

1 important things. I'm not going to repeat everything. I'd
2 like to thank the Commission for the excellent panels. I
3 thought that Esther and professor Nalebuff -- I'm saying it
4 wrong I'm sure. Barry and Esther, I thought did a very nice
5 job of setting the stage for the debate.

6 I appreciate the discussion a lot about the
7 bundling issues and the contract issues. I thought that was
8 quite important. And I think that the other witnesses
9 before me on this panel have done a nice job of reminding us
10 that it's not always a good idea to sit around and have a
11 charming CEO of a company or two come up and -- these guys
12 are good salesmen, that's what they do.

13 I mean how else could Micro -- how else could
14 America Online persuade people to pay a premium price for a
15 service that force-feeds you ads and makes it almost
16 impossible to find the real Internet beneath, at the same
17 time telling people they're too dumb to figure out how to do
18 it the regular way. I mean that's what I call salesmanship.
19 So, you know, we have a tough job here to compete with them.

20 Now in terms of the architecture, the thing that
21 strikes me about looking at this issue is not the Internet
22 we know today, which is nondiscriminatory access where
23 anybody could connect to an Internet server and anybody can
24 get their product out there and connected to people at the
25 same time, but it's the next generation Internet that we're

1 reaching.

2 And really, the issue that I think the Commission
3 has been derelict at looking at and what people have tried
4 to raise to the Commission, in our case back in the
5 mid-1990s before we just stopped beating our head against
6 the wall, is where that's going to be in terms of the
7 broadband platform. Now I'd like to skip in my testimony to
8 the top of page 3 and read some excerpts from a document
9 that Cisco prepared that you may have seen before. It deals
10 with the way they're designing services for cable operators
11 to control data that's going to go into broadband networks.

12 It starts out at the top of the page. It says,
13 "The ability to prioritize and control traffic levels is a
14 distinguishing factor and critical difference between new
15 world networks employing Internet technologies and "the
16 Internet." So the first thing they do is they say, the
17 Internet that we know today is going to be the past and
18 what's going to replace it is going to be something that's a
19 network that employs Internet technologies but it's not the
20 same as the Internet. That's something to think about.

21 The next paragraph, they point out the kind of
22 things that technology they're providing for cable operators
23 to track content, and I'm going to read it, because I think
24 you should think about this. It says, "Traffic type
25 identification allows you to isolate different traffic types

1 in your IP network. Through Cisco quality of service, you
2 can identify each traffic type. Web, e-mail, voice, video.
3 Tools such as type of service bits identification allow you
4 to isolate network traffic by the type of application, even
5 down to the specific brands, by the interface used, by the
6 user type and individual user identification or by the site
7 address."

8 So that's really what the cable companies are
9 asking the company to build for them in terms of the
10 technology to track data. Now skipping down a bit in the
11 paragraph that begins with, "Among other things," Cisco
12 points out that quality of service can also propel you
13 forward by giving you the information you need to offer
14 advanced differentiated service at a profit. For example,
15 time and usage-based billing. Now that's something that
16 people on the Internet have always -- I'm sure the
17 Commission's heard about these kind of ideas about metered
18 Internet use, but this is sort of one of the features of the
19 new technique is the ability to more efficiently do this
20 from the cable operator.

21 Next paragraph. "Cable companies can optimize
22 service profits by marketing express services to premium
23 customers ready to pay for superior network assets." So
24 it's really a fast pipe, a slow pipe, a go-fast button,
25 things like that. And what people are concerned about is

1 the highly differentiated level of service and who's going
2 to get and at what terms and at what level of discrimination
3 to access.

4 And the next paragraph on the next page, the full
5 paragraph, it says -- this is -- and I think quite a key
6 paragraph. They're talking about competitors' service here.
7 And they say, "If a push information service that delivers
8 frequent broadcasts to its subscribers is seen as causing a
9 high amount of undesirable network traffic, you can direct
10 CAR" -- which is, you know, one of the Cisco services -- "to
11 limit subscriber access speed to the service. You could
12 restrict the incoming push broadcast, as well as the
13 subscriber's outgoing access to the push information site to
14 discourage its use. At the same time, you could promote and
15 offer your own or a partner's services with full-speed
16 features to encourage the adoption of your services."

