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FEDERAL TELECOMMUNICATIONS LAW:

A LEGISLATIVE HISTORY OF

THE TELECOMMUNICATIONS ACT OF 1996

PUB. L. NO. 104-104, 110 STAT. 56 (1996)

INCLUDING

THE COMMUNICATIONS DECENCY ACT

Volume 20
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190 - 191

BY

BERNARD D. REAMS, JR.
ASSOCIATE DEAN AND PROFESSOR OF LAW
ST. JOHN'S UNIVERSITY IN NEW YORK

AND

WILLIAM H. MANZ
EXECUTIVE LAW LIBRARIAN
ST. JOHN'S UNIVERSITY IN NEW YORK

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INTRODUCTION

AN OVERVIEW OF THE TELECOMMUNICATIONS ACT OF 1996

The "Telecommunications Act of 1996," signed into law on February 8, 1996, opens up competition between local telephone companies, long-distance providers, and cable companies; expands the reach of advanced telecommunications services to schools, libraries, and hospitals; and requires the use of the new V-chip technology to enable families to exercise greater control over the television programming that comes into their homes. This Act lays the foundation for the investment and development that will ultimately create a national information superhighway to serve both the private sector and the public interest.

President Clinton noted that the Act will continue the efforts of his administration in ensuring that the American public has access to many different sources of news and information in their communities. The Act increases, from 25 to 35 percent, the cap on the national audience that television stations owned by one person or entity can reach. This cap will prevent a single broadcast group owner from dominating the national media market.

Rates for cable programming services and equipment used solely to receive such services will, in general, be deregulated in about three years. Cable rates will be deregulated more quickly in communities where a phone company offers programming to a comparable number of households, providing effective competition to the cable operator. In such circumstances, consumers will be protected from price hikes because the cable system faces real competition.

This Act also makes it possible for the regional Bell companies to offer long-distance service, provided that, in the judgment of the Federal Communications Commission (FCC), they have opened up their local networks to competitors such as long-distance companies, cable operators, and others. In order to protect the public, the FCC must evaluate any application for entry into the long-distance business in light of its public interest test, which gives the FCC discretion to consider a broad range of issues, such as the adequacy of interconnection arrangements to

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permit vigorous competition. Furthermore, in deciding whether to grant the application of a regional Bell company to offer long-distance service, the FCC must accord "substantial weight" to the views of the Attorney General. This special legal standard ensures that the FCC and the courts will accord full weight to the special competition expertise of the Justice Department's Antitrust Division--especially its expertise in making predictive judgments about the effect that entry by a bell company into long-distance may have on competition in local and long-distance markets.

Title V of the Act is entitled the "Communications Decency Act of 1996." This section is specifically aimed at curtailing the communication of violent and indecent material. The Act requires new televisions to be outfitted with the V-chip, a measure which President Clinton said, "will empower families to choose the kind of programming suitable for their children." The V-chip provision relies on the broadcast networks to produce a rating system and to implement the system in a manner compatible with V-chip technology. By relying on the television industry to establish and implement the ratings, the Act serves the interest of the families without infringing upon the First Amendment rights of the television programmers and producers.

President Clinton signed this Act into law in an effort to strengthen the economy, society, families, and democracy. It promotes competition as the key to opening new markets and new opportunities. This Act will enable us to ride safely into the twenty-first century on the information superhighway.

We wish to acknowledge the contribution of Loris Zeppieri, a third year law student, who helped in gathering these materials.

Bernard D. Reams, Jr.
William H. Manz

St. John's University
School of Law
Jamaica, New York
April 1997

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EXAMINING THE EFFECTS OF MEGAMERGERS IN THE TELECOMMUNICATIONS INDUSTRY

HEARINGS

BEFORE THE

SUBCOMMITTEE ON ANTITRUST, MONOPOLIES AND BUSINESS RIGHTS

OF THE

COMMITTEE ON THE JUDICIARY UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

ON

EXAMINING THE EFFECTS OF CERTAIN MERGERS IN THE TELECOMMUNICATIONS INDUSTRY ON COMPETITION AND INFLATION, FOCUSING ON THE MERGER OF QVC NETWORK, INC., AND VIACOM, INC., FOR PARAMOUNT COMMUNICATIONS, INC., AND THE MERGER OF TELE-COMMUNICATIONS, INC., AND LIBERTY MEDIA CORP. INTO BELL ATLANTIC CORP.

OCTOBER 27, NOVEMBER 16, AND DECEMBER 16, 1993

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WILL TELECOMMUNICATIONS MEGAMERGERS CHILL COMPETITION AND INFLATE PRICES?

WEDNESDAY, OCTOBER 27, 1993

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST, MONOPOLIES
AND BUSINESS RIGHTS,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The subcommittee met, pursuant to notice, at 9:54 a.m., in room SD–226, Dirksen Senate Office Building, Hon. Howard M. Metzenbaum (chairman of the subcommittee) presiding.

Also present: Senators Simon, Hatch, Thurmond, and Specter.

OPENING STATEMENT OF HON. HOWARD M. METZENBAUM, A U.S. SENATOR FROM THE STATE OF OHIO

Senator METZENBAUM. We will start this hearing a little early because there are two votes on the floor of the Senate. I will ask the first panel of witnesses to take their seats.

We are here today to begin a series of hearings on the wave of megamergers that are sweeping the telecommunications industry. Before any of these mergers are allowed to go forward, there is one overriding question that we must answer for the American consumer; that is, will this unprecedented convergence of telecommunications giants create a swarm of cost-cutting entrepreneurs or a handful of price-gouging monopolists. Before any telecommunications deal is approved by the antitrust authorities or the Federal Communications Commission, we in Congress must be able to assure the American people that we know the answer.

I have not made up my mind about any particular merger. However, I do have serious reservations about many of them, including Bell Atlantic's merger with Tele-Communications, Inc., QVC's merger with the Home Shopping Network, AT&T's acquisition of McCaw Cellular Communications, and the contest between QVC and Viacom to acquire Paramount. The subcommittee will hear more about these deals from Bell Atlantic, Viacom, and Paramount today. We have been in contact with TCI, QVC, and AT&T, and expect them to appear before the subcommittee at a future date.

I believe that some press accounts have oversimplified and even distorted my position on the complex issues involved in these mergers. Let me make my position clear today. I do not believe that a deal is necessarily good or bad because it is big. The concerns I have expressed about certain mergers are based on my reasoned judgment that consumers can be exploited by conglomerates that wield too much market power. The elimination of competition and

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the potential to compete is, in most instances, harmful to consumers. The key is excessive market power, not size alone.

To that end, I am frank to say that the deal that concerns me the most is the merger of Bell Atlantic with TCI. Together, these monopolists will form a colossus which will have a telephone or a cable wire connecting approximately 40 percent of the homes in America. As you can see by the chart to my right, this deal will also give the new conglomerate control of the lion's share of America's most popular cable programming. Frankly, I had planned to recite the entire list of TCI-controlled programming until I realized that it would add 5 to 10 minutes to this opening statement. Moreover, TCI can make a sizable addition to its stable of programming if QVC—in which TCI already owns a 28-percent stake—acquires the Home Shopping Network and Paramount.

Given the size and scope of Bell Atlantic's and TCI's holdings, the merger could create a megamonster. It would have formidable power to dominate the cable market and to freeze competition which would otherwise occur between local phone companies and cable television systems. Such a concentration of power cannot be dismissed lightly by the Congress, the antitrust authorities, or the Federal Communications Commission.

To my mind, the Bell Atlantic deal raises four fundamental questions. First, can the merger of two huge monopolies that would otherwise be fearsome rivals usher in greater competition? Second, should any restrictions be imposed on the new conglomerate's ability to leverage its power in the cable programming and distribution markets? Third, can FCC and State regulatory authorities governing phone and cable companies adequately protect consumers? Finally, is there anything unique about this combination of monopolists that cautions against the merger?

First, it is no secret on Wall Street that local telephone and cable monopolies were positioning themselves to compete against one another. Both Bell Atlantic and TCI have made public statements to that effect. At a March 1990 hearing before a House Energy and Commerce Subcommittee, one of Bell Atlantic's vice presidents stated that "Bell Atlantic wants to be a full-service cable company and was capable of competing with entrenched cable companies." Likewise, at a cable television public affairs forum in March 1992, John Malone of TCI stated that TCI would "look at new revenue opportunities such as * * * residential phone service."

Now, the merger will put an end to any possibility of competition between Bell Atlantic and TCI, which is an issue that the antitrust authorities will have to consider. Gauging the anticompetitive effects of a merger that eliminates a potential rival is an issue that the antitrust laws have wrestled with for at least three decades. The Supreme Court clearly articulated this concern in its 1964 *Penn-Olin* decision stating that "The existence of an aggressive, well-equipped and well-financed corporation * * * waiting anxiously to enter [a] market would be a substantial incentive to competition which cannot be underestimated."

Another antitrust issue is whether approving this deal could lead to an industry dominated by a handful of telecommunications conglomerates that have powerful incentives to coexist instead of compete. In antitrust terms, this is called mutual forbearance. The the-

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ory is that a conglomerate which is relatively strong in a particular market may refrain from competing aggressively with a conglomerate in another market out of fear of retaliation. Clearly, such a tacit agreement not to compete would harm consumers by inflating prices and limiting choices.

My second major concern about the deal is how much Bell Atlantic's financial deep pockets will entrench TCI's market power in the cable industry. That could raise new entry barriers against other phone companies or small entrepreneurs experimenting with new technologies. As it stands now, TCI has dominated the cable market by shrewdly positioning itself as the industry's gatekeeper. It has done so by amassing an extensive array of cable programming and building a vast set of cable systems.

Let me explain. First, a cable system can't be successful if it doesn't have the programs that viewers demand, such as news shows, movies, sporting events, and shopping channels. Currently, most of these programs are owned by the cable companies themselves. However, TCI owns or controls more programming than any of its competitors. That gives TCI the power to cripple its rivals and to keep new competitors out of the market by refusing to sell programming to them on reasonable terms.

I might add that Bell Atlantic is well aware of the barriers to entry that allowing one company to own so much programming creates. In a January 1993 filing with the FCC, Bell Atlantic stated that "Cable has used its control of programming to impede the development of competing distribution systems by denying access to cable-owned programming or by providing access on unfavorable, discriminatory terms."

Second, the reach of TCI's cable network allows it to control a rival programmer's access to the entire cable market. TCI has the Nation's largest cable television system. It reaches about 25 percent of all cable subscribers. The conventional wisdom in the industry is that a new cable program cannot break even unless it reaches the critical mass of viewers that subscribe to TCI's cable system. That means TCI's decision not to carry a program, for whatever reason, can doom it.

Bell Atlantic itself has acknowledged that cable systems have abused their power to control which programming gets to market. In a January 1993 filing with the FCC, Bell Atlantic complained that "Cable operators have also impeded the development of independent programming sources by denying them access to their monopoly cable systems."

I expect the antitrust authorities to take a hard look at whether the new conglomerate has too much power to chill competition because of its market penetration and its control over so much cable programming.

My third major concern about the merger is whether regulatory measures are sufficient to control anticompetitive conduct in this industry. As we will hear from several of today's witnesses, Federal regulations have not prevented Bell Atlantic and TCI from using anticompetitive business tactics against their rivals in the past. I believe that is significant and should also be considered by the antitrust agencies.

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I am aware that the Cable Act passed by the Congress last year prohibits a great deal of anticompetitive conduct. However, the new law has not been tested and may not be sufficient to curb all possible abuses of the new conglomerate's market power.

Bell Atlantic seems to share my general skepticism. It recently sued to have the FCC's decision on cable rates overturned in favor of regulations that would reduce cable rates by 28 percent. In its pleading, Bell Atlantic described the FCC's decision as "arbitrary and capricious." It also claimed that the FCC rules left cable rates "inflated" and permitted "monopoly operators to continue exercising market power control contrary to the congressional purpose."

I also have doubts about whether the new FCC rules can prevent cable and telephone conglomerates from making monopoly profits at the expense of consumers. Prior to the merger, Bell Atlantic expressed similar doubts. In a January 1993 FCC filing, it urged the FCC to regulate the cable industry to "ensure that cable operators do not evade the Commission's rate regulations by recovering monopoly profits through inflated prices."

In summary, it would be a mistake for the antitrust authorities to rely on untested administrative remedies to protect consumers from telecommunications conglomerates. Finally, I believe that we must be especially careful to scrutinize a merger that involves the medium through which our society communicates the basic values of our democratic society. The exchange of views on television, over the phone, and through computer networking would be influenced by a merger of this breadth.

Therefore, I want to be certain that our antitrust authorities scrutinize the broad political and social ramifications of this merger. As John Shenefield, the Carter administration's antitrust chief, stated almost 15 years ago in testimony before the subcommittee:

> The relationship between economic size and political influence * * * is a fairly direct one. People across this country * * * [grow] quite concerned when they see a limited number of corporate decisionmakers, in effect, governing their lives without direct responsibility, with no public mandate, and without any accountability."

It is altogether appropriate for the antitrust authorities to consider the pervasive power that a telecommunications conglomerate would have to influence our democratic institutions. I would also expect the antitrust authorities to take appropriate steps to block or modify this merger if, after careful scrutiny, the concerns that I and others, including State regulators, consumer groups, and the National Association of Broadcasters have raised, persist. However, I am confident that the Department of Justice will pursue this merger with the vigor it deserves. Their statement indicates that "The proposed telecommunications acquisitions will be analyzed under all plausible theories of competitive harm."

At the conclusion of my statement, I will include in the record a statement submitted to us by Ms. Anne Bingaman, head of the Antitrust Division of the Department of Justice.

I intend to stay involved in this matter and to look carefully at other proposed mergers in this industry, and if I believe that it is necessary, I will propose legislation to adjust our communications policies in the phone and cable industries. I plan to work closely with my colleagues to review the 1992 Cable Act and the 1934 Communications Act to ensure that our antitrust and communica-

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tions policies work in tandem to protect consumers from being victimized by telecommunications conglomerates.

[The prepared statement of Ms. Bingaman follows:]

PREPARED STATEMENT OF ANNE K. BINGAMAN, ASSISTANT ATTORNEY GENERAL, DEPARTMENT OF JUSTICE, ANTITRUST DIVISION

Mr. Chairman and Members of the Subcommittee, I appreciate the opportunity to submit this statement for the record of your hearing on mergers in the telecommunications industry. The announcement of two significant acquisitions in the telecommunications industry has focused attention again on this critical area of the economy. The Department of Justice's Antitrust Division closely monitors transactions in this area since developments in the communication of information will likely be the catalyst for innovation and productivity growth in the economy well into the next century. Telecommunications developments also will have profound and immediate impact on virtually all consumers.

A restructuring of the telecommunications industry requires sound and reasoned antitrust enforcement. Sound enforcement is necessary to assure continuing competition in telecommunications markets. The maintenance of competitive markets is crucially important in maximizing the development of innovative technologies and services, and providing consumers with the widest possible range of choices at the lowest possible prices. Antitrust enforcement also consists of preventing transactions that result in limited access for competitors to telecommunications markets.

Department of Justice merger policy also recognizes that telecommunications mergers may have the potential to create innovative and efficient companies and promote the development of new technologies. For example, there has been some suggestion that these mergers may advance the creation of the long-promised "information superhighway." The Department will closely scrutinize such claims in the course of its merger investigations.

The Department of Justice subjects mergers and acquisitions in the telecommunications industry to rigorous scrutiny as required by law. The Department takes action to oppose transactions after careful review and investigation, typically under the procedures mandated by the Hart-Scott-Rodino Antitrust Improvements Act of 1976. Under the HSR Act, the merging parties are prohibited from consummating a proposed transaction while we conduct a formal investigation.

Proposed telecommunications acquisitions will be analyzed under all plausible theories of competitive harm. Investigations will not be limited to those markets in which the merging parties are direct competitors. The Department of Justice will oppose any transaction if there is significant evidence that the transaction is likely to result in competitive harm. Intervention, if any, will be structured to ensure the prevention of the possible competitive harm caused by the transaction.

Senator METZENBAUM. We will have to take a recess. I see there are five lights on. I will be back just as soon as I can. My guess is it will take me 10 or 15 minutes.

[Recess.]

Senator METZENBAUM. The subcommittee will come to order. I welcome our witnesses this morning. I think you have all been advised that we have a 10-minute time limit, and we will try not to be too rough on that score, but at least try to keep it within the 10 minutes.

Mr. Smith, we have you as our first witness. Please proceed.

PANEL CONSISTING OF RAYMOND W. SMITH, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, BELL ATLANTIC CORP.; SUMNER M. REDSTONE, CHAIRMAN, VIACOM INTERNATIONAL, INC.; AND MARTIN S. DAVIS, CHAIRMAN AND CHIEF EXECUTIVE OFFICER, PARAMOUNT COMMUNICATIONS, INC.

STATEMENT OF RAYMOND W. SMITH

Mr. SMITH. Thank you very much. Good morning, Mr. Chairman and members of the subcommittee. My name is Ray Smith and I am the chairman and chief executive officer of the Bell Atlantic

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Corp. I am pleased to have the opportunity to testify on the merger of the Bell Atlantic Corp., TCI, and Liberty Media. I also want to thank Chairman Metzenbaum for holding hearings on this merger so promptly. I welcome the opportunity to explain to Congress and the American people why this merger is in the public interest.

On October 13, 1993, Bell Atlantic, TCI, and Liberty Media announced our intent to merge in order to create a new kind of company, combining Bell Atlantic's telecommunications skills with TCI's and Liberty's abilities in the creation and the delivery of programming. The net result is a new Bell Atlantic that will cut through the hassle, giving our customers a whole new level of choice and control and convenience in the multimedia marketplace.

Today, consumers are putting up with a tremendous amount of confusion and expense just to get a sampling of the choice and control and convenience that they badly want—VCR's that they can't program, cable channels they can't keep track of, computers and fax machines and telephones that they can't integrate. Consumers want and deserve to have a simple, straightforward way of using the technology to get precisely the information that they want when they want it and how they want it.

It is also clear that neither today's telephone network nor today's cable network alone can meet every one of these customer requirements. Both industries will have to transform their embedded technology base into full-service networks with the power of broadband, the flexibility of switched capabilities, and the freedom of mobile telephone services. These full-service networks will tap the pent-up demand for choice and control and convenience in the communications marketplace.

Our consumers will be the early beneficiaries of such services, such as video on demand that will allow consumers to select the program they prefer from a library containing thousands of titles; interactive distance learning that will allow adults and school-age children to not only watch, but to participate interactively with classes across the city or across the country, or even across the world. Interactive distance medicine will allow patients and doctors to consult a range of specialists without leaving their home or their office, and telecommuting will allow millions to work at or near home, thereby reducing the traffic on our Nation's highways.

The early introduction of these new services will promote the development of the information superhighway, will increase competition for both video and telephone services, and will allow America to be a global competitor with technologies, products, and services to export.

A key vision of the Clinton administration is the establishment of a national information infrastructure, an information superhighway. Our merger supports that vision. The new Bell Atlantic will spend over $15 billion during the next 5 years to create a national network of distribution systems that will transform the way we work and play and learn.

This accelerated investment in the new information technologies that make up the electronic superhighway will make the interactive, multimedia vision a reality much sooner than expected and without the use of any government money. This commitment to the information superhighway means more jobs not just in companies

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like Bell Atlantic, but also in U.S. companies that are developing the equipment and the software that will be used in and with the new full-service networks. Also, by bringing video services to our telephone customers and telephone services to our new video customers, we will stimulate competition where none existed before and bring more customer choice on the markets served by new Bell Atlantic.

Senator, if you look at the map that you referred to in your introductory remarks, you will see red areas all over the country. Those areas mean more competition, not less. A second telephone company is coming soon in those areas to provide more choice and more opportunities and more competition. If you look at the yellow areas, the old Bell Atlantic area, that is where a second cable company is going to be built, providing competition to the existing cable operators.

Outside Bell Atlantic's current telephone service areas, in effect, we will upgrade TCI's cable networks to compete with all comers, including the incumbent local telephone companies. In Bell Atlantic's current telephone service areas, we will upgrade our telephone networks to compete with all other providers, including incumbent cable companies.

We cannot forget in this changing world of technology that in all of these areas you will find well-financed companies, wireless companies, providing competition for both cable and telephone, well-financed companies like AT&T and Bell South and Ameritech, and direct broadcast satellite companies providing competition to the cable companies.

To eliminate any concern about competition in the Bell Atlantic region, we will spin off or sell all TCI and Liberty Cable systems operating there. This means that these cable companies will be completely separate from the new Bell Atlantic—separate companies, no common officers, no common directors, no common employees, no connection; in effect, competitors.

Bell Atlantic has stated to the Department of Justice and the FCC that we will not retain TCI's in-region cable properties. Attached to my prepared remarks today is a letter that I sent yesterday to key Members of the House and Senate Committees on the Judiciary, as well as Commerce, reaffirming that commitment.

Finally, by creating a company that will be one of the world's premier providers of communications services, we will help secure America's preeminence in the global information marketplace. Instead of watching from the sidelines while foreign companies acquire our studios, our long-distance companies, and other programming assets, the new Bell Atlantic will be developing new networks and new services right here in the United States that can be exported around the world. In sum, we think this is a perfect information age marriage, right for our customers, right for our investors, and right for the American public.

At the same time that many are cheering this idea of a new Bell Atlantic and the principles of this merger, some have claimed that the merger might result in a company that is too large. We should put such claims in perspective. Despite the merger, Bell Atlantic will still be one-fourth the size of AT&T, the Nation's largest communications company, and even before its planned merger with

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McCaw. After the merger, Bell Atlantic's video programming revenues will only be 5 or 6 percent of the total video programming revenues generated in the United States. The notion, therefore, that Bell Atlantic by sheer size alone will dominate the marketplace for interactive, multimedia services is without foundation. There are many capable competitors, as the world will see as it evolves.

The proposed merger has other benefits as well. First, because the merger is primarily a stock-for-stock transaction, the merger is being funded by Bell Atlantic's shareholders and not Bell Atlantic's telephone ratepayers. Second, within our region we plan to build video dial tone networks according to the rules set by the FCC. Under those rules, all video programmers will have access to that network on the same terms and conditions as Bell Atlantic or any other company. This means that the networks in our region will be open to all providers of video programming. We cannot and we will not dictate what cable companies, TV companies, or movie studios will put over our network.

Third, although we believe that existing State and Federal regulations are adequate to protect telephone ratepayers, Bell Atlantic will offer all in-region video programming through a subsidiary that is separate from the local telephone company. That separate subsidiary will have access to the video dial tone network only on the same terms and conditions as any other video programmer.

Bell Atlantic is determined that this is one industry in which America will not lose its preeminence. This is one merger that we believe deserves the support of Congress. It is procompetitive and it will cut through the hassles, giving American consumers more choice, more control, and more convenience. Finally, this merger will create jobs and that will be good for the American economy.

Thank you again, Senator, for this opportunity to appear here today. I am happy to answer any questions anyone might have.

[Mr. Smith submitted the following:]

BELL ATLANTIC CORPORATION,
Arlington, VA, October 26, 1993.

The Honorable HOWARD M. METZENBAUM,
Chairman, Subcommittee on Antitrust, Monopolies and Business Rights, Senate Judiciary Committee, Washington, DC.

DEAR MR. CHAIRMAN: As you know, earlier this month, Bell Atlantic, TCI, and Liberty Media announced our intent to merge in order to create a new kind of company, combining Bell Atlantic's telecommunications skills with TCI's and Liberty's abilities in the creation and delivery of programming.

I am enclosing for your review our October 12, 1993 letter of intent setting forth the principal terms and conditions pursuant to which Bell Atlantic proposes to negotiate a merger with TCI and Liberty Media Corporation.

In my testimony before the Senate Antitrust Subcommittee today I will restate my commitment that at the end of this process Bell Atlantic will spin off or sell all TCI and Liberty cable systems in the Bell Atlantic region. These cable companies will be completely separate from the new Bell Atlantic Company—no common officers, no common directors, and no common employees. These cable systems will be managed separately and that no officer, director or other employee of one will serve as an officer, director, or employee of the other. Because both companies will be publicly traded, their ownership will change over time.

I would like to achieve this result immediately, but there is one thing stopping us from creating these two separate companies at the closing of our transaction and that is the Modified Final Judgment. Let me explain.

Under that consent decree, Regional Bell Operating Companies were prohibited from entering the interexchange telecommunications services market now served by AT&T, MCI, Sprint, several domestic satellite fleets and literally hundreds of other

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companies. Unfortunately this apparently clear prohibition on RBOC entry into AT&T's business has been interpreted to prevent us from owning TCI's 26 percent of Turner Broadcasting System or its 18 percent stake in Black Entertainment Television.

Even worse, some of TCI's cable systems straddle LATA borders (which limit the area within which the MFJ permits RBOC's to offer service). The MFJ treats distributing cable programming—even one way movie channels—as the equivalent of RBOC's going into AT&T's interLATA business. Thus, we'll have to hold these systems outside of our new company until the waiver is obtained.

These rules have taken an awful life of their own and they need to be changed. But until the policy is changed and new rules are in place, Bell Atlantic must comply with the ones that exist today. Our Letter of Intent with TCI, therefore, contains an alternative structure—a back-up plan—in case we do not have the waiver of the MFJ that we need by the closing date of this transaction.

Under this scenario, Bell Atlantic will be temporarily prohibited from acquiring an interest in potentially billions of dollars of TCI's assets. These assets include all of TCI and Liberty's interests in other companies that they do not control. These companies include TBS (CNN, CNN Headline News, WTBS, TNT, Cartoon Network) BET, Inc. (Black Entertainment Television), QVC, Home Shopping Network, Family Channel, Court TV, various regional sports networks and cable systems serving over 3 million subscribers. Added to these properties are the cable systems inadvertently built across LATA borders.

