

UNITED STATES FEDERAL COMMUNICATIONS COMMISSION

EN BANC HEARING ON AMERICAN ONLINE, INC.,
AND TIME WARNER, INC.
APPLICATIONS FOR TRANSFER OF CONTROL
CS DOCKET NO. 00-30

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FCC
445 12th Street, S.W.
Washington, D.C.

Thursday,
July 27, 2000

The parties met, pursuant to notice, at
1:09 p.m.

APPEARANCES:COMMISSION

Chairman William E. Kennard
Commissioner Susan Ness
Commissioner Harold Furchtgott-Roth
Commissioner Michael K. Powell
Commissioner Gloria Tristani

PANEL

Mr. Steve Case,
Chairman and CEO, America Online, Inc.
Mr. Gerald Levin,
Chairman and CEO, Time Warner, Inc.
Esther Dyson,
Chairman, EDventure Holdings
Barry Nelabuff,
Professor, Yale University
Barry Orton,
Professor, University of Wisconsin
Mark Cooper,
Director of Research,
Consumer Federation of America
Manuel Mirabal,
Chair, Hispanic Association on Corporate
Responsibility and
Chair, National Hispanic Leadership Agenda
James Love,
Director, Consumer Project on Technology
Cathy Cunningham,
City Attorney, Irving, Texas
Richard D. Parsons,
President, Time Warner, Inc.
Barry Schuler,
President, AOL Interactive Services Group
William F. Reddersen,
Executive Vice President,
BellSouth Corporation
Preston Padden,
Executive Vice President, Disney/ABC
Steven Weed,
Vice-Chairman, American Cable Association
Ross Bagully,
CEO, Tribal Voice, Inc.
Christopher Melcher,
Vice President and General Counsel, RMI.NET

AUDIENCE

Ms. Nancy Block,
Executive Director,
National Association of the Deaf
Mr. Barry Steinhorn,
Attorney, American Civil Liberties Union
Mr. Jeff Shester,
Consumer Group Advocate

P R O C E E D I N G S

(1:09 p.m.)

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2
3 CHAIRMAN KENNARD: Good afternoon and welcome to
4 this *en banc* hearing on the proposed merger between AOL and
5 Time Warner. I'm very pleased to see you all here this
6 afternoon, and we're very much looking forward to hearing
7 the presentations of all of our distinguished panelists
8 today. I want to thank all of them for taking the time to
9 appear before us today on this very important matter.

10 I think more than any other potential acquisition
11 or consolidation in recent memory, the proposed merger of
12 these two companies, AOL and Time Warner, has really
13 captured national attention. And there's good reason for
14 this, because ultimately, this merger could ordain the
15 essential nature of America's broadband services. There are
16 a lot of important questions that we're seeking answers for
17 here today.

18 Will the merger deliver on promises, including
19 accelerated broadband deployment, more innovative services
20 and continued commitment to multiple broadband platforms?
21 Or will it, instead, impair the competitive, consumer-driven
22 evolution of these technologies and stymie growth in new
23 markets such as interactive television and instant
24 messaging? I very much look forward to listening to all of
25 the panelists today and hearing the answers to these

1 important questions.

2 Before we do that, I'd like to take just a moment
3 to discuss my perspective on reviewing mergers of this kind.

4 We are here today because Congress has mandated that this
5 Commission investigate whether approval of transactions like
6 this one are in the public interest. As in all such cases,
7 we have a statutory duty to verify whether this merger would
8 violate either the implementation or enforcement of the
9 Communications Act in our rules and, most importantly,
10 whether it might interfere with the progress towards any of
11 our statutory objectives as we try to bring more competition
12 and more services to the American public.

13 It is the burden of the merging parties to
14 persuade us that the merger is in the public interest and
15 will yield clear public interest benefits. I wanted to say
16 a brief word about the issue of cable access. Some people
17 call it open access, other people call it forced access. I
18 will just call it cable access. I believe that the promise
19 of the Internet is in its remarkable openness, and I hope
20 that this merger would only expand on this openness.

21 I'm very concerned about this issue of access to
22 the cable broadband platform, so much so that I will ask my
23 colleagues shortly to open a separate proceeding on this
24 particular issue. But I very much want to hear about that
25 issue in the context of this particular transaction today.

1 But I want to emphasize that this discussion on cable access
2 should be a debate about means and not ends.

3 I think everybody agrees that the broadband
4 platform should be an open platform. So this is a question
5 of how we get there. Whether we get there through
6 regulation and government intervention or whether there are
7 market forces that will drive to an open platform. Finally,
8 I want to note that this is a public proceeding, and since
9 my tenure here at the Commission, I have worked very, very
10 hard to make sure that the debate over transactions like
11 this is open and transparent and in full public view. I
12 believe it's imperative that the public get this chance to
13 view our decisionmaking process, the kind of questions that
14 we ask and to get all the details and implications of this
15 particular transaction and to voice their own hopes and
16 concerns about it.

17 Well, I look forward to today's proceedings, and I
18 trust that all of the parties involved will do their best to
19 assist us at the FCC in doing our job to make sure that the
20 American consumer is well served. Commissioner Ness?

21 COMMISSIONER NESS: Thank you very much. We're on
22 the threshold of an extraordinary era. Today's hearing
23 provides the Commission with an invaluable opportunity to
24 better comprehend the rapidly converging communications
25 marketplace and the effect of these changes on the American

1 public. Mergers such as the one we will discuss today have
2 the potential of fundamentally reshaping the communications
3 landscape.

4 Public attention has been brought to this merger
5 due to a couple of factors. First, it's the largest merger
6 before this Commission. Indeed, one of the largest mergers
7 in history. This combination is significant in its scale.
8 But the size of the transaction, while historic, need not
9 itself lead to any intervention by the Commission. Big is
10 not necessarily bad, unless it leads to anticompetitive
11 behavior harmful to industry or consumers.

12 Also, commenters have raised a plethora of
13 intriguing topics related to the dynamic technologies and
14 services provided by the merging parties. These range from
15 more traditional communications policy issues, such as cable
16 carriage of broadcast signals and access to vertically
17 integrated video programming providers, to relatively new
18 issues such as interactive television and the
19 inter-operability of instant messaging. I believe our
20 biggest challenge today is to maintain a disciplined focus
21 as we digest the issues before us. Given a marketplace in
22 fundamental transition, we must exercise our jurisdiction
23 and authority with great caution.

24 To that end, just as in any other transaction
25 before us, we must ask the following questions: Will the

1 proposed transaction violate the Communications law and
2 regulations, impair the Commission's ability to implement
3 the Act or interfere with the objections -- objectives,
4 rather, of statutes, over which Congress gave us
5 stewardship? Also, will the proposed transaction yield
6 tangible and specific public interest benefits and will such
7 benefits outweigh harms, if any, that are posed by the
8 transaction?

9 A number of commenters have alleged that there are
10 potential harms from the merger that will frustrate the
11 Commission's ability to fulfil its statutory obligations.
12 Among other things, some have identified potential harms
13 relating to control of conduits, control of content and
14 applications, and the web of interrelationships between
15 providers or these infrastructures and services.

16 Each of these potential harms must be examined
17 through the prism of our core communications policies, such
18 as fostering competition among multiple broadband platforms
19 and video providers, deployment of advanced services to all
20 Americans, diversity of content, and product and service
21 innovation. And in each instance, we must ask ourselves
22 whether the potential harms are caused by or exacerbated by
23 the merger of these parties. An issue does not implicate
24 the fundamental concerns of the Commission, no matter how
25 timely or interesting it might be, or is not merger-specific

1 should not affect our decision whether to grant, condition
2 or deny the merger application.

3 So the purpose of this hearing, like the other *en*
4 *banc* hearings we have held in the past several years, is to
5 hear directly from the parties and to provide an immediate
6 opportunity for others to respond. The decisions we render
7 should be informed by the broadest possible understanding of
8 the markets and the consumer interests at stake. So I look
9 forward to a very vigorous debate today, responsive to the
10 issues by the parties and responsive to the issues of the
11 American public. And finally, whatever we decide to do in
12 this proceeding, we should do so expeditiously. We do not
13 serve the public interest by prolonging the merger review
14 process unnecessarily, thereby casting a pallor of
15 uncertainty over an entire industry. Thus, I'd urge us to
16 complete our deliberations in a thoughtful but punctual
17 manner. Thank you very much.

18 CHAIRMAN KENNARD: Thank you, Commissioner Ness.
19 Commissioner Furchtgott-Roth.

20 COMMISSIONER FURCHTGOTT-ROTH: Thank you, Mr.
21 Chairman. The parties before us today have submitted
22 license transfer applications to the Commission. Unlike
23 tens of thousands of other license transfer applications
24 that this agency reviews each year, this one has been
25 singled out for heightened scrutiny and now, for the first

1 time ever, a public *en banc* hearing. I cannot support the
2 Commission's review of the merging parties beyond their
3 license transfers, for three reasons.

4 First, although the Commission purports to review
5 the merger of AOL and Time Warner, it is in fact -- it in
6 fact does not have the statutory authority to do so.
7 Second, despite the unprecedented public hearing, the
8 Commission's process lacks transparency. And third, today's
9 hearing serves no purpose other than to provide a forum for
10 criticism of the merger and for the parties in turn to plead
11 for this Commission's approval.

12 As I have stated before, the FCC does not possess
13 statutory authority under the Communications Act to review
14 the mergers or acquisitions of communications companies.
15 Rather, the licensing provisions of the Act require the
16 Commission to review applications for license transfers.
17 Specifically, the Act merely directs the FCC to determine
18 whether the transfer of licenses serves the public interest,
19 convenience and necessity.

20 For tens of thousands of license transfers
21 annually, that review is perfunctory. Nothing in the Act
22 grants the Commission jurisdiction to approve or disapprove
23 mergers that consequently involve the transfer of licenses.

24 To be sure, the transfer of licenses is an important part
25 of any merger, but it is simply not the same thing.

1 A merger is a much larger and more complicated set
2 of events than the transfer of FCC permits. It includes, to
3 name but a few, the passage of legal title for many assets,
4 corporate restructuring, stock swaps and the consolidation
5 of corporate headquarters and personnel. Clearly, then,
6 asking whether a particular license transfer would serve the
7 public interest, convenience and necessity entails a
8 significantly more limited focus than contemplating the
9 industrywide effects of a merger between the transferee and
10 the transferor.

11 Our inquiry should be limited to whether the
12 proposed transferee has and will comply with applicable
13 Commission regulations. Our inquiry should not consider,
14 for example, how the combination of the two companies might
15 affect other competitors in the industry. That is the
16 responsibility of the federal antitrust agencies, the
17 Department of Justice and the Federal Trade Commission.

18 Yet, as with past prominent companies who have
19 filed for license transfers as a consequence of a merger,
20 this Commission has used the highly visible nature of the
21 parties here today as an excuse to expand the agency's
22 jurisdiction to include merger review. The Commission seems
23 to believe that any matter or practice that occurs as a
24 result of the merger is within its jurisdiction. While many
25 seem to accept this theory without much question, its logic

1 leads to absurd results.

2 Surely not even the staunchest advocate of the
3 Commission's authority would claim power to review AOL Time
4 Warner's plans for new corporate headquarters at Columbus
5 Circle, but this event is as important -- is an important
6 part of the merger and is no more related to the use of the
7 radio licenses at issue as the other issues that the
8 Commission seems intent on reviewing. At least I have not
9 heard anyone draw a principled distinction among aspects of
10 the merger if this is the subject of review, not the license
11 transfers. That would avoid this sort of ridiculous
12 outcome.

13 The Commission's review of license transfers and,
14 in conjunction, its unauthorized review of mergers, lacks
15 transparency and consistency. The Commission annually
16 approves thousands of license transfers without any scrutiny
17 or comment while others receive minimal review, and a select
18 few are subjected to intense regulatory scrutiny. Today,
19 unfortunately for AOL and Time Warner, they are the first
20 applicants required to expend time and money preparing for a
21 public hearing before the full Commission.

22 This hearing illustrates the highly disparate
23 level of review given to applicants that arise under
24 identical statutory provisions. This is problematic,
25 because merging parties have no way of anticipating the

1 scale of FCC review that will apply to them. Regulated
2 entities have little basis for knowing *ex ante*, how their
3 applications will be treated, either procedurally or
4 substantively. The Commission's review of license transfers
5 should not be arbitrary and discriminatory but, rather,
6 uniform and predictably -- predictable.

7 Finally, I would like to emphasize that today's
8 hearing is an entirely novel and unprecedented approach to
9 the review of license transfers. As far as I can tell,
10 there is no justification for this event other than the fact
11 that AOL and Time Warner are large and highly visible
12 companies in the communications industry. In all
13 proceedings, the Commission notifies the public and receives
14 written comments. This proceeding has been no different.
15 We have received abundant comments from the public,
16 including from most of the witness' today.

17 And this proceeding has dragged on for six months,
18 far too long. Mr. Chairman, you could end this at our next
19 public meeting next week. You can invoke Section 5.D of the
20 Communications Act, with the objective of rendering the
21 final decision within three months -- it would only be three
22 months late -- from the date of filing in all original
23 application renewal and transfer cases. This hearing does
24 not add to our knowledge. It is a public spectacle. I hope
25 that the witnesses and their comments today will answer the

1 following four questions:

2 What specific authority does this Commission have
3 to consider the issues you raise? Second, if the answer is
4 the public interest standard under Title III, how can this
5 Commission apply a different public interest standard for
6 AOL and Time Warner than it applies for any of the tens of
7 thousands of other identical license transfer cases?

8 Third, if your issue is not the public interest
9 standard, such as cable access, as the Chairman mentioned,
10 why should the issue not be addressed through general
11 rulemaking that would apply to the entire industry, rather
12 than to just one firm within the industry? And fourth, are
13 the issues raised, such as anticompetitive behavior, being
14 reviewed by another federal agency with clear statutory
15 authority? Thank you, Mr. Chairman. I look forward to the
16 testimony of the witnesses.

17 CHAIRMAN KENNARD: Thank you, Commissioner.
18 Commissioner Powell.

19 COMMISSIONER POWELL: Thank you, Mr. Chairman, and
20 let me be the first also to welcome Mr. Case and Mr. Levin
21 and all our other distinguished visitors and panelists from
22 whom we will hear today, as well as members of the public a
23 discussion and a debate about a matter of clear public
24 importance.

25 Since its announcements, the proposed merger of

1 America Online and Time Warner has assumed almost mythical
2 proportions among regulatory, legislative and business
3 circles, particularly here in Washington, and as a policy
4 and analytical exercise, this transaction has proven to be
5 irresistible both to those who applaud its promise and to
6 those who fear the merged entity's potential power. By
7 seeking to combine some of the most unique and valuable
8 assets in both the communications and content worlds, the
9 parties have spread before policymakers, advocates,
10 competitors and pundits a smorgasbord of tasty issues for us
11 to sample or devour as we choose.

12 This merger is particularly challenging to review,
13 not so much because of its formidable size but because of
14 its novelty. Normally, when the government reviews a
15 merger, it focuses principally on existing products,
16 services and markets. It takes a snapshot, if you will.
17 But here, we are faced with a merger that is born from a
18 revolution that is in its infancy, and the merger's great
19 promise and possible dangers rest principally in the future,
20 a future that changes rapidly and often unpredictably.

21 It is very difficult to grasp the effect of this
22 combination on consumers in markets that have barely emerged
23 or have yet to be created at all. Thus, the Commission will
24 struggle mightily with how to deal with necessarily abstract
25 issues and will face tough questions, as when to yield to

1 the market's judgment and when to embark on a
2 government-crafted solution. In this vein, I would caution
3 that identifying possible problems that result from this
4 merger is not the same thing as having a workable regulatory
5 solution.

6 We should keep squarely in mind that regulation
7 imposes significant costs on producers and consumers. Valid
8 rules require valid and stable economized and technological
9 assumptions that may be difficult to come by in this
10 innovating space. The hurdles of enforcement are
11 substantial. Additionally, we should recognize that
12 regulatory intervention necessarily directs the course of a
13 market and may distort it by diverting capital away from
14 certain enterprises and towards others. Whether this is
15 wise in a burgeoning, rapidly changing, innovation-driven
16 market is subject to debate and some questions.

17 Finally, I think it's important to say a word
18 about who we are and what we do. It is important to
19 emphasize that many of the interesting challenges, questions
20 and concerns that might arise from this combination are not
21 within the scope of our review, nor are we necessarily
22 empowered to address any and all such questions. Along
23 these lines, I would repeat the caution of the Chairman and
24 many of my colleagues in public statements that we do not
25 regulate the Internet.

1 While our authority does extend to much of the
2 infrastructure that affects Internet service, we must react
3 cautiously and perhaps even skeptically to invitations to
4 intervene in matters that involve Internet content, products
5 and services. It is extremely important, then, that we
6 focus on the matters that will inform our decision and not
7 dawdle too long with issues that do not lend themselves to
8 an FCC regulatory solution. With that, I look forward to
9 hearing from the panelists, and thank you for convening the
10 hearing, Mr. Chairman.

11 CHAIRMAN KENNARD: Thank you, Commissioner.
12 Commissioner Tristani.

13 COMMISSIONER TRISTANI: Before I go to the brunt
14 of my remarks, I would like to thank you for holding this
15 hearing. I, for one, was an advocate of having an *en banc*
16 hearing, because this merger has not only caught the
17 attention of Washington, it has caught the attention of
18 many, many citizens across this country. It's something
19 that I know we're all getting an unprecedented amount of e-
20 mail on, letters on, questions on, and this is one small way
21 that Americans, that the public can have a sense of what
22 happens in the halls of the FCC in Washington when these
23 issues are concerned.

24 I'm delighted that the press is here, because I
25 know this is getting good coverage, and I'm hoping that, in

1 a future hearing, we'll have some kind of an interactive
2 dialogue with the public. We should have thought of that
3 before. Having said all of that, there is a procedural
4 concern that I have, and that's that yesterday, this
5 Commission announced over our Web page that in order to get
6 into this room or to view this hearing at Commission,
7 citizens would have to come at 8:00 in the morning, starting
8 at 8:00 to get a ticket.

9 Now I know that was well-intentioned, because
10 there were security concerns, there were concerns about we'd
11 have overflow, but I think in the future, Mr. Chairman, that
12 if we're going to limit or have different procedures in
13 place, we need to let the public know with sufficient notice
14 -- at least a week's advance -- because I have no clue if
15 there are people that might have wanted to attend this
16 hearing -- and I'm talking about American people, not our
17 usual crowd of friends and lobbyists and attorneys -- that
18 weren't able to come here because they had no clue that you
19 had to use these special procedures that, frankly, Mr.
20 Chairman, I didn't learn about till someone from the public
21 called me and then brought them to my attention.

22 With that, today we will be hearing from the
23 proponents and opponents of the AOL Time Warner merger.
24 This proposed merger is not only one of the largest in
25 United States history but combines the control of conduit

1 and content in an unprecedented fashion, implicating issues
2 that are at the core of our democracy. It raises the
3 specter of barriers to the free flow of information and the
4 marketplace of ideas.

5 If the shelves in the marketplace of ideas are
6 stocked by too few hands, a kind of digital imperialism may
7 replace a well-informed citizenry. In the face of this, the
8 Commission's statutory authority and obligation is
9 abundantly clear. The public's interest must be advanced if
10 this merger is to be approved. When the proposal before us
11 is viewed through the public interest lens, several
12 significant concerns and questions arise. I will highlight
13 only a few here.

14 I am particularly concerned about the impact of
15 this proposal on the diversity of voices and ideas. I am
16 also concerned that this merger may limit a consumer's
17 choice regarding Internet service providers and/or cable
18 delivery services. One question is repeatedly raised. Does
19 the dominance over instant messaging by one corporation
20 create impermissible barriers to competition and to the free
21 exchange of ideas. If the extent to which instant messaging
22 has penetrated the online world is as great as the record
23 indicates, can America afford to leave its ownership in the
24 hands of a single entity whose fiduciary duty is to its
25 shareholders and not to the public?

1 Another persistent question is whether the
2 Commission should address the issue of open access or wait
3 for an industrywide proceeding. These and other pressing
4 questions will not be answered today, but we must answer
5 them before we complete this merger review.

6 In closing, I am reminded of Winston Churchill's
7 remarks during the battle of Britain. When asked if
8 Britain's goose was cooked, he remarked, "This isn't the
9 end, this isn't even the beginning of the end. It is
10 perhaps the end of the beginning." If parties are right, we
11 are entering the digital century. Maybe so.

12 Specious limitations on this Commission's
13 authority to protect and advance the public interest belong
14 in the last century. Today marks a new beginning in our
15 duty to protect the public interest through a review of
16 mergers such as this one.

17 CHAIRMAN KENNARD: Thank you, Commissioner
18 Tristani. Commissioner Tristani is right. We have a legal
19 obligation to make a public interest determination as to
20 whether this particular transaction will serve the public
21 interest, and that is why we're holding a public hearing --
22 so that the public can be involved in that determination.
23 And I just wanted to note for the record that this hearing
24 is not unprecedented. Every major merger that's come before
25 this agency, at least during my tenure, we've had an en

1 *banc*, Commission level hearing like this, including Bell
2 Atlantic, GTE, SBC Ameritech and AT&T TCI.

3 With that, I wanted to outline just a few of the
4 housekeeping matters that we'll be addressing today --

5 COMMISSIONER FURCHTGOTT-ROTH: Mr. Chairman, I --

6 CHAIRMAN KENNARD: Certainly.

7 COMMISSIONER FURCHTGOTT-ROTH: I just, I can't let
8 that remark go without some clarification. I'd be very
9 grateful if you could submit for the record the dates and
10 the minutes of those hearings that were held at the
11 Commission level. I don't recall being present at them.
12 Perhaps others were.

13 CHAIRMAN KENNARD: Well, I do recall you being
14 present at them and asking some questions. In fact, I
15 remember your opening statement was very much like the
16 opening statement that you just made, so, but I'd be happy
17 to give you a tape of that meeting, in fact.

18 COMMISSIONER FURCHTGOTT-ROTH: Meeting? Was it
19 singular? Or were there one for each of these other major
20 mergers, Mr. Chairman?

21 CHAIRMAN KENNARD: As I recall, there was an *en*
22 *banc* hearing that considered each of those mergers. I don't
23 think we need to belabor this point, but I would be happy to
24 submit the record, not, the tape to you, not for the record
25 in this proceeding but just for the record of, for the

1 purpose of clarifying the point.

2 Are there any other remarks from the bench before
3 we move on? Hearing none, I just wanted to clarify some
4 housekeeping matters before we go on so that everyone will
5 know what to expect this afternoon. We will have opening
6 statements from representatives of the two applicants, who
7 are seated here at the table now.

8 Then, we will have three other panels. One will
9 be a panel that will broadly put the merger in context, with
10 two panelists. And then, we will have two larger panels.
11 One will address consumer perspectives, and the other will
12 address industry perspectives on the transaction. I'll ask
13 all of our panelists to confine their remarks to five
14 minutes, and we want to reserve some time for questioning
15 from the bench after the panelists have had an opportunity
16 to speak.

17 We have a very crowded agenda today, so we're
18 going to have to be very, very disciplined about keeping
19 this moving. We have a timekeeper. I'll ask all of our
20 panelists to keep an eye on our timekeeper, who is our
21 secretary, Magolly Sollis here at the Commission. And
22 please work with us here to that we can get through this,
23 and everyone will have an opportunity to state their case.

24 With that, let's begin with our first panel. It
25 is the opening statements of the applicants before us,

1 beginning with Steve Case, the chairman and CEO of America
2 Online.

3 MR. CASE: Good afternoon, Mr. Chairman and
4 Commissioners and thank you for this opportunity to talk
5 about the proposed merger of AOL and Time Warner. As you
6 all know, there has been a fair amount of discussion about
7 what this merger will mean and a fair amount of
8 misinformation. So both Gerry and I have been look forward
9 to coming here today to explain what we believe the merger
10 will mean, not only for our companies but also for
11 consumers.

12 We think, when you look at all the facts, you will
13 conclude that the merger of AOL and Time Warner will benefit
14 consumers and serve the public interest. We are confident
15 that together AOL and Time Warner will build a company that
16 helps to take the Internet to the next level, connecting,
17 informing and entertaining people around the world as never
18 before and benefiting consumers in valuable new ways.

19 Just as important, we want to make clear that our
20 commitments to consumer choice and competition will help
21 lead our industries into the Internet century in a way we
22 can all be proud of. That's what the merger of AOL and Time
23 Warner is really all about. Helping to lead a second
24 Internet revolution that reaches as many people as possible
25 as quickly as possible and serves the public interest.

1 There are three key reasons why we believe this.

2 One, we are confident that the proposed merger of
3 AOL and Time Warner will drive the Internet's development,
4 helping to spur a new era of innovation and robust
5 competition. Two, we are confident that our merger will
6 help consumers make the most of that innovation, increasing
7 their choices and enriching their lives. And three, we are
8 confident that our merger will help to build a truly global
9 medium, leaving no community behind. So let me go through
10 each of these points and the principles that underlie them.

11 First, our merger would help to drive the
12 development of the Internet. I don't think I have to tell
13 anybody in this room that the Internet is transforming the
14 landscape of communications and media. This transformation
15 is evident in everything from the time people now spend
16 online, the way it's really embedded now in their lives, to
17 the way it's shaping our expectations of what media can and
18 should be able to do.

19 And this is just the beginning. Broadband and
20 wireless connections, an ever-increasing array of devices to
21 conveniently access the Internet anytime and anywhere, and
22 the intersection of traditional and digital mediums are
23 fueling a powerful new era of innovation. It's consumers,
24 not technology, that are driving these developments, and
25 that's the way it should be, indeed, it has to be. In this

1 new environment, companies of every size will compete to
2 bring consumers what they want when they want it at prices
3 they can afford, and in ever more useful, convenient ways.

4 This cycle of competition and innovation has
5 brought the Internet and both of our companies to where they
6 are today. And it's always benefitted consumers. The next
7 HBO, the next CNN, the next AOL, these are the kind of
8 remarkable breakthrough innovations AOL Time Warner could
9 create for consumers across a whole variety of platforms.
10 And we have no doubt that our commitment to innovation would
11 prompt our competitors to develop new and better offerings
12 of their own.

13 One of our most recent innovations, AOL TV, is a
14 good case in point. By using open standards, this new
15 interactive television service actually enables
16 interactivity provided by any broadcaster. AOL TV will be
17 an enabling platform for broadcasters and programmers. We
18 have approached it in a way meant to benefit consumers,
19 benefit content producers and benefit broadcasters.

20 As many of the people in this room know,
21 interactive TV has not yet begun a widely used product.
22 Broadcasters and programmers have little incentive to
23 develop interactive content, because there's not an
24 audience, and service providers have difficulty creating an
25 audience without compelling interactive content. The merger

1 of AOL and Time Warner would go a long way towards ending
2 this chicken and egg problem. Built on open platforms, AOL
3 TV can help to jump start an entirely new industry, with
4 many competitors. There are many other areas where we hope
5 to spur innovation, such as finance, healthcare,
6 telecommunications and online music.

7 With music, for example, we believe that AOL's
8 experience in making interactive services easy and secure,
9 combined with Time Warner's skill at providing music attuned
10 to consumer tastes, will speed the advent of digital
11 downloading that both protects artists and service providers
12 for the benefit of consumers. So let me be clear. A
13 combined AOL Time Warner will be able to stimulate even more
14 innovation and competition, and consumers will be the
15 winners.

16 The second point. Our merger will further benefit
17 consumers by increasing their choices. In today's
18 competitive environment, consumers know they have choices --
19 over 7,000 ISPs, millions of Web pages, and new ways of
20 connecting to the Internet -- and consumers exercise that
21 power every day. That's what our AOL anywhere strategy is
22 all about. Making AOL available whenever and however
23 consumers want it.

24 Beyond the Time Warner cable systems, AOL has
25 already formed alliances with DSL, wireless, and satellite

1 providers from Bell Atlantic and SBC to Sprint and Hughes.
2 A combined AOL Time Warner could carry on these agreements
3 and seek new opportunities to distribute our content and
4 communications services on multiple platforms nationwide.
5 And you can be assured that if and when other platforms are
6 developed, AOL will want to be on those as well.

7 At AOL, we are also deeply committed to delivering
8 access to a broad array of the best content available,
9 regardless of who produces it. This will be true in a post-
10 merger world, just as it is true today. It has been
11 suggested that a combined AOL Time Warner might somehow
12 favor our content over that of our competitors through
13 caching or some other technical means. So again, let me be
14 very clear.

