You have operating irreversibly open markets. In those states, the Commissions in those states have worked out with the dominant incumbent carriers open access rules. One can argue that under the Ninth circuit, you should apply those rules to the cable system. We have been asking for a lot less than that for the last couple years. We may have a legal right to all that.

So my answer to you is either use the nondiscrimination language from the cellular providers or the nondiscrimination structure from New York and Texas. Off the shelf. They exist. No long proceedings. We know how to do it.

Alternatively, I'll give you another example. Recently, Montgomery county adopted a policy in which they defined open access, which was interconnection, at the head end, with no other modification to the system. I also read that as no other intervention between the customer and the ISP from the host cable operator. Very simple definition. One paragraph. I'll make sure you have it.

And language like that put it into this merger agreement, put into the AT&T merger agreement under reconsideration will have the effect of establishing the level playing field we heard about. It will balance the bargaining power of the unaffiliated ISP and the affiliated ISP. That's a level of detail I think answers your question.

CHAIRMAN KENNARD: Not exactly. You outlined a couple of options.

MR. COOPER: Yes.

CHAIRMAN KENNARD: But my question very specifically, are you recommending under your formulation of open access, that we consider the issue of pricing and speed?

MR. COOPER: I, the best language is, "rates, terms and conditions that are no less favorable than affiliated entities get."

CHAIRMAN KENNARD: But that just begs the question, because rates, terms and conditions usually include the issue of pricing.

MR. LOVE: What that does, if you, if AOL had agreed in San Francisco to what they had advocated or if San Francisco had agreed to what AOL had advocated, what would happen then is that the ISP would have the right to ask for interconnection, access to the system on rates, terms and conditions no less favorable. If that entity felt that they were being discriminated against, that entity would have a legal right to litigate or perhaps arbitrate, which is the framework of the Telecom Act in 251, 251.

So that may be the better way to go. Give them the right. Tell them to arbitrate disputes so that you don't have to try and write rules. We tried to get through this without writing rules by letting private parties have the private right of action. That is what AOL asked for in San Francisco.

CHAIRMAN KENNARD: Thank you, Mr. Cooper. Any other questions of this panel? Commissioner Ness, you haven't gone yet.

COMMISSIONER NESS: Disney claims that the merged entity would be able to discriminate in routing and caching of data, among other things. Dr. Cooper, since you have addressed this in previous discussions, do you agree with that statement?

MR. COOPER: Well, they clearly have the technical ability. That was the great service that the Cisco documents gave to us. The answer is that a policy to allow nondiscrimination would prevent that. And I thought Montgomery county did a good job of pinning that down. That is, a provider like Disney ought to be allowed to deploy its own caching or obtain caching that -- on rates, terms and conditions that are no less favorable than the cable operator provides to its affiliated service provider.

COMMISSIONER NESS: Mr. Parsons, would you care to respond to this question?

MR. PARSONS: Well, I think that both my colleague from AOL, who's more technically proficient, and I would care to respond. I'm going to let Barry start, but I have a point that I want to make in summary.

MR. SCHULER: Yes. I've listened to this issue being discussed of limiting choice, this notion that somehow the merged entity is going to limit choice to consumers, will somehow disadvantage competitors. I just wanted to point out that that idea is an old media idea. It's not an idea that really applies to our media world.

What's happening today is, if you think about, if you think about old media, you think about choice is important because there's finite choice. There's so many hours of prime time at night. Therefore, if you're in the media business, your job is to try and get as many people doing exactly the same thing. That's how you make money. That's how you get ratings.

In the Internet world, because it's infinite because it's on demand, because you can get what you want when you want it. Our motivation is different. We've learned that the good thing and what consumers want are lots of choice. It doesn't matter to us whether or not people are all doing the same thing.

In fact, if you asked 100 different people what AOL is to them, you would hear them say they're completely different things. It's where I get news, it's where I talk to my friends, it's where I get sports, it's where I get, talk to my friends, where I go to the quilting forum. So from our point of view, we can't discriminate content. If we were to employ some kind of caching that somehow discriminates against content, what that means is, to some segment of our members, they all of a sudden have a bad experience. And so it makes absolutely no business sense. In fact, if we did it, what it would do is they would complain.

