S. HRG. 106–1090

AOL & TIME WARNER MERGER

HEARING

BEFORE THE

COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION UNITED STATES SENATE

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

MARCH 2, 2000

Printed for the use of the Committee on Commerce, Science, and Transportation

U.S. GOVERNMENT PRINTING OFFICE

78–185 PDF WASHINGTON : 2004

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

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AOL & TIME WARNER MERGER

THURSDAY, MARCH 2, 2000

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The Committee met, pursuant to notice, at 10:35 a.m. in room SR–253, Russell Senate Office Building, Hon. Conrad Burns presiding.

OPENING STATEMENT OF HON. CONRAD BURNS, U.S. SENATOR FROM MONTANA

Senator BURNS. The Committee will come to order. I would like to welcome everyone here today to this hearing, which concerns an issue of critical importance to the future development of the Internet, the proposed merger of two massive players in the Internet access and media content fields, and that has to do with America Online and Time Warner.

The purpose of the America Online-Time Warner merger would be, or the proposed merger, I should say, would be the largest merger in history. The amount of money involved is staggering. The initial price on the January 10 announcement was over $156 billion.

This Committee takes its oversight role very seriously, particularly when scrutinizing a combination of such unprecedented scope. Of particular importance in fulfilling the Committee's due diligence duty is a close examination of the potential effects on consumers of such an immense company.

AOL has about 21 million subscribers today, which is about six times larger than the nearest competitor for Internet service, and that is MindSpring. Time Warner is the Nation's second largest cable provider, with a vast array of video, music, and print content that pervades America's every-day life.

From the checkout stands in the afternoon to the couch at home in the evening, clearly the proposed combined company has the potential to use the vast power for the good of America. However, while the proposed merger before this Committee has the potential to provide consumer benefits, we also know the difference between potential and reality. While the combination of Time Warner's enormous treasure trove of content and America Online's 21 million subscribers could provide exciting new services, several serious public policy issues are raised by the creation of such a potentially dominant entity.

In assessing the potential future effects of the proposed merger, it is usually most helpful to look at the current market behavior

of the players involved. With this in mind, I am particularly troubled by the recent developments in the instant messaging area. Instant messaging is a real time chat format which allows users to communicate quickly and cheaply with each other.

America Online alone has over 45 million registered subscribers, and after its 1998 purchase of ICQ, the major alternative instant messaging system, currently commands over 80 million messaging users overall. These users generate nearly a billion messages a day, far more than the entire mail volume of the United States Postal Service.

The mode of communications is especially popular with young people, who favor it over traditional telephone conversation in many cases. As we all know, what has made the U.S. telephone network the envy of the world, and a tremendous positive economic force, it is the fact that it is available everywhere to all users. The fact that anyone can access the network makes it vastly more valuable to everyone.

The spectacular growth of the Internet itself was made possible by the development of open networks, not closed systems. Unfortunately, in the instant messaging area, I fear we are headed in the other direction. Just yesterday my colleague, Senator Hollings and I were presented with a letter from all of the major competitors that offer instant messaging services stating that their products are being purposely blocked by the dominant provider of such services, America Online. This letter was signed by many companies, including AT&T, AltaVista, Prodigy, and others too numerous to mention here.

This very Committee heard just last summer that serious efforts were being undertaken by America Online to deal in good faith with these interoperability problems so that all consumers could benefit. In a July statement issued by the chairman of the working group designed to solve these problems, AOL stated that it, quote, believes that users should be able to exchange messages regardless of which product they use.

AOL also said it was, I quote, fast-tracking these efforts. Well, it is 7 months later, and these blocking problems are more evident than ever, and I look forward to the testimony of the witnesses to clarify these recent events.

Another issue that many Members of this Committee will be interested in, I assume, would be the so-called open access. I followed with great interest the announcement on Tuesday of this week that AOL and Time Warner committed to give their broadband cable customers direct access to Internet service providers on a nondiscriminatory basis. While I was never in favor of Government intrusion and regulation of the cable networks, I applaud the efforts to reach privately negotiated settlements.

I should add that while the memorandum appears to be a positive first step, on closer inspection several questions are raised about how binding such agreement will be, and I look forward to a more detailed description of how this understanding would translate into the marketplace with our witnesses, and I look forward to your testimony today.

I would also like to invite Mr. Case and Mr. Levin if they would—March 21, we kick off this year's activities in the Internet

Caucus, and we will invite both of you to be a part of that, coming up on March 21. You might have your people put that on your calendar, and I thank you for coming today.

Now I turn to my good friend, Senator Hollings.

STATEMENT OF HON. ERNEST F. HOLLINGS,
U.S. SENATOR FROM SOUTH CAROLINA

Senator HOLLINGS. Thank you, Mr. Chairman. I think I can save us time by including my statement in the record here at this point. Let me thank the staff for preparing this statement, because I am not intelligent enough to prepare one on this subject.

Things are breaking so fast, and we come from a policy of open access, and not having control of both content and message. That has been constant throughout our history with TV. Both of you folks at the table are way smarter than we are, but you understand that in the television industry we would not even let the networks produce their own programs. That was to try, under the First Amendment, freedom of speech, more flexible programs than otherwise, and even in the 1996 Telecommunications Act, I remember we put in there for the Bell Companies if they got into video programming that they have open access, nondiscriminatory conduct and everything else.

Now, what I am trying to see is, we have seen the tremendous merging of content and delivery, and anybody that studied John D. Rockefeller—who did not make his money on oil, he made his money on the distribution and delivery of that oil, and I see that you smart folks are really producing—and I will wait my turn for the questions, but it looks to me you all are running down—you all have got the Microsoft book, going right, straight down the Microsoft route that has got them in court right now, but I do thank you, and I would yield to my colleagues.

[The prepared statement of Senator Hollings follows:]

PREPARED STATEMENT OF HON. ERNEST F. HOLLINGS,
U.S. SENATOR FROM SOUTH CAROLINA

The merger of AOL and Time Warner represents the synthesis of old and new media, narrowband and broadband, and content and delivery systems. It also represents the union of the world's largest Internet service provider and the world's biggest entertainment and media company. As such, it raises several public policy concerns that require significant examination.

- AOL has 23 million subscribers, six times larger then its biggest Internet competitor.
- According to the International Data Corp (IDC), a Massachusetts research and financial data firm, AOL controls more than 40 percent of the Internet services market.
- Time Warner controls the second largest cable system in the country, owns 20 percent of the cable lines and serves 12.6 million cable customers.
- Time Warner produces its own content and owns CNN Network News, Cinemax, HBO and TNT, as well as Warner Brothers' movies.
- On the print side, the company publishes numerous popular magazines such as *Time, People, Sports Illustrated, Southern Living, Fortune* and *Money,* which are read by 120 million people.

There is tremendous potential for the exercise of undue market power and the discriminatory treatment of its competitors by this merged company. AOL already has used its market clout to forge agreements with top computer manufacturers to have its Internet access service bundled on new computers. This of course was the basis for the Microsoft anti-trust suit by Justice. In fact, that suit was directly tied to

Netscape which is now owned by AOL. Now under this new agreement, new computers purchased from Dell, Compaq, and Gateway will have AOL's software.

It also is my understanding that AOL has developed a new 5.0 software that reportedly disables its competitors when installed on a user's computer, and is the subject of class action litigation in Arizona, Washington and Oregon. In order to rectify the problem consumers must call the AOL help line and reprogram their computer. While AOL is espousing nondiscriminatory treatment and choice, it is using software that makes it difficult to use multiple service providers. Will there be other changes in the Internet's architecture or AOL's software that will make it difficult for others to compete on a level playing field against AOL.

Finally, this transaction raises the potential for discriminatory practices with respect to content delivered over the Internet/cable platform that will be deployed by AOL-Time Warner. When we passed the cable act in 1992, we were acutely aware of the dangers posed by the vertical combination of both content and distribution systems, and the inevitable temptation of the owner of both the content and distribution system to discriminate against their competitors. Then, in the Telecommunications Act of 1996, we included a provision to ensure that if the telephone companies provided video programming, they could not "unreasonably discriminate . . . with regard to material or information (including advertising) provided by the operator to subscribers . . . or in the way . . . material or information is presented to subscribers." Now we have a cable-Internet merger in which economic incentives will exist to favor their content, news, material, and information, over that of competing content and news information providers. The FTC and Congress should seriously consider whether this combination should be subject to similar principles of non-discrimination.

I look forward to the testimony of our witnesses today on these important issues.

Senator BURNS. Thank you very much. Senator Gorton.

STATEMENT OF HON. SLADE GORTON, U.S. SENATOR FROM WASHINGTON

Senator GORTON. Mr. Chairman, in listening to both you and Senator Hollings I share many of your apprehensions. This is a huge merger. It looks as though it could easily lead us to a point where we have only a handful of major providers in the most dynamic part of our economy, and I share many of the reservations, though not necessarily all of the conclusions of the three members of the second panel that is going to appear before us here today.

And I think it is right and proper on your part that we should take a very careful view of this merger, and should review it with at least a sufficient degree of apprehension that we require a heavy burden of proof on the two merging partners, and that they are not going to lessen competition and openness in the field together, and they play such a dominant role in.

Senator BURNS. Thank you very much. Senator Wyden.

STATEMENT OF HON. RON WYDEN, U.S. SENATOR FROM OREGON

Senator WYDEN. Thank you, Mr. Chairman. I will be very brief, and I want to pick up on what Senator Hollings said. It seems to me that in the 21st Century the money is to be made in interactivity, and I think when you look at the vision that the two of you have discussed with this merger. I think your vision is what we will need to examine. There are two areas in particular that I would look at with you.

First, because of the size of this merger and the number of people involved, to a great extent what the two of you are doing is going to have enormous ramifications for privacy policy in this country. Senator Hollings has a lot of good thoughts on this. Sen-

ator Burns and I have a bipartisan bill with respect to this issue. Senator Kohl has signed on to it.

Mr. Case, I heard you say a couple of days ago that you were essentially ready to back privacy legislation and, given the fact that this is perhaps number 2 now in the polls with respect to the American people, I would like to see you outline your views on privacy this morning. You will be asked about what you think the elements of a good privacy statute ought to be. That is number 1.

The second area, so that you two will be aware of what I am going to ask, is this question about how to make sure that there is no discrimination against unaffiliated content providers. As you know, there is great concern in this country with respect to all of the other content providers who are not affiliated with your system about how they are going to get a fair shake, and I would like to have you all outline how it is that those folks are going to be treated fairly, so we do not end up in a country where, to get some of those content providers, people have got to scroll along for eons in order to get access to those materials. That is what I will be asking.

Mr. Chairman, I look forward to working with you and Senator Hollings in a bipartisan way.

Senator BURNS. Thank you very much. Senator Dorgan.

STATEMENT OF HON. BYRON L. DORGAN, U.S. SENATOR FROM NORTH DAKOTA

Senator DORGAN. Mr. Chairman, thank you very much. Let me thank Mr. Case and Mr. Levin for coming today. I have spoken at some length about my concern about concentration. That is not a secret. My concern about concentration deals especially with the question of how does concentration affect competition?

When we rewrote the Telecommunications Act our interest was in fostering aggressive, robust competition, and that is what I am going to be interested in today. How does this merger affect competition?

And let me also say that I think privacy matters a great deal. As Senator Wyden indicated, privacy is one of the policy areas that we are very interested in.

And I would also say that I was surprised and also found appealing the announcement earlier this week about open access. I think that is certainly a step in the right direction, but we must be concerned, as all of us proceed, about the competitive forces that can exist in the marketplace in telecommunications and entertainment. What are the competitive forces that will allow the consumer, the best possible product at the best possible price? I am interested in hearing all of the witnesses discuss today the effect of this proposed merger on those issues.

Again, both of you are very successful businessmen who have built interesting and wonderful companies. Let me just say that with respect to the $1 billion instant messages, my children contribute a lot to that $1 billion a day, regrettably. We are working on paring that down just a bit.

But this is a fascinating time and a fascinating industry. I am very interested in your presentations, and the presentation of the panel following you.

Senator BURNS. Thank you very much. Senator Bryan.

STATEMENT OF HON. RICHARD H. BRYAN,
U.S. SENATOR FROM NEVADA

Senator BRYAN. Thank you very much, Mr. Chairman, for convening this important hearing, and thanks to our distinguished witnesses for appearing here today. I think this merger raises some potentially troubling implications in terms of public policy, and at least two areas that are of concern to me have been mentioned by my colleagues. These areas include the impact this merger has on competition, and whether there will be open access.

Mr. Case, you appeared before this Committee last year, prior to the merger. At that time you made, I thought, a very compelling argument. You urged us to consider having the FCC open a rule. I want to explore whether or not, after the announcement, you think we need to followup on that with some additional action, either at the regulatory level or at the legislative level and, as two of my colleagues have mentioned previously, the issue of privacy is not just a phantom issue. It is not ephemeral. It is an issue that I hear from my colleagues and from my constituents virtually every day.

The *Wall Street Journal* did an opinion poll sampling last year with a focus on the millennium. What are the concerns that most Americans have in the next century? It was an open-ended poll. The single largest responding category at 29 percent expressed a concern about loss of privacy. I want to explore those issues with you, as I know a number of my colleagues may.

Again, I look forward to the opportunity to ask some questions, and thank you, Mr. Chairman.

Senator BURNS. Thank you, Senator.

Senator Rockefeller, I wonder if you might autograph one of those books that Senator Hollings was referring to.

[Laughter.]

STATEMENT OF HON. JOHN D. ROCKEFELLER IV,
U.S. SENATOR FROM WEST VIRGINIA

Senator ROCKEFELLER. That is on distribution and not on collection.

[Laughter.]

I would say to our two witnesses that I do not necessarily start out skeptically on this merger. There are a number of questions that I need to have answered, and time will help us do that as well as this hearing. This whole phenomenon of the new economy is moving forward, and I am not inclined to try to stop it unless it is unwilling to address certain areas I think that you will be, and I have some questions for you about this, but you know, the privacy question is huge.

Senator Hollings has asked me to do some work on that, and I am going to because he has asked me to and also because I think it is a huge issue. Another important issue is the whole question of not undermining consumer choice when it comes to broadband.

But I do not start out skeptically. I start out with an open mind, and a willingness to hear how you respond to what people have to say because that is what hearings are for, and you have both the

FTC and the FCC to go through. The FCC doesn't ordinarily turn down mergers of this sort. The FTC may very well approve it, I do not know, but your presence here is important, and how you answer questions will be extremely important.

Thank you, Mr. Chairman.

Senator BURNS. Thank you, Senator.

Senator Stevens.

Senator STEVENS. I applaud the merger. I am happy to be here and hear your statements. I hope my colleagues will let us get to that.

Senator BURNS. Thank you, Senator Stevens.

Senator Breaux.

STATEMENT OF HON. JOHN B. BREAUX, U.S. SENATOR FROM LOUISIANA

Senator BREAUX. Now, should I say anything?

[Laughter.]

Well, I thank the chairman, and I think you can tell the scope of this hearing is very important because you have heard from every Member of the Committee, and that is what happens when the subject matter is as important as this.

You know, it seems like now more and more we have less and less. I mean, it seems like every day we have fewer oil and gas companies, fewer airlines, fewer railroads, and fewer telecommunications companies in this country, and big is not necessarily bad, but this is a country, as all of you know who are very competitive in your fields, that has been built on competition. The question I think we legitimately need to look at is how, when you have less and less, do you have more competition? It is a legitimate question. I know you are prepared to respond to it, and I look forward to your response.

Thanks.

Senator BURNS. Senator Cleland.

STATEMENT OF HON. MAX CLELAND, U.S. SENATOR FROM GEORGIA

Senator CLELAND. Thank you very much, Mr. Chairman. I am intrigued at this possibility this morning of our hearing. As a Democrat, I do not get a chance to encounter billionaires very often, so I just came to sit and stare.

[Laughter.]

Additionally, coming from Georgia——

Senator BREAUX. You look at Rockefeller every day. We've got one.

Senator CLELAND. But he's ours.

[Laughter.]

Knowing the history of TBS in Atlanta, and how it became Time Warner, and knowing Ted Turner as I do, I am also fascinated to see the guy who attempts to be Ted Turner's boss.

[Laughter.]

So we welcome you both today. Let me just say, in 1966 Time Warner did purchase TBS in Atlanta. A few months after that merger the TBS subsidiaries of Time Warner employed almost 8,000 employees worldwide, and almost 5,000 in Georgia, and today

those numbers have risen to over 9,000 employees worldwide and over 5,500 located in Georgia, so I think that was a good purchase and a good deal.

As the TBS continues to launch new products, these numbers will continue to grow, I am sure, and create growth in other segments of our economy in Georgia and in the country. Now the merger we are discussing today has the potential, I think, to imitate many of these same positive results.

It involves two dynamic leaders and two powerful industries, and it is no coincidence that it was announced just hours into what Mr. Levin has coined the Internet Century. I am very interested in learning how the merging of TV, movies, print media, with the Internet can really help average Americans, can help the consumer.

The proposed merger between AOL and Time Warner, the largest in U.S. history, offers a tremendous opportunity to help shape the future of the Internet. This understandably creates a great deal of interest, speculation, and some anxiety. There is really no precedent for the merger of a media provider and an Internet provider. It leaves the merger open to interpretation of what is likely to happen.

I personally am looking at this with great optimism and hope and faith, and belief in AOL and Time Warner that they will take full responsibility in this incredible undertaking.

From the public interest standpoint, it is AOL and Time Warner's responsibility, I think, to handle the future in such a manner that your handling of both distribution and content will not produce an unfair advantage in the marketplace. Many of your competitors are expected to follow your lead in the future, so you have a grave responsibility to lead us all bravely and courageously and responsibly into the 21st Century.

Many have already formed opinions on what the future holds, but nobody really knows what the future may hold. I am particularly interested in this in terms of the bottom line, what it does to the life of the average American. Does this merger help the average consumer of goods and services and information in America? I will be looking forward to your responses.

Thank you very much, Mr. Chairman.

Senator BURNS. Thank you, Senator. Twenty years of officiating football, I assume the captains have introduced themselves. I will toss the coin to see who gets to kick and who gets to receive, but whoever would like to lead, and we welcome Steve Case and Gerry Levin, and we appreciate your attendance here this morning, as there is quite a lot of swirl around this proposed merger, and a lot of information, so we thank you for coming this morning, and whoever would like to lead.

STATEMENT OF STEVE CASE, CHAIRMAN AND CEO, AMERICA ONLINE

Mr. CASE. I will start. We certainly understand the ground rules in terms of who is kicking and who is receiving. You get to kick, and we are here to respond as best we can.

[Laughter.]

Senator Burns, I really enjoyed your opening statement, but then you came to the however, and it got a little more troubling. I look

forward to talking about instant messaging, and privacy, and open access, and some of the other issues that have been raised, and I apologize to Senator Rockefeller for somehow having his family name dragged into this.

[Laughter.]

I also am reluctant to go forward with this statement after Senator Stevens' comments, but I do think it answers many of the questions that have been raised. As a starting point I think it would be worth moving through it, and I will try to do it quickly.

We see this merger, as you might imagine, as an opportunity to increase consumer choice and to spur new innovation, and to build further on notions of consumer trust and confidence and to really—I think it is something you all referenced in your comments, to extent the benefits of this Internet revolution to everybody.

In a few short years the Internet has already begun to transform our every-day lives and our businesses, and our schools certainly, and our homes, and also in our Government today we are on the verge of what we think will be a second Internet revolution, and it is a time of incredible innovation and intense competition.

We welcome that competition, because we believe our companies and this new company will be stronger because of it, so while we believe the combination of our companies will allow us to make the most of what we see as the changing world, there are a few things that will not change.

First, we will continue to provide consumers with the broadest, most empowering range of choices, fostering the innovation and competition that are the Internet's driving force. In the Internet age, companies must constantly innovate if they expect to succeed, and history shows that the most powerful innovations are created when we find new ways to join the emerging technology with existing content.

We hope AOL-Time Warner will lead a new era of innovation within our industry by providing consumers with an ever-expanding array of content from music, to movies, to publishing, to communications, to financial services, and AOL-Time Warner will never limit content diversity on any of our systems. If we did try to do that, consumers would waste no time in migrating to other Internet and media services.

A second commitment is, we will continue working to earn consumers' trust and confidence. At AOL, we have put in place what we think is the best privacy policy in the industry, built on core principles of notice and choice. The same is true for Time Warner, a company that is committed to journalistic integrity and consumer choice both on and offline.

I want to thank this Committee for keeping consumer trust and confidence at the top of your agenda. Many companies, including both Time Warner and AOL, supported legislation to put in place protections for information about children using the Internet could not be gathered without parental consent.

We understand the importance of trust to Internet consumers. As you know, the FTC is reviewing our industry's self-regulatory efforts. Armed with the information the FTC report will provide, we can engage in a deliberative process among Members of Congress and the industry and consumers which will tell us whether other

privacy legislation is necessary, and I will personally be happy to work with you to try to reach the best result.

One thing is certain, though. We share the same goal, which is protecting consumers and their families by establishing a new standard of privacy and security for the digital age, while permitting the Internet to continue to flourish.

Third, we will continue to work to implement open access, further increasing consumer's choices and enriching their online experience.

Last year, as has been mentioned, I told this Committee that history demonstrates that as long as infrastructure on which the Internet is built remains open, competition and innovation will flourish, and the Government and industry should work together to ensure a vibrant Internet marketplace.

We are seeing real progress in the marketplace on implementing open access, and we are proud of the role we have played in stimulating that progress. Implementation of open access all across the Nation is no longer a question of whether, but rather, of when.

On the day we announced this merger, AOL and Time Warner committed to open its cable network for competition through multiple ISP's. This week, we took the next step, releasing a memorandum of understanding that will form the framework for delivering AOL and other ISP's over Time Warner cable, and give consumers real choice.

Let me be very clear about what that framework means for consumers. Broadband consumers will not go through AOL unless they choose AOL. If they choose another Internet service provider, they will not see AOL or its front screen, and they will not be blocked from any content they wish to see. That is real open access, and it is the right policy grounded in the right principles for consumers, for the cable industry, and for the growth of the Internet.

Finally, we will continue to broaden the reach and extend the benefits of the Internet, leaving no community behind. Both AOL and Time Warner have taken significant steps to help close the digital divide, the gap between those who have access to these new tools and those who do not.

At AOL we are helping to launch PowerUP, a private public partnership to teach young people the skills they need and give them the guidance they need to make the most of their potential in this new, connected world. This is not just a problem of the inner city. That is why the AOL Foundation created the AOL Rural Telecommunications Awards, which awarded grants to people who are using the interactive medium to revitalize towns with less than 10,000 people.

We will take this challenge seriously at AOL Time Warner, not only as a company, but as individuals with a shared personal conviction that we must use our leadership to build a better world. These are the issues we all need to address to truly build a global medium that empowers people and truly benefits society, not just the Internet industry.

The truth is, as many of you know, without the Government's leadership on projects like ARPANET, and without the support to the NSF, the Internet would still be a distant dream. Without your leadership and support in the future, the Internet may never reach

its full potential. We have a once-in-a-lifetime opportunity to shape this medium while it is still young, and there is definitely room for a continuing partnership between Government and industry to ensure we do it right.

I appreciate the time and effort the Committee is taking to hear about this important merger, and I thank you in advance for the work you will continue to do in the months and years ahead. Together, we believe we can build a medium that will improve people's lives and a medium we can be proud of.

Thank you.

[The prepared statement of Mr. Case follows:]

PREPARED STATEMENT OF STEVE CASE, CHAIRMAN AND CEO, AMERICA ONLINE

Good morning, Chairman Burns, Senator Hollings and Members of the Committee.

As you know, on January 10, AOL and Time Warner announced our plan to join our two companies—creating the world's first truly global media and communications company for the Internet Century.

We see this merger as an opportunity to increase consumer choice and spur new innovation, to build consumer trust and confidence, and to extend the benefits of the Internet Revolution to every community. We intend to make the most of this opportunity.

In a few short years, the Internet has already begun to transform the way we live our lives—changing the way we communicate with friends, family and even our political leaders, the way we shop and are entertained, the way we strengthen our communities at home and build the world community.

Now, we are on the verge of a second Internet revolution. Technological advances are increasing the range of online content people can enjoy and use—from cable broadband, satellite, and DSL connections, to a new generation of wireless and handheld devices that make the Internet available anywhere, at any time.

This is also a time of incredible innovation and intense competition. We welcome that and believe that our new Company will be stronger because of it. The Internet never could have become a driving force of the new economy—and neither AOL nor Time Warner could have gotten where we are today—without consumer-driven competition.

Change this fast and far-reaching brings with it new opportunities—but it also brings new responsibilities. So, while we believe that the combination of our companies will allow us to make the most of the changing world, there are a few things we won't change:

- First, we will continue to provide consumers with the broadest, most empowering range of choices, fostering the innovation and competition that are the Internet's driving force.
- Second, we will continue to work hard to earn their trust and confidence.
- Third, we will continue to work to implement open access—further increasing consumer's choices and enriching their online experience.
- Finally, we will continue to broaden the reach and extend the benefits of the Internet—leaving no community behind.

Let me start with our first and most important commitment at AOL Time Warner: empowering consumers and encouraging innovation.

In our business, consumers are the ultimate venture capitalists—they guide our business models and drive our ideas. Consumers have been empowered, and they are exercising their power every day—seeking out the Internet service that meets their needs and the content that matches their interests: movies, books, stock quotes, even polling data.

One thing the last few years have made crystal clear is that in a rapidly changing, Internet-supercharged economy, companies must constantly innovate and continuously remake themselves if they expect to attract customers.

And history tells us that the most profound, life-changing ideas come to life when people find valuable new ways to join emerging technology with existing content.

HBO combined the idea of cable television and Hollywood movies—and transformed the way we think about entertainment. CNN took cable into the realm of TV news—and changed the way we learn about the world. In the same way, VCRs

transformed the movie industry, and CD technology transformed the music industry.

We hope AOL Time Warner will lead a similar new era of innovation—providing consumers with an ever-expanding range of content across industries, across platforms, across media—from music to movies to publishing to communications to financial services.

And, let me be very clear: AOL Time Warner will never limit content diversity on any of our systems. If we limit content, if we do not promote a diversity of voices, if we do not maintain scrupulous journalistic standards, then consumers will waste no time migrating to other Internet and media services.

Second, AOL Time Warner will build on the consumer trust and confidence that have made our brands among the most trusted in the business.

As separate companies, we have made a commitment to consumers—and we have kept it. As one company, we will continue to make that commitment—and we will continue to keep it. We will take building consumer confidence and trust to the next level—working within our industry and with all of you to craft responsive and responsible policies that address consumers' concerns.

Let me clarify what I mean by this. The Internet will never reach its full potential if people don't feel comfortable and secure using it—nor will they let their children use it.

This Committee and others know this, and I want to thank you for keeping these issues at the top of your agenda. At AOL, we have put in place what we think is the best privacy policy in the industry, built on core principles of notice and choice. The same is true for Time Warner—a company that is committed to journalistic integrity and consumer trust, both on and offline.

As you know, many companies, including both Time Warner and AOL, supported legislation last year to put in place special protections for children using the Internet so that information about them cannot be gathered without parental consent.

We understand the importance of trust to Internet consumers—and I would be happy to work with any of you to determine if other privacy legislation is necessary and when it should be pushed forward. I believe that any legislation that this Committee considers should be looked at only after the FTC has had a chance to do its review of current self regulatory efforts and the FTC's Committee on Access and Security has issued its report. This way, we will have the information we need to engage in a deliberative process among Members of Congress, the industry and consumers—and that is how we will reach the best result.

Our commitment to build consumer trust and confidence doesn't stop there. We have also provided "Parental Controls" for families and teachers to customize their children's experience in cyberspace. I am proud that nearly 80% of America Online's members with children in the home use Parental Controls today.

One thing is certain—we share the same goal: protecting consumers and their families and establishing a new standard of privacy and security for the digital age, while permitting the Internet to flourish in these changing times.

Third, we will make open access a reality for consumers—further increasing their choices and enriching their online experience.

Last year, I appeared before this Committee to talk about this issue. I said then—and I believe just as strongly today—that the history of the Internet has demonstrated that as long as the infrastructure on which it rests is open, competition and innovation will flourish. I also said that I believed government and industry must work together to ensure a vibrant Internet marketplace.

For the most part, people in government agreed on the goal but wanted it to happen in the marketplace. We are now seeing real movement in the marketplace—and I'm proud of the role we've played in bringing us to this point. Our push on this issue, along with the calls for action by consumer advocates and government leaders, has led to significant progress in the past year toward consumer choice in cable broadband service. Implementation of open access nationwide is no longer a question of whether, but of when.

As you know, on the day we announced our merger, AOL and Time Warner committed to making its cable network open for competition by multiple ISPs and to provide open access. This week, we took the next important step forward, jointly releasing a Memorandum of Understanding that will form the framework for delivering AOL and other ISPs over Time Warner cable—and give consumers greater choice.

We are looking forward to putting that framework into practice as soon as possible. For now, I would like to be very clear about what it means, in simple terms, for consumers.

Broadband consumers will not go through AOL unless they *choose* AOL. If they choose another Internet Service Provider, they will not see AOL or its front screen. And they will not be blocked from any content they wish to see.

That's meaningful open access. I have believed for a long time that open access and consumer choice among ISPs is the right policy, grounded in the right principles, for consumers and the growth of the Internet. I am also convinced it is the smartest business practice for the cable industry and the future of cable Internet service.

And so we are committed to working together with our industry to ensure that open access is common practice—and that consumers across the country are the real beneficiaries.

Finally, AOL Time Warner will be committed to ensuring that the benefits and opportunities of the Internet reach every community—leaving no one behind.

The Commerce Department—and this Committee—recognized early on that there is a widening gap between people who have access to the new technology and know how to use it, and those who do not. This "Digital Divide" threatens to place the promise of information technology beyond the reach of those who stand to benefit from it the most.

Both AOL and Time Warner have already taken significant steps to do our part to close the Digital Divide. I am proud of the role we are playing at AOL to help launch PowerUP, a unique public-private partnership to create a network of community technology centers that teach young people the skills they need—and that give them the guidance they need—to make the most of their potential.

Contrary to common perception, this is not just a problem in the inner city. In fact, rural Americans are much less likely than their urban counterparts to have computers, e-mail, even basics like phone lines. That's why the AOL Foundation, together with the National Center for Small Communities, created the AOL Rural Telecommunications Awards. Last year, we awarded $10,000 in grants to four winners who are using the interactive medium to revitalize towns of 10,000 people or less.

One of the things I am most looking forward to at AOL Time Warner is joining our resources and sharing our ideas to close the Digital Divide. We take this challenge seriously, not only as a company, but also as individuals with a shared personal conviction that we must use our leadership to build a better world.

These are the issues we need to address to build a truly global medium that empowers people and benefits society.

And when I say we, I mean all of us. I don't just mean the Internet and communications industry. I mean consumer groups and community leaders, and I mean government.

The truth is, without the government's leadership and support—on projects like ARPANET and its support through the National Science Foundation—the Internet would still be a distant dream. And without your leadership and support in the future, the Internet may never reach its full potential.

We have a once-in-a-lifetime opportunity now to shape this medium while it still young—and do it the right way.

So, I appreciate the time and effort the Committee is taking to hear about this important merger, and I thank you in advance for the work you will continue to do in the months and years ahead. Together, we will build a medium that improves people's lives—and one we can all be proud of.

Thank you.

Senator BURNS. Mr. Levin.

STATEMENT OF GERALD LEVIN, CHAIRMAN AND CEO, TIME WARNER, INC.

Mr. LEVIN. Thank you, Chairman Burns and Senator Hollings, and all the Members of the Committee. I have to start by saying that I feel very comfortable being in this Committee room because we have, in fact, been working together for so many years, I think with the common goal of delivering to consumers the broadest choices in telecommunications and media. We have worked together on telephone competition, the satellite delivery of broadcast programs, the advent of digital television and, of course, cable deregulation.

I think one common aspect of all of that has been to try and do something that makes sense for the consumer in the face of rapidly expanding technology, and that is really where we are today, so I am proud that we have shared the same goals, and actually would like to acknowledge your recent success in the Satellite Home Viewer Improvement Act and certainly, of course, in what I think was landmark legislation, the 1996 Telecommunications Act.

Just a brief word of my history. For almost three decades, actually going back to a time when some cable mavericks like myself and Ted Turner had what then seemed a quixotic dream of overthrowing the stranglehold that the network triopoly had on the basic form of communication, television, and I am pleased to say that that dream has been realized because today we have returned power to the consumer, the viewer, to choose what she or he wants.

I am also very pleased with the array of programming that cable has stimulated, from premium services like Home Box Office to very significant networks like CNN, Disney, Discovery, ESPN, Nickelodeon, CNBC, and of course, C–SPAN, which provides a tremendous public service.