15 AOL has never done anything like that and we never
16 under, because it would diminish our members' online
17 experience. For those same reasons, a combined AOL Time
18 Warner would build on our companies' demonstrated commitment
19 to open access. Real progress has been made on this issue
20 in the past couple years. I have always been a believer in
21 open access, and I'm proud of the role AOL has played in
22 getting us, and increasingly the marketplace at large, to
23 where we are today.

24 It is gratifying to see that most of the country's
25 largest cable companies, including Time Warner and AT&T, are

1 moving forward with open access policies and implementation
2 plans. On the day we announced our merger, we committed to
3 open Time Warner's cable network for competition with
4 multiple ISPs. A month later, we took the next step,
5 jointly releasing a memorandum of understanding that is the
6 framework for delivering AOL and other ISPs over Time Warner
7 cable.

8 As Gerry will talk about in a minute, we are
9 increasingly optimistic about how soon we will have a
10 multiple ISP environment on the Time Warner cable systems.
11 We understand that the Commission will be taking an
12 industrywide look at the open access issue, and we want to
13 assure you that we will be continuing our own efforts to
14 ensure that there really is real choice among ISPs as
15 quickly as possible.

16 So again, let me be clear. The cable systems in a
17 combined AOL Time Warner will not discriminate against other
18 ISP's on the basis of affiliation with us. We are serious
19 about our commitment to open access, because we know it is
20 good for our business and good for consumers. The same pro
21 consumer attitude has guided our business practice on other
22 products, like instant messaging. This is probably the area
23 where the most misinformation has been circulating, so I'd
24 like to take a moment to set the record straight.

25 Let me start at the beginning. We developed

1 instant messaging technology and introduced it as a feature
2 over a decade ago. As our members realized the value of
3 realtime online communication, they began asking to reach
4 beyond the community of AOL members, so three years ago we
5 made instant messaging freely available to all Internet
6 users. Today, we can clearly see the innovation that our
7 decision helped to spur. There are now more than 40
8 companies, including Microsoft, Yahoo and AT&T that are
9 providing their customers with similar features.

10 CHAIRMAN KENNARD: Mr. Case, could you please wrap
11 it up.

12 MR. CASE: I don't have to tell anyone in this
13 room that the challenge we all face now is to create server-
14 to-server interoperability that allows users of all these
15 different services to talk to each other seamlessly. To
16 that end, AOL has taken several steps forward. Indeed,
17 we've recently submitted to the IETF the only architectural
18 plan for true interoperability, and we are committed to
19 moving forward with interoperability.

20 It's a problem the industry has faced together
21 before when standards for e-mail interoperability were
22 devised, and we weren't even dealing then with the challenge
23 of realtime communications, but we learned from that process
24 that interoperability alone isn't enough. We must also take
25 steps to protect people's privacy and security. This is

1 especially true for AOL, where so many of our users are
2 families and young people and, therefore, where the risk of
3 privacy breaches and inappropriate spam are the greatest.

4 Let me again be very clear. We are fully
5 committed to working within our industry to create true
6 server-to-server interoperability, but we are equally
7 committed to protecting consumer privacy and security. We
8 have an opportunity to get it right this time, and we intend
9 to make the most of that opportunity.

10 Finally -- and I'll wrap up --

11 CHAIRMAN KENNARD: I hope so.

12 MR. CASE: Because this is an important one. I
13 think it's particularly important to you, Chairman. We
14 believe our merger gives us the opportunity and the
15 responsibility to help extend the benefits of the Internet
16 to every community around the world. We all know that the
17 future is about more than bytes or bandwidth. It is about
18 how we use new technology to improve people's lives.

19 In fact, nothing has been more crucial to this
20 effort in terms of integrating our companies than our shared
21 commitment to be a catalyst for meaningful change, not only
22 in our companies and our industries but also in our
23 communities locally and globally. And there's no more
24 urgent task before us than bridging the digital divide. One
25 of the things Gerry and I are most looking forward to do is

1 joining our resources and sharing our ideas to expand
2 digital opportunity to all communities.

3 We take this challenge seriously, not only as a
4 company but also as individuals with a shared personal
5 conviction that we must use our leadership to build a better
6 world. These are commitments that will drive and the
7 principle that will guide a combined AOL Time Warner. Our
8 goal is to be able to look back on this time and say we
9 helped create a medium that had a positive impact on
10 people's lives, and that, we think, will most assuredly
11 serve the public interest we are all committed to upholding.

12 Thank you.

13 CHAIRMAN KENNARD: Thank you, Mr. Case. Mr.
14 Levin?

15 MR. LEVIN: Chairman Kennard, Commissioners, last
16 January when Steve and I announced this merger, it was with
17 the vision of creating the first Internet-powered media and
18 communications company. In the short time since then, the
19 velocity of technological change has continued to accelerate
20 and only reinforces our confidence in the promise of this
21 new venture. From Time Warner's perspective, this merger
22 represents a very logical step in our efforts to increase
23 consumer choice in communication services and content, which
24 we understand is the Commission's bedrock policy.

25 Expanding consumer choice is a part of who we are.

1 It's as basic to our corporate DNA as editorial
2 independence and integrity has been to Henry Luce's Time,
3 Inc., and Ted Turner's CNN. Since HBO's debut 28 years ago,
4 Time Warner has been a leader in overthrowing the paradigm
5 that limited the public's programming choices to those
6 selected by a triopoly of broadcast networks. Our
7 leadership in expanding consumer choice in the television
8 marketplace has proven quite successful. The new networks
9 we've developed from CNN to TNT to the Cartoon Network have
10 enriched people's options for more programming.

11 And the billions we've invested in our cable
12 systems have dramatically enlarged the number of channels,
13 not just from Time Warner but from a wide variety of
14 sources. This includes MSNBC and FOX, public affairs from
15 CSPAN, innovative kids' television from Nickelodeon and
16 Disney, ethnic and gender-focused programming from BET and
17 Lifetime. It also extends to Time Warner Cable's successful
18 introduction of 24-hour local news services in a number of
19 our systems.

20 And while we're proud of our role in breaking open
21 the television universe, we also recognize that we've been
22 one of the first to take advantage of digital technology to
23 present revolutionary new options like high-speed
24 interactive services, video on demand, telephony and data
25 delivery. Our early experiments going all the way back to

1 Cube, in Columbus, Ohio, Quantum, in Queens, New York,
2 presage our effort to establish the first fully interactive
3 digital network in Orlando, Florida. And over the past five
4 years, we've invested more than \$6 billion in the
5 development and deployment of broadband architecture.

6 So whatever the delivery mechanism, whether wired
7 or wireless, cable or satellite, it's obvious that the
8 digital revolution has put the global economy in general and
9 the global media industry, in particular, on fast forward.
10 We now see that, while we began with America's leadership,
11 that leadership is already being challenged in Europe, Asia
12 and Latin America. And it was that shared understanding of
13 the intense global competition that the Internet is spawning
14 which helped give our initial conversations the sense of
15 real urgency.

16 We also recognize the opportunity to create a
17 company specially adapted to the uncharted terrain. One
18 that can offer consumers an astounding array of quality
19 content from the widest selection of sources, along with Web
20 features, services and communities that provide ease,
21 convenience and personalization. Let me be very particular
22 to the Commission about the three things that we think you
23 should focus on, which are the public benefits which flow
24 from this combination.

25 First, as well as making traditional media more

1 accessible for online and interactive applications, our
2 company will be a leader in developing new services,
3 including news and lifestyle information on demand and
4 interactive television, and this will help accelerate our
5 competitors' efforts to innovate.

6 Second, by actively pursuing our
7 marketplace-driven multiple ISP initiative, we'll ensure
8 real consumer choice on our cable systems, but importantly
9 provide a catalyst for other cable companies to follow suit.

10 And third, as we speed up deployment of broadband capacity,
11 we will increase the consumers' appetite for broadband
12 services and clearly hasten deployment across competing
13 platforms, whether that's cable, DSL, wireless or satellite,
14 which we believe is a critical FCC goal, pursuant to Section
15 706 of the '96 Telecommunications Act.

16 The merger of Time Warner will be especially
17 beneficial to bring the public real diversity of Internet
18 service providers, and we are committed to making our
19 services available on a nonexclusive basis over a
20 multiplicity of platforms. Our company will promote a
21 competitive environment, which encourages all broadband
22 platforms. We will also carry out the initiative
23 articulated in our memorandum of understanding.

24 This is what we've already done. We've already
25 moved to restructure our Road Runner partnership, thus

1 enabling us to introduce multiple ISPs substantially in
2 advance of the 18 months remaining on the Road Runner
3 exclusivity. In addition, we are negotiating with AOL and,
4 importantly, with other ISPs, about providing high-speed
5 Internet service. And finally, in our Columbus, Ohio
6 system, we have begun technical trials providing multiple
7 ISP service. And we've, therefore, taken our commitment
8 from the ideal to the practical.

9 And by doing this, we've prompted other cable
10 operators to modify their business plans to provide for
11 multiple ISPs, and you can see already that in DSL,
12 satellite and wireless, all these providers are accelerating
13 their own deployment. So, from the consumers' point of
14 view, we're providing and stimulating more choice, better
15 value and lower prices.

16 Finally, no medium in history has surpassed the
17 wildly democratic potential of the Internet to break down
18 the barriers to human communication or to overturn the
19 limits on cross-cultural understanding and expand the
20 educational and economic prerogatives of people everywhere,
21 because the Internet, which cannot be controlled by any
22 company or any government agency, is the technology of human
23 freedom. So it is our hope that we can bring about and
24 stimulate this revolution, a hope I believe we hold in
25 common with the Commission. Thank you.

1 CHAIRMAN KENNARD: Thank you, Mr. Levin. We'll
2 now have a period for questioning from the Commissioners. I
3 had a couple of questions I want to begin with. My first
4 question is about the cable access issue. It's one that we
5 have been grappling with here at the Commission for about
6 two years, and we have -- as I said in my opening remarks,
7 we all believe in openness. Obviously, it's been good for
8 the Internet and it's important for the future of the
9 Internet as we move to broadband, but thus far, we've heard
10 a lot of good intentions.

11 We've seen some industry agreements, nonbinding
12 industry agreements, I might add. We've seen some technical
13 trials. But it's my belief that until we actually see an
14 open access platform in cable broadband implemented where
15 people can actually see it and touch it and feel it and the
16 ISP community can actually get confidence that they'll have
17 access to it, that there will continue to be a lot of
18 skepticism on this issue, for good reason.

19 I would like to ask you, when can we expect to see
20 this? When can we expect to see an open access platform in
21 cable broadband that will give us some confidence that this
22 is really going to happen? That the market is driving
23 toward this.

24 MR. LEVIN: Well, first of all, Mr. Chairman, we
25 are trying to roll back the exclusivity bar to beginning

1 multiple ISPs that was intrinsic in the Road Runner
2 partnership, and we have begun that restructuring, and I am
3 confident, although it requires the consent of all the
4 parties, that we will achieve that so that we don't have to
5 wait 18 months before we can actually begin. And I would
6 hope by the end of the year we will be able to do that.

7 Secondly, we are entering into
8 multiple-affiliation agreements with third-party ISPs, and I
9 expect shortly we will make the announcement about the first
10 third-party affiliation agreement which, again, will confirm
11 that marketplace template for the arrangement. And finally,
12 the trials that I've referred to are actually very important
13 because up until now the ability to install and service
14 high-speed Internet access has had to be proven in the
15 marketplace. And that activity, I think, has proceeded
16 sufficiently so that we now have confidence.

17 And we have installed the first, what I'd call
18 multiple-ISP router in Columbus, Ohio. The trials have
19 begun, and I'm optimistic that by the end of the year, we
20 will also have in place the sufficient software to enable
21 the multiple billing of ISPs. The other thing I would say,
22 Mr. Chairman, is that I do think the understanding that was
23 signed between Time Warner and AOL is binding on us and, in
24 fact, it made several breakthroughs that I think are quite
25 significant. And that's where our activity, I think, will

1 lead the industry in several respects. And we are now
2 embedding those provisions into our affiliation agreements.

3 MR. CASE: If I could just add, I think, you know,
4 from some of our previous discussions, that I share your
5 passion about the importance of open access in terms of
6 preserving the open character of the Internet, and also
7 would share your skepticism that until it's actually
8 happening, it sounds like a lot of promises. But I would
9 note that a year ago, when the Commission looked at this,
10 the Commission concluded at that time that there was a
11 reasonable probability of competition in broadband. It
12 wasn't just about cable. DSL, satellite, wireless would
13 emerge as alternatives. And there was a reasonable
14 probability that the marketplace would indeed work.

15 In the past year, I think there's a lot of
16 evidence to suggest both premises were correct. There is
17 far more competition now in each of these other broadband
18 technologies, billions of dollars now being invested to
19 deploy DSL, experiments now being put in place to actually
20 deliver video over DSL. Just last week, Blockbuster
21 announced an initiative to do just that with DSL and phone
22 companies. Satellite companies have done quite a bit,
23 announcing ventures with other ISPs just in the last few
24 weeks.

25 And venture capital is pouring into wireless

1 technologies. And also in the past year, the cable industry
2 overall has gone from a position where they really weren't
3 focused on open access to a position where, now, the
4 majority of the companies are recognizing that it is
5 something that's going to happen and it's better to happen
6 sooner rather than later and it's in their business interest
7 to get ISPs working on their platform, as opposed to a
8 competing platform.

9 So in the past year, I think there's a lot of
10 evidence to suggest that there are competing broadband
11 technologies and the cable industry is moving towards open
12 access. And we recognize that people really are eager to
13 see some definitive agreements and see some systems in
14 place, and we're confident we'll be able to demonstrate that
15 very shortly.

16 MR. LEVIN: It really is the marketplace at work.
17 I just want to underscore. This is not to satisfy a
18 regulatory requirement. The intense activity, particularly
19 in DSL, both from marketing and the provision of services,
20 is really extraordinary, and for a cable operator not to
21 energetically move to provide consumer choice, the cable
22 system will lose out in the marketplace. That's very clear.

23 CHAIRMAN KENNARD: Well, I think that everyone in
24 this room would hope that we have an environment sooner
25 rather than later where we have multiple broadband platforms

1 competing in the marketplace. Cable, DSL, satellite,
2 terrestrial wireless. But what if our hopes aren't
3 realized? What if there are communities in America where
4 their only choice for broadband will be the cable modem
5 product? Will people in those communities have confidence
6 that the market will drive to an open access environment
7 when there are no broadband competitors?

8 MR. LEVIN: Well, I don't think factually that can
9 occur because, first of all, with respect to the telephone
10 system, which is universally available, DSL is being
11 activated broadly. And you can just see it in the marketing
12 activity, so that in almost every community that certainly,
13 we operate in, there is an intense DSL activity. Secondly,
14 satellite, which is universal, covers the entire geography
15 of the United States, is now offering high-speed service and
16 in fact is using either a telephone return path or, shortly,
17 a satellite return path.

18 And finally, I would not underestimate the growth
19 of wireless, because in fact, the ability to have -- and we
20 see this happening already in Europe and in Asia -- the
21 ability to have Internet access, including with impending
22 3-G, to have broadband access on a portable device, is
23 probably -- all you have to do is test the marketplace. The
24 highest infrastructure valuations today happen to be in the
25 wireless area because of the opportunity for broadband

1 wireless.

2 MR. CASE: If I could just add that the -- we made
3 a big investment in satellite, partly because it is the only
4 way to ensure ubiquity in terms of the national footprint.
5 We're working with Hughes on that project, and even with
6 this merger will continue to work with them and others to
7 develop all these different technologies, so I don't think
8 the concern you have is likely to play out. But if it does,
9 if down the road you find that there really is only one
10 broadband technology and the industry isn't moving
11 forcefully enough to open it up, it would be appropriate for
12 the Commissioner or others to look at that issue and put a
13 national policy in place.

14 As it relates to this merger, these are the
15 companies that are actually doing things about open access.

16 I think the steps we've taken should be applauded, and we
17 really are committed to going from the concept stage to the
18 reality stage, not just around cable broadband technology
19 but also deploying other broadband technologies.

20 CHAIRMAN KENNARD: Okay. Well, it's, just so I
21 understand what you're both saying. Absent a competitive
22 dynamic, absent pressure, competitive pressure from other
23 broadband providers, I understand you to say that there may
24 not be pressure for a market-driven incentive for the cable
25 operator to open their, their broadband platform. Is that

1 right?

2 MR. LEVIN: No, no, no. I wouldn't, I wouldn't
3 articulate it that way. First of all, it is clear that
4 there are going to be multiple broadband providers. But as
5 a matter of business development for the cable system, the
6 importance of developing these new revenue streams, given
7 the fact that the more traditional analog delivery of
8 television signals, or indeed digital delivery of must-carry
9 signals, has a certain ceiling on it in terms of its
10 expansion.

11 The growth opportunities for the cable company
12 really come about in, in the deployment of broadband, so I
13 can say to you that our business plan, with or without the
14 obvious competition, is to make the investment and actually
15 to accelerate the investment in broadband deployment, and
16 then the costs that are the variable costs that are
17 necessary to deliver cable modems. Again, I can't
18 underscore enough that this is a business proposition that
19 grows out of the next development, in this case, the
20 development of the cable industry, both because of the
21 competition and it makes intrinsic sense.

22 MR. CASE: One other point to emphasize is that
23 Time Warner has a significant cable presence, but only 12
24 percent of households in the United States have Time Warner
25 cable access, so 88 percent we need to reach, the national

1 brand with the AOL service through other means. So it is in
2 our interest more than probably any company's interest to
3 make sure all broadband technologies are open and
4 competitive, easy to deploy and affordable. It would be
5 silly for us to focus just on the 12 percent when we have a
6 national business and need to focus on 100 percent.

7 So it's in our interest as much as yours, maybe
8 more in our interest, to work as forcefully as we can to
9 establish arrangements with all the cable companies to
10 deploy cable broadband, as well as all the DSL companies,
11 satellite companies, wireless companies, so we really have a
12 national footprint, with a tapestry of broadband solutions.

13 MR. LEVIN: You know, history is instructive,
14 because on the one hand, having cable has been very helpful
15 in the creation of all of these services. On the other
16 hand, the history of our company, whether it's HBO, CNN or
17 pay-per-view movies, is to work through cable, satellite and
18 DSL -- any delivery system -- because that's in the nature
19 of content, which should be delivered on every platform.

20 So there's nothing new about this concept of
21 stimulating all of the delivery mechanisms, including the
22 one that Steve Case referred to in an announcement of
23 Blockbuster to use the Enron system and then, ultimately,
24 DSL, to deliver, in effect, video on demand movies into the
25 home. And you don't see any cable mentioned in that

1 release.

2 CHAIRMAN KENNARD: Thank you both. Other
3 questions from the Bench. Yes? Certainly.

4 COMMISSIONER TRISTANI: So what I'm hearing is it
5 makes wonderful, eminent business sense to have open access.
6 I'm hearing that. Can you tell me what your timetable is
7 again? Is it --

8 MR. LEVIN: Well, let me characterize it. We have
9 at our cable company -- just speaking on behalf of our cable
10 company -- what's known as a multiple-ISP initiative. And
11 we have been -- and this has been true in the industry --
12 contractually precluded from beginning to have more than one
13 ISP, because of an exclusivity provision in a partnership
14 agreement as a result of a Justice Department mandate. We
15 are trying now to reform that so that we can remove the
16 exclusivity bar. Once we do that, we then turn to the
17 technological capability.

18 So we have now installed the kind of router that's
19 necessary and the software that's needed to distinguish
20 among several ISPs for the consumer. We are now doing that.

21 And finally, you need affiliation agreements and, as a
22 matter of fact -- you know, maybe I should give my e-mail
23 address -- any ISP that would like to come and negotiate
24 with Time Warner Cable, we're open and ready, willing and
25 able.

1 COMMISSIONER TRISTANI: But what's the timetable?

2 MR. LEVIN: Well, as I just said, our -- well --

3 CHAIRMAN KENNARD: What's the e-mail address?

4 MR. LEVIN: GML --

5 COMMISSIONER TRISTANI: I'm not being flippant
6 about the timetable. I just want to have a sense of --
7 because I've heard maybe the end of the year, but could that
8 mean --

9 MR. LEVIN: Well, but as I've indicated, there is
10 a contractual bar right now. I mean if you look at -- there
11 is an exclusivity provision.

12 COMMISSIONER TRISTANI: But you said those
13 contracts could be reformed.

14 MR. LEVIN: Yes, but it requires other parties to
15 agree to do that.

16 COMMISSIONER TRISTANI: So you can't tell me what
17 a timetable is.

18 MR. LEVIN: No, I, I remain quite confident that
19 we can make that happen faster than anyone else in the
20 industry, because there's another exclusivity provision that
21 runs longer for Excite@Home. I'm confident, but I can't
22 warrant it today, but I'm confident in my ability to make
23 this happen. We've obviously already begun the process of
24 restructuring. And so that the first thing that will
25 happen.

1 Secondly, there will be affiliation agreements.
2 You need an agreement with an ISP that sets the terms and
3 conditions. It's very similar to the terms we had in our
4 MOU. And I think I said earlier that there will be an
5 announcement of an affiliation agreement shortly. Finally,
6 this is a, not a trivial technological activity and,
7 frankly, that's the reason why the industry went slowly to
8 see whether the modems would work, they could be installed,
9 whether the service would be high speed, whether you could
10 bill. We now have confidence in that management capacity.

11 Now you need software, which hasn't existed
12 before, with a router that enables you to address separate
13 ISPs going into separate homes. I'm confident that we will
14 build that software. Our company has a history of doing
15 this. We've done it. We've done it before.

16 And that's why I'm highly optimistic. But most of
17 all, it is a business imperative. It's built into our
18 business plan. Multiple ISPs are necessary for the revenue
19 growth. And besides, in every market that we're in, DSL is
20 being marketed competitively to this concept.

21 MR. CASE: If I could just add. We, as I said in
22 the opening remarks, we understand, probably better than
23 anybody, the importance of open access and also understand
24 the importance of demonstrating a real commitment to open
25 access by having real deals with real unaffiliated ISPs that

1 can be implemented in a real way, quickly. And we recognize
2 that that's an important issue to you. It's also an
3 important issue to us, because our credibility is on the
4 line.

5 I have been arguing for open access for years, and
6 I continue to believe open access is critically important.
7 We just now have the wherewithal, we believe, to achieve
8 that within Time Warner systems sooner than might have been
9 thought, because of this restructuring of Road Runner. And
10 we also are optimistic that we can get other cable companies
11 to embrace it.

12 So we need to demonstrate this quickly, and we
13 will demonstrate this quickly. Not just because we think
14 open access is a good policy decision or that open access is
15 a good business decision, but also because we recognize we
16 have made a commitment and we're going to live up to that
17 commitment.

18 COMMISSIONER NESS: Following up on that, to what
19 extent will you be limiting the number of ISPs that will be
20 able to partake of your system?

21 MR. LEVIN: Again, I'll repeat my invitation. As
22 we said in our agreement, we're not providing any limitation
23 on either the number of ISPs or whether they are national,
24 regional or local.

25 COMMISSIONER NESS: And to what extent will you be

1 making the technology available to other cable systems so
2 that others will be able to also open up their systems?

3 MR. LEVIN: Well, we're -- we are not a technology
4 company, in the sense that we make and sell technology, but
5 anything that we've developed -- for example, the paradigm,
6 the hybrid fiber coax architecture that is currently the
7 industry standard was developed by the engineers at Time
8 Warner Cable. We actually won an Emmy for it. And that
9 template, that architecture has been made freely available.
10 If -- the software that we'll be created -- what's necessary
11 here is not the router, because the routers do exist.

12 What's necessary is software that hasn't been
13 written, to distinguish that the traffic going through
14 belongs to one ISP and not another and make sure that the
15 bill goes to the proper place. That software we will
16 acquire from somebody, who will then be able to sell that
17 software. See, that's my point, that this innovation, it
18 hasn't existed before, so we're the first ones to do it.

19 By making it happen, it then travels to other
20 systems and, again, if it doesn't happen, you have, you
21 know, the telephone companies constantly spending much more
22 money on marketing in the marketplace. So I think the short
23 answer to your question is if it's developed for Time Warner
24 Cable, then others would be able to use it.

25 COMMISSIONER POWELL: Let me just ask more

1 pointedly. By the terms of the Road Runner contract, does
2 it have a natural expiration date and, if so, what is it?

3 MR. LEVIN: It's the end of 2001. December 31st,
4 2001.

5 COMMISSIONER POWELL: Okay. So at the latest,
6 pursuant to the Justice Department decree, is there a
7 timetable that shortens that?

8 MR. LEVIN: No. I'm trying to be helpful and
9 opportunistic. No. But what the Justice Department has
10 said is that AT&T must divest its interest in Road Runner so
11 that it isn't in both Excite@Home and Road Runner. And
12 frankly, what I'm saying to you is that I'm trying to take
13 that mandate and turn it around so that that event becomes
14 an event to restructure the ownership of the partnership,
15 and while we are doing that, also remove exclusivity.

16 You know, it's something that is another
17 indication of, you know, our commitment to want to make this
18 happen. Because the exclusivity on Excite@Home, I think,
19 extends until the end of 2002. So that's why, maybe, people
20 have not been rushing to enter into affiliation agreements.

21 So that's why I'm trying to do that and, as I say, once we
22 get an announcement out of a third-party affiliation
23 agreement, I think that will encourage others also.

24 MR. CASE: One other point in terms of the timing.
25 The Road Runner and @Home exclusivities also would impact

1 AOL. So, unless the Road Runner date is moved up, AOL will
2 not be able to provide access over Time Warner Cable systems
3 or any other systems, so clearly we have an interest in
4 trying to restructure this, to accelerate the date that all
5 ISPs -- AOL and other ISPs -- would have access.

6 MR. LEVIN: I should -- it's fortunate that I'm
7 accompanied by those who know better than I do -- the
8 Justice Department decree does push for an earlier
9 restructuring if that's possible, so there is an incentive
10 there.

11 COMMISSIONER FURCHTGOTT-ROTH: Would it place Time
12 Warner systems at a competitive disadvantage if this
13 Commission were to condition the license transfers in such a
14 way that Time Warner systems had a different federal mandate
15 for open access than other cable operators had?

16 MR. LEVIN: Yes. Certainly the answer to that is
17 yes.

18 CHAIRMAN KENNARD: Commissioner Powell, did you
19 have something?

20 COMMISSIONER POWELL: It was going to be a
21 question, but I'm going to make a comment, in the interest
22 of time. I've read through many, many of your testimonies
23 and your presentations, and on many of these issues that are
24 of some concern by other commentators -- commitments to
25 multiple platforms, open access to ISPs, the commitment not

1 to leverage content distribution systems, not to favor your
2 own content through caching and primary screens, no attempt
3 to leverage the AOL-AT&T linkage -- often conclude with,
4 "Trust me, we won't."

5 And one of the central criticisms of the opponents
6 is that, why should you? And I would concede that in a
7 market in which we don't necessarily know how things will
8 evolve, there may be room for "trusting you," but I thought
9 I would represent some things that concern me. One of the
10 best indicators of that is historical performance.

11 And it seems to me that -- I look at things like
12 the high-profile case in which Time Warner was stripping the
13 vertical blinking interval for an EPG. I look at the fact
14 that some fairly heavy-handed tactics by local franchising
15 authorities of Time Warner's and SBC's region on DSL. I
16 look at over a year ago some of AOL's public promises on
17 open Internet messaging services that have still yet to be
18 fulfilled. I'm not personally criticizing those choices.
19 There may be rationales for them, and they both all may be
20 things not even within the scope of our authority but,
21 nonetheless, they are historical backgrounds of credibility
22 on the trust point.

23 And what I would like to emphasize is that I think
24 it's very, very important that the companies, in proving
25 their case, show why there are very powerful economic

1 reasons, not just behavioral reasons, to pursue open models
2 and not leverage content. And Mr. Case, I think you made a
3 good point about, you have to get on systems elsewhere, and
4 I think that's the kind of argument we need to hear. But I
5 would add one refinement. The key is, at what terms and
6 conditions and prices?

7 And I think one of the concerns, or the anxieties
8 raised are that the extreme ability you will have as a
9 content provider may be able to allow you to trade off and
10 dictate terms and conditions that are more favorable to you
11 than others. And I don't need a voluminous response to
12 that. But I just wanted to guide responses to the idea of
13 demonstrating why, as a business matter and economic matter,
14 these are the things we can expect to happen, as opposed to
15 trust.

