experience and technological capabilities with unaffiliated content and interactive services as it does with AOL/Time Warner's content and services. The result under any of these scenarios is the same: *denial of meaningful choice to consumers.*

Consumers would be harmed by more than the loss of choice, however. AOL/Time Warner's denial of access to unaffiliated content providers would deter the development of competing interactive content. This, in turn, would create barriers to entry to any firm that dares to compete with Time Warner's cable system, such as a cable overbuilder. Such an overbuilder would not have the interactive content necessary to compete in the coming world of Interactive Television. The only certain way to avoid these outcomes is to compel the monopolist to choose between content or conduit, requiring separate ownership of the other set of assets.

By requiring this separate ownership of assets as a condition of approval of the proposed merger, the Commission would spare consumers and competitors the completely foreseeable harm of discrimination in the emerging Interactive Television services market which otherwise would result from the merger. Moreover, it would avoid protracted antitrust litigation that almost certainly would be necessary to mitigate this harm after it had occurred.

Disney recognizes that this separation of ownership of content and broadband distribution facilities should be reserved for exceptional transactions, and the proposed AOL/Time Warner merger is such. This deal represents nothing less than a sea change in the anticipated delivery of Interactive Television content to consumers – marrying a monopolist cable television and content owner with a monopolistic OSP provider to create a behemoth that will monopolize the Interactive Television services market from its infancy. Such a combination may well be unprecedented. However, it is significant that in the last half century, when confronted with combinations resembling this one, courts and agencies have required separation of content from conduit in order to preserve diversity, competition and consumer choice. Accordingly, there is ample precedent in law and regulation for the fashioning of a condition requiring separate ownership of content and broadband conduit.

1. Paramount Pictures

In 1948, the Supreme Court found in the Paramount Pictures decision[139] that the major motion picture studios had unreasonably restrained competition in violation of the Sherman Act by entering into certain anticompetitive agreements with exhibitors by vertically integrating the production, distribution, and exhibition of motion pictures. The Supreme Court affirmed the District Court's conclusion that such agreements eliminated "competition *pro tanto* both in exhibition and in distribution of features since the parties would naturally direct the films to the theatres in whose earnings they were interested."[140] Further, the Court stated that the studios' practices were:

> [B]ald efforts to substitute monopoly for competition and to strengthen the hold of the exhibitor-defendants on the industry by alignment of competitors on their side. Clearer restraints of trade are difficult to imagine.[141]

As a result, in Paramount Pictures and in subsequent related cases, the motion picture studios were required to divest themselves of all the movie theaters they owned, and were prohibited from acquiring theatres in the future, except upon application to the Attorney

---

139 United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948).

140 Paramount Pictures, 334 U.S. at 149.

141 *Id.*

General.[142] When permission was granted by a court to a movie studio to own and operate a theater, the studio was required to license its features solely on the merits, theater by theater, and without discrimination in favor of affiliated theaters.[143] Similarly, in this case, there is a clear and present danger that AOL/Time Warner would use its position as both the bottleneck controller of the broadband distribution platform and the content flowing over it to favor its content to the detriment of other unaffiliated content providers.[144]

2. "Fin/Syn" Rules

In the 1970s, the Commission implemented its financial interest and syndication rules ("Fin/Syn rules") that prohibited a broadcast network from syndicating programs produced by the network for rebroadcast by independent television stations, or purchasing syndication rights to programs that it obtained from outside producers, or otherwise obtaining a financial stake in such programs.[145] The concern behind the rules was that the networks, which, in the 1960's, controlled a large part of the system for distributing television programs to American households, would, unless restrained, use this control to seize a dominant position in the production of television programs, and in other words, "lever their distribution 'monopoly' into a

---

142 Paramount Pictures, 334 U.S. at 150-151 (affirming lower courts' decisions to enjoin future acquisitions); United States v. Loew's, Inc., 882 F.2d 29, 30 (1989)(consent judgments prohibited acquisition of theaters in the future except upon application to the Attorney General and a showing that such engagement shall not unreasonably restrain competition in the distribution or exhibition of motion pictures).

143 Loew's, Inc., 882 F.2d at 31 (1989)(the Court granted a movie studio permission to own and operate a theater, however, it did so under the theory that the movie industry had evolved and changed dramatically).

144 The idea of separating content and the concentrated distribution system over which the content travels was the central tenet of the remedy adopted by the U.S. District Court to address the anticompetitive behavior of Microsoft, where the court found that Microsoft used its monopoly control over the computer's essential operating system to favor its own applications programs and disfavor the applications programs of its software competitors. See U.S. v. Microsoft, Civil Action No. 98-1232 (D.D.C. April 3, 2000).

145 Schurz Communications, Inc. v. FCC, 982 F.2d 1043, 1045 (7th Cir. 1992).

production 'monopoly.'"[146] In sum, the Fin/Syn rules were crafted in an era of limited distribution mechanisms,[147] and were premised on the theory that when there is only a limited distribution system, there should be separate ownership of the content distributed over that system to ensure nondiscrimination.

While the rules were ultimately repealed under the rationale that the overall structure of the television industry had changed profoundly,[148] the very market condition that was the predicate for the creation of the Fin/Syn rules has reappeared in the emerging Interactive Television services marketplace. The convergence of broadband technology, television and the personal computer has made the broadband cable pipeline *the* principal distribution facility in the United States for the delivery of Interactive Television services. Given the gatekeeper position that would be occupied by a merged AOL/Time Warner in distribution, separate ownership of either content or "bottleneck" conduit is required to assure consumer choice and competition in the Interactive Television services market.

3. Advantages of a Separation of Ownership Condition

Requiring the complete separate ownership of the bottleneck conduit from the content traveling over it unquestionably would be the most direct and sure means of preventing irreparable harm to consumer choice and competition that otherwise is almost certain to result

---

146 *Id.*

147 At that time there were only the three big networks – FOX, WB and UPN did not yet exist; there were few independent television stations; rather, most were affiliated with the networks; cable was in its embryonic stage; and direct broadcast satellite and the Internet were nonexistent.

148 Schurz Communications, 982 F.2d at 1046 (the television industry has changed in large part because of the expansion of cable television and videocassette recorders, the introduction of a fourth network, the Fox Broadcasting Corporation, the increase in independent stations, and the decrease of prime-time program producers).

from the proposed AOL/Time Warner merger. It has the further advantage of avoiding the enforcement problems which inevitably attend non-structural, behavioral/conduct remedies. In light of the technological sophistication and complexity of the components of the broadband distribution platform, including set-top boxes, routers, etc., it will be difficult and resource intensive to police conduct remedies based on a prohibition against discrimination by a merged AOL/Time Warner. By requiring the separate ownership of the bottleneck conduit and the content that flows over it, the Commission genuinely might be able to find that the merger would be pro-competitive.