Also, encouraged by a lot of that activity, we built in 1994 the first true switch digital interactive system in Orlando, Florida. We learned a lot from that experience, and were encouraged by it, so much so that we now see, with the advent of the Internet—and our own expenditure in the last 4 or 5 years has now passed $6 billion to upgrade our systems—to have developed the kind of digital bank account that can accommodate so many different opportunities for the consumer.

I would like to go back and just again commend the Committee for the 1996 Telecommunications Act, because I think that really was the landmark shift that enabled almost everything that has occurred since that time. It was that Act which shifted telecommunications policy from relying on regulation to a policy fostering competition amongst industry players. Let me quote from the preamble of the 1996 Act describing your vision "to provide for a procompetitive deregulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans."

With the onset of the Internet, which is by far the most profound revolution certainly in any of our history, and probably for the republic itself, you have something that is wildly democratic (lower case d) with no central control whether by a Government agency or by any corporation. Indeed, any citizen in any part of the world is free to publish on the Internet. It is the most extraordinary event I think in the course of human history, because for the first time we have truly a networked society.

So AOL Time Warner was really born to be a new kind of company for the 21st Century. I know we have talked about the economic size of this transaction, but I can assure you that there were three philosophic areas that I had to satisfy myself on with respect to this combination that were actually much more important than the financial characteristics of the transaction.

The first is something that is a part of our heritage at Time Warner, and that is journalistic independence. I feel my trusteeship—

and now through AOL Time Warner, and confirmed by Steve Case, is that we are here to preserve, protect, and defend CNN and Time Magazine and the journalistic independence that they operate under without fear or favor, or any kind of business encroachment. That is the first fundamental principle to which we mutually have attested.

Second, and not just because we are here, or are engaged in hearings this week, we have agreed on the principle of nondiscriminatory access, and what that means, and I will state it flat out, is that with respect to Time Warner cable systems no preference will be shown for affiliated services, soon to be AOL Time Warner, versus unaffiliated services. We have a long history of doing that, not just because it makes good policy, but because it absolutely corresponds to what the consumer wants, consumer choice.

On the flip side of that coin, I would also say to you that there is no intention that the wonderfully diverse material, creative material coming from Time Warner will be exclusively distributed through AOL, so these are principles that we both agreed to. On Tuesday, as you know, we put out a Memorandum of Understanding, to which we are both committed.

Finally, and probably most importantly, is a sense of shared values. I know that the Committee and the Congress is the proprietor of the public interest, but in even the history of my own company, in Henry Luce's will there was a statement that the company is to be operated not just in the interest of shareholders, but in the public interest, and in fact both Time Warner and AOL share this social commitment.

So this is not a question of being the largest company. This is a question of whether we can use the skills and the resources in the private sector, working cooperatively with the public sector and foundations and educational institutions to make a difference in the public we serve.

So that we hold the following values to be truly significant. The issue of privacy is not for us simply a matter of business practice. It's just fundamental to respecting human dignity, and we will talk more about that.

The phrase, the digital divide, is something that we take seriously because it is an apt description of the continuation of the inequality in this Nation that is now going to be unfortunately hastened. AOL has been not only on record but Steve Case is personally committed to meeting that challenge, so that we do not end up with an information aristocracy.

And then finally, I would say something that we have not heard yet this morning, but that is really the importance of education, and what can we do with this combination, with this technology. Really, our ultimate responsibility is with respect to the young people not only in our country but around the world. Frankly we view this, and I view it personally, as a moral imperative. When I see the conditions that some of our most gifted teachers have to operate under, we are bound and determined to make a difference there.

So I guess I should stop. We have put our full statement in the record, Mr. Chairman. I would be happy to answer questions.

[The prepared statement of Mr. Levin follows:]

PREPARED STATEMENT OF GERALD LEVIN, CHAIRMAN AND CEO, TIME WARNER, INC.

Chairman Burns, Senator Hollings and Members of the Committee, I'm very pleased to be appearing before you today. I feel at home in this Committee room where we have worked together over many years to deliver consumers the broadest choices in telecommunications and media. From telephone competition to satellite delivery of broadcast programs to digital television to cable deregulation, we've shared a goal of creating consumer choice in both content and distribution in the context of ever-changing technology. I am proud to share these goals with you and sincerely acknowledge your many successes, most recently in the Satellite Home Viewer Improvement Act and, of course, the landmark 1996 Telecommunications Act. I'm particularly grateful for this opportunity to speak about the planned merger between Time Warner and AOL and will be glad to answer any questions you might have.

I know our merger announcement came as a surprise to many, and the truth is for such a large transaction, it was worked out in a remarkably short period of time.

From my perspective, the AOL-Time Warner merger wasn't a bolt from the blue, but the fulfillment of almost three decades spent in the media business. I began my career with the quixotic hope—or so it seemed—of using cable television to overthrow the stranglehold the broadcast triopoly had on television. Mavericks like Ted Turner and myself believed that the real power of television would only be unleashed when it became a medium driven by consumer choice, with programming alternatives far beyond what three advertising-supported networks could deliver.

The success of that once-radical notion is reflected today in premier pay-television networks like Time Warner's Home Box Office, and our cable systems' lineup of hugely popular networks such as CNN, TBS, Disney, Discovery, ESPN, Nickelodeon, CNBC. . . . The list is long.

Although we'd never claim that this early experience with cable gave us a clairvoyant glimpse of the Internet, it was profoundly formative. I for one was left with the conviction that we'd barely touched the potential of technology to empower viewers to become their own programmers, with no real limits on their options.

Possessed of this belief, I committed my company in 1994 to the deployment of the world's first fully interactive digital network in our Orlando, Florida, cable system.

Short term, that full service network didn't instantly lead to the rollout of interactive television. Long term, the risk Time Warner took resulted in our cable engineers creating a breakthrough architecture that melded fiber-optic trunk lines with the coaxial connection to subscriber homes to offer a switched broadband avenue for interactivity.

In 1995, Time Warner made a $5 billion commitment to rebuild its systems with this broadband architecture—a commitment which now stands at $6 billion. In fact, my faith in cable's pivotal part in the future of digital interactivity was so strong that at a time when reregulation put cable out of favor with investors, Time Warner undertook major acquisitions to expand its cable footprint.

In 1996, the Members of this Committee recognized that exciting new services could flourish only if the policy paradigm shifted its focus from relying on regulation to fostering competition among industry players. The preamble of the 1996 Telecommunications Act aptly describes your vision ". . . to provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans . . ." it was that historic shift in policy that significantly contributed to the growing certainty that something profound was taking place in the telecommunications sector. We are grateful for your wisdom in creating the policy environment that allowed that to happen.

From the very moment Time Warner was opening the way for broadband delivery, the first great wave of a truly networked society arrived in the form of the Internet. Today, we're all awash in that wave, or better yet, surfing it, and the sea change has been so sweeping and profound that it's hard to believe that the word Internet itself didn't enter Webster's until 1997.

The growth of the Internet over so short a time reflects the sheer velocity of what's taking place: in 1995, there were 19 million Internet users; five years later, over 200 million. That number will cross one billion by mid-decade. Led by America Online's easy-to-use, consumer-friendly service, a constantly increasing number of people are making e-mail, instant messaging and e-commerce an integral part of how they live, work and communicate.

It would be hard to exaggerate the implications of the Internet revolution. For the first time, human beings have at their disposal a universal, limitless connection that no government, corporation or centralized agency can control. Every user has the

ability to offer something new. Every web site contains the possibility of meeting consumer needs in more attractive, efficient ways, so that the noise you hear across the economic landscape is that of time-honored—in some cases, centuries-old—business hierarchies as they crash to the ground.

The first lesson of the Internet has already been written: if you think you can do business in the realm of digital interactivity the way you've always done business, think again. . . . Thinking again is precisely what Time Warner has been doing for the last five years, as we refocused on achieving a company wide digital transformation.

I've spoken of what that digital transformation did for our cable customers, providing broadband capacity for high-speed delivery of the Internet. But that was part of a far larger effort. Our multi-billion dollar upgrade also allows us to offer many of the enhanced services our consumers are so eager for. These include increased video offerings, digital television, interactive services and soon, telephony services over the same architecture. As you know, we currently provide facilities based telephone service to businesses through our competitive local exchange carrier. We intend to provide local residential telephone service and, ultimately IP telephony, which we are now testing in Portland, Maine.

Impelled by the nature of our content businesses—operations intimately involved with artistic and intellectual expression in every form—we were pioneers in adapting our flow of creative offerings to this environment. People throughout Time Warner understood the irrevocable impact of what was occurring. They embraced the almost inconceivably broad canvas the Internet provides for expanding the reach of their minds and imaginations.

The challenge for Time Warner was never facing up to the historic significance of digital interactivity. We jumped that hurdle while other media companies were still debating if there was a race. The challenge was time. The global economy in general and the global media industry in particular are on fast forward. They have entered a new context: Internet time. As you know, America's leadership in deploying and using the Internet around the world is unique. However, there exists the fierce competitive determination of entrepreneurs across the globe to catch and surpass us.

From my early conversations with Steve, it became clear that we both understood that those who wished to stay ahead in the instant-to-instant evolution of this medium didn't have the luxury of waiting on events. We saw that the company of the future—a company with the creative infrastructure to provide a constant stream of quality content plus a genetic appreciation of how to form web communities and how to serve them easily and conveniently—had yet to come into existence.

The solution to that puzzle was quickly obvious to both of us: by putting together AOL and Time Warner, we could create the first enterprise not only fully prepared to compete on the Internet—a prototype for the 21st century—but a company that could be a decisive spur to bringing consumers everywhere the speed and immediacy of broadband across all delivery platforms, wired or wireless, thus unlocking the fullest possibilities of interactivity.

For my part, while the economic rationale for our merger was compelling, it wasn't sufficient. Before I could take the step of joining America Online in a merger of equals, I had to satisfy myself about three basic premises.

First, at the very core of Time Warner—the cornerstone of our global reputation and the enduring basis of the bond of trust we've created with audiences in every part of the world—is commitment to journalistic independence.

Ten years ago, in the landmark decision that allowed the Time-Warner merger to go forward, Chancellor William Allen of Delaware's chancery court spoke of our journalistic culture as "unique," and deserving of protection and preservation. The addition of CNN in 1996 made that culture even richer and more far-reaching.

I have always regarded the defense of that heritage as utterly central to my responsibilities as CEO, and in light of the continuing expansion of news and information outlets—many of which we carry on our cable systems—I've had a heightened awareness of Time Warner and CNN's role in upholding the standard for reliable, unbiased journalism.

Steve Case has been equally clear about his unwavering commitment to journalistic independence, and his unprompted offer to have me serve as CEO of AOL Time Warner was a further reaffirmation of that belief.

Second, as a prime mover in the design, development and deployment of broadband networks, Time Warner assumed the huge financial risk of that investment in the face of strong competition from DSL, DBS and other broadband providers.

In building our broadband capacity, we recognized not just the possibility of consumers having a choice among ISPs but the desirability.

Historically, as we learned so clearly with HBO, the provision of choice is a boon to the dynamic growth of cable subscriptions and a prod to the creation of new and better programming.

AOL and Time Warner now have a shared commitment in the form of a Memorandum of Understanding between our companies to provide consumers with multiple ISPs in a genuinely competitive broadband marketplace, and we will be happy to elaborate on that commitment.

Third, fundamental to how Time Warner defines itself is our sense of community responsibility. This has been basic to who we are from the very beginning, and was best summed up in Henry Luce's formulation that we would always operate "in the public interest as well as the interest of shareholders."

But we're under no illusions.

Like you, we recognize the need for a significant increase in corporate involvement focused on helping equip schools with the resources they need to prepare students to enter the digital economy. Personally, as someone who has witnessed firsthand the struggle of dedicated teachers to overcome the shameful inequalities embedded in our educational systems, I regard this need as a moral obligation.

As the Members of this Committee have so frequently articulated, if ever there's been "a clear and present danger" to the future of American society, it's in the "digital divide" that threatens to aggravate long-standing patterns of discrimination and injustice. From the inception of my discussions with Steve Case, I've been impressed with the passionate sincerity of his desire to ensure that his company plays an important role in bridging that divide.

Nothing has been more crucial to the agreement we've reached to merge our companies than our vision of AOL Time Warner's ability to be a catalyst for meaningful change in the way our country—indeed, our world—offers its children the opportunity for creative expression, intellectual enrichment and material success.

As large as our merger may seem, it pales beside the open-ended expanse of broadband media, and the wired and wireless access available through PCs, TVs and the burgeoning multiplicity of hand-held devices. From the consumer's point of view, the intense—and intensifying—competitive struggle to offer everything from telephony to digital downloading of music and entertainment to video on demand embodies the best of all possible worlds: more choice, better value and lower prices. And all that can be offered to consumers while still protecting their privacy, an issue of vital public interest that I pledge AOL Time Warner will continue to address in the most serious manner.

Members of the Committee, I'm grateful for this chance to express to you my bedrock belief in the positive implications of the merger between AOL and Time Warner. Although the age we've entered will be brutally unsparing of companies that can't or won't move fast enough, it will also empower citizens as never before.

If we do it right—and I'm profoundly optimistic that a clear understanding by both the private and public sectors of what's involved will ensure we do—we will add new dimensions to our economy and our democracy.

I think it's obvious that AOL Time Warner is only the first of many competitive realignments intended to form enterprises with the agility and array of resources to thrive on this new terrain. Given the talent, imagination and values that AOL Time Warner will possess, I'm also confident it will be the most socially responsible and competitively successful.

Along with my colleagues at AOL and Time Warner, I look forward to working with you to make sure that individuals and communities everywhere can use the most powerfully liberating communications tool in human history to amplify and inspire, in Jefferson's wonderful phrase, "the pursuit of happiness."

Thank you.

Senator BURNS. Thank you very much, and both of your full statements will be made a part of the record. I am also going to ask unanimous consent that the MOU will be made a part of the record also, and the letter that Chairman Hollings and I received yesterday. *

Senator BURNS. I want to talk a little bit about this instant messaging. As you know, as we moved through the 1996 Act, we knew how difficult it was going to be to deal with the incumbent entity in the exchange business, in the telephones. We know that was

* The information referred to was not available at the time this hearing went to press.

going to be one of the most difficult areas, to unbundle and to deregulate. After all, this industry had been in the regulatory cocoon for so many years.

And as I look at instant messaging, I am seeing we have to avoid, later on, dealing with this situation here with maybe an incumbent in the business of instant messaging.

I would ask the—so far we have shown very little in the area of developing systems that are interoperable, and I wish you could bring this Committee up to date, Mr. Case, on where we are in that, and sort of the five W's we are asking, and if you could bring us up to date, and I may have another question, another followup question with that.

Mr. CASE. Sure. I look forward to it. First of all, it is interesting to think of ourselves as an incumbent, since in 1996 I think we had maybe a few hundred thousand customers, and we were struggling to just stay in business.

As it relates to instant messaging specifically, the letter that I received—I think it is the same one you said—stated the following: our sole concern—this is all the companies raising this concern to you. Our sole concern is with ensuring that all Internet users can enjoy the immense benefits of fully interoperable instant messaging capabilities, and avoid the dangers of a balkanized system. That is precisely what we are working to achieve, so let me give you some background on this and the progress we have made.

We invented this notion of instant messaging more than 15 years ago, when we launched our first service in the fall if 1985. That was at a time when people thought this was just about accessing news, or buying things, and maybe getting people to talk to each other would be useful. We thought building a sense of community was important, and we invested in building this notion of instant messaging, and for a decade, the only way to get that feature was to subscribe to our service.

Several years ago we thought, because of the importance of messaging, that we should not require somebody to be a subscriber to AOL to benefit from this instant messaging capability, so I think it was about 2 years ago we decided to release AOL Instant Messenger as a free product on the Web, free to download, and free to use, so that anybody who wanted to participate in this instant messaging community could get it for free, and use it for free, which was a sort of unusual step, people thought when we took that.

Then, starting about 18 months ago, we started hearing from some companies that said, we really want to work with you to be part of this messaging community, we do not want a balkanized role, we want an inclusive role, and asked if we would make our technology, our protocols available to them so they could build their own instant messaging software.

And over the ensuing year and a half, and particularly in the last few months, we have signed, now, a dozen agreements, including the leaders in the corporate community, including IBM and Sun and Novell, and leaders in portals, such as Lycos, and leaders in Internet service provisions, such as MindSpring and EarthLink, and this week we announced certain wireless initiatives with Motorola and Nokia and Bell South, and we also—I remember doing a deal with Apple and Real Network, so there are many, many

companies that we basically allowed to use these protocols to build their own products, to call it whatever they want. For example, I think it is the Lycos Instant Messenger, not the AOL Instant Messenger for Lycos.

So we have taken a lot of steps to make it an inclusive community. We have licensed it broadly. I think the licensing policy we have had is quite unusual in the software industry. It is not something you see from Microsoft or Sun or other companies. I do not know of any other company that has basically made its software freely available to users, and easily licensed to other companies on a royalty-free basis, so I think we have done a number of things to create this inclusive community.

We have not licensed it to everybody. There are some companies, unfortunately, that have chosen to hack into our servers, as opposed to license this. We think it is very important, in the recent spate of problems with cyber terrorism and Web sites, to indicate how important it is to protect the safety and security and privacy of people, so we have some minimal standards.

People have to agree to participate, and what we are talking about is not just software, but also the community, and when you use this instant messaging software you actually communicate with our servers that we are paying for and participate in this community that everybody can be part of.

So I would say that we should be applauded for innovating and creating instant messaging, for then taking the step of making it freely available to any consumer anywhere in the world. They can get the software for free and the servers for free and then licensing it on very straightforward terms to most of the leading companies around the world, and we will continue to do that, working with other companies and other groups to try to make this notion of messaging part of our future.

Senator BURNS. Thank you very much. I am going to move on. Do you have opening statements? I am sorry, Senator Snowe. Senator Abraham. No statements.

I am going to move right along, and so everybody has a chance, Senator Hollings.

Senator HOLLINGS. Thank you, Mr. Chairman, and right to the point, we admire both of you. You are brilliant, and you have been very successful. This Committee is not against success, and incidentally we are not against innovation. You have got to be innovative to keep pace with fast-breaking technology.

Mr. Chairman, let me ask that you put in the holdings here of Time Warner, the Columbia Journalism Review. There are five pages of holdings there.

I would like to also add into the record the Internet service providers, a list of those, their rankings, the service providers, showing America Online is seven times bigger than its nearest competitor and generally 100 times bigger than the rest.

[The information referred to follows:]

COLUMBIA JOURNALISM REVIEW, MEDIA OWNER'S INDEX

Time Warner—Books

Time Life Books

Time—Life International

Time—Life Education
Time—Life Music
Time—Life AudioBooks
Book-of-the-Month Club
Paperback Book Club
Children's Book-of-the-Month Club
History Book Club
Money Book Club
HomeStyle Books
Crafter's Choice
One Spirit
International
Little, Brown and Company
Bulfinch Press
Back Bay Books
Little, Brown and Company (U.K.)
Warner Books
Warner Vision
The Mysterious Press
Warner Aspect
Warner Treasures
Oxmoor House (subsidiary of Southern Progress Corporation)
Leisure Arts
Sunset Books
TW Kids
Leisure Arts

Time Warner—Cable/DBS

HBO
HBO Home Video
HBO Pictures/HBO Showcase
HBO Independent Productions
HBO Downtown Productions
HBO NYC Productions
HBO Animation
HBO Sports
Cinemax
Time Warner Sports

International
HBO Asia
HBO en Espanol
HBO Ole (with Sony)
HBO Poland (with Sony)
HBO Brasil (with Sony)
HBO Hungary
Cinemax Selecciones

Other Operations
HBO Direct (DBS)
Comedy Central (50% owned with Viacom)
CNN
CNN
CNN/SI
CNN International
CNN en Espanol
CNN Headline News
CNN Airport Network
CNN fn
CNN Radio
CNN Interactive
Court TV (with Liberty Media)
Time Warner Cable
Road Runner (high speed cable modem to the Internet, with MediaOne Group, Microsoft, and Compaq)
Time Warner Communications (telephone service)
New York City Cable Group (largest cable cluster in world—over 1.1 million)
New York 1 News (24 hour news channel devoted only to NYC)

Time Warner Home Theater (Pay-Per-View)
Time Warner Security (residential and commercial security monitoring)
Kablevision (53.75%—cable television in Hungary)

Time Warner Inc.—Film & TV Production/Distribution

Warner Bros.
Warner Bros. Studios
Warner Bros. Television (production)
The WB Television Network
Warner Bros. Television Animation
Hanna—Barbera Cartoons
Telepictures Production
Witt—Thomas Productions
Castle Rock Entertainment
Warner Home Video
Warner Bros. Domestic Pay—TV
Warner Bros. Domestic Television Distribution
Warner Bros. International Television Distribution
The Warner Channel (Latin America, Asia—Pacific, Australia, Germ.)
Warner Bros. International Theaters (owns/operates multiplex theaters in over 12 countries)

Time Warner Inc.—Magazines

Time
- Time Asia
- Time Atlantic
- Time Canada
- Time Latin America
- Time South Pacific
- Time Money
- Time For Kids

Fortune
Life
Sports Illustrated
- Sports Illustrated Women/Sport
- Sports Illustrated International
- SI for Kids

Inside Stuff
Money
- Your Company
- Your Future

People
- Who Weekly (Australian edition)
- People en Espanol
- Teen People

Entertainment Weekly
- EW Metro

The Ticket
In Style
Southern Living
Progressive Farmer
Southern Accents
Cooking Light
The Parent Group
- Parenting
- Baby Talk
- Baby on the Way

This Old House
Sunset
Sunset Garden Guide
The Health Publishing Group
- Health
- Hippocrates
- Coastal Living
- Weight Watchers

Real Simple
Asiaweek (Asian news weekly)
President (Japanese business monthly)
Dancyu (Japanese cooking)
Wallpaper (U.K.)
American Express Publishing Corporation (partial ownership/management)
Travel & Leisure
Food & Wine
Your Company
Departures
SkyGuide
Magazines listed under Warner Brothers label
DC Comics
Vertigo
Paradox
Milestone
Mad Magazine

Time Warner—Music

Warner Music Group—Recording Labels
The Atlantic Group
Atlantic Classics
Atlantic Jazz
Atlantic Nashville
Atlantic Theater
Big Beat
Blackground
Breaking
Curb
Igloo
Lava
Mesa/Bluemoon
Modern
1 43
Rhino Records
Elektra Entertainment Group
Elektra
EastWest
Asylum
Elektra/Sire
Warner Brothers Records
Warner Brothers
Warner Nashville
Warner Alliance
Warner Resound
Warner Sunset
Reprise
Reprise Nashville
American Recordings
Giant
Maverick
Revolution
Qwest
Warner Music International
WEA Telegram
East West ZTT
Coalition
CGD East West
China
Continential
DRO East West
Erato
Fazer
Finlandia
Magneoton
MCM
Nonesuch

Teldec
Other Recording Interests
Warner/Chappell Music (publishing company)
WEA Inc. (sales, distribution and manufacturing)
Ivy Hill Corporation (printing and packaging)
Warner Special Products

Joint Ventures

Columbia House (w/Sony—direct marketing)
Music Sound Exchange (w/Sony—direct marketing)
Music Choice and Music Choice Europe (w/Sony, EMI, General Instrument)
Viva (w/Sony, Polygram, EMI—German music video channel)
Channel V (w/Sony, EMI, Bertelsmann, News Corp.)
Heartland Music (50%—direct order of country and gospel music)

Time Warner—Online/Other Publishing

Road Runner
Warner Publisher Services
Time Distribution Services
American Family Publishers (50%)
Pathfinder

Time Warner—Merchandise/Retail

Warner Bros. Consumer Products
Warner Bros. Studio Stores (as of December 1997, 170 stores worldwide in over 30 countries)

Theme Parks

Warner Brothers Recreation Enterprises (owns/operates international theme parks)

Time Warner Inc.—Turner Entertainment

Entertainment Networks

TBS Superstation
Turner Network Television (TNT)
Turner South
Cartoon Network
Turner Classic Movies
Cartoon Network in Europe
Cartoon Network in Latin America
TNT & Cartoon Network in Asia/Pacific

Film Production

New Line Cinema
Fine Line Features
Turner Original Productions

Sports

Atlanta Braves
Atlanta Hawks
Atlanta Thrashers (NHL team, begin play in 1999)
Turner Sports
World Championship Wrestling
Good Will Games
Philips Arena

Other Operations

Turner Learning
CNN Newsroom (daily news program for classrooms)
Turner Adventure Learning (electronic field trips for schools)
Turner Home Satellite
Turner Network Sales

RANKING INTERNET SERVICE PROVIDERS BY SIZE

This page is maintained by Nick Christenson, *npc@jetcafe.org*. It was last updated on February 25, 2000.

The point of this page is to track the relative sizes of the larger Internet Service Providers, where size is measured by some notion of the extent of their customer

base. Very little information has been made publically available on this, and as far as I can tell, no attempt has ever been made to collate it. The purpose of this page is to make this attempt. It will disappear if anyone with real time and resources ever decides to track this information and make it public. Since the page has been around since the summer of 1998 and this has not yet happened, this doesn't look too likely.

About the only way to gain real information on the size of the customer base of any ISP is via their own announcements. Because of various ISP's philosophies regarding disclosure, some of this data comes from far more accurate and up-to-date sources than others. This is an unfortunate necessity. Of course, we have no real idea what the methodology is that they are using, nor can we tell whether these numbers are in any way accurate. Further, as is especially the case for the free service ISPs, it's hard to gain consensus on what these numbers mean, or how meaningful they are. Nonetheless, this information can show some relative sizes without needing to be horribly accurate.

The vast majority of the information here is compiled by me as I read various sources of ISP news. A sizeable fraction of the data is submitted to me by kind souls from around the Internet. This page is better for everyone because of their contributions. If you ever hear an ISP quote its size in any non-confidential context, please email this number to me, the name of the ISP, and information I can use to cite the figure. I don't intend to quote a number I cannot verify. Of course, representatives of the ISPs themselves are invited to send me their numbers when they can be disclosed publicly.

The goal of this page is to list every ISP doing business in the United States that can legitimately claim more than 100,000 subscribers and list their actual size as accurately as possible. Some are listed that are smaller than this threshold, but I make no commitment to try to list these, especially if they do not have a nationwide or at least a large regional presence.

This is the information I have been able to find so far, along with a set of ISPs that may also be of sufficient size, but for whom I have no information.

ISP	Subscribership	Date	Source
America Online	21,000,000	20000202	CNET News
EarthLink	3,100,000	20000204	CBS MarketWatch
NetZero	3,000,000	20000110	Yahoo!
Compuserve (AOL)	2,500,000	20000119	AOL web site
Prodigy	2,000,000	19991122	Yahoo! After taking over FlashNet and SBC's user bases
AT&T WorldNet	1,800,000	20000201	Internet News
Microsoft Network	1,800,000	19990715	Yahoo!
Old EarthLink	1,600,000	19991020	CBS MarketWatch (merged with MindSpring on Feb. 7, 2000)
Freei.Net	1,500,000	20000120	Internet News
MindSpring	1,297,000	19991020	CNET News (merged with EarthLink on Feb. 7, 2000)
Excite@Home	1,000,000	19991206	CNET News
WebTV	900,000	19990707	CNET News
Gateway net (AOL)	740,000	20000119	AOL web site
One Main	675,000	20010131	Yahoo!
Bell South	650,000	19991109	Internet News
lstUp.com	550,000	19991018	CNET News

ISP	Subscribership	Date	Source
RCN	523,728	20000210	Yahoo!
AltaVista	500,000	19991216	Yahoo!
GTE	491,000	19991129	San Francisco Chronicle
Roadrunner	420,000	19991129	San Francisco Chronicle
IBM Global Internet	>400,000	19980421	Computer Retail Week (Acquired by AT&T WorldNet on December 8, 1998)
Juno	550,000	20000110	CBS MarketWatch
Netcom/ICG	400,000	19990107	San Jose Mercury News (at the time of the MindSpring buyout)
US West	350,000	19991122	US West web site
Voyager.net	355,000	20000214	Yahoo!
SW Bell/Pacific Bell	300,000	19980515	Pacific Bell Internet press release
Espernet.com	274,000	19991001	CNET News
Verio	260,000	19990630	Yahoo!
FlashNet	244,000	19991007	FlashNet web page (at the time of the time of the Prodigy buyout)
Bell Atlantic	200,000	19991129	San Francisco Chronicle
Concentric	l97,000	19991100	Second hand from a Concentric employee
Sprynet	180,000	19990107	San Jose Mercury News (at the time of the MindSpring buyout)
Eisa.com	165,000	19991201	Eisa.com web page
Internet America	147,000	20000127	Yahoo!
ALLTEL	133,000	19991115	ALLTEL press release
JPSnet	115,000	19990303	JPSnet press release
RMI.net	107,000	19991216	Yahoo!
Slash net	100,000	19980518	Internet Week
IDT	80,000	19981020	IDT website
ViIlageNet	70,000	19991123	VillageWorld press release
BiznessOnline.com	63,000	19991230	BiznessOnline press release
Primary Network	60,000	20000124	Primary Network press release
First World	58,700	20000216	Yahoo!
Covad	57,000	20000125	Covad press release
PDQ.net	45,000	19990913	PDQ.net web site (at the time of the Internet America buyout)
Teleport	40,000	19991130	OneMain website (at the time of the OneMain takeover)

ISP	Subscribership	Date	Source
21st Century	37,000	19991213	Internet News (at the time of the RCN takeover)
BigNet	35,000	20000202	Email from the BigNet CFO
TIAC	33,000	19990622	Internet News (at the time of the PSI buyout)
Log on America	30,000	19991028	Yahoo!
Metricom	29,000	19990729	Yahoo!
FIRST	20,000	20000123	Email from the 1st.net CEO
Brigadoon	7,000	19981102	CNET News
Primenet	?	?	No info on their web site
Worldcom	?	?	No info on their web site
Panix	?	?	No info on their web site
Infinet	?	?	No info on their web site

Senator HOLLINGS. Now, having said that, what I am looking for is your statement here about open access, and I see that on open access there are two references here, one with respect, Mr. Case, to AOL 5.0. Can we call—this has just come out, just get along with AOL 5.0.

If America Online is your only route online, sure, but people who juggle multiple Internet providers have had a different story to tell, after having their other accounts incapacitated by the new version of America Online's software.

Then they say, for example, when you call and reference them, AOL spokesman Tricia Primrose said we have seen very few problems like the ones you describe, but, says this individual, we called AOL—this was a *Washington Post* reporter, and I will give you a copy of the story. When we called AOL technical support instead we waited on hold for 55 minutes and then were quizzed as to why we would want to have another ISP.

But AOL's representative did eventually come through with repair instructions. I am seeing that. All the emphasis about, yeah, we have access, but that does not amount to access, and then when you intimidate even the powerhouse Disney—you recently moved the cartoon network of your own entity from Channel 67 in New York to Channel 22, but you took the Disney Channel from 33, and you put it up to 66. The Disney people are afraid to come and testify, because we don't want to irritate the Lone Ranger.

You have gotten powerful enough now where they say, good gosh, we just changed, whereby you favored your own content and repositioned everything, and if we come up and we say what we are really afraid of, we will get cutoff further.

In the past year, America Online has entered into strategic relationships with Gateway, Compaq, and just last month Dell, and then you have deals with Hewlett-Packard and Ace. Now, these manufacturers constitute over 50 percent of the market. That is why I said in my opening comment that I was worried that you

were going down the same road as Microsoft. There is nothing wrong with having a monopoly. It is whether you use the monopoly to abuse the process and withstand competition, and that is what we are looking at here in this Committee.

We do not want to have to legislate and mess up the wonderful communications and electronics explosion, but when we see these trends, when we see you have already got four class actions and everybody moving, and you keep moving, you talk access but you have to wait 55 minutes to even get it explained; when you see that you are powerful enough to take even again the more powerful and get them afraid to come and even testify because they might get put off the channel, much less a bad spot on the channel—let me hear your comments, both of you. That is what this Committee is worried about.

Mr. CASE. I would be happy to respond. Gerry can add to it. First, in our industry there are all kinds of data. Some of it is more accurate than others, but I think if you look at the recent statistics we are not seven times bigger than our next largest competitor. There have actually been some mergers with MindSpring and EarthLink.

That we are the leader by far, and we are grateful so many consumers have agreed to subscribe to us, but you said something like 100 times bigger than the rest, and that is not really the dynamics. We are the leader in our market. Time Warner is the leader in several markets. We are not dominant in anything, and I think any comparison to Microsoft is not an accurate one.

As it relates to AOL 5.0, there is a number of points there. We integrate the Microsoft Windows dialer protocol within our software because it runs on top of the Windows operating system. It is the same thing that almost all the ISP's do, including AT&T and Microsoft and MindSpring and Earthlink. 95 percent of our customers do not use another ISP, and for them this is a more seamless experience.

