EN BANC HEARING ON AMERICAN ONLINE, INC.,
AND TIME WARNER, INC.
APPLICATIONS FOR TRANSFER OF CONTROL
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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,
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Barry Nelabuff,
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Christopher Melcher,
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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
CHAIRMAN KENNARD: Good afternoon and welcome to this en banc hearing on the proposed merger between AOL and Time Warner. I'm very pleased to see you all here this afternoon, and we're very much looking forward to hearing the presentations of all of our distinguished panelists today. I want to thank all of them for taking the time to appear before us today on this very important matter.

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

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

Before we do that, I'd like to take just a moment to discuss my perspective on reviewing mergers of this kind. We are here today because Congress has mandated that this Commission investigate whether approval of transactions like this one are in the public interest. As in all such cases, we have a statutory duty to verify whether this merger would violate either the implementation or enforcement of the Communications Act in our rules and, most importantly, whether it might interfere with the progress towards any of our statutory objectives as we try to bring more competition and more services to the American public.

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

I'm very concerned about this issue of access to the cable broadband platform, so much so that I will ask my colleagues shortly to open a separate proceeding on this particular issue. But I very much want to hear about that issue in the context of this particular transaction today.
But I want to emphasize that this discussion on cable access should be a debate about means and not ends.

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

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

COMMISSIONER NESS: Thank you very much. We're on the threshold of an extraordinary era. Today's hearing provides the Commission with an invaluable opportunity to better comprehend the rapidly converging communications marketplace and the effect of these changes on the American
public. Mergers such as the one we will discuss today have
the potential of fundamentally reshaping the communications
landscape.

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

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

To that end, just as in any other transaction
before us, we must ask the following questions: Will the
proposed transaction violate the Communications law and regulations, impair the Commission's ability to implement the Act or interfere with the objections -- objectives, rather, of statutes, over which Congress gave us stewardship? Also, will the proposed transaction yield tangible and specific public interest benefits and will such benefits outweigh harms, if any, that are posed by the transaction?

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

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

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

CHAIRMAN KENNARD: Thank you, Commissioner Ness.

Commissioner Furchtgott-Roth.

COMMISSIONER FURCHTGOTT-ROTH: Thank you, Mr.
Chairman. The parties before us today have submitted
license transfer applications to the Commission. Unlike
tens of thousands of other license transfer applications
that this agency reviews each year, this one has been
singled out for heightened scrutiny and now, for the first
time ever, a public en banc hearing. I cannot support the Commission's review of the merging parties beyond their license transfers, for three reasons.

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

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

For tens of thousands of license transfers annually, that review is perfunctory. Nothing in the Act grants the Commission jurisdiction to approve or disapprove mergers that consequently involve the transfer of licenses. To be sure, the transfer of licenses is an important part of any merger, but it is simply not the same thing.
A merger is a much larger and more complicated set of events than the transfer of FCC permits. It includes, to name but a few, the passage of legal title for many assets, corporate restructuring, stock swaps and the consolidation of corporate headquarters and personnel. Clearly, then, asking whether a particular license transfer would serve the public interest, convenience and necessity entails a significantly more limited focus than contemplating the industrywide effects of a merger between the transferee and the transferor.

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

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

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

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

This hearing illustrates the highly disparate level of review given to applicants that arise under identical statutory provisions. This is problematic, because merging parties have no way of anticipating the
scale of FCC review that will apply to them. Regulated entities have little basis for knowing ex ante, how their applications will be treated, either procedurally or substantively. The Commission's review of license transfers should not be arbitrary and discriminatory but, rather, uniform and predictably -- predictable.

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

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

What specific authority does this Commission have to consider the issues you raise? Second, if the answer is the public interest standard under Title III, how can this Commission apply a different public interest standard for AOL and Time Warner than it applies for any of the tens of thousands of other identical license transfer cases? Third, if your issue is not the public interest standard, such as cable access, as the Chairman mentioned, why should the issue not be addressed through general rulemaking that would apply to the entire industry, rather than to just one firm within the industry? And fourth, are the issues raised, such as anticompetitive behavior, being reviewed by another federal agency with clear statutory authority? Thank you, Mr. Chairman. I look forward to the testimony of the witnesses.

CHAIRMAN KENNARD: Thank you, Commissioner.

Commissioner Powell.

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

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

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

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

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

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

Finally, I think it's important to say a word
about who we are and what we do. It is important to
emphasize that many of the interesting challenges, questions
and concerns that might arise from this combination are not
within the scope of our review, nor are we necessarily
empowered to address any and all such questions. Along
these lines, I would repeat the caution of the Chairman and
many of my colleagues in public statements that we do not
regulate the Internet.
While our authority does extend to much of the infrastructure that affects Internet service, we must react cautiously and perhaps even skeptically to invitations to intervene in matters that involve Internet content, products and services. It is extremely important, then, that we focus on the matters that will inform our decision and not dawdle too long with issues that do not lend themselves to an FCC regulatory solution. With that, I look forward to hearing from the panelists, and thank you for convening the hearing, Mr. Chairman.

CHAIRMAN KENNARD: Thank you, Commissioner.

Commissioner Tristani.

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

I'm delighted that the press is here, because I know this is getting good coverage, and I'm hoping that, in
a future hearing, we'll have some kind of an interactive
dialogue with the public. We should have thought of that
before. Having said all of that, there is a procedural
concern that I have, and that's that yesterday, this
Commission announced over our Web page that in order to get
into this room or to view this hearing at Commission,
citizens would have to come at 8:00 in the morning, starting
at 8:00 to get a ticket.

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

With that, today we will be hearing from the
proponents and opponents of the AOL Time Warner merger.
This proposed merger is not only one of the largest in
United States history but combines the control of conduit
and content in an unprecedented fashion, implicating issues that are at the core of our democracy. It raises the specter of barriers to the free flow of information and the marketplace of ideas.

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

I am particularly concerned about the impact of this proposal on the diversity of voices and ideas. I am also concerned that this merger may limit a consumer's choice regarding Internet service providers and/or cable delivery services. One question is repeatedly raised. Does the dominance over instant messaging by one corporation create impermissible barriers to competition and to the free exchange of ideas. If the extent to which instant messaging has penetrated the online world is as great as the record indicates, can America afford to leave its ownership in the hands of a single entity whose fiduciary duty is to its shareholders and not to the public?
Another persistent question is whether the Commission should address the issue of open access or wait for an industrywide proceeding. These and other pressing questions will not be answered today, but we must answer them before we complete this merger review.

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

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

CHAIRMAN KENNARD: Thank you, Commissioner Tristani. Commissioner Tristani is right. We have a legal obligation to make a public interest determination as to whether this particular transaction will serve the public interest, and that is why we're holding a public hearing -- so that the public can be involved in that determination. And I just wanted to note for the record that this hearing is not unprecedented. Every major merger that's come before this agency, at least during my tenure, we've had an en...
banc, Commission level hearing like this, including Bell Atlantic, GTE, SBC Ameritech and AT&T TCI.

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

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

CHAIRMAN KENNARD: Certainly.

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

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

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

CHAIRMAN KENNARD: As I recall, there was an en banc hearing that considered each of those mergers. I don't think we need to belabor this point, but I would be happy to submit the record, not, the tape to you, not for the record in this proceeding but just for the record of, for the
Are there any other remarks from the bench before we move on? Hearing none, I just wanted to clarify some housekeeping matters before we go on so that everyone will know what to expect this afternoon. We will have opening statements from representatives of the two applicants, who are seated here at the table now.

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

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

With that, let's begin with our first panel. It is the opening statements of the applicants before us,
beginning with Steve Case, the chairman and CEO of America
Online.

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

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

Just as important, we want to make clear that our
commitments to consumer choice and competition will help
lead our industries into the Internet century in a way we
can all be proud of. That's what the merger of AOL and Time
Warner is really all about. Helping to lead a second
Internet revolution that reaches as many people as possible
as quickly as possible and serves the public interest.
There are three key reasons why we believe this.

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

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

And this is just the beginning. Broadband and wireless connections, an ever-increasing array of devices to conveniently access the Internet anytime and anywhere, and the intersection of traditional and digital mediums are fueling a powerful new era of innovation. It's consumers, not technology, that are driving these developments, and that's the way it should be, indeed, it has to be. In this
new environment, companies of every size will compete to bring consumers what they want when they want it at prices they can afford, and in ever more useful, convenient ways.

This cycle of competition and innovation has brought the Internet and both of our companies to where they are today. And it's always benefitted consumers. The next HBO, the next CNN, the next AOL, these are the kind of remarkable breakthrough innovations AOL Time Warner could create for consumers across a whole variety of platforms.

And we have no doubt that our commitment to innovation would prompt our competitors to develop new and better offerings of their own.

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

As many of the people in this room know, interactive TV has not yet begun a widely used product. Broadcasters and programmers have little incentive to develop interactive content, because there's not an audience, and service providers have difficulty creating an audience without compelling interactive content. The merger
of AOL and Time Warner would go a long way towards ending this chicken and egg problem. Built on open platforms, AOL TV can help to jump start an entirely new industry, with many competitors. There are many other areas where we hope to spur innovation, such as finance, healthcare, telecommunications and online music.

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

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

Beyond the Time Warner cable systems, AOL has already formed alliances with DSL, wireless, and satellite
providers from Bell Atlantic and SBC to Sprint and Hughes. A combined AOL Time Warner could carry on these agreements and seek new opportunities to distribute our content and communications services on multiple platforms nationwide. And you can be assured that if and when other platforms are developed, AOL will want to be on those as well.

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

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

It is gratifying to see that most of the country's largest cable companies, including Time Warner and AT&T, are
moving forward with open access policies and implementation plans. On the day we announced our merger, we committed to open Time Warner's cable network for competition with multiple ISPs. A month later, we took the next step, jointly releasing a memorandum of understanding that is the framework for delivering AOL and other ISPs over Time Warner cable.

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

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

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

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

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

It's a problem the industry has faced together before when standards for e-mail interoperability were devised, and we weren't even dealing then with the challenge of realtime communications, but we learned from that process that interoperability alone isn't enough. We must also take steps to protect people's privacy and security. This is
especially true for AOL, where so many of our users are families and young people and, therefore, where the risk of privacy breaches and inappropriate spam are the greatest.

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

Finally -- and I'll wrap up --

CHAIRMAN KENNARD: I hope so.

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

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

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

Thank you.