4. If The Commission Does Not Require Complete Separation of Ownership of Content and Conduit, It Should, At A Minimum, Compel AOL/Time Warner to Divest a One-Third Interest in All of Its Content *or* Bottleneck Conduit and Interactive Television Operating System Assets to Third Parties.

In the event that the Commission elects to impose anti-discrimination conditions rather that separation, nondiscrimination remedy concerning prices, terms and conditions is not workable standing alone. AOL/Time Warner could easily evade the intent of the prohibition, and undermine the ability of unaffiliated content and interactive services providers to reach consumers cost-effectively, by manipulating transfer prices within a vertically integrated company. For instance, AOL/Time Warner's cable system could readily charge an exorbitant fee to any content provider that desired a return path from the viewer. To maintain compliance with a prohibition against discrimination, the cable system also would charge its own programming arm the exorbitant fee for the return path. For accounting purposes, this fee would suggest a large increase in income to the cable system and a large loss in income to the programming arm. However, because it is just a transfer between two subsidiaries, the fee would have no impact on the company as a whole. On the other hand, the fee would have a devastating impact on third party content providers that must pay for the return path.

To prevent discrimination under these circumstances, the Commission must assure that the transfer prices recorded in the accounting ledger have a real economic impact on the company as a whole. The only way to do this – short of rate of return regulation – is to require AOL/Time Warner to divest a substantial minority interest in all content or in its cable systems and interactive operating system. For instance, if AOL/Time Warner divested a one-third interest in its content subsidiary, one-third of any return path fee would be diverted to independent interest holders. This would have real world consequences. Similarly, if AOL/Time Warner divested a one-third interest in its cable systems, it would receive just two-thirds of the return path fee.

In addition to ordering a partial divestiture, the Commission should require AOL/Time Warner to collect and maintain information related to its licensing of interactive programming. The Commission should further require AOL/Time Warner to report this information on a quarterly basis to the board for the partially divested subsidiary (as well as reporting this information to the Commission). This board would have a fiduciary duty to maximize the return of the subsidiary, and hence, would have the incentive to assure that all interactive programming licenses are arm's length transactions. This proposed provision is adapted from the Federal Trade Commission ("FTC") consent order which required Time Warner to report certain competitive information to Time Warner Entertainment.[149]

---

149 Federal Trade Commission Consent Agreement 62 F.R. 11202 (March 11, 1997) ("Time Warner/Turner Consent Decree").

B. In The Event The Commission Does Not Require Separate Ownership Of The Bottleneck Conduit And The Content Flowing Over It, The Commission Should Impose Clear And Enforceable Conditions On Any Approval Of The AOL/Time Warner Acquisition Prohibiting Discrimination Against Unaffiliated Content And Interactive Television Service Providers.

If the Commission determines to approve the AOL/Time Warner merger without requiring the complete separation of ownership of its content and interactive services from ownership of its bottleneck conduit, at a minimum, it is imperative that there be a set of prohibitions barring discrimination by AOL/Time Warner against unaffiliated content providers so that consumers may enjoy unfettered choice in the emerging Interactive Television services market. The New York Times, in its May 5, 2000 editorial, identified the most glaring danger posed by the AOL/Time Warner merger and proposed a solution:

> The fundamental problem for the FCC is that cable companies like AT&T and Time Warner own not only the cable wire that runs into everyone's home, but also some of the programs delivered over that wire. That puts them in position to discriminate in favor of the information and commercial opportunities presented to cable subscribers. Monopoly is bad enough in the orange juice or suspenders markets. It is downright dangerous when it compromises the public's right to diversified sources of news and entertainment.
>
> *************************
>
> [F]ederal regulators, as they study the merger, should be guided by the same principle in regard to Internet access and digital television services: non-discrimination.

The New York Times had it right. There are myriad ways in which the owner of the broadband pipeline can discriminate against unaffiliated content providers, marginalizing them as competitors in the Interactive Television services market and reducing the choices available to consumers. The technological suppleness of the broadband platform and its component parts, such as routers, and consumer interfaces, such as set-top boxes, afford numerous and multifaceted means to disadvantage independent content suppliers. These include, but are not limited to: (1) outright denial of access to the broadband platform; (2) discriminatory pricing tantamount to a denial of access; (3) screen bias on electronic program guides rendering consumer access to unaffiliated content difficult; (4) steering of subscribers to affiliated interactive advertising sites and portals; and (5) technological discrimination on downstream or return paths or through local caching which deliberately degrades the consumer's experience with unaffiliated content providers relative to his/her experience with AOL/Time Warner content or Interactive Television services.

The imposition of clear and enforceable conditions on the AOL/Time Warner merger is imperative for three distinct yet interrelated reasons. First, as described in detail above, given the sheer, overwhelming concentration of power in the hands of a merged AOL/Time Warner that will exist in the Interactive Television services market and the incentive and ability to abuse that power to harm competitors and consumers, it would be contrary to the public interest to allow the merger between AOL and Time Warner to move forward without specific, enforceable conditions. Rules of conduct to safeguard consumers and competitors must be in force from the moment the merger is approved. In fact, AOL and Time Warner have acknowledged the need for anti-discrimination safeguards in their highly publicized Memorandum of Understanding, date February 28, 2000. Of course, as noted by key Members of both the Senate Judiciary and Commerce Committees, the MOU is both non-binding and too vague to afford any real protection to consumers or the marketplace. Therefore, specific, binding and enforceable safeguards are needed. In the absence of such conditions, consumers' only recourse to redress AOL/Time Warner's likely anticompetitive conduct would be to wait for an aspiring competitor to file a complaint at the Commission, and then wait as the Commission adjudicates whether and how its rules apply to the merged AOL/Time Warner's anticompetitive behavior.

Second, the generally applicable regulatory framework governing the provision of broadband cable services is in flux. The Commission has not decided whether broadband cable service is a telecommunications service, as the U.S. Court of Appeals for the Ninth Circuit has ruled in AT&T v. City of Portland, and, if it is, whether, and to what extent, the Commission would exercise its forbearance authority. The Commission is currently considering initiating a proceeding to determine whether cable broadband services should be regulated as telecommunications services.[150] However, definitive regulatory action in this area will come long after the Commission has approved or disapproved the AOL/Time Warner merger. Similarly, the precise manner of application of other anti-discrimination safeguards governing cable and open video systems, including Sections 616, 628 and 653 of the Communications Act, is not clear in the area of broadband services. Where the potential for anticompetitive abuse is so great and obvious, the lack of certainty about how rules of general application might apply to the new Interactive Television services marketplace dictates that specific rules of unquestionable application be crafted in the form of conditions on the AOL/Time Warner merger. Consumers cannot be asked to run the risk of losing access to diverse sources of news, information and entertainment in the interim.

