

**DOMINANCE ON THE GROUND: CABLE
COMPETITION AND THE AT&T-COMCAST MERGER**

HEARING

BEFORE THE

SUBCOMMITTEE ON ANTITRUST,
BUSINESS RIGHTS, AND COMPETITION

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED SEVENTH CONGRESS

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**DOMINANCE ON THE GROUND:
CABLE COMPETITION AND THE
AT&T-COMCAST MERGER**

TUESDAY, APRIL 23, 2002

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, BUSINESS RIGHTS
AND COMPETITION,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 2:03 p.m., in room SD-226, Dirksen Senate Office Building, Hon. Herb Kohl, Chairman of the Subcommittee, presiding.

Present: Senators Kohl, DeWine, Hatch, Specter, and Brownback.

**OPENING STATEMENT OF HON. HERBERT KOHL, A U.S.
SENATOR FROM THE STATE OF WISCONSIN**

Chairman KOHL. This subcommittee will come to order.

Today, we examine the merger between Comcast and AT&T Broadband. This is the end of AT&T as we know it, but a new AT&T, a wide-ranging, powerful cable monopoly, is emerging. Just as the pre-1984 AT&T controlled the phone line, the equipment, and the content, this new cable giant has the potential to wield similar control over the cable line, the equipment, and the content sent to more than 22 million American homes. The creation of this new and even broader communications conglomerate may pose the same dangers to consumers and to innovation that led to the break-up of the old AT&T monopoly.

As this merger indicates, big changes are coming to the cable industry, but one thing remains the same: cable rates continue to rise, about triple the rate of inflation since the passage of the 1996 Telecommunications Act, and more than 7 percent last year.

Make no mistake, if this merger is approved, AT&T-Comcast will become the Nation's largest cable company, providing television signals to about 30 percent of the Nation's homes. Since this merger was announced, we have been asking ourselves over and over again, how is this good for consumers. We know it is good for the companies, but what does it do for the average consumer?

Ten years from now, if trends like this merger continue, consumers may find almost all of their personal communications and information dominated by a very few large media companies. Their phones, their movies, their Internet, their cable, their link to the outside world will be priced, processed and packaged by one company that faces virtually no competition.

While the Echostar-DirecTV deal has faced a barrage of antitrust questions, this deal has not. In fact, it appears there are few, if any, traditional antitrust concerns raised by it. Nevertheless, there are some serious issues that need to be looked at.

Big is not necessarily bad, but we cannot ignore the potential for a cable company as big as AT&T-Comcast to throw its weight around. We should be frightened about this future, and we need to be thinking about imposing meaningful conditions on this merger to make it tolerable for consumers. Therefore, before we can fully understand the impact of this merger on consumers, we need answers to five key questions.

First, the parties have promised that they will aggressively continue efforts to offer cable telephone service in more markets. This competition to the local telephone monopoly is sorely needed, so how can we be sure that they will keep their promise?

Two, we cannot ignore that such a large company will affect and perhaps control programming. Small, independent media voices will have even a harder time gaining access to the video airwaves. For the last 10 years, we have had rules to guard against cable companies leveraging their monopolies and blocking access to programming to competitors.

These program access rules are expiring this year. Now more than ever, in the face of all of this consolidation, these rules need to be extended. Why do the parties oppose extending these rules?

Three, the parties have promised that they will let consumers choose who will provide them their Internet, but they have been unwilling to make the promise binding. AOL-Time Warner made the promise binding as a condition of their merger. Why shouldn't these parties?

Four, after recent court decisions, the long-established cable ownership caps are currently under review by the FCC. With a seemingly unrelenting wave of media mergers underway, reasonable ownership limits are the last line of defense against excessive concentration in this industry. Will the FCC live up to responsibilities as guardians of diversity of expression in our video marketplace?

Finally, 6 years ago we passed a law mandating a competitive market for the so-called set-top box, the device that delivers the cable signal to the consumer. In the digital age, controlling technology and software is the ultimate power. All of us remember the time when there was only one type of telephone, a clunky and rudimentary device. But when we broke up that monopoly, innovation then flourished. Only a truly competitive set-top box market can unlock the type of innovation that brought us cell phones, faxes, and the Internet itself. We required a competitive set-top box market 6 years ago. So what is going on here?

The answers to these questions and others are essential. We thank our distinguished panel of witnesses for testifying today and we look forward to your testimony.

[The prepared statement of Senator Kohl follows:]

STATEMENT OF HON. HERB KOHL, A U.S. SENATOR FROM THE
STATE OF WISCONSIN

Big changes are coming to the cable industry. Consolidation is picking up. Court rulings are reconfiguring the laws that govern the industry. New technology is blossoming. But one thing remains the same: cable rates continue to rise—about triple

the rate of inflation since the passage of the 1996 Telecommunications Act, and more than 7 percent last year.

Today we examine the merger between Comcast and AT&T Cable. If this merger is approved, AT&T and Comcast will become the Nation's largest cable company, providing television signals to about 30 percent of the Nation's homes. Three companies—AOL-Time Warner, Charter Communications and the new ATT-Comcast—will control 65 percent of the Nation's cable market. And, if this wasn't already enough, the only head-to-head competitors to cable in most areas—the satellite television companies Echostar and DirectTV—are also planning to merge, further reducing consumer choice.

While the Echostar-DirectTV deal has faced a barrage of antitrust questions, this deal has not. In fact, it appears that there are few if any traditional antitrust concerns raised by it. Nevertheless, there are some serious issues that need to be looked at. Big is not bad, but we can't ignore the potential for dominance in a cable company as big as ATT-Comcast will be.

Since this merger was announced, we have been asking ourselves over and over: how is this good for consumers? We know it's good for the companies—but what does it do for the average consumer? Ten years from now, if trends like this merger continue, consumers may find almost all of their personal communications and information dominated by a very few, large media conglomerates. Their phone, their movies, their Internet, their cable, their link to the outside world will be priced, processed and packaged for them by one company that faces virtually no competition.

Before we can fully understand the impact of this merger on consumers, we need answers to five key questions:

One, the parties have promised that they will aggressively continue efforts to offer cable telephone service in more markets. This competition to the local telephone monopoly is sorely needed. How can we be sure they will keep their promises?

Two, the parties have promised that they will let consumers choose who will provide them their Internet—but they have been unwilling to make the promise binding. AOL-Time Warner made the promise binding as a condition of their merger, why shouldn't these parties?

Three, we cannot ignore that such a large company will affect and maybe control programming. Small, independent media voices will have even a harder time gaining access to the video airwaves. For the last 10 years, we've had rules to guard against cable companies leveraging their monopolies and blocking access to programming to competitors. These program access rules are expiring this year. Now more than ever, in the face of all this consolidation, these rules need to be extended. Why do the parties oppose renewing these rules?

Four, 6 years ago we passed a law mandating a competitive market for the so called set-top box—the device that delivers the cable signal to the consumer. In the digital age, controlling the technology and software is the ultimate power. All of us remember the time when there was only one type of phone—a clunky and rudimentary device. But when we broke that monopoly, innovation flourished. Only a truly competitive set-top box market can unlock the type of innovation that brought us cell phones, faxes, and the Internet itself. We required a competitive set-top box market 6 years ago—what's going on here?

Finally, after recent court decisions, the long-established cable ownership caps are currently under review by the FCC. With a seeming unrelenting wave of media mergers under way, reasonable ownership limits are the last line of defense against excessive concentration in this industry. Will the FCC live up to responsibilities as guardians of diversity of expression in our video marketplace?

The answers to these questions are essential. I thank our distinguished panel of witnesses for testifying today and I look forward to their views.

Chairman KOHL. Senator DeWine.

**STATEMENT OF HON. MIKE DeWINE,
A U.S. SENATOR FROM THE STATE OF OHIO**

Senator DEWINE. Mr. Chairman, thank you very much for holding this hearing on this very important issue.

This afternoon, we will examine the proposed merger between two of the leading cable providers in the country, AT&T Broadband and Comcast Corporation. This merger would create an industry giant, as you have pointed out, serving over 27 million subscribers, more than double the size of the next largest cable company.

But, Mr. Chairman, despite its resulting size, this deal appears to avoid many of the traditional antitrust concerns raised by horizontal mergers because the companies in this case do not currently compete with each other in the delivery of video services. Accordingly, in regard to the delivery of video services, a merger between the two is probably not a violation of the Clayton Act test of the "substantial lessening of competition."

But the effects of this deal are not limited only to the video delivery market, and it cannot be examined in isolation. It occurs at the same time that the courts and to some extent the Federal Communications Commission are acting to significantly roll back restrictions on media consolidation.

This trend toward further media consolidation is troubling. Frankly, the regulators must pay close attention to the impact of consolidation, beyond just the standard antitrust analysis. Obviously, preserving vigorous competition is always important and will ensure that consumers receive affordable, high-quality products. However, it is also important that we ensure that information outlets in communities or regions of the country are not controlled by just a few players.

If one company were to own the cable franchise, several broadcast stations, and newspaper outlets in any one given community, the people of that community would suffer not only from a lack of competition, but in all likelihood they also would be exposed to a smaller range of opinions. This would be unacceptable in an era that has been dubbed as the "information age."

Mr. Chairman, in light of recent court decisions, the Federal Communications Commission needs to develop reasonable rules to protect this marketplace of ideas, and it must do so in a coherent fashion that will pass the scrutiny of the courts.

One such rule that they may need to reexamine that is particularly relevant to our hearing today is the cable ownership limit. The FCC must thoroughly examine cable ownership limits and establish an appropriate limit that would ensure healthy competition and a diverse marketplace. If they can't do it, then Congress will need to take a look at it.

Now, focusing again on the specifics of the deal we have before us today, there are competitive implications of this merger that I believe deserve examination. Perhaps the most important is the effect of the merger on the programming market.

As I have said, a combined AT&T-Comcast would control access to over 27 million customers. This customer base would become an extremely important outlet for programmers, increasing the pressure to obtain a spot on the AT&T-Comcast cable system. This would impose a challenge for those who offer new, independent programming.

These independent producers may not have the leverage of linking their product with more established programs. An independent programmer also may not have the financial backing to offer very low initial prices. This creates an obvious problem. The programmer more than ever needs the customer base of AT&T-Comcast, but does not necessarily have the leverage to strike a worthwhile deal. Thus, the increased size of the combined AT&T-

Comcast may make it more difficult for independent programmers, and this, I believe, we should be concerned about.

This increase in the market power of AT&T-Comcast also raises concerns in situations where the cable companies own programming. For example, Comcast owns the Outdoor Life Network. The combined company, with an expanded presence across more media markets, would likely be less willing to carry a similar network from an independent producer. This incentive to exclude independent programming, coupled with fewer programming outlets, might harm the ability of new programs to develop and then to survive.

However, we should acknowledge that these two companies have limited programming ownership. Along those lines, it is important that AT&T has confirmed publicly that it will divest its ownership interest in Time Warner Entertainment programming. I applaud them for that decision and look forward to the completion of that transaction.

The increased market power of AT&T-Comcast also could have an effect on the ability of competitors to gain access to programming. Depending on the competitive circumstances in a local market, the combined AT&T-Comcast might have enough negotiating power to demand exclusive rights to programming, therefore harming the ability of a satellite system or cable over-builder to compete. This obviously would be a very serious concern for consumers, since there is significant evidence that the existence of viable cable over-builders helps to lower prices.

Of course, increased purchasing power also might have a positive effect on prices. If AT&T-Comcast were able to drive down programming costs, it might be able to limit the seemingly endless rise of cable rates. This obviously would be of great benefit to consumers if, in fact, it happened.

One additional area of concern involved broadband, specifically the ability of consumers to choose an Internet service provider when they obtain broadband service from their cable company. When AOL and Time Warner merged, the Federal Trade Commission required the combined company to allow a range of competitive ISPs to provide service on their broadband network.

While the competitive dynamics of this deal differ from those in the AOL merger, this remains an important issue, and I look forward to hearing what plans the company has to ensure that their 27 million consumers will have a choice of ISP providers.

In addition, I look forward to hearing the parties' plans for rolling out broadband and voice services to consumers, and how this merger will help them speed this process. I am particularly interested in their plans for cable telephone service.

Mr. Chairman, I think it is fair to say that we have all been very disappointed in the amount of competition in the local phone service market since the passage of the 1996 Telecommunications Act. If this merger can speed competition in that area, it would be a big plus for consumers.

The AT&T-Comcast merger is an important one and it has the potential to reshape the competitive landscape of cable service in a number of significant ways. We have a very excellent panel today, Mr. Chairman, and I look forward to our discussion.

I thank the Chair.
Chairman KOHL. Thank you, Senator DeWine.
Now, we call on Senator Orrin Hatch from Utah.

**STATEMENT OF HON. ORRIN HATCH,
A U.S. SENATOR FROM THE STATE OF UTAH**

Senator HATCH. Well, thank you, Mr. Chairman. I commend you and Senator Dewine for your work on this committee and for holding this hearing to discuss the AT&T-Comcast merger.

This merger before us today follows a series of consolidation activities in the communications sector since the passage of the 1996 Telecommunications Act. Careful antitrust scrutiny is necessary where two of the five largest cable companies in the Nation plan to merge, and our inquiry should include the possible effects of this merger on related businesses and markets.

These include areas such as the deployment of broadband Internet service; the manufacture and design of cable set-top boxes, which could be the access point for all communications in the future; and the continued vitality of the video programming and Internet content markets.

Overall, this merger by itself does not appear to present the types of competitive concerns that have led me to be skeptical or critical of some other recent major media mergers.

For example, unlike the AOL-Time Warner merger, this transaction does not involve the aggregation of the enormous ownership of content with an online service provider and the cable pipes to deliver that content, creating powerful incentives to favor one's own content over competing content. Nor does the proposed AT&T-Comcast transaction involve the elimination of a direct competitor as does the pending Echostar-DirecTV merger.

It appears that this merger is largely free from these types of traditional antitrust concerns, and I would hope that this merger would not raise issues regarding content discrimination that leads to fewer choices of diverse content which I have found to be of great concern in past media mergers.

I should note that this merger does raise several broader policy questions for us to consider as policymakers. These largely center around potential limitations on consumers' access to rich and diverse content resulting from changes in the competitive landscape as divergence of technologies continues.

By means of the 1996 Telecommunications Act, Congress succeeded in creating a shift in policy in key high-tech industries toward increased deregulation and a concomitantly increased reliance on antitrust principles and enforcement to protect competition.

Now, 6 years later, consumers are really beginning to see some of the benefits of these actions in the form of increased competition and increased choice. Much of this choice is the result of convergence in the types of services provided by the varied companies that form the new information economy. I believe that this convergence will continue to the point where services provided by telecommunications and cable companies will be indistinguishable to consumers. This technology-driven convergence should increase competition, and therefore hopefully consumer choice.

Along with convergence, however, consumers have at the same time witnessed increasing consolidation in the cable, media, and telecommunications markets. In contrast to convergence, this consolidation tends to reduce the number of competitors, and consequently threatens to reduce competition and choice.

As these two forces, consolidation and convergence, work to reshape the competitive landscape of the new economy, I strongly believe that we must not merely protect but, where possible, seek choices that allow the marketplace to expand consumer choice to ensure that as many Americans as possible have full and free access to rich and diverse entertainment and information content.

Accordingly, as the competitive landscape changes, we must ensure that legislation and regulation do not inadvertently hinder consumer choice. In light of these ongoing changes, it is perhaps appropriate to continue to examine existing regulations and their effects on competition in new and evolving marketplaces to protect and strengthen consumer choice.

I have frequently expressed my concerns regarding competition in digital entertainment services and the harms that may befall consumers when information “gatekeepers” limit consumers’ choices or access to content and information for anticompetitive purposes. These concerns have arisen in contexts ranging from the Microsoft case to the AOL-Time Warner merger. These concerns apply equally to cable programming and broadband Internet content.

Because the proposed merger would create the largest cable provider in the Nation, a merged AT&T-Comcast would have significant power as a major purchaser of content. A merged AT&T-Comcast would have similar power in determining which and how many Internet service providers will have access to consumers over its cables. Any merged entity with such power must exercise carefully its powers to ensure that consumer choice and marketplace competition are not unfairly hindered.

In the digital age, a cable merger involves much more than simply which company will deliver video programming to consumers. Rather, a merger within the cable industry today is likely to affect other services, products, technology, and business relationships between very large cable companies and providers of content and communications services.

Finally, I have some basic concerns about implementation of the proposed merger. We need to take into account the practical effects of the proposed merger on consumers. More specifically, I note that AT&T currently provides cable broadband and telephone services in my own home State of Utah. I would like to hear today, and hopefully get some types of assurances regarding how the merger has been structured to avoid difficulties such as loss or disruption of these services, degradation of the quality of these services, and unexpected rate hikes.

Again, I want to thank you, Mr. Chairman. I look forward to hearing from all of our witnesses here today.

[The prepared statement of Senator Hatch follows:]

STATEMENT OF HON. ORRIN HATCH, A U.S. SENATOR FROM THE STATE OF UTAH

This merger before us today follows a series of consolidation activities in the communications sector since the passage of the 1996 Telecommunications Act. Careful antitrust scrutiny is necessary where two of the five largest cable companies in the Nation plan to merge, and our inquiry should include the possible effects of this merger on related businesses and markets. These include areas such as the deployment of broadband Internet service, the manufacture and design of cable set-top boxes, which could be the access point for all communications in the future, and the continued vitality of the video programming and Internet content markets.

Overall, this merger by itself does not appear to present the types of competitive concerns that have led me to be skeptical or critical of some other recent major media mergers. For example, unlike the AOL-Time Warner merger, this transaction does not involve the aggregation of the enormous ownership of content with an online service provider and the cable pipes to deliver that content, creating powerful incentives to favor one's own content over competing content. Nor does the proposed AT&T-Comcast transaction involve the elimination of a direct competitor as does the pending EchoStar-DirecTV merger. It appears that this merger is largely free from these types of traditional antitrust concerns, and I would hope that this merger will not raise issues regarding content discrimination that leads to fewer choices of diverse content which I have found to be of great concern in past media mergers.

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By means of the 1996 Telecommunications Act, Congress succeeded in creating a shift in policy in key high-tech industries toward increased deregulation and a concomitantly increased reliance on antitrust principles and enforcement to protect competition. Now, 6 years later, consumers are really beginning to see some of the benefits of these actions in the form of increased competition—and increased choice. Much of this choice is the result of convergence in the types of services provided by the varied companies that form the new information economy. I believe that this convergence will continue to the point where services provided by telecommunications and cable companies will be indistinguishable to consumers. This technology-driven convergence should increase competition and, therefore—hopefully—consumer choice.

Along with convergence, however, consumers have at the same time witnessed increasing consolidation in the cable, media, and telecommunications markets. In contrast to convergence, this consolidation tends to reduce the number of competitors, and, consequently, threatens to reduce competition and choice.

As these two forces—consolidation and convergence—work to reshape the competitive landscape of the new economy, I strongly believe that we must not merely protect, but—where possible—seek choices that allow the marketplace to expand consumer choice to ensure that as many Americans as possible have full and free access to rich and diverse entertainment and information content. Accordingly, as the competitive landscape changes, we must ensure that legislation and regulation do not inadvertently hinder consumer choice. In light of these ongoing changes, it is perhaps appropriate to continue to examine existing regulations and their effects on competition in new and evolving marketplaces to protect and strengthen consumer choice.

I have frequently expressed my concerns regarding competition in digital entertainment services and the harms that may befall consumers when information “gatekeepers” limit consumers' choices or access to content and information for anti-competitive purposes. These concerns have arisen in contexts ranging from the Microsoft case to the AOL-Time Warner merger. These concerns apply equally to cable programming and broadband Internet content. Because the proposed merger would create the largest cable provider in the Nation, a merged AT&T Comcast could have significant power as a major purchaser of content. A merged AT&T Comcast would have similar power in determining which and how many Internet Service Providers will have access to consumers over its cables. Any merged entity with such power must exercise carefully its powers to ensure that consumer choice and marketplace competition are not unfairly hindered.

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Finally, I have some basic concerns about implementation of the proposed merger. We need to take into account the practical effects of the proposed merger on consumers. More specifically, I note that AT&T currently provides cable, broadband, and telephone services in my home State of Utah. I would like to hear today and hopefully get some type of assurances regarding how the merger has been structured to avoid difficulties such as loss or disruption of these services, degradation of the quality of these services, and unexpected rate hikes.

Chairman KOHL. Thank you very much, Senator Hatch.
Now, we call on Senator Specter.

**STATEMENT OF HON. ARLEN SPECTER,
A U.S. SENATOR FROM THE STATE OF PENNSYLVANIA**

Senator SPECTER. Thank you very much, Mr. Chairman. May I note at the outset that there is parity between the parties? We have four Republicans and you, Mr. Chairman, a Democrat. So the odds are about even at this point.

Chairman KOHL. You are right on that.

Senator SPECTER. There is a practice of a fair amount of testifying on this side of the podium as on that side. I think the issues have been delineated so that I will await for further comment on the substance for the witnesses.

I would like to take just a moment or two to introduce Mr. Brian Roberts from Comcast. The cable company was founded by his father, Ralph Roberts, 35 years ago, just about the time I became District Attorney of Philadelphia, and I am in a position to say unequivocally that there was never an investigation of Ralph Roberts or his company.

[Laughter.]

Senator SPECTER. In my capacity as a United States Senator, I am obviously concerned about the serious issues which have been discussed, but as a Pennsylvania Senator and as a Philadelphian there is a great deal of pride in what the Roberts family has done and what Comcast has done.

Mr. Brian Roberts, at the age of 42, brings an extraordinary record as a leader of this company. He has had the osmosis advantage of being associated with his father for 42 years, and having a son about the same age I know what osmosis can do.

His educational background is sterling—Wharton School. His public service activities are extensive. He serves on the Simon Weisenthal Board, taking up the important issues of the Holocaust. He took on a very big job several years ago on being co-chairman of the committee which brought the Republican National Convention to Philadelphia, a much-heralded event, with agreement by our mayor, who was a Democrat, and the Republicans who came and enjoyed the hospitality of the city.

He has received very distinguished awards, the Powell Police Athletic Award and the William Penn Award, and those go to people who have done some significant amount on public service. Last October, he had Comcast's 35,000 employees nationwide engage in a day of public service. His persuasion brought me for a day of public service as well. I was commandeered to join the enormous throng that he had in Fairmont Park that day.

It is a matter of great economic concern to my city and State to have a company which has 35,000 employees and \$40 billion. I took another look at the figure to be sure. I have watched Comcast

grow. I visited them several years ago when they were downtown, and I had just noted that they took on a \$7 billion operation and I said to the Roberts, Ralph, Brian, are you sure, \$7 billion in debt? And now they have moved ahead as giants.

I visited a very high-tech operation in northeast Philadelphia and saw what consumer service can be. This line of activity is very complicated and it requires a lot of capital, a lot of know-how and a lot of technology on speed of transmission and availability of services for the consumer. While there are important questions we have to answer in our duties on the Antitrust Subcommittee, we should also note what this kind of a merger can do for the consumer.

Thank you very much, Mr. Chairman.

Chairman KOHL. I thank you, Senator Specter.

Before we hear from Senator Brownback, I would ask unanimous consent that the statement of Senator Thurmond be made part of the record.

Senator Brownback.

**STATEMENT OF HON. SAM BROWNBACK,
A U.S. SENATOR FROM THE STATE OF KANSAS**

Senator BROWNBACK. Mr. Chairman, thank you very much. I want to associate myself with the comments already made and just would note that the convergence issue that Senator Hatch had talked about, I think, is an important one, and we are wrestling with it both here and in the Commerce Committee.

It affects different areas of legislation that are coming up now, along with this hearing and the proposed merger that is here today. So I see, as well, some convergence of issues coming together, and I look forward to hearing the panel's thoughts of how that impacts us in bringing these various technologies together in one place in the home as it comes out the other end of the pipe.

Thanks for holding the hearing.

[The prepared statement of Senator Brownback follows:]

STATEMENT OF HON. SAM BROWNBACK, A U.S. SENATOR FROM THE STATE OF KANSAS

WASHINGTON.—U.S. Sen. Sam Brownback today addressed the issue of broadband and the AT&T-Comcast merger at a Senate Judiciary Antitrust Subcommittee hearing. Portions of Brownback's statement follow:

"Broadband connections are having a powerful impact on the underlying service industries providing them to consumers," Brownback said. "Cable TV, wireless, satellite, and telephone companies are converging, with each deploying new technologies that will permit them to offer the same voice, video, and data services over their respective platforms. These developments are ushering in a new era of inter-platform competition in telecommunications.

"While today's broadband services provide us with a window into the future converged and borderless market, we can still clearly recognize traditionally distinct communications industry sectors. For this reason, distinct regulatory regimes continue to be applied to each, and we tend to understand market power within each sector as we always have.

"Convergence requires something more. Congress is currently searching out answers to the question of how regulations should be balanced between the old and the new, as reflected in the Tauzin-Dingell bill and legislation I have introduced, S. 1126, the Broadband Deployment and Competition Enhancement Act. Likewise, the merger of AT&T and Comcast, as with Echostar and DirecTV, requires us to balance our traditional understanding of market power with the development of a converged market where the pool of potential competitors is greatly increased.

"AT&T has vigorously opposed regulatory parity for all broadband service providers, specifically incumbent local telephone companies, rejecting the importance of

convergence in the broadband regulatory debate. Yet, today AT&T comes before this subcommittee hoping that we recognize the advent of convergence-and-inter-platform competition in the broadband-and multichannel- video markets as reason to rubber stamp this merger.

"If AT&T's opposition to broadband parity is correct, then I cannot imagine how convergence justifies this merger. Cable rates continue to rise, the cable industry controls two-thirds of the broadband market, and cable modem subscribers have little choice in ISPs.

"I prefer to embrace the future, and not be mired in the past. I have had the opportunity to meet with Mr. Roberts, and I think he understand the changes that are underway in the marketplace. I appreciate the impressive investments made by the cable industry—including both Comcast and AT&T Broadband—to compete in a converging market.

"While I might not be overly enthusiastic about mergers in general, I am prepared to recognize a validity to consolidation that, traditionally, has never existed as it does in a converging market.

"The Federal Communications Commission, in classifying cable modem service as an information service, has similarly moved forward with an eye toward our future. I commend the commission for this action, and look forward to similarly enlightened treatment of all broadband service providers in the commission's ongoing proceedings," Brownback said.

Sen. Brownback is author of the Broadband Deployment and Competition Enhancement Act of 2001 (S. 1126).

Senator SPECTER. Mr. Chairman, may I just add one note? I left out perhaps Brian Roberts' most important qualification. He won the silver medal in squash at the Macabbean squash tournament. When I found that out, I almost revoked my agreement to introduce him today. I am a squash player, but not that kind.

Chairman KOHL. Well, we thank you very much and we will start with our panelists. I will introduce them. I would like to bring this information to you briefly: We will have to recess at about 2:30, maybe at 2:40. There is a vote, and then we will come back immediately after that vote and we will continue this hearing.

Our first witness today will be Mr. Brian Roberts, who is president of his family's Comcast Corporation. Before becoming president in 1990, Mr. Roberts held a number of senior management positions within the company.

Next, we will hear from Mr. Michael Armstrong, who is chairman and CEO of AT&T. Mr. Armstrong joined AT&T in 1997, after 6 years as the chairman and CEO of Hughes Electronics. Prior to that, he was with IBM for three decades.

Joining us from EarthLink is its CEO, Mr. Garry Betty. Before joining EarthLink in 1996, Mr. Betty was president and CEO of Digital Communications Associates, and senior vice president of sales, marketing and international operations at Hayes Microcomputer.

Next, we will hear from Dr. Richard Green, who is CEO of CableLabs, a non-profit research and development consortium of the cable television industry. Mr. Green has been involved in this industry in a variety of capacities, from television broadcasting and engineering to managing key industry technology projects.

From WideOpenWest, also known as WOW, we have Mr. Mark Haverkate, who is founder, president and CEO of that company. Prior to the launch of WOW in 1999, Mr. Haverkate was executive vice president of RCN Corporation and president of Cable Michigan.

Finally, we will be hearing from Mr. Robert Perry, who is vice president of marketing at Mitsubishi Digital Electronics America.

Mr. Perry joined Mitsubishi after a 7-year tenure with Sharpe Electronics, where he served most recently as the head of the Consumer LCD Products Division.

In addition, Consumers Union, RCN, and the Writers Guild have submitted testimony for the record today.

Following conclusion of this hearing, the record will remain open for 1 week for any additional statements to be included.

So now we would like to call upon Mr. Brian Roberts for your statement.

STATEMENT OF BRIAN L. ROBERTS, PRESIDENT, COMCAST CORPORATION, PHILADELPHIA, PENNSYLVANIA, ACCOMPANIED BY RALPH ROBERTS

Mr. ROBERTS. Chairman Kohl, Senator DeWine, members of the subcommittee, on behalf of my father, Ralph, who is seated just behind me, and myself, we are honored to be here today to talk about our vision and our excitement about what the merger of Comcast and AT&T Broadband will mean for American consumers. I hope we will get to all the issues you laid out, but obviously in questions we can go into specifics. Let me also thank Senator Specter for that gracious introduction, and particularly my squash attributes.