COMMISSIONER NESS: Mr. Orton has agreed that that happens. Have you not?

MR. SCHULER: They would complain to us.

MR. COOPER: Let me respond.

COMMISSIONER NESS: Go ahead, Dr. Cooper.

MR. COOPER: Technically, he's admitted, well, the question was a technical question. Can he? And the answer is yes. And so his point is that, look, if I discriminated against CNBC, then my viewer experience is degraded and I'm going to lose a customer. However, if, yeah, I discriminate against CNBC, but they go over to CNN, which really isn't as good on content but now is just, is faster and prettier and quicker, the answer is that I don't know how far they've degraded, and of course they've captured all the economic rents from the fact they're saving the customer.

MR. SCHULER: That, that is not how, unfortunately -- and I think our friends at Disney would be the first to say -- consumers buy brands. Brands are not fungible. The fact of the matter is somebody wants to watch the Yankees, it's not as good to go watch the Mets. Someone wants to watch, you know, Disney, it's not as good to go watch Mickey Mouse. If someone wants to go --

CHAIRMAN KENNARD: But Mr. Schuler, what if the Mets are in black and white as opposed to color. Isn't that the question?

MR. SCHULER: But understand, but understand that because of the fact that the experience of the Internet is so diverse and it's so different and it's so nonreal-time based, meaning anybody can go on at anytime, our job, and what consumers are buying from us, is providing the best quality of service to what they want when they want it. And we never know what that is. It's impossible to know what it is.

In fact, history has shown to AOL, who six years ago when the Internet came along, was a proprietary service, there was no Internet. The Internet came along. Everyone said it was going to kill us, it was going to put us out of business. Instead, what we did was we embraced the Internet. We incorporated it into our service.

In fact, we set out to be the best Internet service provider out there. And we discovered that by doing that, by providing unrestricted access to content, that people came. Today, 23 million households have decided to buy that.

COMMISSIONER NESS: Okay. Thank you. Mr. Levin, you wanted to respond also.

MR. PARSONS: I would like to make a comment.

COMMISSIONER NESS: Okay. One moment. Mr. Parsons, and then Mr. Levin.

MR. PARSONS: Commissioner Ness, you know, you folks have a tough job because you've got to, you have to make a fine balance. Virtually everything that we've heard on this panel today is about stuff that could happen. In fact, as I was sitting here doing a mild slow burn on Mr. Mirabal's comments and thinking about things like CNN en Espanol and People en Espanol and all the things we do in that area, I remembered one of his comments. He said, it's conceivable -- this is a quote, I think -- "it's conceivable that this could have an anticompetitive effect."

Now that's unarguable. It is conceivable. I mean, technically, you could degrade the stream on the Internet. Technically, you could degrade the stream that a cable company puts across, but what Barry is saying is not only why would they do it -- they don't do it. They don't do it because, because of the marketplace, because of the competitive dynamic.

And I think too many of the commenters on these proceedings have come from the point of view of, not, are we trying to protect competition, but are we trying to protect a competitor? Competition won't let them do, or us ultimately if this Commission and FTC sees its way to clear our merger, do or enter into the kinds of behavior that are conceivable, because there'll be lots of other ISPs out there that are carrying these brands, and we've committed to open access in the way we've defined it in our MOU, Mr. Chairman, so that you can see it.

So that I think, you know, the Commission has the job of understanding -- yes, the dimension of the playing field, what is the art of the possible -- but the Commission also has the very difficult job of trying to find the balance so as not to, to borrow a phrase from constitutional law and the first amendment, not to put a "chilling effect" on innovation and on competition by trying to conceive of everything that could go wrong and anticipatorily block it.

I think that the genius of our economy and the strength of our economy over the last 15 or 20 years has been, frankly, a cutting back of regulatory impositions that has allowed innovation and competition to go forward. And it's enabled to sort of put ourselves in the front rank. So that --

COMMISSIONER NESS: Okay, thank you. Mr. Levin, you wanted to respond. I know we're running out of time.

CHAIRMAN KENNARD: You're on the next panel too, so you'll have a chance to continue your monologue. But --

MR. PARSONS: Appreciate it.

