

1 to any Time Warner programming on carriage of any AOL
2 services. With that clarification on record and included in
3 this Commission's order in the docket, ACA can support the
4 merger.

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

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

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

19 But initially, I want to comment that there are 28
20 million deaf and hearing impaired American citizens who rely
21 on instant messaging services, much like most of us use the
22 telephone, and I would ask, do any of us believe that those
23 28 million citizens should have less functionality in their
24 communications media than those of us who use the telephone
25 have today. Certainly, none of us would tolerate the

1 example that we heard from BellSouth, where you had to have
2 a different service to communicate with somebody who had
3 AT&T or Sprint or MCI. Certainly, that should be -- that
4 should carry over in the world of instant messaging to the
5 deaf and hearing impaired community.

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

19 I guess my question, Barry, would be why didn't
20 you tell us that a year ago? And the next question would be
21 were you misleading us then or are you misleading us now?
22 On the question of interoperability and its effect on
23 security for the members and privacy concerns, there's not
24 been one indication that anybody has demonstrated that
25 security and privacy is in any way more threatened or

1 further at risk with interoperability than it is without it.
2 And in fact, maybe Mr. Schuler can address that later this
3 afternoon.

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

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

19 Commissioner Tristani, I would urge you to take up
20 Steve Case's offer to download AIM and to try that product.
21 And I would ask you at the same time, try Microsoft's, try
22 Yahoo's, try Tribal Voice's, try Otogo's et cetera. And
23 after you do that, I would ask you to think about when you
24 want to make your choice about which product to use, do you
25 want to have the option of making the choice because one

1 product had features and functionality that you preferred,
2 or because one product gave you access to 92 percent of the
3 world to communicate with and the other products limited you
4 to eight or 10 percent?

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

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

18 CHAIRMAN KENNARD: Thank you. Mr. Melcher?

19 MR. MELCHER: Thank you, Mr. Chairman. I'm last.
20 I hope I'm not least. Good afternoon, my name is
21 Christopher Melcher and I'm vice president and general
22 counsel for RMI.NET. I would like to thank the Commission
23 for providing me the opportunity to comment on the proposed
24 merger of AOL Time Warner and its impact on the issue of
25 open access for residential and business consumers to

1 Internet access over the cable technology.

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

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

25 We are a member of the United States Internet

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

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

18 With the change in AOL's position on open access
19 from prior to their proposed merger with Time Warner to now
20 their position following that announced merger, it becomes
21 imperative that the FCC take up the cause of open access for
22 consumers on the nation's 8,000 smaller Internet service
23 providers. The FCC should make open access a clear and
24 enforceable condition of its approval of the AOL Time Warner
25 merger. Let me explain briefly why we support open access

1 and discuss the four most common myths perpetuated by
2 opponents of open access.

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

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

21 In reality, we believe AOL and Time Warner would
22 prefer to create a tilted and skewed playing field by
23 creating a closed system for Internet access and
24 telecommunications services over that system. This would
25 force the consumer to make difficult, noncompetitive

1 choices.

2 Myth number two is that open access cannot be
3 accomplished quickly. Until recently, the argument was that
4 open access could not be accomplished at all. It was
5 technically impossible. I assume AOL and Time Warner would
6 agree that today there are no technological barriers to open
7 Internet access over the cable plant. As we all know, AT&T
8 admitted as much several months ago in a letter to the FCC
9 with Earthlink.

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

21 We are pleased to be a participant in the AT&T
22 open access cable trial, and we are beginning that process
23 now. We also would hope to be a participant in AOL's open
24 access cable trial, and I would like to take Mr. Levin up on
25 his offer that any ISP that requests will be asked to

1 participate. We so request. But those trials are
2 proceeding very slowly and with very limited focus.

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

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

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

25 Competition, as one Commissioner mentioned

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

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

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

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

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

22 CHAIRMAN KENNARD: Thank you. And thank you all
23 for your presentations. I think, in fairness to Mr.
24 Schuler, we should give him an opportunity to respond to the
25 questions of Mr. Bagully that were offered in his

1 presentation.

2 MR. SCHULER: Thank you. Let me just provide a
3 lot of perspective, or at least put some context around this
4 instant messaging issue, which I know is very confusing to
5 people. And it's important to know, when we talk about
6 instant messaging being free, which was a surprise to some
7 people, that we made it free voluntarily. We actually
8 stimulated -- I think the reason why Tribal Voice is in
9 business today is because we created that category.

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

19 But for consumers today, they essentially have
20 interoperability. Now, that does not mean that we think
21 interoperability is a bad idea. We think it is a good idea,
22 for a lot of the reasons that are, have been suggested. And
23 it's also been suggested we've slow-rolled interoperability
24 for some ominous reason, but I'd like to talk about that as
25 well. And I want to use e-mail as the point of history.

1 If you go back 15 years, e-mail also was not
2 interoperable. Corporations, who mostly used e-mail all had
3 their own systems, and you could only mail people inside of
4 a corporation. Then, the industry decided to create
5 protocols to allow e-mail servers to talk to each other. We
6 believe that that's exactly the way you need to enable
7 instant messaging interoperability.

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

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

24 So in thinking about this interoperability issue,
25 our biggest concern is, so now, when we go to do this again,

1 how do we make sure we build in the controls that are going
2 to A, give consumers the ability to filter out what they
3 don't want, B, to ensure that the hackers and spammers out
4 there who seem to be much smarter than all of us who run the
5 networks and manage to get their way in, will be prevented?
6 And how can we, who each want to run independent services,
7 can maintain the standards of our service?

