AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

THE FUTURE OF THE INTERACTIVE TELEVISION SERVICES MARKETPLACE: WHAT SHOULD CONSUMERS EXPECT?

HEARINGS

BEFORE THE

SUBCOMMITTEE ON TELECOMMUNICATIONS, TRADE, AND CONSUMER PROTECTION

OF THE

COMMITTEE ON COMMERCE
HOUSE OF REPRESENTATIVES

ONE HUNDRED SIXTH CONGRESS

SECOND SESSION

SEPTEMBER 27 and OCTOBER 6, 2000

Serial No. 106–166

Printed for the use of the Committee on Commerce

U.S. GOVERNMENT PRINTING OFFICE
67–119CC WASHINGTON : 2001

COMMITTEE ON COMMERCE

TOM BLILEY, Virginia, *Chairman*

W.J. "BILLY" TAUZIN, Louisiana
MICHAEL G. OXLEY, Ohio
MICHAEL BILIRAKIS, Florida
JOE BARTON, Texas
FRED UPTON, Michigan
CLIFF STEARNS, Florida
PAUL E. GILLMOR, Ohio
Vice Chairman
JAMES C. GREENWOOD, Pennsylvania
CHRISTOPHER COX, California
NATHAN DEAL, Georgia
STEVE LARGENT, Oklahoma
RICHARD BURR, North Carolina
BRIAN P. BILBRAY, California
ED WHITFIELD, Kentucky
GREG GANSKE, Iowa
CHARLIE NORWOOD, Georgia
TOM A. COBURN, Oklahoma
RICK LAZIO, New York
BARBARA CUBIN, Wyoming
JAMES E. ROGAN, California
JOHN SHIMKUS, Illinois
HEATHER WILSON, New Mexico
JOHN B. SHADEGG, Arizona
CHARLES W. "CHIP" PICKERING, Mississippi
VITO FOSSELLA, New York
ROY BLUNT, Missouri
ED BRYANT, Tennessee
ROBERT L. EHRLICH, Jr., Maryland

JOHN D. DINGELL, Michigan
HENRY A. WAXMAN, California
EDWARD J. MARKEY, Massachusetts
RALPH M. HALL, Texas
RICK BOUCHER, Virginia
EDOLPHUS TOWNS, New York
FRANK PALLONE, Jr., New Jersey
SHERROD BROWN, Ohio
BART GORDON, Tennessee
PETER DEUTSCH, Florida
BOBBY L. RUSH, Illinois
ANNA G. ESHOO, California
RON KLINK, Pennsylvania
BART STUPAK, Michigan
ELIOT L. ENGEL, New York
TOM SAWYER, Ohio
ALBERT R. WYNN, Maryland
GENE GREEN, Texas
KAREN McCARTHY, Missouri
TED STRICKLAND, Ohio
DIANA DeGETTE, Colorado
THOMAS M. BARRETT, Wisconsin
BILL LUTHER, Minnesota
LOIS CAPPS, California

JAMES E. DERDERIAN, *Chief of Staff*
JAMES D. BARNETTE, *General Counsel*
REID P.F. STUNTZ, *Minority Staff Director and Chief Counsel*

SUBCOMMITTEE ON TELECOMMUNICATIONS, TRADE, AND CONSUMER PROTECTION

W.J. "BILLY" TAUZIN, Louisiana, *Chairman*

MICHAEL G. OXLEY, Ohio,
Vice Chairman
CLIFF STEARNS, Florida
PAUL E. GILLMOR, Ohio
CHRISTOPHER COX, California
NATHAN DEAL, Georgia
STEVE LARGENT, Oklahoma
BARBARA CUBIN, Wyoming
JAMES E. ROGAN, California
JOHN SHIMKUS, Illinois
HEATHER WILSON, New Mexico
CHARLES W. "CHIP" PICKERING, Mississippi
VITO FOSSELLA, New York
ROY BLUNT, Missouri
ROBERT L. EHRLICH, Jr., Maryland
TOM BLILEY, Virginia,
(Ex Officio)

EDWARD J. MARKEY, Massachusetts
RICK BOUCHER, Virginia
BART GORDON, Tennessee
BOBBY L. RUSH, Illinois
ANNA G. ESHOO, California
ELIOT L. ENGEL, New York
ALBERT R. WYNN, Maryland
BILL LUTHER, Minnesota
RON KLINK, Pennsylvania
TOM SAWYER, Ohio
GENE GREEN, Texas
KAREN McCARTHY, Missouri
JOHN D. DINGELL, Michigan,
(Ex Officio)

CONTENTS

	Page
Hearings held:	
September 27, 2000	1
October 6, 2000	59
Testimony of:	
Case, Steve, Chairman and CEO, America Online, Incorporated	17
Froman, John W., Executive Vice President, Circuit City Stores	72
Gray, Lowell J., General Manager, Shore.Net	82
Heffernan, Margaret, President and Ceo, iCast	76
Levin, Gerald M., Chairman and CEO, Time Warner, Incorporated	21
Meisinger, Louis M., Executive Vice President and General Counsel, The Walt Disney Company	68
Wilderotter, Maggie, President and Ceo, Wink	64
Material submitted for the record by:	
Pickering, Hon. Chip, a Representative in Congress from the State of Mississippi, letter dated October 27, 2000, enclosing material for the record	106
Tauzin, Hon. W.J. "Billy", Chairman, Subcommittee on Telecommunications, Trade, and Consumer Protection:	
Letter dated November 6, 2000, to Lowell Gray, General Manager, Shore.Net, enclosing question for the record, and response to same	99
Letter dated November 6, 2000, to Maggie Wilderotter, President and CEO, Wink, enclosing question for the record, and response to same	101
Letter dated November 6, 2000, to Louis M. Meisinger, Executive Vice President and General Counsel, The Walt Disney Company, enclosing question for the record, and response to same	104

THE FUTURE OF THE INTERACTIVE TELEVISION SERVICES MARKETPLACE: WHAT SHOULD CONSUMERS EXPECT?

WEDNESDAY, SEPTEMBER 27, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:10 a.m., in room 2322, Rayburn House Office Building, Hon. W.J. "Billy" Tauzin (chairman) presiding.

Members present: Representatives Tauzin, Oxley, Stearns, Cox, Deal, Largent, Cubin, Shimkus, Pickering, Markey, Boucher, Gordon, Rush, Eshoo, Engel, Luther, Sawyer, Green, McCarthy, and Dingell (ex officio).

Staff present: Linda Bloss-Baum, majority counsel; Kelly Zerzan, majority counsel; Cliff Riccio, research analyst; and Andrew Levin, minority counsel.

Mr. TAUZIN. The subcommittee will please come to order.

This morning we are pleased to welcome both Mr. Case and Mr. Levin, who will give us an understanding of the implications of this historic merger that their two companies have now pending before the regulatory authorities here in Washington.

When Congress passed the Telecommunications Act in 1996, we fully expected that its impact would be nothing short of revolutionary. We knew it would dramatically transform the telecom marketplace by providing the requisite incentives to foster pretty bold thinking among companies with regard to technology innovation.

Clearly we anticipated the convergence of television and computers and telephony, but while we had a glimpse of that future, we had no specifics in terms of the technology or the players. For years we had spoken about technological convergence, but at today's hearing we herald its arrival de novo in the form of interactive television services, a concept that embodies the convergence of television and the computer.

Moreover, we anticipated that some of the Nation's largest companies would seek to offer exciting and newly integrated service packages to their consumers. We had a sense consumers would like that, they would like to receive more and more services and packages from different providers, and that in receiving these integrated packages, they might get added value and more exciting of-

fers. We specifically encouraged traditional telephone and cable companies to penetrate each other's markets, and, in the context of doing so, to offer a full suite of services to their consumers.

Clearly the overarching goal of the Telecom Act of 1996 was to bring about real consumer benefits in the form of more choices, lower prices, and improved product offerings.

Mr. Markey and I as early as 1992 joined forces on the floor of the House in the cable act of that year with that specific goal in mind, because Mr. Markey and I, I believe, share a common vision that when you have got one store in town, you generally have bad prices, bad products, bad attitudes; but when you have two stores in town, prices get better, products improve, and certainly attitudes improve. When three stores come to town, all hell breaks loose, and consumers generally are in charge of the marketplace.

We also knew that a by-product of the 1996 act's passage would be that some companies would likely merge. Earlier this year the country's No. 2 cable company, Time Warner, and the dominant provider of online services in the world, America Online, announced their intention to do just that.

It is against that backdrop that today this subcommittee holds its first oversight hearing entitled The Future of the Interactive Television Services Marketplace: What Can the Consumer Expect?

I think we are very eager to examine what impact this new entity, if it gains the requisite regulatory approvals to merge, will have on consumer choice in the fast-arriving and much anticipated interactive television services marketplace.Will consumers have a genuine choice among a panoply of competitors in this emerging market, or will they be left with a Hobson's choice, electing to enjoy products offered by AOL or Time Warner, or from no one at all? We are particularly interested in learning from our two distinguished witnesses about what new and exciting services a combined AOL-Time Warner intends to offer consumers, and in what form: How will they be packaged? What exactly should consumers expect?

This oversight hearing is intended to be a learning session about what services consumers will enjoy, what the competition will look like in this emerging interactive television services marketplace.

I, for one, am particularly interested in ensuring that the genuine robust competition thrives in this new market. Above all else consumers should have a meaningful choice in what interactive television services they receive, and they must be assured they will be able to enjoy the highest quality of interactive television services, regardless of the provider.

Consistent with the 1996 act and this subcommittee's interest in fostering competition in all markets, this subcommittee obviously will not be content with the creation of de facto monopolies or situations where consumers will not have real choices. We want to see real, vibrant competition, not something illusory.

I am aware that members of the minority are interested in hearing from others on this issue, and, frankly, I agree with them. Like them, I am eager to learn more. In that regard I have been working with Chairman Bliley's staff to find the additional date, Mr. Markey, and Mr. Dingell, when he arrives, that we might conduct a second hearing this session.

I am told that—I have a sense, rather—that it is likely to be the 6th, sort of a sixth sense, that Friday morning is what we are aiming at, so we can, in fact, learn more from others about this interesting prospect before we leave this session.

As I said, this is just the beginning of the learning process. We look forward to hearing other perspectives after this morning.

This morning when we complete this very important hearing, we have an unusually important job to do as a subcommittee. That is to finish our work on the Firestone recall legislation. So in order to accommodate this hearing and to get us in a position where we can move into action on that important bill, we will proceed as follows, if members will, by unanimous consent, agree.

What I would ask by unanimous consent, first of all, is that all members' written statements be made part of the record, without objection; that our witnesses' written statements be made part of the record, without objection; and that our witnesses be permitted, instead of the normal 5, 10 minutes to explain exactly what this new merger portends for American consumers.

Then, by unanimous consent, I will also ask that all members be permitted 10 minutes rather than the usual 5 in the Q and A session so we can thoroughly explore all of the issues that I know are on members' minds.

Is there any objection to this unanimous consent?

Mr. STEARNS. No objection, just a question. I understood this was going to be a hearing of approximately 1 hour. I just wondered, if we had all the subcommittee here and each person had 10 minutes, I am not sure we would be able to get around to all members. I know we want to get around. I just pose that as a question.

Mr. TAUZIN. Actually, we have an hour before we have to recess. At 10 o'clock the committee will recess to go downstairs to take the official committee picture with Chairman Bliley, and we will have a recess for that purpose, and then we will return here to continue and complete the hearing. So I think we can complete it as the chairman has suggested in the unanimous consent.

Is there any objection to the unanimous consent request?

Hearing none, then it is so ordered.

The Chair is now pleased to welcome and recognize for an opening statement my friend, the gentleman from Massachusetts, Mr. Markey.

Mr. MARKEY. Good morning. Thank you, Mr. Chairman, for conducting this hearing today.

Although this hearing is billed as a hearing on the future of interactive television, I think we all know that this is not the true subject for today's hearing.

You might think I am referring to the AOL-Time Warner merger as the real subject of today's hearing, but that is only the subtext of the matter. Today's hearing is a hearing on virtual reality. That is because today the subcommittee is having its first virtual witnesses.

Although we do have two real-world witnesses before us, and I would like to thank Mr. Levin and Mr. Case for taking time out of their busy schedules to spend the morning with us, we have not been permitted for this hearing, in this timeframe, to invite real witnesses with different views and perspectives to come and testify

at this morning's hearing, so today we are going to have to conjure up virtual witnesses in order to balance today's proceedings.

There are obviously other competitors, innovators, and entrepreneurs that have raised concerns about a merger of AOL with Time Warner. There are a number of consumer advocates who have concerns over choice and rates and diversity. What would those virtual witnesses have testified to if they had been permitted to appear before the subcommittee today? Let me venture a few guesses.

For instance, if Margaret Heffernan were here, she would have a number of things to say about openness and interoperability. Margaret is the CEO of iCAST. iCAST is a new breed of entertainment company based not in New York or Los Angeles but, rather, in Woburn, Massachusetts. The Internet permits companies like iCAST to utilize the open platform and do-it-yourself nature of the Internet to permit users to create and share multimedia entertainment.

iCAST has concerns shared by Yahoo, Microsoft, and dozens of other companies about instant messaging interoperability. She probably would have noted that unlike e-mail and telephone communications, instant messaging, or IM, does not yet operate through compatible standards. She would observe that instant messaging already is an application that has some 100 billion instant messages sent every day by millions of users worldwide, and that it is highly popular and an integral part of her company's future business plans.

She would lament the fact that AOL has failed thus far to work with her company and others to develop an open set of technical standards to enable users of any instant messaging service to communicate with each other regardless of which service provider they use.

Ms. Heffernan would probably raise arched eyebrows at media reports that AOL has managed to work out interoperability with two of its own IM services while it seemingly cannot figure it out for the rest of the world. Ms. Heffernan would clearly tell us that AOL dominates the IM market, that interoperabililty is in the hands of that one company, and that AOL has been dragging its feet on this, and that AOL should be required to reach an agreement on standardization by date certain as part of any merger approval.

Our next virtual witness is an Internet service provider. What would that ISP witness have testified about? Our virtual ISP witness would have insisted that telecommunications services such as broadband access to the Internet over cable systems must be fully open for unaffiliated, independent Internet providers. The CEO of EarthLink, Rocky Mount Internet, or Shorenet in Lynn, Massachusetts, or any other CEO of the thousands of ISPs could have been here to tell of their dreams of being the next Steve Case.

They would tell us that our policy should be one of continuing the open architecture and consumer empowerment model of the Internet. Our virtual ISP witness would explain that the platform for driving innovation and economic growth for our new economy is a policy of open access rather than one of optional access, where the cable guy gets the option to choose who gets on and what to charge competitors. Our virtual ISP witness would talk about their

desire to have concrete, legally binding open access rights as part of any AOL-Time Warner merger approval.

Another virtual witness today is somebody representing a competing content provider, such as Disney, ABC, or NBC. This virtual witness would point out the ability of a merged AOL-Time Warner to unfairly favor its own content. This witness would testify to what consumers would miss out if a walled garden developed and other content providers were discriminated against. This witness would explain that open access rights that enable content providers to get into a system would have that right rendered next to meaningless if their content was then electronically buried, technologically degraded, or consumers had difficulty finding it.

The concern about being discriminated against on a systematic basis would lead this witness to talk about the need to scrutinize closely all of the issues around the nexus of content and conduit, and for tough nondiscrimination safeguards to be part of any merger approval.

Finally, Mr. Chairman, what would our virtual consumer witness tell us? Consumer groups such as Consumers Union and Consumer Federation of America and the Media Access Project and Center for Media Education have filed comments at the FCC petitioning the Commission to deny the merger approval. They are concerned about media concentration, especially where AOL-Time Warner would have corporate relationships with both AT&T and with Direct TV. They have obvious concerns about cable rates and cross-subsidies. They would note that important principles of consumer choice could be thwarted without effective open access rules.

Our virtual consumer witness would want commitments on consumer privacy protection as well, and could call for eliminating the cross-ownership with AT&T and Direct TV.

I am not sure exactly what our virtual panelists would say about every issue, or what they might respond with or point out when Mr. Case and Mr. Levin pledge openness and interoperability and attest their merger is both proconsumer and procompetitor. I only know to a virtual certainty that this committee and the members would have been better served if the virtual witnesses would have been permitted to appear in person, in real time to air their views in public.

I appreciate the fact that we will have a hearing with the other witnesses at some point in the future before the session ends, but I think it would have been better for all of us if we had it all part of this one discussion so we could have reached conclusions as to what the best way was to approve the merger, which I think ultimately will happen, but with conditions that were fair to all other participants in the marketplace.

Thank you, Mr. Chairman.

Mr. TAUZIN. I thank the gentleman and can assure him—actually give him virtual assurance that we will have those and other witnesses before this panel. We simply cannot under time constraints have them today.

The Chair recognizes the gentleman from Florida, Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman. Also let me compliment you for holding this hearing, and also to say to Mr. Case and Mr.

Levin, we appreciate very much you being here. We know how busy you are.

But in a democracy, I am reminded that when I go back to my district, and I have town meetings, and generally the people are very supportive of what I am trying to do, but occasionally they will say to me, "Congressman, I want you to help pick up my trash."

I try to explain to them that I deal with Internet issues and Federal issues, and whether we go to war or not. And the woman will generally—the woman said to me, "Well, Congressman, I need help." So I said, "I will try to help you, but have you called the mayor of the small town," which was in Okahumka, and she said, "I have not called the mayor." I said, "Why haven't you called that person first, in all deference to you?" And she said, "I didn't want to start that high."

In a democracy, the people rule, so perhaps you might be reluctant to come up here. We have CNN, I am sure, and we also have C-SPAN. Your every word will be recorded and played again and again throughout this country.

But in this wonderful country, we all report to somebody, and obviously, I report to the constituents who are concerned about your merger, this huge merger, and you as individuals, very successful, very rich, also have a responsibility and a fiduciary responsibility to these people to explain what is happening and to come forth and talk.

So I compliment you for your forthrightness and willingness to come here. I am sure you have some trepidation.

Mr. Chairman, I think in a larger sense, as you pointed out in your opening statement, this is a hearing on interactive television services and focusing what consumers can expect in the future. This interactive television will allow you to practically order any movie ever made without having to leave your living room, order a CD while watching a concert on your television and to download it immediately to your home stereo system, allow you to play interactive games on your television with people on the other side of the world. The possibilities are only limited by our imagination and these two great entrepreneurs and their corporations this morning.

Interactive television is blurring the distinction between home computers and television sets by allowing viewers to use advanced digital desktop devices to access a two-way interactive communications network. It changes the concept of TV broadcasting, because viewers can have a direct and intimate relationship with advertisers, networks, and, of course, their favorite TV shows.

According to the research firm of Frost and Sullivan, interactive television service and advertising revenues will grow from $554 million in 1995 to more than $13 billion by the end of the year 2002. A major trend contributing to the market's growth is a full-service provision to be offered by the cable and telephone companies. Service providers recognize this, and industry consolidations and crossovers are already resulting in a handful of dominant companies. This is one example this morning.

AOL and Time Warner is a $120 million pending merger. As a result, this committee would be remiss in its duties if it failed to carefully scrutinize such a megamerger and, further, if it failed to

fully highlight and uncover the full ramifications it may have on the future of e-commerce, the Internet, and, of course, interactive television services.

So I hope to hear from our witnesses today and be assured that as interactive television services are just being actualized and taking off the ground, companies will not try to strengthen their dominance in this market. As such, I am particularly interested in learning what witnesses are doing to develop interoperabililty standards in instant messaging and to learn more about the implementation of the memorandum of understanding as it relates to an open access platform for competing providers.

I think all of us are just elated that you are here. We appreciate your taking your time. We support competition and lower prices and choice. That is a hallmark of the American culture, choice being the No. 1 trait.

Mr. Chairman, I commend you again for this hearing and look forward to it.

Mr. TAUZIN. I thank my friend from Florida.

The Chair is pleased to welcome the gentleman from Texas, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. To move along, I will paraphrase my opening statement and put in the full statement.

Mr. Chairman, again, I appreciate the opportunity for us to be here. The merger of these two companies will combine one company with 20 million cable subscribers and an ISP with over 130 billion worldwide subscribers. That is a significant amount of market power that I think concerns everyone. Blocking access, or perceived to be blocking access to emerging technologies, including instant messaging, as my colleague mentioned, coupled with the demonstration of the market power to the detriment of competition does not serve the public interest.

I am particularly concerned because I have a district in Houston involved with the origination of the conflict between Time Warner and ABC-Disney last year. I thought we were just being picked on. I found out it was really a nationwide problem.

But when you are dominant in a certain market, and particularly with cable service, you have the ability to impose terms and conditions that would normally not be available in a competitive environment.

That was ultimately solved, and I was glad it was, but then it was followed up with a problem locally with a Time Warner employee, actually a disturbing campaign to target the competition for DSL services in Houston, and I know that employee was disciplined. Again, that kind of demonstration of market power is something that our committee in 1996 did not intend to do with the telecom deregulation.

I know both Mr. Case and Mr. Levin—I am glad you are here in our committee to ensure market competition. I have been assured that AOL supports open cable access and has pledged to have an interoperabililty platform for IM by June of 2001. These are positive signals, Mr. Chairman. I hope we would continue to see that.

I yield back my time.

Mr. TAUZIN. I thank my friend.

The Chair leads to the gentlewoman Mrs. Cubin.

Mrs. CUBIN. Thank you, Mr. Chairman. Most of us have expressed the same concerns about what is going on today. You might think we were talking to the same people.

The representatives of the two companies that are here with us today are obviously major players in the interactive television marketplace; however, they are not alone. Several companies are meeting the demand for interactive television besides these companies, Microsoft and AT&T just to name a couple.

The AOL Web site expresses the importance of open, equal and consumer choice, the role of Federal authority and laws in fostering competition in the Internet industry, and a wide range of content and consumer protection issues.

The Web site goes on to say, and this is a quote, "As the Internet becomes increasingly integrated into our societal fabric, it is crucial to strike an appropriate balance between the role of the government and the role of industry in formulating solutions to Internet policy issues.

"Finding this balance is the key to ensuring that the Internet will continue to grow and reach its full potential unhampered by unnecessary regulation, but appropriately guided and monitored in crucial areas to protect the safety and security of its users."

I could not agree more. I'm sure everyone on this panel agrees that that is of the utmost importance.

As we continue to debate regarding open access to the existing telecommunications infrastructure, it is definitely in the industry's best interest to resolve this question so that Congress does not have to do so. Until that time, this committee does have a responsibility to get to the bottom of some of these issues. I am anxious to hear from Mr. Case about what AOL plans to do regarding their interoperability of instant messaging, and if we expect any advances in telecommunications, we should ensure that systems interact with each other and that consumers have the ability to communicate, even though they may not be on the same network.

In addition, I would like to hear from Time Warner what they are willing—what assurances they are willing to give us that television networks outside AOL-Time Warner family will continue to be carried on Time Warner's cable systems.

Finally, regarding interactive television, I am a huge football fan. Some of the highest points of my life and some of the lowest points in my life have revolved around the Denver Broncos. So I want to be sure that when interactive television comes to Wyoming, I can watch the Broncos on ABC's Monday Night Football over Time Warner's cable network and call up the statistics from ESPN using my Yahoo Web browser.

If I would have thought 5 years ago that I would be saying anything like that, I would ask you to slap me. But anyway, you get the message.

Thank you very much, Mr. Chairman, for holding this hearing. I certainly appreciate the gentlemen's presence here today.

Mr. TAUZIN. The Chair recognizes Mr. Gordon for an opening statement.

Mr. GORDON. Thank you. We welcome Mr. Case and Mr. Levin. It seems like we are trying to filibuster so you don't have any chance to talk today.

I am going to be very brief. You know why you are here. Our interest is obviously in the merger. Our poet laureate of the committee Mr. Markey, as well as others, have laid out the major issues. I hope you will address those, and address them beyond just your good faith and interest, which I have no question about, but how you intend to institutionalize this effort to have interoperability so that if you were to leave tomorrow, we would know that we would have a foundation for this to occur.

Again, thank you for being here.

Mr. TAUZIN. I thank the gentleman.

The gentleman from Virginia, Mr. Boucher is recognized.

Mr. BOUCHER. Thank you, Mr. Chairman. I am pleased to join with other members of the committee this morning in welcoming the chief executive officers of two of the companies that will lead the way in the introduction of interactive television and other advanced services. I want to thank Chairman Tauzin for presenting the opportunity this morning for what I think is a timely discussion.

As AOL, Time Warner, and others launch interactive television services, a new urgency is brought to the debate over the need for a national policy on open access which will assure that all Internet users have a choice of Internet access providers, whatever platform they use for Internet transport.

My Virginia colleague Bob Goodlatte and I have introduced legislation that would make open access the national policy. We recently sent a letter to the Chairman of the FCC urging that the Commission move forward quickly with a rulemaking to require open access as the national policy. It will promote consumer choice, it will promote competition and innovation in the offering of Internet access services, it will provide regulatory parity across all Internet transport platforms, and it will offer greater assurance that all content providers have a clear path to the consumer, free from potential disruption or discrimination.

Given the emerging practice of using the Internet for the interactive content tied to television services and the benefits of open access which I just mentioned, the need for a uniform national policy of open access is today clear, but at the present time, the policy is anything but uniform. It is fraught with disparity.

The disparity is both geographic and industry-specific. It is geographic in the sense that open access is now the law within the States that are within the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, which has now held that cable modem service is a telecommunications service, and as a telecommunications service, it carries with it the preexisting requirements for open access that apply to all of the services that are so defined.

The current law doesn't require open access anywhere else in the Nation, but it does in that select group of States. It is industry-specific because it applies to telephone companies, but not to other Internet transport platforms. The voluntary commitments of some cable companies to provide open access are anything but uniform

and differ greatly in both timing and in the elements the various voluntary commitments will contain.

For all of these reasons, the time has come to end the disparities, to end the uncertainties, and to assure content providers access for interactive TV by making open access the national policy, and to make it applicable to all Internet platforms.

That said, in my view it should not be applied company by company as a merger condition. To do so would create unfair competitive advantages and disadvantages among those who offer similar services and only worsen the uneven and disparate application of open access requirements which characterize the national policy today.

So the time has come for the FCC to move quickly to implement open access as the national policy, and I hope that during the course of this hearing we can underscore in a more definitive way that very clear need.

Thank you, Mr. Chairman. I look forward to the testimony of these witnesses.

Mr. TAUZIN. I thank my friend from Virginia.

The Chair is pleased to welcome and recognize the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman. An early hearing, but I know this is an important one.

Interactive TV is right there, it is on the horizon. I think everyone is real excited about it. I am looking forward to hearing the testimony to learn more about it, its capabilities, and how it will help expand our economy. I think this communication revolution technology really gets the credit for this boom in economic activity that we have in this great country, and this is part of the debate. I thank the folks for coming in early.

I yield back my time, Mr. Chairman.

Mr. TAUZIN. Thank you.

The Chair recognizes the gentlewoman from California, Ms. Eshoo for an opening statement.

Ms. ESHOO. Thank you. Good morning, Mr. Chairman. Thank you for holding this important hearing.

Welcome to our distinguished witnesses.

The technological revolution we are witnessing continues to amaze, I think, every single one of us. The Internet, which initiated this tremendous change just a few short years ago, has become invisible in many ways because it can no longer be associated with just the personal computer. It has itself evolved to the point that it is accessible from a multitude of devices, one of them being the television set.

Today we are going to hear about another new technology, interactive television, which incorporates the Internet and other existing technologies into a single interactive consumer experience. This remarkable technology will allow viewers to purchase products while they are watching them being advertised on television. It will allow viewers to watch television and chat about it at the same time, which I guess we can do today, but it can even allow Mr. Markey to check the statistics of his beloved Red Sox as he watches the game on television. This truly represents, I think, the convergence

of television, Internet, content and commerce into one medium for consumer consumption.

Interactive television is equally remarkable in the e-commerce opportunities it will generate. This market is estimated to reach $25 billion by 2005.

As always, new technology is accompanied by new issues. Issues of interoperability, open access, and revenue collection and distribution must be resolved so we may achieve seamless communication and functionality. Providers, of course, want to offer universal access to their products or systems, so these issues gain increasing importance as new technologies come into the marketplace.

The companies represented here today have a significant stake in how this technology reaches America. AOL is the dominant Internet service provider, while Time Warner has a significant share of the cable and entertainment industries. Together these companies will be the dominant content provider for many Americans who access the Internet.

Many of the issues I mention here are the basis of the concerns that have been raised about the pending merger of these companies. For example, the instant messaging technology that AOL has been instrumental in bringing to online communications at this time is incompatible with other systems. Does this contradict Internet philosophy, which is freedom of information and communication worldwide?

Because the public is growing increasingly accustomed to interactivity and its corresponding benefits of choice, convenience, and control, the inability to freely and easily communicate is something worthy, of course, of the attention of FTC and the FCC, and, of course, we are going to discuss it here this morning.

Having said that, however, I believe that this merger will allow consumers to experience technology such as interactive television sooner than they would have otherwise. I also believe the Internet community will be the recipient of still unrealized benefits that will be an outgrowth of this merger. The merger certainly deserves careful review, but the careful review does not automatically mean imposing conditions which would prevent consumers from reaping these benefits.

So with all of this in mind, I look forward to the testimony. I am very glad to see the witnesses. I think that between the two of you, that you have captured the attention and a lot of the imagination of people across our country.

Thank you, Mr. Chairman, for holding this important hearing. I appreciate it. I look forward to participating in it.

Mr. TAUZIN. I thank the gentlewoman.

The Chair recognizes the gentleman from Ohio, Mr. Sawyer.

Mr. SAWYER. Thank you, Mr. Chairman.

There are really only three things I want to do today: I want to join my colleagues in welcoming our witnesses; I want to submit my statement for the record; and third, I want to yield back the balance of my time.

[The prepared statement of Hon. Tom Sawyer follows:]

PREPARED STATEMENT OF HON. TOM SAWYER, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

I would first like to thank Mr. Case and Mr. Levin for testifying today before the Subcommittee. I realize that this is a very sensitive time in the merger process and appreciate you being here today to listen to the concerns of Congress and to answer questions about the pending merger and interactive television.

First, I am worried that AOL will have the ability to discriminate against unaffiliated content and interactive services providers. I understand and agree with the AOL argument that what is good for the goose is good for the gander—meaning that if open access applies to AOL, it should also apply to everyone else in the market as well. However, I am concerned that if the approach is to wait on the FCC to rule on open access, or even worse, to wait for Congressional action, real open access is at best two to three years away. That means that if we follow this approach, AOL-Time Warner will have a good two to three year run with a dominant share of the market coupled with the ability to discriminate against those ISPs and content providers that are unaffiliated with their system. I would appreciate it if Mr. Case and Mr. Levin could address how they see the market working in the next couple of years if a non-discrimination caveat is not part of the merger and how we can maintain diversity of voice over interactive television.

Second, I am troubled by the length of time it is taking to integrate instant messaging systems. As I understand it, a consumer of AOLTV would currently be blocked from using another IM system. As AOL-TV is rolled-out in Time Warner territories, does AOL have a plan to integrate not only AOL instant messaging but other instant messaging systems as well? Once again, I would appreciate Mr. Levin and Mr. Case's insight on how interoperability of IM systems could be influenced by the roll-out of AOL-TV in Time Warner territories.

Thank you Mr. Chairman for holding this hearing. I look forward to the witnesses testimony and if, by chance, we run out of time today, I look forward to an ongoing dialogue on these issues during further debate on the pending merger and the roll-out of AOL TV.

Mr. TAUZIN. I want to thank the gentleman.

The Chair recognizes the gentleman from Michigan, the ranking member of the full committee, for an opening statement.

Mr. DINGELL. Good morning, Mr. Chairman.

Mr. TAUZIN. Good morning, Mr. Dingell. I am pleased to recognize you for an opening statement.

Mr. DINGELL. First, I commend you for holding this important hearing today on the future of interactive television, Mr. Chairman, and I extend my appreciation to the distinguished witnesses for appearing. I know Mr. Case of AOL and Mr. Levin of Time Warner, and I know that they have provided the subcommittee with valued and valuable insights. Thank you, gentlemen, for testifying.

I must say, however, I am equally troubled that this committee will not be hearing from any witnesses today who would describe alternative visions to the one provided by AOL and Time Warner. I want to make it clear I am not for or against any particular resolution of the questions before the committee today. I think, however, that the committee needs to gather all the facts, and I appreciate your offer, Mr. Chairman, to hold an additional hearing before adjournment that would allow consumer groups and competing enterprises an opportunity to articulate their own visions of the future and to voice concerns that they may have about the perspective of which we will hear today.

I appreciate this offer, Mr. Chairman. I would note, however, that the witnesses that we are discussing were refused the opportunity to testify at today's hearing, particularly since we have such little time remaining before adjournment. The planning for this hearing began more than a month ago. We in the minority trusted

that the hearing would be fair and balanced, as is the customary practice of this subcommittee.

The situation today is particularly distressing because the proposed AOL-Time Warner merger will have a profound effect on the future of all telecommunications and information services, including interactive television. There can be little doubt that the combined company will be an extraordinarily powerful player in every line of business that falls within this subcommittee's jurisdiction, including cable programming, distribution, broadcast television stations and networks, land line and fixed wireless telephony, and, of course, Internet access and broadband delivery systems.

Yet despite the vast implications of this merger for all American consumers and competing providers, this hearing is the first that the committee has held on the prospective activities and actions, and the perspective we will hear about today is going to be quite narrow.

I have no doubt that the proposed merger will produce genuine benefits for the American public. I am even more certain that the witnesses today will do a splendid job in commending our attention to them. Unless and until we hear today about the potential harms that may result, I believe it would be imprudent to make a judgment about the wisdom of this transaction.

Unfortunately, this puts the committee in the awkward position of having to blindly defer to the FCC, an agency whose judgment on these kinds of matters has caused us great distress in the past, and whose judgment on other matters raises still further questions.

I want to make it clear, I do not oppose and I do not support this. I feel that, however, the committee has the distinct responsibility of gathering all the facts, hearing from all the witnesses, and knowing as much as possible about this before we have completed our oversight responsibilities and done our duty on these matters.

I do, however, look forward to hearing the testimony of the witnesses before us. I welcome them. I am glad to see they are here. I have heard their comments on this merger, and I believe they are genuinely trying to not only benefit the company, but also to serve the public interest.

I want to thank you, Mr. Chairman, for your willingness to explore all sides of the debate in the coming weeks. I am hopeful that we will have time to do so and will not find that we lose that opportunity because of adjournment or other events. I remain hopeful that today's witnesses and their representatives will be able to participate in that discussion, as well.

Thank you, Mr. Chairman. I yield back the balance of my time.

Mr. TAUZIN. I thank my friend.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. MICHAEL G. OXLEY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OHIO

Thank you, Mr. Chairman. I commend you for holding these hearings today.

I also want to thank Steve Case and Jerry Levin for being here. Putting together a merger of this size is an absorbing, full-time task. We very much appreciate their willingness to come and talk about the merger's benefits for their companies, as well as for all Americans.

Ever since I first came to Congress nearly twenty years ago, I've been hearing about the promise of interactive television. But in all that time, the closest we've come to interactive TV probably has been channel surfing.

Well, it seems that's finally about to change for good. I look forward to hearing from Steve and Jerry about their plans for television's future. America Online is spearheading the internet revolution, and Time Warner has long been a leader in television, from cable to programming. So the combination of these companies holds great promise to help television take the next great leap forward.

But, I bet we won't just talk about interactive television today. This hearing is the subcommittee's first formal opportunity to hear about the historic AOL-Time Warner merger "up close and personal" from Mr. Case and Mr. Levin.

I always have believed that government generally has no business interfering with economic activity, or trying to judge what the "best" decisions should be. So it will not surprise anyone that I support the AOL-Time Warner merger. These companies leaders in their fields—have so much potential to lead the "wired world" of the 21st century, that we should be cheering them in the world marketplace instead of trying to micromanage the terms on which these companies will merge.