If you are in the 5 percent that want to use a multiple ISP you are able to do that, and if you call us we will explain how to do it. We have recently posted some information online. I am sorry to hear anybody had to wait 55 minutes. We actually have 7,000 people and spend quite a bit of money to make sure if people do have a problem they can get a response quite promptly. I think that has been helpful in terms of growing our business and the loyalty of our members.

As it relates to Disney, certainly Gerry understands Disney better. I am surprised to hear that Disney is intimidated. We have discussions with them on many things. I do not think the debate over channel placement is going to be quite the same in the future that perhaps it was in the past.

If you have a world like the Internet with almost infinite choices, there is not a notion of channel placement. They make their own decisions about what content goes on their own ABC Network and things like that, so I am surprised to hear them apparently suggesting privately to you that there is some issue there, but maybe I should talk directly with them about that.

As it relates to Gateway and Dell, we do have agreements with many PC manufacturers, as do almost all the ISP's out there. Con-

sumers have many choices in terms of PC's, and that is why that business is so darned competitive and prices have come down so rapidly, and we are happy to work with PC manufacturers, but there are many that do not work with us, and many that provide many options to their consumers.

So hopefully that is responsive to your question. We do believe that we are doing a lot of good things in terms of creating great services. We are not always perfect. Sometimes we make mistakes. We make mistakes, we try to correct them and move on, but I think the fact that we have grown so rapidly in the last few years is really consumers voting, in a world of 7,000 ISP's out there to choose from, that AOL is providing something unique, and we do spend a lot of time and a lot of hard work to try to make that the case, and part of what we provide our members is access to everything.

We really do believe that the Internet should be an open platform, and if you sign on to AOL you can go anywhere you want and do anything you want, and the notion of carriage that existed in the traditional world of television, for example, is not really relevant on the Internet, because in a sense it is universal carriage.

Nobody has to do anything to get carried. Everybody has it instantaneously, and millions of people have created Web sites, so it is really a new world. I think it requires a fresh perspective, and we are trying to bring it through our company, and this combination I think will allow us to do some more interesting things for more customers in more ways.

Mr. LEVIN. Why don't we have just a brief conversation about channel positioning. I think, Senator Hollings, someone must be referring to the cable system in New York City. It is just a factual misrepresentation.

The Disney Channel in New York City is a paid television channel, and so the consumer actually pays for that channel, so the channel positioning as it is with HBO or Cinemax, or the Stars, and Encore, I mean Stars I think is on Channel 90. I have never heard a complaint from them because the consumer knows exactly where to go, because he pays separately for it.

The Cartoon Network, in fact, does not compete in that sense with the pay Disney Channel. It really competes with channels like Nickelodeon and, in the City of New York, Nickelodeon is on Channel 6, and the Cartoon Network is on Channel 22.

Having said that, a lot of these channels are basically moved around to really accommodate, for example, companies like Disney. Disney has ESPN and ESPN–2, and in many systems they have asked to have their channel moved to a higher position so that the two could be together.

And besides, I think we are obviously living in a world where for broadcast stations, where this Committee has—and Disney should certainly be following the public interest. There, you want to keep the channel positioning that people are used to with over-the-air television. But in the case of cable channels you look at the cable channels and the satellite, they could be at 292 or 653. That era has long passed, so I honestly believe this is a spurious issue.

Senator BURNS. Senator Stevens.

STATEMENT OF HON. TED STEVENS,
U.S. SENATOR FROM ALASKA

Senator STEVENS. Let me start off by saying I think you have changed the lifestyle of our country. Having a freshman in college out on the West Coast, we thought we would be an empty nest, but we really find that we are capable of having instant communication throughout the day, and it really has changed a lot, and I cannot thank you enough for what you have done so far.

I do want to have just one question, and it sort of has several facets. Sometime ago you announced with your merger that you intended to provide telephony over cable lines. I would like to know if you can give us an update on that, and particularly when that might commence. When we visited previously I asked the question about the concept of universal service, and paying into that fund if you do have interstate telecommunications.

We would also like to know a little bit about what you have in mind further—you mentioned just briefly, Mr. Case, about improving access to rural areas. I think that is one of the real problems about the future. The speed with which we access your system in rural Alaska is a lot different from here in Washington, D.C., and I think we are liable to be behind the curve for a long time if we do not find some way to have greater access to rural areas, but that is sort of a broad question. I would appreciate if you would comment on those issues.

Mr. LEVIN. Senator, with respect to telephony over cable facilities, since the passage of the 1996 Act we have a very robust competitive local exchange carrier, a CLEC that serves many cities around the country using a cable platform, and with telephone switches principally serving for both telephony and high-speed Internet access small businesses.

At the same time, we have what I will call residential circuit switch telephony in Rochester, for example, serving homes and apartments, and then in Portland, Maine, we have the beginnings of a new phase in telephony, what we will call Internet protocol telephony, IP telephony, which really rides on top of the high-speed cable modem that cable systems are now putting in, and which is the subject of our memorandum of understanding.

You can ride on top of the digital routing that goes into a computer. You can plug in a plain old telephone and use the Internet for, in this case it is called packet switching, as opposed to circuit switching, for the normal telephone system. So that is the next development we will see, and what this really suggests, and even going back to the discussion of instant messaging and e-mail, the whole concept of communications is really rapidly emerging.

So that there are so many different ways to communicate with your family, and even in remote areas in Alaska, every facility needs to be used, particularly in that case satellite, and it is one thing we should keep clear. It is not just cable that is providing broadband access. It can be provided through what is called DSL, through a telephone line. It has certain limitations. But definitely by satellite, and AOL has been very active with Hughes, so that this new form of—I will call it telephony, but it is really a new form of communication, can be delivered almost universally.

The issue of making sure that for plain old telephone service, the universal service charge, you know, that there is an adequate way of financing the system, I think we all need to work on that. Everyone acknowledges the objective.

Mr. CASE. If I could just add, I was born and raised in Hawaii, and actually a little known fact is Hawaii became a State the day I was born, so I understand what it is like to be not part of the continental United States.

When I was growing up, all the television shows came a week later, and if you had to make a long distance call it was extremely expensive, and the leadership you provided, and Senator Inouye and others, on bringing Hawaii and Alaska into the rest of the United States was appreciated when I was growing up, but we do recognize it is important to have an inclusive system.

As we think of this digital divide, the economic divide is a real concern, but a rural divide is as well, so we will do what we can to try to bridge that.

Senator STEVENS. What about the contributions to a universal service system? I hear you, Mr. Levin, and I think you are right, the current law really does not cover some of the things you are going to develop here. I hope we can work together and find some way to assure that that pool that is needed to assure adequate access from the rural areas to whatever system they choose is properly funded.

I am disturbed a little bit, but I do not know if the Members here know, but there is some indication the Administration may want to convert the universal service fund into the Treasury. It does not belong there. It is not taxpayers' money, it is ratepayers' money, and it ought to be preserved, as well as the postal service system preserves ratepayers' money, but to me, if we have these developing new communications systems, and rural America is locked into the old twisted payer telephone lines, we cannot come into the 21st Century with everyone else.

So I want to work with you, and I am sure the whole Congress will want to work with you to try to find some way where we are not accused of taxing the Internet if the Internet is in fact being used to piggy-back a new communications system.

But the contribution should be there to assure that there is a fund similar to the old interstate rate pool that is really the genesis of the universal service fund, and I do think that it should be managed by industry, not managed by the Government, but we should find a way to assure—as we did in the 1996 Act, we should find some way to assure that as you develop new communications systems you will proceed to provide funds of that type.

Now, I do not know how to do it. You will have to tell us how to do it. I hope you will tell us how to do it. We do not want Government regulation. We do not want Government ownership of that fund—at least, I do not—but we want the fund to exist to assure that people who want access to any one of these systems can be assured of that if they live in rural American.

Mr. LEVIN. Senator, this is a perfect example of I think what is necessary, and that is, if we just went by the previous law, which established the universal service fund and then tried to automatically applying to Internet telephony, I could say to you, well, there

is no FCC requirement today for contributions because of Internet telephony. That would be a poor statement for me to make.

What we should be doing now is to try and figure out with respect to a whole range of communications how can we finance, because this is really another aspect of the digital divide, but we need to cooperatively think about it not in any adversarial position where we are trying not to be regulated, and this is an area that we feel very strongly about, that there should be some way of preserving the concept that you have established when all we had was the twisted pair.

Now we have all of this explosion of opportunity, so there must be some way, and it should not appear as if it is a taxation of the Internet, so I am simply agreeing with you and saying, we can work up something. I am not stating that we would not pay into a universal service fund. I am saying there is a way of shaping this that could be mutually beneficial, and we ought to work on it.

Mr. CASE. If I could just add quickly two points, one is that as we think about the rural areas, it is not just about cable and about the telephone lines. We do think satellite and wireless is going to become increasingly important, particularly in rural areas. That is why we made a fairly large, for us, investment in Hughes, to stimulate the DIRECTV and direct PC broadband service development, and we continue to work with them and others. We want to support cable and DSL and wireless and satellite and give everybody as many choices as possible, particularly in rural areas that I think ultimately can only be served through satellite or wireless solutions, at least some areas.

The second point is, the IP telephony concept is an interesting one, and having more competition leveraging the facility-based operations I think is an intriguing one. It is still, frankly, more of a concept than a reality. There are still not many people who are really using this, so we should recognize that. At the same time, we should figure out how to achieve the same goal, and maybe there is a different way to come at it as we think about this new medium and think about these new technologies.

Senator STEVENS. Thank you both. We stand ready to work with you. I hope you agree it should not be Government mandate. It should come from the industry itself.

Mr. LEVIN. We can all agree on that.

Senator BURNS. Senator Wyden.

Senator WYDEN. Gentlemen, a number of us on this Committee have been heavily involved in the development of privacy legislation, and it seems to me that earlier in the week, Mr. Case, you were essentially in your testimony on the precipice of supporting Federal privacy legislation. I think it is very sensible for you to stake that ground out.

I mean, my sense is that if there is an EXXON VALDEZ of privacy, a major, major crisis with respect to personal data getting out, that would go a long way to destroying your vision of what interactivity is all about. I think what would be helpful this morning is to just have you outline for the Committee what you think the key elements would be of a privacy bill that we could go forward with.

Mr. CASE. I would be happy to. First of all, I should say that as I have said in the beginning, for us, privacy is about trust, and trust really is the underpinning of building this whole medium.

Everybody has some concerns about sort of this big brother world, and we need to make sure that we put in place policies, procedures, safeguards, what-have-you, to make sure people's privacy is protected so they feel comfortable using this medium, which we think is the right thing to do from a policy standpoint, but also the right thing to do from a business standpoint, because if there is a major incident and people do decide they cannot trust this medium, that would have a very negative impact, obviously, on the growth of the medium.

Our approach here is to recognize there are different layers of this. Last year, for example, we did support the legislation related to children's privacy because we thought that required a different standard, and you had to be extra careful as it relates to children.

In the last couple of years, we have been very active in trying to establish within our own service a clear policy, where it is really about making sure people understand exactly what information is being collected and how it is being used. They have the ability to opt out, and so it really is about notice and choice and trying to encourage other companies within the industry through the Online Privacy Alliance and other initiatives to be on that band wagon.

Actually, I have been pleased with the progress we have made. I remember one of the reports a year ago that said very few Web sites had privacy policies. When the study was done a few months ago, I think it was 65 percent had policies, so that is real progress, and I would like to believe we could continue to make progress through these kind of industry initiatives.

At the same time, I do recognize that there are likely to be some companies on the outskirts, on the fringes, who do not embrace these policies. I actually think, as Tom Friedman of the *New York Times* has written, that the real risk here is not big brother, the big companies, it actually may be little brother, the little companies trying to skate by on the edges, and so it may require some legislation.

Our only concern about legislation is, if it is something that does deal with this issue in a direct way, and provide what we think is the core principles which would be about notice and choice, it is something that in theory we are supportive of. There always is the fear, when that good idea gets going, by the time the legislation is actually passed, it gets to be something well beyond what would be striking the reasonable balance, and so that is really our fear walking down that path.

Our hope has been industry initiative would be sufficient. At the same time, as I said the other day, we do not have an allergic reaction to any form of privacy legislation. We think if it is the right legislation, it strikes the right balance, it gives the consumers notice and choice, it is something that would be good.

It would be better if the industry could do that on its own, but because of the fact there may be some companies on the fringes, and there is always, as you said, the risk of some EXXON VALDEZ kind of incident, that maybe legislation is necessary, and we look

forward to having a dialog and finding out where things stand and what we could do to be helpful.

Senator WYDEN. Let me tick off, then, some of the elements. I gather that you will support a notice requirement that there be a conspicuous policy statement. You will support at a minimum opt-out, so that consumers are empowered with respect to being able to make their choices.

With respect to personal data that is very, very sensitive, financial issues, touching on medical questions, how would you deal with extremely sensitive personal data?

Mr. CASE. Well, I must say I am not an expert on these privacy issues. I probably should spend a little more time before I am too precise, but it is not just something we support in terms of notice and choice. It is something we are doing and trying to get the rest of the industry's support, so the only real issue is whether legislation may be necessary to get everybody to support it, or whether there is a market solution to achieve that.

In general, we recognize that there are differing kinds of data, medical data, for example, being one that probably does require a different kind of approach. Exactly what that is, I am not smart enough to say, but just as you recognized on the children's side, there are different classes of information, some that require different kinds of treatment, but in general we think the principles should be notice and choice.

Senator WYDEN. One other, if I could, just because the clock is running. What about the question of consumer access, and the consumer's access to information that is compiled and sold or transferred? You all are going to have this enormous amount of personal data, so the position that you all take with respect to privacy legislation as it relates to consumer access I think is going to be very key, and I would especially like your position on that.

Mr. CASE. Well, first of all we have a lot of information to be sure, but may have less than you might think, because our policy actually does not result in us tracking individual navigational data, things like that. We do not believe that is an appropriate thing to do, so there is some information, but we perhaps have less than people might fear that is being tracked.

Again, it is a matter of balance. We would be reluctant to agree to something that requires us to collect data that we are not presently collecting simply to make it accessible to people in data bases and things like that, but we recognize that the fundamental issue here is protecting privacy and building trust, and from a business standpoint whatever we can do to stimulate that is something we would be willing to look at.

Mr. LEVIN. Senator, if I could interrupt just to make a statement, I do not think it is a question of whether there should or should not be legislation. We should not overthrow—there is over 75 years of history in the direct marketing business offline and online now, where the issue of privacy has been front and center, and in fact there is a DMA privacy promise that all of the companies subscribe to that deals with many of the issues that you are identifying.

And in fact there is something called a global business dialog that Mr. Case and I are the current cochairs of companies around the world, because this is a global issue, trying to deal with some

of these issues, most particularly privacy and trust, because recognizing that this is not an America-only issue, so that there is some spirit of cooperation and not just blind self-regulation.

The other thing I would say is that this is again an area where it is absolutely in the interest of the companies to have the kind of trust from the consumer. That is why the history is relevant, because the importance of brands that people will rely on for information in transactions will fall away if there is this issue of privacy.

Senator WYDEN. I would hope, gentlemen, that you could furnish the Committee in writing your thoughts with respect to how we would go forward in this privacy area. I am sympathetic to the last point, for example. What we did in the Internet tax area, for example, is make it very clear that we wanted to coordinate what we do in this country with respect to Internet taxes with what we do around the world. We really need to have you flesh out your position on these questions.

We do want to make sure that we have got a realistic enforcement tool. I happen to share the view that Mr. Case articulated, that the problem areas are likely to be those companies that we do not know much about, but they can also do a great deal of damage. If you would furnish to the Committee, because of the heavy involvement from Senator Hollings and Members on both sides of the aisle. We would like to have you flesh out your privacy positions because I think a merger like this with the number of people that are going to be involved gives us a chance to almost walk through, using your merger, what an appropriate piece of privacy legislation ought to look like, and we would welcome having that.

Thank you, Mr. Chairman.

Senator BURNS. Thank you, Senator Wyden. Senator Bryan.

Senator BRYAN. Thank you very much, Mr. Chairman. Let me just follow on the line of questioning that Senator Wyden has begun. Mr. Case, as the author of the Child Online Privacy Protection Act, which is the only piece of legislation that has been enacted by the Congress to protect privacy over the Internet, you were extraordinarily helpful, you and AOL, in providing leadership.

We got a report back from the Federal Trade Commission, as you may recall, within a matter of 90 days, which is an extraordinary occurrence in the Congress. We were able to work with you, the Web sites, and a whole host of consumer and public interest groups to get a piece of legislation on the President's desk in about 90 days. Now, I am not suggesting that to do a privacy piece of legislation in a broader sense will be as easy, but let me reemphasize the point my colleague has made.

We are reaching a critical mass in terms of public opinion. This privacy train is about ready to leave the station. My preference would be to encourage people like yourself and Mr. Levin to take a leadership role, not just to simply say we do not have an objection to it. It may be necessary. It is going to happen. It is a concept whose time has come, and to make historical references, with great respect, Mr. Levin, to direct marketing, we are talking about a potential level of intrusion in terms of privacy, in the ability to disseminate information. As the two of you know, it is unprecedented. It is extraordinary, and the public is beginning to understand that, and they are apprehensive.

So let me just encourage you to take a leadership role in that. I think it is in your best interests, and it is clearly in the public interest, and it will occur. It may not occur in this Congress because we have a relatively short period of time, but it is going to happen. If you look at the history of public response, when the public is demanding action be taken, the Congress, imperfect as it is, tends to respond, and this Congress or a future Congress is going to respond, so I think for you to get on board and to help shape that could be extraordinarily helpful.

Mr. Levin, let me ask you a question if I may, sir. You lauded the Committee for its action in passing the 1996 Telecommunications Act, and you and Mr. Case have earlier this week issued this memorandum of understanding. First, an observation. As one who practiced law in a previous life, to get corporate lawyers to draft a memorandum of understanding for companies of your size in three pages is itself a considerable achievement, and I congratulate you on that effort.

But as each of you know, this memorandum of understanding has no real legal efficacy. I do not impute your good faith in any way, or impugn your good faith in any way, but it is subject to all of the corporate vagaries. Six days from now, six weeks from now, six months from now you could make a determination to change it.

Now, Mr. Case, when we did the Telecommunications Act of 1996, one of the things we did with respect to telephone carriers was incorporate a provision that prohibited discrimination. What is wrong with the Congress enacting a similar provision as it applies to cable?

Mr. CASE. Well, actually, I think Congress has enacted some provisions as it relates to cable in terms of programming, as I recall.

Senator BRYAN. We are talking about nondiscrimination in terms of access. In effect, the policy that you have announced is good, so what is wrong with protecting it and incorporating it into a legislative act?

Mr. CASE. As you may recall, a year ago, when we met in this very room, I suggested this was a good cause for legislation. I made an impassioned case about preserving the openness and competitiveness of the Internet.

Senator BRYAN. And you persuaded this Senator, Mr. Case.

Mr. CASE. Unfortunately not enough. I also made the case that Internet regulation is generally not a good thing at this stage. Sort of what I call the light touch, which would be nondiscriminatory provisions, would strike me as being appropriate, and at that particular point in time, since the cable companies were not doing it voluntarily, maybe the Government should step in.

Although I appreciate your support, there was not a cacophony of voices welcoming that. Nothing happened in the Congress, nothing happened in the FCC, but something did happen in the marketplace, so maybe it shows Congress and the FCC were smarter than I, because AT&T did announce the principles a few months ago, after spending a couple of years explaining why it was not technically possible or financially feasible. I thought that was a step in the right direction.

Then when we announced this merger, we committed both companies to this principle of open access. Six weeks later, we went be-

yond our principle and detailed some very specifics in terms of video streaming and direct billing relationships for RSP's, and things that went well beyond what had been discussed in the past. In the weeks and months ahead, we are going to put that into the marketplace, put that into action, not just between our companies but hopefully other cable companies will join us and other ISP's will have agreements with Time Warner, so we will achieve what I was hoping to achieve a year ago through this light touch through a marketplace solution.

Senator BRYAN. What is wrong, I am not sure I have heard an answer although I do applaud your effort. I do not impugn your sincerity, but what is wrong with incorporating this. This is simply a policy declaration. As you know, you could change it tomorrow. You could change it this afternoon. It has no sense of permanence at all in terms of any legal requirement or efficacy.

If it is good policy, and I believe it is, and I compliment you for it, then what is wrong with a light touch to simply incorporate this concept into a piece of legislation?

Mr. LEVIN. Senator, if I could respond, I think there is something even higher than a binding memorandum of understanding, and that is a sense of values. As I indicated in my opening statement, one of the premises of this merger—there were several, but one related to a respect for privacy as a shared value that we would incorporate into the conduct of our business. The second was nondiscriminatory access for nonaffiliated ISP's, because that is actually a fundamental principle as to how we operate.

I think the pragmatics are as follows. You normally need such legislation when there is a real, perverse need for it, because the marketplace is not operative. We are talking about switched digital systems that only within the last year have even come into operation. There is now at least an understanding on the digital capacity, what we are now calling the digital bank account in broadband cable.

There is now flourishing competition from DSL telephones, DBS, and soon fixed wireless. To me, having grown up in this industry, it is very similar to what happened in the early seventies. We had the startup of pay television. There was limited capacity. You could only get HBO and cable systems that happened to be owned by HBO's parent.

As soon as the capacity was there, other services started. The consumer demand was there. You now have a very robust form of multiple access, and we do not discriminate against any service that is not owned by the company.

The same thing is now happening today, and in fact to me it is just like privacy. This is a very smart thing to do. The consumer really wants more choice, other than an AOL service on Time Warner cable systems, and that is what we are going to do, and this statement for a lot of reasons, because of preexisting obligations, had to be stated in the form of an MOU, but I guarantee you there will be multiple ISP's on Time Warner systems with private commercial arrangements that will be tracked through the industry.

Mr. CASE. If I could just add, I think this is an important issue. It is something that I have been talking about for some time. I just want to make sure it is very clear that we 2 years ago in AOL—

and I personally was basically making the case that all of these infrastructures, particularly as you move to broadband, but wireless, the same thing is true, needed to be open so consumers had choices and ISP's could compete. My hope early on was that would happen voluntarily.

Indeed, when AT&T announced this merger with TCI, that day we put out a statement saying we look forward to working together on this, and it was only when that marketplace approach did not appear to be getting momentum that we argued for Government intervention.

What has happened in the last few months, partly, I think, through our initiative, is a marketplace solution that now goes well beyond what I called for in this room a year ago, which was a light touch, nondiscrimination regarding affiliate ISP's.

We have also talked about direct billing relationships. We have talked about there being no fixed limit on ISP's. We have talked about video streaming and other sorts of things, and this is an MOU that was signed six weeks after announcing a merger which I think is significant progress, that will be followed in the months ahead by a definitive agreement between our companies, and I would expect a definitive agreement between our company and other cable companies and other ISP's and the Time Warner system.

If that fails, if this does not turn into a definitive agreement, it would be perfectly appropriate for you to relook at this, but at this point a marketplace solution seems to be working, and I am pleased to report that some of the progress was not seen a year ago we are seeing today.

Senator BRYAN. What a difference a day makes. Thank you very much, Mr. Chairman.

Senator BURNS. Senator Abraham.

STATEMENT OF HON. SPENCER ABRAHAM,
U.S. SENATOR FROM MICHIGAN

Senator ABRAHAM. Thank you very much, Mr. Chairman. I actually also sit on the Judiciary Committee, so this is the second time we have had a chance to have a hearing that I have been part of with respect to this issue, and I want to again commend Mr. Levin and Mr. Case. I think their expressions of support for consumers and broadening consumer choice and open access and so on is in the right direction, and I treat very seriously what they have said, and I think we should focus on it as we consider going forward.

I mentioned the other day, and I just want to reiterate, in this Committee that I think as we evaluate whether it is this merger or others in the high tech context we really do have to look at issues, because of the new economy, in a new way, issues like barriers to entry. Are there barriers to entry? Does it seem to be the case?

As I mentioned the other day, it appears by the end of this year there will be something in the vicinity of one billion Web sites. That strikes me as a lot of diversity. Are there cost problems for consumers? Well, not much evidence of that in terms of most computer equipment costs, software costs, access costs, even now that we have people offering free Internet service. It seems to me we

have a lot of competition, and so it seems to me just from an innovative point of view, and so on, that we are doing well.

What I want to do is just ask a couple of questions, one maybe just to follow on to Senator Bryan, and that is this. Obviously, the question of deployment of broadband technology is one that you testified here before on, Mr. Case, and I am interested in knowing whether there are any legislative actions, or regulatory changes that you think would be in order at this time to accomplish the goal that I think you have set out in your testimony on Tuesday of establishing as quickly as possible the full deployment of broadband services across this country.

Whether it is the proposal you had a year ago, or others that might affect other potential providers, what are your thoughts, and I would throw that out to both of you.

Mr. LEVIN. If I could just start, because it follows on from the 1996 Act. We have the most robust form of competition taking place right now. It has been a wake-up call for the cable companies, for the telephone companies, and for the satellite companies, and now I would add the wireless and fixed wireless. In fact, there is a real competitive race going on between, on the wire line side DSL, and high-speed Internet access on cable. While that is happening, the DBS side, particularly Hughes, with a very high-speed computer service, and now we have the fast development of wireless.

So what the marketplace is telling us, and the capital markets are supporting this, that there has been a wake-up call, and frankly, the wake-up call came because cable within the last year started to deploy these cable modems. DSL and ADSL has been around for a long time, and all of a sudden it is being heavily marketed, and capital is flowing to four different communications systems, or infrastructures, to deliver high-speed Internet access.

So it is not because—I am not speaking as a vested interest, but I am simply saying that the marketplace is proceeding in ways that we probably could not have predicted a couple of years ago, and now with this statement of nondiscriminatory access, what it will do is encourage not only the cable industry but the development of services, so you could have streaming video and move well beyond the text and pictures where we are, by and large, today.

So I do believe it is working, and I think there would be a chilling effect if there were some intervention at this point, because it is working.

Mr. CASE. First of all, I would like to followup with a closing remark on what Senator Bryan made, what a difference a day makes. I hope he did not intend to suggest that based on this merger suddenly we have changed our tune. I have been very consistent on this issue, and I would like to reiterate again my view.

I have been calling, I think as vigorously as anybody for open access. I have been stating, as best I can, the importance of continuing to have consumer choice, and continuing to have competition in every forum that was available, and always preferred a marketplace solution from day one, as I have always preferred on most of these issues a marketplace solution.

It was only when a marketplace solution did not appear to be possible that I suggested Government involvement was necessary,

and even then suggested a light touch, specifically related to a nondiscriminatory provision in terms of the affiliated ISP's, which we have now achieved in the marketplace through AT&T's effort, and now through Time Warner's effort.

When the No. 1 and No. 2 cable company are on record with this, and actually go well beyond this light touch I was talking about, that also put some specificity into play, I think that is significant progress. I do not think it is what a day makes. It is really what a year makes. Progress has been made. I believe progress will continue to be made.

I believe cable companies are likely to get on this band wagon partly because they think it is good business, partly because they think it is good policy, partly because they think there is some real momentum to it, and one thing I have learned is that they and others tend to want to participate when they think it is in their interest as opposed to when they are forced to do it.

So as long as we are successful and continue to build this band wagon, we will achieve precisely what I and many others have advocated for some period of time through a marketplace solution. If that fails, if we turn out to be the only cable company that really makes this work in the way that we think is important, then it would be perfectly appropriate for you to step back in, but right now it is working, and I think people should take a look at the broadest perspective and not focus so much on the process, and more on the progress, and on the progress we have made, and I think we have provided some leadership on, to make sure consumers do have choice and ISP's can compete.

Senator ABRAHAM. Are there any other regulatory or statutory barriers, maybe not related to cable, whether it is related to other phone companies or to wireless providers, satellite providers that you think need to be altered to create the diversity you are talking about?

Mr. CASE. The principle is the same, that all these different communications platforms, satellite, wireless, would certainly be included. Mobile wireless is becoming a very popular service all around the world. All those communications infrastructures we believe should be open so consumers will have choices, and ISP's and others will be able to compete.

Our hope continues to be that there will be marketplace solutions, but if any of them try to move to a closed model, try to be a bottleneck, try to be gatekeeper, I think if the marketplace is not working then it is appropriate for the Government to step in, but at this particular juncture I do not believe any further Government action is necessary.

Senator ABRAHAM. Let me just ask one last question, even though my light is on, since part of the time was spent answering Senator Bryan. I would be interested in following up. On Tuesday you indicated, and I know you have again today, that you believe maintaining content diversity on the broadband network is in the best interest of this merger, and I am just interested if you would perhaps elaborate on why you believe maintaining that diversity and offering nondiscriminatory access would be in your self-interest.

Mr. LEVIN. Well, again, this is a part of the history of what the consumer wants, and we are ultimately responsive to consumer choice, whether it is multiple ISP's, because this is such a dynamic new area, and our consumers are going to want to have many different perspectives on that.

The same thing applies to programming. If we have a network called Home Box Office, it does not only play the movies from Warner Brothers, and similarly, when we have a lot of this content, we do not just put it on our cable. CNN and TBS are aggressively active on TBS, any form of distribution and, in fact, given the breadth of material at Time Warner, it is not going to appear exclusively on AOL, because AOL is in the business of providing lots of different information.

So again we have, I think, a profound statement that diversity of consumer choice, where the consumer is, in fact, the programmer and it is not some centralized company that is deciding what you want, when you want it, and then delivers it, that is the big change. That is what the Internet provides.

But we have had that lesson. As I indicated in my remarks, starting with HBO, the video cassette, all of these things taught us that you are better off providing, let the consumer decide, and now you have the ultimate capability to get what you want, when you want it, totally customized. That is what the Internet is.

Senator ABRAHAM. Thank you.

Senator BURNS. Senator Rockefeller.

Senator ROCKEFELLER. Thank you, Mr. Chairman.

Steve Case, you and I have had some conversations about the so-called last mile. That was a different conversation then. Now, because you have a merger, that problem has been resolved from your point of view.

We have had a very interesting situation. I remember going to the Bell Atlantic facility near here, and they have these cages downstairs which are highly protected for which we are greatly overcharged, and almost inaccessible for those who want to disburse out from the Bell Atlantic basement using their lines. It is sort of a hostile, tense situation, which is amusing in a sense.

What I want to be sure of is that—and I guess, Gerry Levin, this would be partly to you, that in the case of Time Warner that others who want to be able to interconnect and get into broadband services, that they are not going to have those same kinds of problems in your, quote, basement. They will not have to buy cages with security, or electrify the cages. In other words, that you are going to have a different approach to that than the FCC has had to battle out with the telecoms.

Mr. LEVIN. Let me just start. Part of the principles we established in the MOU do really relate to a form of interconnection by ISP's, which we would welcome, and again it is built into our DMA, because we welcome the interconnection now from hundreds of program services that deliver by satellite or microwave, or whatever way they can. They come into what is called our head end, or our central switching.

And so this has been our history, and now we welcome not in any closed cage, but we welcome that interconnection, and in fact the cable industry has been trying to continue to establish standards

of interoperability, particularly now with packet switching, as we have moved away from analogue video, so that everything is transparent in terms of the interconnection.

Senator ROCKEFELLER. I want to ask one more question, one more point, and thank you for that.

On the privacy issue, AOL would store, let us say, an enormous amount of information, and that is as the world works. I think the critical question is, and I hope your answer to this is no, is, will you, either of you, take that information and sell it to a third party?

Mr. LEVIN. Well, first of all, again, I do think the history even offline is relevant in terms of never doing that unless the consumer is aware, there has been notice, and the consumer has had the opportunity to opt out.

These principles are built into our business, because we have had at Time Warner a data base for over 75 years, so we do not do that. We do not practice that. That is a value that I think is embedded now, and will be at AOL Time Warner, in the practices of AOL.

Senator ROCKEFELLER. When you say, when the customer is given notice, and customers we all are, are often in a hurry to transact what it is we are doing and do not read all the notices. If we do, we do not know exactly what their full implications might be, so is that a conditional no about selling to third parties?

Once you start selling to third parties, that is where people up here start to get very nervous, and that is why sort of a declarative no would be a lot simpler.

Mr. LEVIN. Well, in fact, let me turn it around. Of course, in principle it is no, but on the other hand there are certain areas, assuming the consumer is aware, where in fact it is a benefit because of the ability to receive what I will call customized services, and that does take place.

We are not in the business of selling consumer information. That is not what we are about.

Senator ROCKEFELLER. What we need to know more about, and not now, is how that consumer gets informed, and does that consumer have a chance to opt out.