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

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

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

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

And while we're proud of our role in breaking open the television universe, we also recognize that we've been one of the first to take advantage of digital technology to present revolutionary new options like high-speed interactive services, video on demand, telephony and data delivery. Our early experiments going all the way back to
Cube, in Columbus, Ohio, Quantum, in Queens, New York, presage our effort to establish the first fully interactive digital network in Orlando, Florida. And over the past five years, we've invested more than $6 billion in the development and deployment of broadband architecture.

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

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

First, as well as making traditional media more
accessible for online and interactive applications, our company will be a leader in developing new services, including news and lifestyle information on demand and interactive television, and this will help accelerate our competitors' efforts to innovate.

Second, by actively pursuing our marketplace-driven multiple ISP initiative, we'll ensure real consumer choice on our cable systems, but importantly provide a catalyst for other cable companies to follow suit. And third, as we speed up deployment of broadband capacity, we will increase the consumers' appetite for broadband services and clearly hasten deployment across competing platforms, whether that's cable, DSL, wireless or satellite, which we believe is a critical FCC goal, pursuant to Section 706 of the '96 Telecommunications Act.

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

This is what we've already done. We've already moved to restructure our Road Runner partnership, thus
enabling us to introduce multiple ISPs substantially in advance of the 18 months remaining on the Road Runner exclusivity. In addition, we are negotiating with AOL and, importantly, with other ISPs, about providing high-speed Internet service. And finally, in our Columbus, Ohio system, we have begun technical trials providing multiple ISP service. And we've, therefore, taken our commitment from the ideal to the practical.

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

Finally, no medium in history has surpassed the wildly democratic potential of the Internet to break down the barriers to human communication or to overturn the limits on cross-cultural understanding and expand the educational and economic prerogatives of people everywhere, because the Internet, which cannot be controlled by any company or any government agency, is the technology of human freedom. So it is our hope that we can bring about and stimulate this revolution, a hope I believe we hold in common with the Commission. Thank you.
CHAIRMAN KENNARD: Thank you, Mr. Levin. We'll now have a period for questioning from the Commissioners. I had a couple of questions I want to begin with. My first question is about the cable access issue. It's one that we have been grappling with here at the Commission for about two years, and we have -- as I said in my opening remarks, we all believe in openness. Obviously, it's been good for the Internet and it's important for the future of the Internet as we move to broadband, but thus far, we've heard a lot of good intentions.

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

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

MR. LEVIN: Well, first of all, Mr. Chairman, we are trying to roll back the exclusivity bar to beginning
multiple ISPs that was intrinsic in the Road Runner partnership, and we have begun that restructuring, and I am confident, although it requires the consent of all the parties, that we will achieve that so that we don't have to wait 18 months before we can actually begin. And I would hope by the end of the year we will be able to do that.

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

And we have installed the first, what I'd call multiple-ISP router in Columbus, Ohio. The trials have begun, and I'm optimistic that by the end of the year, we will also have in place the sufficient software to enable the multiple billing of ISPs. The other thing I would say, Mr. Chairman, is that I do think the understanding that was signed between Time Warner and AOL is binding on us and, in fact, it made several breakthroughs that I think are quite significant. And that's where our activity, I think, will
lead the industry in several respects. And we are now embedding those provisions into our affiliation agreements.

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

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

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

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

MR. LEVIN: It really is the marketplace at work.

I just want to underscore. This is not to satisfy a regulatory requirement. The intense activity, particularly in DSL, both from marketing and the provision of services, is really extraordinary, and for a cable operator not to energetically move to provide consumer choice, the cable system will lose out in the marketplace. That's very clear.

CHAIRMAN KENNARD: Well, I think that everyone in this room would hope that we have an environment sooner rather than later where we have multiple broadband platforms
competing in the marketplace. Cable, DSL, satellite, terrestrial wireless. But what if our hopes aren't realized? What if there are communities in America where their only choice for broadband will be the cable modem product? Will people in those communities have confidence that the market will drive to an open access environment when there are no broadband competitors?

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

And finally, I would not underestimate the growth of wireless, because in fact, the ability to have -- and we see this happening already in Europe and in Asia -- the ability to have Internet access, including with impending 3-G, to have broadband access on a portable device, is probably -- all you have to do is test the marketplace. The highest infrastructure valuations today happen to be in the wireless area because of the opportunity for broadband
MR. CASE: If I could just add that the -- we made a big investment in satellite, partly because it is the only way to ensure ubiquity in terms of the national footprint. We're working with Hughes on that project, and even with this merger will continue to work with them and others to develop all these different technologies, so I don't think the concern you have is likely to play out. But if it does, if down the road you find that there really is only one broadband technology and the industry isn't moving forcefully enough to open it up, it would be appropriate for the Commissioner or others to look at that issue and put a national policy in place.

As it relates to this merger, these are the companies that are actually doing things about open access. I think the steps we've taken should be applauded, and we really are committed to going from the concept stage to the reality stage, not just around cable broadband technology but also deploying other broadband technologies.

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

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

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

MR. CASE: One other point to emphasize is that Time Warner has a significant cable presence, but only 12 percent of households in the United States have Time Warner cable access, so 88 percent we need to reach, the national
brand with the AOL service through other means. So it is in
our interest more than probably any company's interest to
make sure all broadband technologies are open and
competitive, easy to deploy and affordable. It would be
silly for us to focus just on the 12 percent when we have a
national business and need to focus on 100 percent.

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

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

So there's nothing new about this concept of
stimulating all of the delivery mechanisms, including the
one that Steve Case referred to in an announcement of
Blockbuster to use the Enron system and then, ultimately,
DSL, to deliver, in effect, video on demand movies into the
home. And you don't see any cable mentioned in that
CHAIRMAN KENNARD: Thank you both. Other questions from the Bench. Yes? Certainly.

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

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

So we have now installed the kind of router that's necessary and the software that's needed to distinguish among several ISPs for the consumer. We are now doing that. And finally, you need affiliation agreements and, as a matter of fact -- you know, maybe I should give my e-mail address -- any ISP that would like to come and negotiate with Time Warner Cable, we're open and ready, willing and able.
COMMISSIONER TRISTANI: But what's the timetable?

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

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

MR. LEVIN: GML --

COMMISSIONER TRISTANI: I'm not being flippant

about the timetable. I just want to have a sense of --

because I've heard maybe the end of the year, but could that

mean --

MR. LEVIN: Well, but as I've indicated, there is

a contractual bar right now. I mean if you look at -- there

is an exclusivity provision.

COMMISSIONER TRISTANI: But you said those

contracts could be reformed.

MR. LEVIN: Yes, but it requires other parties to

agree to do that.

COMMISSIONER TRISTANI: So you can't tell me what

a timetable is.

MR. LEVIN: No, I, I remain quite confident that

we can make that happen faster than anyone else in the

industry, because there's another exclusivity provision that

runs longer for Excite@Home. I'm confident, but I can't

warrant it today, but I'm confident in my ability to make

this happen. We've obviously already begun the process of

restructuring. And so that the first thing that will

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

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

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

MR. CASE: If I could just add. We, as I said in the opening remarks, we understand, probably better than anybody, the importance of open access and also understand the importance of demonstrating a real commitment to open access by having real deals with real unaffiliated ISPs that
can be implemented in a real way, quickly. And we recognize that that's an important issue to you. It's also an important issue to us, because our credibility is on the line.

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

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

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

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

COMMISSIONER NESS: And to what extent will you be
making the technology available to other cable systems so that others will be able to also open up their systems?

MR. LEVIN: Well, we're -- we are not a technology company, in the sense that we make and sell technology, but anything that we've developed -- for example, the paradigm, the hybrid fiber coax architecture that is currently the industry standard was developed by the engineers at Time Warner Cable. We actually won an Emmy for it. And that template, that architecture has been made freely available.

If -- the software that we'll be created -- what's necessary here is not the router, because the routers do exist.

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

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

COMMISSIONER POWELL: Let me just ask more
pointedly. By the terms of the Road Runner contract, does it have a natural expiration date and, if so, what is it?


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

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

You know, it's something that is another indication of, you know, our commitment to want to make this happen. Because the exclusivity on Excite@Home, I think, extends until the end of 2002. So that's why, maybe, people have not been rushing to enter into affiliation agreements. So that's why I'm trying to do that and, as I say, once we get an announcement out of a third-party affiliation agreement, I think that will encourage others also.

MR. CASE: One other point in terms of the timing. The Road Runner and @Home exclusivities also would impact
AOL. So, unless the Road Runner date is moved up, AOL will not be able to provide access over Time Warner Cable systems or any other systems, so clearly we have an interest in trying to restructure this, to accelerate the date that all ISPs -- AOL and other ISPs -- would have access.

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

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

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

CHAIRMAN KENNARD: Commissioner Powell, did you have something?

COMMISSIONER POWELL: It was going to be a question, but I'm going to make a comment, in the interest of time. I've read through many, many of your testimonies and your presentations, and on many of these issues that are of some concern by other commentators -- commitments to multiple platforms, open access to ISPs, the commitment not
to leverage content distribution systems, not to favor your
own content through caching and primary screens, no attempt
to leverage the AOL-AT&T linkage -- often conclude with,
"Trust me, we won't."

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

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

And what I would like to emphasize is that I think
it's very, very important that the companies, in proving
their case, show why there are very powerful economic
reasons, not just behavioral reasons, to pursue open models and not leverage content. And Mr. Case, I think you made a good point about, you have to get on systems elsewhere, and I think that's the kind of argument we need to hear. But I would add one refinement. The key is, at what terms and conditions and prices?

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

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

And the same thing applies to programming. And that's really the history. If you're not providing the
programming or the material or the convenience that the consumer wants, it's very clear that the consumer can go elsewhere and, in fact, now that we're talking about the opportunity to go elsewhere on the Internet, there are all these distribution systems. So the economic compulsion is really overwhelming to service the consumer.

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

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

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

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

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

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

CHAIRMAN KENNARD: Commissioner Ness and then

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Commissioner Tristani.

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

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

So this notion that people are constrained in choice is a little silly. What's happening is unprecedented choice, and we're trying to stimulate more choice on television. We, you know, some say, well, you should worry
about these guys because they're potential monopolists.

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

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

MR. LEVIN: I don't think that the cable companies are working together with other cable companies in any way. As a matter of fact, I think the history of the cable industry is in fact what Steve Case has just indicated is now being carried out on the Internet. And that's deconstructing the establishment. That's really always been the history, providing more services that were not otherwise
available.  