We are living in a time of telecom and media mergers. This is by no means the biggest one. For example, the Vodafone and Mannesmann merger was larger—and that merger went through the European Union process faster than some Olympic marathoners. There are many other mergers on tap from Vivendi and Universal, to Deutsche Telekom and Voicestream.

In such an environment, is it really fair—or good public policy to string out and micromanage merger approvals of *American* companies? Of course not. In a global economy, it is clear that the best solution is to encourage all this economic activity. It can only provide better products and services for all our citizens. So, clearly, the AOL-Time Warner merger should be approved, and soon,

Which leads me to my second point. For years, the FCC has convincingly made the case that it needs to be reformed. The best case for FCC reform has been the way it's handled mergers. The FCC's m.o. is as clear as any crime show on television. It tries to intimidate and extort concessions from companies, instead of taking on issues through the rulemaking process as Congress intended.

Now, with the AOL-Time Warner merger, the FCC is at it again. Threatening merger conditions is nothing more than extortion. The FCC's "process"—if you can call it that—actually tries to pick economic winners and losers by saddling one company with legally binding requirements that no other company has to live with. It's the worst possible way to make public policy, and yields the worst possible result. I hope my colleagues can send a unified message today that we don't want the FCC doing business in that way any longer.

Again, I welcome Steve and Jerry to the committee, and look forward to hearing more from them today about their plans for their new combined company. Thank you, Mr. Chairman.

PREPARED STATEMENT OF HON. STEVE LARGENT, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF OKLAHOMA

Mr. Chairman I will make my opening remarks very brief. I want to welcome our two very distinguished witness. I'm will be extremely interested to hear their views on the rapidly changing convergence of technologies that is driving this digital economy and the future of interactive television.

The proposed AOL/Time Warner merger, if approved, will be the single largest commercial transaction in history. I think it is safe to say that both of these companies are the dominant entities in their respective industries. That is why since the merger was announced several months ago there has been a great deal of discussion and scrutiny regarding consumer choice, as well as, what will this merger mean for competition in the emerging field of digital information and entertainment services including internet service, interactive T.V. and music.

If I can create a word picture, the combination of AOL/Time Warner is like a very large aircraft carrier that for the past few months has been strafed by its various competitors. Personally, I have kept an open mind about the potential benefits of the merger, and I look forward to hearing from our witnesses.

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Thank you Mr. Chairman. I'd like to personally welcome Mr. Case from America Online, one of Virginia's finest exports, and Mr. Levin from Time Warner to the House Commerce Committee and thank them in advance for their testimony this morning.

Today's hearing is *indeed* about an important merger that will affect the way that people around the world receive and share information. That is the merger between

the PC and the television. These two devices, which are commonly used in separate rooms of most American homes every day, are on the brink of becoming one interactive machine that will combine the passive viewing nature of the television with the active communication abilities of the PC.

Since its passage of the Telecommunications Act of 1996, this Committee has undertaken a variety of initiatives to spur the development of electronic commerce. For example, we opened up the market for the retail sale of navigation devices, such as the AOL-TV set-top box; we rewrote the WIPO bill to ensure that consumers would have access to new information products and that manufacturers would have the design freedom to innovate; and more recently, through our oversight responsibilities, we have encouraged the FCC to speed the rollout of new digital television products and services. The resulting explosion of the technology sector has allowed companies to compete and bring the best services, such as interactive television, to the American public.

However, the marketplace for interactive television is still in its infancy, with only two major players currently offering interactive devices in the mass market. Because of this, average consumers do not yet understand how the technology can ultimately affect their viewing habits. And there are a number of unanswered questions involving data speed, billing, control of the screen image and its imbedded information, and how revenues can be shared for products purchased over the medium. I look forward to hearing this morning's testimony about how these important issues will affect the further development of interactive television.

Clearly, it is impossible to discuss the future of interactive television with these two witnesses and ignore the AOL-Time Warner merger pending before the FTC and FCC. According to press reports, I understand that the FTC and FCC may condition the merger on a mandate that AOL and Time Warner open their cable to non-affiliated ISPs. Whether or not I support open access, I am troubled that the FTC, an agency lacking communications expertise, is considering the adoption of merger-specific conditions affecting only one entity. Any open access rule should be the product of a FCC rulemaking, with the benefit of an open debate from all parties, that governs the actions of all market participants.

I am also troubled that there appears to be an inordinate amount of merger negotiation information making its way into the press. Just last week, a FCC "draft order" was leaked to the *Washington Post,* and repeatedly merger negotiations, that are supposedly part of a non-public investigation, are ending up in the papers. These leaks not only affect delicate merger negotiations, but they can, and do, upset the markets on Wall Street. I have sent letters this week to both Chairman Pitofsky and Chairman Kennard outlining these concerns.

I look forward to learning more about this merger and the merger's affect on the future of interactive television. I thank Mr. Tauzin for having this hearing and I thank the witnesses for coming this morning.

With that, I yield back.

PREPARED STATEMENT OF HON. KAREN MCCARTHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Thank you Chairman Tauzin and Ranking Member Markey for holding this hearing on the future of interactive television. I look forward to the testimony of Mr. Case and Mr. Levin on the merger between their companies and the impact it will have on the future of interactive television, the need for open access, the role of instant messaging in interactive television, and the privacy concerns interactive television may raise. I hope a future Subcommittee hearing on interactive television will have additional witnesses expressing a wide variety of view points.

The Internet revolutionized the way we communicate. It has provided people with a means to gather and disseminate information and ideas from all over the world. Interactive television expands upon this revolution by converging television, the Internet, content, and commerce so that consumers are able to not only choose their programming, but interact with it. For example, consumers will be able to purchase a CD of the music being played by a band during the telecast of the Grammys by using their remote control.

As exciting as the possibilities of interactive television seem, there are some significant issues that I hope will be addressed by our witnesses today. First, can interactive television exist in a competitive marketplace if cable operators do not allow access to non-affiliated content providers, and if service providers discriminate against content providers with whom they are not affiliated. If a viewer is watching a baseball game on FOX and clicks a link to get additional statistics, can that viewer choose FOX's sports website or CNN-SI's website for this material?

Second, I am very interested to hear from our witnesses about their views on possible privacy issues arising out interactive television. Will set top boxes provide cable or satellite operators with the ability to store information on the viewing habits and purchases of its customers? If so, how will that information be used? Will it be sold to third parties? Will consumers be informed of the fact that their viewing habits and purchases are being monitored? Will they have the ability to opt out of it? Are the same privacy issues facing users of the Internet applicable to users of interactive television as technological advances become more invasive. We must ensure that consumers do not exchange their right to privacy for the potential benefits of interactive television.

Lastly, I would like to. hear their views on about AOL's instant messenger (IM) system becoming interoperable with other instant messaging systems as a condition of merger approval. Does AOL currently plan on making its IM system interoperable with competing IM systems?

While it is important that the federal government not stifle innovation in nascent technologies, we must consider the ramifications of those technologies on a competitive marketplace, consumer choice, and privacy. Interactive television service providers must not discriminate against the content of competitors. Open access to broadband networks and interactive television set top boxes as well as the interoperability of competing IM systems are necessary to promote competition and a fair playing field. It is my hope that as the interactive television service market grows, industry will work together to achieve these goals.

Thank you Mr. Chairman. I yield back the balance of my time.

Mr. TAUZIN. Before I introduce our witnesses, let me assure my friend, as I have already, that we are working with the staff to fix the date. It looks like it might be Friday, October 6, in the morning, of next week, when we are very likely to be around. It is my hope that we can work with the gentleman, as well as my friend from Massachusetts, on an appropriate witness list and take your concerns into account.

I share your interest in hearing from other witnesses. Our problem was simply scheduling the second panel with the pressure of the action we have to schedule today in terms of the Firestone bill.

I thank the gentleman. We will accommodate them. We will always try to accommodate the minority on these sorts of requests.

Mr. DINGELL. We have had a discussion, you and I, Mr. Chairman, and I appreciated that discussion. I appreciate your comments just now. I know that you have the best of intentions. I am hopeful that events will not preclude those good intentions from bearing appropriate fruit.

Mr. TAUZIN. We have comparable hopes here.

Mr. DINGELL. As my old daddy used to say, trust everybody, but cut the cards.

Mr. TAUZIN. Like Mr. Regula said, trust but verify.

We are going to again work with the gentleman. I have asked the ranking minority member of the subcommittee to deliver to us the appropriate letter under rule 11 today, and we request that we receive that before the termination of this hearing.

Mr. DINGELL. Mr. Chairman, I would just observe one thing. We don't really like to write a letter under a rule, and if we have your commitment on these matters, I think that you will probably not receive a rule 11 letter.

Mr. TAUZIN. That is your call, Mr. Dingell. It is simply a formality that if you would like to proceed with, we would be happy to receive it.

The Chair is now pleased to welcome our two distinguished witnesses, first, Mr. Steve Case, the chairman and CEO of America Online, Incorporated, a sometimes musician, guitar player, who

was obviously interested in making sweet music with our other distinguished witness today Mr. Gerald Levin, chairman of and CEO of Time Warner, Incorporated.

Thank you very much, gentlemen. As I stated, you will be recognized to speak for 10 minutes. You may summarize your statement since we will accept your written statements.

We will begin with Mr. Case. You are certainly welcome.

STATEMENTS OF STEVE CASE, CHAIRMAN AND CEO, AMERICA ONLINE, INCORPORATED; AND GERALD M. LEVIN, CHAIRMAN AND CEO, TIME WARNER, INCORPORATED

Mr. CASE. Good morning, Mr. Chairman and members of the committee. Jerry and I are looking forward to talking to you today about some of the trends that are transforming the landscape of media and communications, specifically convergence and interactivity. The effects of these trends, we think, will be astonishing, creating remarkable new opportunities not only in our industries, but all across all sectors of our new global economy.

We believe that the merger of our two companies will help to drive these trends and make interactivity and convergence more accessible to consumers around the world. The simple fact is this merger will increase consumer choice in ways that really enrich people's lives by spurring new innovations that consumers increasingly want and demand.

In less than 10 years, the Internet and interactive technology have embedded themselves in nearly everything we do. This is not only because the digital revolution has increased consumer choices in ways we only dreamed of 10 years ago, it is because it has empowered the consumer in ways that no other medium has done before. This, in turn, has really begun to shape people's expectations of what all media—whether it be television, telephone, video, or music—can and should be able to do. It is a revolution in the making.

Having gotten a little taste of interactivity, consumers are increasingly demanding a lot more. People are starting to ask, why can't I bookmark my favorite television programs the way I can bookmark my favorite Web sites? Why can't I use my cell phone to get directions to restaurants, buy tickets to a movie, or check my portfolio? Why can't I store the music I like on a portable jukebox I can listen to anywhere I want? Why can't all these newfangled devices work together in a way that is simple and easy to understand?

We want to change the answers to these questions to, "Yes, you can."

As you all know, this is just the beginning as broadband and wireless connections, new handheld and household devices, and the intersection of traditional and digital mediums have really started taking off in the United States as they have in Europe and Asia. The possibilities for innovation will be limitless.

There is no better example of this sea change in consumer-driven innovation than the example of interactive television. For many years television didn't change that much. When most of us were growing up, there were three broadcast networks and public television. Then cable came along. The innovations in movies and tele-

vision news formats that it created began revolutionizing the way we watch television, increasing our choices and creating specialized channels to attract specific segments of a viewing audience.

More than that, it spurred a remarkable era of competition not only in the television industry, but also in the movie business, as companies rushed to give consumers what they wanted, and it made the market for advertising a lot more competitive as well.

That is where we have been with television now for about the last 20 years. Television has offered more choice of channels, but those channels have spoken to us, not with us. All that is about to change with the advent of interactive television.

For years people have been saying that interactive television is the next big thing. As Jerry will tell you in just a minute, there have been a lot of experiments over the last couple of decades with varying, but mostly unsuccessful, results.

That is partly a function of technology—it just wasn't quite there yet—but it is also because consumers weren't ready for it. The pump hadn't been primed. Now we think technology is finally catching up with our imaginations. Consumers have begun to expect their televisions, to say nothing of their telephones, CD players, and other handheld devices, to provide them with the same interactivity, the same range of choices, and the same convenience and consumer control that they are now getting used to because of the Internet.

As one analyst recently put it, TV is about to get a whole lot smarter, but the terrain is still largely uncharted. In fact, the current crop of interactive television experimentation is so new that if you ask three different people what interactive TV is, you will probably get three different answers.

For Microsoft and other Internet companies, it may mean using telephone connections like Web TV does to provide TV screen access to the World Wide Web. If you ask TiVo and other consumer electronic companies, it may mean interactive digital video recorders. If you ask companies like Wink or RespondTV, it may mean a new form of e-commerce. Or if you ask a company like GemStar, it may mean electronic program guides. For still other companies, it might mean video on demand, or other kinds of interactive services like e-mail or instant messaging or on-screen shopping.

All of these services, separately and in combination, will be available in a variety of ways, from satellite to cable to DSL, and also through narrowband connections. The possibilities for innovation in interactive television seem limitless, and I believe the potential benefits to consumers is enormous.

But this really is just the beginning of the beginning. The truth is it is anyone's guess which of the products on the market and now in development are going to drive the interactive television phenomenon. We are still waiting to see how early adopters of this new technology make use of it, and whether it can reach the mass market in meaningful ways that really improve people's lives.

We do know that people are increasingly watching television and using the Internet simultaneously, chatting online about television shows, plugging in Web addresses they read on television to buy new products or get more detailed information about news stories or sports events and other kinds of programming.

To try to meet this kind of consumer demand and test out these concepts, AOL is introducing a new service, AOLTV, this fall. We want to give consumers the greatest range of choices and the richest possible experience by trying to add some aspects of interactivity to television. So AOLTV includes well-known features like e-mail, chat, and instant messaging from the PC to the TV, and it gives users picture-within-a-picture access to the World Wide Web while they are watching television. It lets people bookmark their favorite television shows, and it includes an electronic program guide that lists services and programming so they can further customize their experience.

We are looking forward to helping develop this new medium so it can reach its full potential. So far broadcasters and programmers have had little incentive to develop interactive content without an audience, and service providers have had difficulty building an audience without compelling interactive content.

Already we are providing programmers the tools they need to enhance their television programs, adding everything from live polling to play-along games to letting viewers pick alternative endings to television shows.

We believe that AOLTV's unique combination of features will connect with consumers and spur a whole new way of innovation, but as I think I have made clear, we won't be the only one out there. In this new environment, companies around the world are going to compete harder than ever to bring consumers what they want, when they want it, at prices they can afford, and in ever more useful and convenient ways.

That is as it should be. This cycle of competition and innovation has brought the Internet, and, frankly, both of our companies, to where they are today. That cycle has always benefited consumers.

The next HBO, the next CNN, the next AOL, these are the kind of remarkable breakthrough innovations AOL-Time Warner could create for consumers across a variety of platforms. And we have no doubt that our commitment to innovation will prompt our competitors to develop new and better offerings of their own. Ultimately consumers will be the winners.

So I appreciate the time and effort the committee is taking to listen to us today, and Jerry and I look forward to answering any questions you might have.

[The prepared statement of Steve Case follows:]

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

Good morning, Mr. Chairman and members of the committee. Jerry and I are looking forward to talking to you today about some of the trends that are transforming the landscape of media and communications—specifically, convergence and interactivity. The effects of these trends will be astonishing—creating remarkable new opportunities not only in our industries, but also across all sectors of our new global economy.

We believe that the merger of our two companies will help to drive these trends and make interactivity and convergence more accessible to consumers around the world. The simple fact is, this merger will increase consumer choice in ways that really enriches people's lives—by spurring the new innovations consumers increasingly want and demand.

In less than ten years, the Internet and interactive technology have embedded themselves in nearly everything we do. This is not only because the digital revolution has increased consumers' choices in ways we only dreamed of 10 years ago. It is because it has empowered the consumer in ways that no other medium has done

before. This, in turn, has really begun to shape people's expectations of what all media—whether it be television, telephone, video or music—can and should be able to do. It's a revolution in the making.

Having gotten a taste of interactivity, consumers are beginning to demand a lot more. People are starting to ask, "Why can't I bookmark my favorite television programs the way I bookmark favorite places online?" "Why can't I use my cell phone to get directions to a restaurant, or buy tickets to the movies, or check my portfolio?" "Why can't I store the music I like on a portable jukebox that I can listen to anywhere I want?" And, "Why can't all these new devices work together in a way that's simple and easy to understand?"

We want to change the answers to those questions to "Yes, you can!"

As you all know, this is just the beginning, as broadband and wireless connections, new handheld and household devices, and the intersection of traditional and digital mediums really start taking off in the United States as they have in Europe and Asia. The possibilities for innovation will be limitless.

There is no better example of this sea change in consumer-driven innovation than interactive television.

For years, television didn't really change that much. When most of us were growing up, there were three basic channels and public television. Then cable came along. The innovations in movies and television news formats that it created began revolutionizing the way we watch television—increasing our choices and creating highly specialized channels to attract specific segments of a viewing audience.

More than that, it spurred a remarkable era of competition, not only in the television industry, but also in the movie business, as companies rushed to give consumers what they wanted. And it made the market for advertising a lot more competitive.

That's where we've been now for around 20 years. Television has offered more choice of channels, but those channels have spoken to us, not with us. All that is about to change with the advent of interactive television.

For years, people have been saying that interactive television is the next big thing—and as Jerry will tell you, there has been a lot of experimentation with varying but mostly unsuccessful results. That's partly a function of technology—it just wasn't there yet. But it's also because consumers weren't ready for it—the pump hadn't been primed.

Now, technology is finally catching up with our imaginations. Consumers have begun to expect their televisions—to say nothing of their telephones, CD players and handheld devices—to provide them with the same interactivity, the same range of choices, and the same convenience and control the Internet provides.

As one analyst recently put it: "TV is about to get a whole lot smarter"—but the terrain is still largely uncharted. In fact, the current crop of interactive television experimentation is so new that if you ask three different people what interactive TV is, you'll probably get three different answers.

For Microsoft and other Internet companies, it may mean using telephone connections like WebTV does to provide TV screen access to the World Wide Web; for TiVo and other consumer electronic companies, it may mean interactive Digital Video Recorders; for companies like Wink or RespondTV, it may mean "e-commerce"—or as we're beginning to call it, "t-commerce"—opportunities; for GemStar it may mean Electronic Program Guides. For still other companies it might mean video-on-demand, or other interactive services like e-mail, instant messaging, and on-screen shopping.

And all of these services—separately and in combination—will be available in a variety of ways—from satellite, to cable, to DSL and narrowband connections.

The possibilities for innovation in interactive television seem limitless—and I believe the potential benefits to consumers is enormous.

But this really is just the beginning of the beginning. The truth is, it's anybody's guess which of the products on the market and in development are going to drive the interactive television phenomenon. And we are still waiting to see how "early adopters" of this new technology make use of it—and whether it can reach the mass market in meaningful ways that really improve people's lives.

We do know that people are increasingly watching television and Internet simultaneously: chatting online about television shows, plugging in web addresses they read on television to buy new products or get more detailed information about news stories, sports events and other programming.

To meet this consumer demand, AOL is introducing our own interactive television service, AOLTV, this Fall.

We want to give consumers the greatest range of choices and the richest possible experience. So AOLTV includes well-known features like e-mail, chat and instant messaging from the PC to the TV, and it gives users picture-within-a-picture access

to the World Wide Web while they're watching television. It lets people bookmark their favorite television shows and includes an electronic program guide that lists services and programming so they can further customize their experience.

And we are looking forward to helping develop this new medium so that it can reach its full potential. So far, broadcasters and programmers have had little incentive to develop interactive content without an audience, and service providers have had difficulty building an audience without compelling interactive content. Already, we are providing programmers the tools they need enhance their television programs—everything from live polling, to play-along games, to letting viewers pick alternative endings to television shows.

We believe that AOLTV's unique combination of features will really connect with consumers—and lead a whole new wave of innovation. But as I think I've made clear, we won't be the only one out there. In this new environment, companies around the world are going to compete harder than ever to bring consumers what they want, when they want it—at prices they can afford and in ever-more useful, convenient ways.

That's as it should be. This cycle of competition and innovation has brought the Internet—and both of our companies—to where they are today. And it has always benefited consumers. The next HBO, the next CNN, the next AOL—these are the kind of remarkable breakthrough innovations AOL Time Warner could create for consumers across a variety of platforms. And we have no doubt that our commitment to innovation will prompt our competitors to develop new and better offerings of their own. Ultimately, consumers will be the winners.

So, I appreciate the time and effort the Committee is taking to listen to us today, and Jerry and I look forward to answering any questions you might have.

Mr. TAUZIN. Thank you, Mr. Case.

We are pleased to welcome Mr. Gerald Levin, Chairman and CEO of Time Warner, Incorporated.

Mr. Levin.

STATEMENT OF GERALD M. LEVIN

Mr. LEVIN. Thank you, Mr. Chairman.

I welcome this opportunity to discuss the revolution that is under way, particularly with this subcommittee, because over the years we have had the chance to deliver consumers the broadest choices in telecommunications and media.

Whether it has been enhanced competition in telephony or satellite delivery of broadcast or digital television, we have actually shared the same goal of ensuring that this ever-increasing pace of technology will offer consumers true diversity in both content and distribution.

It was this subcommittee that set us on an irreversible path to a consumer-driven telecommunications marketplace when it wrote the 1996 Telecommunications Act, and again more recently with the Satellite Home Viewer Act.

Along with my own involvement in the expansion of the media marketplace, I have had a special interest in the potential of television. This interest goes back 30 years to a project that we called the Green Channel. At that time, there was growing interest in the possibilities of using cable to provide access to what we called special pay-per-view events. But the Green Channel proposed to go beyond that, creating what we then referred to as pay cable-per-channel, a new kind of subscription service. But behind that rather awkward phrase was a rather startling concept that challenged the accepted wisdom of the then media establishment, because for a quarter of a century, viewers had lived with a television universe in which three networks provided one-size-fits-all programming and reaped large profits from the mass audiences they delivered to advertisers.

Though this model seemed to be chiseled in stone, there was a small band of mavericks, including Ted Turner and myself, who believed that television was a far from finished medium. Back then I think what people loved about television was the instantaneous access it gave them. If you turned it on only between 6 a.m. And midnight, there would be something there. Unfortunately, it might not have been something that they actually wanted because maybe they were looking for news or movies, which meant they had to consult a printed guide. The odds were that if they were patient and waited, they still wouldn't find the movie or the news that they were after.

What people obviously missed in television was real programming choice, control, and convenience. Out of that need came Time, Inc.'s decision to launch Home Box Office, that is what we called the Green Channel, which was the first breach in the self-contained world of the broadcast triopoly controlled television set.

It was approximately almost exactly 25 years ago, September 30, 1975, when HBO set cable's course from a reception novelty to the programming industry it is today when we arranged the satellite distribution of the Ali-Frazier fight to cable systems in Florida and Mississippi.

Along with the success of Ted Turner's superstation, HBO called into being the dramatic increase in programming selection we now mostly take for granted: CNN, Fox, CNBC, Disney, the Cartoon Network, ESPN, Nickelodeon, discovery, TNT, C-SPAN, these are all channels that you can find on the over 250 channels available now on most cable systems.

I mention this not for my own nostalgia, but because it directly concerns the discussion that we are having today about the future of the media, particularly the future of television, because even at that time I came away with the strong belief that it was the power of technology that could remove the limits on consumer choice. I was convinced that as enthusiastic as viewers have always been about television, television was still a long way from being what it could be.

So almost a decade ago, we began taking the next step. In December 1991, we launched something called Quantum, the first 150-channel service in our Queens, New York, cable system. Based on what we learned there, in 1994 we debuted the world's first truly interactive switch digital network in Orlando, Florida.

As I am sure many of you know, short term, the Orlando project was a failure. It did not lead to the rollout of interactive television. Long term, however, it proved to be very helpful to us because in designing and deploying the basic system, our engineers put in place a hybrid architecture that elegantly blended coaxial and fiberoptic cable into a two-way digital pathway which actually resulted in Emmy award-winning design. Thanks to Orlando, but most significantly with the advent of the Internet revolution, we are now at the forefront of offering consumers high-speed data delivery.

Now, when the Internet burst on the scene, the pundits, many of them, said that the long-awaited arrival of media convergence was bypassing television in favor of the PC. As it turned out, as

it usually does, the pundits were right about the fact that convergence arrived, but wrong about where.

In looking at the future of interactive television, we must be clear about the profound force that is at work across the communications spectrum. Convergence is not about any one discrete machine or device. Convergence is the Internet protocol network itself, the digital framework that supplies and drives whatever is connected to it; that is, televisions, PCs, stereos, or a proliferating number of wireless devices.

So whether it is cable, DSL, satellite, or wireless, it is the Internet protocol that is irrevocably changing our understanding of what television is all about. Because of it, consumers can have access to an endless array of content anywhere, anytime, that no corporation and no government agency can control, because the Internet is the technology of human freedom.

As a practical matter, the Internet is already deepening television and changing it. In terms of news, for example, one in three Americans use it as either a replacement or a supplement to what they read in the papers or watch on TV. As Steve has pointed out, when it comes to actual programming, the interactivity enabled by the Internet is just one of several options. Whether that is digital recording devices, digital set-top boxes, AOLTV, the point is that there is one form of—there is not one form of interactive television. Television today is as unlimited as the digital world to which it belongs.

It is also true that no one knows today what interactive television will look like in the years ahead, or what innovations we and others will provide. We don't know because the technology is evolving minute by minute. Unlike a generation ago, we no longer live in a closed television society. The Internet has taught us that it is the consumer who is in charge, and a lot of money is being lost by those who either fail or refuse to understand and who try to impose their own notions of how interactivity should work.

Finally, as someone who has been at this game for quite some time, I feel not only a sense of excitement about television's digital future, but a certain element of pride, and I am not a prideful person, in having been part of bringing it about.

Our hope when we started HBO was to set in motion a competitive cycle that would destroy the limits on consumer choice and programming diversity. That dream is finally before all of us.

Thank you.

[The prepared statement of Gerald M. Levin follows:]

PREPARED STATEMENT OF GERALD LEVIN, CHAIRMAN AND CEO, TIME WARNER INCORPORATED

Thank you, Chairman Tauzin and members of the subcommittee.

I welcome this opportunity to discuss the revolution now under way in the communications marketplace and am particularly pleased to do so before this subcommittee.

Over the years, we've worked together to deliver consumers the broadest choices in telecommunications and media.

Whether it's been enhanced competition in telephony or satellite delivery of broadcast or digital television, we've shared the same goal of ensuring that the ever-increasing pace of technological change offers consumers true diversity in both content and distribution.

Certainly it was this subcommittee that set us on an irreversible path to a consumer-driven telecommunications marketplace when it wrote the 1996 Telecommunications Act and again, more recently, with the Satellite Home Viewer Act.

As you know, along with my involvement in the overall expansion of the media marketplace, I've had a special interest in expanding the potential of television. What you might not be aware of, however, is that this interest goes back almost thirty years to a project dubbed the Green Channel.

At that time, there was growing interest in the possibilities of using cable to provide access to special pay-per-view events. But the Green Channel proposed to go beyond that, creating what, for lack of a better name, we called "pay cable-per-channel."

Behind that awkward phrase was a startling concept which challenged the accepted wisdom of the media establishment.

For a quarter of a century, viewers had lived with a television universe in which three broadcast networks provided one-size-fits-all programming and reaped huge profits from the mass audiences they delivered to advertisers.

Though this model was supposedly chiseled in stone, and couldn't be changed, there was a small band of heretics and mavericks—including Ted Turner and myself—who believed that television was a far-from-finished medium.

Back then, what people obviously *loved* about television was the instantaneous access it gave them. Turn it on between 6:00 a.m. and midnight, and there'd be something there.

Unfortunately, it might not have been the something they wanted. Maybe they were looking for news or movies, which meant having a printed schedule that told when they'd be available. Even if viewers were patient and waited, the odds were it still wouldn't be the movie or news they were after.

What people obviously *missed in* television, I believed, was real programming choice. Out of that belief came Time Inc.'s decision to launch Home Box Office—the name superseded the Green Channel—the first breach in the self-contained world of the broadcast triopoly.

Almost exactly twenty-five years ago, on September 30, 1975, HBO set cable's course from novelty to the programming industry it is today when it was my good fortune to arrange the satellite distribution of the Ali-Frazier fight—"the thrilla in manila"—to cable systems across the country.

Together with the success of Ted Turner's superstation, HBO called into being the dramatic increase in programming selection that we now mostly take for granted—CNN, Fox, CNBC, Disney, the Cartoon Network, ESPN, Nickelodeon, the Discovery Channel, TNT, C-SPAN, the list is long and continues to grow.

I mention all this not for nostalgia's sake, but because it directly concerns the discussion we're having today about the future of the media in general and television in particular.

Although I wasn't granted a clairvoyant glimpse of the internet, I came away with a stronger-than-ever belief in the power of technology to remove the limits on consumer choice.

I was convinced that as exciting and different as cable was—and as enthusiastic as viewers were to have a whole new array of programming choices—television was still a long way from being what it could be.

Almost a decade ago, we began taking the next step. In December 1991, Time Warner launched Quantum, the first 150-channel service, in our Queens, N.Y., cable system.

Building on what we'd learned there, we took a far bigger, more important step in 1994, when we debuted the world's first truly interactive network in our Orlando, Florida, cable system.

Short term, the Orlando project was a failure, in that it didn't lead to the rapid rollout of interactive TV.

Long term, it's proved a significant success.

In designing and deploying the basic architecture for the system, the engineers of Time Warner Cable did something that had never been done before. They put in place a hybrid architecture that elegantly blended coaxial and fiber-optic cable into a two-way digital pathway—a break-through design that was honored with a special Emmy award.

Thanks to Orlando, we're now at the forefront of those offering consumers high-speed delivery of the internet.

When the internet burst on the scene almost at the same time as our Orlando project, the pundits seemed agreed that the long-awaited arrival of media convergence was bypassing television in favor of the personal computer.

As it turned out, they were right about *when* convergence arrived but wrong about *where*.

In looking at the future of interactive television, it's critically important to be clear about the profound force that is at work across the whole communications spectrum: convergence isn't about any one discrete machine or device. *Convergence is the internet protocol network* itself, the digital framework that supplies and drives whatever is connected to it, TVs, PCs, stereos, or a proliferating number of wireless devices.

Whether carried by cable, DSL, satellite or wireless, it's the internet protocol that's irrevocably changing our understanding not just of television but of all media.

Because of it, individual consumers have access to a literally endless array of content, whether print, audio or video, anywhere, anytime, that no corporation or government agency can control.

More than merely another medium, the internet is the technology of human freedom.

At a minimum, this transformation means a degree of openness and innovation that just a few years ago existed only in science fiction. In fact, 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 it . . . think again.

As a practical matter, the internet is already both deepening TV and changing it. In terms of news, for example, one-in-three Americans use it as either a replacement or supplement to what they read in the papers or watch on TV.

As Steve pointed out—and it deserves repetition—when it comes to actual programming, the interactivity enabled by the internet is just one of several options.

The newest generation of digital recording devices allows users to watch TV the same way they would a VCR, pausing, fast forwarding and skipping commercials.

Digital set-top boxes offer a vastly expanded channel capacity and video on demand.

AOLTV hopes to bring the interaction of the online community to enrich people's experience of television.

The point is, there is no one form of "interactive television." *Television is now as unlimited as the digital world to which it belongs.*

No one knows what interactive television will look like in three or five years or what other innovations it will lead to.

We don't know because the technology is evolving minute-to-minute and, unlike a generation ago, we no longer live in a network-centric universe, where a trio of powerful networks calls the shots.

The internet has already taught us that it's the consumer who's in charge, and a lot of money has been lost by those who've either failed or refused to learn that basic lesson and tried to impose their own notions of how interactivity should work.

As someone who's been at this game most of his adult life, I feel not only a sense of excitement about television's digital future but pride at having been part of bringing it about.

Our hope with the Green Channel was to set in motion a competitive cycle that would destroy the limits on consumer choice and programming diversity.

That dream is finally coming true.

Thank you.

Mr. TAUZIN. Thank you, Mr. Levin.

We have received a call from downstairs that the photographer is ready to take the official Committee on Commerce picture, so we will take a 15-minute recess. We will be right back.

[Brief recess.]

Mr. TAUZIN. It is 10:40. The committee will please come back to order.

When the committee recessed, we had completed hearing the testimony of our two distinguished guests. The Chair now recognizes himself and members in order of their appearance on the committee for a round of questions.

Under the unanimous consent, members will be recognized for a 10-minute limit.

Let me begin, first of all, by asking I think kind of the central question here, Mr. Levin and Mr. Case; that is, will consumers in this new world of interactive television, in your opinion, have several fully capable systems by which they can choose the products,

services, for interactive television envisioned, that the merger will allow?

Let me be perhaps a little more specific in the question. One of the reasons why I think satellite television was an inadequate competitor for many years to cable, despite the fact that we passed in 1992 program access laws that allowed satellite companies the right to buy cable programming at nondiscriminatory prices, was the fact that satellite did not have the legal nor physical capacity to offer local channels in their packages.

I remember seeing many ads by the cable company, Mr. Levin. They were very effective. They basically said to consumers, you shouldn't have to run around your house with rabbit ears and tin foil to try to get your local signals. You can get it all from the cable company. The message simply was that the cable was more fully capable as a competitor of delivering the kind of television that consumers wanted, and that until we passed the recent act that allowed local signals in the satellite package, that consumers really did not have a fully capable choice; that cable, in effect, was the most capable, and, therefore, the system of real choice for consumers. Choice was sort of illusory rather than real.

The question that confronts us today as we look at your merged entities and the incredible capacity of your merged systems to make good on the promise of interactive television, is there going to be any system as fully capable as yours that consumers in the various communities in which you serve will be able to turn to if they don't like your prices, terms, or conditions, or, as I pointed out, the attitude of your salesmen?

Please respond.

Mr. LEVIN. Let me start, Mr. Chairman. We are actually in a wonderfully prolific period because there are at least four platforms that can deliver the kind of services that the consumer is beginning to acknowledge. One is broadband cable. Another is satellite, which is now not only fully effective in delivering one-way services, but is now fully capable of delivering interactive or two-way services using a telephone return path and soon a satellite return path. Three is the telephone system itself through something called DSL, digital subscriber line, which is currently capable of delivering high-speed data into the home, whether it is into a PC and soon into a television set. Finally, the fourth area is wireless. You probably have seen that not only for normal cellular telephony, but what is called 3G, or the next generation of wireless capability, you will be able to receive broadband video through a wireless device.

So you now have a full complement of platforms, so both from an AOL perspective and a Time Warner programming perspective, all these platforms are available to everybody.

Mr. TAUZIN. Given that, the question of awkwardness, the question of user-friendliness—if your platform is not only fully capable, but extraordinarily user-friendly, and other platforms have weaknesses in the architecture, weaknesses in the design—as you pointed out, satellite has to rely on a telephone return path for interactivity. Telephone DSL, as you know, is significantly behind in terms of deployment around the country. We are working on policies in that area. But the question is will there be in real time user-friendly, fully capable alternatives, given the fact that these

other technologies you mentioned are, I think, significantly behind your own?

Mr. LEVIN. Let me just add one thing. By the way, just as a side comment, not to intrude on the notion of the number of hearings or the number of people who are testifying, I think—I commend the committee and you, Mr. Chairman, for taking up this subject because it is the most interesting, fascinating subject in the emerging communications industry.

It is an unusual situation, because as many witnesses as you may get, they will define differently what they mean by interactive television. I think the strength in that is the fact that there is an opportunity now for multiple concepts and a lot of innovation to take place. In other words, there is no one definition, one platform.