Mr. LEVIN. Again, I should indicate it is over a course of many years where all of this has been worked out, not only in the private sense through the various associations, and I mentioned the DMA's privacy promise, but we have also been working with the FTC for many years now to make sure that all these things—and doing that as an industry, not just as Time Warner in this case, and so I am satisfied that we could present to you the form of practice here that does not violate or invade the consumer's privacy.

Mr. CASE. Let me just clarify that. We do not sell information based on what people are doing, so for example, if people are going to some service about cancer, for example, we do not then aggregate that cancer target list, then sell it to people who want to sell to that audience. We just do not think that is appropriate.

At the same time, we do make our overall list available for rent, but not based on what people are doing, so the privacy concern—and people can opt out of that if they would like to. The privacy concern I think really relates to what information are you collecting and how are you aggregating it, and then how are you using

it. Our decision is to make sure that we do not—essentially, a lot of people target people based on specifics that really are not their business.

Senator ROCKEFELLER. Mr. Case, I have one other point I have to make. The word opt out also means that we have some clarification, because opting out is a positive act, and a knowledgeable act on the part of the consumer, and if you do not opt out, then you are in, so the question of how does one opt out, how easy is that, and the dynamics of all of that, becomes important. That can be discussed.

I just want to make a final point. I think that Ted Stevens made this point. You grew up in Hawaii. My life is defined by going to West Virginia as a VISTA volunteer. Nineteen percent of our households have access to Internet. Twenty-one percent of our households have computers.

So I think the whole digital divide thing as we discussed it, you at the Potomac Conference, where I think you had some frustrations about some of the results, we generally in public policy and private conversations, we talk about the digital divide. It comes out of our mouths easily. It comes out of our souls easily. But the solution to it is infinitely larger and more complicated than any of us can possibly imagine.

Shareholders have their requirements, and I am not attacking that, but that means that companies have to go to certain places before they go to others.

On the other hand, Gerry Levin knows that my daughter until recently was teaching at Jackie Robinson Junior High School at 106th Street in New York, in Harlem, and the equipment there was not suitable. She was only 27 at the time, highly computer literate, but it had nothing to do with the fact that she was able to teach sociology or mathematics at a level that a teacher should be able to, beyond that, but she did have access, and then there are board of education problems in New York.

When you get into rural parts of the country, it becomes really enormously difficult. There are vast swaths of people that simply have no possibility at the present time, so the digital divide is something that we in the Government cannot do. The e-rate does not cover all of these issues because it is just the discount for the phone line and the wiring up, and that is it. We don't have computers software, much less teacher training, nor the dispersion, except after another 10 or 12 years.

So I think the whole question is of the private sector, not just individual companies operating on their own, or as responsible corporate entities. My sense of both of you is that you are genuinely responsive socially on these issues, as you individually seek to do things. I think it is going to take a much larger effort on the part of the industry as a whole. I worry deeply about the digital divide and the cost to America on that. I think it is very much, in fact, the new civil rights movement.

Mr. CASE. If I could just quickly respond, first on the opt-in, opt-out, we look forward to talking to you further about these issues, but it should be noted that when you subscribe to AOL there is a lot of things we tell you. You set up your screen and so forth, you

are essentially opting in by deciding to subscribe to AOL and set up certain preferences.

It is a little bit different for some Web sites where you may not even know it, but somebody is dropping a cookie and keeping track of what you are doing, and you never even knew somebody was watching, so I think there are a little bit different approaches, but the bottom line is, we all recognize that we need to build trust and security and privacy to build the medium.

I agree on the digital divide issue. I think it is something that individuals and companies need to do working in conjunction with Government and nonprofits. Part of what we are trying to do through this PowerUP initiative is build a public-private partnership. Companies like AOL have made commitments. Gateway, for example, has donated 50,000 computers to it.

We are working with the Boys and Girls Clubs, and the YMCA, and Americorps VISTA is providing the volunteers, and America's Promise is a partner, the Department of Education is a partner, so it really is trying to work together to deal with this, and there actually is a role for Government and leaders of legislation that Senators Biden and Specter have introduced related to this, and I urge you to support that.

Mr. LEVIN. Obviously the issue goes beyond the technology and really relates to the state of our schools, the respect and dignity we give the teachers. We started this conversation about instant messaging; if we could ever plant enough of this capability in homes so that there can be communication between teachers and parents or surrogates, whoever is home, and take advantage of that technology for a form of influence and motivation, we could transform the educational system.

So that is why there is so much promise in this technology, if we can work together to make it more accessible.

Senator BURNS. Senator Breaux.

Senator BREAUX. Thank you, Mr. Chairman.

Mr. Levin, Mr. Case, welcome. Thank you for your being with us to discuss this very important issue. I wear another hat, as we all wear in this business, in different committees. And the other committee I serve on is the Senate Finance Committee, so I would like to ask you a tax-related question.

In Louisiana, if I have a constituent, Mr. Boudreaux, who goes down to the local boot store and buys a pair of boots, he pays a local sales tax, a county, or parish, tax in Louisiana, and the city sales tax. When he buys that same pair of boots over the Internet from a seller who has no presence in the State of Louisiana, he does not pay the city tax. He does not pay the county tax, and he does not pay the State tax.

I am not suggesting that if we do not do anything in that area that grass will grow in the streets of downtown America, but I am concerned that local services, like police and fire protection, schools, roads, and other local services that are principally financed through a State sales tax will dramatically suffer. And it seems to me that by not requiring both sellers of the same product to pay the same legally established sales tax that we are in effect giving a tax subsidy to one seller and not to the other.

Do you think Congress should do anything to correct it?

Mr. CASE. Well, I think we actually have representatives, both Dick Parsons of Time Warner, and Bob Pittman of AOL, on this tax commission, and it sounds like they are having very vigorous debates from what I hear.

Senator BREAUX. They are having a lot of fun.

Mr. CASE. Our view is we do not want or expect or need the Internet to be some kind of tax haven. At the same time, we think it would be a mistake to band-aid the sales tax system yet again and deal with this as an Internet issue. It seems to us that there is an opportunity here for a fresh look and particularly an opportunity for simplification. So whether you buy it from Main Street or buy it from a catalog or buy it on the Internet, there is a consistent approach.

So we will really argued for viewing this through the prism of it is a new opportunity to do this overall sales tax issue in a better way, and let us take the time to do it right. And if we need to extent the moratorium to do it right, fine; but we are not trying to stall the resolution. If smart people can get together and figure out how to simplify things now so it really, truly is neutral, then that is something we would be supportive of.

Mr. LEVIN. Senator, may I just add one thing?

Senator BREAUX. Mr. Levin.

Mr. LEVIN. This is a real opportunity. So any moratorium is not designed to be permanent. But it really suggests that we have a hodgepodge today, even before the Internet, in terms of catalog sales and the way different things have been treated. And now, you put in e-commerce, it is a global issue, because where this originates and who is really buying gets to be something—and that is why, if we can think this through in a way that provides some kind of justice in the system, if I could use that word, then we should do that. But certainly not to disparage the requirement for local government to have its revenue base hampered.

Senator BREAUX. I appreciate that. I get the gist of it, that you are both talking about tax equity and a level playing field and you can compete and your sellers can compete over the Internet. I appreciate that. Let me ask one other question.

The FCC, when it testified before this Committee on telecommunications issues, talked about voice telephone service, transmission, and high-speed broadband services over the telephone service operations are what they have called operationally and technological distinct types of services and need to be regulated differently.

My question is, would you agree that that same distinction applies between the traditional cable video programming services and the high-speed broadband services delivered over cable? Do you think that the FCC's determining that they are a distinctly different services would apply both to cable delivering broadband the same as it is with telephone lines delivering broadband services?

Mr. LEVIN. Certainly, with respect to telephony, Internet telephony is very different from your classic circuit-switched telephony. The whole packet switching technology means it runs through a very different technology. And the opportunity for many people to provide it is so vastly different from the in place local exchange carriers.

Similarly, with respect to video streaming, that is, the opportunity to deliver video through the Internet as opposed to the normal analog system, creates a whole new opportunity. And this is another case of rapid innovation. Almost every day there are new sources of, right now, because of limitations, usually, what we call short attention span theater, it is rather snippets of video. But, over time, the Internet will enable people to publish video just as they now can public text and words.

And so, without taking a position on what the FCC should or should not do, this is the most creative area I have ever seen.

Senator BREAUX. It is a huge question, though. You are going to have to start taking positions on it. Because, No. 1, when you deliver it over the telephone wires, they have a whole set of rules and regulations that the FCC requires, that are pages. Whereas if you are delivering it over your cable system, the same broadband Internet services, the regulatory requirements are vastly different, I mean vastly insignificant compared to if you are doing it over telephone lines. And the FCC says, well, they are distinctly different services, that is why.

Mr. LEVIN. Well, certainly, what is different is everything that an ISP happens to be delivering, which is essentially what is out on the Internet. And by talking about video, remember, these are all the same. The routers that take this material and send it around the world, they do not whether it is text, an E-mail, an instant message, a nice picture that some journalist has taken, or music, or video. It is all being digitally routed. So the system is totally different. It is all done through packets that have little addresses on it. It has nothing to do with the old analog cable system or the old twisted pair telephone system.

I guess all I am suggesting is I do not see right at the moment what regulatory regime is really necessary at this point, because it is totally democratic. There is no centralized control. And I think that is one of the elegant benefits of this network.

Senator BREAUX. Just a final point. You are making the point, Gerry, I take it, that delivering the broadband Internet services over your cable network is different from delivering those same type of services over a telephone line?

Mr. LEVIN. No. In fact, I think to the extent that over a telephone line you can deliver broadband ISP's, it is essentially the same.

Mr. CASE. Let me just add something here, a couple of things. First of all, there are some distinctions between technologies and markets that exist today that do merit different kinds of approaches. For example, a concern in cable television has always been there is really only one cable provider, there is no real competition. There is now some competition from satellite, so that is an improvement. And then there is limited cable capacity, so there is an issue of making sure content diversity exists.

In the Internet space, there are thousands of Internet service providers people can choose from, including free ones, and unlimited choice in terms of content, because essentially there is an aspect of universal carriage. So those are different and should be treated differently.

At the same time, I think it is the point that Gerry is making, we are moving into a world that is converging. And it is a little bit like the tax issue. Looking at these as Internet issues I think is not the right approach. Looking at these as a new opportunity to relook at what we are doing and what is the best way to do it going forward is going to be necessary at some point, no matter how complicated that might be to break down some of these walls and kind at it from a clean slate.

I think there will be a need for that in the years to come. In the meantime, there are some clear differences between some of these markets and technologies.

Senator BREAUX. Thank you, gentlemen.

Senator BURNS. Senator Cleland.

Senator CLELAND. Thank you very much, Mr. Chairman.

This has been a fascinating day for me. But hearing the jargon of the Internet century makes me feel like the train has already pulled out of the station, and I am sitting there eating popcorn and that I am on the wrong side of the digital divide here. So I will say, Mr. Levin, that one of the things I have strongly identified with is what I think is transferable from the 20th century to the 21st century that people can understand. And that is your commitment to what you might call shared values. And that is one of the things I am searching for.

I may not understand all the technology, and I may not be able to track all the mergers and acquisitions and changes in this quicksilver business that you all are engaged in, but what I am looking for is some, shall we say, first principles by which this kind of business, this world of communications, is run. What are the first principles? What are the bedrock concepts out there that we can build on, that maintain not only our economy but the trust of people in our businesses?

I really appreciate your ticking some of these off, Mr. Levin, that your company is committed to the public interest. We all here are. And that is what we are here today to explore. What is in the public interest?

Secondly, journalistic independence, a powerful shared value that I can certainly identify with. Nondiscriminatory access. Opening up your shopping center and say, come one, come all, to the fair. Privacy, rooted in respect for human dignity. That is something I think people can really understand. And, in many ways, that is the business we are all in. If people do not trust me, I do not get elected. If they do not trust you, you are not in business. Whatever it is we are selling, however, we are selling it.

The whole concept about the digital divide, this new world, that we do not want to create an information aristocracy, as you pointed out. Which is your wonderful emphasis on education. The more people, the more citizens that we can get well through education in our country, the more consumers you have, the better our country is going to be. Which is one of the real powerful, positive parts of this Internet world, that it challenges us all to get better and smarter, and put an emphasis on education.

Universal service, the fact that we do not leave any community behind, is powerful as we move forward in the 21st century, as we move across the digital divide. So I really appreciate you are help-

ing to kind of clarify for me some of the first principles that you operate on.

And I think what you all have done here is acted as precursors of other companies so that other entities follow. And you all laying down some solid first principles I think will be in the public interest as we move forward.

I am fascinated, too, Mr. Case, about your understanding of how government can ebb and flow in its actions. Sometimes it is required to be involved. Sometimes it is not required to be involved. One of the things that I have been struggling with is, when is a government action triggered? In other words, I understand from my Internet friends that the Hippocratic Oath should be taken first, that government should do no harm. In other words, this is a good thing; let us not screw it up. Let us not mess this thing up here by a chilling effect of the heavy hand of the bureaucracy of government on this incredible part of our commerce.

But at the same time, your understanding that from time to time, a light touch might be needed is important. I will look forward to your recommendations as we go along. And, finally, Mr. Case, we are both a fan of Tom Friedman, who has written that great book, *"Alexis and the Olive Tree."* His understanding of the difference between big brother and little brother—sometimes government, acting as big brother, may come in and protect the public interest from rogue little brothers. We will be looking, and I will be looking, for your guidance on these issues.

I just wanted to say that your articulation of first principles here has helped me immensely deal with this whole world of e-commerce, as we take commerce, this being the Commerce Committee, as we come out of the industrial age into the information age, that there is a new technology out there, new words, and new acronyms. But some things transfer, in doing business in America, that we all support. And your articulation today of your values of your company and the values you bring to the merger have been very helpful to me.

Mr. Levin, any comment on that?

Mr. LEVIN. Yes.

Senator CLELAND. You articulated the shared values concept.

Mr. LEVIN. Obviously I am deeply appreciative, Senator, because, as you have articulated, our deeply felt sense of values, that obviously resonates. And let me just put it briefly in historical perspective, because I do think we have an opportunity. Every time there has been an advance in this country—I will go back to radio—radio was originally going to be a place where we could deliver classical music to Americans, and then it evolved in a slightly different way.

When television began, this was a hope that it would basically be an educational medium. It has not exactly turned out that way.

So being somewhat of a student of history, my excitement about where we are and this kind of merger, and the emphasis on values, is I do think we have an opportunity. Because, for the first time, this technology does interconnect everyone, if we can just make it happen. It is a fact that most of the people in this world never even made a telephone call. And half the world lives on $3 a day. So it is not the technology per se, but the fact that it represents a form

of community and interconnectedness, that we have just never had that at our disposal before.

So the second thing I would say is that maybe this is also an opportunity—and a lot of that has come in the interchange here—to redefine the role of government and the role of the private sector in some new way, which, I admit, it sounds fuzzy, but to try and get away from the traditional rhetoric and also the assumption that there is an adversarial position of vested interests to make money and government interest to protect the public good. That is what we are trying to get at.

There are some cynics who challenge that. But I guarantee you, we are sincere about it. But it all proceeds from one thing: we have at our disposal a technology like no other generation has had available to it.

Mr. CASE. If I could just add. I certainly agree with everything you have said and everything Gerry has said. I think it is very important to recognize, as we move into this new century, that some things are going to be different and some things can be different if we try to make them different. This notion of more of a partnership between government and business I think is an important notion.

I do think it is unfortunate, as Gerry just said, that the sense is that if you go into business, you are there to make money and take advantage of consumers and get away with as much as you can. If you go into government, you are there to protect consumers and try to rein in those robber barons, who are going to certainly do bad things if not reined in.

Our goal is to try to create this new medium and change the way people get information and communicate and buy products and learn things. And if we are successful, hopefully build the most valuable company, but also build the most respected company, and shaping this in a positive way is key to that. And trust, as you say, is key to that. We certainly have a responsibility to our shareholders, just as you have a responsibility to voters in Georgia. But we both have a greater responsibility to try to do what we can to build a better world.

And I would support more, and I think others would too, light touch sorts of things, as long as there is some confidence that they would indeed be light touches. The fear of business always is that—at least some people in business—is that what seems like a good idea and starts out with a light touch somehow ends up being unwieldy and a heavy touch. And so maybe it is better not to support anything because then you do not have to worry about that, at the finish line, something bad happening.

I think that is a mistake. And I would hope that there is more of a dialog, there is more of a partnership, and that we can deal with issues, privacy being a good example, in a responsible, balanced way.

Mr. LEVIN. Senator, if I could just add. There is one thing I think we can take from the past century into this century, and for the citizens of Atlanta, and that is to deliver a World Series to Turner Field.

[Laughter.]

Senator CLELAND. And that is a good note on which to close, Mr. Chairman. Thank you very much.

Senator BURNS. I thank Senator Cleland.

I only have one followup question. I was noting in your memorandum of understanding, you state that the new corporation will negotiate commercial agreements with unaffiliated Internet service providers. However, it further states, and I quote: "Pursuant to such commercial agreements, AOL-Time Warner will partner with ISP's to offer consumers a choice."

Now, I come from Montana. And sometimes we get in trouble because we do not define terms and we do not operate. How do you define "partner"?

Mr. LEVIN. Well, the word is actually used to indicate that there are many different kinds of ISP's who play a very different role from what AOL does or EarthLink does. There are some who are national. There are some who are regional. There are some who are local. So it is simply meant to communicate that we want to work with several different kinds, that there is not one template. And we want it to be in the form of a partnership.

For example, there are certain ISP's who have the capability of marketing and billing. And so we say in the memorandum that they should have access to the Time Warner cable customer to be able to do that.

There are others who cannot do that. So, in a partnership way, we would offer to do the billing if they require that. That is simply what the word is meant to communicate.

Senator BURNS. I just wondered, because every time we have disputes it sometimes boils down to definitions more than it does anything else.

I want to thank Mr. Case and Mr. Levin today for coming before this Committee. And I have been reminded that there are some Senators who have further questions. We will forward those questions to you. If you could respond both to the Committee and the individual Senators, I would appreciate that very much. And I thank you for coming today and spending this 2 hours with us. We did set a record today, by the way. And I think it is a credit to you that the opening statements of 10 Senators on the Commerce Committee, we got through them in 25 minutes. That is a new record.

Thank you for coming today, and we appreciate your attendance here.

Now we will move to the next panel.

Mr. CASE. Thank you.

Mr. LEVIN. Thank you.

Senator BURNS. Thank you.

We move now to Mr. Jerry Berman, who is Executive Director, Center for Democracy and Technology; Mr. Gene Kimmelman, Co-Director of the Consumers Union; and Robert Lande, Senior Research Scholar, American Antitrust Institute, for the testimony and questions today.

Usually, when it gets down to this time of day, your competition is usually a bowl of soup. And it looks like the soup won again.

[Laughter.]

Thank you, gentlemen, for agreeing to come today. We are interested in your comments. And understanding the testimony you

have heard preceding your panel, your comments are very, very important to this Committee, I want to tell you that.

And we will start with Mr. Berman, who is Executive Director, Center for Democracy and Technology.

Mr. Berman.

STATEMENT OF JERRY BERMAN, EXECUTIVE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

Mr. BERMAN. Senator Burns, thank you for this opportunity to testify today on what I think are critical issues facing the future of the Internet.

CDT is a civil liberties organization and an Internet policy organization. We work tirelessly, or we try to work tirelessly, to protect free speech on the Internet and privacy for consumers. And we think those issues are gravely involved and affected by the AOL-Time Warner merger. It is absolutely important to understand why I am going to emphasize first the first amendment and then privacy.

We have had an open narrow-band Internet. Anyone can connect to it. Anyone can be a publisher. The Internet Caucus that you head has spearheaded the education people about the ability of unaffiliated ISP's to set up low barriers to access. And when the Supreme Court decided the Reno case, which we helped to wire the Court and educate the Court about the Internet, they said this is the most free and open communications media of all time, and it is entitled to the highest first amendment protections because anyone can be a publisher.

We want to make sure that the ability to publish, to be a consumer, to reach content, to speak, translates into the developing broadband Internet. There are two things—the Internet is a network of networks with no gatekeepers. It has been working off a facility, the telephone network, which is a common carriage network, which makes the ability to connect and access and to become part of the Internet easy. We are now moving to broadband platforms. Hopefully, in time—and we have been studying this through a broadband access project—we will have not only cable broadband, but we have DSL in parts of the country but not everywhere, wireless, and so forth.

But, for the foreseeable future, the major deliverer of broadband is going to be the cable facilities. And that is why it is absolutely critical that openness principles be brought to the cable network. That is not there the way their architecture is designed. It has been channeled. It is a gatekeeper network traditionally.

And so, first of all, the announcement by AT&T-MindSpring, and then the MOU announced by AOL and Time Warner, are absolutely critical, because they are committing their companies to the Internet paradigm. Which is that to the extent feasible, they are going to open up their network to unaffiliated ISP's who can carry their own content and do not have to seek permission from the cable network to run on that network and to do the applications that they want to do.

There is great devil in the details. Because unlike the telephone network, which we hope will keep going and be out there as a common carrier, there is limited capacity on a cable network. It can

only carry so many ISP's. It cannot just connect up everyone. It would degrade the signal.

It has problems. But the feasibility of multiple ISP's is there. But nondiscriminatory access by unrelated ISP's, the ability to do streaming video, those principles which are at the core of the MOU, and most of them incorporated, at least by implication, in the AT&T-MindSpring, signal that the intent is to open up and to be nondiscriminatory. The implementation will be critical. A lot of the details have to be spelled out.

And there are two ways of going. One is you bring in the government and say, let us write these rules and make sure that nondiscrimination occurs. I think, in this area, that is premature. First of all, I watched the legislative fight last year, which pitted giants against giants. There is gridlock. It puts everyone into a bunker. They start a war.

It does not create the open standards dialog that we need. The Internet has developed mostly by the industry, the community, coming together and figuring out how to do a standard. And there is a real opportunity here for the cable industry, the public interest community, policymakers, and the computer industry to work out the details of this MOU and to make sure that it is open.

And if that does not work, there is always the role of government. A couple of words about this, and it is critical. So there are forums that we would like to see facilitated by congressional oversight to make sure that the industry works toward openness and that, if legislation becomes necessary and it fails, that will become clear.

The privacy issue, AOL-Time Warner does not change the equation. Privacy, we all know, is a major issue on the Internet. I think we should view it as an opportunity. It does not qualitatively change it. AOL already has a lot of information. Time Warner already has a lot of information. They have both been leaders in the self-regulatory effort on the Internet, trying to build best practices and track onto the Internet.

That self-regulation will be the cornerstone of any legislation, because it will establish what the best practices are. I think that the recognition by Mr. Case that legislation is necessary because of bad actors, little brothers, is something to build on. Because it says there is possible ground-floor notice, consent, opt out, and then we can cover the bad actors. That is the basis for, I think, your legislation and other legislation. So there is room for reaching a consensus there.

The Internet is also driving consumers to ask for privacy. There are also technologies that facilitate privacy, that make it possible for Web browsers and consumers to read the fine print of every Web site about their privacy policies and negotiate consent. And AOL and Time Warner have been active in trying to facilitate the bringing of that technology to the market.

So I think that there is a chance here to work together across lines, bring everyone together, and try and achieve a new social contract for the broadband age that will protect both free speech and privacy. Thank you.

[The prepared statement of Mr. Berman follows:]

PREPARED STATEMENT OF JERRY BERMAN, EXECUTIVE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY

Mr. Chairman and Members of the Committee, the Center for Democracy & Technology (CDT) is pleased to have this opportunity to speak to you on the short and long-term implications of the AOL-Time Warner merger on consumers, and on the Internet itself. CDT is a non-profit, public interest organization that is dedicated to developing and implementing public policies to protect civil liberties and democratic values on the Internet. CDT has been at the forefront of efforts to establish and protect the very high level of constitutional protection that speech on the Internet has been afforded by the United States Supreme Court in the Reno v. ACLU decision. CDT led the coalition that wired the trial court in Philadelphia in that case, and CDT has undertaken a major project to ensure that the open and democratic characteristics of the narrowband Internet—so central to the Reno decision—are carried over into the emerging broadband world.

Mr. Chairman, the Internet is at a critical junction in its evolution. Although as a popular mass medium the Internet is less than ten years old, it is already entering into a period of significant transformations. These transformations are threatening to undermine the fundamental characteristics that make the Internet such a unique and dynamic means of communication. We would like to address two different threats to the Internet—threats to openness and threats to privacy—and the implications of the AOL-Time Warner merger on those issues. For both of these issues, the critical starting point is to look at the vital characteristics that make the Internet what it is today.

I. OPEN ACCESS

A. "Open" Characteristics of the Narrowband Internet

In the first comprehensive assessment of the Internet by an American court, the trial court in the Reno case in 1996 found what it termed "a unique and wholly new medium of worldwide human communication."[1] The narrowband Internet developed into this dynamic medium in large part because it has been "open" at virtually all levels of its existence. The "network of networks" operates using open and freely available technical standards, allowing literally millions of different (and often incompatible) computers to communicate seamlessly. The open protocols used for Internet traffic allow startup companies and individual software designers to create and distribute new modes of communication over the Internet. Speakers, large and small, rely on the openness of the Internet to speak easily, inexpensively, and without significant restriction or limitations on the form or content of the speech.

As one judge put it, the "Internet is a far more speech-enhancing medium than print, the village green, or the mails."[2] That judge concluded that "[f]our related characteristics of Internet communication have a transcendent importance" to the conclusion that the Internet deserves the highest levels of constitutional protection:

> First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.[3]

The "openness" of the narrowband Internet translates into an unprecedented ability of speakers to speak and listeners to receive content, free from governmental or private interference. Internet users have a wide range of choices as to how to access the Internet and what to do with the communications medium once online. Users can speak to the entire world with little or no investment. Listeners can access a vast wealth of content quickly and easily, without significant governmentally- or privately-imposed limitations. In short, the Internet offers individuals, communities, non-profit organizations, companies, and governments an unprecedented ability to speak and be heard.

The infrastructure in which this open, narrowband Internet exists is the telephone system, which operates with full common carrier obligations. Thus, Internet Service Providers (ISPs), with very little investment, could offer services within a community, free from interference by the telephone company providing the "last mile" connection to the ISP's customers. Internet users, in turn, could easily reach any of the often hundreds of ISPs in any given community, and could do so without

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[1] American Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996), aff'd, Reno v. American Civil Liberties Union, 521 U.S. 844 (1997).

[2] Id. at 882 (Dalzell concurring).

[3] Id. at 877 (Dalzell concurring).

facing any telephone-company-imposed restrictions (other than bandwidth limitations inherent in an analog telephone line). The common carrier requirements in the telephone system have led to a great diversity of ISPs, and to a great deal of competition and innovation in the provision of Internet service.

As the Internet moves into the broadband world, it moves away from the mandated openness of common carriage. It is now clear that broadband service over the telephone network—in the form of Digital Subscriber Line, or DSL, service—will be a significant avenue for users to obtain broadband access to the Internet. It is also clear, however, that broadband service over cable networks will for the foreseeable future be the leading method to deliver broadband Internet access. Cable operators are not subject to common carriage requirements, and are thus not required to allow multiple ISPs to offer a diversity of Internet service options to cable Internet users. This difference has raised the very real possibility that the open, dynamic, and democratic Internet might come to be dominated and in part controlled by a small number of private companies that own the critical "last mile" cable connection into users' homes.

B. CDT's Broadband Access Project

As this Committee is well aware, these concerns have led to the often bitter—and often loud—debate over the past eighteen months over whether cable systems should be forced to permit unaffiliated ISPs to offer broadband services over the cable systems. When confronted with the competing arguments and claims in early 1999, the Center for Democracy & Technology decided that it simply did not know enough about the issues to be able to take a position. Instead, CDT undertook its Broadband Access Project to conduct a neutral, balanced assessment of the factual and policy issues surrounding the emergence of broadband technology.

CDT sought and obtained support for the Broadband Access Project from a broad cross section of the emerging broadband industry. The Project's participants include cable operators AT&T and Time Warner, ISPs America Online and MindSpring, local exchange carriers Bell Atlantic and SBC Communications, interexchange carrier MCI WorldCom, and technology companies such as Microsoft. Although these broadband companies were fiercely fighting in the marketplace, on Capitol Hill, and elsewhere, they decided that it would also be worthwhile to participate in a dialogue to discuss the issues raised by broadband technology. In addition to these and other companies, the Project has also included working closely with the public interest advocacy groups that have been at the forefront of the open access debate.

Our consultations and analysis are continuing, and we expect to be able to release the results of the project within the coming months. But two very significant developments in the broadband world have led us to conclude that it is appropriate now to share with this Committee the current draft (as of late February, 2000) of one of the documents our Project is preparing—a clear and careful statement of openness principles that we believe should be applicable to the provision of broadband services over the Internet.

These principles—attached as Attachment A—do not represent any agreement by any company or public interest participant in CDT's Broadband Access Project, but instead reflect CDT's efforts to craft a set of principles that respond to the concerns and views raised by the project participants. These principles are expressly silent on the critical question of whether any governmental action should be taken to enforce the principles—our initial intent was to attempt to articulate what our common goal is, before addressing how to reach that goal. Moreover, these principles are continuing to evolve as we continue to work with the project participants.

The two developments that have led us to release the draft principles at this time are both statements by leading cable operators of their own sets of principles to govern open access on their cable systems. First, in December of 1999, AT&T and the ISP MindSpring sent a joint letter to Chairman William Kennard of the Federal Communications Commission, outlining a set of principles that AT&T stated would guide its dealings with unaffiliated ISPs seeking to provide broadband service over AT&T's cable networks (Attachment B). Second, and what of course prompts this hearing, is the announced merger of AOL and Time Warner, and the "Memorandum of Understanding" that those two companies released earlier this week (Attachment C).

Both of these corporate statements of principles represent very significant and positive steps towards open access. CDT offers its draft principles in the hope that they may assist this Committee and other policymakers in assessing AOL Time Warner's Memorandum of Understanding, as well as the AT&T/MindSpring statement of principles. A summary and side-by-side comparison of the three sets of principles are offered below. Although the sets of principles use different words, many of the points are common to all three sets.

CDT's Draft Openness Principles	AOL Time Warner 2/29/00 Memorandum (the "MOU")	AT&T/MindSpring 12/6/99 Letter to FCC (the "Letter")
Choice Among Competing Internet Service Providers (ISPs)		
A broadband facility owner should permit both affiliated and unaffiliated ISPs to offer broadband service. (See CDT Principle L)	Yes. (See MOU Paragraph 2)	Yes. (See Letter first and seventh bullet points)
A broadband user should be able to obtain service from an unaffiliated ISP without having to also pay anything to an affiliated ISP. (CDT O)	Yes. (MOU Paragraph 2)	Yes. (Letter second bullet point)
A broadband facility owner should permit any qualified ISP to offer service, constrained only by legitimate technical limitations on the number of ISPs supported. (CDT M)	Unclear. The MOU only states that AOL Time Warner will support "multiple" ISPs, and that users will have a "broad choice" of both national and local ISPs. (MOU Paragraphs 2, 4, 8)	Unclear. The Letter only states that AT&T will support "multiple" ISPs. (Letter page 1)
If the number of ISPs supported is subject to technical limitation, facility owners and the industry should work to maximize the ISPs that can be supported. (CDT M)	Unclear. The MOU is silent on this point.	Unclear. The Letter is silent on this point.
A broadband facility owner should offer service to unaffiliated ISPs on a nondiscriminatory basis with regard to (at a minimum) (a) financial terms, (b) technical functionality, and (c) operational support systems. (CDT N)	Generally yes. The MOU states that financial terms and functionality will not be discriminatory (MOU Paragraph 5), but is silent on support systems.	Generally yes. The Letter states that financial terms and functionality will be reasonably "comparable" (Letter sixth and seventh bullet points), but is silent on support systems.
An unaffiliated ISP should not be required to utilize the Internet backbone services of the facility owner. (CDT P)	Yes. (MOU Paragraph 7)	Yes. The Letter indicates that any connections directly into AT&T's facilities shall be provided by AT&T (Letter eighth bullet point), but in subsequent discussions AT&T has clarified that this paragraph does not require the use of AT&T backbone services.
A facility owner should not permit an ISP to offer service only to select portions of a community served by the facility. (A desirable point that is not included in principles prepared by CDT)	Yes. (MOU Paragraph 8)	Unclear. The Letter is silent on this point, but to our knowledge this issue has not yet been raised to AT&T for any reaction.