MR. LEVIN: AOL right now discriminates in content. You get the front page of AOL and it's not a random selection of little content that you see on the page. There are people that pay millions of dollars to AOL to have discriminatory placement on the thing. That's what they do. That's the difference between AOL and a generic ISP is you have strategically placed content.

The reason that they've been fighting with Microsoft is Microsoft gave a number of discriminatory events that have affected AOL in certain ways that AOL has complained to the Justice Department, and they've seen it happen in the very marketplace that Mr. -- that was described by AOL as something that would be impossible. I mean this is really a load of crap. This idea that the cable companies don't discriminate is ridiculous. That's what they do. They're the gatekeeper of the platform. They decide whether you get the golf channel or the food channel, and, you know, if they're part owner of you, your odds of getting on tend to be a little higher, but I mean that's exactly precisely what they do.

Now, what's going on with the architecture at the next thing is different than what AOL deals with right now.

It's going to be qualitatively, characteristically different. The people at -- Steve Wolf, the guy that used to run NSF's operation on the Internet that went over to Cisco used to debate this, you know, about eight years ago on the Com.priv list (phonetic), and he used to talk about wouldn't people pay for a go-fast button? Now, what's driving it is multimedia. If you're talking about simple frames of Web pages and e-mail message, you don't really have to have this high-tech, go-fast stuff like you do now, but with streaming media, the kinds of things they want to convert the Internet into, these things resurface.

The fact that the technology is where it is right now is part of a cycle. It's like this now. Five years from now, it's going to be different. And maybe five years later it will be like it is again now. It goes through cycles. Thank you.

CHAIRMAN KENNARD: Excuse me, I'm going to have to cut you off. We are running very far behind. Commissioner Powell has an engagement, so he has to leave soon. Commissioner Tristani, you'll have the last question on this panel. Then, we're going to have to break for the final panel.

COMMISSIONER TRISTANI: I had a question for Mr. Mirabal and a bit of a comment, but first of all, you made some statements that Time Warner was running a -- and I think it was a Seinfeld episode? -- is that a fact? And I'm talking about the Seinfeld episode which ridiculed Puerto Ricans, burned the Puerto Rican flag and made all Puerto Ricans look like rioters.

MR. MIRABAL: That's correct.

COMMISSIONER TRISTANI: They are running it on syndication?

MR. MIRABAL: They, they produced it through one of their production companies, Castle Rock. And prior to the airing of that episode, a coalition of Hispanic organizations requested well in advance that we be allowed to screen that episode because of the denigrating manner in which it presented --

COMMISSIONER TRISTANI: I know about that, and that's kind of, that happened, but my concern is now, is that still being run? Do you know that as a fact?

MR. MIRABAL: The, the piece that is continuing to be run is Fort Apache, which is worse than the Seinfeld episode, because the Seinfeld episode, to the extent that it is a comedy, treated that with some humor, which we were not happy about. But Fort Apache does not treat it with any humor. And that continues to be run on the station.

COMMISSIONER TRISTANI: Have you asked them not to run it?

MR. MIRABAL: Yes, we have. They have, they probably in their records continuously dating back from when they began running that, that particular movie. I saw it once only three months ago when I was in Boston doing a speech, and I was appalled that it was running again on the station.

COMMISSIONER TRISTANI: And let me ask you another, and this will be my final question, but you, I think, raised some concerns about there not being programming about Hispanics. Is this something that's just a problem with Time Warner or is it a problem with other --

MR. MIRABAL: No, it is not. I'm a member of the National Hispanic Media Coalition, and we've been very public about our concerns on all stations, lack of programming addressing the Latino community. And as I said before, there is limited programming in all stations, but we're, we're citing Time Warner, because that is the basis of this discussion today.

COMMISSIONER TRISTANI: Thank you, Mr. Mirabal.

CHAIRMAN KENNARD: Finished? Okay. Thank you all very much for this panel. We will take a 10-minute break and then reconvene. We need to move through the next panel quickly, because I'd very much like to reserve some time for statements from the general public. Thank you.

(There was a brief recess.)