Because this is my first time before this subcommittee, I would like to just take a brief moment to tell you about Comcast and our roots and the kind of company we are.

As Senator Specter mentioned, my dad founded the company in 1963, and I think we represent what is truly great about family business in America, the opportunity to chase your dream. My dad is a true entrepreneur and he is always forward-looking; evidence the name he coined for his new company back in 1963, Comcast, which means communications and broadcasting. Today, I can't think of a more concise summary of our vision than communications and broadcasting.

I went to work for my father right out of college and have been with Comcast in many different jobs ever since. We both love the cable business; it is in our blood. Having the chance to work together side by side during this great era that we have seen in cable and to have been part of the terrific things that cable has brought this Nation—the creation of CNN, HBO, C-SPAN I, II and III, Fox News, and hundreds of new channels that today we all take for granted—we have always been enthusiastic about the ability of cable technology to do even more. That is why we keep rebuilding and reinvesting.

Our company was one of the first to experiment with the high-speed cable modem, delivering lightning-fast Internet over cable, and one of the first to deploy it. We set the pace in rolling out digital cable, which gives you over 250 channels of TV and audio programming. Now, we are introducing high-definition television right here in Washington, and video-on-demand, another product that lets viewers watch what they want when they want it.

We think there are going to be more and more other great services that broadband cable can deliver. This is why I am so excited about the proposed merger with AT&T Broadband. In all the decades that we have been in this industry, we have never seen an-

other business opportunity that is as exciting for our customers, our employees, and our shareholders.

There is a lot of interest in making sure that the benefits of broadband reach all Americans, and much discussion of what the Government can do. This merger presents a private sector response to that question. It will bring more digital services and features to more Americans more quickly. Let me explain why.

Comcast has substantially completed the upgrade to our cable systems necessary to offer broadband. Nearly 95 percent of our systems are now built to current industry standards. Comcast also has a strong balance sheet, among the very best in our industry, and our business first and foremost has been and will remain cable television.

By contrast, a greater number of AT&T Broadband systems still require additional investment to get them up to current standards. Of course, AT&T has been in a number of different businesses up until now, all of them competing for scarce capital dollars. In the face of external financial pressures, they haven't completed system upgrades as quickly as Comcast did.

This merger will give the combined company a clear focus, a solid balance sheet, and strong borrowing capacity. It will find cost savings in several key areas which will help to finance system upgrades and speed up the introduction of new services, including video, Internet, and cable telephone.

Now, I haven't mentioned phone yet. Frankly, we at Comcast have been a little slow to introduce cable-based phone service. We have been excited and always have said we have been excited about the prospect of cable telephony, but we haven't been focused on circuit-based, but rather the so-called next generation Internet protocol or IP phone, which we believe offers more features at lower cost.

However, the more I spoke with Mike about AT&T Broadband's business and phone business, the better the opportunity looks. Comcast can now take advantage of AT&T's considerable expertise and experience in providing circuit-switched phone over cable, and that will let us give millions more customers a true choice between facilities-based telephone providers. Mike will speak more about these opportunities and their experience in a moment.

I have used the term "facilities-based" a couple of times. Promoting facilities-based competition—telephone against cable, cable against satellite, satellite against wireless—was a cornerstone of our Nation's pro-competitive communications policies of the 1990s. As a result, satellite alone has captured nearly 20 percent of the video marketplace.

Our industry certainly got the competitive message. In the past 6 years, we have invested over \$55 billion as an industry to prepare our systems and our companies for the digital era. Comcast alone has invested over \$5 billion. This merger is completely consistent with these pro-competitive policies. It will accelerate broadband, promote more investment in facilities, and let us keep with the rapidly changing, hotly competitive communications world.

So let me summarize the fundamental case for this merger. What specifically will it mean for consumers? It will mean that more

Americans will have broadband sooner. It will speed up the introduction of digital cable, high-speed cable, and other innovative services still on the drawing board.

It will bring facilities-based phone competition to millions more homes, it will allow us to expand investment in improved local and regional programming, and it will permit us to expand our strong commitment to our local communities using the latest technology. This merger will make all these things possible, as you have said, while not reducing competition in any relevant market.

Chairman Kohl and other Senators, I could not be more proud of what the cable industry and Comcast have brought to America in the past. With our new company, joining Comcast and AT&T Broadband, we have the chance to do so much more. We want to make our new company a true 21st century leader in every sense. We are committed to serve our customers and our local communities both as quality communication service providers and as good corporate citizens.

I thank you for the opportunity to appear today and I look forward to your questions.

[The prepared statement of Mr. Roberts follows:]

STATEMENT OF BRIAN L. ROBERTS, PRESIDENT, COMCAST CORPORATION

Comcast's merger with AT&T Broadband will accelerate the growth and availability of broadband services. Combining these two companies, and drawing on the special strengths and capabilities and resources of each, will ensure that more Americans have access to more digital services and features, sooner. The transaction will yield demonstrable benefits in investment, innovation, facilities-based competition, and new and improved video, data, and voice services, with no offsetting detriments. The merger will therefore serve the public interest.

The merger of Comcast and AT&T Broadband will accelerate the deployment of facilities-based high-speed Internet service and other broadband services. Speeding the deployment of these advanced services not only will benefit consumers by offering them innovative video and other services, but also will benefit the Nation at large by stimulating productivity gains and economic growth. Although Comcast has substantially finished the upgrades to its cable plant necessary to offer broadband services, AT&T Broadband's systems require significant additional investment in order to complete needed upgrades. Due to economies of scale and scope and cost savings resulting from the merger, those upgrades can and will be implemented faster, bringing more benefits to more consumers sooner, than would be possible without the merger. Scale and scope efficiencies and cost savings generated by this merger will also increase the incentive and ability of the merged firm to invest in, and assume the risks associated with, developing and deploying a variety of innovative services and features, such as high definition television ("HDTV"), video-on-demand, and other interactive television ("interactive TV") services.

The proposed merger will also bring benefits in the form of long-awaited local telephone competition, particularly for residential customers. AT&T Broadband brings to this merger its considerable expertise and experience in the provision of circuit-switched telephony over cable plant. It currently markets cable telephony to more than 7 million households and serves more than 1.5 million lines. Significantly, Comcast has no comparable offerings, and the merger will thus permit Comcast to accelerate its entry into this market. Although providing local telephone service in competition with incumbent carriers involves substantial business risk, AT&T Comcast will be better equipped to confront that risk than either company could alone, because of the complementary assets and expertise of Comcast and AT&T Broadband. Importantly, this competition will be *facilities-based*, thus allowing the merged company to offer residential customers a broader range of differentiated services and features that are far less dependent on access to the incumbent telephone companies' facilities on economically-viable terms and conditions.

The proposed merger also will deliver benefits to consumers by stimulating the production and delivery of local and regional programming. Comcast is widely recognized as an industry leader in the development of successful, high-quality programming geared to regional and local markets. The merger will enable AT&T Comcast

to extend this expertise to areas in which AT&T Broadband has significant clusters. The merger will also allow the two companies to draw on their respective expertise in community outreach efforts, including initiatives to connect classrooms to the Internet.

The proposed merger is consistent with all applicable laws, including the antitrust laws. The proposed merger will have no anticompetitive effects in any relevant market. Comcast and AT&T Broadband provide services to consumers in different local markets and, therefore, their union will not affect horizontal concentration in any relevant market. Further, the combined entity will not have either the ability or incentive to exercise buyer or seller market power in any relevant market.

It will not result in any violations of the Communications Act or the Federal Communication Commission's rules. In particular, it bears emphasis that AT&T Comcast will serve less than 30 percent of the Nation's multichannel video programming distribution ("MVPD") customers, the national limit that was reversed and remanded in *Time Warner II*. That calculation does not include the customers served by the Time Warner Entertainment ("TWE") and Time Warner Inc. ("TWI") cable systems. AT&T, with the full support of Comcast, is firmly committed to completing the sale of its limited partnership interest in TWE. If that divestiture is not completed prior to closing, the applicants are prepared to take the steps that may be necessary to insulate the interest (and thus render it non-attributable) under the Commission's rules, as well as such additional steps as may be appropriate to ensure that AT&T Comcast would not be able to influence TWE prior to its ultimate sale.

In addition, AT&T Comcast is fully committed to negotiating mutually beneficial service agreements with Internet service providers ("ISPs") so that its cable customers will have a choice of ISPs. Both AT&T Broadband and Comcast have conducted trials to explore the issues associated with multiple ISP arrangements. Now, each applicant is actively (and independently) negotiating to reach commercial agreements with unaffiliated ISPs. Indeed, Comcast recently announced that it has executed an agreement with United Online that will provide Comcast's customers in Indianapolis and Nashville with access to United's ISP service, with the potential to roll-out this offering to other Comcast cable systems with the concurrence of both Comcast and United Online. In addition, AT&T recently announced that it has reached an agreement with Earthlink.

In summary, the proposed merger of Comcast and AT&T Broadband offers real and substantial benefits to consumers. It will enable AT&T Comcast to accelerate costly investments required to equip cable systems with the capability to deliver and improve high-speed Internet and other broadband services. The proposed combination will also promote facilities-based local telephone competition, particularly for residential customers, and will hasten the development and deployment of other advanced competitive services. The merger will not have any adverse competitive effects in any relevant market. Thus, the merger will be pro-competition, pro-consumer, and consistent with the public interest.

Chairman KOHL. We thank you, Mr. Roberts.
Mr. Armstrong.

**STATEMENT OF C. MICHAEL ARMSTRONG, CHAIRMAN AND
CHIEF EXECUTIVE OFFICER, AT&T CORP., BASKING RIDGE,
NEW JERSEY**

Mr. ARMSTRONG. Thank you, Chairman Kohl and Senators, for inviting me to testify about this proposed merger of AT&T and Comcast.

This merger is a unique opportunity, I think, to achieve two of Congress' longstanding goals: first, the widespread deployment of facilities-based local telephone competition, and, second, the more rapid provision of advanced broadband services. By uniting two companies with complementary assets, this merger will bring more voice, data, and digital video services to more Americans more quickly than would be possible without this merger.

When I testified before the Judiciary Committee almost 3 years ago, I offered that AT&T's cable investments would give more American consumers a choice of local telephone providers. Just 2

years after closing that merger, we are over-achieving on that commitment. We now serve more than 1 million residential telephone subscribers. This is a fivefold increase over the number of cable telephony customers we served at the time of the MediaOne merger.

As a result of this progress, in just these 2 years AT&T Broadband has become one of the ten largest local telephone companies in the Nation. Today, in 55 communities, our telephone penetration is already 25 percent or higher, and this includes several cities such as Salt Lake, Pittsburgh, and Seattle. We enable customers to pay one charge for local intraLATA toll and long distance, and savings are some 39 percent when compared to incumbent telephone companies.

In our original 5-year plan, we thought we would break even financially on telephony in the last quarter of this year and we are on track, because we are over-achieving, to beat that goal. But despite this rapid success, there is still much more to be done. Incumbent local exchange carriers still serve nearly 95 percent of the market for residential telephone service.

We are confident that AT&T-Comcast will take our success to the next level. Comcast cable systems today provide telephone service on a very small scale. AT&T's broadband telephony expertise will strengthen Comcast's ability to offer telephony.

First, Comcast can take advantage of AT&T Broadband's technical and operational capability in launching and providing cable telephony. We have already deployed the systems for the design, for the installation, and for the operation of the complex fiber-coaxial systems that it takes to support digital voice.

Second, Comcast will gain access to AT&T Broadband's back office and customer care systems. Third, our marketing success will help Comcast face the difficult challenge of competing with local monopolies.

Importantly, because AT&T Broadband's cable telephony approach is so highly scalable, it will allow us to expand the availability of telephony over Comcast's systems much more quickly, at least capital expense, and in a more customer-friendly manner. In fact, Brian and I have already announced that shortly after closing the merger we will begin deploying telephone service in Comcast's Philadelphia and Detroit systems. This will bring facilities-based local telephone choice to about 1 million more consumers.

But local telephony competition is not the only important benefit of our merger. The merger will also enhance our ability to offer new broadband services such as HDTV, video-on-demand, and expanded Internet services to virtually millions of additional Americans. In particular, the combined company will have greater financial strength than either one of us would have to do this alone. As a result, we will have far greater access to the capital required to upgrade our cable systems to deploy broadband services.

In addition, the scale economies created by the merger will allow us to more efficiently use the combined resources. For example, we can combine the call centers, centralize repair and maintenance facilities, and more efficiently manage broadband research and development costs. All of this means that we will be in a much better position to bring new broadband services to many, many more customers.

This was our experience in our merger with MediaOne. When I testified before you about that merger, I noted that we would give many more American consumers access to high-speed Internet and other broadband services. In the 2 years since the merger closed, our high-speed data customers have nearly doubled to 1.5 million, and our digital video customers have jumped from 2.2 million to 3.5 million. We are just as confident that the combination of our two companies will continue these benefits.

I also want to address the issue of ISP choice which I know is of interest. Given the competition we have in the marketplace with DSL, we are interested in being as competitive in our offerings to consumers as possible. We concluded a 20-million trial in Boulder, Colorado, with 4 ISPs. We learned a great deal about what we had to do to implement a multiple ISP network.

In fact, we have negotiated and now have in the process of planning an EarthLink implementation in Boston and Seattle, and we announced just this morning another ISP in the Boston area, a local, regional ISP, Net One Plus, so that there will be three ISPs on the network, and we are currently in negotiation with others.

Finally, I want to stress that we will achieve all of the benefits of our merger without violating any FCC rule or antitrust policy. As I described in the written testimony, our merger will not reduce competition in any market.

I look forward to answering any specific questions you may have, Mr. Chairman.

[The prepared statement of Mr. Armstrong follows:]

STATEMENT OF C. MICHAEL ARMSTRONG CHAIRMAN AND CEO, AT&T CORP.

Thank you, Mr. Chairman and Members of the Subcommittee, for inviting me here today to testify about the proposed merger between AT&T Broadband and Comcast Corp.

The merger creates a unique opportunity to accelerate the development and widespread deployment of facilities-based local telephony and broadband services. By uniting two companies with remarkably complementary assets, this merger will bring more digital video, data, and voice services and features, to more Americans, more quickly than would be possible without the merger. In short, the merger will benefit American consumers and enhance competition, without violating any FCC or antitrust rule or policy.

I will focus today on two of the principal public interest benefits that will be made possible by the merger. Specifically, I will discuss how the merger will: (1) promote facilities-based local telephone competition; and (2) accelerate the deployment of facilities-based high-speed Internet service (as well as ISP choice), digital video, and other broadband services. I then will explain that the merger will not violate any law or regulation (including any horizontal ownership limit) and will cause no competitive harm in any relevant market.

I. THE MERGER WILL PROMOTE FACILITIES-BASED LOCAL TELEPHONE COMPETITION, PARTICULARLY TO RESIDENTIAL CONSUMERS

The proposed merger will create substantial benefits in the form of long-awaited local telephone competition, particularly for residential customers. Six years after passage of the Telecommunications Act of 1996 ("1996 Act"), virtually all local exchange traffic—and particularly residential traffic—continues to be carried by the incumbent local exchange companies ("ILECs"). While we are making tremendous strides, the ILECs still provide local exchange service to 95 percent of the customers in their territories. Although our merger obviously cannot be a full solution to producing local competition, it will accelerate the availability of local telephone choice to millions of additional consumers.

The deployment of cable telephony in new markets continues to involve considerable business risks. Cable systems entering the telephony business must underwrite large, upfront investments in new plant and develop and implement order proc-

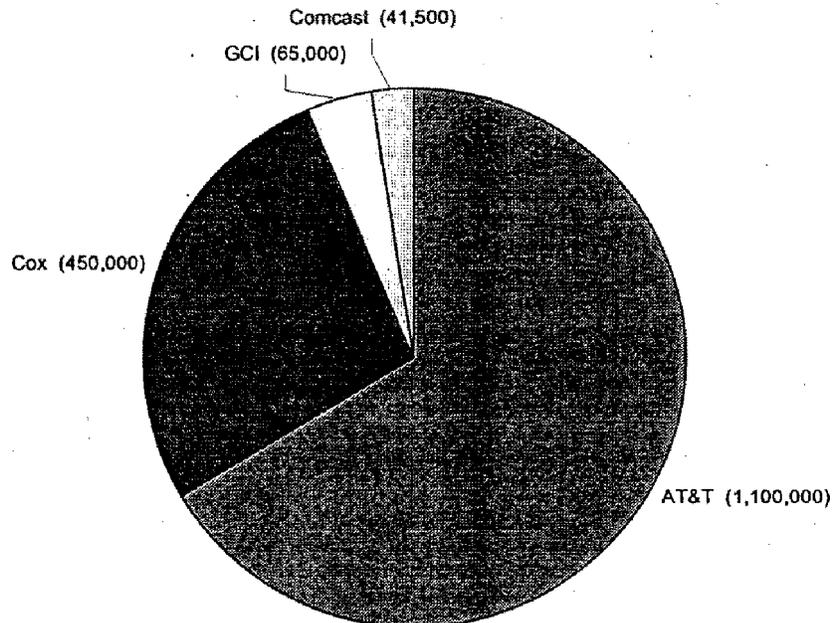
essing, customer care, and other complex support systems, in order to overcome the substantial advantages of incumbent providers. An ILEC's installed infrastructure allows it to serve customers at a lower incremental cost than a new facilities-based entrant and to realize scale efficiencies provided by heavily concentrated customer bases. The magnitude of the risks facing new entrants is underscored by the numerous telecommunications companies that have filed for bankruptcy in recent years.

AT&T Comcast will be on a stronger footing in dealing with these substantial business risks because of the complementary assets and expertise of AT&T Broadband and Comcast and the scale economies created by the merged entity. AT&T Broadband brings to the merged entity extensive experience and expertise in the design, roll-out, provisioning, operations, and marketing of cable telephony in a customer-friendly manner. AT&T Broadband currently offers cable telephony in 16 markets to more than 7 million households and has approximately 1.1 million customers. We offer special "Block of Time" plans that allow customers to pay one charge for local, intraLATA toll, and long distance telephone services, with savings in some markets of over 39 percent when compared to incumbent LEC calling plans. Savings for customers buying more than one line can be even higher.

Our experience has been quite positive. For example, in the Salt Lake City market, we have had consumer take rates of 25 percent or higher in Ogden, Provo, and Salt Lake. We have had a similar consumer response in several Pittsburgh-area communities, including McKeesport, Aliquippa, East Hills, South Hills, Beaver Falls, Carnegie, McKees Rocks, Ross, and Midland, as well as Bellingham in the Seattle market.

In the past year alone, AT&T Broadband added almost one-half million new cable telephony customers, increasing its customer base by over 100 percent. As illustrated below, AT&T Broadband is by far the leading provider of cable telephony in the U.S. today:

CABLE TELEPHONY SUBSCRIBERS (BY PROVIDER)



By contrast, Comcast's cable systems currently provide cable-delivered telephone services on only a very small scale, mostly in cable systems Comcast acquired from third parties which had already launched telephone service.

Fortunately, AT&T Broadband's cable telephony expertise is highly scaleable and can be applied to Comcast's existing cable systems. As a result, AT&T Comcast will

be better able to expand the availability of telephony over the Comcast systems more quickly, at less expense, and in a more customer-friendly manner. In light of these synergies, Comcast has announced that, after closing, the merged company intends to begin to deploy telephone service in the Philadelphia and Detroit markets currently served by Comcast, bringing facilities-based local telephone choice to about one million additional homes.

AT&T Broadband's cable telephony expertise will enhance the ability of Comcast's cable systems to offer telephony services in three important respects: technical and operational expertise, back office systems, and marketing.

A. TECHNICAL AND OPERATIONAL EXPERTISE

Comcast will acquire AT&T Broadband's technical and operational expertise in launching and providing cable telephony. AT&T Broadband has already deployed centralized systems to support the design, installation, maintenance, and operation of the complex, two-way hybrid fiber-coaxial systems that support digital voice and data applications and that interconnect with both copper twisted-pair and fiber optic technologies used by the ILECs.

AT&T Broadband has several business units that have developed—at significant cost—the technical and operational know-how to provide cable telephony in an efficient and consumer-friendly manner. For example, the AT&T Broadband National Operations team provides support on a wide range of planning, engineering, technical, and operational issues that are faced when deploying complex cable telephony service. AT&T Broadband's Technical Operations Organization has already developed operational performance metrics to ensure quality cable telephony services, effective training of technicians and field fulfillment personnel, and cost-effective investigation and resolution of field performance issues. AT&T Broadband's National Service Assurance Center provides the means for our cable systems to ensure not only that calls are completed successfully and billed correctly, but also that all of the necessary number portability, emergency service, and other databases are managed correctly. And, cable telephony providers must be interconnected to, and coordinate with, ILECs (and other competitive LECs) and interact effectively with a variety of third parties to rate, record, and bill traffic for purposes of reciprocal compensation—all functions that AT&T Broadband already performs for its systems. Upon closing of the merger, the same organizations at AT&T Broadband that now act as the points of interface for these issues will be available to support cable telephony operations over the Comcast systems. Comcast will also be able to take advantage of certain interconnection agreements that AT&T Broadband has with the incumbent LECs serving Comcast's territories.

B. BACK OFFICE SYSTEMS

Comcast will also gain access to AT&T Broadband's existing back office systems that support cable telephony. These systems allow AT&T Broadband to take customer orders and to serve as the point of contact for customer care inquiries. Having in place these “nuts and bolts” back office capabilities and employees is essential to offering local telephone service in competition with incumbent LECs. Not only are AT&T Broadband's back office systems highly robust and efficient, but they employ technologies and processes that will allow AT&T Comcast to use them to support offerings in Comcast territories without incurring substantial additional cost.

The combination with AT&T Broadband will also enhance Comcast's telephone billing capabilities. AT&T Broadband has in place specialized billing software processes, developed over several years, that are sufficiently flexible to handle a service area's unique billing parameters and sufficiently robust to handle substantial increases in volume. These back office billing systems can be used to support telephone entry in Comcast territories at a mass market level.

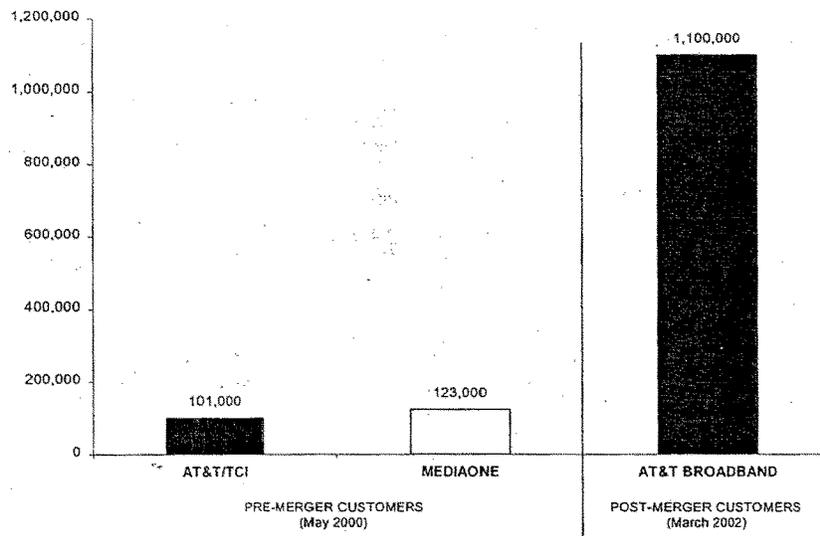
C. MARKETING.

AT&T Broadband's substantial marketing expertise will also help Comcast face the considerable challenge of competing for local telephony customers against formidable incumbents in Comcast's service areas. AT&T Broadband has already conducted primary market research on topics such as pricing and offer design—benchmarked against the competition—to assist it in developing successful product offers, programs, and marketing campaigns. And AT&T Broadband has learned a tremendous amount about customer preferences (including the types of marketing that customers like and dislike) as a result of its market experience over the past several years.

Finally, the technical, operational, back office, marketing, and customer care experience AT&T Broadband has gained from its cable-based, circuit-switched telephony

operations should be applicable in an IP telephony environment. Comcast and AT&T Broadband have taken leadership roles in developing cable-delivered IP telephony. IP telephony may result in significantly lower roll-out costs and increased flexibility and may also provide a common infrastructure that supports multiple advanced services. AT&T Broadband is committed to the continued development of IP telephony.

I want to emphasize that the synergies detailed above are not merely theoretical. AT&T Broadband's experience in deploying cable telephony after the MediaOne merger has proven that combining new cable assets will result in just such consumer benefits. Indeed, as illustrated below, the number of telephony customers served by AT&T Broadband today is five times greater than the number served by the two separate companies before their merger:



We are confident that AT&T Comcast can build on this successful record, and that the combination of our complementary assets and expertise will further accelerate the pace, broad deployment, and effectiveness of facilities-based local telephone competition, creating substantial benefits for consumers. It is also worth emphasizing, however, that while the promise of facilities-based local telephone competition is a major benefit of this merger, realizing this promise will require a substantial investment of time and money by AT&T Comcast, as well as other cable operators, to deploy the necessary technology and gain the necessary market presence. AT&T Broadband and Comcast are strongly committed to making these investments, but nothing about cable telephony or this merger diminishes the independent need to facilitate the other means of creating local telephone competition that Congress specified in the 1996 Act.

II. THE MERGER ALSO WILL ENHANCE THE DEPLOYMENT OF FACILITIES-BASED HIGH-SPEED INTERNET SERVICE, DIGITAL VIDEO, AND OTHER BROADBAND SERVICES, PARTICULARLY TO RESIDENTIAL CUSTOMERS

Comcast and AT&T Broadband both offer high-speed Internet services, serving a combined 2.5 million customers. By combining complementary assets and experience and creating economies of scale and scope, the merger will allow us to more efficiently develop and deploy new, innovative broadband applications over the AT&T and Comcast cable facilities, providing substantial benefits to consumers and stimulating productivity gains and growth in the U.S. economy. Moreover, AT&T Comcast's efforts will provide a competitive spur to other entities, including incumbent telephone companies, nationwide direct broadcast satellite ("DBS") providers, and others. The existence of a strong and credible broadband alternative on cable has already generated competitive responses in the form of accelerated DSL deploy-

ment by incumbent telephone companies, and this proposed merger will further advance this trend.

A. Capital Improvements And Other Merger Benefits

AT&T Broadband's merger with Comcast will enhance significantly its access to the capital required to underwrite an aggressive plan for deploying new broadband services such as HDTV, video-on-demand, and expanded Internet offerings to residential consumers over existing AT&T Broadband systems. It is estimated that AT&T Broadband and Comcast collectively will spend approximately \$5.5 billion in 2002 on capital expenditure items and, following the merger, AT&T Comcast will continue to make substantial capital expenditures. AT&T Comcast should be able to obtain lower prices for many of these capital items as a result of the increased scale of its purchases.

More generally, the scale economies created by the merger will foster more efficient use of infrastructure (e.g., by allowing for more efficient use of call centers), and provisioning, repair, and maintenance (e.g., by providing local/regional scale to support efficient, centralized truck rolls). The merger will also provide national scale that will allow the merged firm to defray more efficiently the enormous research, development, and testing costs associated with new services and features. This increased scale is particularly important to accelerating the development and testing of new interactive TV services, voice-enhanced data services, home networking and security, and other new, and as yet untested, broadband services.

B. ISP Choice

I want to address in particular the issue of ISP choice, which I know is of interest to members of the Subcommittee. AT&T Broadband and Comcast share a strong commitment to providing multiple ISP access on their broadband networks. Indeed, both companies have ample market incentives to make commercially reasonable, customer-friendly arrangements with unaffiliated ISPs in order to maximize the attractiveness of their Internet offerings to customers and potential customers. Given the need to compete with DSL and other comparable high-speed data providers, AT&T Comcast will continue to have such incentives to offer its customers a choice of ISPs post-merger.

AT&T Broadband has made real progress in its efforts to provide ISP choice. In particular, in 2000 and 2001, AT&T Broadband conducted a \$20 million 6-month trial in Boulder with four ISPs (Excite@Home, EarthLink, Juno, and WorldNet) which provided significant experience on the technical and operational requirements needed to support a multiple ISP environment. The Boulder trial enabled us to test our technical infrastructure and assess our key business assumptions. For example, we learned a great deal in Boulder about routing architecture, consumer self-help and diagnostic tools, business-to-business interfaces, and how consumers value ease of ISP selection.

The lessons learned in Boulder will be valuable as we roll out ISP choice in Boston and Seattle this year. The first step in commencing implementation of ISP choice is the agreement we recently entered into with an unaffiliated ISP, EarthLink. Under the agreement, EarthLink will offer high-speed cable Internet service via AT&T Broadband's network. Initially, EarthLink will launch service in Seattle followed by greater Boston. The companies anticipate launching EarthLink's service in additional AT&T Broadband markets in 2003. The planning discussions are underway with EarthLink regarding, for example, the interconnection of our two networks, the deployment of efficient operational interfaces between the companies, and the schedule for rolling out the service in particular communities. In addition, we are actively reaching out to a number of regional ISPs in an effort to provide our customers with even greater ISP choice. We are also migrating to a more robust high-speed data provisioning system across all of our markets to provide more effective support for our high-speed data customers, both those we serve directly and those receiving ISP services from unaffiliated ISPs.