This prohibition and awkward structure will only exist for the few months between the closing and when an MFJ Waiver is obtained. Nevertheless, during that time it will contain a substantial amount of TCI's very valuable assets. Therefore, during the temporary period in which it exists, TCI and Liberty's existing shareholders will continue to own it. Once the MFJ waiver is obtained, this "temporary company" will be merged into the new Bell Atlantic and the in-region cable system will be spun back out to the new combined company's shareholders.

We hope this temporary company never exists in the form I have described here. We designed the merger so that the new Bell Atlantic can offer the public all of the benefits from the combined skills, resources and assets of Bell Atlantic, TCI, and Liberty (except in-region cable systems). Only the MFJ prevents us from doing so immediately. We encourage Congress to take whatever measures are appropriate to assure that the MFJ does not—even temporarily—obstruct a transaction so far removed from the concerns it was created to resolve.

Let me underscore that my preference is we go to the final structure immediately and avoid an interim holding company. You have my personal commitment as to what that final structure will be. This is not a mere promise. This is the binding commitment Bell Atlantic has made to the Federal Communications Commission, the Department of Justice, and now to Congress.

There is no compelling reason for the interim holding company that would be required by the MFJ. I have to believe this is one of those unintended effects created by an antiquated MFJ. We can avoid concerns that would be raised by an interim structure if the necessary waivers are acted on in a timely fashion by the Justice Department and the Court, or if the MFJ is modified.

I enjoyed spending time with you this afternoon and discussing the Bell Atlantic/TCI/Liberty Media merger. Should you have any additional questions or concerns, please feel free to contact me directly.

Sincerely,

(Signed) Ray Smith.

Senator METZENBAUM. Thank you very much, Mr. Smith, and I am impressed with the fact that you finished just about exactly within the 10 minutes. Thank you very much.

Mr. Redstone, we are delighted to have you with us this morning.

STATEMENT OF SUMNER M. REDSTONE

Mr. REDSTONE. Thank you. Good morning, Mr. Chairman and members of the subcommittee. My name is Sumner Redstone and I am chairman of Viacom International, Inc. I really wish to thank the members of the subcommittee for this opportunity to testify and humbly to commend the chairman and the members of the subcommittee for their consideration of issues now which will affect

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the telecommunications industry for decades to come, and possibly to avoid a catastrophe.

While the subcommittee has a variety of issues to consider, I will speak to three areas of particular concern to Viacom, and more importantly to the American public. First, I will discuss the structural problems in the cable industry today caused by the extraordinary and abusive monopoly power wielded by TCI.

Second, I will describe why any enhancement of that market power will further choke competition, specifically why TCI's bid through QVC Network for Paramount Communications, as well as the proposed merger of Bell Atlantic and TCI/Liberty, will have cumulative, significant anticompetitive effects.

Third, I will outline the basic elements of Viacom's strategic vision for the communications industry and explain the procompetitive effects and consumer benefits of the Viacom/Paramount merger.

Over the last several years, TCI—and this is no overstatement—has been the bane of the American cable industry and the American cable consumer. Through a complex web of TCI companies, TCI has systematically attempted to exert monopoly power over almost every aspect of the cable industry. Today, TCI-controlled cable systems control exclusive access to well over 20 percent of American cable homes, and together with its partners and would-be partners in QVC, Comcast, Cox, and Newhouse, TCI controls access to one in every three such homes.

TCI's exclusive access gives it the power to make or break independent programming services—and it does—because given the need to reach a critical mass of cable subscribers, a programming service that is not carried by TCI-controlled cable systems has little or no chance to survive. As a result, TCI can and does extract onerous conditions to carriage, often obtaining an equity interest in otherwise independent programming services.

In our particular case, TCI and Liberty have threatened to deny carriage of our premium services, Showtime and The Movie Channel, and have refused to renew affiliation agreements for that carriage. TCI has also threatened, and I quote, to "crucify" The Movie Channel by dropping it from TCI's systems in favor of Liberty's own Encore service. These threats were designed to force Showtime Networks into a low-ball merger with Encore and to weaken or eliminate Showtime Networks' competitive position.

There are many examples of this kind of activity that do not involve our company. In other examples of TCI's predatory conduct, which may be found in my written statement, TCI/Liberty, one, insisted that NBC change the focus of its cable network, CNBC, in order to prevent competition with TCI-controlled Turner Broadcasting's CNN, prompting then Senator Gore, now Vice President Gore, to call the incident, and I quote, a "shakedown by TCI."

TCI and Liberty extracted an equity interest in Court TV by threatening to create a cloned service and refusing to carry Court TV on TCI's cable system. TCI chilled the bidding for The Learning Channel. All it did was say, you can buy it, but if you do, it is off TCI's system. The result was that TCI ultimately purchased The Learning Channel for $20 million less than the original bidder, Lifetime, in which we have an interest, offered to pay.

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Significantly, in addition to its dominance in cable distribution, TCI and Liberty now own all or part of at least 25 cable programming services in the United States. TCI has also set out to control various technological developments, from encryption, compression, and transmission of signals, to set-top boxes and delivery of programming to homes, again leveraging its market power over access to American cable subscribers for its own benefit.

This, together with the TCI authorization center, a facility that will employ proprietary technology to encrypt, digitally compress, transmit, and control signals from individual programming services—in effect, TCI seeks control not only over content, but over carriage. This will enable TCI to use new technology to create new bottlenecks in the distribution of cable programming services.

The net result of TCI's predatory practices is that TCI typically demands lower license fees from unaffiliated programmers and extracts monopoly rents in the form of higher prices from consumers. As TCI drives down the wholesale price it pays unaffiliated programmers, such programmers will cut back on what they spend on programming. Program diversity, so essential to the principles of our Constitution and quality, are sacrificed.

Our dealings with TCI, our personal dealings in which I have been personally involved, have proven one economic fact of life. TCI's dominant position in cable distribution nationwide, when coupled with its vertical integration into programming, creates intolerable monopoly power. I don't know of a single industry in the United States today where that kind of power exists or is exercised.

Several weeks ago after suffering, along with other cable programmers, at the hands of TCI for years, we took TCI to court, seeking substantial damages for their monopolistic and predatory practices, and we are also challenging TCI's latest attempt to injure our business, a merger that was worked on for 4 years, a consensual merger, through its bid through QVC to upset the strategic merger with Paramount.

TCI's acquisition through QVC of Paramount can only aggravate the serious structural problems I have described. To understand the very real danger of a Paramount acquisition by TCI/QVC, one must understand the level of vertical integration and program protection that TCI has already achieved.

Turner Broadcasting, which is substantially controlled by TCI, has acquired, or will soon acquire, control of independent studios New Line and Castle Rock. TCI has also entered into agreements providing for a substantial equity interest in Carolco Pictures, and according to published reports TCI is looking at deals with MCA's Universal Studios and Sony's Columbia and Tri-Star Pictures.

Should TCI/QVC acquire Paramount, TCI will have significantly enhanced power to dictate terms to programmers, threatening that, unless such programmers accept TCI's terms, TCI will replace their programming with programming produced by its captive studios. By depressing to below-market levels the rate of return of unaffiliated programmers, program diversity, and quality will suffer. TCI now pays us nothing to carry VH–1. We could complain. They could drop VH–1 and VH–1 is out of business.

TCI and its partners' market power is dangerous enough, but when coupled with the publishing, television, and motion picture

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production and other interests of Paramount, the dangers to fundamental first amendment principles designed to further diversity of voices, multiplicity of viewpoints, and freedom of access to the marketplace of ideas, are sobering. This is especially significant in the light of the threatened combination of two of the largest publishers, something that hasn't been focused on, in the world, Paramount and Newhouse, another partner of TCI. This combination would create the single largest and most powerful publisher, presenting in and of itself serious antitrust questions.

As I said, this combination would create the single largest and most powerful publisher, presenting in and of itself substantial antitrust questions with respect to our control of communications in a household. Its superhighway is really an exclusive toll road which we believe will impose content-based charges on those who wish to communicate through it.

Unlike TCI and Bell Atlantic, Viacom favors a truly open telecommunications superhighway, ensuring everyone an equal chance to step up to the microphone. That superhighway should be content- and identity-neutral, and Congress should require that superhighway to be a two-way operating system that is entirely open.

What we have here is a combination of two great monopolists. We have all heard for years how monopoly will lower prices and advantage the consumer, but this has never happened. What we have here is the elimination of two potential competitors.

In contrast to the acquisition by TCI/QVC of Paramount and the proposed Bell Atlantic/TCI merger, Paramount Viacom will combine two companies with different yet complementary strengths. Rather than entrenching an abusive monopolist, Paramount Viacom will create a new, strong competitor, in which each partner can build on each other's programming expertise and talent.

The emergence of Paramount Viacom is particularly important to assure America's traditional worldwide leadership in the creation of programming. Viacom is already an international leader in marketing its programming services all over the world. It has, in effect, created through MTV the first international global network.

Paramount Viacom will have an even greater ability to create and export programming with broad international appeal and enhance American competition worldwide. Paramount Viacom will also provide direct and almost immediate benefits to American consumers, such as the creation of America's first true interactive educational television network for kids, drawing on Simon & Schuster for its educational publishing expertise and on Viacom and its Nickelodeon unit for their expertise in children's programming and interactive media.

In conclusion, the situation facing us today is not at all unlike that of the old Bell System. The difference here is that the anticompetitive effects can be avoided in the first instance without waiting for the disaster to assume full form before remedial measures are taken.

TCI has monopoly power now and exploits it. Think about this. TCI right now reaches 20 percent of cable subscribers in the United States. With its partners, it reaches one in every three homes in the United States. With Bell Atlantic, it will reach approximately 50 percent of consumers in the United States. Leaving aside all is-

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sues of abuse of power, that kind of power should not be lodged in any one company or in any one man.

[The prepared statement of Mr. Redstone follows:]

PREPARED STATEMENT OF SUMNER M. REDSTONE ON BEHALF OF VIACOM INTERNATIONAL, INC.

SUMMARY

1) Today, TCI-controlled cable systems are gatekeepers, controlling exclusive access to well over 20 percent of American cable homes. That exclusive access gives TCI monopsony power to "make or break" independent programming services, because given the need to reach a critical mass of cable subscribers, a programming service that is not carried by TCI-controlled cable systems has little or no chance of commercial success. If the Bell Atlantic/TCI/Liberty deal is completed, TCI will have access to one in every two American homes, enhancing TCI's already prodigious "make or break" power.

2) TCI has been able to leverage its dominant access to American cable homes into cable programming. As a result, TCI and Liberty now own all or part of at least 25 cable programming services in the United States. TCI thus has the power (through its dominant access to cable homes) and the incentive (through its ownership of programming services) to discriminate—and sometimes destroy—independent programming services. And, if TCI acquires Paramount (through QVC), TCI will have even less need for independent programming. As a result, creativity will be stifled, program quality will be diminished and cable service prices to consumers will rise.

3) TCI has also leveraged its market power to obtain control over critical technological developments, including encryption, digital compression, transmission and set-top box access to the home. Given the bottlenecks that TCI has already created in the delivery of cable services, we fear letting the same people build and control the coming communications "superhighway."

4) The TCI/QVC/Paramount transaction, by virtue of TCI's market power and the market power of TCI's partners and would-be partners in QVC, raises serious antitrust questions in itself. The Bell Atlantic/TCI/Liberty combination will only make a bad situation worse. If either proposed combination is allowed to proceed, the American consumer will be forced to *pay more* for *lower quality programming* and *less diversity in programming*. We urge the government to take the time to understand and deal thoroughly with these issues before allowing either combination to proceed. Without government intervention now, it will be much harder to fix the structural problems later—and it may well be impossible to compensate consumers for the harm they will suffer in the interim.

Good morning, Mr. Chairman and Members of the Subcommittee. My name is Sumner Redstone and I am the Chairman of Viacom International Inc. I wish to thank the members of the Subcommittee for the opportunity to appear at today's hearing.

As I am sure you know, Viacom International Inc. is a diversified entertainment and communications company, which employs approximately 5,000 people worldwide. At the core of our company is Viacom Networks, which consists of MTV Networks and Showtime Networks Inc. MTV Networks includes three advertiser-supported, basic cable television networks: MTV: Music Television; VH-1/Video Hits One and Nickelodeon/Nick at Nite. Showtime Networks Inc. operates three premium television networks: Showtime, The Movie Channel and FLIX. We are also joint owners of Comedy Central, Lifetime and All News Channel—three additional advertiser-supported, basic cable networks. Our cable division owns and operates cable television systems that serve approximately 1.1 million customers. Our broadcast division owns five television and fourteen radio stations. Through our entertainment division, we produce programs for the broadcast networks and for first-run syndication. Our new media group is working to develop, produce, distribute and market interactive programming for the stand-alone multimedia and interactive marketplace, which is fast emerging.

In light of recent developments in the communications industry, the work of this Subcommittee, as well as that of federal, state and local regulators and others charged with shaping and enforcing communications policy, is immensely important. We are witnessing the dawn of a new age of communications, a revolution every bit as profound as Bell's invention of the telephone.

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As with the development of our nation's telephone system, we should expect enormous technological advances in this communications revolution. But, also as with the development of the telephone system, the future communications system is susceptible to the leveraging of market power and other anticompetitive practices by those who dominate the nation's local delivery systems. The time for decisive action to ensure free competition and the full benefits of the communications revolution is now, and not, as with the old Bell system, years from now when the anticompetitive effects are manifest. Without the vigilance of Congress, the Federal Communications Commission and the antitrust enforcement agencies, the American public will be denied many of the advantages the communications revolution otherwise would bring.

This revolution is happening at a breakneck pace. If these changes hurtle past policymakers without appreciation of their potential anticompetitive implications, it will take at least a decade of reform—regulation, public enforcement and private litigation—to remedy the situation and, in the meantime, American consumers will be the victims, rather than the beneficiaries, of technological innovation. If allowed to proceed unchecked, the risk is that consumers will suffer as creativity is stifled, program quality is diminished and cable service prices rise. What is at stake is nothing less than the way that Americans will receive information, communicate with one another, and interact—well into the next century.

While the Subcommittee has much work and a variety of issues to consider, I will confine my remarks to three areas of particular concern to Viacom and, I believe, to the American public. First, I will discuss certain structural problems in the cable industry today, caused by the extraordinary—and abusive—monopoly power wielded by Tele-Communications Inc. ("TCI") and the companies it controls. Second, based on our experience in the cable industry, I will describe why *any* enhancement of that market power, indeed TCI's stranglehold, in the communications industry—specifically, the proposed merger of Bell Atlantic and TCI and TCI's affiliated company, Liberty Media Corp. ("Liberty") and TCI's bid, through QVC Network, Inc. ("QVC"), for Paramount Communications Inc. ("Paramount")—will further choke competition and lead to a closed communications "superhighway" built and ultimately controlled by TCI and those affiliated with it. Third, and finally, I will outline the basic elements of Viacom's strategic vision for the communications industry, and explain the procompetitive effects and benefits to consumers of the proposed merger of Viacom and Paramount.

I. TCI'S MONOPOLISTIC AND PREDATORY POWER IN THE AMERICAN CABLE INDUSTRY

Over the last several years, TCI has been the bane of the cable industry and the American cable consumer. Through a complex web of companies it controls or influences, TCI has systematically attempted to exert monopoly power over almost every aspect of the cable industry and, most recently, the technological developments that are the key to the future of our industry.

Today, TCI-controlled cable systems are gatekeepers, controlling access to well over 20 percent of American cable homes. No other cable operator comes close to that size. Even Time Warner (the second largest cable operator in the United States) controls access to only half that number of homes, and the next group of cable operators are one-fourth TCI's size. And together with its partners and would-be partners in QVC—Comcast, Cox Enterprises and Newhouse—TCI controls access to one in every three American cable households. With the addition of the Bell Atlantic service base, TCI and those affiliated with it will have access to one in every two households—creating overwhelming power. By contrast, Viacom's cable system holdings are *de minimis* (about one-twelfth the size of TCI), and provide service to less than two percent of all cable subscribers in the United States.

To understand the source and extent of TCI's dominance, one must understand the unique characteristics of the cable industry. TCI's level of exclusive access gives it the power to make or break cable programming services, among other things, as it sees fit. Unlike any other industry that comes to mind, the cable industry is unique in that even a 20 percent market share could result in such monopoly power.

TCI's "make or break" power derives from the fact that to successfully launch and operate a national cable programming service, that service must reach a sufficient base or "critical mass" of subscribers in order to generate sufficient advertising revenues or subscriber fees. In the case of a nationwide advertiser-supported basic cable programming service, such as Viacom's MTV and Nickelodeon, the "critical mass" of subscribers required to succeed is roughly 40 million of the current 57 million available subscribers. Premium television services, such as Viacom's Showtime and The Movie Channel, have extraordinarily high fixed costs, and therefore are also heavily dependent on wide distribution by cable operators in order to amortize those fixed costs. Further, in the case of premium services, wide distribution by cable op-

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erators is not enough. Premium services, where carried, also need to be favorably marketed by cable operators (including favorable positioning, packaging and retail pricing) in order to encourage consumer subscriptions to individual services. Due to TCI's control of well over 20 percent of cable homes nationwide, a decision by TCI not to carry or favorably market a programming service on its exclusive-access cable systems would require that that service, at a minimum, be carried by nearly every other cable system in the United States for it to succeed commercially—an impossible hurdle to overcome.

TCI also wields its market power in subtle—but no less anticompetitive—ways. Our experience has shown that TCI attempts to leverage its market power over access to American cable subscribers in order to tighten its grip on programming services and other aspects of the cable industry. TCI often dictates grossly unfair terms as a condition to carriage of programming services. As to existing programming services, TCI often threatens to deny carriage, refuses to renew affiliation agreements and threatens to drop programming services entirely, knowing that without access to TCI's systems, programming services cannot succeed.

In our case, TCI and Liberty have threatened to deny carriage on their cable systems of our premium television services—Showtime and The Movie Channel—and have refused to renew affiliation agreements with Showtime Networks for carriage of those premium services. TCI has also threatened to "crucify" The Movie Channel by dropping it from TCI's cable systems in favor of Liberty's own Encore service.

These threats were designed to force Showtime Networks into a low-ball merger with Liberty-owned Encore Media and to weaken or eliminate Showtime Networks' competitive position. These tactics are part of a pattern by TCI to extract an equity interest in third-party programming services. For example, TCI used its monopoly muscle to buy The Learning Channel when it was put up for sale. Lifetime (a joint venture of ABC/Capital Cities, Hearst and Viacom) submitted a bid for The Learning Channel of $50 million, while TCI offered only $30 million. TCI then used the threat to eliminate The Learning Channel from TCI's cable systems—if the service were sold to anyone other than TCI—to chill the bidding for The Learning Channel. As a result of TCI's predatory actions, Lifetime's competing bid for The Learning Channel was reduced to approximately $39 million and ultimately withdrawn. TCI then purchased The Learning Channel for $30 million.

In another example of TCI's power to eliminate programming competition, when NBC began to develop its own all news cable network, the Consumer News and Business Channel, CNBC, TCI pressured NBC into changing the focus of CNBC in order to prevent competition with TCI controlled-Turner Broadcasting's Cable News Network. According to then Senator, and now Vice President, Gore, TCI kept CNBC off the air until TCI was assured that CNBC would not compete with CNN. Vice President Gore called the CNBC situation a "shakedown by TCI."

In the case of start-up programming services launched by third parties, TCI uses a similar tactic—threatening to create a clone of the new programming service, which TCI threatens will be carried on TCI's cable systems in lieu of the third party's new service, if TCI's demands for an equity interest in that service are not met. Because carriage on TCI's systems is essential for a new service to succeed, TCI's demands for equity tend to be met. For example, we understand that Liberty extracted an equity interest in Court TV in just that way—threatening to create a clone service and refusing to carry Court TV on TCI's cable systems. Afraid of losing its sunk costs, Court TV gave in to TCI and today, Liberty owns thirty-three percent of Court TV.

TCI (and Liberty) now own all or part of at least 25 cable programming services in the United States (including Encore, QVC Network, Home Shopping Network, Superstation WTBS, CNN, Headline News, TNT, The Cartoon Channel, The Family Channel, The Discovery Channel, The Learning Channel, Black Entertainment Television, Court TV, Prime Network, Sportschannel America, X*Press Executive and The Box).

TCI has also set out to control various technological developments—from encryption, compression and transmission of signals to set-top boxes and delivery of programming to the home—again leveraging its market power over access to American cable subscribers for its own benefit. TCI has created bottlenecks which give it control of the delivery of programming by cable and satellite, including control of encryption and compression technology. This, together with the construction of the TCI Authorization Center—a facility that will employ proprietary technology, as TCI sees fit, to encrypt, digitally compress, transmit and control signals from individual program services—will enable TCI to use new technology to create new bottlenecks in the distribution of cable programming services. TCI thus will be able to further leverage its existing monopoly power by refusing to distribute any programming not transmitted through the TCI Authorization Center.

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The net result of TCI's predatory practices is borne by cable programmers and the American consumer alike: TCI typically demands lower license fees from programmers in which TCI has no equity interest and extracts monopoly rents (in the form of higher prices) from consumers that will sacrifice diversity, choice, quality and creativity in cable programming. Why? As TCI drives down the wholesale price it pays to such unaffiliated programmers, those programmers will have to cut back on what they spend to create programming. As TCI knows, those programmers have no other viable way to get their programming to cable consumers in TCI's franchise areas except through TCI, so they must accept TCI's terms. Because TCI attempts to—and often does—deny unaffiliated programmers a fair return on their investment, those programmers will spend less, program quality will deteriorate and—most importantly—viewers will suffer. Thus, TCI will continue to rob the marketplace of the incentive to create better television, and consumers will be the losers.

In contrast to TCI's typical practice of paying unaffiliated programmers license fees which are substantially below market rates, we believe that TCI frequently pays programming services in which it or Liberty has an equity interest full license fees. In these cases, TCI creates not only artificially low license fees payable to its competition, but creates artificially high license fees for its own affiliated programming services. The benefit to TCI of this is twofold, *first*, TCI is able to leverage non-TCI cable systems into paying those high license fees for its own affiliated programming services by demanding the same license fees that TCI itself pays, and *second*, TCI is able to depress the license fees payable to its competition because non-TCI cable systems frequently refuse to pay license fees for non-TCI programming which are higher than the license fees paid by TCI for such non-TCI programming. The effect overall is an increase in consumer prices for cable services and a diminution in program quality and choice.

Because of our success in creating programming with broad consumer appeal, Viacom has been a thorn in TCI's side. Perhaps because we have attempted to resist its efforts to leverage its existing market power, TCI has targeted us for its most egregious forms of conduct. Among other things, TCI has tried to acquire Showtime Networks on unfair terms; attempted to destroy The Movie Channel for the benefit of TCI/Liberty's own premium movie services; and acquired studio production capabilities through TCI-related companies and entered into exclusive motion picture output agreements, at predatory prices, for TCI/Liberty's own premium movie services, in order to deny Showtime Networks access to that motion picture output. TCI is willing to overpay for the right to this output since TCI will be recompensed through the monopoly tax TCI will then charge American consumers in the form of higher prices for cable television.

Several weeks ago, after taking TCI on for years in the marketplace, we took TCI to court. We have sued a number of TCI-controlled companies, including Liberty and QVC, in New York federal court seeking substantial damages for their monopolistic and predatory practices. We are also challenging TCI's latest attempt to injure our business—its bid, through QVC, to upset our strategic merger with Paramount. At bottom, our dealings with TCI have proven one economic fact of life: a dominant position in cable distribution nationwide, when coupled with vertical integration into programming, creates intolerable monopoly power; TCI has it, and it uses it. I therefore believe that TCI's market power must be addressed immediately; I also believe that, if the past is prologue, TCI's latest attempt to control the coming communications "superhighway" must be stopped. We simply cannot afford to wait until TCI's closed superhighway is in place, and then spend the next ten or more years trying to open it.

II. A. BELL ATLANTIC WILL ONLY MAKE A BAD SITUATION WORSE

The combination of Bell Atlantic and TCI can only aggravate the serious structural problems that are the source of the anticompetitive power that TCI so brazenly abuses. The primary reason—and primary danger—is that when TCI's, its partners' and would-be partners' share of U.S. cable homes are combined with Bell Atlantic's share of the local telephone service business, estimated to be in excess of 17 percent, the combined entity will be able to reach into virtually 50 percent of American homes. TCI already abuses its control of its local cable franchises, and if allowed to merge with Bell Atlantic, the new combination will possess overwhelming power which can only exacerbate the kind of anticompetitive conduct in which the current TCI already engages. There is simply no question that that kind of power should not be concentrated in one company.

If completed, the proposed merger between Bell Atlantic and TCI will give Bell Atlantic/TCI/Liberty an entrenched dominant presence in 48 of the 50 states and in 59 of the top 100 U.S. local markets. This massive combination will control access

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to 22 million telephone and cable customers—without taking into account the market power and reach of TCI's partners and would-be partners in QVC. If TCI sought to acquire each of the cable systems it does not already own located in the Bell Atlantic service areas, antitrust enforcers would surely view the attempted acquisition as having grave anticompetitive consequences, and the FCC would prohibit that acquisition as a blatant violation of the FCC's horizontal ownership rules (which are far too lenient in any case). Yet, this is essentially what TCI is accomplishing through the "back door" by the Bell Atlantic transaction—horizontal ownership well in excess of the FCC's limits—although TCI tries to gloss over it by the use of superhighway rhetoric.