CHAIRMAN KENNARD: Before we begin our next panel, I wanted to make an announcement. We very much view this process as an ongoing process of collecting information for the record that we're developing in connection with this proposed transaction. And in that regard, we have established a Web site and an e-mail address where people who are interested in contacting us about this transaction and providing additional comment, which will be included in the record, can do so by sending their comments to AOLTWPS at FCC.gov. That's AOLTWPS at FCC.gov.

We'll now go to our next panel, which will be industry perspectives on this transaction. And the first witness will be Mr. William Reddersen, executive vice president of BellSouth Corp. Mr. Reddersen.

MR. REDDERSEN: Mr. Chairman, I suspect that I don't have to introduce myself now. I am Bill Reddersen, and good afternoon to all, Commissioners and to the staff. Let me start by thanking you for this opportunity to share with you BellSouth's concerns surrounding the merger of these two great companies. Before I get into the specific issues, I would like to make a couple of brief comments up front.

Today's industry convergence is a very natural outcome of both broadband and Internet technology, and this trend will likely result in a limited number of vertically integrated players like this combination and AT&T. Given this consolidation, we at BellSouth do not object to this merger, per se. However, we do believe that this merger must be conditioned to ensure that the consumer value created by it is not outweighed by the potential anticompetitive choice-limiting impacts of it.

Finally, these issues are purely about conditions on a voluntary merger. They have nothing to do with regulating the larger Internet, per se. Given the consolidated market power and concentration of key resources created by this merger, there are three deal-specific areas with which this Commission, the FTC and the Justice Department must be concerned.

First, if a limited number of megaplayers is a natural industry progression, then real competition will result only if these new megaplayers are required to compete rather than allowed to cooperate and share markets.

Secondly, the scarce and required resources individually controlled by AOL and Time Warner, each with their own substantive market power, must be made available on market-based terms and conditions, or competition will be reduced.

Third, all of these players, including AOL, are in the network business. This Commission has understood for decades that independent or unconnected networks restrict competition. Given these points, we believe this merger must be conditioned it the following three ways.

First, a very bright line must be drawn between the new AOL Time Warner and the merged ATT/TCI/Media One. The DOJ has already identified this concern but clearly did not have this additional merger in its scope. These two gigantic companies must be required to compete and not allowed to share markets in any way. All current and joint ownership between AOL and AT&T should be eliminated and prohibited going forward. The simple test which must be applied to all future AOL AT&T relationships is to require that they be based solely on generally available market terms and conditions.

Second, as both AOL and Time Warner stated in their May 11th filing, open access to content is their policy. The public interest will be best served if this voluntary policy is clearly codified. The dominance of AOL's distribution control is unrivaled by any other network today, broadcast, cable or satellite. This Commission clearly knows that withholding content will have serious impact on competition.

You lived it with satellite and cable overbuilders, and you will relive it in the broadband Internet world if we are not vigilant. The relationship between Time Warner content and AOL-packaged distribution must be based on generally available market terms and conditions. Again, a simple principal simply applied to this merger.

Finally, AOL is a network in and of itself. In fact, it is one of the highest volume communications networks in the world. It is the largest by an order of magnitude of any other consumer Internet network. Combined with Timer Warner Cable, it will grow even larger in its market power. The issue here is simple, as well. Like any other network, AOL must be required to openly interconnect with other networks.

This issue is best seen in the instant messaging debate. If I reduce this complex debate to a simple telephone analogy, what it would mean is that customers on a competing SELEX (phonetic) network would not be allowed to talk to customers on BellSouth's network equally. Without such standards-based interconnection, no long distance or local telephone competition could ever or would ever develop. Certainly, such a standard should be applied to this merger, as well.

In closing, let me summarize quickly. First, AOL Time Warner and ATT's TCI Media One must be fully separate and must compete with each other and not allowed to join together. Second, Time Warner content that is packaged and distributed through AOL's dominant Internet environment must be made available on market terms and conditions. Finally, AOL's network must openly interconnect to others.

It is no accident that these merging parties clearly recognize these critical issues going into this merger. That is why they voluntarily offered up their MOU and their May 11th letter to this body. Now, all that remains is for these stated promises and policies to be refined and codified as conditions to deal approval.

I've listened to all of the discussion today very carefully. There's been a consistent theme coming out of a lot of different points made. That is that we're dealing with a past history of closed environments. We're dealing with the technical capability and potential self-interest to continue some of that behavior. We're dealing with a theme of "trust me," going forward that doesn't make sense anymore.