Comcast also has conducted trials of ISP choice, which have provided it with valuable experience and insight into how best to roll out this new offering. The merger will enable our two companies to share the unique experiences we have had and the important knowledge we have gained in our respective ISP choice trials. This sharing of "best practices" will enable AT&T Comcast to overcome the substantial technical and operational complexities involved in implementing ISP choice, so that this important new service offering can be rolled out on a more efficient and widespread basis than the two companies could hope to achieve independently.

III. THE MERGER WILL NOT RESULT IN ANY VIOLATION OF THE COMMUNICATIONS ACT OR THE FCC'S RULES

The proposed merger will not result in the violation of any provisions of the Communications Act, other applicable statutes, or the FCC's rules. In particular, I will address today the reasons why the proposed merger will not violate the FCC's cable horizontal ownership limit.

In October 1999, the FCC adopted a rule prohibiting a cable operator from having an attributable interest in cable systems that account for more than 30 percent of all MVPD subscribers nationwide. However, as the Subcommittee knows, last year the D.C. Circuit in *Time Warner II* reversed the 30 percent limit and remanded the rule to the FCC for further consideration. The FCC has initiated a proceeding to consider the cable horizontal issue in light of *Time Warner II*. The FCC has not yet reached a decision in that proceeding.

Of course, AT&T Comcast will take all steps necessary to comply with any new cable horizontal ownership limit that the FCC adopts. But, it is especially noteworthy that the merger would not violate even the 30 percent limit that was set aside in *Time Warner II*. AT&T Comcast will serve approximately 27.3 million subscribers, or about 29.7 percent of the Nation's MVPD subscribers. Because this percentage is below the horizontal limit in effect before the ruling in *Time Warner II*, there can be no reasonable basis for concern that the proposed merger would violate any horizontal ownership rule.

This calculation does not include the subscribers served by the cable systems owned by Time Warner Entertainment Co., L.P. ("TWE"). When AT&T merged with MediaOne, AT&T Broadband acquired a minority, limited partnership interest representing about 25 percent of TWE. Subsidiaries of AOL Time Warner hold the remaining majority interest in TWE. Under the terms of the TWE Limited Partnership Agreement ("LPA"), AT&T Broadband has no role in or ability to influence the management or operations of TWE, nor does it have the right to communicate with TWE, or AOL Time Warner, the general partner of TWE, on matters pertaining to the day-to-day operations of TWE. The TWE Cable Management Committee (all members of which are appointed by and from AOL Time Warner) has full discretion and final authority over TWE's cable operations. All of MediaOne's rights with regard to the TWE Cable Management Committee were terminated before AT&T merged with MediaOne and acquired the TWE interest. Thus, we believe that the interest in TWE would qualify for insulation from attribution to AT&T Broadband under the FCC's attribution rules today, and to AT&T Comcast post-merger.

In any event, AT&T Broadband and Comcast do not view the TWE interest as a long-term investment and are firmly committed to divesting the interest for a fair price as quickly and efficiently as possible. In fact, the process of attempting to sell the TWE interest is already underway. AT&T Broadband has pursued with AOL Time Warner various options for the sale of its TWE interest to AOL Time Warner in an efficient and expeditious manner. AT&T Broadband also is pursuing the sale of its TWE interest via a public offering pursuant to the registration rights provisions of the TWE LPA. Although AT&T Broadband is pursuing diligently all possible avenues to dispose of its TWE interest, the simple fact is that our ability to sell promptly the interest at a fair price depends almost entirely on the cooperation of AOL Time Warner and its subsidiaries, who do not have the same interests or incentives as AT&T Broadband in this regard.

IV. THE MERGER WILL HAVE NO ANTICOMPETITIVE EFFECTS IN ANY RELEVANT MARKET

AT&T Broadband and Comcast provide services to consumers in different local markets and therefore the proposed merger will have no measurable impact on horizontal concentration in any relevant market. Additionally, the combined entity will not have either the ability or incentive to exercise buyer market power in any relevant market.

A. MULTICHANNEL VIDEO PROGRAMMING DISTRIBUTION

The merger will not have any adverse effect on competition in the business of multichannel video programming distribution. AT&T Broadband and Comcast cable systems reach different residences and businesses and compete in different local markets, so the proposed merger will not reduce actual competition in any relevant local distribution market.

Further, the merged company will face intense competition from DBS providers. DirecTV and EchoStar, two DBS providers, distribute video programming throughout the United States and compete directly in all local markets served by AT&T

Broadband, Comcast, and other cable operators. In less than 10 years, DBS has grown from serving no multichannel video subscribers to serving nearly 18 million subscribers, over 19 percent of all MVPD subscribers nationwide. Last year alone, DBS grew 12 times faster than cable, with both DirecTV and EchoStar experiencing tremendous subscriber growth. Indeed, four out of five new customers now are choosing DBS over cable, and almost one-half of existing DBS subscribers are former cable customers. In addition, AT&T Comcast will face retail competition in many localities from cable “overbuilders” (including RCN and Knology), electric utilities (including Starpower and Seren), and MMDS and SMATV providers.

B. VIDEO PROGRAMMING PRODUCTION AND PACKAGING

The merger will not adversely affect competition in the production and packaging of video programming for sale to MVPDs. As explained below, AT&T Comcast will have neither: (1) “seller power” that would allow it to raise prices for, or discriminate in the distribution of, video programming; nor (2) “buyer power” that would allow it to insist on anticompetitive terms and conditions for programming that it purchases from others.

As the members of the Subcommittee know, a critical element of any competition analysis is the definition of the relevant geographic market. The relevant geographic market for the purchase and sale of video programming is quite broad and, for many types of programming, international in scope. There are no significant limitations on transporting programming and, as a result, video programming can be sent to virtually any distribution outlet in the world for roughly equivalent costs. Moreover, the only limiting factor on the international distribution of U.S.-produced content is whether there is foreign demand for that content. Foreign demand is quite strong; international sales now account for a very substantial portion of video programmers’ businesses. By way of example, MTV reaches more than 340 million households in 140 countries.

1. *Seller Power*

The merger will not reduce competition or create market power in the sale of video programming by AT&T Comcast. The combined company will have only very modest programming interests and no enhanced ability to control the pricing of video programming to MVPDs. AT&T Comcast will have ownership interests in a total of 24 video programming networks, or 6.4 percent of the current 374 programming networks. This very limited set of post-merger interests (many of which are minority interests) presents no concentration problem or threat of competitive harm, particularly when viewed against the backdrop of the highly competitive video programming marketplace, and the far more significant program holdings of other media entities.

2. *Buyer Power*

AT&T Broadband and Comcast are, of course, buyers of video programming. There are two theories of competitive harm that could be raised by an assertion that the merger creates buyer “market power”: first, that the merger would reduce horizontal competition in the purchasing of programming and thereby create buyer monopsony power; and second, that the merger would increase the incentive and ability of the merged firm to engage in distribution foreclosure in the purchase of video programming from video programming producers. As explained below, the merger will not create any anticompetitive consequences under either of these theories.

Monopsony Power. Traditional monopsony theory holds that a firm buying a sufficiently high percentage of the output of a group of sellers may have the ability to set unilaterally the price it pays for goods or services produced by the sellers. This theory has no applicability in the present case for several reasons.

First, companies can only exercise monopsony power over goods that, when sold to one buyer, cannot be sold to another buyer. However, video programming can be consumed by an unlimited number of buyers. This negates the normal intuition that a very large purchaser may be able to exercise monopsony power over sellers.

Second, a programmer’s distribution alternatives will largely determine whether the programmer is vulnerable to an attempt to exercise monopsony power. As noted, AT&T Comcast will account for less than 30 percent of total purchases, and that is not remotely enough to give it buyer market power, since the alternative distribution channels and revenue sources available to video programmers are significant (i.e., over 70 percent of the U.S. distribution market, as well as substantial international distribution markets).

Third, a cable operator’s appetite for quality programming is driven by consumer demand and retail competition. As a cable operator gets bigger, there is no change in its incentives to buy the programming that is likely to produce the greatest num-

ber of viewers relative to the cost of the programming. For these reasons, and given the intense competition from DBS and others at the retail level, even if a cable operator was large enough to exercise monopsony power—and AT&T Comcast clearly will not be large enough—it would choose the same quantity and quality of programming as a competitive, “non-monopsonist” purchaser.

Distribution Foreclosure. Nor could the combination of AT&T Broadband and Comcast trigger any foreclosure concerns. Such concerns could arise if the merged entity would have sufficient market power in the distribution of programming such that it would have the incentive and ability to foreclose access to its cable systems by refusing to buy programming that viewers desire from unaffiliated program packagers or producers.

As an initial matter, AT&T Comcast will not have the incentive to foreclose unaffiliated video program packagers or producers because AT&T Comcast will have only modest video programming interests, and the damage caused by distribution foreclosure to its core cable distribution business could be substantial. It is clear that consumers view DBS and cable as substitutes and have demonstrated that they would readily switch from cable to DBS if they viewed AT&T Comcast’s offering as inferior. As a result, any action by AT&T Comcast that degraded the quality of its programming—by foreclosing competitively priced unaffiliated programming that consumers want—would cause AT&T Comcast to lose customers to DBS or other distributors. Moreover, given the modest programming interests of AT&T Comcast, the potential benefits of such a strategy would be essentially non-existent.

AT&T Comcast will also have no *ability* to foreclose. In order to engage in foreclosure successfully, AT&T Comcast would have to control such a substantial percentage of all distribution channels to which rival video programmers could turn as to be able to drive them out of business or substantially raise their costs. However, even focusing solely on U.S. MVPD distribution channels, AT&T Comcast will purchase programming for systems that serve less than 30 percent of subscribers. Video programmers, of course, understand marketplace dynamics and would recognize that, even without AT&T Comcast, they still have access to more than 70 percent of U.S. MVPD subscribers.

C. SET-TOP BOXES, CABLE MODEMS, AND OTHER MVPD CONSUMER EQUIPMENT

Likewise, the merger will have no adverse effect on any equipment market. The relevant geographic market for MVPD customer equipment is global. Set-top boxes, modems, and other navigation devices are purchased by MVPDs and MVPD customers in the U.S., as well as by MVPDs, consumers, and other buyers worldwide. With fewer than 30 million subscribers, AT&T Comcast will represent less than 10 percent of the 317 million worldwide cable and DBS subscribers. Accordingly, AT&T Comcast cannot be considered to have the power to do anything to harm the production or supply of such equipment.

Even if one were to focus on the domestic equipment market, AT&T Comcast would purchase equipment for less than 30 percent of U.S. multichannel video customers—a level too low to raise any concerns about anticompetitive harm.

Moreover, given the ubiquitous availability of DBS and DSL alternatives, AT&T Comcast will have no incentive to exercise market power against set-top box or modem manufacturers. Any action by a cable operator that has the effect of restricting the supply of high-quality equipment that enables consumers to access operator-provided services would cause the operator to lose cable customers to the DBS competitors and Internet customers to DSL or other competing providers. Thus, AT&T Comcast will be compelled by market forces to deal fairly with equipment manufacturers and to ensure that it and its customers have access to the best quality state-of-the-art equipment at the best possible price.

D. INTERACTIVE TV SERVICES

The merger will not harm consumers or competition with respect to the provision of interactive TV services. As with MVPD and other services discussed above, AT&T Broadband and Comcast do not compete with each other in the provision of interactive TV services, so the merger will have no adverse effect on competition in this business. Moreover, the interactive TV business is in the very early stages of its development and many questions remain about the technology and consumers’ demand for it. Indeed, there has not yet emerged a clear definition of what interactive TV is or how the market should be defined. So, it is entirely premature to even speculate on how the merger might affect this business.

Moreover, notwithstanding the nascent stage of the interactive TV business, numerous companies (including DBS providers) are investing substantial resources in developing, deploying, and distributing interactive TV content, equipment, and serv-

ices. In this highly dynamic environment, AT&T Comcast will have no market power in the provision of interactive TV services.

CONCLUSION

Thank you for this opportunity to testify. I would be pleased to answer any questions you might have about the proposed merger.

Chairman KOHL. We thank you, Mr. Armstrong.

As I noted, there is a vote, so we will have now a 10-minute recess and then we will be back.

[The subcommittee stood in recess from 2:44 p.m. to 3:02 p.m.]

Chairman KOHL. This hearing will resume, and we will commence with testimony by Mr. Betty.

**STATEMENT OF GARRY BETTY, CHIEF EXECUTIVE OFFICER,
EARTHLINK, ATLANTA, GEORGIA**

Mr. BETTY. Thank you, Chairman Kohl, Senators, and thank you for inviting me to testify today about the proposed merger between AT&T and Comcast and its potential impact on competition and consumer choice in the broadband Internet access arena.

My name is Garry Betty. I am the CEO of EarthLink. EarthLink is the Nation's third largest Internet service provider and we are the largest independent ISP. We currently serve 4.9 million customers with dial-up, broadband, and Web-hosting services. In broadband, EarthLink is platform-agnostic, providing high-speed Internet access to over 530,000 customers through digital subscriber line, cable, and satellite connections. The majority of EarthLink's broadband customers today have DSL connections, as most major cable companies do not offer cable modem customers a choice of ISPs.

All of us here today want to encourage broadband deployment. Broadband deployment is a term that is frequently used about almost anything these days. Unfortunately, it is also misused as an excuse for activities that benefit network owners at the expense of consumers.

It has been said that you can do just about anything you want in Washington these days as long as you say it is to promote broadband deployment. One example of this has been the refusal of most major cable companies to allow consumers who want to connect to the broadband Internet through high-speed cable modems to choose their ISP. Rather, these cable companies have forced customers to use just their cable company's in-house Internet service.

This "take or leave it" choice has resulted in higher prices and lower adoption rates than would be the case if consumers had competitive choice in their Internet provider over cable. We are therefore here today to ask that AT&T and Comcast commit to providing customers in all their markets a choice in broadband ISPs over cable by signing commercially reasonable contracts with independent ISPs prior to the merger being approved.

AT&T and Comcast have argued since 1998 to Congress, the FCC, Federal courts, and local authorities that they should not be required to offer their subscribers a choice in Internet providers over broadband cable. Rather, they have proposed that open access should be voluntary, and have promised that they would open their

networks by this year. They have couched these arguments in very appealing calls for market-based solutions for broadband Internet access over cable.

Unfortunately, while ISPs have always existed in a competitive marketplace, cable companies have not. Just as most consumers have no competitive choice in their cable television provider, so too most consumers have no choice in their Internet provider over broadband cable.

This is a significant problem, since cable is and will remain the primary platform through which consumers get broadband Internet access. In 2001, cable provided about two-thirds, or 6.5 million out of 9.7 million, of all broadband connections. By the end of 2002, cable will still be 60 percent, and by 2005 it is estimated that cable will provide more than half of the connections for broadband customers.

Notwithstanding calls for ubiquitous competition in platforms, the fact remains that cable will remain the only broadband connection for millions of Americans for years to come. This many consumers should not be denied meaningful choice in their Internet provider over these cable connections.

Furthermore, broadband is the future of the Internet. While the market for dial-up Internet access has matured and reached a plateau of about 55 million households, broadband continues to grow and it has grown from about 1 million households at the end of 1999 to an estimated 30 million households by the end of 2005.

There have been a lot of promises made over the years. During 1999, in AT&T's merger with TCI, AT&T told the Commission that it was committed to an open broadband platform and that it would favor the unbundling of the modem in order to provide consumers with choice at the lowest prices.

Later that year, at the urging of then-FCC Chairman Kennard, AT&T signed a statement of principles with MindSpring Enterprises, now part of EarthLink, in which AT&T committed to offer broadband consumers a choice of ISPs when its exclusive contract with its own affiliated ISP, Excite@Home, expired in June 2002.

In June 2000, AT&T signed an agreement with the Massachusetts Coalition for Consumer Choice and Competition, which was seeking an open access referendum on the November 2000 ballot. In exchange for removing the ballot initiative, AT&T committed to conduct a multiple ISP trial no later than October 2001 and to implement ISP choice statewide by July 1, 2002.

As part of their acquisition of TCI, AT&T also made a commitment in the year 2000 to the local franchising authority in King County, Washington, to provide multiple ISP choices to consumers once their contract expired. On March 12, we announced an agreement with AT&T to offer broadband service to AT&T Broadband cable customers in Boston and Seattle later this year. They have also suggested that they will open additional markets during 2003, although they are under no obligation to do so.

While we are pleased to have reached the agreements we have and look forward to signing others like them, there are still millions of AT&T and Comcast cable customers who have no competitive choice in broadband Internet service over cable.

Similarly, Comcast recently signed an agreement with United Online to provide Indianapolis and Nashville customers with a choice of ISPs. Again, these limited agreements raise a question as to whether this is a slow trend toward long-promised open access or merely an effort to forestall an open access requirement in the context of this merger review.

As I am running out of time, I will say that we have been very satisfied with the arrangement that we have been able to negotiate with AOL Time Warner. I think it is an example of how it does provide consumer choice. Their business and adoption rates have increased 20 to 25 percent only 6 months after the introduction of that and has been a big part of their growth story prospectively.

What I urge today is to have support from the Senate to support concepts of customer choice on open access over AT&T and Comcast systems, look for standards of effective open access consistent with what was set forth in the AOL Time Warner agreement that we signed, and perhaps push for getting more than just a promise and actually implement contractual arrangements between independent third parties prior to the merger being concluded.

Thank you.

[The prepared statement of Mr. Betty follows:]

STATEMENT OF GARRY BETTY, CEO, EARTHLINK

Good afternoon and thank you for inviting me to testify today about the proposed merger between AT&T and Comcast and its potential impact on competition and consumer choice in broadband internet access.

I am Garry Betty, CEO of EarthLink. EarthLink is the Nation's third largest Internet Service Provider (ISP) and is the largest independent ISP. EarthLink serves 4.9 million customers with dial-up, broadband and web hosting services. In broadband, EarthLink is "platform agnostic" providing high-speed internet access to over 530,000 customers through Digital Subscriber Line (DSL), cable, and satellite connections. The majority of EarthLink's broadband subscribers today have DSL connections as most major cable companies do not offer cable modem customers a choice of ISPs.

All of us here today want to encourage broadband deployment. "Broadband deployment" is a term that is frequently used these days. Unfortunately, it is also sometimes misused as an excuse for activities that benefit network owners at the expense of consumers. It has been said that you can do just about anything you want in Washington these days as long as you say it is to promote broadband deployment.

One example of this has been the refusal of most major cable companies to allow consumers who want to connect to the broadband internet through a high-speed cable modem to choose their internet provider. Rather, these cable companies have forced consumers to use just their cable company's in-house internet service. This take-it-or-leave-it choice has resulted in higher prices and lower adoption rates than would be the case if consumers had competitive choice in their internet provider over cable.

We are therefore here today to ask that AT&T and Comcast commit to providing customers in all their markets a choice in broadband ISPs over cable by signing commercially reasonable contracts with independent ISPs prior to their merger being approved.

AT&T AND COMCAST MUST OFFER CABLE MODEM CUSTOMERS A CHOICE OF ISPS

ATT and Comcast have argued since 1998 to Congress, the FCC, Federal courts and local authorities that they should not be required to offer their subscribers a choice in internet providers over broadband cable. Rather, they have proposed that open access should be voluntary and have promised that they would open their networks by this year. They have couched these arguments in very appealing calls for market-based solutions for broadband internet access over cable.

Unfortunately, while ISPs have always existed in a competitive marketplace, cable companies have not. Just as most consumers have no competitive choice in their cable television provider, so too most consumers have no choice in their internet provider over broadband cable.

This is a significant problem since cable is and will remain the primary platform through which consumers get broadband internet access. In 2001, Cable provided about $\frac{2}{3}$ (6.5 million out of 9.7 million) of all broadband connections. By year-end 2002, cable will still provide 60 percent (8.0 million out of 13.8 million) of all broadband connections. By 2005, cable will still provide more than half (est. 17.0 million out of 30.7 million) broadband connections.

Notwithstanding calls for ubiquitous competition in platforms (i.e. cable vs. DSL vs. satellite) the fact remains that cable will remain the only broadband connection for millions of Americans for years to come. This many consumers should not be denied meaningful choice in their internet provider over those cable connections.

Furthermore, broadband is the future of the internet. While the market for dial-up internet access has matured and reached a plateau at about 55 million households, broadband continues to grow from about 1 million households at year-end 1999 to an estimated 30 million or more households by 2005.

PROMISES MADE

In 1999, during the FCC's review of AT&T's merger with TCI (even then the Nation's largest cable company), AT&T told the Commission that it was committed to an open broadband platform and that it "would favor the unbundling of the modem in order to provide consumers with choice and lowest prices."

Later that year, at the urging of then FCC Chairman Kennard, AT&T signed a statement of principles with MindSpring Enterprises (now part of EarthLink) in which AT&T committed to offer its broadband consumers a choice of ISPs when its exclusive contract with its own affiliated ISP, Excite@Home, expired in June 2002. (Letter to FCC Chairman William E. Kennard from James W. Cicconi, David N. Baker and Kenneth S. Fellman, December 6, 1999).

BOSTON AND SEATTLE: LOCAL COMMITMENTS

In June 2000, AT&T signed an agreement with the Massachusetts Coalition for Consumer Choice and Competition which was seeking an open access referendum from the November 2000 ballot. In exchange for removing the ballot initiative, AT&T committed to conduct a multiple ISP trial no later than October 2001, and to implement ISP choice statewide by July 1, 2002. (Memorandum of Agreement between AT&T Corp. and the Massachusetts Coalition, June 27, 2000).

As part of their acquisition of TCI, AT&T also made a commitment in year 2000 to the local franchising authority in King County, Washington to provide multiple ISP choice to consumers once their contract with Excite@Home expired on June 4, 2002. As Excite@Home expired before their contract did, King County demanded in February 2002 that open access should immediately be implemented. (Letter to Janet Turpen, AT&T, from Kevin Kearns, King Co. Washington, February 19, 2002).

SMALL STEPS FORWARD

On March 12, 2002, EarthLink announced an agreement with AT&T to offer broadband internet service to AT&T Broadband cable customers in Boston and Seattle later this year. AT&T has also suggested that they will open additional markets in 2003. While we are pleased to have reached the agreements we have, and look forward to signing others like them, there are still millions of AT&T and Comcast cable customers who still have no competitive choice in broadband internet service providers over cable.

Similarly, Comcast recently signed an agreement with United Online to provide Indianapolis and Nashville customers with a choice of ISPs. Again, these limited agreements raise the question as to whether this is a slow trend toward long-promised open access or merely an effort to forestall open access requirements in the context of a merger review.

While we would like to believe that AT&T, Comcast and other cable companies will voluntarily open their systems, promises may no longer be enough. This merger would combine the Nation's first and third largest cable companies into super-size company controlling cable TV and internet access to over 40 percent of American homes. We would prefer to be able to sign business contracts on commercially reasonable terms. But barring such commitments, open access requirements would be necessary to ensure consumer choice in access.

AOL-TIME WARNER EXAMPLE

As part of its' antitrust review of the AOL Time Warner merger, the FTC required open access as a condition of approving that merger. In order to offer cable internet access through its affiliate AOL, Time Warner Cable must allow subscribers on its cable systems to choose from among AOL, Roadrunner (another in-house service), EarthLink, or other two other unaffiliated ISPs.

While it is still early in our relationship with Time Warner, we are glad to report significant progress. Beginning in September 2001, EarthLink now offers broadband internet access to Time Warner Cable customers in 30 of their top 40 markets, with the remainder to come online by the end of this year.

This open access relationship benefits all involved. Not only can EarthLink offer broadband service to customers formerly foreclosed to us, but we have helped drive overall broadband subscriber growth on the Time Warner systems. Time Warner executives have noted a 20 percent to 25 percent increase in overall broadband take rates. (Chris Bogart, Pres./CEO of Time Warner Cable Ventures, at Goldman Sachs Communacopia 2002, April 9, 2002). Consumers also benefit as they now have competitive choice in their internet provider over cable, with price differentiation and EarthLink service offered at a market-leading \$41.95 a month.

I urge you today to support the same basic conditions of open access on the AT&T and Comcast systems that apply to the AOL Time Warner systems.

The minimum standards for effective open access are:

- Consumers of broadband cable services should have a choice among multiple ISPs.
- Cable broadband providers must negotiate at arms-length nondiscriminatory commercial arrangements with both affiliated and non-affiliated ISPs (including "first screen" placement).
- ISPs should have the choice of operating on a national, regional, or local basis.
- Both the ISP and the cable operator should have the opportunity for a direct relationship with the customer.
- ISPs should be allowed to provide video streaming and there should be no discriminatory restrictions on provision of content.

These are the basic standards that shaped the FTC's requirement for open access on the AOL Time Warner systems. These same requirements should be met by AT&T and Comcast as a condition of their merger.

NOT REGULATING THE INTERNET

There's been a lot of rhetoric by cable companies and their surrogates that open access is "regulatory." But stop for a moment and consider what's being regulated. Throughout the country, cable companies have had exclusive local franchises to operate the cable system in any given area. These franchises were created by government regulations. Actions that seek to limit cable monopoly power created by these regulations, and to give consumers increased choices in broadband services are, by definition, de-regulatory.

This is also not "regulating the internet." The open unregulated competitive internet we enjoy today exists because of regulations on the underlying largely non-competitive infrastructure over which it travels. That's why even though consumers until recently had no choice in local phone service (and may only have limited choice today), they have never been required to buy the local phone company's ISP. For example, Verizon's ISP is available as a competitive choice, but you're not required to buy or use their ISP just because you get your local phone service from them. Compare this to most cable companies (which are also regulated, just under different rules) where if you want internet access through a cable modem, you have no choice but to purchase the cable company's affiliated ISP.

By comparison, internet access has always been competitive. There are over 6,000 ISPs across the country. Consumers in major cities can choose from hundreds of ISPs that serve their local area. And over 96 percent of internet users throughout the country, even in the smallest towns and rural areas, can choose from among at least 4 Internet Service Providers. Compare this to cable, where over 96 percent of customers throughout the country have NO choice in who their cable company is. As high speed internet access becomes available over cable, we are at a crossroads. Will we follow the open consumer choice path of the internet, or the closed no choice model of cable?

Cable folks will say that open access isn't necessary because there are other means of high-speed access to the internet, such as Digital Subscriber Line (DSL) technology over phone lines. But DSL has distance limitations. Once you get more than a mile and a half from a telephone central office, DSL service starts to degrade. Once you get beyond three miles, it is essentially unavailable. And tech-

nologies such as satellite, wireless and electric lines will not be widely available for many years to come. The upshot is that for as many as a third of consumers across the country, particularly in rural areas, if they get any broadband access at all in the next 5 years, it will only be through a cable line. These customers deserve choice in broadband internet access as well.

It has been consistent policy in this country for over 20 years to give consumers greater choice in their telecommunications services. The Federal court decision that broke up the old Ma Bell AT&T in 1984 and allowed competition in long distance has resulted in rates that are more than 2/3 lower today than they were then. In passing the Telecommunications Act of 1996, Congress established the framework to bring these same benefits of competition to local phone service and to wireless. Legislation such as the Satellite Home Viewer Act and the program access provisions of the 1992 Cable Act sought to end cable's longstanding monopoly over multi-channel video programming. And consumers have always had competitive choice in Internet Service Providers in large part because FCC decisions beginning in the 70s, and 80s and continuing today that allowed such information services to travel unfettered over phone lines. At every turn, policymakers have sought to give consumers greater choice in their communications services. Broadband internet access over cable should be no exception.

Thank you for giving me the opportunity to speak with you today. I look forward to any questions you may have.

Chairman KOHL. We thank you, Mr. Betty.
Mr. Green.

**STATEMENT OF RICHARD R. GREEN, PRESIDENT AND CHIEF
EXECUTIVE OFFICER, CABLE TELEVISION LABORATORIES,
INC., LOUISVILLE, COLORADO**

Mr. GREEN. Good afternoon, Chairman Kohl and Senators. I am Richard Green, President and CEO of CableLabs. I appreciate this opportunity to testify before this subcommittee and look forward to answering any of your questions that you have concerning the role of the cable industry in developing and deploying new technology.

CableLabs is a research and development consortium of the cable television system operators serving North and South America. CableLabs conducts and funds research and development projects to help cable companies plan for the future and apply technology to meet customers' needs.

We have been working to promote development of new services over cable systems and to introduce competition among suppliers to increase innovation and reduce prices to consumers. Our tremendously successful effort with cable modems is an example of this work.

Today, 7 million American homes enjoy cable high-speed data service. The cable modems used in those homes were developed at CableLabs. The cable industry recognizes that to make cable modems broadly available, it would be necessary for these modems to use a common interface. Interoperability of the modems was achieved through the cooperation of the cable industry, equipment manufacturers, retailers, and others working with CableLabs on the DOCSIS project.

As a result, a highly competitive environment has developed, to the benefit of consumers. CableLabs has certified over 200 different modem models from dozens of vendors. Cable modem retail prices have dropped from \$300 to \$50.