Finally, approval of the AOL/Time Warner merger may be the last, realistic opportunity to protect consumers and competitors from lasting consequences of anticompetitive behavior. If the rules of the road are not established now, and AOL/Time Warner is permitted to continue its

---

[150] *FCC Chairman to Launch Proceeding on "Cable Access,"* Federal Communications Commission Press Release (rel. June 30, 2000).

plans to deploy a closed broadband cable/set top box system architecture, the difficulty, cost and disruptive effort of "opening" it later on, would become barriers to change. The impact of such harm could forever alter the competitive landscape of the Interactive Television services market and the availability of services to consumers. It is incumbent upon the Commission to apply prophylactic conditions to prevent anticompetitive behavior by AOL/Time Warner.

C. SOURCES AND PRECEDENTS FOR ANTI-DISCRIMINATION CONDITIONS

1. Title II of the Communications Act

In AT&T v. City of Portland,[151] the United States Court of Appeals for the Ninth Circuit concluded that the FCC maintained authority to regulate cable broadband services as a telecommunications service. The court concluded that @Home is not a "cable service" as defined by Congress in the Communications Act which describes "cable service" as the one-way transmission of programming to subscribers. Rather, the court held that @Home, an interactive service that provides two-way communication and information exchange, is a "telecommunications service." The Ninth Circuit also concluded that the Communications Act includes cable broadband transmission as one of the "telecommunications services" a cable operator may provide over its cable system. Moreover, in reaching this decision, the court reasoned that applying the carefully tailored scheme of cable television regulation to a non-broadcast interactive medium like cable broadband Internet access would lead to absurd results (i.e., set asides for public, educational or governmental use, must carry rules, etc.).

The Commission helped create the foundation for the Ninth Circuit's decision. In its amicus brief filed in AT&T v. City of Portland, the Commission suggested that it may be

---

[151] AT&T v. City of Portland, No. 99-35609 (9th Cir. June 22, 2000).

appropriate to treat Internet access via cable as a telecommunications service. The Commission stated that "[s]trong arguments have been advanced in support of the argument that Internet access via cable is not a cable service," and noted that "not every service offered over cable facilities is a "cable service."[152] The Commission noted that when Internet access is provided over telecommunications facilities, "the Commission treats that service as an information service."[153] As the Commission correctly recognized, "[I]f the same type of Internet access service is offered over cable systems as well as telephone networks, it is not readily apparent why the classification of the service should vary with the facilities used to provide the service."[154] Moreover, on a more fundamental conceptual level, the Commission suggested that Internet access may be more appropriately characterized as an information or telecommunications service rather than a cable service because Internet access more closely resembles the switched (one-to-one) networks, in which the consumer chooses the content and sends it to the person(s) of his or her choice.[155] The Ninth Circuit's ruling and the Commission's amicus brief open the door for the Commission to condition approval of the AOL/ Time Warner merger upon compliance with the attendant non-discriminatory access provisions that exist for common carriers under current law, including Sections 201 and 202 of the Communications Act.

---

152 Brief of the Federal Communications Commission as Amicus Curie in AT&T v. City of Portland ("FCC Amicus Brief" (August 16, 1999) at 20.

153 *FCC Amicus Brief* at 24-25 (*citing Federal-State Joint Board on Universal Service,* Report to Congress, 13 FCC Rcd 11501, 11536-40 (¶¶ 73-82) (1998)).

154 *Id.* at 25.

155 *Id.* at 26.

2. 1992 Cable Act and 1996 Telecommunications Act Sources for Anti-discrimination Safeguards

In addition to the anti-discrimination safeguards contained in Title II of the Communications Act upon which the Commission could rely to craft appropriate conditions, there are several additional sources of guidance which could serve as models for appropriate safeguards to mitigate the harm to competition and consumer choice that will likely result if conditions are not attached to the AOL/Time Warner merger. For example, Section 628 of the Communications Act has been useful as a tool to remedy anticompetitive, discriminatory conduct by vertically integrated and other cable operators.[156] Sections 616[157] and 653[158] – which bar discrimination by cable operators and open video service providers against unaffiliated programming providers – in practice have only been of marginal value in their effectiveness. Nonetheless, the principles behind these provisions can serve as an effective template for the

---

156 Section 628 was intended by the Congress to foster competition to incumbent cable operators by other multichannel video programming distributors and was crafted expressly to address the real world business difficulties experienced by aspiring competitors to cable who encountered difficulty in obtaining access to quality cable programming. Due to the highly vertically integrated nature of the cable industry, most of the problems were encountered with cable programmers owned or controlled by cable Major Systems Operators. Section 628(b) contains a general prohibition against "unfair methods of competition or unfair or deceptive acts or practices" which hinder significantly or prevent any MVPD from providing cable programming to subscribers. Section 628(c) requires the FCC to promulgate regulations prohibiting vertically integrated cable operators from improperly influencing the sale of programming and prohibits vertically integrated cable programmers from discriminating in the prices, terms and conditions of sale of satellite delivered cable programming to MVPDs. Section 628(c) also addresses refusals to deal by vertically integrated cable programmers. It bars exclusive contracts in areas not served by a cable operator and presumptively prohibits exclusive contracts in areas served by a cable operator unless the Commission determines, utilizing enumerated criteria, that such contracts are in the public interest.

157 Section 616 prevents a multi-channel video programming distributor from engaging in discrimination on the basis of selection, terms, or conditions for carriage of video programming, the effect of which is unreasonably retrain the ability of an unaffiliated video programming vendor to compete fairly.

158 Section 653 prohibits OVS operators from discriminating against unaffiliated entities "with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming." 47 U.S.C. §573(b)(1)(E). Congress included this provision as part of the 1996 Telecommunications Act because it was deeply concerned about the potential for open video systems ("OVS") operators to use their control over consumer access to programming to discriminate in favor of programming provided by vendors affiliated with the OVS operator.

Commission's creation of strong, enforceable conditions that should be attached to any possible approval of the AOL/Time Warner merger. The same concerns that were the basis for anti-discrimination provisions in the Communications Act apply with even greater force to the Interactive Television services market where the ability of the bottleneck broadband cable pipe owner to discriminate against unaffiliated content providers has grown exponentially with advances in technology. Because these areas of the Communications Act all possess the philosophical underpinnings appropriate to be used as guidance for the development of conditions on this merger, the FCC would be acting completely within and consistent with its statutory authority by crafting merger conditions grounded in the rationale behind Sections 616, 628, and 653 or Title II.

D. ANTI-DISCRIMINATION CONDITIONS NEEDED TO MITIGATE THE ANTICOMPETITIVE EFFECTS OF THE AOL/TIME WARNER ACQUISITION.

1. The Commission Should Protect Consumer Choice By Imposing A Broad Prohibition Against AOL/Time Warner Engaging In Anticompetitive Practices.