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

So in fact, I think it's time to recognize that in fact the net effect of creating more capacity, which is what cable has done and what the Internet now explodes on an infinite basis, is providing more choice and more opportunity for independent programmers. The last thing I would say is a lot of the comments we're hearing seem to belie the other proceeding that we're involved in, which is at the FTC, examining the antitrust issues. The issue here
is not to protect competitors but to stimulate competition. And I think that's what all this technology is designed to do.

MR. CASE: I also would add that there's a big distinction between television of the past and how you think about it and limited channel capacity and whose gets carriage, essentially, and the Internet model, which, essentially, everybody gets access, everybody gets carriage. And certainly on AOL, people can go wherever they want whenever they want, and this notion that we would somehow block the Yahoo domain or somehow slow it down is ridiculous. We, we've never done that, we never would do that.

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

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

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

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

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

   But his concern -- well, first of all, he wants, wants us to deny the merger, but he said, if you do allow it, make sure instant messaging is interoperable and that everybody can have it. I hear you saying that you're already taking a lot of steps to do that but, aside from Mr. Payne's e-mail, a lot of our commenters have said that for about 18 months, AOL has said a lot but done too little in this area.
And I hear that you're committed to doing this, but how strong can your commitment be? I mean, can you say this is something that absolutely must be done? And I'll tell you what drives his concern. I didn't know much about instant messaging until I got this e-mail and started thinking about it, but if it's as good as it sounds, I can see a lot of people who are going to say, I'm not going to get any other system that can't use it, and we may end with the one system that has it, and --

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

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

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

COMMISSIONER TRISTANI: So I can have it?

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

COMMISSIONER TRISTANI: So how would I go about
getting it for my provider?

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

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

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

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

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

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

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

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

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

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

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

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

MR. CASE: No. I'm about to answer your question. Anybody can use any of the messaging systems of any of the dozens of companies, pretty significant companies, Lotus and Apple and Lycos, and so forth, that have their own customized versions of this. What we're trying to now do is
server-to-server interoperability so you can download some
other system and the servers talk to each other in a way
that protects the privacy and security and prevents spam and
pornography and things like that.

COMMISSIONER TRISTANI: Which is back to --

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

COMMISSIONER TRISTANI: When did you submit that?

MR. CASE: About a month ago.

COMMISSIONER TRISTANI: About a month ago?

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

wonderful --

MR. CASE: Well, to be honest, this is an issue
which troubles me, because I think if today we were sitting
here with a huge market share in instant messaging and the
only way to get instant messaging was to pay AOL a monthly
fee, and people said, you know, maybe, because instant
messaging is becoming more important, maybe this company
should actually make it available to other companies on some
kind of license basis, I think nobody would have
hypothesized that an appropriate, fair thing to do would be
require us to give it away free to consumers and license it
on a royalty-free basis to companies. I think that would be
viewed as overreaching, just as I think that would be viewed as overreaching if the government thought that, you know, the way to deal with the Microsoft issue was to basically put the Windows on the Web -- anybody could download it for free and any company could modify it and use it for free.

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

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

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

I'm sure I wouldn't ask you nor would you want to
commit that any and all services that would be generally
categorized as instant messaging will stay free forever.
For example --

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

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

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

MR. CASE: Well, if I could just quickly respond.
I understand the network dynamic, and I would just add that,
as I said before, Microsoft launched a messaging service 10 months ago and now has 18 million users, so it hardly suggests that somehow the network effects in this particular feature are such that it's somehow impeding competition. I think competition is robust. I think Microsoft is going to integrate, unless the government doesn't allow them to, that messaging service in the operating system and will have far more than 18 million customers a year from now. So it's a vibrant, competitive market.

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

MS. DYSON: Thank you very much, Chairman and Commissioners. I'm glad to be here. I'm neither an economist nor a lawyer, so I am generally going to try and set some perspective from the viewpoint of a longtime industry observer, a venture capitalist and someone who's
intimately involved with some of the policy issues for the Internet's infrastructure.

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

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

This market is changing incredibly rapidly, and I don't think the Federal Communications Commission or Time Warner or AOL or I or anybody here could really figure out what is going to happen, but it's clear to me that the way
people are looking at this market now seems to be missing a number of very interesting phenomena. Nobody here today has mentioned Napster or Gnutella.

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

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

The real key is to have that customer relationship, and here I would like to disagree or at least point out something that I think was missed. Through AOL you can indeed get to all these other Internet sites, and
they would be incredibly stupid to try and block access. But they do provide links. They have favored marketing partners, for which they are paid. And that's part of what the issue is here today.

How much choice does the consumer have and know about? How easy is it? At what point does making things incredibly convenient for the consumer limit the consumer's choice because he doesn't know about what else is out there? And that's why I think consumer education is tremendously important. In that context, then, the role of the government, I think, should be to let this go forward but to raise concerns -- to say this is what we're going to be watching for.

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

Finally, there is indeed all the issues of open access, and Barry's going to talk about this, but let me
just end by saying open access is not just a matter of principle, it's a matter of pricing. And so, watching those contracts and the terms of those contracts is indeed an important function. Thank you very much.

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

MR. NALEBUFF: Chairman, Commissioners, 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. Yes, actually I think the stakes are that big. And at the same time, I think that predicting the future of the digital economy is actually hopeless. In fact, given the flux of the environment today, I would be more than content to predict where we are today.

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

Now, of course that's easier said than done. What is the field? Is it home? Work? Mobile? What is level? Do we want to emphasize levelness within a technology, and thereby promote intersystem competition? Or emphasize
levelness across technologies, and thereby promote
intersystem competition? We certainly 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 DSL 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 your most challenging problem, and that
is where I will focus my remarks. I believe that it is in
the self-interest of Time Warner AOL to provide access to
their system and that 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 and services as a bundle offers the
bundler a tremendous advantage in the marketplace. By
"complementary," I mean goods that enhance each other's
values, as in hardware and software, hamburgers and french
fries or, in this case, broadband cable pipes, ISPs and
What's interesting here is that the advantage of the bundler comes from being able to offer a lower -- not higher, but lower price. And this is now where you see my role as a theorist come into play. When two separate firms get together to coordinate their pricing of complementary products, such as A and B, the monopoly price is lower than the result with uncoordinated pricing. The intuition is that when the 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 the price will be too high.

This is in direct contrast to when firms coordinate the price of substitutes or competing products, and thereby raise the price. When firms coordinate the price of complements, the price goes down. Thus, at first glance both the firms and the consumers are better off. The only reason that you may be 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's win-win-lose. A win for the bundler, a win for consumers today, and a lose 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 level field -- the playing field level for players who are left out of the bundle? What does the FCC want to do for players who, like AOL just a few months ago, are worried 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 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 Time Warner AOL bundle.

I don't wish to regulate how the elements of a bundle should be prices 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 those 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
collection of the extra price for dial-up service, currently
$12.00 -- to get to the $21.95 price -- reflecting the basic
ISP services.

My final point is that there's another subtle
example where the playing field today seems tilted. And
it's a problem I think you should be concerned about, and
it's something, actually, we heard again and again in Mr.
Levin's testimony. This 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. And you've heard about the
problems that have been created by the Road Runner contracts
and the @Home contracts, many of which are trying to be
undone today. I believe that the FCC and other government
agencies should be paying as close attention to these
contracts as they do to merger agreements. Thank you.

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

MR. NALEBUFF: If, in the end, there is enough
competition in different types of platforms, the advantages
of opening up those platforms to, if you'd like, single
providers, I think will allow them to exist. On the other
hand, whether or not venture capitalists and the market will
fund those companies in a world where they're not sure to
get access is a question. The fact that they do have access
now on dial-up or in the case of DSL certainly is helpful.

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

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

MR. NALEBUFF: I believe that they will certainly
have access. The question is at what terms and what price.

And moreover, I believe that if you required everything to
be unbundled, actually prices would be higher, and adoption
would be slowed down and consumers would be worse off. And
so there is this tradeoff, if you'd like, between success
today, penetration today and serving consumers today, and
the ability of people to play going forward. I don't have
more of an answer, I guess, than that.

CHAIRMAN KENNARD: Okay. Fair enough. Other questions?

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

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

And we could all go outside and sit on Independent Avenue and watch Metro buses go by with extraordinary amounts of dot com advertising. Television revenues and ads last year increased dramatically by virtue of the increased advertising by dot com companies. We tend to forget, I
think, that reaching consumers about the possibility of sites or Web sites and access is not limited to whatever portal or medium accesses on the instrument itself.

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

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

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

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

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

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

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

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

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

CHAIRMAN KENNARD: Mr. Furchtgott-Roth?

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

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

There are two situations. You might even describe them, as an economist, as two games that might be followed. One, in which -- and two entities come before one antitrust authority. And I wonder if you could comment first on whether any and all the issues that have been raised today will in fact be reviewed by the Federal Trade Commission in their antitrust review. And second, whether the outcome of a single -- the review by a single antitrust agency is likely to be different from a review by multiple antitrust
MR. NALEBUFF: I have to say that you have obviously picked up on the -- quite rightly that many of the issues here are as much competition policy and antitrust as they are communication policy. I am also in Esther's camp in the sense of getting companies to talk about what their policies will be, establishing track records, getting this out in the open, I think will actually solve many of the concerns that people are, people have.

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

So my view is that, like Esther's, that the process of getting people to talk about their plans for the future and the kind of commitments that they intend to make, the type contracts, is actually a good substitute in this case for regulation. And if they do that once or if they do that twice, I don't think it hurts. And that's my take.
CHAIRMAN KENNARD: Sounds like a good endorsement for this hearing. Any other questions from the bench? Commissioner Tristani.

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

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

And the answer is that these companies signed contracts which do not look to be in either the public interest or their own interest, where we sit today. And yet, part of the problem was there was no discussion about those at the time. They sort of went under the radar. And I suspect that having the same type of public attention, press attention to the contracts that would literally keep other players out of the market and shape the game -- well,
let me go back one step -- as a game theorist, I think the
way you win, the way you succeed is not necessarily just by
playing the game well, but by changing the game.

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

CHAIRMAN KENNARD: Commissioner Powell?

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

Many people widely believe that Apple Computer
Corporation's refusal to license other producers of its
systems limited its network in a way that put it under water
for a very long time. Similar, vertical integrations by IBM
in hardware and/or software. The lists go on. Ford Motor
Company doesn't produce steel anymore, as opposed to doing
this. And there are some interesting examples of even bundled services being rejected by consumers. Some things as simple as they don't want a $350 communications bill, but they seem to be more comfortable when they're on six different ones.