CDT's Draft Openness Principles	AOL Time Warner 2/29/00 Memorandum (the "MOU")	AT&T/MindSpring 12/6/99 Letter to FCC (the "Letter")
A facility owner should allow an ISP to control the billing relationship for all Internet services ("last mile" access and ISP services). (A desirable point that is not included in principles prepared by CDT)	Yes. (MOU Paragraph 9)	No. The Letter indicates that AT&T intends to bill users for the "last mile" access services that it provides. (Letter tenth bullet point)
A facility owner should attempt to modify existing exclusive contractual relationships to permit open access as soon as possible. (A desirable point that is not included in principles prepared by CDT)	Yes. (MOU Paragraph 11)	No. The Letter indicates that AT&T intends to provide open access after its current exclusive contractual arrangements expire. (Letter page 1)
Access to Internet Content		
A broadband facility owner should not restrict users' ability to access constitutionally protected content on the Internet. (CDT C, D)	Probably yes. The MOU is silent on this point, but in other contexts AOL Time Warner has made clear commitments that access to content should not be restricted by a service provider.	Yes. (Letter fourth bullet point)
The Internet industry should maximize the ability of users to access a diverse range of broadband content. (CDT E, F)	Unclear. The MOU is silent on this point.	Unclear. The Letter is silent on this point.
Ability to Speak on the Internet		
A broadband facility owner should not restrict users' ability to speak or post constitutionally protected content on the Internet. (CDT G, H)	Probably yes. The MOU is silent on this point, but AOL Time Warner have in the past supported users' ability to speak on the Internet.	Probably yes. The Letter is silent on this point, but AT&T has in the past supported users' ability to speak on the Internet.
The Internet industry should maximize the ability of a diverse range of broadband speakers to distribute broadband content widely and at reasonable cost. (CDT I, J).	Unclear. The MOU is silent on this point.	Unclear. The Letter is silent on this point.
Ability to Use the Internet to its Fullest		

CDT's Draft Openness Principles	AOL Time Warner 2/29/00 Memorandum (the "MOU")	AT&T/MindSpring 12/6/99 Letter to FCC (the "Letter")
A broadband facility owner should not impose any limits on the functionality that an ISP can offer to its users, unless technically required and equally applied to all ISPs. (CDT A)	Unclear. The MOU commits to non-discrimination on this point, and to allow streaming video (MOU Paragraphs 5, 6). In testimony before the Senate Judiciary Committee, AOL Time Warner committed to allowing ISPs to offer IP telephony over the broadband facility.	Unclear. The Letter (Letter sixth bullet point) commits to non-discrimination on this point, but is silent on possible restrictions on the use of the facility. The Letter does commit to allow unaffiliated ISPs to offer "advanced applications" over the facility. (Letter eleventh bullet point)
The industry should work to remove any current technical limitations on broadband users' ability to use the Internet. (CDT B)	Unclear. The MOU is silent on this point.	Unclear. The Letter is silent on this point.

C. Moving Forward on Open Access: The Next Steps

As the above comparison suggests, the AOL Time Warner Memorandum of Understanding represents a very positive step towards open access. AOL Time Warner has made a positive commitment on many, but not all, of the points articulated in CDT's draft principles. A number of key points remain unclear, including, for example, the number of ISPs that will be supportable on a typical Time Warner cable system. As AOL Time Warner acknowledges, the Memorandum of Understanding is only the first step toward open access. Looking at both AOL Time Warner and the broadband industry more broadly, there are at least three critical and independent steps toward open access that policymakers must consider:

1. A set of open access principles and goals must be refined and further articulated. No matter which set of principles serves as the starting point (CDT's, AOL Time Warner's, AT&T's, or another set), there must be further discussions and, hopefully, consensus on what exactly will be necessary for a broadband facility to be considered "open." Consensus on these key threshold principles and goals must include policymakers, the public interest community, and the Internet industry.

2. The entire U.S. cable industry (beyond AT&T and Time Warner) must be brought into these discussions about open access principles, and ultimately must undertake to implement open access on their systems. Even if all currently pending mergers are approved and AOL Time Warner and AT&T both implement open access on their systems, there are many major cable systems that have not yet made a commitment to open their cable systems.

3. Finally, any set of open access principles must be fully and effectively implemented. As is often the case with policy and technology, the devil will be in the details. This is all the more true given the significant technical complexity that will be inherent in any implementation of open access on a cable system. Open access commitments by AOL Time Warner and AT&T are certainly positive developments, but until actual contracts are signed with unaffiliated ISPs and open access is actually implemented, there will unavoidably be uncertainty and concern about the true prospects for open access.

Remaining is the critical question of how these next steps are implemented. The traditional pre-Internet approach to this type of policy situation has called for governmental action to require and oversee these and other steps toward open access. In the context of the Internet, however, a variety of policy issues have been addressed in the first instance not by governmental action but by private self-regulatory efforts. Public interest organizations fighting for open access have strongly argued that there must be a federal government policy, and federal oversight, to ensure that AOL Time Warner, AT&T, and other private companies in fact implement true open access. These public interest advocates assert that the democracy and free

speech on the Internet are so fundamentally important that they cannot be left to private negotiations between Internet companies.[4]

From CDT's perspective, the most significant problem with the idea of a government mandate of open access is that such action would lead (and in some cases already has led) to extensive litigation and, ultimately, prolonged delay. With the recent movement toward open access by AT&T and Time Warner, it appears possible that the cable industry as a whole is in fact moving on its own towards open access. CDT believes that these efforts toward consensus and voluntary implementation of open access should be given an opportunity to succeed.

Critically, however, the details of open access cannot be determined and implemented without direct and continuing public interest involvement in the decisions. The public interest advocates are correct in concluding that free speech and democracy on the Internet are critically important, and require public participation in the development and evolution of the Internet. The Internet industry has frequently sought to keep government out and allow the industry to solve problems without governmental mandate. In most situations, this voluntary approach is desirable, but for it to succeed when free speech and the First Amendment are at stake, there must be a way for public interest voices to take part in the network and infrastructure design decisions that will be necessary to implement open access in the broadband Internet.

There may also be a role short of legislation that Congress can and should play. Hearings of this type serve to focus attention—attention of the industry, the media, and the public—on the issues raised here. If the industry is going to succeed in addressing the critical issues of open access, it should do so with the participation and input of policymakers at all levels of government. Ultimately, however, if this effort fails to address these critical issues and fails to implement meaningful open access, the government may at that time need to take action.

II. PRIVACY

As with the open access issue, the critical starting point on the privacy questions is the current state of privacy (and citizens' expectations of privacy) and the ways in which the evolution of the Internet may threaten privacy principles. As many of you know, the Center for Democracy & Technology has long been an advocate for protecting privacy on the Internet, and we have previously had the privilege of addressing this Subcommittee on privacy issues.[5] We will only briefly summarize our analysis of privacy issues on the Internet, and then consider how the proposed AOL Time Warner merger might impact the privacy issue.

CDT believes that a key privacy consideration should be individuals' long-held expectations of autonomy, fairness, and confidentiality, and policy efforts should ensure that those expectations are respected online as well as offline. These expectations exist vis-à-vis both the public and the private sectors. By autonomy, we mean the individual's ability to browse, seek out information, and engage in a range of activities without being monitored and identified. Fairness requires policies that provide individuals with control over information that they provide to the government and the private sector. In terms of confidentiality, we need to continue to ensure strong protection for e-mail and other electronic communications.

As it is evolving, the Internet poses both challenges and opportunities to protecting privacy. The Internet accelerates the trend toward increased information collection that is already evident in our offline world. The trail of transactional data left behind as individuals use the Internet is a rich source of information about their habits of association, speech, and commerce. When aggregated, these digital fingerprints could reveal a great deal about an individual's life. The global flow of personal communications and information coupled with the Internet's distributed architecture presents challenges for the protection of privacy.

The proposed merger of AOL and Time Warner does highlight both the increased risks for privacy problems as the Internet evolves, and the great potential for self-regulatory efforts to enhance privacy protection. Both AOL and Time Warner have access to significant amounts of personal data about their subscribers. For AOL, this includes for example, information about online service subscribers, AOL.COM portal users, and ICQ and instant messaging users. Time Warner has access to informa-

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[4] Until the announcement of its proposed merger with Time Warner, America Online also advocated government action. Since the merger announcement, however, AOL and Time Warner have adopted the approach taken by AT&T in December, by effectively asking everyone to trust them and allow them to implement open access voluntarily, without government fiat.

[5] See, e.g., Testimony of Deirdre Mulligan, Staff Counsel of the Center For Democracy & Technology, Before the Subcommittee on Communications of the Senate Committee on Commerce, Science, and Transportation, July 27, 1999.

tion about ranging from cable subscriber usage to magazine subscriptions. The specter of the merged companies pooling all of their information resources, and then mining those resources for marketing and other purposes, should be cause for concern.

Fundamentally, however, the AOL Time Warner merger does not alter the equation for a privacy solution. Protecting privacy on the Internet requires a multipronged approach that involves self-regulation, technology, and legislation.

On self-regulation, we must continue to press the Internet industry to adopt privacy policies and practices, such as notice, consent mechanisms, and auditing and self-enforcement infrastructures. We must realize that the Internet is global and decentralized, and thus relying on legislation and governmental oversight alone simply will not assure privacy. Because of extensive public concern about privacy on the Internet, the Internet is acting as a driver for self-regulation, both online and offline. Businesses are revising and adopting company-wide practices when writing a privacy policy for the Internet. Efforts that continue this greater internal focus on privacy must be encouraged.

On the technology front, while the Internet presents new threats to privacy, the move to the Internet also presents new opportunities for enhancing privacy. Just as the Internet has given individuals greater ability to speak and publish, it also has the potential to give individuals greater control over their personal information. We must continue to promote the development of privacy-enhancing and empowering technology, such as the World Wide Web Consortium's Platform for Privacy Preferences ("P3P"), which will enable individuals to more easily read privacy policies of companies on the Web, and could help to facilitate choice and consent negotiations between individuals and Web operators.

Finally, we must adopt legislation that incorporates into law Fair Information Practices—long-accepted principles specifying that individuals should be able to "determine for themselves when, how, and to what extent information about them is shared."[6] Legislation is necessary to guarantee a baseline of privacy on the Inter-

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[6] Alan Westin. Privacy and Freedom (New York: Atheneum, 1967) 7. The Code of Fair Information Practices as stated in the Secretary's Advisory Comm. on Automated Personal Data Systems, Records, Computers, and the Rights of Citizens, U.S. Dept. of Health, Education and Welfare, July 1973:

There must be no personal data record-keeping systems whose very existence is secret.

There must be a way for an individual to find out what information about him is in a record and how it is used.

There must be a way for an individual to prevent information about him that was obtained for one purpose from being used or made available for other purposes without his consent.

There must be a way for the individual to correct or amend a record of identifiable information about him.

Any organization creating, maintaining, using, or disseminating records of identifiable personal data must assure the reliability of the data for their intended use and must take precautions to prevent misuse of the data.

The Code of Fair Information Practices as stated in the OECD guidelines on the Protection of Privacy and Transborder Flows of Personal Data *http://www.oecd.org/dsti/sti/ii/secur/prod/PRIV*__EN.HTM:

1. Collection Limitation Principle: There should be limits to the collection of personal data and any such data should be obtained by lawful and fair means and, where appropriate, with the knowledge or consent of the data subject.

2. Data quality: Personal data should be relevant to the purposes for which it is to be used, and, to the extent necessary for those purposes, should be accurate, complete and kept up-to-date.

3. Purpose specification: The purposes for which personal data is collected should be specified not later than at the time of data collection and the subsequent use limited to the fulfillment of those purposes or such others as are not incompatible with those purposes and as are specified on each occasion of change of purpose.

4. Use limitation: Personal data should not be disclosed, made available or otherwise used for purposes other than those specified in accordance with the "purpose specification" except: (a) with the consent of the data subject; or (b) by the authority of law.

5. Security safeguards: Personal data should be protected by reasonable security safeguards against such risks as loss or unauthorized access, destruction, use, modification or disclosure of data.

6. Openness: There should be a general policy of openness about developments, practices and policies with respect to personal data. Means should be readily available of establishing the existence and nature of personal data, and the main purposes of their use, as well as the identity and usual residence of the data controller.

7. Individual participation: An individual should have the right: (a) to obtain from a data controller, or otherwise, confirmation of whether or not the data controller has data relating to him; (b) to have communicated to him, data relating to him:

—within a reasonable time;

Continued

net, but it is not one-size-fits-all legislation. Privacy legislation must be enacted in key sectors such as privacy of medical records. For consumer privacy, there needs to be baseline standards and fair information practices to augment the self-regulatory efforts of leading Internet companies, and to address the problems of bad actors and uninformed companies. Finally, there is no way other than legislation to raise the standards for government access to citizens' personal information increasingly stored across the Internet, ensuring that the 4th Amendment continues to protect Americans in the digital age.

In all of these areas, the positions of AOL and Time Warner are and will be critical to achieving increased privacy protection. Both America Online and Time Warner have strong privacy policies, have generally been quick to respond if lapses or violations are identified,[7] and have been strong supporters of P3P and other privacy-enhancing technology. CDT welcomes the acknowledgement by AOL CEO Steve Case (before the Senate Judiciary Committee earlier this week) that some legislation will be necessary to incorporate best privacy practices on the Internet.

In evaluating the merger, it will be critical to ensure that the merged company will continue a strong commitment to privacy. Just as in the broadband area AOL Time Warner committed to requiring arms length negotiations between different business units within the merged company, the business units of the merged company should continue to maintain their subscriber information separately and in conformance with clearly stated privacy practices.

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The history of the Internet, and the history of telecommunications reform in general, is that policy regimes are first created by consensus among a broad cross section of the community. CDT is committed to participating in any process that helps to build a new social contract embodying democratic values in the emerging broadband world.

WORKING DRAFT—DEFINING "OPENNESS"

Open Access Principles for the Broadband Internet, The Center for Democracy & Technology, February 2000

One of the most prominent—and hard fought—public policy debates over the last year has been whether cable television systems should be forced to permit unaffiliated Internet Service Providers ("ISPs") to offer high-speed "broadband" Internet service over the cable system wires. As this "open access" battle has been waged, many participants in the debate have used, and laid claim to, the concepts of "openness" and "open access." Many ISPs and public interest advocates have demanded that the cable industry "open" their cable systems, and that the government take action to force such "openness." Some cable companies have in turn asserted that their systems already are "open," in that their customers can reach any content on the Internet without restriction. Recently, some leading companies have stated that they intend to "open" their cable networks voluntarily, by allowing some number of unaffiliated ISPs to offer service over the networks.

Throughout this entire debate, however, a critical element has been missing—consensus on what exactly "openness" is. The debate has been about the "how" (market forces, Congressional statute, federal regulatory rule, or other governmental action) without first making clear the "what."

This paper focuses exclusively on the "what," and attempts to define "openness" and "open access" in the context of the debate over broadband access to the Internet. The paper first looks briefly at the critical and unique characteristics of the low-speed "narrowband" Internet, and then maps those characteristics into the broadband world. Based on the principles established in the narrowband world, the paper then identifies specific steps that the Internet industry in general, and broadband providers in particular, must take for the broadband Internet to remain

—at a charge, if any, that is not excessive;

—in a reasonable manner; and,

—in a form that is readily intelligible to him; (c) to be given reasons if a request made under subparagraphs (a) and (b) is denied, and to be able to challenge such denial; and, (d) to challenge data relating to him and, if the challenge is successful to have the data erased, rectified completed or amended.

8. Accountability: A data controller should be accountable for complying with measures which give effect to the principles stated above.

[7] See Testimony of Deirdre Mulligan, Staff Counsel of the Center for Democracy & Technology, before the Subcommittee on Courts and Intellectual Property of the House Committee on the Judiciary, March 26, 1998, at 11–13 (concerning disclosure of subscriber information to the U.S. Navy).

as "open" as the narrowband Internet has been. The principles and specific steps identified are not focused solely on the cable industry, but are intended to be principles and actions applicable to the entire broadband Internet industry.

This paper does not address the "how"—whether broadband Internet market should be allowed to try to take the identified steps on its own, or whether a governmental body should step in and force the networks to be open. This paper also does not attempt to address every public policy issue and concern raised by the evolution of the broadband marketplace today. The paper does not, for example, discuss whether undue market power arises from the aggregation of simultaneous ownership of content and access pipes. Nor does the paper address whether a competitive market is threatened by bundling or other market actions taken by the owners of access facilities.

"Open" Characteristics and Principles of the Narrowband Internet

Before defining "openness" for the broadband Internet, it is critical to understand what that term has come to mean in the narrowband world. In the first comprehensive assessment of the Internet by an American court, a federal court in Philadelphia in 1996 found what it termed "a unique and wholly new medium of worldwide human communication."[1] The narrowband Internet has been "open" at virtually all levels of its existence. The "network of networks" operates using open and freely available technical standards, allowing literally millions of different (and often incompatible) computers to communicate seamlessly. The open protocols used for Internet traffic allow startup companies and individual software designers to create and distribute new modes of communication over the Internet. Speakers, large and small, rely on the openness of the Internet to speak easily, inexpensively, and without significant restriction or limitations on the form or content of the speech.

As judge put it, the "Internet is a far more speech-enhancing medium than print, the village green, or the mails."[2] That judge concluded that "[f]our related characteristics of Internet communication have a transcendent importance" to the conclusion that the Internet deserves the highest levels of constitutional protection:

> First, the Internet presents very low barriers to entry. Second, these barriers to entry are identical for both speakers and listeners. Third, as a result of these low barriers, astoundingly diverse content is available on the Internet. Fourth, the Internet provides significant access to all who wish to speak in the medium, and even creates a relative parity among speakers.[3]

The "openness" of the narrowband Internet translates into an unprecedented ability of speakers to speak and listeners to receive content, free from governmental or private interference. Internet users have a wide range of choices as to how to access the Internet and what to do with the communications medium once online. Users can speak to the entire world with little or no investment. Listeners can access a vast wealth of content quickly and easily, without significant governmentally- or privately-imposed limitations. In short, the Internet offers individuals, communities, non-profit organizations, companies, and governments an unprecedented ability to speak and be heard.

Some of the "open" characteristics of the narrowband world may be threatened by the technological and business developments in the broadband world. This paper seeks to identify the key characteristics of the narrowband world, and "map" them into the developing broadband Internet. The paper then offers specific steps that companies and the Internet industry can take to ensure that the openness of the Internet will continue with broadband technology. In considering the issues raised by broadband technologies, this paper should help in defining the goals that any public policy strategy (whether governmentally imposed or privately implemented) should pursue.

Open Access Principles for the Broadband Internet

Ability to Use the Internet to its Fullest Potential

> In the narrowband world, Internet users are generally free to use their Internet connections to access any part of the Internet and to run any Internet-related application, so long as such use does not harm the operations of the network or the use of the Internet by others. On certain facilities in the broadband world

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[1] American Civil Liberties Union v. Reno, 929 F. Supp. 824, 844 (E.D. Pa. 1996) (available at http://www.ciec.org/victory.shtml).

[2] Id. at 882 (Dalzell concurring).

[3] Id. at 877 (Dalzell concurring).

(those where the "last mile" connection to the user is a shared resource [4]), there is greater potential that an individual user could harm the ability of other users to access the Internet, and thus facility owners may (but may not) need to impose restrictions on use. This increases the risk that a facility owner might impose restrictions for anticompetitive reasons.

Internet users should he able to use their Internet connection to access any part of the Internet and to run any Internet-related application, so long as such use does not harm the operations of the network or the use of the Internet by others.

A. A facility owner should impose no limits on the content, applications, or functionality that an ISP can make available to its customers. In situations where the last mile connection to the individual users is a shared resource, a facility owner may impose reasonable limitations or restrictions on the data flow rates (including burst rates and packet sizes or volumes) that can be provided and supported by an ISP, so long as (a) the limitations arise out of reasonable technical and engineering concerns, and (b) the limitations apply equally to all ISPs providing broadband service.

B. To the extent any technically-required limitations are placed on users' ability to use the Internet, facility owners and the Internet industry in general should engage in research and development efforts to maximize the functionality available to user and thus to minimize any technically-required limitations.

Access to Speech of Others

In the narrowband world, Internet users can access any publicly posted constitutionally protected speech on the Internet free from interference or restrictions imposed by their ISP or facility owner. In the broadband world, this critical feature of the Internet should continue.

Internet users should be able to access any publicly posted speech on the Internet free from interference or restrictions imposed by their ISP or facility owner.

C. A facility owner should impose no limits on the constitutionally protected content that an ISP can make available to its customers (except technically-required limitations, if any, as discussed above), and should allow ISPs and their customers to reach—or filter—any Internet content.

D. In contracting with ISPs, facility owners should ensure that all Internet users on their facilities have access to at least one ISP that offers unrestricted and unfiltered access to constitutionally protected content on the Internet.

In the narrowband world, all speech is available to all Internet users essentially equally, without any particular type of speech (such as commercial speech) being easier or faster to access. In the broadband world, selected high-bandwidth content will be delivered more quickly to users than other content, creating the risk that types of speech will be favored and others disfavored.

The broadband Internet infrastructure should not favor particular types of content over other types.

E. Broadband providers and the Internet industry in general should maximize the ability of broadband users to access a diverse range of broadband, high-bandwidth content, including content of individuals, non-profit organizations, and community entities.

F. Broadband providers within a geographic area should work with, and interconnect with, each other, so as to maximize the ability of broadband users to reach broadband content quickly.

Ability to Speak and Be Heard

In the narrowband world, Internet speakers can post essentially any constitutionally protected speech in any form free from interference or restrictions imposed by their ISP or facility owner, and can do so for relatively little expenditure. In the broadband world, this critical feature of the Internet should continue.

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[4] The term "last mile" is commonly used to refer to the physical connection (e.g., telephone wire for DSL service and fiber and coax cable for cable service) between an end user's home or business and the "central office" or "headend" facilities of the service provider. In a typical cable facility, the total capacity to carry Internet data is shared among many customers of the cable system, and a single customer using an overly large portion of that capacity could harm the ability of other customers to access the Internet.

Internet users should be able to post any constitutionally protected speech in any form free from interference or restrictions imposed by their ISP or facility owner.

G. A facility owner should impose no limits on the constitutionally protected content that an ISP can permit its customers to post to the Internet (except technically-required limitations, if any, as discussed above).

H. The Internet industry should strive to maximize the ability of individual speakers to post speech to the Internet with relatively low expenditure.

In the narrowband world, all speakers can reach all Internet users essentially equally, without any particular type of speaker (such as commercial entities) better able to reach listeners. In the broadband world, as indicated above, selected high-bandwidth content will be delivered more quickly to users than other content, creating the risk that types of speech will be favored and others disfavored.

The broadband Internet infrastructure should not favor particular types of speakers over other types.

I. Broadband providers and the Internet industry in general should strive to maximize the ability of a diverse range of broadband speakers, including individuals, non-profit organizations, and community entities, to reach listeners as quickly and efficiently as can commercial speakers, and to do so at a reasonable cost.

J. Broadband providers within a geographic area should strive to maximize interconnections among providers, so as to maximize the ability of broadband speakers to reach broadband listeners.

Choice of Methods and Providers to Access the Internet

In the narrowband world, most Internet users have a wide range of choices among ISPs offering access to the Internet, and ISPs are able to operate under a wide variety of business models and offer a wide variety of services to users. In the broadband world, users' choices may be much more limited.

Internet users should have choice among broadband facilities (e.g., cable, DSL, wireless, etc.) and, within each facility, among broadband service providers, and both facility owners and the Internet industry should strive to maximize the available choices.

K. Individuals should be able to obtain broadband service over a variety of competing "last mile" facilities.

L. Within each type of last mile broadband Internet access facility, broadband users (whether individuals or businesses) should be able to obtain broadband service from a range of Internet Service Providers (ISPs), including both affiliated and unaffiliated ISPs. A last mile broadband facility owner should allow access to such facility by both affiliated and unaffiliated ISPs.

M. A last mile broadband facility owner should permit third party access by any qualified ISP, constrained only by legitimate technical limitations (if any) on the number of ISPs that can reliably be supported by the facility. To the extent any such limitation exists, facility owners and the Internet industry in general should engage in research and development efforts to maximize the number of ISPs that can be supported over any particular type of facility.

N. A last mile facility owner should permit access by both affiliated and unaffiliated ISPs on a nondiscriminatory basis, specifically (but without limitation) with regard to (a) financial terms, (b) physical access and technical capabilities, and (c) operational support systems.

O. Broadband users should not be required to pay for service from an ISP affiliated with the facility owner in order to obtain service from an unaffiliated ISP.

P. A facility owner should permit unaffiliated ISPs to interconnect into the communications system at one or more reasonable and efficient points, and an unaffiliated ISP should be permitted to transport its customers' Internet traffic from the interconnection point(s) onto the ISP's facilities for delivery to the requested destinations.

Senator BURNS. Thank you, Mr. Berman. And I also want to thank you for your energy and leadership in the Internet Caucus. You have put a lot of time and energy into that and I think it is paying off. There is a lot of interest still in this. And as these issues evolve, there will always be a place for that caucus and to freely discuss these kind of issues.

It is my pleasure now to introduce Gene Kimmelman, who is Co-Director of Consumers Union. Thank you for coming this morning.

STATEMENT OF GENE KIMMELMAN, CO-DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION

Mr. KIMMELMAN. Thank you, Mr. Chairman, on behalf of Consumers Union, publisher of Consumer Reports. We appreciate the opportunity to testify on the AOL-Time Warner merger.

Mr. Chairman, as I listened to Mr. Case and Mr. Levin, I am just wowed. All those new services combined over cable TV, with Internet, their commitments, open access, worrying about the digital divide, this sounds like a panacea. And maybe if we wanted one company to provide everything to us, these would be the two individuals that we might want to pick to run it. But usually in our marketplace, we do not choose monopoly or dictatorship. And even if it is benevolent, we have concerns.

They describe their DNA and their sense of values and their long history. But I recall, Mr. Levin's company working with TCI, having leveraged NBC, which testified about this leverage before this Committee in the eighties. Time Warner and TCI did not want a news channel from NBC on cable that would compete with their CNN. And the end result was CNBC. It did create diversity. CNBC is different from CNN. Levin and Case are all for diversity. But it was under their control, under their guidance.

And they talk about open access. Mr. Case says he always wanted the marketplace. His open access commitment has no enforcement mechanism. He does not want the government involved. There is no enforcement even if it is a contract with an independent Internet service provider. He does not want to state any commitment, so that if somebody has a complaint there is no right to a remedy. What is a right without a remedy?

So I urge the Committee to look very carefully at the substance of these commitments and the details of this merger. Because the underlying market structure raises some significant antitrust and competition concerns.

In my testimony, Mr. Chairman, I show the relationship between AOL-Time Warner and AT&T. AT&T serves more than 40 percent of all cable customers, with its merger with MediaOne, and through MediaOne, will own more than 10 percent of AOL, which through Time Warner's cable systems serves another 20 percent approximately of American consumers. Almost two-thirds of all consumers are within this tight web of companies. More than half of the most popular cable programming, more than half of the narrow-band Internet access, more than three-quarters of today's broadband Internet access market is in this corporate web, not to mention publishing—more than 33 magazines, records, books.

Is that a problem? Well, yes, just look at the new services being developed by AOL-Time Warner. I have appended a *USA Today* article to my testimony, about AOL TV, which is fabulous. This is point and click Internet access. It is channel surfing on your television with an AOL icon, channel 4, AOL icon, channel 7, just like hitting a channel, you get into AOL, you get into the Internet, you get anything you want from AOL.

Is that subject to open access? I have not heard them say anything like that. That is a unique, new set of services, combining television and broadband Internet, that is not comparable to anything else in the marketplace or foreseeable.

Can a telephone company do it with digital subscriber line? No, they cannot do the video quality. They cannot do the speed.

Can MMDS, can satellite do it? No. They might be able to do one-way video, but they cannot do the feedback loop as quickly. No one else can offer this kind of service except over the cable wire. It is unique. It is wonderful. But if it is tied up with a company controlling lines into almost two-thirds of homes and no one else can do it, we have an enormous problem.

So we believe there is a significant antitrust problem with this merger. The concentration of power in transmission and content mean that everyone else in the programming industry for television, in the Internet service industry needs to be on AOL-Time Warner systems, and probably AT&T's systems. Otherwise they cannot reach the public. They cannot get in front of the eyeballs that draw investment capital, that draw the advertiser revenue to make them viable.

You can offer other services. You can go to yesterday's Internet and you can offer a lot of old-fashioned services that may be very popular to a smaller market. Businesses that predominently need data services, can use telephone wires. But the mass consumer market that likes to just channel surf and point and click will have a wonderful opportunity from, unfortunately, possibly only one company. We want that to change. We want that to be an open system. We want that to be subject to nondiscrimination and open access.

Now, Mr. Chairman, at the announcement of this merger, the news reports indicated that there was one major theme that kept coming from the CEOs and the other top officials at AOL-Time Warner. And that was that this deal "was all about shaping people's lives." And we have heard an awful lot about the good things that they are committed to in terms of their values.

Now, is that what the American people want from even the best corporation? Do we want a $350 billion company that is shaping our lives? Is that what a business is supposed to do? Or is it supposed to be responding to consumer demand, responding to consumer needs, not shaping them?

We are very concerned, Mr. Chairman. And I will conclude by saying that this merger involves interlocking relationships in the cable industry and the Internet community that are very dangerous to consumers. So we believe this merger should be substantially restructured under our antitrust laws, and under the oversight of the Federal Communications Commission. And if the companies will not allow it to be restructured, if they will not allow their open access deal to be subject to real enforcement in the marketplace, their merger should be rejected.

Thank you.

[The prepared statement of Mr. Kimmelman follows:]

PREPARED STATEMENT OF GENE KIMMELMAN, CO-DIRECTOR, WASHINGTON OFFICE, CONSUMERS UNION

To protect consumers' interest in the development of competitive markets for all communications services, Consumers Union [1] believes that the Federal Trade Commission (FTC) and Federal Communications Commission (FCC) should reject or seek substantial modification of the AOL-Time Warner merger. Coming on the heels of massive consolidation in the cable television industry,[2] the proposed merger of AOL with Time Warner poses enormous dangers for the preservation of vibrant Internet competition in a broadband environment, and threatens the emergence of broad-based competition to the cable TV industry.

This merger should not be viewed in isolation. AT&T has already purchased all of Telecommunications Inc.'s (TCI) cable properties. If the proposed merger of AT&T with MediaOne is approved, AT&T would own about 25 percent of Time Warner Entertainment—most of Time Warner's cable systems, plus some of its programming and studio properties.[3] Through Time Warner's previous merger with Turner Broadcasting Systems, AT&T already owns a nine percent "passive" stake in Time Warner.[4]

These joint holdings form the basis of a tight-knit cartel that could dominate and control distribution of the broadband and television services that the vast majority of consumers want to see and use. Figure 1 illustrates the AT&T/Time Warner ownership links that, with AOL, account for:

1. almost two-thirds of all U.S. cable or multichannel video households;
2. nearly one-half of the most popular cable television stations/networks;[5]
3. more than one-half of narrowband Internet users;[6]
4. more than three-fourths of broadband users;[7]
5. publishing of more than 10 percent of the nation's books and 33 magazines read by 120 million people;[8]
6. sale of 119 million records last year, about one-sixth of the market;[9] and
7. movies produced by Warner Brothers and New Line Cinema, about one-fifth of the domestic market.[10]

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[1] Consumers Union is a nonprofit membership organization chartered in 1936 under the laws of the State of New York to provide consumers with information, education and counsel about goods, services, health, and personal finance; and to initiate and cooperate with individual and group efforts to maintain and enhance the quality of life for consumers. Consumers Union's income is solely derived from the sale of *Consumer Reports*, its other publications and from noncommercial contributions, grants and fees. In addition to reports on Consumers Union's own product testing, *Consumer Reports* with approximately 4.5 million paid circulation, regularly, carries articles on health, product safety, marketplace economics and legislative, judicial and regulatory actions which affect consumer welfare. Consumers Union's publications carry no advertising and receive no commercial support.

[2] Consumers Union, Consumer Federation of America and Media Access Project, "Breaking The Rules: AT&T's Attempt to Buy a National Monopoly in Cable TV and Broadband Internet Services," August 17, 1999.

[3] In the Matter of Applications for Consent to the Transfer of Control of Licenses, MediaOne Group, Inc., To AT&T Corp., Applications and Public Interest Statement of AT&T and MediaOne Before the FCC, July 7, 1999; and "Breaking The Rules," op. cit.

[4] Federal Trade Commission, In the Matter of Time Warner Inc., Turner Broadcasting Systems Inc., Telecommunications Inc. and Liberty Media Corp., Complaint, File No. 961–0004, Sept. 1997.

[5] In the Matter of Annual Assessment of the Status of Competition in Markets for the delivery of Video Programming, CS Dkt. No. 99–230, Sixth Annual Report, FCC, Jan. 14, 2000.

[6] "Breaking the Rules," op. cit.

[7] Id.

