

December 6, 1999

Chairman William E. Kennard
Federal Communications Commission
Washington, DC 20554



Dear Mr. Chairman:

Several months ago, you asked me to meet with representatives of AT&T, Excite@Home, MindSpring, Atlanta Mayor Campbell and the FCC's Local and State Government Advisory Committee with the goal of reaching agreement on a definition of "open access" in the cable broadband environment. I am among the three of these six people you called upon who have chosen not to sign the letter being sent to you today.

In dozens of hours of conversation over the last four months, I tried to work constructively towards that objective. So did the others. The discussions were candid and sincere. I believe the participants acted in good faith at all times.

It is with regret that I advise you that what AT&T describes in the letter being sent to you today by three of the six members of the group IS NOT "Open Access."

Even so, I promised you that I would try to be flexible, and I had remained willing to endorse AT&T's "voluntary" undertaking as an important step in the right direction.

However, a few weeks ago, I reluctantly concluded that I could not sign the letter I had helped to draft, even if I had also presented a separate statement of my own views. Here is why:

- AT&T was unwilling to discuss, much less consider, several criteria which are essential to insuring that cable operators will not abuse their monopoly position to favor certain content and certain business partners. This inhibits the Internet's current role as a renewable source of constant innovation, economic growth and free expression.
- With the unexplained withdrawal of Excite@Home from the discussions, there was no longer any assurance that Excite@Home would cooperate in the planning and implementation of AT&T's commitments, or in preparing for broader access in the "post exclusivity" period.
- Widespread mischaracterization of the recent FCC staff report on broadband access, including misleading statements by a high level Commission official at a public meeting I attended three weeks ago, led me to realize that the letter could be misused to make it seem that AT&T has in fact agreed to provide "open access."

Nonetheless, there are important breakthroughs in the letter. AT&T's willingness to make its systems more available to competitors is a significant breakthrough. While I do not doubt the sincerity of those making these "voluntary" promises, the simple fact is that the high turnover of top

officials at AT&T requires that you obtain binding commitments. Accordingly, I ask that you make AT&T's compliance with these undertakings a condition of any transfer of ownership MediaOne cable systems to AT&T.

I have been inundated with queries since self-serving versions of the letter were leaked to the press. Thus, I will use this letter as a vehicle to summarize my concerns. I ask that you place this letter, along with all correspondence you receive from other of the participants, in html format on the Commission's Broadband Internet Access webpage: <http://www.fcc.gov/broadband/> I will also post this letter on Media Access Project's website: <http://www.mediaaccess.org> Interested citizens - and Commission staff - can learn more about my views on the subject *via* links to the compendium of broadband materials contained at: <http://www.nogatekeepers.org>

I would stress that I have not seen the final version of the AT&T undertakings, as I withdrew from the talks two weeks ago. Based on my knowledge of the drafting, as well as leaks which reporters have received from what they describe as knowledgeable parties, these are my comments:

- 1. Although AT&T owns 58% voting control of Excite@Home, it is hiding behind an "exclusive contract" to delay introduction of broader access for up to two and a half years, and perhaps much longer.**

AT&T says it will not open its systems until it is freed of existing contractual commitments. In the case of Excite@Home, this could be at least two and a half years. AT&T has been unwilling to disclose when MediaOne's exclusivity with the RoadRunner ISP will expire; some of these agreements evidently run much longer than the Excite@Home contracts.

These contracts are in my opinion, unlawful. That aside, AT&T controls the voting stock in Excite@Home and appears to be acquiring 50% operating control of RoadRunner. It can provide access much more quickly. The failure to do so means that AT&T will be able to retain a stranglehold on the prime internet access customers for many years to come.

To call this open access is like saying that on January 1, 1984, the day AT&T divested the local phone companies, there was competition in long distance services. The Commission should not allow a new monopoly to be created as it "watchfully" waits for competition.

- 2. Open access requires more than a choice of ISP's.**

Open access requires that cable operators provide competing ISP's with full access to their systems under the same terms and conditions, and at the same rates, that access is available to affiliated ISP's. An operator should not be able to restrict offerings to those which its affiliate chooses to provide.

The characteristics and benefits of open access are described in *Keeping the Information Superhighway Open for the 21st Century*, a paper to be released today by the Consumer Federation of America: <http://www.consumerfed.org/internetaccess/keeping1299.htm>

3. Requiring ISP's to use AT&T transport facilities permits content-based discrimination in favor of preferred content providers and commercial partners, and threatens to undermine the most valuable characteristics of the Internet: low entry barriers for nascent entrepreneurs, free expression and serendipitous innovation.