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

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

And so now the question is how much of an incentive will you have to buy what bundle? What are the combination of bundles that will be available? And who will be invited to play in those games? And so, yes, you can try to carry it too far, but I think we've seen, especially in the software industry, just the dramatic success of software bundles. And here, I actually don't mean Explorer and
MS. DYSON: I'd just like to add that another phenomenon that's going on is outsourcing, and AOL itself got rid of its own ISP operations and found it more effective to operate that way. I think you're going to see a lot of banks and other people offering ISP services not because they themselves own anything but because they're reselling them. And again, they have that consumer operation.

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

CHAIRMAN KENNARD: Commissioner Ness?

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

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

And you know, there's a question. How much do consumers want to know? How much do they take for granted? But I would like to see simply a broad education system where people understand this stuff. And if they don't, then maybe it's the government's job to educate rather than to regulate. But I hope the press pays more attention to this stuff, makes consumers more economically literate.

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

(There was a brief recess.)

CHAIRMAN KENNARD: Okay, we're prepared to begin our next panel. We have a very distinguished set of panelists here. I also want to note that there are
representatives from AOL and Time Warner at the table here. They will not be making opening statements, but they will be available to respond to arguments and critiques from the other panelists.

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

MR. ORTON: I'm Dr. Barry Orton, professor of telecommunications at the University of Wisconsin, Madison, and I'm a consultant to local governments who are franchising authorities in cable television. I'm an original founder of the National Association of Telecommunications Officers and Advisors and president of its Wisconsin chapter. I advised the city of Milwaukee and 28 Milwaukee area suburbs on the Time Warner AOL merger and, in fact, one of those suburbs was Brown Deere, Wisconsin, the hometown of Deborah Latham's family. So I've been representing local municipalities for about 20 years on cable matters.
After reviewing the technical, legal and financial qualifications of AOL Time Warner and receiving assurances that existing franchise obligations would remain intact, my Milwaukee area franchising authorities all approved the transfer of control last month on my recommendation. They did not consider open access platform issues as part of their transfer process, and they are convinced that this is a national issue rather than a local issue.

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

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

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

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

My colleagues in education, particularly in distance education, have told me from various parts of the country that they have had problems with students who tried to take distance education courses who were on AOL, because they don't have all the full features that others do, for example, the ability to take full attachments from anywhere. And that's been a real detriment to some individuals trying to take distance education while on AOL.

In some periods between 1996 and 1998, AOL's performance quality and level of customer service rivaled the worst cable operators before cable re-regulation in the
'92 Act. If AOL hadn't been in the virtual marketplace but in the real marketplace and they sold hundreds of thousands of tickets to Bruce Springsteen concerts with only 50,000 seats available for the public, they probably would have been indicted.

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

In 1997, 36 attorneys general required them to stop advertising until they could provide sufficient modem access. In 1998, a 44-state attorney generals voluntary compliance act forced AOL to clarify its free trial offers, disclose its minimum -- its premium surcharges, its cancellation procedures and reform its other business practices. As Ohio Attorney General Betty Montgomery said in 1998, "The problem we're experiencing with AOL is similar to a parking attendant that sells too many monthly passes. When drivers show up at the garage, it's already full of cars."
You should look at these voluntary compliance assurances and their subsequent reports to the attorney generals that they were actually meeting the terms of those and, in case you have problems getting them, which we did, I've finally gotten them and I've passed them on to the cable bureau staff. So I would recommend your looking at that.

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

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

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

MR. COOPER: Thank you, Mr. Chairman. My name is
Dr. Mark Cooper. I'm director of research at the Consumer Federation of America. The Consumer Federation and its member groups have testified on this issue from Cambridge to Los Angeles to Broward County, Florida.

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

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

For while consumers have enjoyed the benefit of hundreds of competitors on the narrowband Internet, things are moving in a very different direction on the broadband internet, which of course the Department of Justice has defined as a separate market. We have a dramatic increase
in the concentration from recent mergers. We have the refusal of vertically integrated facilities owners to provide open access. We have the failure of proprietary platform owners to inter-operate for communications. The chokepoints on the broadband Internet are clear, backbone, bit rates and bootstream. The sticky features that lock consumers into the Internet platforms have been identified, instant messaging, keywords, e-mail addresses and electronic programming information. A handful of dominant firms are leveraging those chokepoints to extract economic rents and foreclose choices to consumers.

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

If wire owners can give their own programming an edge, we will not have fair competition for eyeballs. What is quite clear is that as the commercial value of the Internet increases, these companies are more than willing to destroy its openness in pursuit of their proprietary economic interests. These powerful interests will frustrate
Two years after we first asked for open access, the exclusionary contracts are still in place. Virtually no deal -- details of nondiscrimination have been provided. And there is no way for any individual ISP to assert a right to that nondiscrimination if they are frustrated. The frailty of the voluntary access promises was demonstrated in Los Angeles when AOL was asked to simply put its MOU at the back of the franchising agreement. And it objected vigorously.

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

The U.S. Appeals Court in the Ninth circuit clearly concluded that the "provision of conduit services of underlying telecommunication services are, in fact, subject to a common carriage obligation," that 200-year-old principle I mentioned at the beginning of my remarks. Open access is the law of the land. Open protocols and fair competition for eyeballs must be the policy of this Commission.
We have outlined four specific steps that this Commission should take before they allow this merger to go forward. And one of them might well be until they deliver those promises, don't approve this merger. Wait till the end of the year or the middle of next year until you see what open access looks like before you let the merger go forward. And that may be a fifth one.

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

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

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

MR. MIRABAL: Thank you. My name is Manuel Mirabal. I'm chair of the board of directors of the Hispanic Association on Corporate Responsibility, better known as HACR. HACR is a coalition of 10 of the largest Hispanic national organizations working on public policy in
the U.S. We represent the interests of 36 million Hispanic Americans.

HACR has a vital interest in the proposed merger. We believe it is essential that the potential economic and social benefits of the Internet and telecommunications revolution must be available to all segments of the population. We further believe that the proposed regulatory process, which we're seeing today, is necessary. These hearings afford citizens the right to be heard, and through this process, we must ensure that the interest of the public is protected.

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

The combined record of both applicants in responding to the needs of the Hispanic community consists of minimal efforts to address programming, cable service and Internet access. Furthermore, neither company has responded to our request for information concerning the impact of the
merger on the Hispanic community. Consequently, we are
deeply concerned that this merger will make matters worse
than they are now for the Hispanic community, because of the
limited ability of this community to afford costly Internet
services, the existing disparity in access to Internet and
telecommunications services and the limited geographical
cable service areas, which exclude large segments of our
community.

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

Diminished competition would disproportionately
affect the Hispanic community due to socioeconomic reasons.
AOL brings with it 23 million narrowband customers. Time
Warner brings a dominant position in the delivery of
entertainment news and educational programming in geographic
markets it serves. With this impressive collection of
assets and dominance in the related markets, the combined
AOL Time Warner will be able to behave in ways that could
limit consumer choice and harm competition.

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

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

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

The potential for consumers to be harmed by the

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

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

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

AOL’s Steve Case has stated to investors that the
The proposed merger would create something new and powerful and would become even more central to people's lives. With a record as bare as AOL's in addressing Hispanic-American concerns and with no apparent interest in learning about our needs, this merger is a recipe for disaster for the Hispanic community.

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

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

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

A lot of people have said a lot of, I think,
important things. I'm not going to repeat everything. I'd like to thank the Commission for the excellent panels. I thought that Esther and professor Nalebuff -- I'm saying it wrong I'm sure. Barry and Esther, I thought did a very nice job of setting the stage for the debate.

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

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

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

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

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

The next paragraph, they point out the kind of things that technology they're providing for cable operators to track content, and I'm going to read it, because I think you should think about this. It says, "Traffic type identification allows you to isolate different traffic types
in your IP network. Through Cisco quality of service, you can identify each traffic type. Web, e-mail, voice, video. Tools such as type of service bits identification allow you to isolate network traffic by the type of application, even down to the specific brands, by the interface used, by the user type and individual user identification or by the site address."

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

Next paragraph. "Cable companies can optimize service profits by marketing express services to premium customers ready to pay for superior network assets." So it's really a fast pipe, a slow pipe, a go-fast button, things like that. And what people are concerned about is
the highly differentiated level of service and who's going
to get and at what terms and at what level of discrimination
to access.

And the next paragraph on the next page, the full
paragraph, it says -- this is -- and I think quite a key
paragraph. They're talking about competitors' service here.
And they say, "If a push information service that delivers
frequent broadcasts to its subscribers is seen as causing a
high amount of undesirable network traffic, you can direct
CAR" -- which is, you know, one of the Cisco services -- "to
limit subscriber access speed to the service. You could
restrict the incoming push broadcast, as well as the
subscriber's outgoing access to the push information site to
discourage its use. At the same time, you could promote and
offer your own or a partner's services with full-speed
features to encourage the adoption of your services."

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

CHAIRMAN KENNARD: Thank you, Mr. Love. Ms.
MS. CUNNINGHAM: Thank you. I'm Cathy Cunningham. I'm here from the city of Irving, Texas, and I also am here on behalf of the National Association of Telecommunications Officers and Advisors, which has 432 local government members representing over 20 million cable subscribers.

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

But I think it's important to have these kind of hearings as just a person who lives out almost in, maybe not quite in the middle of nowhere -- I'm near Dallas -- but still, in the middle of America. It's, this is an issue that's very interesting to people, and I think that if you had just passed over this like a standard type of license transfer, it would be seen as not gaining the public trust. The public wants to hear these things talked about. I don't think it would benefit the public, the Commission or the companies involved not to have this kind of hearing.
I think that the public wants a hearing like this, and I think that it's -- it would really be actually detrimental even to the companies to not have this. It would just be seen as wrong by the public, by those people who aren't living in this city but who live outside this city. I think they want this sort of thing and they want to be able to see it and know that -- and hear these explanations that are being produced by the company representatives, by the panel before us, this panel and the next panel. This is the sort of thing the public wants to hear about.

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

Secondly, a comment I heard several times mentioned was there were discussion about marketplace. And I know that this Commission struggles with and is sincerely interested in doing the right thing as far as marketplace versus governmental regulation or even intrusion into certain areas. In my city, in the city of Irving, Texas, we
have been blessed or cursed, depending on how you want to look at it, but the location. We have more than 20 telecommunication companies that have build-out facilities in our rights of way.