16 MR. LEVIN: Well, the short answer is really that
17 the, it's the consumer who makes these choices, and if we
18 were ever to exclude, you know, whether it relates to EPG
19 which is a subject that the Commission has under advisement,
20 and we will carry -- whatever line the Commission draws,
21 that's exactly what we will do. But we'll carry anything
22 and everything, because it's the consumer that is making the
23 choice for navigation.

24 And the same thing applies to programming. And
25 that's really the history. If you're not providing the

1 programming or the material or the convenience that the
2 consumer wants, it's very clear that the consumer can go
3 elsewhere and, in fact, now that we're talking about the
4 opportunity to go elsewhere on the Internet, there are all
5 these distribution systems. So the economic compulsion is
6 really overwhelming to service the consumer.

7 Having said that, I have to also comment that I
8 think that this company, these two companies and this new
9 company is distinctive, not only because of its history, but
10 the desire to want to serve the consumer, the public
11 interest with a set of values that really count. I think
12 that's very important to us. So that, yes, we are
13 responsive to shareholders, but we're also responsive to the
14 public interest. Indeed, it's built into our charter. That
15 was the charter at Time, Inc., and it is at AOL, and it will
16 be at the new company.

17 So, we have the best of all possible worlds. We
18 have the recognition that the consumer is making a choice,
19 and you have a company that values its social commitment.

20 MR. CASE: Let me just add that as I said in my
21 opening remarks, there's a lot of misinformation flying
22 around, and I think some of it was embedded in one of your
23 premises regarding instant messaging in particular. And I
24 certainly take issue with that characterization. I actually
25 think our company has been a model for how to take a

1 technology and open it up.

2 But as I said in my opening remarks, we invented
3 this, actually 15 years ago. Three years ago, we made it
4 free so anybody could download the software for free or use
5 it for free. And then in the past year we've licensed it to
6 more than a dozen companies on a royalty-free basis. That's
7 not something that Microsoft, for example, has done with
8 Windows.

9 If the Justice Department, as their remedy in
10 this, suggested that Windows should be put on the Web so
11 anybody could download and use for free and license on a
12 royalty-free basis to a dozen other companies, they would
13 have been laughed out of Washington as a much too stringent
14 remedy. We did both of those things voluntarily and,
15 additionally, have indicated our commitment to
16 interoperability proposed to the IETF in architecture for
17 server-to-server interoperability.

18 So I think we've done a lot to make sure that
19 anybody can talk to anybody, nobody has to subscribe to AOL,
20 you can use it for free if they want, if companies want to
21 create their own interface, they're free to do that. And if
22 we can get agreement with these companies about server-to-
23 server interoperability, we're ready, willing and able to do
24 that.

25 CHAIRMAN KENNARD: Commissioner Ness and then

1 Commissioner Tristani.

2 COMMISSIONER NESS: A number of commenters have
3 been very concerned about your ability, not just to
4 discriminate in favor of your own product but, rather,
5 potentially, to discriminate in favor of the product of
6 other major players in exchange for benefits that you might
7 receive from such relationships. And it's been described as
8 a colony of two 800-pound gorillas dancing, and thereby
9 stomping a number of other smaller players who might want to
10 be able to play in the marketplace. Can you comment a
11 little bit about these concerns that have been raised? And
12 I'm sure we'll be hearing them as the panels proceed.

13 MR. CASE: Want me to start on that one? I think
14 people who make that claim do not understand what's happened
15 on the Internet. What's happened on the Internet is the
16 blowing up of traditional barriers to entry, which is
17 resulting in an unprecedented flood of competition and
18 choice. When I was growing up, the only thing I could watch
19 on television and ABC, CBC, NBC and PBS. Now, you've got
20 dozens of stations in some markets, hundreds of stations in
21 other markets, and millions of Web sites to choose from.

22 So this notion that people are constrained in
23 choice is a little silly. What's happening is unprecedented
24 choice, and we're trying to stimulate more choice on
25 television. We, you know, some say, well, you should worry

1 about these guys because they're potential monopolists.

2 Actually, if those companies are worried about us,
3 it's because we're populists, trying to take the Internet
4 model to television, and instead of consumers going home and
5 turning on the television and watching what the networks
6 want when they want, they want to work like the Internet
7 where they choose to go where they want, do what they want,
8 when they want. So we want to take that Internet model,
9 which is a model of competition and choice, and bring it to
10 television. It's not surprising to me that some companies
11 would rather protect the status quo. Consumers want the
12 Internet model on top of television.

13 COMMISSIONER NESS: The expectation, however, is,
14 for example, you'd have major cable companies exchanging
15 benefits with each other to the detriment of others who do
16 not have cable facilities. Cable still remains, in most
17 areas of the country, as a major bottleneck provider. Can
18 you comment further on that?

19 MR. LEVIN: I don't think that the cable companies
20 are working together with other cable companies in any way.

21 As a matter of fact, I think the history of the cable
22 industry is in fact what Steve Case has just indicated is
23 now being carried out on the Internet. And that's
24 deconstructing the establishment. That's really always been
25 the history, providing more services that were not otherwise

1 available.

2 We used to have this very narrow aperture through
3 which programming can pass. And in fact, each, as each day
4 goes by, there are more services that are being created.
5 And frankly, when we, when I look at the conventions coming
6 up, the political conventions, I think it's time to
7 recognize that the public interest, convenience and
8 necessity has now shifted from broadcast licensees to the
9 cable industry and the Internet industry, because who's
10 going to carry, on a 24-hour basis, everything that's
11 happening in, you know, two of the most important political
12 events so it's available on an interactive basis to all
13 Americans? It's coming from all the cable networks, it's
14 coming from CSPAN, it's coming from local cable news
15 services, it's coming from all the Internet services. It's
16 the most exciting thing to happen. It's not coming from the
17 broadcast licensees.

18 So in fact, I think it's time to recognize that in
19 fact the net effect of creating more capacity, which is what
20 cable has done and what the Internet now explodes on an
21 infinite basis, is providing more choice and more
22 opportunity for independent programmers. The last thing I
23 would say is a lot of the comments we're hearing seem to
24 belie the other proceeding that we're involved in, which is
25 at the FTC, examining the antitrust issues. The issue here

1 is not to protect competitors but to stimulate competition.

2 And I think that's what all this technology is designed to
3 do.

4 MR. CASE: I also would add that there's a big
5 distinction between television of the past and how you think
6 about it and limited channel capacity and whose gets
7 carriage, essentially, and the Internet model, which,
8 essentially, everybody gets access, everybody gets carriage.

9 And certainly on AOL, people can go wherever they want
10 whenever they want, and this notion that we would somehow
11 block the Yahoo domain or somehow slow it down is
12 ridiculous. We, we've never done that, we never would do
13 that.

14 The reason is if we did that, our members would
15 quit, because they don't want a constrained Internet. They
16 want an open Internet, and that's what they get from AOL.
17 If we tried to do some of the things that some of the people
18 are suggesting, it would be harmful to our business.

19 MR. LEVIN: If I could just go back to, again, the
20 difference between the marketplace and a regulatory
21 requirement. The concept of high-definition television,
22 which we've been working on for many, many years. There's
23 more activity taking place by Home Box Office, which is not
24 a regulated licensee in that sense, than by any broadcaster.
25 And the reason for that is the picture quality is

1 exquisite, and it makes a lot of sense from a kind of a
2 competitive advantage.

3 So that's a marketplace desire. It's part of the
4 history of innovation, and I think that needs to be
5 acknowledged, because that's what's driving so much of all
6 of these new services.

7 CHAIRMAN KENNARD: Commissioner Tristani, and then
8 we're going to have to wrap up this first panel.

9 COMMISSIONER TRISTANI: I have here a four-page e-
10 mail that I received from a Joel Payne from Massachusetts.
11 And I told you I got lots of e-mails about this merger, and
12 most of them are, like, two paragraphs, garden variety, deny
13 the merger, they're too big, danger to democracy. Mr. Payne
14 goes into a bit more detail, but his main concern is instant
15 messaging, and you must love the service, and I commend you.
16 If you invented it, it sounds marvelous, and I'm going to
17 check it out.

18 But his concern -- well, first of all, he wants,
19 wants us to deny the merger, but he said, if you do allow
20 it, make sure instant messaging is interoperable and that
21 everybody can have it. I hear you saying that you're
22 already taking a lot of steps to do that but, aside from Mr.
23 Payne's e-mail, a lot of our commenters have said that for
24 about 18 months, AOL has said a lot but done too little in
25 this area.

1 And I hear that you're committed to doing this,
2 but how strong can your commitment be? I mean, can you say
3 this is something that absolutely must be done? And I'll
4 tell you what drives his concern. I didn't know much about
5 instant messaging until I got this e-mail and started
6 thinking about it, but if it's as good as it sounds, I can
7 see a lot of people who are going to say, I'm not going to
8 get any other system that can't use it, and we may end with
9 the one system that has it, and --

10 MR. CASE: Well, I understand the concern. Again,
11 I'll just try to reiterate some of the facts, that we did
12 open it up and make it freely available, that issue three
13 years ago.

14 COMMISSIONER TRISTANI: Well, but let me ask you,
15 does that mean that everybody that's on the Internet can
16 have it?

17 MR. CASE: Yes. Yes. For free. That three years
18 -- up until three years ago --

19 COMMISSIONER TRISTANI: So I can have it?

20 MR. CASE: The only way to get instant messaging
21 was to pay us a monthly fee, because it was part of our
22 service. And we said, well, that's a benefit and, indeed,
23 may attract and keep members. Wouldn't it be better for us
24 to open it up for anybody --

25 COMMISSIONER TRISTANI: So how would I go about

1 getting it for my provider?

2 MR. CASE: Go to AOL.com and you can download AOL
3 instant messenger for free, whether you're using Mindspring
4 or Earthlink or the Microsoft Network or any provider. It
5 doesn't cost you anything to download. It doesn't cost you
6 anything to use it.

7 COMMISSIONER TRISTANI: And I can, I can put it in
8 my system?

9 MR. CASE: Yeah, absolutely. Or you can download
10 it from many other companies like Lycos and Apple and Novel
11 and Lotus, their own customized versions using the same
12 technology.

13 COMMISSIONER TRISTANI: So how come there's been
14 so much e-mail like this?

15 MR. CASE: Because there's a merger pending and
16 there's an opportunity, and people like to focus on issues.

17 COMMISSIONER TRISTANI: It is as easy and simple
18 as doing that? You know, I don't really know --

19 MR. CASE: Well, I welcome you to download it
20 tonight and see it for yourself. I would also add, I would
21 also add that what's happened in instant messaging is
22 competition. There are some pretty big companies, including
23 Microsoft, who have entered the market. Microsoft launched
24 their messenger services less than a year ago. Last week,
25 announced they 18 million users of it. So this is a market

1 that we're hardly monopolizing. There are many, many,
2 companies --

3 COMMISSIONER TRISTANI: But let me ask you
4 something. If, let me get back, because you've gone into
5 another issue. But if I don't want to go through the
6 trouble -- and you say it's real easy, but I'm not
7 technology-savvy, and I'd suspect a lot of Americans my age
8 are not either -- if I don't want to go through the trouble
9 of having to do that, what's wrong with there being an open
10 system, where I don't have to do that?

11 MR. CASE: There is nothing wrong with it. That's
12 what we're working toward.

13 COMMISSIONER TRISTANI: Particularly when there
14 are 23 million subscribers who, you know, who are probably
15 my buddies.

16 MR. CASE: The issue right now is anybody can use
17 our instant messaging system for free. Nobody has to pay us
18 anything.

19 COMMISSIONER TRISTANI: But you're not answering
20 my question. Why couldn't there be an --

21 MR. CASE: No. I'm about to answer your question.
22 Anybody can use any of the messaging systems of any of the
23 dozens of companies, pretty significant companies, Lotus and
24 Apple and Lycos, and so forth, that have their own
25 customized versions of this. What we're trying to now do is

1 server-to-server interoperability so you can download some
2 other system and the servers talk to each other in a way
3 that protects the privacy and security and prevents spam and
4 pornography and things like that.

5 COMMISSIONER TRISTANI: Which is back to --

6 MR. CASE: That requires a technical architecture,
7 which we have submitted to the IETF, which companies are now
8 able to comment on.

9 COMMISSIONER TRISTANI: When did you submit that?

10 MR. CASE: About a month ago.

11 COMMISSIONER TRISTANI: About a month ago?

12 Because I think we got into another issue. Yeah, you can do
13 it eventually, but the idea is since this is such a
14 wonderful --

15 MR. CASE: Well, to be honest, this is an issue
16 which troubles me, because I think if today we were sitting
17 here with a huge market share in instant messaging and the
18 only way to get instant messaging was to pay AOL a monthly
19 fee, and people said, you know, maybe, because instant
20 messaging is becoming more important, maybe this company
21 should actually make it available to other companies on some
22 kind of license basis, I think nobody would have
23 hypothesized that an appropriate, fair thing to do would be
24 require us to give it away free to consumers and license it
25 on a royalty-free basis to companies. I think that would be

1 viewed as overreaching, just as I think that would be viewed
2 as overreaching if the government thought that, you know,
3 the way to deal with the Microsoft issue was to basically
4 put the Windows on the Web -- anybody could download it for
5 free and any company could modify it and use it for free.

6 But we did both of those things voluntarily, and
7 now we're going an extra step and trying to work with the
8 Internet standards body, IETF, to promote server-to-server
9 interoperability that will allow anybody to talk to anybody
10 using any system in a way that protects privacy and avoids
11 spam and a lot of other problems that could emerge. I think
12 we should be applauded for what we've done.

13 CHAIRMAN KENNARD: We'll have some more discussion
14 on instant messages. Commissioner Powell, you'll have to
15 have the last comment, because we --

16 COMMISSIONER POWELL: I just want to, again, try
17 to make sure we sharpen these concerns. I applaud and am
18 more impressed by the second half of your answer, but I want
19 to say something about the first. It is classic information
20 industry network effect to give product away in order to
21 build and install base to substantial levels, and only then,
22 when you have substantial customer bases, to then
23 potentially try to develop new and more value-added services
24 from which the revenue comes.

25 I'm sure I wouldn't ask you nor would you want to

1 commit that any and all services that would be generally
2 categorized as instant messaging will stay free forever.
3 For example --

4 MR. CASE: I think it's highly likely they will
5 stay free forever. It hasn't in industry, but we have no
6 plans to change that. We believe instant messaging is a
7 feature, not a business, and we want to make that feature
8 broadly available.

9 COMMISSIONER POWELL: Well, it would be one thing
10 if it's, if you're going to make some representation it will
11 stay free forever, but we expect, and I think that we would
12 applaud, that there'll be development of innovations using
13 that technology, for example, net-to-phone functionality for
14 voice services will then offer, I think as it is on AOL, for
15 a cent a minute or two cents a minute, there are service
16 relationships and fees associated with those services. And
17 I think those are good things, but those are not free
18 things, and a free thing can be a leverage to things that
19 ultimately produce revenue.

20 And I just want to emphasize that that's part of
21 the concern, and I don't, again, I don't think that it means
22 it's wrong, but it, but it means that I think it's important
23 in the responses to be focused on to what degree --

24 MR. CASE: Well, if I could just quickly respond.
25 I understand the network dynamic, and I would just add that,

1 as I said before, Microsoft launched a messaging service 10
2 months ago and now has 18 million users, so it hardly
3 suggests that somehow the network effects in this particular
4 feature are such that it's somehow impeding competition. I
5 think competition is robust. I think Microsoft is going to
6 integrate, unless the government doesn't allow them to, that
7 messaging service in the operating system and will have far
8 more than 18 million customers a year from now. So it's a
9 vibrant, competitive market.

10 CHAIRMAN KENNARD: Thank you very much for your
11 testimony, and we'll invite the next panel to come up, which
12 is Esther Dyson and Barry Nalebuff. Thank you. While
13 people are coming up for this next panel, I'd like to ask
14 everyone here to please turn their cell phones off. This is
15 the FCC. We love cell phones but not in our open meetings,
16 so please turn them off. We're very pleased to have our
17 next two panelists, Esther Dyson and Barry Nalebuff, and
18 I'll remind you to please confine your presentation to five
19 minutes so we can have some time for a free interchange with
20 you. Esther?

21 MS. DYSON: Thank you very much, Chairman and
22 Commissioners. I'm glad to be here. I'm neither an
23 economist nor a lawyer, so I am generally going to try and
24 set some perspective from the viewpoint of a longtime
25 industry observer, a venture capitalist and someone who's

1 intimately involved with some of the policy issues for the
2 Internet's infrastructure.

3 I'd like to start out by saying that I think these
4 hearings are tremendously important and useful. The Federal
5 Communications Commission may have some very specific things
6 it can and cannot do, but the role of government is not
7 simply to either interfere or let things move forward
8 without interfering. It is to educate the citizenry
9 broadly, to educate the press, the consumers. I think what
10 we want here is neither federal regulation nor is it
11 self-regulation. It is regulation by the marketplace.

12 And in order for that to happen, the marketplace
13 has to be informed. Consumers may have a lot of choice, but
14 if they don't know what those choices are, if they aren't
15 aware of them, they won't be able to exercise them. So I
16 want to say from the start, even though I do believe this
17 merger should go forward, I think these hearings are an
18 important part of the process of what the government should
19 be doing. And with that, I'd like to talk in my remaining
20 three minutes about the marketplace and a little bit about
21 the government's role.

22 This market is changing incredibly rapidly, and I
23 don't think the Federal Communications Commission or Time
24 Warner or AOL or I or anybody here could really figure out
25 what is going to happen, but it's clear to me that the way

1 people are looking at this market now seems to be missing a
2 number of very interesting phenomena. Nobody here today has
3 mentioned Napster or Gnutella.

4 This whole -- we're talking about the content
5 business as if the business of eating were entirely Lutes
6 and perhaps McDonald's. But there's a huge amount of home
7 cooking going on. And AOL built its business by providing
8 its users access to each other more than it did by providing
9 content. It is now heavily reliant on commerce. Content is
10 almost -- it's like the beer you serve in a bar, but what
11 you're really selling is the ambience -- the bartender, the
12 other people in the bar. And to look only at content is to
13 miss the point.

14 We're looking today also at access. We're, again
15 there's going to be huge amounts of competition from various
16 other players. This has been gone into at length. But
17 another part to mention is the whole billing relationship
18 with the customer. That's, that's what AOL has now, to some
19 extent. It sells access to these consumers for purposes of
20 e-commerce. And in that way, it's going to be competing
21 with banks, with utilities, with Amazon.com.

22 The real key is to have that customer
23 relationship, and here I would like to disagree or at least
24 point out something that I think was missed. Through AOL
25 you can indeed get to all these other Internet sites, and

1 they would be incredibly stupid to try and block access.
2 But they do provide links. They have favored marketing
3 partners, for which they are paid. And that's part of what
4 the issue is here today.

5 How much choice does the consumer have and know
6 about? How easy is it? At what point does making things
7 incredibly convenient for the consumer limit the consumer's
8 choice because he doesn't know about what else is out there?

9 And that's why I think consumer education is tremendously
10 important. In that context, then, the role of the
11 government, I think, should be to let this go forward but to
12 raise concerns -- to say this is what we're going to be
13 watching for.

14 Some people will say, well, that's unpredictable
15 and arbitrary and the government should stick to its
16 knitting and simply implement the laws, but this is a
17 fast-changing market. There are concerns. There are
18 concerns about things like instant messaging and, yes, AOL
19 is starting to do the right thing, but I would hardly say
20 it's voluntary. I would say it's in response to consumer
21 and political pressure. And God bless it. I like to see
22 that happen. And I see hearings like this as part of that
23 whole process.

24 Finally, there is indeed all the issues of open
25 access, and Barry's going to talk about this, but let me

1 just end by saying open access is not just a matter of
2 principle, it's a matter of pricing. And so, watching those
3 contracts and the terms of those contracts is indeed an
4 important function. Thank you very much.

5 CHAIRMAN KENNARD: Thank you very much. Dr.
6 Nalebuff.

7 MR. NALEBUFF: Chairman, Commissioners, many
8 people here, myself included, are trying to understand the
9 future of the Internet, its impact on our lives and the
10 economy and how this proposed merger will change the course
11 of history. Yes, actually I think the stakes are that big.
12 And at the same time, I think that predicting the future of
13 the digital economy is actually hopeless. In fact, given
14 the flux of the environment today, I would be more than
15 content to predict where we are today.

16 So that leaves us in a predicament. The stakes
17 are high and our knowledge is low. In this type of an
18 environment, how do we best set policy? My answer here is
19 simple. Keep a level playing field so that the best man,
20 woman, technology company may win. This one single rule
21 should be what guides any policy prescription.

22 Now, of course that's easier said than done. What
23 is the field? Is it home? Work? Mobile? What is level?
24 Do we want to emphasize levelness within a technology, and
25 thereby promote intersystem competition? Or emphasize

1 levelness across technologies, and thereby promote
2 intersystem competition? We certainly don't want to create
3 equality by bringing everyone to the lowest level. And the
4 current environment is decidedly unlevel.

5 While phone and cable technologies are converging,
6 the regulatory environments have not. There are open access
7 requirements on DSL that do not exist for cable. Do we
8 relax requirements on DSL? Create requirements for cable?
9 Try to find some middle ground? Or simply rely on
10 competition to sort things out?

11 I think that creating a level playing field for
12 open access will be your most challenging problem, and that
13 is where I will focus my remarks. I believe that it is in
14 the self-interest of Time Warner AOL to provide access to
15 their system and that this is in line with their public
16 statements. The question is at what price and with what
17 terms?

18 The bundling of a cable modem pipe and an ISP is
19 not all that different than bundling an operating system and
20 a network browser. The ability to sell a package of
21 complementary goods and services as a bundle offers the
22 bundler a tremendous advantage in the marketplace. By
23 "complementary," I mean goods that enhance each other's
24 values, as in hardware and software, hamburgers and french
25 fries or, in this case, broadband cable pipes, ISPs and

1 content.

2 What's interesting here is that the advantage of
3 the bundler comes from being able to offer a lower -- not
4 higher, but lower price. And this is now where you see my
5 role as a theorist come into play. When two separate firms
6 get together to coordinate their pricing of complementary
7 products, such as A and B, the monopoly price is lower than
8 the result with uncoordinated pricing. The intuition is
9 that when the price of A falls, that helps expand the market
10 and part of those gains go to B. Unless the sellers of A
11 and B work together, they won't fully recognize those gains,
12 and thus the price will be too high.

13 This is in direct contrast to when firms
14 coordinate the price of substitutes or competing products,
15 and thereby raise the price. When firms coordinate the
16 price of complements, the price goes down. Thus, at first
17 glance both the firms and the consumers are better off. The
18 only reason that you may wish to be concerned is that
19 those who don't or who can't bundle are left at a big
20 disadvantage and over time that may change the nature of
21 competition.

22 Bundling is neither win-win nor win-lose. It's
23 win-win-lose. A win for the bundler, a win for consumers
24 today, and a lose for those who are excluded from the
25 bundle. This brings us back to the issue of a level playing

1 field. Do you want to help keep the level field -- the
2 playing field level for players who are left out of the
3 bundle? What does the FCC want to do for players who, like
4 AOL just a few months ago, are worried they'll have no one
5 to dance with?

6 If all consumers could choose between competing
7 bundles for broadband, this wouldn't be a concern. In many
8 places, competition does exist, from DSL bundles, from RCN
9 second cable line, from wireless, cable and satellites. I
10 expect that third generation mobile wireless technology will
11 really solve this issue, but we are not there yet.
12 Therefore, the question is whether or not to level the
13 playing field by giving other ISP and content providers
14 access to the Time Warner AOL bundle.

15 I don't wish to regulate how the elements of a
16 bundle should be priced when broken up into its components.
17 The resulting arguments over setting those prices would be
18 a lose-lose game. But we do have the advantage of AOL
19 selling dial-up service and content as an add-on to those
20 with Internet access.

21 That leads me to ask whether the price they set
22 for those two services, whatever they choose, might be a
23 useful proxy for how much to discount the cable bundle when
24 offering their cable pipeline services to other players. In
25 particular, I think the discount should be at least the

1 bring-your-own-access price, currently \$9.95, plus some
2 fraction of the extra price for dial-up service, currently
3 \$12.00 -- to get to the \$21.95 price -- reflecting the basic
4 ISP services.

5 My final point is that there's another subtle
6 example where the playing field today seems tilted. And
7 it's a problem I think you should be concerned about, and
8 it's something, actually, we heard again and again in Mr.
9 Levin's testimony. This proposed merger is what has caught
10 your eye, but practically every single issue that you will
11 talk about today could also arise as a result of contracts,
12 typically exclusive contracts. And you've heard about the
13 problems that have been created by the Road Runner contracts
14 and the @Home contracts, many of which are trying to be
15 undone today. I believe that the FCC and other government
16 agencies should be paying as close attention to these
17 contracts as they do to merger agreements. Thank you.

18 CHAIRMAN KENNARD: Thank you. Thank you both for
19 that testimony. It was wonderful testimony. Let me follow
20 up with a couple of questions, first for Dr. Nalebuff. Is
21 there a role in this future of telecommunications as you see
22 it for anyone who doesn't or can't bundle? Will we lose the
23 unbundlers, if you will? Or the unbundled companies.

24 MR. NALEBUFF: If, in the end, there is enough
25 competition in different types of platforms, the advantages

1 of opening up those platforms to, if you'd like, single
2 providers, I think will allow them to exist. On the other
3 hand, whether or not venture capitalists and the market will
4 fund those companies in a world where they're not sure to
5 get access is a question. The fact that they do have access
6 now on dial-up or in the case of DSL certainly is helpful.

7 I'm less worried, I guess, in a world in which you
8 could have bundle against bundle competition. But I think
9 it is inevitable that people who are -- who don't have a
10 bundle to offer will be at a disadvantage in the
11 marketplace.

12 CHAIRMAN KENNARD: Okay. And let me -- I don't
13 mean to characterize your testimony. I'm really just trying
14 to understand here. Are you saying that in order to create
15 that environment where someone who is not able to bundle its
16 access to the platform, if you will, are you suggesting that
17 requires some government intervention to make that happen?

18 MR. NALEBUFF: I believe that they will certainly
19 have access. The question is at what terms and what price.
20 And moreover, I believe that if you required everything to
21 be unbundled, actually prices would be higher, and adoption
22 would be slowed down and consumers would be worse off. And
23 so there is this tradeoff, if you'd like, between success
24 today, penetration today and serving consumers today, and
25 the ability of people to play going forward. I don't have

1 more of an answer, I guess, than that.

2 CHAIRMAN KENNARD: Okay. Fair enough. Other
3 questions?

4 COMMISSIONER POWELL: Yes. Ms. Dyson, I was
5 really quite intrigued by your, your observation that by the
6 nature of this medium and this phenomenon itself, there's a
7 certain really high value to being able to go where you
8 want, when you want in the way that you want, and that there
9 is an economic incentive to do that, and I think it's an
10 important point. And you pointed out that the more critical
11 issue is favored status potentially, or links, or what
12 consumers may not know about something.

13 I, too, used to be sort of more persuaded by that
14 argument, but I wanted to probe with you something that at
15 least modified my thinking about it. I'm struck by the
16 fact, in Internet space, that one's brand is, in fact,
17 directions to their house. That is, if I'm Commissioner
18 Mike.com, that's not only who I am, that's where I live.
19 And in advertising or raising the prominence of my brand,
20 I'm also raising the prominence of how to find me.

21 And we could all go outside and sit on Independent
22 Avenue and watch Metro buses go by with extraordinary
23 amounts of dot com advertising. Television revenues and ads
24 last year increased dramatically by virtue of the increased
25 advertising by dot com companies. We tend to forget, I

1 think, that reaching consumers about the possibility of
2 sites or Web sites and access is not limited to whatever
3 portal or medium accesses on the instrument itself.

4 And I have a hard time seeing the day when I see
5 an ad for Gaps.Jeans.com that I want to go to and AOL won't
6 let me get there and forces me to go to Levis. We're going
7 to have a very nasty conversation very quickly. And could
8 you sort of comment on that phenomenon and whether that
9 mitigates that concern to some degree.

10 MS. DYSON: Well, I'm not sure whether I agree
11 with you or disagree with you. I, the point I was trying to
12 make is, though, even though you can type in GapJeans.com,
13 and people will, and you can also go to a search engine, you
14 are, when you get to, for example, the AOL site, there's
15 going to be a link that says come to such and such a place.
16 There are going to be ads, and you can follow those links.
17 That happens a lot as opposed to people typing stuff in.