17 Now, what in the history of the cable industry, of
18 all the years of discrimination makes you think that these
19 companies won't want to do this to benefit their own
20 integrated services? And what, in the history of litigation
21 and broken promises and things like that and failure to make
22 real specific commitments make you feel that you can leave
23 the public in the lurch on an issue like this? My time is
24 up. Thank you very much for the opportunity to be here.

25 CHAIRMAN KENNARD: Thank you, Mr. Love. Ms.

1 Cunningham.

2 MS. CUNNINGHAM: Thank you. I'm Cathy Cunningham.
3 I'm here from the city of Irving, Texas, and I also am here
4 on behalf of the National Association of Telecommunications
5 Officers and Advisors, which has 432 local government
6 members representing over 20 million cable subscribers.

7 I would like to deviate or supplement the comments
8 that I filed with -- first of all, by addressing some of the
9 things that I've heard brought up in the initial comments of
10 the Commissioners and subsequently. First of all, in regard
11 to whether -- why it's important that we meet -- and I
12 wanted to say I'm very grateful, as a representative of a
13 local government to be here and that the FCC is showing this
14 kind of interest in the role local government plays in
15 response to the consumer advocacy on behalf of our citizens.

16 But I think it's important to have these kind of
17 hearings as just a person who lives out almost in, maybe not
18 quite in the middle of nowhere -- I'm near Dallas -- but
19 still, in the middle of America. It's, this is an issue
20 that's very interesting to people, and I think that if you
21 had just passed over this like a standard type of license
22 transfer, it would be seen as not gaining the public trust.
23 The public wants to hear these things talked about. I don't
24 think it would benefit the public, the Commission or the
25 companies involved not to have this kind of hearing.

1 I think that the public wants a hearing like this,
2 and I think that it's -- it would really be actually
3 detrimental even to the companies to not have this. It
4 would just be seen as wrong by the public, by those people
5 who aren't living in this city but who live outside this
6 city. I think they want this sort of thing and they want to
7 be able to see it and know that -- and hear these
8 explanations that are being produced by the company
9 representatives, by the panel before us, this panel and the
10 next panel. This is the sort of thing the public wants to
11 hear about.

12 And I think the answer to all four of those
13 questions that were posed is really that it's important for
14 public trust, as much as public interest or anything else.
15 And as the professor, whose last name I won't even attempt,
16 said before, two hearings doesn't hurt. People, hearing it
17 more than once sometimes helps some of us what some of the
18 issues are and to either get a comfort level or know where
19 we're not comfortable.

20 Secondly, a comment I heard several times
21 mentioned was there were discussion about marketplace. And
22 I know that this Commission struggles with and is sincerely
23 interested in doing the right thing as far as marketplace
24 versus governmental regulation or even intrusion into
25 certain areas. In my city, in the city of Irving, Texas, we

1 have been blessed or cursed, depending on how you want to
2 look at it, but the location. We have more than 20
3 telecommunication companies that have build-out facilities
4 in our rights of way.

5 And in all that 20 new companies, none of them
6 have come to the residents to offer competition. They're
7 going to the big businesses or they're just passing through
8 town. So taxpayers are helping to, in some ways acquire
9 that property they benefit from, but the individual resident
10 has not seen the competition, they're not seeing additional
11 choices. And in the area of town I live in, which is
12 considered a middle-class neighborhood with a lot of
13 Internet users, there's not DSL.

14 I mean it's not -- it would be very nice, I would
15 like to hear all these things and say yes, a marketplace
16 exists, but sometimes it doesn't. It doesn't in all parts
17 of the country. It doesn't in my neighborhood. And that's
18 despite the remarkable facilities built out that I struggle
19 with at work trying to find room for all of these companies.

20 So once -- right now, our cable company, which is
21 a partnership between Time Warner and AT&T, hasn't yet to
22 rule out the broadband services -- I think that's coming
23 soon -- but right now, there's no high-speed broadband
24 access, and when the cable company does roll it out in the
25 next couple of months they said, they'll be the first ones

1 and for a while they'll be the only ones. I suspect that
2 DSL is coming, but it's not there yet.