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

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

24 If you go to Tribal Voice -- and they also have
25 standards, but let me tell you how, on their own Web site,

1 they tell you to deal with a person who harasses you. I
2 will just read this. It won't take too long. "If you've
3 been abused or harassed on Powwow, find the IP address of
4 the perpetrator by clicking on the name field in the
5 person's powwow window. The window cycles between the
6 person's powwow ID and his or her IP address." It goes on
7 and on for a couple of more paragraphs.

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

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

25 There are two ways to do interoperability.

1 There's a right way and a wrong way. In the wrong way, the
2 client-to-client or peer-to-peer way, we would be forced to
3 the lowest common denominator of providing service to our
4 members. In the right way, server-to-server, the proposal
5 which we put forth to the IETF, the IETF has been struggling
6 with this issue --

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

11 MR. SCHULER: Well, no --

12 COMMISSIONER TRISTANI: And the security issue.
13 Let me finish.

14 MR. SCHULER: Um-hum.

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

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

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

22 MR. SCHULER: Okay. My turn? We have been
23 absolutely consistent all the way through - and we can go
24 show you my quotes -- that privacy and security and the
25 difficulty, the technical difficulty of getting these

1 systems, which must communicate in real time to be able to
2 allow us to do what we're talking about doing. And that is
3 us to offer a level of service, other companies to offer a
4 level of service. It is very hard. We run another service.
5 We have another instant messaging service --

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

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

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

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

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

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

1 forward with a proposal. We did.

2 CHAIRMAN KENNARD: Mr. Schuler.

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

6 CHAIRMAN KENNARD: Mr. Schuler.

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

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

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

21 CHAIRMAN KENNARD: Twelve months from today.

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

24 CHAIRMAN KENNARD: Is that a yes?

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

1 today.

2 CHAIRMAN KENNARD: Twelve months from today.

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

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

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

24 And I don't think there's anyone here -- because
25 today instant messaging on all services are run relatively

1 spam- and intrusion-free -- but I don't think there's anyone
2 here who wants to one day say that, you know, we pushed this
3 issue and in the process we got interoperability, but we
4 took a service that people love and enjoy and introduced a
5 factor they hate, and that's spam and intrusion forever.

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

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

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

24 So the fact of the matter is that the architecture
25 for interactive television -- and this is a whole new area.

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

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

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

20 MR. PADDEN: Sure. You know, I described what
21 we're going to do on election night this year and consumers
22 doing interactive television with a separate TV and a PC
23 with the PC connected to the public switch telephone
24 network, which is still open, will be able to interact. But
25 if that same consumer was trying to interact in a single

1 screen experience using a Time Warner Cable box, the new
2 cable boxes that I saw at the cable show in March had no
3 phone modem in them at all. It was the cable in and the
4 cable out.

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

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

16 MR. PADDEN: Well, so far, our company has
17 invested about \$65 million in trying to build out that
18 digital spectrum, including -- I think you know we did
19 Monday night football in high definition throughout the
20 entire football season last year -- but there's no return
21 path. Certainly nothing comparable to the broadband two-way
22 path of the cable infrastructure that has any remote chance
23 of being an effective substitute for consumers to what the
24 cable plant is going to offer. And what we're focused on is
25 what, what the consumer's effective choices are going to be

1 in the world of interactive television. And all the
2 analysts that we have read to date indicate that the two-way
3 broadband hybrid fiber coax network will enjoy advantages
4 over every other architecture.

5 CHAIRMAN KENNARD: Mr. Parsons.

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

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

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

1 rest of the world.

2 And the remedy that they now come before this
3 Commission with, which is to break apart, or suggest that
4 you require the breaking apart of the distribution platform
5 from the content platform is, in my judgment, almost
6 laughable in the face of the last 50 or 60 years of history
7 of this country and, in particular, in the face of the
8 beneficiaries of the relaxing of the regulatory provisions.
9 The notion that we would go back to sort of 1948 and
10 separate content from distribution or as, or go back to the
11 1970s with the thin-thin rules. Precisely the beneficiaries
12 of the relaxation of those rules, and allowing the industry
13 to come together in a vertically integrated way, as Gerry
14 was saying earlier, not only has resulted in the
15 proliferation of content, but choice for consumers.

16 And, you know, I think the Commission should think
17 long and hard as it seeks to consider how to really
18 encourage -- I'll put it that way -- a proliferation of both
19 choice and content in this new medium. Do you let the
20 market do it, where consumer will will drive what is
21 ultimately presented to them? Or do you try and regulate
22 that from, you know, from behind the parade, if you will,
23 because of some fear of a host of horrors that a
24 competitor has said I could be hurt? Not competition could
25 be hurt. I could be hurt, because I've invested a lot of

1 money in a business model that relies -- that requires
2 access to this return path and if I don't get it, I might be
3 hurt in the way in which I'm approaching the marketplace.

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

10 CHAIRMAN KENNARD: Commissioner Ness.

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

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

25 That's a negotiated arrangement with unaffiliated

1 services. We'd be totally comfortable with our friends at
2 Disney, which they know. But that's not what they want.

3 COMMISSIONER NESS: Did you want to respond?

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

16 Another example. In the letter that's in the
17 record, we said, in this new interactive world, we're sure
18 consumers will have the opportunity to drill down while
19 watching CNN if there's a news story they would like more
20 detail about, they'll be able to click and get transported
21 to a broadband Web site that CNN will have developed with
22 more detail on that news story. We're all working on these
23 same opportunities for consumers. We said, just tell us
24 that the system will function the same if this consumer's
25 watching ABC News and they'd like to drill down.