And all of the panelists, to a member, have said, don't take the "trust me" theme. Codify the promises. Thank you, Mr. Chairman.

CHAIRMAN KENNARD: Thank you. Mr. Padden?

MR. PADDEN: Thank you, Mr. Chairman. I'd like to focus my remarks today on interactive television, which, at least to our way of thinking, represents the convergence of traditional television, Internet content, communications and commerce. And our company is investing millions of dollars in developing wonderful new interactive television content for consumers. For example, on election night this year we're going to have interactive election coverage, the likes of which the American people have never seen before. They won't have to wait for the race, the information about the races they're interested in to be selected by the director in the studio to come up on the screen.

You'll be able to pull up and call the election results you want. We'll be able to do instant polls. We're also doing, although not quite on the same level of civic responsibility, a play-along game with Regis Philbin on Who Wants to be a Millionaire, and interactive content to go along with Sunday night and Monday night football. And even on Saturday mornings, we have interactive content for children. We call it Zoog Disney. The Zoog's are creatures that live in the Zether, which is the space between the computer and your television. And we've had wonderful success with all of this.

And Mr. Love remarked that he thought it was a little strange that a big company like Disney was taking the position we are. But it's really very easy to explain. All we want is a world where, as we deploy this interactive television content, consumers have the right to choose or to not choose our content based on how good a job we do creating it and promoting it. And what we're trying to avoid is a world where that choice is skewed or limited by the business interests of the company that owns the pipe to the consumer's home.

And we are very focused on the cable plant, because all the analyst reports that we read say the hybrid fiber coax network will have great advantages over every other technology in delivering this interactive television product. Certainly, DSL, which may be competitive with cable modems for high-speed Internet access, at least as it exists today and for the foreseeable future, consumers are not going to have the option of getting interactive television over DSL, because the technology just doesn't support it.

Satellite is great, but a lot of consumers don't have access to satellite, and even those that do, the return path is not comparable to the return path available on full interactive two-way cable. Now our company stayed out of other mergers that have come before this agency, despite significant concerns. We've also stayed out of the open access debate. We've not been among those who have been critical of this agency for not moving more quickly, frankly, because we heard the rationale that you didn't want to stifle the development of broadband, slow its deployment, and that made some sense to us.

There's two things that pushed us over the line with respect to this transaction. First, you heard Mr.

Levin say that they are now starting to install routers that are capable of open access. And I think in that statement there's a very important fact. And that is the architecture for interactive television systems is being set now. Decisions are being made now about what kind of routers are in fact going to be installed in these networks. What capabilities will be in the box and in the operating system.

And we think it's important that the concept of openness get built in now. Also, we believe this merger is different than any other merger that has come before you. A different collection of assets. It's a merger of the AOL walled-garden marketing environment with the narrow, bottleneck cable pipeline and the Time Warner content library. Several of the witnesses have referred to all the pieces of the puzzle that come together in this company -- cable past 20 million homes, half of the narrow-band Internet marketplace, and on and on -- we don't think you can rely on promises of good behavior.

We think there's a history here with both companies, the common thread being abusing bottlenecked facilities to limit consumer choice. I'll give you just a few examples. AOL, if you want, if you're a company that wants to put your content inside their walled garden, their contract will require you to disable navigation links otherwise available to the consumer. There is no way to characterize that requirement as pro consumer choice. It's anti-consumer choice. It's taking choice and options away from the consumer.

We've provided those contracts to the Federal Trade Commission. If we can work out the appropriate protective order, we'd be happy to provide them to you. With respect to Time Warner, they refuse to carry the local and regional news channels they don't own. That's not the consumer making the choice, that's Time Warner making it for them. They refuse to carry Disney channel on basic. They own a children's channel called Cartoon Network. We believe they have a conflict of interest and that's why they did that.

I see my time is up. We're very concerned about what they're going to do in this interactive marketplace, particularly discrimination on the return path. And I just wanted to read you the one sentence from our just-negotiated, hard fought retransmission consent agreement with Time Warner with regard to the return path so you'll know, despite all the focus on this issue, what we were able to achieve.