Mr. TAUZIN. We will be looking at that. I want you to know that that is going to be the focus at least that I want to take in these hearings, and that is whether or not there will be real choice, not illusory choice.

Mr. LEVIN. I think it is crystal clear that just as we can see today the interactivity that comes through Internet protocol through the Internet, that, in fact, the ability to deliver whatever the concept is, and that is, additional program information, different camera angles, the ability to purchase, play games, call down movies, all these different ideas can be serviced.

As you know, today the satellite delivery of movies and multiple channels is just as robust as anything on cable.

Mr. TAUZIN. We limit it, so let me try to be specific. If you are the most capable and you are the best there is for some time, and regardless of other competitors offering similar but not necessarily as fully capable or as smoothly operative as your own systems, then you will get a lot of questions here today about if you are the dominant player, the best player in the marketplace, are you going to allow open access to other-owned programming? If you are going to allow open access, under what conditions will you allow that?

I want to raise this question, because I have come to understand that there are really two debates here. One is whether or not government should compel open access, and we have had discussions of this privately and publicly on the record, or whether or not, given a lack of government policy requiring open access, whether you would want to do that on your own as a good public policy for the company and for the public; or, third, given the circumstance where people have to negotiate their way onto your system, will they have equal technological treatment on your system?

That is an interesting question that people are beginning to raise. If I am a programmer that needs to be on your system to reach as many consumers, because you are the best, most capable, most fully operative system that consumers would likely choose, will I have the same technological treatment as your own programming on those systems? Will I be as fully interoperative, fully interactive, as any other program on the system, or will I find that because we are talking about dollars, sales of products, telemarketing in the television era, am I going to be treated differently when I do negotiate my way onto your system?

Please respond, either one of you.

Mr. LEVIN. Let me start, and we are talking about two areas.

One, for interactive television, as we have indicated, this is an emerging series of ideas, and I think you will find many participants who will have no problem delivering as much material downstream as they want, and getting it back up is relatively easy. That is true for everyone.

With respect to multiple ISP, that is, the kind of high-speed Internet access, we have been working in a very focused, systematic way to deliver multiple ISP. This started well before the announcement of the AOL-Time Warner merger. The first thing we did was to acknowledge a set of principles that took the cable industry well beyond where it currently resides in two respects; that is, not to limit the delivery of full-motion video coming through a PC, through Internet protocol; and second, not to limit the ability of any ISP to market and bill and service the consumer.

Mr. TAUZIN. In that sense, if I am ESPN, and I negotiate my way onto your system, will the consumers who watch that programming have the same technological capabilities of visiting an ESPN shop to purchase products, or will that be treated differently because ESPN is not owned by your company?

Mr. LEVIN. The simple answer is yes, both technologically from a sound business perspective, that is, giving the consumer exactly what they want and desire, and there is no limitation.

I think, again, we have two different streams in the question. One relates to the notion of the emerging idea of what is interactive television. The other is high-speed Internet access delivered through some kind of broadband platform. It is the latter that we are normally talking about, the concept of markup ISP or open access.

In that case, we have publicly declared and invited any ISP to come—and remember, Time Warner cable serves only a portion of the country—to come and participate now as we are trying to restructure some of the early exclusivity arrangements that have been entered into, and provide a technical test that enables these routers to deliver and pass through the ISP without the cable system touching or doing anything with respect to that feed.

Mr. TAUZIN. We will be submitting some written questions. I want to explore that further.

I want to leave one question with you as my time does expire. We know there is an existing relationship between Time Warner and AT&T. AT&T owns, I think, 25 percent. The question is, absent a separation, a sale, an acquisition of that ownership, will AOL-Time Warner be able to leverage its programming onto the AT&T cable systems if that is not settled somehow through negotiations or through government action?

Mr. LEVIN. I think the clear answer to that, Mr. Chairman, is no. In fact, AT&T has a passive partnership interest in a partnership that was acquired through the acquisition of Media One that was established in 1991. There is no control or no opportunity to influence Time Warner cable or any of its programming services.

Mr. CASE. If I could just add, Jerry certainly is the expert on television because he has been focused on this for the last few decades. I am not an expert on television, I am not even in the television business yet, but hopefully in the next month or so that will change.

But I will give you my perspective, coming at it from more of the Internet side. There has been a lot of experimentation in interactive TV. In 1980, when I graduated from college and moved to Cincinnati, Ohio, one of the benefits I thought of moving to Cincinnati, Ohio, in addition to working for Proctor and Gamble is the Cube Interactive TV system was being tested in two cities in the country, Cincinnati and Columbus. I thought I would get to experience it, in addition to which I read about it in college in a variety of science fiction futuristic things. Twenty years later, people are still waiting for interactive television. Nothing material has happened. So this is a market that needs more attention and more innovation.

I think AOL-Time Warner can stimulate that. I think we already have stimulated more dialog about this, more investment in this. The bottom line is television has not changed very much other than the more choices that consumers have, largely stimulated by Time Warner's innovations with HBO and CNN.

What people now want is the kind of choice and control which they get from the Internet, which I think AOL is as responsible as any company for making that mass market phenomenon.

Together I think we can make the promise of interactive TV a reality. It is still in the starting point. There are many different interactive TV systems. There are many different delivery paths in terms of communications. Sitting on top of those are dozens, probably soon to be hundreds, of different devices. You can go to Circuit City or Best Buy tonight and buy some interactive TV boxes that sit on top of your television and either connect with your cable or satellite.

Soon I think we will connect over DSL or wireless. That will connect to hundreds, eventually thousands, of different services.

So I think the Internet model of choice and consumer control is starting to move into the television industry. That is really what this is all about. It is in the starting gates. It is very exciting. We are optimistic about it. The reality is it is still in its inception, and it requires more focus and investment.

Nobody is bright enough to know exactly what is going to develop. As I said in my opening statement, there are many different companies with very different views of how this will develop. We just think it requires more time and attention. I assure you, the kinds of things you are concerned about are not going to be of concern. The choices are going to be the kind of choices that you are used to on the Internet, when consumers are watching their television 5 years from now.

Mr. TAUZIN. Thank you.

The Chair recognizes the gentleman from Tennessee Mr. Gordon.

Mr. GORDON. Thank you.

Just following up on more questions about interoperability, Mr. Case, going to your area of expertise, can you give us your information in terms of instant messaging?

I know there have been some negotiations. Your critics will say you have broken those and have not moved forward on that. Where does that stand? Tell us where it stands now and what your intentions are to open this up.

Mr. CASE. Our intention is to have an interoperable instant messaging system that is as interoperable as e-mail, but more effective in terms of protecting consumer security and privacy.

I think people know the benefit of e-mails is that any system can talk to any other system. That has helped stimulate the demand for the Internet. More than half the mail that gets distributed each day gets tossed away because it is spam and pornography and things that need to be blocked from the system.

The e-mail connectivity that was put in place more than a decade ago did not think through some of the issues regarding parental controls and other things to protect safety. What we are trying to do with interoperability of instant messaging is providing the benefits. Anybody can talk to anybody using any systems, but some of the protections which I think people need—hopefully we can learn from some of the lessons of e-mail over the past decade.

To give some history on instant messaging, we invented it 15 years ago as part of our first service. For more than a decade, the only way to get it was pay us money. Subscribe to AOL, and you can use instant messaging. We decided to make it free years ago. Now it is freely downloadable. It costs nothing to use. Any ISP customer can use that at no cost. We have since licensed it on a royalty-free basis to more than a dozen companies.

I would venture that you won't find another technology invention as popular as instant messaging that has been so broadly given away free, because of our belief in the Internet model of openness and making sure it really is as seamless as possible.

What we have been doing over the past year is trying to work on server-to-server interoperability so we can connect directly with companies in the instant messaging business, of which there are dozens, and provide this kind of seamless connectivity with the proper protections.

I think we are making good progress on that front. We indicated at an FCC hearing that it would take about a year to do the technical development to make that possible. In the meantime we have put in architecture in front of the IATF to get people to comment on our particular approach.

Meanwhile, this is a very competitive market. We are committed to interoperability. We think it is the right thing. We are moving quickly toward it. In the meantime, this market has developed where there are dozens of companies, including Microsoft and Yahoo—Microsoft launched an instant messaging service a year ago. It is now climbing up to 20 million users. A couple of weeks ago it integrated it into the Windows operating system.

Instant messaging is now becoming part of computing. Yahoo has, I think, tens of millions of people using instant messaging as well. So this is a vibrant market with lots of different competitors. AOL was the company that invented it. AOL is the company that has taken the lead in popularizing it. AOL opened it up and made it free to use, download, license. AOL is the company that will make interoperability work over the next year.

Mr. GORDON. Are you going to set a hard deadline of a year?

Mr. CASE. It is hard to set a hard deadline. It requires cooperation with a lot of different companies and a standards process. We have said things we can do from a technical side—that we have

said by next summer we will be able to technically support interoperability on a server-to-server basis with these particular precautions. We are eager to move down that path.

Mr. GORDON. Do you think before a merger is approved, there should be something—a more definite timeframe set?

Mr. CASE. No.

Mr. GORDON. Why would you say that?

Mr. CASE. I think we have already demonstrated that—again, if you look at the history of technology, I don't think Microsoft has taken Windows and made it free to download and free to use, or then freely licensed other companies to change it in whatever way they wanted. Nor has that happened in any other instance, real audio or other technologies.

I think we should be applauded for the leadership we have already taken in taking something we have invented and making it freely available, and for the steps we took even before we announced the merger to move down the path of interoperability. Frankly, we would get there sooner if this merger had been approved already. A lot of people are focusing a lot of time on the lobbyists' side of things, not the engineering side of things. The sooner we can get back to the engineering side of things and figure out how to make this work, the better off we are.

In the meantime, I think we are looking at a market that is working. Microsoft has integrated it now in the operating system. That is the subject of a whole other process. It is the precisely the kind of thing the government is concerned about.

What it will do with instant messaging, it will probably make them the dominant provider of instant messaging over the next year or 2 because it is integrated in the operating system.

Mr. GORDON. Since you intend to make it interoperable anyway, would you have any objections to the FCC making that a requirement for the merger?

Mr. CASE. We are having a dialog with the FCC. We are having a dialog with the FTC, and also with the European Union. We believe that our commitments are significant, and the steps we have taken on interoperability with instant messaging, the steps we have taken on open access in terms of ISPs, are significant.

We think it would be better for us to demonstrate in the market that these things work, which we are committed to do, as opposed to having a piecemeal approach applied through the merger review process.

Mr. GORDON. I conclude by saying, what are those commitments that you said you made?

Mr. CASE. On which topic, open access or instant messaging?

Mr. GORDON. Interoperability with instant messaging.

Mr. CASE. We will continue to make it freely available to consumers. There is no plan to change that. We will continue to license it to lots of different companies on a royalty-free basis. We continue to work aggressively toward server-to-server interoperability to connect other instant messaging systems in a way that is safe and secure for families.

Mr. GORDON. Thank you.

Mr. LEVIN. If I could just add, of course, this merger doesn't implicate instant messaging as you normally have in a horizontal

merger where there are overlapping businesses. Time Warner is obviously not in the instant messaging business. However, just as an observer, we have great respect for what AOL is doing in terms of trying to design a system that deals with some of the flaws of the current e-mail system, which we have all experienced during the past year, from viruses to intrusive e-mail.

Mr. TAUZIN. I thank the gentleman.

The Chair recognizes the gentleman from Florida Mr. Stearns.

Mr. STEARNS. Thank you, Mr. Chairman.

I think when I hear your question with my colleague, talking about making it free and making it available, I guess the question would be, the interoperability, when this is going to occur.

You obviously can't give us a date today when you think that this would be solved, but I think—as I understand it, the crux of this debate is whether you will make interoperability for other competition.

Wouldn't you say that is pretty much the crux of what we are talking about, why people are concerned?

Mr. CASE. I think there may be many concerns. As the chairman said, the hearing is focused on interactive television. There are concerns about interactive television. I think there are many issues related to this merger.

One of the benefits, frankly, of this merger is it has focused a lot of attention on the possibilities in this new world, and has led more companies, I think, to rethink their strategies and try to figure out ways to be more innovative.

As it relates to instant messaging, I do think that a lot of progress has been made in the last few years. Most people didn't know what it was 5 years ago. Now more and more people are using it. Many of our Instant Messenger customers—at last number, about 40 percent of our customers using AOL Instant Messenger already used some other instant messaging services, and people can use multiple services. They are all freely available. When they buy their new computers, they will soon have the Microsoft version freely available on the operating system. So the market is working. Instant messaging is a feature now that tens of millions of people are enjoying.

We agree, and have been saying this for over a year now, that server-to-server interoperability is the next step, and we are willing to take the lead in making that happen, connecting our servers with the servers of Microsoft or Yahoo or other companies, so the kind of seamlessness that consumers want they can get, but the kind of protections that they need they also can get.

Mr. STEARNS. I am looking at this Wall Street Journal of Monday. Just reviewing it, it talks about Mr. Parker, Richard Parker from the Federal Trade Commission. I guess he is the top antitrust cop. He is going to recommend that the merger be blocked unless the two companies agree to a tough list of conditions. Have these conditions been explained to you? Do you know what they are?

Mr. CASE. We certainly are having a dialog with the FTC and with other agencies. We have indicated that we think this merger is unusual. It is large in scope. It gets a lot of attention.

Mr. STEARNS. No, the question is when he lets the press know that he has these lists of tough conditions before he would rec-

ommend the merger, is it correct—is my understanding correct that he has a list of tough conditions? Has he made them known to you? Just yes or no.

Mr. CASE. We do have a dialog with the FTC. We think that is best a private dialog, not a dialog to read about in the press.

Mr. STEARNS. I understand. Then the FCC seems to have some concerns, too.

I guess my question is do you feel that the conditions that the Federal Trade Commission is offering you are going to be difficult to comply or are unreasonable?

I am giving you an opportunity, a public forum, not to talk about the details and what these tough conditions are which he threatens to block this merger with, but in a general way, both of you to explain, what is the FTC generally asking you to do that is difficult for you? Or perhaps maybe you can give us in a general tone what you feel the problem is.

Mr. LEVIN. If I could respond——

Mr. STEARNS. This article I thought was pretty much putting you in a box between the FCC and the FTC. They are talking about some of the things we are talking about. They call it a Kabuki dance between you folks. They are saying that they are threatening to block this whole thing.

Maybe the public does not have to know all the conditions, but I think the public should have an idea of what we are talking about. Maybe if that is possible, you could illuminate here today.

Mr. LEVIN. First of all, obviously this is a press report. It may or may not be accurate, although we are the press, so I hesitate to say that.

But let's go back. I think it is clear that Time Warner and AOL have been quite responsive to all of the regulatory authorities who are implicated in this merger. By that I mean in terms of interaction, document requests, and fulfilling all of the procedural requirements that obtain here in the United States and, as Steve indicated, in Europe.

Second, we said at the outset that it is clear that the merger of AOL and Time Warner is a profound idea. Indeed, one of the stunning ironies is the fact that the conversations that we are having and the public policy debates are actually quite healthy, because it is forcing people to think about the future and the future destination of where interactivity is going, what the digital revolution means, because it is underlying our economy. It has a lot to do with American ingenuity and how that is being transmitted around the world. So in every venue we have actually welcomed the opportunity.

Now, obviously in each case there are a different set of standards being applied because they are operating under different jurisdictional requirements. I think it is fair to say that at the outset we believe that there are no overlapping businesses. Even the discussion we have just had on instant messaging is not implicated by Time Warner at all. It is one of those unusual situations where the concepts are more interesting than perhaps the true issues.

We have also been very responsive from day 1 even before this process got under way by identifying the concept of multiple ISPs

and a form of access on cable television. We have taken the leadership on that.

Indeed, I can say that I am very focused and systematic in pursuing that, regardless of the regulatory bodies. So I think it is not wise for us to characterize in public what is really a private regulatory process. I think every agency is doing its job, and we are doing ours.

Mr. STEARNS. Okay. In your opinion, no antitrust laws are being violated?

Mr. LEVIN. That is certainly our opinion. There are no overlapping businesses between these two companies.

Mr. STEARNS. The fact that they are putting tough conditions and so forth for you, either with the FCC or the FTC, your position is that basically there are no antitrust laws being broken? Perhaps you don't need to have any conditions because this is a merger between two companies that will enhance the public's ability to operate the interactive television?

Mr. LEVIN. Again, I wouldn't want to characterize the nature of the discussions, because obviously what is being pursued is the FCC's views on its jurisdictional mandate, and the FTC is doing the same thing.

I would characterize the process as constructive.

Mr. CASE. I would just add that as it relates to the merger, as Jerry said, there are no overlapping businesses, so there aren't the same kind of classical antitrust issues when we look at ExxonMobil or WorldCom, or most of the mergers—the airlines, most of the mergers out there.

Most of the issues really have to do with public policy, a national policy, as Mr. Boucher said; what should the broadband policy be for our country for all technologies, or what should the proper policy be for instant messaging systems or other kinds of issues like that. The view that many have expressed is that it would be better to deal with those as policy matters either through the regulatory bodies or through Congress determining what those policies should be, as opposed to using the merger process to try to set policy in sort of a piecemeal fashion.

We have a good dialog. We are not antagonistic. We understand it is a big merger. It has generated a lot of attention. I think the dialog we have had has been constructive. We are obviously eager to finalize this merger, and we are open-minded, but we do think that there are significant policy issues that are probably better dealt with in the right policy forums.

Mr. STEARNS. When I am on Netscape, let's say—let's say I am on AOL and I want to get to the World Wide Web, I can do that through your site. If I am an ISP subscriber, would I be able to enjoy the interactive television experience without having to pay more as a consequence of them not being an AOL or AOLTV subscriber?

Do you follow what I am saying? Let's say you are a Juno subscriber or any other ISP subscriber. Will you be able to enjoy the interactive television experience without having to pay more as a consequence of the customer not being on AOL or an AOLTV subscriber?

Mr. LEVIN. Let me just start, because with that particular example, we have actually entered into an arrangement with Juno to give them the same access that any other service, including AOL, would have to our consumers.

I would say they have been very responsive. We have held out our hand, and we have invited every ISP who would like to participate in the broadband technology to come and join us. So far we haven't been overwhelmed by responses.

Mr. STEARNS. The point, Mr. Chairman, this afternoon is basically since we only have one group testifying, the idea is to give them an opportunity to answer some questions, because I don't know if they are coming back. So they have their opportunity now to express their opinion. They might not have it at the subsequent hearing.

Are these gentlemen coming back to the subsequent hearing?

Mr. TAUZIN. They wouldn't come back after a second panel, anyhow. I don't think there is any——

Mr. CASE. On that topic, if I could interject, and earlier there was sort of—I didn't fully understand what was being discussed, but sort of an intramural dispute over this particular hearing and who is participating, and some concerns that were expressed about maybe issues have not been properly vetted, or maybe consumer groups or competitors haven't been given a say.

I would just give you this comfort: This merger has been the most scrutinized merger in history. We have had numerous hearings in Congress, the FCC. Many companies, not just ours, many competitors, have been deposed by various regulatory bodies.

I would like to assure you that all the issues are being dealt with, all the voices are being heard. When this merger ultimately is approved, which I expect it to be, I think you can be comforted that it had more scrutiny than any merger in history.

Mr. TAUZIN. The gentleman's time has expired.

Let me make the point as we move on, I, for one, agree with the gentleman. I think it is awful that part of this process is being conducted behind closed doors. It is kind of ironic that the place is called The Portals, because they have shut the doors. They have the discussions in room 385.

The Commission can, if it wants to, apparently impose conditions upon the parties or force them to accept conditions that you can't appeal once you have accepted them. I think the process stinks. We ought to have an open discussion about what is really being discussed in room 385. We ought to know what the public interest discussions are all about. You ought to be able to talk to us about it.

Maybe we will invite the FCC to come and talk to us and the FTC to tell us what is going on behind closed doors.

Mr. STEARNS. If the gentleman will yield, I think it would be worthwhile to have Mr. Parker come here and testify.

Mr. TAUZIN. Everybody is constrained not to talk. That is the way it works. That is unfortunate. We ought to change the law so it stops working that way.

Mr. CASE. Mr. Chairman, we are trying to be responsive to the process that exists. I think it has been a constructive process.

Mr. TAUZIN. You happen to be before them now. Whoever gets before them has that chance in that little room. They end up hav-

ing to accept all kinds of conditions to get out. There is something wrong about that. We are going to talk about that more next year.

The Chair recognizes the gentleman from Virginia Mr. Boucher.

Mr. BOUCHER. Thank you very much, Mr. Chairman. I want to underscore again what I believe to be the inappropriateness of imposing an open access policy company by company as a merger condition. I agree with the comments made by the others this morning, that that should not be a condition of approving the merger between AOL and Time Warner.

As a matter of fact, I strongly support the legislation that Chairman Tauzin has introduced which would deny the ability of the regulatory agencies to impose additional merger conditions beyond the mere requirement that companies come into compliance with the requirements of current law. Everybody should meet those dictates. But beyond that, these agencies should not, in my opinion, be able to impose conditions that are not a feature of current law.

That being said, I very strongly believe that now is the time that we should have a national policy on open access. I mentioned in my opening statement the many benefits that open access will provide. From the standpoint of today's hearing on interactive television, it would assure content providers that they have a clear and uninterrupted path to the ultimate consumer, free of any potential disruption or discrimination. I think it is important that they have that assurance.

We have anything but a national policy today. The policy we have at the present time is fraught with both geographic and industry-specific disparities, creating competitive disadvantages in regions of the country and among various industry participants. I think that is a condition that we simply can't tolerate.

Mr. Case, earlier this year you and I had a conversation about an effort that I know you have had under way over the last several months to have conversations with a number of cable companies, including the one that is controlled by Time Warner, but the others as well, in the effort to persuade them to adopt on a voluntary basis an open access policy. I wonder if you would take just a few minutes this morning to enlighten us concerning the progress of those conversations. I have seen in the press statements by a number of the cable MSOs that they endorse the general principle of open access, but those statements have been remarkably short on details. We really don't have a clear sense today of what the elements of their to-be-voluntarily assumed open access policies will be.

What I am asking you is to comment on a number of things: First of all, the progress on these discussions, the extent to which you are pleased or displeased with that progress. If you can talk about it this morning, I think it would be helpful for us to know what elements of open access Time Warner is willing to adopt. Mr. Levin might participate with you in answering that portion of the question.

Also, I would ask what elements of open access the other cable companies are willing to adopt, as revealed in your conversations. In answering that question, I hope that you would be specific with regard to at least these elements: First of all, the need for nondiscrimination in the treatment of all of the unaffiliated Internet

providers. They should be given access on exactly the same terms and conditions that the cable companies' affiliated Internet access provider enjoys.

There should be a direct relationship between the customer and the unaffiliated Internet access provider with the cable modem opened and its affiliated Internet access provider having no role in that relationship.

Third, I would say there ought to be a commitment to permit the unaffiliated Internet access providers to attach at the cable head end. By allowing attachment at that point, competition can exist for the carriage of the data traffic from the cable head end to the Internet backbone and even beyond.

There are some Internet backbone segment providers that also have cable companies and affiliated cable modem services, and I have no doubt that those particular companies would be very interested in carrying the traffic from the originating customer throughout the entire length of the Internet backbone, and perhaps, if they are lucky, even having that message terminate on their own cable system somewhere else.

That is not healthy, in my opinion. I think that we ought to have competition for the carriage of that data traffic, and the simple requirement that the unaffiliated providers be able to attach at the cable head end provides that assurance. I think that is an essential element of Internet access.

I am going to be quiet. I have asked you several questions. I would appreciate your thoughts on those various matters.

Mr. CASE. I agree with you about the importance of a national policy that encompasses all broadband platforms. I agree with you that it complicates things to have more of a piecemeal approach.

I think the discussions we have had with cable companies have been encouraging in principle, but so far have not had the level of specificity that could result in an agreement, frankly because of this merger process.

The same is true in terms of Time Warner's negotiations with other ISPs. A lot of people are in a wait-and-see mode trying to see how this merger settles out, and some ISPs, including major ISPs, have explicitly told us they are not going to enter into an agreement, even though we have offered open access, until the merger is approved because they don't want to help the merger get approved and may get better terms if they wait.

So the merger review process has, I think, slowed us a little bit in terms of achieving what we believe we can achieve in the marketplace. But once the merger is approved, I do believe that we will make progress in getting other cable companies to embrace the concept of open access, and getting many other ISPs to benefit from the commitments Time Warner has made for open access, which include the things you have talked about, nondiscrimination, and a direct relationship with the customer, and being able to connect to the cable system the same way AOL connects to the cable system; and many other things you didn't mention, including offering the video stream, which previously has been blocked, and directly bill the customer, and so forth.

I would say, however, that I think it would be better, if your desire is to have open access on cable, to have a situation where AOL

and Time Warner are doing that voluntarily because they believe it is in their business interests, which is the case, as opposed to having it mandated as a condition, because I fear that if it is mandated as a condition, the other cable companies will be less likely to embrace it voluntarily, because they will feel that this was just the price we paid to get a merger approved and wouldn't necessarily be in their interest. So actually I think it would be more difficult to get open access throughout the cable systems if we had a condition than if we didn't.

That said, if that is the way things play out, then we will do our best to try to embrace this notion not just with ISPs, which we can do from Time Warner cable, but also other cable companies. But thinking of this as a national policy matter across all these broadband platforms and trying to allow us to demonstrate in the marketplace, which we can and will do, that open access can work, and it does make good business sense as well as good policy sense, would be the better approach. We have made that view clear.

Mr. LEVIN. I want to be very clear and very specific. As a business proposition, having nothing to do with the national or regulatory debate on open access, we believe strongly that multiple ISPs are an important service to provide to our consumers.

I say that because we are a product of our own history. We did the same thing with multiple pay television services in the early days, in 1970, where you used to just have one service to assist them, usually owned by the same company. As soon as the technology and the consumer demand permitted it, we had multiple pay services.

So this is a business proposition. I advised the Chairman of the FCC about this well before the AOL-Time Warner merger.

Second, we have publicly announced a series of operative principles that will apply. The most significant one in February was that there should be a direct relationship between the ISP and the consumer in terms of the service, marketing, and billing. We also agreed that there should be no limitation on video streaming.

Next, we have undertaken to enter into actual ISP agreements, and the one agreement I referred to before with Juno does effectively contain nondiscrimination, because the terms are the same terms that a service called Roadrunner has and that a service called AOL would have.

Finally, the interconnection point, which we have been very open about, is at the head end. We are not insisting, and we have said this publicly, that an ISP has to use any of the services, backbone or otherwise, or any transport services.

Finally, it is in our best interest to give the consumer choice and not to interfere with the ability to gain high-speed Internet access from multiple sources. That is our position. I have stated it publicly. I am firmly committed to it.

As we speak, we are doing several things, including testing in Columbus, the famous spot for the Cube system, the first trial of a virtual router that can actually handle ISPs, because it has never been done before. Recognize that the architecture of the cable system was designed to deliver television systems pursuant to a must-carry regime from the FCC, and space has to be provided for what-

ever is necessary for digital services. Consistent with that, this test is now going forward.

Finally, in all the cable industry there are exclusivity agreements which prohibit the carriage of multiple ISPs. We are in the process of restructuring our agreement to advance the time when we will no longer have exclusivity.

Mr. OXLEY [presiding]. The gentleman's time has expired. He is recognized for 2 additional minutes.

Mr. BOUCHER. Mr. Chairman, let me commend Time Warner on the integrity of your open access policy. I think the preliminaries that you have announced can be a model that should be applied if we eventually come to a national open access policy and that, in the meantime, should be adopted voluntarily by the other cable companies.

But my question to you is this: Given the fact that your policy is solid, given the fact that it does constitute genuine open access, you have committed to all of the principles that I personally think are important in defining real open access, don't you see yourself as being at something of a competitive disadvantage unless the other cable companies are required to comply with terms that are at least as onerous; and have we not come to the time, therefore, when the Federal Communications Commission should not just have a notice of inquiry, but actually launch a rulemaking in order to establish open access as a national policy and eliminate the disparities in the application of that policy that exist today?

Mr. LEVIN. Certainly the FCC is the regulatory agency that is charged, and now judicially charged, with having either a policy that has some provisions to it or defers from exercising its jurisdiction, and that needs to take place.

As a business proposition I am satisfied, as long as we are not saddled with any discriminating conditions that we would have to undertake, that part of my assignment has always been to demonstrate in the marketplace that there is a business formula that makes a lot of sense to the consumer, just as we have done in many other cases. And if I can demonstrate that multiple ISPs is a sound business practice, then it will proliferate in the cable industry.

Mr. BOUCHER. Thank you.

Mr. OXLEY. The gentleman's time has expired.

The Chair recognizes the gentlewoman from Wyoming.

Mrs. CUBIN. Thank you, Mr. Chairman. I want to go to a little different area. Thank you for educating me on the issues that I am about to talk about.

Mr. Case, you testified before the Senate Committee on Commerce earlier this year. I understand that you didn't specifically talk about interoperability, but you did talk about licensing.

Could you tell me where AOL is with—first of all, tell me what licensing is, what you are licensing, and who it is, and then how does that differ from interoperability.

Mr. CASE. There have been several steps in this process in terms of opening up Instant Messenger. The first was making it free to any consumer who wants to use it, irregardless of what network they are connected to, what ISP they are connected to, what have

you. Tens of millions of consumers have taken advantage of that free feature.

About 1½, 2 years ago, some companies approached us and said, it is great that you are doing that. We would like to create kind of our own version of it. Instead of just having AOL and Instant Messenger, your product, we want to have our own product, Lycos Messenger, Novell Messenger, Lotus Messenger. Those are some of the companies that did express an interest. We would like to enter into a license with you so we essentially can take what you have developed, this technology, and modify it so it is essentially our product, not your product.

So we entered into licenses, royalty-free licenses, to enable them to do that. I don't know what the current number is, but at least a dozen companies have entered into that. Other companies are welcome to do that. We don't have to wait for a standards process to essentially allow systems to talk to each other.

Interoperability is a different issue. It is kind of related, but different. That would allow any company to connect on a server-to-server basis without licensing our technology. They can do whatever they want as long as their servers interoperate with our servers, and there are consistent standards in terms of business practices, like making sure that security is protected in a consistent way and things like that.

So interoperability is the next step, a step that is important to take so any company can connect with instant messaging without having to have any relationship with us, just based on embracing some industry standards, some open protocols. That is the next step, and we are now moving to that. In the meantime, any consumer who wants it can use it for free. Any company that wants to license it can do so on a royalty-free basis.

Mrs. CUBIN. Tell me what that means, a royalty-free basis. What is the benefit to you of the licensing? Is it like a franchise?

Mr. CASE. Instant messaging has obviously generated a lot of interest. We have always viewed it as a feature, not a business. It is not really a revenue-generating business for us. We make the service free, and the usage of it is free.

We think it is an important part of the Internet. We have always believed that the soul of the Internet was community, building a sense of community and allowing people to talk to each other, talk to the people they talk to anyway, but maybe more easily, like your family or friends, or meeting people you otherwise wouldn't have met and talking to them.

So we have one integrated community which we think is better, because people would like to be able to reach anybody through instant messaging, not just people using a particular system. But it is not for us a business per se, it is a feature, but we think a very important feature.

Mr. LEVIN. If I could just comment, the concept of royalty-free license usually means it is not being done as a business proposition, but it is a form of making sure that adequate standards are recognized. I think that is mostly the issue here about trying to do something here with respect to the spam, pornography, and trying to control this form of communication, which hasn't taken place with e-mail.

Mr. CASE. Many companies have—IBM, Lotus, Apple, Lycos, Novell—there is a long list of companies that have done this. It is not just something we did with a few companies. We have done this with many companies and are eager to do with more companies.

Mrs. CUBIN. Along that line, I realize AOL has made several statements regarding the importance of security and privacy as they relate to instant messaging.

Can you tell me—and I believe that the Internet Engineering Task Force is working on standards. Can you tell me—AOL isn't working with that group; is that correct?

Mr. CASE. That is not correct. We are working with that group. We have submitted an architectural proposal in June to that group.

Mrs. CUBIN. How long after they make their public announcement of what the standards should be do you think that AOL will implement it; 3 months, 6 months?

Mr. CASE. We would have to ask our engineers. I guess it depends on what specific approach they are recommending, how many modifications it would require to what we are doing.

In the meantime, as I said, we are doing everything we can to popularize instant messaging. While we are eager to move the interoperability, we have this architecture on the table now people are beginning to look at and comment on. I believe working groups have been set up to deal specifically with this server-to-server interoperability issue. We are open to work with any company on an interim basis, at least to license them so they can use it right now.

In terms of how long it would take us to support it, it really depends on what the specific technology is in place, what protocols are put in place, and how much of a modification our system would be required to embrace that approach.

Mrs. CUBIN. For some reason I was under the impression that AOL wasn't actually at the table with the task force and communicating. I would think if they were, that a lot of the things that you described implementing would—it would make implementing easier.

Why do I think you are not at the table when you just told me you are? Are you a member of that task force?

Mr. CASE. We are a member of the committee. We are active participants in the process.

Perhaps this can be explored in your subsequent hearing next week. Maybe some of those companies can on the record talk about what we have done or haven't done. I think there is a lot of misinformation on this topic, and when people really look at the facts, they will see that AOL has done a lot already and is committed to doing more through the proper Internet standards bodies.

Mrs. CUBIN. That is why we are having this hearing today is to find out some of those things.

Mr. Chairman, I don't have any further questions. I yield back the balance of my time.

Mr. OXLEY. The Chair recognizes the gentlewoman from California Ms. Eshoo.

Ms. ESHOO. Thank you, Mr. Chairman.

I can't help but make the following observation: That is, the genius of America. I think there is a lot of it at the table today. Obviously, there is a lot of it in the room. But I think that all of us are struck by that.

I have a deep appreciation of it. I do. I am in awe of what we are doing in our country, what we are bringing forward. Obviously, every time you punch the pillow, you put a dent in it and something pops up, so there are new issues and challenges. But I don't think for a moment that we should lose sight of what is at hand and what it all represents. It is astounding. It is extraordinary. It is very American. That thrills me.

I want to get back to something that my colleague Rick Boucher brought up about which direction to go. I think he was touching on that. He went into some of the specifics that underscore parts of this legislation.

To you, Steve, AOL has always stated that you favor a market approach rather than a regulatory or a legislative one to the open access question as far as making available cable lines to rival Internet providers. That has been a huge debate. There have been bills introduced. Some say that it was the intent of the Telecom Act, and it has fallen short, so now we have to reverse things, et cetera, et cetera.

In your opinion, is the market providing a solution? I ask this because it is a broader question. Obviously there are cameras here, so you are speaking to America. There are many communities that are debating this. What evidence can you offer to us that the market approach really remains the best response to this issue? If it is working, and I think that it is in so many areas, is it providing a solution fast enough? Because there is an impatience. You have spoiled us with your instantized everything. We want microwaved answers to everything these days because the industries have so spoiled us with fast responses.

Could you comment on that? And then if you can get to this one, today's Washington Post describes your situation with a small cable operator in Florida who is withholding his local cable franchise license that AOL needs transferred from Time Warner to the merged company. His action could apparently delay the rollout of high-speed Internet service in that area.

Have you encountered similar battles elsewhere in the country, and do you expect this to be a relatively common occurrence, and what would alleviate the problem? Should the FCC step in with action? Does the lack of a single legislative framework, which was alluded to, add to the confusion?

Mr. CASE. I will let Jerry take the second one.

In terms of the first question, I think we are really at the beginning of the second Internet revolution that will take us beyond PCs and phone lines and allow you to connect through many different devices, your telephone, even your stereo, all kind of different things connected to many different networks, both wired and wireless networks, narrowband and broadband networks.

I think there is an enormous innovation and investment going into all these areas with unprecedented capital infusions, the venture capital market, the ISP market, and so forth, a lot of IPO markets .

