

1           You have operating irreversibly open markets. In  
2 those states, the Commissions in those states have worked  
3 out with the dominant incumbent carriers open access rules.  
4 One can argue that under the Ninth circuit, you should apply  
5 those rules to the cable system. We have been asking for a  
6 lot less than that for the last couple years. We may have a  
7 legal right to all that.

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

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

20           And language like that put it into this merger  
21 agreement, put into the AT&T merger agreement under  
22 reconsideration will have the effect of establishing the  
23 level playing field we heard about. It will balance the  
24 bargaining power of the unaffiliated ISP and the affiliated  
25 ISP. That's a level of detail I think answers your

1 question.

2 CHAIRMAN KENNARD: Not exactly. You outlined a  
3 couple of options.

4 MR. COOPER: Yes.

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

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

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

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

24 So that may be the better way to go. Give them  
25 the right. Tell them to arbitrate disputes so that you

1 don't have to try and write rules. We tried to get through  
2 this without writing rules by letting private parties have  
3 the private right of action. That is what AOL asked for in  
4 San Francisco.

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

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

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

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

24 MR. PARSONS: Well, I think that both my colleague  
25 from AOL, who's more technically proficient, and I would

1 care to respond. I'm going to let Barry start, but I have a  
2 point that I want to make in summary.

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

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

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

22 In fact, if you asked 100 different people what  
23 AOL is to them, you would hear them say they're completely  
24 different things. It's where I get news, it's where I talk  
25 to my friends, it's where I get sports, it's where I get,

1 talk to my friends, where I go to the quilting forum. So  
2 from our point of view, we can't discriminate content. If  
3 we were to employ some kind of caching that somehow  
4 discriminates against content, what that means is, to some  
5 segment of our members, they all of a sudden have a bad  
6 experience. And so it makes absolutely no business sense.  
7 In fact, if we did it, what it would do is they would  
8 complain.

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

11 MR. SCHULER: They would complain to us.

12 MR. COOPER: Let me respond.

13 COMMISSIONER NESS: Go ahead, Dr. Cooper.

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

24 MR. SCHULER: That, that is not how, unfortunately  
25 -- and I think our friends at Disney would be the first to

1 say -- consumers buy brands. Brands are not fungible. The  
2 fact of the matter is somebody wants to watch the Yankees,  
3 it's not as good to go watch the Mets. Someone wants to  
4 watch, you know, Disney, it's not as good to go watch Mickey  
5 Mouse. If someone wants to go --

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

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

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

23 In fact, we set out to be the best Internet  
24 service provider out there. And we discovered that by doing  
25 that, by providing unrestricted access to content, that

1 people came. Today, 23 million households have decided to  
2 buy that.

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

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

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

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

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

25 And I think too many of the commenters on these

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

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

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

24 COMMISSIONER NESS: Okay, thank you. Mr. Levin,  
25 you wanted to respond. I know we're running out of time.

1           CHAIRMAN KENNARD: You're on the next panel too,  
2 so you'll have a chance to continue your monologue. But --

3           MR. PARSONS: Appreciate it.

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

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

24           Now, what's going on with the architecture at the  
25 next thing is different than what AOL deals with right now.

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

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

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

23 COMMISSIONER TRISTANI: I had a question for Mr.  
24 Mirabal and a bit of a comment, but first of all, you made  
25 some statements that Time Warner was running a -- and I

1 think it was a Seinfeld episode? -- is that a fact? And  
2 I'm talking about the Seinfeld episode which ridiculed  
3 Puerto Ricans, burned the Puerto Rican flag and made all  
4 Puerto Ricans look like rioters.

5 MR. MIRABAL: That's correct.

6 COMMISSIONER TRISTANI: They are running it on  
7 syndication?

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

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

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

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

25 MR. MIRABAL: Yes, we have. They have, they

1 probably in their records continuously dating back from when  
2 they began running that, that particular movie. I saw it  
3 once only three months ago when I was in Boston doing a  
4 speech, and I was appalled that it was running again on the  
5 station.

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

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

18 COMMISSIONER TRISTANI: Thank you, Mr. Mirabal.

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

24 (There was a brief recess.)

25 CHAIRMAN KENNARD: Before we begin our next panel,

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

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

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

22 Today's industry convergence is a very natural  
23 outcome of both broadband and Internet technology, and this  
24 trend will likely result in a limited number of vertically  
25 integrated players like this combination and AT&T. Given

1 this consolidation, we at BellSouth do not object to this  
2 merger, per se. However, we do believe that this merger  
3 must be conditioned to ensure that the consumer value  
4 created by it is not outweighed by the potential  
5 anticompetitive choice-limiting impacts of it.