3 And so right now, without, without governmental
4 intrusion, the marketplace isn't working, because there is
5 no marketplace for some of us right now. What I think the
6 cities want -- I don't think the cities are -- speaking on
7 behalf of all of them, which is pretty presumptuous for me
8 to do, but at least on behalf of myself, I don't think we're
9 here to give answers, because you're struggling with some
10 very difficult questions, but we're here to encourage you in
11 that struggle. We want to encourage you to help us make
12 sure that our citizens have a quality, universal, timely
13 service.

14 We want to work in partnership with the Federal
15 Government, as Professor Orton mentioned as far as consumer
16 standards or something like that. If you were to set those
17 types of standards, we would certainly be -- the level of
18 government that consumers are going to turn to when they
19 have problems, they're probably not going to dial a long
20 distance number. They're going to dial us, and they're
21 going to expect something gets answered.

22 Second, this goal goes along with it. I thank you
23 for including us in this. I hope you will continue to
24 include your local governments as these sort of things
25 develop, and I would like to mention that our city -- and in

1 closing, I would just like to mention our city did approve
2 the transfer agreement. And in our city, Time Warner agreed
3 and actually provided language concerning an open access
4 provision in the transfer agreement. I think that if it was
5 okay for us, I don't know why it wouldn't be okay across the
6 country.

7 And if the feeling is that the agreement, as I
8 heard in the testimony, the first panel, that the agreement
9 is binding, I don't see what it would hurt for this
10 Commission to put a stamp on it or for somebody to put a
11 stamp on it and help make that so for the American public.
12 Thank you.

13 CHAIRMAN KENNARD: Thank you very much, Ms.
14 Cunningham. And thank you all, all the panelists for your
15 testimony. I want to direct my initial questions to Mr.
16 Mirabal. Mr. Mirabal, you made some what I consider to be
17 fairly serious allegations against the merging parties here
18 and, in particular, you allege that Time Warner has not been
19 providing service to the Hispanic community.

20 I believe that that is one of the most serious
21 allegations you can make before this Commission, and that's
22 not a personal whim. I think that that's strongly grounded
23 in Section 1 of the Communications Act, which charges this
24 Commission with ensuring that we have a truly nationwide
25 communication service that serves all of our communities,

1 including the rich diversity of our country.

2 So I'd like to find out a little bit more from you
3 what's behind these allegations. You mentioned programming,
4 but I want to, in particular, find out whether you have
5 concerns about the deployment of services by Time Warner in
6 the Hispanic communities, if you have allegations in that
7 regard. You touched on it briefly, but you didn't really
8 elaborate.

9 MR. MIRABAL: Certainly, Mr. Kennard. We do have
10 additional data and reports that we can give to the
11 Commission concerning those issues, but let me just say that
12 we, we have been attempting to work with Time Warner over
13 the last several years -- about three, to be exact -- yet
14 upon their commitment to us to conduct a self-evaluation on
15 those issues, which we mentioned -- they include governance,
16 employment, diversity issues in the company, the issue of
17 procurement for minority suppliers, the issue of service of
18 their cable and other facilities to our community -- we have
19 yet to receive a report from Time Warner on those very
20 issues.

21 They have made repeated requests to us to delay
22 reporting on these matters to us, although we have raised
23 concerns that go all the way from south Florida through
24 Atlanta up through New Haven and all of the Northeast states
25 and many other areas of the country about concerns about

1 being able to access certain cable services where those
2 services do not go into certain communities for various
3 reasons. That information has not been made available to
4 us.

5 CHAIRMAN KENNARD: When did you request this
6 information?

7 MR. MIRABAL: This started almost three years ago,
8 sir. And shortly afterward, Time Warner joined a corporate
9 board of one of our member organizations and made to
10 commitments to conduct, as I said before, a self-evaluation
11 of these issues. And that has yet to be presented to us.
12 More recently, when the merger was announced by AOL Time
13 Warner, we sent a letter to the chief executive officers of
14 both companies, and Mr. Levin was one of them, and requested
15 a meeting, because we wanted to address our concerns
16 regarding this merger as far as it affected the
17 Hispanic-American community.

