policies, the MHCRC believes considerable progress has been made in opening up the telephone wire to competition by requiring the monopoly incumbents to provide wholesale access to resellers. This has reduced rates in long distance and data services, encouraged technological innovation, and broadened access for businesses and consumers..

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<sup>36</sup>A useful overview of early Internet history is traced in Barbara Esbin's paper, *op.cit.* at footnote 8 herein, pp 6-8. Esbin further cites Leiner, Cerf *et. al.* *AA Brief History of the Internet* version 3.1 (revised Feb. 20, 1998) <<http://info.isoc.org/internet-history>>

However, the MHCRC would submit that similar progress on the far more robust broadband cable wire has barely begun. Yet, we know that cable=s Afat pipe≡ is much more suitable in terms of technology, speed, and capacity to carry the ever-more-dense Internet content (particularly multimedia) that is becoming a necessity (by any objective measure) for adequate access to the Internet now and in the immediate future.

It is now abundantly evident from our process here that AT&T/TCI intend to do everything possible, including filing litigation, to maintain bottleneck control over the cable customer=s initial entry to the high-speed cable Internet platform. Such control is maintained by requiring each cable customer to enter the high-speed Internet world only through the proprietary platform (e.g. A@Home≡, ARoad Runner≡) of the incumbent cable operator, before reaching other platforms, ISP=s, and content providers of the consumer=s choice. Without a broad menu of wholesale access through the cable modem, it is not clear to us that the present great variety in narrowband retail access choices (through online providers and ISP=s ) will survive commercially long enough to provide similar economically-disparate or technologically-vibrant competitive choices to future cable modem customers.

The MHCRC submits that such an anti-competitive scenario is clearly wrong. It is self-evidently not in the public interest. It appears contrary to every hard-earned lesson of public telecommunications policy this great nation has learned at least since the 1982 AT&T breakup.

If the current policy pronouncements of federal law have any real meaning, the MHCRC believes that the FCC, Congress, and franchising authorities should *together and immediately* be doing everything possible to prepare cable networks for the competitive, open cable platform which

longstanding national communications policy clearly contemplates, and we should do so despite whatever statutory or categorical confusion may now exist<sup>37</sup>, .

Such an open cable platform will develop more rapidly, consistently, and fairly if the FCC begins to take action to look into this matter by appropriate regulatory means, and if the FCC is careful in the meantime not to unjustly preempt or impair local effort, such as the MHCRC=s, to spur competition through utilizing existing local franchising authority.

Finally, the MHCRC hopes that the present sporadic growth in high speed Internet access through narrowband or wireless options in some limited markets, though itself encouraging, is not mistaken by the FCC as reason to excuse the cable industry from a clear public need to open up its broadband platform to competition.

In our view, either action is pursued now, or else an overly timid 'wait and see' attitude (whether federal or local), will require all involved levels of government to spend many years in the future trying to 'retrofit' open access onto a monopolistic and proprietary broadband Internet platform: the same platform the cable industry is now rushing to deploy.

We urge the FCC not to lose track of the overall competitive Aforest≡ in a rush to applaud the isolated narrowband or wireless "trees" of the moment. If the FCC mistakes current competition among ISPs on the narrowband wire as reason enough to forgo action, the MHCRC submits that the consequence of such inaction may cause vibrant competition and choice to disappear entirely if AT&T and TCI's business plans for Internet access on the broadband pipe prevail.

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<sup>37</sup>Esbin, *op.cit.* at footnote 8 herein, particularly pp 111-118.

Surely, this is not the result intended by the FCC, nor is it the result intended by the citizens serving on the Mt. Hood Cable Regulatory Commission. We have attempted to follow the lead of our federal jurisdictional partner---the FCC---in recommending what seems to us a simple, common-sense requirement that consumers be assured a variety of choices, prices, and providers for increasingly-critical high-speed access to the Internet. Our reward thus far has been unlooked-for notoriety, litigation, and a dearth of federal guidance. We earnestly request that the FCC move promptly to address this situation.

Respectfully submitted,

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Norman D. Thomas, Chair

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David C. Olson, Staff Director  
MT. HOOD CABLE REGULATORY  
COMMISSION  
1211 SW Fifth Ave, Room 1160  
Portland, OR 97204

## **DECLARATION**

I, David C. Olson, declare as follows:

1. I am Director of the Office of Cable Communications and Franchise Management of the City of Portland, Oregon and am staff director for the Mt. Hood Cable Regulatory Commission.
2. This declaration is submitted in support of these *ex parte* comments of the Mt.

Hood Cable Regulatory Commission.

3. I have reviewed the factual assertions contained in these *ex parte* comments and I declare that they are true to the best of my knowledge.

I hereby state under penalty of perjury that the foregoing is true and correct.

Executed on January 31, 1999

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David C. Olson

**EXHIBITS**  
**TO EX PARTE COMMENTS OF**  
**MT. HOOD CABLE REGULATORY COMMISSION**

EXHIBIT A - **MHCRC Resolution No. 98-12:** *Recommend City of Portland and Multnomah County approve proposed change of control of TCI cable franchises (Portland, Multnomah, and Hayden Island) to AT&T, with conditions.*  
Adopted by the Mt. Hood Cable Regulatory Commission November 16, 1998  
(3 pages total)

EXHIBIT B - **Local (Portland, Oregon) press clippings, etc.:** including editorial from Portland *Oregonian* referring to statements from FCC Commissioner Gloria Tristani; and other press coverage of MHCRC, Portland, and Multnomah action on open access and AT&T/TCI transfer (including press coverage of lawsuit filed January 19, 1999 by AT&T/TCI against City of Portland and Multnomah County).