

April 11, 2000

The Honorable Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

RE: Cable Open Access Conditions: CS Docket Nos. 99-251 and 00-30

Dear Commissioner Furchtgott-Roth:

The Telecommunications Resellers Association (TRA) represents more than 200 companies that offer Internet services. We are writing to express concern over AT&T's public statements and ensuing news reports related to the announcement that AT&T is assuming control of Excite@Home, one of the nation's largest cable modem Internet service providers (ISP).

According to AT&T's March 29 press release and subsequent news items, the agreement provides that Excite@Home's Internet portal page will be featured on AT&T's high-speed Internet service start-page through 2008. It was further reported that AT&T, together with Comcast Corporation and Cox Communications, two large cable operators with similar arrangements with Excite@Home, have agreed not to market the services of other ISPs to any of the millions of customers who subscribe to the companies' cable offerings before the exclusivity provisions with Excite@Home expire in 2002 (Communications Daily, March 30, 2000, 2-3).

Notwithstanding protests to the contrary, these developments may signal the first step in what could become a wholesale retreat by AT&T and other key companies from earlier open access commitments. Fortunately, the Commission has the means to prevent such backsliding. With the review of the AT&T-MediaOne merger still pending, and review of the AOL-TimeWarner deal just getting under way, TRA recommends that the Commission address the cable open access issue in the context of these proceedings. Specifically, the Commission should consider conditioning approval of the AT&T-Media One and AOL-Time Warner mergers upon binding and enforceable open access commitments. Securing such commitments at this time is not only essential to the public interest and within the scope of the proceedings, but also completely reasonable given the corporations' public assurances.

TRA believes that timely FCC consideration of the open access issue will bring necessary focus to the critical, yet missing details surrounding AT&T's and AOL-Time Warner's future open access policies. Open access, in TRA's view, requires cable operators to make at least

three distinct commitments to unaffiliated ISPs and the subscribers they serve. These commitments are the following:

- (1) that all ISPs will be free to market their services to all customers of a cable provider, regardless of when customers subscribed to the provider's cable service or Internet transport service;
- (2) that Internet transport services will be unbundled from Internet portal management services and that both will be offered separately for purchase by unaffiliated ISPs;
- (3) that customer access to unaffiliated ISPs will not be screened, degraded or limited by the cable provider.

AT&T's public statements related to the Excite@Home deal appear to conflict with each of these requirements. First, AT&T is unwilling to permit full freedom of choice, as evidenced by its refusal to allow competing ISPs to market AT&T's transport services to existing Excite@Home subscribers at the time the exclusivity provisions expire. Denied the right to market to any existing Excite@Home subscriber, unaffiliated ISPs will be placed at a severe competitive disadvantage and customer choice is thereby diminished. Of equal concern, TRA is unaware of any binding commitment by AOL-Time Warner that precludes them from adopting similar discriminatory terms for unaffiliated ISPs.

Second, AT&T has indicated that its cable modem service will "feature" the Excite@Home portal. It is unclear whether this feature will require the customers of unaffiliated ISPs to "click through" the Excite@Home portal page before reaching the Internet content of their choice. If this were the case, however, the Excite@Home portal would constitute a virtual roadblock for subscribers who want to access an unaffiliated ISP's content or portal.

Finally, AT&T's statements cast doubt on its willingness to provide customers of unaffiliated ISPs access to the full range of Internet content available to AT&T's own customers. If customers can only access the Internet through the Excite@Home network, then AT&T retains the ability to filter, manipulate, or otherwise control end users' access to the Internet. Although AT&T-Excite@Home may claim that it will not engage in such conduct, earlier remarks by Excite@Home that it stands ready to limit video streaming raise doubts about such promises. TRA has similar reservations about how AOL/Time Warner would address comparable open access issues should that merger be approved without conditions.

In its October 1999 report, "Broadband Today," the Cable Services Bureau opined that, "the Commission's policy of regulatory constraint and monitoring" should continue "until the Commission has a better view of how broadband technology will be deployed and used by consumers." Until "fuller development of the broadband industry" occurs, the Bureau argued, "the notion of applying prophylactic 'open access' measures . . . would be unsound public policy that could have the unintended effect of impeding the rapid development of this industry." It is TRA's view that the impending mergers of AT&T/Media One/Excite@Home and AOL/Time Warner represent the "fuller development of the broadband industry" the Bureau was referring to

in its Report. The time is thus ripe to assess the status of this important industry, and to take action to assure that these mergers expand – not limit – consumer access to alternative ISPs.

As you made clear in your “Open Internet” speech last December 16, open, interconnected and competitive networks are critical to broadband growth. TRA is deeply concerned that policies now under consideration by some of our nation’s largest communications companies may frustrate rather than facilitate deployment of advanced telecommunications services to American consumers. We therefore urge the Commission to seriously consider requiring AT&T- Media One and AOL-Time Warner to commit to unambiguous, binding and enforceable open access terms, consistent with those listed above, as conditions of their merger approvals.

We look forward to working with you and stand ready to discuss this or other issues at your convenience.

Sincerely,

David Gusky
Executive Vice President

cc: Commissioner Susan Ness
Commissioner Michael Powell
Commissioner Harold Furchtgott-Roth
Commissioner Gloria Tristani