As it relates to broadband, a lot has happened. A couple years ago we were concerned that cable might be the only distribution path for broadband, and those companies might not move—even though we thought it was in their business interests to do it—to open the systems up rapidly enough. What has happened in the last couple of years is one of the leading cable companies, Time Warner, has made a very clear commitment I think, to open access with a memorandum of understanding. Other companies are starting to embrace at least the concept of it. But moreover, other broadband technologies have emerged. DSL, which a couple of years ago was questionable, now has a fair amount of momentum. If you talk to some of the companies like Cisco, they will probably say they are selling more routers to support DSL than to support cable. If you turn on the television, you will see Verizon offering DSL and many other companies. So the DSL market is quite robust and competitive.

Satellite has also emerged as an option, which was not so clear 2 years ago, right now with using the telephone as a return path, but their next generation, which will come out next year, which is a two-way satellite system.

There are many different wireless companies. Wireless has become extremely hot in the last year or 2. The options over the third generation spectrum are going for many billions of dollars. A lot of people believe wireless is going to be the best solution because it is more mobile, and it still over time can provide the same kind of high-speed broadband access.

We are now seeing many technologies coming to fruition, funded by significant capital, many, many billions of dollars.

Your earlier point, I think it does demonstrate America's creativity and ingenuity. Because of the interest in high-speed access, all this activity has happened.

On the cable side, I do believe that when Time Warner—when we finalize this deal and Time Warner is demonstrating in the market that open access works, other cable companies will embrace that. But in the meantime there are many different choices available to other ISPs today and other consumers today. I do think it demonstrates that the market can work.

Mr. LEVIN. Let me respond, first of all, to the lengthy article in the Washington Post this morning.

In fact, there are about 1,200 local jurisdictions that Time Warner cable has sought some form of change in, and .69 percent of those local jurisdictions have now approved the process, but for the one—a couple of systems. In fact, it has actually gone much more smoothly than I would have predicted at the beginning of the process. It says something about, I think, the quality of the relationships that Time Warner cable has with its local jurisdictions.

With respect to competition, I think it is quite clear that what we are seeing on two fronts is the most robust form of marketplace competition I have seen in my period of being in the business.

First, with respect to high-speed Internet access, DSL is a technology that has been available for some time on the part of the telephone companies. It is only now being marketed and promoted because of the activity of cable systems in putting in high-speed cable modems, so you now have a real marketplace contest to put

high-speed either DSL or cable modems in, a lot of advertising. So that is actually working.

On the other side, digital television, the competition between satellite and cable is quite significant. That proceeds apace. I think what we are seeing now is very healthy competition to give the consumer either interactive high-speed access to the Internet, or forms of digital television.

Ms. ESHOO. Thank you both, gentlemen.

I leaned over and said to my colleague much earlier in this that I think one of the real compliments that can be paid to witnesses is when they not only answer your questions, but that, whatever you say, you become very instructive to the committee. So this has been educational as well.

I compliment you. I wish you well. I still think there are tons of things to deal with, but I think it is progress that really is pushing all of this and creates the new problems. So I welcome the problems, because they are being pushed by success. Thank you very much.

Mr. CASE. Thank you. I agree, there are tons of questions, tons of problems as we move into this more connected world. I am eager to complete this merger review process, which creates some tension, so we can resume the more collaborative effort we have tried to have with this government and other governments, so we can collectively, industry and government together, shape the right policies, because there are many thorny issues that will be addressed over the next decade as we move to this more connected world.

Ms. ESHOO. I urge the chairman to continue holding hearings with all the affected parties in this, because I think it is so important for us. If we take the wrong step legislatively, it is like the elephant's hoof coming down on the ant. It can really do a lot of damage.

Mr. TAUZIN. We have made the announcement. We are scheduling additional hearings. If we had hearings with all the affected parties, we would be here through Christmas, so I don't think the gentlewoman would want this.

Ms. ESHOO. Neither would the chairman. Maybe a different chairman.

Mr. TAUZIN. We will have a different chairman here regardless.

Let me correct the record. The room I refer to is apparently the FTC building, not The Portals. But it is still a closed-door meeting that you can't talk to us about.

The point is the same. One day we ought to have a law that opens those doors and lets the public in, since the public is going to be affected by whatever decisions are made and whatever voluntary conditions you are coerced into accepting.

The Chair recognizes the gentleman from Ohio, Mr. Oxley.

Mr. OXLEY. Thank you, Mr. Chairman.

You may be an ant, but you are a big ant, particularly after the merger.

Mr. Levin, you mentioned Cube. Twenty-five years ago in Columbus, Cube began, and I remember it very well. I was a member of the legislature at the time, and spent time in Columbus, obviously, the capital. I was exposed to Cube, I think the first interactive tele-

vision experiment. It was fascinating, particularly because one of the programs was interactive communications between Coach Woody Hayes and his not-so-adoring public.

On the first show he received several—had interactive capability with several fans who basically said that it was time for him to move on, which was kind of a blood sport in Columbus, anyway, in those years. There was a Goodbye, Woody, Club. Woody was, all of us know, the Bobby Knight of his day. His responses got more and more vehement as he faced all of these probing questions.

Mr. TAUZIN. He didn't choke on camera, did he?

Mr. OXLEY. No. Interactive TV has not gone that far, even today, where it could reach out and choke the accuser, but he verbally did. I remember that very well.

The reason I remember that whole thing is now we are talking about interactive TV. That was going to be the wave of the future. Twenty-five years later, what leads us all to think that the public is going to embrace that wonderful concept, even though it was introduced with great fanfare in Columbus, Ohio, some 25 years ago?

Mr. LEVIN. I joined this industry 30 years ago because I read something called the Sloan Commission Report that talked about the interactive television and the wired Nation in 1970. We still don't have it, so I think—by the way, I had the dubious duty of interring the last Cube box about 10 years ago, kind of as a memorial to what was a failed experiment. On the other hand, what came out of it were things like Nickelodeon and lots of interesting programs.

We had another experiment in 1981 where we tried to deliver news on demand to precursors of computers, and it just failed miserably. Yet the concepts were always there. That was for two reasons: One, the technology was not there. I mean, the true digital technology for cost-efficient interactivity just did not exist. Second, the consumer didn't know, didn't understand, wasn't fully appreciative of the notion that television is kind of a lean-back, passive experience.

The profound nature of the Internet has done two very significant things. One is it actually provides a digital system that can interconnect and can be interactive, but second, it has given everybody the experience that we all used to associate with interactive television; that is, the opportunity to get news on demand, to shop, to play games, do all these lifestyle things.

So that habit structure has now proliferated, and the digital technology, which we didn't really have—by the way, it is another irony that the last medium to be digital is actually television. The first medium was print, which we did 25 years ago. We now have the platform predicate and the consumer experience that is probably setting the stage for interactive television.

But to the extent history teaches us anything, it is the fact that nobody has a handle on what the concept is yet.

Mr. OXLEY. Mr. Case?

Mr. CASE. If I could add, I am younger than Jerry. I actually got interested in this business in 1978 reading books like Alvin Toffler's The Third Wave, talking about interactive television, and not that much has happened. But I agree with Jerry that now the time probably is right. The technologies have gotten better.

More importantly, consumer habits have changed. People are more used to interactive services because of the growth of the Internet. They are starting to ask, if I can do all of this on my PC, why can't I take more control of my TV? Why do I just see what the networks want me to see? Why can't it work like the Internet where I can go where I want, do what I want, where I want?

So I think the consumer appetite is there, but I don't think anybody is smart enough to know exactly how this will develop. I think this merits attention, it merits investment, it merits innovation.

That is beginning to happen. Over the next 5 or 10 years, I do think television will be transformed. Some existing companies in that business may not like that because they kind of like the way it is working, but I think it is going to open the doors up to many newcomers, just like with Internet. The growth of Internet, fueled by AOL and others, has really resulted in a whole slew of new companies being formed and unprecedented innovation. Now the time is to focus on television and try to create that same kind of competitive dynamic.

I am optimistic it can happen. At the same time, AOLTV, which is just rolling out now, over the next year will get tens of thousands of people to use it. It is not going to be kind of an out-of-the-gate home run. We are still listening and learning. You have to be on the playing field, you have to interact with customers, you have to give them things to use and play with and learn from.

That is the story of AOL in the last decade is learning from people and finding out what they like and don't like, and doing more of what they like and less of what they don't like.

Mr. OXLEY. I am sorry I didn't get a chance to give my opening statement, but I do think these kinds of mergers have tremendous upside potential.

I obviously wish you well. I share the concerns that other members of the panel expressed about the micromanaging going on at the FTC and FCC and trying to pick winners and losers.

You may fall on your face, but you and your shareholders have taken that risk. Indeed, the marketplace is going to determine at the end of the day, when you are back here 5 years from now, whether it has been a success or it hasn't.

It seems to me that the overall majority on this committee, on both sides of the aisle, hope that this is the beginning of a great new revolution in interactive television and all kinds of entertainment and news and the like.

How does the rollout of high definition television and its implications—how does that affect your view of the future?

Mr. LEVIN. This is another example of the technology that has been around for many years. I know at HBO, for example, probably 10 or 12 years ago we started picking up our boxing events in high-definition television, even though the consumer wasn't there.

I think the digital technology enables the transmission and the delivery of high-definition television that broadband capacity can now permit, and the quality of the picture, and the fact that you use what is called an aspect ratio, so it looks very much like what a motion picture looks like as opposed to a television screen, is very powerful.

The problem is that the spectrum that has been given to the broadcasters to use for that purpose is now being thought about in a different way, to use it for many other applications that relate to the use of high-speed data and other forms of either subscription or advertising-supported video. I think it is unfortunate, because, in fact, it is a striking technology. It is still somewhat costly, but probably over time it will be delivered, but you don't see very much business support for high-definition television today.

We have, in our case, tried to make arrangements with those who are delivering high-definition signals, whether that is everyone from CBS to HBO, to carry it on our cable systems.

Mr. OXLEY. We have already seen the effect of the Internet and the explosion of television programming, cable and the like, changing the whole face of television. The market share for the major networks, the three other networks, is substantially down. One would guess that that would continue to be the case.

How do you both see, let's say, 5 years from now, the video landscape as it relates to the networks, the traditional networks? Where is the audience going to go, in your estimation? Is this the beginning of the end for the three or the four or five, whatever, broadcast networks?

Mr. LEVIN. Well, this is a persistent question. There is no doubt that when you have a 250-channel system, which you have through satellite, the cable now, the share of the audience on the part of the major broadcast networks is continually declining, although the business is still very healthy because it is the largest aggregation of eyeballs to deliver to advertisers.

What has happened is that, first of all, the broadcast networks are participating in the fragmentation of television. That is, they all own or have interest in a number of specialized channels, so they are no longer just one broadcast service.

I think, second, the reason for so much interest in what either interactive television or applying the Internet experience to television—the reason for that interest is to try and carve out additional business formats that can actually take advantage of the smaller and smaller niched audiences where people are going to what their personal interests are.

Having said that, I think we will always have major events, from the Super Bowl to the Academy Awards to some of the reality television we have seen recently. The point is to give the consumer much more control than the consumer currently has. That is what the broadcast networks need to learn.

Mr. CASE. I am confident a few years from now you will have a 24-hour Survivor channel.

Mr. OXLEY. Oh, no. This is the low point in this hearing. I yield back.

Mr. TAUZIN. I am not sure we want to survive that.

The Chair recognizes the gentleman from Chicago, Mr. Rush.

Let me point out that we have apparently a vote on the floor, which will be followed by 5-minute votes, so that we probably are going to have to take a little recess after this to give everybody the time perhaps to have some lunch or relax a bit. My guess is that we will be gone for at least a half hour once we recess.

Mr. Rush.

Mr. RUSH. Thank you, Mr. Chairman. I am going to try to elevate this, to turn back up to some loftier heights here.

Mr. Levin, your merger with AOL and Time Warner will bring interactive TV to new heights. I want to share the comments of my colleague Ms. Eshoo. I think the fact that you are here and we are discussing this issue is really testimony to the greatness of America's ingenuity and know-how. I believe sincerely that this is a very, very powerful moment and a powerful undertaking that you are engaged in.

However, I want to deal with some content issues here. You and I have both had violence visited upon our houses, and I know you are sensitive to street violence, also. I really want to take this moment to ask you, how do you assess violence in America today, and how can you and I both, and others, harness this enormous power and potential that we have to try to deal with the issue of violence in America?

Mr. LEVIN. Well, obviously, this is a deeply personal subject for me.

Mr. RUSH. I understand that but—please forgive me, but I just want to take this opportunity to do that.

Mr. LEVIN. I find it appalling that a subject so important gets somehow caught up in either politics without addressing the real issues or taking one part of our society and putting the blame there. I think it is just a constellation of things—everything from guns to drugs, to failure of the educational system, to the lack of not just parental authority but coming from the churches and the synagogues and the mosques should be playing more of a role in the community.

So what should we be doing? I do think that we need a much more informed national dialog on this issue. The reflex response every time there is a tragedy is just an unfortunate way of dealing with it. No one truly knows why young people—their empathetic response just shuts down when they are young, and they have no way of dealing with society. I think it is fairly clear that the experience of real violence as opposed to fantasy violence, either in our peer groups or through parental abuse, that is where this is learned. So I would just say there are a whole host of things to recognize the complexity.

As you know, there is a hearing taking place in the Senate right now on the subject of the marketing of R-rated films to young people; and, you know, our company is trying to be very responsive. I just think we need to take a look at every facet and recognize that we all need to work together on this.

As a matter of fact, it is not just because of deep personal experience, but I think companies do care about this issue and want to help and want to play a role in trying to ameliorate one of biggest problems in our society. Because it occurred even yesterday in a school in New Orleans, that there is a national epidemic that is not solely attributable to the media. In fact, if you would just talk to young people and ask them what they think the issue is, it is not music, lyrics; it is not R-rated films. It has a lot to do with the kind of adult supervision and the fact that in our education system——

In addition to my son, who was a heroic teacher, I have a daughter who is a social worker who works in schools. Because teachers

can't contend with the issues they have. And who is paying attention to the role of teachers in our society, giving them the support?

That is why some of the things that we are trying to do as a company are designed to deal with that. So rather than that being an adversarial relationship, we should all be working together for the sake of our young people. I can't give you a singular answer.

Mr. RUSH. I don't expect you to give a singular answer, but I wanted to take a moment to applaud you. Because I have recognized and I have seen a visible evidence of HBO really trying to deal more effectively with this violence, and I would like to applaud you.

Mr. Case, do you have anything you would like to add?

Mr. CASE. I think Jerry was very articulate about it. It is a very complicated problem.

I think government needs to take a more macro perspective on it, even though, obviously, there are a lot of parts to it that have very passionate views on both sides. I think companies like AOL, companies like Time Warner, and certainly AOL and Time Warner together, would hope to be a leader in trying to deal with some of these thorny issues or some things that the media entertainment companies can do and will do to try to do its part. There are some things that can be done through the advent of the Internet and other interactive technologies, but it is a much more complicated problem.

Everybody has to do what they can within their own businesses or their own groups or what have you, and there needs to be people taking a step back and trying to be more strategic about it, more thoughtful about it and less reactive.

So certainly we have said for some time that we aspire to be the most valuable company in the world, but we also aspire to be the most respected company in the world. And we are only going to be the most respected company if we do conduct ourselves in a responsible way, if we do follow up on commitments, whether it be open access or messaging interoperatively, some of the things we have talked about today.

But, in addition, we go beyond that and really try to establish a new kind of dialog between businesses and government and deal with some of these issues, whether it be violence or education or health care, in a more collaborative way.

We don't think the traditional—looking at the past century, the sort of hostility that has existed between industry and government with the industry generally trying to—at least viewed this way, particularly in the robber baron era—trying to get away with as much as they possibly can and the government trying to be responsible and rein them in is the right approach for the next century. We think a more responsible, more balanced, more constructive, more collaborative approach is critically important for many issues but this one, certainly that is the case as well.

Mr. LEVIN. If I could just add, because I chose to come back and continue to be the CEO of our company; and one of the reasons was there is such an important role to play.

I would simply use an example that occurred recently, and that is through news and story telling—CNN's Pierre Thomas on CNN did a probing report on heroin addiction in Baltimore. HBO, at the

same time, Charles Dutton had a series called The Corner, which was a harsh series, but it disclosed the same issue done in story telling. It was an important message to deliver both in journalism and in what we call the entertainment business. But that is perhaps more powerful than any other way of delivering the message that we have to pay attention.

Mr. RUSH. I saw that series, and I really take my hat off to you. It was a very, very insightful—brutal but insightful and educational series.

Mr. LEVIN. Our proudest moment was when it got four Emmys and the recognition that this is the role we can play.

Mr. RUSH. Thank you so very much.

Mr. TAUZIN. I thank the gentleman.

On the other hand, Bobby, I don't think Tony Soprano can be a lot less violent than he already is. He suddenly mellows out on us.

Let me an announce that we are going to——

Mr. LARGENT. Can I follow up on just a real quick—because we have to go vote?

Mr. TAUZIN. We have about 4 minutes.

Mr. LARGENT. I was listening very intently, Mr. Levin, to your answer. I guess when you talked about a whole constellation of issues surrounding youth violence in our country I couldn't agree more with that. There is a lot of contributing factors but I never heard you say that the graphic movies, music that your company produces is one of those contributing factors to the level of violence that exists in our country. Do you agree with that statement?

Mr. LEVIN. What I would like to say, and this comes from deep emotion, my son used materials that we produce to reach children in the South Bronx who are otherwise unreachable, used movies, used music, all of this material to improve their vocabulary; and to me that was the most heroic example I can think of and personally dedicating himself to that. I take full responsibility for everything this company produces, but I have profound respect for what he did, which far exceeded anything I have heard from anyone else.

Mr. LARGENT. Again——

Mr. LEVIN. And I would prefer that you not pursue it, because this is something that is more personal to me and not professional.

Mr. LARGENT. Okay. You still did not answer the question.

Mr. LEVIN. Fortunately, you haven't had the personal anguish that I have.

Mr. LARGENT. There is no question about that.

Mr. CASE. Let me just add, because I am certainly not an expert in some of these businesses, movies and so forth, I am just learning about them. And I certainly cannot even relate to some of the issues that Jerry and Mr. Rush have had to deal with. But I don't want you to leave with the impression that when you are talking about constellation that we are somehow saying that the companies that we are involved with have nothing to do with it. We do think that the companies we are involved with do have an influence, and we do think what we do has a positive influence.

I am sure mistakes are made from time to time, and people have to assess what is being done in terms of the creation of content, also marketing distribution of content and so forth; and that is something we will continue to look at to make sure we are doing

the best we possibly can. But the main point is it is unfortunate that this issue, which is a serious issue in terms of overall problem, gets politicized during the election cycles.

Mr. TAUZIN. We have 2 minutes left.

Mr. CASE. I think it masks the broader issue and the broader challenge which is to deal with this in a constructive way with everybody doing their part and doing the best they can to try to make a better world.

Mr. TAUZIN. We have 2 minutes. We are going to have to recess. We will continue this discussion when we get back, Mr. Levin.

It is very interesting, on the Senate side Jack Valenti on behalf of the movie industry is taking some responsibility for mistakes and admitting that the industry can do better.

We will come back in a half hour. The committee stands in recess.

[Brief recess.]

Mr. TAUZIN. The subcommittee will please come back to order.

While we are awaiting the arrival of a few members I know who wanted to engage you in several questions—we will see whether they make it back in time—let me ask a question that the staff propounded in their memo on the members which is kind of interesting.

Steve, you remember we had our conference at Landsdowne on privacy when we talked about the fact that the Internet and its e-commerce features was essentially telemarketing, just in a new and more vibrant and perhaps more interesting form. That essentially a lot of the e-commerce companies on the Internet are selling services and goods in the same way that people call you up on the telephone and offer to sell you services and goods. It is simply done in this new medium. And as we go to interactive television, essentially, we are moving from telemarketing to telenet market to television marketing in an interactive fashion. So the question, how those dollars are going to be divvied up, becomes quite interesting.

The staff propounds this scenario. If Nike sells a pair of shoes on a CBS program transmitted by an AT&T cable TV system to a Motorola set top box running Microsoft software and ultimately on a Sony television, who does Nike pay for advertisement of its products? How is that going to work?

I mean, we all understand generally how the advertising world works on television today. We understand how it gets more complex on the Internet. This is incredibly new levels of complexity that I think nobody yet can understand. Can you help us understand it?

Mr. CASE. I don't think anybody knows for sure how that will work. Because I said before nobody knows for sure how interactive television will develop. And it is certainly fair to say as this world converges there is lots of companies, thousands of companies that are trying to figure out how to get some piece of the action.

If you look at other businesses, other models such as the Internet, there are companies that are providing communications, there are companies that are for manufacturing chips, there are companies for manufacturing PCs, there is retailers, there is Internet service providers, there is portals, there is thousands of different

web sites; and they all come at this from somewhat of a different vantage point.

The nice thing about the Internet is, as you know, anybody can create a web site and anybody can get to that web site. So it really becomes more promotion to drive awareness to the site and to drive traffic to the site.

Right now, in the Internet context, there are many companies—AOL is certainly one of them—but many companies, portals like Yahoo, PC manufacturers such as Compac, who now sell buttons on their keyboards. There are a variety of different companies that are doing things in terms of interactive television.

It really is not clear now what interactive television will be and exactly how it will develop. It becomes very difficult to understand the business models. I think the first step is building interest in the category, getting people to use it, and then trying to figure out how to build a business out of it.

Mr. TAUZIN. So, in short, it is going to be a marketplace resolution. There will be negotiating and contracting. And I suppose—Mr. Pickering, get ready, because I am about to recognize you—I suppose in the context of your negotiating with other programmers to put programs on your systems that the division of revenues in the interactive sales will be part of the negotiating that goes on in terms of locating that channel, that program on your system. Is that what the dispute is all about, the dollars derived from profits of sales in interactive TV?

Mr. LEVIN. To the extent there is a dispute, no one really understands it to even ask the right question at this point, which is mildly amusing. In fact, one of the things that is at issue here is whether—I think the case of, you know, broadcast program, whether the direct—the commerce that is related to it is a part of the program or it is something separate, it is a separate business.

Because, actually, the FCC has some rules about that in terms of the requirements for carriage. How much of it do you have to carry? If it is program related, you do. If it is not program related, you do not. There has to be a bargain.

You also have what is the use of the digital spectrum that is being given to the broadcasters. Will that be used to transmit data to use it for electronic commerce? If that is the case, who is going to get paid?

That is why these issues are so. Difficult because you can't take the traditional television regulatory regime and transpose it to this Internet-powered digital activity because the rules just do not seem to apply. That is why it probably is helpful if the marketplace tries to deal with this to see what the allocation of responsibilities is to come up with a formula that works that the consumer can respond to. It is still very early in the game.

Mr. TAUZIN. Only one comment, I think you probably will see policymakers both in the regulatory darkrooms and here on Capitol Hill more willing to let that happen if there is truly comparable competitive delivery systems from whom consumers can choose and from whom programmers can negotiate different rates in terms and conditions. That is going to end up being the test in the end.

And I will just leave with you that thought.

Mr. LEVIN. I will think that you are absolutely correct, and that is why the real issue is how robust are these various platforms.

Mr. TAUZIN. How robust is the competition. As good as you get, is there anybody that can be nearly as good or comparably as good so that there is real choice out there, not only for consumers but for those who want to sell their videos, their services, their music, whatever it may be?

Mr. LEVIN. Again, I would credit the 1996 act and everything that has happened, the Satellite Home Viewer Act. There is robust competition. There has been a wake-up call for all the players, including the telephone companies, the cable companies, the satellite companies and the wireless companies. That is what is taking place. And the financial community is actually financing a lot of this now.

Mr. TAUZIN. Parenthetically, we still have some work to do in the digital transition, as far as I can see.

Mr. Pickering from Mississippi is recognized.

Mr. PICKERING. Thank you, Mr. Chairman. Thank you for having this hearing today.

I apologize for being late to the hearing, and I may ask questions that have already been covered, and if I do please forgive me. I will try to ask questions in a different way.

Mr. Levin, it is good to see both you and Mr. Case with AOL. Bob Pittman, a great Mississippian at your company, Time Warner, having one of the first systems in Jackson, Mississippi, plays a historical role. We appreciate both of your contributions to what we are seeing in telecommunications and technology interactivity convergence.

I do have a few questions for both of you.

One, the recent FCC staff recommendation, as one of their recommendations on a condition for approval of your merger was the instant messaging interoperability. What is your response to that staff recommendation? Do you think it is necessary? If not, why not?

Mr. CASE. Well, we did talk a little bit about this this morning. But we don't think it is appropriate, at least on our side, to be discussing in any detail the kind of discussion we have had with the FCC or the FTC. We read about it sometimes in the paper, and sometimes it is right, and sometimes it is not right. But we do not think the process is well served by having us talk about specific issues.

The overall issue is we do believe that the merger is pro-competitive for the reasons we just talked about. It stimulates the development of many different markets such as interactive television. We do recognize and I think everybody now recognizes there are no overlapping businesses. So there aren't the traditional anti-trust issues. And we as a company do believe that the commitments we make publically are significant, whether it be related to what Time Warner cable said on open access, what AOL said on instant messaging. And we do not believe that it would be appropriate just from a policy standpoint to deal with these issues through merger conditions. We think it is better to deal with these issues either through relying on the market to work and allowing companies to make commitments and to deliver on those commitments or to

have a more national policy approach as it relates to different technologies, different competitors.

So a simple answer to the question is, we don't believe any conditions are necessary or appropriate. At the same time, we don't have any desire to get into a tiff with the United States government. If there is some kind of approach that everybody can agree on and allow us to move forward sooner rather than later, then we will try our best to reconcile that with our fundamental belief that it would be inappropriate for this particular merger and, actually, it would be bad public policy.

Mr. PICKERING. My understanding is you have made commitments or agreements to move to interoperability within a 1-year period of time; is that correct?

Mr. CASE. Right. In our instant messaging—I will be happy to go through some of the things we talked about this morning in more detail—but, basically, we talked about the history of instant messaging, how we got it to where it is, what we have already done in terms of making it free to consumers and licensing it on a royalty-free basis to more than a dozen companies and what we have talked about in terms of server-to-server interoperability. And we did indicate in a hearing over the summer that we thought it would take about a year, from a technical standpoint, to allow that to happen; and then we have to work with some companies and test it out.

We do believe we are on the path to operability. But, in the meantime, we are pleased that consumers are able to use instant messaging without subscribing to AOL or without even using an AOL instant messenger. They can use the Lycos messenger or Lotus messenger or what have you messenger.

The other point that we talked about a little bit this morning is Microsoft launched a messaging product a year ago and are already saying they have 20 million customers and in the last couple of weeks integrated with the operating system. So people are concerned about instant messaging and making sure that it is open and competitive.

I think perhaps more attention should be foscused on the longstanding debate about the operating system and what product should or shouldn't be integrated in the operating system. I think we have done a lot already; and we will do more over the next period of time, particularly on operability, over the next year.

Mr. PICKERING. This is one follow-up final question on this subject. As part of that compatibility operating system, as you know, one of the issues is being able to be use the technologies that would filter out from the instant messaging those things that are inappropriate for children, whether it is pornography or obscenity or other things that parents or schools or libraries decide would be inappropriate. Is that interoperability, in your view, necessary to be able to use those technologies, those tools to protect our children? And with your current approach, can those types of tools be used, those filters, those technologies? What is the state as it currently exists in relation to those technologies?

Mr. CASE. Well, as I hope you know, AOL has been a leader over many years in developing parental controls. We do believe we shoulder considerable responsibility not just to make the Internet

available to everybody but make it safe for families and allow parents to decide what contents or communications should or shouldn't be appropriate.

There is a whole series of things we have done in terms of people being able to block certain websites or block certain e-mail addresses or block people from using instant messaging. And that is precisely one of the issues that we are focused on as we move to interoperability, to make sure the safety standards, the community standards that we have worked hard to put in place are protected as we move to interoperability so we don't have some of the problems with instant messaging that, frankly, we have had with e-mail, was pretty serious problems that do concern a lots of parents.

As it relates to right now, to my knowledge at least some of the popular filtering software—but just to clarify, with AOL the filtering software is built in already for free, parental control. So they are already in place.

If you use AOL Instant Messenger, which is a product that doesn't cost anything to use, doesn't cost anything to download, you can use any Internet service provider to connect to that service. The filtering programs, which is a Net Nanny, do still work in the context of, if you click on a web site in instant message and let's say a pornographic site that your parents have set up to block that, as I understand it, the instant messaging service would block access to that.

It is unclear to me whether every single feature of those products works with our product. But I think, to my knowledge, something like Net Nanny works better with AOL instant messenger than it works with Microsoft messenger or other projects. I am sure over the coming months we will continue to refine things so that we can provide the interoperability everybody wants but also the safety that parents need.

Mr. PICKERING. Mr. Chairman, I have one other question on how this affects competition, but if I have taken too much time——

Mr. TAUZIN. Not at all. Proceed, sir.

Mr. PICKERING. One final question on competition, and this goes back to what you see or what you predict in the marketplace as far as capital flows.

One small anecdote. I have some friends back in Mississippi who are beginning a new startup company coming out of telecommunications, trying to buy rural telecommunications companies to then give the upgrade to broad band capability, to interactive capability, voice video data. That is their business plan and the concept, and that is going into small towns, rural communities, and that is their approach. Do you see interactivity and the convergence of these technologies being the driver in the future for competition for broad band capability into places like my district, primarily outside of Jackson, rural, small town? Is that your prediction for the future?

Mr. LEVIN. I think one of the most interesting aspects of this is the fact that the onset of the digital technology which was brought about by this convergence means that you can now deliver voice video and data in a highly efficient, cost-efficient way in rural areas as well as urban areas. In fact, the capital markets, the financial system are in a very significant way financing many new startups who can kind of appear almost overnight. It is like you are

leapfrogging all the technology and all of the developments that have taken place over the last 25 or 30 years. So it is a very encouraging time for people to be able to do that, and I think it is a good sign for kind of the rest of America to have this opportunity. Because we are also seeing it in the larger markets, too, where there are startup companies that can actually overbuild cable systems. There are DSL resellers who can provide high-speed Internet access. So there are a thousand flowers blooming as a result of this.

Mr. PICKERING. Thank you, Mr. Chairman. I think they want to buy one of the rural ones in your district.

Mr. TAUZIN. Well, we need a little competition in my district. I thank the gentlemen.

Let me, apparently, wrap this session by thanking you and asking several things of you.

One, you have heard from some of the members some of the concerns that will be expressed by other witnesses who will come at a later date and give us their perspectives on what interactive television, particularly your own merger, may mean for them and their competitive opportunities or lack of opportunities, whatever they believe about this. It would be very useful knowing that if you would perhaps want to supplement in writing to us some comments about some of these concerns that you have heard expressed today and certainly we will hear expressed in the next meeting.

Second, the hearing record will stay open for 30 days; and I would like to send you a few written questions that you can respond to, particularly in the area of this question of technologically equal status. I hear more and more about it. I want to know more about it. Is it a question that you have to decide in the open market or is it something we are going to have to face as a policy issue 1 day? Is it an architecture question or is it a dispute over dollars, who gets revenue from interactive television marketing sales?

Obviously, the questions we are going to face regarding the use of the spectrum, if you can correctly put your finger on that, we are going to face those questions as we complete the digital transition through the year 2006. And this enormous adventure you are about to enter will have great implications upon some of those questions about carriage and about standards and about some of the architecture questions about these systems and about consumer product manufacturers. We are probably going to want to know more about as we go forward.

Finally, let me tell you that I think your merger is the most intriguing and probably the most impacting merger on American consumers that I have seen in the last several years. There have been a lot of telecom mergers, but this one, because I think it portends so much in terms of new packages of services and new implications on competition and consumer choice, is probably one of the most—I think probably one having the most and largest impact upon some of the policy questions we will face next year. So you know we are going to pay a lot of attention to it. Our business is not to decide your application before the regulators, but obviously the impacts of it and how this unfolds and, as you said, much of this is de novo and we will learn together.

But I would very much appreciate it if you will remain available to us and in future months as we gather again to get an update

of how it is going and to get some understanding again on whether these concerns that have been raised are real or fictitious or really problems that normal competitors face when they try to compete against one another in a new market.

Mr. CASE. I will be happy to do that.

Mr. TAUZIN. Let me also announce that once we adjourn we are going to ask all our guests here to clear the room because we will have to set it up for the markup that starts at 2 o'clock.

So unless there is further business to come before the committee, let me thank you for the courtesy of your visit and your testimony; and we will look forward to hearing from you in writing with additional questions.

The hearing stands adjourned. Thank you.

[Whereupon, at 1:13 p.m., the subcommittee was adjourned.]

THE FUTURE OF THE INTERACTIVE TELEVISION SERVICES MARKETPLACE: WHAT SHOULD CONSUMERS EXPECT?

FRIDAY, OCTOBER 6, 2000

HOUSE OF REPRESENTATIVES,
COMMITTEE ON COMMERCE,
SUBCOMMITTEE ON TELECOMMUNICATIONS,
TRADE, AND CONSUMER PROTECTION,
Washington, DC.

The subcommittee met, pursuant to notice, at 11:30 a.m., in room 2322, Rayburn House Office Building, Hon. W.J. "Billy" Tauzin (chairman) presiding.

Members present: Representatives Tauzin, Cubin, Shimkus, Markey, Boucher, Luther, McCarthy, and Dingell (ex officio).

Staff present: Kelly Zerzan, majority counsel; Cliff Riccio, legislative analyst; Andy Levin, minority counsel; and Brendan Kelsay, minority research analyst.

Mr. TAUZIN. The committee will please come to order.

Let me first thank those of you who were downstairs with us to witness and to participate in the tribute to Chairman Bliley upon his retirement. I think probably that was the last markup session of the full committee, and so we took a moment to acknowledge the members of our committee who were leaving: Mr. Coburn, Mr. Klink and Mr. Lazio; also to honor our chairman. And I want to thank those of you in attendance to see that tribute and to thank you for being there.

Second, I want to welcome you to this subcommittee hearing. We recently heard from the principals of the AOL/Time Warner merger with reference to how that merger would impact upon consumer products and services and how in fact that merger would provide both opportunities and challenges for the future world of telecommunications in that it represented the first real combination, the convergence of computer and television on the broadband essentially with data and video and audio and other services which might merge in interactive systems for the benefit of what the 1996 act obviously intended, which was more and more packages of services delivered to consumers in the kind of one-stop shopping that consumers in America generally like.

There were serious questions raised, obviously, during that hearing regarding instant messaging and competitive systems and the nature upon which competing and known systems might interact with and be a part of the AOL/Time Warner system and how con-

sumers might fare in a world where such a tremendous and important convergence was occurring.

And as part of our hearing last week we committed to do a second panel, and therefore we are pleased to welcome that second panel today in the interest of hearing other perspectives of those, how consumers would in fact fare in the post AOL/Time Warner merger.

We welcome the witnesses today. I have worked with Mr. Markey and Mr. Dingell to ensure that we had witnesses who would bring to the table some of the concerns that they expressed at the last hearing. And Mr. Markey and Mr. Dingell, I hope that you have been pleased that we have worked with you in assembling this panel today.

I yield back the balance of my time.

Mr. MARKEY. Thank you, Mr. Chairman. I want to thank you for holding this hearing today. I think it is critical that the perspectives which we are going to hear today be heard by all of the members of the subcommittee. And I think it is going to be the testimony that really helps us to put all of these issues in the proper context.

There are obviously many competitors and innovators and entrepreneurs who have raised concerns about a merger of AOL with Time Warner. In addition, there are a number of consumer advocates concerned about choice and rates and diversity. I believe that the future of interactive television is a bright one with new services, increased choices, and lower prices. But interactive television will only have that bright future if we remain steadfast in our policy of promoting open networks, interoperability, and ruthless competition as the best way of serving consumer interests and promoting economic growth.