18 And we have yet to be able to hold a meeting where
19 we get any details or any answers as to when those details
20 will follow to us. So we --

21 CHAIRMAN KENNARD: Mr. Parsons, would you like to
22 address this issue?

23 MR. PARSONS: I think I would, Mr. Chairman. I
24 want always to be careful not to seem to engage in a food
25 fight on these kind of panels but I, like you, think the

1 allegations that have been made are serious. And first, I
2 would hope that whatever followup data Mr. Mirabal is going
3 to share with the Commission he would also share with us.
4 To my knowledge, which is while not exhaustive, at least
5 extensive on this subject, since it is an area that reports
6 to me and our corporation, I think we have an exemplary
7 record in terms of not only serving the Hispanic community
8 but serving the full breadth of, as you call it, the
9 diversity and the richness of the communities in which we
10 operate.

11 To start, with our cable company, we serve all
12 areas of the franchises in which we are in. We're the
13 first, I think, cable company to enter into a social
14 contract with the FCC where we made commitments within
15 communities to not only serve all areas within the
16 communities but to make sure that we drove broadband
17 deployment of our, of our plant into all areas of the
18 communities. That commitment, which we made in 1994, was to
19 have, in terms of the 20 million homes passed that the Time
20 Warner Cable franchises serve, all of those plans upgraded
21 to full 750 megahertz capacity by the end of this year. And
22 as I think the chairman knows, we're on schedule to do that.

23 We also committed to wire all the schools in those
24 communities and so that the schools would have access to the
25 broadband capacity beyond the cable service. And so I would

1 be more than amazed, I would be shocked if there were, if
2 there was actual data to support the allegation that we
3 somehow are underserving the Hispanic community within the
4 franchises where we operate.

5 Secondly, from a programming perspective, I think
6 that you can look at Time Warner's programming across its
7 many programming platforms, which includes broadcast with
8 the WB, HBO in terms of premium cable, all of the Turner
9 services, and they have been more than even-handed. We have
10 reached out to the minority communities, including the
11 Hispanic community because, frankly, they over-index in
12 terms of television watching. In fact, HBO will launch in
13 September the first of what will be called HBO Latino. It
14 will be one of the multiplex services on our HBO offering,
15 because we understand there is a need in that community and
16 there is an appetite in that community.

17 The Americanos, which Mr. Mirabal spoke about, was
18 a movie project and book project we did in conjunction with
19 James Edward Olmos that was precisely to celebrate, and give
20 visibility to, the impact and contribution that the Hispanic
21 community is making to America today. And that has traveled
22 around the country. I could go on and on.

23 WEA Latina. We are, as you know, a major record
24 company. About 20 percent of the Latin music that's
25 available in this country is from artists that we've gone

1 out and found and developed and nurtured and then brought to
2 the public's attention. So I would be very interested to
3 see the documentation that Mr. Mirabal has agreed to share
4 with you. We have probably -- in fact we just won an award
5 for having one of the best minority and women in business
6 development initiatives in corporate America. So I can't
7 say that our track record is entirely spotless or that we
8 are the exemplar. We sure try. We've sure been recognized.

9 There's lot of tangible data to point to that
10 suggests we're making some progress and, while I listened
11 very carefully to Mr. Mirabal's response to your very direct
12 question, I didn't hear any actual evidence of, or factual
13 allegation that suggests that we aren't doing our job in
14 this area. The fact that he has not had the meeting that he
15 has asked for with Mr. Levin is something I'll have to look
16 into in terms of whether he's met with any of the other
17 people in our company. But on the record and on the facts,
18 I think we're hard to fault.

19 CHAIRMAN KENNARD: Well, there seems to be an
20 interesting disconnect here, and I look forward to the
21 information that you plan to submit, Mr. Mirabal. Other
22 questions? Yes.

23 COMMISSIONER TRISTANI: I just have a question,
24 and I don't know if you keep these statistics, but do you
25 know what proportion of your subscribers are Hispanics?

1 MR. PARSONS: I don't as I sit here today. I
2 could get that information for you, I suspect.

3 COMMISSIONER TRISTANI: I'd be interested. I'd be
4 interested. Thank you.

5 CHAIRMAN KENNARD: Any questions. Commissioner
6 Furchtgott-Roth.

7 COMMISSIONER FURCHTGOTT-ROTH: I'd like to thank
8 the witnesses for coming today. I'd particularly like to
9 thank Ms. Cunningham for addressing the questions that I
10 asked and for her comments about the value of this hearing.
11 I, too, listened very carefully to Professor Nalebuff's
12 comments and to Ms. Dyson's comments as well, which I
13 interpret as meaning that there's value in having public
14 discussion of matters that are of great public interest. I
15 still wonder about whether this agency has been -- does this
16 in a discriminatory manner or not in choosing which issues
17 to raise and which not, and also whether there aren't other
18 federal agencies that address these more directly.