Throughout the discussions I attended, AT&T was unwilling to agree to let ISP's have access to connections at the cable head end. It instead insisted that ISP's use AT&T transport facilities all the way to the Internet backbone. The absence of an affirmative statement that ISP's can connect at the head end is profoundly anti-competitive, and utterly at odds with what the Commission expects of all other telecommunications services. It particularly penalizes ISP's which own, or have long-term leases for, transport facilities, and which may have built their own regional nodes.

Professors Lawrence Lessig (Harvard Law School) and Mark Lemley (University of Texas Law School) have described how the closed cable television model is antithetical to the core characteristics of the Internet as we know it today in comments recently filed in the AT&T/MediaOne merger proceeding: <http://cyber.law.harvard.edu/works/lessig/MB.html>

Professor Jerome Saltzer of MIT has described five kinds of content control in his newly-published paper <http://web.mit.edu/Saltzer/www/publications/openaccess.html>

Free expression includes the right not to receive access to unwanted material. Your strong support for the television v-chip ought to impel you to examine how closed access does not permit parents to use effective "server side" filtering by subscribing to "family friendly" ISP's. This problem is discussed in the brief Media Access Project co-authored in the Ninth Circuit Portland case: <http://www.mediaaccess.org/filings/index.html#anchor44776>

3. AT&T has abandoned its claims that it is not technologically feasible for cable operators to provide access to multiple ISP's.

Even as technologists at the highest levels of AT&T and Excite@Home were representing to me that there is no technological impediment to providing citizens with access to multiple ISP's, their lobbyists have continued to argue the contrary position before numerous state and local legislative and regulatory bodies. Indeed, a significant factor in my decision to withdraw from the talks you asked me to attend was the claim contained in an October 15, 1999 article by Excite@Home's General Counsel that "The technology simply does not yet exist to allow multiple ISPs to share a coaxial cable on a commercial basis."¹

Since AT&T says it can provide this access for Excite@Home customers on AT&T cable

¹Daniel Pine, *Let the Feds Regulate*, at <http://www.thestandard.com/article/display/0,1151,7017,00.html>
A forceful rebuttal can be found in a two part article, Professor Lawrence Lessig, *Cable Blackmail*, at <http://www.thestandard.com/article/0,1153,5198,00.html>
and *The Cable Debate, Part II*, at <http://www.thestandard.com/article/0,1151,5621,00.html>

systems and RoadRunner customers on MediaOne cable systems, all the other Excite@Home and RoadRunner partners should be able to do so as well.

4. Open Access brings a better financial return for cable operators.

Competitive ISP's will generate more revenue for cable operators. They can market to, and provide better customer service for, citizens who might otherwise be left on the wrong side of the digital divide. For example, Cuban-Americans have different needs than Mexican-Americans and citizens of Puerto Rico. Cultural impediments may mean that a single ISP with one Spanish language marketing staff will miss many of these new customers, leaving others outside the digital environment.

A thoughtful and important discussion of the how open access is more profitable for cable operators and for the economy as a whole is contained in a newly-released paper by Professor Jeffrey McKie-Mason of the University of Michigan, at <http://www.opennetcoalition.org/press/jmmwhi.pdf>

5. AT&T has been unwilling to make a written commitment that customers can purchase Internet access at commercially reasonable rates without having to buy a bundled "package."

Failure to permit independent purchase of Internet services threatens to expand the digital divide.

My Request: Open-Minded and Objective Reevaluation of Voluntary Access Plans

In accepting your request to meet with AT&T and others, I placed at risk my relationships with my clients and my professional colleagues. I have had several very emotional conversations in the two days since word of my involvement was leaked to the press, and one client has directly accused me of a breach of trust.

I knew this would be difficult, but I was willing to take the risk. I am proud that I tried to advance the public's agenda, and I am confident that I will be able to convince my colleagues that I did the right thing.

This experience impels me to make a request of you. I ask that you undertake a candid and zero-based review of what AT&T and, more importantly, other cable operators and their trade associations, say about open access in the days and weeks to come. This may require you to do something I know does not always come easily to you - to change your mind.

Depending on what you find, I ask you to reevaluate your unwillingness to use the Commission's legal authority to require non-discrimination in providing broadband cable internet services. For example, if one or more of the major cable operators remain unwilling to agree that affording access to multiple ISP's at the cable head end is not technologically feasible, or that they are unwilling to make binding commitments not to abuse caching and other quality of service standards to favor certain content at the expense of free expression and economic growth, you need to ask yourself if marketplace forces alone can influence those monopoly cable operators to follow a different course.

I will do the same thing. I will approach my own inquiry as open-mindedly as I can. I know you will, too.

Sincerely,

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President and CEO

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