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

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

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

22 Third, all of these players, including AOL, are in  
23 the network business. This Commission has understood for  
24 decades that independent or unconnected networks restrict  
25 competition. Given these points, we believe this merger

1 must be conditioned in the following three ways.

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

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

21 You lived it with satellite and cable  
22 overbuilders, and you will relive it in the broadband  
23 Internet world if we are not vigilant. The relationship  
24 between Time Warner content and AOL-packaged distribution  
25 must be based on generally available market terms and

1 conditions. Again, a simple principal simply applied to  
2 this merger.

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

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

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

1 AOL's network must openly interconnect to others.

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

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

16 And all of the panelists, to a member, have said,  
17 don't take the "trust me" theme. Codify the promises.  
18 Thank you, Mr. Chairman.

19 CHAIRMAN KENNARD: Thank you. Mr. Padden?

20 MR. PADDEN: Thank you, Mr. Chairman. I'd like to  
21 focus my remarks today on interactive television, which, at  
22 least to our way of thinking, represents the convergence of  
23 traditional television, Internet content, communications and  
24 commerce. And our company is investing millions of dollars  
25 in developing wonderful new interactive television content

1 for consumers. For example, on election night this year  
2 we're going to have interactive election coverage, the likes  
3 of which the American people have never seen before. They  
4 won't have to wait for the race, the information about the  
5 races they're interested in to be selected by the director  
6 in the studio to come up on the screen.

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

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

1 the business interests of the company that owns the pipe to  
2 the consumer's home.

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

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

24 There's two things that pushed us over the line  
25 with respect to this transaction. First, you heard Mr.

1 Levin say that they are now starting to install routers that  
2 are capable of open access. And I think in that statement  
3 there's a very important fact. And that is the architecture  
4 for interactive television systems is being set now.  
5 Decisions are being made now about what kind of routers are  
6 in fact going to be installed in these networks. What  
7 capabilities will be in the box and in the operating system.

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

19           We think there's a history here with both  
20 companies, the common thread being abusing bottlenecked  
21 facilities to limit consumer choice. I'll give you just a  
22 few examples. AOL, if you want, if you're a company that  
23 wants to put your content inside their walled garden, their  
24 contract will require you to disable navigation links  
25 otherwise available to the consumer. There is no way to

1 characterize that requirement as pro consumer choice. It's  
2 anti-consumer choice. It's taking choice and options away  
3 from the consumer.

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

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

22 The contract says, "Nothing contained herein shall  
23 obligate operator to provide broadcaster with access to any  
24 return path provided to subscribers by operator for any  
25 purpose." So we got nothing. Thank you, Mr. Chairman.

1                   CHAIRMAN KENNARD: Thank you, Mr. Padden. Mr.  
2 Weed?

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

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

20                   Postmerger Time Warner AOL will control essential  
21 Time Warner programming, AOL services, including AOL TV, and  
22 substantial investment in the largest direct TV broadcast  
23 company, Direct TV. These factors give AOL Time Warner the  
24 market power to threaten the public interest and a viable  
25 independent cable industry and its progress in closing the

1 digital divide.

2 I want to about the digital divide. The  
3 Commission has voiced repeated concerns over the digital  
4 divide. That is, the concern that consumers in certain  
5 markets, including smaller markets in rural areas, will not  
6 have access to broadband services. In fact, recently,  
7 Chairman Kennard observed that the lack of high-speed access  
8 in rural regions stems primarily from the high cost of  
9 providing such services. Chairman Kennard stated,  
10 "Providing customers with sophisticated services in areas of  
11 low density is an expensive undertaking."

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

21 But the business model in smaller markets is far  
22 from proven. Independent cable's progress could be stalled  
23 by the imposition of costly local, federal regulation or by  
24 abuse of market power by companies that control essential  
25 programming and Internet services. This brings us to the

1 ACA's primary question to the applicants. Will AOL Time  
2 Warner require independent cable operators to carry AOL  
3 services as a condition of access to essential Time Warner  
4 programming?

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

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

23 First, the applicants argue that they would not  
24 require carriage of AOL services as a condition of access to  
25 Time Warner programming, because it was not in their

1 economic interest to do so. Independent cable operators  
2 would just find an alternative programming, Time Warner  
3 said. This economic argument does not work. Of course it  
4 is in the applicant's economic interest to leverage key  
5 programming assets to force carriage of other services.

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

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

21 But then, in the applicant's July 17th filing,  
22 they appeared to retreat from this statement. With this  
23 apparent inconsistency on the record, ACA asks today for  
24 clarification. The most appropriate clarification for these  
25 applicants is to affirm that they will not condition access