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

I mean it's not -- it would be very nice, I would like to hear all these things and say yes, a marketplace exists, but sometimes it doesn't. It doesn't in all parts of the country. It doesn't in my neighborhood. And that's despite the remarkable facilities built out that I struggle with at work trying to find room for all of these companies. So once -- right now, our cable company, which is a partnership between Time Warner and AT&T, hasn't yet to rule out the broadband services -- I think that's coming soon -- but right now, there's no high-speed broadband access, and when the cable company does roll it out in the next couple of months they said, they'll be the first ones
and for a while they'll be the only ones. I suspect that DSL is coming, but it's not there yet.

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

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

Second, this goal goes along with it. I thank you for including us in this. I hope you will continue to include your local governments as these sort of things develop, and I would like to mention that our city -- and in
closing, I would just like to mention our city did approve the transfer agreement. And in our city, Time Warner agreed and actually provided language concerning an open access provision in the transfer agreement. I think that if it was okay for us, I don't know why it wouldn't be okay across the country.

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

Thank you.

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

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

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

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

They have made repeated requests to us to delay reporting on these matters to us, although we have raised concerns that go all the way from south Florida through Atlanta up through New Haven and all of the Northeast states and many other areas of the country about concerns about
being able to access certain cable services where those
services do not go into certain communities for various
reasons. That information has not been made available to
us.

CHAIRMAN KENNARD: When did you request this
information?

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

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

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

MR. PARSONS: I think I would, Mr. Chairman. I
want always to be careful not to seem to engage in a food
fight on these kind of panels but I, like you, think the
allegations that have been made are serious. And first, I would hope that whatever followup data Mr. Mirabal is going to share with the Commission he would also share with us. To my knowledge, which is while not exhaustive, at least extensive on this subject, since it is an area that reports to me and our corporation, I think we have an exemplary record in terms of not only serving the Hispanic community but serving the full breadth of, as you call it, the diversity and the richness of the communities in which we operate.

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

We also committed to wire all the schools in those communities and so that the schools would have access to the broadband capacity beyond the cable service. And so I would
be more than amazed, I would be shocked if there were, if there was actual data to support the allegation that we somehow are underserving the Hispanic community within the franchises where we operate.

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

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

WEA Latina. We are, as you know, a major record company. About 20 percent of the Latin music that's available in this country is from artists that we've gone
out and found and developed and nurtured and then brought to
the public's attention. So I would be very interested to
see the documentation that Mr. Mirabal has agreed to share
with you. We have probably -- in fact we just won an award
for having one of the best minority and women in business
development initiatives in corporate America. So I can't
say that our track record is entirely spotless or that we
are the exemplar. We sure try. We've sure been recognized.

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

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

COMMISSIONER TRISTANI: I just have a question,
and I don't know if you keep these statistics, but do you
know what proportion of your subscribers are Hispanics?
MR. PARSONS: I don't as I sit here today. I could get that information for you, I suspect.

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

CHAIRMAN KENNARD: Any questions. Commissioner Furchtgott-Roth.

COMMISSIONER FURCHTGOTT-ROTH: I'd like to thank the witnesses for coming today. I'd particularly like to thank Ms. Cunningham for addressing the questions that I asked and for her comments about the value of this hearing. I, too, listened very carefully to Professor Nalebuff's comments and to Ms. Dyson's comments as well, which I interpret as meaning that there's value in having public discussion of matters that are of great public interest. I still wonder about whether this agency has been -- does this in a discriminatory manner or not in choosing which issues to raise and which not, and also whether there aren't other federal agencies that address these more directly.

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

MR. COOPER: Let me -- I didn't want to directly use the initial time. I expected you would come back around to your questions. And let me make a couple points about...
why there is multiple review of mergers between agencies. Second of all, why some mergers attract more attention than others.

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

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

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

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

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

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

COMMISSIONER FURCHTGOTT-ROTH: Dr. Cooper, by your own testimony, the Sherman Act and the Communications Act
are quite different, and I come back to my question, which
is, is the information that you testified about today
similar to the information that you've presented to the
Federal Trade Commission, which enforces the Sherman and the
Clayton Acts.

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

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

MR. COOPER: Well, again, the difference in this
merger -- and I think I have testified in almost all of the
en banc hearings the chairman referred to -- these are very large mergers affecting substantial portions of the country, frequently involving, in this case, cross-ownership of content and conduit, so they raise different issues. They clearly raise different issues when I'm looking at AOL Time Warner versus a small license transfer, SBC Ameritech, which definitely was a similar context.

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

CHAIRMAN KENNARD: Mr. Love.

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

For example, the Federal Trade Commission, along with the Department of Justice, administers the merger guidelines. And we have concerns -- and this has been a case that's brought up -- that the treatment of collaborative ventures, the so-called joint venture
guidelines -- are too much of a safe harbor for mergers and
not enough of a, don't do enough to capture the degree to
which the companies are not really independent. The fact
that -- people have talked as if AT&T and Time Warner are
somehow these independent companies, but they have an
incredible web of joint ventures and collaborative
agreements, which makes them something different than just
independent entities.

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

So when Bell Atlantic merged with Nynex, that was
just a half, you know, half a country. They couldn't really
intervene in it. And so we raise that issue, because we
believe that having more players makes the regulatory
environment work better because you hear more voices. Now that's something that's sort of different. Now --

COMMISSIONER POWELL: Why is that remarkable?

MR. LOVE: What's that?

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

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

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

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

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

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

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

On the other hand, the reason to bring things up
in this proceeding is because you have more of a permanent
relationship with the cable industry than the FTC does. FTC
looks at these things from time to time. You look at them
on an ongoing basis, and so in a way you're more of a,
you're more related to them than the Justice Department or
the FTC is. And so I think you have more of an oversight
role. But I also think you have more of a responsibility.
Some of the solutions are more regulatory than
antitrust in nature, by their, because of the, just you
can't come up with, you know, a little consent order today
that would solve all the problems tomorrow, because you
don't even know what they're going to be yet. And so you're
trying to sort of, I think as some people implied in the
last panel, develop a bit of a, what is the body language,
you know, what, you know, you tell them kind of where you
want them to go and then, you know, you're going to see them
again. So that sort of makes more sense to have that
investment. If Robert Petowsky has that discussion, it's
not really that meaningful.

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

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there is not a baseline definition.

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

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

MR. COOPER: Well, the Commission certainly has a very lengthy description of open access that I filched from AOL and AT&T. You will recall that AOL, in San Francisco and AT&T, in Canada, defined in great detail to regulatory bodies what they meant by open access. And frankly, what they said, and certainly what AT&T said in Canada, looked an awful lot like 251, 271 under the Telecom Act.
And as I read the 9th circuit, that is one path you may have to go down, depending on how that plays out, the nature and structure of common or open access, because it may or may not be full common carriage under the Telecom Act now applies to the cable industry, at least in the 9th circuit, although obviously, we may yet litigate that question with you. But, so at one level, that is the level of detail into which this Commission may have to go under the law.

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

So you have that history. And in that case, there is not this huge structure of regulation that we have had to live through in the last four years in 271. Those are two models of access that this Commission has and has applied in a nondiscriminatory framework. We don't have to do an awful lot of work, as I pointed out to this Commission in the case of Texas and New York.
You have operating irreversibly open markets. In those states, the Commissions in those states have worked out with the dominant incumbent carriers open access rules. One can argue that under the Ninth circuit, you should apply those rules to the cable system. We have been asking for a lot less than that for the last couple years. We may have a legal right to all that.

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

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

And language like that put it into this merger agreement, put into the AT&T merger agreement under reconsideration will have the effect of establishing the level playing field we heard about. It will balance the bargaining power of the unaffiliated ISP and the affiliated ISP. That's a level of detail I think answers your
CHAIRMAN KENNARD: Not exactly. You outlined a couple of options.

MR. COOPER: Yes.

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

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

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

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

So that may be the better way to go. Give them the right. Tell them to arbitrate disputes so that you
don't have to try and write rules. We tried to get through this without writing rules by letting private parties have the private right of action. That is what AOL asked for in San Francisco.

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

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

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

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

MR. PARSONS: Well, I think that both my colleague from AOL, who's more technically proficient, and I would
care to respond. I'm going to let Barry start, but I have a
point that I want to make in summary.

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

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

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

In fact, if you asked 100 different people what
AOL is to them, you would hear them say they're completely
different things. It's where I get news, it's where I talk
to my friends, it's where I get sports, it's where I get,
talk to my friends, where I go to the quilting forum. So from our point of view, we can't discriminate content. If we were to employ some kind of caching that somehow discriminates against content, what that means is, to some segment of our members, they all of a sudden have a bad experience. And so it makes absolutely no business sense. In fact, if we did it, what it would do is they would complain.

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

MR. SCHULER: They would complain to us.

MR. COOPER: Let me respond.

COMMISSIONER NESS: Go ahead, Dr. Cooper.

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

MR. SCHULER: That, that is not how, unfortunately -- and I think our friends at Disney would be the first to
say -- consumers buy brands. Brands are not fungible. The fact of the matter is somebody wants to watch the Yankees, it's not as good to go watch the Mets. Someone wants to watch, you know, Disney, it's not as good to go watch Mickey Mouse. If someone wants to go --

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

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

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

In fact, we set out to be the best Internet service provider out there. And we discovered that by doing that, by providing unrestricted access to content, that
people came. Today, 23 million households have decided to buy that.

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

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

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

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

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

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

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

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

COMMISSIONER NESS: Okay, thank you. Mr. Levin, you wanted to respond. I know we're running out of time.
CHAIRMAN KENNARD: You're on the next panel too, so you'll have a chance to continue your monologue. But --

MR. PARSONS: Appreciate it.

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

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

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

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

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

COMMISSIONER TRISTANI: I had a question for Mr. Mirabal and a bit of a comment, but first of all, you made some statements that Time Warner was running a -- and I
think it was a Seinfeld episode? -- is that a fact? And
I'm talking about the Seinfeld episode which ridiculed
Puerto Ricans, burned the Puerto Rican flag and made all
Puerto Ricans look like rioters.

MR. MIRABAL: That's correct.

COMMISSIONER TRISTANI: They are running it on
syndication?

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

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

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

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

MR. MIRABAL: Yes, we have. They have, they
probably in their records continuously dating back from when they began running that, that particular movie. I saw it once only three months ago when I was in Boston doing a speech, and I was appalled that it was running again on the station.

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

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

COMMISSIONER TRISTANI: Thank you, Mr. Mirabal.

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

(There was a brief recess.)

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

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

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

Today's industry convergence is a very natural outcome of both broadband and Internet technology, and this trend will likely result in a limited number of vertically integrated players like this combination and AT&T. Given
this consolidation, we at BellSouth do not object to this
merger, per se. However, we do believe that this merger
must be conditioned to ensure that the consumer value
created by it is not outweighed by the potential
anticompetitive choice-limiting impacts of it.

