Testimony of
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July 26, 2000

Many people here, myself included, are trying to understand the future of the Internet, its impact on our lives and the economy, and how this proposed merger will change the course of history. I think the stakes are that big. At the same time, I think predicting the future of the digital economy is, well, hopeless. In fact, given the flux in the current environment, I would be content to predict where we are today. This leaves us in a predicament. The stakes are high and our knowledge is low. In this environment, how do we best set policy?

My answer is simple: keep a level playing field so that the best man/woman/technology /company may win. This one rule should guide any policy prescription.

This is easier said than done. What is the field? Home, work, mobile? What is level? Do we want to emphasize levelness within a technology and thereby promote intra-system competition or emphasize levelness across technologies and thereby promote inter-system competition? We don't want to create equality by bringing everyone to the lowest level. And the current environment is decidedly unlevel. While phone and cable technologies are converging, the regulatory environments have not. There are open access requirements on xDSL that do not exist for cable. Do we relax requirements on DSL, create requirements for cable, try to find some middle ground, or simply rely on competition to sort things out.

I think that creating a level playing field for open access will be one of your most challenging problems and that is where I will focus my remarks. I believe that it is in the self interest of TW/AOL to provide access to their system and this is in line with their public statements. The question is at what price and with what terms.

The bundling of a cable modem pipe and an ISP is not all that different than bundling an operating system and a network browser. The ability to sell a package of *complementary* goods as a bundle offers the bundler a tremendous advantage in the marketplace. By complementary I mean goods that enhance each other's value, as in hardware and software; hamburgers and fries; or broadband cable pipes, ISPs, and content. One of the big advantages comes from being able to offer a *lower* price.

When two separate firms get together to coordinate their pricing of complementary products A and B, the monopoly price is *lower* than the result with uncoordinated pricing. The intuition is that when price of A falls, that helps expand the market and part of those gains go to B. Unless the sellers of A and B work together, they won't fully recognize those gains and thus price will be too high.

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

Bundling is neither win-win nor win-lose, it is win-win-lose – a win for the bundler, a win for consumers today, and a loss for those who are excluded from the bundle. This brings us back to the issue of a level playing field. Do you want to help keep the playing field level for players who are left out of the bundle? What does the FCC want to do for the players who, like AOL just a few months ago, are worried that they'll have no one to dance with?

If all consumers could choose between competing bundles for broadband this wouldn't be a concern. In many places competition does exist, from DSL bundles, from RCN's second cable line, from "wireless" cable and satellites. I expect that third-generation mobile wireless technology will really solve this issue. But we are not there yet.

Therefore the question is whether or not to level the playing field by giving other ISP and content providers access to the TW/AOL bundle. I don't wish to regulate how the elements of a bundle should be priced when broken up into its components. The resulting arguments over setting those prices would be a lose-lose game. But we do have the advantage of AOL selling dial-up service and content as an add-on to those with Internet access. That leads me to ask whether the price they set for these two services, whatever they choose, might be a useful proxy for how much to discount the cable bundle when offering their cable pipeline services to other players. In particular, I think the discount should be at least the "bring-your-own-access" price (currently $9.95) plus some fraction of the extra price for dial-up service (currently $12 to get to the $21.95 standard plan price) reflecting the basic ISP services.

There is another more subtle example where the playing field seems tilted today and it's an problem I think you should be concerned about. The proposed merger is what has caught your eye. *But practically every single issue that you will talk about today could also arise as a result of contracts, typically exclusive contracts*. I believe that the FCC and other government agencies should pay as close attention to these contracts as they do to merger agreements.

Thank you.