In a similar and parallel effort, CableLabs has worked hard to encourage the commercial availability of cable set-top boxes and other equipment that work with cable systems. CableLabs members have been very clear in their instructions to us. These mem-

bers supported the DOCSIS effort that successfully created a retail market in cable modems. They want the same thing to happen with cable set-top boxes and integrated digital television sets.

But first and perhaps foremost, it is important for you to understand that cable systems can deliver and today are delivering broadcaster digital signals. High-definition digital cable set-top boxes which allow cable operators to provide digital and high-definition broadcast to consumers exist and they are being deployed today.

Therefore, in those areas where cable companies have reached agreement with broadcasters to carry their digital signals, there are no technical compatibility problems.

A number of cable companies, including Comcast, AT&T, AOL Time Warner, Cox, and Charter are currently providing such services or have announced plans to do so in the near future. The cable industry has worked with the consumer electronics industry to develop an integrated DTV set which would allow the cable set-top box to be incorporated within the DTV.

To this end, the National Cable and Telecommunications Association and the Consumer Electronics Association reached a voluntary agreement in February of 2000, and that agreement would allow consumer digital television sets to be connected directly to digital cable systems.

In a related area, the FCC has implemented the provision in the 1996 Telecommunications Act calling for the commercial availability of navigation devices such as set-top boxes. Consistent with the congressional direction that the security of the cable operator's signal not be jeopardized, the FCC rules require that separable security modules must be available from cable operators. These modules support integrated television receivers, as well as set-top boxes, in the retail market.

These removable point-of-deployment, or POD, security cards foster the portability of set-top boxes and other point-of-deployment-enabled devices. Leading cable operators, including the two companies here today, have publicly affirmed that these systems will support set-top boxes and integrated TV equipment built to these specifications.

Moreover, to further promote retail sales of set-top boxes, in October of 2001 the cable industry launched an initiative that provides customers with the option of purchasing from participating retailers the exact same set-top box that they lease from the cable operator.

In addition to the open cable hardware specification mentioned above, the Open Cable project has recently published an open specification for middleware, a voluntary initiative called OCAP, that will promote the commercial availability of fully portable digital set-top boxes and integrated TVs that will function seamlessly on cable systems. Once again, Comcast, AT&T and other cable operators have committed that their systems will support OCAP-enabled devices.

The CableLabs process is open, cooperative, and efficient. We modeled our Open Cable effort on our successful DOCSIS effort. As we did with DOCSIS, we worked with equipment designers and manufacturers, over 500 companies in all, to cooperatively prepare

and approve specifications. We are convinced that by attracting additional manufacturers, competition will add features to and reduce the price of set-top boxes for consumers as well as cable operators. Our goals are to issue specifications that will unleash market forces to promote innovation and competitive offerings.

Thank you again for this opportunity to testify this afternoon, and I will be pleased to answer the subcommittee's questions.

[The prepared statement of Mr. Green follows:]

STATEMENT OF RICHARD R. GREEN, PRESIDENT AND CHIEF EXECUTIVE OFFICER,
CABLE TELEVISION LABORATORIES, INC.

Good afternoon. I am Dr. Richard Green, President & CEO of CableLabs. I appreciate the opportunity to testify before this Committee, with particular emphasis on the development of the retail market for cable set-top boxes. I also look forward to answering any technical questions you may have concerning the role of the cable industry in developing and deploying new technology.

I speak to you today as a scientist who has devoted a great deal of his professional career to questions involving the application of digital technology. The experience I gained during 4 years as Director of the CBS Advanced Television Technology Laboratory, 5 years as Senior Vice President of Operations and Engineering of PBS, and 14 years as CEO of CableLabs gives me a special appreciation for the technical perspectives of manufacturers, cable operators, and broadcasters.

CableLabs is a research and development consortium of cable television system operators serving North and South America. CableLabs conducts and funds research and development projects to help cable companies plan for the future and apply technology to meet consumers' needs. I know this hearing is focused on the pending merger between Comcast and AT&T Broadband, and I would be remiss if I did not note that both of those companies are important participants in the work of our laboratory. Brian Roberts has recently served as Chairman of the CableLabs Board of Directors.

CableLabs was incorporated under the Cooperative Research Act. The Act, which this committee played a key role in developing, encourages research and development among companies within industries like the cable industry. I believe that we have been able to realize the potential of that Act by, among other things, contributing to the development of a burgeoning broadband industry and helping spur the digital transition.

For example, over ten million American homes now enjoy high-speed Internet access connections and over seven million of those homes are served by cable high-speed data service. The cable modems used in those homes were developed at CableLabs. In the past, computer users knew that they could buy a modem that would work on any phone line. Cable industry leaders wanted their customers to be able to buy their own cable modem at retail and be confident that it would work on any cable system in North America. Through CableLabs' DOCSIS (Data Over Cable Service Interface Specification) project, that goal has been achieved. Cable's broadband service is providing an important new and competitive, high-speed data highway into American homes.

A word about the CableLabs' cable modem or DOCSIS effort is instructive because it is a model for our OpenCable project which aims to address similar interoperability and retail availability issues for cable set-top boxes and digital television sets.

The cable industry recognized that to make cable modems broadly available and take advantage of the economies of scale to get the lowest possible price for consumers, it would be necessary for cable modems to use a common interface. Interoperability of DOCSIS cable modems was achieved through the cooperation of the cable industry, equipment manufacturers, retailers and others working with the CableLabs DOCSIS project. With 3 years of careful development of the specification, relying upon input from CableLabs' member companies and the consumer electronics and software industries (including many who were not traditional suppliers for the cable industry), the DOCSIS modem specification became an international standard at the International Telecommunications Union. Then, CableLabs, again with input from its members and industry vendors, invited vendors to bring their equipment to CableLabs to test its interoperability with other vendors' DOCSIS modems. CableLabs developed a series of tests to measure conformance with the standard and, in so doing, insure product interoperability. We do this by "certifying" cable modem compliance with the DOCSIS standard.

The certification process gives retail purchasers confidence that a certified cable modem will interoperate with other DOCSIS products made by other manufacturers. As of today, a highly competitive environment has developed to the benefit of consumers as CableLabs has certified over 200 different modem models from dozens of vendors.

In a similar and parallel effort, CableLabs has worked hard to reduce the technical barriers to the delivery of digital and HDTV television and to encourage the commercial availability of cable set-top boxes and other equipment that works with cable systems. CableLabs' members, the leading companies in the cable industry, have been very clear in their instruction to us. These members supported the DOCSIS effort that successfully created a retail market in cable modems. They want the same thing to happen with cable set-top boxes and integrated DTVs.

The process of developing the digital set-top box standards has proved immensely more complicated, as we have attempted to reconcile the often competing interests of hundreds of parties from outside our industry. But with a lot of give and take among the players, we've now done it.

I would like to give you a sense of how complex an undertaking this is, and of just how much progress has nevertheless been made.

First and perhaps foremost, it is important for you to understand that cable systems can deliver—and today are delivering—broadcasters' digital signals (including high definition signals) to DTV sets owned by cable customers. In short, *there is no technical impediment to current generation DTVs working with cable*. “High-definition” digital cable set-top boxes which allow cable operators to provide digital broadcast signals (including high definition signals) to consumers exist and are being deployed today. Therefore, in those areas where cable companies have reached agreements with broadcasters to carry their digital signals over the cable plant, there is no technical “compatibility” problem with the delivery of those signals. A number of cable companies including Comcast, AT&T, AOL Time Warner, Cox and Charter are currently providing such services or have announced plans to do so in the near future.

The cable industry has also worked with the consumer electronics industry to develop an “integrated” DTV set which would allow the cable set-top box to be incorporated within the DTV—so that no external cable set-top box is needed. To this end, the National Cable & Telecommunications Association (NCTA) and the Consumer Electronics Association (CEA)—representing all major manufacturers—reached voluntary agreements in February 2000, that will allow consumer digital television sets to be connected directly to digital cable systems. The features agreed to by CEA and NCTA for these types of DTV models are specifically spelled out in the agreement. The agreements detail the technical specifications that will enable these sets to work with cable systems. Those specifications, developed by CableLabs, were adopted as U.S. standards in November 2001, although manufacturers could develop products based on the specifications even before the standards were adopted as some did.

In fact, these specifications have been available to manufacturers for over 2 years and some manufacturers have developed prototype integrated DTV receivers. One such device was on display at the January 2001 Consumer Electronics Show, connected to and working with the local Cox cable system in Las Vegas. In short, just as there is no technical barrier to a consumer receiving digital signals over the cable plant, there are no technical barriers for a manufacturer to build an “integrated DTV” model with the features described in the CEA-NCTA technical agreement.

In a related area, the FCC has implemented the provision in the Telecommunications Act of 1996 calling for the commercial availability of navigation devices such as set-top boxes. Consistent with the congressional direction that the security of the cable operator's signals not be jeopardized while fostering the commercial availability of set-tops and other devices, the FCC rules require that separable security modules for set-top boxes must be available from cable operators to support “integrated television receivers” as well as set-top boxes in the retail market. These removable “point-of-deployment” or “POD” security cards handle conditional access and encryption of premium cable channels. They foster the portability of digital set-top boxes and other POD-enabled devices since the devices may be sold nationwide and will work with POD modules supplied by various cable operators to accommodate their particular conditional access systems. Leading cable operators—including the two companies here today—have publicly affirmed that their systems will support set-top boxes and integrated DTV equipment built to these specifications, including integrated DTV sets contemplated by the February 2000 NCTA-CEA agreement.

CableLabs developed the removable security modules as part of its OpenCable project. The cable industry has invested millions of dollars to develop specifications

and support for the “POD module” for one reason—to facilitate the retail availability of digital set-top boxes and integrated digital television receivers. The specifications needed to produce devices accommodating the separate security POD modules were also adopted as U.S. standards last year, although they have been available since 1999. Moreover, to further promote retail sales of set-top boxes, in October 2001, the cable industry launched an initiative that provides customers with the option of purchasing from participating retailers the exact same set-top boxes they can lease from their cable operator.

In addition to the OpenCable hardware specifications mentioned above, the OpenCable project has recently published an open specification for middleware (software)—the OpenCable Application Platform (“OCAP”) specification—that will promote the retail availability of fully portable digital set-top boxes and integrated DTV sets that will support a wide range of applications. For example, OCAP will permit the downloading and execution of applications, such as program guides, to any OCAP-enabled devices by any cable system supporting OCAP. This will enhance the portability of set-top boxes and DTV sets which the OpenCable POD modules already foster. Because OCAP is based upon an existing European specification, tremendous economies of scale and scope can be achieved. Once again, Comcast, AT&T and other cable operators have committed that their systems will support CableLabs certified, OCAP enabled devices.

The CableLabs process is open, cooperative, and as efficient as possible. We work to keep equipment development time to a minimum. To fulfill this goal we modeled our OpenCable effort on our successful DOCSIS effort. As we did with DOCSIS, we work with equipment designers and manufacturers—over 500 companies in all—to cooperatively prepare and approve the specifications. Over the last 3 years, the OpenCable project has released specifications which provide the details necessary to build set-top boxes and integrated DTV sets that will function seamlessly on cable systems.

We are convinced that by attracting additional manufacturers, competition will add features to, and reduce prices of, set-top boxes for consumers as well as cable operators. Our goals are to issue specifications that will unleash market forces to promote innovation and competitive offerings. (In fact, our License Agreements explicitly assure manufacturers that our specifications are not a ceiling on innovation, and invite them to add other features and functionalities.)

Finally, I would like to briefly mention that we are also pursuing a similar approach to remove technical barriers for the deployment of telephone services over cable networks. The PacketCable project at CableLabs has issued specifications, now worldwide standards, supporting telephone services using advanced voice over the Internet technologies. Thus, in the near future, we believe consumers will benefit greatly from lower cost equipment and competitive telephone services delivered over cable networks in an even wider fashion than currently is the case.

In closing, CableLabs has been working to remove technical barriers inhibiting the deployment of innovative new services over cable systems. Through the efforts I described above, we are assisting the cable industry in developing a new wave of innovative products that we hope will keep cable services attractive to consumers in an increasingly competitive environment. I hope that this has helped to clarify some issues of interest to the Committee. Thank you again for this opportunity to testify this afternoon. I'd be pleased to answer the Committee's questions.

Chairman KOHL. We thank you, Mr. Green.

Now, we turn to Mr. Haverkate.

STATEMENT OF MARK HAVERKATE, PRESIDENT AND CHIEF EXECUTIVE OFFICER, WIDEPENWEST, CASTLE ROCK, COLORADO, ON BEHALF OF THE BROADBAND SERVICE PROVIDERS ASSOCIATION

Mr. HAVERKATE. Mr. Chairman, Senator DeWine, thank you very much for allowing me to participate in this important hearing today. I am the President of WideOpenWest and I represent today my company, as well as the Broadband Services Providers Association, which is a group of 13 entrepreneurial companies across the country that have been out building brand new high-speed residential broadband networks for the last several years.

In effect, when the Congress passed the 1996 Cable Act, they passed us the ball. We caught it and we ran with it. Since that time, we have been working as hard as we can to build new networks and provide competition to the local incumbent cable and telephone companies in as many markets as possible.

Since that time, we have invested collectively over \$5 billion in building these new high-speed networks. We are up to about 1 million customers together, so we feel like we have made substantial progress from a ground-zero start back in 1996. But even with that tremendous progress, we are still only about 5 percent the size of an AT&T-Comcast, just to put things in perspective.

A few months ago, my company, WideOpenWest, stepped up to the plate to preserve competition when no one else would and we acquired the properties that Ameritech built in the Midwest, the competitive cable TV properties that were built in the States of Ohio, Illinois, and Michigan.

Since acquiring those properties, we have been aggressively adding digital services, aggressively rolling out high-speed Internet, and now are providing competitive choice for all those products to over 1.3 million households in those three States, much to the delight of the municipalities, because now they have a competitive choice today and going forward, hopefully.

I am pleased to report not only from WOW but also from the other Broadband Service Providers Association members that, in fact, the demand for broadband is very strong. We have tremendous support for the services that we offer. The penetrations that we are getting are generally on target with our business plan. In fact, our business model is a good business model.

One example of innovation I would like to bring up is on the Internet side. A lot of people consider us more on the cable TV or phone side, but not only WOW but the other companies have put a lot of attention on the roll-out of high-speed Internet service, and we are doing it in a different way than the cable industry has done it so far.

In WOW, for example, we have three different options for the customer on price and speed. So depending on whether the residential user is a high-bandwidth user or a home telecommuter and they need the highest possible speed and performance, we have that option available. We also have an option as low as \$19.95 a month for "always on" high-speed Internet for the customer who just wants to have an "always on" connection to the Net. So we actually have broadband services available for prices less than a dial-up connection.

Before I move into talking about our concerns with the AT&T-Comcast merger, I would just like to point out that I personally, and I am sure many other members of the BSPA, have tremendous respect for the Roberts family. Just like Mr. Roberts, Sr., who was an entrepreneur years ago and built a great communications company, that is what we aspire to do today, so in many ways we look up to that. But we do have issues with the conduct of the corporation and I would like to use the rest of my time to point out some of those things. It is not just Comcast, but AT&T as well, as well as some of the other MSOs.

We think that there has been a decision made that the best time to try to eliminate the local broadband competitors from the market is right now. Everyone knows that the capital markets are a little bit weak. There are big companies combining together. There is talk about competition between the cable industry and the telephone industry. It is a good time now to look around and say we have 13 entrepreneurial companies out there that really pose a serious competitive threat to us on the Internet side, on the digital services side, on the video-on-demand side coming up. Maybe now is the time to really put the pressure on and see what we can do.

So two things are happening. One is on the program exclusivity side. Everyone knows that Comcast and AT&T have control and ownership interests in a lot of different channels, not only the basic cable channels but sports teams and the channels that distribute those sports teams, video-on-demand programming. They are moving into control over all sorts of programming.

Even one possibility is the purchase of broadcast stations. If they end up owning broadcast stations, and all this clout combined, the risk that we have, all 13 of our companies, is if we can't have equal access to all the programming that is available on fair, economic terms, that is a trump card that they automatically win. We cannot possibly compete with a company that has all this programming and control of it and doesn't make it available to us, or if they do make it available, they make it on harsh terms, and expect to be able to hold on to our customer base.

The second issue that I would like to point out before I close is a current practice that should cause concern for the subcommittee because it is certainly a concern for the competition, and that is that there are now two rates that are being used in the market.

Historically, in the cable television business, ever since Mr. Roberts, Sr., was in it in 1963, the common practice is to have one rate. You notify the municipality, you notify the customers, and everybody in that municipality pays the same rate. It is not like a flea market or an eBay where everybody gets a different rate.

But now there is a strategy that is being deployed, we feel, directly targeting us, and that is to have two rates in the same municipality for the same service, one rate that their customers pay, their big, large base of customers pay, and then a second rate that is 35 percent less, or sometimes more, that is directed at our customers or any of their customers that consider switching over to Comcast.

So now you have two rates in the same market for the same services, next-door neighbors getting the exact same services paying different rates. And you ask, well, why is that? Is that good competition? Well, it is not. It is clearly designed by a big corporation to try to squeeze out the competition, and we are here to object to that and to bring it to the subcommittee's attention.

So are we in favor of the merger or not? For us, it is not an issue about size. For us, it is an issue about corporate behavior and whether it is in the best interests of this country, after all the work that was done by Congress, by the municipalities, and by all these entrepreneurial companies to build these networks and really have local competition be at its height. Is it really in our best interests to allow some of this bad behavior to jeopardize that whole process?

We suggest that it isn't and we ask for some attention to be put to this so that our entrepreneurial dreams can come true.

Thank you very much.

[The prepared statement of Mr. Haverkate follows:]

STATEMENT OF MARK HAVERKATE, PRESIDENT AND CHIEF EXECUTIVE OFFICER,
WIDEOPENWEST, ON BEHALF OF THE BROADBAND SERVICE PROVIDERS ASSOCIATION

Mr. Chairman, Members of the Committee, my name is Mark Haverkate, and I am the Chief Executive Officer of WideOpenWest, a broadband communications company providing residents and small businesses in 5 States with cable television, high speed internet, and telephone services.

I appear today on behalf of my company, and also on behalf of the Broadband Service Providers Association ("BSPA"), an organization founded in October 2001, and consisting of 13 pioneering companies committed to building competitive broadband networks in communities across the country.¹

We appreciate your invitation to participate in this hearing. We have great concerns about the proposed merger between AT&T and Comcast, and look forward to discussing them with you today.

INTRODUCTION

Ten years ago, neither my company, nor any of the members of the BSPA, existed in the form they do today. Their creation was in direct response to the Telecommunications Act of 1996—which brought down barriers to competition among telephone, cable, and data service providers—and to advances in fiber optic and other technologies that made it possible to provide all of these services through "one wire."

Through this marriage of law and technology, the means has been borne to bring the great benefits of competition to consumers everywhere: as the FCC has proved, where consumers have a choice between providers of communications services, they pay lower prices, get better service, and have a greater range of more advanced offerings to choose from.

For example, WideOpenWest—or WOW as most of our customers call us—began operations in March of 2000, connecting our first customers in the Denver metropolitan market, where we continue to operate a digital cable and high speed Internet system in direct competition with AT&T Broadband. We are proud of the innovation we brought to the residential communications market, being the first cable television operator to champion the cause of open access for ISPs, the first company to offer flat rate unlimited long distance telephone service, and the first company to offer residential Internet customers a choice of three speed and price options.

In November of last year, WOW stepped forward when no one else would to acquire Ameritech's extensive competitive cable television systems in the Midwest markets of Chicago, Columbus, Cleveland, and Detroit. We are now adding digital and Internet services to those networks in order to bring residents there unprecedented—and much appreciated—consumer choice.

My company, and all the members of the BSPA, are bringing these benefits to consumers in dozens of communities around the country today.

Yet we are far from satisfied. Our goal is to expand much further, bringing the benefits of competition to every community that wants it.

To do so, however, we face significant challenges. As we build our systems it is imperative that we:

- Can count on vigorous enforcement of the Nation's antitrust and communications laws, to ensure that incumbents do not use their vast market power to stifle competition before it can become fully established.
- Have fair access to video programming that customers want to watch.
- Have fair access to utility poles and conduits.
- Have fair access to residents of multiple dwelling units—often the first toehold for competitors entering a market.
- Are not discriminated against in the application of franchising, tax and other laws.

The proposed merger between AT&T and Comcast has significant implications with respect to each of these areas. Whether that merger occurs, and under what

¹The member companies of the BSPA are Altrio Communications, Carolina Broadband, ClearSource, Everest Connections, Gemini Networks, Grande Communications, Knology, RCN, Seren Innovations, Starpower Communications, Utilicom Networks, WideOpenWest, and WinFirst.

conditions, will therefore have a major impact on whether the promise of the broadband industry is met, and consumers in other parts of the country have real choice in the purchase of cable television and other communications services in the future.

THE PROPOSED MERGER WOULD REDUCE COMPETITION

In many of our markets, the incumbent we face is either Comcast or AT&T Broadband. As a group, the members of the BSPA today have franchises to build systems in communities with more than 15 million households—nearly half which are now being provided service by either Comcast or AT&T. For some companies this number is much higher. In the case of WideOpenWest, for example, more than 75 percent of our territory is now being served by systems owned by either Comcast or AT&T. For other members of the BSPA, that percentage is even higher.

The members of the BSPA are highly concerned about the adverse effects of the proposed merger between Comcast and AT&T. I want to discuss two of the reasons for our position with you today.

First, the merger parties now control several key programming channels that all residential customers want access to. In the future, they will control more, including many sources of interactive and “on demand” programming. Yet they have already shown themselves willing to use their control over that programming for anti-competitive purposes. We fear the merger only will make this situation worse.

Second, the merger parties have shown that they are willing to resort to unfair and anticompetitive pricing tactics to prevent us from doing business in their communities. We fear that the merger would lead to even greater use of these tactics, in a targeted and coordinated way, with even more damaging results.

MERGER WOULD REDUCE COMPETITORS’ ACCESS TO KEY PROGRAMMING SERVICES

As the Chairman of the FCC has recognized, “content is king” in the broadband world. Unless a competitor carries what subscribers want to watch, it cannot survive.

Comcast and AT&T today own numerous national and regional programming services that BSPA members need in order to compete. The merger parties have also announced their intention to use their combined resources to gain control over additional programming services. They have also shown that they will use their control over programming as a sword against competitors, and to undermine efforts to enter the merged entity’s markets.

For example, Comcast owns, either in whole or in part, seventeen programming services carried by it and other cable television systems. These services comprise 6 percent of all those distributed nationally. Some of these services are extremely popular with certain segments of the population.²

These services include three regional sports networks: Comcast SportsNet, which is carried on Comcast systems in the Philadelphia market; Comcast SportsNet Mid Atlantic, which is carried on Comcast systems in the Washington and Baltimore markets; and Comcast Sports Southeast, which is carried on Comcast Systems in various markets in the Southeast. All three networks feature real-time sporting events played by local professional and collegiate teams, as well as sports news and discussion shows. Comcast has exclusive rights to much of the programming carried on these networks.³

Comcast also owns two other regional programming services, the Comcast Network and the Sunshine Network. Its other programming interests include QVC, E! Entertainment, Golf Channel, Discovery Health Channel, iN DEMAND, Outdoor Life, and style.⁴

AT&T holds positions in three national programming services: E! Entertainment, style, and iN DEMAND. It also has equity in three regional ones: Fox Sports New England, New England Cable News, and Pittsburgh Cable News Channel.⁵ By virtue of its approximately 25 percent interest in Time Warner Entertainment, it has

²*In re Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, § 158, CS Dkt No. 01-129 (rel. Jan. 14, 2002)(“Eighth Annual Report.”)

³*In re Applications for Consent to the Transfer of Control of Licenses, Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee*, Applications and Public Interest Statement, at 14 (filed Feb. 28, 2002)(“Applications and Public Interest Statement.”)

⁴Applications and Public Interest Statement, at 15.

⁵Applications and Public Interest Statement, at 25. AT&T spun off its Liberty Media subsidiary last summer, and with it AT&T’s attributable interest in numerous additional programming services formerly owned by Tele-Communications Inc. Whether and the extent to which AT&T has exclusive or preferential terms for carriage of these services today is unknown.

ownership interests in several more: Home Box Office, Cinemax, Comedy Central, and CourtTV.⁶

BSPA members must have equal access to the programming services controlled by Comcast and AT&T if they are to compete effectively in their markets, and provide the benefits of that competition to consumers.

This is particularly true with respect to the regional sports programming networks, which have long been recognized as “must have” programming. Many potential customers care deeply about sports, and will not subscribe to the service of any competitor that does not carry the sports programming they want to watch.⁷ This fact has been borne out by hard data by BSPA member RCN: according to a survey it conducted, 40-58 percent of cable subscribers indicated that they would be less likely to subscribe to cable service if it lacked local sports programming.⁸

For the same reason, iN DEMAND is considered an essential offering, since it features not only films and other entertainment programs, but sports packages as well. HBO, too, is considered a “marquee” programming service, and one that competitors must be able to offer their customers.

The other programming services owned by the merger parties are also of great importance to the competitiveness of BSPA members. QVC, in particular, is key because it is the most popular home shopping service on cable television today, and is also a source of revenue for systems that carry it.⁹ Others are as well—at least to certain segments of the population. To individuals in these groups, the ability to watch certain golf tournaments, or more extensive coverage of the Tour de France, is important enough to control their choice of broadband or cable service provider.¹⁰ While the number of such subscribers would vary among service areas, the experience of the BSPA members is that some number of customers in each would cancel their service if they could no longer watch this programming.¹¹ If access to several such services were denied, the total number of customers lost could be highly significant.

MERGER PARTIES HAVE WITHHELD PROGRAMMING TO DEFEAT COMPETITION

The merger parties have previously shown they are willing to use their control over programming to suppress competition in the market for multichannel video distribution services.

For example, it is well known that access to sports programming is crucial for any new entrant to this market. Comcast knows that, too, so in the late 1990s, when it was establishing Comcast SportsNet, it assiduously refused to allow RCN (or DirecTV or EchoStar) to carry that service on any of its systems in the Philadelphia area. The DBS providers both filed complaints against Comcast with the FCC, but because the programming service is not distributed by satellite, and is instead distributed by terrestrial means, neither was able to persuade the FCC to order Comcast to grant it access to this programming. RCN was able to avoid this fate but just barely—it now has access to SportsNet programming, but only for 3 months at a time.

AT&T, too, has not been above using its own exclusive access to programming as a sword against competition. For example, in Kansas City the incumbent cable operator—a joint venture between AT&T and AOL Time Warner called Kansas City Cable Partners (“KCCP”)—has refused to allow BSPA member Everest Connections

⁶ Applications and Public Interest Statement, at 25, 53. AT&T also has a slightly less than 5 percent ownership interest in Cablevision Systems Corp., which owns numerous important programming services, including American Movie Classics, Bravo, Fox Sports Net, and the MSG Network. *See id.* at 20 & n.27.

⁷ Eighth Report, §§ 171-74; *See also In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, § 183 (“Seventh Annual Report”); *Impact of Sports Programming Costs on Cable Television Rates*, GAO/RCED-99-136, at 3 (June 1999.)

⁸ *In re Annual Assessment of the Status of Competition in Markets for the Delivery of Video Programming*, § 184 n.650 (“Sixth Annual Report.”)

⁹ QVC is carried to over 77 million homes. *See* Eighth Annual Report, App. D, Table D-6. Systems that carry QVC are paid a portion of the gross revenue generated from sales to buyers within their franchise areas. Where more than one system serves a particular area, these payments are divided in proportion to each system’s number of subscribers as a percentage of the total number of subscribers within the franchise area.

¹⁰ The Golf Channel is reportedly of immense importance to golf enthusiasts. The Outdoor Life Channel also appeals to core groups of sports enthusiasts; for example, several years ago it obtained exclusive rights to cover the Tour de France bicycle race in the United States.

¹¹ *See* Statement of Brian Roberts, President, Comcast Corporation; (Golf Channel), “People thought nobody would ever want to watch a golf channel. Golf Channel is probably one of the best brands in television if you happen to like golf.” (Joint analyst meeting)(Dec. 21, 2001.)

to carry Metro Sports, a local sports network KCCP has established.¹² This service has exclusive rights to certain popular sports programming, such as the basketball games played by the University of Missouri, other college basketball and football games, professional soccer matches, high school sporting events, and more. Everest's efforts to gain access to this programming service have been stymied by the fact that KCCP distributes it by microwave transmission, not satellite.¹³

Since Everest is not allowed to carry Metro Sports, it is effectively prevented from signing up residents for whom watching sports is a priority. This is true, as Everest's marketing staff has found out, even for residents who are otherwise dissatisfied with service from KCCP.¹⁴ To add insult to injury, KCCP allows Comcast—which provides service in several adjacent suburbs, but which does not compete with KCCP—to carry this programming.¹⁵

The proposed merger could lead to an expansion of the programming tactics Comcast and, to a lesser extent, AT&T have used to impede competition in their markets, and increase the adverse impact of these tactics on both BSPA members and consumers. It would provide an incentive for both Comcast and AT&T to discriminate in the sale of their programming not only to benefit their own systems, but those of their new partner as well. It would also provide additional leverage to obtain exclusive access to programming owned by third parties, which the merged entity could use to pressure its competitors in multiple markets.