18 And at the same time, there is a new generation,
19 which unfortunately is not testifying, at least not so far
20 as I know, which is 22-year-olds, who are much more
21 comfortable with the medium, are used to using search
22 engines and floating around and so forth, but there is,
23 there is a challenge to have you get onto that piece of
24 prime real estate, which is whatever the consumer sees when
25 he first logs on, whether it's the AOL home page or -- a

1 depressingly small number of people pick their own home
2 page, which is not that of their primary provider.

3 So the issue is making sure that at least those
4 contracts are disclosed. If I get linked to someplace, I
5 should know that somebody paid something to have me go
6 there. That it wasn't that somebody thought it was simply
7 the best place to buy jeans, but that they get 29 cents for
8 every, every time I buy a jeans there.

9 It's becoming, for better or worse, a very
10 mercenary world. That's probably better than a world where
11 people control things for political reasons, but it is very,
12 very commercially driven.

13 COMMISSIONER POWELL: I guess the point I was
14 making is I'm concerned about the overstatement of the
15 sophistication required for a user to get to something other
16 than the favored link that the provider, by virtue of the
17 bombardment and, by the way, often rich experiences of
18 television advertisement, which people will say is the
19 singly greatest mass marketization tool, advertising,
20 newspapers, magazines, I mean everything is dot com. My
21 five-year-old thinks everything is dot com.

22 And I know that there's this youth component, but
23 I'm not so sure that -- I guess I'm questioning that one's
24 knowledge about what's available is really as sophisticated
25 a function when there is this mass marketization of dot com

1 addresses anyway.

2 MS. DYSON: Again, I think there is this
3 incredibly large commercial component, but people are also
4 very much driven by their friends, and they -- the whole
5 Napster, Gnutella phenomenon. They go where it's not
6 commercial. And they understand that difference in a way
7 that maybe the adults don't. They know what's commercial
8 and what's not and, of course, they understand people are
9 going to be trying to advertise to them. They, they're much
10 more cynical than we are.

11 But those things exist. And that was all I was
12 trying to say. I have a fair amount of faith in the
13 consumer, but I also believe in the role of the press and
14 government and everybody else in educating them about what's
15 going on.

16 CHAIRMAN KENNARD: Mr. Furchtgott-Roth?

17 COMMISSIONER FURCHTGOTT-ROTH: I would
18 particularly like to welcome our witnesses, and particularly
19 Professor Nalebuff. He and I were undergraduates together
20 and sat through Professor Houseman's public finance course
21 together. I think I had the seat right behind him, and if
22 I'd been more clever I would have perhaps copied from
23 Professor Nalebuff's notes, because he was the star of the
24 class. And I think I may be one of the few people in the
25 audience today who actually understood everything professor

1 Nalebuff had to say.

2 I particularly want to ask you, Professor
3 Nalebuff, about the following situation, and this gets to a
4 level playing field. Most of the issues that have been
5 raised today potentially come under the rubric of potential
6 anticompetitive behavior. The merger, at large, as opposed
7 to license transfers -- the merger, at large, is being
8 reviewed by the Federal Trade Commission. If the
9 circumstances had been slightly altered, if perhaps the
10 market valuation of the companies at the time of the
11 acquisition had been slightly different, it might well have
12 been the case that Time Warner had acquired AOL, in which
13 case this hearing would not take place, because this agency
14 would have no license transfers to review, there would have
15 been no application for license transfers to come to the
16 FCC.

17 There are two situations. You might even describe
18 them, as an economist, as two games that might be followed.

19 One, in which -- and two entities come before one antitrust
20 authority. And I wonder if you could comment first on
21 whether any and all the issues that have been raised today
22 will in fact be reviewed by the Federal Trade Commission in
23 their antitrust review. And second, whether the outcome of
24 a single -- the review by a single antitrust agency is
25 likely to be different from a review by multiple antitrust

1 agencies.

2 MR. NALEBUFF: I have to say that you have
3 obviously picked up on the -- quite rightly that many of the
4 issues here are as much competition policy and antitrust as
5 they are communication policy. I am also in Esther's camp
6 in the sense of getting companies to talk about what their
7 policies will be, establishing track records, getting this
8 out in the open, I think will actually solve many of the
9 concerns that people are, people have.

10 Take one specific case. I think it is possible
11 for cable operators to control and limit possibly access
12 through their pipes. That if they decided that they didn't
13 want Napster, no matter who your ISP is, it's possible they
14 could block that. I think, in the end, they're not going to
15 do it. I think that there will be a public discussion about
16 this point and, as a result, if people thought that this was
17 one of the things that they would go ahead and do, the
18 clamor against that would actually prevent it from
19 happening.

20 So my view is that, like Esther's, that the
21 process of getting people to talk about their plans for the
22 future and the kind of commitments that they intend to make,
23 the type contracts, is actually a good substitute in this
24 case for regulation. And if they do that once or if they do
25 that twice, I don't think it hurts. And that's my take.

1 CHAIRMAN KENNARD: Sounds like a good endorsement
2 for this hearing. Any other questions from the bench?
3 Commissioner Tristani.

4 COMMISSIONER TRISTANI: I wanted to follow up,
5 professor, on your comment about contracts, which you made
6 in your statement and you've just made now when you said the
7 FCC and other government agencies should pay more close
8 attention to these contracts. Can you enlighten me as to
9 what paying close attention might mean?

10 MR. NALEBUFF: Well, we see today how much effort
11 Time Warner is going through to get out of the contracts
12 that it was so happy to enter into two years ago. We see
13 the problems that are possibly caused by the @Home
14 contracts. So to the extent that you are all concerned with
15 issues of open access, to the extent that this is in the
16 companies' own interests, you know, how do we get ourselves
17 to this position today?

18 And the answer is that these companies signed
19 contracts which do not look to be in either the public
20 interest or their own interest, where we sit today. And
21 yet, part of the problem was there was no discussion about
22 those at the time. They sort of went under the radar. And
23 I suspect that having the same type of public attention,
24 press attention to the contracts that would literally keep
25 other players out of the market and shape the game -- well,

1 let me go back one step -- as a game theorist, I think the
2 way you win, the way you succeed is not necessarily just by
3 playing the game well, but by changing the game.

4 And ways you can change the game include changing
5 the players, as we see through this merger, and sometimes by
6 changing the rules. And that's a way of doing it --
7 contracts are a way to do that. And so when we see cases
8 where the game is being fundamentally changed, either
9 through the playing field, the rules, the players is a time
10 when we should be thinking about the consequences of that.

11 CHAIRMAN KENNARD: Commissioner Powell?

12 COMMISSIONER POWELL: I had a pretty
13 broad-reaching question about -- people seem to accept quite
14 simply that vertical integration or bundling is, A,
15 necessarily going to prove advantageous as a producer or
16 provider and, B, will automatically be accepted by
17 consumers, when there are some fairly nontrivial examples,
18 historically, of incredibly failed attempts to do that.
19 Particularly, oddly enough, in information industries.

20 Many people widely believe that Apple Computer
21 Corporation's refusal to license other producers of its
22 systems limited its network in a way that put it under water
23 for a very long time. Similar, vertical integrations by IBM
24 in hardware and/or software. The lists go on. Ford Motor
25 Company doesn't produce steel anymore, as opposed to doing

1 this. And there are some interesting examples of even
2 bundled services being rejected by consumers. Some things
3 as simple as they don't want a \$350 communications bill, but
4 they seem to be more comfortable when they're on six
5 different ones.

6 Could you opine a little bit about how safe an
7 assumption it is that these vertical integrated companies
8 and/or this bundled services will actually prove superior or
9 is detrimental as suggested.

10 MR. NALEBUFF: I think you're spot on there, and
11 companies have gotten better and more sophisticated in their
12 use of bundling. If you'd like, you don't just have a happy
13 meal choice. You can also buy a hamburger or fries or a
14 drink too, but you're given incentives to do all three. I
15 think the notion that you would bundle and not give people
16 any incentive to buy the individual components would be
17 foolish both from a business perspective, as well as from a
18 policy perspective.

19 And so now the question is how much of an
20 incentive will you have to buy what bundle? What are the
21 combination of bundles that will be available? And who will
22 be invited to play in those games? And so, yes, you can try
23 to carry it too far, but I think we've seen, especially in
24 the software industry, just the dramatic success of software
25 bundles. And here, I actually don't mean Explorer and

1 Windows. I really mean Office.

2 MS. DYSON: I'd just like to add that another
3 phenomenon that's going on is outsourcing, and AOL itself
4 got rid of its own ISP operations and found it more
5 effective to operate that way. I think you're going to see
6 a lot of banks and other people offering ISP services not
7 because they themselves own anything but because they're
8 reselling them. And again, they have that consumer
9 operation.

10 So what looks like bundling from the point of view
11 of the consumer may well be an assembly of different
12 services from different providers. And that often is more
13 effective, because nobody's very good at doing everything.
14 And it's controlling that access, again, that is the issue.

15 CHAIRMAN KENNARD: Commissioner Ness?

16 COMMISSIONER NESS: You mentioned earlier that
17 what we need to see is more disclosure of the provisions of
18 the contract, and if consumers know what would be in these
19 contracts, then they would be able, presumably, to make
20 better choices as to where they want to go and what they
21 want to see, and public pressure on the companies to provide
22 more opportunities. How do we achieve such disclosure? Is
23 this something that will happen within the marketplace
24 itself? Either one of you.

25 MS. DYSON: Ideally, you do it by getting the

1 press to write about it, by holding hearings such as these,
2 by getting consumers to ask, by creating competitive
3 pressure. If that doesn't work, you probably, as the FCC,
4 call up your friends at the FTC. There are -- and it's not
5 simply what contracts some provider may have with another
6 provider. It is what -- how much is being paid for this
7 link.

8 And you know, there's a question. How much do
9 consumers want to know? How much do they take for granted?

10 But I would like to see simply a broad education system
11 where people understand this stuff. And if they don't, then
12 maybe it's the government's job to educate rather than to
13 regulate. But I hope the press pays more attention to this
14 stuff, makes consumers more economically literate.

15 CHAIRMAN KENNARD: Any other questions from the
16 bench? Hearing none, we'll move to the next panel. Thank
17 you both very much. We really appreciate your taking the
18 time to do this. And I wanted to publicly acknowledge and
19 thank Esther Dyson's work with ICANN. That is a tremendous
20 public service, not only for the country, for the world, and
21 we're very appreciative of your work.

22 (There was a brief recess.)

23 CHAIRMAN KENNARD: Okay, we're prepared to begin
24 our next panel. We have a very distinguished set of
25 panelists here. I also want to note that there are

1 representatives from AOL and Time Warner at the table here.

2 They will not be making opening statements, but they will
3 be available to respond to arguments and critiques from the
4 other panelists.

5 It's my view that we have a more robust discussion
6 if we can get a little bit of a debate going. It usually
7 fleshes out the issues a little bit more and it makes for
8 more interesting dialogue. So that's why Mr. Parsons and
9 Mr. Schuler are sitting at the table. And with that, I'd
10 like to begin with our first panelist, Professor Orton from
11 the University of Wisconsin. And I'll ask that you give
12 your name and affiliation for the record when you begin your
13 statement. Professor.

14 MR. ORTON: I'm Dr. Barry Orton, professor of
15 telecommunications at the University of Wisconsin, Madison,
16 and I'm a consultant to local governments who are
17 franchising authorities in cable television. I'm an
18 original founder of the National Association of
19 Telecommunications Officers and Advisors and president of
20 its Wisconsin chapter. I advised the city of Milwaukee and
21 28 Milwaukee area suburbs on the Time Warner AOL merger and,
22 in fact, one of those suburbs was Brown Deere, Wisconsin,
23 the hometown of Deborah Latham's family. So I've been
24 representing local municipalities for about 20 years on
25 cable matters.

1 After reviewing the technical, legal and financial
2 qualifications of AOL Time Warner and receiving assurances
3 that existing franchise obligations would remain intact, my
4 Milwaukee area franchising authorities all approved the
5 transfer of control last month on my recommendation. They
6 did not consider open access platform issues as part of
7 their transfer process, and they are convinced that this is
8 a national issue rather than an local issue.

9 However, they are concerned about the local
10 impacts of broadband convergence as reflected in this
11 merger. Historically, they have had good experiences with
12 Time Warner and its predecessors, going back to original
13 Warner Amex back in the early '80s that got the original
14 franchise in the Milwaukee area. From most communities'
15 perspective, Warner has been a relatively good cable
16 operator and a responsible corporate citizen. They have
17 been, as you heard, at the forefront of experimentation with
18 two-way cable and in development of quality programming.

19 They were one of the original social contract
20 cable operators, as you know, and they've been long
21 supportive of public educational and governmental access on
22 the local level. The willingness of the Milwaukee area
23 municipalities I represent to approve this merger largely
24 stems from the fact that the Time Warner entities holding
25 their franchises remain in place, and Time Warner has agreed

1 to continue to abide by the provisions of those franchises.

2 There is a level of trust that's been built up from
3 long-term service and from relationships with Time Warner's
4 people. When problems have occurred, there has been good
5 faith efforts to find solutions and make corrections.

6 America Online has a far different history and
7 does not enjoy the same level of trust on the part of local
8 governments. Their repeated failure to provide adequate
9 service capacity to meet the demand their marketing
10 generates has a track record that makes local officials very
11 nervous, quite frankly. AOL -- to most professional users
12 and long-term users of the Internet, AOL has been looked at
13 as the sandbox where people learn to use the Internet and
14 perhaps graduate to more sophisticated services.

15 My colleagues in education, particularly in
16 distance education, have told me from various parts of the
17 country that they have had problems with students who tried
18 to take distance education courses who were on AOL, because
19 they don't have all the full features that others do, for
20 example, the ability to take full attachments from anywhere.

21 And that's been a real detriment to some individuals trying
22 to take distance education while on AOL.

23 In some periods between 1996 and 1998, AOL's
24 performance quality and level of customer service rivaled
25 the worst cable operators before cable re-regulation in the

1 '92 Act. If AOL hadn't been in the virtual marketplace but
2 in the real marketplace and they sold hundreds of thousands
3 of tickets to Bruce Springsteen concerts with only 50,000
4 seats available for the public, they probably would have
5 been indicted.

6 The three successive assurances of voluntary
7 compliance with multiple state attorney generals, where they
8 were explicitly forced to correct every part of their
9 operation from the size of their modem pool to their refund
10 policy to their telephone support system, their marketing
11 materials and service capacity really bear looking at very
12 carefully. In 1996, 20 states required AOL to refund
13 customers who tried and failed to cancel their service and
14 AOL abruptly switched to a 1995 flat monthly rate.

15 In 1997, 36 attorneys general required them to
16 stop advertising until they could provide sufficient modem
17 access. In 1998, a 44-state attorney generals voluntary
18 compliance act forced AOL to clarify its free trial offers,
19 disclose its minimum -- its premium surcharges, its
20 cancellation procedures and reform its other business
21 practices. As Ohio Attorney General Betty Montgomery said
22 in 1998, "The problem we're experiencing with AOL is similar
23 to a parking attendant that sells too many monthly passes.
24 When drivers show up at the garage, it's already full of
25 cars."

1 You should look at these voluntary compliance
2 assurances and their subsequent reports to the attorney
3 generals that they were actually meeting the terms of those
4 and, in case you have problems getting them, which we did,
5 I've finally gotten them and I've passed them on to the
6 cable bureau staff. So I would recommend your looking at
7 that.

8 Finally, I recommend that you consider your
9 regulations established under Section 76 through .309 that
10 allow local governments to enforce minimum standards for
11 telephone availability, installation and service calls and
12 outages for cable television, and expand those to include
13 high-speed cable modem service so that local governments
14 could have the tools to answer the inevitable complaints
15 they will get when providers of all sorts on cable modem
16 service, whether it's @Home, Road Runner or others have
17 outages, have service call problems, have telephone
18 problems.

19 Give local governments the tools they need to
20 enforce those kinds of customer service standards, and I
21 think some of -- at least the customers that do have
22 problems will have someplace to go. Thank you.

23 CHAIRMAN KENNARD: Thank you, professor. Mr.
24 Cooper?

25 MR. COOPER: Thank you, Mr. Chairman. My name is

1 Dr. Mark Cooper. I'm director of research at the Consumer
2 Federation of America. The Consumer Federation and its
3 member groups have testified on this issue from Cambridge to
4 Los Angeles to Broward County, Florida.

5 We believe that the principle of nondiscriminatory
6 access is not technology-specific. It has governed the
7 communication and commerce highways of this nation since its
8 founding, from roads to canals to railroads to highways to
9 telecommunications network, open access, nondiscrimination
10 is a standard that stands above technology and accommodates
11 changes in technologies.

12 Open access is above economic interests. Economic
13 interests must be subservient to the principle of
14 nondiscrimination. We firmly believe that if we had not
15 taken up that fight at the local level, there would be no
16 national policy debate, there would be no concessions. It
17 is the cities across this country who voted for open access
18 and went and got sued by AT&T that have created this debate
19 and turned all of the major newspapers in this country
20 around on the issue.

21 For while consumers have enjoyed the benefit of
22 hundreds of competitors on the narrowband Internet, things
23 are moving in a very different direction on the broadband
24 internet, which of course the Department of Justice has
25 defined as a separate market. We have a dramatic increase

1 in the concentration from recent mergers. We have the
2 refusal of vertically integrated facilities owners to
3 provide open access. We have the failure of proprietary
4 platform owners to inter-operate for communications.

5 The chokepoints on the broadband Internet are
6 clear, backbone, bit rates and bootstream. The sticky
7 features that lock consumers into the Internet platforms
8 have been identified, instant messaging, keywords, e-mail
9 addresses and electronic programming information. A handful
10 of dominant firms are leveraging those chokepoints to
11 extract economic rents and foreclose choices to consumers.

12 The cable industry has succeeded for several years
13 now to prevent competition by banning streaming video.
14 Millions of consumers have been denied a choice of ISPs on
15 their cable modem systems. The dispute over AOL's instant
16 messaging practices has simmered for a year with no end in
17 sight. AOL's would-be cable subsidiary has given the public
18 and policy makers a brutal lesson in what it looks like to
19 negotiate with someone who can pull the plug.

20 If wire owners can give their own programming an
21 edge, we will not have fair competition for eyeballs. What
22 is quite clear is that as the commercial value of the
23 Internet increases, these companies are more than willing to
24 destroy its openness in pursuit of their proprietary
25 economic interests. These powerful interests will frustrate

1 commercial negotiations for nondiscrimination.

2 Two years after we first asked for open access,
3 the exclusionary contracts are still in place. Virtually no
4 deal -- details of nondiscrimination have been provided.
5 And there is no way for any individual ISP to assert a right
6 to that nondiscrimination if they are frustrated. The
7 frailty of the voluntary access promises was demonstrated in
8 Los Angeles when AOL was asked to simply put its MOU at the
9 back of the franchising agreement. And it objected
10 vigorously.

11 How can it be that it is in the economic interests
12 to provide open access but when you ask, would it hurt them
13 if they were required to do so, it suddenly becomes a
14 disaster? The two cannot both be true, unless they want
15 commercial leverage in negotiation, which is exactly what
16 they're exercising. We do not have to tolerate the refusal
17 to interconnect and to provide open access.

18 The U.S. Appeals Court in the Ninth circuit
19 clearly concluded that the "provision of conduit services of
20 underlying telecommunication services are, in fact, subject
21 to a common carriage obligation," that 200-year-old
22 principle I mentioned at the beginning of my remarks. Open
23 access is the law of the land. Open protocols and fair
24 competition for eyeballs must be the policy of this
25 Commission.

1 We have outlined four specific steps that this
2 Commission should take before they allow this merger to go
3 forward. And one of them might well be until they deliver
4 those promises, don't approve this merger. Wait till the
5 end of the year or the middle of next year until you see
6 what open access looks like before you let the merger go
7 forward. And that may be a fifth one.

8 First, in order to maximize rivalry between
9 companies, you should prevent them from owning any interest
10 in each other's operations. There's a handful of them left
11 competing for consumers in this industry. Second of all,
12 although cross-technology has never disciplined market
13 forces in this industry, we must maximize that policy by not
14 allowing any entity to own more than one platform
15 technology.

16 Third, to prevent the leveraging of market power
17 in conduit in facilities into the content market, we must
18 have open access. And fourth, proprietary --

19 CHAIRMAN KENNARD: Thank you, Dr. Cooper. Mr.
20 Mirabal.

21 MR. MIRABAL: Thank you. My name is Manuel
22 Mirabal. I'm chair of the board of directors of the
23 Hispanic Association on Corporate Responsibility, better
24 known as HACR. HACR is a coalition of 10 of the largest
25 Hispanic national organizations working on public policy in

1 the U.S. We represent the interests of 36 million Hispanic
2 Americans.

3 HACR has a vital interest in the proposed merger.

4 We believe it is essential that the potential economic and
5 social benefits of the Internet and telecommunications
6 revolution must be available to all segments of the
7 population. We further believe that the proposed regulatory
8 process, which we're seeing today, is necessary. These
9 hearings afford citizens the right to be heard, and through
10 this process, we must ensure that the interest of the public
11 is protected.

12 HACR has serious concerns about the claims AOL and
13 Time Warner have made. I have concerns that the merger will
14 not foster a more competitive environment, offer more
15 choices nor create social benefits. We believe that the
16 merger will create a dominant entity, which has the
17 potential to limit competition, restrict content and
18 monopolize services in an industry that continues to evolve
19 rapidly and that will penetrate more and more into our
20 everyday lives.

21 The combined record of both applicants in
22 responding to the needs of the Hispanic community consists
23 of minimal efforts to address programming, cable service and
24 Internet access. Furthermore, neither company has responded
25 to our request for information concerning the impact of the

1 merger on the Hispanic community. Consequently, we are
2 deeply concerned that this merger will make matters worse
3 than they are now for the Hispanic community, because of the
4 limited ability of this community to afford costly Internet
5 services, the existing disparity in access to Internet and
6 telecommunications services and the limited geographical
7 cable service areas, which exclude large segments of our
8 community.

9 We, therefore, are urging the Commission to deny
10 the application for transfer of control by AOL and Time
11 Warner. Combined, the new company would become a cable
12 Internet media conglomerate, dominating three important and
13 distinct elements of this industry -- cable and television
14 content, Internet content, and cable assets. The potency of
15 this vertical integration in one company, we believe, could
16 serve to dampen competition and harm all consumers.

17 Diminished competition would disproportionately
18 affect the Hispanic community due to socioeconomic reasons.

19 AOL brings with it 23 million narrowband customers. Time
20 Warner brings a dominant position in the delivery of
21 entertainment news and educational programming in geographic
22 markets it serves. With this impressive collection of
23 assets and dominance in the related markets, the combined
24 AOL Time Warner will be able to behave in ways that could
25 limit consumer choice and harm competition.

1 This merger, which brings these elements together
2 under the control of one company may prove a threat to the
3 competition in conduits and content if left unchecked. AOL
4 Time Warner will have complete control of content and
5 distribution in markets served by Time Warner Cable and may
6 engage in controlling content by denying or complicating
7 access to their cable delivery system.

8 It's not enough that Mr. Levin and Mr. Case have
9 signed a nonbinding memorandum of understanding pledging to
10 open their cable lines to multiple Internet services. We
11 have to see that in place. The new company will also have
12 greater incentives to control or discriminate with regard to
13 content as we move into the uncharted territories of
14 Internet interactive television. Cable has a virtual
15 monopoly in the delivery of this television service, and
16 that doesn't appear to change in the near future.

17 Absent conditions prohibiting AOL Time Warner from
18 discriminating against content it does not own or control,
19 it is conceivable that the new company could dampen
20 competition. Of equal concern to the potential risk of
21 content discrimination, should the merger be approved
22 without safeguards to protect the consumer, is the threat to
23 competition in the market of delivery of broadband and
24 content services.

25 The potential for consumers to be harmed by the

1 diminished competition in content and its delivery is far
2 greater if AOL Time Warner is allowed to engage in
3 preferential dealings with other cable providers. Together,
4 AOL Time Warner will reach 80 percent of American
5 households, and together their content ownership will cover
6 the majority of the most appealing content in cable and on
7 the Internet. If allowed to engage in business dealings
8 which favor each other, undoubtedly, competition and
9 consumers, we believe, will be harmed.

10 The record of AOL and Time Warner in addressing
11 the concerns of the Hispanic community is poor. Although
12 Time Warner has done more than AOL to respond to issues,
13 which we have raised in the past, we cannot state today that
14 they have acted responsibly in addressing our concerns about
15 programming, diversity and community-building investment.

16 We are reminded how little commitment there is to
17 address these issues when we continue to see movies like
18 Fort Apache regularly shown on their stations and production
19 companies like Castle Rock produce shows that use the
20 burning of Hispanic flags as jokes and typecast Hispanics as
21 gang members from the West Side Story decades ago. Time
22 Warner has done little to rectify this situation to date.
23 One documentary, *Americanos*, does not resolve the problem
24 that we have with their programming.

25 AOL's Steve Case has stated to investors that the

1 proposed merger would create something new and powerful and
2 would become even more central to people's lives. With a
3 record as bare as AOL's in addressing Hispanic-American
4 concerns and with no apparent interest in learning about our
5 needs, this merger is a recipe for disaster for the Hispanic
6 community.

7 The two companies have independently operated
8 without regard for the Hispanic community in areas of their
9 businesses from employees to customers to businesses at the
10 very top of both organizations. The Hispanic community has
11 been systematically ignored or denied equitable service and
12 opportunity. For these reasons and others, which are stated
13 in our submission to you, we urge you to deny the
14 application. Thank you.

15 CHAIRMAN KENNARD: Thank you, Mr. Mirabal. Mr.
16 Love.

17 MR. LOVE: Thank you. My name is Jamie Love. I
18 work in Washington, D.C. for a consumer group, a group that
19 was started by Ralph Nader in 1995. I work a lot on issues
20 relating to Internet, intellectual property rights. I used
21 to do a lot of work in telecommunications, but I haven't
22 done it for a while, and people like Mark Cooper, Jeff
23 Shester, other people kind of got mad at me and told me to
24 get involved in this issue, so I'm here today.

25 A lot of people have said a lot of, I think,

1 important things. I'm not going to repeat everything. I'd
2 like to thank the Commission for the excellent panels. I
3 thought that Esther and professor Nalebuff -- I'm saying it
4 wrong I'm sure. Barry and Esther, I thought did a very nice
5 job of setting the stage for the debate.

6 I appreciate the discussion a lot about the
7 bundling issues and the contract issues. I thought that was
8 quite important. And I think that the other witnesses
9 before me on this panel have done a nice job of reminding us
10 that it's not always a good idea to sit around and have a
11 charming CEO of a company or two come up and -- these guys
12 are good salesmen, that's what they do.

13 I mean how else could Micro -- how else could
14 America Online persuade people to pay a premium price for a
15 service that force-feeds you ads and makes it almost
16 impossible to find the real Internet beneath, at the same
17 time telling people they're too dumb to figure out how to do
18 it the regular way. I mean that's what I call salesmanship.
19 So, you know, we have a tough job here to compete with them.

20 Now in terms of the architecture, the thing that
21 strikes me about looking at this issue is not the Internet
22 we know today, which is nondiscriminatory access where
23 anybody could connect to an Internet server and anybody can
24 get their product out there and connected to people at the
25 same time, but it's the next generation Internet that we're

1 reaching.

2 And really, the issue that I think the Commission
3 has been derelict at looking at and what people have tried
4 to raise to the Commission, in our case back in the
5 mid-1990s before we just stopped beating our head against
6 the wall, is where that's going to be in terms of the
7 broadband platform. Now I'd like to skip in my testimony to
8 the top of page 3 and read some excerpts from a document
9 that Cisco prepared that you may have seen before. It deals
10 with the way they're designing services for cable operators
11 to control data that's going to go into broadband networks.

12 It starts out at the top of the page. It says,
13 "The ability to prioritize and control traffic levels is a
14 distinguishing factor and critical difference between new
15 world networks employing Internet technologies and "the
16 Internet." So the first thing they do is they say, the
17 Internet that we know today is going to be the past and
18 what's going to replace it is going to be something that's a
19 network that employs Internet technologies but it's not the
20 same as the Internet. That's something to think about.

21 The next paragraph, they point out the kind of
22 things that technology they're providing for cable operators
23 to track content, and I'm going to read it, because I think
24 you should think about this. It says, "Traffic type
25 identification allows you to isolate different traffic types

1 in your IP network. Through Cisco quality of service, you
2 can identify each traffic type. Web, e-mail, voice, video.

3 Tools such as type of service bits identification allow you
4 to isolate network traffic by the type of application, even
5 down to the specific brands, by the interface used, by the
6 user type and individual user identification or by the site
7 address."