TCI has already engaged in a series of corporate shell games, essentially shuffling assets in order to avoid the strictures of federal regulation. One need look no further than the history of TCI and Liberty to predict the future. When threatened by restrictions on vertical integration and horizontal concentration, TCI "spun off" Liberty, with majority voting control ending up in the hands of John Malone. And now that the danger from those regulations has apparently been avoided, Liberty and TCI have announced that they will recombine, with the financial benefits of that recombination flowing to TCI/Liberty's controlling shareholder, John Malone.

This makes one suspicious that the same pattern will undoubtedly be followed in the Bell Atlantic/TCI deal. The companies have announced that if they fail to obtain regulatory approval allowing TCI's cable franchises and Bell Atlantic's local telephone service to operate in the same geographical areas, those cable assets will be "spun off" in order to "solve" the problem. However, as in the TCI/Liberty spin-off, the assets will go to none other than the stockholders of TCI/Liberty and their controlling shareholder, John Malone. The regulations will be satisfied on their face while their underlying purpose will be subverted. Control will still lie with TCI through common ownership and interlocking directorates.

TCI has also long used hardball tactics with local governments to get its way. When the small town of Morganton, North Carolina, concluded that TCI's service was "atrocious" and decided not to renew TCI's cable franchise, the Mayor, Mel Cohen, began to explore building a municipal cable system. In response, TCI declared war on the project and on Mayor Cohen. TCI sued the town for $35 million, hired a lobbying firm to propose a referendum giving TCI a lifetime franchise, and ran negative ads to defeat Mayor Cohen's reelection. TCI spent upwards of $140,000 on the campaign, in contrast to the $600 spent by the incumbent. The town fought the lawsuit and won, and the Mayor was reelected, but TCI has continued to appeal the ruling. While the case is on appeal, TCI retains the cable franchise and its $1.3 million annual proceeds. Indeed, in a familiar tactic, TCI offered to sell the system to a consortium of buyers, but the town refused to approve the sale when it discovered that one of the purchasers was owned and controlled by TCI. In a similar, and no less telling story, when a dispute arose between the town of Vail, Colorado and TCI over rising rates and poor service, over one weekend TCI exhibited nothing but the home phone numbers of the mayor and the city manager.

With that history in mind, the new, bigger TCI with its enhanced market power, will be able to step up its destruction of anyone who does not play by TCI's rules. TCI already successfully dictates terms of carriage to almost every programmer, and Showtime Networks, which is fighting for its very survival against TCI's anticompetitive tactics, is living proof of that power. And if past is prologue—and it is—TCI will use this power to favor its own programming as well as to extract ownership interests and unreasonably low license fees from unaffiliated programming services.

TCI proposes illusory cures for these serious concerns. First, publicly TCI promises a better tomorrow with plenty of competition. Meanwhile, privately TCI so thoroughly dictates economic conditions today in the cable industry that competition tomorrow will be far too late to control TCI's abuses. The situation is not unlike that of the old Bell system. The difference here is that the anticompetitive effects can be avoided in the first instance, without waiting for the disaster to assume full form before measures are taken to remedy the situation. TCI has monopoly power now and exploits it now. The acquisition by TCI, through QVC, of Paramount will only further enhance TCI's monopoly power and its ability to abuse it. The Bell Atlantic deal will only make things worse, and no amount of rhetoric from TCI or Bell Atlantic will change that inevitable fact.

II. B. DIFFERENCE IN VISIONS FOR THE DATA SUPERHIGHWAY

How is the Viacom/Paramount merger—with the recently announced investment in Viacom by NYNEX Corporation—different from TCI's proposed Bell Atlantic/TCI/Liberty combination? Aside from very important structural differences (which I will

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get to in a moment), there is a fundamental difference in our vision of the way people will communicate.

TCI has spent a lot of time lately talking about the Bell Atlantic deal as the fulfillment of the long-awaited electronic superhighway. But TCI speaks out of both sides of its mouth. While promising an open highway and free competition—using buzzwords like "connectivity," "system compatibility," and "open architecture"—TCI has also boasted that the Bell Atlantic/TCI combination "will allow us to control all of the communications needs of a household with one device." Similarly, Raymond Smith, Chairman and CEO of Bell Atlantic, has stated:

> Our fundamental strategy is very straightforward. Number one, to develop a full-service network capable of delivering voice and data and image and video using both wired and wireless technologies in high-growth markets, both domestically and internationally. Number two, to develop the information, entertainment, and transactional services that can be offered over that network. And number three, to develop operating systems that allow customers easy access to those services.

Thus, while Bell Atlantic and TCI have promised that the proposed merger will bring "choice, control and convenience in the communications marketplace," what this really means is TCI's choice, TCI's control and TCI's convenience. But, as they say—and as TCI itself recognizes—the devil is in the detail, and TCI and Bell Atlantic are providing no detail. They are saying, in essence, "trust us, we will do the right thing." They cannot be trusted, however, and their vision is not of a truly open, content-neutral, superhighway, where any programmer has unimpeded access to viewers on commercially reasonable terms.

Viacom favors this type of truly open telecommunications superhighway, supporting both competition and First Amendment values, and ensuring everyone an equal chance to step up to the microphone. We believe the superhighway should be content and identity neutral. What that means is that as in an actual highway, a toll is paid to gain access to the highway and that toll is not determined by what a particular vehicle is carrying or the owner of that vehicle. An empty truck owned by company "A" pays the same toll as one owned by company "B" whose truck is loaded with goods worth a million dollars. The toll taker collects tolls based on volume of usage, not the value of goods carried or the owner of the truck. In other words, as with the telephone system today, people should pay based on how much they use the superhighway, not what they say or do on it or who they are.

What TCI has not told you is that *its* superhighway is really an exclusive toll road which detours competition and which we believe will impose content-based charges on those who wish to communicate through it. It is not the road to the future but a path to a past of unchecked monopolies and arbitrary censorship. As both Bell Atlantic and TCI have made clear, their superhighway will give them full control over the programming from its point of origin through its delivery to the home. And they mean to levy tolls on both programmers and consumers at several points along the journey.

The first toll booth on TCI's superhighway will collect a fee imposed on users of the superhighway for initial access, and that fee will not be a flat rate, but rather will be levied on a sliding scale based on TCI's perception of the value of the particular programming. The second toll booth will collect the fee TCI will charge to exit the highway and unlock the key inside the set-top box TCI has placed there, in order to access the viewer. And the third, and most pernicious, toll booth will be the one that collects the charge for obtaining the specifications to the operating system that will control the interactive lanes of the highway, without which programmers will be unable to create software capable of accessing the highway.

By manipulating crucial technologies over which it has the ability to gain control, we believe that TCI will control what the set-top box is allowed to receive or not receive. Already TCI's market power has made its choice of set-top box the *de facto* industry standard. By the same token, Bell Atlantic/TCI will select the proprietary technology and equipment necessary to construct their superhighway, and given the fact that their superhighway will be the first constructed and capable of accessing virtually 50 percent of all American homes, it is safe to assume that the Bell Atlantic/TCI superhighway operating system will also become the *de facto* industry standard. If this occurs, Bell Atlantic/TCI's control over the technology of program delivery, and thus over programming itself, will be almost absolute.

We need to be sure that TCI's superhighway is more than just a means to detour both competition and free speech. To that end, I suggest that you ask TCI a few questions about just what TCI means by an "open" superhighway. Because of TCI's vagueness and its use of politically correct buzzwords, it may be impossible to pin

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TCI down, or ask all the right questions. Nevertheless, we would begin with the following:

(1) *Will TCI charges be based strictly on the amount of usage of the superhighway?* In other words, TCI should charge for the number of trucks on the road, but not for the subjective value it places upon their cargo.

(2) *Will TCI divest its entire interest in programming to a wholly unrelated third party?* Such a sale will help to prevent the threat of discrimination against non-TCI programmers' access to TCI's highway.

(3) *If not, will TCI limit its affiliated programmers' use of its highway to no more than a specific percentage of the highway's total traffic capacity?* TCI has spoken of the virtually unlimited capacity of TCI's highway. But in actuality, capacity can be limited in a manner designed to permit TCI to continue to discriminate against unaffiliated programmers by reserving a large portion of limited highway capacity for its favorite sons. A specific percentage cap on its usage will help ensure that TCI builds the highway as openly as it promised.

(4) *Will TCI subscribe to standardized, non-proprietary data formats (e.g., MPEG II for video and Dolby AC-3 for audio)? And will TCI agree not to place a proprietary transport layer on its data signal?* In other words, will it make the highway usable by all vehicle makes and models?

(5) *Will TCI's highway and set-top boxes support the use of at least two encryption processes?* Such a move will promote both signal security (by offering redundancy in the event that one encryption process is compromised) as well as competition.

(6) *Will TCI permit the set-top boxes to be sold as a commodity (like telephones are now—but were not always), whereby all manufacturers have open access to the necessary technology and specifications to build compatible equipment and which all programmers can access?* Or will it force a household that wants to get other programming services to go to the expense of getting another set-top box? In effect, this would be no different from forcing a family to buy multiple television sets simply to access different channels.

(7) *Will TCI operate its Authorization Center as a non-profit free trade zone?* In other words, will TCI allow programmers to sell their services directly to the viewer (or to other cable systems or other distributors), or will it insist that its Authorization Center serve as a gatekeeper which directly controls whether a consumer receives a given service?

After you pose these questions to TCI, the more vague assurances or "don't know's" you hear, the more worried you should be. All that I ask is that you do not put the highwayman in charge of the highway. Viacom believes that, at a minimum, Congress should require that the superhighway be a full, two-way operating system that is entirely and truly open, and further, that the software specifications for access to the superhighway be made publicly available.

II. C. TCI'S ACQUISITION OF PARAMOUNT WOULD FURTHER STIFLE COMPETITION AND CREATIVITY IN THE CABLE INDUSTRY

If Paramount falls to TCI, through its controlled company, QVC, it will be further able to control not only the method and manner of non-broadcast access to a critical mass of American homes, but it will be further able to exclude from the marketplace or competitively disadvantage any programming provider who will not agree to its terms, and replace that provider's programming with TCI's own program offerings. The result of TCI's exclusionary tactics has been and will be to inflate prices to consumers, reduce quality and deny adequate returns for third-party programming, reducing the supply of innovative television.

To understand the full context and the very real danger of a Paramount acquisition by TCI/QVC, one must understand the vertical integration TCI has already achieved. For example, Turner Broadcasting, which is substantially controlled by TCI, has acquired, or will soon acquire, control of independent studios New Line Cinema and Castle Rock Entertainment. TCI has also entered into agreements providing for a substantial equity interest in Carolco Pictures. And, according to public reports, in addition to its intent to acquire Paramount, TCI is considering deals with both MCA's Universal Studios and Sony's Columbia Pictures and Tri-Star Pictures.

What are the dangers of TCI controlling Paramount? Once TCI has Paramount, TCI will have the enhanced power to dictate terms to Viacom and other programmers by wielding the threat that unless such programmers agree to its terms, TCI

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will replace their programming with that produced by its captive studios. By depressing to below-market levels the rate of return of unaffiliated programmers, diversity, quality and new sources of programming will be thwarted to the detriment of the American viewing public. Indeed, the power that TCI would have to control programming and cable distribution is dangerous enough by itself, but when coupled with the publishing, television and motion picture production and other interests of Paramount, the danger to fundamental First Amendment principles designed to further a diversity of voices, a multiplicity of viewpoints and freedom of access to the marketplace of ideas, is sobering. This is especially significant in light of the threatened combination of two of the largest publishers in the world, Paramount and Newhouse. This combination would create the single largest and most powerful publisher, presenting, in and of itself, substantial antitrust questions. If TCI's plans are fulfilled, it will be TCI which determines which voices, viewpoints and ideas are carried on the nation's superhighway. Indeed, TCI could end up controlling the news we receive and the content of our children's schoolbooks.

DIFFERENCES IN VIACOM'S ACQUISITION OF PARAMOUNT

As I mentioned earlier, there are obvious and meaningful differences between the proposed Bell Atlantic/TCI/Liberty combination and NYNEX's investment in Viacom. Most fundamentally, Bell Atlantic and TCI are merging their entire operations. Two companies which would otherwise compete in an expanded marketplace are becoming one, thereby eliminating the benefits of that competition. In contrast, NYNEX's relationship with Viacom is completely different, since the two companies will remain operationally independent. NYNEX is simply making a passive investment in Viacom and NYNEX will have no right to control Viacom's actions or vice-versa. Any future coordination between NYNEX and Viacom will occur only as a result of arms-length negotiations between independent parties for the benefit of two separate shareholder constituencies. Bell Atlantic/TCI/Liberty will combine to create one gigantic $60 billion company which serves only one shareholder constituency, whose largest shareholder will be John Malone.

In contrast to the proposed Bell Atlantic/TCI merger, which simply makes the nation's biggest cable operator even bigger, the proposed Paramount Viacom International will combine two companies with different—yet complementary—strengths. Rather than entrenching an abusive monopolist, Paramount Viacom will create a new, strong competitor in which each partner has access to and can build on each other's programming, expertise and talent, the very embodiment of First Amendment values.

The emergence of Paramount Viacom International is particularly important to ensure America's traditional worldwide leadership in the creation of programming. Viacom is already an international leader in marketing its programming services to Europe, Latin America and Asia. Paramount Viacom International will be a company with an even greater ability to create and export programming with broad international appeal and thus enhance American competition worldwide.

The proposed Paramount/Viacom merger will do far more than help the U.S. balance of payments. It will provide direct and almost immediate benefits to American consumers. For example, Paramount's Simon & Schuster, the leader in educational publishing, will be able to tap into Viacom's expertise in interactive television technology and together will create many new consumer offerings, such as a new Nickelodeon designed as the first, true interactive educational network for students of all ages and disciplines.

CONCLUSION

In conclusion, I appreciate your commitment to ensuring a fair and competitive environment and to the principles of freedom of expression that you have long labored to guarantee every American. I thank you and will, of course, be happy to answer any questions you may have.

Senator METZENBAUM. Thank you very much, Mr. Redstone.

Mr. Martin Davis, chairman of the board and chief executive officer of Paramount Communications, we are happy to hear from you, sir.

STATEMENT OF MARTIN S. DAVIS

Mr. DAVIS. Thank you. Mr. Chairman and members of the subcommittee, good morning. My purpose today is to tell you why the

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Paramount Communications board voted unanimously to enter into a merger agreement with Viacom, a decision we announced on September 12, 1993.

We are proceeding with this merger agreement on the basis of a revised and enhanced offer to our shareholders just made by Viacom, an offer which, we strongly believe, provides our shareholders with more value, both short and long term, more than the unsolicited hostile takeover bid announced by QVC.

Let me now turn to the basis of our agreement with Viacom. Paramount is a copyright-driven, American-owned enterprise. Our operations are primarily in film and television production, as well as book publishing. Our studio in Los Angeles, I might add, was founded in 1912. Today, we are one of the Nation's leading publishers of educational textbooks and related instructional materials, as well as a premier trade book publisher through Simon & Schuster.

Paramount operates the now completely modernized Madison Square Garden and its popular regional sports cable network, five recently acquired and expanding theme parks, and seven UHF broadcast stations. Paramount also helped to launch USA and Sci-Fi, two successful cable networks jointly owned by MCA.

Over the past decade, the worlds of entertainment and publishing, our two core operations, were forever altered by changes sweeping through our marketplace both here and abroad. These dramatic changes posed formidable challenges to our management and, if I may, let me cite some of them.

First, aided by a weak dollar and by less rigorous foreign accounting practices, European and Japanese companies have entered the U.S. market on a massive scale. Foreign owners are now in control of large Hollywood studios and have gained an enormous beachhead for the production of films, television and cable programming, as well as access to valuable film libraries. They have also acquired a number of major American publishing houses who produce instructional materials for our schools.

Second, our competition overseas has intensified as we pursue new global opportunities in the information and entertainment fields. Our competition now comes in large measure from horizontally and vertically integrated, foreign-owned entities who are protected and shielded by their governments in a trade playing field which is far from level when it comes to American companies. If the United States is to remain a robust competitor in Asia and throughout the Common Market, then only those American companies with strong complementary product franchises and efficient distribution systems will succeed over the long run.

Third, within our own country the media lineup has been radically transformed. Companies that were once independent and limited to a single market have joined forces across the product and service lines, as well as technologies, to create powerful multinational and domestic giants against whom we must also compete.

On that note, what must be of concern to you as members of the Antitrust Subcommittee, as it is to us as independent programmers, is the extraordinary market power amassed by the cable forces who are an integral part of the QVC lineup.

First, we have TCI, which is by far the Nation's largest cable operator, with over 10 million subscribers. Add to that the 3-million-

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plus subscribers in Liberty Media, soon to be folded back up again by John Malone into TCI. But it does not stop there. Comcast, part of the original QVC group, has 2.6 million subscribers, making it the fourth largest cable operator. The more recent QVC allies are Cox Cable, with 1.7 million subscribers, and Newhouse Cable, with 1.3 million, the fifth and seventh largest MSO's. This brings the grand total to nearly 19 million subscribers. Effectively, this nationwide cable cartel would give TCI and its partners the ability to control access to one out of every three cable homes in America. When you throw in the Bell Atlantic service area, it is frightening to contemplate that the TCI/QVC group would hold the power to control the cable gateway to one out of every two homes in this country.

This concentration of market power does not even stop there. The TCI/Liberty Malone empire owns all or part of as many as 23 cable networks and 16 regional sports networks. This combination of horizontal and vertical power would have an even greater anticompetitive mass if it were to succeed in acquiring the Paramount Studio, as well as controlling the MSG Cable Network and our 50-percent interest in USA Network.

A QVC-Paramount board consisting of TCI, Liberty Media, Comcast, Newhouse, and Cox nominated directors would exert enormous leverage over the marketplace not only in cable, but in publishing, since Newhouse's Random House competes head to head with Simon & Schuster.

Surely, this aggregation of media power in so few hands must somehow be brought under control if we are to preserve the values of competition, programming diversity, and the best interests of the consumer. Our antitrust agencies must take a long and hard look at the anticompetitive aspects of the QVC hostile takeover bid for Paramount.

May I give you some historical perspective with a direct bearing on the subject before you. During the 1930's and 1940's, companies who owned the movie seats also owned the movies that were being shown. This combination of content and carriage was stifling competition and hurting the consumer.

In 1948, our Government broke up this vertically integrated monopoly in, as it turns out, the Paramount case. Despite the handwringing at the time, the film makers prospered. They were able to increase their production not only to serve their traditional market, the theaters, but the new, free television markets which were then opening up. I submit that we are in the same situation today. Instead of movie seats, there are armchairs in the living room in front of a screen in the form of a television set wired for cable.

Question: By severing the link between the cable program ownership and the control over the means of delivery, could we, by taking a leaf out of the Paramount case book, serve both the consumer and increase competition in this new media age? The new media gateway, I submit, whether it is called the communications superhighway or whatever label one chooses to affix, must be open to all programmers on a fair and equitable basis.

Despite the intent of the 1992 Cable Act, a crucial question you must answer is whether large, integrated cable combines like TCI will be able to continue to discriminate against independent cable

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programmers by denying them fair access to their delivery systems. By so doing, they can block the only currently available cable media path to the consumer. These cable bridge-keepers should no longer be allowed to hold up independent program drivers by charging exorbitant tolls or by keeping them off the cable roadway.

In the face of the structural changes in our business environment that I referred to earlier, it became clear to management that Paramount could not simply stand pat. Since I became chairman of Paramount in 1983—a company that at that time was known as Gulf+Western where I have spent almost all of my working life—my colleagues and I began to explore a number of alternative directions. These strategies were aimed at equipping Paramount to become a first-class competitor in the domestic and international arenas, and thus to build long term rather than short-term shareholder values.

A decade ago, we redefined our businesses by sharpening our focus on entertainment and publishing. We were not afraid to undertake the challenge of deconglomerating and to concentrate on what we considered to be the growth areas of the future as the information age began to dawn. In so doing, we created exciting opportunities for the writers, editors, directors, producers, and performers, the talent that is at the heart of our business. And we did so while strengthening our balance sheet by paying down our once very heavy debt load and increasing our liquidity. In the process, our shareholder values increased ten-fold.

During this restructuring, we also began to explore the possibilities of a business combination to find, if you will, an ideal fit. In pursuing that course, we wanted to avoid the dangers of highly leveraged or bust-up transactions that undermined so many companies in the "go for it" eighties. Our strategy led us to a careful search for an acquisition that could meet these criteria: first, a compatible management culture and business philosophy; a combination that would present no antitrust hurdles—we believe in competition, not in the heavy hand of monopoly; a financially strong association without the need to sell off valuable assets, dislocating employees and their families as well as the communities in which they live; a creative and innovative product mix, proven entertainment franchises, and a motivated talent base together with a global distribution and marketing system, taking full advantage of the latest delivery technologies; and most importantly, a community of interest that would enable us to grow and build our businesses together for the long haul, businesses that would inform, entertain, and educate audiences both here and around the world.

Viacom's chairman, Sumner Redstone, and I have been business associates since the mid-1950's when he built a successful film exhibition circuit throughout New England. Over the past 4 years, Sumner Redstone and I talked about the possibilities of a Paramount-Viacom merger. Last summer, these spirited and arms-length negotiations gained momentum. They culminated in the friendly merger agreement approved by the Paramount board. Clearly, I am convinced our agreement with Viacom meets all of the criteria I outlined. Together, our combined companies can

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achieve more and compete more vigorously than each could have done in its own right.

We saw the unusual benefits that could flow by bringing together the array of creative talent both our companies have assembled in recent years. We looked at the international distribution systems represented by Viacom's MTV Latin America, Europe, and Asia services. Linking these networks to our programming would enhance our ability to reach viewers all over the world.

We visualized the intriguing opportunities in educational publishing. Let me cite Viacom's popular children's cable network, Nickelodeon, and the computer-based interactive learning technology Paramount is bringing into the Nation's classrooms. Uniting these two great franchises would promote educational innovation and literacy training.

We saw the potential of additional free television programming and have just announced the creation of a fifth broadcast network with Chris-Craft, a project we have been working on for more than a year.

We saw a commitment to maintaining the integrity of our assets and a resulting company that would accelerate its growth, expand employment opportunities, and promote the flow of exports—the uniqueness and popularity of American intellectual property that can measurably improve the U.S. trade balance.

Senator METZENBAUM. Mr. Davis, can you wind up, please?

Mr. DAVIS. Pardon?

Senator METZENBAUM. Can you wind up, please?

Mr. DAVIS. I am almost there, sir.

We could not identify any antitrust or regulatory problems. In fact, we are pleased to note that our proposed merger with Viacom last week received the required Hart-Scott-Rodino approval from the U.S. Government.

Finally, we recognize that Paramount Viacom, while still only half the size of Time Warner and smaller than Fox' News Corp. or Sony-Columbia, Matsushita's MCA or the German Bertelsmann Group, could serve as a model for a new form of business alliance, one prepared to meet the global goals of competition, programming diversity, and state-of-the-art product innovation, while at the same time honoring our joint commitment to building long-range shareholder values.

Mr. Chairman, that completes my remarks. I am pleased to respond to your questions.

Senator METZENBAUM. I do have, and my guess is my colleagues have a number of questions, but before doing so some of our members were not here before when we were taking opening statements. Senator Specter, we would be happy to hear from you, sir.

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

Senator SPECTER. Thank you, Mr. Chairman. In an opening statement, I would like to express some of the concerns which I have, however, I am now very late for an earlier commitment, so I am going to have to excuse myself, but I will try to return to ask questions and have a dialog.

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Up until late yesterday afternoon, all I knew about this matter was what I read in the newspapers and heard on the electronic media. As is the custom, I met late, at the request of Mr. Smith and then at the request of Mr. Redstone and Mr. Davis. Although I had earlier appointments scheduled at Mr. Diller's request, he could not complete them, but I talked to him by phone today. What I see unfolding is a very complicated picture, one which is going to require very considerable analysis in a variety of fora.

When Mr. Smith outlines the goals of Bell Atlantic, I am candidly impressed. I have seen Bell Atlantic operate in my hometown over many years, and I would like to see competition in cable and in telephones both in Pennsylvania and in Philadelphia. I would like better cable service also in Washington where they are also present. Bell Atlantic and QVC and Comcast all have very substantial roots in Pennsylvania.

When I take a look at the statements which are made by Mr. Redstone, as I heard them yesterday afternoon and read his statement and hear them this morning, I am very concerned. I have examined in a cursory fashion a very extensive complaint which Viacom has filed against TCI in the Federal court alleging antitrust violations.

I don't know what the facts are, but if TCI is going to have access to 50 percent of American households, then I have grave doubts about the public policy wisdom of such an arrangement; but I repeat, I don't know what the facts are. I have been provided with a chart which talks about vertical integration and horizontal integration, and I think we may soon, if this is all so, have diagonal integration, with as extensive as these issues are.

I am just a little disappointed that Dr. John Malone is not present today, but I understand the problems of scheduling.

Senator METZENBAUM. He has been invited and he was out of the country, but we expect him to be before us at a subsequent hearing.

Senator SPECTER. Well, I would hope that he would be present. When we talk about the kind of allegations—and I emphasize that they are allegations—that Mr. Redstone has made, and I don't know what the facts are, but if these facts are proven, it is a very serious question.

I have been dissatisfied with antitrust enforcement back through many administrations, both Republican and Democratic. I don't think we have had nearly enough vigor in antitrust enforcement. Fortunately, there is a remedy on private right of action, and the Viacom Co. has commenced a complex lawsuit with a big, thick, fat complaint. It would be my hope that Viacom would pursue that in Federal court. There are procedures with the temporary restraining order and preliminary injunction to bring this matter into court promptly and to see what can be proved.