The Commission should attach a broad, "catch-all" condition to any approval of the AOL/Time Warner merger patterned after Section 628(b) of the Communications Act. Congress included Section 628(b) in the 1992 Cable Act specifically to curb the potential for anticompetitive abuses perpetrated by vertically integrated cable companies, *i.e.*, cable systems operators also owning cable programming networks. In enacting this provision, Congress foresaw the core threats posed by the AOL/Time Warner merger:

> First, ... vertical integration gives cable operators the incentive and ability to favor their affiliated programming services. For example, the cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers. .... Second, ... vertically integrated cable programmers

> have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms.[159]

The protections afforded in Section 628 also served as the basis for several of the nondiscrimination conditions in the consent decree permitting Time Warner's acquisition of Turner Broadcasting.[160] Further support for a broad, catch-all prohibition against AOL/Time Warner engaging in anticompetitive discrimination can be found in the policy underpinnings of Section 616 of the Communications Act which protects unaffiliated video programmers and consumers from anticompetitive practices of incumbent cable operators.

2. The Commission Should Protect Consumer Choice By Imposing A Specific Prohibition Barring Any AOL/Time Warner Unreasonable Refusal to Deal With Unaffiliated Content or Interactive Television Services Providers.

The foundation for ensuring non-discrimination by AOL/Time Warner in the Interactive Television services market must be a guarantee that the entity maintaining bottleneck control over its conduit and content cannot restrain consumer choice and competition by unreasonably refusing to deal with unaffiliated providers of content and Interactive Television services. The concept of "refusal to deal" as an antitrust violation was developed by case law interpreting the Sherman Act. Section 2 of the Sherman Act prohibits monopolization or attempts at monopolization.[161] Where a refusal to deal is a unilateral action, the standard for determining whether there has been a violation of Section 2 of the Sherman Act is inter alia, whether the activity has impaired competition in an unnecessarily restrictive way or whether its purpose is to

---

159 S. Rep. No. 92, 102nd Cong. 1st Sess. 25-26 (1991).

160 *See,* Time Warner/Turner Consent Decree.

161 15 U.S.C. Section 2.

create or maintain a monopoly.[162] The Supreme Court's decision in Aspen Skiing Co. is particularly relevant because it specifically addressed the effect on competition of a refusal to deal and, as such, serves as an appropriate model for a prophylactic condition to address the likely harm AOL/Time Warner will cause to consumers and market competition if the merged entity is left unchecked. In that case, the Aspen Skiing Co. refused to deal with the Aspen Highlands Corp. in offering customers a four-mountain, six-day ski pass. The court held that the refusal to deal is illegal if it "unnecessarily excludes or handicaps competitors."[163] The court found that as a result of the refusal to deal, customer choices were restricted and the ability of Highlands to compete was harmed. The underlying premise in this antitrust case applies with equal force, if not more, to the AOL/Time Warner merger, where an unreasonable refusal to deal will choke-off competition in the Interactive Television services marketplace to the detriment of consumers.

AOL/Time Warner will be uniquely positioned to use "gatekeeper" power over the bottleneck conduit and a significant amount of content traveling over that conduit as leverage to refuse to bargain with unaffiliated competitors seeking carriage on its distribution system. As discussed in greater detail in Section VI above, at least for the foreseeable future, the cable broadband platform may well be the only commercially viable delivery medium for Interactive Television services. Therefore, without an unreasonable refusal to deal condition, AOL/Time Warner will have the ability to block aspiring competitors and prevent consumers from having access to a diverse menu of content and Interactive Television services.

---

[162] Aspen Skiing Co. v. Apsen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

[163] Aspen Skiing Co., at 597.

3. The Commission Should Protect Consumer Choice By Imposing A Condition Prohibiting Discrimination Against Unaffiliated Content or Interactive Television Services Providers On the Basis of Prices, Terms or Conditions For Carriage.

The Commission must ensure that consumers' access to a broad choice of service providers in the Interactive Television services market is not blocked by the potential for AOL/Time Warner to discriminate against unaffiliated companies on the basis of prices, terms or conditions for carriage. In fashioning this condition, the Commission should look to Sections 616 and 628 of the Communications Act for guidance.

The 1992 Cable Act and its legislative history[164] clearly indicate that Congress found that the cable television industry is highly concentrated with a high degree of vertical integration of cable systems and programmers.[165] When drafting the 1992 Cable Act, Congress was concerned that increased horizontal concentration and vertical integration in the cable industry had created an imbalance of power between cable operators and program vendors. Congress concluded that vertically integrated cable operators have the incentive and ability to favor affiliated programming vendors over unaffiliated programming vendors with respect to granting carriage on their systems.[166]

To ameliorate this anticompetitive threat, Congress prohibited discrimination in the prices, terms and conditions of carriage in Sections 616 and 628 of the Communications Act.

---

[164] House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) ("House Report"); Senate Committee on Commerce, Science, and Transportation, S. Rep. No. 102-92, 102d Cong. 1st Sess. (1991) ("Senate Report"); House Committee on Energy and Commerce H.R. Rep. No. 102-862, 102d Cong. 2d Sess. (1992), reprinted in Cong. Rec. H8308 (Sept. 14, 1992) ("Conference Report").

[165] Senate Report at 25.

[166] Senate Report at 24; House Report at 41-45.

Section 616(a)(3), added by the 1992 Cable Act, prevents a multichannel video programming distributor from engaging in discrimination on the basis of selection, terms, or conditions for carriage of video programming, the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly.

Section 628(c) instructs the Commission to prescribe regulations that at a minimum:

> "(2)(A) prevent a cable operator which has an attributable interest in a satellite cable programming vendor or a satellite broadcast programming vendor from unduly or improperly influencing the decision of such vendor to sell, or the prices, terms, and conditions of sale of, satellite cable programming or satellite broadcast programming to any unaffiliated multichannel video programming distributor;
>
> (B) prohibit discrimination by a satellite cable programming vendor in which a cable operator has an attributable interest or by a satellite broadcast programming vendor in the prices, terms, and conditions of sale or delivery of satellite cable programming or satellite broadcast programming among or between cable systems, cable operators, or other multichannel video programming distributors, or their agents or buying groups...".[167]

The concerns about discrimination with regard to prices, terms and conditions for carriage embodied in Sections 616 and 628, and in the Commission's Rules, apply with even greater force to the AOL/Time Warner merger due to the unmatched power the fused entity will exercise in the Interactive Television services marketplace.

4. The Commission Should Protect Consumer Choice by Requiring A Condition Prohibiting AOL/Time Warner From Demanding A Financial Interest In Unaffiliated Content or Interactive Television Services Providers.