19 And so I'd like to hear from each of the witnesses
20 whether, in fact, the information that you are providing to
21 the FTC -- FCC today is similar to information that you may
22 have provided to the Federal Trade Commission as well.

23 MR. COOPER: Let me -- I didn't want to directly
24 use the initial time. I expected you would come back around
25 to your questions. And let me make a couple points about

1 why there is multiple review of mergers between agencies.
2 Second of all, why some mergers attract more attention than
3 others.

4 It seems to me that the Communications Act, for at
5 least six and a half decades, has recognized that
6 communication and broadcast are special and different. And
7 that's why we have a Communications Act in addition to a
8 Sherman Act. And it holds these industries, because they're
9 so vital to democracy, to a higher standard. And you have a
10 statute that exposes to a public interest test, which is
11 different than a market competition test.

12 And we have, we have a variety of rules on
13 limitations on ownership that go way beyond the Sherman Act,
14 some of which have been involved in recent mergers and one
15 merger that is more or less still pending. So that the
16 Communications Act is different, it establishes different
17 authorities, it establishes different standards, and so I
18 think there's a legitimate reason to ask both similar
19 questions and different questions. That's why we have
20 multiple review across the agencies.

21 Second of all, why does a merger like this attract
22 more attention than other mergers? Well, one, in some
23 license transfers there's a *de minimis* issue. If it's a
24 small transfer between two companies, it may not matter.
25 Second of all, this merger involves cross-ownership between

1 content and conduit, which have been the subject of a great
2 deal of concern in public policy. So that raises different
3 kinds of questions than other mergers.

4 Third, I would suggest that, given that we have a
5 pending petition for reconsideration on the AT&T Media One
6 merger, you literally have before you almost two-thirds of
7 the wires in the cable industry to be considered. So, in
8 point of fact, if you were to treat those two mergers -- I
9 understand you have ruled initially on the AT&T Media One,
10 but we do have a petition on reconsideration and clearly
11 these mergers were before you at the same time -- you could
12 have the effect of establishing what is virtually an
13 industrywide policy in a framework that is much quicker than
14 the normal rulemaking.

15 So those, I think, are good reasons. The whole
16 industry was here, a cross-ownership issue was here.
17 Communications Act is very different than the Sherman Act.
18 Those are good reasons that this Commission gives a very,
19 very hard look at these kinds of mergers and, in fact,
20 passes through a single license by a small operator that
21 doesn't own any content. I don't think the differential
22 scrutiny is inappropriate when you have so many important
23 issues and so much of the industry structure at stake.

24 COMMISSIONER FURCHTGOTT-ROTH: Dr. Cooper, by your
25 own testimony, the Sherman Act and the Communications Act

1 are quite different, and I come back to my question, which
2 is, is the information that you testified about today
3 similar to the information that you've presented to the
4 Federal Trade Commission, which enforces the Sherman and the
5 Clayton Acts.

6 MR. COOPER: Well, some of it is and some of it
7 isn't. We don't necessarily raise, and I personally haven't
8 raised, all of the issues I raise here under the
9 Communications Act down at the FTC or the Department of
10 Justice under the Sherman Act. But there is an overlap.
11 The Congress passed the Communications Act 30-plus years
12 after the Sherman Act -- I'll do the math -- and they
13 understood that there was an overlap. And in fact, because
14 communication and broadcast is so important, it is not
15 unreasonable to have two agencies look at the issue. So,
16 certainly a certain amount of the information is the same.

17 COMMISSIONER FURCHTGOTT-ROTH: But Dr. Cooper,
18 isn't it the exact same public interest standard under the
19 Communications Act that applies to broadcast, to all
20 wireless licenses, to the tens of thousands of license
21 transfers that this agency reviews every year, and to which
22 this agency does not apply anticompetitive tests, does not
23 hold public hearings?