The merger parties have also expressed their intention to develop new programming services, which they have strongly implied they do not intend to share with competitors. As the parties have recently stated to the FCC, "Comcast's established expertise in producing local and regional programming will enhance the ability of the merged entity to offer AT&T Broadband customers the kinds of community-oriented coverage that Comcast already provides today to many of its customers. [This programming] offers potential customers a reason to sign up for Comcast's services, and offers existing customers one more reason to continue to subscribe."¹⁶

To the extent such services were the sole source for regional sporting events and other highly popular programming, new entrants could be denied access to the ingredients that are most critical to their success as competitors.

SECRET, SELECTIVE DISCOUNTING

Over the past year many members of the BSPA have been subjected to extreme, targeted discounting by Comcast and AT&T in order to drive us out of business. These discounts are huge, and they are only offered to our customers or residents in our communities that want to switch to us from the incumbent. They are not advertised or made available generally—they are granted secretly over the telephone or in the doorways of our customers' homes. For example:

- Throughout southeastern Michigan, in markets where WideOpenWest competes with Comcast, residents we sign up for service are being offered rate discounts of between 33 and 50 percent to switch back to Comcast. They are also being offered free digital service, free pay per view, and other giveaways. Existing Comcast customers that try to cancel their service to sign up with us are being offered similar benefits not to do so. Importantly, these offers are not publicized, nor are they made available to anyone other than our existing customers and those Comcast customers who have asked to be disconnected in order to switch over to us.

- In Austin, Corpus Christi, and other markets in Texas, both Grande and ClearSource are being subjected to deep discounting by AT&T, through its joint venture with AOL Time Warner, Texas Cable Partners.¹⁷ In Austin, for example, TCP

¹² AT&T and Time Warner are both 50 percent owners of KCCP. In addition, Time Warner's interest is mainly held through its subsidiary, Time Warner Entertainment, in which AT&T owns about 25 percent. See Applications and Public Interest Statement, App. 7.

¹³ The FCC's program access rules protect—to some extent—competitors' access to satellite delivered programming owned by vertically-integrated cable programming vendors. It does not extend to programming delivered by terrestrial means.

¹⁴ Some of the sports programming that appears on Metro Sports is produced by Mizzou Sports Properties ("Mizzou.") Because KCCP has refused to allow Everest to carry Metro Sports, Everest has tried to obtain this programming directly from Mizzou so Everest could produce its own sports programming channel for its systems. Yet, KCCP, anticipating this response, has locked up this programming by means of an exclusive contract with Mizzou.

¹⁵ The communities in the Kansas City metropolitan area served by Comcast include Olathe in Kansas, and Raytown, Independence and other communities in Missouri.

¹⁶ Applications and Public Interest Statement, at 42, 44.

¹⁷ Texas Cable Partners owns cable systems across Texas, and is 50 percent owned by AT&T. The remainder of the partnership is owned by a partnership controlled by and AOL Time Warner subsidiary, Time Warner Entertainment.

is offering discounts of between \$16 to \$28 per month to customers of these competitors in order to lure them back to the incumbents' own service.¹⁸

- In Kansas City, Everest is being subjected to comparable tactics by AT&T, through its joint venture with AOL Time Warner, Kansas City Cable Partners. In that market, however, KCCP has gone even further than its Texas affiliate—promising Everest customers additional payments of \$200 if they switch back to KCCP, and even more if they agree to write testimonials in favor of KCCP's service. KCCP has also made so-called customer “loyalty test” offers to residents in areas where Everest is building out its system, through which customers in these neighborhoods are guaranteed discounts on service prices if they agree to stay with KCCP or 12 months. To fund these discounts, KCCP has raised the price of service for other neighborhoods served by its system.

- In Augusta, Georgia, Comcast is offering discounts in excess of 50 percent for basic and digital cable, high speed data, and other services—but only in areas where Knology offers competitive services. These offers are not made generally throughout Comcast's service area, but are instead mailed directly to Knology customers and new residents in competitive neighborhoods.

Secret, selective discounting like this will destroy competition if it is allowed to continue. Giving big discounts to a chosen few is a cheap way for incumbents to exact the greatest possible toll on new entrants. And while that relative handful of customers gets a big financial benefit, once the competitor is forced from the market they—with the rest of their neighbors—will resume paying the pre-competition, monopoly rate: just like customers do in the communities where competitors have not yet entered.

In truth, the merger parties are waging a behind-the-scenes hostile take-over of our company and the entire competitive broadband industry—one customer at a time. It is a clever strategy, and one that is likely to work if it is allowed to continue. Moreover, once they achieve this goal, they will also have complete control over the huge market for cable modem Internet access, and again know no restraint in what they charge for it.

The Federal Communications Commission recognizes these facts, and publicly stated that secret and selective discounting threatens to destroy broadband competition. In its recent report on the state of competition in the cable television industry, the Commission reviewed these actions and concluded:

The vast resources of a large MSO may simply prove too much if brought to bear in a targeted fashion against a single system entrant. Moreover, we are concerned about the signal such targeting may send to others who would compete in the MVPD market, and particularly to the financial markets to which a new entrant may well be dependent for resources. [S]uch practices. . . tend to limit competition and discourage new entry.¹⁹

These tactics will only get worse if the merger is approved. Combining the resources of both AT&T and Comcast, without preventing the merged entity from targeting BSPA members in this manner, will allow the new company to coordinate and intensify these actions—with lethal effect on competitors. If this is allowed to happen, it will be too much for many of our companies to endure.²⁰ The result would undermine competition in the market for broadband services across the country.

MERGER PARTIES ENGAGE IN OTHER ANTICOMPETITIVE CONDUCT

The selective discounting programs now being used by the merger parties against BSPA members are not the only means they are using to prevent entry, impede competition, and deny consumers choice. Numerous other tactics are also being employed, and are producing comparable results.

These tactics include efforts to prevent competitors from getting franchises, or to saddle them with onerous or unrealistic terms. They include securing exclusive contracts for certain programming services that they do not own—and that are not owned by other MSOs, or are not delivered by satellite, thereby making it impossible for the competitor to gain access through use of the FCC's program access rules. They include taking action to impede or slow competitors' ability to build their systems, get access to utility poles, and serve multiple dwelling units.

¹⁸ See, e.g. *Time Warner Cable Discounts Draw Fire From City, Competitor, Austin American-Statesman* (Feb. 19, 2002.)

¹⁹ Eighth Annual Report, § 209.

²⁰ For example, the merged company could use these predatory tactics simultaneously in multiple markets served by a particular competitor, thereby forcing that competitor to fight battles, and expend scarce resources, in each of these markets at the same time.

All of these tactics impose substantial financial burdens on BSPA members, and directly reduce the level of competition they are able to provide. The merger parties plainly pursue them to eliminate from the market the only competitor they have that can match them for quality and value, and can provide consumers with a more complete range of communication services than they themselves can.

BSPA members believe that, given the track record of the merger parties, combining their assets and management would lead to coordinated campaigns in multiple markets targeting one or more of them to achieve this goal. If that were to happen, competition would suffer—if not disappear altogether. Entry would be prevented, expansion would be delayed, consumers would be denied choice, prices would rise, and the market would be denied all the other benefits that competitive communications providers provide.

CONCLUSION

I want to be very plain that our company is ready for competition. So are all the members of the BSPA. That competition may well be bare-knuckled, and we expect that. But the tactics we are seeing today go well beyond a fair fight. They are the equivalent of a bully slipping on brass knuckles before the fight begins. No competitor can long stay in the ring under these circumstances.

Six years ago Congress adopted as Federal policy the goal of bringing facilities-based competition to the national markets for multichannel video, telephony, and data services.²¹ WOW and the other members of the BSPA have answered this call, and are now in the process of bringing all of its benefits to consumers around the country. But we are now at a crossroads: If we cannot put a stop to the tactics Comcast, AT&T and other incumbents are using against us, and if we cannot get fair access to the programming customers want to watch, then this goal will either be long delayed in its achievement, or undermined altogether.

If this happens, then all your hard work, and of the FCC, and of the many, many local franchising authorities around the country with which we have worked to bring competition to their communities, will have been for nothing.

Thank you again for inviting me here today. We stand ready to work with this Committee in any way we can to ensure that the fruits of competition are within the reach of consumers everywhere.

Chairman KOHL. We thank you, Mr. Haverkate.
Now, we ask Mr. Perry to make his statement.

STATEMENT OF ROBERT A. PERRY, VICE PRESIDENT, MARKETING, MITSUBISHI DIGITAL ELECTRONICS AMERICA, IRVINE, CALIFORNIA

Mr. PERRY. Thank you, Chairman Kohl and Senator DeWine, for having me here this afternoon. I appreciate the opportunity to address you. I would also like to thank you, Chairman Kohl, for your fifth point, which is in the 1996 Telecommunications Act the FCC was to promote the availability of retail set-top boxes to create this vast competitive environment for new products and innovation. So I appreciate you bringing that up; it was obviously lacking in some of the statements that have been made here today.

First and foremost, my name is Robert Perry. I am the Vice President of Marketing of Mitsubishi Digital Electronics America. My responsibilities include produce development, government affairs, and dealing with the retailers who sell our products across the country.

My goal in life is quite simple. It is to sell large volumes of advanced digital television receivers and other products as quickly, inexpensively and effectively as possible. One out of every five HDTVs in consumers' homes today is a Mitsubishi. But despite the best efforts of the members of this committee to introduce competi-

²¹See, e.g., S. Rep. No. 104-230, at 1 (1996)(Congress seeks to accelerate the "deployment of advanced telecommunications services to all Americans [and open] all telecommunications markets to competition")(conference report for Telecommunications Act of 1996.)

tion, my competitors and I are still unable to offer a single consumer product of any sort that connects directly to any digital cable system. The dominance of the AT&T-Comcast deal can either seal this market from competition or finally open it. This power will all be in the hands of one of my colleagues at this witness table.

The prepared statements of Comcast and AT&T for today's hearing do not even address the device market, nor does their oral testimony, but 10 years of leaving this issue to CableLabs has not enabled competitive entry. For such entry to have a chance, it must be actively embraced and supported by the CEOs before you today.

For 10 years, the Congress has tried to open this market to competition. In 1991, Senator Leahy pointed out that cable systems do not really support the operation of television receivers. In 1996, Congress explicitly instructed the FCC to assure the competitive commercial availability of any product necessary to receive any service offered by a cable operator.

In 1998, the FCC accepted an offer from CableLabs and its MSO owners to draft and support necessary technical specifications by July 1, 2000. These specifications turned out to be late, inadequate, incomplete, and not sufficiently tested. Mr. Green barely refers to them in his testimony today.

Recently, a competitor of ours asked CableLabs to certify a prototype DTV receiver built essentially to the July 2000 specifications, but CableLabs refused to consider certifying it because it does not also rely on newer specifications that are still under development and revision. So CableLabs' first try was deemed good enough for the FCC, but not good enough for an actual product.

CableLabs' newer specification, known as OCAP, may be an improvement, if and when it is complete and reliable. But today it is untested, far from ready, and even farther from being relied upon. In fact, in recent public statements they have commented that OCAP may not even be ready in time to support the digital television transition.

In addition, at present we have no assurance that the products built to this specification would actually work when connected to cable systems. The cable MSOs themselves, such as Mr. Roberts and Mr. Armstrong, have been unwilling to say that they will rely on this specification in the devices that they themselves lease to customers.

Moreover, both OCAP 1.0 and OCAP 2.0 provide that competitive product features such as recording, games, program guides, telephony, and home networking might not work or could be disabled at will by the MSO. CableLabs has referred to this issue as "tools, not rules." As we all know, no one orders tools without intending to use them.

We face another show-stopper in the so-called POD-host interface, or PHILA license, which any entrant must sign in order to compete with MSOs in the device market. Elements of this license are anti-competitive and profoundly anti-consumer. Such provisions include turning off home network interfaces by remote control, reducing the resolution of high-definition content, turning off consumer home recording via technical means, and requiring CableLabs certification prior to sale at an unlimited per-product certification fee.

While we try to fight through this obstacle course, cable MSOs say they distribute about 135,000 digital set-top boxes per week, about 25 million to date, all proprietary, and none which conform to the standards set for competitors or are bound by this license. Not a single competitive product has been sold or even certified for manufacture by CableLabs. The competitive score to date is cable MSOs \$10 billion in commerce, competitive entrants zero.

AT&T-Comcast will be CableLabs' largest owner and Motorola's biggest customer. I believe this committee can and should insist on a commitment here and now that the enormous power resulting from this merger be used to deconstruct monopoly, not consolidate and perpetuate it.

Here are the minimum commitments that I urge this subcommittee to demand from my colleagues at this witness table. As to standards and specifications, a simple and authoritative pledge from AT&T-Comcast that by a date certain their devices will live by the same rules and specifications they set for competitors, and that specifications will not discriminate against competitive entrants. This would go an enormous way to build confidence in manufacturers, retailers, and consumers to enter this marketplace.

As to product certification, while my colleagues and I like and respect Mr. Green, MSO policies and resource constraints on CableLabs have led to certification practices that in many cases are discriminatory, under-funded, over-priced, non-transparent, inefficient, and unpredictable. It is up to AT&T-Comcast as the dominant cable MSO to build confidence that CableLabs will drop any requirement that they approve competitive products for sale.

As to the PHILA license, the POD-host interface license, this license is a public trust originating in the Congress. A reasonable license would not threaten the 2.5 million HD displays now owned by consumers with degraded resolution or with interfaces being shut off and screens going dark, or with the unconstrained ability to stop home recording by technical means.

AT&T-Comcast will have the power to insist on reasonable license terms that a manufacturer could sign without having to apologize to its past, present, and future customers. Accomplishing this would fulfill Mr. Armstrong's commitment here today not to violate any FCC regulation, as well as complying with the will of Congress.

On behalf of my company, I thank you very much for having invited me today.

[The prepared statement of Mr. Perry follows:]

STATEMENT OF ROBERT A. PERRY, VICE PRESIDENT, MARKETING, MITSUBISHI DIGITAL ELECTRONICS AMERICA, INC.

My name is Robert Perry. I am Vice President, Marketing, of Mitsubishi Digital Electronics America. My professional goal is to sell large volumes of advanced digital television receivers, as quickly, inexpensively, and effectively as is possible. While I have enjoyed some success in doing this, I face a massive and frustrating competitive obstacle that also afflicts 70 percent of my customers. Despite the efforts and instructions of the Congress and the FCC, my competitors and I are still unable to offer a consumer product, of any sort, that connects directly to any digital cable system. The power to be conveyed by the merger of Comcast and AT&T Broadband can be used to make this obstacle insurmountable, or finally to clear it away. If the merger goes through, this power will all be in the hands of my colleagues at this witness table.

One out of every five HDTVs in consumers' homes today is a Mitsubishi. But even with this leadership, we are unable to make headway in offering products that connect to digital cable systems. And I see competition from others repressed as well. Although I appear today on behalf of my company, I am also the chairman of the Video Board of Directors of the Consumer Electronics Association, a Board member of the Home Recording Rights Coalition, and a Board member of HAVI, a corporation devoted to digital home networking software systems. In each capacity I have learned how and why consumers are still denied the benefits of competition mandated by the Congress 6 years ago.

A little history:

- In 1991, Senator Leahy complained that cable systems do not adequately support the operation of TV receivers. His attention to this issue led to legislation in 1992, telling the FCC to "promote" the availability of competitive remote controls and set-top boxes.

- In 1996, Section 304 of the Telecommunications Act more explicitly instructed the FCC to assure the competitive commercial availability of any product necessary to receive a service offered by a cable operator—not just set-top boxes, but also DTV receivers and other new products that consumers want and expect, such as digital video recorders.

- In 1998, FCC regulations gave the cable industry until July 1, 2000, to support the operation of competitive devices bought by consumers from independent manufacturers and retailers. CableLabs, the research consortium of the cable industry, offered to draft the necessary technical specifications, and the FCC accepted this offer.

- Today, in the second quarter of 2002, there is no competitive entry on the horizon. The July 1, 2000 standards were late, inadequate, incomplete, and not sufficiently tested. Recently a competitor of ours did ask CableLabs to certify a prototype DTV receiver built to this specification, as subsequently modified and improved. But CableLabs refused to consider certification of such a product, because it does not incorporate newer specifications that are still under development and revision.

- The newer specification—the "Open Cable Access Platform," or OCAP, is software-based and may be an improvement if and when it is complete and reliable. But it is untested, far from ready, and even farther from being relied upon. Why? *Because at present we have no assurance that products built to this specification would actually work when connected to cable systems. The cable operators themselves have been unwilling to say that they will rely on this specification in the devices that they, themselves, lease to customers.* Moreover, as now written, this specification enables cable operators and program suppliers to remotely and unilaterally suppress competitive features of multi-purpose products. Product features such as recording, games, program guides, telephony, and home networking, might not work or could be disabled at will if they are provided in a consumer electronics device connected to digital cable.

- In 2000, a new and persistent legal barrier emerged—a license offered by the consortium of major cable MSOs, take it or leave it. Due to copy protection considerations advanced by the motion picture industry, any competitive entrant must sign this license, offered by CableLabs. Elements of this license are not only anticompetitive, they are also profoundly anti-consumer. It includes provisions for:

- Turning off home network interfaces by remote control.
- Reducing the resolution of high definition content by three-fourths on designated programs.
- Allowing consumer home recording to be turned off via technical means on an unrestricted basis.
- Requiring "certification" of these products by CableLabs prior to their sale, at an unlimited per-product "certification" fee.

The only companies that have signed this license are Motorola, Scientific Atlanta, and Pace—all entrenched suppliers of set-top boxes to cable operators themselves, who are not bound by its terms.

So, Mr. Chairman, as Comcast and AT&T Broadband appear today to defend their proposed aggregation of power in all markets, you should be aware that their industry thus far has used its concentrated power to frustrate the competitive entry legislation launched a decade ago by the chairman of your own parent committee:

- Cable operators distribute about 135,000 digital set-top boxes per week; they own about 25 million proprietary set-top boxes, none of which conforms to or relies on competitive standards, or the proposed CableLabs standards for attachment to cable systems.

- Not a single competitive product has been sold to any consumer, nor has any yet been manufactured or even certified by CableLabs for manufacture. The fox does not simply rule the henhouse; it is owner and sole tenant.

A merged AT&T and Comcast will be by far the biggest, most powerful, and most influential cable operator in the markets for both cable services and cable devices. Today, both companies procure their set-top boxes from the same supplier, which already dominates its market. The merged AT&T and Comcast will be CableLabs' largest owner, and Motorola's biggest customer. Its combined intentions and single checkbook will determine whether this product market remains closed to viable competition, or finally becomes the open and competitive market that Chairman Leahy envisioned in 1992, and that the Congress demanded in 1996.

You could, of course, simply approve this aggregation, and rely on the FCC to insist on compliance through closer regulation. There are proposals pending at the FCC for it to demand compliance with existing regulations, and I support them. But in the face of the concentrated cable industry power that already exists, the FCC has been pushing a string. In my view this Committee can and should insist on a commitment, here and now, that the enormous power resulting from this merger be used to deconstruct monopoly, rather than to consolidate and perpetuate it.

Here are the minimum commitments I believe this Subcommittee should demand of my colleagues at this witness table:

As to standards and specifications: I don't see how I can ask my company to invest millions of dollars in a new product line, or my customers to invest over three thousand dollars in an HDTV receiver, if the cable operators who wrote the software and specifications governing the product's operation are unwilling to rely on them in the products that they distribute themselves. A simple and authoritative pledge, from the individual who will run the combined AT&T-Comcast, that by a date certain (preferably 2003) their devices will live by the same rules and specifications they set for competitors, and that these will not discriminate against competitive features, would go an enormous way to build confidence that those who buy products from competitive entrants will not be disappointed or abandoned in their investment.

As to product certification: I don't understand how the July 1, 2000 CableLabs specification could be adequate to satisfy FCC regulations, but not adequate for CableLabs certification of an actual product. The CableLabs certification practice is in many cases discriminatory, underfunded, overpriced, nontransparent, inefficient, and unpredictable—at least as it is encountered by those who would compete with CableLabs' MSO owners. A pledge from the merged Comcast-AT&T to look very seriously into these complaints, and to work expeditiously toward self-certification, as we enjoy in other standards areas, would go a long way.

As to the "PHILA" license that competitive entrants must sign: The ability to license competitors is a public trust that the FCC has granted to CableLabs, albeit perhaps in error, and that CableLabs continues to abuse. How can CableLabs be shielded from antitrust scrutiny, but not public accountability, in exercising it? A reasonable license would be one that did not threaten the 2.5 million displays now owned by consumers with degraded resolution, or with interfaces being shut off and screens going dark, or with the unconstrained ability to stop home recording by technical means. Even the motion picture industry has disavowed so-called "selectable output control," by which high-definition outputs, home network connections and recordable interfaces can be shut off in this manner. But in April 8 letters to Senators Leahy and Hatch, the President of CableLabs refused to disavow selectable output control. I call upon the prospective head of the merged AT&T-Comcast, here and now, to disavow selectable output control, and to pledge to sit down and work out, expeditiously, a license that manufacturers could sign without having to apologize to their past, present, and future customers.

Mr. Chairman, I know that this subcommittee has been looking into the competitive issues that I've discussed today for quite some time, and that it has inquired of Chairman Powell of the FCC about them on more than one occasion. I believe you have performed a great public service in doing so. We are fortunate that this merger transaction, which would further aggregate monopoly power in the distribution of devices and in the setting of technical standards for their procurement, is within the jurisdiction of this Subcommittee, as are the regulators who must rule on it. On behalf of my company, I thank you very much for having invited me today.

Chairman KOHL. We thank you, Mr. Perry, and we will begin asking a few questions.

Mr. Roberts, your statement was very well written and very well delivered. We appreciate it very much, but I was disappointed that you didn't seem to have answered any of the points and questions that I felt were most pertinent and that I noticed as I spoke you were at least to some extent marking down.

So, first of all, will this merger offer consumers any relief from continually rising cable rates—the first question, if you would mark that down.

The second question: Won't, Mr. Roberts, this merger make it more difficult for small, competitive cable operators like our witness here today, WideOpenWest, to compete with you and other giant cable companies, as Mr. Haverkate has attested?

Third, Mr. Roberts, how can independent programmers ever hope to distribute their programs over cable lines? Won't large cable companies like yours prefer to get their content from their own affiliated companies? Specifically, shouldn't the program access rule be extended past this October?

Fourth, why won't you agree in a legally binding manner to allow access to your high-speed Internet connections by competing companies, as AOL-Time Warner did as a condition of their merger?

Fifth, how do you respond to Mr. Perry, and what assurances can you give us that the law with regard to the set-top boxes will actually be implemented soon with your full approval?

Mr. ROBERTS. Thank you, Mr. Chairman. As I mentioned in the opening statement, I look forward to the chance to address specifically all five of those issues.

So, taking it from the beginning, cable rates: As you know, two-thirds of our cost comes from the programming cost that we pay to the programming channels, the 100 channels that we carry, or more. Last year, in Comcast, and the year before, our programming costs went up about 15 percent per year, and you see today in New York City, with the New York Yankees' dispute with Cable Vision, a real-live example of the terrible dilemma facing a cable operator.

It is a product that clearly many people want, and at the same time a new cost above and beyond all your existing costs have been reported of around \$2.00 a month for one channel. So in our case and in AT&T's case, we launched that channel and we have recently announced a rate increase, and that rate increase is substantially more than inflation.

Another cable company has chosen not to carry the new product and they have significant competitive problems with full-page ads being run by dish competitors saying switch your cable over and you can get the Yankees. So this is a competitive business today and your principal competitor is the satellite industry, who also has many of the same channels, and in many cases their programming costs have gone up as well and they have raised rates.

So the complexity of what happens to the consumer from their cable company has to be looked at at a couple of levels. One, what are your programming costs? Two, we have been able to rebuild all of our systems and offer new products like digital and modems, as you have heard here today. All of those products are optional, so all consumers get a better cable system, but many have chosen to take incrementally more services.

Finally, the issue of how do you put a package together to compete with your satellite brethren or companies like WideOpenWest? In our case, our rate increases have been about 5 percent each of the last several years, and our programming costs have gone up double digits. If it wasn't for the new services, our business would be going backward. So that is No. 1.

Chairman KOHL. How will this merger affect your rates? How will this bring down rates to your customers who are listening to you today?

Mr. ROBERTS. I think that the ability to accelerate the new products so we can get more of the incremental revenues takes pressure off the basic rate. If it had not been for digital and modems, I don't believe you could pay 15 percent more for programming, which is two-thirds of your costs, and only have a 5-percent increase, which we acknowledge is higher than the inflation rate as it is already. So the first problem is can you get more new products to consumers to not have to raise basic rates?

No. 1, will there be an ability between the two companies to reduce costs and be able to then pass some of that or all of that through in some form of consumer benefit, whether that is an acceleration of new products or directly in rates or in giving better service and competing as a better competitor. So that is hopefully responsive to question No. 1, and Mr. Armstrong may want to add to that.

No. 2, will it be more difficult for small companies or small entrants to compete with us? I don't believe the merger affects that question because the markets are different markets. So AT&T is Boston and Comcast is in Michigan, where we compete with WideOpenWest. The reality is that this is a very different cable business than your father's cable business, if I can steal the line from the commercial.

Since 1992, with the cable law of 1992, there was the creation of the satellite industry. Today, we have two competitors in satellite and many local competitors such as WideOpenWest, and in other cities we have wireless competitors. But nationwide, everywhere, there are two competitors from satellite. There is price competition. They run specials and marketing promotions. It is the customary practice in a competitive business, very different than pre-1992, where the only way to get ESPN or HBO was through cable. That is not the case today. You can get a free satellite dish and in many cases 6 months of very discounted service at \$9 a month.

So we have to match that new marketing offer on the ground. In those cases, three out of four new sign-ups appear to be going to satellite, and their growth rate has been faster the last several years than cable. So I don't believe the merger in any way changes the competitiveness today in each of the local cities where we compete.

We have a national competitor in every one of our markets, and in many of the markets where WideOpenWest is, and other facilities-based competitors, we are competing and I think all of our behavior is customary and we basically meet their price. We have to build an entire franchise. In many cases, they do not or have not, and we have sometimes additional burdens put on us by the local municipality that they may or may not have.

On the question about independent programmers and won't you discriminate against small, independent programmers, I actually think this deal has the potential to be an enabler for the content and technology community to galvanize and incubate new development. Why do I say that?

We have paid a lot of money in this merger. There is pressure for us to innovate and to create new services. Now, not all those ideas are going to come from Comcast employees, and so we have gone out and will go out and try to say to any new entrepreneur, especially given our roots, can you come and with one contract with this company really make your business plan come alive and become real?

Some of the examples like the Outdoor Life Network that you mentioned—there was a group of entrepreneurs that founded that channel and they were able to make deals. There is a competitive channel; we carry that competitor. You mention QVC. We carry the Home Shopping Network, which we do not have any financial interest in.

We have a competitor in satellite, just using that for the moment, in every one of our markets. If we don't carry the best programming, we are going to lose our customers, and therein lies the debate in New York City right now. So as people have new ideas, whether it is things like cable modems, there is a pressure on us to make sure we are innovating and finding new revenues that are optional to the consumer and something that causes them to want to stay with Comcast.

You asked about Internet service providers and whether we should have a condition like AOL. I would submit that we are not AOL. AOL has a huge market force in narrow-band Internet. More than 50-percent penetration of all the people who get Internet connections do so through AOL. Comcast has a total of 1 million Internet connections. AOL has 30 million. So we are an innovator in the space of high-speed broadband.

Dr. Green, who helped us innovate cable modems—I can remember many times when people said cable modems will never work. And even though it may sound harmless to put a condition on, it chills the financial capital that went into a brand new service like cable modems, where we have less than a 10-percent market share of homes. But of total Internet connections, it is a much lower number. This is an early entrant.

Now, to the specific of EarthLink and other multiple ISPs, we have said for some time we want to do business with as many connective points as possible so that consumers have the choice that they want because if they don't take it from us, they are going to take it from DSL, our competitor. Every one of our products is competitive today, including high-speed modems, with DSL and wireless.

So we were in an exclusive arrangement with Excite@Home when we invented cable modems. The contract terminated when Excite@Home went bankrupt in December. In January, we transitioned, with great pain, 1 million customers off of Excite@Home in a hurry-up way onto the Comcast high-speed network, and in February announced that we wanted to get started on our commitment to do multiple ISPs.

The first arrangement we made was with United Online, who I believe has sent you a letter, and that is Net Zero and Juno. AT&T announced an arrangement with EarthLink. The reason we begin in two cities is we want to get it right for our customers and make this work. But you have my commitment, and I reaffirm what I

have said before, which is it is absolutely our intention, because we think it is good business, to get multiple ISPs in commercially reasonable ways throughout our company. We want to get it done. We just transitioned 1 million customers.

I don't think it should be a condition of this deal because we don't have a gatekeeping service today. We have a brand new competitor and we don't want to get the financial community concerned that there are going to be regulations on something we just invented.