I do not think it is possible for this subcommittee to begin to sort out all these complex factual allegations and potential defenses. When I listened to Mr. Diller on the telephone for a few moments this morning, he had quite a lot to say on the other side. I understand that Mr. Redstone and Viacom have some concerns, motivations perhaps, not to see the QVC merger take place with Paramount. I understand that, but whatever the motivations are, what

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is of concern to this committee and me and others is what the facts are. So I would hope that Viacom would proceed to try to produce a resolution of the facts and put up the evidence to the extent that they have it.

Speaking for myself, and perhaps for others on the committee, we are not going to get involved in whether Viacom or QVC ought to merge with Paramount—that is another question—unless there are antitrust implications in and of itself. But there are very profound public policy interests involved here on the consumers of America in cable television which are enormously, enormously important.

As I say, I will try to return to participate in the questioning, and I think that we are going to have to scrutinize this matter very closely. I hope that the new antitrust chief, Ms. Anne Bingaman, a very competent lawyer who heads that division, will take a close look and that we will be able to find out what the facts are so that we can come to an informed judgment.

Senator METZENBAUM. Thank you very much, Senator Specter.

Senator Hatch, do you have an opening statement?

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

Senator HATCH. Thank you, Mr. Chairman. This hearing is a very interesting one to me, and the issues surrounding this hearing are very interesting. In my view, the question posed by the title of this hearing, "Will Telecommunications Mega-Mergers Chill Competition and Inflate Prices," manages to be both leading and misleading. The answer to this question is clearly not the reflexive unthinking "yes" that the question invites. This question must instead be examined in light of the revolutionary changes underway in telecommunications.

Until now, the local markets for telephone and cable have developed and have been regulated as separate natural monopolies. Real competition within each market has been viewed as technologically infeasible and regulatory walls designed to prevent the leveraging of market power into other market products have reinforced the local monopolies.

Now, however, technological changes are rapidly rendering obsolete the assumptions that have governed regulation of local telephone and cable markets. Specifically, remarkable advances in wired and wireless communications will soon make vigorous competition possible in both the local telephone and cable markets. The regulatory walls protecting each of these monopolies are rapidly crumbling and the markets themselves are merging.

The collapse of these walls will not only subject the local telephone company and the local cable company to competition; it will also free them to venture out to compete on each other's terrain. The sooner the local monopolies are ended, the more the American consumer will benefit. Promotion of competition in the telephone and cable markets is therefore the surest path to low prices and quality service for the American consumer.

This hearing centers on two prospective mergers, one between a local telephone company, albeit a very large one, and a cable system, the largest; the other a battle within the cable industry for

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control of a movie studio. I hope that this hearing will examine, among other issues, important questions such as: What existing regulatory barriers impede the development of competition in the telephone and cable markets? Do alliances between local telephone companies and out-of-region cable companies offer the best prospect of vigorous competition in the emerging combined market? What threats to long-term competition are posed by acquisitions during this transitional phase that we are now in? These are interesting questions.

I have met with everybody testifying here today on this first panel, and I have to say that I am concerned about some of the problems that have been raised. I do think that it is important, Mr. Chairman, that Mr. Malone testifies before the committee and that he be prepared to answer some of the questions that we have. I think it is critical because this is not some little itty-bitty thing; this is a very, very big set of processes and set of determinations, and I, for one, want to do what is right and proper under the circumstances and under the law in this situation.

Thank you, Mr. Chairman.

Senator METZENBAUM. Thank you very much, Senator Hatch. Let me make it very clear, we had indicated to Mr. Malone that we would like to have him present here. I could not speak with him; he was out of the country. I spoke with his representative. He told me they would consider coming before the committee. I told him we would expect him to come before the committee at a future date, and we will work that out in the not too far distant future.

I also spoke with Mr. Barry Diller and he indicated a complete willingness to be with us, and it is just a matter of scheduling. We also expect to hear from Mr. Allen, chairman of the board of AT&T. So we want to see to it that—and I am sure all of the committee members feel the same way, and that is that all of the parties to these matters be given an opportunity to be heard and that we be given an opportunity to inquire of them.

With that, we will proceed forward with some questions and we will start with you, Mr. Smith. Mr. Smith, until this merger was announced, I had hoped, based on your company's past assertions about competition, that Bell Atlantic would build a video platform which would be the most formidable competitor to TCI's cable monopolies in the Bell Atlantic region.

You claim that you still will move to compete against cable. Frankly, Mr. Smith, I am skeptical. Even if you are not allowed to control both wires into the consumers's homes, you will no longer have strong reason to compete aggressively against cable companies. In fact, there is every reason to believe you will sell the TCI cable systems in your phone region to companies that won't aggressively compete against you. You and I both know you can make sales to people who could be very aggressive competitors and you can make sales to those that would not have sort of an understanding to lay back and not come on too strong as a competitor.

I know there are lots of ways to achieve that kind of an objective, realistically speaking. I believe you will have the power to leverage TCI's vast programming and extensive cable systems to intimidate your competitors and discourage or prevent them from competing with you aggressively.

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Isn't it true that if this merger were approved, you could block other phone or cable companies from competing with your phone business because of the control that you have over so much popular programming and the vast number of people that your cable systems would reach?

Mr. SMITH. No, it absolutely is not true, Senator. It is our intention to spin off all of the TCI and Liberty cable systems that are in our territory in a way that will benefit the shareholders of the corporation. We will do that in a way that will be consistent with all of the laws of the land and we will not have any kind of cozy arrangements with anyone at any time. It is the tradition of our company, Bell Atlantic, to remain above reproach when it comes to handling situations of this sort.

Somebody said that it is the definition of intelligence to be able to hold two conflicting ideas in your mind at the same time, and that means that sometimes we are going to have to deal with people as competitors and at the same time they may be suppliers, such as AT&T. We compete vigorously against AT&T. We compete vigorously against Southwestern Bell. We compete vigorously against all sorts of companies that are in our territory. We plan to do exactly that.

We will build the world's best video network in the old Bell Atlantic region. We will compete with the cable companies that are there, whether they were owned by TCI or not in the past. And we have a precedent to this. Back in 1984 when the Bell System was broken into eight parts, AT&T and the seven regional holding companies, there were questions of the sort that you posed. People said, well, these are friends and they are going to have, at least at the very beginning, the same shareholders, and so on; they won't compete against each other. Well, I think that that has proven absolutely not to be true.

We are strategic competitors against virtually every one of the former members of the Bell System, and that is exactly what we will do, and we don't do that just out of an altruism, Senator. We do it because it is good business. The video market is large. The interactive video market is going to be gigantic. It is very much to our advantage to compete very directly against those cable companies.

The cable companies that will be spun off are likely to be spun off to companies like AT&T, Bell South, Ameritech, excellent companies who are going to be doing the same sorts of things as we are out of their region. They are going to be competing against us for telephone and we are going to be competing against them in our territory in video. So I don't see this in any way being advantageous to our shareholders, and it certainly is not something that we would ever consider doing.

Senator METZENBAUM. Well, Mr. Smith, Bell Atlantic is a very well-respected company.

Mr. SMITH. Thank you.

Senator METZENBAUM. And I hold it in the highest regard. You made one statement that caught my attention. You said Bell Atlantic would always want to conduct itself in a manner that would be above reproach.

Mr. SMITH. Yes, sir.

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Senator METZENBAUM. But the fact is that I am not sure exactly when you did it, but not too long ago Bell Atlantic was saying that the cable rates should be reduced 28 percent. I came in from New York early this morning and glanced at the Washington Post and saw you had now changed your position on that, you said we will have to reconsider that position. Now, that sort of sounds like, well, I am on a different side of the table now; now, I am in the cable business and I don't think this 28-percent reduction should be the fact.

I have to say to you that we are all realists. You are a business person. I came out of the business world, and if you are going to own the cable companies, you don't want cable rates to be reduced 28 percent. But before when you weren't in that position of owning TCI, you were for it. That is not exactly the kind of image that you tell us Bell Atlantic maintains and wants to continue to maintain. Would you care to address yourself to that?

Mr. SMITH. Yes, certainly. When we were providing testimony concerning the Cable Act, we were concerned about rights and we made statements of that sort. That still is to our advantage. As you know, Senator, we are in a letter of intent stage. We haven't signed a definitive agreement and we certainly haven't closed on these properties, and you should be aware that there is a cash-flow test in these properties which states that we will pay a certain multiple of the cash-flow. So if the cash-flow is slightly lower, we pay a lower price. So I am not retracting that testimony.

We are going to have to review all of our positions so that we represent our shareholders and our customers. All of the positions that we made in the past were made sincerely. We felt that they were appropriate. I am not retracting that, but we will have to consider as circumstances alter cases and we go forward.

I feel that our company has been above reproach. What we have attempted to do was to represent all aspects of our constituency, which is our customers, our shareholders, our employees, and the communities. We try to do it in a balanced and reasonable way so we provide a fair return and we provide good jobs and we provide good value to the customers, and we are good citizens in the community. So, as we make these positions and we change over time, we are doing it as circumstances alter, so I don't think that that is in any way a change in our basic position.

Senator METZENBAUM. Are you saying to me that you need monopoly profits from cable consumers in order to complete this deal?

Mr. SMITH. Monopoly profits, sir?

Senator METZENBAUM. Yes.

Mr. SMITH. Would you explain?

Senator METZENBAUM. Well, if there is no competition—we were looking at a world prior to this deal being made where it was reasonable to assume and everybody in the field felt that the day was coming when the Bell companies would be in a position to compete with the cable companies by having the second wire into the home and providing a similar service to that which cable provides.

Mr. SMITH. Absolutely.

Senator METZENBAUM. Now, the question is, when you eliminate that, when you are in control of both of the wires—and even though you say we will sell off one, the fact is you are saying to

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us now you need the profits that that monopoly gives you, which is what TCI now has. Before, you were telling us there was a 28-percent reduction that should be made, and now I gather from the morning paper you are saying this is something we will have to reconsider.

Mr. SMITH. I will have to read the morning paper, Senator, but the fact is that we made that statement and we still think that that is reasonable. The fact of the matter is, though, we will not own both sides of the wires. Let me see if I can make that clear.

All across in the red parts that you see on your map there, TCI is the cable operator. They will build full-service networks in those areas and they will compete with all comers, not just other cable competitors such as direct broadcast satellite or 28-gigahertz systems that are going to provide sort of short-term wireless cable or any of the others. All comers will be competed with, including the telephone companies.

We fully expect that the telephone companies will do what Bell Atlantic is going to do in the yellow areas, and that is to equip their networks with cable capacities that will deliver the equivalent of video dial tone to all of the customers. It is to our advantage at Bell Atlantic to compete directly with all of the cable companies that are in that yellow territory.

We will never control both sides of the line. I sent a letter just yesterday to yourself and a number of members of the leadership making that very, very clear. We made that statement clear to the Justice Department.

Senator METZENBAUM. Mr. Smith, I am going to have to ask you to make your answers a little shorter because of time constraints.

Mr. SMITH. Yes, sir.

Senator METZENBAUM. But are you saying to me that people in those red areas should be getting 28-percent rate reductions? Is that what you are saying?

Mr. SMITH. No, I am not saying that, Senator.

Senator METZENBAUM. I didn't think so, but that is what you said when you appeared before one of the regulatory bodies.

Mr. SMITH. Senator, I didn't appear before the body.

Senator METZENBAUM. No; I understand.

Mr. SMITH. That was a Bell Atlantic statement that was made.

Senator METZENBAUM. When I say "you," I mean Bell Atlantic.

Mr. SMITH. And under the circumstances at that time, they felt that there should be a reduction in the rates at that level.

Senator METZENBAUM. Mr. Smith, you claim we don't need to worry about the proposed merger because of the nondiscrimination provisions of the 1992 Cable Act.

Mr. SMITH. That is correct.

Senator METZENBAUM. You claim under the act you won't be able to leverage and discriminate, as John Malone did, so there is no problem with your owning all of TCI's programming. However, if you are so confident that the law will work, why did you decide that you needed to pay a hefty price to own all of this programming?

Mr. SMITH. Well, let me say first of all that the accusations made at this table and by others about John Malone are unproven, and America has a long and cherished tradition of unsupported and

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unproven accusations and counteraccusations during acquisition battles. So I am not about to comment on which pot is calling which kettle black, but I cannot sit by and say that John Malone has done these things. These things that are absolutely unproven.

Senator METZENBAUM. I am not sure I would agree with that. From my own personal experience, I remember when a little wireless company in Cleveland was trying to get into the marketplace and just had the squeeze put upon it, and it seems to me that I have some recollection of other instances in which John Malone has indeed wielded his monopoly power.

Mr. SMITH. No offense, but accusations are not proof. But the fact of the matter is I am not prepared to comment on those, and there are accusations made the other way, of course. But the fact of the matter is that the reason for the Bell Atlantic and TCI merger is this, that we felt as we looked ahead that this country was going to move toward interactive video systems that will be delivered to every single home.

As I said in my testimony, this is going to be a very important societal benefit. It is also going to be a very good business. We concluded in Bell Atlantic that we didn't have the programming and cable experience and it would take us an awful long time to develop it. We looked around this country and we said which companies had this kind of experience, and we saw the fine companies of Comcast and Time Warner and TCI and we concluded that the best match for us would be TCI.

We paid the price, or offered the price to TCI and Liberty Media based on the value that we saw in the future. The core competencies of those companies matched ours perfectly. We had a way and means that we felt we would spin out any kind of conflicting assets within our region. We would promote competition outside of our territory and we would bring fierce competition inside the territory by equipping our existing network to become that superhighway. So that was the reason that we wanted to do that. This is a wonderful new business for us and we saw them as the best possible partner.

Senator METZENBAUM. Senator Hatch, I have got another question for Mr. Smith, then I will yield to you and then I will come back to Mr. Smith.

Senator HATCH. I would appreciate it if I could because I do have to leave.

Senator METZENBAUM. I will just ask one more and then yield to you.

Senator HATCH. OK, thank you.

Senator METZENBAUM. Under your merger agreement, I understand that through TCI you would own a large share, 30 percent, of Teleport, a company that has begun to provide direct competition with local phone companies in New York, Boston, Chicago, Dallas, Los Angeles, and is moving into the Bell Atlantic region particularly with respect to New Jersey, Pennsylvania, and the District of Columbia.

If this merger goes through, you would then have a 30-percent share of Teleport. Wouldn't you then be able to stifle telephone competition which would otherwise develop from Teleport?

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Mr. SMITH. We would seek to do exactly the same thing with Teleport as we are doing with the in-region cable. We would think it would be inappropriate to be on both sides of the competitive wire, whether that competitor was a former TCI cable company or a former Teleport company. So we would seek to divest all conflicting assets of that sort.

Senator METZENBAUM. Senator Hatch?

Senator HATCH. Thank you, Mr. Chairman.

Mr. Smith, as you have heard again this morning and as you know, TCI and Mr. Malone have been accused of a broad range of abusive anticompetitive practices. Now, I admit these are accusations and I am eager to hear Mr. Malone's account. I understand why he can't be here, a conflict in scheduling, but I think he is going to have to come. In his absence, though, let me just direct a couple of questions to you.

Mr. SMITH. Surely.

Senator HATCH. First, is Bell Atlantic's acquisition agreement with TCI in any respect contingent upon QVC's successful acquisition of Paramount?

Mr. SMITH. No.

Senator HATCH. What role would Mr. Malone play in the combined Bell Atlantic-TCI merger?

Mr. SMITH. Mr. Malone would be vice chairman and I will be chairman of the board. Mr. Malone will be responsible for the development of new programming, especially in the interactive, multimedia area.

Senator HATCH. One of the basic concerns that Viacom has expressed about TCI is that its size in the cable systems market allegedly gives it monopsony power in acquiring programming, and that it allegedly has leveraged and will continue to leverage that power into monopoly power in the programming market. Now, would you agree that if these allegations are true they would pose a serious threat to competition and to the welfare of American consumers?

Mr. SMITH. I think that the allegations are based on a model of the industry which is rapidly changing.

Senator HATCH. But what if they are true?

Mr. SMITH. The model was that there was one cable operator in each location and there were limited numbers of channels that were available, and this scarce commodity into the living rooms could be controlled by one person or another. Many of those concerns have been addressed by the 1992 Cable Act. It is a good act and it requires that unaffiliated content providers have access to whatever number of channels there are.

But the fact is that the paradigm is changing. With compression technologies and with wireless technologies, the capacity into each city and to each home is increasing almost exponentially. We are not talking about 30 channels that are limited anymore, or even 500 channels. The kind of interactive network that we are building is based on the telephone model; that is, it is switched and any individual who has content will have access to this new network, and we will be able to provide their contact into the home. So the old model, I believe, is no longer operational.

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Senator HATCH. But would you agree that these allegations merit careful examination by antitrust enforcement authorities?

Mr. SMITH. I think that all aspects of this deal will require careful consideration, and we expect that and we want that so that we can go forward on an even basis.

Senator HATCH. On pages 16 and 17 of his written testimony—and I have read the testimony—Mr. Redstone poses seven questions to be asked of TCI. Now, may I request that you and Mr. Malone provide answers to those questions to the committee?

Mr. SMITH. Of course.

Senator HATCH. All right, thank you. Now, I have a question regarding the proposed divestment of TCI's cable operations with Bell Atlantic's region. Let me say parenthetically that this divestment eliminates what, from an antitrust perspective, would be the single most potentially troublesome feature of the acquisition.

Mr. SMITH. Yes.

Senator HATCH. Could you explain how the divestment would take place under the acquisition agreement, because as I read the acquisition agreement transfer of in-region cable operations to another company would be contingent on that company agreeing to subscribe to Bell Atlantic's video dial tone network service? I want to know if that is a correct reading, and if so, how would you respond to the concerns that this provision itself might be anticompetitive or might have anticompetitive consequences?

Mr. SMITH. The spin-out of the TCI assets in the Bell Atlantic region is not contingent upon the taking of Bell Atlantic's video dial tone service. This is an offer that we have made to every cable company in our operating territory and a number of them have accepted it. This is an arrangement by which the video dial tone network is built. It is either owned or co-owned by either or both of the parties. It passes all of the scrutiny of the Justice Department to make sure that, although capital may be preserved, which is the idea behind this, competition is also preserved. The approval of those agencies is required before any of these kinds of systems could be put up, but it isn't contingent on that.

Senator HATCH. One last question. Are there any existing regulatory barriers to competition in the cable market that you believe are outdated?

Mr. SMITH. Yes; we went to court, as you may recall, in Alexandria and said that the 1984 Cable Act was unconstitutional on first amendment grounds. Bell Atlantic won that case and it was applied without a stay, pending appeal, to Bell Atlantic only.

We personally feel that there should not be any kind of cross-ownership for cable and that telephone companies all over the countries should be permitted into this field. Free and open competition is really going to be very good. It is going to not only, I believe, provide more choice and convenience, it is also going to provide in the long run lower prices and it will also expand the market. So, yes, I think there is that cross-ownership that is inappropriate even today.

Senator HATCH. Thank you. Mr. Chairman, I just have a couple of questions for Mr. Redstone. I have only taken about 5 or 6 minutes. Could I just finish these?

Senator METZENBAUM. I have no problem, but Senator Simon——

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Senator HATCH. Do you mind, Senator Simon, because this is very important as far as I am concerned?

Senator SIMON. Go ahead.

Senator HATCH. There is a lot riding on it for all sides here. We really do need to go into this in perhaps more detail than what we are doing here today, and I appreciate our distinguished chairman holding these hearings.

Mr. Redstone, as I understand it, your concerns center on TCI's alleged power in the cable systems market. Now, do you agree that technological changes make competition within the local cable market possible, and if so, will these changes suffice to prevent the consolidation or maintenance of abusive market power?

Mr. REDSTONE. No, they won't. If I may suggest——

Senator HATCH. If you will get a little closer to your mike, I think it will help.

Mr. REDSTONE. We have all heard about this 500-channel cable system. Well, I will believe it when I see it. Right now, there is a limited channel capacity throughout the United States. What you have here, however, is control, not only horizontal control of cable, such horizontal control that right now, forgetting the track record of anticompetitive behavior, Mr. Malone decides what people can hear and see in the United States, not only in his cable franchise area but in the United States because if a cable channel cannot succeed, it doesn't succeed anywhere.

That kind of power should not be in the hands of any one person. That kind of power will be enhanced in two ways; first, by an acquisition of Paramount and, second, by this merger. It is not simply the control of the gate; it is the control of the programming services. Mr. Malone, through his own entities and related entities, controls 25 programming services. He controls 16 regional sports channels. Are we to give him Paramount's one regional sports channel?

Right now, he is able to discriminate against every programmer. I assure you, you will not find any programmers here to testify, except those affiliated or particularly friendly with Mr. Malone, because if they do their life is in his hands. If you add the Paramount library to Mr. Malone's enormous program holdings—those aren't disposed of as a result of this merger—he can further discriminate against other programmers and eliminate their necessity on his cable systems.

But, finally, forgetting the track record of anticompetitive behavior—we say it is not proven; it was proven enough for Senator Gore to call it holding ransom, a shakedown, in the words of Senator Gore, and he was right. Forgetting that, nobody should have this kind of power. Nobody should be the gatekeeper to consumers to cable, to access to cable.

Senator HATCH. But doesn't the 1992 Cable Act already proscribe the activities that you allege that TCI has engaged in, and why can't sufficient relief be obtained for these alleged violations either through the courts or through the FCC?

Mr. REDSTONE. Well, I assume they can, and if we could only secure a vigilant look at the antitrust implications of the proposed merger of QVC and Paramount, as well as Bell Atlantic and TCI, that is all we have a right to ask. The hope that these concerns which we express—we do have a private ax to grind, but we believe

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our concerns rise to the dignity of issues of great public concern which will affect the future of the telecommunications industry. We believe that they should be seriously looked at by the antitrust authorities. We have no right to request anything more than that.

Senator HATCH. Do you support or oppose eliminating existing restrictions on the ability of telephone companies to compete in the cable business?

Mr. REDSTONE. I think that telephone companies should be allowed to compete. I think that competition of every kind is good for America, but while we hear about all this potential competition for newcomers, the fact of the matter is that this merger, particularly with TCI, eliminates competition between a proven monopolist and Bell Atlantic. That is the immediate result of this.

We have heard today, if I may just add one thought, that we all want a state-of-the-art superhighway to the American home. We think that is a good idea. We don't think it should be in the control of one man.

Senator HATCH. Well, one last question. Does the Bell Atlantic acquisition exacerbate any of your concerns? If so, how? Let me just add this to it. How does the fact that the combined Bell Atlantic-TCI entity would have access to half of the American homes reflect a threat to competition if other telephone and cable entities would also have access to such homes?

Mr. REDSTONE. I think what you have, sir, is the fact that with just 20 to 25 percent of cable homes in the control of John Malone, reaching just that part of the country, you have clearly anti-competitive behavior. You clearly have serious antitrust issues merely by the existence of the power, getting away from the abusive power.

Remember, these people who have these monopolies are gatekeepers. They decide who can get in and they decide what programmers can get in. When you add just his partners, you now have a reach to one-third of the homes of America. When you add Bell Atlantic, you have a reach by one company into 50 percent of the homes of the United States. That is too much power for anybody.

Senator HATCH. I have used up enough of my time. I am sorry, Mr. Davis, I won't ask you any questions. I am sure you will miss that. [Laughter.]

But I have really enjoyed this and have appreciated all of the testimony here today, both the written and the oral. Thank you.

Senator METZENBAUM. Thank you, Senator Hatch.

Senator Simon?

OPENING STATEMENT OF HON. PAUL SIMON, A U.S. SENATOR FROM THE STATE OF ILLINOIS

Senator SIMON. Thank you, Mr. Chairman. First, I want to commend you for holding this hearing. I think it is important that we look at any concentration of economic resources in our country, and I think the Antitrust Division of the Justice Department also has to look at this very carefully. I confess, as I have told one of you at the table, I probably know less about this whole merger than most members of this subcommittee. But I think whenever you

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have this kind of concentration of economic resources, we have to look at it.

I would say, second, I am concerned not just in this field, but in general, about how we are allocating our capital resources in our country. To the extent that you have a stock-for-stock transaction, that is a healthy thing. We talk a great deal about the Federal Government's deficit, and I have been one of those who has talked a lot about it. But it is really a culture of debt that we have created in our society that applies to corporations, it applies to consumers, as well as to governments.

One of the changes in the tax law that came about the other day that Senator Metzenbaum and I did not vote for was to, for the first time since 1927, permit corporations to write off goodwill when one corporation acquires another corporation. I might add, I am going to be introducing legislation—I would be happy to have you as a cosponsor, Senator Metzenbaum——

Senator METZENBAUM. You got me.

Senator SIMON [continuing]. To rescind that provision as of the effective date that the President signs the legislation.

Third, I am concerned about this—and I mentioned to Mr. Smith the other day when he stopped in the office—I am concerned about telephone companies getting into the cable business and the allocation of costs. A February 1993 GAO report says the FCC simply doesn't have the resources to monitor cross-subsidization adequately. I am also sure the various State regulatory bodies do not have the resources to monitor that adequately, and I fear that the consumer can lose out in the long run in this kind of a situation.

Then, finally, since I have the three of you here—and unfortunately I am just moving from committee meeting to committee meeting this morning and I am going to have to leave in just a few minutes. But since we have all three of you here who represent sizable investments in cable, one of the problems that we are trying to work on is this whole question—and this is not a dollar bottom line, but a cultural bottom line—the whole question of entertainment violence on television that glorifies violence.

The research is just overwhelming. The Surgeon General has twice given us warnings, and the National Institute of Mental Health has as well. No serious researcher questions the reality that entertainment violence is adding to violence in our society. The broadcast networks have moved some. How permanent that move is is a concern of mine. I have to say candidly cable has been much less responsive in terms of where we are going.

If I may just toss this one question at you—and there will probably be another panel on here before I get back, and I will also have some written questions in some other areas. But since we have the three of you here, what is your feeling in this whole area of the glorification of violence? Obviously, if you are going to have a program on the Civil War, it is going to have to have violence in it, but the glorification of violence, what one researcher calls "happy violence," is out there far too much.