The contract says, "Nothing contained herein shall obligate operator to provide broadcaster with access to any return path provided to subscribers by operator for any purpose." So we got nothing. Thank you, Mr. Chairman.

CHAIRMAN KENNARD: Thank you, Mr. Padden. Mr. Weed?

MR. WEED: Good afternoon, thanks for being here. I'm Steven Weed. My real job is I run a group of cable systems in the Northwest, but I'm here today as vice chairman of the American Cable Association. The ACA represents about 300 independent cable companies, representing about three million subscribers, primarily in smaller and rural markets. ACA must transact with media conglomerates like Disney/ABC, Viacom, Fox and Time Warner for programming essential to its video business.

Those companies have overwhelming market power over independent cable companies. In many cases, they use this market power to determine -- to the detriment, excuse me, of independent cable and its customers. That's why we're here today. On behalf of our members, I thank the Commission for the invitation to voice our concerns. ACA has participated in this proceedings to raise one important public interest issue.

Postmerger Time Warner AOL will control essential Time Warner programming, AOL services, including AOL TV, and substantial investment in the largest direct TV broadcast company, Direct TV. These factors give AOL Time Warner the market power to threaten the public interest and a viable independent cable industry and its progress in closing the digital divide.

I want to about the digital divide. The Commission has voiced repeated concerns over the digital divide. That is, the concern that consumers in certain markets, including smaller markets in rural areas, will not have access to broadband services. In fact, recently, Chairman Kennard observed that the lack of high-speed access in rural regions stems primarily from the high cost of providing such services. Chairman Kennard stated, "Providing customers with sophisticated services in areas of low density is an expensive undertaking."

ACA members know this economic very well. But one important point is overlooked in the digital divide. Independent cable is making great progress in smaller markets. Increasing numbers of ACA members are delivering high-speed broadband services, including high-speed Internet access, to smaller communities in rural areas throughout the United States. It's an expensive undertaking, but independent cable is figuring out how to serve these markets and is taking the risk and making it happen.

But the business model in smaller markets is far from proven. Independent cable's progress could be stalled by the imposition of costly local, federal regulation or by abuse of market power by companies that control essential programming and Internet services. This brings us to the

ACA's primary question to the applicants. Will AOL Time Warner require independent cable operators to carry AOL services as a condition of access to essential Time Warner programming?

If they answer in the affirmative, the question would pose a serious threat to independent cable's progress in providing advanced service to smaller markets. It could ultimately force many smaller systems out of the business altogether. Here's how it could happen: To advance AOL's anywhere strategy, AOL Time Warner could require carriage of AOL service on independent cable systems as a condition of access to essential Time Warner programming. They could make independent cable pay for these services like Disney/ABC and others make independent cable pay for undesired services as a condition of access to its essential broadcast and satellite programming now.

Independent cable systems would have no choice but to accept Time Warner's terms or lose customers to satellite dishes. This would disrupt existing ISP partnerships, raise costs for small cable operators, cut margins, deter investment and stall network upgrades. AOL and Time Warner have responded to ACA's question but in inconsistent ways.

First, the applicants argue that they would not require carriage of AOL services as a condition of access to Time Warner programming, because it was not in their economic interest to do so. Independent cable operators would just find an alternative programming, Time Warner said. This economic argument does not work. Of course it is in the applicant's economic interest to leverage key programming assets to force carriage of other services.

As a prime example, Disney/ABC. To gain access to ABC programming and essential services like Disney and ESPN, independent cable must agree to a varying array of burdensome and costly conditions. AOL Time Warner would have the same incentives to tie programming and AOL services unless they valued the public interest and a viable independent cable industry. The applicants have suggested they might.

In their July 12th filing, AOL and Time Warner made an unequivocal statement that they would not require carriage of AOL services as a condition of access to Time Warner programming. ACA cheered. Time Warner and AOL, it seemed, to be the first media conglomerate acknowledging its obligation to temper its economic interest with the public interest and fair treatment of independent cable companies.

But then, in the applicant's July 17th filing, they appeared to retreat from this statement. With this apparent inconsistency on the record, ACA asks today for clarification. The most appropriate clarification for these applicants is to affirm that they will not condition access