8 So that's really what the cable companies are
9 asking the company to build for them in terms of the
10 technology to track data. Now skipping down a bit in the
11 paragraph that begins with, "Among other things," Cisco
12 points out that quality of service can also propel you
13 forward by giving you the information you need to offer
14 advanced differentiated service at a profit. For example,
15 time and usage-based billing. Now that's something that
16 people on the Internet have always -- I'm sure the
17 Commission's heard about these kind of ideas about metered
18 Internet use, but this is sort of one of the features of the
19 new technique is the ability to more efficiently do this
20 from the cable operator.

21 Next paragraph. "Cable companies can optimize
22 service profits by marketing express services to premium
23 customers ready to pay for superior network assets." So
24 it's really a fast pipe, a slow pipe, a go-fast button,
25 things like that. And what people are concerned about is

1 the highly differentiated level of service and who's going
2 to get and at what terms and at what level of discrimination
3 to access.

4 And the next paragraph on the next page, the full
5 paragraph, it says -- this is -- and I think quite a key
6 paragraph. They're talking about competitors' service here.

7 And they say, "If a push information service that delivers
8 frequent broadcasts to its subscribers is seen as causing a
9 high amount of undesirable network traffic, you can direct
10 CAR" -- which is, you know, one of the Cisco services -- "to
11 limit subscriber access speed to the service. You could
12 restrict the incoming push broadcast, as well as the
13 subscriber's outgoing access to the push information site to
14 discourage its use. At the same time, you could promote and
15 offer your own or a partner's services with full-speed
16 features to encourage the adoption of your services."

17 Now, what in the history of the cable industry, of
18 all the years of discrimination makes you think that these
19 companies won't want to do this to benefit their own
20 integrated services? And what, in the history of litigation
21 and broken promises and things like that and failure to make
22 real specific commitments make you feel that you can leave
23 the public in the lurch on an issue like this? My time is
24 up. Thank you very much for the opportunity to be here.

25 CHAIRMAN KENNARD: Thank you, Mr. Love. Ms.

1 Cunningham.

2 MS. CUNNINGHAM: Thank you. I'm Cathy Cunningham.

3 I'm here from the city of Irving, Texas, and I also am here
4 on behalf of the National Association of Telecommunications
5 Officers and Advisors, which has 432 local government
6 members representing over 20 million cable subscribers.

7 I would like to deviate or supplement the comments
8 that I filed with -- first of all, by addressing some of the
9 things that I've heard brought up in the initial comments of
10 the Commissioners and subsequently. First of all, in regard
11 to whether -- why it's important that we meet -- and I
12 wanted to say I'm very grateful, as a representative of a
13 local government to be here and that the FCC is showing this
14 kind of interest in the role local government plays in
15 response to the consumer advocacy on behalf of our citizens.

16 But I think it's important to have these kind of
17 hearings as just a person who lives out almost in, maybe not
18 quite in the middle of nowhere -- I'm near Dallas -- but
19 still, in the middle of America. It's, this is an issue
20 that's very interesting to people, and I think that if you
21 had just passed over this like a standard type of license
22 transfer, it would be seen as not gaining the public trust.

23 The public wants to hear these things talked about. I
24 don't think it would benefit the public, the Commission or
25 the companies involved not to have this kind of hearing.

1 I think that the public wants a hearing like this,
2 and I think that it's -- it would really be actually
3 detrimental even to the companies to not have this. It
4 would just be seen as wrong by the public, by those people
5 who aren't living in this city but who live outside this
6 city. I think they want this sort of thing and they want to
7 be able to see it and know that -- and hear these
8 explanations that are being produced by the company
9 representatives, by the panel before us, this panel and the
10 next panel. This is the sort of thing the public wants to
11 hear about.

12 And I think the answer to all four of those
13 questions that were posed is really that it's important for
14 public trust, as much as public interest or anything else.
15 And as the professor, whose last name I won't even attempt,
16 said before, two hearings doesn't hurt. People, hearing it
17 more than once sometimes helps some of us what some of the
18 issues are and to either get a comfort level or know where
19 we're not comfortable.

20 Secondly, a comment I heard several times
21 mentioned was there were discussion about marketplace. And
22 I know that this Commission struggles with and is sincerely
23 interested in doing the right thing as far as marketplace
24 versus governmental regulation or even intrusion into
25 certain areas. In my city, in the city of Irving, Texas, we

1 have been blessed or cursed, depending on how you want to
2 look at it, but the location. We have more than 20
3 telecommunication companies that have build-out facilities
4 in our rights of way.

5 And in all that 20 new companies, none of them
6 have come to the residents to offer competition. They're
7 going to the big businesses or they're just passing through
8 town. So taxpayers are helping to, in some ways acquire
9 that property they benefit from, but the individual resident
10 has not seen the competition, they're not seeing additional
11 choices. And in the area of town I live in, which is
12 considered a middle-class neighborhood with a lot of
13 Internet users, there's not DSL.

14 I mean it's not -- it would be very nice, I would
15 like to hear all these things and say yes, a marketplace
16 exists, but sometimes it doesn't. It doesn't in all parts
17 of the country. It doesn't in my neighborhood. And that's
18 despite the remarkable facilities built out that I struggle
19 with at work trying to find room for all of these companies.

20 So once -- right now, our cable company, which is
21 a partnership between Time Warner and AT&T, hasn't yet to
22 rule out the broadband services -- I think that's coming
23 soon -- but right now, there's no high-speed broadband
24 access, and when the cable company does roll it out in the
25 next couple of months they said, they'll be the first ones

1 and for a while they'll be the only ones. I suspect that
2 DSL is coming, but it's not there yet.

3 And so right now, without, without governmental
4 intrusion, the marketplace isn't working, because there is
5 no marketplace for some of us right now. What I think the
6 cities want -- I don't think the cities are -- speaking on
7 behalf of all of them, which is pretty presumptuous for me
8 to do, but at least on behalf of myself, I don't think we're
9 here to give answers, because you're struggling with some
10 very difficult questions, but we're here to encourage you in
11 that struggle. We want to encourage you to help us make
12 sure that our citizens have a quality, universal, timely
13 service.

14 We want to work in partnership with the Federal
15 Government, as Professor Orton mentioned as far as consumer
16 standards or something like that. If you were to set those
17 types of standards, we would certainly be -- the level of
18 government that consumers are going to turn to when they
19 have problems, they're probably not going to dial a long
20 distance number. They're going to dial us, and they're
21 going to expect something gets answered.

22 Second, this goal goes along with it. I thank you
23 for including us in this. I hope you will continue to
24 include your local governments as these sort of things
25 develop, and I would like to mention that our city -- and in

1 closing, I would just like to mention our city did approve
2 the transfer agreement. And in our city, Time Warner agreed
3 and actually provided language concerning an open access
4 provision in the transfer agreement. I think that if it was
5 okay for us, I don't know why it wouldn't be okay across the
6 country.

7 And if the feeling is that the agreement, as I
8 heard in the testimony, the first panel, that the agreement
9 is binding, I don't see what it would hurt for this
10 Commission to put a stamp on it or for somebody to put a
11 stamp on it and help make that so for the American public.
12 Thank you.

13 CHAIRMAN KENNARD: Thank you very much, Ms.
14 Cunningham. And thank you all, all the panelists for your
15 testimony. I want to direct my initial questions to Mr.
16 Mirabal. Mr. Mirabal, you made some what I consider to be
17 fairly serious allegations against the merging parties here
18 and, in particular, you allege that Time Warner has not been
19 providing service to the Hispanic community.

20 I believe that that is one of the most serious
21 allegations you can make before this Commission, and that's
22 not a personal whim. I think that that's strongly grounded
23 in Section 1 of the Communications Act, which charges this
24 Commission with ensuring that we have a truly nationwide
25 communication service that serves all of our communities,

1 including the rich diversity of our country.

2 So I'd like to find out a little bit more from you
3 what's behind these allegations. You mentioned programming,
4 but I want to, in particular, find out whether you have
5 concerns about the deployment of services by Time Warner in
6 the Hispanic communities, if you have allegations in that
7 regard. You touched on it briefly, but you didn't really
8 elaborate.

9 MR. MIRABAL: Certainly, Mr. Kennard. We do have
10 additional data and reports that we can give to the
11 Commission concerning those issues, but let me just say that
12 we, we have been attempting to work with Time Warner over
13 the last several years -- about three, to be exact -- yet
14 upon their commitment to us to conduct a self-evaluation on
15 those issues, which we mentioned -- they include governance,
16 employment, diversity issues in the company, the issue of
17 procurement for minority suppliers, the issue of service of
18 their cable and other facilities to our community -- we have
19 yet to receive a report from Time Warner on those very
20 issues.

21 They have made repeated requests to us to delay
22 reporting on these matters to us, although we have raised
23 concerns that go all the way from south Florida through
24 Atlanta up through New Haven and all of the Northeast states
25 and many other areas of the country about concerns about

1 being able to access certain cable services where those
2 services do not go into certain communities for various
3 reasons. That information has not been made available to
4 us.

5 CHAIRMAN KENNARD: When did you request this
6 information?

7 MR. MIRABAL: This started almost three years ago,
8 sir. And shortly afterward, Time Warner joined a corporate
9 board of one of our member organizations and made to
10 commitments to conduct, as I said before, a self-evaluation
11 of these issues. And that has yet to be presented to us.
12 More recently, when the merger was announced by AOL Time
13 Warner, we sent a letter to the chief executive officers of
14 both companies, and Mr. Levin was one of them, and requested
15 a meeting, because we wanted to address our concerns
16 regarding this merger as far as it affected the
17 Hispanic-American community.

18 And we have yet to be able to hold a meeting where
19 we get any details or any answers as to when those details
20 will follow to us. So we --

21 CHAIRMAN KENNARD: Mr. Parsons, would you like to
22 address this issue?

23 MR. PARSONS: I think I would, Mr. Chairman. I
24 want always to be careful not to seem to engage in a food
25 fight on these kind of panels but I, like you, think the

1 allegations that have been made are serious. And first, I
2 would hope that whatever followup data Mr. Mirabal is going
3 to share with the Commission he would also share with us.
4 To my knowledge, which is while not exhaustive, at least
5 extensive on this subject, since it is an area that reports
6 to me and our corporation, I think we have an exemplary
7 record in terms of not only serving the Hispanic community
8 but serving the full breadth of, as you call it, the
9 diversity and the richness of the communities in which we
10 operate.

11 To start, with our cable company, we serve all
12 areas of the franchises in which we are in. We're the
13 first, I think, cable company to enter into a social
14 contract with the FCC where we made commitments within
15 communities to not only serve all areas within the
16 communities but to make sure that we drove broadband
17 deployment of our, of our plant into all areas of the
18 communities. That commitment, which we made in 1994, was to
19 have, in terms of the 20 million homes passed that the Time
20 Warner Cable franchises serve, all of those plans upgraded
21 to full 750 megahertz capacity by the end of this year. And
22 as I think the chairman knows, we're on schedule to do that.

23 We also committed to wire all the schools in those
24 communities and so that the schools would have access to the
25 broadband capacity beyond the cable service. And so I would

1 be more than amazed, I would be shocked if there were, if
2 there was actual data to support the allegation that we
3 somehow are underserving the Hispanic community within the
4 franchises where we operate.

5 Secondly, from a programming perspective, I think
6 that you can look at Time Warner's programming across its
7 many programming platforms, which includes broadcast with
8 the WB, HBO in terms of premium cable, all of the Turner
9 services, and they have been more than even-handed. We have
10 reached out to the minority communities, including the
11 Hispanic community because, frankly, they over-index in
12 terms of television watching. In fact, HBO will launch in
13 September the first of what will be called HBO Latino. It
14 will be one of the multiplex services on our HBO offering,
15 because we understand there is a need in that community and
16 there is an appetite in that community.

17 The Americanos, which Mr. Mirabal spoke about, was
18 a movie project and book project we did in conjunction with
19 James Edward Olmos that was precisely to celebrate, and give
20 visibility to, the impact and contribution that the Hispanic
21 community is making to America today. And that has traveled
22 around the country. I could go on and on.

23 WEA Latina. We are, as you know, a major record
24 company. About 20 percent of the Latin music that's
25 available in this country is from artists that we've gone

1 out and found and developed and nurtured and then brought to
2 the public's attention. So I would be very interested to
3 see the documentation that Mr. Mirabal has agreed to share
4 with you. We have probably -- in fact we just won an award
5 for having one of the best minority and women in business
6 development initiatives in corporate America. So I can't
7 say that our track record is entirely spotless or that we
8 are the exemplar. We sure try. We've sure been recognized.

9 There's lot of tangible data to point to that
10 suggests we're making some progress and, while I listened
11 very carefully to Mr. Mirabal's response to your very direct
12 question, I didn't hear any actual evidence of, or factual
13 allegation that suggests that we aren't doing our job in
14 this area. The fact that he has not had the meeting that he
15 has asked for with Mr. Levin is something I'll have to look
16 into in terms of whether he's met with any of the other
17 people in our company. But on the record and on the facts,
18 I think we're hard to fault.

19 CHAIRMAN KENNARD: Well, there seems to be an
20 interesting disconnect here, and I look forward to the
21 information that you plan to submit, Mr. Mirabal. Other
22 questions? Yes.

23 COMMISSIONER TRISTANI: I just have a question,
24 and I don't know if you keep these statistics, but do you
25 know what proportion of your subscribers are Hispanics?

1 MR. PARSONS: I don't as I sit here today. I
2 could get that information for you, I suspect.

3 COMMISSIONER TRISTANI: I'd be interested. I'd be
4 interested. Thank you.

5 CHAIRMAN KENNARD: Any questions. Commissioner
6 Furchtgott-Roth.

7 COMMISSIONER FURCHTGOTT-ROTH: I'd like to thank
8 the witnesses for coming today. I'd particularly like to
9 thank Ms. Cunningham for addressing the questions that I
10 asked and for her comments about the value of this hearing.

11 I, too, listened very carefully to Professor Nalebuff's
12 comments and to Ms. Dyson's comments as well, which I
13 interpret as meaning that there's value in having public
14 discussion of matters that are of great public interest. I
15 still wonder about whether this agency has been -- does this
16 in a discriminatory manner or not in choosing which issues
17 to raise and which not, and also whether there aren't other
18 federal agencies that address these more directly.

19 And so I'd like to hear from each of the witnesses
20 whether, in fact, the information that you are providing to
21 the FTC -- FCC today is similar to information that you may
22 have provided to the Federal Trade Commission as well.

23 MR. COOPER: Let me -- I didn't want to directly
24 use the initial time. I expected you would come back around
25 to your questions. And let me make a couple points about

1 why there is multiple review of mergers between agencies.

2 Second of all, why some mergers attract more attention than
3 others.

4 It seems to me that the Communications Act, for at
5 least six and a half decades, has recognized that
6 communication and broadcast are special and different. And
7 that's why we have a Communications Act in addition to a
8 Sherman Act. And it holds these industries, because they're
9 so vital to democracy, to a higher standard. And you have a
10 statute that exposes to a public interest test, which is
11 different than a market competition test.

12 And we have, we have a variety of rules on
13 limitations on ownership that go way beyond the Sherman Act,
14 some of which have been involved in recent mergers and one
15 merger that is more or less still pending. So that the
16 Communications Act is different, it establishes different
17 authorities, it establishes different standards, and so I
18 think there's a legitimate reason to ask both similar
19 questions and different questions. That's why we have
20 multiple review across the agencies.

21 Second of all, why does a merger like this attract
22 more attention than other mergers? Well, one, in some
23 license transfers there's a *de minimis* issue. If it's a
24 small transfer between two companies, it may not matter.
25 Second of all, this merger involves cross-ownership between

1 content and conduit, which have been the subject of a great
2 deal of concern in public policy. So that raises different
3 kinds of questions than other mergers.

4 Third, I would suggest that, given that we have a
5 pending petition for reconsideration on the AT&T Media One
6 merger, you literally have before you almost two-thirds of
7 the wires in the cable industry to be considered. So, in
8 point of fact, if you were to treat those two mergers -- I
9 understand you have ruled initially on the AT&T Media One,
10 but we do have a petition on reconsideration and clearly
11 these mergers were before you at the same time -- you could
12 have the effect of establishing what is virtually an
13 industrywide policy in a framework that is much quicker than
14 the normal rulemaking.

15 So those, I think, are good reasons. The whole
16 industry was here, a cross-ownership issue was here.
17 Communications Act is very different than the Sherman Act.
18 Those are good reasons that this Commission gives a very,
19 very hard look at these kinds of mergers and, in fact,
20 passes through a single license by a small operator that
21 doesn't own any content. I don't think the differential
22 scrutiny is inappropriate when you have so many important
23 issues and so much of the industry structure at stake.

24 COMMISSIONER FURCHTGOTT-ROTH: Dr. Cooper, by your
25 own testimony, the Sherman Act and the Communications Act

1 are quite different, and I come back to my question, which
2 is, is the information that you testified about today
3 similar to the information that you've presented to the
4 Federal Trade Commission, which enforces the Sherman and the
5 Clayton Acts.

6 MR. COOPER: Well, some of it is and some of it
7 isn't. We don't necessarily raise, and I personally haven't
8 raised, all of the issues I raise here under the
9 Communications Act down at the FTC or the Department of
10 Justice under the Sherman Act. But there is an overlap.
11 The Congress passed the Communications Act 30-plus years
12 after the Sherman Act -- I'll do the math -- and they
13 understood that there was an overlap. And in fact, because
14 communication and broadcast is so important, it is not
15 unreasonable to have two agencies look at the issue. So,
16 certainly a certain amount of the information is the same.

17 COMMISSIONER FURCHTGOTT-ROTH: But Dr. Cooper,
18 isn't it the exact same public interest standard under the
19 Communications Act that applies to broadcast, to all
20 wireless licenses, to the tens of thousands of license
21 transfers that this agency reviews every year, and to which
22 this agency does not apply anticompetitive tests, does not
23 hold public hearings?

24 MR. COOPER: Well, again, the difference in this
25 merger -- and I think I have testified in almost all of the

1 *en banc* hearings the chairman referred to -- these are very
2 large mergers affecting substantial portions of the country,
3 frequently involving, in this case, cross-ownership of
4 content and conduit, so they raise different issues. They
5 clearly raise different issues when I'm looking at AOL Time
6 Warner versus a small license transfer, SBC Ameritech, which
7 definitely was a similar context.

8 So I think it is, it is reasonable for the
9 Commission to give different levels of scrutiny to mergers
10 that are -- the magnitude is dramatically different. So I
11 do not see anything unfair in giving high scrutiny to a
12 merger that raises so many issues.

13 CHAIRMAN KENNARD: Mr. Love.

14 MR. LOVE: Well, we've talked to the Federal Trade
15 Commission about this merger. We've talked, you know,
16 today, to this one. We've actually had different
17 conversations. One of the reasons why the conversations
18 were different is that the Federal Trade Commission has a,
19 has a particular expertise in competition policy where it's
20 more fruitful to explore certain types of issues.

21 For example, the Federal Trade Commission, along
22 with the Department of Justice, administers the merger
23 guidelines. And we have concerns -- and this has been a
24 case that's brought up -- that the treatment of
25 collaborative ventures, the so-called joint venture

1 guidelines -- are too much of a safe harbor for mergers and
2 not enough of a, don't do enough to capture the degree to
3 which the companies are not really independent. The fact
4 that -- people have talked as if AT&T and Time Warner are
5 somehow these independent companies, but they have an
6 incredible web of joint ventures and collaborative
7 agreements, which makes them something different than just
8 independent entities.

9 And so this merger, in a sense, from that point of
10 view, we think is, would be cast a bit different. And then
11 another issue that has come up with the Federal Trade
12 Commission and the Justice Department is whether or not
13 mergers in these cases remove players from regulatory
14 proceedings. The case would be -- in a case in the regional
15 Bell operating companies, the problem was companies like
16 Compaq Computer and Intel would only intervene in certain
17 markets, depending on the ARBAK (phonetic) and --
18 proceedings I was involved in -- and Intel told me this and
19 so did Compaq, that they had board-level decisions not to
20 intervene in Bell Atlantic's territory for both Intel and
21 Compaq, because of corporate relations.

22 So when Bell Atlantic merged with Nynex, that was
23 just a half, you know, half a country. They couldn't really
24 intervene in it. And so we raise that issue, because we
25 believe that having more players makes the regulatory

1 environment work better because you hear more voices. Now
2 that's something that's sort of different. Now --

3 COMMISSIONER POWELL: Why is that remarkable?

4 MR. LOVE: What's that?

5 COMMISSIONER POWELL: Why is that remarkable that
6 corporate interests might elect not to intervene in a public
7 proceeding. I mean you couldn't possibly suggest that the
8 government should compel --

9 MR. LOVE: No, no, but I mean Intel --

10 COMMISSIONER POWELL: Or encourage parties to file
11 in the proceedings if they choose not to for their own
12 self-interest.

13 MR. LOVE: No. Well, Intel, Intel was very active
14 in this particular set of proceedings I was involved in --
15 Pac Bell Territory, U.S. West territory -- and we worked
16 closely with Intel and in some cases with, and some SBC
17 tours, and also with Compaq in some of these proceedings.
18 But then they would in some areas and they wouldn't in other
19 areas. And we had issues with 3COM, whether 3COM would
20 intervene in some and not in others. And it's, I didn't
21 find it remarkable at all, but I found it a consequence of
22 merging a bunch of ARBAKs (phonetic) together is that nobody
23 wants to intervene because there's just too much at stake.
24 There's too many.

25 At one point, to give you an example, Pac Bell

1 took a videoconferencing product that Intel sold, they threw
2 it across the table at the salesmen and they said, why are
3 you intervening in this ISD in re case we have in -- this
4 was back about five years ago in California -- and go talk
5 to your, you know, go talk to your government relations
6 people and come back, and then we can talk about, you know,
7 whether we're going to buy your product or not. Well, Pac
8 Bell's a pretty big customer for that kind of thing.

9 So, you know, those kind of discussions take
10 place. So when there's a merger of companies, after a
11 while, it's more and more difficult to -- like, consumer
12 groups have, you know, miniscule resources, we kind of
13 depend upon maybe some giant company will see things our
14 way. Like, we're glad Disney's on the next panel, for
15 CNIPES sakes. That's pretty weird. But, you know, that's
16 the way it is.

17 Now, that's what we have to kind of depend on in
18 this world. Now, you put everybody together, it's harder to
19 get somebody to take on the 12,000-pound gorilla, you know,
20 so I mean that's kind of an issue. We tried to raise that
21 with Justice and we're trying to raise it with FTC, because
22 these are kind of generic issues for them that go way beyond
23 what you do. And you may not, you know, necessarily have as
24 much interest as they have.

25 On the other hand, the reason to bring things up

1 in this proceeding is because you have more of a permanent
2 relationship with the cable industry than the FTC does. FTC
3 looks at these things from time to time. You look at them
4 on an ongoing basis, and so in a way you're more of a,
5 you're more related to them than the Justice Department or
6 the FTC is. And so I think you have more of an oversight
7 role. But I also think you have more of a responsibility.

8 Some of the solutions are more regulatory than
9 antitrust in nature, by their, because of the, just you
10 can't come up with, you know, a little consent order today
11 that would solve all the problems tomorrow, because you
12 don't even know what they're going to be yet. And so you're
13 trying to sort of, I think as some people implied in the
14 last panel, develop a bit of a, what is the body language,
15 you know, what, you know, you tell them kind of where you
16 want them to go and then, you know, you're going to see them
17 again. So that sort of makes more sense to have that
18 investment. If Robert Petowsky has that discussion, it's
19 not really that meaningful.

20 CHAIRMAN KENNARD: Mr. Love, I'd like to take the
21 discussion away from jurisdiction and process and back to
22 sort of the substance of the issues that are before us in
23 this particular transaction. We've had some discussion from
24 this panel on the access question, the open access question.
25 And one of the frustrations I have with this debate is that

1 there is not a baseline definition.

2 When the cable industry talks about open access,
3 they have a very different -- which they call forced access
4 -- they have a very different definition of what acceptable
5 access is for the consumer than the discussion I hear from
6 some competitors to the cable industry, particularly the
7 telephone companies and the consumer groups. Mr. Cooper, I
8 know you to be a veteran of the telephone wars where we have
9 debated this issue of access to a platform ad nauseam all
10 across the country. I would like to ask you how you define
11 open access.

12 Is it more than interconnection? Does it get into
13 issues of caching and speed and pricing? So that we can
14 have a better understanding of what we're talking about when
15 -- at least when we hear from you -- on this open access
16 question. You mentioned that open access is one of your
17 four recommendations as to how we deal with this merger, but
18 you didn't really tell us what that means.

19 MR. COOPER: Well, the Commission certainly has a
20 very lengthy description of open access that I filched from
21 AOL and AT&T. You will recall that AOL, in San Francisco
22 and AT&T, in Canada, defined in great detail to regulatory
23 bodies what they meant by open access. And frankly, what
24 they said, and certainly what AT&T said in Canada, looked an
25 awful lot like 251, 271 under the Telecom Act.

1 And as I read the 9th circuit, that is one path
2 you may have to go down, depending on how that plays out,
3 the nature and structure of common or open access, because
4 it may or may not be full common carriage under the Telecom
5 Act now applies to the cable industry, at least in the 9th
6 circuit, although obviously, we may yet litigate that
7 question with you. But, so at one level, that is the level
8 of detail into which this Commission may have to go under
9 the law.

10 The interesting thing is that for the almost two
11 years that we have been arguing for this around the country,
12 we had not advocated that. We had advocated almost a simple
13 sentence that said, essentially, unaffiliated Internet
14 service providers shall be allowed to gain access to cable
15 modem systems on "rates, terms and conditions that are no
16 less favorable than" affiliated ISPs, the identical language
17 that we have for cellular providers interconnecting with
18 ARBAKS.

19 So you have that history. And in that case, there
20 is not this huge structure of regulation that we have had to
21 live through in the last four years in 271. Those are two
22 models of access that this Commission has and has applied in
23 a nondiscriminatory framework. We don't have to do an awful
24 lot of work, as I pointed out to this Commission in the case
25 of Texas and New York.

1 You have operating irreversibly open markets. In
2 those states, the Commissions in those states have worked
3 out with the dominant incumbent carriers open access rules.

4 One can argue that under the Ninth circuit, you should
5 apply those rules to the cable system. We have been asking
6 for a lot less than that for the last couple years. We may
7 have a legal right to all that.

8 So my answer to you is either use the
9 nondiscrimination language from the cellular providers or
10 the nondiscrimination structure from New York and Texas.
11 Off the shelf. They exist. No long proceedings. We know
12 how to do it.

13 Alternatively, I'll give you another example.
14 Recently, Montgomery county adopted a policy in which they
15 defined open access, which was interconnection, at the head
16 end, with no other modification to the system. I also read
17 that as no other intervention between the customer and the
18 ISP from the host cable operator. Very simple definition.
19 One paragraph. I'll make sure you have it.

20 And language like that put it into this merger
21 agreement, put into the AT&T merger agreement under
22 reconsideration will have the effect of establishing the
23 level playing field we heard about. It will balance the
24 bargaining power of the unaffiliated ISP and the affiliated
25 ISP. That's a level of detail I think answers your

1 question.

2 CHAIRMAN KENNARD: Not exactly. You outlined a
3 couple of options.

4 MR. COOPER: Yes.

5 CHAIRMAN KENNARD: But my question very
6 specifically, are you recommending under your formulation of
7 open access, that we consider the issue of pricing and
8 speed?

9 MR. COOPER: I, the best language is, "rates,
10 terms and conditions that are no less favorable than
11 affiliated entities get."

12 CHAIRMAN KENNARD: But that just begs the
13 question, because rates, terms and conditions usually
14 include the issue of pricing.

15 MR. LOVE: What that does, if you, if AOL had
16 agreed in San Francisco to what they had advocated or if San
17 Francisco had agreed to what AOL had advocated, what would
18 happen then is that the ISP would have the right to ask for
19 interconnection, access to the system on rates, terms and
20 conditions no less favorable. If that entity felt that they
21 were being discriminated against, that entity would have a
22 legal right to litigate or perhaps arbitrate, which is the
23 framework of the Telecom Act in 251, 251.

24 So that may be the better way to go. Give them
25 the right. Tell them to arbitrate disputes so that you

1 don't have to try and write rules. We tried to get through
2 this without writing rules by letting private parties have
3 the private right of action. That is what AOL asked for in
4 San Francisco.

5 CHAIRMAN KENNARD: Thank you, Mr. Cooper. Any
6 other questions of this panel? Commissioner Ness, you
7 haven't gone yet.