24 MR. COOPER: Well, again, the difference in this
25 merger -- and I think I have testified in almost all of the

1 en banc hearings the chairman referred to -- these are very
2 large mergers affecting substantial portions of the country,
3 frequently involving, in this case, cross-ownership of
4 content and conduit, so they raise different issues. They
5 clearly raise different issues when I'm looking at AOL Time
6 Warner versus a small license transfer, SBC Ameritech, which
7 definitely was a similar context.

8 So I think it is, it is reasonable for the
9 Commission to give different levels of scrutiny to mergers
10 that are -- the magnitude is dramatically different. So I
11 do not see anything unfair in giving high scrutiny to a
12 merger that raises so many issues.

13 CHAIRMAN KENNARD: Mr. Love.

14 MR. LOVE: Well, we've talked to the Federal Trade
15 Commission about this merger. We've talked, you know,
16 today, to this one. We've actually had different
17 conversations. One of the reasons why the conversations
18 were different is that the Federal Trade Commission has a,
19 has a particular expertise in competition policy where it's
20 more fruitful to explore certain types of issues.

21 For example, the Federal Trade Commission, along
22 with the Department of Justice, administers the merger
23 guidelines. And we have concerns -- and this has been a
24 case that's brought up -- that the treatment of
25 collaborative ventures, the so-called joint venture

1 guidelines -- are too much of a safe harbor for mergers and
2 not enough of a, don't do enough to capture the degree to
3 which the companies are not really independent. The fact
4 that -- people have talked as if AT&T and Time Warner are
5 somehow these independent companies, but they have an
6 incredible web of joint ventures and collaborative
7 agreements, which makes them something different than just
8 independent entities.

9 And so this merger, in a sense, from that point of
10 view, we think is, would be cast a bit different. And then
11 another issue that has come up with the Federal Trade
12 Commission and the Justice Department is whether or not
13 mergers in these cases remove players from regulatory
14 proceedings. The case would be -- in a case in the regional
15 Bell operating companies, the problem was companies like
16 Compaq Computer and Intel would only intervene in certain
17 markets, depending on the ARBAK (phonetic) and --
18 proceedings I was involved in -- and Intel told me this and
19 so did Compaq, that they had board-level decisions not to
20 intervene in Bell Atlantic's territory for both Intel and
21 Compaq, because of corporate relations.

22 So when Bell Atlantic merged with Nynex, that was
23 just a half, you know, half a country. They couldn't really
24 intervene in it. And so we raise that issue, because we
25 believe that having more players makes the regulatory

1 environment work better because you hear more voices. Now
2 that's something that's sort of different. Now --

3 COMMISSIONER POWELL: Why is that remarkable?

4 MR. LOVE: What's that?

5 COMMISSIONER POWELL: Why is that remarkable that
6 corporate interests might elect not to intervene in a public
7 proceeding. I mean you couldn't possibly suggest that the
8 government should compel --

9 MR. LOVE: No, no, but I mean Intel --

10 COMMISSIONER POWELL: Or encourage parties to file
11 in the proceedings if they choose not to for their own
12 self-interest.

13 MR. LOVE: No. Well, Intel, Intel was very active
14 in this particular set of proceedings I was involved in --
15 Pac Bell Territory, U.S. West territory -- and we worked
16 closely with Intel and in some cases with, and some SBC
17 tours, and also with Compaq in some of these proceedings.
18 But then they would in some areas and they wouldn't in other
19 areas. And we had issues with 3COM, whether 3COM would
20 intervene in some and not in others. And it's, I didn't
21 find it remarkable at all, but I found it a consequence of
22 merging a bunch of ARBAKs (phonetic) together is that nobody
23 wants to intervene because there's just too much at stake.
24 There's too many.

25 At one point, to give you an example, Pac Bell

1 took a videoconferencing product that Intel sold, they threw
2 it across the table at the salesmen and they said, why are
3 you intervening in this ISD in re case we have in -- this
4 was back about five years ago in California -- and go talk
5 to your, you know, go talk to your government relations
6 people and come back, and then we can talk about, you know,
7 whether we're going to buy your product or not. Well, Pac
8 Bell's a pretty big customer for that kind of thing.