On Mr. Perry's concerns, he is technically knowledgeable and Dr. Green is technically knowledgeable, so I would like to defer some of that. But let me specifically address the big picture of set-top boxes which was on your list in the beginning.

I went to the consumer electronics show with a number of cable operators this January and I was amazed at what I saw. Everywhere is high-definition sets, as Mr. Perry is talking about, and that is clearly a very real possibility that that is what Americans want. Every one of those sets was connected to satellite.

I walk into Circuit City and I see all they want to do is sell you a satellite dish and sell you a high-definition or flat-screen monitor. It is critical to the cable industry that we have a competitive offering. So I came away from that saying we have to accelerate our relationships with the set-top manufacturers and get these set-top boxes available at retail so that our competitor's product, who does offer some of these functions and features, isn't the only place.

I met with the CEO of Circuit City last week, the first time we had ever met. In cable modems, we have all the Circuit City stores carrying our cable modems. In cellular telephone, a previous business Comcast has been in, and AT&T as well, we offered all of our products at retail. Cable television has traditionally not done that. That has to change for business reasons because our competitor has an advantage over us and if the consumer, as they replace these sets, is being told by the consumer electronics industry and by the retail industry to switch to satellite, I am the loser and Comcast is the loser.

So we are going to try to fix that, and Dr. Green will tell you all the steps that the cable industry came home from that consumer electronics show and said let's accelerate our activities there. So hopefully that addresses some of your issues.

Chairman KOHL. You have, and I appreciate your frankness. My sense in listening to your testimony and to your response is that you are doing an outstanding job in representing your company's best interests, and I think that is what you should do and I appreciate that.

Whether or not that is in the best interests of the consumers of America is, of course, open to debate, I am sure, as you would agree, and open to question. I am always concerned, as I was, as you know, in the case of the satellite television companies who wanted to merge. I am against it, and when you appeared in our office we discussed it and I made it very clear that I thought that that was not in the best interests of consumers to take the two biggest satellite companies and merge them.

I have forgotten your specific response, but I thought you understood what I was saying and were somewhere sympathetic to some of the arguments that I made about consolidation.

I am going to pass it on to Senator DeWine. Before I do, I would just like to ask Mr. Green, Mr. Haverkate, and Mr. Perry to respond briefly, but respond to some of the things that Mr. Roberts has said.

I will start with you, Mr. Green.

Mr. GREEN. Thank you, Mr. Chairman. I welcome the opportunity to respond.

Specifically on set-top boxes, we are disappointed, as you are, that the retail market has developed so slowly. We have worked very, very hard to try to solve the technical problems that may have been part of this issue. Specifically, I want to set the record straight with respect to the performance of cable in producing the POD modules.

In other words, there were a series of agreements. First, in February of 2000 there was an agreement between the Consumer Electronics Association and the National Telecommunications Association in which we agreed on the specifications for interconnection. In July of 2000, the FCC required that we prepare a module that could be inserted in a television set or a set-top box to provide interoperability, the separation of the security module.

We were on time. We delivered that product. It works and it was certified. Mr. Perry is incorrect in saying late, inadequate, and not complete. Those modules are available and as proof of that, at the consumer electronics show there were two manufacturers that showed television sets that accepted the POD module, were connected to the Cox Cable television system in Las Vegas and they worked. So it is not true that these specifications were not complete.

In addition to that, we worked with Mr. Perry's group to define the interfaces for a digital television receiver. We published those specifications. These specifications are American national standards. They are not just CableLabs specifications. They are standards.

Following that, we worked within the cable industry and working with manufacturers to develop the next generation of specifications, which are software. We are very interested in developing an attractive retail product, so that the software and the applications that need to run on a set-top box or a television set are very important.

The Open Cable specification, OCAP, provides that software. It is a fair and open specification which provides a set of interfaces that anyone can write to. It is available to anyone for development. We have issued two sets of the specifications Mr. Perry referred to, and we hope that this will also help to provide an attractive retail product moving forward in the set-top box.

Thank you, Mr. Chairman.

Chairman KOHL. Mr. Haverkate.

Mr. HAVERKATE. Mr. Chairman, Brian Roberts made one comment on the programming issue. I think I got the quote down exactly right. He said if we don't carry the best programming, we will lose our customers. I think that is exactly the point that I am trying to make relative to our relationship and our ability to compete

with Comcast-AT&T, where they have control over what programming is available and have the ability to restrict access to that programming to us.

So I couldn't agree more on that point with Mr. Roberts that if we don't carry the best programming, we will lose all of our customers. But if it is their programming and they get our customers, then they have certainly an incentive to withhold that programming, and they have shown in the past that they will.

The second point on the issue of this rate discrimination and improper practices in the markets themselves—Brian referred to it as customary promotions, I think was the term that he used. That is not the case. A promotion is something designed to try something new, but at least it is a public promotion. I have never once seen an ad, and I don't expect I will see an ad that says please call Comcast and say that you are interested in switching your service to WOW and we will reduce your rate by 35 percent.

This price strategy is being done undercover; it is being done in secret. It is not a promotion. It is designed to restrict the ability of a competitor like us to succeed. They can call it a promotion if they want. Look it up in the dictionary. It is not a promotion and the intent is clear.

In fact, I think basically what is happening here, Mr. Chairman, is they are conducting a hostile takeover of our industry one customer at a time. They probably wouldn't be allowed to buy our companies, so they have decided to buy it one customer at a time by going out to our customers and offering whatever price they have to take it over. And if it is allowed to continue, I think it is going to be successful.

With the company of the size that they have and the resources that they have, and the young stage of development that our industry is in, there is no way—no matter how good we are, no matter what products we offer, no matter how good our Internet service is, going up against that kinds of odds is impossible. So I would certainly appreciate any advice or attention to this matter that could be given.

Thank you.

Chairman KOHL. Thank you.

Mr. Perry, do you have a comment?

Mr. PERRY. Yes, sir, and thank you for giving me an opportunity to respond.

In addition to my duties at Mitsubishi, I am also the Chair of the Video Division of the Consumer Electronics Association, as well as a member of the executive board of directors. I also am pleased to serve on the Home Recording Rights Coalition, which is a grassroots organization that is dedicated to preserving consumers' normal and customary recording practices. We happen to believe, in this transition from analog to digital, that you didn't give up any of your rights.

That being said, I would like to respond to some of these points very specifically, but still not get into an engineering discussion. I am not one, and I don't even play one on TV.

Having said all that, Mr. Green's response about the specification—he is referring to the POD specification. The POD is essentially an access card that slides into the front of some kind of a set-

top box. That specification is essentially complete. The other specifications that are required to build a complete product are not. They are not, and we cannot build to them, and this belies kind of a central underpinning of what we are in the business of doing.

What we do in the consumer electronics business everyday, myself and all of my competitors, is we try to develop the latest, coolest products that consumers want, and they get to vote in the stores. What we do as manufacturers is quite literally bash each other's heads in lowering prices and increasing ingenuity and new features.

In fact, if you were to look at the projection television business as an example, in 1997, just as we were starting the digital transition of our country's infrastructure, a 50-inch projection television, a big-screen TV, sold for a little more than \$2,000. Today, the HD version of that television sells for under \$2,000. We do that everyday in our business.

So it is a little bit disingenuous to assume that there is a specification out there that we can build products to, but we simply don't. What we want to make are products that connect directly to the wall, don't require set-top boxes, or we want to make set-top boxes for those consumers who may need one for secondary televisions and other televisions in the home.

Those specifications and the license agreements that go with them—the specs are not complete and the license terms are egregious. Let me explain how egregious one of those license terms is.

In this PHILA license, we are being asked to agree to allow the content provider, by encoding their digital content before they sell it to an MSO, or to allow the MSO to send a signal to turn off outputs of those products. There are two kinds of outputs on products. There are those outputs that I can record at home and enjoy my customary home recording rights, and then there are the other outputs that I can't record.

The specification and its associated license agreement specifically require us to relinquish that right to the MSO. If they want to keep all the recording capability in a set-top box so they can charge—in other words, pay every time you press “play”—they can do it under these specifications. These are some of the issues in a very, very complex document which frankly have to be addressed before manufacturers will risk capital.

Another key point which has not been spoken about is there are two sets of specifications. There is this very complex specification that requires paying tribute to CableLabs in the form of licensing fees and certification fees. It is very complex. It makes a very expensive consumer product.

Then there is another specification which the cable MSOs themselves can use which is simple. No cable MSO has appeared and said we will abide by the specifications issued by our scientific organization, CableLabs. None of them have agreed to follow their own specification. That should be a pretty clear indicator of really what is going on here.

I applaud the fact that Comcast is a good supporter of HDTV. They have had a number of great announcements recently and it is wonderful. Our country is trying to transition to a digital infrastructure. The unfortunate part is, as we transition, we need to

make sure that the set-top box issued by the cable company is not a gatekeeper that is designed to abridge normal consumer recording rights, the ability to network, and all these kinds of new technologies that can happen in the home and benefit consumers.

We haven't heard any conversations about how does the cable MSO unlock their monopoly for set-top boxes. If a specification truly existed that didn't come with egregious licensing terms that required us to effectively pay a competitor, you can bet we would be making those products today. Those are truly the issues.

Thank you.

Chairman KOHL. We thank you, Mr. Perry.

I am going to turn this over to Senator DeWine right now. I need to go to another meeting, a conference committee on the bankruptcy reform bill. So I want to thank you all for coming and I will turn this over to the ranking member of this subcommittee, Senator Mike DeWine.

Senator DEWINE [presiding]. Thank you, Mr. Chairman.

The FCC's recent report on cable prices indicated that when consumers have effective competition in cable, they enjoy lower prices. That certainly shouldn't come as a shock to anybody. The competition from over-builders, though, has come from new entrants and relatively small providers of cable services.

Let me ask you all, and we will start with Mr. Roberts, why is it that the larger cable companies have not moved into other large companies' markets to bring consumers the benefits of head-to-head competition? We really haven't seen that. Why?

Mr. ROBERTS. Well, in our case—

Senator DEWINE. And let me just say, is this merger going to make that any more likely?

Mr. ROBERTS. Well, heretofore, because you served the entire community and because you have now two national competitors in satellite, it has not proven to make a lot of money. Ameritech, as was mentioned earlier, went into the business, and before them Florida Power and Light and others, large, substantial companies who wanted to go into other markets where you have to wire up the entire community or some substantial amount of homes and then see how many customers you get.

Satellite and wireless have proved to be a quicker and easier way to get a large footprint. So in our case, when that happened, satellite occurred, we put \$5 billion, as I mentioned in my testimony, in the last 5 years into upgrading our existing facility to try to sell new products and to have a more competitive offering so that customers would retain with us.

Senator DEWINE. Mr. Armstrong.

Mr. ARMSTRONG. Senator, I think that having pursued, first, the acquisition of TCI and then MediaOne, and now putting together AT&T-Comcast, we are probably the most aggressive in believing in and committing to enormous amounts of capital to deploy broadband services.

Second, this is a very, very high fixed-cost business, whether you are an entrepreneur starting it up or whether you are transforming what is already there. I have been in three forms of networking in my career—data communications with the IBM Company for 3 decades, then 6 years with Hughes in satellite communications and

wireless communications, and now wire line and cable communications—and there are some common denominators to those businesses.

One is that they are very capital-intensive and have an extremely high fixed-cost nature to them, and you have got to get as much content going over those infrastructures that you spent all that money to make go fast and connect to customers as you can. So we have been concentrating on clustering our assets so that we can leverage our capital so that we can bring more services to more people sooner.

In that respect, we hope we can converge the interests of the consumer, as was spoken to before, with the interests of the cable company, because if we can bring more services at better prices in better bundles sooner to the consumers because we have clustered these properties, we will be as competitive as we can possibly be.

Senator DEWINE. Anyone else on the panel?

Mr. HAVERKATE. Senator, there are, I think, two references now that implied that the new broadband companies are not building entire communities. Generally speaking, that is not the case at all. The franchises that we have in the Midwest have been completely built out. We are providing services to 100 percent of the communities there, and we are providing similar franchise requirements as the incumbent MSO and we certainly don't believe that we are getting any special treatment in that respect.

There has also been an implication that our business is not a viable business, but it certainly is. While we are still young, we still have several members of the Broadband Service Providers Association that are turning into a positive cash-flow situation. We are right on the edge of becoming successful companies, and I think if we can prove that this is a viable business model and that there is room for a second local network in these markets, considering the explosion of Internet and digital services, I think that will lead to more competition, including the possibility of big companies competing with each other.

So I would certainly not give up on the goals of the Cable Act in having this local competition, because we are not, and we think we have an excellent opportunity as long as there are some ground rules that are established now going forward.

Senator DEWINE. How are things going for you, Mr. Haverkate, in Columbus and in Cleveland?

Mr. HAVERKATE. We have about 21 to 22 percent penetration in those markets, so 1 in 5 households is connected to our network. When Ameritech built it, they built an excellent analog cable network, but they were slow to introduce digital services and they didn't introduce Internet at all because they had a DSL strategy.

When we took over, we accelerated the roll-out of digital cable and Internet services, so now we have a comparable suite of services as Comcast or Time Warner does, or Adelphia Cable does. So we are doing very well on increasing the range of services that we are providing to our existing customers, but we are having some serious difficulty in fighting this issue on rate discrimination that I mentioned before, where our customers are being targeted and asked to switch for a big payoff.

Senator DEWINE. Let me ask Mr. Armstrong, Mr. Roberts and Mr. Haverkate the following question. Cable franchise agreements often require cable providers to have uniform pricing for consumers in their franchise area, at least for basic cable services. Many cable over-builders have noted that when they enter into a specific neighborhood that the incumbent cable provider will offer free programming, discount prices, and cash rebates in that area to prevent their customers from switching to competing services. Obviously, the customers who receive these benefits and this competition have benefited from the competition.

Let me ask you, do these types of discounts and promotions violate the franchise agreements, and also will the ability to offer these types of discounts harm consumers in the long run if new entrants are unable to establish a sufficient customer base and remain viable?

Mr. Armstrong, do you want to start?

Mr. ARMSTRONG. First, Senator, I don't think it will harm consumers. I think competition is pretty darn good. We spend a lot of time competing with dish.

Senator DEWINE. Long run, as well as short run, they will be better off? Clearly, in the short run they are going to be better off.

Mr. ARMSTRONG. Sure, and I think in the long run they are going to be better off, also. We spent a lot of time competing with dish in my old outfit, DirecTV, as well as over-builders, as well as Bell companies, and as Brian mentioned, in some cases some wireless outfits. I don't think it violates, to my knowledge, being competitive.

I do think it is wrong if people start to price below cost in order to keep them long term. That is very bad and that is not the right thing to do at all. I know at least in our company's case, we have never, never approached that.

So the bottom line, Senator, is I think it is good to have competition. I think we have got a lot of competition, and over-builders aren't the only ones we are reacting to day by day.

Senator DEWINE. Mr. Haverkate, any comment?

Mr. HAVERKATE. Yes. I don't believe I responded to the question about franchise requirements, but for them most part the franchises do address the issue of discriminatory pricing and charging uniform rates and publicly disclosed rates across the entire customer base. So in most cases, this practice that I have been talking about today certainly appears to be in violation of the franchise agreements that municipalities have.

Senator DEWINE. It would be?

Mr. HAVERKATE. It would be. It is in violation, yes, because rates are supposed to be publicly disclosed, which they are not, and uniform, which they are not.

The second thing is certainly it is hard to argue against a lower rate. Certainly, everyone wants to get a deal, but if the price of allowing this activity to happen is the elimination of competition, be assured that rates will go up faster in the future. Choices of Internet service will be reduced. Competition in the digital arena will not exist.

We are not talking about a short term/long term like 3 years from now. If this issue isn't addressed immediately and some stop

isn't put to it, companies of this size, if they have the intent, have the ability to put us out of business, not next year but this year. So it is a very serious issue.

They keep talking about the satellite industry. Well, I want to talk about the local network industry that has spent so much money, time and effort to put themselves in place and now are at risk.

Senator DEWINE. Mr. Roberts, any comment?

Mr. ROBERTS. Thank you. A couple of points. First of all, I have tremendous admiration for a fellow entrepreneur. The Ameritech Company, which is now part of SBC, built some of these markets, and I believe your company was able to buy them for substantially less than they had spent to build them. So that is the entrepreneurial model at work, and he is absolutely entitled to pursue his business and I wish him good luck.

The reason we keep referring to satellite as a major competitor is that is where the vast—first of all, it is available everywhere in the country, not market by market. And, of course, in the last couple of years Congress has passed a law, the Satellite Home Viewer Act, to allow satellite to have all the local broadcast signals.

I believe what has been referred to in the local franchise of one rate is the level of service that includes the local broadcast signal, the so-called B-1, and I believe if there is a certain community where there is some behavior, then you could complain to that community or complain to the FCC.

So, again, I guess I would step back and say I don't see it as a merger issue. The satellite industry and the over-build industry are competing, and we are responding, in turn, by upgrading our networks, investing, clustering, as Mike mentioned, and hopefully creating a compelling proposition to the consumer.

Senator DEWINE. Senator Specter.

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

One of the concerns which I have involves the tie-ins between sports teams and cable. Two examples come to mind, or a number of examples come to mind. One example is the Braves network, another example is the Yankees network.

I heard recently that a substantial charge was being added to the cable subscribers of Yankees' games and the interrelationship of this arrangement is that enormous revenues go to teams like the New York Yankees. They are able to buy pennants and buy World Series championships almost at will.

Mr. Haverkate, you are nodding in the affirmative. I think I will start with you. You appear to agree with me.

Mr. HAVERKATE. Well, I agree 100 percent with your comments so far.

Senator SPECTER. Well, what is the extent of major sports teams' ability to control cable television to acquire more funds, which then in turn can be used to buy players and buy pennants?

Mr. HAVERKATE. Well, they have an enormous ability there. The example that you are using in New York—while WOW doesn't operate in New York, I know that RCN and other members do. Typically, the negotiations go something like this: We have decided to put this number of games on this channel and this is what the rate is and you have until Friday to agree to it.

If you are a competitive provider like we are or like the satellite industry is and you have a lower market share and you are doing everything that you can to try to hold on to the customers that you have, the last thing you need is to not have programming like the New York Yankees. So, in effect, we agree to whatever demands they have, no matter what the price is.

Generally speaking, the cable MSOs have had to do the same thing because if they don't do it, then they are painted as the bad guys and withholding key programming from consumers. Occasionally, there is a company like Cable Vision that says no and takes the heat on it. But generally speaking, all the leverage in that negotiation is with the sports owners and the sports channel, and the cable companies have very little to do with it, in my experience.

Senator SPECTER. Do the Yankees own a cable network?

Mr. HAVERKATE. I believe they do. Since I don't operate in the New York market anymore, I have only been following this particular issue through the trade press. So maybe Mr. Roberts or Mr. Armstrong would know the details more than myself.

Senator SPECTER. Does anybody know for sure whether the Yankees own a network?

Mr. ROBERTS. It is 50-50.

Senator SPECTER. Mr. Armstrong, you are looking with an affirmative nod.

Mr. ARMSTRONG. It is 50-50.

Mr. ROBERTS. I think they own 50 percent of the network and they sold the other 50 percent to some investors recently in the last year.

Senator SPECTER. Mr. Perry, what do you think Congress ought to try to do about that, if anything?

Mr. PERRY. Well, sir, I think that concentrations of power, as commented very early, I think, in some of the opening comments, are not necessarily bad if, in fact, there is oversight and if an environment is created where this power can be put to tremendous use of allowing for competition and allowing for equal access and allowing for lots of entrants to innovate and bring technology to the party, which is something that we do in our business.

Senator SPECTER. How can you have oversight, or how can you have competition? It is a full circle. The Yankees own the system or 50 percent of it. They must have had a good reason for bringing in investors. That produces revenues because people like to watch the Yankees because they are good, and that enables them to acquire a lot of money to buy more players who are good. What happens to competition in the American League?

I am frankly more worried about Atlanta because they are in our division, but let's stick with the Yankees.

Mr. PERRY. As we discussed earlier, being a Burks County boy and actually having taught economics at a couple of colleges in the Burks County area, it is a fact of like that all companies as they grow tend to desire to stifle competition and to exert more market power.

I believe that is why the 1996 Telecommunications Act was passed. I believe that is why the Federal Government has a wide range of legislation and regulatory oversight on all of these issues,

and I believe that that oversight has to be properly employed, and vigilantly.

Senator SPECTER. Do you think oversight could do something about the Yankees' practices?

Mr. PERRY. I am not so sure whether there is specific legislation or regulatory authority to address that issue. However, this specific issue that you bring up, while it is not particularly an issue that our industry focuses on, does have an effect of being exclusionary, and let me explain how that works.

Today, while we have two DBS satellite providers, one offers sports programming packages that are highly attractive, and the other cannot. They cannot because the arrangements for the provisioning of programming are exclusionary. They, in fact, are used as a competitive weapon, and that is market power at work which a lot of us would probably say is probably inappropriate use of market power.

That is going to flip to the cable side fairly quickly. It has been commented on that they have a national competitor called satellite. Well, our country is in the middle of this digital television transition. In fact, all of the local broadcasters in the Philadelphia market have transitioned.

This transition allows the local broadcasters to deliver high-definition, very high-quality pictures, and broadcasters like CBS and ABC deliver their prime-time schedules in high-definition. Well, one of the things that is not being brought up here today is that cable has a very natural advantage in this marketplace. Even if Echostar purchases DirecTV, they cannot offer HD programming in all their markets. They will be relegated to 12 channels of HD and then lower-resolution programming across the rest of the country, where cable, because they are a wired, on-the-ground system, will be able to deliver, if they wish, high-definition programming in every market of the country. So while, in fact, they are competitors, they don't necessarily compete on equal footing.

So I went a little bit over the answer to your question, sir, but these are part of the intricacies that affect how these business models work and whether they are really fair to the consumer. Our company, and frankly our industry, really doesn't have a position for or against this merger. Our position is that the regulatory and legislative authorities that are already there should be enforced to ensure that if this goes forward that the consumer is treated fairly and they have all this access and they have the right to get this variety of programming and services without the set-top box or contracts creating exclusionary environments to control them.

Senator SPECTER. Mr. Betty, do you agree that cable has that kind of an advantage over satellite?

Mr. BETTY. I really don't have an opinion on the subject.

Senator SPECTER. Well, that is refreshing.

[Laughter.]

Senator DEWINE. Mr. Armstrong.

Mr. ARMSTRONG. Senator, could I take a shot? And I find myself very uncomfortable doing this, but I was 6 years in the satellite industry and we started DirecTV. The satellite industry can provide more capacity by advanced satellite technology, better use of frequency on the transponders, and reuse of the spectrum. It is called

a spot beam technology that will enable them to, in fact, implement the same frequency in different geographies from a geosynchronous satellite system. So while I think that we in the cable industry have some advantages over satellite, I just don't buy into that is one of them.

Mr. PERRY. I would point out, sir, if I could, that the people who are promoting the deal between EchoStar and DirecTV, I believe, when they have come to the Hill have talked specifically about a commitment to deliver, I believe, local-to-local broadcasts in standard definition in all TV markets and 12 channels of HD. If it was part of their business plan to deliver HD in every market, I am sure that would have been offered up.

Senator DEWINE. Mr. Perry, let me just interrupt Senator Specter for a moment and let me just say that we will be certainly interested in getting the answer to that question.

Senator SPECTER. Well, I am concerned about the impact on sports which is readily apparent. There are a lot of other questions which are on the table which defy analysis and are very hard to figure out.

There is a sense of unease in the Congress, or at least in this member, on mergers and acquisitions, but unless there is a violation of the antitrust laws, lessening of competition—and, candidly, there does not appear to be that here—there is no legislative reach to object.

A number of us have wrestled with what has happened not just here, but everywhere, on gigantic concentration. There is a sense, as Jefferson said, about a feeling of discomfort with the size, with the gigantic nature in so many, many of the lines. We see the import in a number of ways. We see it in sports, where America has a love affair with sports, and I have seen this cable operation work to the disadvantage of most of the teams.

We have a franchise in western Pennsylvania, in Pittsburgh, doing very well right now, but a small-market team has a very, very tough time surviving, and the big-market teams, where they tie into cable, really have it made. We wrestled on this subcommittee with the problem of franchise changes, and while this does not directly affect the issues here, it does in an indirect way as to cable's import on helping teams like the Braves or the Yankees, where the franchises are extracting enormous sums of money—\$1 billion in public money for stadiums in Pennsylvania.

I introduced legislation which would require Major League Baseball or the NFL to pay for three-quarters of the cost of stadium construction. The NFL has a \$17.6 billion, multi-year television contract. It doesn't go over cable, but the extortion of the big cities is just overwhelming and we are trying to put our hand around the issue.

Does anybody have any ideas as to what we might do on the examples we have on the table, the Yankees or the Braves?

Mr. Armstrong, you have been in this business a long time. What do you think?

Mr. ARMSTRONG. I don't think that qualifies me, but I do think that there is a very natural market tug between the love affair, as you have rightly put it, with sports teams and American consumers. We love our sports, we idolize our heroes, and we do a

pretty good job, whether it is from the sky on the ground, of bringing that action to everybody, almost too much of it some weekends. But right now, we have a difficult tug.

By the way, Senator, it is not just the NFL and the NHL and the NBA. Also, you have things like ESPN who have rate increases every year that are very high, double-digit rate increases for what they bring, as well. And what we are trying to do, to the best of our ability, is to tier them so we can price them to the people who want to watch them, and to try to mitigate the impact on the basic service that many people take as their fundamental service.

So I hope over time that market forces lead us to, if people are going to want to watch it that much and the teams are going to charge that much for people to watch it, we can evolve to the ability to tier it so that the people who do watch it pay for it and not all the other people. I hope the market will enable that to happen over time.

Senator SPECTER. Well, I didn't get any part of your answer to the issue of how to break up the Yankees.

[Laughter.]

Mr. ARMSTRONG. Or beat them.

Senator SPECTER. Mr. Roberts, I know that there is an element with Comcast and the sports teams with which you have an interest. Would you comment on the ways you see your practices evolving with the Flyers or the other sports teams and I think some activities in Washington, too, to ameliorate this kind of an issue?

Mr. ROBERTS. Well, I think you put your finger on the pulse of a quagmire, and I don't know that anybody has the answer or we all would be chasing it right today. We recognize that love affair and want to be associated with it, but at the same time it is a cost and there is an unevenness, as you point out. I think you probably need to talk league by league on that unevenness, because in some leagues there is a cap or some sort of less extreme disparity between teams.

At the same time, our behavior in the sports business is pretty consistent with the norm of the industry. It is not a market leader the way the Yankees are right now, or the Braves on a national basis with having their games available everywhere, and that creates extra revenue. You are right; for years, they have done better, so there is a cause and effect.

I think the point you made about stadiums—we know from Philadelphia that that is exactly the tough problem for what to do, and if we didn't have it, then the teams may have moved. I don't know, but I think it is worthy, and going back to the earlier discussion on cable rates, at least that there is an understanding that this is a complicated, multi-layered problem, not just somebody desiring to raise rates 5 percent and, gee, that is great. In fact, the cost of sports is going up way greater than that amount of money, as you know.

Senator SPECTER. Mr. Armstrong, I am advised that you are to be the chairman of the board of AT&T-Comcast. There is a provision that the chairman cannot be removed without the approval of 75 percent of the board before the year 2010 that is more job security than Senator DeWine and I have. We have to run and can be defeated more often at a lower figure.

Is it true that you will be the chairman of the board, or that is the plan, and can't be retired without a vote of 75 percent of the board?

Mr. ARMSTRONG. That provision is currently in there, Senator. It does not apply to me, however, until 2010. It applies to me until the spring of 2005, and it applies so that I will be able to help with this transition to assure the success of this company in coming together deliver on the synergies that we promised the shareholders. So for me, it is a transitional vehicle.

Senator DEWINE. Just until 2005?

Mr. ARMSTRONG. Yes.

Senator SPECTER. Well, why is the provision in there, then? Is it only applicable to whoever takes over after you, until the year 2010?

Mr. ROBERTS. I think it applies to, in all probability, myself. As you may know, the Roberts family has 88 percent, approximately, of the votes in Comcast. In the merger discussions between ourselves and AT&T, it was negotiated that we would reduce that voting percentage from hard control, if you will, north of 51, to 33 $\frac{1}{3}$. So it was a balanced package of governance to say, since we are now below, it would require three-fourths of the board so that there would be stability that the vision that we painted out, which is going to take many years to fulfill, could happen; that our investment had been with a number of years since we went public for 29 years.

My father has had hard control of the company, and in giving that up, which was a huge line to cross, but in order to help create this company this was a negotiated balance and will be put before all the AT&T shareholders to see whether they like this deal or whether they don't, and we will live with that outcome.

Senator SPECTER. Are you saying, in effect, because you have so many obligations under this arrangement, you want to be sure that you are in a position to operate the company to make sure that the company and you can fulfill your commitments?

Mr. ROBERTS. That was the basis of us wanting to go forward with making this large investment in this new company for our family's investment.

Senator SPECTER. Thank you very much. My time has expired long since, actually.