Section 616's authority over the emerging Interactive Television market is not crystal clear. Nonetheless, Section 616 speaks to an important anticompetitive issue that must be

---

[167] See, 47 U.S.C.§ 548(c)(2)(B).

addressed by the Commission to preserve consumer choice in the Interactive Television services market -- the ability of AOL/Time Warner to extract a financial interest in unaffiliated programming vendors as a condition for carriage. In 1992, Congress found that, in return for carriage on the cable system, some cable operators required certain non-affiliated programming vendors to grant them certain concessions, including a financial interest.[168] As a result, Section 616(a)(1) was included to prevent a multichannel video programming distributor from requiring a financial interest in a programming service as a condition for carriage on a cable system.

Without adequate safeguards, AOL/Time Warner will be tempted to extract financial interests from unaffiliated content and interactive service providers, and in that case will use those interests as leverage to undermine the ability of unaffiliated content and interactive services providers to compete against AOL/Time Warner's content and interactive services. This anticompetitive behavior will reduce the choices of consumers, preventing them from truly experiencing an Interactive Television services market with diverse content and services. The Commission should protect consumer choice by attaching a condition to the AOL/Time Warner merger modeled on Section 616.

5. The Commission Should Protect Consumer Choice By Requiring A Condition Limiting AOL/Time Warner's Affiliated Content On Its System To No More Than 40 Percent Of Its Broadband Cable Pipeline's Total Bandwidth Capacity, Both in Total and By Genre.

The Commission has a special duty to ensure that the AOL/Time Warner merger will not reduce the American public's current access to a diverse selection of news, information and entertainment. The economic incentives for AOL/Time Warner to monopolize Interactive Television services, especially with the growth and popularity of sports programming,

168 Senate Report at 24; House Report at 42.

entertainment and associated interactive services, are simply too great for the Commission to merely trust AOL/Time Warner to permit the public to receive content and interactive services from unaffiliated providers. With its sizable interests in news media and its bottleneck control over the broadband pipeline, there is an enormous potential for AOL/Time Warner to flood its total bandwidth capacity with its own or affiliated news, sports and other content, as well as interactive services.

This potential conduct has serious implications for the First Amendment rights of viewers to have access to diverse sources of news and information because it will undermine the ability of the public to receive competitive news sources, like ABC News, that are critical to ensuring the accuracy and integrity of information. Indeed, the importance of protecting the ability of the public to access diverse news sources was recognized in the Time Warner/Turner consent decree which required the carriage of at least one independent advertising supported news and information national video programming service with specified carriage penetration rates.[169] Similar safeguards should be attached to AOL/Time Warner merger to protect the public's interest in diverse programming in the Interactive Television services market.

The fear that AOL/Time Warner will discriminate against unaffiliated content and service providers in the Interactive Television service market by dominating total bandwidth has historical roots. In the 1992 Cable Act, Congress found that vertically integrated cable operators have the incentive and ability to favor their affiliated programmers over unaffiliated programmers, thereby making it more difficult for unaffiliated programmers to obtain carriage

---

169 *See* Time Warner/Turner Consent Decree; *see* also FTC Press Release (February 7, 1997) (stating that the consent decree "requires Time Warner's cable interests to carry a rival to CNN").

on vertically integrated systems.[170] Consequently, Congress directed the Commission "to prescribe rules and regulations establishing reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest."[171] The Commission's channel occupancy rule provides that a cable operator may not devote more than 40 percent of its activated channels to the carriage of affiliated programming networks.[172] This restriction applies only to the first 75 activated channels.[173] These channel occupancy rules "are designed to place limits on a cable operator's programming power."[174]

The rationale behind the Commission's channel occupancy rules, which "are intended to ensure access to carriage on cable systems by video programming providers that are unaffiliated with cable operators,"[175] and the purpose of the independent news carriage condition of the Time Warner/Turner consent decree apply with equal force to the AOL/Time Warner merger. AOL/Time Warner, with its control over the bottleneck conduit for Interactive Television services, has the incentive to favor its own content over that of unaffiliated content providers aspiring to compete in the Interactive Television services

---

170 See, e.g., Section 2(a)(5), 1992 Cable Act.

171 47 U.S.C. Section 533(f)(1)(B).

172 See 47 C.F.R. Section 76.504.

173 Id.

174 Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Implementation of Cable Act Reform Provisions of the Tele-communications Act of 1996; Review of the Commission's Cable Attribution Rules, 14 FCC Rcd 19014, Report and Order; Corrected in CS Docket No. 98-82; CS Docket No. 96-85 (1999) at ¶ 68.

175 Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 11 FCC Rcd 7413 Notice of Inquiry in CS Docket No. 96-133 (1996) ¶ 22.

marketplace, resulting in a reduction of content and Interactive Television choices for consumers. To preserve consumer access to a diverse selection of news, information and entertainment, the Commission should prohibit AOL/Time Warner from using more than 40 percent of its broadband cable pipeline's total bandwidth capacity for content or Interactive Television services it owns or that is affiliated with AOL/Time Warner, and should apply that 40 percent limit by programming genre, including news, sports and entertainment programming.

6. The Commission Should Protect Consumer Choice By Imposing Conditions Prohibiting AOL/Time Warner From Engaging In Specific Discriminatory, Anticompetitive Practices.

The Commission should impose a series of specific prohibitions on identifiable practices that would have a discriminatory effect on unaffiliated content providers, and thereby undermine competition and reduce consumer choice in the emerging Interactive Television services market. These behavioral conditions are more susceptible to enforcement than a generic requirement of non-discrimination and they are necessary to ensure that consumers will have unfettered access to a diverse selection of technologically equal content and interactive service offerings. These protections should include, but not be limited to, a prohibition against:

- discrimination with respect to downstream traffic;
- discrimination on the return path for Interactive Television services;
- discrimination in caching practices that makes AOL/Time Warner's information or broadband services easier to access than the information or services of unaffiliated content providers.
- discrimination that would degrade the ability of consumers to access unaffiliated content or use unaffiliated Interactive Television services;
- discrimination that disables, blocks the use of, or results in the deletion of navigation links to unaffiliated content or unaffiliated interactive services;

- discrimination by set-top box design and architecture that fills up memory with affiliated content before loading unaffiliated content;

- discrimination through the use of a closed, proprietary broadband cable architecture that fails to use open, content-neutral technical standards;

- discriminatory presentation of information (with respect to channel position, page placement, and prominence and availability of displays) or displays on navigational devices or electronic program guides for purposes of enabling subscribers to select program or content offerings;

- discrimination that erodes equal quality of service between AOL/Time Warner owned or affiliated content or Interactive Television services and unaffiliated content or Interactive Television services (e.g., equivalent error rates in transmission and timeliness of bits delivery);

- discrimination that restricts the ability of consumers to access unaffiliated content or interactive services based on the interoperability of such services with AOL/Time Warner owned or affiliated instant messaging services;

- content restrictions on the material made available to consumers by unaffiliated content or Interactive Television services providers; and

- discrimination that undermines interactive advertising opportunities.

