

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 addresses anyway.

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

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

16 CHAIRMAN KENNARD: Mr. Furchtgott-Roth?

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

1 Nalebuff had to say.

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

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

1 agencies.

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

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

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

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

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

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

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

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

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

11 CHAIRMAN KENNARD: Commissioner Powell?

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

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

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

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

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

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

1 Windows. I really mean Office.

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

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

15 CHAIRMAN KENNARD: Commissioner Ness?

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

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

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

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

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

22 (There was a brief recess.)

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

1 representatives from AOL and Time Warner at the table here.  
2 They will not be making opening statements, but they will be  
3 available to respond to arguments and critiques from the  
4 other panelists.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1 commercial negotiations for nondiscrimination.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

25           The potential for consumers to be harmed by the

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

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

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

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

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

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

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

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

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

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