8 COMMISSIONER NESS: Disney claims that the merged
9 entity would be able to discriminate in routing and caching
10 of data, among other things. Dr. Cooper, since you have
11 addressed this in previous discussions, do you agree with
12 that statement?

13 MR. COOPER: Well, they clearly have the technical
14 ability. That was the great service that the Cisco
15 documents gave to us. The answer is that a policy to allow
16 nondiscrimination would prevent that. And I thought
17 Montgomery county did a good job of pinning that down. That
18 is, a provider like Disney ought to be allowed to deploy its
19 own caching or obtain caching that -- on rates, terms and
20 conditions that are no less favorable than the cable
21 operator provides to its affiliated service provider.

22 COMMISSIONER NESS: Mr. Parsons, would you care to
23 respond to this question?

24 MR. PARSONS: Well, I think that both my colleague
25 from AOL, who's more technically proficient, and I would

1 care to respond. I'm going to let Barry start, but I have a
2 point that I want to make in summary.

3 MR. SCHULER: Yes. I've listened to this issue
4 being discussed of limiting choice, this notion that somehow
5 the merged entity is going to limit choice to consumers,
6 will somehow disadvantage competitors. I just wanted to
7 point out that that idea is an old media idea. It's not an
8 idea that really applies to our media world.

9 What's happening today is, if you think about, if
10 you think about old media, you think about choice is
11 important because there's finite choice. There's so many
12 hours of prime time at night. Therefore, if you're in the
13 media business, your job is to try and get as many people
14 doing exactly the same thing. That's how you make money.
15 That's how you get ratings.

16 In the Internet world, because it's infinite
17 because it's on demand, because you can get what you want
18 when you want it. Our motivation is different. We've
19 learned that the good thing and what consumers want are lots
20 of choice. It doesn't matter to us whether or not people
21 are all doing the same thing.

22 In fact, if you asked 100 different people what
23 AOL is to them, you would hear them say they're completely
24 different things. It's where I get news, it's where I talk
25 to my friends, it's where I get sports, it's where I get,

1 talk to my friends, where I go to the quilting forum. So
2 from our point of view, we can't discriminate content. If
3 we were to employ some kind of caching that somehow
4 discriminates against content, what that means is, to some
5 segment of our members, they all of a sudden have a bad
6 experience. And so it makes absolutely no business sense.
7 In fact, if we did it, what it would do is they would
8 complain.

9 COMMISSIONER NESS: Mr. Orton has agreed that
10 that happens. Have you not?

11 MR. SCHULER: They would complain to us.

12 MR. COOPER: Let me respond.

13 COMMISSIONER NESS: Go ahead, Dr. Cooper.

14 MR. COOPER: Technically, he's admitted, well, the
15 question was a technical question. Can he? And the answer
16 is yes. And so his point is that, look, if I discriminated
17 against CNBC, then my viewer experience is degraded and I'm
18 going to lose a customer. However, if, yeah, I discriminate
19 against CNBC, but they go over to CNN, which really isn't as
20 good on content but now is just, is faster and prettier and
21 quicker, the answer is that I don't know how far they've
22 degraded, and of course they've captured all the economic
23 rents from the fact they're saving the customer.

24 MR. SCHULER: That, that is not how, unfortunately
25 -- and I think our friends at Disney would be the first to

1 say -- consumers buy brands. Brands are not fungible. The
2 fact of the matter is somebody wants to watch the Yankees,
3 it's not as good to go watch the Mets. Someone wants to
4 watch, you know, Disney, it's not as good to go watch Mickey
5 Mouse. If someone wants to go --

6 CHAIRMAN KENNARD: But Mr. Schuler, what if the
7 Mets are in black and white as opposed to color. Isn't that
8 the question?

9 MR. SCHULER: But understand, but understand that
10 because of the fact that the experience of the Internet is
11 so diverse and it's so different and it's so nonreal-time
12 based, meaning anybody can go on at anytime, our job, and
13 what consumers are buying from us, is providing the best
14 quality of service to what they want when they want it. And
15 we never know what that is. It's impossible to know what it
16 is.

17 In fact, history has shown to AOL, who six years
18 ago when the Internet came along, was a proprietary service,
19 there was no Internet. The Internet came along. Everyone
20 said it was going to kill us, it was going to put us out of
21 business. Instead, what we did was we embraced the
22 Internet. We incorporated it into our service.

23 In fact, we set out to be the best Internet
24 service provider out there. And we discovered that by doing
25 that, by providing unrestricted access to content, that

1 people came. Today, 23 million households have decided to
2 buy that.

3 COMMISSIONER NESS: Okay. Thank you. Mr. Levin,
4 you wanted to respond also.

5 MR. PARSONS: I would like to make a comment.

6 COMMISSIONER NESS: Okay. One moment. Mr.
7 Parsons, and then Mr. Levin.

8 MR. PARSONS: Commissioner Ness, you know, you
9 folks have a tough job because you've got to, you have to
10 make a fine balance. Virtually everything that we've heard
11 on this panel today is about stuff that could happen. In
12 fact, as I was sitting here doing a mild slow burn on Mr.
13 Mirabal's comments and thinking about things like CNN en
14 Espanol and People en Espanol and all the things we do in
15 that area, I remembered one of his comments. He said, it's
16 conceivable -- this is a quote, I think -- "it's conceivable
17 that this could have an anticompetitive effect."

18 Now that's unarguable. It is conceivable. I
19 mean, technically, you could degrade the stream on the
20 Internet. Technically, you could degrade the stream that a
21 cable company puts across, but what Barry is saying is not
22 only why would they do it -- they don't do it. They don't
23 do it because, because of the marketplace, because of the
24 competitive dynamic.

25 And I think too many of the commenters on these

1 proceedings have come from the point of view of, not, are we
2 trying to protect competition, but are we trying to protect
3 a competitor? Competition won't let them do, or us
4 ultimately if this Commission and FTC sees its way to clear
5 our merger, do or enter into the kinds of behavior that are
6 conceivable, because there'll be lots of other ISPs out
7 there that are carrying these brands, and we've committed to
8 open access in the way we've defined it in our MOU, Mr.
9 Chairman, so that you can see it.

10 So that I think, you know, the Commission has the
11 job of understanding -- yes, the dimension of the playing
12 field, what is the art of the possible -- but the Commission
13 also has the very difficult job of trying to find the
14 balance so as not to, to borrow a phrase from constitutional
15 law and the first amendment, not to put a "chilling effect"
16 on innovation and on competition by trying to conceive of
17 everything that could go wrong and anticipatorily block it.

18 I think that the genius of our economy and the
19 strength of our economy over the last 15 or 20 years has
20 been, frankly, a cutting back of regulatory impositions that
21 has allowed innovation and competition to go forward. And
22 it's enabled to sort of put ourselves in the front rank. So
23 that --

24 COMMISSIONER NESS: Okay, thank you. Mr. Levin,
25 you wanted to respond. I know we're running out of time.

1 CHAIRMAN KENNARD: You're on the next panel too,
2 so you'll have a chance to continue your monologue. But --

3 MR. PARSONS: Appreciate it.

4 MR. LEVIN: AOL right now discriminates in
5 content. You get the front page of AOL and it's not a
6 random selection of little content that you see on the page.
7 There are people that pay millions of dollars to AOL to
8 have discriminatory placement on the thing. That's what
9 they do. That's the difference between AOL and a generic
10 ISP is you have strategically placed content.

11 The reason that they've been fighting with
12 Microsoft is Microsoft gave a number of discriminatory
13 events that have affected AOL in certain ways that AOL has
14 complained to the Justice Department, and they've seen it
15 happen in the very marketplace that Mr. -- that was
16 described by AOL as something that would be impossible. I
17 mean this is really a load of crap. This idea that the
18 cable companies don't discriminate is ridiculous. That's
19 what they do. They're the gatekeeper of the platform. They
20 decide whether you get the golf channel or the food channel,
21 and, you know, if they're part owner of you, your odds of
22 getting on tend to be a little higher, but I mean that's
23 exactly precisely what they do.

24 Now, what's going on with the architecture at the
25 next thing is different than what AOL deals with right now.

1 It's going to be qualitatively, characteristically
2 different. The people at -- Steve Wolf, the guy that used
3 to run NSF's operation on the Internet that went over to
4 Cisco used to debate this, you know, about eight years ago
5 on the Com.priv list (phonetic), and he used to talk about
6 wouldn't people pay for a go-fast button? Now, what's
7 driving it is multimedia. If you're talking about simple
8 frames of Web pages and e-mail message, you don't really
9 have to have this high-tech, go-fast stuff like you do now,
10 but with streaming media, the kinds of things they want to
11 convert the Internet into, these things resurface.

12 The fact that the technology is where it is right
13 now is part of a cycle. It's like this now. Five years
14 from now, it's going to be different. And maybe five years
15 later it will be like it is again now. It goes through
16 cycles. Thank you.

17 CHAIRMAN KENNARD: Excuse me, I'm going to have to
18 cut you off. We are running very far behind. Commissioner
19 Powell has an engagement, so he has to leave soon.
20 Commissioner Tristani, you'll have the last question on this
21 panel. Then, we're going to have to break for the final
22 panel.

23 COMMISSIONER TRISTANI: I had a question for Mr.
24 Mirabal and a bit of a comment, but first of all, you made
25 some statements that Time Warner was running a -- and I

1 think it was a Seinfeld episode? -- is that a fact? And
2 I'm talking about the Seinfeld episode which ridiculed
3 Puerto Ricans, burned the Puerto Rican flag and made all
4 Puerto Ricans look like rioters.

5 MR. MIRABAL: That's correct.

6 COMMISSIONER TRISTANI: They are running it on
7 syndication?

8 MR. MIRABAL: They, they produced it through one
9 of their production companies, Castle Rock. And prior to
10 the airing of that episode, a coalition of Hispanic
11 organizations requested well in advance that we be allowed
12 to screen that episode because of the denigrating manner in
13 which it presented --

14 COMMISSIONER TRISTANI: I know about that, and
15 that's kind of, that happened, but my concern is now, is
16 that still being run? Do you know that as a fact?

17 MR. MIRABAL: The, the piece that is continuing to
18 be run is Fort Apache, which is worse than the Seinfeld
19 episode, because the Seinfeld episode, to the extent that it
20 is a comedy, treated that with some humor, which we were not
21 happy about. But Fort Apache does not treat it with any
22 humor. And that continues to be run on the station.

23 COMMISSIONER TRISTANI: Have you asked them not to
24 run it?

25 MR. MIRABAL: Yes, we have. They have, they

1 probably in their records continuously dating back from when
2 they began running that, that particular movie. I saw it
3 once only three months ago when I was in Boston doing a
4 speech, and I was appalled that it was running again on the
5 station.

6 COMMISSIONER TRISTANI: And let me ask you
7 another, and this will be my final question, but you, I
8 think, raised some concerns about there not being
9 programming about Hispanics. Is this something that's just
10 a problem with Time Warner or is it a problem with other --

11 MR. MIRABAL: No, it is not. I'm a member of the
12 National Hispanic Media Coalition, and we've been very
13 public about our concerns on all stations, lack of
14 programming addressing the Latino community. And as I said
15 before, there is limited programming in all stations, but
16 we're, we're citing Time Warner, because that is the basis
17 of this discussion today.

18 COMMISSIONER TRISTANI: Thank you, Mr. Mirabal.

19 CHAIRMAN KENNARD: Finished? Okay. Thank you all
20 very much for this panel. We will take a 10-minute break
21 and then reconvene. We need to move through the next panel
22 quickly, because I'd very much like to reserve some time for
23 statements from the general public. Thank you.

24 (There was a brief recess.)

25 CHAIRMAN KENNARD: Before we begin our next panel,

1 I wanted to make an announcement. We very much view this
2 process as an ongoing process of collecting information for
3 the record that we're developing in connection with this
4 proposed transaction. And in that regard, we have
5 established a Web site and an e-mail address where people
6 who are interested in contacting us about this transaction
7 and providing additional comment, which will be included in
8 the record, can do so by sending their comments to AOLTWPS
9 at FCC.gov. That's AOLTWPS at FCC.gov.

10 We'll now go to our next panel, which will be
11 industry perspectives on this transaction. And the first
12 witness will be Mr. William Reddersen, executive vice
13 president of BellSouth Corp. Mr. Reddersen.

14 MR. REDDERSEN: Mr. Chairman, I suspect that I
15 don't have to introduce myself now. I am Bill Reddersen,
16 and good afternoon to all, Commissioners and to the staff.
17 Let me start by thanking you for this opportunity to share
18 with you BellSouth's concerns surrounding the merger of
19 these two great companies. Before I get into the specific
20 issues, I would like to make a couple of brief comments up
21 front.

22 Today's industry convergence is a very natural
23 outcome of both broadband and Internet technology, and this
24 trend will likely result in a limited number of vertically
25 integrated players like this combination and AT&T. Given

1 this consolidation, we at BellSouth do not object to this
2 merger, per se. However, we do believe that this merger
3 must be conditioned to ensure that the consumer value
4 created by it is not outweighed by the potential
5 anticompetitive choice-limiting impacts of it.

6 Finally, these issues are purely about conditions
7 on a voluntary merger. They have nothing to do with
8 regulating the larger Internet, per se. Given the
9 consolidated market power and concentration of key resources
10 created by this merger, there are three deal-specific areas
11 with which this Commission, the FTC and the Justice
12 Department must be concerned.

13 First, if a limited number of megaplayers is a
14 natural industry progression, then real competition will
15 result only if these new megaplayers are required to compete
16 rather than allowed to cooperate and share markets.

17 Secondly, the scarce and required resources
18 individually controlled by AOL and Time Warner, each with
19 their own substantive market power, must be made available
20 on market-based terms and conditions, or competition will be
21 reduced.

22 Third, all of these players, including AOL, are in
23 the network business. This Commission has understood for
24 decades that independent or unconnected networks restrict
25 competition. Given these points, we believe this merger

1 must be conditioned in the following three ways.

2 First, a very bright line must be drawn between
3 the new AOL Time Warner and the merged ATT/TCI/Media One.
4 The DOJ has already identified this concern but clearly did
5 not have this additional merger in its scope. These two
6 gigantic companies must be required to compete and not
7 allowed to share markets in any way. All current and joint
8 ownership between AOL and AT&T should be eliminated and
9 prohibited going forward. The simple test which must be
10 applied to all future AOL AT&T relationships is to require
11 that they be based solely on generally available market
12 terms and conditions.

13 Second, as both AOL and Time Warner stated in
14 their May 11th filing, open access to content is their
15 policy. The public interest will be best served if this
16 voluntary policy is clearly codified. The dominance of
17 AOL's distribution control is unrivaled by any other network
18 today, broadcast, cable or satellite. This Commission
19 clearly knows that withholding content will have serious
20 impact on competition.

21 You lived it with satellite and cable
22 overbuilders, and you will relive it in the broadband
23 Internet world if we are not vigilant. The relationship
24 between Time Warner content and AOL-packaged distribution
25 must be based on generally available market terms and

1 conditions. Again, a simple principal simply applied to
2 this merger.

3 Finally, AOL is a network in and of itself. In
4 fact, it is one of the highest volume communications
5 networks in the world. It is the largest by an order of
6 magnitude of any other consumer Internet network. Combined
7 with Timer Warner Cable, it will grow even larger in its
8 market power. The issue here is simple, as well. Like any
9 other network, AOL must be required to openly interconnect
10 with other networks.

11 This issue is best seen in the instant messaging
12 debate. If I reduce this complex debate to a simple
13 telephone analogy, what it would mean is that customers on a
14 competing SELEX (phonetic) network would not be allowed to
15 talk to customers on BellSouth's network equally. Without
16 such standards-based interconnection, no long distance or
17 local telephone competition could ever or would ever
18 develop. Certainly, such a standard should be applied to
19 this merger, as well.

20 In closing, let me summarize quickly. First, AOL
21 Time Warner and ATT's TCI Media One must be fully separate
22 and must compete with each other and not allowed to join
23 together. Second, Time Warner content that is packaged and
24 distributed through AOL's dominant Internet environment must
25 be made available on market terms and conditions. Finally,

1 AOL's network must openly interconnect to others.

2 It is no accident that these merging parties
3 clearly recognize these critical issues going into this
4 merger. That is why they voluntarily offered up their MOU
5 and their May 11th letter to this body. Now, all that
6 remains is for these stated promises and policies to be
7 refined and codified as conditions to deal approval.

8 I've listened to all of the discussion today very
9 carefully. There's been a consistent theme coming out of a
10 lot of different points made. That is that we're dealing
11 with a past history of closed environments. We're dealing
12 with the technical capability and potential self-interest to
13 continue some of that behavior. We're dealing with a theme
14 of "trust me," going forward that doesn't make sense
15 anymore.

16 And all of the panelists, to a member, have said,
17 don't take the "trust me" theme. Codify the promises.
18 Thank you, Mr. Chairman.

19 CHAIRMAN KENNARD: Thank you. Mr. Padden?

20 MR. PADDEN: Thank you, Mr. Chairman. I'd like to
21 focus my remarks today on interactive television, which, at
22 least to our way of thinking, represents the convergence of
23 traditional television, Internet content, communications and
24 commerce. And our company is investing millions of dollars
25 in developing wonderful new interactive television content

1 for consumers. For example, on election night this year
2 we're going to have interactive election coverage, the likes
3 of which the American people have never seen before. They
4 won't have to wait for the race, the information about the
5 races they're interested in to be selected by the director
6 in the studio to come up on the screen.

7 You'll be able to pull up and call the election
8 results you want. We'll be able to do instant polls. We're
9 also doing, although not quite on the same level of civic
10 responsibility, a play-along game with Regis Philbin on Who
11 Wants to be a Millionaire, and interactive content to go
12 along with Sunday night and Monday night football. And even
13 on Saturday mornings, we have interactive content for
14 children. We call it Zoog Disney. The Zoog's are creatures
15 that live in the Zether, which is the space between the
16 computer and your television. And we've had wonderful
17 success with all of this.

18 And Mr. Love remarked that he thought it was a
19 little strange that a big company like Disney was taking the
20 position we are. But it's really very easy to explain. All
21 we want is a world where, as we deploy this interactive
22 television content, consumers have the right to choose or to
23 not choose our content based on how good a job we do
24 creating it and promoting it. And what we're trying to
25 avoid is a world where that choice is skewed or limited by

1 the business interests of the company that owns the pipe to
2 the consumer's home.

3 And we are very focused on the cable plant,
4 because all the analyst reports that we read say the hybrid
5 fiber coax network will have great advantages over every
6 other technology in delivering this interactive television
7 product. Certainly, DSL, which may be competitive with
8 cable modems for high-speed Internet access, at least as it
9 exists today and for the foreseeable future, consumers are
10 not going to have the option of getting interactive
11 television over DSL, because the technology just doesn't
12 support it.

13 Satellite is great, but a lot of consumers don't
14 have access to satellite, and even those that do, the return
15 path is not comparable to the return path available on full
16 interactive two-way cable. Now our company stayed out of
17 other mergers that have come before this agency, despite
18 significant concerns. We've also stayed out of the open
19 access debate. We've not been among those who have been
20 critical of this agency for not moving more quickly,
21 frankly, because we heard the rationale that you didn't want
22 to stifle the development of broadband, slow its deployment,
23 and that made some sense to us.

24 There's two things that pushed us over the line
25 with respect to this transaction. First, you heard Mr.

1 Levin say that they are now starting to install routers that
2 are capable of open access. And I think in that statement
3 there's a very important fact. And that is the architecture
4 for interactive television systems is being set now.
5 Decisions are being made now about what kind of routers are
6 in fact going to be installed in these networks. What
7 capabilities will be in the box and in the operating system.

8 And we think it's important that the concept of
9 openness get built in now. Also, we believe this merger is
10 different than any other merger that has come before you. A
11 different collection of assets. It's a merger of the AOL
12 walled-garden marketing environment with the narrow,
13 bottleneck cable pipeline and the Time Warner content
14 library. Several of the witnesses have referred to all the
15 pieces of the puzzle that come together in this company --
16 cable past 20 million homes, half of the narrow-band
17 Internet marketplace, and on and on -- we don't think you
18 can rely on promises of good behavior.

19 We think there's a history here with both
20 companies, the common thread being abusing bottlenecked
21 facilities to limit consumer choice. I'll give you just a
22 few examples. AOL, if you want, if you're a company that
23 wants to put your content inside their walled garden, their
24 contract will require you to disable navigation links
25 otherwise available to the consumer. There is no way to

1 characterize that requirement as pro consumer choice. It's
2 anti-consumer choice. It's taking choice and options away
3 from the consumer.

4 We've provided those contracts to the Federal
5 Trade Commission. If we can work out the appropriate
6 protective order, we'd be happy to provide them to you.
7 With respect to Time Warner, they refuse to carry the local
8 and regional news channels they don't own. That's not the
9 consumer making the choice, that's Time Warner making it for
10 them. They refuse to carry Disney channel on basic. They
11 own a children's channel called Cartoon Network. We believe
12 they have a conflict of interest and that's why they did
13 that.

14 I see my time is up. We're very concerned about
15 what they're going to do in this interactive marketplace,
16 particularly discrimination on the return path. And I just
17 wanted to read you the one sentence from our
18 just-negotiated, hard fought retransmission consent
19 agreement with Time Warner with regard to the return path so
20 you'll know, despite all the focus on this issue, what we
21 were able to achieve.

22 The contract says, "Nothing contained herein shall
23 obligate operator to provide broadcaster with access to any
24 return path provided to subscribers by operator for any
25 purpose." So we got nothing. Thank you, Mr. Chairman.

1 CHAIRMAN KENNARD: Thank you, Mr. Padden. Mr.
2 Weed?

3 MR. WEED: Good afternoon, thanks for being here.
4 I'm Steven Weed. My real job is I run a group of cable
5 systems in the Northwest, but I'm here today as vice
6 chairman of the American Cable Association. The ACA
7 represents about 300 independent cable companies,
8 representing about three million subscribers, primarily in
9 smaller and rural markets. ACA must transact with media
10 conglomerates like Disney/ABC, Viacom, Fox and Time Warner
11 for programming essential to its video business.

12 Those companies have overwhelming market power
13 over independent cable companies. In many cases, they use
14 this market power to determine -- to the detriment, excuse
15 me, of independent cable and its customers. That's why
16 we're here today. On behalf of our members, I thank the
17 Commission for the invitation to voice our concerns. ACA
18 has participated in this proceedings to raise one important
19 public interest issue.

20 Postmerger Time Warner AOL will control essential
21 Time Warner programming, AOL services, including AOL TV, and
22 substantial investment in the largest direct TV broadcast
23 company, Direct TV. These factors give AOL Time Warner the
24 market power to threaten the public interest and a viable
25 independent cable industry and its progress in closing the

1 digital divide.

2 I want to about the digital divide. The
3 Commission has voiced repeated concerns over the digital
4 divide. That is, the concern that consumers in certain
5 markets, including smaller markets in rural areas, will not
6 have access to broadband services. In fact, recently,
7 Chairman Kennard observed that the lack of high-speed access
8 in rural regions stems primarily from the high cost of
9 providing such services. Chairman Kennard stated,
10 "Providing customers with sophisticated services in areas of
11 low density is an expensive undertaking."

12 ACA members know this economic very well. But one
13 important point is overlooked in the digital divide.
14 Independent cable is making great progress in smaller
15 markets. Increasing numbers of ACA members are delivering
16 high-speed broadband services, including high-speed Internet
17 access, to smaller communities in rural areas throughout the
18 United States. It's an expensive undertaking, but
19 independent cable is figuring out how to serve these markets
20 and is taking the risk and making it happen.

21 But the business model in smaller markets is far
22 from proven. Independent cable's progress could be stalled
23 by the imposition of costly local, federal regulation or by
24 abuse of market power by companies that control essential
25 programming and Internet services. This brings us to the

1 ACA's primary question to the applicants. Will AOL Time
2 Warner require independent cable operators to carry AOL
3 services as a condition of access to essential Time Warner
4 programming?

5 If they answer in the affirmative, the question
6 would pose a serious threat to independent cable's progress
7 in providing advanced service to smaller markets. It could
8 ultimately force many smaller systems out of the business
9 altogether. Here's how it could happen: To advance AOL's
10 anywhere strategy, AOL Time Warner could require carriage of
11 AOL service on independent cable systems as a condition of
12 access to essential Time Warner programming. They could
13 make independent cable pay for these services like
14 Disney/ABC and others make independent cable pay for
15 undesired services as a condition of access to its essential
16 broadcast and satellite programming now.

17 Independent cable systems would have no choice but
18 to accept Time Warner's terms or lose customers to satellite
19 dishes. This would disrupt existing ISP partnerships, raise
20 costs for small cable operators, cut margins, deter
21 investment and stall network upgrades. AOL and Time Warner
22 have responded to ACA's question but in inconsistent ways.

23 First, the applicants argue that they would not
24 require carriage of AOL services as a condition of access to
25 Time Warner programming, because it was not in their

1 economic interest to do so. Independent cable operators
2 would just find an alternative programming, Time Warner
3 said. This economic argument does not work. Of course it
4 is in the applicant's economic interest to leverage key
5 programming assets to force carriage of other services.

6 As a prime example, Disney/ABC. To gain access to
7 ABC programming and essential services like Disney and ESPN,
8 independent cable must agree to a varying array of
9 burdensome and costly conditions. AOL Time Warner would
10 have the same incentives to tie programming and AOL services
11 unless they valued the public interest and a viable
12 independent cable industry. The applicants have suggested
13 they might.

14 In their July 12th filing, AOL and Time Warner
15 made an unequivocal statement that they would not require
16 carriage of AOL services as a condition of access to Time
17 Warner programming. ACA cheered. Time Warner and AOL, it
18 seemed, to be the first media conglomerate acknowledging its
19 obligation to temper its economic interest with the public
20 interest and fair treatment of independent cable companies.

21 But then, in the applicant's July 17th filing,
22 they appeared to retreat from this statement. With this
23 apparent inconsistency on the record, ACA asks today for
24 clarification. The most appropriate clarification for these
25 applicants is to affirm that they will not condition access

1 to any Time Warner programming on carriage of any AOL
2 services. With that clarification on record and included in
3 this Commission's order in the docket, ACA can support the
4 merger.

5 Moreover, ACA can commend AOL and Time Warner for
6 their willingness to step up to the important public
7 interest obligations of supporting independent cable and its
8 efforts to close the digital divide in smaller markets.

9 CHAIRMAN KENNARD: Thank you, Mr. Weed. Mr.
10 Bagully?

11 MR. BAGULLY: Good afternoon, Mr. Chairman,
12 Commissioners. I'm Ross Bagully, CEO of Tribal Voice.
13 We're an independent provider of instant messaging services.
14 I want to first thank you for the opportunity to be here
15 today and to participate in this hearing. I would also like
16 to depart from the printed text that I have previously
17 provided, to take the opportunity to address some of the
18 comments made here today.

19 But initially, I want to comment that there are 28
20 million deaf and hearing impaired American citizens who rely
21 on instant messaging services, much like most of us use the
22 telephone, and I would ask, do any of us believe that those
23 28 million citizens should have less functionality in their
24 communications media than those of us who use the telephone
25 have today. Certainly, none of us would tolerate the

1 example that we heard from BellSouth, where you had to have
2 a different service to communicate with somebody who had
3 AT&T or Sprint or MCI. Certainly, that should be -- that
4 should carry over in the world of instant messaging to the
5 deaf and hearing impaired community.

6 Earlier today, Mr. Case discussed the availability
7 of the AOL instant messenger and his commitment to
8 interoperability. However, one year ago, Mr. Schuler
9 promised to fast-track interoperability within the IETF.
10 During that one-year cycle, there has been very limited if
11 any participation by AOL in the IETF process. Two to three
12 months ago, Mr. Case again addressed the issue of IM
13 interoperability, and at that time, his suggestion was you
14 could achieve interoperability by licensing AOL's software.

15 Shortly thereafter, AOL has again changed its position,
16 again promising to fast track interoperability with the IETF
17 but using as an excuse, security and privacy concerns of its
18 members.

19 I guess my question, Barry, would be why didn't
20 you tell us that a year ago? And the next question would be
21 were you misleading us then or are you misleading us now?
22 On the question of interoperability and its effect on
23 security for the members and privacy concerns, there's not
24 been one indication that anybody has demonstrated that
25 security and privacy is in any way more threatened or

1 further at risk with interoperability than it is without it.