In last week's opening remarks, I offered proxy statements on behalf of many of the panelists at the witness table today. I look forward to their real world testimony and I thank them for being with us.

Before I yield back, Mr. Chairman, I would like to extend a special welcome to two witnesses from Massachusetts here today.

Mr. TAUZIN. We didn't do that, did we?

Mr. MARKEY. In a year we should have two.

Mr. TAUZIN. Massachusetts has been well represented by yourself, Mr. Markey.

Mr. MARKEY. Shore.Net shows us how a relatively small company can move markets and prod competition. Shore.Net was the first Internet provider in New England to offer Web hosting services back in 1994. And Shore.Net was the first in Massachusetts to offer digital subscriber lines in 1997.

Lowell Gray is a former programmer at AT&T Bell Laboratories, at Bell Core, NIH Core Research Center Laboratories and at Harvard Medical School.

Another innovative Massachusetts company here today is iCast. iCast.com is a multimedia-rich entertainment site which empowers individuals with the tools to create, customize, and share their personal entertainment interests. They include a mix of original, user-generated, and syndicated audio and video content, entertainment, news, live and archived events and more. iCast has also developed

a product called the iCaster. The iCaster is a next-generation media player which integrates media search with chat, instant messaging and other services.

Notwithstanding the accent that you will hear shortly from Margaret Heffernan, I want you to know that she was born in Texas, has a distinguished career in producing. Recognizing that the Web would evolve quickly from a print format into a more interactive information-rich entertainment medium, Margaret decided that she would use her production expertise at the BBC to create an interactive multimedia-rich Web site, and she has been the CEO of iCast for the last 4 years. She received both a BA and MA from Cambridge University which is not in Massachusetts, but——

Mr. TAUZIN. But should be.

Mr. MARKEY. We would call Harvard Cambridge if they would call Cambridge Harvard. I don't think we will be able to cut that deal.

We appreciate your willingness, Mr. Chairman, to have this hearing.

Mr. TAUZIN. Mrs. Cubin is recognized.

Mrs. CUBIN. Thank you. I am pleased that the subcommittee will hear from other companies today that provide or will be providing types of interactive television services as our witnesses last week, AOL and Time Warner, did. Although last week's witnesses combined will be the dominant player in the interactive television marketplace, it will be good to hear from smaller competitors and learn what products you are bringing to the interactive television marketplace.

In hindsight, after asking questions of the panelists last week, I truly wished that we could have had the panels combined so I could get information from both sides and compare some answers regarding the accusations of open access, competition, and interoperability or lack thereof. But suffice it to say, we will cover those areas today.

The importance of open access and consumer choice cannot be overstated. I would like to quote the AOL Web site that I mentioned last week: "As the Internet becomes increasing integrated into our societal fabric, it is crucial to strike an appropriate balance between the role of government and the role of industry in formulating solutions to Internet policy issues. Finding this balance is the key to ensuring that the Internet will continue to grow and reach its full potential, unhampered by unnecessary regulation, but appropriately guided and monitored in crucial areas to protect the safety and security of its users."

That is what AOL says on its Web site. Much of the aforementioned quote applies to every component of the telecommunications infrastructure, not just the Internet. As Congress continues the debate regarding open access to the existing telecommunications infrastructure, it would be in the industry's best interests, I believe, to resolve this question before the Congress finds it necessary to act. If we expect any advances in telecommunications, we should ensure that systems interact with each other and that consumers have the ability to communicate even though they may not be on the same network.

We will hear today from Disney about the Time Warner cable systems and to what extent Time Warner executives should give the American people assurances that it is willing to provide access to Disney and other companies outside of the AOL/Time Warner family.

Thank you for calling this hearing today, Mr. Chairman, and I look forward to communicating and having a discourse with the panel. Thank you for being here.

Mr. TAUZIN. I thank the gentlelady.

The gentleman from Virginia, Mr. Boucher.

Mr. BOUCHER. Last week we focused on the need for an open access structure at the Internet transport level in order to facilitate the arrival of interactive television. Today, in the second interactive television hearing, we can examine another pressing need for open access, this time at the navigation device level. In the 1996 Telecommunications Act, we required the Federal Communications Commission to ensure the competitive availability of navigation devices, broadly defined as any appliance that brings to the consumer services offered by cable companies, whether video, data, or the interactivity between video and data that we are commonly calling interactive television.

The intent of this committee in writing that provision was to assure that these next-generation set-top boxes be manufactured by a variety of companies and be sold by a variety of retailers. A competitive market for these devices is essential to the interactive functioning of information technology devices which receive content that is delivered over cable systems. A competitive market for navigation devices will also assure that no single entity or industry controls this critical information gateway into the home. But 4.5 years after we imposed the requirement for competition in the development and marketing of these gateway devices, the market remains closed. Only cable companies are distributing the devices at the present time. Not only do we not have the competition we were seeking, but a range of additional problems has arisen which threaten the ability of consumers to get full use from their digital TV sets and their ability to engage in legally protected home video recording for time shifting and other commonly accepted purposes.

Today, Circuit City's Vice President for Merchandising, Mr. Froman, can describe in detail the reasons that this committee and its will is being frustrated, and will suggest steps to be taken to ensure that the law on open access and true competition for next-generation set-top boxes will be carried out. And I would like to call the committee's attention to his testimony, and I look forward to the committee receiving it.

Mr. TAUZIN. We have a vote on the floor. Mr. Shimkus has already made that vote, so I will recognize Mr. Shimkus for an opening statement, place him in the chair, and I will make that vote and I will be right back. Mr. Shimkus will introduce our panel and we will begin discussion as quick as we can. Thank you.

Mr. SHIMKUS [presiding]. Welcome to the panel. We are glad to have you here. This is a follow-up to the hearing we had last week. We are all excited about hearing from you. It is an interesting age and period of time, and as things keep moving forward, the interactivity of television and streaming capabilities, and not just

through the coaxial cable but telephones and direct satellites, bring new opportunities. My basic position is numerous types, numerous choices.

The Cardinals are in the playoffs and I am a Cardinal's fan and as in a baseball game, these late hearings in the year, we are in the batter's box. We are in the on-deck circle. We will probably step in the batter's box in the next Congress to address these things. These are important hearings for us to learn.

[Additional statements submitted for the record follow:]

PREPARED STATEMENT OF HON. TOM BLILEY, CHAIRMAN, COMMITTEE ON COMMERCE

Thank you, Mr. Chairman. I welcome the witnesses here today to discuss the issue of interactive television. Last week we heard from America Online and Time Warner on this issue. Today I am pleased to get another look at this new technology from the witnesses before us..

It seems that we have talked about the prospect of interactive television for years. Companies around the globe have invested millions of dollars in this product. After years of promise, it appears that we are finally on the cusp of a new marketplace.

Interactive television is exciting. The ability to turn passive television viewing into an opportunity to participate in a program is hard to imagine. CoConsumers will be able to order products from the comfort of their homes with just a click of the television remote; sports fans will get new access to the field; and children will find new ways to learn their A-B-C's. All from the comfort of their homes with just a click of the television remote. The possibilities are truly limitless.

Because interactive television is still in its infancy, we can, and should, continue to work to ensure that competition thrives and flourishes. As I would expect with any new industry, there continue to be many unanswered questions—namely, issues of content control, interoperability, open access for all competitors, as well as the practical effects of the AOL-Time Warner merger. In listening to this morning's testimony, I look forward to hearing about how these important issues will affect the future of interactive television.

I thank the Chairman for holding this important hearing and I yield back my time.

PREPARED STATEMENT OF HON. KAREN MCCARTHY, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MISSOURI

Thank you Chairman Tauzin and Ranking Member Markey for holding this hearing on the future of interactive television. I look forward to the testimony of all of the witnesses regarding the merger between America Online (AOL) and Time Warner and the impact it will have on the future of interactive television, the need for open access, the role of instant messaging in interactive television, and the privacy concerns interactive television may raise.

The Internet revolutionized the way we communicate. It has provided people with a means to gather and disseminate information and ideas from all over the world. Interactive television expands upon this revolution by converging television, the Internet, content, and commerce so that consumers are able to not only choose their programming, but interact with it. For example, consumers will be able to purchase a CD of the music being played by a band during the telecast of the Grammys by using their remote control.

As exciting as the possibilities of interactive television seem, there are some significant issues that I hope will be addressed by our witnesses today. First, can interactive television exist in a competitive marketplace if cable operators do not allow access to non-affiliated content providers, and if service providers discriminate against content providers with whom they are not affiliated. If a viewer is watching a baseball game on FOX and clicks a link to get additional statistics, can that viewer choose FOX's sports website or CNN-SI's website for this material?

Second, I am very interested to hear from our witnesses about their views on possible privacy issues arising out interactive television. Will set top boxes provide cable or satellite operators with the ability to store information on the viewing habits and purchases of its customers? If so, how will that information be used? Will it be sold to third parties? Will consumers be informed of the fact that their viewing habits and purchases are being monitored? Will they have the ability to opt out of it? Are the same privacy issues facing users of the Internet applicable to users of

interactive television as technological advances become more invasive. We must ensure that consumers do not exchange their right to privacy for the potential benefits of interactive television.

Lastly, I would like to hear their views on AOL's instant messenger (IM) system becoming interoperable with other instant messaging systems as a condition of merger approval. Does AOL need to make its IM system interoperable with competing IM systems? How will it hurt consumers if AOL does not make its system interoperable?

While it is important that the federal government not stifle innovation in nascent technologies, we must consider the ramifications of those technologies on a competitive marketplace, consumer choice, and privacy. Interactive television service providers must not discriminate against the content of competitors. Open access to broadband networks and interactive television set top boxes as well as the interoperability of competing IM systems are necessary to promote competition and a fair playing field. It is my hope that as the interactive television service market grows, industry will work together to achieve these goals.

Thank you Mr. Chairman. I yield back the balance of my time.

Mr. SHIMKUS. With that, I will end my opening statement and I will go into your opening statements. Your statements are all submitted in total into the record. What we like to do in this committee is have you be conversational. You will be given 5 minutes to give an opening statement and we will probably not be too stringent on that. Try to highlight your opening statement so that the vast majority of members who are here can get full benefit. They have looked at some of your statements, and staff members have already tried to prepare some of the members for the testimony. With that, I will yield back my time and I will open it up for the panel.

The first panel is seated and I would like to have Ms. Maggie Wilderotter, President and CEO of Wink. You have 5 minutes. You may begin.

STATEMENTS OF MAGGIE WILDEROTTER, PRESIDENT AND CEO, WINK; LOUIS M. MEISINGER, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, THE WALT DISNEY COMPANY; JOHN W. FROMAN, EXECUTIVE VICE PRESIDENT, CIRCUIT CITY STORES; MARGARET HEFFERNAN, PRESIDENT AND CEO, iCAST; AND LOWELL J. GRAY, GENERAL MANAGER, SHORE.NET

Ms. WILDEROTTER. Thank you very much to the chairman and members of the committee. I do appreciate the opportunity to appear before you to speak on behalf of Wink Communications regarding interactive television. Wink is a 5-year-old software and services company based in Alameda, California. Our vision is to expand and enhance the television viewing experience by providing convenience, utility and choice to the mass market television video that consumers love. Using our complete solution of products referred to as an end-to-end system, networks and advertisers provide consumers interactive information, entertainment and commerce offers which are synchronized to TV programs and commercial. Wink enhancements typically appear as graphics and superimposed on top of the television picture in the location designated by the network or the advertiser.

There are no monthly or use fees for the service. Furthermore, it is provided on cable and satellite set-top boxes so consumers do not incur any incremental expense for additional equipment. Consumers use their television remote control and can interact with

Wink enhancements as easily as they change channels or adjust volume. Consumers are alerted to the availability of interactive enhancements by a scripted eye symbol which appears in the left-hand corner of their television screen. They are in full control to access the interactive enhancements.

Examples of interactive television enhancements include being able to check current weather forecasts, the latest sports scores on ESPN, or request a car brochure or a coupon from Clorox while viewing a 30-second commercial, all with one simple click.

Wink's service has been available in the United States since June 1998 and is currently provided in markets across the country, including New York, Los Angeles, Dallas, Fort Worth, St. Louis and Jacksonville. Each of the top five cable operators have launched Wink in at least one market. Both major satellite operators have agreed to launch Wink nationwide, and the launch of DirectTV will be announced shortly. Wink service is expected to be available in 3 million TV households by the end of this year.

Central to the Wink proposition is the consumer. The core attributes of our service are fundamental to customer satisfaction, value, variety, convenience and control. Acceptance is great and remarkably consistent across the 25 communities in which we have launched the service. Wink interactive television is provided free of charge to every household with an enabled set-box top, and consumer behavior speaks for itself. Seventy percent of the households use the service. On average, 20 percent of an audience tuned to a particular show use the Wink interactive enhancements. Customer satisfaction ratings are in the 90 percent range, the highest ever recorded for a new service launch by a cable operator.

Wink creates the experiences that drive the simple evolution of television as the consumers want it. It is easy to use, it adds entertainment or informational value, and keeps the viewer in the driver seat, opting in to use as they choose; and most importantly, it is part of watching television.

The television business is a particularly complicated business. In order to facilitate the delivery of interactive enhancements to viewers'favorite TV programs and advertisements, we at Wink have had to enter into agreements with all of the major companies from each of the major constituent groups in the television business. Cable and satellite operators must agree to allow their plant and set-tops to be used to deliver interactive programming to consumers and to collect viewer responses to those interactive offers. Broadcast and cable networks must agree to originate and broadcast interactive enhancements to their programming and to allow advertisers to air interactive enhancements associated with their commercials. Original copyright holders such as major sports leagues and the Hollywood studios must agree to create or allow others to create interactive enhancements on their programming. Advertisers and their agencies must agree to create and air interactive enhancements to their commercials and to fulfill consumers orders or requests for information. And last but not least, manufacturers must agree to enable the interactive television services on their set-tops and server platforms.

It certainly has not been easy, but we have not needed any regulatory relief to craft partnerships with over 90 companies in the

business. Our business philosophy has always been to respect the industries' existing business models and customer relationships and to provide a win/win for all constituents. We do not attempt to share in existing advertising revenues or subscriber fees, and aim to preserve the network's right to determine which content is provided in conjunction with their programming and advertisers with their advertising, and, as operators have a right to determine which services are provided to their subscribers, we respect that. We share our revenues with cable and satellite operators and with networks.

Resolving the competing interests of all of the parties involved in interactive television will take time. Cable and satellite operators control the final delivery to consumers in any associated two-way communication. The industry has demonstrated an ability to negotiate carriage of a variety of services in arm's length negotiations. We believe interactive television is still evolving at a rapid pace. It is not clear how technology, access to cable operator networks or consumer demand will shape this business. The dynamic marketplace must be allowed to develop.

As stated earlier, we continue to build our business in the current environment and we believe that it would be premature to attempt to regulate an industry that is an embryotic stage. I am honored to have the opportunity to present to the committee. Thank you again.

[The prepared statement of Maggie Wilderotter follows:]

PREPARED STATEMENT OF MAGGIE WILDEROTTER, PRESIDENT AND CEO, WINK COMMUNICATIONS

Thank you to the Chairman and members of the committee. I appreciate the opportunity to appear before you to speak on behalf of Wink Communications regarding interactive television.

Wink is a five-year-old software and services company based in Alameda, CA. Our vision is to expand and enhance the television viewing experience. Central to the Wink proposition is the consumer. The core attributes of our service are fundamental to customer satisfaction: value, variety, convenience and control. Acceptance is wonderful and remarkably consistent across the 25 communities into which we have launched the service. Wink interactive TV is provided free of charge to every household with an enabled set-top box in the markets in which Wink is deployed, and consumer behavior speaks for itself: 70% of households use the service. On average, 20% of the audience tuned to a particular show uses the interactive Wink enhancements. Customer satisfaction ratings are in the 90% range—some of the highest ever recorded for a new service launched by the cable operator. Wink creates the experiences that drive the simple evolution of TV as consumers want it. It is easy to use, it adds entertainment or informational value and keeps the viewer in the driver's seat, opting in to use as they choose, and most importantly, it is reliant on a very well-established consumer practice—watching television!

Using our complete solution of products, referred to as an "end to end system," networks and advertisers provide consumers interactive information, entertainment and commerce offers which are synchronized to TV programs and commercials. Wink enhancements typically appear as graphics and text superimposed on top of a television picture in a location designated by the network or advertiser. There are no monthly or use fees charged to the consumer for the service. Furthermore, it is provided on the lowest cost interactive set-tops sold at retail or provided by cable and satellite operators, so consumers do not incur an incremental expense for additional equipment. Consumers use a regular remote control, and can interact with Wink enhancements as easily as they change channels or adjust volume.

Consumers are alerted to the availability of interactive enhancements by a small "i" symbol that appears briefly in the upper left corner of their TV screen. They are in full control to decide whether to access the interactive enhancements.

Examples of interactive television enhancements include being able to:

- check current weather and five-day forecasts on The Weather Channel, read up-to-the-minute headlines on CNN, view updated sports scores and schedules on ESPN or check out the latest financial market news on CNBC
- look up information about guests and upcoming features on popular shows like "The Tonight Show with Jay Leno" on NBC and "The Early Show" with Bryant Gumbel on CBS
- purchase the latest CD of the artist featured on VH-1's "Behind the Music," or the currently playing James Bond movie on either VHS or DVD, during the annual "15 Days of 007" marathon on TBS
- request a brochure, coupon or sample offer while viewing the commercial for the product

Wink's service has been available in the United States since June of 1998, and is currently provided to close to 350,000 cable households in markets across the country, including New York, Los Angeles, Dallas/Fort Worth, St. Louis and Jacksonville. Each of the top 5 cable operators have launched Wink in at least one market. Both major satellite operators have agreed to launch Wink nationwide, and the launch of DIRECTV will be announced shortly. The Wink service is expected to be available in 3,000,000 TV households by the end of the year.

The television business is a particularly complicated business. In order to effectively facilitate the delivery of interactive enhancements to viewers' favorite TV programs and advertisements, we have entered into agreements with all of the major companies from each of the major television business constituent groups:

- Cable and satellite operators must agree to allow their plant and set-tops to be used to deliver the interactive programming to consumers, and to collect viewer responses to interactive offers.
- Broadcast and cable networks must agree to originate and broadcast interactive enhancements to their programming, and to allow advertisers to air interactive enhancements associated with their commercials
- Original copyright holders, such as the major sports leagues and the Hollywood studios, must agree to either create or allow others to create and air interactive enhancements for their programming.
- Advertisers and their agencies must agree to create and air interactive enhancements to their commercials and to fulfill consumers' orders or requests for information
- Manufacturers must agree to enable the interactive television services on their set-tops and server platforms.

It certainly has not always been easy, but we have not needed any regulatory relief to craft partnerships with over 90 companies in the business. Our business philosophy has always been to respect the industry existing business models and customer relationships, and provide a win-win for all constituents. We do not attempt to share in existing advertising revenues or subscriber fees, and aim to preserve a network's right to determine which content is provided in conjunction with their programming and advertising, and an operator's right to determine which services are provided to their subscribers. We share our revenues with cable and satellite operators and networks.

The regulatory environment greatly affects the deployment of interactive television. For example, the broadcast networks enjoy guaranteed passage by cable operators of program-related information carried in their analog video signals. Cable networks, on the other hand, must negotiate for clearance of such content. We have secured carriage of our network partners' interactive content with our cable and satellite operator customers. In today's mostly analog transmission environment, that has been difficult but manageable. In the digital transmission environment of tomorrow, where every bit is a bit, regardless of whether it is video, audio or data, and the interactive content potentially can consume very significant amounts of precious bandwidth, negotiations for the carriage of interactive enhancements will be even more complicated. Furthermore, much of the value of interactive television services hinges on the availability and speed of a return path to collect viewer responses and allow for two-way communication.

Resolving the competing interests of all the parties involved will take time. Cable and satellite operators control the final delivery to consumers and any associated two-way communication. However, the industry has demonstrated an ability to negotiate carriage of a variety of services in arms-length negotiations. We believe interactive television is still evolving at a rapid pace and it is not at all clear what the right answer is regarding access to broadcast bandwidth or the return path. As stated earlier, Wink has been able to build a business that benefits all parties in the current environment. We believe that it would be premature to attempt to regulate an industry that is still changing very rapidly.

I am honored to have had the opportunity to present to the committee. Thank you again.

Mr. SHIMKUS. Next we turn to Mr. Meisinger.

STATEMENT OF LOUIS M. MEISINGER

Mr. MEISINGER. Thank you. My name is Lou Meisinger. I am the Executive Vice President and General Counsel of the Walt Disney Company.

Let me get right to the issue. What can consumers expect from interactive television? Absent regulatory or legislative intervention, the answer is, regrettably, quite clear. Speaking with remarkable and chilling candor, Time Warner executive Kevin Leddy recently told a New York times reporter, "What you see on our screen will be our partners." Necessarily then, but unstated, what consumers will not see are the interactive offerings of content providers who are not Time Warner partners.

AOL/Time Warner's plan to dominate interactive television is in active implementation. The Walt Disney Company tried mightily to secure from Time Warner a simple pledge of nondiscrimination. We sought assurance that Time Warner's interactive cable service would work the same for consumers whether they were interacting with content owned by AOL/Time Warner or other content providers. Time Warner said no. NBC received similar preemptory treatment at the hands of Time Warner/AOL. Other companies with less clout will likely fare much worse, particularly in a postmerger environment.

Interactive television is an important new entertainment communications and commerce service that is here today and growing rapidly. We at the Walt Disney Company are investing millions of dollars in its development. Today, interactive television is largely a two-screen experience, but new cable set-top boxes now being deployed contain the necessary hardware and software to enable a single-screen experience in which consumers can interact with television programming right on their television sets.

ABC and ESPN have developed interactive applications for our football broadcasts. While watching the games, consumers are able to pull up statistics and can compete against other viewers around the country in predicting upcoming plays. Despite the inconvenience of the current two-screen experience, more than 650,000 viewers participated in ABC's interactive television offering during our Super Bowl telecast earlier this year.

Also currently available is a play-along application for ABC's "Who Wants to be a Millionaire?" and election night will provide other opportunities. Still other applications are in the offing. Drilling down for detailed comment on news programs, ordering up different camera angles and audio feeds from sporting events, or watching your friends watch programming together.

None of this innovative programming will be possible unless Disney and other content providers have fair and nondiscriminatory access to consumers. As a content provider, Disney's only objective is a world in which a consumer's right to choose is accompanied by the ability to choose or not to choose Disney's interactive television offerings.

This committee should be concerned that consumer choices are not limited or skewed directly or by subtle technical means in favor of content owned by the company that owns the pipeline to the consumer's home. Unfortunately, for at least the next 5 years, representing the critical formative period for interactive television, cable systems will enjoy a decided advantage over any other distribution platform such as DSL or satellite.

This merger of the world's No. 1 media company and No. 2 cable operator, Time Warner, and the world's No. 1 ISP, AOL, brings together an unprecedented market-dominating collection of assets and capabilities: monopoly cable pipelines to 20-plus million homes, a vast content library including many of the leading cable television channels, 50 percent of the narrow-band internet marketplace, a virtual monopoly of instant messaging and other so-called "sticky" network-effect creating applications such as e-mail, buddy lists, chat rooms and instant messaging.

Unfortunately, with this proposed merger, AOL has abandoned its years-long advocacy of open access in favor of its own self-interest. "If gatekeepers want to play in the Internet game, we should require them to play by the Internet rules. We owe consumers no less." This is not Disney talking, these were the remarks of AOL's senior officer for global and strategic policy, advocating open cable access before the House Judiciary Committee last year.

Soothing reassurances provided to this subcommittee are not enough. Belying its professed commitment to the consumer, in May of this year, Time Warner unilaterally turned off ABC television programming for more than 8 million viewers. AOL has also insisted upon contractual terms that require Disney to remove navigation links to other sites on the Internet and foreclosed the sale and promotion of competitive products. When Earthlink took up AOL/Time Warner's pledge to provide nondiscriminatory access to other ISPs, it was met with commercial terms so onerous and so adhesive that doing business was impossible.

Nonbinding MOUs and platitudes are one thing. Real life conduct is apparently quite another. Again Mr. Vradenburg's prescience was right on the money last year when he said of AT&T, AT&T is moving toward a commitment for open access, but the rubber is going to hit the road and really test this in reality when we, AOL, try to enter into enforceable agreements. Well, Disney, NBC and Earthlink all tested Time Warner's tires and the results were a blowout.

The AOL/Time Warner merger is a unique combination. There are no other companies that, when combined, would enjoy similar market dominance, and both conduit and content and interactive television is particularly at risk. Government agencies have an obligation to assure consumer choice. Specifically, government agencies must ensure open, nondiscriminatory access for alternative ISPs through the set-top box and connected through the video platform.

In addition, because AOL and Time Warner currently and will continue to command the overwhelming majority of customer relationships on their platform, strong nondiscriminatory conditions are essential on the AOL/Time Warner platform itself. Voluntary negotiations are no substitute for strong and enforceable govern-

ment-mandated open access. The preservation of consumer choice and robust competition require no less.

Thank you.

[The prepared statement of Louis M. Meisinger follows:]

PREPARED STATEMENT OF LOUIS M. MEISINGER, EXECUTIVE VICE PRESIDENT & GENERAL COUNSEL, THE WALT DISNEY COMPANY

Thank you Mr. Chairman. My name is Lou Meisinger. I am the executive vice president and general counsel of the Walt Disney Company. Let me get right to the topic of this hearing—what can consumers expect from interactive television? Absent regulatory or legislative intervention, the answer is regrettably quite clear. Speaking with remarkable and chilling candor, Time Warner Cable executive Kevin Leddy recently told a New York Times reporter, "what you see on our screen will be our partners." Necessarily then, though unstated, what consumers will not see are the interactive offerings of content providers who are not Time Warner's partners.

This prophecy on the part of Mr. Leddy is not simple musing. AOL/Time Warner's design is in active implementation. The Walt Disney Company tried mightily to secure from Time Warner a simple pledge of non-discrimination for Disney's highly desirable content. We sought assurance that Time Warner's interactive cable service would work the same for consumers whether they were seeking to interact with content owned by AOL/Time Warner or other content providers. Instead, Time Warner insisted on a condition expressly precluding the return path communications essential for consumers to interact with Disney/ABC Television offerings. Disney's experience was not an isolated aberration. According to documents filed with the Federal Communications Commission, another powerful content provider, NBC, received similarly peremptory treatment at the hands of Time Warner. Even armed with the market power of the Olympics, NBC could not gain assurance that consumers would be able to interact with NBC content.

If, even as their proposed merger is under regulatory scrutiny, AOL/Time Warner can deal so dismissively with companies like Disney and NBC, we need not speculate as to how other companies with less clout will fare in a post merger environment.

Interactive television is an important new entertainment/communications/commerce service that is here today and growing rapidly. The Walt Disney Company is investing millions of dollars in the development of innovative interactive television content. Today, interactive television is largely a "two screen" experience in which the consumer uses a nearby computer to interact with programming on his or her television set. However, new cable set top boxes now being deployed contain the necessary computer hardware and software to enable a "single screen" experience in which consumers can interact with television programming right on their TV.

Let me give you just a few examples of Disney/ABC interactive television services that consumers can enjoy today. ABC and ESPN have developed innovative interactive applications to accompany Sunday night and Monday night NFL football games. While watching the games, consumers are able to pull statistics of their choice from the vast database resident at the on-field production facilities. Consumers can also compete against other viewers nationwide in predicting upcoming plays. Despite the logistical inconvenience of the current "two screen" experience, more than 650,000 viewers participated in ABC's interactive television offering during our Super Bowl telecast earlier this year.

Also currently available is an interactive television application that enables consumers to play along with Regis Philbin on ABC's hit game show "Who Wants to be a Millionaire." Young viewers to ABC and the Disney Channel can interact with our cartoon programs utilizing the "Zoog Disney" interactive application. Finally, on election night in a few weeks, ABC News will enable consumers to interact with our coverage of the election results by accessing the latest election returns for the political contests of most interest to each individual viewer.

In addition to these existing interactive television applications, Disney and ABC executives are busily developing even more exciting projects. Soon, consumers will be able to click on the screen during ABC newscasts and be linked directly to interactive broadband web sites devoted exclusively to a single news story. Sports fans will be able to access different camera angles and audio feeds. And, consumers equipped with inexpensive "Buddy Cams" will be able to watch the live image of a friend in the corner of a TV screen while enjoying together a sporting event or other television program.

None of this innovative programming will be possible, of course, unless disney and other content providers, have fair and non-discriminatory access to consumers. Anything less plays right into the hands of AOL/Time Warner, whose stated strategy is to monopolize this field for itself and its privileged partners.

In considering public policy objectives for the exciting new domain of interactive television, we urge this committee to place laser-like focus on, and to give pre-eminent consideration to, the issue of consumer choice. As a pure content provider, Disney's only objective is a world in which a consumer's right to choose is accompanied by the ability to choose, or not to choose, Disney interactive television offerings.

that fundamental right of choice to access diverse content must be based solely on how good a job we and others do to create and promote appealing content. This committee must work to avoid a world in which consumer choices are limited or skewed, directly or by more subtle means, in favor of content owned by the company that owns the pipeline to the consumer's home.

Unfortunately, for at least the next five years, representing the critical formative period for interactive television, hybrid fiber/coax cable systems will enjoy a decided advantage over any other distribution platform for the provision of interactive television services. Cable passes virtually every home in the country and is capable two-way broadband transmissions. By contrast, Telco provided DSL is great for high speed Internet service but cannot match cable's capacity to carry multiple channels of live, full motion television programming. In addition, DSL suffers from severe distance limitations and is not available at all to a large percentage of American consumers. Satellites are great for one-way television, but rely upon an inherently limited narrowband return path that limits the range of interactive applications.

These limitations will and do make DSL or satellite dependent interactive television services an inferior and, ultimately, non-competitive option to AOL/Time Warner's Cable enabled offering.

The proposed merger of AOL and Time Warner dramatically exacerbates these cable bottleneck issues. This merger of the world's number one media company and number two cable operator (Time Warner) and the world's number one ISP (AOL), brings together an unprecedented market-dominating collection of assets and capabilities: monopoly cable pipelines to 20 million American homes; a vast content library including many of the leading cable television channels such as CNN, HBO, TNT, TBS, Cartoon Network; 50% of the narrowband internet marketplace; a virtual monopoly in instant messaging and "sticky," network-effect creating applications such as e-mail, buddy lists and chat rooms.

For 18 months, AOL itself foresaw the threat of discriminatory cable bottlenecks as consumers migrated from narrowband to broadband. AOL aggressively advocated government assured open access to safeguard consumer choice. Unfortunately, with this proposed merger, AOL has abandoned consumer choice in favor of its own self-interest.

"If gatekeepers want to play in the Internet game, we should require them to play by Internet rules. We owe consumers no less." Once again, this is not disney talking. These were the remarks of AOL's senior officer for global and strategic policy, George Vradenburg, advocating open cable access before the House Judiciary Committee on June 30, 1999, conspicuously, before AOL itself sought to become the dominant gatekeeper.

Contrary to the soothing reassurances provided to this subcommittee last week, both AOL and Time Warner have in the past abused their market position to limit and influence consumer choice. In May of this year, Time Warner arrogantly and unlawfully turned off ABC television programming for approximately 3.5 million households representing more than 8 million viewers. Time Warner also refused to carry Disney Channel as part of its basic cable service preferring to offer its own Cartoon Network instead. AOL has compromised the open architecture of the Internet by creating a formidable "walled garden" where, by AOL's own reckoning, its customers spend approximately 85% of their time on-line. In the past, Disney has contracted with AOL to offer Disney and ABC websites inside the AOL walled garden. AOL has insisted on contractual terms that required us to remove navigation links that would enable consumers to "escape over the wall." Again, Disney is not the only target. AOL has offered client software that disables the client software of any other ISP.

Even more recently, when earthlink took up AOL/Time Warner's pledge to provide non-discriminatory access to other ISP's, it was met with commercial terms so onerous and adhesive that doing business was impossible. All of this, ominously, has taken place while their proposed merger is still under review. Non-binding MOU's and platitudes are one thing; real life conduct is apparently quite another. Again, AOL's prescient Mr. Vradenburg was on the money last year when he said of AT&T,

"AT&T is moving toward a commitment for open access—but the rubber's going to hit the road and really test this in reality when we (AOL) try to enter into enforceable agreements." Well, Disney, NBC and Earthlink all tested AOL/Time Warner's tires and the results were a blowout.

The AOL/Time Warner merger is a unique combination. There are no other companies that, when combined, would enjoy similar market dominance in both conduit and content. Consumers will be deprived of choice for interactive television applications because there will be no viable full-blown options to AOL/Time Warner's offering. Government agencies have an obligation under the anti-trust laws and the public interest standard to assure consumer choice. Carrying out that mandate requires that this merger either be blocked or be approved with conditions so that consumer choice is not limited to AOL/Time Warner content partners. Specifically, government agencies must assure open access for alternative ISPs through the set top box and connected to the video platform. In addition, because AOL and Time Warner will likely command the overwhelming majority of customer relationships on their platform, government agencies also must require strong non-discrimination conditions. The AOL/Time Warner interactive television cable systems must function the same for the consumer whether that consumer is seeking to interact with content owned by AOL/Time Warner or its chosen partners or by some other unaffiliated party.

The range of possible discriminatory practices can be far more subtle and sophisticated than the outright exclusion expressed by Mr. Leddy. AOL/Time Warner will have the capability to favor its own content and content partners regarding downstream data rates, return path connectivity and data rates, caching, navigation, menus and display formats.

Instead of government conditions, AOL and Time Warner have offered a voluntary pledge of open access. Earthlink's recent experience belies the bona fides of that empty pledge. Even more remarkably, two different ISPs have advised Disney that Time Warner sought agreements which would prohibit the alternative ISP from offering consumers a lower price than AOL/Time Warner's own ISP service. If not a per se violation of the anti-trust laws, such a demand is at least a clear sign that voluntary negotiations are no substitute for strong and enforceable government mandated open access. The preservation of consumer choice and robust competition require no less.

Thank you very much for the opportunity to appear before you this morning and I would be happy to answer any questions you might have.

Mr. SHIMKUS. Thank you.

Next is Mr. John Froman, Circuit City Stores.

STATEMENT OF JOHN W. FROMAN

Mr. FROMAN. Thank you. The interactive digital broadband pipe into the consumer's home today is the cable wire. Fundamentally, competition in the cable market depends on open access for content providers to the cable infrastructure, and for device manufacturers to the customer'S premises. Neither has yet been achieved. Both are necessary. So long as the cable industry continues to control the conditions for entry into each end of its service, the consumer will not receive the benefits of competition.

In the 1996 Telecommunications Act, this committee included a provision that explicitly told the FCC to assure in its regulations the competitive availability of devices that provide access to cable systems. The FCC has tried to do so. But I am here to tell you today that it will take more than a single act of Congress to overcome 5 decades of monopoly. The Bliley-Markey provision to deregulate cable navigation devices ordered the FCC to ensure competitive access in the same manner that telephone customer premises equipment had been deregulated 2 decades earlier. The FCC, in turn, issued regulations requiring that by July 1, 2000, cable industry operations and specifications must support the operation of competitive devices on its systems. This date has come and gone, yet there has been no competitive entry.

Today I want to call to your attention three major reasons why competitive manufacturing and retail entrants still do not enjoy open access to the market for cable navigation devices. First, the motion picture industry has sought to diminish the utility of such devices by insisting on restrictive anticonsumer licensing terms to which no competitive manufacturing entrant has been willing to agree. Second, the cable industry specifications for competitive devices do not thus far support user interactivity. Consumers wanting interactive features would still need to lease a set-top box from their cable operator. Third, despite Congress's prohibitions on bundling, cable operators are able to subsidize the leasing of digital set-top boxes to the more affluent customers by charging more for leasing obsolete analog set-top boxes to the less affluent customers.