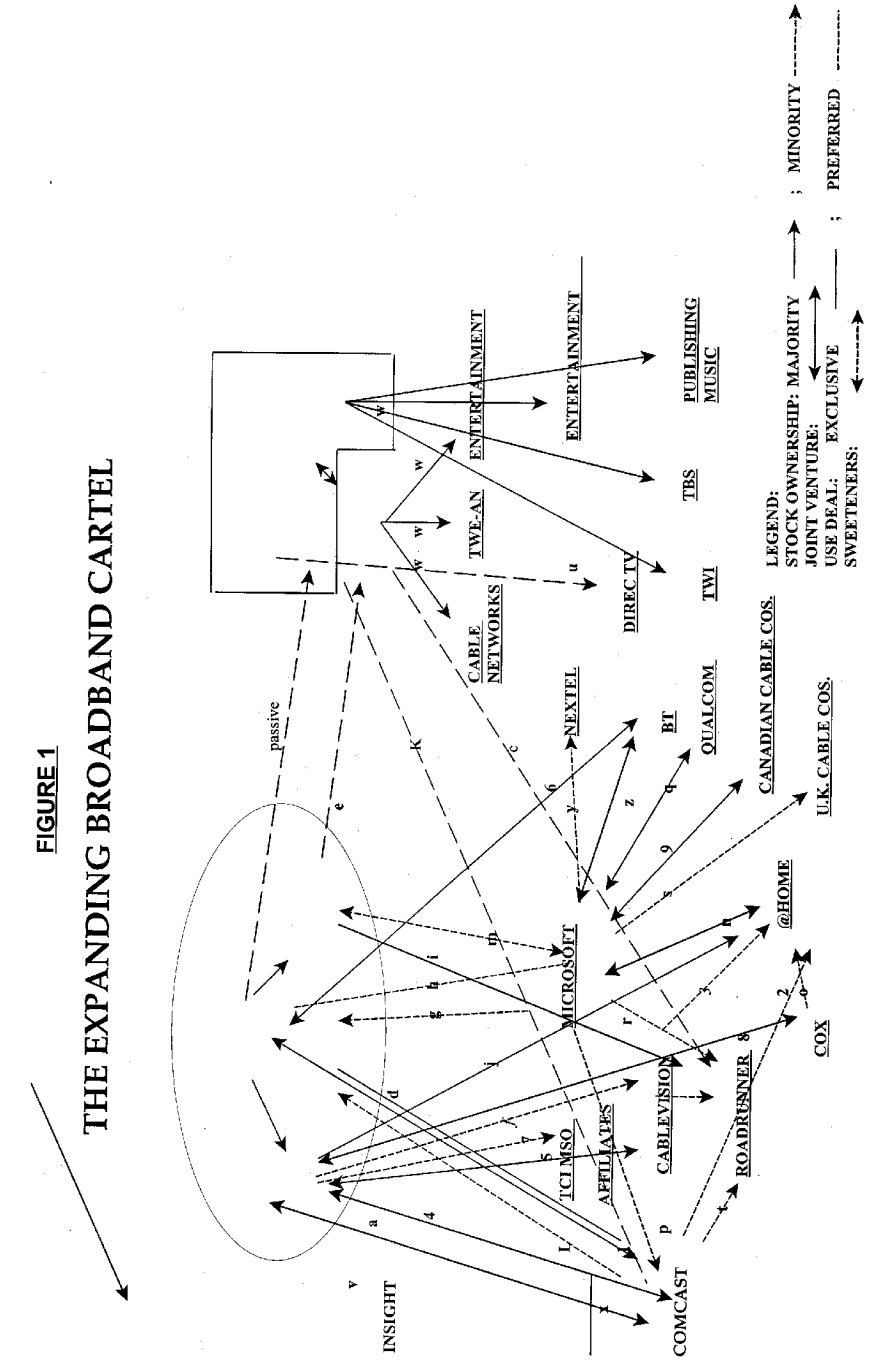
[8] Saul Hansell, "AOL Agrees to Buy Time Warner for $165 Billion; Media Deal is Richest Merger," New York Times, Jan. 11, 2000.

[9] Id.

[10] Id.

FIGURE 1

THE EXPANDING BROADBAND CARTEL



DESCRIPTIONS OF RELATIONSHIPS AND IDENTIFICATION OF SOURCES:

1 = $1.5 billion breakup fee (10)
2 = Large minority (12); 12% (16)
3 = Minority (6)
4 = QVC Joint venture (16)
5 = Programming joint venture through Liberty (22); Investment (19)
6 = Joint venture (20)
7 = TCI MSO Joint ventures (4)
8 = Programming joint venture through Liberty (22)
9 = Set top box joint venture (15)

a = 10% Ownership of Time Warner (23)
b = exclusive deal for telephony (6)
c = 25% (6)
d = exclusive deal for telephony (5)
e = 26% (1) (16)
f = 25% (1) (4)
g = 3% ownership (3) (5)
h = up to ten million set tops guaranteed (3)
i = Majority (5); 25% (6)
j = 39% (6)
k = 25% (6)
L = Exchange of systems is likely to be consummated with a stock swap (2)
m = Microsoft gets to buy MediaOne's European cable systems (9)
n = Windows NT in @Home solutions network (13)
o = Minority (6)
p = 11% ownership (5) (12) (17)
q = Wireless Internet (8)
r = Through Comcast (5) (12); Direct (18); 10% (16) (20)
s = 5% NTL, 30% Telewest, 30% Cable & Wireless (14)
t = Minority (5) (12)
u = small ownership (25)
v = 34% via MediaOne (1)
w = Cable systems are primarily owned in TWE; TBS is owned by Time Warner; Entertainment is split between Time Warner and TWE (24)
x = Manager of AT&T owned systems (7) (11)
y = 4% (8)
z = Wireless Internet (8)

SOURCES:

(1) "AT&T Household Reach to be Issue in MediaOne Merger Review," *Communications Daily*, May 10, 1999.
(2) "War Ends: AT&T and Comcast Cozy up in Solomon-Like Deal," *Broadband Daily*, May 5, 1999.
(3) "AT&T Comes Out on Top in Microsoft Deal," *Broadband Daily*, May 10, 1999.
(4) "FCC to Scrutinize AT&T MediaOne Deal," *Broadband Daily*, May 10, 1999.
(5) "AT&T Poised to Regain Long Reach, Via Cable," *Washington Post*, May 5, 1999.
(6) "AT&T Goes Cable Crazy," *Fortune,* May 24, 1999.
(7) "AT&T Chief's $120 Billion Plan Capped by Deal for MediaOne," *Washington Post*, May 6, 1999.
(8) "Microsoft to Buy A Stake in Nextel," *Washington Post*, May 11, 1999.
(9) Allan Sloan, "AT&T-MediaOne Soap Opera Has Just About Everything," *Washington Post*, May 11, 1999.
(10) "Pact Ends MediaOne Bid War," *Washington Post*, May 6, 1999.
(11) "Comcast, in AT&T Accord, Abandons MediaOne Bid," *Wall Street Journal*, May 6, 1999.
(12) "As Worlds Collide, AT&T Grabs Power Seat," *Wall Street Journal*, May 6, 1999.
(13) "Microsoft, @Home Make Broadband Pact," *ZDNet*, May 13, 1999.
(14) "A Contest Is On In Britain to Revolutionize Cable TV," *New York Times*, May 13, 1999.

(15) "Rogers Communications and Microsoft Announce Agreements to Develop and Deploy Advanced Broadband Television Services in Canada," Microsoft Presspass, July 12, 1999.
(16) Schiesel, Seth, "Concerns Raised as AT&T Pursues a New Foothold," *New York Times*, May 6, 1999.
(17) Fabrikant, Geraldine and Seth Schiesel, "AT&T Is Seen Forging Link to Microsoft," *New York Times*, May 6, 1999.
(18) Markoff, John, "Microsoft Hunts Its Whale, the Digital Set-Top Box," *New York Times*, May 10, 1999.
(19) "ACTV Gets Boost from Liberty Digital," *Broadband Daily*, May 17, 1999.
(20) Wolk, Martin, "Microsoft Poised for Major Role in New Industry," *Reuters*, May 6, 1999.
(21) Fabrikant, Geraldine and Laura M. Holson, "Key to Deal for MediaOne: Keeping the Losing Bidder Happy," *New York Times*, May 6, 1999.
(22) Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CC Docket No. 98–102, Fifth Report, Table D–6.
(23) Federal Communications Commission, In the Matter of Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming, CC Docket No. 98–102, Fifth Report, Table D–1.
(24) "Transfer of Control Application," *Transfer of Control of FCC Licenses MediaOne Group, Inc. to AT&T Corp.,* July 7, 1999.
(25) "Transfer of Control Application," *Transfer of Control of Licenses Time Warner Inc. and America Online., to AOL Time Warner Inc.,* February 11, 2000.

Most significantly, AOL and Time Warner are developing AOLTV—a new generation of easy-to-use, combined television and broadband Internet access services—that virtually no one else in the market could challenge in the foreseeable future:

> "The service [AOLTV], expected this summer, could be profoundly important," says Merrill Lynch's Internet specialist Henry Blodget. If the service is a hit, the company's clout over interactive communications might become "analogous to Microsoft's control of the PC operating system."
>
> "The more ways a subscriber interacts with AOL," Blodget says, "the less likely the subscriber will be to pull up stakes and go with a different provider—especially when the entire family has programmed the service with individual buddy lists, calendars and e-mail accounts." What wows observers is the proven appeal of the services AOLTV harnesses. AOL subscribers, now 21 million, wouldn't have to boot up their computers to access e-mail, instant messaging, chats, calendars, and online shopping or investment services.
>
> People could use them while watching, say, "Who Wants to Be a Millionaire" by pointing a remote or wireless keyboard at a set-top decoder that splits the screen to show online content and the TV show.
>
> Initially, people wanting AOLTV would need a special set-top box to connect the TV to a phone line.
>
> But the deal with Time Warner, the No. 1 cable operator with more than 13 million customers, opens the way for AOLTV to dominate interactive TV. It could become a seamless part of the cable TV package, eliminating the need for a separate set-top box and a phone line.[11]

Although this particular set of services is not yet available, the unique ability to offer consumers a "point-and-click" TV-based service, guided by remote control, illustrates the potential danger of allowing so much distribution capacity and content to be locked up in one corporate entity.

For example, no companies have been more eloquent than AOL and AT&T at describing how other distribution technologies—like phone companies' Digital Subscriber Line (DSL) services, satellite and other wireless services (e.g., MMDS)—cannot offer comparable television-quality services or the interactive speed of broadband services offered over a cable wire. We provide a lengthy presentation of this persuasive argument and market analysis in Attachment B. And other independent analyses support the conclusion that these technologies will not be able to

[11] See Attachment A, David Lieberman, "AOL angles for TV viewers," *USA Today,* Feb. 24, 2000.

compete effectively, for the foreseeable future, with cable for mass-market consumer services that combine television with broadband Internet services.[12]

When these technical advantages are added to enormous control of cable distribution systems in the Time Warner "family" and its vast stockpile of popular television, Internet and other content services, it is obvious that the AOL-Time Warner merger could substantially harm consumer choice and drive up prices for a broad variety of cable-based services. Everyone in the television programming and broadband Internet service markets will need to reach enough "eyeballs" to obtain the financing and advertiser support necessary to make their services financially viable. This will require carriage on Time Warner's and AT&T's cable systems. If AOLTV takes off, the need for open access to cable lines for traditional online services may be dwarfed by a new combined service where the AOL brand is the only Internet gateway that provides TV viewers immediate access by remote control.

Unfortunately, the FCC has failed to require nondiscriminatory open access to cable systems or effectively limit horizontal ownership of cable systems, and the Clinton Administration has taken a hands-off approach to media and communications mergers. This leaves consumers at risk of losing the market's potential to expand competition to cable TV monopolies and to preserve Internet competition using new broadband technologies. AOL's and Time Warner's recently announced "memorandum of understanding" does not alleviate this concern. While we commend the companies for taking a first step to outline the elements that open access would entail, their agreement is meaningless unless disputes about its terms are subject to public oversight and independent third-party enforcement.

As the quotes from AOL in Attachment B indicate, it was not long ago that AOL believed that regulation was necessary to make an open access policy work. Given that the elements of open access described in the memorandum only make sense if AOL's and AT&T's description of cable's monopoly power in Attachment B is accurate, it is difficult to understand why these companies should be trusted to enforce a policy against their cable monopolies' financial self interest.

Therefore, Consumers Union will ask the FTC and FCC to reject the AOL-Time Warner deal unless it is significantly restructured. To prevent horizontal concentration in the cable and broadband markets, all ownership links and preferential arrangements between Time Warner and AT&T must be severed. In addition AOL should be required to divest its holdings in Time Warner's satellite competitor, DIRECTV. Finally, a nondiscriminatory open access policy with public accountability should be implemented before this merger is cleared. Such a policy must include consideration of new services that combine traditional television with new interactive broadband Internet services, to ensure that nondiscrimination principles govern an evolving marketplace.

WHO DO YOU TRUST?

AOL AND AT&T . . . WHEN THEY CHALLENGE THE CABLE MONOPOLY

OR

AOL AND AT&T . . . WHEN THEY BECOME THE CABLE MONOPOLY?

February 2000

I. COMMERCIAL INTERESTS AND PUBLIC POLICY FLIP-FLOPS

A. Changing Policy Positions

Before they purchased cable TV companies, both AT&T and AOL were vigorous and prominent advocates for the proposition that governments need to adopt a public policy to ensure fair competition and open access to the broadband Internet. Promptly upon the acquisition of cable wires—the very bottleneck facilities about which they had complained so loudly—they reversed their policies and ceased supporting a public obligation to provide open access to cable facilities. Yet, they continue to demand that open access requirements be imposed on other types of facilities that they do not own.

While this is certainly not the first policy flip-flop driven by merger and acquisition, it is unique given what AOL and AT&T are seeking from policymakers: a trust-me, hands-off approach to open access. They have made their honesty an issue by claiming that they can be trusted to do what they previously claimed could only be accomplished through public policy action. Therefore, we believe it is appropriate

[12] Sanford C. Bernstein & Co., and McKinsey & Co., "Broadband!" January 2000; "The ISP Directory," *Washington Post,* Oct. 29, 1999; and David Lieberman, "Bridging the Digital Divide," *USA Today,* Oct. 11, 1999.

to scrutinize whether these companies can be simply trusted to open their cable networks to nondiscriminatory, open access for nonaffiliated internet service providers (ISPs).

If AOL and AT&T were just expressing a self-interested, but inaccurate, description of cable's monopoly power before they purchased cable properties, then how can they be "trusted" to do anything other than follow their current self-interest in exercising control over access to their cable systems? On the other hand, if their previous policy positions reflected an accurate description of the market structure and critical steps needed to ensure open access—as we believe they did—then how is it possible for the "market," as they described it, to open itself up? This paper offers a detailed description of the market structure and elements of open access as presented to the public by AOL and AT&T before they sought to become cable companies through merger.

Based on AOL and AT&T's past assessment of the market, which we believe is accurate and coincides with our own past research,[1] how can the public trust them to do anything other than exercise the market power that they claimed cable companies possess? Why should policymakers entrust open access rules to a cable market dominated by AOL and AT&T, when those companies provided policymakers with market analysis demonstrating that openness can only be achieved through regulatory mandate?

B. Increasing Urgency for Public Policy to Require Open Access

The AOL flip-flop resulting from its acquisition of Time Warner, coming on the heels of the AT&T merger with MediaOne, is a special source of concern. These transactions push the ongoing trend of concentration and consolidation in the cable TV and broadband and Internet industries to alarming new levels. To trust them to voluntarily refuse to exercise monopoly power that they previously sought government control over is like relying on a dictator to act benevolently. Their economic interests will inevitably drive them to abuse their market power.

We now face the prospect of having two huge, interconnected companies—AT&T and AOL—completely dominating the broadband landscape. First, they would own over half of all cable wires in the nation and half of the most popular cable TV programming. They would have over half of the narrowband Internet subscribers and at least three-quarters of all residential broadband Internet subscribers.

Second, the cable industry has never behaved in a competitive manner and this merger makes competition even less likely.[2] Major cable companies never overbuild one-another's facilities. They never compete head-to-head in the wires business and they are joint ventured up to their eyeballs in programming.[3] The AOL-Time Warner merger creates one, interconnected set of owners of broadband service providers since AT&T owns more than 10 percent of AOL-Time Warner through MediaOne's substantial ownership of Time Warner Entertainment. Indeed, AOL-Time Warner executives trumpeted the fact that the first call they made after announcing the merger was to AT&T CEO Michael Armstrong to offer to work together.

Third, AOL was being counted on by some to use its strong position in the narrowband Internet market to propel the telephone industry's high-speed technology (Digital Subscriber Line or DSL) forward as a competitor to cable. DSL is behind cable in roll out and subscribers and has significant technological disadvantages compared to cable, including geographic coverage and bandwidth. It was hoped that AOL's marketing and money would make this less attractive alternative a future competitor for cable, particularly in the residential sector, where DSL's limitations are greatest. There could be no clearer vote of no confidence in DSL than AOL's acquisition of Time Warner.

In order to allay fears about the remarkable concentration that is taking place in the industry, these companies have offered a series of explanations and claims that actual and potential competition will alleviate or prevent market power problems. When these arguments fail to quiet critics and the companies are pressed to provide better assurances, the companies insist that they can be counted on to voluntarily negotiate fair arrangements for access to their newly acquired facilities. These promises stand in sharp contrast to the statements they made before they secured a favored place on the information superhighway by purchasing exclusive rights to its most attractive high-speed lanes.

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[1] Consumer Federation of America, Consumers Union, and Media Access Project, Breaking the Rules: AT&T's Attempt to Buy a National Monopoly in Cable TV and Broadband Internet Service, August 17, 1999; Consumer Federation of America, Transforming the Information Super Highway into a Private Tool Road: The Case Against Closed Access Broadband Internet Systems, September 20, 1999.

[2] Breaking the Rules.

[3] Breaking the Rules.

This paper demonstrates that their statement about open access before they obtained this advantage should carry special weight in informing policy makers about the demands that should be placed on them as facilities owners. The paper relies on official statements made to governmental entities by these corporations. They loudly demanded a public policy that imposes open access obligations on broadband facility owners before their commercial interests in the issue changed. The purpose of this paper is not to chastise the companies for changing positions, although it does point out the many ways in which what they now say contradicts what they said so recently. Rather, the purpose of the paper is to understand why they were so adamant to secure open access to cable facilities. There are still thousands of Internet service providers out there who have not been able to purchase their own wires, and never will be. They still need the protections that these two huge corporations demanded.

AT&T made a lengthy filing before the Canadian Radio-Television and Telecommunications Commission from the perspective of an unaffiliated content provider owning no wires in Canada.[4] It argued strongly that an open access requirement is necessary to promote competition and ensure that unaffiliated content providers would not be discriminated against by the owners of broadband access facilities. In the process, it provided a detailed and point-by-point refutation of every one of the arguments that AT&T, as a dominant cable operator in the United States, has made against open access.

AOL's advocacy of a public policy requiring open access is well known and its overnight reversal of position has attracted a great deal of attention. It argued vigorously for open access at the federal level.[5] What is less well known is the detailed description of open access that AOL offered a couple of months before it acquired Time Warner.[6] The City of San Francisco witnessed one of the most prolonged fights over open access, supporting the concept but requiring technical, legal and economic analysis to flesh it out before it imposed a requirement. AOL, which had fought bitterly for open access in the City, answered the challenge by outlining not only the justification for open access, but a road map to the light handed requirements that would keep the broadband Internet open.

Contrast that position to AOL's current stance. When AOL chairman Steve Case announced the merger with Time Warner, he said, "We always hoped [open access] would come through the marketplace, rather than having to get government involved." Time Warner chief executive Gerald Levin said that the two companies were "going to take the open access issue out of Washington, out of city hall, to the marketplace." [7]

Although the advocacy of AT&T and AOL for open access for cable modems for broadband Internet service are the central concern in this paper, it is important to note that these two corporations have also advocated open access for other technologies. AT&T argues for open access to telephone networks for advanced services. Its most recent statements, filed in the U.S. in late-January 2000, make especially interesting reading in light of the vigorous fight AT&T has put up against open access requirements for its cable systems.[8]

The sharp reversal of position underscores the need for binding public policy, rather than vague private sector promises, to protect and promote competition in the next generation of Internet development. To put the matter bluntly, it is patently obvious that important public policies which will determine the free flow of commerce and information in the "Internet Century" cannot be left to the whims of the commercial interests of large corporations that change their views with every merger or acquisition.

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[4] AT&T Canada Long Distance Services, "Comments of AT&T Canada Long Distance Services Company," before the Canadian Radio-television and Telecommunications Commission, Telecom Public Notice CRTC 96–36: Regulation of Certain Telecommunications Service Offered by Broadcast Carriers, February 4, 1997.

[5] At the federal level, AOL's most explicit analysis of the need for open access can be found in "Comments of America Online, Inc.," In the Matter of Transfer of Control of FCC Licenses of MediaOne Group, Inc. to AT&T Corporation, Federal Communications Commission, CS Docket No. 99–251, August 23, 1999 (hereafter, AOL, FCC).

[6] America Online Inc., "Open Access Comments of America Online, Inc.," before the Department of Telecommunications and Information Services, San Francisco, October 27, 1999.

[7] Press Conference, January 10, 2000.

[8] "Comments of AT&T Corp. in Opposition to Southwestern Bell Telephone Company's Section 271 Application for Texas," In the Matter of Application of SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Texas, Federal Communications Commission, CC Docket No. 00–4, January 31, 2000 (hereafter, AT&T SBC Comments).

C. The Government Role in Ensuring Open Access

Did these companies really advocate a role for government policy to ensure open access? There is no doubt about it.

1. AOL

While AOL always intended for private parties to implement open access by negotiating the necessary details to implement an obligation created by government action, it simply cannot hide from the critical role it felt government had to play. AOL urged governments to make an unequivocal commitment to a comprehensive and meaningful policy of open access that clearly signaled that closed access is not acceptable. It urged San Francisco to back up that commitment by providing a private right of action and a threat of government enforcement. AOL stated:

> The City's critical and appropriate role is to establish and firmly embrace a meaningful open access policy, not to manage the marketplace. We believe that once such a policy is fully in place, the industry players will negotiate the details to fairly implement open access. The City thus should not have to play an active role in enforcing nondiscriminatory pricing or resolving pricing disputes. Rather, the City should simply adopt and rely on a rule that a broadband provider must offer high speed Internet transport services to unaffiliated ISPs on the same rates as it offers them to itself or its affiliated ISP(s). The City's unequivocal commitment to this policy and the resulting public spotlight should offer enforcement enough, and indeed we expect that cable operators will adjust their ways readily once they understand that a closed model for broadband Internet access will not stand. When necessary, the opportunity to seek injunction or bring a private cause of action would offer a fallback method of obtaining redress . . .
>
> As stated above, the City's role is to establish a comprehensive open access policy with an effective enforcement mechanism. Network management issues are best left to the industry players, and the City need not play a hands-on role in this area. The companies involved are in the best position to work out specific implementation issues. This is not to say, however, that a reluctant provider would not have the ability to interfere with the successful implementation of an open access regime. Accordingly, through its enforcement policy if necessary, the City should ensure that the necessary degree of cooperation is achieved. (AOL, pp. 4–5).

AOL did not have to defend the need for open access in its comments to San Francisco, since the proceeding was to implement open access requirements. It did, however, pat the city on the back for endorsing open access. As AOL put it

> AOL applauds the City for taking this critical step in the implementation of the Board of Supervisors' open access resolution, which wisely supports consumers' freedom to choose their Internet service provider and to access any content they desire—unimpeded by the cable operator. (AOL, p. 1).

AOL also offered its arguments for open access in the FCC's proceeding overseeing the AT&T/MediaOne merger.

> What this merger does offer, however, is the means for a newly "RBOC-icized" cable industry reinforced by interlocking ownership relationships to (1) prevent Internet-based challenge to cable's core video offerings; (2) leverage its control over essential video facilities into broadband Internet access services; (3) extends it control over cable Internet access services into broadband cable Internet content; (4) seek to establish itself as the "electronic national gateway" for the full and growing range of cable communications services.
>
> To avoid such detrimental results for consumers, the Commission can act to ensure that broadband develops into a communications path that is as accessible and diverse as narrowband. Just as the Commission has often acted to maintain the openness of other late-mile infrastructure, here too it should adopt open cable Internet access as a competitive safeguard—a check against cable's extension of market power over facilities that were first secured through government protection and now, in their broadband from, are being leveraged into cable Internet markets. Affording high-speed Internet subscribers with an effective means to obtain the full range of data, voice and video services available in the marketplace, regardless of the transmission facility used, is a sound and vital policy—both because of the immediate benefit for consumers and because of its longer-range spur to broadband investment and deployment. Here, the Commission need do no more than establish an obligation on the merged entity to pro-

vide non-affiliated ISPs connectivity to the cable platform on rates, terms and conditions equal to those accorded to affiliated service providers. (AOL, FCC, p. 4).

2. AT&T

AT&T's policy recommendations in Canada were oriented toward a federal agency. It argued that federal regulatory authorities should not forbear regulation, which is exactly the opposite of what it now argues in the U.S.

> AT&T Canada LDS submits that the application of the Commission's forbearance test to the two separate markets for broadband access and information services supports a finding that there is insufficient competition in the market for broadband access services and the market for information services to warrant forbearance at this time from the regulation of services when they are provided by broadcast carriers. As noted above, these carriers have the ability to exercise market power by controlling access to bottleneck facilities required by other service providers. It would appear, therefore, that if these services were deregulated at this time, it would likely impair the development of competition in this market as well as in upstream markets for which such services are essential inputs. (AT&T, p. 15).

AT&T argued that vertically integrated cable and telephone facility owners possess market power and have to be prevented from engaging in anticompetitive practices. These are the very same arguments AOL made in the U.S. over two years later.

> The dominant and vertically integrated position of cable broadcast carriers requires a number of safeguards to protect against anticompetitive behavior. These carriers have considerable advantages in the market, particularly with respect to their ability to make use of their underlying network facilities for the delivery of new services. To grant these carriers unconditional forbearance would provide them with the opportunity to leverage their existing networks to the detriment of other potential service providers. In particular, unconditional forbearance of the broadband access services provided by cable broadcast carriers would create both the incentive and opportunity for these carriers to lessen competition and choice in the provision of broadband service that could be made available to the end customer. Safeguards such as rate regulation for broadband access services will be necessary to prevent instances of below cost and/or excessive pricing, at least in the near-term.
>
> Telephone companies also have sources of market power that warrant maintaining safeguards against anticompetitive behavior. For example, telephone companies are still overwhelmingly dominant in the local telephony market, and until this dominance is diminished, it would not be appropriate to forebear unconditionally from rate regulation of broadband access services (AT&T, p. 15).
>
> In the opinion of AT&T Canada LDS, both the cable companies and the telephone companies have the incentive and opportunity to engage in these types of anticompetitive activities as a result of their vertically integrated structures. For example, cable companies, as the dominant provider of broadband distribution services, would be in a position to engage in above cost pricing in uncontested markets, unless effective constraints are put in place. On the other hand, the telephone company will likely be the new entrant in broadband access services in most areas, and therefore expected to price at or below the level of cable companies. While this provides some assurances that telephone companies are unlikely to engage in excessive pricing, it does not address the incentive and opportunity to price below cost. Accordingly, floor-pricing tests would be appropriate for services of both cable and telephone companies. (AT&T, pp. 16–17)

Furthermore, in the case of both cable and telephone broadcast carriers, safeguards would also need to be established to prevent other forms of discriminatory behavior and to ensure that broadband access services are unbundled. (AT&T, p. 17).

II. THE NEED FOR OPEN ACCESS POLICY: ANALYSIS OF SUPPLY AND DEMAND FACTORS

The recommendation that government requirements for open access are necessary to promote and protect competition rests on extensive analysis of market structure. A comprehensive case was laid out by AT&T in Canada and AOL in the U.S, which rejected each of the major arguments against open access. AT&T/AOL cited at least five fundamental supply-side characteristics that support the recommendation for open access and three demand-side characteristics.

A. Supply-Side

1. Vertical Integration

AT&T drove a very hard bargain when it came to the question of regulation of access to broadband facilities. It viewed one fundamental problem as leveraging market power from the core business of vertically integrated facilities owners who have a dominant position in an adjacent market. Thus, it advocated regulation of access not only because there was a lack of competition in the new market (broadband access), but also because there was a lack of competition in the core markets that the facilities owner dominates (cable TV service for cable operators and local exchange service for telephone companies).

> In terms of the appropriate period in which to apply the safeguards, AT&T Canada LDS is of the view that safeguards against anticompetitive behavior would need to be maintained for cable companies until competition in the provision of broadband access services has been established in a substantial portion of the market . . .
>
> In the case of cable companies, there would need to be evidence that vigorous and effective competition had evolved in a substantial portion of the market for broadband access services and in their core businesses (i.e., the distribution of broadcast programming services). Moreover, in order to protect against abuse of any residual market power, safeguards should be in place, including the implementation of an effective price mechanism for basic and extended basic cable services in order to prevent instances of cross-subsidization, and provision of nondiscriminatory and unbundled access to the broadband service of cable broadcast carriers. (AT&T, pp. 17 . . . 18)
>
> Similar considerations apply to the case of telephone companies with respect to local telephone services. Until vigorous competition in local telephone markets exists, some safeguards . . . will be needed. (AT&T 17).

AOL described the threat of vertically integrated cable companies in the U.S. in precisely these terms.

> At every link in the broadband distribution chain for video/voice/data services, AT&T would possess the ability and the incentive to limit consumer choice. Whether through its exclusive control of the EPG or browser that serve as consumers' interface; its integration of favored Microsoft operating systems in set-top boxes; its control of the cable broadband pipe itself; its exclusive dealing with its own proprietary cable ISPs; or the required use of its "backbone" long distance facilities; AT&T could block or choke off consumers' ability to choose among the access, Internet services, and integrated services of their choice. Eliminating customer choice will diminish innovation, increase prices, and chill consumer demand, thereby slowing the roll-out of integrated service. (AOL, FCC, p. 11)

2. Paucity of Alternative Facilities

AT&T maintained that the presence of a number of vertically integrated facilities owners does not solve the fundamental problem that nonintegrated content providers will inevitably be at a severe disadvantage. Since non-integrated content providers will always outnumber integrated providers, competition can be undermined by vertical integration. In order to avoid this outcome, even multiple facilities owners must be required to provide nondiscriminatory access.

> Furthermore, as noted above, every carrier that provides local access services will control bottleneck access to its end customer. This means that any connecting carriers, such as IXCs, have no alternatives available to obtain access to the end customers or the access provider, other than persuade their customers to switch to another access provider or to become vertically integrated themselves. In AT&T Canada LDS' view, neither of these alternatives is practical. Because there are and will be many more providers of content in the broadband market than there are providers of carriage, there always will be more service providers than access providers in the market. Indeed, even if all of the access providers in the market integrated themselves vertically with as many service providers as practically feasible, there would still be a number of service providers remaining which will require access to the underlying broadband facilities of broadcast carriers. (AT&T, p. 12).

AOL also argues that the presence of alternative facilities does not eliminate the need for open access.

> Moreover, an open access requirement would provide choice and competition of another kind as well. It would allow ISPs to choose between the first-mile facilities of telephone and cable operators based on their relative price, performance, and features. This would spur the loop-to-loop, facilities-based competition contemplated by the Telecommunications Act of 1996, thereby offering consumers more widespread availability of Internet access; increasing affordability due to downward pressures on prices; and a menu of service options varying in price, speed, reliability, content and customer service. (AOL, FCC, p. 14)

Another indication of the fact that the availability of alternative facilities does not eliminate the need for open access policy can be found in AOL's conclusion that the policy should apply to both business and residential customers. In San Francisco, the city asked whether the policy of open access "should apply only to residential services?" The business sector has experienced a great deal more competition for telephone service and broadband services. DSL, which was originally intended by telephone companies as a business service, is much better suited to this market segment and market analysis indicates that cable and telephone companies are dividing this market more evenly. If ever there was a segment in which the presence of two facilities competing might alleviate the need for open access requirement, the business segment is it. AOL rejected the idea.

> Defining "consumers" to include only residential customers, however, would unduly limit the fulfillment of these goals. There is no indication that the Board intended to exclude business customers from the benefits flowing from competition and choice . . . The City should thus ensure nondiscriminatory open access to broadband Internet access for residential and business services alike. (AOL, pp. 1–2).

3. Essential Access Functions

AT&T also made a much more profound argument about the nature of the integration of facilities and programming. AT&T defined access to the customer as an essential input to the delivery of information services for both cable and telephone facilities.

> AT&T Canada LDS is of the view that broadband access services are a bottleneck service. These facilities are a necessary input required by information service providers seeking to deliver their services to their end-user customers. In fact, many of these access facilities share the same bottleneck characteristics as those exhibited by narrowband access facilities, such as those which are used in the provision of local and long distance telephone services. (AT&T, p. 10)

Because of the essential nature of access, AT&T attacked the claim made by cable companies that their lack of market share indicates that they lack market power. AT&T argued that small market share does not preclude the existence of market power because of the essential function of the access input to the production of service.