There is a letter which has been written by the AFL-CIO to the Securities and Exchange Commission raising quite a number of issues, and you have probably already responded to it. I would like to have this made a part of the record, Mr. Chairman.

Senator DEWINE. Without objection, it will be made part of the record.

Senator SPECTER. And also to have your responses to the issues which were raised here. To repeat, I believe you have already responded to them, but I think that our record here ought to have those responses as well.

Senator DEWINE. I would advise all the members of the panel that members of the subcommittee have the opportunity to submit written questions and those can be submitted.

Senator Specter, anything else?

Senator SPECTER. That concludes my questioning.

Senator DEWINE. I am going to jump around a little bit with a few additional questions. I want to get back to the issue about exclusive contracts in regard to programming and maybe get some comments about that.

The ability of any program distributor to get access to programming is obviously a key element of being a valid competitor in this business. Let me ask you what you believe would be appropriate concerning the program access rules in regard to the exclusive deals for programming. A good example, of course, would be DirecTV's deal with the NFL, the Sunday package, the NFL Sunday Ticket, where if you want to watch any football game in the country, about the only way you can really do that is to buy that package. You can't buy it from cable, you can't buy it from anybody else but DirecTV.

Mr. ARMSTRONG, you are smiling. Let's get your comment.

Mr. ARMSTRONG. I am smiling, Senator, because when I was at DirecTV we negotiated the arrangement with the NFL.

Senator DEWINE. So you are responsible for that?

Mr. ARMSTRONG. I used the word "we." They own it now. The company at the time paid quite a premium to put that package together and at the time we were betting a lot on would we have the kind of package that would differentiate us in the marketplace.

The NFL felt they were clearly within the rules of the road in program access to cut such a deal with a satellite carrier. On the same token, after coming to AT&T and getting in the broadband cable business, I realized how outrageous this was.

Senator DEWINE. You saw it from a little different perspective?

Mr. ARMSTRONG. Absolutely, and so I can only say that I think the program access rules, as interpreted by the FCC, have held up that transaction. I think now Chairman Powell and the Commission are taking that under review and we have yet to learn their direction.

Senator DEWINE. Although that has been in effect, though, since when?

Mr. ROBERTS. 1992.

Senator DEWINE. What year?

Mr. ROBERTS. 1992, so basically it has been in effect for 10 years and it said that the FCC at the end of that period would review it and that is the process we are in.

Senator DEWINE. That is where we are now.

Mr. ROBERTS. And I think that that is an appropriate point, because it doesn't apply to the satellite industry and it does apply to cable and it has, I think, worked in today having 16 million customers who now have satellite dishes. The question is is it still appropriate or does it need to be modified, and that process is ongoing.

Senator DEWINE. Staying with you, Mr. Roberts, the D.C. Circuit Court recently ruled that the 30-percent cable ownership cap was not valid and needs to be revisited by the FCC. What do you think about that? Do you think a cable ownership cap is important, and what would be the level?

Mr. ROBERTS. Well, I don't know that I have an answer as a number. I would defer to what is going on in other industries.

Senator DEWINE. You all would not be violating that, right?

Mr. ROBERTS. Well, that was what I was going to say.

Senator DEWINE. You are close.

Mr. ROBERTS. Well, we would be right at about 30 percent if you assume that we are able successfully, and we plan to—and I want to confirm what Mike had said earlier about the Time Warner interest that we are going to dispose of that partnership. The remaining company, based on the old rules, would be right around 30 percent, I think slightly under. That has, as you said, been remanded.

I think one of the reasons that I think this transaction hopefully doesn't present difficulties—somebody mentioned earlier, well, what about broadcast stations, what about newspapers? Today, in Comcast-AT&T, none of that is there, and I think you have to do all these rules in their totality.

What is the number of TV stations that can be owned? What is the number of networks? So I think you have to look in the totality, and the same in the phone industry. But I don't think this transaction, even if the old rules were in place, would be violative. So we are hopeful to participate in that process with the FCC to help them set kind of a set of rules that both the courts uphold and apply uniformly.

Diversity of voices which somebody mentioned earlier—I think that is a critical thing to safeguard. I would submit that cable television has added more to the diversity of news and information over the last 25 years in this country than almost any single industry contribution.

Senator DEWINE. So the summary of your answer is what?

Mr. ROBERTS. The summary of the answer is I think something higher than 30.

Senator DEWINE. I guess so.

Mr. ROBERTS. At least 30.

Senator DEWINE. At least 30, OK. Forty?

Mr. ROBERTS. I really don't know, honestly.

Senator DEWINE. Mr. Armstrong, a comment at all?

Mr. ARMSTRONG. I think it ought to have a minimum of 4 in front of it. I wouldn't even think that 3 was appropriate. No. 2, I hope they do away with the attribution rules which lend to the counting of subs when they set this thing. That would be a good step forward.

Senator DEWINE. Mr. Haverkate.

Mr. HAVERKATE. While size isn't a factor for the broadband services providers, generally speaking, either one of these companies in their current size are already large enough to take actions to trample our business. So we are concerned more about the rules of the game and the actions and behaviors that are permitted than we are about the size of the company.

Senator DEWINE. Senator Specter, anything else?

Senator SPECTER. No, thank you.

Senator DEWINE. Well, I have got a couple more here.

Both AT&T and Comcast own programming, not as much as some other cable systems, but nonetheless this merger will increase vertical integration. There are a number of concerns associated with this type of consolidation.

For example—and I mentioned this in my opening statement— independent programmers may find it more difficult to gain access

to cable systems as cable companies own more programming. In addition, competitors may have difficulty gaining access to programming owned by the incumbent cable system.

Concerned with issues such as these, the Department of Justice imposed conditions on the Liberty-TCI transaction, requiring that the company not discriminate against independent programmers or competing program distributors.

Let me ask the panel, would similar non-discrimination provisions relating to programming be appropriate in this merger?

Mr. Haverkate.

Mr. HAVERKATE. Well, I would certainly think that would be a good idea. But in addition to that, if you were an independent programmer and you were trying to get access on the AT&T-Comcast network and they said to you one of the terms and conditions of you getting on our system is that you are an exclusive on our system and you are not allowed to sign an agreement for carriage on our competitor, believe me, that is what they will do because getting on that large of a network is key to their business. Getting on our network is not key to their business.

So this issue of kind of collecting these programming assets and holding them in tight control is a key issue on whether this competition is going to last in the marketplace or not. Especially going back to Senator Specter's point where a company actually owns the sports teams in the same market where they can say we are going to carry these only on our network and we are not going to sell them to our competition in the network, that basically locks out all competitors in that market.

Mr. BETTY. Senator DeWine, I think similarly, when you look at the opportunity to provide customer choice of ISPs, having non-discriminatory access to things like video streaming or restrictions on provisioning that content over the pipe coming into the home also will be important in order to maintain competition in an open-access environment.

Senator DEWINE. Mr. Roberts.

Mr. ROBERTS. Thank you. Between the two companies, I think we have about 6 percent or less of the cable networks. As you mentioned, it is not very many. I think we pride ourselves on the good relationships we have with both large content companies, but also small and medium-size companies. We have a relationship with News Channel 8 right here in the District, with the Weather Channel, Word Network, with, as I mentioned earlier, Outdoor Life Channel, and many others.

I really think if you are on a pro-competitive path, any regulatory restrictions have consequences, and I think today there are safeguards in place and we are in a competitive business. We have very few exclusive agreements with independent programmers such as you are referring to, and virtually none that I can think of against WideOpenWest. So I do think the marketplace is working.

Senator DEWINE. Mr. Armstrong and Mr. Roberts, last year it was reported that at least one cable company attempted to require a popular programmer to agree not to permit its programming to be delivered over the Internet. As high-speed Internet access becomes available to more consumers either through cable companies, phone companies or other providers, many people believe that video

streaming over the Internet could bring competition into the multi-channel video market in coming years. Yet, established distributors of video programming such as cable companies may have an incentive to prevent this emerging competition.

Let me ask you, will a merger such as the one that you propose that increases the market power of individual cable firms enable the ability to block or delay video distribution from these emerging competitors? Do either of your companies have agreements in place today that prevent or limit distribution of content over the Internet, and will you commit not to enter into such agreements?

Mr. ARMSTRONG. Senator, let me try that. The answer is yes, video streaming indeed will be enabled by Web sites. There are a couple of billion Web sites out there, everything from maybe you and I doing some video streaming with full motion pictures of family, to people who have servers that, in fact, charge, pay-per-view kinds of services that come from video streaming.

It is very difficult to monitor those bit streams as they come through in terms of the content that they are carrying. On the other hand, we can now monitor with our networks how much consumption people are using. You might be interested to know that in the Excite@Home days when we did an analysis with over 3 million subscribers to a broadband service Excite@Home offered, 5,700 consumed 30 percent of the network. We tended to call them the Net Hogs, and they are obviously using a lot of capacity that we are spending a lot of capital on.

So what the industry is going to have to migrate to, and the technology is there to do it, is to understand what the consumption is that is causing us to spend so much capital to keep the performance levels up, the reliability there, and the service levels appropriate, and charge for it.

I look at it as a business opportunity. If Web sites want to video-stream, if ISPs want to video-stream, if portals want to video-stream, terrific. I would just like to get paid for that consumption and the capital I have got to put forward to let that happen.

Mr. ROBERTS. I totally want to just agree on that point that as a business model we are trying to take 10 percent of consumers and give them more than 10 percent, a reason to buy a cable modem. This hearing, I believe, is being streamed on C-SPAN III, and that is a practice now that is very common and that is one of the benefits of cable modems. So we absolutely want to encourage it. Mike's point about finding a way to charge for different consumption models is very logical.

I think the second point you raised is sort of akin to a broadcaster if they were streaming one of the big networks, and yet the local broadcaster said what about the integrity of what I have purchased or my business relationship? So I think what you are referring to is probably if we are being asked to pay for a channel that is then given for free over the Internet, is that a good business model?

So we are not ever blocking any Web sites. We have never done that. Excite@Home never did that, to my knowledge. What I think you are referring to is just—and there have not been any contracts where this has been a dispute with our company or that any programmers ever raised with me. I think we are going to try to, as

this becomes more prevalent, find an acceptable business model so that they can begin to stream the content, if that is what the consumer wants, and find a secure way for them to get paid and to make sure that there is an integrity to the product.

Senator DEWINE. Well, Mr. Roberts, I know that your company started as a family-owned business and remains a family-owned business. It was started by your dad and your dad has been seated very quietly behind you during this whole hearing. I just, before we close, want to see if he might have any brief comment before we close this down.

Mr. ROBERTS. It is my honor to turn it over to the elder statesman.

Senator DEWINE. Mr. Roberts.

Mr. RALPH ROBERTS. Thank you very much, and I am slightly prepared. I want to thank you for giving me this chance to say a few words. Pardon my throat.

Senator DEWINE. Well, my throat, as you can tell, Mr. Roberts, has been bad throughout the hearing. So you are doing very well, sir.

Mr. RALPH ROBERTS. Thank you. I have had a lot of experiences in my life, but this is the first time I have had an opportunity to talk to a congressional committee.

Senator DEWINE. They are to be avoided, Mr. Roberts.

[Laughter.]

Mr. RALPH ROBERTS. I learned how to avoid them for 60 years.

I am really quite thrilled to be here today, and I know you have heard from Brian and Mike what an incredible vision we really have for what Comcast and AT&T Broadband can become. What is especially wonderful for me personally is that I have had the opportunity to work side by side with my son, Brian, and seeing him sort of taking a family business that I founded over 30 years ago and seeing it grow into a leader in the cable and broadcast community industry—a long distance from Tupelo, Mississippi, where we started.

Brian and I think of ourselves as entrepreneurs. We think that that is the spirit that makes American business the best in the world. Being an entrepreneur means understanding your customer, being willing to take risks, but to do it intelligently so that you can build and grow something that customers really want. We will keep that spirit in this new company and we will deliver the quality and the value that Comcast customers have come to expect. We will continue to create the kind of competition that you in Congress want to see.

I was very interested in the many questions you asked and I hope you received clear answers. I also hope that you share our belief that this merger is really a good thing for America's consumers.

Thanks again for giving me this few moments.

Senator SPECTER. Mr. Chairman, if I may comment, I am glad I stayed until the very end.

You should have been the lead witness.

[Laughter.]

Senator SPECTER. This would have been a much shorter hearing had you said that at the outset. I complimented you at the start, Mr. Roberts, and I would compliment you at the conclusion for

what you have done and your comments on entrepreneurship. You are certainly Exhibit A, and Brian is Exhibit A-plus.

Mr. RALPH ROBERTS. Well, thank you very much.

Senator SPECTER. You have done a great job on your own and a great job in producing your successor.

Mr. RALPH ROBERTS. Thank you.

Senator SPECTER. Thank you. Thank you, Mr. Chairman.

Senator DEWINE. Mr. Roberts, thank you very much. Senator Specter, thank you. Let me thank all of our witnesses for their testimony today.

There are clearly some points of disagreement about specific issues related to this merger. The Department of Justice and the FCC must look closely at program access issues and consumer choice regarding ISPs. They should do what is necessary to protect consumer choice.

I encourage the agencies to look closely at media consolidation, in general, and put in place rules to protect the marketplace of ideas that is so vitally important to this democracy of ours. Should this merger be approved, we expect AT&T-Comcast to live up to the promises that they have made today in terms of new services and faster deployment.

I again thank the members of the panel, I thank our audience, and the hearing is adjourned.

[Whereupon, at 4:49 p.m., the subcommittee was adjourned.]

[Submissions for the record follow.]

[Additional material is being retained in the Committee files.]

SUBMISSIONS FOR THE RECORD

STATEMENT
OF
RCN CORPORATION

BEFORE THE
UNITED STATES SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON ANTITRUST, COMPETITION
AND BUSINESS AND CONSUMER RIGHTS

HEARING ON
COMPETITION AND MERGERS IN THE CABLE TV INDUSTRY

WASHINGTON, D.C.

APRIL 23, 2002

I. Introduction

RCN corporation provides cable service to consumers in competition with monopoly incumbent cable providers. RCN offers its cable service bundled in a package with high-speed Internet service and local and long distance telephone service. Consumers enjoy buying all of these exciting services from one provider, for one price, and paying only one bill. RCN has fought hard to enter the market, but has faced anticompetitive tactics by incumbents that have slowed or prevented RCN from providing consumers with an alternative to monopoly cable service.

RCN has encountered particular resistance from Comcast, which has deterred its entrance to certain markets. The combination of AT&T and Comcast is sure to make the competitive landscape worse for startup providers like RCN. The new entity will have greater incentive and opportunity to impede competition, thereby depriving consumers of a choice of cable television provider. The combined entity may thwart competition by: (1) circumventing the program access rules; (2) coercing unaffiliated programmers into exclusive contracts; (3) employing anti-competitive marketing tactics; (4) preventing competitors from accessing vendors of cable-related technologies; (5) tying up local building contractors so that competitors cannot deploy facilities; (6) interfering with local franchising; and (7) blocking access to apartment and office buildings.

In order to mitigate some of the harmful effects of the merger, RCN suggests at the least, imposition of specific conditions: (1) providing access to programming controlled in whole or in part by the merger parties; and (2) addressing monopsony control over third-party vendors of essential goods and services, including programming.

II. RCN Provides Competition in the Market for Consumer Cable Service

RCN is the nation's first and largest facilities-based competitive provider of bundled telephone, cable television, and high-speed Internet services.¹ RCN was created in response to the pro-competitive policies adopted in the Telecommunications Act of 1996. As of the end of 2001, RCN's network passed approximately 1.5 million marketable homes, and RCN had more than 800,000 customer connections to its network.² RCN operates in seven of the ten largest markets in the United States, namely Boston, Chicago, Los Angeles, New York, Philadelphia, San Francisco, and Washington, D.C. We are building out, and relying on, our own state-of-the-art broadband fiber optic cable network, an investment of many billions of dollars.

The focus of this statement is on the video aspect of our business (also referred to as cable or multichannel video programming distribution ("MVPD")). In such capacity we are frequently described as a "cable overbuilder," which means we compete in areas where an incumbent is already providing service. Indeed, RCN is precisely the type of competitor Congress sought to promote when it opened the broadband market to competition through the passage of the Telecommunications Act of 1996 and when it provided competitors with access to programming in the Cable Television and Consumer Protection Act of 1992 ("Cable Act of 1992").

III. Cable Competition Has Produced Significant Consumer Benefits

It is axiomatic that, where consumers have a choice of multiple providers from whom they can purchase service, providers have a far more powerful incentive to upgrade their service and offer lower prices than exists in a monopoly environment. In the MVPD industry, this translates into better picture quality, fewer outages, more channel choices, more responsive customer service and better value for the dollar.

¹ The figures and examples cited herein for RCN incorporate those for Starpower, a joint venture in the Washington, D.C., market owned 50 percent by RCN and 50 percent by PEPCO Communications.

² A single customer may have multiple connections to the network for phone, Internet, and cable television service.

The Federal Communications Commission (“FCC”) has documented the benefits of MVPD competition: “Subscribers usually benefit from ‘head to head’ competition. . . . customers generally receive lower monthly rates and better service, while operators generally enjoy higher penetration rates and lower churn rates.”³ “In communities where ‘head to head’ competition is present, the incumbent cable operator has generally responded to competitive entry in a variety of ways, such as by lowering prices, providing additional channels at the same monthly rate, improving customer service, adding new services”⁴

RCN’s presence in the market has consistently held down prices and resulted in other economic benefits to the local community. For example, incumbent Time Warner announced rate freezes in Somerville, a Boston suburb, upon RCN’s entry, even though it was raising rates by 10 percent to 15 percent in most of the eastern Massachusetts communities in which it was the franchisee.

The city of Boston was able to negotiate a franchise renewal with Cablevision which imposed obligations on the incumbent more favorable to the public than would otherwise have been possible because RCN was already operating in the city as an open video system (“OVS”).⁵ Cablevision agreed to increase its commitment to public, educational and government (“PEG”) channels and increase the channel capacity of its system. Cablevision also moderated its regional rate increase in the Boston area because it faced competition from RCN.

In Allentown, Pennsylvania, which is one of the very few communities in the United States that has been served for 20 years by competitive cable companies, cable rates are significantly below the national average. Furthermore, penetration is higher than the national

³ *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming, 8th Annual Report*, CS Docket No. 01-129, FCC 01-389, *rel.* January 14, 2002. (“*FCC Eighth Annual Report*”) at ¶ 208.

⁴ *Id.* at ¶ 197.

⁵ RCN operates in some jurisdictions as an OVS provider, rather than as a traditional cable franchisee. However, RCN’s franchise obligations in both situations are similar, and its product offerings and services are indistinguishable from the subscribers’ point of view. Accordingly, we do not differentiate in this paper between traditional cable and OVS, using the term “cable” to refer generally to RCN’s offerings in competition with incumbent cable providers.

average (approximately 90 percent of the city is wired by two companies), and there are fewer customer complaints on a percentage basis than the industry experiences nationally. The competitors in Allentown -- RCN and Service Electric -- both have almost fully built out the city, so that most residences have two broadband wires available.

RCN's affiliate in Washington, D.C., Starpower, has provoked dramatic changes in the offerings of incumbent cable operators, discouraging price increases and improving service offerings. Upon the announcement of Starpower's entry into the market, the D.C. incumbent's rate increases moderated from previously announced annual increases in the range of seven percent to a mere two percent in 1998. Today, Starpower charges \$34.95 per month for 94 channels of basic cable, and generally provides free installation through various promotions, whereas Comcast currently offers 60 channels for \$35.86 per month.

In anticipation of competitive entry, Cox Cable announced that it would upgrade its cable to 860 MHz capacity in Fairfax County, Virginia. In Prince George's County, Maryland, Comcast announced an upgrade of its plant beyond its franchise obligation when it believed Starpower's arrival was imminent. Comcast in Arlington County, Virginia, announced a major overhaul of its channel line-up with significant additional channel capacity and digital upgrades to make its offerings more competitive with newly-franchised Starpower.

The ability of broadband cable providers to bundle their services also has resulted in distinct benefits for consumers. In the Boston area, for example, RCN's ResiLinkSM Platinum service, which costs \$156 per month, provides telephone, cable and high-speed Internet access. Typical cable and phone providers in the Boston area offer less for a combined monthly total of about \$243 per month.⁶

IV. Scope of the Merger of AT&T and Comcast

The proposed merger of the AT&T Broadband Division of AT&T Corporation with Comcast Corporation will create by far the largest multiple system operator ("MSO") in the

⁶ RCN Annual Report for 2000, at 12.

MVPD market. Together, Comcast and AT&T will have an estimated 22 million subscribers, as compared with second-place AOL Time Warner, which has an estimated 12.7 million subscribers. In addition, AT&T Comcast will hold AT&T's 25 percent stake in Time Warner Entertainment ("TWE"), which controls the majority of AOL Time Warner's cable customers as well as highly desirable and non-substitutable programming assets, such as HBO, Cinemax, and Comedy Central. (The merger parties have promised to shed their interest in TWE, but have not been effective in bringing the sale to fruition.) The new company will have subscribers in 17 of the nation's top 20 metropolitan areas, and a presence in 41 states.

In considering the proposed merger, it is imperative to recall that the MVPD industry is one of historical monopolies, dominated by entrenched incumbents that established their subscriber base in the era before competition and retain, in most areas of the country, a potent monopoly as the sole cable television provider. Although there will remain, if the proposed AT&T Comcast merger is approved, several other large cable MSOs and a host of smaller cable operators, in any given geographic market in which AT&T and Comcast operate there is no more than one cable competitor, if there is any cable competition at all. For consumers that want bundled telecommunications services, an increasingly popular option in which customers pay a single rate to receive a combination of video programming, high-speed Internet, and telephony services,⁷ the incumbent cable operator or a broadband overbuilder often is the only choice. If RCN or another broadband overbuilder in competition with AT&T Comcast in a given market is forced out of business, competition for bundled services will cease to exist in that market, and the choice of MVPD providers will be reduced to three or, if the EchoStar DirecTV merger is approved, two.⁸

⁷ In RCN's experience, consumers view the bundled service offering as highly attractive, more so than video programming offered as a stand-alone product. According to an August 2001 study by CENTRIS, published by the Cable and Telecommunications Association for Marketing, more than half of all consumers (56%) express a preference for using one company for all of their telecommunications services.

⁸ RCN recognizes that DBS providers offer competition to monopoly cable providers with respect to video programming. However, DBS providers cannot currently match AT&T Comcast's anticipated capability to provide bundled cable, high-speed Internet access, and telephony services to customers – at present, only the handful of competitive broadband cable overbuilders, such as RCN, can do so. Nor can DBS providers fully compete with the incumbent cable operators with respect to video on demand and other interactive services. Furthermore, satellite service often is not available for tenants in apartments or office buildings due to physical limitations. In touting the synergies that will be achieved by the proposed merger, AT&T Comcast has focused heavily on the merged entity's

The government has an obligation to ensure that the merger, if approved, does not harm competition. Action by the U.S. Department of Justice (“DOJ”) is essential to protect competition in the MVPD market. DOJ, which has recognized the potential for harmful behavior that can occur in the merger context, has pledged in Reply Comments filed in the FCC’s ownership limits proceeding, to “continue to review, on a case-by-case basis, mergers in the MVPD industry to determine whether they will have anticompetitive consequences in violation of Section 7 of the Clayton Act.”⁹ DOJ has acknowledged the need to examine, in the merger review context, “whether the combined entity could use its increased size to extract anticompetitive terms and conditions from multichannel video programmers and/or raise barriers to entry for its MVPD rivals either alone or in collusion with others.”¹⁰ DOJ has recognized that the FCC’s rules cannot be relied upon alone to safeguard competition in the market for programming, and that denying or conditioning the approval of mergers that result in significantly increased concentration in the MVPD market may be necessary to constrain anti-competitive impacts on the availability of, and access to, video content.

In order for competition to survive in the context of a merger, the FCC also must apply scrutiny to the transfer of licenses, while at the same time enforcing its existing rules providing competitors with access to programming and other competitive protections. RCN urges Congress to stress to DOJ and the FCC the importance of protecting a competitive landscape in the context of the AT&T Comcast merger.

In particular, RCN believes it is imperative and appropriate, if the merger of AT&T and Comcast is to be approved, that conditions be imposed on the merged entity that will ensure the survival of competitive cable and broadband providers. Conditions should bar the merged entity from entering into exclusive or “sweetheart” deals with affiliated content providers and

ability to add telephony to the services it provides to customers throughout the merged entity’s network footprint: “AT&T Broadband’s cable telephony business has already been able to generate significant benefits for AT&T Broadband, including a reduction in subscriber ‘churn’ . . . [W]e estimate that, within five years, AT&T Comcast should generate an additional \$600 to \$800 million in EBITDA annually by providing cable telephony to Comcast’s former service areas.” Declaration of Robert Pick at ¶¶11-12, dated February 27, 2002, *In re the Applications of Comcast and AT&T Broadband for Transfer of Control of Licenses*, on file with the FCC.

⁹ *Reply Comments of the Department of Justice*, filed with the FCC in CS Docket No. 98-82 *et seq.*, dated February 19, 2002.

¹⁰ *Id.*

exercising monopsony power over third party providers of programming to the detriment of smaller MVPD companies.

V. Comcast's Past Behavior, and the Threat of Future Harm to Competition

While RCN has made great progress in bringing competitive service to consumers, it has not been easy. RCN faces a number of obstacles as it strives to compete. Chief among these obstacles is the anti-competitive behavior of cable incumbents, who possess both the incentive and the ability to harm RCN's prospects in the market. Comcast has been a particularly rapacious competitor to RCN in RCN's Philadelphia area and Washington, D.C., markets. Insofar as Comcast's management is expected to assume operational control of the merged entity, RCN harbors a very real concern that Comcast's anti-competitive tactics are likely to be adopted by the merged entity and employed on a far broader scale than has heretofore been seen.

Based on Comcast's past behavior, RCN has reason to believe that the company will continue to act in an anti-competitive manner, and that the merger with AT&T will increase its power to do so. The combined entity may thwart competition by: (1) circumventing the program access rules; (2) coercing unaffiliated programmers into exclusive contracts; (3) employing anti-competitive marketing tactics; (4) preventing competitors from accessing vendors of cable-related technologies; (5) tying up local building contractors so that competitors cannot deploy facilities; (6) interfering with local franchising; and (7) blocking access to apartment and office buildings.

Importance of the Program Access Rules. Access to programming is a cable operator's lifeblood. Absent the ability to provide the programming that customers desire, no cable company can succeed in a competitive market. Consumers simply will not take a chance on a competitive cable provider if they cannot be absolutely assured that they will get the specific programming they want.

Consumer fanaticism for viewing local sports events underscores the degree to which competitors cannot survive without access to programming. Surveys conducted for RCN by professional polling organizations confirm the vital importance of local sports programming to a

cable operator's success: the data show that some 40-58 percent of cable subscribers would be less likely to subscribe to cable service if it lacked local sports programming.

Congress recognized the critical role programming plays in a competitive market when it passed the Cable Act of 1992, directing the FCC to promulgate the "program access" rules. The program access rules provide that vertically integrated cable companies (those that have ownership interests in both programming and distribution) cannot engage in unfair methods of competition or unfair or deceptive practices in an effort to hinder competitors' access to programming controlled by the integrated cable companies. The rules prohibit discrimination in the terms under which programming is made available to competitors.¹¹ The program access rules limit the ability of vertically integrated cable companies to enter into exclusive contracts with their programming affiliates that result in denial of such programming to competitors.¹²

Unfortunately, the program access rules have significant limitations. First, by changing the technical method of delivery, cable MSOs can escape the requirement that they must share affiliated programming with competitors (*i.e.*, "terrestrial evasion"). Second, a significant provision of the program access rules – the rule preventing vertically integrated distributors from entering into exclusive contracts with their affiliated programmers – is scheduled to sunset on October 5, 2002. Third, cable MSOs with market power can coerce unaffiliated programmers into exclusive contracts, since the program access rules do not apply to unaffiliated programming.

"Terrestrial Evasion." While the FCC's program access rules require vertically integrated cable MSOs to offer access to their affiliated programming on a non-discriminatory basis, the rules contain a significant loophole. Enacted in 1992, the program access statute applies to programming delivered to a cable distributor's headend "via satellite." Newer technologies and practices allow the delivery of cable programming through "terrestrial" means, avoiding the use of a satellite and thereby avoiding the requirement to share the programming.

¹¹ See 47 U.S.C. § 548(b) and § 548(c)(2)(B).

¹² See 47 U.S.C. § 548(c)(2)(D).

Vertically integrated cable MSOs have sought to exploit this loophole by moving programming – especially critical local sports programming – from satellite to terrestrial delivery.

While access to any popular programming is important, access to local sports is absolutely critical to the success of competitive cable providers. Unfortunately, RCN's major programming battles have occurred while attempting to gain local sports coverage from vertically integrated incumbents – like Comcast – who see it in their interest to provide the programming exclusively to their own affiliates, and who take advantage of terrestrial evasion to wrest the programming from the purview of the program access rules. In the Philadelphia metropolitan area the overwhelmingly dominant incumbent, Comcast, acquired the great bulk of the local sports programming, as well as their venues,¹³ and threatened to deny RCN long term access. The threat was mitigated only when Comcast faced DOJ review of its plan to acquire Home Team Sports in the Washington area. Both DirecTV and EchoStar have ultimately been denied access to Comcast's terrestrially delivered sports programming.