Under the FCC regulations, in order to enter this market, a manufacturer needs a license from the cable industry CableLabs Consortium. But cable labs face an explicit threat from the Motion Picture Association that content would be withheld from cable systems unless this license includes severe restrictions on the recording and display capabilities of consumer electronics and information technology products. CableLabs has felt obliged to offer a license draft that does not allow any VCR or PC to be attached directly or work interactively on any cable system. The draft license would require manufacturers to cutoff the flow of HDTV signals to DTV-ready receivers now in the market. Not a single entrant has been willing to sign this license.

The cable industry supports interactivity in set-top boxes that they lease to consumers, but not thus far in the specifications for competitive entrant devices. In an August 2 filing with the FCC, the Consumer Electronics Retailers Coalition compiled all of the ways in which the cable industry still does not support competitive entry, and I have attached that report to my testimony.

Cable operators appear to be loading the cost of their new digital set-top boxes, which they lease to affluent customers, onto the rental for their old analog boxes, which they lease to their less affluent customers. They face no potential competition in the market for fully depreciated analog boxes which are headed for the scrap heap. This subsidy from the monopoly analog market is unfair to consumers and forestalls entry into the digital market.

What I have described thus far are obstacles to open access to the cable device market. But unless there is more competition for cable services, we can fight through all of these roadblocks and still not be able to enter the digital device market.

As was the case with the telephone monopoly, dealing with 50 years of a closed cable market will require open access to the service as well as the device. This will oblige cable operators to compete on the basis of efficiency in rendering services and supporting customer equipment. Unless and until the market for cable services is fully competitive, the only way we will achieve a level playing field in the device market would be to prohibit service providers from also leasing navigation devices.

Despite Congress having passed a law and the FCC having issued regulations, the retailer market share of devices that provide interactive access to cable programming remains at zero. More needs to be done to get around the set-top roadblock. A reasonable

license that is fair to consumers needs to be worked out. Technical specifications for the devices leased by the MSOs must be the same as those for competitive entrant devices. The rules pertaining to the subsidies and leasing of MSO-provided boxes need to be clarified, and the FCC should be encouraged to proceed with achieving open access to the broadband infrastructure across the board.

Mr. Chairman, we greatly appreciate the interest and leadership that has been shown by this subcommittee. Much remains to be done. Circuit City and the other members of the Consumer Electronics Retailers Coalition remain committed to bringing real competition in interactive products to consumers.

[The prepared statement of John W. Froman follows:]

PREPARED STATEMENT OF JOHN W. FROMAN, EXECUTIVE VICE PRESIDENT, MERCHANDISING, CIRCUIT CITY STORES, INC., ON BEHALF OF CONSUMER ELECTRONICS RETAILERS COALITION

Mr. Chairman and Members of the Subcommittee, my name is John Froman. On behalf of Circuit City Stores and the Consumer Electronics Retailers Coalition, I would like to thank the Subcommittee for inviting me to appear today.

As Circuit City's Executive Vice President for merchandising, I am responsible for all product purchasing decisions. Circuit City has long believed that consumers want and expect interactivity in their digital television products. Unfortunately, we are still a long way from being able to offer it to our customers. And we are not the only ones. I am also appearing today as a member of the Consumer Electronics Retailers Coalition ("CERC"). The other CERC members are Best Buy, RadioShack, Sears, the International Mass Retail Association (IMRA), and the National Retail Federation (NRF).

Open Access To Both The Headend And The Set-Top Is Necessary To Competition

Fundamentally, competition in the cable market depends on open access—for content providers, to the cable infrastructure; and for device manufacturers, to the customer's premises. Neither has yet been achieved. Both are necessary. So long as the cable industry continues to control the conditions for entry into each end of its service, the consumer will not receive the benefits of competition.[1]

Open Access To The Set-Top

In the 1996 Telecommunications Act, this Committee included a provision that explicitly told the FCC to assure, in its regulations, the competitive availability of devices that provide access to cable systems.[2] The FCC has tried to do so. But I am here to tell you today that it will take more than a single act of Congress to overcome five decades of monopoly.

For 50 years, Federal and state law allowed cable operators to define, limit, and lock up the market for any device that could control access to all cable programming. The Bliley-Markey provision, to deregulate cable "navigation devices," ordered the FCC to ensure competitive access, in the same manner that telephone customer premises equipment had been deregulated two decades earlier.[3] The FCC in turn issued regulations requiring that by July 1, 2000, cable industry operations and specifications must support the operation of competitive devices on its systems.[4] This date has come and gone, yet there has been no competitive entry.

Today I want to call to your attention four major reasons why competitive manufacturing and retail entrants still do not enjoy open access to the market for cable "navigation devices."

---

[1] *See, e.g.,* the discussion of the relationship of set-top boxes to Internet access in the October 4, 2000, *Wall Street Journal,* at B8.

[2] This provision was first offered as a separate bill by Chairman Bliley and Rep. Markey. Ultimately it was incorporated, as Section 304, in the Telecommunications Act of 1996. Section 304 became Section 629 of the Communications Act of 1934 and is codified at 47 U.S.C. § 529.

[3] *Hearing on Telecommunications Reform Legislation Before the Senate Committee on Commerce,* 104th Cong., 1st Sess. (Jan. 9 1995)(statement of Hon. Thomas J. Bliley, Chairman of House Committee on Commerce "we have seen what has happened in the telephone market—we should insist on the same type of dynamics for . . . set-top boxes and other devices."); *See*, S. Conf. Rep. No. 104-230, at 181 (1996); H.R. Rep. No. 104-204, at 112 (1995).

[4] *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices,* CS Docket No. 97-80, Report & Order, 13 FCC Rcd 14775, ¶11 (Rel. June 24, 1998).

1. The motion picture industry has sought to diminish the utility of such devices by insisting on restrictive, anti-consumer licensing terms, to which no competitive manufacturing entrant has been willing to agree.
2. The cable industry's specifications for competitive devices do not, thus far, support user interactivity. Consumers wanting interactive features would still need to lease a set-top box from their cable operator.
3. Despite Congress's prohibitions on bundling, cable operators are able to subsidize the leasing of digital set-top boxes to their more affluent customers, by charging more for leasing obsolete analog set-top boxes to their less affluent customers.

(1) Licensing Restrictions. Under the FCC regulations, in order to enter this market a manufacturer needs a license from the cable industry "CableLabs" consortium. But CableLabs faces an explicit threat, from the Motion Picture Association, that content would be withheld from cable systems unless this license were to include severe restrictions on the recording, and even the display, capabilities of consumer electronics and information technology products. CableLabs has felt obliged to offer a license draft that does not allow any VCR or PC to be attached directly, or work interactively, on any cable system. The draft license would also require manufacturers to cut off the flow of HDTV signals to DTV-ready receivers now in the market. To our knowledge, not a single competitive entrant has been willing to sign this license.[5]

(2) Discrimination in Specifications. The cable industry supports interactivity in the set-top boxes that *they* lease to consumers, but not, thus far, in the specifications for competitive entrant devices.[6] In an August 2nd filing with the FCC, the Consumer Electronics Retailers Coalition compiled all the ways in which the cable industry still does not support competitive entry. I have attached this report to my testimony.

(3) Subsidies For The MSO Set-Top Box. Cable operators appear to be loading the cost of their new digital set-top boxes, which they lease to their more affluent customers, onto the rental charges for their old analog boxes, which they lease to their less affluent customers. They face no potential competition in the market for the fully depreciated analog boxes, which are headed for the scrap heap. This subsidy from the monopoly analog market is unfair to consumers and forestalls entry into the digital market.

The Bliley-Markey provision forbade subsidy of cable equipment through service charges. Cable operators also should not be able to load their digital acquisition costs onto the backs of their customers who are stuck with the old analog boxes.

Open Access To Services

What I've described thus far are obstacles to "open access" to the cable device market. But unless there is more competition for cable services, we could fight through all these roadblocks, and still not be able to enter the digital device market.

So long as the cable operator remains the gatekeeper for broadband access, the industry attitude is that it "already owns" its customer base. With such a mindset, cable operators have little incentive to engage retailers to market cable services, or to support the convergence of cable functionality with freely marketed consumer electronics and information technology equipment. The paradigm of the set-top box, delivered to the door by the cable operator, will remain the standard model until the industry is faced with competition for its installed base.

As was the case with the telephone monopoly, dealing with fifty years of a closed cable market will require open access to the service, as well as the device. Open access to the cable broadband infrastructure will promote new and competitive means of distributing entertainment programming, such as pay-per-view and video-on-demand entertainment. This will oblige cable operators to compete on the basis of efficiency in rendering services and supporting customer equipment.

---

[5] According to NCTA, as of the July 1 deadline, only Scientific-Atlanta (an entrenched industry supplier) had executed some version of this license, on June 28. Three months after the July 1 deadline, the issue is still under negotiation, and is back in the hands of the FCC. In a letter dated September 1, 2000, however, FCC official Dale N. Hatfield asked this Subcommittee to initiate action to clarify the home recording issues raised by this draft license. In a September 18 declaratory order, the FCC said that its rules would not prohibit "allowable" license restrictions on home recording capabilities. *In the Matter of Implementation of Section 304 of the Telecommunications Act of 1996; Commercial Availability of Navigation Devices, CS Docket No. 97-80, Further Notice of Proposed Rule Making and Declaratory Ruling,* ¶29 (Rel. Sept. 18, 2000). The FCC has not yet defined "allowable."

[6] In technical terms, we will have achieved a level playing field only when all Navigation Devices, from whatever source, are OpenCable compliant, operate according to applications that can be downloaded from the headend, and rely on the Opencable "Middleware" software specification that is now under development.

Unless and until the market for cable services is fully competitive, the only way we will achieve a completely level playing field in the device market would be to prohibit service providers from also leasing navigation devices.

What Needs To Be Done

Despite Congress having passed a law, and the FCC having issued regulations, the retailer market share of devices that provide interactive access to cable programming remains at zero. When Congress passed the Bliley-Markey provision, it foresaw that interactive functionality would be incorporated into PCs, VCRs, DVD players, and new generations of "convergence" products.[7] But we are still not in a position to offer these features to our customers, either in stand-alone set-top boxes, or in other consumer electronics or information technology products. More needs to be done to get around the set-top roadblock.

- A reasonable license, that is fair to consumers, needs to be worked out. The FCC has given the cable industry until October 18 to submit such a license, that addresses the copy protection issue within "allowable" limits, but has not defined those limits. We believe such limits must be informed by the "encoding rules" included by the Congress, under the leadership of this Committee, in Section 1201(k) of the Digital Millennium Copyright Act,[8] and must ensure that HDTV programming over cable will not be denied to those consumers who have invested in the present generation of DTV receivers.
- Technical specifications for competitive entrant devices must be the same as those for the devices leased by MSOs. The FCC has recently noticed a proceeding asking whether, in light of the roadblocks to which I have alluded, the date for such a level playing field (presently January 1, 2005), needs to be moved up. We believe this date can and should be set at January 1, 2002.
- The rules pertaining to subsidies and leasing of MSO-provided boxes need to be clarified. It is simply not fair to ask your less affluent constituents to pay more than their analog boxes are worth, so that the cable operator can forestall competitive entry into the market for digital navigation devices. The sooner cable operators are accountable for the real costs of these devices, the sooner they will support efficiencies, such as the successful integration of navigation features into consumer electronics and information technology products. It is the convergence of such products that will lower costs to all consumers.
- The FCC should be encouraged to proceed with achieving Open Access to the broadband infrastructure, across the board. When this infrastructure is recognized as the common carrier resource it is, competition will bloom for both services and devices. If this cannot be accomplished expeditiously, the only alternative is to prohibit service providers from leasing navigation devices.

Mr. Chairman, we greatly appreciate the interest and leadership that has been shown by this Subcommittee. Much remains to be done. Circuit City and the other members of the Consumer Electronics Retailers Coalition remain committed to bringing real competition, in interactive products, to consumers.

Mr. TAUZIN. Thank you.

The Chair is now pleased to welcome Ms. Heffernan, president and CEO of iCast.

STATEMENT OF MARGARET HEFFERNAN

Ms. HEFFERNAN. Thank you, Mr. Chairman. iCast is an Internet entertainment company based in Woburn, Massachusetts. We employ 200 people and are located in a warehouse site made famous by the Woburn Superfund. Today that site is filled with many new economy companies like mine.

I want to thank you, Mr. Chairman, and especially Mr. Markey, for calling this hearing today and giving me the opportunity to testify. I was one of those virtual witnesses that wanted to testify last week and I want to thank you, Mr. Markey, for previewing the points that I am going to make on AOL.

My story is typical of many companies in the new economy. I was born in Texas, raised in the U.K., and I moved back to the United

[7] *See also Navigation Device Report & Order* ¶25.
[8] 17 U.S.C. § 1201(k).

States because of the tremendous opportunities provided here to explore interactive television. To that end, my company, iCast, provides an interactive application called the iCaster which allows members to instant message each other while listening to radio streams or watching Webcasts. It is one of a number of hybrid applications which paved the way to interactive television.

As a consequence, the merger of AOL and Time Warner is of grave concern. Why? Because in our own attempt to enter the instant messaging market, we have discovered how closed AOL has made it. Although our iCaster is technically interoperable with AOL's Instant Messenger, AOL has deliberately blocked us since we launched. They continue to do so; and when we protest, they maintain that they believe in interoperability, but not right now.

This market dominance is a problem, therefore, right now. In the old world of AT&T, who would have dared to start Sprint? Where would we have found a market? The merger takes a big problem and makes it bigger, makes the market dominance that AOL currently enjoys more secure, and makes any semblance of competition a foregone defeat.

If I didn't have nerve and daring, I wouldn't work in new technology. But I know that the odds favor Goliath against David. This merger makes Goliath bigger and heavier and no nicer. Everyone involved in the debate over instant messaging agrees this is a major application and a major market. Lehman brothers valued AOL's instant messaging market at nearly $6 billion. A senior executive at Verizon called AOL's network the biggest communications market in the world. So we all agree, it's big. Everyone agrees that interoperability is good and needed, and the sooner the better. So the debate resolves down to can AOL/Time Warner be trusted to live up to its public commitment to fast-track interoperability.

The record speaks for itself. In July 1999, AOL wrote that it would fast-track its efforts to create a standard for interoperability with the Internet Engineering Task Force. Here is the full record of their contribution. This organization works through e-mail. You can see on the chart AOL's stunning leadership. Last week, Mr. Case sat here and told you that AOL was providing leadership to this process and mentioned that they had submitted a proposal to the IETF; but what he didn't tell you was that it was instantly thrown out because it was last-minute and insubstantial. It was a cover up for inaction.

When the Wall Street Journal documented how AOL has begun to make its own two services interoperable, AOL said it wasn't true, but the chat rooms are full of people using it. Mr. Case told you that filtering companies like Net Nanny were happy with AOL's instant messaging but, as Net Nanny wrote Congressman Pickering yesterday, that isn't true either. Net Nanny has not been able to strike a deal with AOL's instant messaging service. As their CEO wrote, "The chief obstacle we face is the lack of an industry-wide open standard that we can use to develop our software."

When he sat here last week, Mr. Case told you the merger would spur new innovation that consumers want, but our iCaster users want to be able to talk to AOL users.

Mr. Case and Mr. Levin told you that they were committed to consumer choice, but what choice have they offered their own cus-

tomers when they can't communicate with other instant messengers? Believing these statements is like believing that the Berlin Wall was really built for the safety of East German citizens. When he came here last week, Mr. Levin said the Internet is the technology of human freedom, but he clearly has one kind of freedom in mind for his company and another kind of freedom for everybody else's. Mr. Levin espoused a belief in openness and innovation. But what kind of openness is it that exaggerates IETF contributions, hides AIM and ICQ interoperability and denies parents the choice of filtering safeguards?

I am very grateful to the members for the penetrating questions that they asked last week. It is no small matter for a company like mine to go up against the Goliath that is AOL, but we have no choice. In the absence of any evidence that AOL will live up to its public commitments, we have to ask that the committee help protect consumer interests. History teaches us consumers benefit from interoperability, and this committee knows that better than anyone. This committee, which has to protect consumers when market forces cannot, must address the simple question: Can AOL be trusted to do this themselves? The record says, no. If AOL/Time Warner is allowed to merge without a clear and certain path for interoperability, consumers will be denied the benefits that an open market can bring.

[The prepared statement of Margaret Heffernan follows:]

PREPARED STATEMENT OF MARGARET HEFFERNAN, PRESIDENT AND CEO, ICAST

My name is Margaret Heffernan. I am the President and CEO of ICAST, an Internet entertainment company based in Woburn, Massachusetts. Our company, which employs 200 people, provides an array of multimedia content and tools that enable our users to view, listen to and share that content over the Internet.

What I'd like to do today is, tell you first, of my personal experience with AOL's tactics of keeping a stranglehold over the Instant Messaging ("IM") market; second, how the proposed merger with Time-Warner will make that stranglehold worse, and; third, why government officials should not be fooled by AOL's rhetoric of openness but instead should base the government's decision-making on the facts. Those facts clearly demonstrate AOL's desire to maintain its wall around the IM market for as long as it can. And the facts also demonstrate that it is in the public interest that that wall be removed as soon as possible.

But as a preliminary matter I want to make it clear that my company, and the many others who have joined in this effort, do not seek to regulate the Internet. Rather, we want to ensure that Internet services remain competitive, accessible, and devoid of entry barriers.

As Chairman Tauzin said at the last hearing, the purpose of these hearings is to ensure that consumer choice is protected. It is clear to us, and to many others in the Internet community that unless the Government imposes necessary conditions on the AOL/Time Warner merger, consumer choice will not be protected and IM, a vibrant and critical platform for future exchanges of information, particularly for interactive television, will be rendered non-competitive and non-accessible, with impossibly high entry barriers.

I. ICAST'S HOPE FOR IM AND EXPERIENCE WITH AOL

At iCAST, we know that IM is an application that has tremendous consumer and business value. One of the most powerful and distinguishing features of the IM protocol is "presence detection"—i.e., the ability to allow users, subject to their control, to let news and entertainment providers, work colleagues, friends or others know when they are "online" and available, and which Internet-connected device they are using. Competitive delivery of services utilizing the presence detection and other unique capabilities of the IM protocol would bring enormous public benefits. IM can serve as an "intelligent agent," enabling weather alerts, school scheduling information and time-sensitive news to be delivered to any device. IM can support advanced audio and video-based conferencing and other audio and video related services, in-

cluding collaborative business document sharing. IM can bring additional capabilities to wireless tools, such as telephones and personal digital assistant (PDA) devices. And, as AOL highlights in its public statements, IM can play an important role in interactive TV offerings.

Over this past winter, we at iCAST developed a downloadable media player that combines the power of IM with the excitement of experiencing multimedia online. The product, called the iCASTER allows users to play a variety of music and video formats, while simultaneously IM'ing their friends through its fully integrated instant messaging functionality. Further, the product is designed to allow users to easily share music and video files by simply "dragging and dropping" music and video files from their play lists to names on their IM "buddy list."

For our IM platform, we chose a product created by Tribal Voice, as we believed it had features that best suited our product. We wanted our customers to be able to freely communicate with everyone, just as they can with telephones and e-mail. As AOL controls 80-90% of the market we knew that we would need them not to block our users messages. But we were hopeful that AOL would allow us to be interoperable as Tribal Voice had developed a product that utilized an AOL sanctioned IM protocol that it made publicly available on its Web site, thus eliminating privacy and security concerns. Further, AOL's public statements at the time indicated it favored interoperability.

In February of this year, when we launched the ICASTER it was designed to be interoperable with AOL AIM, MSN Messenger and Tribal Voice's PowWow instant messaging products. This meant that our users could communicate with over 60 million IM users. AOL blocked interoperability with our product within two days. I called AOL to try to determine if the blocking was unintentional. I was told that no, the blocking was intentional, and that AOL would continue blocking. I was also told that they thought the iCASTER application was really cool. I ask if they would consider, as a gesture of good faith and in accordance with their public comments about interoperability, whether they would consider not blocking until the industry agreed on an open standard. I was told, in no uncertain terms, the answer was no.

So as a company, we had a problem. It is one thing to face a powerful incumbent with a huge built in advantage. That is the nature of the market and we are ready to take on such a fight.

But it is entirely a different thing to face a market in which the incumbent, and a potential competitor, controls your ability to even communicate with your customers and potential other customers.

As Congressman Tauzin noted at the beginning at the first panel, when's there's only one store in town, you get bad service, bad prices, and bad attitudes. And that is what we have right now with Instant Messaging.

And it's about to get worse.

II. HOW THE PROPOSED MERGER WILL MAKE THE EXISTING PROBLEM FAR WORSE, PARTICULARLY FOR INTERACTIVE TELEVISION

It was clear that we faced a difficult situation. But when we began to think through the future implications of an AOL joined with Time-Warner, it became obvious that the existing problems were about to become even worse.

With its control of well over 80% of the active IM users AOL already enjoys market power over both consumers and the content and applications providers that require access to the IM platform to bring presence-enabled services and applications to those consumers.

The proposed merger with Time Warner will deepen that dominance in a variety of ways.

In particular, the proposed merger would:

- Allow AOL to leverage its IM dominance into interactive TV services provided by Time Warner. To be sure, AOL has stated that it will not block the Advanced Television Enhancement Forum signals from rival video programmers. At the same time, however, AOL has announced that IM—that is, AOL's closed IM system—will be an integral feature of its interactive TV platform. In fact, they are saying that AOL's closed IM will be the exclusive IM service supported by AOLTV. By declining to allow IM interoperability and allowing rival interactive TV providers to use AOL IM only upon payment of substantial license fees (or not licensed at all), AOL would substantially raise rival interactive TV providers' costs. This could enable AOL to use its IM monopoly to help tip the interactive TV business in its favor and also through vertical integration to foreclose the millions of IM-capable TVs of Time Warner subscribers to rival IM providers;

- give AOL the incentive and ability to make Time Warner's IM-enabled content (and related applications) exclusive to the AOL IM platform, thereby making AOL IM the only platform over which consumers can access all content and substantially raising IM rivals' costs by forcing two-level entry (in both IM and IM-enabled content/applications);
- eliminate a well-financed potential IM entrant with broadband-enhanced next generation capabilities, and, by adding the one million (and growing) Time Warner/Road Runner subscribers to the AOL IM subscriber base, further reduce the prospect that another IM provider can effectively compete;
- give AOL the incentive and ability to use Time Warner's cable systems (e.g., routers and servers) to discriminate in favor of AIM and ICQ and IM-related traffic, thereby further raising rivals' costs of competing with AOL; and
- give AOL the incentive and ability to use its essential IM distribution platform to discriminate in favor of Time Warner content (as well as "intelligent agents" and other applications that prefer or sponsor Time Warner content), thereby raising content/aggregation/ intelligent agent rivals' costs; and

Moreover, it should be understood that approval of the proposed merger without conditions means that interoperability becomes an even more distant goal. After all, increasing the duration and value of AOL's IM market power, as noted above, will increase the incentives for AOL to maintain that market power, and thereby further increase AOL's incentives to resist IM interoperability.

While it is easy to see how the merger creates a number of specific opportunities and incentives for AOL/TW to unfairly exploit its market dominance of IM, these examples are really just representative of the larger point; that if one is allowed to control a critical platform, one can improperly control a number of markets. The television broadcasters, who have a great stake in the future of interactive television, understand that for the future of television to be robust and competitive, AOL/Time-Warner must not be allowed to maintain walls, like they are doing with instant messaging. As the National Association of Broadcasters wrote Chairman William Kennard of the Federal Communications Commission "(t)o counteract the natural incentive of the combined AOL/TW to continue favoring its own content and services over those of the unaffiliated entities, and to protect the interests of consumers in receiving services and content from a variety of competing sources, the Commission must insure that unaffiliated content and service providers are not subject to discriminatory treatment by AOL/TW. To achieve this goal, the Commission should extend the basic principle of open access beyond Internet access so as to include such services as instant messaging, EPG (electronic programming guides) and digital and interactive television." (Letter from National Association of Broadcasters to Chairman William Kennard; October 2, 2000)

V. THE BOTTOM LINE: CAN THE PUBLIC TRUST AOL TO SOLVE THE PROBLEM?

So given how the merger would make matters so much worse, we decided we had to raise our voice and point out the problem.

And we have been gratified that not only have we been joined by numerous companies, but leading editorial writers from around the country, ranging from Business Week to the Economist, from the San Jose Mercury to the Silicon Alley Daily, have joined in the call to open up IM.

Yet the odd thing is that this debate is not really a debate about philosophy. After all, we only want openness; we do not want regulation.

And AOL says it agrees. It says it is for interoperability and open standards. It says it is willing to let others through the wall it has constructed.

If we had any evidence that AOL was sincere in its statements we would not be here. But in business, you look beyond the rhetoric and consider performance. Government should do no less. And Congressman Dingell wisely said at the hearing last week "Trust everyone but cut the cards."

So what has been AOL's performance here?

15 months ago, in July 1999, members of Congress first started expressing concern about AOL blocking competitors. AOL responded by promising it would "fast-track" its efforts to work with the Internet Engineering Task Force. Indeed, Mr. Case came before you and bragged that AOL had committed to providing "leadership" to the IETF process. In response to a question from Congressman Gordon, Case said that he had committed AOL to work "aggressively" toward interoperability.

But what has AOL actually done to "fast-track" its efforts? What kind of leadership has it offered? How "aggressive" has it been in working toward interoperability?

The business of the IETF, not surprisingly, is done over the Internet. The logs of the discussions are a matter of public record. So consider how much AOL has done over the last 15 months by comparing the number of its submissions to the IETF to what the rest of the industry is doing.

	AOL emails	Industry emails
August 1999	0	147
September 1999	0	314
October 1999	0	547
November 1999	0	470
December 1999	0	278
January 2000	0	345
February 2000	0	193
March 2000	0	160
April 2000	0	58
May 2000	0	65
June 2000	8	235
July 2000	0	197
August 2000	0	604
September 2000	0	164

Note that the only month AOL had any submissions was in June, when, in response to press reports that the FTC and FCC were investigating the IM issue, AOL submitted a proposal to the IETF. Mr. Case told you about that proposal in an effort to convince you AOL was living up to its promise to move along the IETF effort. But what he neglected to tell you was that the IETF has already rejected the AOL proposal as a "last-minute submission was a general framework for instant messaging interoperability rather than a full-fledged protocol." (Network World Fusion 8/3/2000.) Since that time, AOL has again gone silent.

At the last hearing, Congressman Greene suggested that AOL had indicated that there would be interoperability by June of 2001. Unfortunately, while AOL has implied a timetable close to that, it has always provided plenty of wiggle room. Given the pace of development of the Internet one might have thought fast tracking a solution would take less than 15 months. But now, 15 months after making that "commitment" the same AOL official has publicly said that fast tracking is a bad idea and AOL needs at least another year.

If one can look at AOL's record and believe that it represents a sincere effort to "fast-track" interoperability, if one can believe that providing less than one-quarter of one percent of the entries to a process constitutes leadership, then one can, perhaps, believe that AOL/Time-Warner will honestly work towards interoperability. But that would be like believing that the East German Regime built the Berlin Wall to protect its citizens.

But we all know the real reason the Wall was built. The Regime wanted to protect itself. And so here, the many excuses AOL gives for blocking interoperability are nothing more than the kind of propaganda that marked the communications of the defender's of Berlin's Wall.

Recently, Verizon CEO Ivan Seidenberg noted that the biggest communications market in the world is AOL's IM network. There is nothing wrong, per se, with a large market. But just as the government would not allow Verizon or AT&T to prevent competitors from being able to interoperate with their customers, so here, the government has a role in protecting the public interest.

So the choice for the government is clear. It can close its eyes to the facts and the public will get interoperability on AOL's timetable and on AOL's terms. And if there is one thing we can be sure of it is that AOL's timetable will not be on Internet time.

Or the Government can make AOL live up to its own words and set a date certain for interoperability. And then consumers can enjoy the benefits of a vigorous, competitive market.

Thank you.

Mr. TAUZIN. Thank you.

The Chair is now pleased to welcome Lowell Gray, the General Manager of Shore.Net of Lynn, Massachusetts.

STATEMENT OF LOWELL J. GRAY

Mr. GRAY. Thank you. Thank you for holding this hearing and inviting me to discuss the future of the interactive television marketplace. I appreciate an opportunity to share my views. As the founder of one of the largest Internet service providers in New England, I have been fortunate to be actively involved in the incredible Internet and telecommunications revolution happening around us. I started Shore.Net in 1993 as a dial-up Internet provider. My goal was to empower individuals with the resources then becoming available, thanks to the public Internet. For $9 a month, anyone with a modem and a terminal could get an e-mail address, join worldwide discussion groups, and access vast archives of information at universities, libraries and the government. The Internet was not commercial yet. When the NSF then ended its role as supporter of the network in 1994, the community debated how commercial presence would change the Internet for better or worse.

To me it was obvious: Getting the Internet into the private sector would unshackle it from its limited roots and lead to amazing new advances with benefits for everyone. But I also agreed with people who said that advertising and unsolicited e-mail would be harmful to the free and open Internet we knew. In hindsight, these discussions seem quaint. None of us could imagine then how quickly the Internet would explode throughout our society and how soon all these issues would reach critical mass.

Right after the commercial Internet was born in 1994, the world soon learned about a new development: the world Wide Web. We set up our first Web server and gave all our customers the ability to publish their own Web pages. Then we started offering domain name registration and virtual Web hosting for businesses and other organizations. Our business took off beyond our wildest dreams. It was still true to my original mission. We empowered the little guy as an equal on the level playing field of the Internet. For pennies a day, a small entrepreneur could have a presence on the Internet peer-to-peer with the largest corporations.

The whole nature of the Internet is a decentralized peer-to-peer network. When I think of a free and open Internet, I think of it in the sense of liberty, freedom of expression, freedom of association, the core values that we hold dear as Americans. This does not mean a free ride, which is the spin that some parts of the industry are trying to create. ISPs like Shore.Net pay retail prices to telecom vendors to carry customer traffic. In Massachusetts, we pay millions of dollars every year to companies like Verizon and WorldCom and other carriers. Along with our other ISP peers, we represent the telecommunication companies' fastest growing source of revenue nationwide. Each part of the Internet has been built and paid for by the community that connected to it.

ISPs have also been called freeloaders since the earliest days of the commercial Internet. The phone companies blamed us, their customers, for their inability to keep up with demand. They tried to make us pay more for a line just because we wanted to use it to carry data. Fortunately, the Telecommunications Act of 1996 changed all that. New CLECs emerged who gave them real competition and gave consumers more choices at lower prices.

But there have been unfortunate side effects, too. For example, our local telephone company has been out of facilities in our Lynn central office for most of this year and won't deliver more capacity until next year. This is choking the growth of our company and other newly emerging inner-city businesses in our Lynn cyber-district. We are facing similar problems with new CLEC competitors. Endemic lost records, missed appointments, finger pointing among the vendors have all plagued DSL provisioning.

However, the advent of DSL is a very positive development. If we keep an open competitive marketplace, these problems can be solved. Similarly, if ISPs have the choice of buying from cable companies as well as CLECs, the competition will encourage all carriers to improve service quality. Instead, they accuse us of wanting a free ride over cable Internet systems. This is simply not true. For years we have offered to pay full retail price to lease capacity on two-way cable systems, but their owners, without exception, have refused to do business with anyone other than their own subsidiaries. Cable broadband systems should be subject to the same basic open access requirements that any new entrant into the telecommunications business is required to meet.

Why is open access important to the future of interactive television and other broadband services? I believe that much more is at stake than just the narrow issue of open access to cable systems. The real issue here is about ensuring the future of the Internet as a free and open marketplace where our American constitutional values can survive. Mr. Levin said last week that the Internet is the technology of human freedom, but it can also be the technology of oppression or control. I believe that vertical integration of content and communications, combined with the lack of data privacy protections, is a grave threat to our Nation.

It is not the government as Big Brother that I worry about, it is the giant, all-seeing corporation with its data base marketing and cookies, tracking our every move, selling our personal identities to its advertisers and business partners and even controlling what information we receive. Imagine a monopoly power over the flow of your personal data that goes to the heart of who you are, your entire being. That is why competition and consumer choice is so essential in our telecommunications marketplace and that is why open access requirements must be a foundation of converged telecommunications networks. I am not suggesting that we apply Bell-style regulations to cable television networks.

Mr. TAUZIN. Your time has expired, Mr. Gray. I will give you an opportunity to wrap up.

Mr. GRAY. Thank you for the opportunity to testify.

[The prepared statement of Lowell J. Gray follows:]

PREPARED STATEMENT OF LOWELL J. GRAY, GENERAL MANAGER, SHORE.NET

Thank you for holding this hearing and inviting me to discuss the future of the interactive television marketplace. It is an honor to be here, and I appreciate the opportunity to share my views on this important topic with the members of the Subcommittee.

As the founder of one of the largest Internet Service Providers in New England, I have been fortunate to be actively involved in the incredible Internet and telecommunications revolution happening around us.

I started Shore.Net in 1993 as a dial-up Internet provider. My goal was to empower individuals with the resources then becoming available thanks to the public

Internet. For $9 a month, anyone with a modem and a terminal could get an email address, join world-wide discussion groups, and access vast archives of information at universities, libraries and the government. The Internet was not commercial yet. When the NSF then ended its role as supporter of the network in 1994, the community debated how commercial presence would change the Internet for better or worse.

To me it was obvious: getting the Internet into the private sector would unshackle it from its limited roots and lead to amazing new advances with benefits for everyone. But I also agreed with people who said that advertising and unsolicited email would be harmful to the free and open Internet we knew. In hindsight, these discussions seem quaint. None of us could imagine then how quickly the Internet would explode throughout our society and how soon all these issues would reach critical mass.

Right after the commercial Internet was born in 1994, the world soon learned about a new development: the World-Wide Web. We set up our first web server and gave all our customers the ability to publish their own web pages. Then we started offering domain name registration and "virtual" web hosting for businesses and other organizations. Our business took off beyond my wildest dreams. And it was still true to my original mission: we empowered the little guy as an equal on the level playing field of the Internet. For pennies a day, a small entrepreneur could have a presence on the Internet peer-to-peer with the largest corporations.

The whole nature of the Internet is a decentralized peer-to-peer network. When I think of a free and open Internet, I think of it in the sense of liberty—freedom of expression, freedom of association—the core values that we hold dear as Americans. This does not mean a free ride, which is the spin that some parts of the industry are trying to create. ISPs like Shore.Net pay retail prices to telecom vendors to carry customer traffic. In Massachusetts alone, we pay millions of dollars a year to Verizon, Worldcom, and other carriers. Along with our other ISP peers, we represent the telecommunications companies' fastest growing source of revenue nationwide. Each part of the Internet has been built and paid for by the community that connected to it.

ISPs have been called freeloaders since the earliest days of the commercial Internet. The phone companies blamed us, their customers, for their inability to keep up with demand. They tried to make us pay more for a line just because we wanted to use it to carry data. Fortunately, the Telecommunications Act of 1996 changed all that. New CLECs emerged who gave them real competition and gave consumers more choices at lower prices.

But there have been unfortunate side-effects too. For example, our local telephone company has been out of facilities in our Lynn central office for most of this year and won't add more capacity until next year. This is choking the growth of our company and other newly-emerging inner-city businesses in our Lynn cyber-district. We are facing similar problems with new CLEC competitors. Endemic lost records, missed appointments, and finger pointing among the vendors plague DSL provisioning.