Mr. SMITH. I would like to start, Senator. As a father, and soon to be a grandfather twice, I am as concerned about the sex and violence on television as anyone and I really look forward to working

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with this new industry that we are in and also with the Congress to resolve the issue.

I would like to make one comment, though, and it is a question you might want to ask yourself as to why programming is so vulgar and so violent today. One of the reasons is that the programmers are addressing a very large audience through only the number of channels that exist today. They end up programming at the lowest common denominator.

A quote here from George Gilder that struck my eye said that television is not vulgar because people are vulgar; it is vulgar because people are similar in their prurient interests and sharply differentiated in their civilized concerns.

What we are about to do is to create a high-capacity interactive network that will break down that old paradigm. We are going to spend $15 billion upgrading TCI's network and Bell Atlantic's network. It is going to provide a variety of specialized programming, information and services to the public. They will have much more control than they ever had in the old broadcast paradigm. The vulgar will remain, but it will not be broadcast to every single house on the block.

Senator SIMON. Well, if I may just comment, then I want to hear from the two of you. When you say "the vulgar," if something is vulgar, it may offend you and it may offend me.

Mr. SMITH. I was using it as a euphemism for all of that stuff we hate.

Senator SIMON. But the reality is the violence and the glorification of violence is not simply vulgar; it is not simply offensive.

Mr. SMITH. I agree.

Senator SIMON. It does harm.

Mr. SMITH. It creates a pattern in the minds of some people and it becomes the norm, I am afraid.

Senator SIMON. Yes, and what I would like to do is see some cable people step up and say we want to eliminate this. We have one of the best-known children's programs in this Nation that is produced in two versions—one is the violent version for the United States and the other is the nonviolent version for all the other countries in the world. When the Christian Science Monitor asks a spokesperson for the program why, she says in the United States we expect violence and we have no adverse reaction; we can't sell it in other countries. Something is wrong, and I think cable has to join the broadcast industry in doing something about it.

Mr. SMITH. Whether "Beavis and Butt-Head" would sell across this globe the way it sells here in the United States is a real serious question, as someone who is now entering this new industry.

Senator SIMON. Mr. Redstone?

Mr. REDSTONE. In the first place, I can beat the gentleman to my right in one respect. I have five grandchildren and I am very concerned about their viewing habits. In fact, notwithstanding the last comment, I think that Nickelodeon has been generally praised here and throughout the world for the contribution it makes to children's education and programming, and we take that responsibility very seriously.

I think MTV performed a true service in bringing out hundreds of thousands of people who had given up on the system to vote in

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its Choose or Lose campaign last year. As far as the slur on "Beavis and Butt-Head," what took place there was that we developed a program that was basically a satire on the foibles of America. We did not expect young children to be watching it. We learned a hard lesson. The program was immediately moved to late at night and a thorough search of the editorial comments of that "Beavis and Butt-Head" show.

Believe me, we are committed to anything that will eliminate gratuitous violence in programming in the United States. Nor do I believe that the addition of 40 more channels necessarily brings about the result that violence will be diminished. That depends upon the responsibility of the programmer, not the number of channels.

Senator SIMON. Mr. Davis?

Mr. DAVIS. Senator Simon, I am pleased to see this so far has been a nonviolent session. [Laughter.]

We will try and keep it that way.

Senator SIMON. Yes.

Mr. DAVIS. In the 30.5 hours of programming that we at Paramount produce today, perhaps the one show that you have singled out is "The Untouchables" of all the shows that we have, and we are cognizant of the issues that have come up on violence. We are sensitive to it. We are working with you, not only ourselves but through the Motion Picture Association. We are working with the networks. We are working with those cable operators, or programmers I should say, that will function with us, and we intend to do something about it. We are aware of it. We don't necessarily agree on all of the issues, but I think you will find remarkable changes in the future.

Senator SIMON. I thank you, Mr. Chairman.

Senator METZENBAUM. Thank you, Senator Simon.

Senator Specter?

Senator SPECTER. Thank you, Mr. Chairman.

Mr. Smith, when I was reciting in my opening statement some of the allegations of Mr. Redstone, I saw you nodding in the negative. I would be pleased to hear any comment you would care to make on what Mr. Redstone had to say about TCI's alleged monopoly powers.

Mr. SMITH. Well, as Mr. Redstone began to add up all of the areas of TCI's control, I thought for a moment we were approaching 125 percent of the country. I believe that the figures are exaggerated and are incorrect. The fact of the matter is that if you count, as Mr. Redstone did, all of the telephone and all of the cable subscribers in this country, there are 175 million cable and telephone subscribers, and TCI and Bell Atlantic have 22 million of those. So you can take those two numbers and divide them any way you like and add others that may be influenced. But in this world of competition that we are entering, no company is going to have the kind of control that Mr. Redstone suggests or accuses TCI of.

Senator SPECTER. Well, that is a factual question we will have to inquire into further.

Mr. SMITH. Of course.

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Senator SPECTER. Permit me to ask you if, in fact, TCI did have a 50-percent market share or access to a market share, would you consider that excessive in the public interest?

Mr. SMITH. If TCI controlled 50 percent of the 175 million telephone and cable subscribers, I would say you would have some real questions there.

Senator SPECTER. You and I talked briefly yesterday about the additional capital and jobs which would be created.

Mr. SMITH. Yes.

Senator SPECTER. That is always a comment of desirability. Would you tell us how much capital would be provided by the proposed Bell Atlantic-TCI merger and how many jobs that would create nationally, with some focus on Pennsylvania? [Laughter.]

Mr. SMITH. I will have to use some Kentucky or Pennsylvania windage here, but basically as we build the business plans for the new interactive networks that we will build in the old TCI and in the new Bell Atlantic territory, we, as I said in my testimony, will be spending something in the neighborhood of at least $15 billion over just the next 5 years.

We expect those investments to accelerate beyond that. There will be two effects of that, one of which will be the actual jobs in our territory and, by the way, in all of the other telephone territories and cable territories in this country that will, I believe, take this merger as the model for the future and they will build their own levels of networks.

But there will be two levels of jobs, first of all those jobs that are involved in the building of the network itself. Those are linemen and splicer jobs, jobs that involve building of the fiber optic highways themselves, the programmers who will program the new systems. This is the computer programmers, not counting all of the others that will be involved in the deployment of the information.

At the end of that 5 years, we are going to be talking about thousands and thousands of jobs in Pennsylvania. I can give you one hint as to the number. I believe in Pennsylvania alone, in our current plans we have something in the neighborhood of $2 billion to spend in just this 5-year period after the merger, so we are talking about substantial investments in this network.

But beyond that, just think about what kinds of services these are going to spawn. QVC, for example, is a very rudimentary—and I am not talking about it in terms of any bid; I am talking about it as a service. QVC is a very rudimentary kind of service. It is on one channel and it is not all that easy to buy the services. Yet, there are 5,000 people who work for that company across the country—by the way, Senator, 2,500 of them in Pennsylvania—who produce this very, very rudimentary shopping service. As it becomes interactive, as it becomes even broader, this and the other kinds of home shopping and home information services are going to create jobs in that magnitude, thousands of jobs, sir.

Senator SPECTER. Thank you, Mr. Smith.

Mr. Redstone, your statement contains some very strong allegations. You have the charge here that TCI was able to pressure CNBC into not going to a news format because it would compete with CNN, which has a significant control factor by TCI and Dr. Malone. You might be interested to know, if you don't know al-

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ready, that CNBC covered your full testimony and they cut off when it came to my opening statement. [Laughter.]

Mr. REDSTONE. Believe me, I have no control over CNBC, sir.

Senator SPECTER. You have no control. Perhaps there is coverage by indirection. They want to be sure to not be subject to a charge of unfairness.

You then say in your statement that "Vice President Gore called the CNBC situation a 'shakedown' by TCI." Now, it may be that Vice President Gore is not totally without influence in the Clinton administration. Given his attitude on the subject as you articulate it, why can't you get the Department of Justice to act on your charges?

Mr. REDSTONE. I would like to answer that, but may I, Senator, just refer to one statement that was made by Mr. Smith?

Senator SPECTER. As soon as you have answered my question, you may.

Mr. REDSTONE. Well, we would hope that he would become interested.

Senator THURMOND. If you don't mind, speak in your microphone.

Mr. REDSTONE. We would hope that Vice President Gore would become interested. As a matter of fact, Vice President Gore also said that John Malone was the godfather of the cable industry cosa nostra, so we would think that he should be interested in the public policy issues that we have raised in our complaint. Incidentally, we realize that it is not the function of any government body to deal with a private dispute. What we say is that this private dispute involves issues of great national concern.

Senator SPECTER. Well, have you asked the Justice Department to look into these charges?

Mr. REDSTONE. Our lawyers have been meeting with the Justice Department. I believe at the request of the Justice Department, our technology people have been to the Justice Department to discuss in detail the bottlenecks in the transmission of the signal in the United States. We have met with Mr. Neel, who is the Deputy Chief of Staff at the White House.

What we are really seeking is no more than a good, hard look at what is taking place here. We are satisfied, if that takes place, there will not be a Paramount merger with QVC, which was incidentally just described as a rudimentary shopping channel.

Senator SPECTER. Well, did you take those complaints to the Department of Justice——

Mr. REDSTONE. Yes.

Senator SPECTER. Excuse me. You haven't heard the question yet—before you filed your Federal antitrust suit?

Mr. REDSTONE. No.

Senator SPECTER. Why not?

Mr. REDSTONE. I am not certain. I guess we thought it was our responsibility to file the complaint. It may have been a better procedure to discuss it with them at that time, but we did go to the Department of Justice to express the complaint.

Senator SPECTER. Well, the private right of action is really a supplement to the Department of Justice. I would think that you would look to them. If they file the complaint, you don't have to pay the filing fee.

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Mr. REDSTONE. Well, I would agree with that, Senator, but it is not always possible to stimulate a Government agency to utilize the necessary resources to approach abuses of the kind that exist. We are really hoping that we will be successful in having the antitrust agencies take a good, hard look at Paramount-QVC and Bell Atlantic-TCI.

Senator SPECTER. I have many more questions, but I will ask only one in the interests of time because there are so many more witnesses, and that pertains to your statement on page 5 which you made orally that TCI has threatened to "crucify" The Movie Channel by dropping it from TCI's cable system in favor of Liberty's own Encore service.

Now, in a context where TCI has sufficient market power to make that kind of a threat and complete it, what is the quality of your evidence that you have on such a serious charge?

Mr. REDSTONE. We will introduce evidence by employees discussing this matter with employees of TCI who used the phrase—this is not a phrase that we made up—"we will crucify you if there is not a deal done that satisfies John Malone."

Senator SPECTER. Well, a final statement, Mr. Redstone. If you have that quality of proof, I hope you will go into Federal court, seek a temporary restraining order or preliminary injunction, and then we will really know what the facts are if they are submitted to a court and you have an adjudication.

Mr. REDSTONE. We assure you, sir, that the allegations made in our complaint are not frivolous. Every one of them will be proven.

Senator SPECTER. Thank you.

Senator METZENBAUM. Senator Thurmond?

OPENING STATEMENT OF HON. STROM THURMOND, A U.S. SENATOR FROM THE STATE OF SOUTH CAROLINA

Senator THURMOND. Thank you, Mr. Chairman. Mr. Chairman, I want to make a brief statement and then I will have a few questions.

The hearing this morning seeks to address the complex issues involved in the telecommunications industry by looking at consolidation which recently has been proposed. These issues are exciting because traditional telephone, cable television, and wireless technologies are rapidly converging, which may bring new products and strong competition into areas that have not experienced the invigorating effects of competition in the past. We are at the point where cable systems have the ability to begin offering telephone services, while telephone companies may be able to provide video services over their telephone lines.

The role of the Congress should be to encourage competition in these converging technologies so that consumers benefit from better services and lower prices. We should make sure that laws and regulations keep up with technological advances so that we do not unnecessarily restrain competition where it could flourish in the marketplace.

Certainly, this hearing should not be taken as a signal to investors or the antitrust enforcement agencies that the specific transactions being discussed are disfavored or will not survive antitrust

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scrutiny. Our purpose today is not to conduct an antitrust minitrial on the merits of specific transactions.

The Department of Justice and the Federal Trade Commission have been given the responsibility for conducting detailed analyses of mergers under the antitrust laws. In carrying out this responsibility, I expect that the agencies will carefully scrutinize large telecommunications mergers. However, it is neither necessary nor advisable for the Congress to try to micromanage this review process by the antitrust enforcement agencies or to try to influence how transactions are viewed in the financial markets.

Mr. Chairman, the issue should not be whether any particular merger is good or bad, but whether any changes in the applicable laws or regulations may be desirable to achieve strong competition in the telecommunications industry for the benefit of consumers.

I want to thank all these witnesses for their time and effort in appearing before the subcommittee this morning.

Now, Mr. Smith, please make your answers as brief as you can since time is moving on. Does merging with TCI provide any technological help to Bell Atlantic's plans to offer video services over its telephone lines within the Bell Atlantic region, or does the merger simply provide Bell Atlantic with programming in that region?

Mr. SMITH. Senator, it was about a year or two ago that we concluded that in order to get the competencies and the abilities that involved programming and cable operations, it would take us a number of years. We looked at all of the available companies, the companies in this country, concluded that TCI was a very good operator, and that as we combined we would be able to accelerate the deployment of the interactive services in our territory using their skills.

Senator THURMOND. Mr. Davis, in your written testimony you suggest opening the media gateway to all programmers. Does your proposal apply to all companies, including Viacom, or only to telephone companies and the largest cable companies?

Mr. DAVIS. It clearly applies to everyone. Mr. Smith, in his remarks, was referring to choice and control for the consumer. I am as concerned about will the programmers, such as ourselves, have some choice and some small measure of control with who we deal with, or be told who we have to deal with or be told what the price is for our programming. That is our concern, sir.

Senator THURMOND. Under the FCC rules on video dial tone, do all video programmers have equal access to the video delivery systems that will be available over the telephone lines?

Mr. DAVIS. Yes.

Senator THURMOND. Mr. Redstone and Mr. Davis, you both might answer this question. You are focusing on TCI as the party interested in Paramount, but is the ultimate competition for Paramount between Bell Atlantic, through TCI, and NYNEX through its backing of Viacom?

Mr. REDSTONE. I will reply to that, sir. The ultimate competition today involves a true monopolist, TCI. Our position—I tried to bring this in before. Mr. Smith will have no difficulty refuting statements that I didn't make. I didn't make a statement that they would control 125 percent of America, but the statements I made

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were accurate—20 to 25 percent themselves, a third with their partners, access to 50 percent of America with Bell Atlantic.

Coming back to your question, sir, we are concerned both with the implications of Paramount-QVC and Bell Atlantic-TCI. One of our concerns is that you are not only dealing today with a gatekeeper whose gatekeeping will be expanded, you are dealing with a party who combines that with vertical integration, controls 25 programming services, now wants to add to it the Paramount library, which will add several more channels in a world which still has limited channel capacity, increasing the power to diminish the role of the independent programmer like ourselves and the power to discriminate in favor of his own services. Whenever you give anybody control of that much product, you give them control of price.

Senator THURMOND. Mr. Davis, your testimony noted that Paramount chose Viacom in order to enhance your ability to reach viewers. If QVC is ultimately successful in its bid and survives the scrutiny of the antitrust enforcement agencies, would QVC not result in more viewers being reached with Paramount's products?

Mr. DAVIS. It would be virtually impossible, sir, because the reason that we said that we chose to merge with Viacom is looking at the plethora of product that will be available and the opportunities between the two companies. QVC is a shopping network, and having been accused of disparaging it as a shopping network, that is what it is. Viacom is not, Paramount is not.

You are talking about cable networks that exist in Viacom. As we said earlier, we have an interest in the USA and the Sci-Fi cable networks. We have a regional sports network through Madison Square Garden. Putting that together with the creative personnel, with the creative talents that both companies possess, with the huge amount of programming that we have in television, will make this a very successful company that no other company frankly can match in terms of programming only.

Senator THURMOND. Mr. Redstone, in your testimony you seem to consider all of the cable market share of QVC's backers to be controlled by TCI. What is the basis for this?

Mr. REDSTONE. TCI controls QVC in the following way. TCI has something like 22 to 27 percent of control through Liberty Media. Its two partners, Comcast and Diller, each control about 12.5 percent. That comes very close to 50 percent, with the rest widely dispersed. There is a voting trust. Mr. Malone's partners have to vote with Mr. Malone.

Now, coming to some of the other cable programming services, let's come to Turner Broadcasting. Other than Ted Turner, Mr. Malone is the largest stockholder of Turner Broadcasting, but more important than that, he has negative control of everything Turner Broadcasting does. Turner cannot spend more than $1 million unless John Malone says OK.

So when Turner acquired or agreed to acquire New Line and Castle Rock, they could not do so unless John Malone said OK. That has particular significance when you consider the other interests in Carolco, his alleged interest in obtaining equity in Matsushita and Sony, and now you want to add Paramount to that.

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Senator THURMOND. I want to ask this question to be answered briefly by all of you. We will start with Mr. Smith. If cable companies are backed by larger telephone companies outside their home regions, will this provide stronger competition in the telecommunications industry? That is, will not Viacom, backed by NYNEX, be a more equal competitor to TCI, backed by Bell Atlantic, compared to the situation before the telephone companies get involved?

Mr. SMITH. Yes, I think that will result in more vigorous competition. It is not only NYNEX and Viacom and Bell Atlantic and TCI, it is also US West and Time Warner and Southwestern Bell and Hauser Cable in our own territory. These are companies that have come to the conclusion that they need both the expertise of cable as well as telephony, and it is going to result in more competition, lower prices, and more choice across this country.

Senator THURMOND. Mr. Redstone?

Mr. REDSTONE. I was just going to say, sir, that the——

Senator THURMOND. Speak in your microphone so we can hear you, please.

Mr. REDSTONE. The premise about NYNEX and Viacom is really, if I may say so, totally off the track. It is not applicable and irrelevant. NYNEX has no interest other than make a financial investment in Viacom. They made an investment in terms of a convertible preferred stock. There are no arrangements for any business transactions between NYNEX and Viacom. None may ever take place. If one does, be assured it will receive the proper scrutiny. That is not at all comparable to a merger, an actual merger, between Bell Atlantic and TCI. There is no merger between us and NYNEX. They made an investment in our company, period, over and out.

Senator THURMOND. Mr. Davis?

Mr. DAVIS. As a programmer, we obviously welcome more competition. As a programmer, we also welcome more channels available to us, not controlled by one single entity. What we would like to see under the new cable law and we would like to see under the new rules applying to telephone companies is more telephone companies coming in with their systems, as opposed to frankly acquiring other existing cable systems, which is only going to stifle competition.

Senator THURMOND. Thank you, gentlemen, for your appearance. Mr. Chairman, thank you.

Senator METZENBAUM. Thank you, Senator Thurmond.

Mr. Smith, it has been a long time. I would like to come to you.

Mr. SMITH. Yes, sir.

Senator METZENBAUM. I am firmly convinced that competition would drive both telephone and cable rates down. In past hearings before this subcommittee and other committees, representatives of consumer and business telephone ratepayers have claimed that Bell Atlantic and other phone companies have charged rates significantly higher than were appropriate for a telephone monopoly. Many of these groups, as well as Bell Atlantic, complained about monopolistic pricing in the cable industry.

It seems to me that this merger will actually make it less likely that consumers will get the rate reductions they deserve. Mr. Hatfield, a communications expert who will testify later this morning,

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claims that you will maximize your profits by not going head-to-head against other competitors to provide the kind of package of cable service or local phone service that consumers receive today.

You have described your cable ventures as a video jukebox that has a server to offer consumers individual shows. I am not sure if you used those phrases today, but I know you did yesterday when we were talking. I don't understand how that would be real competition, with the 40 to 50 channels of diverse programming that cable companies offer today. I wonder if you could explain how you——

Mr. SMITH. Yes; let me start with the local ratepayers in the telephone industry. We are very proud in Bell Atlantic of having probably the very best record over the last 10 years since divestiture of keeping basic rates in line. In some of our jurisdictions, it has been virtually a decade, 10 years, and basic rates have remained at the lowest levels in the country. In the areas where we are beginning our video dial tone experiments, New Jersey, for example, has the lowest rates in the country. So we have a very good track record. We have agreements with the various State regulators to provide incentives to our company and keep basic rates low that will go well into the 21st century. We are very proud of that.

In terms of the video jukebox and why that will increase competition, if I can take just a moment, the notion of channels in the year 2000 will be considered quaint. It will be old-fashioned and people will really chuckle about the fact that there were 30 or 40 or 50.

The video jukebox provides you an infinite number of channels in every single home. As much storage space as there is on these huge new servers that IBM, DEC, Compaq, and other companies will build, that will be the number of "channels" or services that will be available to you, not 30 or 50 or 500, but thousands and thousands to every single home.

The day of limited capacity for video is over. This new technology brought about by digital equipment machines, brought about by fiber optics and by the switching technologies of the telephone companies, will provide an infinite variety and virtually infinite capacity. So the old paradigm, I am afraid, is gone.

Senator METZENBAUM. Mr. Redstone claims that through TCI, you will be able to manipulate the market for communications equipment in a manner that harms competition. When similar concerns were raised in the telephone industry, we opened that market to competition to prevent the AT&T monopoly from thwarting innovation. Your company previously suggested to the FCC that all cable equipment be made available to consumers just as telephones are today. Do you still stand by that position?

Mr. SMITH. Yes; I think that is probably a good idea and I think that that is exactly the way the marketplace will evolve; that is, all aspects of these markets will be competitive. The timing and the exact terms of exactly how that will take place over time remains to be seen. The existing entities, such as cable companies and telephone companies, will be offering competitive services, bundling and unbundling, packaging and unpackaging services in every conceivable way.

The consumer will have the choice, and since they will have not just one cable company or one telephone company in any territory,

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they are the ones who will rule the roost, not an individual, not an individual company, not a producer, not a transport company, but the consumer.

Senator METZENBAUM. You are assuming that there will be competition.

Mr. SMITH. We are going to make sure that there is, sir.

Senator METZENBAUM. One of the concerns of this hearing is whether there indeed will be competition and whether this merger would eliminate that likelihood.

Mr. SMITH. If I may say so, sir, we certainly wouldn't have entered into this merger if we didn't believe that there would be competition and that that competition would be profitable to our shareholders.

Senator METZENBAUM. Wait a minute. I am talking about competition against you. I am not talking about your ability to compete with others. I think there is no question that you will be able to compete.

Mr. SMITH. We will certainly compete in the red areas against the existing cable companies outside of our territory, and already Time Warner and US West have stated that they will compete against Bell Atlantic in our territory, and so has Southwestern Bell when they bought the Hauser cable properties. So there will be competition. They are already building the systems to do so.

Senator METZENBAUM. That is one of the major questions before us, and they are, can you compete without having the programs available and will you have too much control of the programming?

You claim that cable competition in your region will not be harmed by your proposed merger because TCI's properties in your region are not that extensive. My understanding is quite different. Is it not true that TCI owns cable systems—I guess maybe you answered this before—serving about 1.2 million cable subscribers in your cable territory? Isn't that the fact?

Mr. SMITH. Yes, that is correct, sir, and as we have stated in my letter to you yesterday, to the Justice Department and in my testimony, we plan to spin those off to separate corporations which will compete vigorously with us and we with them.

Senator METZENBAUM. But absent the merger, TCI had the potential, or has the potential to be your strongest competitor.

Mr. SMITH. TCI, Comcast, Cox Cable, Jones Intercable—all of these companies in each of the towns are very strong competitors and they plan, each on their own, to go into the telephone business just as we plan to go into the cable business. There is going to be competition on both sides. This merger doesn't affect that in the least. In fact, it increases the possibility of competition in our territory and outside, sir.

Senator METZENBAUM. That is the question that will be before the Antitrust Division and the FCC.

Mr. SMITH. Yes, sir.

Senator METZENBAUM. The 1992 Cable Act was designed to get at the anticompetitive practices of the cable industry. However, Mr. Redstone claims that the untested strength of FCC regulations cannot possibly counter any incentives to engage in anticompetitive conduct that would grow out of this merger.

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Bell Atlantic recently challenged the FCC's rules regulating cable rates. In fact, Bell Atlantic filed a Federal lawsuit alleging that the FCC wasn't aggressive enough in bringing down those rates. You obviously recognized that with inflated cable rates, cable companies would have excess cash to invest in equipment that would help them compete with your telephone business.

Given the skepticism that your own company has expressed about the FCC's ability to protect consumers through rulemaking, wouldn't you agree that the antitrust agencies should be even more skeptical of the power of FCC rulemaking to protect consumers when they review this deal?

Mr. SMITH. If there is only one cable company in town, then those statements are reasonable. If there are two cable companies in town, as there is today in the Bell Atlantic region because we tested the 1984 Cable Act under first amendment conditions and found that it was unconstitutional—now that there are two cable companies in town, you will have competition, as well as the FCC and the other regulators that will make sure that competition is fair.

I believe in the market, and the market will tell us who provides the best value, the most reliable service and the most quality, and the customers are the ones that are going to tell us. Bell Atlantic won that case, and so we are entering into the cable business right now. We are building it in New Jersey, we are building it in Virginia, and we will build it all over our territory.

Senator METZENBAUM. Thank you, Mr. Smith.

Mr. Redstone, Viacom has filed an antitrust lawsuit against TCI. It has been mentioned several times today. I want to make it clear that neither I nor this committee take a position on your lawsuit. I do not believe Congress should be trying a lawsuit in a hearing. However, many of your allegations are consistent with the kind of conduct that led the Congress to enact cable legislation last year. Therefore, they raise deeply troubling questions about the proposed merger between Bell Atlantic and TCI.