Denial of programming became a reality for RCN in early 1999, when Cablevision revised its sports programming distribution system from satellite to terrestrial so as to preclude RCN's carriage of an important tier of extremely popular local sports programming. In the New York metropolitan area, Cablevision boasts more than three million subscribers and at the time controlled programming rights for seven of the nine local professional sports teams¹⁴ and their venues.

¹³ Comcast serves 1.9 million subscribers in the Philadelphia metropolitan area, about 90 percent of the total subscribership. Nationally it is one of the largest MSOs, with some 8.2 million subscribers. Through subsidiaries, Comcast owns a controlling interest in the Philadelphia Flyers National Hockey Team, the 76ers National Basketball team and two arena arenas. It also holds a controlling interest in SportsNet which controls the great bulk of the professional area sports programming in the Philadelphia marketing area. SportsNet carries approximately 66 percent of the games of the Philadelphia Flyers (NHL) and 73 percent of the Philadelphia 76ers' (NBA) regular season games as well as 49 percent of the Phillies' games (MLB). Comcast also owns exclusive rights to broadcast games of the Philadelphia Phantoms (American Hockey League), Philadelphia Wings (National Lacrosse League), and Philadelphia Kixx (National Professional Soccer League), as well as numerous football and basketball games of regional colleges and universities. This programming is distributed terrestrially to subscribers in the Philadelphia area. In its own promotional material Comcast has touted the strategic importance of SportsNet: "SportsNet provides a significant marketing advantage against satellite TV and other competitors."

¹⁴ These teams were the Yankees, Mets, Knicks, Nets, Rangers, Islanders, and the N.J. Devils. Cablevision owns outright two of these teams: the Knicks and the Rangers.

RCN has seen a troubling trend among incumbents to consolidate their holdings in a limited number of metropolitan areas, *i.e.* to “cluster,” and then to build a terrestrial fiber distribution network in those communities. Comcast employs a clustering strategy and refers, for example, in its Year 2000 annual report to a “Mid-Atlantic Super Cluster,” which includes Delaware, Maryland, New Jersey, Pennsylvania, Virginia, and Washington, D.C. If AT&T and Comcast are allowed to merge, they can take advantage of a clustering strategy, especially in states where they both currently operate cable systems, such as Florida, Pennsylvania, and Virginia, and in areas where their systems are in nearby states, such as in the Northeast corridor.

With clustering, the economics of fiber distribution become more practical, allowing the incumbent to evade the program access rules by buying the rights to local professional sports programming and refusing to share that programming with competitors. This is what Cablevision has done to RCN in New York City, and is what Comcast threatened to do to RCN in the Philadelphia area. Amassing cable systems in geographically proximate areas, as AT&T and Comcast will do in many cases, will increase their ability to move programming onto a terrestrial network and thereby circumvent the program access rules.

Sunset of the Exclusivity Rule. Competitors rely on the program access rules to gain critical programming. One of the key rules, however, is in danger of being phased out. The prohibition on exclusive contracts between vertically integrated cable companies and their programming affiliates sunsets on October 5, 2002, unless the FCC determines in a rulemaking that continuing the provision is necessary to preserve and protect competition and diversity in the distribution of video programming.¹⁵

If the sunset is allowed to occur, Comcast and AT&T can lock up their affiliated programming in exclusive contracts, thereby cutting off competitors. Such a strategy would make sense to AT&T and Comcast because the combined company would have a significant consumer reach (*e.g.*, a presence in 41 states), and the parties may benefit more from disadvantaging their competitors than they would from gaining revenue from the sale of the programming to competitors. A substantial amount of programming could be affected.

¹⁵ 47 U.S.C. § 548(c)(5).

Comcast, AT&T, and companies in which one or both have an ownership interest, have a stake in a formidable slate of programming assets. Comcast owns, in whole or in part, the following important programming:

- E! Entertainment
- style.
- Golf Channel
- QVC
- Comcast Sports Southeast (regional)
- Comcast SportsNet (Philadelphia)
- Discovery Health Channel
- The Outdoor Life Channel
- G4
- iN DEMAND
- Comcast SportsNet-MidAtlantic (regional)
- cn8, the Comcast Network (regional)

AT&T owns interests in the following:

- E! Entertainment
- style.
- New England Cable News (regional)
- iN DEMAND
- Fox Sports New England (regional)
- Pittsburgh Cable News Channel (regional)

In addition, AT&T, through its 25 percent ownership stake in Time Warner Entertainment, has a significant stake in marquis programming such as HBO, Cinemax, Comedy Central, and CourtTV (until such time as the sale of TWE is completed).

If AT&T and Comcast are permitted to merge, the combined entity will enjoy, for example, a 50 percent interest in E! Entertainment, a 50 percent interest in style., and a 55 percent interest in iN DEMAND. The new entity will have substantial power to lock up affiliated local and national programming in exclusive contracts if permitted to do so. This danger is more than speculative. AT&T and Comcast have both filed comments in the FCC's proceeding regarding the sunset, vigorously opposing extension of the ban on exclusive contracts, so that they may be permitted to engage in exclusive contracting with affiliates.¹⁶ iN

¹⁶ *In the Matter of Implementation of the Cable Television Consumer Protection and Competition Act of 1992, Development of Competition and Diversity in Video Programming and Distribution, Sunset of Exclusive*

DEMAND, in which the parties will have a large interest, has also filed comments to the same effect.¹⁷ In order to prevent an anticompetitive denial of programming to competitors, the FCC should extend the rule against exclusivity, particularly given the context of the instant merger.

Coercion of Unaffiliated Programmers. AT&T Comcast, through sheer market share, may also exert inappropriate influence over non-affiliated third-party programming providers. If pressured to choose between selling content to AT&T Comcast, or to RCN, the choice is clear: AT&T Comcast, with its 22 million subscribers, will win. Similarly, if pressured to price their product at levels that will impede RCN's ability to compete with AT&T Comcast, particularly where the programming is "must have," there is little doubt that third-party providers of programming will desire to keep their largest customer happy. Comcast and other large MSOs have demonstrated in other contexts that they are well aware of their monopsony purchasing power, and will use it to influence and even control third-party vendors to the detriment of competitors in their markets.

The threat that AT&T Comcast will coerce unaffiliated programmers is made more real by the fact that AT&T apparently has retained a right to "most favored nation" treatment by its former affiliate, Liberty Media, which controls, for example, 12 channels of STARZ, seven channels of Encore, and BET Movies. Liberty Media also owns lesser interests in several other program offerings.

Anticompetitive Marketing Tactics. Comcast has worked diligently, through anti-competitive marketing practices, to keep RCN out of its service areas. In Folcroft, Pennsylvania, for example, in mid-2000, Comcast sales representatives went door to door approaching customers to tell them (wrongly) that RCN did not carry SportsNet or that RCN would not be allowed to carry SportsNet past October 2000.

Contract Prohibition, CS Docket No. 01-290, Comments of Comcast Corporation filed Dec. 3, 2001, Comments of AT&T Corporation filed Dec. 3, 2001.

¹⁷ *Id.*, Comments of iN DEMAND filed Dec. 3, 2001.

Comcast formed a “swat team” to combat RCN’s entrance into the market. The swat team was instructed to approach current Comcast customers and offer lower cable pricing in return for signing a contract to continue using Comcast services for 18 months. According to one former sales representative, “Comcast’s mission was to get all their customers to agree to the 18-month contract before RCN entered the market so that RCN would be locked out of the market.” The swat team was heavily compensated for their efforts and were informed that if they succeeded, “RCN would not survive.”

Comcast sales representatives were also instructed to inform customers that those who switched to RCN services would have to change their phone numbers. Ultimately, Comcast obtained 18-month contracts from 80 percent of its current customers, seriously weakening RCN’s ability to compete in the Folcroft market.¹⁸

Use of Monopsony Power to Preclude Access to Vendors of Cable-Related Technologies.

If the AT&T Comcast merger is approved, the new entity will possess the power to impede competitors’ access in the market for cable-related technologies. Some of these technologies include video on demand (“VOD”), electronic programming guides, and set-top boxes. AT&T Comcast would be the largest cable operator, dominating roughly 30 percent of the cable marketplace; the new entity could potentially impose exclusivity requirements that would prevent RCN from bringing a given service to all of the subscribers for whom RCN competes, in any area in which the merged entity will operate.

Video on Demand. VOD is just one of the emerging technologies, barely conceivable a few short years ago, that analysts anticipate will drive the success of the cable industry in the coming years.¹⁹ VOD allows cable subscribers to receive digital video movies and events of

¹⁸ Affidavits and correspondence of RCN employees and former Comcast employees, on file with RCN.

¹⁹ The growth in advanced services has been phenomenal, with the FCC predicting in its most recent report on the MVPD industry that there would be a 171.2 percent increase in such services during 2001. *FCC Eighth Annual Report* at Table B-4. Other examples of new technologies that, like VOD, will change the face of the cable industry are personal video recorders (best known currently under the TiVo brand name), interactive television applications, and other advanced digital technologies. The concerns expressed herein with respect to VOD apply equally to other emerging technologies, including those not now imagined that may become crucial to the industry in the future. RCN is using the example of VOD to illustrate the potential anticompetitive effect that the exercise of monopsony power by the largest MVPD providers is having and will have, because VOD currently is the most mature of the emerging new cable technologies, and the only one for which RCN, to date, has negotiated

their choice, directly to their television set, whenever they desire. Subscribers can select from a library of available programming, and can use rewind, fast-forward, pause and stop functionality to control viewing, in the same manner as with a VCR. Once ordered, subscribers have access to a chosen movie for a period of 24 hours, before it is “returned.” VOD is viewed as critical to the continued viability of cable, which has lost significant market share to satellite-delivered video services in recent years. True VOD, which is highly desired by subscribers, cannot currently be provided over the satellite platform, thereby giving cable operators who offer VOD a renewed competitive edge.²⁰

To operate cost-effectively, VOD requires: (1) a technology platform that can be acquired at reasonable cost; and (2) attractive programming content. As to the first factor, there are a small number of viable vendors – only four: Seachange International, nCube, Concurrent Computers, and DIVA Systems. DIVA is under financial duress, and may not survive in the long term.²¹ The success of nCube to date in deploying its equipment has been limited; accordingly, it is not RCN’s vendor of choice. The remaining two vendors – Seachange and Concurrent – have shown an affinity for the largest cable providers that has impeded RCN’s efforts to negotiate acceptable contracts for the deployment of their technology. Both companies have contracts with Comcast as well as with Time Warner Cable.

Time Warner Cable, the second largest MSO, has exerted its monopsony buying power to negotiate exclusive non-compete clauses in its contracts with Seachange and Concurrent that prevent RCN from deploying technology provided by either company in any market in which Time Warner operates. Comcast owns a stake in Seachange, which could influence Seachange to enter into similar non-compete agreements with the merged entity. RCN witnessed evidence of the power Comcast wields over Seachange when Seachange refused to be publicly identified with RCN’s VOD deployment in the Philadelphia market, for fear it would negatively impact the

deployment contracts. There is no reason to think, however, that the situation is likely to be appreciably different for other new technologies, for which there may be only one or a few viable vendors.

²⁰ Although VOD has been technologically feasible for some time, the high cost of VOD equipment has discouraged deployment. Recently, the cost of VOD equipment has come down to a viable level, and cable operators currently are rushing to bring the service to market.

²¹ DIVA Systems announced this week that it had laid off 20 percent of its staff, and has sufficient cash only to get it through the end of June. See <http://www.cedmagazine.com/cedailydirect/0204/cedaily020418.htm>.

vendor's relationship with Comcast. RCN was eager to publicize its deployment of the popular VOD service in the media, but Seachange declined to be named.

The second factor in the success of VOD – the need for access to attractive programming content – heightens the importance of the program access issues discussed above. VOD service requires that cable operators must negotiate agreements with content providers for the transmission of programming on demand that are *separate* from their contracts to broadcast that same programming. Thus, all of the competitive concerns discussed above in connection with the acquisition of programming generally apply equally, and for a second time, in connection with RCN's ability to compete in providing VOD. Many of the properties identified as "must have" programming are equally important to the success of RCN's VOD product offering. This includes, if it is migrated to the VOD platform, the vital local sports programming that Comcast controls in the Philadelphia area and Washington, D.C., area markets.

Programming Guides. Comcast has exerted its market power to prevent RCN from providing a popular electronic programming guide to its subscribers. Comcast is one of four large MSOs invested in WorldGate Communications' TV Gateway product, an important alternative to the popular, patented TV Guide electronic programming guide, that allows subscribers to navigate the wealth of channel choices now available via cable. TV Gateway has informed RCN that, due to exclusives with its financial partners, it cannot license RCN to use its product in any market in which RCN competes with any of its four MSO investors: Comcast, Charter, Adelphia, and Cox.

Set-top Boxes. The market for set-top boxes, essential for providing cable subscribers with access to digital channels, among other advanced digital services, like the market for VOD equipment, is controlled by a very small number of viable vendors. Time Warner has negotiated an exclusive arrangement with Scientific Atlanta that precludes that vendor from supplying set top boxes to RCN in any Time Warner market. Currently, RCN obtains its set-top boxes from Motorola. While this arrangement has generally been satisfactory, RCN has experienced problems during periods of peak demand, when Motorola has provided its entire available inventory to the largest MSOs, while forcing RCN to wait. The result of this preferential

treatment has been that large cable operators could provide service to new subscribers, while RCN could not, creating an obvious and enormous competitive handicap for RCN. Again, this circumstance illustrates the potential anticompetitive effect of the large cable operators' monopsony power – a circumstance that grows worse as market concentration increases.

If the ability of the largest incumbent cable operators to negotiate exclusive arrangements with vendors is not constrained, and is exercised with multiple vendors or in multiple markets, competitors like RCN could effectively be locked out of the market for various cable-related technologies. If so, RCN simply could not compete effectively and would inevitably be driven out of the market due to its inability to satisfy consumer demand. By virtue of the merged entity's increased market share as a result of the merger, if approved, its monopsony power can only increase.

Obstructing Access to Third-Party Building Contractors. To succeed as an overbuilder, RCN must be able rapidly and cost-effectively to deploy its network in a market. Indeed, in many markets, RCN is subject to build-out requirements that require it to achieve the capability to provide service to a specified number of homes within a given timeframe.²² Once its network has been deployed in a given area and is operational, RCN must be able to provide timely and high-quality installation service to its customers, to connect the customer's home to RCN's network. If an incumbent can disrupt RCN's ability to meet either of these two objectives – by delaying RCN's network deployment and/or impeding RCN's ability to timely connect customers to its system – RCN's deployment costs rise, potential customers are lost, it cannot garner needed revenues to support further deployment of its system, and its return on investment is ultimately reduced. In short, RCN is placed at an enormous competitive disadvantage.

Comcast is well aware of this fact, and has exerted its full weight in the Philadelphia area market to impede RCN's ability to deploy its network and connect its customers by actively interfering with RCN's ability to hire the independent construction and installation contractors

²² Typically, these build-out requirements are imposed by the local franchising authority at the behest of the incumbent cable operator, in the name of establishing a "level playing field." In reality, however, it is anything but competitively "level" to require a competitor to build out at the same pace that an incumbent monopolist originally built, or more typically, is rebuilding its system. Whereas the incumbent had a captive, untapped customer base upon deployment of its network, RCN must win its subscribers away from the incumbent.

on whom RCN, like every other cable company, depends for such services. RCN is aware of no fewer than 15 contractors in the Philadelphia area market – representing virtually all of the viable construction and installation contractors in the area – whom Comcast or, prior to its acquisition by Comcast, Suburban Cable,²³ have prevented or tried to prevent from doing business with RCN.

Upon RCN's entry into the Philadelphia area market, Suburban began requiring contractors, as a condition of receiving Suburban's business, to sign clauses in their contracts barring the contractor from working for any competing cable operator in the same jurisdiction. The sole competing cable operator, of course, was RCN. Suburban, and later Comcast have aggressively enforced these clauses, going to extraordinary lengths to document "violations" and intimidate contractors who were thought to be in contact with, or working for, RCN. For example, Suburban construction and engineering management personnel, many of whom went to work for Comcast when Suburban was acquired, followed contractors in their trucks, taking photographs to document that the contractor had been seen at an RCN office or work site. These photographs were then used to support the contractor's termination. Other contractors, who had not done work for RCN, have been threatened with the loss of their work for Comcast if they were found to be providing service to RCN.

A few of the contractors subjected to these bullying tactics no longer are working for Comcast and since have contracted to work for RCN. Others have declined to work for RCN, citing their desire to retain their lucrative Comcast contracts. In at least one instance, a large contractor that provides construction services in multiple markets refused to work with RCN in Comcast territory, although it did substantial work for RCN in non-Comcast markets.

²³ Suburban Cable was an incumbent regional cable operator with franchises throughout the Philadelphia and Harrisburg, Pennsylvania, markets, which Comcast acquired in January of 2000 as part of its strategy to consolidate and control regional cable "clusters" in the Philadelphia, Baltimore, and Washington, D.C., metropolitan area markets. This "clustering" of cable systems by Comcast, and the market domination that has accompanied it, has greatly increased the anti-competitive impact of Comcast's actions in each market, because such actions now impact RCN (or, in Washington, its affiliate, Starpower) throughout the relevant market. This is in contrast to the fragmented state of the regional markets when RCN originally entered them, wherein no one competitor could act in a concerted manner to impede RCN's market entry.

These heavy-handed, anti-competitive tactics – which can only grow worse when AT&T Comcast comes to control an even larger share of the market and can act concertedly in multiple jurisdictions – have adversely affected RCN and, consequently, competition in the Philadelphia area market, in several ways. First, contractors in the Philadelphia area market demand significantly higher prices from RCN for their services, because they anticipate being harassed or black-listed by Comcast. These prices are both higher than RCN pays in markets where its competitor has not engaged in such tactics and, RCN believes, higher than the prices Comcast pays. Second, RCN has suffered delays and construction setbacks, and accompanying expense, when no willing contractor could be found to perform the work or contractors have abruptly backed out of their commitments to RCN due to Comcast's interference. In some instances, contractors have abandoned their work for RCN after being threatened by Comcast with reprisals, leaving RCN unable to proceed until it could locate and retain an alternate contractor.

Disturbingly, Starpower has recently received indications that Comcast now is replicating these anti-competitive tactics in the Washington, D.C., area. Several of Starpower's local contractors have told Starpower in the past few months that Comcast has told them they will lose Comcast's work if they also do work for Starpower.

Interference with Local Franchise Negotiations. In order to enter a new market, a cable overbuilder must first obtain from the local franchise authority ("LFA") a viable cable franchise. Negotiating such franchises is challenging. The incumbent, monopoly cable operator's franchise often is presented by the LFA as the starting point for negotiation, with little or no regard for the fact that the incumbent operator has typically had many years – without any competition – to build out its network, establish a subscriber base, recover its costs, and build a revenue stream. Thus, RCN typically is asked to assume large up-front financial obligations, including build-out deadlines and PEG support commitments,²⁴ that will come due long before the company can expect to have any significant subscriber base or revenue stream.

The incumbent (which, by definition, has been in the community for some time and, therefore, is a political as well as commercial presence) can be expected to lobby the LFA hard

²⁴ Support for public, educational, and governmental access, which requires both substantial monetary and in-kind contributions.

to impose the highest possible burdens on the competitive provider. In two prominent instances, however, excessively aggressive lobbying of the LFA by Comcast led to the failure of RCN's efforts to negotiate a viable franchise, with the consequence that consumers in those two markets still face a cable monopoly today. Comcast's conduct is indicative of the lengths to which it will go to impede competition in its markets.

Prince George's County, Maryland. RCN operates in the Washington, D.C., area through Starpower, a 50/50 joint venture of RCN Corporation and PEPCO Communications. Starpower first approached Prince George's County in October of 1997 to discuss Starpower's interest in providing competitive video programming services in the County. Between June of 1998 and March of 2000, Starpower negotiated the terms of a franchise with the County Executive's staff and the County's attorneys.²⁵ In March of 2000, after input from all interested parties, including the incumbent cable operator, the Prince George's County Cable Commission (appointed by the County Executive) unanimously approved Starpower's proposed cable franchise agreement. Nonetheless, in response to objections belatedly instigated by Comcast, which acquired Jones Communications' cable system in Prince George's County in 1999, the County reopened its negotiations with Starpower and reconsidered the merits of Starpower's franchise agreement. Subsequently, in October of 2000, the Cable Commission again unanimously approved Starpower's proposed cable franchise agreement, as originally submitted. The County Council unanimously approved Starpower's franchise agreement in November of 2000. Rather than approve the franchise, however, the County Executive, in an unexpected reversal, presumably at Comcast's urging, reopened negotiation of the franchise once more. After months of additional negotiation, during which the County continued to increase its demands, Starpower decided, in the summer of 2001, that it no longer could proceed with its plans to serve customers in Prince George's County, despite having its base of operations there. Consequently, Prince George's County residents today do not have a choice of cable television provider.

²⁵ Starpower established its regional headquarters in Lanham, Maryland, in Prince George's County, at the outset of this process. The company's cable headend, telephone switching facilities, and technical operations base all continue to be located there. Thus, Starpower had every expectation that it would be a long-term partner with the County and its residents.

Philadelphia, Pennsylvania. Similarly, Comcast influenced the Philadelphia City Council to delay granting RCN a cable franchise for many months, while RCN was forced to respond to Comcast-scripted questions regarding its application. There, as in Prince George's County, after laboring for some three years to obtain a franchise, RCN ultimately determined that it was not feasible to proceed, and withdrew its franchise application. Consequently, while RCN is serving customers in jurisdictions around the City of Philadelphia, Philadelphia residents do not today have a competitive choice for their cable service.

Building Access. Even once its network is deployed, and RCN has succeeded in obtaining the programming customers want to view over that network, incumbent MSOs often attempt to block RCN from reaching its potential customers in apartment or office buildings (multiple dwelling units or "MDUs"), an attractive target market. In the Washington, D.C., metropolitan area, for example, Starpower has encountered numerous instances in which the incumbents (Comcast and its predecessors) have received exclusive building rights covering a period of years.

Frequently these exclusive contracts involve up-front payments to building owners, and it has proven very difficult to offer service in any such building.²⁶ While it may be possible, at least in some states, to litigate the legality or enforceability of such arrangements, doing so creates ill will with the MDU owner, is expensive, and is time consuming.

VI. Conclusion

The combination of AT&T and Comcast will result in a new entity with the incentive and a greater opportunity to thwart competition, thereby depriving consumers of a choice of cable television provider. The means by which competition could be blunted include circumvention of the program access rules, coercion of unaffiliated programmers, employment of anti-competitive marketing tactics, prevention of access to vendors of cable-related technologies and local building contractors, interference with local franchising, and prevention of access to apartment and office buildings.

In order to mitigate some of the harmful effects of the merger, RCN suggests, at the least, imposition of specific conditions providing access to programming controlled in whole or in part by the merger parties, and addressing monopsony control over third-party vendors of essential goods and services, including critical programming.

²⁶ For additional examples of the building access problem *see, e.g.*, comments in FCC Docket CS 95-184.

1-17
STATEMENT BY SENATOR STROM THURMOND (R-SC) BEFORE THE
ANTITRUST SUBCOMMITTEE OF THE SENATE JUDICIARY COMMITTEE,
REGARDING THE PROPOSED MERGER BETWEEN AT&T BROADBAND AND
COMCAST, TUESDAY, APRIL 23, 2002, SD-226, 2:00 PM.

Mr. Chairman:

Thank you for holding this important hearing today on the proposed merger of AT&T Broadband and Comcast. The plan to merge these two companies warrants particular scrutiny by this committee because the resulting company would be approximately two times larger than the next largest cable company, AOL-Time Warner. The sheer size of the merged company would give the resulting corporation close to 30% control of the cable market, which could then be leveraged to gain significant control of the broadband Internet and cable telephony markets. Given these troubling facts, I have several concerns that I hope our witnesses will address today.

First, we should ask whether consumers will benefit from the proposed merger. Past cable mergers have actually resulted in higher cable rates, rather than lower ones. For example, in Columbia, South Carolina, cable rates increased after Time Warner acquired the local franchise in 1995. Not only did rates increase, but they began to outpace inflation significantly. Proponents of the merger need to make a

compelling case explaining why the creation of a cable giant will lower prices for the cable consumer.

Second, we should examine whether the merged company's large market share will give it an undue amount of control over programming. Obviously, as one of the biggest buyers of programming, the new company would have influence over the types of television shows that are produced. This committee should examine the wisdom of allowing one company to wield such heavy influence over cable television programming.

Third, this committee should examine the effects of this proposed merger on the markets of component parts, such as set top boxes. The cable companies already have substantial influence over which manufacturers can break into the set top box market. By further consolidating the industry, the merged company would have tremendous influence over the abilities of manufacturers to compete. Additionally, the new company would also play a major role in any negotiations over industry standards for set top boxes and other technologies.

Mr. Chairman, I appreciate your interest in the proposed merger of AT&T Broadband and Comcast. This deal

raises serious concerns about the future of competition in the cable industry, and it is imperative that we consider all possible ramifications of this merger. Above all, we should look to see if the American consumer will benefit. I look forward to hearing from our witnesses today.

VICTORIA RYAN
PRESIDENT
CHARLES D. HOLLAND
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April 22, 2002

The Honorable Herb Kohl
Chairman
Subcommittee on Antitrust, Competition,
Business and Consumer Rights
Hart Senate Office Building, #308
Washington, DC 20510

Dear Chairman Kohl:

The Writers Guild of America, west believes that the merger of the cable holdings of AT&T and Comcast raises significant concerns regarding competition in the television industry. Together with our affiliate, Writers Guild of America, East, we represent the 11,500 men and women who write virtually all the national entertainment programming and much of the national news Americans see. The television industry is vital to our nation's public discourse. As a result, the greatest scrutiny must be applied to transactions that threaten to concentrate control of this vital public discourse. The AT&T-Comcast merger is such a transaction.

Conventional wisdom holds that the "scarcity" argument that traditionally justified, in part, broadcasting regulation is outdated. It is our view that not only does it continue to apply to broadcasting but also that it should apply to the cable industry. A constituency of a point of view or a cultural heritage cannot express its contribution to our social dialogue at will. Rather, its views must serve the profit motive of one of a handful of companies or it will be excluded.

The lack of diversity in the media has been well documented. The pursuit of access for ethnic minorities, women, older writers and others with diverse experiences and viewpoints remains a challenge for the Writers Guild members because programmers primarily target other viewers whom their advertisers are trying to reach.

Writers Guild of America, west, Inc.

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This represents a dangerous trend.

At all points, the marketplace of ideas has become so closed as to be a private enterprise rather than a public market. We noted in February 2000 that the metaphorical "marketplace of ideas" is quickly evolving from the insightful metaphor used by Justice Holmes in 1919 into a literal marketplace where the value of ideas is measured only by money (see *Early Warning Signs*, by Charles B. Slocum, Written By Magazine, February, 2000). We must not let it be so.

The marketplace of ideas is a concept rich with something more than money—our very national soul is at stake. We urge the committee to take the broad view of antitrust enforcement when reviewing the AT&T and Comcast merger. This view is well within the scope of existing statutes (see *Antitrust and the Marketplace of Ideas*, By Maurice E. Stucke and Allen P. Grunes, *Antitrust Law Journal*, Vol. 69, 2001 at 249).

After the proposed merger, the combined entity will have 27.28 million cable and satellite subscribers, 29.87% of the nation's total 91.33 million subscribers (See *Applications and Public Interest Statement*, submitted by AT&T and Comcast with the FCC, February 28, 2002, at page 50).

A program service striving for viability depends principally upon widespread availability of its programs to viewers for success. The possibility of viability for a program service is substantially reduced if 30% of the US cable and satellite subscribers are unavailable to them. The control of this large a block of subscribers in one entity endows that entity with undue influence over a program service. The combined AT&T Comcast would be in a position to offer harsh "take it or leave it" offers to program services faced with little choice.

In the alternative, the choice, even for benign reasons, of AT&T Comcast to not carry a program service would deal the program service a severe blow, in one fell swoop. This not only disadvantages the program service as a unique voice, but also impoverishes the 29.87% of

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the families in the United States which would, in the case of the merged AT&T-Comcast, be deprived of the point of view.

We urge the Committee to scrutinize the proposed merger for its national scope and also to look at the impact locally. Concentration of cable ownership must also be analyzed within each Dominant Market Area. Consumers benefit when a number of distinct cable system operators exist side-by-side in a metropolitan area. True competition between the cable operators does not exist because each consumer cannot switch to a different cable operator. However, consumers can at least compare program offerings, prices and levels of customer service with residents of nearby communities. If the consumer feels underserved or overcharged, they can complain or switch to one of the two national direct broadcast satellite operators.

The WGA urges the Committee to examine carefully the undue influence that a combined AT&T-Comcast will wield over program services, which are vital conduits for our public discourse.

Sincerely,



Victoria Riskin
WGAw President