However, the advent of competition in DSL is a very positive development. If we keep an open competitive marketplace, these problems can be solved. Similarly, if ISPs have the choice of buying from cable companies as well as LECs, the competition will encourage all carriers to improve service quality. Instead, they accuse us of wanting a free ride over cable Internet systems. This is simply not true. For years, we have offered to pay full retail price to lease capacity on two-way cable systems but their owners, without exception, have refused to do business with anyone other than their own subsidiaries. Cable broadband systems should be subject to the same basic open access requirements that any new entrant into the telecommunications business is required to meet.

Why is open access important to the future of interactive television and other broadband services? I believe that much more is at stake than just the narrow issue of open access to cable systems. The real issue here is about ensuring the future of the Internet as a free and open marketplace where our American constitutional values can survive. Mr. Levin said last week that the Internet is the technology of human freedom. But it can also be the technology of oppression or control. I believe that vertical integration of content and communications, combined with the lack of data privacy protections, is a grave threat to our nation.

It's not the government as Big Brother that I worry about, it's the giant all-seeing corporation with its database marketing and cookies, tracking our every move, selling our personal identities to its advertisers and business partners, and even controlling what information we receive.

Our society has faced similar challenges in the past but nothing so all-encompassing as this. I think a good analogy is to look at the collusion between big oil

and the railroads in the 19th century. Data is like oil and communications networks are like the railroads. Back then, our predecessors created laws regulating common carriers to protect the public interest and ensure competition. The railroads were prohibited from making special deals with big oil and had to publish open non-discriminatory tariffs available to all shippers. Oil is just oil, but your data is you. Imagine monopoly power over the flow of your personal data. It goes to the heart of who you are, your individuality, your entire being.

That is why competition and consumer choice is so essential in our telecommunications marketplace. And that is why open access requirements must be a foundation of converged telecommunications networks. I'm not suggesting that we apply Bell style regulations to cable networks, but I think that the basic open access rules that apply to any new entrant offering telecommunications services, such as a CLEC, should apply to cable broadband systems. We have to recognize that while we would like to have multiple facilities-based providers to each home, there are some limits on the number of telephone poles and radio towers in each neighborhood. In order to have a competitive Internet, we must share these wires. Open access requirements should apply to the basic network telecommunications services, and we must leave the higher application layers free of regulation.

Setting common carrier rules uniformly for all networks, whether telephony or cable or will benefit consumers with lower prices, better quality service and more choice. I believe this will result in an open marketplace where information producers and consumers will have the most choices and freedom.

The other critical issue that our society faces is privacy and fair trade. Consumers need strong protection of their data privacy and open trade practices that they can trust. Very simply, no company should be permitted to sell or exchange information about you without your opt-in consent. Any holder of information must give you trustworthy means to view, correct or delete your information.

The only meaningful way to give consumers the ability to take action to protect their own data or to select the content they choose to view, is to give them choice. Separating content from carriage and protecting data privacy are hard principles to implement in this ever-changing technology landscape but I urge you to consider them.

Think of the converged Internet, telephone and television marketplace at our doorstep. I have tremendous respect for large companies like AOL and Time Warner who are building it on a global scale. I believe Steve Case when he describes the new interactive products that his company is bringing to market. Cyberspace is a new frontier, let's treat it as one. Where is the line between public space and private space? Is there an Internet commons? Let's keep networks open to innovation and invention and give others the ability to create new content or applications just as AOL Time Warner have the freedom to do.

When I bring the Internet and television together in my home with my family, I do not want the experience shaped and subtly controlled by some media conglomerate. If I want them to store a profile of my viewing habits as a convenience, it should be my informed choice. I also want some public space to be off-limits to commercial interests. My children should not be a captive audience to advertisers in our public schools and public libraries. Open access will ensure that we have the choices available to make our own decisions about these matters in our homes and communities.

I greatly appreciate the opportunity you have given me to share my views with you today. I look forward to any questions you may have.

Mr. TAUZIN. Good wrap.

Let me depart from the usual procedure. I understand, Ms. Heffernan, that Mr. Markey is going to have to leave, and I am going to recognize Mr. Markey while he is here.

Mr. MARKEY. Thank you, Mr. Chairman.

Ms. Heffernan, let me ask you, please, you made reference and you have a chart over there, the communications that exist between AOL and the rest of the industry in terms of trying to resolve this interoperability question on instant messaging, so what is the—in your opinion what is the prognosis for this to be resolved given that track record in the near term? And if you don't think that it can be resolved because the ISP revolution, this thing is so central to the opportunity for the United States, what role do you

see the government playing in ensuring that this interoperability is created?

Ms. HEFFERNAN. Thank you, Mr. Markey. I would like to thank you for representing our views when I was a virtual witness last week.

Mr. MARKEY. And when I become a virtual Congressman in 5 minutes, you can represent me.

Ms. HEFFERNAN. The chart does indeed tell an extremely interesting story. Since the Internet Engineering Task Force worked almost exclusively by e-mail, I think the quality of commitment that AOL has brought to their leadership position speaks for itself.

We have certainly had no indication that this is going to change. Indeed, after a certain amount of reporting that the FCC and the FTC had some interest, you see this blip in June 2000, and then nothing further after that. So I am afraid that I have seen nothing either in the IETF interactions or in industry interactions that AOL can be taken at its word that it is going to fast-track or even track creating a standard for the industry.

As a consequence, we have been forced to look to the government to ask that as a condition of the merger, AOL commit to a hard date by which either the IETF protocol is implemented or de facto interoperability is allowed to occur.

Mr. MARKEY. Mr. Gray, you tried to negotiate open access. You have not been able thus far to reach any agreement. In the absence of effective rules in this area, do you think that there would be as bright a future as we hope for this entire ISP revolution? There are 8- or 9,000 in the country.

Mr. GRAY. I think the open evolution of a competitive ISP industry will be greatly thwarted. The continued waves of consolidation are going to get worse. I think we are going to lead to a dismal future where AT&T and AOL/Time Warner, if we are lucky the two of them will compete; but it might be one.

For example, in Massachusetts back this spring, a representative of AT&T came to visit me because of the ballot initiative, and a memorandum of understanding was signed between a Massachusetts coalition and them. But that has no teeth in it and I think it is just empty promises. I don't see them moving forward to live up to their commitment to hold trials by next year.

Mr. MARKEY. What does that mean for you and the thousands of companies like you?

Mr. GRAY. It means that future broadband markets are going to be off limits to us.

Mr. MARKEY. Mr. Froman, very briefly, the 1996 Telecommunications Act has a provision, so-called navigational devices which include set-top boxes. In that provision we built into the law an antisubsidy provision to help unbundle and promote competition and open standards. Can you elaborate on whether these antisubsidy provisions are working effectively and what the FCC needs to do to promote greater competition?

Mr. FROMAN. I believe that the antisubsidy provisions are not working effectively, Mr. Markey, and it is because today cable companies, under section 623 of the Telecommunications Act, are allowed to aggregate the cost of all of their equipment and spread it over their entire network. What this means in practice is that some

cable systems, like the one in Lincoln, Massachusetts, are fully analog. Those customers are now paying much more for their analog obsolete boxes than other customers in the same cable vision system, perhaps in New York. And section 623 allows this cost aggregation and allows cable companies to take a box that we are told costs $400 and charge their digital customers $3.50 a month, and that is pretty compelling. It is an 11-year payback in that case.

I believe what Congress and the FCC needs to do is work out—eliminate that provision. And there are several other things, a reasonable license that I mentioned earlier. The quickest way to make this all work is to have the elimination of cost aggregation and have an open standard that competitive entrants can compete with the same standard as the MSOs are providing.

Mr. MARKEY. We will try to work on that. I would like to ask one final question. Mr. Meisinger, you are Disney. You are huge, and you represent a big company and you are testifying before us today. I think it would be helpful for us to understand what you think consumers will never see, will never see in terms of a couple of services that you think might be stifled without open systems and nondiscriminatory access? Can you paint a quick picture for us?

Mr. TAUZIN. The gentleman's time has expired. Please respond to the gentleman.

Mr. MEISINGER. It is hard to say because I am not part of our programming contingent, but there is no question that the type of content that has been forthcoming from the Walt Disney Company for many decades will be foreclosed unless we have access to the AOL/Time Warner platform and to the platforms of other competitive ISPs because that is ultimately where consumers will derive a choice.

Our concern as a large company is that even our content may be foreclosed from the marketplace. That is a rather daunting prospect when you consider how desirable and appealing our content has been historically. But we are not asking this committee to mandate the carriage of our content. Our objective is to make sure that if AOL/Time Warner chooses to place our content and make it available to their customers, that we will have nondiscriminatory treatment. It may very well be said that people don't have that much of an interest in seeing Who Wants to be a Millionaire or watching ABC Monday night football; but as my colleague said, nor do we want to see for our news only Ted Turner or Peter Jennings. We want the consumer to have a broad choice of content. That is our objective.

Mr. MARKEY. Thank you, Mr. Chairman. Thank you.

Mr. TAUZIN. The Chair will recognize Mrs. Cubin.

I understand that Mr. Dingell got caught up in the votes, and he is on crutches right now and is having a little slower time getting around. I am going to recognize him after this to make his full opening statement and then recognize him for a round of questions, but I will now recognize Mrs. Cubin.

Mr. DINGELL. I will put my opening statement in the record. It is an excellent one. Rather than to say anything, I think I would want to commend you for holding this hearing. You have honored a commitment that you have given us. We have to lot to do to make sure that the results of these events now ongoing in the tele-

communications industry are both fair, and quite honestly, to all of the people in that industry, fair to the consumers, and that they establish the best possible telecommunications system in the world.

Mr. TAUZIN. Without objection the gentleman's opening statement will be put in the record in its entirety.

[The prepared statement of Hon. John D. Dingell follows:]

PREPARED STATEMENT OF HON. JOHN D. DINGELL, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF MICHIGAN

Mr. Chairman, thank you for holding this second day of hearings on issues related to the proposed AOL-Time Warner merger and its effect on the future of interactive television. I appreciate your willingness to allow parties who have concerns about the merger to share their views with the Committee today. I must say, however, that I believe a truly "interactive" hearing last week—with all parties represented—would have been more productive.

Some charge AOL and Time Warner with seeking to create a so-called "walled garden" around their own content. I find it ironic that the Committee created a similar environment last week when it only permitted these two companies' views on their own merger to be presented.

As I said then, I have not prejudged the merits of this merger or its effect on the American public. But there is no question that real public issues exist that must be addressed. The legitimacy of consumer and competitors' complaints over the impenetrability of this walled garden should be thoroughly vetted.

It gives me great pause if dominant players in the market are able to discriminate against unaffiliated programmers and effectively hinder the free flow of information to the public. Likewise, the use of so-called "sticky" applications without clear and enforceable interoperability standards may leave consumers with limited choices in the future world of interactive TV. That too, is a cause for concern.

At the same time, however, the notion of government-imposed mandates on one industry player—imposed in the context of a merger transaction—may itself lead to anti-competitive results in the marketplace. I have long argued against imposing these lopsided requirements that compromise the level playing field this Committee has always sought to achieve.

Clearly there are no easy answers to these questions, which simply heightens the need for a fully informed debate before this Committee. In my view, such a debate is most productive when all players are given equal opportunity to participate in an "interactive" exchange.

I look forward to hearing from the witnesses, and thank them for their patience in waiting for this day to present their views. Again, Mr. Chairman, I thank you for agreeing to make today's hearing possible.

I yield back the balance of my time.

Mr. TAUZIN. Mrs. Cubin.

Mrs. CUBIN. Last week when I was questioning Steve Case about interoperability and the task force and AOL's participation in it, I was under the impression that AOL wasn't actually participating very much. But Mr. Case's answer to me was this: "We are a member of the committee. We are active participants in the process. Perhaps this can be explored in your subsequent hearing next week. Maybe some of those companies on the record can talk about what AOL has or hasn't done. I think there is a lot of misinformation on this topic, and when people really look at the facts, they will see that AOL has done a lot already and is committed to doing more through the proper Internet standards bodies."

Obviously Mr. Case opened the door to this question. I would like a couple of you to tell the committee what your company's experiences have been in dealing with AOL on this subject.

I have this report here which is a history of AOL's support or lack of support on the task force. In a USA Today news article, it says that—this is a statement from AOL, that they are—that they oppose fast-tracking of the process of interoperability, and then I

have a letter from Barry Shuler that says that AOL is fast-tracking our efforts.

These are—this is the report of the task force, and as I have looked through it and read the statements, they are contradictory. I want you to tell me what your experience has actually been and what you would want me to ask Barry Shuler or say to him.

Ms. HEFFERNAN. I will take that first. I think there are a couple of things. First of all, since obviously our message isn't very appealing, Mr. Case is trying to shoot the messenger by claiming us to be misleading. I think the facts of the chart speak for themselves. That shows the quality of engagement that AOL has brought to their relationship with the IETF, and it is important to remember that in July 1999, Mr. Case committed to a leadership position in developing this standard for interoperability.

Mrs. CUBIN. I think what I am talking about more than what they did on the task force is what your companies have actually dealt with in trying to work out interoperability of instant messaging with AOL.

Ms. HEFFERNAN. I can certainly speak from firsthand experience in that regard. When they first began to block the iCaster, we called up AOL and said, What are you doing? Maybe it is a mistake, maybe it is a misunderstanding. And I should emphasize here that the technical protocol that we used to interoperate with AOL is one that AOL has published and validated itself.

AOL senior executives confirmed that they were blocking us. They confirmed that it was deliberate. They confirmed that they would continue to do so.

I said, well, gee, I thought you guys were on the record as being committed to interoperability. They said, we believe in it, but we really want to work with the IETF to make it happen.

I said we all know that is going to take a lot of time and if you really want to work with them, why don't you work with them? And they said, well, that's a matter for another part of AOL.

Mrs. CUBIN. Excuse me?

Ms. HEFFERNAN. That is a matter for another part of AOL.

So I said okay, even if we all recognize that creating the standard may take some time, how about as a gesture of good faith to show you mean this, you allow us to continue to interoperate with you until such time as the IETF standard is produced; to which their simple response was, we don't want to do that. That was essentially the end of the discussion.

I think actions speak louder than words, and we have had a lot of public statements about commitment. We have also had, as you said, contradictory statements about we want to fast-track it or slow-track it, whatever. I have seen nothing firsthand or through the many other companies that I have talked to——

Mrs. CUBIN. I just have a couple of seconds. I want to ask each and every one of you, are you advocating that the government condition or mandate open access to both ISPs and cable networks for this merger? Is that what every one of you are advocating? Yes or no?

Mr. TAUZIN. If you can quickly go through the line.

Ms. WILDEROTTER. No.

Mr. MEISINGER. Yes, we are advocating open access for ISPs.

Mr. FROMAN. We believe in open access broadly for the navigation devices as well as the service cable providers.

Mrs. CUBIN. As a mandate by the government?

Mr. FROMAN. Yes.

Ms. HEFFERNAN. And we are asking that the government mandate interoperability on the subject of instant messaging.

Mr. GRAY. We are not in favor of mandating it as a condition of the merger, but we believe that open access should be a requirement across the industry.

Mr. MEISINGER. We are asking for that as a condition of the merger, not in a national policy sense at this time.

Ms. WILDEROTTER. And the "no" is geared around a government mandate. I think the marketplace needs to work it out.

Mr. TAUZIN. The Chair recognizes Mr. Dingell.

Mr. DINGELL. Mr. Meisinger, I heard your comment, but I want to reinforce the record here on this matter, so I am going to ask you questions about it. If the FTC or FCC were to impose open access conditions on AOL/Time Warner, as you propose, would that give other cable companies such as AT&T the ability to demand such access on Time Warner's systems but to refuse identical access on its own systems? If so, is that a fair result? Should these rules apply to all companies in the industry, and does the public have any say or concern in this matter?

Mr. MEISINGER. I believe that open access is open access.

Mr. TAUZIN. Let me ask you each to pull the mike close to you.

Mr. MEISINGER. We are not advocating a differential treatment. Our concerns at this juncture pertain to this specific transaction that we have a problem with——

Mr. DINGELL. Let's address that, because I get the impression that you are talking about this specific transaction. If that is all that happens, this will give you the privilege of equal access to AOL/Time Warner, but your company will not be compelled to give equal access to others. And/or to—or to other cable companies or, for that matter, to AOL/Time Warner.

Mr. MEISINGER. Equal access to what?

Mr. DINGELL. You know what equal access is.

Mr. MEISINGER. We are advocating that other ISPs have equal access to the Time Warner cable platform. Our product, to the extent that we are a content provider, is accessible to all companies as far as I know. We do not discriminate at this juncture.

Mr. DINGELL. We are talking about equal access to the services so that everybody can have the same access and transmission and things of that kind. I am trying to understand. You are kind of giving me the unfortunate impression that you get equal access, but others don't. Or that equal access will be imposed on AOL/Time Warner, but not on certain others. That leaves us with—for example, like AT&T. So you get this rather curious result where some folks are at a disadvantage, some folks are at a fine advantage, and the public doesn't get a break. That is how I understand what you are telling us. I want you to say yes, I am right in my appreciation or not.

Mr. MEISINGER. I believe in connection with——

Mr. DINGELL. You want a fair advantage?

Mr. MEISINGER. We believe to give the consumer the broadest range of choice, other ISPs have to have the ability to create competitive platforms. That is our position.

Mr. DINGELL. Let me ask this question going across.

Ms. Wilderotter, how many of you favor or oppose the idea that there should be fair rules that should apply equally to all providers and participants in the industry?

Ms. WILDEROTTER. I do agree that there should be fair rules to all providers in the industry.

Mr. DINGELL. Mr. Meisinger, apparently you don't subscribe to that.

Mr. MEISINGER. No, that is an absolute perfect prescription for the Walt Disney Company.

Mr. DINGELL. Are you advocating equal access and open access to all or just Time Warner?

Mr. MEISINGER. Well, eventually when the issue becomes broader than the merger we would consider that. But at this juncture I am proposing equal access to, on behalf of all ISPs, to other cable platforms as well.

Mr. DINGELL. But at this time I guess the answer to the question is no.

Mr. Froman.

Mr. FROMAN. I am very much for fairness to all participants in the industry and all consumers.

Ms. HEFFERNAN. We absolutely believe that interoperability should be required of all instant messaging companies, not just ours and not just AOL's.

Mr. DINGELL. I agree. Go ahead.

Mr. GRAY. I believe that fair rules should apply to all participants in the industry.

Mr. DINGELL. So I think I would infer from the comments of all except Mr. Meisinger, who seems to have a unique view here on this matter, that you would generally favor having the FCC then to set up fair rules that would apply equally to all persons in the industry, is that correct?

Mr. MEISINGER. Mr. Dingell, respectfully, we have testified about our support for open access and equal treatment.

Mr. DINGELL. At some future date—I find that impressive, and I would simply remind you that in the orderly passage of time all of us will be dead and perhaps none of us will then have to confront——

Mr. MEISINGER. We believe it is timely now, and we have testified specifically on that subject.

Mr. DINGELL. Are you reviewing then your position?

Mr. MEISINGER. No I am not. I wanted to make it clear that the position we are advocating this morning is with respect to the proceedings being conducted by the FTC or FCC. We have no problem with fair treatment for all participants in the business, no problem whatsoever.

Mr. DINGELL. Do you then believe the FCC should come forward with rules that would cover everybody?

Mr. MEISINGER. I think that would be a prudent thing to do at some point in time, and I know it is being studied now.

Mr. DINGELL. Just yes or no to all. I think I am getting close to the borders of my time, Mr. Chairman. Am I not fair then in assuming that the notion of government mandates on one industry player imposed in the context of a merger transaction may lead to anti-competitive results in the marketplace?

Mr. TAUZIN. I would ask you all please to answer that, hopefully in the affirmative.

Ms. WILDEROTTER. So what do you really mean, chairman?

Absolutely, I think it has to be a level playing field for all the participants in the business.

Mr. DINGELL. I have this curious view that level playing field is the fairest way. So I gather you accord with my view now, Mr. Meisinger.

Mr. MEISINGER. Yes.

Mr. DINGELL. You have been giving me some rather ambiguous answers, but I will give you time to set them out with sufficient——

Mr. TAUZIN. But not a lot of time. Proceed, sir.

Mr. MEISINGER. I regret the confusion. We believe in the concept of open access. We also believe in the particular imposition of conditions on this particular transaction, and we believe that this committee and others should study the issue along with the FCC, and I know that is being done.

Mr. FROMAN. Yes, we agree, Mr. Dingell.

Ms. HEFFERNAN. Equality is absolutely at the heart of interoperability.

Mr. GRAY. Yes, I agree that we need to apply this fairly across the board or it would be anti-competitive.

Mr. TAUZIN. Thank you very much. Thank you. Mr. Dingell.

Mr. DINGELL. Your patience is appreciated.

Mr. TAUZIN. Indeed. Although I would suggest that if somebody is going to make these rules we might want to do it right here, Mr. Dingell, instead of at the FCC. I think you have some similar feelings about that.

The Chair recognizes the gentleman from Illinois, Mr. Shimkus.

Mr. SHIMKUS. Thank you, Mr. Chairman.

Let me ask Mr. Meisinger—this is kind of a follow-up to the ranking member. Disney Corporation, what are the major—do you have major cable holdings in direct or part holdings in direct satellite or any of those pipes that I referred to in my opening statement?

Mr. MEISINGER. No, sir.

Mr. SHIMKUS. That is where I was a little bit confused. Because I think the question—and I don't dare try to speak for the ranking member—but the question was, you seek equal access to—if AOL/Time Warner develops an exclusionary rule, and I have thought the intent—the discussion was if you had pipes would you not allow—would you want the opposite of what you are asking for for AOL and Time Warner?

Mr. MEISINGER. If that was the question which I now understand you to be asking, the answer to that is we would obviously be compelled to follow the same paradigm as the rest of industry.

Mr. SHIMKUS. Thank you. And that helps clarify the debate and discussion for myself.

Help me out on—in my opening statement, I mentioned multiple pipes, multiple choices. To have that, doesn't that rely on consistent industry standards? Isn't that a requirement? And if you would just start and answer across the table. I am just a layman. I am just a simple country boy from southern Illinois. So we are trying to handle this high tech issue, and I think this does speak to consistent standards, and I wanted to see if you all agree.

Ms. WILDEROTTER. Well, I do think it requires consistency in order to deliver multiple products and services into the home. I do think that every pipe has a different paradigm associated with that to optimize how a consumer experiences interactive television in the home. So I think if you look at the cable pipe and there are a number of efforts going on in the cable industry today on interoperability and there are services being delivered where we deliver our service of enhanced broadcasting, we are co-existing with video on demand companies, with electronic program guides, with Internet access capability, all in one box in the home. So we have a number of constituents on the vender side that are providing multiple services in a very competitive environment delivering services. So, too, on the satellite side. So I do think that whether it is a standard or not it is less important than the interoperability really works to what is the consumer experience going to be in the home from a user interface perspective.

Mr. SHIMKUS. Thank you.

Mr. Meisinger.

Mr. MEISINGER. From our perspective we are interested in standards which make it clear that our content will be equally accessible to our consumers across all platforms on which we can distribute our product.

Mr. FROMAN. We believe standards, open standards, consistent standards are the most important thing to a competitive marketplace; and it is the one thing that threatens to negate competition in the cable marketplace today. For example, competitive navigation devices, set-top boxes with pod interfaces, are not being made available to competitive entrants. The specification for these devices is different than the specification for the devices that the MSOs are able to provide on their own.

The date which the FCC has set for those standards to be the same is January 1, 2005. In private conversations with executives from specific MSOs, they have told us that as long as they have the ability to have a different standard and use a proprietary box in their system and aggregate the cost and sell it for much cheaper than the market value for a sustained period of time, they are interested in doing that; and they are not interested in changing it. Open standards is the solution, and it is the easiest thing the Commission can do to make this work.

Mr. SHIMKUS. Ms. Heffernan.

Ms. HEFFERNAN. Yes, absolutely, industry standards are essential. Let me give you one interesting example.

Net Nanny builds filtering software so parents can protect what kind of information they get through instant messaging devices. What they have said is we don't have the resources to write specific software for 10 plus standards today. Writing for one standard, we could provide multiple products that would filter different things

for different parents according to the ages of their child and the preferences of their parents. So this is a perfect example of where an industry standard would provide more choice to consumers of a kind that they can't access today.

Mr. GRAY. I have got to use an old joke. The great things about standards is that there is so many to choose from.

Mr. TAUZIN. That is an old joke.

Mr. GRAY. But the standards process in the Internet, first of all, the whole Internet has become a success because of the standardization of the Internet protocol in interoperability. But if you look at the IATF process it is not paper standards that count. What is great about IATF is that what makes a standard accepted is that when there are real world solutions that implement it. That is what makes a standard.

Mr. SHIMKUS. I will just close. I will not follow up with a question, Mr. Chairman.

I think we can all agree with that, but we need to be cautious about who sets the standards and is it a standard that you then lock in and you do not allow for new advancements, especially when government gets involved. We see it at FCC all the time. So it has got to be dynamic somehow. And if we get involved legally based it is no longer dynamic. It is a monumental overcoming to try to change.

With that, Mr. Chairman, I yield back.

Mr. TAUZIN. I thank the gentleman for identifying that tension. It does exist in all these areas.

The Chair will recognize himself. I will give you some additional time if any of our colleagues on this side want to have additional time. You might want to let them know that if they want another round.

Let me first try to set the stage for the question I will ask. This is almost very Yogi Berra "deja vu all over again" in a sense that there was a time when AT&T was the big telephone company, a common carrier. We broke it up at some point, and now there are a lot of attempts to put it back together in a lot of different forms. But when the competitors to long distance AT&T began to arrive, a lot of similar problems, interconnection and interoperabilities and complaints about meetings missed and contracts not signed and technical difficulties and all sorts of problems like that. So there is a sort of sense of deja vu.

But the difference here is that we are dealing primarily with a cable structure which is not a common carrier which is essentially deregulated. In the world of AT&T, Sprint, MCI, et cetera, we are dealing with basic telephone service which was heavily regulated, subsidized with universal service obligations and heavily impacted with open access requirements, common carrier requirements. But here we are dealing with a cable structure. Satellite is not a common carrier and yet satellite carries Internet services. Wireless services can be telephone or not, so they can be common carriage or not depending upon the form of the service.

We know the Internet is carried on all four of those forms, and before too long perhaps on some new ones, perhaps on electric lines, perhaps with some new concepts such as Time Domain recommends to us and ultra broadband wireless technology.

The question I am asking is, if in fact we are to avoid what Mr. Dingell has cautioned against, that is, government regulations subjectively on some companies but not on their competitors, which I have complained about as much as I believe Mr. Dingell has, of FTCs and FCCs that simply get you in the room when they got you and make you agree to regulations and conditions or else you do not get out of the room, which I think is where we find ourselves too often in these merger decisions.

If we are to make policy for the new world—broadband, interactive, converged—Internet services over all these forms, some common carriers and some not, what is the right policy? Should we take the telephone model and begin allowing the FCC to dictate the terms of interoperability and common carriage, open access if you want to call it that, technical nondiscrimination issues, and issues of cost aggregation, all the incredible ways in which the government has intricately regulated the common carriage of telephone service? Or should we find a different model? Did the 1996 act point us in a different direction or did it point us in the direction that some of you are asking us to take, to gin up the regulators to begin regulating this new world of broadband service, interactive television? Come back to me. Mr. Froman.

Mr. FROMAN. Fundamentally, we believe, as we said earlier in the case of navigation devices which will receive the interactive television, what we are asking for is a common standard. And when we saw level playing field, the MSOs and the competitive entrants, the Sonys and the Panasonics, consumer electronics manufacturers just need to have the same standard that they are working off of. The MSOs just need to be playing on the same field. I think you can avoid regulation if you were to just say by January 1, 2002, these industries need to have this standard.

Mr. TAUZIN. Just do it on your own. Come up with some standards.

Mr. FROMAN. Just set a date.

Mr. TAUZIN. Anybody else? I see Ms. Wilderotter.

Ms. WILDEROTTER. Yes, Mr. Chairman. I thought that was very eloquent in terms of the complexity of what we all have to deal with in this environment. But I think it is extremely important that we make sure that markets are able to develop to the point of really knowing if there is a necessity of regulation. By putting the consumer in the middle of this and making sure that there are services and choices for consumers is really what the most important thing is. I truly believe that the broadband environment today is a competitive environment. I think there are multiple choices for consumers in terms of how they get interactive television.

Mr. TAUZIN. Let me stop you there. We have another vote again.

Do you think it would be competitive enough? Is AOL/Time Warner going to be such a dominant player that we will end up having to write rules for AOL/Time Warner with reference to all of these concerns?

For example, are we going to really have to go in and dictate the terms of the contracts that Disney signs with AOL/Time Warner for the carriage of ESPN to make sure that they are technically equal, that they have the same rights to their consumers as any other program? That is essentially what Disney is asking the regu-

lators to do, to try to enforce right now through this process on this company, on this merged company.

Are we going to find ourselves doing that? Will there be enough competitive pipes fully capable, available to consumers to choose from so we have less need for us to use the old telephone model of heavy government regulation and more reliance upon the Internet model of free-flowing competition?

Ms. WILDEROTTER. I definitely think there is enough competition and there is enough free flow to give choice in the marketplace.

Mr. TAUZIN. Anyone else?

Mr. GRAY. I respectfully disagree a bit.

Mr. TAUZIN. Tell me why you disagree.

Mr. GRAY. I totally agree on the content side. And if you look at a company like Disney the Internet model is great. There is no need for regulation at all at the content level, the Internet level. But in the real world there is a limited number of pipes. And so if you are looking at the physical media there is only so many telephone poles and radio towers that people want in their neighborhoods.

Mr. TAUZIN. You say the content level, but Disney will say wait a minute. Even if government doesn't give us a right to be on the AOL/Time Warner system, we saw Mickey Mouse roar. We know Mickey Mouse has some leverage and managed to get back on. We can do that in the private sector. We can take ABC off, and Time Warner realized consumers want ABC programs so they will get back on.

But the point I am making is we might get back on, but we might be differently treated. The consumers may not interact with our programming the same way they can interact with other programming. Does the government really have to get in all that or can't this be negotiated in a competitive marketplace of broadband interactive services?

Mr. GRAY. I think if you openly route IP packets, Internet packets, across the network that we will be fine. But cable still has that head end which they control. So if they discriminate on how they carry packets across their network, that is the limited resource that does need——

Mr. TAUZIN. Do you have one you want to get in before we leave?

Mrs. CUBIN. No.

Mr. TAUZIN. I want to ask you this. Assuming that either the agencies involved with this merger or the agencies after this merger or this Congress begins writing rules, as Mr. Dingell suggested, to apply to all the players in this new field on interoperability, on open access, on technical non-discrimination, on elimination and cost aggravation—and I can think of about eight or ten others—pole locations, agreements, price terms, conditions of fairness, we do a lot of that stuff around here. Assuming we entered into all of that activity, would that be reregulating cable? Yes or no.

Ms. WILDEROTTER. Absolutely, it would be. No doubt about it. And again I just want to make a comment as a small company in a very new business of interactive television that does not have a big parent behind us. We are a public company, and we have built this company from scratch. We are working within the existing

model, and we will be deployed in 12 million homes over the next couple years.

Mr. TAUZIN. I commend you for that. I want to see more of that, frankly.

Mr. MEISINGER. There is no question under your hypothetical that would be regulating cable. Our concern is in the absence of free market solutions——

Mr. TAUZIN. You want government pressure?

Mr. MEISINGER. We think and in the case of this particular instance it was clear that that would not work, that there are times when regulators need to intervene.

Mr. TAUZIN. Mr. Dingell made the case and I sympathize with some of the problems you are having, I really do. I think he does, too. But we are left with this case-by-case business and the government sort of makes a case-by-case rule and then it doesn't apply to the other competitors. And he made the point very well that we didn't want to do it that way.

Mr. MEISINGER. That is a timing issue. The problem is that Time Warner/AOL did not wait for the regulators to complete the process.

Mr. TAUZIN. The point I am making is we can't put them all in the room at the same time unless we do rulemaking or a law. So you only have one in the room at a time and then you regulate him selectively. You understand the concern we have with that.

Mr. MEISINGER. Of course I do. And you need to have a rational system of regulation if you have one. But the Clayton Act contemplates that the FTC and public interest requires that the FCC take a look at individual transactions. That is being done here. But that doesn't supplant the need or the potential inquiry into need for further regulation so that everybody has equal access and consumers are not denied choice. I think that is objective.

Mr. TAUZIN. I just caution you to be careful what you ask for.

Anyone else?

Mr. FROMAN. Mr. Chairman, it strikes me that the issue we are talking about here has several component parts. And when you ask the question is the pipe is big enough for everybody, is it the only pipe, well, there are competitive access for ISPs. You have satellite, you have DSL, you have dial up, even though it is not broadband——

Mr. TAUZIN. The point is, if there are enough competitors, do we need to regulate each one?

Mr. FROMAN. Absolutely. And we agree with the point——

Mr. TAUZIN. I want to stop you. Your answer is, yes, we should regulate each one.

Mr. FROMAN. No, sir. I do not believe that. I think we need to have broad guidelines established by the FCC to keep us moving in the right direction.

The video side is a little different. There are not the competitive entrants on video cable. DBS has done remarkably well, and we are very enthusiastic supporters of DBS. But it is not for everyone. There are antennae issues, dish issues on homes, line of sight, multiple dwelling units, so cable has—the cable companies today have the ability to block more content than just Internet access. There are electronic program guides that customers buy in televisions

that can be blocked. So we need some broader guidelines so the industries can keep it moving forward.

Mr. TAUZIN. Please proceed.

Ms. HEFFERNAN. I would like to make one point very clear. We are not asking that the Internet be regulated. I think the notion that interoperability is a principal but industry bodies like the IATF figure out details and the protocols, I think that works.

Mr. TAUZIN. Ms. Heffernan, just quickly. So you work them a lot. You have the protocols and what operability is required but somebody doesn't want to sign you up. Do you need government to force them to?

Ms. HEFFERNAN. I don't need government to force people to use my application. Apparently, I need government to help AOL live up to its public commitments, the commitments it has made to the government, the public——

Mr. TAUZIN. What you are saying is, if AOL/Time Warner behaves in a way that allows for a real interoperability and works out your problems in the marketplace, that the government can to away and so can we, and of course that is true—if you get what you want in the marketplace. But suppose you don't is the big question. Suppose you don't get it? Would you still be up here asking us to come in and order all the players, not just AOL/Time Warner, but all those pipes to treat you the same? I don't know yet. We have to think about that.

Mr. Gray.

Mr. GRAY. The cable systems are a de facto monopoly today. If you look at the future of my business, I need to deliver high-speed broadband services to our customers. There is simply no choice of what is available to us. DSL has an insignificant market share. It is really not a true competitor.

Mr. TAUZIN. You see, Mr. Gray, I am glad we have you on each end of the table because that is the range of opinion that we are forced to work in. I have got about 3½ minutes so we have to wrap.

I just want to point out to you that that is exactly the struggle that we have to face in trying to philosophically think this through in a real world, not a virtual world, the real world of consumers trying to get these services and companies, trying to form up and build the assets that Time Warner and AOL are obviously trying to put together to deliver these interactive services.

At the same time, we are also facing a world where very soon the video side and the data side and the telephone side are going to be just one anyhow. It will not make a lot of difference how they are coming to us or where they are coming to us. What is really going to be the question is can we get everything we want in an easy, useful, affordable way from enough different companies so that we feel like we are going shopping? There are a lot of stores out there; and if we don't like what the Giant is carrying, we can move over to the Safeway, whatever it is. If we have don't have that same marketplace we will be back here talking about reregulating cable and satellites and wireless services again. I just hope we can avoid that.

Thank you very much for your contributions. The hearing stands adjourned.

[Whereupon, at 12:56 p.m., the subcommittee was adjourned.]