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

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

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

Third, all of these players, including AOL, are in
the network business. This Commission has understood for
decades that independent or unconnected networks restrict
competition. Given these points, we believe this merger
must be conditioned it the following three ways.

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

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

You lived it with satellite and cable overbuilders, and you will relive it in the broadband Internet world if we are not vigilant. The relationship between Time Warner content and AOL-packaged distribution must be based on generally available market terms and
conditions. Again, a simple principal simply applied to this merger.

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

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

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

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

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

And all of the panelists, to a member, have said, don't take the "trust me" theme. Codify the promises.

Thank you, Mr. Chairman.

CHAIRMAN KENNARD: Thank you. Mr. Padden?

MR. PADDEN: Thank you, Mr. Chairman. I'd like to focus my remarks today on interactive television, which, at least to our way of thinking, represents the convergence of traditional television, Internet content, communications and commerce. And our company is investing millions of dollars in developing wonderful new interactive television content
for consumers. For example, on election night this year we're going to have interactive election coverage, the likes of which the American people have never seen before. They won't have to wait for the race, the information about the races they're interested in to be selected by the director in the studio to come up on the screen.

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

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

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

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

There's two things that pushed us over the line
with respect to this transaction. First, you heard Mr.
Levin say that they are now starting to install routers that are capable of open access. And I think in that statement there's a very important fact. And that is the architecture for interactive television systems is being set now. Decisions are being made now about what kind of routers are in fact going to be installed in these networks. What capabilities will be in the box and in the operating system.

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

We think there's a history here with both companies, the common thread being abusing bottlenecked facilities to limit consumer choice. I'll give you just a few examples. AOL, if you want, if you're a company that wants to put your content inside their walled garden, their contract will require you to disable navigation links otherwise available to the consumer. There is no way to
characterize that requirement as pro consumer choice. It's anti-consumer choice. It's taking choice and options away from the consumer.

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

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

The contract says, "Nothing contained herein shall obligate operator to provide broadcaster with access to any return path provided to subscribers by operator for any purpose." So we got nothing. Thank you, Mr. Chairman.
CHAIRMAN KENNARD: Thank you, Mr. Padden. Mr. Weed?

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

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

Postmerger Time Warner AOL will control essential Time Warner programming, AOL services, including AOL TV, and substantial investment in the largest direct TV broadcast company, Direct TV. These factors give AOL Time Warner the market power to threaten the public interest and a viable independent cable industry and its progress in closing the
I want to about the digital divide. The Commission has voiced repeated concerns over the digital divide. That is, the concern that consumers in certain markets, including smaller markets in rural areas, will not have access to broadband services. In fact, recently, Chairman Kennard observed that the lack of high-speed access in rural regions stems primarily from the high cost of providing such services. Chairman Kennard stated, "Providing customers with sophisticated services in areas of low density is an expensive undertaking."

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

But the business model in smaller markets is far from proven. Independent cable's progress could be stalled by the imposition of costly local, federal regulation or by abuse of market power by companies that control essential programming and Internet services. This brings us to the
ACA's primary question to the applicants. Will AOL Time Warner require independent cable operators to carry AOL services as a condition of access to essential Time Warner programming?

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

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

First, the applicants argue that they would not require carriage of AOL services as a condition of access to Time Warner programming, because it was not in their
economic interest to do so. Independent cable operators would just find an alternative programming, Time Warner said. This economic argument does not work. Of course it is in the applicant's economic interest to leverage key programming assets to force carriage of other services.

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

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

But then, in the applicant's July 17th filing, they appeared to retreat from this statement. With this apparent inconsistency on the record, ACA asks today for clarification. The most appropriate clarification for these applicants is to affirm that they will not condition access
to any Time Warner programming on carriage of any AOL services. With that clarification on record and included in this Commission's order in the docket, ACA can support the merger.

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

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

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

But initially, I want to comment that there are 28 million deaf and hearing impaired American citizens who rely on instant messaging services, much like most of us use the telephone, and I would ask, do any of us believe that those 28 million citizens should have less functionality in their communications media than those of us who use the telephone have today. Certainly, none of us would tolerate the
example that we heard from BellSouth, where you had to have
a different service to communicate with somebody who had
AT&T or Sprint or MCI. Certainly, that should be -- that
should carry over in the world of instant messaging to the
deaf and hearing impaired community.

Earlier today, Mr. Case discussed the availability
of the AOL instant messenger and his commitment to
interoperability. However, one year ago, Mr. Schuler
promised to fast-track interoperability within the IETF.
During that one-year cycle, there has been very limited if
any participation by AOL in the IETF process. Two to three
months ago, Mr. Case again addressed the issue of IM
interoperability, and at that time, his suggestion was you
could achieve interoperability by licensing AOL's software.
Shortly thereafter, AOL has again changed its position,
again promising to fast track interoperability with the IETF
but using as an excuse, security and privacy concerns of its
members.

I guess my question, Barry, would be why didn't
you tell us that a year ago? And the next question would be
were you misleading us then or are you misleading us now?
On the question of interoperability and its effect on
security for the members and privacy concerns, there's not
been one indication that anybody has demonstrated that
security and privacy is in any way more threatened or
further at risk with interoperability than it is without it. And in fact, maybe Mr. Schuler can address that later this afternoon.

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

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

Commissioner Tristani, I would urge you to take up Steve Case's offer to download AIM and to try that product. And I would ask you at the same time, try Microsoft's, try Yahoo's, try Tribal Voice's, try Otogo's et cetera. And after you do that, I would ask you to think about when you want to make your choice about which product to use, do you want to have the option of making the choice because one
product had features and functionality that you preferred,
or because one product gave you access to 92 percent of the
world to communicate with and the other products limited you
to eight or 10 percent?

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

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

CHAIRMAN KENNARD: Thank you. Mr. Melcher?

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

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

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

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

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

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

With the change in AOL's position on open access from prior to their proposed merger with Time Warner to now their position following that announced merger, it becomes imperative that the FCC take up the cause of open access for consumers on the nation's 8,000 smaller Internet service providers. The FCC should make open access a clear and enforceable condition of its approval of the AOL Time Warner merger. Let me explain briefly why we support open access
and discuss the four most common myths perpetuated by opponents of open access.

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

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

In reality, we believe AOL and Time Warner would prefer to create a tilted and skewed playing field by creating a closed system for Internet access and telecommunications services over that system. This would force the consumer to make difficult, noncompetitive
Myth number two is that open access cannot be accomplished quickly. Until recently, the argument was that open access could not be accomplished at all. It was technically impossible. I assume AOL and Time Warner would agree that today there are no technological barriers to open Internet access over the cable plant. As we all know, AT&T admitted as much several months ago in a letter to the FCC with Earthlink.

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

We are pleased to be a participant in the AT&T open access cable trial, and we are beginning that process now. We also would hope to be a participant in AOL's open access cable trial, and I would like to take Mr. Levin up on his offer that any ISP that requests will be asked to
participate. We so request. But those trials are proceeding very slowly and with very limited focus.

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

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

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

Competition, as one Commissioner mentioned

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

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

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

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

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

CHAIRMAN KENNARD: Thank you. And thank you all for your presentations. I think, in fairness to Mr. Schuler, we should give him an opportunity to respond to the questions of Mr. Bagully that were offered in his
MR. SCHULER: Thank you. Let me just provide a lot of perspective, or at least put some context around this instant messaging issue, which I know is very confusing to people. And it's important to know, when we talk about instant messaging being free, which was a surprise to some people, that we made it free voluntarily. We actually stimulated -- I think the reason why Tribal Voice is in business today is because we created that category.

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

But for consumers today, they essentially have interoperability. Now, that does not mean that we think interoperability is a bad idea. We think it is a good idea, for a lot of the reasons that are, have been suggested. And it's also been suggested we've slow-rolled interoperability for some ominous reason, but I'd like to talk about that as well. And I want to use e-mail as the point of history.
If you go back 15 years, e-mail also was not interoperable. Corporations, who mostly used e-mail all had their own systems, and you could only mail people inside of a corporation. Then, the industry decided to create protocols to allow e-mail servers to talk to each other. We believe that that's exactly the way you need to enable instant messaging interoperability.

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

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

So in thinking about this interoperability issue, our biggest concern is, so now, when we go to do this again,
how do we make sure we build in the controls that are going to A, give consumers the ability to filter out what they don't want, B, to ensure that the hackers and spammers out there who seem to be much smarter than all of us who run the networks and manage to get their way in, will be prevented? And how can we, who each want to run independent services, can maintain the standards of our service?

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

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

If you go to Tribal Voice -- and they also have standards, but let me tell you how, on their own Web site,
they tell you to deal with a person who harasses you. I will just read this. It won't take too long. "If you've been abused or harassed on Powwow, find the IP address of the perpetrator by clicking on the name field in the person's powwow window. The window cycles between the person's powwow ID and his or her IP address." It goes on and on for a couple of more paragraphs.

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

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

There are two ways to do interoperability.
There's a right way and a wrong way. In the wrong way, the client-to-client or peer-to-peer way, we would be forced to the lowest common denominator of providing service to our members. In the right way, server-to-server, the proposal which we put forth to the IETF, the IETF has been struggling with this issue --

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

MR. SCHULER: Well, no --

COMMISSIONER TRISTANI: And the security issue.

Let me finish.

MR. SCHULER: Um-hum.

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

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

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

MR. SCHULER: Okay. My turn? We have been absolutely consistent all the way through - and we can go show you my quotes -- that privacy and security and the difficulty, the technical difficulty of getting these
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systems, which must communicate in real time to be able to allow us to do what we're talking about doing. And that is us to offer a level of service, other companies to offer a level of service. It is very hard. We run another service. We have another instant messaging service --

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

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

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

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

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

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

CHAIRMAN KENNARD: Mr. Schuler.

MR. SCHULER: And the important thing to add is that interoperability has to be true interoperability. There are many services out there --

CHAIRMAN KENNARD: Mr. Schuler.

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

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

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

CHAIRMAN KENNARD: Twelve months from today.

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

CHAIRMAN KENNARD: Is that a yes?

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

CHAIRMAN KENNARD: Twelve months from today.

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

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

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

And I don't think there's anyone here -- because today instant messaging on all services are run relatively
spam- and intrusion-free -- but I don't think there's anyone
here who wants to one day say that, you know, we pushed this
issue and in the process we got interoperability, but we
took a service that people love and enjoy and introduced a
factor they hate, and that's spam and intrusion forever.