2 And in fact, maybe Mr. Schuler can address that later this
3 afternoon.

4 One of the comments was -- that Mr. Case made was
5 that AIM can be downloaded for free from the Internet and
6 can be used. This is absolutely correct. However, the
7 answer to that is, what happens to the competitive
8 marketplace and where is the incentive for new features, new
9 functionality, new choice for the consumer if everybody in
10 fact is using a single delivery product?

11 The other point on that, by the way, was while it
12 is free, there is a licensing agreement. The licensing
13 agreement gives AOL the unilateral right to change the terms
14 and conditions of your use of that product at any time in
15 the future. Now, that's not unusual in a licensing
16 agreement. What's unusual is that this is an excuse why
17 there doesn't need to be any competition and it's okay for
18 them to completely own the market.

19 Commissioner Tristani, I would urge you to take up
20 Steve Case's offer to download AIM and to try that product.

21 And I would ask you at the same time, try Microsoft's, try
22 Yahoo's, try Tribal Voice's, try Otogo's et cetera. And
23 after you do that, I would ask you to think about when you
24 want to make your choice about which product to use, do you
25 want to have the option of making the choice because one

1 product had features and functionality that you preferred,
2 or because one product gave you access to 92 percent of the
3 world to communicate with and the other products limited you
4 to eight or 10 percent?

5 We all know that interoperability is essential for
6 networks to grow and expand. That's been true for a long
7 time. Mr. Parsons discussed a lot of issues earlier, and he
8 was saying that we were anticipating bad behavior, but what
9 I'm talking about today isn't anticipatory at all. I'm
10 talking about bad behavior that has been occurring for the
11 past 12 to 18 months. AOL consciously, intentionally and
12 knowingly blocks ours, Icast's, AT&T's, Microsoft's access
13 to inter-operating with their system, all companies using
14 protocols, which AOL published themselves and which they use
15 for their own system.

16 In closing, I ask the Commission to join us in
17 telling Mr. Case, break down this wall. Thank you.

18 CHAIRMAN KENNARD: Thank you. Mr. Melcher?

19 MR. MELCHER: Thank you, Mr. Chairman. I'm last.

20 I hope I'm not least. Good afternoon, my name is
21 Christopher Melcher and I'm vice president and general
22 counsel for RMI.NET. I would like to thank the Commission
23 for providing me the opportunity to comment on the proposed
24 merger of AOL Time Warner and its impact on the issue of
25 open access for residential and business consumers to

1 Internet access over the cable technology.

2 RMI.NET is a national Internet commerce solutions
3 provider with a strong regional focus in the Midwest,
4 Southwest and Western United States. We will have
5 approximately \$50 million in revenue for year 2000.
6 Significant in our minds, but obviously pales in comparison
7 to the other folks at this -- some of the other folks at
8 this table and who have spoken previously. We believe
9 ourselves to be a provider of the broadest possible range of
10 Internet access services to business and residential
11 customers and a premier one-stop provider of Internet access
12 and web services to small- and medium-sized business
13 customers. We are one of the small to midsize ISPs that
14 have been talked about here today.

15 We provide Internet access to more than 100,000
16 customers nationwide, and we offer the full spectrum of
17 Internet access from standard dialup to DSL to high-volume
18 T1s and DS3s all the way up to wholesale Internet access as
19 a backbone provider for other smaller ISPs. We are a
20 primary Internet access provider for thousands upon
21 thousands of residential Internet users across our nation,
22 especially those located in rural America and isolated
23 communities throughout the Midwest and Western United
24 States.

25 We are a member of the United States Internet

1 Industry Association, a nonprofit association that
2 represents the interests of smaller to midsize Internet
3 service providers. RMI.NET and the U.S. Internet Industry
4 Association both strongly support the opening up of the
5 nation's cable systems to true competition at the wholesale
6 and retail level. We believe this should be an express
7 condition of any FCC approval of the proposed merger between
8 AOL and Time Warner.

9 As Chairman Kennard correctly raised earlier
10 today, the real issues is not whether high-speed cable as a
11 broadband access technology will compete with DSL or other
12 forms of high-speed Internet access. The issue is whether
13 we should close one form of high-speed access to the
14 Internet to competition. Given that cable may prove to be
15 the superior form of broadband Internet access, your
16 decision will affect the entire Internet industry and will
17 affect how our nation and the world communicate.

18 With the change in AOL's position on open access
19 from prior to their proposed merger with Time Warner to now
20 their position following that announced merger, it becomes
21 imperative that the FCC take up the cause of open access for
22 consumers on the nation's 8,000 smaller Internet service
23 providers. The FCC should make open access a clear and
24 enforceable condition of its approval of the AOL Time Warner
25 merger. Let me explain briefly why we support open access

1 and discuss the four most common myths perpetuated by
2 opponents of open access.

3 First, we believe the correct analogy should be
4 the analogy to DSL. Open access should mean that Internet
5 service providers have access to the cable plant and to the
6 cable head end, and that should be that we have direct
7 access to the consumer, with no interference. The first
8 myth the cable industry will tell you is that open access is
9 not fair. They will tell you that they have built or
10 purchased their systems and have the right to control
11 access.

12 In fact, we believe those systems were built with
13 the support and participation of the public, not only
14 through franchise awards but through guaranteed consumer
15 revenue for the cable companies in the form of predictable
16 cable rates and increases a local regulated monopoly, if you
17 will. I would argue that the public, therefore, has some
18 portion of equity or ownership in these cable systems, which
19 entitles the public to have competitive open access and
20 choice on that system which they helped to build.

21 In reality, we believe AOL and Time Warner would
22 prefer to create a tilted and skewed playing field by
23 creating a closed system for Internet access and
24 telecommunications services over that system. This would
25 force the consumer to make difficult, noncompetitive

1 choices.

2 Myth number two is that open access cannot be
3 accomplished quickly. Until recently, the argument was that
4 open access could not be accomplished at all. It was
5 technically impossible. I assume AOL and Time Warner would
6 agree that today there are no technological barriers to open
7 Internet access over the cable plant. As we all know, AT&T
8 admitted as much several months ago in a letter to the FCC
9 with Earthlink.

10 The question of open access for all Internet
11 service providers over the cable system is no longer a
12 question of whether there should be access, but the question
13 is simply is only when and under what terms. AOL and AT&T
14 have now publicly admitted that the critical issue will be
15 how open access will be implemented, and both have started
16 to develop and implement open access cable trials to explore
17 how multiple Internet service providers would operate over
18 that cable system. AT&T began a trial in Boulder, Colorado.
19 We've just learned recently that AOL is starting a trial in
20 Columbus, Ohio.

21 We are pleased to be a participant in the AT&T
22 open access cable trial, and we are beginning that process
23 now. We also would hope to be a participant in AOL's open
24 access cable trial, and I would like to take Mr. Levin up on
25 his offer that any ISP that requests will be asked to

1 participate. We so request. But those trials are
2 proceeding very slowly and with very limited focus.

3 We have seen absolutely nothing yet that would
4 support any decision by the FCC to delay or eliminate the
5 immediate intervention and regulation to ensure true open
6 access over the cable system. These trial are going through
7 several phases. We do not expect those, even the
8 preliminary phase to be completed until well into later this
9 year or into next year, 2001. We don't expect there to be
10 any significant results on a number of issues until well
11 into 2001, perhaps 2002.

12 History has taught us that you cannot allow the
13 owner of a monopoly or monopsony technology to control the
14 terms of the access to that technology. This is what we
15 learned from the breakup of Ma Bell in the 1980s and the
16 Telecommunications Act of 1996.

17 The third myth is that requiring open access would
18 hurt competition and the marketplace. What will hurt
19 competition in the marketplace is to allow AOL in concert
20 with AT&T to divide and control nearly 75 percent of the
21 broadband access market. If AOL Time Warner are allowed to
22 control and close off a significant percentage of the
23 broadband access market, the remaining small Internet
24 service providers like RMI will quickly be extinguished.

25 Competition, as one Commissioner mentioned

1 earlier, is not allowing two 800-pound gorillas to fight
2 over a technology superior product. It's allowing for all
3 of the Internet service providers to compete over that
4 product. That's the model that has resulted in the
5 phenomenal growth and success of the Internet. Cable may be
6 the superior product.

7 DSL and other high-speed broadband access pass
8 only roughly 30 percent of the homes in America today.
9 Cable and cable broadband currently pass nearly 90 percent
10 of the homes in America. It's a significant issue.

11 The final myth is that open access will hurt the
12 consumer. Again, dead wrong.

13 CHAIRMAN KENNARD: Mr. Melcher, I'll ask you to
14 sum up, please.

15 MR. MELCHER: Thank you, Mr. Commissioner, Mr.
16 Chairman. In sum, we would say that the final myth is that
17 open access will benefit the consumer by allowing the
18 consumer to retain the service that they have now from their
19 local Internet access provider. We ask the FCC to mandate
20 open access as a condition of this merger. Thank you very
21 much.

22 CHAIRMAN KENNARD: Thank you. And thank you all
23 for your presentations. I think, in fairness to Mr.
24 Schuler, we should give him an opportunity to respond to the
25 questions of Mr. Bagully that were offered in his

1 presentation.

2 MR. SCHULER: Thank you. Let me just provide a
3 lot of perspective, or at least put some context around this
4 instant messaging issue, which I know is very confusing to
5 people. And it's important to know, when we talk about
6 instant messaging being free, which was a surprise to some
7 people, that we made it free voluntarily. We actually
8 stimulated -- I think the reason why Tribal Voice is in
9 business today is because we created that category.

10 The way consumers are using instant messaging
11 today is, while the services don't talk to each other, every
12 consumer can talk to each other. If your friend happens to
13 use Yahoo Messenger and you know it, you download Yahoo
14 Messenger. And it's not like the telephone metaphor, where
15 you have to have six phones. It's really all on your
16 computer. We're talking about the difference between how
17 many buddy list windows might you have up. One, two or
18 three.

19 But for consumers today, they essentially have
20 interoperability. Now, that does not mean that we think
21 interoperability is a bad idea. We think it is a good idea,
22 for a lot of the reasons that are, have been suggested. And
23 it's also been suggested we've slow-rolled interoperability
24 for some ominous reason, but I'd like to talk about that as
25 well. And I want to use e-mail as the point of history.

1 If you go back 15 years, e-mail also was not
2 interoperable. Corporations, who mostly used e-mail all had
3 their own systems, and you could only mail people inside of
4 a corporation. Then, the industry decided to create
5 protocols to allow e-mail servers to talk to each other. We
6 believe that that's exactly the way you need to enable
7 instant messaging interoperability.

8 However, while e-mail interoperability was done
9 successfully, unfortunately, when it was done, no one knew
10 about spam. No one thought about the idea that when servers
11 had open protocols and that they could talk to each other,
12 that harmful people out there would all of a sudden start
13 figuring out how to send lots of mails, which were, are
14 either marketing materials or, worse yet, pornographic
15 materials that end up in people's mailboxes. You've heard
16 about things like the Love Bug virus that caused damaging
17 effects on networks. Those are all distributed via e-mail.

18 And I can tell you we have 8,000 people in our
19 call centers. We take two millions calls a week from our
20 customers. The single biggest complaint we get from them is
21 spam. They think we let it get through. We get -- I read
22 these things, I see it, I've seen things, why did you let my
23 daughter see a pornographic picture?

24 So in thinking about this interoperability issue,
25 our biggest concern is, so now, when we go to do this again,

1 how do we make sure we build in the controls that are going
2 to A, give consumers the ability to filter out what they
3 don't want, B, to ensure that the hackers and spammers out
4 there who seem to be much smarter than all of us who run the
5 networks and manage to get their way in, will be prevented?

6 And how can we, who each want to run independent services,
7 can maintain the standards of our service?

8 And this is the most important thing of all. On
9 AOL, instant messaging is a feature. And one of the reasons
10 people buy AOL today is because we have standards. We have
11 community standards, and we monitor and police them. If
12 people do bad things, we throw them off.

13 On our instant messaging service, we have a little
14 button, and it says "Notify AOL." And what it does is if
15 someone's harassing you, if someone is -- and understand
16 that spam or harassment in instant messaging is real time.
17 It's someone who's talking to you and may be saying bad
18 things to you -- if that happens, we have a button that you
19 press. It says, "Notify AOL." When you press it, it goes
20 to a real live human being in our call center who
21 immediately intervenes. That's the standard of service we
22 offer, and that's what we pay for -- that's what people pay
23 us for.

24 If you go to Tribal Voice -- and they also have
25 standards, but let me tell you how, on their own Web site,

1 they tell you to deal with a person who harasses you. I
2 will just read this. It won't take too long. "If you've
3 been abused or harassed on Powwow, find the IP address of
4 the perpetrator by clicking on the name field in the
5 person's powwow window. The window cycles between the
6 person's powwow ID and his or her IP address." It goes on
7 and on for a couple of more paragraphs.

8 "Once you have the IP address, you can look up the
9 person's Internet service provider using any WHOIS program.
10 The Internet provides a Web page from which you can run a
11 WHOIS inquiry directly. Such an inquiry usually returns the
12 name, address and phone number where you can file a
13 complaint. Be sure that you can provide the IP address,
14 offender and the time of the occurrence. If you are
15 unsuccessful at identifying abusers, e-mail Abuse at
16 Tribal.com and we will track them down. Please include the
17 person's powwow name, powwow ID, powwow address." It goes
18 on and on.

19 And then it comes to the end. "In addition, if
20 criminal actions are involved, we urge you to contact your
21 local police. Tribal Voice will cooperate fully with the
22 authorities." Now, the point I'm making here is that he is
23 free in his business to set the standards for his community
24 he wants.

25 There are two ways to do interoperability.

1 There's a right way and a wrong way. In the wrong way, the
2 client-to-client or peer-to-peer way, we would be forced to
3 the lowest common denominator of providing service to our
4 members. In the right way, server-to-server, the proposal
5 which we put forth to the IETF, the IETF has been struggling
6 with this issue --

7 COMMISSIONER TRISTANI: I think one other point
8 you maybe misunderstood Mr. Bagully made was that a year
9 ago, he was told one thing, and then a few months ago, he
10 was told it's the privacy issue --

11 MR. SCHULER: Well, no --

12 COMMISSIONER TRISTANI: And the security issue.
13 Let me finish.

14 MR. SCHULER: Um-hum.

15 COMMISSIONER TRISTANI: And he also indicates that
16 there had been flip-flops.

17 MR. SCHULER: Okay, so let me clarify --

18 COMMISSIONER TRISTANI: So there were different,
19 so, and, and it would surprise me that you weren't thinking
20 about these issues a year ago or 18 months ago if you were
21 really seriously thinking about doing interoperability.

22 MR. SCHULER: Okay. My turn? We have been
23 absolutely consistent all the way through - and we can go
24 show you my quotes -- that privacy and security and the
25 difficulty, the technical difficulty of getting these

1 systems, which must communicate in real time to be able to
2 allow us to do what we're talking about doing. And that is
3 us to offer a level of service, other companies to offer a
4 level of service. It is very hard. We run another service.
5 We have another instant messaging service --

6 COMMISSIONER TRISTANI: Do you think this is
7 something you can do?

8 MR. SCHULER: We do. We do, and we put forth the
9 way we believe it can be done. Just so you know, the
10 industry standards body, who has been working on this issue
11 for more than a year gave up. The people, the work group
12 who has been trying to figure out how you put forth the
13 protocols absolutely gave up, and finally --

14 COMMISSIONER TRISTANI: Were you, were you working
15 with them?

16 MR. SCHULER: We were working with them. And
17 finally, they just basically said, look, we'll take
18 proposals from the industry on how to do that. We were the
19 only ones who did it. We came forward --

20 COMMISSIONER TRISTANI: But you were working with
21 them throughout from the beginning?

22 MR. SCHULER: Yes. And we put forward a proposal
23 that outlines how to do this server to server
24 interoperability. Nobody else did. Microsoft didn't.
25 Yahoo didn't. Tribal Voice didn't. No one else came

1 forward with a proposal. We did.

2 CHAIRMAN KENNARD: Mr. Schuler.

3 MR. SCHULER: And the important thing to add is
4 that interoperability has to be true interoperability.

5 There are many services out there --

6 CHAIRMAN KENNARD: Mr. Schuler.

7 MR. SCHULER: Let me finish. Let me finish. The
8 fact of the matter is -- Oh, I'm sorry, I'm sorry.

9 CHAIRMAN KENNARD: I understand your getting
10 carried away with the excitement, but we really do need to
11 get back to a couple fundamental questions. I just want to
12 know what the time frame is. You've said that you want this
13 to happen and that you can do it. Could you tell us for the
14 record when it will get done?

15 MR. SCHULER: Well, we can tell you for the record
16 that there are two pieces to the puzzle. One piece of the
17 puzzle is building the technology that will allow our
18 servers to interoperate with other services and incorporate
19 all the controls that allow us to protect our consumers. We
20 think that's about a 12-month job. Then, there's another --

21 CHAIRMAN KENNARD: Twelve months from today.

22 MR. SCHULER: We are working at it right now. But
23 there's another issue --

24 CHAIRMAN KENNARD: Is that a yes?

25 MR. SCHULER: Well, yes. Twelve months from

1 today.

2 CHAIRMAN KENNARD: Twelve months from today.

3 MR. SCHULER: But let me clarify. That's 12
4 months to do the technology. There is another issue that's
5 important, and that is the issue -- understand that as we
6 are publishing what we are doing, as these protocols are
7 public, that at the same time that we are developing and
8 other people are developing their systems to interoperate
9 with ours, the hackers and spammers are out there figuring
10 out how to break it.

11 This is an issue we deal with every single day.
12 Our system is under attack every single day. And so along
13 with the development of the system, there has to be a period
14 of quality assurance, a period of us testing the system and
15 assuring that when we put it up -- because understand, and
16 this is an important issue, this is a Pandora's box. It's
17 like mail. When the door is open, you can't take it back.

18 The reason that spam is such a horrible issue
19 today is that, with the door open, you can't ever close it
20 up again. So the important thing is to do it properly.
21 There's a technology component and there's a component of
22 ensuring that you've built the most unbreakable system
23 possible.

24 And I don't think there's anyone here -- because
25 today instant messaging on all services are run relatively

1 spam- and intrusion-free -- but I don't think there's anyone
2 here who wants to one day say that, you know, we pushed this
3 issue and in the process we got interoperability, but we
4 took a service that people love and enjoy and introduced a
5 factor they hate, and that's spam and intrusion forever.

6 CHAIRMAN KENNARD: Okay. Thank you, Mr. Schuler.

7 I want to return to something that Mr. Padden said in his
8 testimony. He testified that his company had not jumped
9 into this debate earlier but felt compelled to for a number
10 of reasons, and one of which was that his view is that the
11 architecture is being built out now, investments are being
12 made and if this Commission does not act now, we may have
13 lost an opportunity.

14 And I'd like to get a reaction on that argument
15 from either AOL or Time Warner, because I think it's an
16 important issue that needs to be fleshed out. Do you want
17 to go first? Maybe you should have a rest, Mr. Schuler.

18 MR. SCHULER: Okay. Well, I just want to comment
19 on the issue that Preston brings up, which is focused on
20 return path. You don't need a broadband cable system to
21 have a return path. In fact, our AOL TV product, which
22 we've just introduced, doesn't use cable at all. It uses
23 standard telephony as a return path.

24 So the fact of the matter is that the architecture
25 for interactive television -- and this is a whole new area.

1 Who knows how it's going to turn out? Starting out today,
2 you can do interactive TV with a telephone, and we're doing
3 it. I'm a little confused about his argument, because we've
4 approached every broadcaster and cable network about working
5 with us on AOL TV and told them that they all can program
6 their interactivity and have a return path and work with us
7 to make this platform happen, and they have, ABC is one of
8 the networks that has turned us down for some reason.

9 So I'm curious as to, if they're so concerned
10 about having return path, and by the way, there is none
11 today. There are very few set top boxes I know that offer a
12 true interactive return path. I'd be curious why, when give
13 the opportunity -- and by the way, no cash required, we're
14 not asking them for any money. We just want to work with
15 everybody to kick start this whole new category. They
16 turned us down for the opportunity to have return path for
17 all the programming we'd love to have them develop.

18 CHAIRMAN KENNARD: Mr. Padden, would you like to
19 respond to that?

20 MR. PADDEN: Sure. You know, I described what
21 we're going to do on election night this year and consumers
22 doing interactive television with a separate TV and a PC
23 with the PC connected to the public switch telephone
24 network, which is still open, will be able to interact. But
25 if that same consumer was trying to interact in a single

1 screen experience using a Time Warner Cable box, the new
2 cable boxes that I saw at the cable show in March had no
3 phone modem in them at all. It was the cable in and the
4 cable out.

5 And I've read you the provision from our contract,
6 which gives us no access whatsoever to the cable return
7 path. That consumer, when migrating from the dual screen
8 relying on the telephone network to the single screen in the
9 cable infrastructure would lose the opportunity to interact.

10 CHAIRMAN KENNARD: But Mr. Padden, what about the
11 broadband platform? You know, the U.S. Congress loaned the
12 broadcasters a lot of spectrum worth a lot of money for them
13 to develop their own digital platforms. And why not develop
14 your own as opposed to requiring some divestiture of the
15 Time Warner system?

16 MR. PADDEN: Well, so far, our company has
17 invested about \$65 million in trying to build out that
18 digital spectrum, including -- I think you know we did
19 Monday night football in high definition throughout the
20 entire football season last year -- but there's no return
21 path. Certainly nothing comparable to the broadband two-way
22 path of the cable infrastructure that has any remote chance
23 of being an effective substitute for consumers to what the
24 cable plant is going to offer. And what we're focused on is
25 what, what the consumer's effective choices are going to be

1 in the world of interactive television. And all the
2 analysts that we have read to date indicate that the two-way
3 broadband hybrid fiber coax network will enjoy advantages
4 over every other architecture.

5 CHAIRMAN KENNARD: Mr. Parsons.

6 MR. PARSONS: Mr. Chairman, with respect, I have a
7 slightly different perspective on this subject matter,
8 having been deeply involved in it. I think, I think the
9 reason that Disney is here today is a simple one. And that
10 reason was because they basically said to us at one point in
11 time in the negotiation, if you don't agree to these
12 demands, we're going to go down and throw, splash cold water
13 all over your merger before the FCC and the FTC. And it's
14 important --

15 CHAIRMAN KENNARD: What demands were today, Mr.
16 Parsons? In retransmission context?

17 MR. PARSONS: The demands in terms of what I'll
18 call open access and nondiscrimination. It's important to
19 note that we in fact offered a nondiscrimination on the
20 basis of affiliation place and that's not what they wanted.
21 What they wanted was essentially, something goes, that in
22 effect would require us to discriminate in favor of Disney,
23 because if thin about what real nondiscrimination is, they
24 basically wanted us to carry all of their stuff, or whatever
25 we carried of ours to carry of theirs, and to heck with the

1 rest of the world.

2 And the remedy that they now come before this
3 Commission with, which is to break apart, or suggest that
4 you require the breaking apart of the distribution platform
5 from the content platform is, in my judgment, almost
6 laughable in the face of the last 50 or 60 years of history
7 of this country and, in particular, in the face of the
8 beneficiaries of the relaxing of the regulatory provisions.

9 The notion that we would go back to sort of 1948 and
10 separate content from distribution or as, or go back to the
11 1970s with the thin-thin rules. Precisely the beneficiaries
12 of the relaxation of those rules, and allowing the industry
13 to come together in a vertically integrated way, as Gerry
14 was saying earlier, not only has resulted in the
15 proliferation of content, but choice for consumers.

16 And, you know, I think the Commission should think
17 long and hard as it seeks to consider how to really
18 encourage -- I'll put it that way -- a proliferation of both
19 choice and content in this new medium. Do you let the
20 market do it, where consumer will will drive what is
21 ultimately presented to them? Or do you try and regulate
22 that from, you know, from behind the parade, if you will,
23 because of some fear of a host of horribles that a
24 competitor has said I could be hurt? Not competition could
25 be hurt. I could be hurt, because I've invested a lot of

1 money in a business model that relies -- that requires
2 access to this return path and if I don't get it, I might be
3 hurt in the way in which I'm approaching the marketplace.

4 But what about the consumers? I would submit that
5 the trend has been clearly in a direction away from what the
6 Disney folks are suggesting and proposing. And the result
7 of that trend has been more choice, more consumer
8 empowerment, greater diversity in content. And why would
9 this Commission want to reverse that?

10 CHAIRMAN KENNARD: Commissioner Ness.

11 COMMISSIONER NESS: Thank you. Can you tell me if
12 you provide a return path for any other programming that's
13 on your cable system? Is there two-way interactive
14 programming for any other programmers that are on the
15 service?

16 MR. PARSONS: We do, we do on a, on a conventional
17 and negotiated basis. For example, there's a service called
18 Wink. A little eye will pop up on your screen. You can pop
19 the eye. It takes you into an Internet-based service. And
20 that's right, Gerry reminds me that it's unaffiliated with
21 us -- that is a commercial service that's out there that
22 comes to the cable operator and comes to the programmer and
23 makes a deal to have their service ride along board. We're
24 totally comfortable with that.

25 That's a negotiated arrangement with unaffiliated

1 services. We'd be totally comfortable with our friends at
2 Disney, which they know. But that's not what they want.

3 COMMISSIONER NESS: Did you want to respond?

4 MR. PADDEN: A couple specific examples. We know
5 that advertisement are being made today with interactive
6 triggers. For example, an ad for a car. Click here if you
7 would like to test drive this jeep. What we asked -- and we
8 put these letters in the record -- what we asked our friends
9 at Time Warner was, we're pretty sure if that interactive ad
10 runs on a channel Time Warner owns, that the system
11 functionality will enable that interaction and the customer
12 will have a chance to register for a test drive. All we
13 asked them was assure us that if Chrysler buys that schedule
14 on ABC instead of on TNT that the system will function the
15 same for the consumer when they're trying to interact.

16 Another example. In the letter that's in the
17 record, we said, in this new interactive world, we're sure
18 consumers will have the opportunity to drill down while
19 watching CNN if there's a news story they would like more
20 detail about, they'll be able to click and get transported
21 to a broadband Web site that CNN will have developed with
22 more detail on that news story. We're all working on these
23 same opportunities for consumers. We said, just tell us
24 that the system will function the same if this consumer's
25 watching ABC News and they'd like to drill down.

1 We have not asked for any kind of preferential
2 anything. In fact, we're having a hard time trying to think
3 of all the questions we asked. And the bottom line -- and
4 you'll see this in the letters -- we asked of Time Warner,
5 just assure us that the system will function for consumers
6 when they're seeking to interact with our content the same
7 way it does when they're seeking to interact with your
8 content.

9 COMMISSIONER NESS: Response from Time Warner or
10 AOL.

11 MR. PARSONS: There'll be one from both actually.
12 First of all, one of the differences between us and Disney,
13 I think, is they seem to think they know how the world of
14 interactivity is going to roll out in the future and,
15 therefore, can answer all the questions today. Our concern
16 was and is -- and it should be a concern of this Commission
17 as well -- that no one really knows how these interactive
18 services and how interactivity, once introduced into
19 television, will roll out and that it should be determined
20 by the players in the marketplace and by customer and
21 consumer demand, as opposed to trying to lay the tracks now
22 that will keep the train from going where it needs to go but
23 put it on a path that someone thought may happen.

24 Secondly, I have to disagree respectfully with Mr.
25 Padden's characterization of what they asked for.

1 Essentially, they asked for parity with all of our services
2 and it's, so that, you know, instead of nondiscrimination on
3 the basis of affiliation. And when I responded -- well, I
4 won't get into all of the discussions, but they were
5 essentially saying, protect us, and we're fine. Promise to
6 do for us everything that you do for your own services, and
7 we're fine.

8 The fact that that might, and would in fact,
9 preclude other services that consumers might want -- we
10 don't even, we don't even, as the Commission well knows,
11 carry all of our services, because we're guided by the
12 consumer demand. So I think the ask was a lot more
13 substantial, and I think that the concern was -- what Disney
14 was trying to do, and what we hope this Commission will
15 refrain from doing, is to lay some tracks across the
16 wilderness when we don't know where the watering holes are,
17 when we don't know where the customer demands are, where we
18 don't know how this is going to roll out, because the
19 marketplace needs to determine that. But I know that Barry
20 wanted to add something.

21 MR. SCHULER: I just wanted to add that laying the
22 tracks means even though there are digital set top boxes out
23 there, in order to enable the kinds of applications that Mr.
24 Padden is talking about, interactive, more information on
25 news, playing along with games, you need software, you need

1 services, you need technology to be able to run on those
2 platforms. It may be that the current platform today can't
3 necessarily support that, but we did introduce, just
4 introduced a platform that does do it and, again, I will
5 repeat, gave ABC the opportunity to do exactly what they're
6 asking to do without charging any money, and they said no.