Section 653(b) of the Communications Act[176] provides the Commission with statutory guidance for the imposition of conditions prohibiting these types of discriminatory conduct. In the 1996 Telecommunications Act, Congress was deeply concerned about the potential for open video systems ("OVS") operators to use their control over consumer access to programming to discriminate in favor of programming provided by vendors affiliated with the OVS operator. To address this fear, Congress prohibited OVS operators from discriminating against unaffiliated entities "with regard to material or information (including advertising) provided by the operator to subscribers for the purposes of selecting programming."[177]

---

[176] *See* 47 U.S.C. §573.

[177] 47 U.S.C. §573(b)(1)(E).

While it is uncertain and, indeed, unlikely that Section 653(b) would apply to a merged AOL/Time Warner as a matter of law, the policy concerns underlying Section 653(b) nonetheless apply with great force. AOL/Time Warner, as the owner of a proprietary, closed broadband cable system, will have unprecedented control over the distribution of and access to programming and content in the Interactive Television services market, especially through its ability to manipulate the technological capabilities of unaffiliated content and Interactive Television services providers. Without behavioral safeguards, AOL/Time Warner will be able to pick and choose which services will run on its network, and it will have the power to block any service it wants. Time Warner has already demonstrated this ability when it blocked the carriage of ABC recently during a sweeps period in violation of federal law. In addition, Time Warner has engaged in the practice of stripping EPG data from broadcasters' VBI, thus disabling the competitive Gemstar EPG to favor Time Warner's own content. Such hostile action toward Gemstar's EPG also is concrete evidence that Time Warner is targeting the EPG as a means to control Interactive Television advertising. Similarly, AOL has blocked the use of its Internet service platform by rival instant messaging services, and it has disabled links to unaffiliated content providers, services and advertisements reducing consumer access to such products.

The ability of AOL/Time Warner to erode consumer choice by unleashing various forms of technological discrimination against unaffiliated content and interactive service providers is in stark contrast to the fundamental open nature of today's narrowband Internet, made possible by an end to end architecture that maintains a simple, non-discriminatory network with intelligence placed in the networks' applications, or "ends" of the system. The Commission must ensure that consumers will have the ability to obtain unfettered access and interactivity with the content and Interactive Television services of unaffiliated providers with the same technological capabilities and quality of experience encountered when accessing or using AOL/Time Warner content or interactive services.

7. The Commission Should Require That AOL/Time Warner Must Pass Through All the Bits of Broadcasters To Ensure a Level Playing Field for Unfettered Consumer Choices.

It is absolutely critical for broadcasters to be able to distribute their programming to as wide a viewing audience as possible. In recognition of this imperative, Congress required cable operators to carry "in its entirety ... program-related material."[178] Congress acknowledged that cable operators had an incentive to use their control over the distribution system anticompetitively to disfavor competing broadcast programming services, thereby threatening the future viability of free, over-the-air broadcasting.[179]

The convergence of cable broadband technology with advanced television services, as well as the advent of new interactive services that will enhance the viewer's experience, make the need for this "pass-through" requirement even more compelling. The unique AOL/Time Warner combination will bring together new tools for disfavoring broadcasters' content to the benefit of their own by refusing to pass through unaltered new and exciting programming enhancements that will increasingly come to define the medium. The Commission should require that AOL/Time Warner pass through unaltered all the free bits of broadcasters. More and more, program services will compete for audience share on the basis of new, exciting content. In other words, any information or material contained in the broadcast signal that the viewer would have received for free, over-the-air, must also be delivered over the cable broadband pipeline

---

[178] 47 U.S.C. § 534 (b)(3).

[179] See, Conference Rep. No. 862, 102nd Cong., 2nd Sess. 3 Section 2(a)(2) (1992).

unaltered to the consumer. The Commission must not permit AOL/Time Warner to compete unfairly by blocking consumer access to free programming enhancements provided by unaffiliated content providers.

8. Whether AOL/Time Warner Is A Telecom Services Provider Or A Cable Services Provider, the Commission Should Require That Consumers Have Non-Discriminatory Access to Unaffiliated Interactive Television Service Providers and Unaffiliated Broadband Internet Service Providers.

Prior to the announced merger between AOL and Time Warner, AOL led a crusade for the better part of two years advocating a government mandated "open access" policy. AOL repeatedly asserted the need for ISPs to enjoy open and equal access to the "bottleneck" broadband pipelines leading into millions of American homes. As George Vradenburg of AOL stated:

> As we move to the broadband world, real and substantial threats are emerging to the competitive Internet access market that necessitate strong, immediate and unequivocal Congressional action to preserve competition and openness in the Internet marketplace across all facilities.[180]

Equally strong pronouncements from AOL propounding the virtues of "open access" came from AOL CEO Steve Case, who stated:

> Market-driven policies need only a few baseline principles from policymakers – minimal requirements needed to ensure consumer choice. One such principle is open access, which has proved its worth in making the Internet what it is today.[181]

---

180 Prepared Statement of George Vradenburg, Legislative Hearing on H.R. 1686, The Internet Freedom Act and H.R. 1685, The Internet growth and Development Act Before the House Judiciary Committee, 106th Cong. 1st Sess. (June 30, 1999) at 10.

181 Prepared Statement of Steve Case, Legislative Hearing on Internet Access and the Consumer Before the Senate Commerce Committee, 106th Cong. 1st Sess. (April 13, 1999) at 24.

After AOL and Time Warner announced their merger plans, however, they abruptly jettisoned their support for mandatory open access. AOL and Time Warner then took the remarkable position that the market, all by itself, would cure any possible problem concerning discriminatory treatment with respect to unaffiliated company access to broadband cable facilities or consumer access to unaffiliated services. Clearly, the market working alone will not address these issues, especially given the tremendous market power AOL/Time Warner will possess if the Commission approves the merger without conditions.

In tacit recognition of this fact, AOL/Time Warner created a Memorandum of Understanding acknowledging that unaffiliated ISPs need to have access to the AOL/Time Warner broadband platform so that consumers will have a choice of multiple ISPs. While the Memorandum of Understanding is significant because it admits the potential for discrimination in the Interactive Television services market, it is worthless as a remedy because it is too vague and legally unenforceable. As Chairman Hatch noted:

> [d]oubts concerning the resoluteness to, and vagueness of, this memo could be overcome should [AOL and Time Warner] agree to condition the approval of this merger, or the transfer of any licenses by the FCC, on AOL/Time Warner's compliance with the promises made therein and its yet to be articulated terms.[182]

AOL/Time Warner certainly cannot, given its recognition of the importance of "open access," object to conditioning its merger on complying with a meaningful, unambiguous and easily enforceable non-discriminatory access commitment.