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

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

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

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

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

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

MR. PADDEN: Sure. You know, I described what we're going to do on election night this year and consumers doing interactive television with a separate TV and a PC with the PC connected to the public switch telephone network, which is still open, will be able to interact. But if that same consumer was trying to interact in a single
screen experience using a Time Warner Cable box, the new
cable boxes that I saw at the cable show in March had no
phone modem in them at all. It was the cable in and the
cable out.

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

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

MR. PADDEN: Well, so far, our company has
invested about $65 million in trying to build out that
digital spectrum, including -- I think you know we did
Monday night football in high definition throughout the
entire football season last year -- but there's no return
path. Certainly nothing comparable to the broadband two-way
path of the cable infrastructure that has any remote chance
of being an effective substitute for consumers to what the
cable plant is going to offer. And what we're focused on is
what, what the consumer's effective choices are going to be
in the world of interactive television. And all the
analysts that we have read to date indicate that the two-way
broadband hybrid fiber coax network will enjoy advantages
over every other architecture.

CHAIRMAN KENNARD: Mr. Parsons.

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

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

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

And the remedy that they now come before this Commission with, which is to break apart, or suggest that you require the breaking apart of the distribution platform from the content platform is, in my judgment, almost laughable in the face of the last 50 or 60 years of history of this country and, in particular, in the face of the beneficiaries of the relaxing of the regulatory provisions. The notion that we would go back to sort of 1948 and separate content from distribution or as, or go back to the 1970s with the thin-thin rules. Precisely the beneficiaries of the relaxation of those rules, and allowing the industry to come together in a vertically integrated way, as Gerry was saying earlier, not only has resulted in the proliferation of content, but choice for consumers.

And, you know, I think the Commission should think long and hard as it seeks to consider how to really encourage -- I'll put it that way -- a proliferation of both choice and content in this new medium. Do you let the market do it, where consumer will will drive what is ultimately presented to them? Or do you try and regulate that from, you know, from behind the parade, if you will, because of some fear of a host of horribles that a competitor has said I could be hurt? Not competition could be hurt. I could be hurt, because I've invested a lot of
money in a business model that relies -- that requires access to this return path and if I don't get it, I might be hurt in the way in which I'm approaching the marketplace.

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

CHAIRMAN KENNARD: Commissioner Ness.

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

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

That's a negotiated arrangement with unaffiliated
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services. We'd be totally comfortable with our friends at Disney, which they know. But that's not what they want.

COMMISSIONER NESS: Did you want to respond?

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

Another example. In the letter that's in the record, we said, in this new interactive world, we're sure consumers will have the opportunity to drill down while watching CNN if there's a news story they would like more detail about, they'll be able to click and get transported to a broadband Web site that CNN will have developed with more detail on that news story. We're all working on these same opportunities for consumers. We said, just tell us that the system will function the same if this consumer's watching ABC News and they'd like to drill down.
We have not asked for any kind of preferential anything. In fact, we're having a hard time trying to think of all the questions we asked. And the bottom line -- and you'll see this in the letters -- we asked of Time Warner, just assure us that the system will function for consumers when they're seeking to interact with our content the same way it does when they're seeking to interact with your content.

COMMISSIONER NESS: Response from Time Warner or AOL.

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

Secondly, I have to disagree respectfully with Mr. Padden's characterization of what they asked for.
Essentially, they asked for parity with all of our services and it's, so that, you know, instead of nondiscrimination on the basis of affiliation. And when I responded -- well, I won't get into all of the discussions, but they were essentially saying, protect us, and we're fine. Promise to do for us everything that you do for your own services, and we're fine.

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

MR. SCHULER: I just wanted to add that laying the tracks means even though there are digital set top boxes out there, in order to enable the kinds of applications that Mr. Padden is talking about, interactive, more information on news, playing along with games, you need software, you need
services, you need technology to be able to run on those platforms. It may be that the current platform today can't necessarily support that, but we did introduce, just introduced a platform that does do it and, again, I will repeat, gave ABC the opportunity to do exactly what they're asking to do without charging any money, and they said no. So I don't know exactly what their issue and concern is, because AOL TV does enable exactly the kind of technologies they're talking about, to do single screen work, to read those triggers he's talking about and enable them. And so, given the opportunity, the answer was no.

CHAIRMAN KENNARD: Commissioner Tristani.

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

MR. PARSONS: Unequivocally. We will not. We will not tie them together in that way. We had thought, we had thought we were clear in our previous submissions.
Obviously, we weren't. Mr. Weed has raised the point. But we're being unequivocal now. We will not tie them.

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

COMMISSIONER POWELL: I want to briefly go back to this interactive television issue, because there's a lack of clarity here that I think has a lot to do with merger specificity that's important to distinguish. We have being discussed what is essentially two different products or platforms with two different potential problems or not problems, and they're not necessarily interchangeable. There is AOL TV, a product, as I understand, sold at retail. A product, as I understand has a relatively open opportunity for programming interoperability.

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

MR. PADDEN: Well, you're right. They're two
separate products. I would, we certainly have a concern that I hope we've articulated about the, what we believe is going to be a cable bottleneck for the delivery of broadband two-way interactive television. But with respect to the stand-alone AOL TV box, my understanding, Mr. Schuler, is we have not said "no."

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

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

COMMISSIONER POWELL: Just one thing quickly about
that. I'm not so sure, when you have a stand-alone technological product, I assume with some form of operating system, that there are often proprietary tools for writing to that system. I mean certainly the case is true of Microsoft operating systems or any other operating systems, that you have to have the APIs and protocol in order to write effectively. I'm not so sure that that's --

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

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

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

MR. MELCHER: I'd like to just raise a point that I think this is obviously an important discussion for Disney and Time Warner on open access with regards to open access with regards to content. I think up until very, very recently, open access has always focused on open access to, via, or for Internet access via a new technology. And so I would hope we make sure the distinction is kept separate, that whether or not you agree Disney should have open access in terms of content, what is, I think, more of immediate interest to the American public is that they have access to this cable technology for Internet
access, and not necessarily to watch interactive TV but to surf the Internet, to use it for work, to use it in all the ways that we use the Internet.

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

CHAIRMAN KENNARD: Thank you.

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

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

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

MR. BAGULLY: We are, actually two points, Commissioner. One, we are completely free and agreeable to inter-operate with anybody that wants to, and we openly exchange protocols. But we are part of a new group called IM Unified, which, in fact, consists today of about eight, and it's a rapidly growing number of Internet, or instant messaging companies that have committed to publishing standard for interoperability among our companies in the
next six to eight weeks, and to have complete
interoperability among our companies by the end of the year.
We think the long-term solution is, in fact, the IETF
publishing standards, but rather than wait, we've decided to
go ahead and do this on our own.

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

MR. BAGULLY: Yes sir.

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

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

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

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

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

MR. BAGULLY: No. The difference, Commissioner,
is that everybody else, or all the other IM companies, are striving, working together to try to make this happen as quickly as possible, as opposed to what we believe is a stalling tactic.

COMMISSIONER POWELL: Okay.

CHAIRMAN KENNARD: Okay. Commissioner Furchtgott-Roth.

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

COMMISSIONER TRISTANI: Yes there were.

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

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

COMMISSIONER FURCHTGOTT-ROTH: There was a general review of mergers. It was not particularized to one merger.
Notabart (phonetic) was in Illinois on that Monday.

COMMISSIONER TRISTANI: Well, somebody, somebody --

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

COMMISSIONER FURCHTGOTT-ROTH: Not according to Com Daily.

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

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

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

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

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

So we certainly are here because of this specific
merger, the marriage of the AOL closed, proprietary,
walled-garden marketing environment with the Time Warner
content assets and cable bottleneck distribution. That is,
we believe, a deadly combination for consumer choice, and
that's why we're here.

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

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

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

But to then, to then dress it up as a public
policy issue, as Preston said earlier that, well, there are conflict of interest, Time Warner has the Cartoon Network and everybody else put Disney down on basic. It's money. That's all it is.

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

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

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

MR. PARSONS: No, Mr. Chairman. And I appreciate the opportunity to answer the question, because I think what you have here is sort of the reverse of the situation you
described with NBC and News Corp a few years ago. Here, the commercial deal got done, and the public policy dispute follows. So we can't possibly be here trying to gain leverage in the commercial transaction, because we did that transaction.

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

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

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

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

MR. MELCHER: Two quick points, Mr. Chairman.

Thank you. I have, while I welcome the participation of Mr. Padden at Disney, I have questions, as well. Recently, it was announced that AT&T secured an agreement with Quest and U.S. West that they would not participate in the AT&T cable license transfer. Specifically, it was a deal so that if U.S. West Quest did not come in and say that the cable should be open for open Internet access, that AT&T would not oppose the U.S. West Quest merger. And that deal was just publicized through the efforts of a commission in Washington, I believe. So I have suspicions.

Secondly though, more importantly, I think this issue may be drawing some attention away from what I, again, believe to be the most significant issue, which is open Internet access, not whether the Disney content gets on Time Warner but whether the American public gets the superior Internet access product, which is cable. I believe it will be. And I think, following up on Mr. Reddersen's comment earlier, I think FCC could do well to codify the agreement
that AT&T, that AOL and Time Warner have all stepped up and
said that they will honor open access, make them codify it
and enforce it.

I think a rulemaking really is appropriate, but
time is running out. And I would agree with Mr. Padden on
that point. Time is running out. There is no time to wait.
We need to make conditions now on this merger and get into
a rulemaking, because if we don't, I think we'll have an
architecture that's built out in the next six to eight, 12
months, which will prevent open Internet access.

And that is my fear. That AT&T and AOL and Time
Warner right now are building out an architecture with
billions of dollars that will prevent open access. If you
do not act quickly, you will lose the opportunity.

CHAIRMAN KENNARD: Thank you. Mr. Schuler, very
briefly, and then Commissioner Ness.

MR. SCHULER: Very briefly. To your point about
Disney's motivations in using these proceedings. If you go
to page 47 of their own filing, they say right here in black
and white, "AOL Time Warner can prove Disney wrong. All it
has to do is come to the negotiating table and agree to
arrangements with Disney." Blah, blah, blah, blah, blah.

MR. PADDEN: No. Don't do blah, blah, blah.
Finish. It says to provide nondiscriminatory access.
That's all we're looking for.
MR. PARSONS: No, no, no. You have it exactly right, Mr. Chairman. It's the same dance, it's just a different order of the steps.