My first question to you then is, one of the biggest concerns that I have about the Bell Atlantic deal is that it signals an end to competition between cable and telephone companies, or could offer that kind of signal, depending upon your interpretation and the factual basis as determined by the agencies. The way I see it, Bell Atlantic has neutralized its most likely competitor for local phone service by merging with TCI.

Your company, Viacom, operates the 12th largest cable system in the country. Therefore, you must have thought about how competition was most likely to develop in your industry. Were you anticipating that, in the future, local telephone companies would be competing head-to-head with you for the delivery of cable services?

Mr. REDSTONE. It is hard to answer that question, Senator. Mr. Smith describes a rosy new world that is going to take place some time in the future where competition will exist. All I know, sir, is that this particular merger is one of the most obvious and inflammatory examples of the elimination of competition between one man who has excessive control of the cable industry and Bell Atlantic.

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Also, if I may, Mr. Smith carefully avoids reference to the control of programming. He says in the year 2000 there will be a million programming services. I don't know about the year 2000. I am concerned about the independent cable programmers who will be put out of business next year because of the influence of Mr. Malone.

It is not so easy to develop a cable programming service, sir. Six years ago when we took over Viacom, MTV was considered a fad. We worked very hard. We were lucky, we were successful, and now we have an international global network. That can't be done just like that. It is easy just to confine your views to access to the consumer. That is bad enough, but what about the control of programming services?

In other words, it takes the two. It is not just the horizontal conspiracy that exists and is being enhanced here, it is the vertical integration and the control of all those programming services which puts TCI in a position that it has today.

Senator METZENBAUM. Let me go to Mr. Davis. Mr. Davis, I get the impression from your statements that you believe it makes business sense for communications network owners like cable companies that want to become more competitive and be part of the so-called information age to invest in programming. Am I correct in that?

Mr. DAVIS. No, sir.

Senator METZENBAUM. No?

Mr. DAVIS. No; actually, when I cited the 1948 consent decree, or the consent decree imposed upon the motion picture in 1948, I am referring to that and I am using that as an analogy to today. We are talking about allowing the programmers or the producers that we were then in 1948 to have access to the theaters then or the distributors today. If we have to deal with one source which has control, we are not going to be able to determine our own destiny.

Senator METZENBAUM. But what I am really asking you is doesn't it make sense, and isn't what we are seeing is the need for communications network owners like cable companies—if they want to become more competitive and be part of the so-called information age, don't they then have to concern themselves more with programming than almost any other aspect of this?

Mr. DAVIS. No; I would think that by doing that, they would only exercise more and more control. They would be able to determine what goes on, who produces what, and who does what.

Mr. REDSTONE. May I help on that, Senator?

Senator METZENBAUM. Surely.

Mr. REDSTONE. The problem is, of course, it would be good to be able to develop more programming, but you can't develop programming in the United States today unless John Malone says OK. That is the problem. He now determines what people can see and hear in the United States. It is not possible. Unless John Malone says Court TV can live, it doesn't live.

Let me give you a quick example, if you like, that we just went through. We developed a shopping channel called the MTV Music Shopping Channel. Mr. Malone was wild for it. Barry Diller called me very upset because it was going to go on HSN, another service controlled by John Malone. I said, why don't you talk to John Ma-

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lone. I don't want to, in this hearing, discuss what he said about John Malone; it is in our complaint.

But here is the answer. As soon as the Paramount transaction occurred, all of a sudden this MTV Music Shopping Channel that Barry called me about and wanted and was so upset because it was going to go on HSN—that disappeared. Its life was over, and instead we have a German company, Bertelsmann Music, which was introduced on the scene and our stock was knocked off that day. That is what we live with today.

Mr. SMITH. If I may, we are talking about the merger of TCI and Bell Atlantic, and all roads, all accusations and all logic seems to go back to Viacom and Paramount. These are accusations that are unproven and there are opportunities for Mr. Redstone to find remedies for these in the courts. I would suggest that he does that.

The statement that there is no programming in this country that can ever exist without John Malone is nonsense and, looking forward, the changes in our industry that are underway today—IBM and Digital Equipment and Microsoft are creating this interactive future, a future that isn't 10 years away, but is 1 or 2 years away—will create an open architecture that will not permit anyone, not Mr. Redstone or Mr. Malone or anyone, to control. This is the world that we are creating today.

Mr. Redstone is talking about the past. We have got to look forward to the future. This merger creates an opportunity for competition outside the Bell Atlantic territory in telephony and it creates competition inside our territory for cable. The programming will have all kinds of new paths, not just one lane on the superhighway, but two and three and four lanes through the air and through the terrestrial networks.

Mr. REDSTONE. May I, Senator? We are not talking about yesterday. We are talking about today. Mr. Smith is talking about a rosy contemplated future. We are talking about today. To the extent that we have referred to Paramount, what we have said is that TCI now has monopolistic power in distribution and in the control of programming. What we have said is that becomes enhanced by a merger with Viacom, and it becomes further enhanced by a merger with Bell Atlantic.

Senator METZENBAUM. Gentlemen, we thank you very much for your appearance here today. I think, Mr. Smith, I do hope that you will convey, as well as his representatives in the audience, to Mr. Malone that we do expect him to appear before this committee soon. We will be adjourning some time by Thanksgiving and we expect to hear from him, we expect to hear from Mr. Diller, and we expect to hear from Mr. Allen of AT&T, and so we don't want to wait until the very last minute to do so.

Gentlemen, thank you very much for being here.

Mr. SMITH. Thank you, Senator.

Mr. REDSTONE. Thank you.

Mr. SMITH. Senator Thurmond, thank you.

Senator METZENBAUM. Our next three witnesses are Dale Hatfield, president of Hatfield Associates, of Boulder, CO; Kevin Arquit, of Rogers & Wells, of New York; and Peter W. Huber, Kellogg, Huber & Hansen, of Washington, DC. We will limit each of the witnesses to 5 minutes. At the conclusion of the witnesses' tes-

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timony, Senator Thurmond has another engagement and he has asked if he might proceed before the Chair, and I have no objection to that, for a period of 10 minutes.

I will say to each of the witnesses, please indicate whether you currently are or have in the past few years done any work for parties that have an interest in any of these mergers we are discussing. In other words, I know that some of you are professionals in this area. I do not find fault with that. We have called you as witnesses because you are experts and it would only be understandable that you would have some clients in the area.

I would like you each, before Senator Thurmond asks any questions—in fact, Senator Thurmond, I really question the procedure of asking questions before these men have had a chance to testify. You are on live C–SPAN and it just seems as if it is totally out of order. I think the questions could be submitted afterwards, but I think we owe it to them to permit them to offer their 5-minute statements before any questions are asked.

Do you have questions of each of them?

Senator THURMOND. I was just going to base them on their statements they have already submitted.

Senator METZENBAUM. Well, I know, but I think if we do that—we never have done that before and I don't think we should do it today.

Mr. Hatfield, would you proceed and tell us something about your previous or present clients as well? I want to make it clear that in asking that question I am not suggesting any impropriety, nor am I looking askance at the fact that these men who are experts in this area do work for people who have an interest in this issue before us today.

Please proceed.

PANEL CONSISTING OF DALE N. HATFIELD, PRESIDENT, HATFIELD ASSOCIATES, INC., BOULDER, CO; KEVIN J. ARQUIT, ROGERS & WELLS, NEW YORK, NY; AND PETER HUBER, SENIOR FELLOW, MANHATTAN INSTITUTE FOR POLICY RESEARCH, NEW YORK, NY

STATEMENT OF DALE N. HATFIELD

Mr. HATFIELD. Thank you, Mr. Chairman. I very much appreciate the opportunity to appear before the subcommittee today to testify regarding this recent wave of mergers. Let me state, as you have asked, I have been in the consulting business for a little over 11 years, almost 12 years. I have done work for cable television companies, competitive access providers. These are the new companies that are competing with the telephone companies for limited services. I have done some work for the Bell operating companies, and also have worked for a number of the long-distance carriers as well, and then, of course, a lot of other carriers, mobile radio people and things like that, that may have some interest in this proceeding. However, I should say that I am here today strictly on my own.

Senator METZENBAUM. Please proceed, Mr. Hatfield. Thank you.

Mr. HATFIELD. In this testimony, I will focus my attention on potential purchases by the regional Bell operating companies of large

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cable companies, as exemplified by the proposed merger of Bell Atlantic and TCI. Of course, I have prepared——

Senator METZENBAUM. Slow it down a little. You are reading so fast it is going to be hard to follow you.

Mr. HATFIELD. I am trying to get my 5 minutes. Thank you.

Senator METZENBAUM. But I want to be sure we can appreciate what you are saying.

Mr. HATFIELD. I have prepared a full statement which I have given to the subcommittee and, of course, I will summarize it here.

Senator METZENBAUM. All statements will be included in the record.

Mr. HATFIELD. Let me state at the outset that when I first heard the announcement of the proposed merger of a large telephone company and the largest cable company, and when I recognized that this was just probably the first of a series of mergers of the same type to follow, I was really discouraged. I was extremely disappointed because for some 20 years now, I have been a steadfast advocate of the notion that competition, rather than monopoly, is the best way of assuring customers a diversity of affordable communications and information products and services.

My initial reaction was, and still is, that allowing the consolidation of large telephone companies and large cable companies is likely to reduce the prospects for meaningful competition in communications and information services. In the few minutes I have available, I would like to set forth some personal observations as to why the mergers of local telephone companies and cable companies are likely to reduce rather than enhance competition.

First, I would observe that the history of the communications industry in the United States has not been a happy one from an antitrust perspective. From the earliest days of the industry, the Bell System sought to gain and maintain a monopoly by the most nefarious means, including denying access to essential facilities and buying out competition.

I am reminded of this history because the economics of having two networks, a telephone company wire coming into your home and a cable company wire coming into your home—the economics of that are still very uncertain. But if you think for a moment, if the economics do not support two wires and if the telephone companies have come to believe that the cable companies might ultimately have the superior technology or position, then it seems to me it is in their mutual benefit to protect their existing business and investments by acquiring their potential competitors; that is, they have a strong incentive to make sure that the competing technology or system is in friendly telephone company hands, and this is exactly the direction in which I see we are headed.

Second, and related to my first point, I have always been somewhat skeptical of cable companies actually competing successfully for the provision of ordinary local telephone service because of a host of barriers, including State laws and regulations that precede it. In listening to the testimony here today, it sounds like somehow this competition is a foregone conclusion. I have testified through the United States before State regulatory commissions, and by and large they show an extreme degree of skepticism about the benefits

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of ordinary local competition, in part, because of its possible impact on universal service.

However, having participated in the industry for so many years and finally seeing the willingness at least of a few regulators to at least entertain the notion of local competition, I feel that independent cable systems represent the best long-term promise for true local telephone competition. But with cable systems owned by other telephone companies, and despite the arguments of the proponents of the merger to the contrary, I believe that the likelihood of competition will be reduced.

In other words, with such tight control of the industry by a few companies, I doubt if they will really compete. I am afraid they will just pull their punches. Even if the competition does emerge, it is more apt to be at the fringes of the market rather than the traditional core portions of the respective telephone and cable businesses.

Third, I think from what I heard this morning we are missing something here because even if competition develops, we will still be left with a duopoly and the two providers, telephone companies and cable companies owned by telephone companies, would have a strong incentive to limit additional entry using, for example, their control over rights-of-way. In short, a duopoly does not equate to competition, and the duopolists have an incentive to fight additional entry just as a cellular telephone duopoly recently fought so hard to maintain control of their duopoly, their business.

Fourth, over the past few years I have been very gratified to see Bellcore and Cable Labs, the research arms of the telephone industry and the cable industry respectively, compete in terms of designing the best architecture for future broadband networks. I think that rivalry has been very beneficial to the two industries and ultimately to customers. I have to wonder whether that rivalry will continue if the industry is consolidated into telephone company hands. In fact, I doubt if both laboratories will even continue to exist independently if full consolidation of the industry takes place.

Fifth, and finally, if the number of separate paths into the home diminishes or if the number of entities controlling these paths decreases, then I am much more concerned about some of the content control and content ownership issues that have been raised here this morning.

Let me just simply conclude my testimony by stating that based upon my 20-some-odd years of experience in the industry and in dealing with potential competitors, I believe that the proposed merger raises substantial and significant competitive concerns that must be addressed fully by the antitrust enforcement agencies and the communications policymakers.

Again, thank you very much, Mr. Chairman and the subcommittee, for giving me the opportunity to testify today.

[The prepared statement of Mr. Hatfield follows:]

PREPARED STATEMENT OF DALE N. HATFIELD, PRESIDENT OF HATFIELD ASSOCIATES, INC.

INTRODUCTION

Thank you Mr. Chairman. I very much appreciate the opportunity to appear before you today to testify regarding the recent wave of mergers in the telecommuni-

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cations industry. I have been involved in the telecommunications policy arena for over twenty years, and I can state without hesitation, or reservation that the issues raised by these mergers are crucial to the development of telecommunications in the United States. They are particularly crucial in determining what role competition—rather than monopoly—will play in the future development of our nation's telecommunications and information infrastructures, and I want to commend you and the Subcommittee for holding these hearings so promptly.

Before I present the substance of my testimony, I thought it might be useful if I briefly summarized my experience in the telecommunications policy field. One of my earliest positions was Deputy Chief of the Office of Studies and Analysis in the Office of Telecommunications Policy, Executive Office of the President. From there, I went to the Federal Communications Commission (FCC) where I became Chief of the Office of Plans and Policy. After serving at the FCC, I went to the National Telecommunications and Information Administration (NTIA) in the U.S. Department of Commerce, where I became Chief of the Office of Policy Analysis and Development. Subsequently, I became Acting Assistant Secretary and then Deputy Assistant Secretary of Commerce for Communications and Information and Deputy Administrator of NTIA. I left government nearly twelve years ago, and established my own consulting firm in Boulder, Colorado. We have grown to six full-time professionals with advanced degrees in engineering, economics, and business. A principal part of our consulting work has been for firms—including cable television companies—who have sought to compete with telephone companies in the provision of local communications services. In addition to serving private sector clients, I have also served as a consultant to the Department of Justice and to foreign governments regarding issues of telecommunications policy.

In my testimony here today, I will focus my attention on potential purchases by the Regional Bell Operating Companies and GTE of large cable television companies (Multiple System Operators or MSO's), as exemplified by the proposed merger of Bell Atlantic and Tele-Communications Inc. (TCI). I will divide the balance of my testimony into three parts. First, I will touch on some of the public policy benefits claimed by proponents of these mergers. Second, I will briefly set forth what I believe are their potential dangers to the public interest. Third, I will offer some personal observations based upon my experience and study of the history of the telecommunications field. I should hasten to add that the views and opinions I am expressing here today are my own, and do not necessary reflect the views of other entities with which I have been, or am affiliated.

Let me also state at the outset that, when I first heard the announcement of the planned merger of a large local telephone company and the largest cable company and recognized that other mergers would surely follow if it was left unchallenged, my heart sank. My heart sank because, for more than twenty years, I have been a steadfast advocate of the notion that competition—rather than monopoly—is the best way of assuring consumers a diversity of affordable telecommunications and information products and services. My initial reaction was, and still is, that allowing the consolidation of large telephone companies and cable companies will greatly diminish the prospects for future competition in telecommunications and information services.

POTENTIAL PUBLIC INTEREST BENEFITS

The proponents of these mergers of large telephone companies and cable television companies have advanced three public interest benefits that could potentially flow from this increased industry concentration. First, they have argued that cable companies lack experience in designing, operating, maintaining, and managing the types of two-way systems necessary to provide ordinary local telephone services and that the mergers would result in the transfer of the necessary experience. Second, they have argued—sometimes unfairly perhaps—that cable television networks have a negative quality and reliability image and that the image would be enhanced by an affiliation with a large telephone company. Third, they argue that because of the debt burdens carried by the cable companies they would be unable to upgrade their networks without the infusion of capital from the telephone companies. Thus, the proponents allege that these mergers would increase the prospects of the cable firms successfully competing in the provision of local telephone services.

POTENTIAL THREAT TO THE PUBLIC INTEREST

In terms of the danger to the public interest presented by the mergers of the large telephone and cable firms, I have identified six potential threats:

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First, if, in their acquisitions of cable television companies, the local telephone companies are allowed to retain control of cable systems lying within their telephone operating areas, the prospects for meaningful competition between the two industry sectors will be reduced and the potential for bottleneck control over video and other forms of programming into the home will be increased.

Second, cable companies (a) have been aggressive investors in companies that have entered the market to carry telephone calls and other forms of communications between large users and the long distance telephone companies such as AT&T, MCI and Sprint, (b) have been experimenting with bypassing the local telephone company to carry telephone calls from smaller customers to those same long distance companies, and (c) have been exploring entry into the ordinary local telephone market itself. Likewise, local telephone companies—especially Bell Atlantic—have been experimenting with technologies that would allow them to deliver television programming in competition with the cable companies. With a highly consolidated, nationwide telephone/cable industry, there would be a much diminished likelihood of these two industries competing head-to-head in the core of each other's businesses.

Third, both the large telephone companies and the large cable companies have been experimenting with wireless pocket-phone systems (Personal Communications Systems or PCS) and those systems may form the technical basis for (a) competition with existing cellular radio companies and (b), potential competition for ordinary local telephone services. Since the FCC has tentatively decided to allow both telephone companies and cable companies (like Bell Atlantic and TCI) to bid for the licenses to provide these pocket-phone systems, potential competition could be reduced since the acquired spectrum would be under common ownership following a merger. Furthermore, cable television systems can be combined with these wireless pocket-phone systems to create networks that can compete with cellular radio systems. But it is unlikely that telephone company owned cable companies would pursue this opportunity aggressively in order to avoid competing with their parent's own, out-of-region cellular affiliates.

Fourth, the fundamental structure of the telecommunications market has an impact on diversity and innovation. Eight large telephone companies (the Bell Operating Companies and GTE) and the large cable companies today provide numerous parallel paths for innovation. A reduction in those parallel paths is likely to lead to less innovation.

Fifth, a key bottleneck for new entrants into broad band communications is the availability of programming. The cable companies already have substantial ownership positions in programming and the large telephone companies have signaled their intent in becoming investors in the programming market as well. With a highly consolidated, nationwide cable/telephone business, there will be fewer independent investors in program production, thus reducing program competition and diversity.

Sixth, if ownership of the facilities for the local distribution of programming is concentrated in fewer firms, and if those firms also have an ownership interest in their own programming (the situation that would exist after these mergers), then those firms would have incentives not to carry independently produced programming thus further reducing program competition and diversity.

PERSONAL OBSERVATIONS

Over the last few minutes I have set forth some of the alleged public interest benefits of mergers between the large telephone companies and described the large cable companies and the associated dangers. In the time I have remaining, I would like to offer some personal observations regarding these issues:

First, and perhaps most importantly, I must observe that the history of the telecommunications industry in the United States has not been a happy one from an antitrust perspective. Going back to the earliest years of the industry, following the expiration of the Bell patents prior to the end of the last century, AT&T tried to stifle emerging independent competition by refusing to interconnect, by refusing to sell equipment to the new entrants, by filing numerous patent suits, by attempting to thwart the development of superior non-Bell equipment, by dominating the conduct of the R&D necessary to advance the industry, and by engaging in a public relations war to destroy public and financial support for the independents. When these attempts failed to stop competitive inroads, the company shifted strategies and began to acquire its competitors. It was these acquisitions, coupled with other actions, that led to the Bell System's monopoly control over the telephone industry and the subsequent abuses that produced the AT&T antitrust suit and the break-

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up of the Bell System. Moreover, the anti-competitive and anti-consumer practices of the Bell Operating Companies since the break-up have been well documented.

I am reminded of this history because the economics of having two networks serving the nation's homes is still uncertain. But if the economics do not support two "wires" and if the telephone companies believe that the long term effect of cable-telephone company competition may be that cable companies have the superior technology or position—for example, because they control the existing broad band connection into the home—then it is to the mutual benefit of the telephone companies to protect their existing business and investment by acquiring their potential competitors just as their predecessors did. Moreover, if the mergers are approved, they will have the same incentives (and increased abilities) to maintain that resulting monopoly just as they have in the post-break-up environment.

Second, and related to my first point, I have always been somewhat skeptical of cable companies actually competing successfully for the provision of ordinary telephone services because of host of barriers—such as telephone number portability, difficult and contentious issues surrounding the prices, terms and conditions of interconnection with the incumbent monopolist, and state regulatory barriers to name just a few. However, having watched competition develop successfully in the telephone equipment and long distance portions of the telecommunications market—and the apparent willingness on the part of some regulators to entertain the notion of local competition—I feel that cable systems did present the best long term promise for true local telephone competition.

Thus, as I indicated at the outset of my testimony, I was very disappointed when I learned of the proposed merger because I felt it would be the "straw that breaks the camel's back" in terms of such competition actually developing. In other words, my belief is that when firms face each other on opposite sides of the table in multiple markets, it reduces the likelihood that they will engage in vigorous competition in each other's territory. In other words, if telephone company A owns the cable company in telephone company B's territory and telephone company B owns the cable company in A's territory, they are less likely to use their telephone facilities to compete in the cable business and vice versa. It is less risky for them to confine themselves to their core business and avoid head-to-head competition. On this basis, if competition does still emerge, it is apt to be at the fringes of the market—say in the provision of specialized and/or new services—rather than in the traditional core portions of the their respective telephone and cable businesses.

Third, and related to my first two observations, even if a modicum of competition does develop, there will be strong incentives for a consolidated, nationwide cable-telephone industry to attempt to foreclose entry by additional competitors. Because of their control over critical rights-of-way and bottleneck facilities, they would be in a strong position to limit additional entry. Having two providers in a market—a duopoly—is not enough to produce real competition because the potential price cutter knows that any reduction in price will be immediately met by the other competitor. With multiple providers, there will always be a maverick who will cut prices and thereby protect consumers from the exercise of monopoly power.

The likelihood of concerted action is exacerbated by the fact that the large telephone companies (a) must—by necessity—work together to coordinate the operation of their interconnected land line networks, (b) share in the ownership of a large portion of the cellular radio industry, and (c) typically act in a unified position in the face of threats to their commercial well being. In short, a consolidated industry has the incentive to react to additional competition in a unified way just as the cellular radio carriers (largely owned by the telephone companies) did in opposing a new entrant into their business (FleetCall/NEXTEL).

Fourth, over the past few years I have been gratified to see the rivalry between Bellcore and CableLabs (the research arms of the telephone and cable industries respectively) compete in terms of the best architectures for future broad band networks capable of carrying vast amounts of information. In my opinion, that rivalry has caused the Bell Operating Companies to retreat from what regard as an overly expensive, overly complex, fiber-to-the-home architecture to a more cost-effective architecture based upon a fiber-copper (coaxial cable) hybrid advanced by the cable industry. Even more recently, I read a trade press report that Bellcore researchers had designed a video-on-demand system designed to put interactive multimedia applications, via the telephone network, in the hands of the customer instead of at the telephone company Central Office. The article states specifically that this development "represent(s) a subtle turn in thinking by the telephone industry, patterned after recent architecture developments in the cable TV world." I have to wonder whether such rivalry can, and will exist, if the industry is consolidated. In fact, I

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doubt if both laboratories will continue to exist if full consolidation of the industry takes place.

Fifth, and finally, if the number of independent paths into the home diminishes or, if the number of entities controlling those paths decreases, then I have even stronger concerns about the proposed mergers. Given the telephone industry's increased interest in investing in cable programming and the recent Federal Court decision that would allow Bell Atlantic to provide cable programming within their designated local exchange areas, the potential drawbacks from the merger seem even more severe from a content-control standpoint.

SUMMARY AND CONCLUSIONS

In the interest of time, I will simply summarize my testimony by stating that based upon my twenty-odd years of experience in the industry working with potential competitors, I believe the proposed merger raises substantial and significant competitive concerns that must be addressed fully by antitrust enforcement agencies and communications policymakers.

Senator METZENBAUM. Thank you, Mr. Hatfield. We appreciate your testimony and I will have some questions for you from myself as well as from Senator Thurmond.

Mr. Arquit?

STATEMENT OF KEVIN J. ARQUIT

Mr. ARQUIT. Thank you, Senator. In response to your question, first of all, I am a partner in the law firm of Rogers & Wells. However, neither I nor the firm has a client interest in this matter. This testimony was prepared on my own time. In terms of your request about previous employment, I guess in that sense I was employed by the Federal Trade Commission. In the last 2 years of the Reagan administration, I was its general counsel, and during the Bush administration I was the Director of the Bureau of Competition and in that capacity we investigated and analyzed several cable and programming mergers, but that is the background.

Senator METZENBAUM. Does your firm represent any cable or telephone companies at the present time?

Mr. ARQUIT. Not that I know of, and none has paid for this testimony.

Senator METZENBAUM. I wasn't suggesting they paid for it.

Mr. ARQUIT. OK. Well, I would like to discuss the antitrust implications of recent telecommunications mergers. My comments are set forth in much greater detail in my written statement.

To me, it seems obvious that asking the hard antitrust questions now is the prudent course to take. It will be impossible to remake the competitive landscape 10 years from now if mistakes result from the lack of a thorough analysis. However, we should also recognize that a transaction may speed up the emergence of an interactive, multimedia market. If a merger is necessary to achieve that efficiency, the antitrust laws should not stand in the way.

The motivation for virtually every merger is increased profits, and that fact alone is not troubling. The focus of the antitrust enforcer should be on the expected source of those profits. Will the profits come from leaps in innovation, improved efficiency, or lower costs? If so, the merging parties should be given a hearty round of applause. Or will the profits come from an exercise of market power and the elimination of competition which will benefit the parties, but at the expense of everyone else? Answering these questions is the challenge that confronts the antitrust enforcer.