Clearly, the Commission would be within its authority to impose an open access condition on the AOL/ Time Warner merger to ensure consumers enjoy unfettered access to

[182] AOL/Time-Warner Merger: Competition and Consumer Choice in Broadband Internet Hearing Before the Senate Judiciary Committee (Feb. 29, 2000) (opening statement of Chairman Hatch).

unaffiliated content and Interactive Television service providers. As discussed above, in AT&T v. City of Portland, the Ninth Circuit concluded that the FCC and Congress maintained authority over the regulation of telecommunications services, including cable broadband services. Under the Ninth Circuit's reasoning, AOL/Time Warner's provision of Interactive Television services likely would be treated as a telecommunications service subject to the same regulatory framework as telecommunications services provided by a common carrier. Under this rationale, AOL/Time Warner, in its provision of cable broadband services, should be required to comply with Section 251(a)(1) and "interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." In addition, the Commission should require AOL/Time Warner to make its services available to all requesting parties, including unaffiliated ISPs and unaffiliated content and Interactive Television services providers, without discrimination in compliance with Sections 201 and 202. Certainly, these tested anti-discrimination provisions in Title II would afford the type of consumer protection which the Commission is obliged to provide if it determines to approve the AOL/Time Warner merger.

E. The Commission Should Require Interoperability Among AOL/Time Warner Instant Messengers and Rival Instant Messengers

AOL has about a 90 percent share of the instant messaging market with over 150 million users. Instant messengers will be a central feature of Interactive Television, as "buddies" will be able to exchange views in real time about any program they are viewing. AOL's monopoly position gives it an enormous advantage in the Interactive Television world over competing interactive systems without the network of instant messenger users. AOL has already excluded rivals from AOL's 150 million users, deliberately sabotaging any rival's attempt at interoperability. In the absence of a Commission order, AOL is likely to be just as exclusionary in the way it operates its set top box, denying interoperability to viewers of competing Interactive

Television operating systems. This would give AOL/Time Warner the whip hand to foist a closed system on content providers and viewers alike. The obvious remedy is a requirement that AOL/Time Warner facilitate interoperability so that users of rival Interactive Television systems could communicate with users of AOL instant messengers.

X. ARBITRATION PROCEDURES SHOULD BE USED TO ENFORCE THE SAFEGUARDS NECESSARY TO PREVENT AOL/TIME WARNER FROM ENGAGING IN ANTICOMPETITIVE, DISCRIMINATORY BEHAVIOR IN THE INTERACTIVE TELEVISION SERVICES MARKET.

So that the Commission does not find itself embroiled in every dispute concerning discrimination in the Interactive Television services market, the Commission should utilize arbitration to enforce anti-discrimination conditions imposed on the AOL/Time Warner merger. The Commission should establish a panel of arbitrators who would be prepared to resolve disputes arising from the conditions attached to any approval of AOL/Time Warner merger. Parties that believe AOL/Time Warner is not complying with the merger conditions may cause the issue to be resolved in binding arbitration.

The Commission should provide for the swift and vigorous enforcement of the AOL/Time Warner merger conditions by modeling the arbitration after the Commission's accelerated docket, ("rocket docket") which offers parties a streamlined dispute resolution procedure.[183] Rocket docket procedures focus initially on mediating disputes. Failing a settlement, an accelerated 60-day schedule for discovery, trial and order is put into motion. By taking a similar approach, complaints arising out of the AOL/Time Warner merger conditions can be resolved as expeditiously as possible. This would enable competitors, harmed by any

---

[183] Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to Be Followed When Formal Complaints Are Filed Against Common Carriers, Report & Order, CC Dkt. No. 96-238, 12 FCC Rcd 22497(rel. Nov. 25, 1997) ("First Report and Order")

noncompliance with the consent decree by AOL/Time Warner, to have the benefit of a decision within a short timeframe.

XI. SUMMARY OF PROPOSED TEXT OF CONDITIONS THAT SHOULD BE IMPOSED ON THE AOL/ TIME WARNER MERGER.

The following conditions should be engrafted on the AOL/Time Warner merger before any possible Commission approval to ensure competition and preserve consumer choice in the emerging Interactive Television services market.

A. CONDITION MANDATING SEPARATE OWNERSHIP OF BOTTLENECK BROADBAND CABLE CONDUIT AND ITS CONTENT TO ENSURE COMPETITION AND CONSUMER CHOICE IN THE INTERACTIVE TELEVISION SERVICES MARKET.

- AOL/Time Warner shall make an election with respect to owning either its content and related services or its distribution facilities, but it shall not maintain an interest in both sets of assets. If AOL/Time Warner elects to keep its distribution facilities, including but not limited to its cable systems, broadband cable/Internet platforms and associated hardware and software, then AOL/Time Warner shall separate from ownership of its content holdings, including but not limited to its cable programming, cable ancillary services, Interactive Television services, and Internet content. If AOL/Time Warner elects to retain its content holdings, it shall separate from ownership of all of its distribution facilities.

B. STRUCTURAL SAFEGUARDS ABSENT COMPLETE SEPARATION OF CONTENT AND CONDUIT.

- AOL/Time Warner shall place all content, including video programming, movies, music and written content, in a subsidiary separate from its distribution facilities to ensure consumer choice in the Interactive Television services market.

- AOL/Time Warner shall divest at least a one-third interest in either the content or distribution facilities to a purchaser or purchasers approved by the Commission to ensure consumer choice in the Interactive Television services market.

- AOL/Time Warner shall on a quarterly basis report in detail to the board of the subsidiary that has been partially divested and to the Commission the terms and conditions of each license relating to Interactive Television and all plans related to the creation or licensing of Interactive Television to ensure consumer choice in the Interactive Television services market.

C. In the Alternative, Conditions to Ensure Non-Discrimination, Competition, and Consumer Choice in the Interactive Television Services Market.

- AOL/Time Warner shall not engage in any unfair methods of competition or unfair or deceptive acts or practices, the purpose or effect of which is to hinder or prevent any consumer from accessing or using unaffiliated content or unaffiliated Interactive Television services.

- AOL/Time Warner shall not restrict consumer choice in the Interactive Television services market by unreasonably refusing to deal with providers of unaffiliated content or unaffiliated Interactive Television services for carriage of such services provided by such vendors.

- AOL/Time Warner shall not restrict consumer choice in the Interactive Television services market by discriminating against any unaffiliated content or Interactive Television services provider on the basis of prices, terms, or conditions for carriage of services provided to such vendors.