[Additional material submitted for the record follows:]

ONE HUNDRED SIXTH CONGRESS

TOM BLILEY, VIRGINIA, CHAIRMAN

W.J. "BILLY" TAUZIN, LOUISIANA
MICHAEL G. OXLEY, OHIO
MICHAEL BILIRAKIS, FLORIDA
JOE BARTON, TEXAS
FRED UPTON, MICHIGAN
CLIFF STEARNS, FLORIDA
PAUL E. GILLMOR, OHIO
JAMES C. GREENWOOD, PENNSYLVANIA
CHRISTOPHER COX, CALIFORNIA
NATHAN DEAL, GEORGIA
STEVE LARGENT, OKLAHOMA
RICHARD BURR, NORTH CAROLINA
BRIAN P. BILBRAY, CALIFORNIA
ED WHITFIELD, KENTUCKY
GREG GANSKE, IOWA
CHARLIE NORWOOD, GEORGIA
TOM A. COBURN, OKLAHOMA
RICK LAZIO, NEW YORK
BARBARA CUBIN, WYOMING
JAMES E. ROGAN, CALIFORNIA
JOHN SHIMKUS, ILLINOIS
HEATHER WILSON, NEW MEXICO
JOHN B. SHADEGG, ARIZONA
CHARLES W. "CHIP" PICKERING, MISSISSIPPI
VITO FOSSELLA, NEW YORK
ROY BLUNT, MISSOURI
ED BRYANT, TENNESSEE
ROBERT L. EHRLICH, JR., MARYLAND

JOHN D. DINGELL, MICHIGAN
HENRY A. WAXMAN, CALIFORNIA
EDWARD J. MARKEY, MASSACHUSETTS
RALPH M. HALL, TEXAS
RICK BOUCHER, VIRGINIA
EDOLPHUS TOWNS, NEW YORK
FRANK PALLONE, JR., NEW JERSEY
SHERROD BROWN, OHIO
BART GORDON, TENNESSEE
PETER DEUTSCH, FLORIDA
BOBBY L. RUSH, ILLINOIS
ANNA G. ESHOO, CALIFORNIA
RON KLINK, PENNSYLVANIA
BART STUPAK, MICHIGAN
ELIOT L. ENGEL, NEW YORK
THOMAS C. SAWYER, OHIO
ALBERT R. WYNN, MARYLAND
GENE GREEN, TEXAS
KAREN McCARTHY, MISSOURI
TED STRICKLAND, OHIO
DIANA DEGETTE, COLORADO
THOMAS M. BARRETT, WISCONSIN
BILL LUTHER, MINNESOTA
LOIS CAPPS, CALIFORNIA

JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

November 6, 2000

Mr. Lowell Gray
General Manager
Shore.Net
173 Oxford Street
Lynn, MA 01901

Dear Mr. Gray:

Thank you for testifying before the Subcommittee on Telecommunications, Trade, and Consumer Protection on Friday, October 6, 2000 on Part II: "The Future of the Interactive Television Services Marketplace: What Should Consumers Expect?" Members have requested an opportunity to submit additional questions for the record. Please respond to the attached questions no later than November 20, 2000.

If you have any questions concerning any aspect of your testimony, please contact Kelly Zerzan or Linda Bloss-Baum of the Commerce Committee staff at (202) 226-2424.

Sincerely,

W.J. "Billy" Tauzin
Chairman
Subcommittee on Telecommunications, Trade, and Consumer Protection

Attachments

cc: The Honorable Edward J. Markey
Ranking Minority Member
Subcommittee on Telecommunications, Trade, and Consumer Protection

Questions for the Record Offered by Ms. McCarthy

QUESTION: Are there any privacy issues raised by the advent of interactive television? Can set-top boxes collect data on the viewing and purchasing habits of consumers? If so, what will be done with that data? Will consumers be told that it is being collected and how it is being used?

Testimony of Lowell J. Gray
Subcommittee on Telecommunications, Trade & Consumer Protection
Committee on Commerce
"The Future of Interactive Television: What Should Consumers Expect"
October 6, 2000

Re: Question for the Record Offered by Ms. McCarthy

Yes, there are substantial privacy issues raised by the advent of interactive television. Digital set-top boxes are high-performance computer devices that can be programmed for an unlimited variety of data processing tasks. All information about interactive television viewer behavior (program selection, 2-way interactive responses, etc.) can be stored and forwarded under the direction of the system operator. System operators will sell this data for profit and also use it to dynamically shape the viewer experience. Without regulatory intervention and a competitive market offering real choice, consumers will not be informed about what is being collected and how it is being used. This is already true today: look at the widespread use of cookies and 1 pixel hidden images for secretly tracking consumer behavior on the Internet; only the most sophisticated technology-savvy users have the means to detect and deal with these privacy intrusions.

Respectfully submitted,

Lowell Gray

Lowell Gray
General Manager
Shore.Net, a PRIMUS Company
November 24, 2000

ONE HUNDRED SIXTH CONGRESS

TOM BLILEY, VIRGINIA CHAIRMAN

W.J. "BILLY" TAUZIN, LOUISIANA
MICHAEL G. OXLEY, OHIO
MICHAEL BILIRAKIS, FLORIDA
JOE BARTON, TEXAS
FRED UPTON, MICHIGAN
CLIFF STEARNS, FLORIDA
PAUL E. GILLMOR, OHIO
JAMES C. GREENWOOD, PENNSYLVANIA
CHRISTOPHER COX, CALIFORNIA
NATHAN DEAL, GEORGIA
STEVE LARGENT, OKLAHOMA
RICHARD BURR, NORTH CAROLINA
BRIAN P. BILBRAY, CALIFORNIA
ED WHITFIELD, KENTUCKY
GREG GANSKE, IOWA
CHARLIE NORWOOD, GEORGIA
TOM A. COBURN, OKLAHOMA
RICK LAZIO, NEW YORK
BARBARA CUBIN, WYOMING
JAMES E. ROGAN, CALIFORNIA
JOHN SHIMKUS, ILLINOIS
HEATHER WILSON, NEW MEXICO
JOHN B. SHADEGG, ARIZONA
CHARLES W. "CHIP" PICKERING, MISSISSIPPI
VITO FOSSELLA, NEW YORK
ROY BLUNT, MISSOURI
ED BRYANT, TENNESSEE
ROBERT L. EHRLICH, JR., MARYLAND

JOHN D. DINGELL, MICHIGAN
HENRY A. WAXMAN, CALIFORNIA
EDWARD J. MARKEY, MASSACHUSETTS
RALPH M. HALL, TEXAS
RICK BOUCHER, VIRGINIA
EDOLPHUS TOWNS, NEW YORK
FRANK PALLONE, JR., NEW JERSEY
SHERROD BROWN, OHIO
BART GORDON, TENNESSEE
PETER DEUTSCH, FLORIDA
BOBBY L. RUSH, ILLINOIS
ANNA G. ESHOO, CALIFORNIA
RON KLINK, PENNSYLVANIA
BART STUPAK, MICHIGAN
ELIOT L. ENGEL, NEW YORK
THOMAS C. SAWYER, OHIO
ALBERT R. WYNN, MARYLAND
GENE GREEN, TEXAS
KAREN McCARTHY, MISSOURI
TED STRICKLAND, OHIO
DIANA DEGETTE, COLORADO
THOMAS M. BARRETT, WISCONSIN
BILL LUTHER, MINNESOTA
LOIS CAPPS, CALIFORNIA

JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

November 6, 2000

Ms. Maggie Wilderotter
President and CEO
Wink
1001 Marina Village Parkway
Alameda, CA 94501

Dear Ms. Wilderotter:

Thank you for testifying before the Subcommittee on Telecommunications, Trade, and Consumer Protection on Friday, October 6, 2000 on Part II: "The Future of the Interactive Television Services Marketplace: What Should Consumers Expect?" Members have requested an opportunity to submit additional questions for the record. Please respond to the attached questions no later than November 20, 2000.

If you have any questions concerning any aspect of your testimony, please contact Kelly Zerzan or Linda Bloss-Baum of the Commerce Committee staff at (202) 226-2424.

Sincerely,

W.J. "Billy" Tauzin
Chairman
Subcommittee on Telecommunications, Trade, and Consumer Protection

Attachments

cc: The Honorable Edward J. Markey
Ranking Minority Member
Subcommittee on Telecommunications, Trade, and Consumer Protection

Questions for the Record Offered by Ms. McCarthy

QUESTION: Are there any privacy issues raised by the advent of interactive television? Can set-top boxes collect data on the viewing and purchasing habits of consumers? If so, what will be done with that data? Will consumers be told that it is being collected and how it is being used?

November 20, 2000

Karen McCarthy
U.S. House of Representatives
Committee on Commerce
Room 2125 Rayburn House Office Building
Washington,DC 20515

Dear Ms.McCarthy:

Thank you for the opportunity to respond to your questions about privacy in the interactive television industry. I respectfully submit the following correspondence for the record:

Are there any privacy issues raised by the advent of interactive television?
Set-top box technology has allowed cable operators access to customer information for many years. In keeping with section 631 of the Cable Communication Policy Act of 1984, cable operators are required to inform customers of the nature of personally identifiable customer information that they collect, and of the nature of the use that they make of such information. Interactive television technology makes it possible for set-top boxes to be used by consumers to make purchases and to respond to non-purchase offers that are presented by advertisers. The data generated as a result of these requests is collected by Wink in accordance with our partnership agreements. Our partnership agreements with various cable operators adhere to the legal obligations specified in the noted policy act.

Can set-top boxes collect data on the viewing and purchasing habits of consumers?
While it is possible for cable operators to collect specific data on the viewing habits of consumers via current set-top box technology, data regarding purchases/requests for information made via interactive television cannot be gleaned by the cable system operator. Data that we do collect for the purpose of processing consumer orders, (purchasing/request for information) are aggregated by market or category for reporting and analysis. As a service provider to the cable industry, Wink's responsibility is to adhere to the privacy practices and legislation governing our clients (cable operators). We are entrusted with personal information regarding cable customers with restrictions from the cable operators, following the guidelines set out in the Cable Communications Policy Act of 1984. In addition to this standard practice, Wink has lead the industry by adopting and practicing internal privacy policies related to personally identifiable information. One such policy is our "Guidelines for the Fair Treatment of Viewers Using Wink". This is a clause included in all of our contracts with advertisers that use Wink to enhance their commercials. In it we state that "Data collected without specific authorization by the viewer shall never be reported by Wink in a manner that identifies such data to the household or individual providing it". Viewers give

soy-based inks 30% pcw 60% recycled 1001 Marina Village Parkway • Alameda, California 94501 USA • Telephone 1-510-337-2950 • Fax 1-510-337-2960

permission to release personal information to an advertiser when they place an order or request for information using their remote control. Our company web site references our privacy policies stating that "customer information will not be released by Wink to third parties...unless a customer has authorized Wink to do so for the purpose of processing an order".

If so, what will be done with that data?
The data that Wink collects from viewer use of interactive television are primarily data used to process purchases/requests for information. Any analysis that is culled from these data is in the form of aggregated reports. This aggregated data is shared with our clients (cable operators, broadcast and cable networks or specific advertiser) who generated the responses. The spirit of this data is similar to any retail tracking of sales. Aggregated data can help identify improvements in service or products that would be beneficial to the consumer, or lead to improvements in how advertisers spend their advertising budgets and/or communicate a product's benefits to consumers. It is worth repeating that no personally identifiable information is associated with this data, and that even the aggregated data is only shared with the client, network and distribution channel that generated the responses.

Will consumers be told that it is being collected and how it is being used?
Under the Cable Communication Policy Act of 1984, cable operators are required to inform customers of the nature of personally identifiable customer information that they collect, and of the nature of the use that they make of such information.

The interactive television industry is a developing technology that is many years out from realizing its full potential. Our compliance with standing consumer privacy legislation and stance toward maintaining the security of consumer information will help our service become accepted and trusted. We believe that any additional regulation would be premature given the industry's early stage of development.

Sincerely,

Maggie Wilderotter
President and CEO
Wink Communications, Inc.

cc: Tom Bliley, Chairman, Commerce Committee
John D Dingell, Ranking Minority Member, Commerce Committee
W.J. "Billy" Tauzin, Chairman
Subcommittee on Telecommunications, Trade and Consumer Protection
The Honorable Edward J. Markey, Ranking Minority Member
Subcommittee on Telecommunications, Trade and Consumer Protection

ONE HUNDRED SIXTH CONGRESS

TOM BLILEY, VIRGINIA CHAIRMAN

W.J. "BILLY" TAUZIN, LOUISIANA
MICHAEL G. OXLEY, OHIO
MICHAEL BILIRAKIS, FLORIDA
JOE BARTON, TEXAS
FRED UPTON, MICHIGAN
CLIFF STEARNS, FLORIDA
PAUL E. GILLMOR, OHIO
JAMES C. GREENWOOD, PENNSYLVANIA
CHRISTOPHER COX, CALIFORNIA
NATHAN DEAL, GEORGIA
STEVE LARGENT, OKLAHOMA
RICHARD BURR, NORTH CAROLINA
BRIAN P. BILBRAY, CALIFORNIA
ED WHITFIELD, KENTUCKY
GREG GANSKE, IOWA
CHARLIE NORWOOD, GEORGIA
TOM A. COBURN, OKLAHOMA
RICK LAZIO, NEW YORK
BARBARA CUBIN, WYOMING
JAMES E. ROGAN, CALIFORNIA
JOHN SHIMKUS, ILLINOIS
HEATHER WILSON, NEW MEXICO
JOHN B. SHADEGG, ARIZONA
CHARLES W. "CHIP" PICKERING, MISSISSIPPI
VITO FOSSELLA, NEW YORK
ROY BLUNT, MISSOURI
ED BRYANT, TENNESSEE
ROBERT L. EHRLICH, JR., MARYLAND

JOHN D. DINGELL, MICHIGAN
HENRY A. WAXMAN, CALIFORNIA
EDWARD J. MARKEY, MASSACHUSETTS
RALPH M. HALL, TEXAS
RICK BOUCHER, VIRGINIA
EDOLPHUS TOWNS, NEW YORK
FRANK PALLONE, JR., NEW JERSEY
SHERROD BROWN, OHIO
BART GORDON, TENNESSEE
PETER DEUTSCH, FLORIDA
BOBBY L. RUSH, ILLINOIS
ANNA G. ESHOO, CALIFORNIA
RON KLINK, PENNSYLVANIA
BART STUPAK, MICHIGAN
ELIOT L. ENGEL, NEW YORK
THOMAS C. SAWYER, OHIO
ALBERT R. WYNN, MARYLAND
GENE GREEN, TEXAS
KAREN McCARTHY, MISSOURI
TED STRICKLAND, OHIO
DIANA DeGETTE, COLORADO
THOMAS M. BARRETT, WISCONSIN
BILL LUTHER, MINNESOTA
LOIS CAPPS, CALIFORNIA

JAMES E. DERDERIAN, CHIEF OF STAFF

U.S. House of Representatives
Committee on Commerce
Room 2125, Rayburn House Office Building
Washington, DC 20515–6115

November 6, 2000

Mr. Louis M. Meisinger
Executive Vice President & General Counsel
The Walt Disney Company
500 South Buena Vista Street
Burbank, CA 91521-0930

Dear Mr. Meisinger:

Thank you for testifying before the Subcommittee on Telecommunications, Trade, and Consumer Protection on Friday, October 6, 2000 on Part II: "The Future of the Interactive Television Services Marketplace: What Should Consumers Expect?" Members have requested an opportunity to submit additional questions for the record. Please respond to the attached questions no later than November 20, 2000.

If you have any questions concerning any aspect of your testimony, please contact Kelly Zerzan or Linda Bloss-Baum of the Commerce Committee staff at (202) 226-2424.

Sincerely,

Billy Tauzin

W.J. "Billy" Tauzin
Chairman
Subcommittee on Telecommunications, Trade, and Consumer Protection

Attachments

cc: The Honorable Edward J. Markey
Ranking Minority Member
Subcommittee on Telecommunications, Trade, and Consumer Protection

Questions for the Record Offered by Ms. McCarthy

QUESTION: Are there any privacy issues raised by the advent of interactive television? Can set-top boxes collect data on the viewing and purchasing habits of consumers? If so, what will be done with that data? Will consumers be told that it is being collected and how it is being used?

Louis M. Meisinger
Executive Vice President and General Counsel

November 20, 2000

VIA FAX

The Honorable W. J. "Billy" Tauzin
Chairman
Subcommittee on Telecommunications, Trade,
And Consumer Protection
U. S. House of Representatives
Room 2125, Rayburn House Office Building
Washington, D.C. 20515-6115

Dear Mr. Chairman:

I am pleased to respond to Congresswoman McCarthy's question stemming from my October 6, 2000 testimony before your subcommittee.

Any interactive medium that gives the consumer the opportunity to register their preferences raises questions regarding privacy. Interactive Television is no exception. The cable television operator enjoys absolute control over the entire system of Interactive Television and will be in a position to collect data on all viewing and purchasing habits of consumers. It will be up to the operator to decide whether consumers are informed that their responses are being monitored and how those responses may be used in the future. This fact is a concern both for consumers and for independent content/commerce providers seeking to provide consumers with content and commerce competitive to that owned by the cable television system operator. Access to consumer information from all channels and sites will give the cable system operator an unfair advantage over all other content/commerce providers and, necessarily, limit consumer choice.

In comments filed with regulatory agencies, The Walt Disney Company has urged that limitations be placed on the cable system operator's collection and use of such data. Without question, this subject would be an appropriate matter for further review by the Telecommunications Subcommittee.

If you should have any further questions on this subject, please don't hesitate to contact me.

Sincerely,

Louis Meisinger

cc: The Honorable Edward J. Markey
Ranking Minority Member
Subcommittee on Telecommunications, Trade, and Consumer Protection

427 CANNON HOUSE OFFICE BUILDING
WASHINGTON, DC 20515
(202) 225-5031

923 22ND AVENUE
MERIDIAN, MS 39301
(601) 693-6581

110-D AIRPORT ROAD
PEARL, MS 39208
(601) 932-2410

2090 AIRPORT ROAD, SUITE D
COLUMBUS, MS 39701
(601) 327-2766

CHIP PICKERING
THIRD DISTRICT, MISSISSIPPI

Congress of the United States
House of Representatives
Washington, DC 20515–2403

COMMITTEES:
COMMERCE
SUBCOMMITTEES:
TELECOMMUNICATIONS, TRADE AND CONSUMER PROTECTION
ENERGY AND POWER
HEALTH AND ENVIRONMENT

ASSISTANT WHIP AT LARGE
POLICY COMMITTEE

October 27, 2000

Mr. Chairman:

Enclosed are several items I would like to be submitted for the record for the TTCP hearing held on September 27, 2000. In addition, I have enclosed questions for Mr. Steve Case that follow up on my questions to him during the hearing.

If you have any questions, please contact my staff Mike Chappell at 225-5031.

Sincerely,

Chip Pickering

Internet: http://www.house.gov/pickering/

Safeguarding Our Children - United Mothers

October 5, 2000

Honorable Charles "Chip" Pickering
427 Cannon House Office Building
Washington, D.C. 20215

VIA FAX: Mike Chappell
202 255 5797

Dear Congressman Pickering,

My name is Debbie Mahoney, and I am the founder of Safeguarding Our Children - United Mothers (SOC-UM), a non-profit child abuse prevention and education organization. I appreciate the concern which you expressed at last week's hearing on behalf of protecting our children from unnecessary risks in the misuse of Instant Messaging. I have been following the media coverage of the AOL-Time Warner merger with interest because it has touched on a subject very important to me: instant messaging. While our organization considers the Internet to be an overwhelmingly positive experience for all its users, including children, we are very much aware that there is a dark side. We believe it's essential that effective safeguards exist to deal with its risky areas.

Kids love Instant Messaging. It's an instant, virtual conversation. Their friends (aka : " buddies") can see when they are online, so they know they can reach them instantaneously. It's set up so that they can have a completely private conversation that no one can see, listen to, or learn about later. Unfortunately, this can also include risky conversations with predators and others who may not have kids' best interests in mind.

However, the media reporting on instant messaging seems to be missing a few critical facts. I truly believe that unless parents and concerned adults know about the misuse of instant messaging, we will have an even bigger problem on our hands as the medium and its uses continue to expand. In the current instant messaging environment, children are already encountering risks and the risks are real. Of the almost 500 traveler cases reported to the FBI from October 1999, to today, 90% involve some form of instant messaging, email, and chat. However, while I have concerns about the risks, I also believe that there can be effective solutions.

One of the greatest tools parents can employ is filtering, monitoring, and blocking software, and currently they are simply not available to address instant messaging applications. Later, I will be submitting a "white paper" entitled: *Open Standards: Ensuring a Protective Shield for Kids Using Instant Messaging*; in it I will describe in more detail how the role of open standards should be the leading element in facilitating

1852 W. 11th St., 191, • Tracy, CA 95376• (209)832-5703• fax:(603)719-8794• soc-um@soc-um.org

child protection within IM. Additionally, I will elaborate on the role technology can play. However the key to technological options is opening up standards so filtering and blocking companies can develop effective tools for parents to help them deal with the risks of IM.

Today, with one provider owning between 80 and 90 % of the IM market, no one in the industry can provide these child protection software solutions without their help and cooperation. But even access to the proprietary protocols of the leading IM application won't be enough. Without open standards, a solution, which works with AOL's AIM and ICQ (the two most popular) still won't work with any new and emerging IM applications, and there are several. It's also important to consider that kids and predators will find ways to get around controls that exist on one service, but will be less able to do so if the controls span the entire IM industry.

It's important to recognize that AOL's Instant Messaging, within its core service, has Parental Controls. However, the leading application, ICQ, also owned by AOL, doesn't have any Parental Controls. What I'm suggesting is that similar controls, but with more and better features and flexibility and built around open standards, should be available across the board.

There is no need for IM to be such a risky medium for children. There are things which can be done, and which have already been done with email, Web sites and other areas of the Internet –technological solutions, parental awareness and involvement, and effectively trained and supported law enforcement – to complete the protective shield of helping kids stay safe online. Why are there over 100 suppliers of competitive filtering, blocking, and monitoring solutions that address these areas? It's because these environments are built on open standards.

I certainly don't believe that technology is a panacea. It is not the total solution and it's not perfect. In fact, I believe very strongly that there are at least four essential ingredients to which we must all commit:

- Better awareness on the part of parents and concerned adults, responsible ISPs and others in industry
- More effective training and funding for specialized law enforcement involved in investigating and dealing with cases
- More programs, like "The Internet and Your Child" –where industry, parents
- , and law enforcement work together to improve awareness about these kinds of problems and devise solutions for communities
- And, finally, and essentially, open standards so that the filtering companies have the means necessary to play their role as part of the shield of protection for our children when they are using Instant Messaging.

I just don't get it. Why are open, interoperable standards a complex issue? I'm a consumer. Computers, telephones and VCR's have standards. Cars parts are

interchangeable. Every consumer I know, including me, relies on industry-developed standards to ensure that we have choice in the products we buy. Open standards mean competition. Competition means more choice and better options for consumers.

If participants in almost every other field in the world can agree on standards for the sake of convenience, improved functionality, more choice, and better range of features for customers, surely, the leading players in the IM field can agree to a convention that will help to protect children from predators.

Open standards are also the rule on most of the Internet. I've recently heard that a group of new instant messaging companies wants AOL to agree to adopt an open standard for IM; I know that the filtering companies need that too – so they can do their part.

Today, a user can purchase computer virus software programs to protect their programs and data. Such protection for our children against predators isn't available because of the lack of open standards. Until we adopt open standards so safeguards can be implemented, there will never be effective, easy to use, affordable solutions that will work across multiple instant messaging systems. This is obviously unacceptable. Our children are far too important to let this situation continue.

It is my hope that this letter will not be seen as a call to legislation or regulation of the Internet – in fact, nothing is further from my concept of an effective solution. As part of the shield to protect children, one of the first lines of defense for parents is technology, which can filter, block, and monitor IM content, but amazingly, it remains unavailable today.

The safety of our children should be important enough for policy makers to inquire of AOL and Time Warner why they aren't stepping up to the plate to join the other instant messaging companies to develop and adopt open standards. AOL is the IM market leader. As the market leader, I would hope that AOL would lead the industry toward open standards for the protection of children.

Surely the software we use for the protection of our children should be at least as flexible – and as widely available—as the software we use to protect our computer systems. We can restore lost data to a computer, but we cannot restore lost innocence to a child.

Sincerely,

Debbie Mahoney, founder

1852 W. 11th St., 191,• Tracy, CA 95376• (209)832-5703• fax:(603)719-8794• soc-um@soc-um.org

October 4, 2000

The Honorable Charles "Chip" Pickering
427 Cannon House Office Building
Washington, DC 20515

Dear Congressman Pickering:

I am writing you in response to a call we received from your office yesterday regarding statements made by AOL Chairman Steve Case during his testimony September 27 before the House Commerce Committee's hearing on the AOL-Time-Warner merger.

Our goal in responding to your inquiry is to provide the facts related to our filtering software and give you some history on our relationship with AOL, other IM providers and the instant messaging issue in general. There seems to be some misunderstanding among those following this issue. We believe it is important that you and your colleagues understand the actual state of play regarding the interoperability of AOL's instant messaging services with child safety software such as ours.

Mr. Case indicated that, in addition to AOL's own Parental Controls, there are software filtering tools like Net Nanny that work with instant messaging applications. He also said that Net Nanny worked better with AOL's instant messenger application than with Microsoft's.

The fact is that, today, our software works with neither service.

As the oldest and one of the most well respected online child safety software vendors, we have been developing software solutions to protect families for more than five years. In the beginning, we specifically designed Net Nanny in response to a case involving a suspected pedophile soliciting a 14-year-old child in a chat room. We did so knowing that if parents had the ability to prevent personal information and suggestive terminology from being sent to, or by, their children, they would be able to help protect them against physical and emotional harm. We were very successful in this endeavor, and continued to experience success as long as we were able to tap into the standardized protocols that existed within chat room services.

Net Nanny expanded its scope in 1995 to include control over access to pornographic, hate, drug and violence-related web sites and newsgroups. We also added in other controls such as warning messages, monitoring and activity logs. But we have always believed that children face the greatest risk by corresponding with live people in interactive environments such as instant messaging and chat. It is here that children need a shield against suggestive and explicit language and checks to prevent them from exchanging personal information with predators such as name, age, address, telephone number and school name - information that allows predators (often masquerading as contemporaries and "friends") to locate kids and kids to contact predators. Protecting children in these areas is our number one priority. Thus, we have spent the better part

of three years trying to get from AOL (the dominant IM provider) the information we need to supply the protective tools that are in demand. To date, we have been unsuccessful.

Instant messaging creates unique problems for child safety software. We created software that worked well with open architectures, such as Internet Relay Chat (IRC) and the ICQ service, but as the medium evolved to include proprietary solutions with their own unique architectures, we found it increasingly difficult and inefficient to adapt our software to new IM services.

Our software solution used to work extremely well with ICQ, garnering great praise from child safety advocates, until AOL purchased ICQ and then, regrettably, we found that it was no longer compatible. While we still work successfully with the IRC standard for chat and instant messaging, our software's inability to work with the ICQ service, leaves children, a majority among ICQ's 75+ million users, at risk. Net Nanny software has never interoperated with AOL's AIM, or any of the other recent IM entrants, including Microsoft.

The chief obstacle we face is the lack of an industry-wide open standard that we can use to develop our software for instant messaging.

We know that instant messaging is an extremely popular application for children. We also know, through our continuing work with law enforcement, that it is the #1 tool used by sexual predators to lure children into physical and emotional exploitation. (Source: FBI's Innocent Images). We have been trying to get technical cooperation from IM providers so we can continue to give parents the tools they need to protect their children in instant messaging. We have commitments from other IM providers, including Microsoft, to allow interoperability of our software with their services. But, as yet, we do not have a commitment from AOL. Although, last week, following Mr. Case's comments, we contacted AOL and they expressed a willingness to re-assess our requests. They have not made any promises as to the outcome of their re-assessment, so at this point, we can only hope.

We are encouraged by our recent conversation with AOL, because it is key to our mission and our market viability that we work with the dominant provider of instant messaging. But it is important to stress that this is not enough. Protective solutions that span the entire instant messaging market are necessary. Kids are notorious for trying to get around the controls that parents attempt to put in place, and they are more savvy than their parents AND most of the Internet providers that offer to do the job of protecting kids for parents. If children want to communicate with someone and do so freely, they will find a way to do it. If they don't know how, the predators will show them how and that means finding programs that allow them to do it "under the radar" of their parents or their IM provider.

This underscores the critical need for industry-wide open standards for instant messaging. With industry-wide open standards, regardless of which IM application kids use, protections will be in place that follow them wherever they go. This will help shield children from receiving suggestive and explicit language, and it will help prevent them from exchanging personal information with predators, such as name, age, address, telephone number and school name — information that allows predators to locate kids and kids to contact predators.

We are a small, albeit savvy, company. But we don't have the resources to write a specific software solution for each of the 10+ IM applications that exist today. Industry-wide interoperability will give us the ability to write one "standardized" solution, based on industry-accepted technical protocols and regular cooperation with IM vendors. This is how we operate with open-standards-based Web, e-mail, newsgroups and Internet Relay Chat. If we had the same

open standards in instant messaging, we are confident that we could provide equally effective tools to help parents keep their kids and their families' personal information safe.

Unfortunately, this is not the environment we face today.

And because we are a security company that is also developing software solutions for the business environment, we recognize the emerging demand for instant messaging protections within the business-to-business and business-to-consumer instant messaging environment as well. All of this further demonstrates the importance of achieving an open standards environment – sooner rather than later.

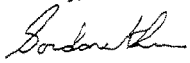
We are on the threshold of introducing a new version of our Net Nanny product. Unfortunately, it will be shipped this fall without protective support for a market of 90 million+ IM users, the majority of which are children and youth. We simply can't delay the software's release, while waiting for the dominant IM provider and the other IM providers to achieve an IM open standard. It isn't hard to understand how damaging this situation is to our company in terms of market viability and to the millions of families that can't benefit from a solution that would help them keep their kids safe.

We have been, and will continue to be, a committed member of the Internet industry. We have been a leader in supporting national and international Internet education initiatives, along with other concerned Internet companies, including AOL and Microsoft, and grassroots training programs in cooperation with law enforcement, corporate computer specialists, child advocates and other volunteers. We are also a proud member of the Congressional Internet Caucus Advisory Committee. It is vital that we all work together to achieve an Internet environment that encourages parental education and empowerment and that we pay attention to the many different voices that are working toward child safety online. But we must do so with accuracy and a commitment to do what is necessary to achieve this not only in word, but also in deed.

We look forward to the day when we can again successfully offer a solution to help protect the tens of millions of children who remain vulnerable when they use instant messaging and we hope that those who have influence will make this a priority as we all work toward supporting and expanding the integrity of the Internet. Relevant and necessary solutions, that successfully solve problems, require innovation. Innovation requires an environment that respects free market principles and promotes cooperation within a competitive environment.

It should not be a matter of *eventually* achieving this; it should be a matter of making it a priority to achieve it *now*, to protect our children.

Sincerely,



Gordon Ross
President and CEO

cc: Rep. W.J. "Billy" Tauzin
Rep. Ed Markey
Rep. Steve Largent
Sen. Conrad Burns

Excite @ Home

450 Broadway Street
Redwood City, CA 94063
tel: 650.556.5000
fax: 650.556.5100
net: www.excitehome.net

September 28, 2000

The Honorable Charles "Chip" Pickering
427 Cannon HOB
Washington, DC 20515

Dear Representative Pickering:

Thank you so much for your leadership on the Telecommunications Subcommittee hearing on "The Future of Interactive Television" held on Wednesday. I know this time of year is very hectic with many demands being placed on your time so your attendance was greatly appreciated.

The hearing was an important opportunity for Members of Congress to ask direct questions and hear relevant testimony from AOL & Time Warner on what will be, if approved by the regulators, the largest Internet and multimedia company in the world.

One specific point that you brought up at the hearing I believe needs a bit of clarification. You asked a very important question to AOL Chairman Steve Case about the filtering tool Net Nanny. As you know, Net Nanny provides parents with important tools to ensure that the Internet in their homes is safe for their children. Mr. Case's answer to your question regarding Net Nanny was not entirely accurate. Net Nanny, contrary to Mr. Case's claims, has been rebuffed in its attempts to work with AOL and develop Instant Messaging filtering software. AOL is not currently using Net Nanny as a filtering tool for Instant Messaging. I would be happy to provide you with additional information if you would like to get a written clarification from Mr. Case.

Again, thank you for your leadership on this important issue.

Sincerely,

Jon Englund
VP – Policy and Government Affairs
Excite@Home

October 23, 2000

Nika Herford
VP, Public Affairs
Net Nanny Software, Inc.
15831 NE 8th, Suite 200
Bellevue, WA 98008

Via Fax: 425-688-3010
Email: NikaH@NetNanny.com

Dear Nika:

Thank you for your letter inquiring about ways that we can work together to help ensure that children will continue to have safe and age-appropriate experiences while using our online services.

As you know, protecting children's online safety has always been one of our highest priorities at AOL. That's why we've made our comprehensive Parental Controls an integrated part of AOL's subscription service since 1994 and why we've devoted significant resources to educating parents about how to use those controls. Like you, we've also worked closely with Congress and the Federal Trade Commission to make sure that strong legal protections exist for children's privacy and safety online.

The reason for both of our companies' deep commitments in this area is clear: we strongly share Net Nanny's belief that in order for this medium to reach its potential, we must ensure that effective tools are readily available to parents to help guide and protect their children online.

Thus to address the specific concerns raised in your letter, we brought together a team of AOL's top technical and programming experts and have spent much of the last week exploring potential ways to integrate your software in a way that protects our users' privacy and security.

We're pleased to report that the result of those efforts should provide both immediate and longer-term solutions that will allow Net Nanny's software to operate with AOL Instant Messenger (AIM) and our ICQ client.

In the short term, our engineers believe that the standard Microsoft Windows text controls can be used with minimal effort to intercept and block any AIM messages that do not meet Net Nanny's screening standards. As you know, Net Nanny works with standard Windows text controls, and AIM also supports standard Windows message that is supported by AIM: WM_GET_TEXT in the ATE window.

Similarly, ICQ also uses standard Windows controls to display and edit messages, and our engineers believe that with minimal technical changes, Net Nanny should be able to filter its messages using standard Windows API calls. This method of working with ICQ is well tested with the ICQ client and is already being done by at least one third party software vendor to translate the ICQ user interface language.

In either case, if you would like additional technical advice on how best to implement such screening for Net Nanny by using these existing Window-based text features, please feel free to contact Mark Donner at (703) 265-2551 or by email at Donnermrk@aol.com.

As a longer-term solution, we're pleased to tell you that when we release the new version of AIM in the spring, an API will be available for that version that will allow Net Nanny to filter AIM text before it is displayed by the client. While Net Nanny should be able to implement immediate message filtering without that API, we're pleased to be able to take these additional steps to be of assistance. We will inform you as soon as that API is available.

As you know, the AOL client for our proprietary service already includes robust Parental Controls that allow our members to create a customized online environment for each of their children based on each child's age and maturity level. That industry-leading technology is built right into the AOL client and widely used by most of our families, reducing the need for additional screening software.

In addition, as the AOL subscription service is frequently a target for hackers and spammers, providing Net Nanny, or any third party, with internal coding information and technical specifications would place the security and privacy of our members at risk. Thus, we would suggest that you encourage your users to take advantage of AOL's powerful built-in Parental Controls when they use our subscription service.

We look forward to continuing our work directly with you on these issues and on other cooperative industry efforts to empower, educate and protect children online. I hope this letter helps address the concerns that you raised and please feel free to contact me if you have any other questions.

Best regards,

Ginny Wydler

Ginny Wydler
Executive Director, Standards & Policy
Integrity Assurance
America Online, Inc.

Cc: Kurt Rolland - VP, Development (kurtr@netnanny.com)

○