9 So, you know, those kind of discussions take
10 place. So when there's a merger of companies, after a
11 while, it's more and more difficult to -- like, consumer
12 groups have, you know, miniscule resources, we kind of
13 depend upon maybe some giant company will see things our
14 way. Like, we're glad Disney's on the next panel, for
15 CNIPES sakes. That's pretty weird. But, you know, that's
16 the way it is.

17 Now, that's what we have to kind of depend on in
18 this world. Now, you put everybody together, it's harder to
19 get somebody to take on the 12,000-pound gorilla, you know,
20 so I mean that's kind of an issue. We tried to raise that
21 with Justice and we're trying to raise it with FTC, because
22 these are kind of generic issues for them that go way beyond
23 what you do. And you may not, you know, necessarily have as
24 much interest as they have.

25 On the other hand, the reason to bring things up

1 in this proceeding is because you have more of a permanent
2 relationship with the cable industry than the FTC does. FTC
3 looks at these things from time to time. You look at them
4 on an ongoing basis, and so in a way you're more of a,
5 you're more related to them than the Justice Department or
6 the FTC is. And so I think you have more of an oversight
7 role. But I also think you have more of a responsibility.

8 Some of the solutions are more regulatory than
9 antitrust in nature, by their, because of the, just you
10 can't come up with, you know, a little consent order today
11 that would solve all the problems tomorrow, because you
12 don't even know what they're going to be yet. And so you're
13 trying to sort of, I think as some people implied in the
14 last panel, develop a bit of a, what is the body language,
15 you know, what, you know, you tell them kind of where you
16 want them to go and then, you know, you're going to see them
17 again. So that sort of makes more sense to have that
18 investment. If Robert Petowsky has that discussion, it's
19 not really that meaningful.

20 CHAIRMAN KENNARD: Mr. Love, I'd like to take the
21 discussion away from jurisdiction and process and back to
22 sort of the substance of the issues that are before us in
23 this particular transaction. We've had some discussion from
24 this panel on the access question, the open access question.
25 And one of the frustrations I have with this debate is that

1 there is not a baseline definition.

2 When the cable industry talks about open access,
3 they have a very different -- which they call forced access
4 -- they have a very different definition of what acceptable
5 access is for the consumer than the discussion I hear from
6 some competitors to the cable industry, particularly the
7 telephone companies and the consumer groups. Mr. Cooper, I
8 know you to be a veteran of the telephone wars where we have
9 debated this issue of access to a platform ad nauseam all
10 across the country. I would like to ask you how you define
11 open access.

12 Is it more than interconnection? Does it get into
13 issues of caching and speed and pricing? So that we can
14 have a better understanding of what we're talking about when
15 -- at least when we hear from you -- on this open access
16 question. You mentioned that open access is one of your
17 four recommendations as to how we deal with this merger, but
18 you didn't really tell us what that means.

19 MR. COOPER: Well, the Commission certainly has a
20 very lengthy description of open access that I filched from
21 AOL and AT&T. You will recall that AOL, in San Francisco
22 and AT&T, in Canada, defined in great detail to regulatory
23 bodies what they meant by open access. And frankly, what
24 they said, and certainly what AT&T said in Canada, looked an
25 awful lot like 251, 271 under the Telecom Act.

1 And as I read the 9th circuit, that is one path
2 you may have to go down, depending on how that plays out,
3 the nature and structure of common or open access, because
4 it may or may not be full common carriage under the Telecom
5 Act now applies to the cable industry, at least in the 9th
6 circuit, although obviously, we may yet litigate that
7 question with you. But, so at one level, that is the level
8 of detail into which this Commission may have to go under
9 the law.

10 The interesting thing is that for the almost two
11 years that we have been arguing for this around the country,
12 we had not advocated that. We had advocated almost a simple
13 sentence that said, essentially, unaffiliated Internet
14 service providers shall be allowed to gain access to cable
15 modem systems on "rates, terms and conditions that are no
16 less favorable than" affiliated ISPs, the identical language
17 that we have for cellular providers interconnecting with
18 ARBAKS.

19 So you have that history. And in that case, there
20 is not this huge structure of regulation that we have had to
21 live through in the last four years in 271. Those are two
22 models of access that this Commission has and has applied in
23 a nondiscriminatory framework. We don't have to do an awful
24 lot of work, as I pointed out to this Commission in the case
25 of Texas and New York.