- AOL/Time Warner shall not restrict consumer choice in the Interactive Television services market by requiring a financial interest in unaffiliated content or Interactive Television services providers as a condition for carriage of unaffiliated content or Interactive Television services.

- AOL/Time Warner's content or Interactive Television services or that of affiliated entities made available to consumers through its cable facility shall not use more than 40% of the cable facility's total bandwidth capacity, and, further, shall not exceed 40% of the content and interactive services in each of the genres of news, sports and entertainment programming provided to consumers.

- AOL/Time Warner shall not restrict consumer choice in the Interactive Television services market by engaging in the following discriminatory practices:

    1. Preventing or hindering consumers from accessing or interacting with unaffiliated content or unaffiliated Interactive Television services at the same downstream traffic speed as AOL/Time Warner's content or Interactive Television services or that of affiliated entities.

    2. Preventing or hindering consumers from receiving or interacting with unaffiliated content or unaffiliated Interactive Television services at the same return path traffic speed as AOL/Time Warner's content or Interactive Television services or that of affiliated entities.

    3. Preventing or hindering consumers through the use of discriminatory caching from accessing or interacting with unaffiliated content or unaffiliated Interactive Television services at the same speed, efficiency,

and quality of service (e.g., equivalent rates of transmission and timeliness of bits delivery) as AOL/Time Warner's content and Interactive Television services or that of affiliated entities.

4. Preventing or hindering consumers through the use of discriminatory set-top boxes, discriminatory set-top box operating systems or other discriminatory hardware or software from accessing or interacting with unaffiliated content or unaffiliated Interactive Television services at the same speed, efficiency, and quality of service (e.g., equivalent rates of transmission and timeliness of bits delivery) as AOL/Time Warner's content and Interactive Television services or that of affiliated entities.

- AOL/Time Warner shall not restrict consumer choice in the Interactive Television services market by discriminating against unaffiliated content or unaffiliated Interactive Television services providers and in favor of AOL/Time Warner or affiliated entities in interacting with consumers at the point of actual program or service selection through navigation devices or menus or through screen bias (e.g., excluding or unfairly limiting the displays of unaffiliated content and Interactive Television service providers, discriminatory channel placement or page placement, or disabling, blocking, or causing the deletion of links to unaffiliated content or Interactive Television services).

- AOL/Time Warner shall not restrict consumer choice in the Interactive Television services market by imposing any content restrictions on the material made available to consumers by unaffiliated content or unaffiliated Interactive Television service providers.

- AOL/Time Warner shall not restrict consumer choice in the Interactive Television services market by imposing any restrictions or engaging in any anticompetitive or discriminatory practices that would limit the ability of unaffiliated content or unaffiliated Interactive Television service providers to advertise products or services to consumers or to provide navigation links to unaffiliated content.

- AOL/Time Warner shall pass-through unaltered on its broadband cable facilities, all bits transmitted free, over-the-air by local commercial television stations to ensure consumer choice in the Interactive Television services market.

- AOL/Time Warner shall provide nondiscriminatory access to its broadband cable facilities to unaffiliated content providers, unaffiliated interactive service providers, unaffiliated instant messaging services, and unaffiliated Internet service providers at the same prices and on the same terms and conditions as it affords affiliated providers of such services to ensure consumer choice in the Interactive Television services market.

- AOL/Time Warner shall provide all necessary information and shall otherwise facilitate the interoperability of AOL/Time Warner's instant messenger system and competing systems.

- If any unaffiliated content or Interactive Television services provider believes that it has been discriminated against by AOL/Time Warner and that such discrimination is contrary to the merger conditions or believes that AOL/Time Warner has otherwise violated the merger conditions, that provider may elect to cause the issue to be submitted to outside, independent, arbitration. Arbitrators shall be selected from a panel previously determined by the Commission. The arbitration shall be concluded within 60 days notice of an alleged breach of the merger conditions.

XII. CONCLUSION

AOL's and Time Warner's fundamental plea to regulators reviewing their proposed combination is "trust us" and grant unconditional merger approval. However, the Commission should bear in mind that actions speak louder than words. AOL's and Time Warner's brazen anticompetitive behavior before, and quite astonishingly, even during the pendency of the Commission's merger review – including illegally deleting ABC programming during sweeps period, stripping Gemstar's electronic programming guide information from broadcast signals, blocking consumer interface with independent instant messaging systems, and refusing to carry rival state news programming – speaks volumes about the potential harm that the merged AOL/Time Warner can cause to consumer choice and competition in the emerging Interactive Television services market. AOL and Time Warner have shown over and over again that they will not hesitate to thwart competition and consumer choice to maximize monopoly profits.

The stakes here are simply too high and the risk to the public too great for the Commission simply "to trust" AOL and Time Warner to do the right thing. Instead, to protect consumer choice and competition, the Commission should not approve the AOL/Time Warner merger absent the attachment of strong and enforceable conditions that either require separate ownership of cable broadband conduit and content, or prohibit discrimination against unaffiliated content and Internet service providers.

Respectfully submitted,

Lawrence R. Sidman, Esquire
Lawrence Duncan, III, Esquire
Jessica A. Wallace, Esquire
VERNER, LIIPFERT, BERNHARD,
MCPHERSON & HAND, CHARTERED
901 15th Street, N.W.
Suite 700
Washington, D.C. 20005

(202)371-6206

Counsel for The Walt Disney Company

Preston Padden
Executive Vice President,
Government Relations
The Walt Disney Company
1150 17th Street, NW
Suite 400
Washington, DC 20036

Lou Meisinger
Executive Vice President &
General Counsel
The Walt Disney Company
5000 South Buena Vista Street
Burbank, California 91521

Alan N. Braverman
Executive Vice President &
General Counsel
ABC, Inc.
77 West 66th Street
New York, New York 10023

James W. Olson, Esquire
Marc G. Schildkraut, Esquire
Scott Weisman, Esquire
HOWREY, SIMON, ARNOLD & WHITE, LLP
1299 Pennsylvania Avenue, NW
Washington, DC 20004

(202)383-7246

Of Counsel for The Walt Disney Company

Dated: July 25, 2000

Attachment A

DOCUMENT OFF-LINE

This page has been substituted for one of the following:

o An oversize page or document (such as a map) which was too large to be scanned into the ECFS system.

o Microfilm, microform, certain photographs or videotape.

● Other materials which, for one reason or another, could not be scanned into the ECFS system.

The actual document, page(s) or materials may be reviewed by contacting an Information Technician at the FCC Reference Information Center, at 445 12th Street, SW, Washington, DC, Room CY-A257. Please note the applicable docket or rulemaking number, document type and any other relevant information about the document in order to ensure speedy retrieval by the Information Technician.

One Video Cassette.