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Let's consider this distinction in the context of a merger between a phone company and a cable company. At first glance, what is the big deal? A telephone company provides telephone service and cable companies provide cable programming. If the two companies were not competing before, how could a merger between them lessen competition?

Well, one answer is that two companies can compete not just in the final service offered to consumers, but across an entire spectrum of activities, including research and development. In the telecommunications industry, for example, the merging parties may not presently have overlapping products or services, but nonetheless be active, competing participants in a research and development race to be a leader in the emerging interactive, multimedia market. A merger puts an effective end to such competition.

There are those who will point out that there are multiple other players that exist, so the loss of R&D competition in any one transaction is no big deal. This may, in fact, be true, but there are also those who will insist that most of the time two well-trained sprinters will run much further and faster than any contestant in a three-legged race. Whatever the truth, the stakes are too high to ignore the question of how a merger will affect competition for competing versions of the future.

There is also the issue of potential competition to consider; that is, that phone companies are poised to enter cable markets, and vice versa. Certainly, cable companies, in recently opposing cable re-regulation, were quick to argue that they faced effective competition from telephone companies about to enter the video market. The obvious antitrust question is whether the marriage of a large cable and telephone company short-circuits that impending competition. If so, consumers are the big losers, as the prospect of competition that would have emerged in both markets is torn from their grasp.

Put another way, there are two lines into most homes that are capable of handling telecommunications, one, the phone line, and the other, the cable line. Placing both in the hands of a single owner deprives consumers of whatever competition may have resulted from the previously separate ownership. It is worth noting that in the United Kingdom cable systems are already competing with British Telecom for local telephone customers.

Potential competition problems are presumably solved if the cable company divests those cable properties located in the telephone company service area. The result is two companies poised to compete in the same manner as were the cable and phone companies premerger. My understanding is that Bell Atlantic is proposing such a fix at first. I simply note that regarding any such spinoff, it is important that the divested cable assets not end up in the same hands as those controlling the merged entity. It is one thing to have separate employees, directors and officers, but what is also needed are separate, unrelated owners. In the final analysis, competitive concerns are alleviated only if the owner of the divested assets has incentives to compete independently without regard for the fortunes of the newly merged entity.

A third competitive issue to consider is the vertical effect of a merger. Certainly, there has been a trend in the cable industry to-

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ward vertical integration of suppliers of video programming with distributors of video signals. Vertical integration can raise a number of antitrust issues. For example, if most cable customers end up being served by a very few large companies who control both programming and local cable systems, nonintegrated programmers may be out of luck in finding adequate distribution if the large, integrated companies use only the programming of their own captive sources. I must emphasize, however, that vertical relationships have a capacity to generate efficiencies and that antitrust enforcement in this area should be used sparingly.

In conclusion, the conglomerate mergers underway today present a host of antitrust issues, including vertical foreclosure, potential competition, actual horizontal competition, as well as the promise of significant efficiencies and creation of new markets. Responsible policymakers cannot turn their backs on questions just because they are hard. These mergers will require honest, substantive analysis in order to reach the right results. Mistakes in either direction made in the name of politics could impact virtually every American household.

Thank you, Mr. Chairman.

[The prepared statement of Mr. Arquit follows:]

PREPARED STATEMENT OF KEVIN J. ARQUIT [1]

I. INTRODUCTION

Mr. Chairman, I appreciate the invitation to testify today about the antitrust considerations relevant to the recent groundswell of telecommunications mergers. Most agree that we are witnessing the convergence of two industries (telephony and cable television) into what will ultimately be a seamless communications market. To put it bluntly, the consequences flowing from these deals will be felt by the American public for years, perhaps generations, to come.

To me, it therefore seems obvious that the proposed megadeals should receive very careful scrutiny under the antitrust laws—laws that are focused on enhancing consumer welfare, by encouraging efficiency and protecting competition. Any time a transaction or group of transactions will result in vast economic resources falling into the hands of a few, large players in a vitally important industry, there are critical antitrust questions that need to be asked.

By far the most visible transactions are the competing bids of QVC Network, Inc. and Viacom Inc. for Paramount Communications, Inc., and the proposed conglomerate merger of Tele-Communications, Inc. ("TCI"), and Liberty Media Corporation into Bell Atlantic Corporation. At issue is the ownership of extremely valuable assets in the areas of video signal distribution, telephone service, data transmission, entertainment programming, wireless communication, as well as a host of related and developing technologies. Quite apart from their relevance to antitrust aficionados such as myself, these deals are undoubtedly landmark transactions in the history of American business.

It is also imperative to recognize, however, that there is another side to the equation. The efficiencies that may abound with the emergence of a multimedia, interactive communications market are breathtaking in scope. Such technology combined into the much-mentioned "data superhighway" may end up being the essential life support system for virtually every other American industry. By lowering transaction costs for those other industries, they will be strengthened in the ongoing battle to maximize competitiveness in world markets. To the extent these deals are necessary to achieve such efficiencies, they should be allowed to proceed. Antitrust analysis should fully consider the existence and extent of such efficiencies. Just as lax enforcement can result in irreversible competitive harm, over-enforcement will stunt development of the very technologies that are essential to our future competitiveness.

[1] Mr. Arquit was General Counsel of the Federal Trade Commission from 1988–1989, and Director of the FTC's Bureau of Competition from 1989–1992. He is presently at the law firm of Rogers & Wells. The remarks contained herein represent the personal views of Mr. Arquit.

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As a matter of policy, I believe that asking the hard antitrust questions now is the prudent course to take. It will be impossible, or at least impractical, to remake the competitive landscape ten years from now if mistakes result from the lack of a thorough analysis. It so happens that one of the federal antitrust statutes, Section 7 of the Clayton Act (15 U.S.C. Sec. 18), is specifically designed to reach competitive problems in their incipiency, *i.e.*, before their undesirable effects take hold. Section 7, the primary federal statute used to challenge mergers and acquisitions on antitrust grounds, prohibits transactions the effect of which "*may be* substantially to lessen competition, or to tend to create a monopoly" (emphasis added). This stop-it-before-it's-too-late notion seems especially appropriate for this industry.

The main purpose of my remarks today is to identify generally the goals of antitrust enforcement and the antitrust pressure points that could develop as a result of consolidation. As a preliminary matter, let me offer a disclaimer. Antitrust lawyers sometimes engage in a fiction (born of practical necessity) when analyzing the competitive effects of merger transactions or other business practices. To create a meaningful framework for analysis, relevant markets are assumed to exist at some fixed point in time and competitive effects are analyzed within those neatly defined markets. Of course, in reality both competition and the contours of most markets are dynamic: less like a snapshot and more like one of Paramount's full-length feature films with quadraphonic Dolby surround sound.

Particularly with high technology markets such as those involving telecommunications, the effects of present-day transactions on future competition can be difficult to predict and tricky to analyze. Today's state-of-the-art is tomorrow's old hat. Unfortunately for antitrust analysts, the information/technology revolution has not yet developed a crystal ball or a time machine. Indeed, if antitrust practitioners were in fact blessed with any such gift of clairvoyance, I suspect most would be tempted to switch hats and become investment advisors of one sort or another. Instead, as is often the case with important policy decisions, competition policy makers must make their best judgments, given the facts they have and drawing from past experience. But clearly, this exercise is not physics, and absolute answers are elusive.

As a starting point for the antitrust analysis, I would like to emphasize that it is basic market economics and a primary tenet of our free enterprise system that businesses engage in transactions (large or small) in order to increase their profits. Undoubtedly, this is the purpose of the proposed mergers discussed today from the perspective of the parties and their shareholders. But the quest for profits is not itself an antitrust violation, even when those seeking the profits are large and powerful corporations. When markets are functioning properly—that is, when competition is allowed to flourish—the corporate goal of profit maximization is perfectly consonant with the interests of consumers, who benefit from new and better products and lower prices as a result of the incentives that increased profits create. It is therefore important that antitrust enforcement not interfere with a transaction, though pursued for greater profits, that will actually enhance competition. On the other hand, it is imperative especially in an important industry such as telecommunications, for antitrust enforcement to ensure that profit maximization is pursued by companies in a climate of vigorous competition.

Thus, the essential antitrust questions when looking at a merger focus on the way that the parties are likely to achieve the expected increased profits that have motivated the transaction. Will the profits come from improved efficiency and the realization of synergies, which should lower costs, spur innovation, and ultimately benefit consumers as well as the parties? If so, the merging parties should be given a hearty round of applause.

Or, will the profits come from an exercise of market power, the elimination of competition, and the erection of market entry barriers, which will benefit only the parties at the expense of everyone else? Recognizing the difference between these two scenarios is exceedingly difficult, but is the essence of sound antitrust merger policy. Telecommunications mergers, including those that involve cable and telephone companies, can be analyzed in these terms to identify potential antitrust issues.

II. POTENTIAL COMPETITIVE EFFECTS AND EFFICIENCIES

A. Foreclosure of potential competition between cable companies and telephone companies in the distribution of video signals and in the provision of local telephone service

During the debate of the past three or four years over cable re-regulation, the conventional wisdom was that cable companies and telephone companies were on a competitive collision course in the market for the distribution of video signals. Indeed, in seeking to prove that their business faced, or would soon face, "effective

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competition"—and thus that industry re-regulation was unnecessary—the cable companies argued repeatedly that telephone companies were on the verge of competing for video subscribers. On the other side of this coin, it is likely to become technologically feasible for cable companies to provide telephone service over their networks in competition with the local telephone companies. In the United Kingdom, cable systems, some of which are partially owned by the U.S. Baby Bells, are already competing with British Telecom for local telephone customers.

The obvious antitrust question that emerges from these facts is whether the marriage of a large cable company and a large local telephone company might result in the heading off of impending competition in their respective (near-monopoly) primary businesses. If so, such a merger could potentially harm consumers by depriving them of competition both in the market for video signal distribution (if, absent the merger, the phone company would have competed with the cable company for video subscribers) and in the market for the provision of local telephone service (if, likewise, the cable company would have competed with the telephone company for local telephone connections). Of course, this scenario assumes the absence, or at least a lessening, of current regulatory restrictions that forbid some aspects of this competition; as we all know, such proposals are currently being made.

Antitrust experts will recognize this theory of competitive harm as the so-called "potential competition" theory. In practice this theory has been applied sparingly because in many market contexts it is difficult to prove with any reasonable level of certainty how competition will be harmed, when there is no benchmark of actual rivalry between merging parties by which to measure the loss of competition resulting from the transaction. In a nutshell, cases against merging "potential competitors" are often in practice just too speculative to penetrate an able defense by the parties.

The merger of a cable company and a telephone company might, however, present a case where the foreclosure of potential competition is certain enough to raise viable antitrust issues. The fact that these two separate industries have been accelerating toward a head-on competitive battle with one another seems undeniable, based on the industries' own accounts of where they are headed. Moreover, largely because the development of the two industries has been so heavily regulated—with regulatory restrictions discouraging competition in many cases—local monopolies (or virtual monopolies) have become the order of the day for both. Antitrust enforcers will want to examine closely the records of merging cable and telephone companies for documents that recognize that in the absence of regulatory restrictions, the two industries would be a serious competitive threat to one another. Of course, the cable/telephone competition overseas that involves many of these same U.S. companies puts flesh and blood on mere "notions" of competition.

The cable distribution of video signals and the provision of telephone service are essentially confined to discrete geographic areas. Thus, any potential competition problem in these markets created by a merger would presumably be solved if the cable company involved were to divest itself of the properties it owned that were located in the telephone company's local area of operation. Such a divestiture would in effect eliminate the (potential) competitive overlap of the two companies. To the extent that restrictions on telephone companies imposed by the Cable Communications Policy Act of 1984 are either lifted or stricken (as would be the case if a recent federal district court decision stands), the merged company, after appropriate divestitures, could then distribute video signals over its telephone lines in competition with the newly divested (and separately owned) local cable systems. Moreover, in areas not previously served by the telephone company, the merged entity, by upgrading the purchased cable systems could attempt to provide local telephone service in competition with other regional telephone companies. The emergence of either phenomenon would create a new competitor in a previously monopolistic market. Such a potential procompetitive effect should be weighed heavily in the overall assessment of any need for antitrust enforcement.

My current understanding is that such a "fix-it-first" divestiture solution is what Bell Atlantic and TCI have proposed to solve any "potential competition" problem with their transaction. According to news reports, TCI plans to divest all of its cable holdings located in the Bell Atlantic telephone service area, which includes six states and the District of Columbia. Although such divestitures could largely minimize antitrust potential competition concerns with telephone company/cable company mergers, there are a few general caveats to note about the sufficiency of a divestiture solution, whether done voluntarily by the parties or pursuant to a Department of Justice or Federal Trade Commission order.

First, if the spin-off is intended to alleviate anticompetitive concerns, it is important that ultimate control of the divested assets be in different hands from those controlling the merged entity. It is often the case that shares of a widely held, pub-

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licly traded company are so dispersed that effective control by any readily definable group of shareholders is not possible. However, where effective control of one corporation is exercised by a limited group, the efficacy of any divestiture is undermined if that same group is also a large shareholder, or is in a position to exercise control, with respect to the divested assets, because the common shareholders of the divested cable systems and the new entity could serve to facilitate competitive coordination between the two purported "competitors." At the very least, the group controlling the divested assets might not operate those assets with the same competitive vigor that a truly independent operator would.

Second, from a competitive effects standpoint, it would be important that those acquiring the divested cable assets have the expertise to operate them as competently as the previous owners and with the same competitive potential in both video signal distribution and telephone service. For example, a large cable company with substantial financial wherewithal might well have engaged in substantial research and development in support of turning its cable systems into a viable competitor in the telephone service market. If the new owner of the divested cable assets located in the telephone company's service area were to be, for example, a company with little or no technological research capability and no chance of using those cable systems for telephone service, then the divestiture may not solve the potential competition problem in the telephone service market (assuming regulatory barriers come down). With their R&D and technical support lifeline having been severed, the divested assets might be a greatly diminished source of competition. This is not to say such a result is inevitable, but simply to point out that the identity of the new owner is a fact relevant to the antitrust analysis.

In sum, divestiture remedies can offer a meaningful solution. However, care must be taken to make sure that the company or individuals who buy the divested assets will be able to compete effectively in all of the relevant markets in which potential competition might be foreclosed, and without regard for the fortunes of the newly merged entity.

B. Foreclosure of actual competition in the "innovation market" for telecommunications technology

When experts examine the competitive effects of mergers, they usually focus primarily on competition between the parties in production and marketing of the ultimate product or service offered for sale. This is because competition at these levels is easier to observe and measure. But companies that compete with one another often do so across the entire spectrum of activities, including research and development. What one usually hears from the parties about R&D when a merger is under review is that the transaction will create great synergies. In many circumstances, this result is undoubtedly true, and great significance should attach to such a fact. There is a flip side, however, and that is that the elimination of R&D rivalry may also eliminate competition for visions of the technological future. Once again, the antitrust enforcer is called upon to make fine distinctions, a job made harder here by the difficulties inherent in defining a meaningful relevant market for "innovation." Nonetheless R&D competition among both telephone and cable companies to emerge as a leader in the evolving interactive multimedia market, where there may soon be little functional distinction between computers, TV's, or telephones, could be foreclosed by mergers among leading firms in these industries. Innovation appears to be the lifeblood of high tech companies, and antitrust must ensure that mergers between them do not chill this important aspect of rivalry in industries such as telecommunications.

Indeed, in telecommunications markets, competition in innovation can be particularly significant. Quite often an entire generation of improvements in telecommunications depends on one company reaching an important technological threshold, which establishes certain standards in a particular area. Once the standard is established, others adapt applications and equipment to take advantage of the standard. This can be very procompetitive by lowering transactions costs through uniform adaptability. In this sense, telecommunications innovation can be more of a step function than a straight line or even a smooth curve. However, if a merger, by reducing R&D rivalry, were to retard the development or lower the quality of a "threshold" standard, it could affect a whole generation of innovations derived from that breakthrough.

However, the competition in R&D for the still emerging communications services market undoubtedly extends beyond the telephone company and cable company that have chosen to be partners in any particular transaction. The list of possible other contestants in the R&D race may include the other Baby Bells, the communication equipment manufacturers, and providers of long distance service. To the extent there are multiple players that are involved in a mad dash to the finish line to de-

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velop workable technologies, there is less concern that a particular transaction carries any meaningful risk of competitive harm for R&D.

But resolution of this issue requires a hard look by government enforcers. There are those who will say large telephone and cable companies need each other's R&D help in order to make the future happen, and this may in fact be true. But there are also those who will insist that most of the time, two, well-trained sprinters will run much further and faster than any contestant in a three-legged race. A thorough antitrust investigation of industry merger transactions would at least enable enforcement officials to see what the parties' documents, and their scientists, have to say about their respective independent research efforts. Perhaps consumers would be best served by marrying two complementary technologies now; perhaps they would be best served by forcing the best company to win in a competition to shape the future of telecommunications markets, rather than by allowing two of the strongest competitors to join their efforts. Whatever the truth, the stakes are too high to fail to consider closely this question.

C. Vertical foreclosure in the markets for video programming and video signal delivery

Part of the trend in the telecommunications consolidation that is currently underway is toward vertical integration of suppliers of video programming with distributors of video signals. For example, TCI currently has substantial interests in many cable programming networks, and, an affiliated entity, QVC, is actively involved in a high-profile battle to acquire Paramount Communications Inc., which owns a large movie studio, a publishing company, and other valuable programming assets, including a film library.

Vertical integration can raise a number of antitrust issues. Under certain limited market conditions, a vertically integrated company can potentially harm competition by foreclosing existing, non-integrated rivals from segments of the market that would otherwise be open to them. For example, if, as a result of a series of mergers, most of the video subscribers in the U.S. were served by a very few large, vertically integrated distributors, smaller, non-integrated programmers might be closed out of the market, as the large distributors used only programming produced by their own captive sources. If the net effect of such foreclosure were that consumers were denied a sufficiently broad array of programming, there would be an antitrust problem. To the extent that there exist in a practical sense, either now, or in the near future, alternative methods of signal delivery (e.g., direct broadcast satellite), such entry reduces the likelihood of foreclosure thereby lessening competitive concerns. This assumes, of course, that the technology critical to signal transport and delivery, such as encryption and compression, is made available on competitive terms to those attempting such entry.

In addition to possible foreclosure in the video programming market, under certain circumstances, foreclosure could occur of smaller cable operators attempting video signal delivery. They might not be able to compete with the larger, integrated companies for subscribers, if they were unable to obtain quality programming from the sources tied up by the larger companies. If consumers pay higher prices as a result, there are antitrust implications. Again, the existence or absence of entry barriers is crucial to the antitrust analysis. If there are no significant barriers to entry in the production and supply of video programming, foreclosure of the type just described is unlikely. But if subscribers demand well-recognized, high-quality material of a type not easily duplicated, foreclosure is more plausible.

As for the latter concern, major provisions of the 1992 Cable Act require that vertically integrated cable companies make their programming available to other cable operators on non-discriminatory terms. It is too early to tell whether Cable Act regulations will be effective in guaranteeing high quality programming for independent operators or whether instead we find ourselves in the land of unintended consequences, which so often is the result of regulation.

The federal government's antitrust merger guidelines express two explicit concerns about the effects of vertical integration (at least when it results from a merger). First, according to the guidelines, vertical integration can increase barriers to entry by making it necessary for a potential new entrant to enter both markets in order to enter either. For example, there are a number of upstart technologies that hold at least the potential of providing serious competition to the cable and telephone companies in the distribution of video signal. These include direct broadcast satellite and microwave technologies, both of which can circumvent cable and telephone wires. If the owners of one of these alternative delivery systems were unable to purchase desirable programming, and were therefore forced to enter the programming market in order to enter the video signal distribution market, vertical integration could be seen as raising entry barriers. Similarly, if the technology for a nec-

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essary input, such as scrambling or digital compression, were subject to incumbent control, the result could be the foreclosure of alternative delivery systems.

The second issue that the merger guidelines raise is that vertical integration could facilitate collusion. The concern here would be that by owning an upstream entity that sells to downstream rivals, a company can more easily monitor prices in the downstream market. Thus, for example, if a cable/telephone company were to own a large library of programming, and was a large supplier of programming to competitive video signal distributors, the cable/telephone company would possess competitively significant cost information about its downstream competitor. This information could facilitate competitive coordination.

would like to emphasize that whatever antitrust problems may exist as a result of vertical integration in telecommunications markets (and to the extent that the Cable Act and other regulations do not already solve some of them), the Bell Atlantic/TCI merger only lends itself to such an analysis if the transaction creates any additional vertical linkages. Moreover, because vertical relationships have an enormous capacity to generate efficiencies and to remedy sources of market failure, such as free riding, it is only in special circumstances that vertical integration will, on balance, actually harm competition. I flag the vertical integration issue merely because there are many instances of vertical integration in the telecommunications industry. Still, very careful thought would be required before one could conclude that it makes sense to challenge any of these transactions on a vertical theory.

D. Reduction in competition in other relevant markets such as advertising

An issue that merits antitrust attention is whether relevant product markets other than video signal distribution and telephone service might also be adversely affected by mergers between telephone and cable companies. One possibility, which I offer merely hypothetically, is the market for the delivery of audiences to video programming advertisers. I am assuming, of course, that such a relevant product market would be found to exist after a proper analysis. For example, it is possible that other forms of advertising such as that in newspapers and on the radio are in the same relevant product market with video advertising.

If a large telephone company and a large cable company were each capable of distributing video signals to the home (this assumes application of the potential competition theory), then each could presumably sell advertising time on their respective programming lineups, based on their arrangements with program suppliers. If this were the case, the two companies could compete for advertising dollars. A merger between the two companies would eliminate that competition between them.

Again, the advertising "market" is merely an example of how a telephone company and a cable company could theoretically compete with one another in a market separate from services provided to consumers over cable or telephone wire. The important point here is the generic one, that actual or potential competition could be affected by large transactions in relevant markets that are not immediately apparent on the surface. Although divestiture solutions might solve many such competitive problems, always keep in mind that divestitures must be coextensive with the competitive problem in order to be effective.

III. CONCLUSION

As modern commercial markets become more complex, antitrust analysis gets more difficult. And there may be no set of markets that is more difficult to parse from a competitive standpoint than those related to telecommunications, particularly given the rapidly changing nature of such markets. The conglomerate mergers underway today present a host of antitrust issues including vertical foreclosure, potential competition, actual horizontal competition as well as the promise of significant efficiencies and creation of new markets. Sorting out these issues in the context of a particular merger transaction is not an easy task. Nonetheless, responsible policy makers cannot turn their backs on questions just because they are hard. In my opinion, they must embrace the challenges that hard questions pose and seek to enact correct policies that will serve the public interest. Those who contend that large corporate transactions are bad, just because they are "big," are just as irresponsible as those who turn a blind eye to blatantly anticompetitive, anticonsumer transactions just because they benefit a high-profile industry. These telecommunications industry mergers will require honest, substantive analysis in order to reach the right result. Mistakes, in either direction, made in the name of politics could affect literally every American household.

Thank you again, Mr. Chairman, for this opportunity to testify, and I shall be pleased to answer any questions that you or others on the committee may have for me.

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Senator METZENBAUM. Thank you very much, Mr. Arquit.
Mr. Peter Huber, we are happy to have you with us, sir.

STATEMENT OF PETER HUBER

Mr. HUBER. Good afternoon, Mr. Chairman. In response to your question, I have a great deal to confess. I was retained by the Department of Justice as an expert witness some years ago. I was of counsel to Mayer, Brown & Platt, and I am now of counsel to a small law firm in town that did represent and may still represent—I would have to check with my partners there—NYNEX, which has a $1 billion stake in Viacom, and has represented Bell Atlantic in its first amendment challenge across the river. We have worked with Southwestern Bell that competes in Bell Atlantic's territory, and for US West that, of course, has a stake in Time Warner that competes against Bell Atlantic. I could go on, but you have limited me to 5 minutes.

I should add perhaps that the person who gave me my first job as a lawyer after I finished my clerkships was a lady by the name of Anne Bingaman, but that is history now.

Mr. Chairman, there are really two essential facts in antitrust law, and they apply here more than anywhere, and two essential inquiries. One is what is the product or service, and the second is where is it sold. What is the product or service, the relevant question here? You have already provided the answer, and correctly. Cable and telephony are converging. We are going into a digital broadband world.

In the digital world, a bite is a bite, whether it is carrying video or voice or data. The technology is here today for telephone companies to provide video services over their networks and for cable companies to provide telephone services, so the product and service markets—clearly, we are talking here about what very soon will be one industry, a single product.

The second inquiry, however, cannot be forgotten and seems to be overlooked, or seems to have been overlooked in much of our discussion. Antitrust analysis is conducted in the scope of geographic markets, and the local distribution market in telecommunications is, by definition, local. It makes no sense to talk about a national market for local distribution. That is an oxymoron.

The content in these markets may be sold nationwide or indeed internationally, but if you are talking about the distribution markets themselves, those are local markets and they must be analyzed as such. Discussion of market shares of a local distribution market simply doesn't make very much sense, and I might also add at this point, and perhaps you would care to follow up on this, a discussion of access to customers is not terminology known to the antitrust law. Both Safeway and Giant have access to me in my neighborhood, but that doesn't mean they own me. Access is not the measure. Market shares are the measure.

These two facts have, I think, two consequences, and they are not very complicated. First of all, we do not want cable and telephone companies to be merging in-region. Very soon, they will be in the same business. Of course, they should not be merging horizontally within relevant geographic markets. As I understand it, not much of that is proposed. If it is proposed, it should be resisted.