COMMISSIONER TRISTANI: I just want to comment that I think AOL shouldn't talk about the same dance or not using proceedings and then changing course. It used the 9th circuit very effectively till it got a reason not to do it. That's the American way.

COMMISSIONER NESS: Mr. Melcher, you mentioned Mr. Reddersen, who was commenting also on nondiscriminatory access to programming and his concern about multiple cable providers not effectively, not enabling companies that are providing DSL service, for example, from getting access to the programming, be it AOL or Time Warner. Is that, that was the essence of your testimony. Is that right?

MR. MELCHER: One of the three points, yes, Commissioner.

COMMISSIONER NESS: Okay. Can Time Warner and AOL please comment about whether they will be making, on a nondiscriminatory basis, programming available to DSL providers.

MR. SCHULER: I can say that on AOL's part, we have gone to every DSL provider in the country to cut deals to offer our services over DSL. We have cut deals with everybody except Bell South, who has not wanted to do a deal
with us. So our intent is to offer ubiquity of broadband services everywhere, whether it's cable or satellite or broadband wireless or DSL, because that's what makes our business work.

COMMISSIONER NESS: Mr. Reddersen, would you like to respond?

MR. REDDERSEN: Yeah, I was about to say earlier that I didn't think I was in a contract dispute with these people, so I couldn't comment, similar to Mr. Padden, but obviously I am. Since Mr. Schuler has brought it up, I will tell you he is right. We do not have an agreement where they will provide AOL service over Bell South's DSL service. The reason we don't is because they want substantially better terms and conditions than anyone in the marketplace and they won't do a deal without them.

We have available wholesale tariff and we have volume discounts on that wholesale tariff, and there are many large ISP's out there participating on it and they can participate in that tariff anytime they want to do that.

Let me finish now, Mr. Schuler, please. The issue, I think, that was brought up earlier is really important. And that is, the real issue, while there's an issue of cable access here and it's very, very important, the real bottleneck here going forward is the AOL environment. I think that's what Ms. Dyson was describing.

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And when we talk about and when Disney talks about that control environment and the content flow in and out of it, what we're really describing is whether other content players will have open access to that environment and whether content that flows from Time Warner through that closed AOL environment will be available to other Internet service providers.

Let me give you a simple and easy example. If the Braves games are available on streaming media but only available on the AOL environment in Atlanta, then all other ISPs providing broadband streaming media might as well close shop in Atlanta. So this is a two-way issue here for content providers having reasonable market terms and conditions into that environment and for the Time Warner content to be made available openly to other ISPs. So if both parties are concerned about that control point, there must be some reason for that. And it's not a contract dispute on our part. I will guarantee you that.

COMMISSIONER NESS: Time Warner, go ahead.

MR. PARSONS: Well, I submit though, that the beginning of Mr. Reddersen response puts this all in context. He says AOL wants too much money. They say he won't pay them the fair amount. Business dispute, you know. And I, and I do think that, when I say it's the same dance that, with our friends at Disney, it isn't just a question
of nondiscrimination because, as I said, we put that on the table. What they wanted was -- and if you look at their letters and read them carefully -- they wanted to be treated exactly the same way in all instances that we treat our own content.

So does that mean, for example, if you put a CNN box on some web site, that you have to put an ABC News box on the web site. Those things have to be negotiated in the marketplace. You can't, this Commission, I don't think, can deal with the subtleties and the nuances and the complexities of trying to arrange business arrangements that are going to enable a business to grow and be dynamic and innovation to occur. You've just got to leave that to the marketplace.

Now, what we have done is we've committed to open access on the broadband platform. I will tell you, we've heard Gerry Levin say it, I will say it. Time Warner, we make stuff. And the way you maximize the value of making stuff is you sell it to as many distribution channels and across as many, as many outlets as you can.

And if you look at the way we manage our business now, that's what we do. That's what we've said we're going to do in the new environment.

COMMISSIONER NESS: Mr. Reddersen response, please.
MR. REDDERSEN: Very simply, and please don't let this whole debate and the issues get narrowed down to any dispute between Disney and Time Warner AOL. The whole message being brought to you by Time Warner AOL, both excellent companies -- I marvel at the products and services that they bring to the marketplace -- is twofold. First, it's "Trust me, I will be open, in a world where I may not have been in the past, but trust me in the future. I will be." I would urge you, having tried that argument over the last 15 years in the telecom industry -- it probably didn't work -- not to take that argument here.

The second issue and more important issue may be let the market work. Well, the only other player out there that has the potential to provide the leverage against AOL Time Warner to make the market work is AT&T TCI Media One, and there are so many interlocking relationships between those two entities, that it's unlikely that they will establish market terms and conditions between the two parties that are at all reasonable to the rest of the industry. So I urge you, if you can establish that separation, you may at least have a large player out there that can establish market prices and terms and conditions that are reasonable. Thank you.

CHAIRMAN KENNARD: I'm sorry, but that'll have to be the last word for this panel. I'm sorry, we're running...
way over, and I want to hold at least 15 minutes so that we can have some statements from people in the audience who have been waiting throughout this entire panel. So thank you all very much. I thought we had a really good, robust debate there, and I appreciate your participation.

We'll take 15 minutes and 15 minutes only for anyone in the audience who would like to make a statement for the record in this proceeding. I'll ask that you speak for no more than two minutes, and I'll ask our timekeeper here to make sure that we keep everybody on the clock.

Okay, please begin here on my right. Nancy? Welcome.

MS. BLOCK: Hello, my name is Nancy Block, and I'm the executive director of the National Association of the Deaf, an independent consumer-based nonprofit association representing 28 million deaf and hard-of-hearing Americans. As advocates for communications accessibility, we are, of course, deeply interested in all technologies that can solve particular challenges for people who are deaf, late deafened, hard of hearing and deaf-blind.

In its current incarnation, instant messaging enables deaf-to-deaf and deaf-to-hearing seamless communication for people with computers and Internet connections, but only as long as they share the same provider. Therefore, we have a strong interest in making sure that open and interoperable communication functions
that have helped fuel the explosive growth of the Internet continue as the medium makes new forms of communication possible.

As instant messaging technology develops and instant messaging moves on to wireless devices such as pagers and cell phones, the possibilities for enhanced communication become even more exciting. A fundamental principal of accessibility is that users of critical communications functions should be able to communicate with all others, even those who have different service providers.

Ease of communication, regardless of the provider, is important to all consumers, and especially so to deaf and hard of hearing people, for whom instant messaging represents an important new advance.

Recently, at our biannual convention -- sorry -- our biannual national conference earlier this month, delegates passed a resolution calling for FCC and FTC attention to the issue of instant messaging, open access and interoperability. It is of particular importance that people who are deaf, late deafened hard of hearing and deaf-blind be able to take advantage of the many advantages that instant messaging has to offer for seamless, instantaneous and barrier-free communication. Attention must also be given to the universal design and the importance of planning for access right from the start. Thank you.
CHAIRMAN KENNARD: Thank you, Nancy. We appreciate you being here. Yes sir.

MR. STEINHORN: My name's Barry Steinhorn. I'm the associate director at the American Civil Liberties Union. I hadn't actually originally planned to speak during this session, but the last panel gave me the impression that perhaps I should. I don't think the Commission should be diverted from some of the main issues here by a concern about whether or not some of the comments at the presentations of the last panel were based on business disputes rather than important public policy issues. Perhaps they were, perhaps they weren't.

But there are important public policy issues here. In particular, there's the issue of open access. And I want to endorse the proposal that was made by Mark Cooper and others -- and I won't repeat that -- but I want to put it in a slightly different context. ACLU, for example, has on a number of occasions represented a small Web site, operates in the city of Philadelphia, called the Critical Path AIDS project. Critical Path AIDS project, as the name suggests, provides information about sexually transmitted disease, partly sexually transmitted disease. They are somewhat controversial. They have been threatened on a number of venues with various kinds of punitive actions. We are very concerned that if this walled garden
that others have described does in fact occur, it's not so much that Disney may have difficulty getting into the walled garden, because we assume that there, the marketplace perhaps would be able to solve these problems, but the Critical Path AIDS Project and other small providers, who the Internet has given an opportunity to speak to audiences large and small will, in fact, be walled off. That they will not, for example, have the same access as, perhaps, Web MD, or some other large medical Web site, which may not be affiliated with Time Warner AOL or with AT&T, but may have an arrangement or even a credibility with Time Warner AOL or AT&T that may lead them to get preferential treatment in all the ways that you've discussed here -- caching and access streaming video, et cetera.

So we urge you to enact an open access requirement rather than simply trusting the marketplace to solve that problem, and to keep in mind the small content providers, not simply the large commercial providers. Thank you.

CHAIRMAN KENNARD: Thank you for that statement.

Jeff Shester.

MR. SHESTER: Thanks. And Barry has stated some of my concern, that what was in part missing from today is the role that the Internet plays in our democracy and that the mission that we have, I think, that you have, historic mission that you have at this point is to make sure that
this end-to-end architecture principal that has allowed all
of this diversity, content diversity, including
noncommercial and independent voices to exist and flourish,
as well as competition, to help them make the transition to
the broadband environment, which will be dominated by the
ITV space.

Mr. Parsons, I have to say I follow what you're
doing, and you're running the tracks, you're creating the
railroad, you're creating the engines and a closed system is
moving into place, and we have to ensure that an open access
policy ensures that those noncommercial diverse community
voices are as powerful in some way as the Disneys and the
NBCs. Thank you.

CHAIRMAN KENNARD: Thank you, Mr. Shester. Are
there any other statements from the public. I don't see
anyone else lined up. Well, thank you all. It's been a
long day, but I think it's been a very worthwhile and
productive day, and I think that you've certainly
enlightened us, and I appreciate your patience and all the
preparation that went into these presentations.

I also want to thank the Commission staff who
worked so hard to make this event happen today. Deborah
Lathan, chief of our cable services bureau and her great
team, including Royce Dickens and John Norton in the cable
bureau and Ruth Dancey, who we're happy to have back at the

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Commission. Also Michelle Ellison and Michelle Rouseau and Darrell Cooper were very instrumental in making this happen today. So thank you all very much and this hearing is adjourned.

(Whereupon, at 6:04 p.m., the hearing in the above-entitled matter was adjourned.)
REPORTER’S CERTIFICATE

FCC DOCKET NO.: 00-30

CASE TITLE: In Re: America Online & Time Warner

HEARING DATE: July 27, 2000

LOCATION: Washington, DC

I hereby certify that the proceedings and evidence are contained fully and accurately on the tapes and notes reported by me at the hearing in the above case before the Federal Communications Commission.

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