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En Banc Hearing
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Thank you Mr. Chairman.

We are very grateful to have this chance to talk about the future of Interactive Television and the AOL/Time Warner/EMI merger.

Often promised in the past, Interactive Television is now rapidly becoming a reality with the convergence of traditional television, internet content, communications services and commerce applications all rolled into a wondrous new servant of consumer needs. The Walt Disney Company is investing millions of Dollars in the development of compelling new content and services for Interactive Television – a play-along interactive companion for "Who Wants To be A Millionaire"; detailed statistics, games and separate audio tracks for sporting events; behind the scenes coverage of the Academy Awards; in depth election coverage far beyond anything possible on old fashioned one-way TV; and our imaginative "Zoog Disney" interactive content for children.

We are here today to advocate a world of Interactive Television in which each consumer enjoys the freedom to choose, or to NOT choose, our content and our services based solely on how good a job we do in satisfying consumer needs and tastes. And, we are here to warn against a world in which consumer choice is limited and skewed by the conflicted business interests of the company that operates both the pipeline to the home and a closed and proprietary marketing environment.

All the analysts agree that 2-way broadband hybrid fiber-coax networks, built by the cable industry, will be the primary platform for Interactive Television. For many consumers, cable will be the only platform. Millions of Americans, including many in apartment buildings, have no access to satellite. And satellite is limited to a narrowband return path. Future deployment of broadband uplinks from consumer's homes is unlikely to be cost competitive with the existing cable infrastructure. And, at least for the foreseeable future, DSL will not have the capacity to deliver full screen, full motion live television.

Because of the likely dominance of the cable platform, and the scarcity of good substitutes, Disney considered raising concerns regarding recent cable mergers involving TCI, AT&T and Media One. We also nearly succumbed to AOL's constant and relentless entreaties for us to join the fight for government assured open access of cable pipelines. But, our respect for our cable system customers, and our understanding of this agency's desire to not prematurely regulate broadband, kept us on the sidelines.

The merger before you today pushed us into the debate. This transaction would merge AOL's internet dominating closed and proprietary "walled garden" architecture and business practices with Time Warner's bottleneck cable pipelines and vast content library to pose a clear threat to consumer choice and competition in Interactive Television. The combined company would control:

1) the bottleneck cable pipeline past 20 million homes,
2) 50% of the narrowband internet marketplace,
3) a vast content library including a dozen leading cable networks,
4) set top box computer hardware,
5) the operating system for those boxes,
6) "sticky" application such as e-mail and chat,
7) a near monopoly in Instant Messaging", and
8) publishing rights to nearly 80% of the music used in popular films and television programs.

Interactive Television platforms present myriad opportunities for technologically sophisticated discrimination in favor of content and services owned by, or affiliated with, the owner of the pipeline. Given the unprecedented concentration of market power that would be created by this merger, there is a clear threat to consumer choice in the 20 million homes passed by AOL/Time Warner cable. In addition, there is clear danger of a deal in which AOL/Time Warner completes AT&T phone calls in return for AT&T favoring AOL/Time Warner Interactive Television content and services. Such a deal

would extend AOL/Time Warner's control of Interactive Television to more than 50% of the market. Add in AOL/Time Warner's equity stake in satellite provider Direct TV and the domination of Interactive Television will be complete.

This massive aggregation of market power cannot be left to voluntary promises of good behavior. Both AOL and Time Warner have demonstrated their propensity to abuse their bottlenecks and market strength to limit and skew consumer choice and to inhibit competition. AOL has perfected a collection of predatory tactics and business practices that result in consumers spending 85% of their time online trapped inside AOL's proprietary "walled garden." AOL requires its content partners to disable or limit consumer navigation links to sites outside the "walled garden." It prohibits advertising for competitive services. AOL takes affirmative steps to render its instant messaging services incompatible with competitive services resulting in a market share in excess of 90%. And, AOL actually developed client software that disables the client software of any other ISP on the customer's desktop.

Time Warner's history is replete with similar anti-competitive practices. The common thread to Time Warner' actions has been use of its cable distribution bottleneck to reduce consumer choice and to exclude service offerings deemed competitive with Time Warner offerings. For example, almost alone among cable companies, Time Warner historically has refused to carry local and regional news channels owned by others. In Florida, Texas, Ohio, New England and the Northwest, Time Warner has refused to carry non-owned news channels thereby reducing consumer choice in news

and preserving the market for its own existing or planned news channels. It is instructive that the Federal Trade Commission was forced to order Time Warner to carry a non-Time Warner owned National news channel as a condition on the approval of its merger with Turner Broadcasting.

Similarly, Time Warner stood almost alone among major cable companies in refusing to carry Disney Channel on basic on most of its systems. Time Warner would prefer that children watch Cartoon Network, which it owns. By reducing consumer choice in children's channels, Time Warner could expect to increase the market share of its own offering.

On its Manhattan cable system – arguably the most important and influential cable platform in the world – Time Warner moved its own channels to the highest traffic and most desirable lower channel positions. In fact, TNT and TBS were added to the lower tier only after Time Warner purchased Turner Broadcasting.

Time Warner also sought to reduce consumer choice in electronic program guides – the all important navigation map of Interactive Television. By affirmatively stripping Gemstar data streams out of local broadcast station VBI's, Time Warner rendered the Gemstar guide an empty and useless vessel. This action left consumers with only one choice in interactive guides – the Time Warner guide.

The most prominent episode in this clear pattern of restricting consumer choice occurred on May 1 of this year when Time Warner illegally shut off ABC for millions of consumers nationwide. Worse yet, when ABC tried to provide consumers with an alternative by giving away satellite dishes, Time Warner fought furiously to maintain its monopoly by threatening financial retribution against ABC. Time Warner threatened to reduce Disney/ABC license fees by $5,000.00 per dish given away. And, Time Warner seemed to carry out its threat when it unilaterally reduced the fees that it was paying to Disney.

In the face of this very clear pattern of anti-competitive conduct – all aimed at reducing consumer choice – there is simply no way that anyone can rely on generalized and vague assurances of good behavior from the parties to this merger. As AOL itself argued to the House Judiciary Committee just one year ago, strong government action is needed to assure consumer choice and competition in Interactive Television.

Absent government intervention, AOL and Time Warner are likely to employ a variety of tactics to further their dominance in Interactive Television, including:

1) excluding competing interactive content and services (*e.g.*, dropping an interactive ABC);

2) force-feeding AOL/Time Warner/EMI content (*e.g.*, send the customer to CNN when he or she clicks on a "news" icon, instead of offering a "menu bar" of competitive news choices);

3) transmitting its own content "downstream" to consumers at preferential (*i.e.*, faster) data rates;

4) blocking critical, interactive "return path" communications between customers and competing content providers and services;

5) limiting customers' ability to access locally "cached" data to their own content;

6) favoring its own content in navigation systems and links;

7) favoring its own content with more simple and convenient consumer interfaces;

8) building its own merchant lists to the exclusion of the content provider's list; and

9) developing AOL/TW controlled interactive advertising, even if it undermines the content providers advertising message (*e.g.*, supplying a navigation link to Ford, when the content provider is advertising GM).

In our supplemental comments filed earlier this week, Disney provided the Commission with a broad menu of possible remedies to assure consumer choice and competition in Interactive Television. That menu included a separation of content and bottleneck conduit and a comprehensive list of behavioral remedies. I would be happy to discuss any and all of those remedies in response to your questions.