7 So I don't know exactly what their issue and
8 concern is, because AOL TV does enable exactly the kind of
9 technologies they're talking about, to do single screen
10 work, to read those triggers he's talking about and enable
11 them. And so, given the opportunity, the answer was no.

12 CHAIRMAN KENNARD: Commissioner Tristani.

13 COMMISSIONER TRISTANI: I wanted to go into
14 another area. Mr. Weed asked a question that I would like
15 you to address. And by the way, Mr. Weed, I really
16 appreciate the work that a lot of your members do in the
17 rural communities, in hard-to-serve communities, in
18 communities where no other players will go so -- he said
19 that he's received inconsistency responses from AOL Time
20 Warner on the question whether you will require carriage of
21 AOL services as a condition of access to Time Warner
22 programming. Which is the answer? Unequivocally?

23 MR. PARSONS: Unequivocally. We will not. We
24 will not tie them together in that way. We had thought, we
25 had thought we were clear in our previous submissions.

1 Obviously, we weren't. Mr. Weed has raised the point. But
2 we're being unequivocal now. We will not tie them.

3 CHAIRMAN KENNARD: Commissioner Powell and then
4 Commissioner Furchtgott-Roth.

5 COMMISSIONER POWELL: I want to briefly go back to
6 this interactive television issue, because there's a lack of
7 clarity here that I think has a lot to do with merger
8 specificity that's important to distinguish. We have being
9 discussed what is essentially two different products or
10 platforms with two different potential problems or not
11 problems, and they're not necessarily interchangeable.

12 There is AOL TV, a product, as I understand, sold at retail.

13 A product, as I understand has a relatively open
14 opportunity for programming interoperability.

15 And then there is the potential for Time Warner
16 digital set top box problems. And I want to get clear from
17 ABC whether they're concerned about both of those, or
18 principally about the cable set top box as a gateway with
19 Time Warner, which does not capture or bring in the AOL TV
20 product. You have tended to answer Mr. Schuler's question
21 about programming by going back to the cable box, which is
22 not his product. And I'm not so sure your concern, if its
23 exclusive to one of those, is necessarily specific to the
24 combination.

25 MR. PADDEN: Well, you're right. They're two

1 separate products. I would, we certainly have a concern
2 that I hope we've articulated about the, what we believe is
3 going to be a cable bottleneck for the delivery of broadband
4 two-way interactive television. But with respect to the
5 stand-alone AOL TV box, my understanding, Mr. Schuler, is we
6 have not said "no."

7 Various parts of our company were approached by
8 AOL, and the offer was we -- AOL will make available or
9 proprietary offering tools to enable you to create content
10 for this AOL TV stand-alone box that is for now, anyway,
11 unconnected to their cable distribution. We had an internal
12 meeting, and each of our divisions either has or will be
13 getting back to AOL TV to seek more information about
14 exactly what they're talking about. I will say that the
15 minute we heard proprietary offering tools, a bunch of
16 caution flags went up around our company, because today the
17 beauty of the narrowband Internet is you don't need any, you
18 don't need to rent anybody's -- or have them loan initially
19 before they have any market penetration loan them for free
20 -- you don't need anybody's proprietary offering tools.

21 The, you have end-to-end connectivity, anybody can
22 play. What, we're going to explore the AOL TV stand-alone
23 box offer more specifically, but we have concerns about the
24 standards issue.

25 COMMISSIONER POWELL: Just one thing quickly about

1 that. I'm not so sure, when you have a stand-alone
2 technological product, I assume with some form of operating
3 system, that there are often proprietary tools for writing
4 to that system. I mean certainly the case is true of
5 Microsoft operating systems or any other operating systems,
6 that you have to have the APIs and protocol in order to
7 write effectively. I'm not so sure that that's --

8 MR. PADDEN: Well, that's why I said caution flags
9 went up and we will be getting each of the operating
10 divisions, I mean they came separately to ESPN, to Disney
11 channel, to ABC, and they're each going to be getting back
12 to them.

13 COMMISSIONER POWELL: Time's short, so I don't --

14 CHAIRMAN KENNARD: Go ahead, Mr. Melcher, quickly.

15 MR. MELCHER: I'd like to just raise a point that
16 I think this is obviously an important discussion for Disney
17 and Time Warner on open access with regards to open access
18 with regards to content. I think up until very, very
19 recently, open access has always focused on open access to,
20 via, or for Internet access via a new technology.

21 And so I would hope we make sure the distinction
22 is kept separate, that whether or not you agree Disney
23 should have open access in terms of content, what is, I
24 think, more of immediate interest to the American public is
25 that they have access to this cable technology for Internet

1 access, and not necessarily to watch interactive TV but to
2 surf the Internet, to use it for work, to use it in all the
3 ways that we use the Internet.

4 And that's what I think we'd like to focus on as a
5 service provider. We want access to this technology on a
6 wholesale basis, equal access, to use it in whatever way we
7 see fit to serve the American public as they use the
8 Internet, not interactive TV. Thank you.

9 CHAIRMAN KENNARD: Thank you.

10 COMMISSIONER POWELL: Mr. Chairman, I had one more
11 point.

12 CHAIRMAN KENNARD: Oh did you? I'm sorry. Go
13 ahead, Commissioner Powell.

14 COMMISSIONER POWELL: We've heard a lot of talk
15 about instant messaging and AOL's interoperability. I
16 assume you're going to tell me Tribal Voice has no problem
17 inter-operating with any and all other IM providers?

18 MR. BAGULLY: We are, actually two points,
19 Commissioner. One, we are completely free and agreeable to
20 inter-operate with anybody that wants to, and we openly
21 exchange protocols. But we are part of a new group called
22 IM Unified, which, in fact, consists today of about eight,
23 and it's a rapidly growing number of Internet, or instant
24 messaging companies that have committed to publishing
25 standard for interoperability among our companies in the

1 next six to eight weeks, and to have complete
2 interoperability among our companies by the end of the year.

3 We think the long-term solution is, in fact, the IETF
4 publishing standards, but rather than wait, we've decided to
5 go ahead and do this on our own.

6 COMMISSIONER POWELL: Okay. I want to jump in,
7 because I want to be clear. That's an announcement just
8 this week.

9 MR. BAGULLY: Yes sir.

10 COMMISSIONER POWELL: But for the last year, if I
11 downloaded any of these other IM products -- Microsoft's,
12 Yahoo's, yours -- would I have inter-operating functionality
13 that we're insisting that AOL have? Is the answer to that
14 yes or no?

15 MR. BAGULLY: It's yes with Microsoft. It's yes
16 with AT&T. It's no with Yahoo, though we are working with
17 them. They're part of this organization too.

18 COMMISSIONER POWELL: So Microsoft's IM product
19 can talk to anybody's IM products except AOL.

20 MR. BAGULLY: Can talk to ours. I don't know --
21 and it cannot talk to AOL's. Beyond that, I don't know.

22 COMMISSIONER POWELL: So all these other IM
23 products are not necessarily yet reached this same level of
24 interoperability that's so important.

25 MR. BAGULLY: No. The difference, Commissioner,

1 is that everybody else, or all the other IM companies, are
2 striving, working together to try to make this happen as
3 quickly as possible, as opposed to what we believe is a
4 stalling tactic.

5 COMMISSIONER POWELL: Okay.

6 CHAIRMAN KENNARD: Okay. Commissioner
7 Furchtgott-Roth.

8 COMMISSIONER FURCHTGOTT-ROTH: Thank you, Mr.
9 Chairman. I do have a question for the panel, but before I
10 get to that, I think I may owe you a bit of an apology, Mr.
11 Chairman. We did hold a hearing on December 14th, 1998,
12 that looked at mergers generally, and there were single
13 panels on each of three license transfer applications before
14 the Commission -- AT&T, TCI, Bell Atlantic GTE, SBC
15 Ameritech -- although those license applications for Bell
16 Atlantic GTE, SBC Ameritech were subsequently withdrawn and
17 resubmitted in radically different forms. There were no
18 CEOs at those hearings.

19 COMMISSIONER TRISTANI: Yes there were.

20 COMMISSIONER FURCHTGOTT-ROTH: Not all of them.
21 Who was there?

22 CHAIRMAN KENNARD: Actually, you were doing pretty
23 well. Let him finish, okay?

24 COMMISSIONER FURCHTGOTT-ROTH: There was a general
25 review of mergers. It was not particularized to one merger.

1 Notabart (phonetic) was in Illinois on that Monday.

2 COMMISSIONER TRISTANI: Well, somebody, somebody
3 --

4 CHAIRMAN KENNARD: All the CEOs were there, as I
5 recall, but no need to belabor the point here.

6 COMMISSIONER FURCHTGOTT-ROTH: Not according to
7 Com Daily.

8 COMMISSIONER TRISTANI: Oh, don't trust everything
9 you read in Com Daily.

10 COMMISSIONER FURCHTGOTT-ROTH: Oh, I do. Anyway,
11 if one looks at all of the major license transfer
12 applications we've had before the Commission while we've
13 been here as a Commission, even if one counted all three --
14 and I'm not sure I would -- that's just a small minority of
15 the major applications that have been before this
16 Commission. But I do accept there has been a hearing in the
17 past.

18 The issue that the gentlemen here raise are all
19 very important issues. I don't mean to suggest otherwise.
20 What I would suggest is, in some instances, these are issues
21 that may well be being reviewed by the Federal Trade
22 Commission. In other instances, they're not being reviewed
23 by the Federal Trade Commission because, frankly, it's not
24 clear they are narrowly related to the license transfer or
25 the merger but rather to general problems between the cable

1 industry generally and the broadcast industry, or electronic
2 messaging generally.

3 The question I have is, for instance, Mr. Padden,
4 are these issues that are narrowly related to just AOL Time
5 Warner, or are these problems that are more generic that
6 need to be reviewed by the Commission industrywide. Do you
7 have the same problems as a broadcaster in dealing with
8 other cable operators? And the same for the folks involved
9 in electronic messaging. Is this narrowly involve just AOL?
10 Or are these issues that, frankly, may be more amenable to
11 generalized rulemaking rather than rules that would apply to
12 just one player in the industry and not to anyone else?

13 MR. PADDEN: I can certainly say for our part, we
14 are here because of the specific collection of assets in
15 this merger and our specific history of problems with these
16 companies. We've not had other Internet service providers
17 ask us, insist that we remove consumer links that would
18 allow consumers to navigate more freely in order to do
19 business with them. Disney channel was being carried on the
20 basic tier in 60 million American homes while Time Warner
21 refused to carry it.

22 So we certainly are here because of this specific
23 merger, the marriage of the AOL closed, proprietary,
24 walled-garden marketing environment with the Time Warner
25 content assets and cable bottleneck distribution. That is,

1 we believe, a deadly combination for consumer choice, and
2 that's why we're here.

3 MR. PARSONS: May I, Commissioner, because I
4 think, first of all, you've put your finger on something
5 that I think is very fundamental. Let's take IM for one
6 second. There's nothing about this merger that implicates
7 the IM issue. Time Warner isn't in the business. It's,
8 there is no question as to somehow by the joining up of
9 these companies, will the IM situation get better or worse?

10 It will be stay the course.

11 So one question is, is this, a license application
12 like this, an opportunity to sort of open up the entire
13 business practices of both companies and look around and see
14 what you would do differently if you ran the company? I
15 mean, there is no jurisdictional relationship, for example,
16 between the IM issue and the merger. So I think that's one
17 set of questions.

18 But the second is, are these, is this a spillover
19 of business disputes now dressed up to look like important
20 public policy issues. And I submit it, that's exactly what
21 it is. There is no question. It's well-documented.
22 Everybody sort of had an opportunity to have their, their
23 fling at the media about the well-publicized disputes
24 between Time Warner and Disney.

25 But to then, to then dress it up as a public

1 policy issue, as Preston said earlier that, well, there are
2 conflict of interest, Time Warner has the Cartoon Network
3 and everybody else put Disney down on basic. It's money.
4 That's all it is.

5 CHAIRMAN KENNARD: I need to follow up on that. I
6 need to follow up if you'll permit me. I'm not sure if you
7 finished. But in the interchange we saw a few minutes ago,
8 it did sound like what was fundamentally at stake here was a
9 contractual dispute between ABC/Disney and Time Warner.

10 And I have to ask you very bluntly, Mr. Padden,
11 because I've seen this happen before -- in fact, you were
12 involved -- when NBC brought allegations against News
13 Corporation when you were at News Corporation. Serious
14 public policy issues were addressed. We developed a record.

15 Then there was a deal that was made between NBC
16 and the Fox network. Suddenly, their allegations
17 disappeared. And we don't like to have our processes here
18 used as leverage in a contractual dispute. And you alluded
19 to some meetings coming up, and is this the kind of
20 allegations that suddenly we're going to see ABC/Disney
21 disappear from this proceeding, because their issues are
22 resolved at the negotiating table?

23 MR. PARSONS: No, Mr. Chairman. And I appreciate
24 the opportunity to answer the question, because I think what
25 you have here is sort of the reverse of the situation you

1 described with NBC and News Corp a few years ago. Here, the
2 commercial deal got done, and the public policy dispute
3 follows. So we can't possibly be here trying to gain
4 leverage in the commercial transaction, because we did that
5 transaction.

6 What happened is we raised in our commercial
7 negotiation with Time Warner -- and again, the letters are
8 in the record -- we raised a host of what we believe are
9 public policy issues involving nondiscrimination, one of the
10 core principle of the enabling statute of this agency. And
11 running through a whole host of operating parameters,
12 knowing that we were doing a contract that was going to run
13 seven years into the future, and without being able to know,
14 even, all the right questions to ask, our core ask in a
15 public policy sense was, just tell us that you're not going
16 to discriminate in the functionality of this system for
17 consumers depending on whether they're trying to interact
18 with your content or with ours. And it runs through all the
19 issues. Caching, return path, data rates, all of it.

20 But what happened in the negotiation is they said,
21 we will conclude the financial negotiation and you take
22 those public policy issues to Washington, because we're not
23 going to deal with just you on them, because if we give
24 this, if we agree to be nondiscriminatory to you, we have to
25 be agree to be nondiscriminatory to everybody, to which we

1 said, well, of course.

2 So we ended up doing what they asked. We closed
3 the commercial deal. That's over. And we are here
4 advancing the public policy issues to this agency.

5 CHAIRMAN KENNARD: Mr. Melcher, Mr. Schuler and
6 then Commissioner Ness has some questions.

7 MR. MELCHER: Two quick points, Mr. Chairman.
8 Thank you. I have, while I welcome the participation of Mr.
9 Padden at Disney, I have questions, as well. Recently, it
10 was announced that AT&T secured an agreement with Quest and
11 U.S. West that they would not participate in the AT&T cable
12 license transfer. Specifically, it was a deal so that if
13 U.S. West Quest did not come in and say that the cable
14 should be open for open Internet access, that AT&T would not
15 oppose the U.S. West Quest merger. And that deal was just
16 publicized through the efforts of a commission in
17 Washington, I believe. So I have suspicions.

18 Secondly though, more importantly, I think this
19 issue may be drawing some attention away from what I, again,
20 believe to be the most significant issue, which is open
21 Internet access, not whether the Disney content gets on Time
22 Warner but whether the American public gets the superior
23 Internet access product, which is cable. I believe it will
24 be. And I think, following up on Mr. Reddersen's comment
25 earlier, I think FCC could do well to codify the agreement

1 that AT&T, that AOL and Time Warner have all stepped up and
2 said that they will honor open access, make them codify it
3 and enforce it.

4 I think a rulemaking really is appropriate, but
5 time is running out. And I would agree with Mr. Padden on
6 that point. Time is running out. There is no time to wait.

7 We need to make conditions now on this merger and get into
8 a rulemaking, because if we don't, I think we'll have an
9 architecture that's built out in the next six to eight, 12
10 months, which will prevent open Internet access.

11 And that is my fear. That AT&T and AOL and Time
12 Warner right now are building out an architecture with
13 billions of dollars that will prevent open access. If you
14 do not act quickly, you will lose the opportunity.

15 CHAIRMAN KENNARD: Thank you. Mr. Schuler, very
16 briefly, and then Commissioner Ness.

17 MR. SCHULER: Very briefly. To your point about
18 Disney's motivations in using these proceedings. If you go
19 to page 47 of their own filing, they say right here in black
20 and white, "AOL Time Warner can prove Disney wrong. All it
21 has to do is come to the negotiating table and agree to
22 arrangements with Disney." Blah, blah, blah, blah, blah.

23 MR. PADDEN: No. Don't do blah, blah, blah.
24 Finish. It says to provide nondiscriminatory access.
25 That's all we're looking for.

1 MR. PARSONS: No, no, no. You have it exactly
2 right, Mr. Chairman. It's the same dance, it's just a
3 different order of the steps.

4 COMMISSIONER TRISTANI: I just want to comment
5 that I think AOL shouldn't talk about the same dance or not
6 using proceedings and then changing course. It used the 9th
7 circuit very effectively till it got a reason not to do it.
8 That's the American way.

9 COMMISSIONER NESS: Mr. Melcher, you mentioned Mr.
10 Reddersen, who was commenting also on nondiscriminatory
11 access to programming and his concern about multiple cable
12 providers not effectively, not enabling companies that are
13 providing DSL service, for example, from getting access to
14 the programming, be it AOL or Time Warner. Is that, that
15 was the essence of your testimony. Is that right?

16 MR. MELCHER: One of the three points, yes,
17 Commissioner.

18 COMMISSIONER NESS: Okay. Can Time Warner and AOL
19 please comment about whether they will be making, on a
20 nondiscriminatory basis, programming available to DSL
21 providers.

22 MR. SCHULER: I can say that on AOL's part, we
23 have gone to every DSL provider in the country to cut deals
24 to offer our services over DSL. We have cut deals with
25 everybody except Bell South, who has not wanted to do a deal

1 with us. So our intent is to offer ubiquity of broadband
2 services everywhere, whether it's cable or satellite or
3 broadband wireless or DSL, because that's what makes our
4 business work.

5 COMMISSIONER NESS: Mr. Reddersen, would you like
6 to respond?

7 MR. REDDERSEN: Yeah, I was about to say earlier
8 that I didn't think I was in a contract dispute with these
9 people, so I couldn't comment, similar to Mr. Padden, but
10 obviously I am. Since Mr. Schuler has brought it up, I will
11 tell you he is right. We do not have an agreement where
12 they will provide AOL service over Bell South's DSL service.

13 The reason we don't is because they want substantially
14 better terms and conditions than anyone in the marketplace
15 and they won't do a deal without them.

16 We have available wholesale tariff and we have
17 volume discounts on that wholesale tariff, and there are
18 many large ISP's out there participating on it and they can
19 participate in that tariff anytime they want to do that.
20 Let me finish now, Mr. Schuler, please. The issue, I think,
21 that was brought up earlier is really important. And that
22 is, the real issue, while there's an issue of cable access
23 here and it's very, very important, the real bottleneck here
24 going forward is the AOL environment. I think that's what
25 Ms. Dyson was describing.

1 And when we talk about and when Disney talks about
2 that control environment and the content flow in and out of
3 it, what we're really describing is whether other content
4 players will have open access to that environment and
5 whether content that flows from Time Warner through that
6 closed AOL environment will be available to other Internet
7 service providers.

8 Let me give you a simple and easy example. If the
9 Braves games are available on streaming media but only
10 available on the AOL environment in Atlanta, then all other
11 ISPs providing broadband streaming media might as well close
12 shop in Atlanta. So this is a two-way issue here for
13 content providers having reasonable market terms and
14 conditions into that environment and for the Time Warner
15 content to be made available openly to other ISPs. So if
16 both parties are concerned about that control point, there
17 must be some reason for that. And it's not a contract
18 dispute on our part. I will guarantee you that.

19 COMMISSIONER NESS: Time Warner, go ahead.

20 MR. PARSONS: Well, I submit though, that the
21 beginning of Mr. Reddersen response puts this all in
22 context. He says AOL wants too much money. They say he
23 won't pay them the fair amount. Business dispute, you know.
24 And I, and I do think that, when I say it's the same dance
25 that, with our friends at Disney, it isn't just a question

1 of nondiscrimination because, as I said, we put that on the
2 table. What they wanted was -- and if you look at their
3 letters and read them carefully -- they wanted to be treated
4 exactly the same way in all instances that we treat our own
5 content.

6 So does that mean, for example, if you put a CNN
7 box on some web site, that you have to put an ABC News box
8 on the web site. Those things have to be negotiated in the
9 marketplace. You can't, this Commission, I don't think, can
10 deal with the subtleties and the nuances and the
11 complexities of trying to arrange business arrangements that
12 are going to enable a business to grow and be dynamic and
13 innovation to occur. You've just got to leave that to the
14 marketplace.

15 Now, what we have done is we've committed to open
16 access on the broadband platform. I will tell you, we've
17 heard Gerry Levin say it, I will say it. Time Warner, we
18 make stuff. And the way you maximize the value of making
19 stuff is you sell it to as many distribution channels and
20 across as many, as many outlets as you can.

21 And if you look at the way we manage our business
22 now, that's what we do. That's what we've said we're going
23 to do in the new environment.

24 COMMISSIONER NESS: Mr. Reddersen response,
25 please.

1 MR. REDDERSEN: Very simply, and please don't let
2 this whole debate and the issues get narrowed down to any
3 dispute between Disney and Time Warner AOL. The whole
4 message being brought to you by Time Warner AOL, both
5 excellent companies -- I marvel at the products and services
6 that they bring to the marketplace -- is twofold. First,
7 it's "Trust me, I will be open, in a world where I may not
8 have been in the past, but trust me in the future. I will
9 be." I would urge you, having tried that argument over the
10 last 15 years in the telecom industry -- it probably didn't
11 work -- not to take that argument here.

12 The second issue and more important issue may be
13 let the market work. Well, the only other player out there
14 that has the potential to provide the leverage against AOL
15 Time Warner to make the market work is AT&T TCI Media One,
16 and there are so many interlocking relationships between
17 those two entities, that it's unlikely that they will
18 establish market terms and conditions between the two
19 parties that are at all reasonable to the rest of the
20 industry. So I urge you, if you can establish that
21 separation, you may at least have a large player out there
22 that can establish market prices and terms and conditions
23 that are reasonable. Thank you.

24 CHAIRMAN KENNARD: I'm sorry, but that'll have to
25 be the last word for this panel. I'm sorry, we're running

1 way over, and I want to hold at least 15 minutes so that we
2 can have some statements from people in the audience who
3 have been waiting throughout this entire panel. So thank
4 you all very much. I thought we had a really good, robust
5 debate there, and I appreciate your participation.

6 We'll take 15 minutes and 15 minutes only for
7 anyone in the audience who would like to make a statement
8 for the record in this proceeding. I'll ask that you speak
9 for no more than two minutes, and I'll ask our timekeeper
10 here to make sure that we keep everybody on the clock.
11 Okay, please begin here on my right. Nancy? Welcome.

12 MS. BLOCK: Hello, my name is Nancy Block, and I'm
13 the executive director of the National Association of the
14 Deaf, an independent consumer-based nonprofit association
15 representing 28 million deaf and hard-of-hearing Americans.

16 As advocates for communications accessibility, we are, of
17 course, deeply interested in all technologies that can solve
18 particular challenges for people who are deaf, late
19 deafened, hard of hearing and deaf-blind.

20 In its current incarnation, instant messaging
21 enables deaf-to-deaf and deaf-to-hearing seamless
22 communication for people with computers and Internet
23 connections, but only as long as they share the same
24 provider. Therefore, we have a strong interest in making
25 sure that open and interoperable communication functions

1 that have helped fuel the explosive growth of the Internet
2 continue as the medium makes new forms of communication
3 possible.

4 As instant messaging technology develops and
5 instant messaging moves on to wireless devices such as
6 pagers and cell phones, the possibilities for enhanced
7 communication become even more exciting. A fundamental
8 principal of accessibility is that users of critical
9 communications functions should be able to communicate with
10 all others, even those who have different service providers.

11 Ease of communication, regardless of the provider, is
12 important to all consumers, and especially so to deaf and
13 hard of hearing people, for whom instant messaging
14 represents an important new advance.

15 Recently, at our biannual convention -- sorry --
16 our biannual national conference earlier this month,
17 delegates passed a resolution calling for FCC and FTC
18 attention to the issue of instant messaging, open access and
19 interoperability. It is of particular importance that
20 people who are deaf, late deafened hard of hearing and deaf-
21 blind be able to take advantage of the many advantages that
22 instant messaging has to offer for seamless, instantaneous
23 and barrier-free communication. Attention must also be
24 given to the universal design and the importance of planning
25 for access right from the start. Thank you.

1 CHAIRMAN KENNARD: Thank you, Nancy. We
2 appreciate you being here. Yes sir.

3 MR. STEINHORN: My name's Barry Steinhorn. I'm
4 the associate director at the American Civil Liberties
5 Union. I hadn't actually originally planned to speak during
6 this session, but the last panel gave me the impression that
7 perhaps I should. I don't think the Commission should be
8 diverted from some of the main issues here by a concern
9 about whether or not some of the comments at the
10 presentations of the last panel were based on business
11 disputes rather than important public policy issues.
12 Perhaps they were, perhaps they weren't.

13 But there are important public policy issues here.

14 In particular, there's the issue of open access. And I
15 want to endorse the proposal that was made by Mark Cooper
16 and others -- and I won't repeat that -- but I want to put
17 it in a slightly different context. ACLU, for example, has
18 on a number of occasions represented a small Web site,
19 operates in the city of Philadelphia, called the Critical
20 Path AIDS project. Critical Path AIDS project, as the name
21 suggests, provides information about sexually transmitted
22 disease, partly sexually transmitted disease. They are
23 somewhat controversial. They have been threatened on a
24 number of venues with various kinds of punitive actions.

25 We are very concerned that if this walled garden

1 that others have described does in fact occur, it's not so
2 much that Disney may have difficulty getting into the walled
3 garden, because we assume that there, the marketplace
4 perhaps would be able to solve these problems, but the
5 Critical Path AIDS Project and other small providers, who
6 the Internet has given an opportunity to speak to audiences
7 large and small will, in fact, be walled off. That they
8 will not, for example, have the same access as, perhaps, Web
9 MD, or some other large medical Web site, which may not be
10 affiliated with Time Warner AOL or with AT&T, but may have
11 an arrangement or even a credibility with Time Warner AOL or
12 AT&T that may lead them to get preferential treatment in all
13 the ways that you've discussed here -- caching and access
14 streaming video, et cetera.

15 So we urge you to enact an open access requirement
16 rather than simply trusting the marketplace to solve that
17 problem, and to keep in mind the small content providers,
18 not simply the large commercial providers. Thank you.

19 CHAIRMAN KENNARD: Thank you for that statement.
20 Jeff Shester.

21 MR. SHESTER: Thanks. And Barry has stated some
22 of my concern, that what was in part missing from today is
23 the role that the Internet plays in our democracy and that
24 the mission that we have, I think, that you have, historic
25 mission that you have at this point is to make sure that

1 this end-to-end architecture principal that has allowed all
2 of this diversity, content diversity, including
3 noncommercial and independent voices to exist and flourish,
4 as well as competition, to help them make the transition to
5 the broadband environment, which will be dominated by the
6 ITV space.

7 Mr. Parsons, I have to say I follow what you're
8 doing, and you're running the tracks, you're creating the
9 railroad, you're creating the engines and a closed system is
10 moving into place, and we have to ensure that an open access
11 policy ensures that those noncommercial diverse community
12 voices are as powerful in some way as the Disneys and the
13 NBCs. Thank you.

14 CHAIRMAN KENNARD: Thank you, Mr. Shester. Are
15 there any other statements from the public. I don't see
16 anyone else lined up. Well, thank you all. It's been a
17 long day, but I think it's been a very worthwhile and
18 productive day, and I think that you've certainly
19 enlightened us, and I appreciate your patience and all the
20 preparation that went into these presentations.

21 I also want to thank the Commission staff who
22 worked so hard to make this event happen today. Deborah
23 Lathan, chief of our cable services bureau and her great
24 team, including Royce Dickens and John Norton in the cable
25 bureau and Ruth Dancey, who we're happy to have back at the

1 Commission. Also Michelle Ellison and Michelle Rousseau and
2 Darrell Cooper were very instrumental in making this happen
3 today. So thank you all very much and this hearing is
4 adjourned.

5 (Whereupon, at 6:04 p.m., the hearing in the
6 above-entitled matter was adjourned.)

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