> By contrast, the telephone companies have just begun to establish a presence in the broadband access market and it will likely take a number of years before they have extensive networks in place. This lack of significant market share, however, is overshadowed by their monopoly position in the provision of local telephone services.
>
> In any event, even if it could be argued that the telephone companies are not dominant in the market for broadband access services because they only occupy a small share of the market, there are a number of compelling reasons to suggest that measures of market share are not overly helpful when assessing the dominance of telecommunications carriers in the access market . . .
>
> Where the market under consideration involves the provision of telecommunications *access* service (such as the market for broadband access services), it is more important to examine the supply conditions in the relevant market than the demand conditions which characterize that particular market. This is because telecommunications access service represents an essential input to the production process of other service providers. Therefore, even if the service provider only occupies a very small market share of the overall market for broadband access services, it is dominant in the provision of its access services because alternate providers must rely on that access provider in order to deliver their own services to the end-user subscriber. (AT&T, pp. 8, 9).
>
> AOL also identifies the critical importance of access.

> The key, after all, is the ability to use "first mile" pipeline control to deny consumers direct access to, and thus a real choice among, the content and services offered by independent providers. Open access would provide a targeted and narrow fix to this problem. AT&T simply would not be allowed to control consumer's ability to choose service providers other than those AT&T itself has chosen for them. This would create an environment where independent, competitive service providers will have access to the broadband "first mile" controlled by AT&T—the pipe into consumers' homes—in order to provide a full, expanding range of voice, video, and data services requested by consumers. The ability to stifle Internet-based video competition and to restrict access to providers of broadband content, commerce and other new applications thus would be directly diminished. (AOL, FCC, p. 13)

AT&T explicitly rejects the claim that nondominant firms in the access market should be excused from open access regulation.

> AT&T Canada LDS does not consider it appropriate to relieve the telephone companies of the obligation . . . on the grounds that they are not dominant in the provision of broadband services. These obligations are not dependent on whether the provider is dominant. Rather they are necessary in order to prevent the abuse of market power that can be exercised over bottleneck functions of the broadband access service. It should be noted that . . . Stentor [a trade association of local telephone companies in Canada] was of the view that new entrants in the local telephony market should be subject to regulation and imputation test requirements because of their control over local bottleneck facilities. Based on this logic, the telephone companies, even as new entrants in the broadband access market, should be subject to similar regulatory and imputation test requirements. (AT&T, p. 24, emphasis added)

4. New Markets Need Open Access

As indicated in the above quotes, AT&T argued for open access at an early stage of development of broadband in Canada. Thus, AT&T's argument responds directly to the claim that the market is too new to require an open access obligation. AT&T argued that the requirement is necessary to ensure that the market develops in a competitive direction from its early stages in Canada.

AOL argued exactly the same thing in the U.S., when the market was still new, but much more highly developed. It argued that requiring open access early in the process of market development would establish a much stronger structure for a proconsumer, procompetitive market. Early intervention prevents the architecture of the market from blocking openness and avoids the difficult task of having to rebuild the market on an open bases later.

> The Commission should proceed while the architecture for cable broadband is still under construction. To wait any longer would allow the fundamentally anti-consumer approach of the cable industry to take root in the Internet and spread its closed broadband facility model nationwide. Must consumers await an "MFJ for the 21st Century?"

> Obliging AT&T to afford unaffiliated ISPs access on nondiscriminatory terms and conditions—so that they, in turn, may offer consumers a choice in broadband Internet Access—would be a narrow, easy to administer, and effective remedy. It would safeguard, rather than regulate, the Internet and the new communications marketplace. The openness it would afford is critical to a world in which—as boundaries are erased between communications services and applications—we ensure that consumers likewise are truly afforded choice without boundaries. (AOL, FCC, p. 18)

5. Open Access Speeds Deployment

There is a final supply-side argument that these companies have made that is critically important to the ongoing debate, which involves the impact of open access requirement on the deployment of facilities. AOL argues that open access conditions would do little to slow, and might actually speed, the development and deployment of broadband facilities, while they ensure a vigorously competitive content market.

> Open access will not unduly increase cable operator's financial risk. A nondiscriminatory transport fee set by the cable operator would allow AT&T to recover full transport costs plus profit from each and every interconnecting provider. And AT&T's affiliated ISP would still be free to compete—based on cost and quality—with other ISPs. As Forrester Research observed, "[c]able companies can make money as providers of high-speed access for other ISPs. Instead of gnashing their teeth, large cable operators should make their networks the

best transport alternative for providers of all types of telecommunications services." According to AT&T itself, "the only way to make money in networks is to have the highest degree of utilization." Open access would allow AT&T to do just that, fostering a wholesale broadband transport business that would increase use of the cable operator's platform, fuel innovation, and attract additional investment. (AOL, pp. 6–7)

B. Demand-Side Fundamentals

AT&T offered a series of observations about the nature of the demand side of the broadband market that reinforces the conclusion that an open access requirement is necessary.

1. Narrowband Does Not Compete With Broadband

The most fundamental observation on the demand side offered by AT&T is the fact that narrowband services are not a substitute for broadband services.

> AT&T Canada LDS notes that narrowband access facilities are not an adequate service substitute for broadband access facilities. The low bandwidth associated with these facilities can substantially degrade the quality of service that is provided to the end customer to the point where transmission reception of services is no longer possible. (AT&T, p. 12).

AT&T and the cable industry say exactly the opposite in the U.S. This is a critical point in the antitrust analysis of the AT&T-MediaOne merger. If the narrowband market is a separate market from broadband, as AT&T so clearly argued in Canada, then the concentration of broadband services that AT&T proposes to accomplish through merger in the U.S. appears to violate the antitrust laws.

Not only did AT&T reject the notion that competition for narrowband Internet service is sufficient to discipline the behavior of vertically integrated broadband Internet companies, it expressed the concern that leveraging facilities in the broadband market might damage competition in the whole content market.

> As noted above, even though the market for Internet access service generally demonstrates a high degree of competition (with the exception of co-axial cable Internet access services), the potential exists for providers who also control the underlying access to undermine the continuation of such competition. Accordingly, AT&T Canada LDS submits that safeguards against anti-competitive behavior should be applied to the provision of information service by those broadcast or telecommunications carriers who own and operate broadband access networks. (AT&T, p. 17).

AOL raised a parallel concern. It argues that the leverage from integration could undermine the prospects for increased competition in the traditional cable industry.

> We submit that, to answer this question, the Commission should examine certain critical "mega-effects" of the proposed AT&T/MediaOne combination. First, the FCC should consider how this merger's video and Internet access components together would service to keep consumers from obtaining access to Internet-delivered video-programming—and thereby shield cable from competition in the video market. (AOL, FCC, p. 8)

2. Switching Costs

AT&T also made an argument in Canada on the demand-side that undercuts its claims in the U.S. that the current advantage of cable over DSL should not be a source of concern. AT&T argued that the presence of switching costs can impede the ability of consumers to change technologies, thereby impeding competition.

> [T]he cost of switching suppliers is another important factor which is used to assess demand conditions in the relevant market. In the case of the broadband access market, the cost of switching suppliers could be significant, particularly if there is a need to adopt different technical interfaces or to purchase new equipment for the home or office. Given the fact that many of the technologies involved in the provision of broadband access services are still in the early stages of development, it is unlikely that we will see customer switching seamlessly from one service provider to another in the near-term. (AT&T p. 12)
>
> The equipment (modems) and other front-end costs are still substantial and unique to each technology. There is very little competition between cable companies (i.e. overbuilding). Thus, switching costs remain a substantial barrier to competition.

3. Bundling

A third demand-side problem identified by AT&T in Canada is the leverage that vertically integrated firms possessing market power in an adjacent market can bring to bear on a new market. By packaging together broadband services, particularly those over which integrated firms exercise market power, non-integrated competitors can be placed at an unfair advantage.

> [T]his dominance in the broadband access market provides cable broadcast carriers with considerable market power in the delivery of traditional broadcasting services. This dominant position in the core market for BDU (cable TV programming] services can, in turn, be used by the cable companies to leverage their position in the delivery of non-programming services, the vast majority of which will be carried over by their cable network facilities.
>
> As broadcasting and telecommunications technologies converge, subscribers will seek to simplify their access arrangements by obtaining all of their information, entertainment and telecommunications services over a single broadband access facility. This, in turn, will make it more difficult for service providers to use alternate access technologies as a means of delivering service to their customers. (AT&T, pp. 8–9).

Bundling remains one of the focal points of antitrust and competitive concern in the U.S. AOL raised the bundling issue in its comments at the FCC as well.

> Second, the agency should reflect upon how this merger would enable cable to use RBOC-like structure to limit consumer access to the increasingly integrated video/voice/data communications services offered over the broadband pipe controlled by cable. And finally, the agency should recognize how these two "mega-effects" of the merger together reinforce cable's ability to deny consumers the right to choose: (a) between a competitive video-enhanced Internet service rather than a traditional cable service; (b) among competing cable Internet services; and (c) among competing "bundles" of video/data/voice services that contain multichannel video. (AOL, FCC, p. 8)

C. Understanding the Present and Looking to the Future: Open Access Remains Necessary

While AT&T might argue that conditions have changed since it so vigorously supported open access in 1997, and therefore it should not be held to those comments, AOL can make no such claim. In fact, AT&T's analysis of the broadband market is still applicable.

First, many of the arguments it made are unaffected by changes in the industry. There are fundamental characteristics of the communications and broadband industry identified by AT&T/AOL that do not change which require open access to facilities. These are enduring characteristics of the market—paucity of facilities compared to content providers, access as an essential input, separate narrowband and broadband markets, switching costs, bundling—that establish the need for a public obligation to provide open access.

Second, AT&T's view of the likely development of alternative technologies expressed in Canada is similar to the view that many take today. The two wireline technologies that are up and running, although not fully deployed, are dominant. Cable is ahead of DSL. Wireless is farther out in the future.

> [I]t would appear that there is only a limited number of broadcast carriers that are capable of offering broadband access services. Indeed, only the cable and telephone companies appear to be positioning themselves as hybrid broadcast/telecommunications carriers at the present time. While this is not to say that other service providers such as MMDS and LMCS carriers do not have plans to launch hybrid services of their own, neither of these service providers currently offer both broadcasting and telecommunications services on a facilities basis over their networks.
>
> In the opinion of AT&T Canada LDS, the supply conditions in broadband access markets are extremely limited. There are significant barriers to entry in these markets including lengthy construction periods, high investment requirements and sunk costs, extensive licensing approval requirements (including the requirements to obtain municipal rights of way) . . . Under these circumstances, the ability for new entrants or existing facilities-based service providers to respond to nontransitory price increases would be significantly limited, not to mention severely protracted. (AT&T, pp. 7, 12).

Third, even where there have been positive developments in the industry to expand alternatives, it is not clear that such changes have been or will soon be of sufficient magnitude to change the basic conclusion of AT&T's analysis. Many analysts reach the same conclusion today about the U.S. that AT&T reached three years ago about the Canadian market. The changeable characteristics of the market that might lessen, but not negate, the need for open access, have simply not moved far enough to create a basis to contradict AT&T's conclusion that open access is necessary. Ironically, AT&T told Canadian regulators not to speculate about the development of technologies. They were told to deal with the facts on the ground, not what might happen in the future.

> As noted above and in some of the preceding sections, the market for *broadband access* services is subject to rapid innovation and technological change. Indeed, the recent advances in wireless broadband delivery systems suggests that the possibility exists, at least in the long term, for a breakthrough in technology which could have a significant impact on the supply conditions affecting broadband access services. However, since the happening of these events is difficult to anticipate and the resulting impact on the market essentially unpredictable, it is appropriate to design policies and approaches to regulation which address the current market conditions and a need to supply safeguards in those instances where market power is present. (AT&T p. 15).

Any claim that the market situation has changed so much that open access is no longer necessary is totally undermined by AT&T's continued insistence in the U.S. that telephone companies be required to make their advanced services networks available to competitors on an open access basis. AT&T continues to make exactly the same arguments about the telephone companies in the U.S. in 2000 that they made about the telephone companies in Canada in 1997.

In opposing the entry of SBC into long distance in Texas, AT&T complains about bottleneck facilities, vertical integration, bundling of services. As a result, it demands nondiscriminatory access. It has simply stopped making the arguments that apply with equal force to cable companies. Needless to say, AT&T refuses to accept the same public policy obligation to provide open access to the approximately 2 million cable homes that its cable wires pass in Texas.

> Today, SWBT is exploiting its control over essential xDSL-related inputs, not only to prevent advanced services competition from AT&T and others, but also to perpetuate its virtual monopoly over the market for local voice services . . .
>
> SWBT has not, in fact, complied with its statutory duties to provide nondiscriminatory access to xDSL-capable loops (47 U.S.C. s. 271(c)(2)(B)(ii)&(iv)) and the operational support systems and processes that are needed to enable Texas consumers to benefit from a competitive market for xDSL services (47 U.S. (c)(2)(B)(ii)) . . .
>
> SWBT must also have policies, procedures, and practices in place that enable AT&T (by itself, or through partners) to provide consumers with the full range of services they desire, including advanced data services. Otherwise they will not be able to purchase *some* services—and will therefore, be less inclined to obtain *any* services—from AT&T. Thus, SWBT's inability (or unwillingness) to support AT&T's and other new entrants' xDSL needs not only impairs competition for advanced services but also jeopardizes competition for voice services as well.
>
> As both the Commission and Congress have recognized, high-speed data offerings constitute a crucial element of the market for telecommunications services, and, because of their importance, the manner in which they are deployed will also affect the markets for traditional telecommunications. Many providers have recognized the growing consumer interest in obtaining "bundles" of services from a single provider. Certainly SBC, with its $6 billion commitment to "Project Pronto" has done so. AT&T is prepared to compete, on the merits, to offer "one-stop shopping" solutions. Competition, however, cannot survive if only a single carrier is capable of providing consumers with a full package of local, long distance, and xDSL services. (AT&T SBC Comments, pp. 9. . . 10. . . 11. . . 12)

Now that AT&T has bought a stake in the majority of cable wires in the country, it excludes cable programming and cable-based broadband Internet from the mix of services that must be included in the bundle. It is willing to compete on the "merits to offer one-stop shopping" by demanding open access to other people's wires, but it will not allow the same terms and conditions for others to compete over its wires.

AOL, however, did not hesitate to point out the powerful anticompetitive effect that integrating video services in the communications bundle could have. The video component of the bundle is certainly one of the most important of the components.

> The second "mega-effect" of this proposed merger is of even broader potential consequence. With this merger, AT&T would take an enormous next step toward its ability to deny consumers a choice among competing providers of integrated voice/video/data offerings—a communications marketplace that integrates, and transcends, an array of communications services and markets previously viewed as distinct. (AOL, FCC, pp. 9–10).

D. Conclusion

The concept of essential functions in network industries that provide market power over end user customers even where several access providers are available is extremely important. These are the new choke points in the Internet economy. Because of switching costs, convergence of access, and bundling of products, this is a fundamental observation about the nature of these industries. These demand side structural problems interact with the observation that facilities providers will always be far fewer in number than content providers with the inevitable result that absent an open access obligation many content providers will be at a severe disadvantage.

AT&T-AOL were fundamentally correct in concluding that even without vertical integration and dominance, access is an essential function that presents a significant problem for public policymakers who are concerned about preserving the remarkably dynamic innovation and competition of today's Internet. In the information economy where the smooth flow of information is so critical, these choke points may call for even greater commitment to ensure open access than has historically been the case, because their importance imbues them with even greater potential for the abuse of market power.

> Where a broadband access provider is neither vertically-integrated nor dominant with respect to telecommunications or broadcasting service, but is offering broadband access services then the requirement for third party access tariff, CEI and other non price safeguards should apply. (AT&T, p. 29)

It was quite clear in the formulation of these two "unaffiliated" companies that broadband access services should be available on nondiscriminatory terms, even where there is an absence of vertical integration and dominance. Through this analysis, they arrived at an entirely reasonable public policy formulation that is consistent with our view that communications and transportation networks have always been and should always be subject to a requirement to be open because of the critical role they play.

III. IMPLEMENTING PUBLIC POLICY

A. Overview of Approaches and Goals

AOL's proposed rule for San Francisco typifies its approach to light handed open access requirements in which the local franchising authority creates the obligation and then allows private parties to work out the details with city enforcement as a backstop.

> *Section 1: Non-discrimination requirements:* Franchisee shall immediately, with respect to this franchise, provide any requesting Internet Service Provider access to its broadband Internet transport services (unbundled from the provision of content) on rates, terms and conditions that are at least as favorable as those on which it provides such access to itself, to its affiliates, or to any other person. Such access shall be provided at any point where the Franchisee offers access to its affiliate. Franchisee shall not restrict the content of information that a consumer may receive over the Internet . . .
>
> *Section 2: Private Right of Action:* Any Internet Service Provider who has been denied access to a Franchisee's Broadband Internet Access Transport Services in violation of this Ordinance has a private cause of action to enforce its rights to such access.
>
> *Section 3: Enforcement Rights of City and County:* In addition to any other penalties, remedies or other enforcement measures provided by Ordinances or state or federal laws, the City and County may bring suit to enforce the requirements of this Ordinance and to seek all appropriate relief including, without limitation, injunctive relief. (AOL, pp. 2–3.)

AOL made essentially the same recommendation to the FCC.

> The essence of an open access policy is thus competition, not regulation. Open access would create a competitive check on conduct—a far more preferable option than a behavioral check requiring constant step-by-step scrutiny of a cable operator's dealing with every provider of content or new applications to make sure that the company's conduct doesn't skew its network in favor of affiliated service providers.
>
> This approach does not require imposition of legacy common carrier regulation. The model for such early, targeted safeguarding is drawn directly from the existing cable regulatory framework, but its policy foundation cuts across all FCC regulation. Any cable television system operator that provides any Internet service provider access to its broadband cable facilities would have to provide a requesting ISP comparable access to its facilities on rates, terms, and conditions equal to those under which it provides access to its affiliate or to any other person. (AOL, FCC, p. 14).

Commenting before a federal body with much broader regulatory powers, AT&T proposed a much more vigorous regime of regulation.

> Given the incentives and opportunities available to broadcast carriers to abuse their market power and control over bottleneck facilities, AT&T Canada LDS has recommended the adoption of a number of safeguards in order to prevent instances of anti-competitive behavior . . .
>
> 1) implementation of a cost-based price floor to protect against below cost pricing of broadband access services;
> 2) implementation of a cost-based price ceiling with a limited mark-up to prevent excessive pricing of access services in uncontested markets;
> 3) implementation of a third party access tariff, allowing for nondiscriminatory and unbundled access to broadband bottleneck facilities, as well as comparably efficient interconnection and associated non-price safeguards;
> 4) implementation of price caps, accounting separations and other safeguards against anti-competitive cross-subsidization; and
> 5) imputation of appropriate third party access tariffs to value added information services providers by broadcast carriers. (AT&T, p. iii)

It is interesting to note that the provisions of the Telecommunications Act of 1996 to which AT&T points when it demands open access to xDSL in the U.S. are almost identical to the provisions that AOL proposed in the San Francisco proceeding. This makes it quite clear what entities that do not own essential access wires need to enter markets.

> s. 271 (c)(B) COMPETITIVE CHECKLIST—Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:
>
> (ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251 (c)(3) and 252 (d)(2) . . .
>
> (iv) Local loop transmission from the central office to the customer's premises, unbundled from switching or other services.
>
> s. 251 (c)(3) UNBUNDLED ACCESS—the duty to provide, to any requesting telecommunications carrier for the provision of a telecommunications service, nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable and nondiscriminatory in accordance with the terms and conditions of the agreement and the requirements of this section and section 252. An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service. (Telecommunications Act of 1996)

It is also interesting to note that AT&T embeds the obligation to provide nondiscriminatory access and unbundling into the permanent conditions in the industry structure. That is, it recommends the relaxation of detailed regulation only after vigorous competition develops in both the access market and the adjacent core markets where facilities owners have market power. However, even after this deregulation, AT&T recommends the continuance of "safeguards to ensure that broadband access services continue to remain available from the telephone [and] cable companies on a nondiscriminatory and unbundled basis." (AT&T, p. iii)

While AT&T Canada LDS considers that forbearance from the regulation of broadcast carrier access and value-added information services is not warranted at this stage in the development of the broadband market, conditional forbearance may be warranted when certain barriers to entry are removed in the cable distribution and local telephony markets. With respect to the broadband services provided by telecom broadcast carriers, the following safeguards should be treated as preconditions to any relaxation of the rules applicable to these carriers:

1) local competition issues are resolved and the terms and conditions for local entry have been successfully implemented such that practical alternatives to the supply of local services exist in the local market;
2) the broadband tracking requirements established in Decision 95–21 have been implemented and reports from the telephone companies satisfy the Commission that treatment of broadband investment and expenses are appropriate;
3) price cap regulation has been implemented in such a manner as to preclude telephone companies from recouping broadband investment costs from utility services: and
4) the establishment of safeguards to ensure that broadband access services continue to remain available from the telephone companies on a nondiscriminatory and unbundled basis.

With respect to the broadband services provided by cable broadcast carriers, the following safeguards should be treated as pre-conditions to any relaxation of the rules applicable to these carriers:

1) a demonstration that vigorous and effective competition has evolved in a substantial portion of the market for broadband access services and in the market for BDU services:
2) the implementation of an effective price cap mechanism for basic and extended basic services in order to prevent instances of cross-subsidization; and
3) the establishment of safeguards to ensure that broadband access services *continue* to remain available from the cable companies on a nondiscriminatory and unbundled basis. (AT&T, p. ii, emphasis added)

AT&T's regulatory proposal goes far beyond anything being considered for cable operators in the U.S., although wireline telephone companies are subject to exactly this type of regulation in their high speed services. Indeed, as noted, AT&T continues to push for regulation of telephone companies, including their advanced DSL services. In fact, one of the more important implications of the AT&T analysis in Canada is that the cable and telephone industries should be subject to similar obligations. In the U.S. it vigorously defends asymmetric regulation, with its property being unregulated.

Whether through AOL's private negotiations backed up by a public obligation or AT&T's direct regulation, the objectives of both companies were generally the same. The standards by which we should measure the quality of open access are the conditions that AOL and AT&T stipulated that facilities owners should grant to non-affiliated ISPs when they were non-affiliated ISPs themselves.

B. Specification of Nondiscriminatory Access Conditions

In order to analyze the complex issue of nondiscriminatory access to the broadband facilities, CFA has adopted the analytic approach presented in Table 1.[9] It identifies three broad areas of concern and about two dozen specific practices. AT&T and AOL provided extensive concrete discussions of these potential problems.

In addition to pricing safeguards, AT&T advocated a number of non-price safeguards to accomplish three general goals of open access.

Such safeguards are necessary to ensure that competing service providers:

(1) are able to gain comparable access to network bottlenecks; (2) are protected against abuse of confidential information which is provided to the bottleneck access provider; and (3) are not otherwise disadvantaged in the market by the bot-

[9] The framework for analysis is based on the paradigm presented by Larry Lessig, Code and Other Laws of Cyberspace (New York, Basic Books, 1999) as described in Mark Cooper, "Creating Open Access to the Broadband Internet," Briefing: Can We Preserve the Internet as We Know It? Challenges to Online Access, Innovation, Freedom and Diversity in the Broadband Era (Dec. 20, 1999) and "Open Access to the Broadband Internet: Overcoming Technological and Economic Discrimination in Proprietary Networks," University of Colorado Law Review, forthcoming.

tleneck access provider through, for example, the negotiation of exclusive or preferential agreements with other service providers. (AT&T, p. 22)

C. Architecture: Technology Bias

The first source of potential discrimination lies in the architecture of the network. It involves the technical capabilities of the network that could disadvantage independent ISPs in the activities that they are allowed to conduct. The architecture of the network, controlled by the proprietor, can be configured and operated to restrict the ability of the independent ISP, while it does not restrict the ability of an affiliated ISP. Technology bias can take several forms, including interconnection, structure, and flow control. We have already noted that AOL urged the FCC to act early in the development of the industry to prevent it from embedding anti-consumer characteristics into its architecture.

Table 1. Technical and Economic Sources of Discrimination in Proprietary Broadband Networks

Architecture: Technology Bias	**The Market: Business Leverage**
INTERCONNECTION	INFORMATION GATHERING
Physical connection	PRICING
Compatibility	Price Squeeze
FILTERING	Cross-subsidy
Committed Access Rate	Pricing Options
Preferential Queuing	PRODUCT BUNDLING
STRUCTURE	CUSTOMER RELATIONSHIP
Restricted backbone choice	Marketing
Precedence	Billing
Collocation	Boot screen
Replication	
Norms: Service Restrictions	
PROVIDERS	
Speed of service	
Time of downstream video	
CONSUMERS	
Limits on upstream traffic	
Prohibitions on server set-up	
Prohibitions on local area networking	

1. Interconnection

Interconnection involves allowing ISPs to establish a connection between networks. These connections must be compatible if they are to be meaningful. The cable industry's existing exclusive contracts do not allow independent ISPs to connect directly to the consumer. AT&T Canada was very concerned about exclusive and preferential deals.

> A prohibition on preferred agency or exclusive arrangements between vertically-integrated broadband access providers and integrated or affiliated information service providers which contain discriminatory access provision, either in terms of price or quality of access. (AT&T, p. 23)

It is important to recognize that mere physical interconnection and protocol support are only very minimum conditions that must be met to ensure access to customers. They are necessary, but not sufficient, conditions. AOL described interconnection in some detail.

> *Access: The term "access" means the ability to make a physical connection to cable company facilities, at any place where a cable company exchanges consumer data with any Internet service provider, or at any other technically feasible point selected by the requesting Internet service provider, so as to enable consumers to exchange data over such facilities with their chosen Internet service provider. (AOL, p. 2)*

> There are at least three possible network designs that allow for open access. These include:
>
> • policy-based routing, which routes packets to the appropriate ISP using the source IP address as the unique identifier;
> • virtual private networks (VPNs) and IP tunnels, which create virtual dedicated connections over the HFC network between the customer and the ISP (a solution appropriate to routed (layer 3); and
> • Point-to-Point Protocol over Ethernet (PPPoE) encapsulation, which is a protocol analogous to commonly employed designs for dial-up (a solution appropriate to bridged (layer 2) access networks).
>
> Each of these options has its own unique set of advantages and disadvantages. The appropriateness of each option varies depending on the type of cable system (i.e. large or small, multiple nodes vs. single node) and the networking architecture being addressed. (AOL, p. 7–8)

AT&T uses the term Comparably Efficient Interconnection (CEI) to describe interconnection in the broadband market.

> More specifically, in order to effectively compete with broadcast carriers in the provision of non-programming services, competitors must be able to provide end users with equivalent services at equal or lower prices. Therefore, in providing nondiscriminatory access to their broadband networks, broadcast carriers must allow competitors to access their broadband distribution network in the most efficient manner possible. For example, competitors must have the option to specify the point of interconnection as either the headend, the drop, inside wire, or any combination thereof. This concept is known as Comparably Efficient Interconnection (CEI) and refers to the principle of providing competitors with access to the broadband network on terms that are technically and economically equivalent to those provided by the broadcast carrier to itself. Under CEI, the interconnection provided must be equivalent in terms of scope, quality and price but may vary by type of competitive entity. (AT&T, pp. 25–26)

AT&T also expressed a concern about standards and their management.

> To the extent that standards are developed for interfacing with broadband access services, the carriers who provide these services should not be permitted to implement any non-standard, proprietary interfaces, as this would be contrary to the development of an open network of networks. In addition, any new network or operational interface that is implemented by a broadband access provider should be made available on a nondiscriminatory basis. (AT&T, p. 23)

2. Structure

Structure involves the deployment of physical facilities in the network. The proprietary network owner can seriously impair the ability of independent ISPs to deliver service by restricting their ability to deploy and utilize key technologies that dictate the quality of service. Structure determines how facilities are deployed and the effect that deployment has on the quality of service. Substantial discrimination can result from forcing independent ISPs to connect to the proprietary network in inefficient or ineffective ways or giving affiliated ISPs preferential location and interconnection. The quality of service of independent ISPs can be degraded.

The ability to deploy facilities to ensure and enhance the quality of service will be particularly important in the third generation of Internet service development. The multimedia, interactive applications that will distinguish the next phase of the Internet are particularly sensitive to these aspects of quality, much more so than previous applications.

> *Of course, allowing a single entity to abuse its control over the development of technical solutions—particularly when it may have interests inconsistent with the successful implementation of open access—could indeed undermine the City's policy. It is therefore vital to ensure that unaffiliated ISPs can gain access comparable to that which the cable operators choose to afford to its cable-affiliated ISP. (AOL, p. 8)*

3. Flow

Flow control involves the filtering of the flow of information. Even though networks are interconnected, there is still the possibility of discriminating against some of the data that flows through the Internet. Simply put, the technology allows pervasive discrimination against external, unaffiliated service providers.

Of course, it is implicit in the open access resolution that nondiscriminatory access for multiple ISPs extends to all relevant aspects of the technical and operational infrastructure, so that all business system interfaces will be open to all ISPs and performance levels will not favor the affiliated ISP. (AOL, p. 7)

It is important to confirm that the cable operator must provide equal treatment for local content serving (caching or replication) that the affiliated and nonaffiliated ISPs can provide, specifically, no firewalls, protocol masking, extra routing delays or bandwidth restrictions may be imposed in a discriminatory manner. (AOL, p. 9)

D. Norms: Service Restrictions

The second source of potential discrimination involves behavioral norms. The network owner can place restrictions on how nonaffiliated service providers can use the network. As long as the network owner is also a direct competitor of the independent ISP, concerns about restriction being imposed to gain competitive advantage will persist. Restrictions that are explained as necessary for network management may be viewed as driven by business motives, rather than technical considerations, by independent ISPs. These limitations can be applied to either service providers or consumers.

In a last mile shared environment, proper network and bandwidth management might possibly require certain limitations on data transmission. However, content- or service-specific restrictions can be both over- and under-inclusive—and most of all, anticonsumer. Limitations on video streaming, for example, protect cable's traditional video programming distribution business. TCI admitted early on, its 10-minute cap is a "restriction which we imposed on @Home so that we were the determiner of how stream video works in our world . . . [and] so that [we] determined [our] future in the area of streaming video. Any legitimate network management policies must be free of such anticompetitive intent and effect. (AOL, p. 10)

E. Business Leverage

Open access cannot ignore business reality. If the network owner inserts himself in the relationship between the customer and the independent ISP in such a way as to ensure that its affiliated ISP has a price, product or customer care advantage, then competition between ISPs will be undermined. This gives rise to the third category of discrimination issues, which involves the market. The potential anticompetitive problem is the abuse of business leverage.

1. Information

In order to manage the network and effectuate the service prohibitions discussed above, the network owner must engage in intensive monitoring of individual activity and gathering of information. The proprietary network owner must identify flows of data. Needless to say, this raises business and competitive concerns. The gathering of all that information places the network owner in a powerful position vis-à-vis competitors and consumers. The detailed control of the network confers an immense information advantage on the system operator. Because of the conflict of interest created by the vertical integration of facilities and content, the potential for competitive abuse of information is substantial. It is an advantage that is evident to those in the industry

Confidential treatment of information provided by service providers to broadband access carriers that are vertically-integrated . . . Broadband access providers that are affiliated with or have joint marketing arrangements with broadband service providers should also be required to enter into non-disclosure agreements affording these latter parties the same level of confidential treatment . . . (AT&T, p. 23)

2. Pricing

The most critical business issue is a potential price squeeze that can be placed on independent programmers and service providers by the closed business model. By controlling a bottleneck, network owners can place price conditions on independent content providers that undermine their ability to compete. Both AOL and AT&T appear to want a separate, wholesale transport service to be made available.

Broadband Internet Transport Services—The term "broadband Internet access transport services" means broadband transmission of data between a user and his Internet service provider's point of interconnection with the broadband Internet access transport provider's facilities. (AOL, p. 3)

In Canada, AT&T insisted that tariffs be set subject to clear conditions and filed. The central goal was to avoid the problem of cross-subsidy.

> Accordingly, the cable companies and telephone companies should be required to file tariffs for approval of their broadband access services and to include in such applications evidence that the rate is compensatory.
>
> Cross-subsidization is an issue for vertically integrated carriers particularly where the broadband service (including access) is not provided on an arm's length basis. The Commission has required telephone companies to maintain an accounting separation for their broadband activities and to provide adequate tracking reports. (AT&T, pp. 19, 22)

In the U.S., AT&T has now offered to make transport services available at a price that is, presumably, less than it charges its customers for transport and content. That price remains to be negotiated, however, and the principles for arriving at a reasonable price are not stated. The potential for cross-subsidy and discrimination is shifted, not eliminated, by this concession. In the context of the more regulatory model advocated by AT&T in Canada, it was able to specify what would constitute reasonable rates.