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But the correlative proposition is that if we see a cable company attempting to compete out-of-region or a telephone company competing out-of-region, we should applaud that. This is an attempt to create new competition, not to eliminate old competition. I feel jealous of British consumers today who have a second telephone company called NYNEX that has been investing in cable properties in Britain. According to the Wall Street Journal last week, NYNEX, through cable properties in Britain, is now British Telecom's "most formidable rival for local telephone service." That is in England. I wish NYNEX would come to Bethesda, too, and perhaps they will once cable properties are spun off.

We see this now across the country. Southwestern Bell is poised to compete head-to-head in Bell Atlantic territory through Hauser. US West, of course, has a major stake in Time Warner, which operates cable systems outside US West's region. NYNEX, of course, has a stake in Viacom. I know this is Washington, but I was amused to hear this characterized as a trivial investment. It is $1.2 billion, which I would have thought gives them a reasonably pressing interest. Bell South has an investment in Prime.

These are all large transactions. Of course, they deserve your scrutiny. Of course, they deserve the scrutiny of the Justice Department and the FCC. They will get that scrutiny. They should, but I think if you examine them in very basic, traditional antitrust terms—what is the product market and where is it really being sold—maps are pretty; I have drawn my share of them in my life, but you have to come down to reality. We are talking about local distribution networks and, examined in those terms, there is all the difference in the world between horizontal overlaps and out-of-region ventures.

There is a great irony for somebody like me who has been in this business for a while—23 years since 1970 when the FCC first acted and then 1984 when the Congress acted. The theory was that cable companies were horribly vulnerable; that if we let telephone companies into any aspect of video business, cable companies would be killed. The John Malones back then were the tiny, vulnerable infants. That was argued as recently as 3 months ago across the river.

Now, when we find telephone companies willing to invest out-of-region and to shore up and cooperate with out-of-region cable companies, which can only increase competition, suddenly the theory is that they are too strong. I think we have to get away from this Goldilocks soup, you know, too hot or too cold approach to antitrust law and do some hard-headed analysis here in terms of the basic products and services at issue and the geographic market.

Thank you very much.

[The prepared statement of Mr. Huber follows:]

PREPARED STATEMENT OF PETER HUBER

My name is Peter Huber. I am a Fellow of the Manhattan Institute for Policy Research, a think tank based in New York, and I serve Of Counsel to the Washington, D.C. law firm of Kellogg, Huber & Hansen. I am a co-author of the treatise *Federal Telecommunications Law* (Little Brown 1992). I was also the author of *The Geodesic Network: 1987 Report on Competition in the Telephone Industry*, the report submitted to federal Judge Harold Greene on the occasion of the first triennial review of the Bell breakup, and an update to that report (privately undertaken), *The Geodesic Network II: 1993 Report on Competition in the Telephone Industry*. I have written

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numerous other articles and commentaries on the technology and economics of the telecommunications industry. Through my current law firm, and through prior affiliation with the Chicago firm of Mayer, Brown & Platt, I have also conducted numerous other studies of the telecommunications industry on behalf of the Regional Bell Companies and other clients. My testimony here today, however, represents my own views.

The recent spate of mergers in the telecommunications industry must be assessed in light of two market realities.

The first is technological. From an engineering perspective, telephone and cable service are fast becoming one and the same. In the digital world, a byte is a byte—whether it represents a hiccup on a telephone call, or a decimal point in a spreadsheet, or one tiny fragment of a picture in a re-run of "I Love Lucy." Voice, video, and data are, or soon will be, indistinguishable. The same networks can and do carry everything. Telephone companies have at hand the capability to transport color television over their existing networks. Cable companies have at hand the technology needed to provide full, two-way telephone service over a combination of existing cable plant and wireless add-ons.

Transport media are merging as well. Television used to travel by air, telephone by wire. Today, cable is the dominant medium for transporting television signals over the last mile to the home. Cable passes over 95 percent of American homes; over 60 percent actually subscribe. Meanwhile, the fastest growth in telephony is wireless. The FCC recently cited studies projecting 60 million users of wireless services within the decade. Congress itself recently designated a very large block of spectrum (200 MHz) for allocation to new "personal communications services." Cable companies have been among the most aggressive and ambitious developers of these wireless services. The first PCS call in the U.S. to use cable plant for a portion of the transport was placed on February 12, 1932, from the President of Cox Enterprises to then-FCC Chairman Al Sikes.

The second basic determinant of market boundaries in the telecommunications industry is geographical. Consumers still buy "last mile" transport locally. A consumer in Denver buys service from cable and telephone companies in Denver, not Des Moines. This fact may seem obvious, but it is overlooked surprisingly often. From an antitrust perspective, however, it is critical. Local telecommunications—whether cable or telephone—are just that—*local*.

These two fundamental facts of the telecommunications industry suggest, in turn, two important antitrust conclusions.

First, phone companies and cable companies should be permitted to compete against each other head to head, in the same service areas. They are in the same business—or they will be as soon as regulators allow. We should welcome the competition that engineering now makes both possible and inevitable. Maintaining regulatory walls between them will only suppress competition. At the same time, we don't want cable and telephone companies to combine competing facilities within the same geographic service areas. As Congress itself has recognized, a single provider of both cable and telephone service may be all that is economically possible in rural areas. But in big cities, cable and telephone companies should go at each other as independent entities.

The best way to encourage that is to permit *out of region* alliances—precisely the same alliances that should be forbidden within the same service areas. Such alliances present the most certain road to head-to-head competition among the seven Regional Bell Companies, GTE, Sprint, Time Warner, Cox, and other providers of both cable and telephone service, whose operations are currently confined to more limited geographic markets.

The potential benefits of such competition have already been tested overseas; British consumers have been the first beneficiaries. As *The Wall Street Journal* reported just a few days ago (October 21, 1993), a New York based Regional Bell Company—NYNEX—is now battling for market share with British Telecom, having entered the British market through a U.K. cable-television affiliate. NYNEX is preparing to offer British customers various discount-calling plans over its British cable network—including free night-time calls or special promotions for phoning friends and relatives. NYNEX's long-distance tariffs currently undercut BT's by as much as 13 percent. As the *Journal* reported, NYNEX "has emerged in the past two years as the biggest cable-TV operator in Britain and BT's most formidable rival for local telephone service." The *Journal* went on to note that cable-TV companies in Britain are already offering 226,871 telephone lines to British subscribers. By some estimates cable-TV operators will capture as much as 20 percent of Britain's telephone market within a decade.

It now seems likely that U.S. consumers will soon realize similar benefits. What NYNEX is doing overseas, Southwestern Bell, US West, BellSouth, NYNEX itself,

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and most recently, Bell Atlantic, are preparing to do within the United States, outside their existing service areas.

Last February, Southwestern Bell announced its intention to purchase two existing cable systems. One is in Arlington County, Virginia and the other is in Montgomery County, Maryland—both are in Bell Atlantic's telephone service area.

In May, US West invested $2.5 billion in Time Warner, the nation's second largest cable operator. Time Warner runs 13 of the nation's top 50 cable systems including New York City (NYNEX), Orlando FL (BellSouth), Houston TX (Southwestern Bell), Honolulu HI (GTE), Rochester NY (NYNEX), Cincinnati OH (Ameritech), Kansas City MO (Southwestern Bell), Memphis TN (BellSouth), Austin TX (Southwestern Bell), San Diego CA (PacTel), Charlotte and Raleigh/Durham NC (BellSouth), and Malden MA (NYNEX). Time Warner also operates a total of 30 cable networks in Bell Atlantic's region. US West/Time Warner is now in a much stronger position to compete against NYNEX, GTE, Ameritech, Bell Atlantic, and others, than they were before that alliance was formed. There has been no offsetting loss to competition in US West's region; the company's alliance with Time Warner was structured to eliminate all possible horizontal aspects of the alliance within US West's home territory.

More recently still, NYNEX announced plans to invest $1.2 billion in Viacom International, the nation's thirteenth largest cable operator. One of Viacom's cable systems runs through the heart of San Francisco—PacTel's telephone territory. Viacom also serves Salem WA (US West), Milwaukee WI (Ameritech), and Nashville TN (BellSouth). Here again, it is almost impossible to imagine how such an alliance could have any effect other than to increase head-to-head competition between NYNEX and the other Regional Bells. Within a few years, NYNEX/Viacom will almost certainly be offering phone service in direct competition with NYNEX's former siblings in the Bell family, just as NYNEX is already doing in Britain, through its alliances with cable entities there. Already today, through different allies, NYNEX and Bell Atlantic are in effect bidding against each other to create a further alliance with Paramount.

In October, BellSouth likewise announced the acquisition of a 22.5 percent stake in Prime Management. Prime's Austin-based cable system subsidiary, Prime Cable, is the nation's 24th-largest cable operator. One of its systems operates in Las Vegas NV, side by side with a telephone network operated by PacTel. This surely means more competition, not less. Recent press reports also suggest that BellSouth may become a third bidder for Paramount.

Competition is of course unfolding in the other direction too—from the telephone network into the cable business. The FCC has led the way with its "video dialtone," which encourages telco provision of video transport in-region, and Bell Atlantic recently prevailed in federal district court on a first amendment challenge to a related provision of the 1984 Cable Act. Telephone companies have the technology to carry video over their existing networks; they are now being granted the legal authority to do so. Thus, as telcos prepare to offer cable services out of region, they must also prepare to square off against other telcos who will offer video dialtone on their home turf. Such developments should warm the hearts of antitrust enforcers.

In my view, the specter of some "Big Brother" monopoly developing in this kind of environment is highly implausible. GTE is the largest local telephone company in this country, followed by the seven Regional Bell Companies. Their counterparts in the cable industry—companies like TCI, Time Warner, Cox, and Viacom—are substantial entities too. As cable companies enter wireless telephony they will find themselves competing not only with local telcos but with AT&T/McCaw—a company with revenues over four times those of Bell Atlantic and TCI combined. It seems wholly implausible to suggest that Bell Atlantic/TCI will soon knock AT&T/McCaw out of wireless telephony, or US West/Time Warner out of video transport, either in Bell Atlantic's region or in areas currently served by TCI.

Defenders of the 1984 Cable Act have long argued that cable companies could *not* survive competition by telcos. No one would dare compete against a telco within its own service area, the argument ran. No cable company had the financial resources, the technical expertise, or the raw staying power, to do anything so risky. Thus, competition itself had to be forbidden, so that competition would be preserved. As recently as last summer, for example, various groups were still arguing before a federal district judge that telco entry into the video programming business would quickly annihilate established cable carriers; all the customers would end up migrating on to telephone company facilities instead.

That prediction is not going to be vindicated. Backed by NYNEX, cable concerns in Britain have proved they can compete head to head against the massive British Telecom. Backed by out-of-region telcos in the United States, cable companies now have abundant resources and technical capabilities to compete against in-region telcos. American consumers will benefit.

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Senator METZENBAUM. Thank you very much. I have a few questions and then Senator Thurmond has asked me to make inquiry on his behalf. I would appreciate your answers being rather short.

Mr. Hatfield, I understand you have done extensive work for the cable television industry, as you already indicated, and the long-distance phone companies and the local telephone companies. As I sit here, I must confess I am somewhat astonished that the people you usually represent have been virtually silent about the Bell Atlantic merger since it was announced.

I suppose other cable companies hope to be swallowed by other capital-rich local phone companies and that long-distance companies are looking to get in on the merger action as well, and the marketplace stocks seem to be reflecting that anticipated action in both areas. But the silence frightens me because my experience tells me that when companies are afraid to take on corporate giants in the political arena, they are also afraid to compete aggressively against corporate giants in the marketplace.

Do you share any of my concerns, or would most of your clients support the testimony you presented today?

Mr. HATFIELD. Let me start with the first part of your question and say, yes, I am concerned. Second, I doubt very seriously if many of my clients would support what I had to say here today, but let me reinforce the sort of premise of your question that this silence does indicate something that does very much concern me because before we had industries that were really clashing against each other and now there is this silence. It was my hope, as I indicated, that that rivalry would produce real competitive benefits for consumers.

Senator METZENBAUM. I must confess that it concerns me because those who would normally be heard from aren't being heard from, and you get the feeling that there is some fear psychosis out there that they don't want to step on anybody's toes. I don't have any proof of that.

Mr. HATFIELD. I should say that I have not talked to any of my clients regarding my testimony here today.

Senator METZENBAUM. Mr. Hatfield, my impression from your testimony is that you believe the kind of competition most likely to develop as a result of the merger will be on the margins of telephone and video services rather than head-to-head competition for the core telephone and cable services that most consumers use. Is that your position, and if so, why do you believe the merger won't yield more robust competition?

Mr. HATFIELD. Yes, I believe that that is a likely outcome. There will be some sparring, maybe, at the edges of the market, but the competition won't be head-on and direct into the basic core businesses, and the reason that I say that is that these companies—Mr. Huber said these are just local operations, but telephone networks by their very nature require coordination. In other words, these companies must work together to make sure that we have a seamless network that a call can go across the country. So by their very nature, they are working together every day.

Second, all these companies share in the ownership of cellular. Each of the local telephone companies was awarded a wire line cellular license, so there again they have a natural coordination or a

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natural function together there. Of course, remembering my days from here in Washington many years ago, they always seem to lobby in a very unified sort of fashion. So I don't see this sort of separation of entities here. I see something that is much closer and, as I indicated in my testimony, my fear is that this potential competitor will fall into the hands of an industry that, as I said before, has had a history of trying to preclude competition and maintain their monopoly.

Senator METZENBAUM. My greatest concern about this deal really relates to the fact that—well, I guess it is reinforced when I hear a communications expert like you who seems so committed to full competition in all communications markets expressing disappointment about the Bell Atlantic merger.

Do you believe that if this merger were not completed, it is likely that cable and telephone companies would compete more aggressively, and most importantly from my perspective, would these companies be more inclined to challenge each other's popular core cable TV and telephone services?

Mr. HATFIELD. Yes, I believe, on balance, that the likelihood of competition would be more likely under the conditions where the merger did not take place. But more fundamentally than that, I think what I am trying to say is that the issues are so important here that, you know, I could be wrong, but what we need to do so clearly is to look at it very, very, very carefully.

Senator METZENBAUM. Mr. Arquit, as you know, the cable legislation that we enacted last year was designed to cure anticompetitive abuses of the cable industry's market power. However, those rules, which will be administered by the FCC, have not been tested. I know that some antitrust authorities will claim the FCC's power to regulate the cable industry reduces the need for close antitrust scrutiny. I, frankly, do not share that view.

However, do you believe the antitrust authorities can or should rely on an untested regulatory regime to prevent consumers from being exploited by new telephone and cable conglomerates?

Mr. ARQUIT. I guess, Senator, asking someone like myself who served in the Reagan administration to talk about the problems with regulation is like putting red meat in front of a hungry dog. You know, I think regulation does leave a lot to be desired and all regulation can ever really do is to approximate the results of vigorous competition. Very often, it is a very poor surrogate and what you find yourself in, instead, is the land of unintended consequences, and also regulatory evasion.

I don't claim to be an expert on what has happened with the 1992 cable bill, but there is certainly a vociferous and identifiable crowd of consumers out there whose cable bills went up. I suspect that was not the result intended by Congress when it passed the legislation.

As far as regulatory evasion, there are, as I understand it, provisions in that statute which prevent discriminatory pricing, except when there are differences in cost. Well, when you have got someone owning all the inputs that form the basis of cost, it seems to me there are all kinds of opportunities to free-wheel in terms of what is meant by cost, allocation of overhead, and other things that

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are somewhat intangible, and therefore an ability to affect the price.

I raise these things just to make the point that I don't think regulation is a panacea, and certainly not a substitute for antitrust enforcement.

Senator METZENBAUM. I might say to you on the cable bill that we passed, frankly, I think Congress has an obligation to revisit that issue. I don't think we did the kind of job we should have done, and I expect to talk to some other Members of Congress about doing just that.

In the last 12 years, the antitrust agencies have brought virtually no challenges against mergers that threatened to eliminate a potential competitor. However, while you were at the FTC, that agency brought three such cases. Two of them were against drug company monopolists that were each other's most likely competitors for a particular kind of pharmaceutical product. At the time the FTC challenge was brought, neither of those companies had invaded each other's markets, although they were clearly planning to do so. What kind of anticompetitive effects was the FTC concerned about when it moved to block those mergers?

Mr. ARQUIT. The issue in any potential competition case is whether or not there would have been competition from someone who would have engaged in freestanding entry, someone who no longer does that because they merge instead. The problem with these kinds of cases always has been, whether it is in the pharmaceutical industry or other places, finding proof that, in fact, they had the capability and the intention to enter.

In those cases, one involving the AIDS/HIV virus, it is a fact that neither party was yet a player in the market concerned. However, they were both seen to be the furthest along in terms of research and development and other types of investment that were necessary to enter the market, so the case was brought and settled by a consent agreement.

Basically, what you want to look for is the likelihood that one of the merging parties would have entered independently on its own, that entry conditions are difficult, that the market is concentrated, and that there are not that many other firms capable of entry.

Senator METZENBAUM. Thank you very much, Mr. Arquit.

Mr. Huber, one of the major dilemmas we face as lawmakers evaluating significant mergers is whether we should urge our antitrust officials to engage in a meticulous review of the potential ramifications of the merger before it is completed or just sit back and wait and see what happens in the marketplace.

I know you don't agree with many of my concerns about this merger, but don't you agree that if there are significant problems which can be remedied by antitrust review before the fact, our society is better off with early intervention as opposed to experiencing anticompetitive behavior and massive, costly antitrust litigation down the road?

Mr. HUBER. Yes.

Senator METZENBAUM. Mr. Huber, your testimony states that cable and telephone networks "can and do carry everything." You conclude by stating that "cable companies have abundant resources and technical capabilities to compete against in-region telephone

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companies." Do you agree that we should do everything necessary to promote competition between cable and telephone companies?

Mr. HUBER. Yes, I am a hundred percent in favor.

Senator METZENBAUM. Thank you very much. Now, I have some questions here that Senator Thurmond wanted asked and I will ask them on his behalf. I did ask his staff to cut them down so that I might leave here at a reasonable time.

Mr. Hatfield, do you believe that all of the efficiencies and benefits asserted in defense of the Bell Atlantic-TCI merger would occur just as readily in the absence of the merger?

Mr. HATFIELD. Yes.

Senator METZENBAUM. The answer is yes?

Mr. HATFIELD. I was following the lead of my——

Senator METZENBAUM. OK, fine. Then I want to ask this question on Senator Thurmond's behalf to each of you. Would you please address, in the long run, what is the minimum optimal number of telecommunications competitors that you would hope to see?

Mr. HUBER. I will be happy to start if nobody else wants to. I would like to see more than one, for sure. Obviously, it depends on what scope you are discussing this. At a local level, I think two is a lot better than one. I think we will probably have three or four in the delivery of video if we get DBS and the other oxymoron, wireless cable.

Obviously, at the programming level we will have far more than that, and we already do. Sixty percent of current viewership is not owned by Mr. Malone—incidentally, I have never worked for him so far as I know—but it is over-the-air television in which he has no interest. I have a home satellite dish and I know there are about 150 channels being uplinked at the moment to that dish, so there is a lot of programming up there.

Programming volume has gone up steadily over the last 15 years, which is generally a good sign. That rather suggests that Mr. Malone has not been entirely successful in monopolizing that market yet anyway. But how many providers we get depends in large part on exactly how you are defining your market.

Senator METZENBAUM. Again on behalf of Senator Thurmond, do any of you have any concerns that the antitrust enforcement agencies will not adequately analyze and review these proposed transactions?

Mr. HUBER. To the contrary, I am dead sure they are looking at them with great care.

Senator METZENBAUM. I will just go back for 1 minute. The other two did not answer that question, which was would each of you please address, in the long run, what is the minimum optimal number of telecommunications competitors you would hope to see.

Mr. ARQUIT. Well, I don't know that I have that much to add to it. I think in any particular industry it varies. It depends on the extent to which there will be an ability to engage in coordinated interaction among the players in an industry. When you have an industry where the terms are such that there is instant information that is conveyed if there is standardized product and the like, that suggests that coordinated interaction is somewhat easier, so you would require more firms in such an industry for competition

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to result. Where there are heterogenous products, it is the opposite, but I can't give you an absolute number.

Mr. HATFIELD. I couldn't give you an absolute number either, but obviously I have expressed a concern with just a duopoly. Because, as I have indicated in my full testimony, there are a number of other barriers that prevent additional competition in ordinary local telephone service, I am concerned about whether we can get beyond one, let alone get to two.

Senator METZENBAUM. Again, on behalf of Senator Thurmond, do any of you have any concerns that the antitrust enforcement agencies will not adequately analyze and review these proposed transactions? Mr. Hatfield?

Mr. HATFIELD. Being outside of Washington, and so forth, I have not followed exactly what the new administration has been doing regarding antitrust enforcement, so I am afraid I would have to beg off answering that question.

Senator METZENBAUM. Mr. Arquit?

Mr. ARQUIT. Well, as more than a casual observer to that scene, I have no reason to think that there is any problem there. My impression is that both agencies are committed to vigorous enforcement of the antitrust laws.

Senator METZENBAUM. Mr. Huber?

Mr. HUBER. Mr. Chairman, if I may paraphrase somebody or other, I know Anne Bingaman; Anne Bingaman is my friend. I think you should rest easy. There are many other important matters. She is going to give a very close to these transactions.

Senator METZENBAUM. Does that mean that you know Anne Bingaman and you're no Anne Bingaman? [Laughter.]

Mr. HUBER. That, too, Senator, I confess.

Senator METZENBAUM. Again on behalf of Senator Thurmond, do any of you have comments on the assertion that TCI can make or break cable programming with its 20-percent market share because of the large market share necessary for a program to be successful? Does this amount of market necessary for the success of a program depend on the cost of that program? Do any of you care to answer that?

Mr. HUBER. I would be delighted to. We do know that 60 percent of the viewership in this country is watching programs that are created or distributed initially by the over-the-air broadcasters. Under the must-carry rules, those get on to the cable systems. They get on for free; there is no transport cost. So we do have a large chunk of this market that is pretty well insulated.

Second, one should note that TCI is getting smaller in this transaction. With all of those overlaps, they are losing a base of 1 million, so whatever problems may exist from TCI alone are going to be reduced. If you want to add in all the telephone industry, which is a fair enough addition given the convergence of these technologies, then, of course, you have to add in all the other telephone companies, too. Any way you slice it, I think monopsony power of the traditional cable carriers and TCI, in particular, is declining, not increasing.

Senator METZENBAUM. Mr. Arquit?

Mr. ARQUIT. I presume that is the question that legions of Government antitrust lawyers will be investigating over the next few

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weeks or months, and I don't claim to have the clairvoyant powers to come up with a conclusion before they reach their result. I don't want to make a factual assessment. I don't have the basis for doing it.

Senator METZENBAUM. Mr. Hatfield?

Mr. HATFIELD. I would say that I don't consider myself to have expertise in the programming side of the business to be able to offer an informed opinion.

Senator METZENBAUM. The Chair has had somebody waiting in his office for about 45 minutes. I am going to have to leave, but I am leaving you in very good hands. Senator Specter is with us and, Senator Specter, if you would be good enough to ask such questions as you have and then—just a second, please.

We have received a number of letters from regulators, consumers, and broadcasters that we will put in the hearing record.

[The letters referred to follow:]

PUBLIC UTILITIES COMMISSION,
STATE OF CALIFORNIA,
San Francisco, CA, October 25, 1993.

The Honorable HOWARD M. METZENBAUM,
U.S. Senate, Washington, DC.

DEAR SENATOR METZENBAUM: I am writing to you in connection with the hearings you have scheduled before the Senate Antitrust Subcommittee to explore the implications for consumers of the proposed merger of Tele-Communications, Inc. (TCI) and Bell Atlantic. In announcing the hearings, you warned that this megamerger could have a chilling effect on competition in both the cable and telephone industries and could artificially inflate prices. There are issues which are of significant importance not only to consumers, but also to state regulators, such as the California Public Utilities Commission which is charged with, among other things, the duty of assuring the continued availability and affordability of high quality telephone service and encouraging the development and deployment of new technologies.

The Commission has a long history of supporting the development of competition where feasible as a way of ensuring maximum consumer choice and rates most reflective of costs. The Commission continues to grapple with the introduction of competition into regulated markets which were traditional monopoly markets and which retain bottleneck elements. In addition, we struggle with the involvement of regulated utilities in both regulated and unregulated businesses. Our experience demonstrates the great difficulty and complexity in balancing the various interests involved in such transitional markets. The Commission also is heavily involved in efforts to develop the infrastructure in California to position our citizens to benefit from the essential information superhighway.

From the perspective of a state public utility regulator, the announced merger of TCI and Bell Atlantic, coupled with TCI's involvement in the acquisition of Paramount, raises extremely difficult issues relating to the ability of regulators to effectively regulate the combined entity, particularly since various parts of the new entity are currently regulated by multiple federal, state, and local agencies. For example, to the extent the combined entity will have shared costs, how will the proper allocation of those costs between different regulated entities (cable vs. telephone) as well as with unregulated entities (Paramount) be determined? Given the vertical combination of telephone/cable distribution systems with programming entities, how will regulators effectively review the transactions between the affiliated entities? Important public policy concerns with cross-subsidization and denials of access to "common carrier" and distribution facilities are also implicated in this megamerger.

The information superhighway as presently envisioned is intended to provide vast new horizons and opportunities to businesses and consumers. What will be the effect on that vision if one company, whose interests include both the highway and what is carried on the highway, is positioned to deny entry to others on that highway?

The California Public Utilities Commission has been engaged for the past decade in efforts to both introduce competition into monopoly utility markets and to deregulate utilities as the markets become competitive. This has proven to be an extremely complex effort. The TCI/Bell Atlantic/Paramount may create a new form of access-

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