

ORIGINAL

Lampert & O'Connor, P.C.

1750 K Street NW
Suite 600
Washington, DC 20006

EX PARTE OR LATE FILED

RECEIVED

AUG - 9 2002

Tel 202/887-6230
Fax 202/887-6231

Linda L. Kent
kent@l-olaw.com

VIA HAND DELIVERY

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

August 9, 2002

EX PARTE

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
TW-A325
445 12th Street, S.W.
Washington, D.C. 20554

Re: Oral *Ex Parte* Presentation
CC Docket Nos. 01-337, 02-33

Dear Ms. Dortch:

On August 8, 2002, Steven Teplitz, Vice President and Associate General Counsel, AOL Time Warner Inc. ("AOL"), Donna N. Lampert and the undersigned, both of Lampert & O'Connor, P.C., met with Commissioner Kevin Martin and Dan Gonzales and Catherine Bohigian of his staff to discuss the above-referenced dockets.

In the meeting, we discussed AOL's positions as presented in its Reply Comments in CC Docket 01-337, filed on March 22, 2002 and its Comments and Reply Comments in CC Docket 02-33, filed on May 3, 2002 and July 1, 2002, respectively. Specifically, we stated that the application of Title II regulation to wireline carriers is a matter of statutory interpretation informed by Commission and judicial precedent, not a matter of "deregulatory" results. Here, the fundamental statutory issue is whether the ILEC is under a compulsion to serve as a Title II common carrier. In fact, we pointed out that Commission and judicial precedent recognize several factors that, if present, would necessitate common carriage of ILEC broadband transport facilities, such as a carrier's market power, the lack of sufficient alternative common carrier facilities to address user needs, control of bottleneck facilities, the need for nondiscriminatory access to a carrier's facilities, the need to deter anticompetitive conduct by a carrier and/or to stimulate competition generally, the need to safeguard reasonable rates and the general need to impose Title II obligations on ILECs in light of market circumstances. The record in these proceedings confirms that common carrier regulation and, specifically, the *Computer Inquiry* obligations, are necessary to avoid unreasonable conduct and further discrimination. No

evidence has been presented that the proposed reclassification of ILEC wholesale broadband transmission service would be consistent with Commission, statutory and judicial precedent.

AOL urged the Commission to look at the impact on consumers of undermining the highly competitive environment for Internet access services that exists today. The FCC has created a successful regulatory environment that ensures that all ISPs – whether independent or carrier affiliated – are afforded access to telecommunications inputs provided by ILECs on non-discriminatory rates, terms and conditions. For example, AOL explained that overall investment is best spurred by the FCC's current open framework, predicated on the principles of the FCC's *Computer Inquiry* precedent. The FCC's objective should be to spur *overall* investment, including the investment from the thousands of unaffiliated information service providers that have reasonably relied upon the open regulatory framework to create their businesses, not just ILEC investment which has not in fact been burdened by the application of the *Computer Inquiry* rules. These safeguards do not require a particular rate-setting methodology such as TELRIC, but rather require fair treatment of unaffiliated ISPs as compared with affiliated ISPs. While some updating of this framework may be in the public interest, elimination of the core requirements of access and nondiscriminatory treatment is not.

Pursuant to Section 1.1206(b) (2) of the Commission's Rules, two copies of this Notice are being provided to you for inclusion in the public record in each of the above-captioned proceedings. Should you have any questions, please do not hesitate to contact me.

Sincerely,



Linda L. Kent

cc: Commissioner Martin
Dan Gonzales
Catherine Bohigian