> 1) cost-based rates to prevent vertically-integrated access providers from engaging in predatory pricing;
> 2) limits on the level of mark-up over cost with respect to cable companies' broadband access services;
> 3) unbundling and nondiscriminatory access in the price of information services of all broadcast carriers.
> 4) imputation of the tariffed rates for broadband access in the price of information services provided by vertically-integrated broadcast carriers;
> 5) price caps in core markets where vertically-integrated carriers are dominant; and
> 6) investment and expense tracking as a further check against cross-subsidization. (AT&T, p. 21)
>
> In the case of cable companies, the implementation of an appropriately designed price cap regime could provide some protection against cross-subsidization . . . Furthermore, if in addition to price caps, the Commission considers it necessary to insulate basic cable subscribers from cross-subsidizing cable companies' other broadband activities as common carriers, it could implement accounting separation and tracking requirements for cable companies. (AT&T, p. 22)

AOL worries about AT&T in the U.S. offering "one click access" to the Internet without a price difference. This forces independent service providers to subsidize the content of the affiliated ISP.

> *Provided that the City establishes the right policy—allowing the consumer to choose any ISP they want without being required to pay for or go through the cable-affiliated ISP—then there are many technical solutions available to broadband providers and no need for the City to mandate any particular approach. (AOL, p. 7)*

Beyond the cross-subsidy question, in the U.S. the whole idea of a wholesale transport tariff remains up in the air. AT&T has steadfastly resisted the basic idea of entering into commercial relationships with ISPs and allowing the ISP to have the only relationship to the customer.

However, the pricing standards to which AT&T points in its efforts to obtain nondiscriminatory access to xDSL technology from local telephone companies in the U.S. embody these fundamental principles of cost-based, nondiscriminatory prices for unbundled services.

s. 252 (d) Pricing Standards.—

> (1) INTERCONNECTION AND NETWORK ELEMENT CHARGES.—Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—
>
> (A) shall be—
>
> (i) based on the cost (determine without reference to a rate of return or other rate-based proceeding) of providing the interconnection or network elements (whichever is applicable), and
>
> (ii) nondiscriminatory, and

(B) many include a reasonable profit.

(2) [A] State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—

(i) such terms and conditions for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carriers network facilities of calls that originate on the network facilities of another carrier; and

(ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls. (Telecommunications Act of 1996)

3. Bundling

As noted above, in Canada AT&T expressed concerns about an incumbent monopolist selling video "broadcast" services or local telephone services and planning to sell bundles of "broadband services." In this regard a fundamental issue arises over what independent ISPs will be allowed to sell and how consumers will be allowed to buy services. Cable TV's bundling of programming has long been a source of concern. If cable owners leverage bundles with Internet and cable service, independent ISPs will be at a severe disadvantage.

AT&T proposed principles to govern bundling raise concerns in two regards. On the one hand, it recommended unbundling of service elements. On the other hand, it recommended that the unaffiliated content provider be allowed to resell (and therefore bundle) the cable programming—i.e., to create a complete bundle.

Because broadcast carriers exercise control over bottleneck facilities, they have both the incentive and the opportunity to bundle these facilities with their other services and offer the entire package to their customers for a single price . . . [T]he Commission concluded that the bundling of monopoly service elements with competitive service elements is generally appropriate subject to three conditions:

1) the bundled service must cover its cost, where the cost for the bundled service includes:
a) the bottleneck component(s) "costed" at the tariffed rate(s) (including, as applicable, start-up cost recovery and contribution charges); and
b) the Phase II causal costs for components not cover in a) above;

2) competitors are able to offer their own bundled service through the use of stand-alone tariffed bottleneck components in combination with their own competitive elements;

3) resale of the bundled service permitted . . .

In the absence of such a requirement, broadcast carriers will be able to engage in strategic and anti-competitive pricing behavior arising directly out of their dominant position in the access market. (AT&T, pp. 27–28)

What AT&T had identified as a powerful lever in the marketplace, control over the core product, it sought to neutralize by requiring unbundling and resale.

AT&T Canada LDS submits that broadcast carriers should not be permitted to bundle their broadcast and telecommunications service until the Commission has established rules which permit the unbundling and resale of BDU services. Furthermore, to the extent that the unbundling and resale of BDU services is tied to entry of the telephone companies into the BDU market, no telephone company should be permitted to bundle BDU service with its local telephone service until all of the issues relating to unbundling and resale of these service have been resolved by the Commission. (AT&T, p. 28)

The question of how and what independent ISPs will be able to market to customers remains a bone of contention between AT&T in the U.S. and the unaffiliated ISPs.

IV. CONCLUSION

The "unaffiliated" AT&T/AOL indictment of a vertically integrated, highly concentrated market clearly applies to the current situation in the U.S. and will likely continue to for the foreseeable future. The discussion of demand-side problems points to issues that are long term in nature. The insightful discussion of network access as an essential function for communications technologies establishes the need for open access on an enduring footing. The recommendation by AT&T that the fed-

eral governments in Canada not forbear from regulation was correct in 1997, as it was in 1999, when AOL made a similar recommendation in the U.S. That conclusion applies to the U.S. today as a matter of public policy.

What AT&T and AOL said as "unaffiliated" companies has even greater importance for other "unaffiliated entities." Even as non-facilities owners, AT&T and AOL were still very large and powerful corporations. Their analysis makes a strong case that the problems facing unaffiliated ISPs are large and real. Their frank discussion of the potential problems and the specificity with which they offered solutions should be a wake up call to policy makers. All but the most powerful ISP are likely to fare very badly in a commercial setting where discriminatory access is not firmly rejected.

It is obvious, however, that in the terms of the U.S. debate over open access, the remedies that AT&T proposed in Canada are well beyond what is being considered in the U.S. for cable TV. Telephone companies in the U.S. are under legal obligations that match the array of regulations AT&T advocated for cable TV and telephone companies in Canada. No one in the U.S. is advocating or contemplating such a heavy-handed regulatory approach for cable. AOL's light-handed approach, with government triggering private negotiations and backstopping the process, has received considerable attention. It has been adopted in a number of communities.

Combining the defense of open access with AOL's description of the necessary policy elements to ensure nondiscrimination through light-handed regulation presents a complete and compelling package. Public policy makers can readily adopt AOL's recommendations of a few months ago to ensure that unaffiliated ISPs, who are unable to buy broadband wires, will have a reasonable chance of competing in the broadband marketplace that AOL believes will be the dominant form of communication in the century ahead.

AT&T's much more detailed road map to nondiscriminatory access could be useful, however, in providing guidelines and benchmarks as private negotiators and the courts develop a means to understand the issues they need to be on the lookout for as negotiations proceed. The long debate over open access has produced some key barometers of open access.

1) Comparably efficient interconnection, with the identification of several options for physical and virtual interconnection, a list that can hopefully be expanded.

2) Open standards with change management.

3) ISP neutral network management.

4) Minimum content and service restriction, consistent with neutral network management.

5) Performance parameters, including a list of services to be made available and practices to be avoided.

6) Confidentiality of competitively sensitive information and protection against abuse of such information by vertically integrated broadband service providers.

7) A wholesale relationship between unaffiliated ISPs and vertically integrated service providers from whom the independents wish to purchase facilities.

8) Rates for transport service that are subsidy free and not anticompetitive.

9) Bundling and marketing provisions that prevent the abuse of leverage over monopoly services.

At the same time, AOL's desire to make open access as efficient as possible by using a public obligation to trigger private negotiations over the details of open access is a valid process. Ironically, the Telecommunications Act of 1996, to which AT&T points in its demand for open access to telephone company xDSL services, had a negotiation and arbitration procedure in place to attempt to have private parties implement. AT&T's complaints about the Baby Bells reluctance to open their markets only makes it clear that obstinate corporations can make the process difficult, but that does not obviate the need for the process. The obligation to negotiate and recourse to legal authority for redress drives the process forward. Without the public obligation, there is little chance that open access will be provided for those who need it most, the smaller niche players and innovative start ups, who have defined the special nature of the Internet.

Early in the twentieth century, as the telephone was just starting its evolution to the dominant means for people and businesses to communicate at a distance,

AT&T first articulated the concept of universal service.[10] While the motivation for and impact of that commitment have been hotly debated, there is no doubt that it deeply affected the development of public policy throughout the entire century.

As we begin the "Internet Century," there is clearly a need for a new balance between the public and private roles in the network of networks that is the Internet. It is unfortunate that as the remarkable potential of a broadband Internet began to emerge, the dominant technology appears to be one that had excused from an open access obligation by Congress for its core service. It would have been encouraging if, in the initial commercial convergence of the Internet and the cable TV industry, the open values of the Internet had proven dominant.[11] Unfortunately, it appears that the two new giants of the broadband industry have yet to overcome the closed business model and antigovernment rhetoric of "one of America's most enduring monopolies."[12] What they said before they bought their own wires should carry special weight with policy makers who are concerned about keeping the Internet open.

Senator BURNS. Thank you, Mr. Kimmelman.

Now we have Robert Lande, who is Senior Research Scholar, American Antitrust Institute. Thank you for coming.

STATEMENT OF ROBERT H. LANDE, SENIOR RESEARCH SCHOLAR, AMERICAN ANTITRUST INSTITUTE

Mr. LANDE. Thank you very much.

If this merger goes through, we can expect to see a lot more major media mergers. There is even the possibility of the scenario that Senator Gorton referred to earlier, that our country could be left with only a handful of major media companies, and then a fringe of much, much smaller players.

I ask the Committee, is this the situation that we would like the country to be in a decade from now? And if not, can the antitrust laws do anything about it?

Well, I submit the answer to the first question is no. And as to whether the antitrust laws can do anything about it, the answer is unclear.

Why should we fear being left with only a handful of major media conglomerates? Frankly, it would represent too much control in the hands of too few people. They would not necessarily have to exercise this control in the form of higher prices for newspapers. They might exercise their control in terms of a lack of editorial diversity, a lack of a decision as to which news stories are noteworthy and which are not, the biasing of certain links to certain Web sites.

Now can the antitrust laws prevent this kind of a problem? The problem is that mostly the antitrust laws are concerned with price. And normally, if you have about half a dozen companies, you are going to get price competition. But, Mr. Chairman, would you feel comfortable if there were only half a dozen major media companies left in this country?

Let me go further. What if those half a dozen companies had the political philosophy the exact opposite of yours? Would you be reassured if they said we will price our Internet access and our newspapers at the competitive level? Would that be your only concern?

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[10] Consumer Federation of America, A Historical Perspective and Policies for the Twenty-First Century (Washington, D.C., 1997).

[11] Lessig's argument in Code raises a broader set of concerns about the threats to the openness of the Internet and clearly believes a new balance must be struck to preserve that openness.

[12] Press Statement, U.S. Department of Justice, Primestar Merger.

Well, antitrust is about a lot more than price, fortunately. It is about consumer choice, about maximizing consumer choice. Usually price competition and choice competition go hand in hand. Not necessarily. Not in an area like the communications media. Because communications firms compete in part by offering a different gatekeeper function, different editorial functions.

And one media conglomerate cannot effectively meet consumer demand for a different variety of viewpoints by extending its product line. Because those new products will inevitably bear to some degree the stamp of their corporate owner. In other words, you need a lot more diversity, you need a lot more players in the media business than you do in a business where the only thing that counts is price.

And these issues are especially complicated by the web of interrelationships that Mr. Kimmelman was talking about. These are not free, independent companies making these decisions. And we have to bear that in mind.

I am not at all sure, to be frank, that the antitrust laws could prevent what I call the nightmare scenario. That is, our country is left with only a handful of major media companies and a fringe of smaller players. So what should we do?

Well, I urge this Committee and this Congress to establish a temporary committee to study media mergers and media convergence. This independent organization could try and find out what might happen if there is this tidal wave of media mergers that so many people are expecting to happen in light of the AOL-Time Warner merger. Which of the possibilities that I have outlined could come to pass? And can the antitrust laws do anything about them?

If the answer is no, then this Committee might wish to recommend to your Committee additional legislation to stop this potential nightmare scenario.

Thank you very much.

[The prepared statement of Mr. Lande follows:]

PREPARED STATEMENT OF ROBERT H. LANDE, SENIOR RESEARCH SCHOLAR, AMERICAN ANTITRUST INSTITUTE

I am Robert H. Lande, the Venable Professor of Law at the University of Baltimore School of Law, currently on leave as the Senior Research Scholar at the American Antitrust Institute.[1] Thank you very much for allowing me to present the views of the American Antitrust Institute on the America Online (AOL)/Time Warner merger.

Media mergers have long been front-page news, particularly since AOL and Time Warner announced their intention to combine. Even more significant, however, has been the speculation that this merger has caused: if the AOL-Time Warner, and now the Time Warner/EMI, transactions are consummated, similar media mergers can be expected. There is even a possibility that this merger will cause a wave of media mergers so large that, within a decade, most of our information may be supplied by perhaps six of these huge media conglomerates and a fringe of smaller firms.

Today, before this has come to pass, is the time to pause and ask two critical questions. Is this kind of media oligopoly the place where we, as a society, want to end up? And if not, can the antitrust laws effectively prevent the threatened wave of mergers? The answers to the first question is clear. We do not want to permit mergers until there is only a handful of large media firms left. The answer to the

[1] The American Antitrust Institute is an independent educational, research and advocacy organization. See www.antitrustinstitute.org.

second question, however, is far less certain. But I optimistically believe that the antitrust laws, if they are enforced vigorously and interpreted properly, can prevent this from happening.

We should distrust a media oligopoly because it is an undue concentration of control in the hands of a few individuals. It should be stressed that this control need not manifest itself as a price rise for the daily newspaper or in AOL's monthly fee. Rather, it could consist of a change in editorial viewpoints, a shift in the relative prominence of links to certain websites, a bias against certain forms of entertainment, or a decision not to cover certain topics because they are not "newsworthy." In each of these ways mergers could significantly undermine diversity of offerings and, ultimately, consumer choice.[2]

All of these problems can exist without any improper intent on the part of the media barons. Even if they try to be fair and objective they will necessarily bring their own worldview to the job. And in time some of these media conglomerates surely will come into the hands of people who are not interested in being fair or objective.

Which brings us to the antitrust laws.

At first it might appear that the antitrust laws can be of little help in grappling with the issues presented by AOL-Time Warner/EMI. The antimerger laws are today commonly understood as protecting price competition, and a relatively small number of firms—to greatly oversimplify, let's say at most half a dozen—are normally thought to be enough to keep a market price-competitive.[3] Six firms (or even four) may be sufficient to make and sell pig iron or aspirin competitively because these products are relatively homogeneous and much of what we care about is related to product price.

But a handful of media firms would not be sufficient for the diversity of viewpoints in a democracy. Would any Member of this Committee feel comfortable if there were only six media viewpoints left in this nation? Would you be reassured if I guaranteed you that these remaining media conglomerates would sell their newspapers and Internet advertisements at competitive price levels? Of course not.

But the key question is: are these considerations too nuanced for antitrust to consider? Would this be a wrong without a remedy? The answer to this question is unclear. I believe, however, that the antitrust laws, if correctly and vigorously interpreted, should be adaptable enough to meet this challenge.

Antitrust is not exclusively about price. It is essentially about choice—about giving consumers a competitive range of options in the marketplace so consumers can make their own, effective selection from the market's offerings.[4] A number of Supreme Court decisions have made it clear that under the antitrust laws consumer welfare consists of much more than low prices.[5] The purpose of the antitrust laws is to give consumers the ability to choose freely from among the options that the free market would provide to them.[6] Consumers should be able to make their

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[2] The kinds of bias that could arise in this area could be especially troublesome because consumers might never know that the biasing has occurred. When a reader or viewer never learns about news events or particular editorial perspectives, he or she might not look to other sources for them. The readers or viewers often would have no reason to suspect that they have been deprived of a diversity of choices.

[3] In industry after industry firms merge until there is only a handful left, the antitrust authorities often are unable to do anything about it. In these industries the merging parties usually assert that the government is unable to demonstrate that there will be any likely price effects from the merger at issue. On this basis the merger often is permitted. In former years mergers were governed by an "incipiency" standard, where mergers were prevented well before they would lead to the point where anticompetitive problems were likely. This concept, however, has faded in recent years.

[4] See, e.g., FTC v. Indiana Fed'n. of Dentists, 476 U.S. 447, 459 (1986) ("an agreement limiting consumer choice . . . cannot be sustained . . ."); *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 499 n.5 (1988) (observing that the challenged activity "might deprive some consumers of a desired product . . ."); *Bates v. State Bar of Arizona,* 433 U.S. 370 n.20 (1977) ("The public is entitled to know the . . . useful information that will enable people to make a more informed choice. . . ."); *United States v. Continental Can Co.,* 379 U.S. 441, 455 (1964) ("price is only one factor in a user's choice. . . ."). Many lower courts also make this point. See, e.g., *United States v. Brown Univ.,* 5 F.3d 658, 676 (3rd Cir. 1993) (characterizing the crucial issue as whether the challenged practice "actually enhances consumer choice."; *Berkey Photo v. Eastman Kodak,* 603 F.2d 263 (2nd Cir. 1979) (crucial issue is whether "the free choice of consumers is preserved. . . ."); *Butler Aviation Co. v. Civil Aeronautics Board,* 389 F.2d 517, 520 (2nd Cir. 1968) (analyzing effect of corporate acquisition on consumer choice).

[5] See supra note 4.

[6] Id. For a more thorough discussion see Neil W. Averitt and Robert H. Lande, "Consumer Choice: The Practical Reason For Both Antitrust and Consumer Protection Law," 10 Loyola Consumer L. Rev. 44 (1998); Neil W. Averitt and Robert H. Lande, "Consumer Sovereignty: A Unified Theory of Antitrust And Consumer Protection Law," 65 Antitrust L.J. 713 (1997).

choices along any dimension that is important to them—including price, quality, and editorial viewpoint.

In most cases price competition is a reasonable surrogate for effective consumer choice and diversity. If a market is price-competitive but consumers want a wider range of models or options, the competing manufacturers normally will extend their product lines. Soft drink consumers who want orange soda will get it, and it does not matter whether the orange soda is made by a firm that also makes colas, or even by an orange juice or beer company. No harm, no foul. A series of mergers that would leave only a handful of significant beverage manufacturers might well not offend the antitrust laws.[7]

But some types of consumer choice and some types of nonprice competition cannot be satisfied this way. Communications media compete in part by offering independent editorial viewpoints and an independent gatekeeper function. Six media firms cannot effectively respond to a demand for choice or diversity competition by extending their product lines because the new media products will inevitably bear, to some degree, the perspective of their common corporate parent.[8] For these reasons competition in terms of editorial viewpoint or gatekeeping can be guaranteed only by ensuring that a media market contains a larger number of firms than may be required in other, more conventional markets. The number of media firms necessary to ensure effective variety, diversity or choice competition is significantly larger than that required to preserve price competition.[9]

Of course, how this general principle affects the legality of any specific transaction depends upon the facts of the case. The AOL-Time Warner merger is the first major merger between the "old" and "new" media genres. Before this merger the "new" media—of which AOL is probably the premier example—had started to provide more and more competition for the "old" media as people increasingly obtain their news and editorial viewpoints over the Internet. In many respects this is a merger of converging types of media since AOL is in the Internet access business and Time Warner owns cable systems, and cable increasingly is being used for Internet access.

This merger raises antitrust issues that I lack the factual basis to answer at this time. For example, does AOL compete in a relevant market that can best be defined as "access to the Internet"? Or should its market be defined more narrowly, as a market consisting of access to the Internet and also the network of chat rooms and other proprietary content that AOL provides? Should "high speed access to the Internet" be considered a separate relevant market?

If the relevant market for merger purposes is "all forms of access to the Internet," then AOL's market share is not unduly large (a reported 25%) and entry is relatively easy. Even if the postmerger AOL-Time Warner firm would attempt to steer AOL users towards Time Warner publications, in light of AOL's non-dominant market share and easy entry it is unlikely that this would detrimentally affect consumers. If the market consisting of chat rooms, etc. is the more meaningful one, however, then the possibility of anticompetitive effects from this merger increases because AOL might well have significant power within this market. AOL might be able to use its market power to distort consumer choice in a manner that favors Time Warner publications anticompetitively.[10] Other antitrust issues could arise in a relevant market consisting of "high speed access to the Internet." If, in a few years, Time Warner will have a very large share of this market in certain areas of the country through its cable systems, and if AOL is regarded as one of the most likely potential entrants into this market, then the AOL-Time Warner merger could serve to forestall this entry.

The FTC is currently collecting the information that will enable it to make these crucial determinations. Nevertheless, there are some things that are already clear.

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[7] This is, of course, a greatly oversimplified analysis. The anti-merger statute is worded in terms of preventing mergers the effect of which "may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. Sec. 18 (1999). To perform the analysis correctly many factors would have to be examined, including the relevant market shares, industry concentration trends, and the innovative potential of the remaining firms.

[8] An important but subsidiary question is, "who is the real or effective gatekeeper" concerning particular issues? Even an independently owned newspaper has several potential gatekeepers or viewpoint promulgators—its writers, editors, and publisher. A large conglomerate like AOL-Time Warner would have its CEO as its ultimate gatekeeper. Nevertheless, on particular issues different people within the organization would, as a practical matter, have gatekeeping or viewpoint functions. Despite this possibility of decentralized decisionmaking, however, for merger evaluation purposes there should be a presumption that a media firm's CEO is the gatekeeper for every part of that firm.

[9] This interpretation of the antitrust laws is, moreover, consistent with fundamental First Amendment principles.

[10] AOL could bias its links or screens analogous to the manner in which the some airline reservations systems allegedly were biased during the 1980s.

An antitrust analysis of the AOL-Time Warner merger must stress two issues in addition to the crucial choice and diversity issues discussed above: the possibility that this merger will spark a trend to similar mergers, and the effects of the web of interrelationships that already exist in this industry.

The January 24, 2000 issue of *Business Week* has a insightful article titled "So Who's Next: They're all looking at each other."[11] This piece provides an overview of how, due largely to the AOL-Time Warner merger, a virtual tidal wave of mergers between "old" and "new" media could occur. Among the firms rumored to be interested in large mergers (although not necessarily with each other) are AT&T, Yahoo, Microsoft, Disney, Viacom, News Corp. (owner of Fox)—in fact, just about every media conglomerate is wondering whether they are going to be left behind by the AOL-Time Warner merger.[12] Look at the January 11, 2000 *Wall Street Journal*—or, it seems, almost any other day's edition—for other rumors or possibilities.

If AOL-Time Warner goes through, copycat media mergers are certainly likely. A traditional concern of merger enforcement is whether the merger being evaluated is likely to spark a trend to concentration in the affected industry.[13] This concern should be taken very seriously by the FTC and the courts when they evaluate the legality of the AOL-Time Warner merger.[14]

Moreover, the only way to accurately assess the effects of this merger on the firms' independent editorial and gatekeeper functions is to evaluate the AOL-Time Warner merger in light of the large number of important media joint ventures that already exist.[15] Firms often behave differently towards firms with whom they have important joint ventures. Their incentives to engage in hard competition with these firms can diminish. A complex merger like AOL-Time Warner cannot be properly evaluated unless this preexisting web of interrelationships throughout the industry is taken into account.

Am I convinced that the interpretation of the antitrust laws described above is the one that will be applied by the enforcement agencies and the courts, and that it will prevent all the important problems that could arise from media mergers? Frankly, I am not entirely optimistic. What is needed at this point is a much more thorough look at the challenges that will be raised by future media mergers. This is particularly true for mergers like AOL-Time Warner which involve different types of media that are in the process of converging.[16]

I therefore urge Congress to create a Temporary Committee to Study Media Mergers and Media Convergence. This Committee could include Members of the Senate and the House who have relevant expertise, the heads of the FTC, FCC, and DOJ Antitrust Division, heads of companies engaged in the affected sectors, and representatives of consumer groups and other public interests most affected by media mergers. The Committee's purpose should be to identify problems that may be caused by large media mergers and by media convergence, and to propose appropriate remedies. If the Committee concludes that the existing laws cannot prevent the problems that plausibly could arise, then it should recommend to the Congress that new legislation should be enacted.[17]

In conclusion, I would like to reiterate the concern that the AOL-Time Warner mergers could lead to a wave of media mergers that could cause an unhealthy level of concentration in this crucial industry. It is uncertain, however, whether the antitrust laws could be used to stop this trend before it becomes anticompetitive. I have outlined the ways in which the antitrust laws could be enforced and interpreted so they are likely to stop some or many of the most dangerous large media mergers. I am not suggesting that under today's antitrust laws there is or should be a higher

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[11] See Steve Hamm and Steve Rosenbush, "So Who's Next? They're All Looking at Each Other." *Business Week,* Jan. 24, 2000 at 46.

[12] Id.

[13] See Robert Pitofsky, Chairman, Federal Trade Commission, "The Nature and Limits of Restructuring in Merger Review," Cutting Edge Antitrust Conference, Law Seminars International, Feb. 17, 2000, Empire Hotel, New York, N.Y., at 6–7 (discussing how the possibility that a merger will causing a merger wave can effect the analysis of that merger).

[14] How many mergers constitute a merger wave? There is no magic answer to this question, or to the question of when the enforcers and the courts should block a merger because it is likely to be anticompetitive. The enforcers and the reviewing courts will have to analyze the facts of each merger carefully and at some point they may decide that a particular merger is likely to be harmful.

[15] For example, AOL has major ongoing projects with Nokia, Hoover, DME Interactive, Onvia.com, Sprint PCS, Motorola, BellSouth, Kinko's and MarketWatch.com.

[16] Many different types of media are in the process of converging. For example, Internet access (one of AOL's market) and Cable T.V. (part of Time Warner's domain) are likely to converge soon.

[17] The Committee should be directed to complete its work within a short period—a year or two—to ensure that possible problems could be prevented.

bar or a special rule for media mergers. I am only suggesting the careful yet aggressive application, to special circumstances, of the single universal rule of antitrust. And that rule is to preserve for consumers a truly competitive range of choices in the marketplace.

However, it is far from certain whether the courts would interpret these laws in the vigorous manner I have described. For this reason Congress should establish a temporary Commission to study the potential problems that could arise from media mergers.

I greatly appreciate the Committee's invitation to present these views here today.

Senator BURNS. Thank you. I am going to ask just a couple of questions here and then try to get comments from all three of you if I could.

I think you have already covered the area of your assessment of the instant messaging debate. I noticed that area. I am concerned about that because of the implications coming off of the 1996 Act. Now, nobody else I heard drew a parallel like that, but I do not want to get into the same situation or create a situation that Congress and the consumer is going to have to deal with 10–15 years from now. And, of course, the way the technologies are moving, they may have to deal with it a lot quicker than we did the old one.

I want just your take on, in the memorandum of understanding, I like that first step. I would agree with you there is no enforcement trigger in that area. Maybe we would have to take a look at that. But basically, I like to give every citizen in this country—businessmen or corporation—the benefit of the doubt until they really display to us that they are not a very good neighbor with the American way.

Would you want to comment on that, Mr. Berman?

Mr. BERMAN. Thank you, Senator.

If there was not the MOU and the commitment to openness made—and there is no reason that AOL-Time Warner had to make that commitment; it is not required by law and there is no consensus on the Hill to pass any statute that does that, so they are doing something which is contrary to conglomerate building because it is opening their network to unaffiliated people who can provide similar services to theirs even over their network—that has to be taken into account. And I think that that is a major step.

It cannot succeed without other cooperation by other cable companies buying into that paradigm. They have not yet. Time Warner and AT&T are not the only cable companies. There needs to be experimentation. There needs to be fleshing out of this. There needs to be an opportunity to see how this is going to work over their facilities.

And that is why I think that the open standards and a race to legislation is contrary, even though I share the same concerns as the two gentlemen here, and have worked with them, that it is not going to work that way, that we have to try another way, another paradigm of not trust, but working together and trying to spell out the details here, to bring it before the Congress, to have forums to document and to build a record until the FCC—by the way, which does not want to get into this—may be able to act or until Congress has the will.

That is a long answer, but I think that we are going to have to not trust the market, but involve ourselves in the market and be part of that market of persuasion.

Senator BURNS. Mr. Kimmelman?

Mr. KIMMELMAN. Mr. Chairman, I am not suggesting that we need legislation. I just suggest you scrutinize this carefully. Because, with all due respect to Mr. Case, he was out around the country and here saying that we needed open access rules enshrined in public policy before. And now he is in a different situation, and I understand that, but Congress must reconcile these differences.

How do we know, if there is a dispute, it will be resolved fairly under this voluntary memorandum? Even if you read it in the most positive light, the companies are subject to a merger review and so they may have some reason to be on good behavior before Congress until their merger is approved.

I think policymakers need to resolve concerns now to make sure that we do not have to undo an enormous problem later. Why not have this be binding by contract? And why not have these terms, with clarification as to what they mean, be subject to reciprocity requirements? If anyone who has content and takes advantage of this on an AOL-Time Warner system, they have to do so on any system they own.

And you can use market mechanisms, as Mr. Case suggests, to make this meaningful and useful in the marketplace. My concern is, as I understood him to say, he said, we are presenting this, we want to try to do this, we hope everyone else in the cable industry will do it—although they have all opposed it tooth and nail up to now. And then he said, if that does not work we will come back.

Well, does that mean if it does not work, AOL-Time Warner will quit doing it? Because they should not be disadvantaged in the marketplace. If he really wants everyone to do it in the marketplace, Mr. Case and AOL-Time Warner are better off if they are all subject to the same standards—accountability to the public for nondiscrimination. It should not be just one company. It should be everyone.

So I am a little suspicious about the vagueness and the recalcitrance here on something enforceable.

Senator BURNS. Mr. Lande?

Mr. LANDE. I am afraid if we wait, we will be shutting the barn door after the horse has already left.

Senator BURNS. They very seldom ever leave on their own, by the way, those horses.

[Laughter.]

Mr. LANDE. But companies do change their mind on their own. And Mr. Levin and Mr. Case are good people, but we do not know who their successors are going to be. And what if their successors are more like some of the folks at Microsoft, who have been known to allegedly discriminate? And we have a case that takes years, and that case still is not over.

I think the best way to do it is to make it binding as part of a consent order with the Federal Trade Commission. If they agree to that as part of their consent order, then it is binding and then we will not have to worry about barn doors being opened or closed.

Senator BURNS. Mr. Berman?

Mr. BERMAN. One last comment. I am tying it back to the privacy debate. It is like the tax moratorium debate. Congress is giving the

industry a lot of time to try and figure out a self-regulatory regime. And they say, the market will solve it.

Well, the market has not solved it. And Mr. Case I think has said that today. But it has given a number of companies a chance to try and develop best practices and some technologies and things that may improve privacy on the Net, which can now be put into regulation. And we maybe have the basis for experimentation on how to map privacy onto the Internet.

I think that the same period of time has to occur in this open access so that we know what rules and what contracts to make enforceable. Otherwise, I think we slow down technology, we push them backward. And instead of moving forward, we may end up with a closed open Net before we even know it because the Internet is changing so rapidly while we sit here and debate these issues.

Mr. KIMMELMAN. It seems to me if it is good enough for AOL, it ought to be good enough for everybody.

[Laughter.]

Senator BURNS. I can see right now that as we are going into the closing moments of this hearing, and I think there will probably be hearings to follow, that this Senator has structured this hearing the wrong way. I think we should turn around the panels maybe, and we would probably learn a lot more. Because I structure my hearings a little bit different.

I like robust debate at that table rather than this table, and we listen. And then we make up our own minds. Some of us are incapable of doing that sometimes. Nonetheless, I can see we probably made a mistake in structuring it this way, and I will be careful of that in the future.

I want to thank you for coming today and offering your testimony. And your full testimony will be made part of the record. And we will be visiting with you in the future, I will guarantee you. Because your dialog is very, very important to this Committee.

Yes, Jerry?

Mr. BERMAN. I have one more comment. AOL and Time Warner and AT&T and all of the companies that are involved with this together have committed themselves to participating in an open forum to discuss the MOU and what it means in an ongoing set of forums which the consumer groups have been participating in and they are welcome to. And I think that we would like your participation and we would like to get the results of that so that we can watch this thing develop together.

Senator BURNS. Jerry, I am going to make one other suggestion, and I am going to make the suggestion to Mr. Kimmelman and Mr. Lande. I am not real sure that this is not a project of the Internet Caucus, that we get Room 902 and all the principals involved and lay out those arguments and let America make up its mind. I think that is true democracy in its truest form. And I would not mind pursuing that avenue.

Thank you very much. This hearing is closed.

[Whereupon, at 1:10 p.m., the hearing was adjourned.]

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